Unclaimed Property and Due Process: Justifying 'Revenue-Raising' Modern Escheat

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States have long claimed the right to take custody of presumably abandoned property and hold it for the benefit of the true owner under the doctrine of escheat. In the face of increasing fiscal challenges, states have worked to increase their collection of unclaimed property via new escheat legislation that appears to bear little or no relation to protecting the interests of owners. Holders of unclaimed property have raised substantive due process challenges in response to these modern escheat statutes. This Note contends that two categories of these disputed laws—those shortening dormancy periods and those allowing states to estimate a holder’s unclaimed property liability in the absence of creditor records—are logically consistent with the legitimate state interest in reuniting owners with their abandoned property and therefore do not violate due process.

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What do Mick Jagger, Ben Bernanke, Steve Jobs, and the New York Yankees have in common? The State of California is holding lost money that belongs to each of them.¹ In fact, the same is true of approximately eight million individuals and businesses in that state.² Lest one think that this is a situation peculiar to the Golden State, the numbers are similarly impressive on the East Coast—Delaware alone expects to collect over $400 million in unclaimed property in 2012³—and on a national scale.⁴ From the child who forgets to spend a gift card received several birthdays ago to the employee who never gets around to cashing her final paycheck, unclaimed property can spring up nearly anywhere, and surprisingly little ever makes its way back into the hands of its owners.⁵ How is such a system possible? Understanding how states have come to collect such large sums of money requires some basic knowledge of what precisely unclaimed property is.

Unclaimed property may be described as accounts or items held by one party (the “holder”) but belonging to a second party (the “owner”) who has not acted to exercise control over the accounts or items for some extended period of time.⁶ Such property can take the form of inactive bank accounts, uncashed payroll or dividend checks, stocks, travelers checks, and even unredeemed gift cards and refunds.⁷ Though the relevant statutes vary, all states⁸ claim the right to consider property “abandoned” after it has been dormant for some period of time (the “dormancy period”),⁹ to seize this

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3. See Chad Livengood, Revenue Recovering to Tune of $155 million, NEWS J. (Wilmington, Del.), Mar. 19, 2011 (noting that Delaware’s “new estimate for 2012 shows revenue from abandoned property breaking the $390 million [mark] by $35 million”).
4. See Thurm & Tam, supra note 2.
5. See id. (“On average, states identify owners and return about one-third of [unclaimed] property.”).
7. Id. (listing also trust distributions, unredeemed money orders, insurance payments or refunds and life insurance policies, annuities, certificates of deposit, customer overpayments, utility security deposits, mineral royalty payments, and contents of safe deposit boxes).
abandoned property, and to hold it in a custodial capacity for the benefit of the true owner ("modern escheat"). However, the Due Process Clause of the Fourteenth Amendment constrains a state's ability to interfere with private property, and some courts have expressed skepticism over the constitutionality of certain unclaimed property statutes that appear to be focused more on generating revenue ("revenue-raising statutes") than on returning the property to its actual owners ("reunification").

This Note contends that two categories of revenue-raising statutes do not violate the Due Process Clause of the Fourteenth Amendment because they are logically related to the government interest in reunification. These two categories are (1) those statutes that shorten dormancy periods, accelerating a state's collection of unclaimed property, and (2) those statutes that permit a state to estimate a holder's unclaimed property liability incurred over a longer period of time by sampling a shorter period. Part I introduces the

See, e.g., DEL. CODE ANN. tit. 12, §§ 1198–99, 1201 (dormancy period of five years for categories of property not specified, fifteen years for travelers checks, and three years for securities-related property); KY. REV. STAT. ANN. § 393.020, .060, .064, .090 (dormancy period of three years for categories of intangible property not specified, seven years for travelers checks, and three years for securities-related property); UNIF. UNCLAIMED PROP. ACT § 2, 8C U.L.A. 102–03 (dormancy period of five years for categories of property not specified, fifteen years for travelers checks, and five years for securities-related property).

See, e.g., DEL. CODE ANN. tit. 12, § 1206; KY. REV. STAT. ANN. § 393.140; UNIF. UNCLAIMED PROP. ACT §§ 4, 16 & cmt., 8C U.L.A. 111–12, 132. Modern escheat may encompass both personal and real property, see infra notes 20–22 and accompanying text, and is generally custodial in nature, see infra note 23 and accompanying text.

U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of ... property, without due process of law . . . .").

This Note uses the term "revenue-raising statutes" to mean those unclaimed property laws for which the connection to reunification is not immediately apparent. However, as this Note contends, some of these statutes are logically consistent with the legitimate government interest in reunification. See infra Part IV. The term is not meant to imply that the intent of the legislatures enacting such statutes was necessarily to generate revenue.

See, e.g., Taylor v. Westly, 488 F.3d 1197, 1201 (9th Cir. 2007) (finding that California's practice of liquidating unclaimed property almost immediately after taking custody likely failed to satisfy the notice requirements of due process and merited an injunction); Am. Express Travel Related Servs. v. Hollenbach (Am. Express I), 630 F. Supp. 2d 757, 764 (E.D. Ky. 2009).

For example, Kentucky now utilizes a seven-year dormancy period for travelers checks. KY. REV. STAT. ANN. § 393.060(2). Prior versions of the statute allowed a fifteen-year period. See, e.g., KY. REV. STAT. ANN. § 393.060(2) (2007). Since states take custody of abandoned property and property is only deemed abandoned when a full dormancy period has run, see supra note 9 and accompanying text, lowering dormancy periods has the effect of accelerating the presumption of abandonment and therefore state collection of this property.

See, e.g., DEL. CODE ANN. tit. 12, § 1155; UNIF. UNCLAIMED PROP. ACT § 20, 8C U.L.A. 137. These laws allow a state to determine how much total unclaimed property a holder possesses despite the absence of records actually demonstrating this liability. See infra note 45. A state may estimate the larger amount of unclaimed property owed based on the subset of a holder's records that are still available. See id. With regard to this second category, this Note specifically references title 12, section 1155 of the Delaware Code, since it was recently enacted and because Delaware's status as a preferred state of incorporation makes its use of
concept of escheat, notes the significance of revenue-raising unclaimed property laws, and details a recent holder-initiated substantive due process challenge to such an escheat statute, which has raised the specter of challenges to similar unclaimed property laws. Part II considers and dismisses one potential justification for such laws. It concludes that courts should avoid simply characterizing escheat statutes as revenue-raising mechanisms, since these laws are unable to satisfy the due process requirements applied to tax statutes and because such characterization risks undermining public trust in the legislative process. Part III considers and partially dismisses another potential justification—that holders, as debtors and not actual owners, do not have the recognized property interest in escheated funds necessary even to raise a due process claim. It contends that holders often do have such a property interest but notes that this interest may sometimes be extinguished prior to escheat. Finally, Part IV argues that courts should nevertheless uphold revenue-raising escheat laws, as they are rationally related to the legitimate government interest in reuniting owners with their abandoned property.

I. THE DUE PROCESS CHALLENGE TO "REVENUE-RAISING" UNCLAIMED PROPERTY LAWS

Escheat was traditionally understood as the "[r]eversion of property . . . to the state upon the death of an owner who has neither a will nor any legal heirs."16 The concept has its roots in Roman law, under which an officer would be appointed to assert the right of the emperor to a decedent’s estate when that decedent left no heirs to claim it.17 In England, the idea was incorporated into the feudal land system, which was itself built on the proposition that the sovereign was the original grantor of real property and therefore had at least an indirect interest in all land.18 Escheat fit into this structure as the means by which land would revert to the sovereign when a person with fee simple estate in land died without identifiable heirs.19 In America, the concept of escheat, which applied solely to real property, and the analogous theory of bona vacantia, which applied to per-

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18. WILLIAM BLACKSTONE, 2 COMMENTARIES *53 ("The grand and fundamental maxim of all feudal tenure is this: that all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown.").
19. John V. Orth, Escheat: Is the State the Last Heir?, 13 GREEN BAG 2D 73, 75 (2009) ("If no heir was immediately identifiable, a legal officer held a proceeding known as an inquest of office to determine if the property had escheated, that is, reverted to the Crown 'from defect of heirs' (propter defectum sanguinis)."). Escheat could also occur through attaint when the possessor of a fee simple was convicted of a serious crime and lost the ability to devise property. See BLACKSTONE, supra note 18, at *245–46 ("propter delictum tenentis").
Unclaimed Property and Due Process

sonal property, eventually merged and expanded. They were codified in various state statutes. Modern escheat is a vastly different legal form but provides a similar practical benefit to the state. Today, most unclaimed property laws allow the government to seize abandoned property and hold it for the benefit of the true owner in a custodial capacity rather than passing title to the crown or state upon an owner’s death. However, this caretaking relationship does not erase the government’s ability to profit from the abandonment of property. In fact, states stand to gain from even custodial escheat in several ways. Though state governments hold approximately $33 billion in unclaimed property, only a fraction of this amount is returned to its actual owners annually. Recognizing this low rate of reunification, many states simply deposit the collected property into their general funds, in some cases retaining a minimal amount in a separate trust account to address owners’ claims. Additionally, some states benefit from those funds that


21. See Delaware v. New York, 507 U.S. 490, 497 n.9 (1993) (“Our opinions ... have understood ‘escheat’ as encompassing the appropriation of both real and personal property, and we use the term in that broad sense.”); Note, supra note 20, at 1327 (“American escheat statutes make no distinction between bona vacantia and escheat and are applicable to reality and personality alike ... Modern statutes thus perform dual functions, continuing the traditions of both bona vacantia and common law escheat.”).

22. See Note, supra note 20, at 1330. A detailed history of unclaimed property law is beyond the scope of this Note. See generally id. and MICHAEL HOUGHTON ET AL., UNCLAIMED PROPERTY (Corp. Practice Series Portfolio 74-2nd, 2009), § II, A-3 to -6 (Sept. 2009), for more thorough descriptions of escheat’s origins and evolution.

23. See, e.g., UNIF. UNCLAIMED PROP. ACT (1995) § 16 & cmt., 8C U.L.A. 132 (2001). The idea of “custodial” escheat is somewhat contradictory, since escheat was historically understood to pass full title to the sovereign. Several modern unclaimed property statutes, however, use the term “escheat,” and this Note likewise understands the term to carry its modern custodial definition.


25. E.g., Thurm & Tam, supra note 2 (noting that in 2006 states collected about $5.1 billion in unclaimed property but returned just $1.75 billion to owners). For reasons discussed below, see infra note 32, the numbers are even more striking for preferred states of incorporation such as Delaware, which capture disproportionately large amounts of unclaimed property and remit even lower percentages to owners. See Randall Chase, Delaware Among States Eyeing Unclaimed Property, BLOOMBERG BUSINESSWEEK, Nov. 24, 2010, http://www.businessweek.com/ap/financialnews/D9JMOUD00.htm (noting that abandoned property is Delaware’s third-largest source of revenue and that the state “has taken in more than $1.7 billion ... since 2007 but returned only $46 million, or less than 3 percent”).

26. See, e.g., CAL. CIV. PROC. CODE § 1564 (West 2011) (requiring that money be put in abandoned property fund and any amount in excess of $50,000 be transferred to the general fund each month); DEL. CODE ANN. tit. 12, § 1205(a) (2007) (authorizing the deposit of all property into the general fund); see also UNIF. UNCLAIMED PROP. ACT § 13(a) & cmt., 8C U.L.A. 127 (recommending that $100,000 be retained in a trust account and the remainder be deposited in the general fund and noting “that the amount of the trust fund which is ultimately established will reflect a State’s experience in paying owners’ claims”). Given this low rate of reunification, escheated funds could be viewed as “interest-free loans that a state may never be
are eventually remitted by claiming the interest earned while in government custody.27

Perhaps understanding the revenue-raising potential of escheat laws, legislatures and state officials have taken steps to increase the collection of unclaimed property.28 Such efforts have taken the form of both more stringent enforcement of existing statutes29 and the implementation of aggressive new escheat laws.30 This latter category includes statutes that shorten the dormancy period that must pass before holders are required to turn over unclaimed property to the state31 and that authorize estimation of a holder’s escheat liability for years past.32

A. The Due Process Challenge: American Express

A federal district court in Kentucky recently pushed back against ambitious unclaimed property laws, however, seemingly providing a legal roadmap for holders who would seek to challenge revenue-driven escheat legislation. In American Express Travel Related Services Co. v. Hollenbach


27. See, e.g., DEL. CODE ANN. tit. 12, § 1206(c). While owners have recently challenged such provisions, they have had little success. See, e.g., Suever v. Connell, 579 F.3d 1047, 1056 (9th Cir. 2009) (examining California’s retention of interest and noting that “the State is not constitutionally required to pay any interest”); Simon v. Weissmann, 301 F. App'x 107, 114 (3d Cir. 2008) (holding that Pennsylvania’s retention of interest was not an unconstitutional taking); Cwik v. Giannoulas, 930 N.E.2d 990, 998 (Ill. 2010) (similarly holding that Illinois’s retention of interest was not an unconstitutional taking). But see Sogg v. Zurz, 905 N.E.2d 187, 192–93 (Ohio 2009) (holding that Ohio’s retention of interest violated the state’s constitution).


29. Harris & Shambaugh, supra note 26, at 52 (“By increasing enforcement of the unclaimed property laws already on the books, states are often able to generate increased revenues . . . .”); Peters, supra note 28, at 54–55; see also Chase, supra note 25 (noting that in 2009, for the first time, Delaware collected more unclaimed property through enforcement actions than from regular collections).


31. See supra note 14; see also Harris & Shambaugh, supra note 26, at 52 (noting that Florida, Kentucky, Iowa, Louisiana, Oklahoma, Tennessee, and Utah recently shortened dormancy periods for various types of property).

32. See, e.g., DEL. CODE ANN. tit. 12, § 1155 (2007 & Supp. 2010) (allowing Delaware to estimate the amount of unclaimed property that a holder accrued during years for which that holder does not possess owner records). Under the Supreme Court’s priority rules, where no ownership records exist, the holder’s state of incorporation has the right to take custody of the property. Texas v. New Jersey, 379 U.S. 674, 681–82 (1965). Accordingly, Delaware may extrapolate a holder’s total unclaimed property liability for years past and often, as a preferred state of incorporation, may claim the entirety of this amount without evidence that even a fraction of the true owners have any connection to Delaware.
(American Express I), the district court granted the holder-plaintiff’s motion for summary judgment, determining that a Kentucky statute that shortened the dormancy period for uncashed travelers checks from fifteen years to seven years did not satisfy rational basis review under the Due Process Clause of the Fourteenth Amendment. In a later opinion denying the defendant’s motion to alter, amend, or vacate the judgment, the district court clarified that “[the statute in question] was not enacted to further a ‘legitimate’ state interest. Instead, it was enacted to raise revenue for the state.”

The court thus concluded that, at least in the case of escheat statutes, raising revenue is not a legitimate interest sufficient to meet the requirements of due process. While it has long been observed that unclaimed property laws serve a dual purpose—reunification and providing states with the use of the abandoned property—the district court did not regard the latter function as independently sufficient.

In May 2011, however, the Court of Appeals for the Sixth Circuit vacated the American Express I decision, holding that Kentucky’s shortened dormancy period did not violate substantive due process and remanding the case for consideration of the remaining constitutional challenges. The Sixth Circuit emphasized that the district court applied an improperly strict form of rational basis review and that legislative decisions ought to be accorded greater deference.

The appellate court specifically noted that the


34. Am. Express I, 630 F. Supp. 2d at 764–66. The Kentucky legislature actually enacted a similar statute in 2006. American Express Travel Related Services Co. (“American Express”), an issuer of travelers checks and a holder of the unclaimed property affected by this statute, challenged the shortened dormancy period, and a state court struck it down for failing to meet state notice and publication requirements. Id. at 760. The legislature then passed “virtually the same amendment . . . during the next legislative session[,]” and American Express challenged it as violating the Kentucky Constitution and the Due Process, Contract, and Takings Clauses of the United States Constitution. Id.


39. Id. at 689–92.
revenue-raising aspect of the statute did not trigger enhanced scrutiny or "rational basis with a bite."\textsuperscript{40}  
Analyzing the unclaimed property law at issue, the Sixth Circuit determined that the statute was rationally related to "facilitat[ing] Kentucky's interest in assuming possession of abandoned property."\textsuperscript{41} The precise reasoning upon which the appellate court upheld the statute is unclear: the court indicated that the legitimate state interest necessary to satisfy due process was the state's general interest in seizing abandoned property,\textsuperscript{42} but the opinion can be read to suggest that revenue generation was also a government objective underwriting due process.\textsuperscript{43} Though this Note will address both possible rationales, it appears more likely that the Sixth Circuit intended the former objective alone to satisfy its due process inquiry.\textsuperscript{44} 

\textbf{B. Looking for the Proper Rationale}

Unclaimed property laws that provide a financial benefit to the escheating state but seemingly do not aid in reunification can be cast as revenue-driven. Such laws include those shortening dormancy periods and those authorizing the estimation of unclaimed property liability. Laws that reduce dormancy periods, like the one at issue in the \textit{American Express} decisions, may appear to be motivated by fiscal concerns because simply accelerating the transfer of property to the state does not have any obvious connection to the amount returned to owners. Statutes authorizing estimation of unclaimed property liability seem even more focused on revenue because the very use of extrapolation implies an absence of records that would otherwise provide the identities of the owners.\textsuperscript{45} If the owners are not known, it seems unlikely that reunification could occur.

\textsuperscript{40} Id. at 692 (internal quotation marks omitted). The court noted that raising revenue is a legitimate government interest, in contrast to the "improper government objective[s]" at issue in recent Supreme Court decisions that seemed to apply a more searching form of rational basis review. Id.

\textsuperscript{41} Id. at 693.

\textsuperscript{42} Id. ("Because [facilitating Kentucky's interest in assuming possession of abandoned property] constitutes a legitimate state purpose and the seven-year presumptive abandonment period is rationally related to that purpose, the 2008 amendment does not violate substantive due process guarantees.").

\textsuperscript{43} See id. at 692 ("[R]evenue raising is certainly a legitimate legislative purpose." (quoting United States v. Carlton, 512 U.S. 26, 40 (1994) (Scalia, J., concurring)) (internal quotation marks omitted)).

\textsuperscript{44} The internal structure of the opinion suggests that the court did not intend to frame revenue generation as the necessary government interest, as its language about revenue generation falls in a section defining the scope of rational basis review and not in the section actually applying that standard. See id. This Note, however, also discusses this potential justification infra in Part II.

\textsuperscript{45} For example, title 12, section 1155 of the Delaware Code allows the state to estimate the amount of unclaimed property "due and owing on the basis of any available records of the holder or by any other reasonable method of estimation" when "the records of the holder . . . are insufficient to permit the preparation of a report." \textsc{Del. Code Ann.} tit. 12, § 1155 (2007 & Supp. 2010). While Delaware generally requires holders to submit records providing
Courts following the district court’s approach from *American Express I* would invalidate these aggressive laws, while those adopting the appellate court’s view from *American Express III* would uphold them. Although this Note argues that the latter result is correct, it further contends that courts need not rest their decisions upon either of the possible bases for the Sixth Circuit’s conclusion, as these rationales are unclear and inconsistent with the modern understanding of unclaimed property. Rather, courts confronting aggressive escheat laws may resolve the problem by determining that such statutes are, in fact, rationally related to their broadly accepted purpose: reunification.46

Before turning attention to *American Express III*’s possible grounding in a state’s interest in raising revenue, it should be noted that the Sixth Circuit’s other potential rationale—that a state’s interest in assuming possession of abandoned property is sufficient to underwrite due process—is problematic. Under highly deferential rational basis review, a legislature could claim that virtually any unclaimed property law is related to this broad goal. Unreasonable legislative assumptions about abandonment rates could justify drastic reductions in dormancy periods. Overbroad methods of estimating unclaimed property liability would stand so long as the legislature felt they constituted rational means of “correcting the evil” of abandoned property. Though a state’s general interest in taking control of abandoned property may in fact be a legitimate government objective,47 such reasoning raises questions as to whether there are any practical substantive due process limits on state escheat. Moreover, it makes little sense to employ this type of justification when a far more direct approach is presented by the connection between even aggressive escheat statutes and reunification. Another rationale should therefore be advanced to avoid an unnecessarily expansive reading of state escheat powers.

II. THE REVENUE-RAISING JUSTIFICATION PROBLEM

Though the Sixth Circuit in *American Express III* reached the proper conclusion, it may have done so by relying on the revenue-raising aspect of the statute to provide the legitimate government interest needed to satisfy rational basis review. This Part argues that courts seeking to resolve the due process problem should avoid simply characterizing unclaimed property laws as revenue-generating measures. Such an approach blurs the line

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46. A New Jersey district court recently employed this general approach in a decision refusing to enjoin a shortened dormancy period statute. See Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff, 755 F. Supp. 2d 556, 579–81 (D.N.J. 2010) (distinguishing *American Express I* as a case in which the court “found conclusively that the only” motivation was revenue).

47. There are older cases that affirm the constitutionality of escheat in broad terms. See, e.g., Conn. Mut. Life Ins. Co. v. Moore, 333 U.S. 541, 547 (1948) (“The right of appropriation by the state of abandoned property has existed for centuries in the common law.”).
between escheat and taxation and may raise questions as to why the former is not held to the same jurisdictional due process standards. Moreover, a revenue-centric view is troublesome given the general understanding of modern unclaimed property laws, which are viewed as consumer-protection mechanisms.

If a court accepts the proposition that unclaimed property laws are intended to “yield public revenue,” there is no principled reason to treat these measures differently than taxes or to decline to subject them to the same constitutional restraints of nexus and apportionment. However, escheat statutes will not be able to clear these twin hurdles under the Supreme Court’s current priority rules in the field of unclaimed property.

In many ways, escheat laws already resemble taxes. They mandate “involuntary payments [by holders] to the state” and often employ record retention, report filing, and audit requirements analogous to those used in the tax context. Based on such similarities, commentators have even suggested that holders utilize a tax professional in their unclaimed property compliance efforts. Given that a tax is “[a] charge, [usually] monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue,” a claim that escheat laws are also intended to raise revenue only further blurs the line between the two. Since the determination of whether a monetary assessment constitutes a “tax” rests on an examination of that assessment’s form and purpose, even state actions that are not explicitly labeled “taxes” may be treated as such by the federal courts. Thus, it could be argued that escheat laws intended to raise revenue should be regarded as taxes and analyzed under the corresponding constitutional tests. However, the due process analysis applied to taxation conflicts with the jurisdictional priority rules for unclaimed property discussed below.

48. See infra notes 49–54 and accompanying text.
50. See Houghton et al., supra note 22, at A-43.
51. See id.
52. BLACK’S LAW DICTIONARY 1594 (9th ed. 2009).
53. United States v. U.S. Shoe Corp., 523 U.S. 360, 367 (1998) (noting that “we must regard things rather than names” in determining whether to classify a harbor maintenance tax as an actual tax (quoting Pace v. Burgess, 92 U.S. 372, 376 (1875)) (internal quotation marks omitted)); see also Edye v. Robertson (Head Money Cases), 112 U.S. 580, 595–96 (1884) (holding that a federal statute requiring ship owners entering U.S. ports to pay a fee for every immigrant aboard was not a tax because the proceeds did not go to “the general support of the government” and were used to regulate immigration).
54. Courts have been hesitant to classify escheat as a tax, see, e.g., Am. Petrofina Co. of Tex. v. Nance, 859 F.2d 840, 841 (10th Cir. 1988) (noting that the “characterization of [Oklahoma’s unclaimed property law] as a tax measure is incorrect”), but “[w]hen a state raises revenue from intangible property, no principled reason exists to distinguish due process requirements because the form of raising revenue is labeled tax or escheat,” Suellen M. Wolfe, Escheat and the Concept of Apportionment: A Bright Line Test to Slice a Shadow, 27 ARIZ. ST. L.J. 173, 176 (1995).
55. See infra notes 58–61 and accompanying text.
State taxes are subject to a two-prong test, which asks first whether there is a nexus between the taxpayer and the tax state and second whether a rational relationship between the portion of the tax base being pursued and the intrastate activities of the taxpayer exists. From this second requirement springs the concept of apportionment, which requires fair division of the tax base "among the various states providing protection and services to the taxpayer." In contrast to the idea of apportionment, under the priority rules of unclaimed property, a state may seek all such property owed to creditors whose last known addresses fall within its borders and, when there is no recorded address, all abandoned property held by a debtor incorporated in that state. The jurisdiction enjoyed by escheat laws thus extends far beyond that of state tax laws, which means that escheat laws may fail to satisfy the second prong of the tax statute due process test. For example, under the priority rules a state may claim the right to escheat all abandoned property held by one of its corporations when the addresses of that corporation's creditors are unknown. If a state were to exercise this priority right and a court then were to ask whether the law conformed to the requirements imposed on taxes—specifically whether the "tax" base drawn upon was proportional to the holder's activities within the state—the escheat would face jurisdictional problems. While providing a corporate home to the holder certainly entitles the state to some degree of taxing power, the "taxing" of all unclaimed property for which creditor records do not exist is in no way related to the intrastate activities of the holder. Thus, the unclaimed property collection would fail the tax statute due process analysis.

Of course, this particular problem could be overcome should the Supreme Court exchange the priority rules for a division of unclaimed property


57. Wolfe, supra note 54, at 236; see also Goldberg v. Sweet, 488 U.S. 252, 262 (1989) ("The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed."); Nat'l Leather Co. v. Massachusetts, 277 U.S. 413, 423 (1928).


59. The location of a corporation is presumed to be the state in which it is incorporated and is not determined by a factual inquiry into where its "principal offices are located." Delaware, 507 U.S. at 506 ("As in Texas, we find that determining the State of incorporation is the most efficient way to locate a corporate debtor. Exclusive reliance on incorporation permits the disposition of claims under the secondary rule upon the taking of judicial notice.").

60. See id. at 499.

61. This assumes that the holder conducts business across state lines.
more in line with traditional tax apportionment considerations. The Court, however, has refused to alter its jurisdictional guidelines on several occasions. Additionally, if viewed as taxes, escheat statutes would have to conform to other constitutional limitations on state taxation, including the restrictions imposed by the Commerce Clause.

Moreover, justifying unclaimed property laws by their ability to generate revenue is inconsistent with the typical understanding of modern escheat as a device intended to protect missing owners. Though many observers have noted that these laws serve dual policy objectives, their primary purpose is to assist in reunification; the financial benefit represents only a secondary goal. For the reasons discussed in Part IV, courts confronting substantive due process challenges to unclaimed property laws may assert that they are, in fact, rationally related to their primary objective of reunification. Given this ability, it makes little sense for a court to rest its decision upon the troubling view that these statutes are chiefly intended to raise revenue. Judicial recognition that a law is intended to facilitate one governmental interest when the statute was in essence “sold” to the public on entirely different grounds can only undermine public confidence and trust in the legislative process.

The uncertainty created by blurring the line between escheat and taxation and the general inconsistency of viewing unclaimed property laws as primarily motivated by revenue suggest that courts upholding aggressive escheat laws should do so under another rationale. Possible alternatives in-

62. At least one commenter has urged precisely this, arguing that the current priority rules cannot “equitably resolve competing state claims to abandoned property that is not clearly located within one state.” Wolfe, supra note 54, at 174.

63. See, e.g., Delaware, 507 U.S. at 509 (“[I]n Pennsylvania, we expressly refused to ‘vary the application of the [primary] rule according to the adequacy of the debtor’s records.’ And we decline to do so here.” (quoting Pennsylvania v. New York, 407 U.S. 206, 215 (1972))).

64. HARTMAN & TROST, supra note 56, § 2:3 (“[I]n order for the tax craft to reach the harbor of constitutionality, it must sail safely past the Scylla of the commerce clause and the Charybdis of due process.”).

65. See What is Unclaimed Property?, supra note 6 (“Unclaimed property is one of the original consumer protection programs.”).

66. See supra note 36 and accompanying text.

67. For example, Millar and Coalson state as follows:

[S]tate unclaimed property laws are primarily designed as procedural mechanisms that facilitate the return of unclaimed property to its owner.

A number of courts have also held that these laws have a secondary objective as well—to give the state, rather than the holder of the unclaimed property, the benefit of the use of the property until the owner reclaims it . . . .

Millar & Coalson, supra note 36, at 517.

68. See John Martinez, Rational Legislating, 34 Stetson L. Rev. 547, 550, 552–55 (2005) (noting that public distrust of state legislatures is worsening and suggesting that the problem is best addressed through “rational legislating” measures that “clearly set[] out the analytic connection between the problems legislators seek to address and the enactments passed to address them” (emphasis omitted)).
clude either showing that the holder lacks a property interest in the unclaimed funds and thus may not even bring an initial due process challenge or demonstrating that the legislation is rationally related to some other legitimate government interest, like the reunification of owners with their abandoned property.

III. THE PROPERTY INTEREST JUSTIFICATION PROBLEM

Courts faced with revenue-raising escheat statutes may consider the established test, which asks first whether a protected property interest exists and then "whether 'the deprivation of that interest contravene[s] the notions of due process.'" Looking to the first prong of this analysis, a court could rest its endorsement of an unclaimed property law on the theory that holders simply have no property interest in the disputed funds (the "property interest justification"). While more satisfying than a justification based on the revenue-raising nature of these statutes or a broad assertion of escheat's constitutionality, such a maneuver would have limited utility, since its application would be restricted to those revenue-raising escheat statutes that do not operate to shorten dormancy periods. Moreover, some circuits have held that a plaintiff must show a property interest only when attacking "discretionary conduct of government officials" and not when challenging an actual state law. If this is indeed the case, the property interest justification would lose what little utility it does have, as holders simply would not be required to demonstrate the deprivation of a property interest.

Let us assume, however, that in order for a holder to assert a Fourteenth Amendment claim alleging that it has been deprived of its property without due process of law it must first show that it actually had an interest in the property. States could conceivably argue that holders, by virtue of their status as debtors and not actual owners, do not possess such an interest.


70. See infra Section III.C. For the purposes of this Note, these are laws authorizing the use of extrapolation to assess unclaimed property liability.

71. E.g., Am. Express III, 641 F.3d 685, 688–89 (6th Cir. 2011). But see Thomas W. Merrill, The Landscape of Constitutional Property, 86 VA. L. REV. 885, 888–89 (2000) ("After College Savings Bank, one thing seems reasonably clear: Parties seeking to protect an economic interest under the Due Process or Takings Clauses, whether advancing a procedural or a substantive claim, must be prepared to demonstrate that their interest is 'property.'").

72. See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673, 675 (1999) (holding that the plaintiff had no property interest in "freedom from a competitor's false advertising" and thus prophylactic federal legislation could not protect this interest under Section 5 of the Fourteenth Amendment); Wojcik v. City of Romulus, 257 F.3d 600, 609 (6th Cir. 2001) ("Procedural and substantive due process claims are examined under a two-part analysis. First, the Court must determine whether the interest at stake is a protected liberty or property interest under the Fourteenth Amendment."); Merrill, supra note 71, at 888–89.

73. Such an argument would not be frivolous; the American Express I court expressly considered this threshold issue and found that American Express had a property interest, Am. Express I, 630 F. Supp. 2d at 760–61 (looking to state law to determine what
Unfortunately, it is unclear when property exists for the purposes of substantive due process. There are at least three possibilities regarding what constitutes such an interest: (1) that property is created by nonconstitutional sources such as state law (the “Roth theory”); (2) that property is defined by the right to exclude others (the “College Savings theory”); and (3) that nonconstitutional sources of law establish what rights an entity has and federal law then determines whether those rights represent property (the “patterning theory”). This Part briefly discusses each theory and concludes that several of the holder-owner relationships that most often give rise to unclaimed property liability represent circumstances in which the holder in fact has a cognizable property interest under any of the three frameworks.

A. Three Property Interest Theories

One theory of how to define a property interest was articulated in Board of Regents of State Colleges v. Roth. The Supreme Court, reviewing a procedural due process claim and determining that the nonrenewal of an untenured professor’s contract was not a deprivation of property, described the creation of property interests as follows:

Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—

constituted a property interest), but the Sidamon-Eristoff court addressed the same question under the Takings Clause and found that American Express did not have a property interest, Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff, 755 F. Supp. 2d 556, 586-87 (D.N.J. 2010) (also looking to state law to determine what constituted a property interest). Though what represents a property interest for substantive due process purposes is not necessarily the same as for takings purposes, e.g., Merrill, supra note 71, at 958, the Sidamon-Eristoff court actually seemed to apply the same test as in American Express I and suggested that the American Express I court was incorrect in finding a substantive due process property interest. See Sidamon-Eristoff, 755 F. Supp. 2d at 586-87.

74. Merrill, supra note 71, at 889. One commentator has noted that the Supreme Court’s pronouncements have been “seemingly inconsistent” and are “to put it mildly, likely to produce bewilderment among lower courts and practicing lawyers.” Id. at 889-90.

75. See infra notes 79-82 and accompanying text.

76. See infra notes 83-86 and accompanying text.

77. See infra notes 87-93 and accompanying text. See Merrill, supra note 71, for a far more thorough discussion of what may constitute a property interest.

78. This Part specifically addresses bank accounts and uncashed checks. See, e.g., Unclaimed Property, PA. TREASURY, http://www.patreasury.org/unclaimedProperty.html (last visited July 21, 2011) (recognizing “savings or checking accounts” and “checks that have not been cashed” as two of the most common types of unclaimed property); Unclaimed Property Main Page, CAL. STATE CONTROLLER’S OFFICE, http://www.sco.ca.gov/upd.html (last visited July 21, 2011) (recognizing “[b]ank accounts” as one of the most common types of unclaimed property).

79. 408 U.S. 564 (1972).
rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.\(^\text{80}\)

This positive law approach has been cited favorably in subsequent cases,\(^\text{81}\) including one of the Court's major unclaimed property decisions.\(^\text{82}\)

The second theory, provided by *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,\(^\text{83}\) diverges from the *Roth* standard significantly. In finding that a plaintiff had no property interest in "freedom from a competitor's false advertising,"\(^\text{84}\) the Court declared that "[t]he hallmark of a protected property interest is the right to exclude others."\(^\text{85}\) This could be understood as a departure from the positivist approach of *Roth* and the related theory, discussed below, which simply attaches elements to that foundational standard.\(^\text{86}\)

The third theory, prominently displayed in *Drye v. United States*,\(^\text{87}\) provides that courts should "look initially to state law to determine what rights the [party] has in the property the Government seeks to reach, then to federal law to determine whether the [party's] state-delineated rights qualify as 'property' or 'rights to property.'"\(^\text{88}\) This can be viewed as a qualified *Roth* standard—rather than relying exclusively on nonconstitutional sources of law to define property, those independent foundations would be used only to determine whether an interest exists and then federal law would control

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82. Delaware v. New York, 507 U.S. 490, 501–02 (1993) (applying the standard to determine which entity was properly understood as the "debtor" but not to determine whether the holder has due process property rights).
85. *Id.*
86. *See Merrill, supra* note 71, at 887–89. Indeed, *College Savings* seems to represent a narrowing of the field protected by substantive due process. *See id.* at 987 ("The basic problem with *College Savings Bank* 's right-to-exclude criterion in the context of substantive due process is that it takes the intuitive core of *taking* property—property-as-ownership—and seeks to transpose it to a doctrine that historically has performed a much broader function.") Professor Merrill acknowledges that his own theory, the product of an attempt to reconcile the conflicting caselaw, is not able to fully account for the "right to exclude" language and can only embrace *College Savings* to the extent that it would have reached the same result. *See id.* at 986–91, 998.
87. 528 U.S. 49 (1999).
88. *Drye*, 528 U.S. at 58. In fact this two-step analysis is on display or implicitly acknowledged in a number of the Court's decisions. *See, e.g.*, Town of Castle Rock v. Gonzales, 545 U.S. 748, 766 (2005) (even if Colorado law created an entitlement, "it is by no means clear that [the entitlement at issue] could constitute a 'property' interest for purposes of the Due Process Clause."); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978) ("Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972))). One commentator refers to this as the "'patterning definition' approach to constitutional property." Merrill, *supra* note 71, at 927, and this Note refers to it as the patterning theory.
whether that interest is "property." It is unclear, however, precisely which federal law should be applied in this second step. At least for the federal tax lien statute, this latter determination turned on the ability of the deprived party to "channel" the property; in other cases, the Court has emphasized the existence of monetary value and the ability to exclude.

B. Common Holder-Owner Relationships Create a Property Interest for the Holder

Though the precise test for assessing what represents a constitutional property interest is unclear, it appears that a holder of unclaimed property will often have such an interest under any of these three possibilities. Two of the most common situations that create unclaimed property are when a party issues a check that a payee fails to cash and when a party deposits funds with a financial institution that he later fails to withdraw. Applying each of the three tests described above to these two contexts suggests that a holder will often have a cognizable property interest for the purposes of substantive due process.

Under the Roth theory, the appropriate inquiry is whether nonconstitutional sources create the interest. Various courts, interpreting state law, have noted that a deposit with a bank not only creates a debtor-creditor obligation that must be honored but also passes full ownership of the funds to the bank. Travelers checks, such as those at issue in the American Express decisions, can be viewed as creating a similar relationship: the purchase of the check functions as a deposit of that check's value with the issuing entity, and that entity may then be called upon as a debtor to repay the deposited amount.

89. Merrill, supra note 71, at 927 ("Federal constitutional law prescribes the set of criteria an interest must have to qualify as property; whether the claimant has an interest that fits the pattern is then determined by examining independent sources such as state law.").

90. See Merrill, supra note 71, at 954 ("The problem with the patterning-definition strategy is that it requires courts to commit to general federal constitutional criteria for the identification of property interests. There is remarkably little useful law to assist in this endeavor.").

91. Drye, 528 U.S. at 61.

92. Castle Rock, 545 U.S. at 766. See also Merrill, supra note 71, at 987.

93. See supra notes 83–86 and accompanying text.

94. See supra note 78.


96. Am. Express I, 630 F. Supp. 2d at 761. Indeed, this is precisely the reasoning that allowed the American Express I court to discover a property interest, push forward, and consider the second prong of the due process analysis. Id. at 760–61.
Even should a court view escheat not as the seizure of deposited funds but only as the assumption of intangible debt or the depositor's contractual right to repayment,\textsuperscript{97} a bank-holder will still be able to demonstrate a property interest in its own contractual right to earn a profit from the deposited funds.\textsuperscript{98} So, under the foundational \textit{Roth} analysis, the parties holding unclaimed property via a banking or quasi-banking relationship will be able to assert a substantive due process property interest.

The conclusion is the same for escheatable property arising out of uncashed checks. When one party presents a check to another, he does not immediately surrender ownership of the promised funds but rather maintains his interest in those funds until the drawee bank actually honors the order.\textsuperscript{99} While one must look to state law in applying the \textit{Roth} test, the Supreme Court has turned to Article 3 of the Uniform Commercial Code, adopted by all 50 states,\textsuperscript{100} and found that under this "state law" no property interest is transferred until a check is honored.\textsuperscript{101}

The \textit{College Savings} theory asks whether the claimant had a right to exclude others from the supposed property. While a bank-holder must acquiesce to a depositor's wishes regarding the disbursement of funds, it need only pay the debt from its own reserves and is not required to return the funds that were actually deposited.\textsuperscript{102} Rather, the bank takes full title to, and thus may exclude all others from, the deposited funds themselves.\textsuperscript{103} Should a court reject this reasoning by viewing escheat as the assumption of

\textsuperscript{97} Courts may view escheat as the seizure of an owner's contractual right to payment rather than the seizure of the deposited funds themselves. See \textit{Anderson Nat'l Bank v. Luckett}, 321 U.S. 233, 241 (1944) (understanding the unclaimed "deposits" to be "debtor obligations of the bank" and not the funds themselves). \textit{But see} \textit{Delaware v. New York}, 507 U.S. 490, 502 (1993) (noting that the abandoned "[f]unds held by a debtor" are what "become subject to escheat" but then going on to affirm that "‘deposits are debtor obligations’" (first emphasis added) (quoting \textit{Anderson Nat’l Bank}, 321 U.S. at 241)). If this is the case, the fact that the bank acquires title to the actual money is of no consequence—the escheated property is not that tangible money.

\textsuperscript{98} Bank-holders have an implicit interest and contract right in generating profits from deposited funds. See \textit{State Tax Comm’n v. Yavapai Cnty. Sav. Bank}, 81 P.2d 86, 88 (Ariz. 1938). This ability to utilize the funds, like all contractual benefits, represents a "specific entitlement[]", 17A AM. JUR. 2d \textit{Contracts} § 1 (2010), and thus rises above the "abstract need[s] or desire[s]" and "unilateral expectation[s]" rejected in \textit{Roth}. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577–78 (1972) (noting that the claimant \textit{did} have a property interest in his contractually guaranteed employment up until the specified termination date).

\textsuperscript{99} \textit{See} \textit{Barnhill v. Johnson}, 503 U.S. 393, 396–400 (1992) (holding that a transfer does not occur under the Bankruptcy Code until the drawee bank honors a check, where a "transfer" is defined as the "parting with property or with an interest in property" (quoting 11 U.S.C. § 101(54) (1988)) (internal quotation marks omitted)).

\textsuperscript{100} \textit{Id.} at 398 n.5 ("New Mexico, the State in which the instant transaction occurred, has adopted the U.C.C. as have all other 49 States, the District of Columbia, Guam, and the Virgin Islands.") (internal citation omitted)).

\textsuperscript{101} \textit{See id.} at 397–99.


\textsuperscript{103} \textit{See supra} note 95 and accompanying text.
a depositor's right to repayment, a bank may again frame its own right
to generate profits from the deposits as the relevant property interest.\textsuperscript{104} The bank may exclude even the depositor from this contractual right.

Likewise, in the common situation of an uncashed check, the holder will have a property interest under the \textit{College Savings} theory. Since the issuer of the check does not cede his interest in the funds to be transferred until the drawee bank actually honors the check, there is no reason to believe that his general right to exclude has been impaired before that point.

Finally, the interests created in these two contexts would also constitute "property" under the patterning theory, which begins from the \textit{Roth} standard and then inquires “whether the [party’s] state-delineated rights qualify as ‘property’ or ‘rights to property’ ” under federal law.\textsuperscript{105} For the reasons discussed above, the threshold component of this test—the nonconstitutional interest—will be present.\textsuperscript{106} With regard to the second hurdle, the unclaimed funds at issue in the cases of an uncashed check or a forgotten bank account will clearly possess monetary value, and, in either scenario, the holder will be able to “channel” the money.\textsuperscript{107} Likewise, the holder will be able to exclude others from this interest.\textsuperscript{108}

Thus, in two of the most common unclaimed property contexts—where a creditor fails to collect his deposit from a financial institution and when he fails to cash a check—the holding entity would actually have a recognized property interest, and the due process inquiry may proceed.\textsuperscript{109} A reviewing court would be unable to employ a property interest justification in such situations.

\textbf{C. A Holder’s Property Interest in Unclaimed Property is Extinguished upon Abandonment}

Courts may, however, be able to use the property interest justification to endorse a \textit{subset} of revenue-raising escheat statutes—namely, categories of unclaimed property laws apart from those shortening dormancy periods.\textsuperscript{110} The Supreme Court has stated that a banking institution’s property interest in deposited funds is extinguished when those funds become abandoned, or,

\begin{itemize}
  \item \textsuperscript{104} See supra note 96–98 and accompanying text.
  \item \textsuperscript{105} See supra note 87–88 and accompanying text.
  \item \textsuperscript{106} See supra notes 95–101 and accompanying text.
  \item \textsuperscript{107} Deposited funds “belong to the bank, become part of its general funds, and can be loaned by it as other moneys.” Burton v. United States, 196 U.S. 283, 301 (1905) (quoting Bank of the Republic v. Millard, 77 U.S. 152, 155 (1869)). In this way, the bank “exercises dominion over” the deposited funds and “determines who will receive the property.” Drye v. United States, 528 U.S. 49, 51 (1999).
  \item \textsuperscript{108} See supra notes 102–104 and accompanying text.
  \item \textsuperscript{109} See Wojcik v. City of Romulus, 257 F.3d 600, 609 (6th Cir. 2001).
  \item \textsuperscript{110} Again, for the purposes of this Note, this subset is limited to laws authorizing the use of estimation to determine unclaimed property liability. See supra note 15.
\end{itemize}
in other words, when the dormancy period has elapsed.\textsuperscript{111} Assuming that this reasoning may be extended to other forms of unclaimed property,\textsuperscript{112} escheat statutes that affect only property already deemed abandoned will be shielded from holder-initiated due process attacks.\textsuperscript{113} A court may dismiss due process challenges to laws authorizing states to extrapolate a holder’s unclaimed property liability because the extrapolation provides an estimate of only that unclaimed property that has already been deemed abandoned and therefore only those funds in which the holder no longer has a property interest.

On the other hand, courts will not be able to extend this justification to those statutes shortening dormancy periods, as the very act of reducing the dormancy period accelerates the date of abandonment. Here, a property interest justification would face a circularity problem; a holder would be unable to challenge the escheat statute due solely to the implications of the statute itself. Such a situation would be akin to a state passing a law denying an individual access to the courts and then refusing to hear his challenge on account of that very law.

Finally, it is worth noting once more that even the little work the property interest justification might do in supporting those laws that authorize extrapolation would be erased if a holder-plaintiff challenging an actual statute—as opposed to discretionary government conduct—need only show arbitrary and capricious action. This conclusion would eliminate the property interest requirement entirely and further reduce a reviewing court’s options for upholding the constitutionality of these statutes.

\section*{IV. The Reunification Answer}

Though a court facing an aggressive escheat law typically may not dismiss a Fourteenth Amendment claim under the property interest justification,\textsuperscript{114} government interference with property rights nevertheless satisfies due process so long as it is rationally related to a legitimate state

\begin{itemize}
\item \textsuperscript{112} This seems to be a fair assumption. Justice Thomas’s statements about a bank lacking property interest in abandoned funds followed and was intended as an illustration of his more general point that “[f]unds held by a debtor become subject to escheat because the debtor has no interest in the funds.” Delaware, 507 U.S. at 502.
\item \textsuperscript{113} With their property interest having expired, the holders will not be able raise a due process challenge. See Wojcik, 257 F.3d at 609 (“Only after identifying a property interest at stake do we continue to consider whether the deprivation of that interest contravened the notions of due process.”).
\item \textsuperscript{114} See supra Part III.
\end{itemize}
interest. Though the connection to reunification is not always obvious, a court confronting questionable categories of escheat laws should endorse them as bearing some direct and logical relation to the concededly legitimate aim of returning abandoned property to its true owners. The relationships between these revenue-raising statutes and reunification are found in (1) the financial security offered by placing unclaimed funds in states' hands (the "financial security connection"), (2) the earlier notification required by shortened dormancy periods (the "early notification connection"), (3) the benefits of collecting property in the custody of a common holder (the "common holder connection"), and (4) the effect of incentivizing holder record-keeping (the "record-keeping connection"). This Part explores each of these connections in turn, explaining why and how a reviewing court should conclude that both laws shortening dormancy periods and those authorizing the extrapolation of unclaimed property liability do, in fact, satisfy the requirements of due process.

A. The Financial Security Connection

The relative financial security of states compared to private holders suggests that both shortened dormancy periods and statutes allowing for the estimation of unclaimed property liability ultimately serve to reunite owners with their abandoned property. This financial well-being is a product of the inability of states to enter bankruptcy as well as the potential for government oversight to minimize debtor mismanagement of owed funds.

States, unlike private holders, are unable to declare bankruptcy. This inability protects owners whose property rests in state hands from the inherent uncertainty of the bankruptcy context, in which debtors may discharge debts and face competing creditor claims. While owners may file a claim for abandoned property that has become part of a bankruptcy estate, such efforts by no means assure these owner-creditors of complete recovery.


116. Out of the two categories of unclaimed property laws considered by this Note, the early notification, common holder, and record-keeping connections only apply to and justify those statutes shortening dormancy periods. *See infra* Sections IV.B-D. The financial security connection, however, demonstrates that both categories are logically consistent with reunification. *See infra* Section IV.A.


119. *See* 4 COLLIER ON BANKRUPTCY ¶ 507.02 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010) ("Many bankruptcy cases do not generate sufficient proceeds to pay in
Furthermore, the ability of a state to intervene and protect the silent interest of the true owners is limited in bankruptcy proceedings. Most courts considering this issue have determined that an escheating state cannot participate as a claimant unless the property at issue was deemed abandoned before the date of the filing of the bankruptcy petition. At least one court, however, has denied that a state may ever participate in such proceedings. Given this uncertainty, the true owner of the property would benefit by having it placed in the hands of an entity incapable of entering bankruptcy.

Setting aside the unpredictability when a holder is in bankruptcy, state escheat provides some financial security by erasing the risk of property being squandered by a private holder before bankruptcy proceedings are even initiated. While the Bankruptcy Code guards against fraudulent transfers made within two years of a bankruptcy petition, it does not prevent a debtor from misusing the resources in its possession prior to this clawback period. The limited clawback period leaves creditors, including the owners of unclaimed property, vulnerable. The American legal system recognizes the risk of debtor mismanagement in other areas and has protected creditor interests by subjecting at-risk property to various forms of governmental oversight or control. Unclaimed property law can be viewed as another method by which states can assume such a guardianship role. While revenue-driven escheat practices may not have an obvious effect on the amount of unclaimed property returned to its true owners, they ultimately help to accomplish this goal by transferring the funds to safer hands.

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4. See id. § 548.03[1](a) ("Section 548 and fraudulent transfer law generally attempt to protect creditors from transactions which are designed, or have the effect, of unfairly draining the pool of assets available to satisfy creditors' claims . . . .").
5. See, e.g., 12 U.S.C. § 1821(c) (2006) (authorizing the Federal Deposit Insurance Corporation to act as a conservator or receiver for certain classes of struggling insured depository institutions); 13 Moore's Federal Practice § 66.03[2]-[3] (3d ed. 1997) (discussing the practice of appointing federal equity receivers, which are officers of the court, to protect property of claimants, owners, creditors, and the public generally); 9 Moore's Federal Practice, supra, § 53.10[3][d] (explaining that a master may be appointed to take custody of and administer the distribution of awarded funds).
The financial security benefit is clearly applicable in assessing the propriety of escheat statutes that shorten dormancy periods, but the government interest in reuniting owners with their unclaimed property is not so clearly served by questionable laws that allow for estimation in determining escheat liability. After all, the use of extrapolation is itself justified by the holder's lack of creditor records, and, without such records, the true owners of the seized property cannot be identified. One might contend that if the owners cannot be found, the property cannot be remitted, and the government interest in reunification cannot be served. It would make no difference that the funds are entrusted to the safe hands of the state if the state is protecting them for nobody but itself.

The fallacy of this argument is the assumption that creditors may be identified only through a holder's records. In some cases, the missing creditor will also possess a sufficient record of the transaction. The use of extrapolation places an amount of a holder's property, approximately equivalent to the value of the unclaimed property it owes, in the secure custody of the state to await the emergence of the true owners.

B. The Early Notification Connection

While the financial security connection suggests that both types of revenue-raising statutes discussed by this Note are logically related to reunification, several additional connections further link reductions in dormancy periods to this government objective. The first of these is the early notification connection.

Statutes reducing dormancy periods assist in reunification by ensuring that attempts to contact owners are made sooner, when it is more likely that an owner will be found at the address listed in a holder's records. Quicker turnover to a state has actually been shown to result in the return of a substantially higher percentage of unclaimed property. This phenomenon is likely due to population mobility, which makes it increasingly difficult to

126. The shortening of dormancy periods inevitably shifts some amount of unclaimed property to state governments that previously would have been retained by private holders. In other words, such statutes increase state unclaimed property holdings while decreasing private holdings. The relatively greater security of government custody increases the chances of reunification, since the first step in returning property is having the property to return. Thus, shortened dormancy periods, simply by transferring unclaimed property from private to public hands, support reunification. The Uniform Law Commission actually noted this benefit in its summary of the Uniform Unclaimed Property Act of 1995. Unclaimed Property Act Summary, UNIF. LAW COMM’N, http://www.nccusl.org/ActSummary.aspx?title=Unclaimed%20Property%20Act (last visited Aug. 24, 2011).

127. See supra note 45 and accompanying text.

128. For example, an uncashed travelers check would remain in the owner's possession and would demonstrate both his ownership and, through the absence of a countersignature, that he had not previously recovered the deposit from the holder. See 9 C.J.S. Banks and Banking § 484 (2011).

contact owners as years pass. The underlying rationale suggests that not only will quicker escheat aid in reunification but also so will any means of ensuring earlier notification attempts, since such efforts are more likely to find an owner at his record address.

Shortened dormancy periods actually aid reunification by encouraging quicker notification in two related ways. First, states actively seek to contact owners soon after escheat. Though, like private holders, government actors often have an incentive to retain unclaimed property for as long as possible, many states work to achieve reunification through the publication of owner names in electronic databases, outreach at public events, and various other means. Importantly, and in contrast to private holders, states are generally required to begin notification measures soon after taking custody of escheated funds. Put simply, a shortened dormancy period results in quicker escheat, which in turn mandates earlier state attempts to contact the true owners. These earlier efforts will result in more effective notification, as "the missing owner's trail" will be "warmer." Thus, reducing dormancy periods increases the odds of reunification.

However, the connection between shortened dormancy periods and reunification does not rest solely on a state's responsibility to engage in prompt creditor notification. It is further bolstered by the fact that private holders are generally required to contact the apparent owner before turning over the unclaimed property to the state. Shortened abandonment presumptions...
accelerate the notification provided to owners by both states and private holders.\textsuperscript{138}

**C. The Common Holder Connection**

As noted above, shortened dormancy periods increase the amount of unclaimed property being held by states and decrease the amount held by private debtors.\textsuperscript{139} Thus, if it could be shown that placing more abandoned property in government hands increases the chances of reunification, the dormancy statutes would reach a legitimate state interest. It is logically consistent to believe that placing large amounts of unclaimed property in the hands of a common holder—the government—does help to bring about reunification: if a state holds more unclaimed property, a potential owner has more incentive to check that state's records to see if his own property is being held.

States pursue reunification in a number of ways,\textsuperscript{140} but perhaps the most common is the use of searchable electronic databases containing the names of abandoned property owners.\textsuperscript{141} These databases provide a low-cost means by which claimants may identify their forgotten or previously undiscovered property, and the benefit of such a search is potentially quite high. The possibility of realizing a benefit only rises as the amount of unclaimed property held by a state increases; more money in a state's unclaimed property holdings means a greater likelihood that any given claimant will locate his own abandoned property through a search of those holdings. Assuming that the owners of unclaimed property act rationally and become more likely to engage in a particular act when its benefit-cost ratio increases, placing more unclaimed property in state custody should incentivize owners to utilize electronic databases and other state resources.

On the other hand, it is doubtful that similarly increasing the amount of unclaimed property held by private debtors would likewise encourage owners to seek it out; the difference is cost. While states provide a low-cost means of locating abandoned funds by gathering them in the hands of a central actor, private holders are dispersed. The cost to an owner of seeking reunification from individual private debtors includes retaining and organizing the records necessary to show which entity is holding the property as well as contacting and filing claims with each separate holder. As the benefits rise, the costs increase as well.

\textsuperscript{138} Of course, the prevention of abandonment is somewhat different than "reunification," but both arrive at the same result—ensuring that property ends up in the possession of its true owner.

\textsuperscript{139} See supra note 126.

\textsuperscript{140} See supra note 133.

\textsuperscript{141} See Waters, supra note 133.
Finally, at least as it relates to property for which the presumption of abandonment is tied to a loss of contact with the owner, shortened dormancy periods may incentivize greater holder-creditor contact. This, in turn, is likely to lead to more frequent reunification.

Since holders often derive some benefit from the retention of unclaimed property, they have an incentive to prevent the dormancy period from running. Generally, this may be accomplished through some form of contact with the owner. Thus, as holders are threatened with shorter dormancy periods, they may act to keep more thorough creditor records and maintain the minimal level of contact with these owners sufficient to ward off the presumption of abandonment. The retention of creditor records will ultimately result in more efficient notification of owners whether by the state or by the holder itself, and the increased contact may prevent the property from ever becoming truly abandoned in the first place.

For example, under Delaware law, most categories of property are deemed abandoned when a full dormancy period has passed, and this period only runs when the “owner has ceased, failed or neglected to exercise dominion or control . . . or to assert a right of ownership or possession or to make presentment and demand for payment and satisfaction or to do any other action in relation to or concerning such property.” A Delaware corporation that issues gift certificates will want to maintain contact information for its purchasers so that, when the five year dormancy period is about to expire, it can reinitiate communication with the owners, thereby resetting the clock. While a purchaser might respond by claiming his property from the corporation, this result simply leaves the holder in the same position as if it had turned over the funds to the State of Delaware. On the other hand, the owner may prefer to leave his property in the form of gift certificates or otherwise neglect to redeem them, and the corporation would

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142. See, e.g., Am. Express I, 630 F. Supp. 2d 757, 759 (E.D. Ky. 2009) (“American Express does not charge a fee for issuing travelers checks to its customers. The ability to offer this service gratis derives from profits earned on the travelers check funds.”). Indeed, holders will often have a recognized property interest in the unclaimed property. See supra Part III.B.  
143. See, e.g., Del. Code Ann. tit. 12, § 1198(9)(a) (2007 & Supp. 2010) (“‘Period of dormancy’ means the full and continuous period . . . during which an owner has ceased, failed or neglected . . . to do any . . . act in relation to or concerning such property.”); Ky. Rev. Stat. Ann. § 393.060(2) (West 2010) (presuming abandonment for sums payable on written instruments “unless the owner has . . . corresponded in writing with the banking or financial organization” within the designated dormancy period); Unif. Unclaimed Prop. Act (1995) § 2(c), 8C U.L.A. 104 (2001) (“Property is unclaimed if for the applicable period . . . the apparent owner has not communicated in writing . . . with the holder concerning the property . . .”).  
144. Again, the prevention of abandonment is not precisely “reunification,” but both operate to place property in the hands of its true owner. See supra note 138.  
146. For gift certificates, the dormancy period is actually the shorter of five years or the certificate’s expiration period less one day. Id. § 1198(9)(b)(1)–(2).
continue to profit from these accounts. If the former sequence occurs, the owner never loses the money that he placed in the gift certificates; if the latter sequence occurs and the certificates are eventually abandoned, some record of the owner's address exists for future notification. In either scenario, the shortened dormancy period has supported the goal of reunification.

While the relationship between revenue-raising escheat statutes and reunification may not be immediately apparent, the four connections discussed above should allow these laws to satisfy a holder-initiated due process challenge. Both statutes reducing dormancy periods and those allowing estimation of unclaimed property liability increase the financial security of owner-creditors. The former category further supports reunification by increasing the chances that owners are contacted before their trails go cold, incentivizing owner efforts to locate their own abandoned property and encouraging holders to maintain more thorough records.

CONCLUSION

The American Express III court arrived at the proper outcome in upholding a revenue-raising unclaimed property law, but reached its conclusion in a fashion that was unclear and inconsistent with the general understanding of modern escheat as a consumer-protection device. The better approach is to recognize that even aggressive escheat legislation ultimately benefits missing owners. Though the relationship between revenue-raising laws and the reunification of owners with their abandoned property may be complex, it certainly does exist.

Ultimately, the recognition that aggressive escheat statutes conform to the requirements of due process is consistent with both logic and the

147. Of course, this incentive will only exist for the holder to the extent that the value of maintaining the property saved from escheat by the latter sequence exceeds the administrative costs of initiating the preemptive contact. This value is likely to depend on the type of property in question. For example, it would not seem strange that an owner of a dormant bank deposit actually intended to leave it untouched and would want it to remain in the hands of the bank. Thus, it may make sense for a bank to incur the costs associated with keeping better owner records and contacting those owners before the earlier presumption of abandonment—it could reasonably anticipate that many "missing" owners would actually prefer to leave their deposits untouched, giving the benefit of those funds to the bank in the interim. On the other hand, it is unlikely that an employee would have intentionally delayed the deposit of a payroll check and, upon being contacted, would ask that his employer continue to hold those funds. Thus, whether this record-keeping incentive would actually exist may well depend on the holder's specific industry, and such inquiries are beyond the scope of this Note.

148. A court must ask whether "there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955). Here, the four connections demonstrate that the considered escheat statutes were rational means of correcting the "evil" of incomplete reunification.

149. See supra Section IV.A.
150. See supra Section IV.B.
151. See supra Section IV.C.
152. See supra Section IV.D.
acknowledged policy objectives of modern escheat.\textsuperscript{153} These laws help to reunite owners with their abandoned property and, in the interim, allow the public at large to enjoy the use of the missing funds. Given the amount of money at stake, judicial recognition of these statutes' validity should provide comfort to both groups. Perhaps more importantly, affirming their constitutionality under the proper rationale will provide certainty and encourage trust in the legislative process.

\textsuperscript{153} See supra note 36 and accompanying text.