

NOTES

UNCLAIMED BILLIONS: FEDERAL ENCROACHMENT ON STATES' RIGHTS IN ABANDONED PROPERTY

I. INTRODUCTION

United States residents have abandoned and continue to abandon tangible and intangible property valued at billions of dollars.¹ In 1991, under state unclaimed property laws, the fifty states took custody of over \$1.2 billion in unclaimed property assets.² Current state unclaimed property legislation, traditionally called "escheat," empowers states to take title to, or claim custody of, most intangible property that has remained unclaimed and therefore is presumed abandoned.³ Although escheat originally meant that the state became absolute owner of the property, the term escheat is also used to include custody of unclaimed property.⁴

Despite a general acknowledgment of sovereign state authority to regulate unclaimed property,⁵ the federal government has quietly taken control of unclaimed property valued in excess of \$6.5 billion,

¹ Telephone Interview with Patty White, Secretary of the National Association of Unclaimed Property Administrators during the 1991 term (Mar. 11, 1992); see also Andrew W. McThenia, Jr. & David J. Epstein, *Issues of Sovereignty in Escheat and the Uniform Unclaimed Property Act*, 40 WASH. & LEE L. REV. 1429, 1432 (1983) (in 1962 the value of unclaimed property, estimated at \$15 billion, was growing at the rate of \$1 billion annually).

² Telephone Interview with Patty White, *supra* note 1.

³ See, e.g., Note, *Origins and Development of Modern Escheat*, 61 COLUM. L. REV. 1319, 1330 (1961) (modern statutes focus on abandonment as a cause for escheat); Comment, *A Survey of State Abandoned or Unclaimed Property Statutes*, 9 ST. LOUIS U. L.J. 85, 85 (1964) (modern escheat occurs when property has remained unclaimed for a specified period of time). All states also continue to escheat real and personal property where a resident has died intestate without heirs and the state has been appointed administrator of the estate. 1 DAVID J. EPSTEIN ET AL., UNCLAIMED PROPERTY LAW AND REPORTING FORMS § 1.05 (1990). This note focuses on state claims to intangible property in situations when the property is presumed abandoned, not when a resident has died intestate.

⁴ See, e.g., *Survey*, *supra* note 3, at 85 ("escheat" used to denote state control of unclaimed property); Jo Beth Prewitt, Note, *Unclaimed Property—A Potential Source of Non-Tax Revenue*, 45 MO. L. REV. 493, 494 (1980) ("escheat" is used to describe the transfer of custody or title to the state); cf., *Modern Escheat*, *supra* note 3, at 1331 (state custodial statutes are not true escheat statutes because they do not give title to unclaimed property). For purposes of this discussion, "escheat" includes custodial control as well as transfer of title to unclaimed property.

⁵ See *infra* notes 68–72 and accompanying text for a discussion of the acknowledged authority for state escheat.

collected within federal agencies.⁶ Although the federal government's conduct is not technically "escheat" under traditional law, it functions essentially the same.⁷ With billions of dollars in the balance, there is a growing urgency on the part of the states to assert their sovereign rights in a fiscal battle over abandoned property in federal custody.⁸ Absent controlling federal law, or common law, it remains unclear who has the better right to claim these assets for the missing owners.⁹

The early American colonies initially adopted the principles of unclaimed property law from English common law.¹⁰ Under English law, the doctrine of escheat allowed the English Crown to take title to unowned real property that usually consisted of land belonging to a tenant who had died intestate, without legal heirs.¹¹ Similarly, the English doctrine of *bona vacantia* operated to empower the Crown to claim unowned personal property.¹² In the United States, the English escheat and *bona vacantia* doctrines were merged into a single escheat doctrine, granting states sovereign rights to abandoned property.¹³ Gradually, the states codified the doctrine to cover all types of intangible property that is presumed abandoned.¹⁴

⁶ U.S. GEN. ACCOUNTING OFFICE, UNCLAIMED MONEY: PROPOSALS FOR TRANSFERRING UNCLAIMED FUNDS TO STATES 4 (May 1989) [hereinafter GAO REPORT] (approximately \$1.5 billion in unclaimed property collected by several federal agencies); Telephone Interview with Andy Montgomery, Assistant Director of Public Affairs, Financial Management Service (June 19, 1992) (the Financial Management Service assessed the value of pre-1989 unclaimed federal treasury checks at \$5 billion).

⁷ See, e.g., Note, *Escheat of Corporate Dividends*, 65 HARV. L. REV. 1408, 1413 (1952) (the federal government exercises powers very similar to escheat); *Modern Escheat*, *supra* note 3, at 1336-37 (in several instances the federal government has exercised power similar to escheat).

⁸ See, e.g., *Arizona v. Bowsher*, 935 F.2d 332, 334 (D.C. Cir.), *cert. denied*, *Alabama v. Bowsher*, 112 S. Ct. 584 (1991) (23 states attempted to claim custodial escheat of unclaimed funds in federal custody). The states have also supported legislation that would transfer unclaimed money collected by federal agencies to the states. S. 1612, 100th Cong., 1st Sess. § 2 (1987).

⁹ See *infra* notes 229-367 and accompanying text for a discussion of the states' and the federal government's right to claim the assets.

¹⁰ See Ray H. Garrison, *Escheats, Abandoned Property Acts, and Their Revenue Aspects*, 35 KY. L.J. 302, 303-04 (1947).

¹¹ See *id.* at 302; *Modern Escheat*, *supra* note 3, at 1319-20.

¹² *Modern Escheat*, *supra* note 3, at 1326.

¹³ *Id.* at 1327; Prewitt, *supra* note 4, at 493.

¹⁴ ALA. CODE §§ 35-12-1 to -50 (1991); ALASKA STAT. §§ 34.45.010-.780 (1990 & Supp. 1991); ARIZ. REV. STAT. ANN. §§ 44-301 to -340 (1987 & Supp. 1991); ARK. CODE ANN. §§ 18-28-201 to -232 (Michie 1987 & Supp. 1991); CAL. CIV. PROC. CODE §§ 1500-1599 (West 1982 & Supp. 1992); COLO. REV. STAT. §§ 38-13-101 to -134 (1987); CONN. GEN. STAT. ANN. §§ 3-56 to 3-76 (West 1988 & Supp. 1991); DEL. CODE ANN. tit. 12, §§ 1130-1224 (1987 & Supp. 1990); D.C. CODE ANN. §§ 42-201 to -242 (1981 & Supp. 1991); FLA. STAT. ANN. §§ 717.001-

Unlike their early English counterparts, almost all modern American escheat statutes are custodial in nature.¹⁵ While states have possession of unclaimed property, the true owner never loses title to the property and thus can successfully reclaim it at any time.¹⁶ Most states have adopted unclaimed property laws that are modeled after the 1954 Uniform Disposition of Unclaimed Property Act¹⁷ ("1954 Uniform Act"), its 1966 revision¹⁸ ("1966 Uniform Revision") or the 1981 Uniform Unclaimed Property Act¹⁹ ("1981 Uniform Act").²⁰ The goal of the proposed uniform legislation was to settle interstate controversies over the right to abandoned intangible property that could not be readily identified with any one state.²¹

.1401 (West 1988 & Supp. 1992); GA. CODE ANN. §§ 44-12-190 to -243 (Michie 1982 & Supp. 1991); HAW. REV. STAT. §§ 523A-1 to -41 (Supp. 1984); IDAHO CODE §§ 14-501 to -543 (1979 & Supp. 1991); ILL. ANN. STAT. ch. 141, ¶¶ 101-146 (Smith-Hurd 1986 & Supp. 1991); IND. CODE ANN. §§ 32-9-1-1 to -45 (Burns 1980 & Supp. 1991); IOWA CODE ANN. §§ 556.1-.36 (West Supp. 1991); KAN. STAT. ANN. §§ 58-3901 to -3932 (1983); KY. REV. STAT. ANN. §§ 393.010-.990 (Michie/Bobbs-Merrill 1984 & Supp. 1990); LA. REV. STAT. ANN. §§ 9:151 to 9:188 (West 1991 & Supp. 1992); ME. REV. STAT. ANN. tit. 33, §§ 1801-1875 (West Supp. 1991); MD. COM. LAW. II CODE ANN. §§ 17-101 to -326 (1990 & Supp. 1991); MASS. GEN. L. ch. 200A, §§ 1-17 (1981 & Supp. 1992); MICH. STAT. ANN. §§ 18.733(1)-734(4) (Callaghan 1986); MINN. STAT. ANN. §§ 345.31-.60 (West 1990); MISS. CODE ANN. §§ 89-12-1 to -57 (Supp. 1990); MO. ANN. STAT. §§ 447.500-.595 (Vernon 1986 & Supp. 1992); MONT. CODE ANN. §§ 70-9-101 to -316 (1991); NEB. REV. STAT. §§ 69-1301 to -1332 (1990); NEV. REV. STAT. §§ 120A.010-.450 (1986 & Supp. 1991); N.H. REV. STAT. ANN. §§ 471-C:1 to -C:43 (1983 & Supp. 1990); N.J. STAT. ANN. §§ 46:30B-1 to -108 (West 1987); N.M. STAT. ANN. §§ 7-8-1 to -34 (Michie 1986 & Supp. 1991); N.Y. ABAND. PROP. LAW §§ 101-1500 (McKinney 1991 & Supp. 1992); N.C. GEN. STAT. §§ 116B-1 to -49 (1990); N.D. CENT. CODE §§ 47-30.1-01 to -38 (1978 & Supp. 1991); OHIO REV. CODE ANN. §§ 169.01-.99 (Baldwin 1991); OKLA. STAT. ANN. tit. 60, §§ 651.1 to 685.1 (West 1971 & Supp. 1992); OR. REV. STAT. §§ 98.302-.436 (1987); PA. STAT. ANN. tit. 72, §§ 1301.1-.29 (1991 Supp.); R.I. GEN. LAWS §§ 33-21.1-1 to -41 (1984 & Supp. 1991); S.C. CODE ANN. §§ 27-18-10 to -400 (Law. Co-op. 1991); S.D. CODIFIED LAWS ANN. §§ 43-41A-1 to -57 (1983 & Supp. 1991); TENN. CODE ANN. §§ 66-29-101 to -204 (1982 & Supp. 1991); TEX. PROP. CODE ANN. §§ 72.001 to 75.102 (West 1985 & Supp. 1992); UTAH CODE ANN. §§ 78-44-1 to -40 (1992); VT. STAT. ANN. tit. 27 §§ 1208-1238 (1989); VA. CODE ANN. §§ 55-210.1 to 210.30 (Michie 1986 & Supp. 1991); WASH. REV. CODE ANN. §§ 63.24.010-.170 (West 1966 & Supp. 1992); W. VA. CODE §§ 36-8-1 to -31 (1985 & Supp. 1991); WIS. STAT. ANN. §§ 177.01-.40 (West Supp. 1991); WYO. STAT. §§ 26-30-101 to -104 (1991).

¹⁵ McThenia & Epstein, *supra* note 1, at 1432 (most statutes are purely custodial in nature); *Modern Escheat*, *supra* note 3, at 1330 (most abandoned property statutes are protective and custodial). There are, however, several states that continue to have provisions for taking title to unclaimed property. *See, e.g.*, IND. CODE ANN. § 32-9-1-36 (Burns Supp. 1991); N.H. REV. STAT. ANN. § 471-C:30 (Supp. 1990).

¹⁶ McThenia & Epstein, *supra* note 1, at 1432-33.

¹⁷ 1954 UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, 8A U.L.A. 215 (1966).

¹⁸ UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, 8A U.L.A. 135 (1966).

¹⁹ UNIFORM UNCLAIMED PROPERTY ACT, 8A U.L.A. 617 (1981).

²⁰ I EPSTEIN ET AL., *supra* note 3, § 1.06[1].

²¹ *See* 1954 UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, 8A U.L.A. 215, 215-

Subsequent judicial enforcement of state unclaimed property legislation has reinforced the states' authority and power to regulate tangible and intangible unclaimed property.²²

Despite a legislatively and judicially recognized state right to escheat,²³ the federal government has claimed rights similar to escheat with respect to certain property in its custody.²⁴ Claiming preemptive federal law established under federal war powers, federal agencies have removed abandoned veterans' property from state control.²⁵ Fiscally even more significant, several federal agencies also claim that federal custody statutes preempt state unclaimed property laws.²⁶ Thus, the federal government, under the guise of preemption, has taken custody of billions of dollars worth of assets in abandoned property that state residents formerly owned.²⁷

This note focuses on the conflicts that have arisen between federal agencies and the states over federal "carving out" of custodial unclaimed property rights. Section II sets forth the English historical roots of modern American unclaimed property law.²⁸ Section III discusses the development of state legislation and the corresponding judicial decisions that influenced the development of

17 (1966) (prefatory note discusses multiple state claims to some intangible property); UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, 8A U.L.A. 135, 137-38 (1966) (prefatory note discusses the problem of intangible property having multiple locations); UNIFORM UNCLAIMED PROPERTY ACT, 8A U.L.A. 617, 617 (1981) (prefatory note discusses the rule that will be followed to resolve the problem of multiple state claims to intangible property); see also *Survey*, *supra* note 3, at 87 (Uniform Act was necessary because of multiple state claims to intangible property).

²² See R. Perry Sentell, Jr., *Escheat, Unclaimed Property, and the Supreme Court*, 17 CASE W. RES. L. REV. 50, 82 (1965) (survey of United States Supreme Court rulings on state unclaimed property legislation indicates that the Court has been very supportive and permissive of state legislation).

²³ See *infra* notes 67-72 and accompanying text for a discussion of the development of states' rights to escheat.

²⁴ See, e.g., 26 U.S.C. § 6408 (1988) (providing that state escheat laws do not apply to unclaimed refunds of federal tax); 38 U.S.C. § 5200 (1988), amended by 38 U.S.C.A. § 8520 (West 1991) (providing that title to veterans' property vests in the United States if they die intestate without heirs in a veterans' hospital).

²⁵ 38 U.S.C. § 5200 (1988), amended by 38 U.S.C.A. § 8520 (West 1991). See *infra* note 299 for a discussion of congressional war powers granted by the United States Constitution.

²⁶ See *Arizona v. Bowsher*, 935 F.2d 332, 334-36 (D.C. Cir.), cert. denied, 112 S. Ct. 584 (1991) (U.S. Treasurer claimed that unclaimed property collected by various federal agencies and transferred to the U.S. Treasury was not subject to state unclaimed property laws).

²⁷ GAO REPORT, *supra* note 6, at 4 (information from six federal agencies indicated that from 1982 to 1987 they had accumulated about \$1.5 billion in payable claims); Telephone Interview with Andy Montgomery, *supra* note 6 (the Financial Management Service estimated that the pre-1989 unclaimed treasury checks totalled \$5 billion).

²⁸ See *infra* notes 33-119 and accompanying text.

the Uniform Acts.²⁹ Section IV outlines federal attempts to carve out from state authority certain types of unclaimed property.³⁰ Section IV also examines the current controversy between the federal and state governments with respect to rights to the custody of unclaimed property in federal control.³¹ Finally, section V discusses various issues raised by states' claims to the property held in federal custody, and concludes that the states have more legitimate rights to unclaimed property in federal control than does the federal government.³²

II. THE EARLY ENGLISH DOCTRINES OF ESCHEAT AND *BONA VACANTIA*: ROOTS OF AMERICAN LAW

The states, not the federal government, assumed the sovereign rights of the Crown.³³ Thus, the English common law rights of escheat and *bona vacantia* that provided for the disposition of unclaimed property were left with the states.³⁴ These doctrines have been modified by the states; under most state law, when intangible property has been unclaimed for a prescribed period of time, there is a presumption of abandonment and the state may claim custody of the property.³⁵

A. *American Interpretation of an English Tradition*

Unclaimed property legislation has its roots in the English common law doctrines of escheat and *bona vacantia*.³⁶ Under the English common law doctrine of escheat, unowned real property that failed to pass under a will when a tenant died intestate automatically reverted to the tenant's lord.³⁷ Generally, the companion doctrine of *bona vacantia* dictated that the English Crown could claim unowned personal property.³⁸ The personal property often con-

²⁹ See *infra* notes 120-228 and accompanying text.

³⁰ See *infra* notes 229-348 and accompanying text.

³¹ See *infra* notes 349-71 and accompanying text.

³² See *infra* notes 372-96 and accompanying text.

³³ McThenia & Epstein, *supra* note 1, at 1431.

³⁴ *Modern Escheat*, *supra* note 3, at 1336.

³⁵ See 1954 UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, 8A U.L.A. 215 (1966) (sections two through nine of the Act describe the time period property is to remain unclaimed before there is a presumption of abandonment); *Modern Escheat*, *supra* note 3, at 1330 (abandonment is presumed when the owner cannot be located).

³⁶ Prewitt, *supra* note 4, at 493.

³⁷ Garrison, *supra* note 10, at 302.

³⁸ *Id.* at 303.

sisted of personalty remaining in an estate when the real property was escheated.³⁹ However, *bona vacantia* also applied to personal property held in a failed trust and personal property that remained after the dissolution of a corporation.⁴⁰

The purpose behind the English common law doctrine of escheat was to ensure feudal tenures.⁴¹ The reversion of real property to the feudal lord ensured that if the tenant or his bloodline no longer provided services to the lord, the land would return to the lord to be reconveyed.⁴² Nevertheless, with the disintegration of the feudal structure, the bloodline rationale became obsolete and escheat came to be considered a royal prerogative.⁴³ The Crown's claim to unowned personal property under the doctrine of *bona vacantia* was based on the assumption that the Crown had a more equitable right to the unclaimed property than a stranger.⁴⁴ The Crown's right to *bona vacantia* was generally operative only when there was no owner, not when the owner was merely unknown.⁴⁵

The American states adopted the broad principles of English common law escheat and *bona vacantia* under a unified doctrine of escheat.⁴⁶ In the early 1800s, American escheat was like English escheat and applied only to real property of a citizen who died intestate without legal heirs.⁴⁷ States attempting to claim title to unowned personal and intangible property using the English doctrine of *bona vacantia* were generally unsuccessful.⁴⁸

For example, in the 1939 case of *Illinois Bell Telephone Co. v. Slattery*, the United States Court of Appeals for the Seventh Circuit stated that the state of Illinois could not claim abandoned utility

³⁹ *Modern Escheat*, *supra* note 3, at 1327.

⁴⁰ *Id.* at 1327-28; Comment, *Bona Vacantia Resurrected*, 34 ILL. L. REV. OF NW. U. 171, 178 (1939).

⁴¹ See *Modern Escheat*, *supra* note 3, at 1319-20.

⁴² *Id.*

⁴³ *Id.* at 1320.

⁴⁴ *Id.* at 1326-27.

⁴⁵ *Id.* at 1326.

⁴⁶ See *State v. Standard Oil Co.*, 74 A.2d 565, 572 (N.J. 1950) (doctrine of escheat was eventually extended to include personal property, tangible and intangible); Prewitt, *supra* note 4, at 493.

⁴⁷ I EPSTEIN ET AL., *supra* note 3, § 1.04[3].

⁴⁸ See, e.g., *Illinois Bell Tel. Co. v. Slattery*, 102 F.2d 58, 68 (7th Cir. 1939) (reasoning that the doctrine of *bona vacantia* was too indefinite to be a rule of law in Illinois); cf., *New Jersey v. Elsinore Shore Assoc.*, 592 A.2d 604, 606 (N.J. Super. Ct. App. Div. 1991) (quoting a New Jersey statute that states that the common law doctrine of *bona vacantia* applies to unclaimed property not specifically covered under other unclaimed property laws); see generally *Bona Vacantia Resurrected*, *supra* note 40 (commenting on *Slattery*).

refunds under the doctrine of *bona vacantia*.⁴⁹ In *Slattery*, the telephone company had overcharged for services and had been ordered to refund the money, but not all the refunds were claimed.⁵⁰ The State of Illinois claimed the remaining funds.⁵¹ Although the court ruled against the State on other grounds, it reasoned that the common law doctrine of *bona vacantia* was of such an uncertain and indefinite nature that the court did not feel justified in declaring it a rule of Illinois law.⁵²

Subsequently, most states enacted legislation to cover the disposition of intangible property based on the doctrine of escheat, rather than *bona vacantia*.⁵³ Thus, the English principles of escheat and *bona vacantia* merged under the doctrine of escheat rather than continuing as separate doctrines.⁵⁴ Modern American unclaimed property legislation differs from its English roots in that under United States law, it is not necessary for escheated property to have been passed intestate.⁵⁵ Modern statutes contain a presumption of abandonment; thus, property becomes deliverable to the custody of the state after it has remained unclaimed for a period of time, usually five to fifteen years.⁵⁶ For instance, the state can often claim unclaimed checking account balances after five years while traveler's checks must remain unclaimed for fifteen years.⁵⁷

Moreover, modern American escheat legislation, unlike early English common law, is primarily a custodial claim rather than an absolute taking of title.⁵⁸ Under English escheat and *bona vacantia* doctrines, absolute title reverted to the Crown when the property was escheated or claimed.⁵⁹ In contrast, although several unclaimed property statutes are still called escheat acts, today very few statutes allow for the ultimate transfer of title to the abandoned property to the state.⁶⁰ Although those few states retain the right to initiate

⁴⁹ 102 F.2d at 68.

⁵⁰ *Id.* at 60-62.

⁵¹ *Id.* at 62.

⁵² *Id.* at 68.

⁵³ See 1 EPSTEIN ET AL., *supra* note 3, § 1.04[2] & n.9.

⁵⁴ *Modern Escheat*, *supra* note 3, at 1327; Prewitt, *supra* note 4, at 493.

⁵⁵ See Sentell, *supra* note 22, at 50-51.

⁵⁶ See, e.g., UNIFORM UNCLAIMED PROPERTY ACT, 8A U.L.A. 617, 622, 635 (1981) (most intangible property is presumed abandoned after five years of remaining unclaimed, whereas traveler's checks are presumed abandoned after 15 years).

⁵⁷ *Id.* at 622, 630, 635.

⁵⁸ McThenia & Epstein, *supra* note 1, at 1432.

⁵⁹ *Modern Escheat*, *supra* note 3, at 1320, 1326.

⁶⁰ E.g., IND. CODE ANN. § 32-9-1-36 (Burns Supp. 1991); N.H. REV. STAT. ANN. 471-

proceedings to foreclose and acquire title, most states act only as custodians and hold the property until the original owners or their heirs appear to claim the property.⁶¹ Thus, the states are actually claiming an obligation, not the property itself.⁶²

Commentators have asserted that there are several advantages to custodial escheat laws as opposed to absolute escheat laws.⁶³ Custodial statutes, they assert, are easier to administer because there is no need to obtain a court order foreclosing title to the property.⁶⁴ In addition, although the states must maintain permanent records of all property, state administrators have argued that the procedural requirements for custodial escheat are simpler.⁶⁵

In sum, American states' unclaimed property statutes do not completely parallel earlier English escheat and *bona vacantia* doctrines. Unlike their historical predecessors, American state statutes are custodial and do not result in a transfer of title. They are based on abandonment rather than intestate succession and they apply primarily to intangible property. Despite these differences, however, the American laws still reflect the English presumption that the state, rather than the fortuitous individual "holder" of the property, has a more equitable claim to unclaimed property.⁶⁶

B. *The States Assumed the Sovereign Escheat Powers*

Absent a royal family, the states assumed the Crown's claims of sovereignty and the power to escheat.⁶⁷ Thus, the individual states, rather than the federal government, asserted the right to escheat abandoned property.⁶⁸ Some commentators and courts have stated that this early assertion of authority was based on the state assumption of the sovereign power of the people.⁶⁹ Other courts reasoned that traditionally, the states possess the right to regulate succession

C:30 (Supp. 1990). It has been suggested, however, that these absolute escheat provisions are rarely used. 1 EPSTEIN ET AL., *supra* note 3, § 1.06[1].

⁶¹ McThenia & Epstein, *supra* note 1, at 1432.

⁶² See 1 EPSTEIN ET AL., *supra* note 3, § 9.02[1].

⁶³ See *id.* § 1.06[2].

⁶⁴ See *id.* § 1.06[1].

⁶⁵ 1954 UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, 8A U.L.A. 215, 216 (1966).

⁶⁶ See *Modern Escheat*, *supra* note 3, at 1326-27.

⁶⁷ McThenia & Epstein, *supra* note 1, at 1431; *Modern Escheat*, *supra* note 3, at 1336.

⁶⁸ *Modern Escheat*, *supra* note 3, at 1336.

⁶⁹ McThenia & Epstein, *supra* note 1, at 1431; see also *Germantown Trust Co. v. Powell*, 108 A.2d 441, 442 (1919) (the state, by virtue of its sovereign power, may take charge of property that is abandoned, unclaimed for a period of time, or that has no known owner).

of property.⁷⁰ Yet other courts have termed escheat a state police power and concluded that under the Tenth Amendment of the United States Constitution, escheat power is reserved to the states.⁷¹ Although courts and commentators give a number of rationales for state escheat, it is widely accepted that the regulation of the disposition of unclaimed property is a state right.⁷²

Beginning in the late 1800s, the United States Supreme Court affirmed the states' historic right to regulate both real and personal unclaimed property.⁷³ For example, in 1896, in one of the early escheat cases, *Hamilton v. Brown*, the Court upheld a Texas escheat statute that vested title to real property in the state when the owner died intestate.⁷⁴ Under Texas law, title to a parcel of land had been vested in the State of Texas when a citizen died without known heirs.⁷⁵ In *Hamilton*, the State had sold the property at auction.⁷⁶ Later, persons claiming to be heirs appeared and challenged the purchaser's title.⁷⁷

The United States Supreme Court held that the Texas statute was constitutional.⁷⁸ The *Hamilton* Court reasoned that in the United States, when title to land fails for want of heirs, it escheats to the state.⁷⁹ The Court further reasoned that the statutory notice requirements provided the defendants with due process.⁸⁰ Thus, the *Hamilton* Court held that title had properly vested in the State.⁸¹

Likewise, in 1905, in *Cunnius v. Reading School District*, the United States Supreme Court supported state administration of

⁷⁰ *E.g.*, *United States v. Oregon*, 366 U.S. 643, 649 (1961) (Douglas, J., dissenting) (the power to regulate succession of property is a traditional state right); *Greenough v. People's Sav. Bank*, 94 A. 706, 709 (R.I. 1915) (the power of a state to pass an unclaimed property law rests on its right to provide for the care and custody of property).

⁷¹ *See, e.g.*, *United States v. Alabama*, 434 F. Supp. 64, 67 (M.D. Ala. 1977) (control over abandoned property is traditionally left to the states under their police power); *In re Montana Pac. Oil & Gas Co.*, 614 P.2d 1045, 1047 (Mont. 1980) (Montana's unclaimed property law is a valid exercise of the sovereign police power to protect all property within the state).

⁷² *See, e.g.*, *Texas v. New Jersey*, 379 U.S. 674, 677 (1965) (it is unquestioned that the state where the property is located may escheat tangible unclaimed property); *Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541, 546 (1948) (the state may more properly be custodian and beneficiary of abandoned property than any person).

⁷³ *See Sentell, supra* note 22, at 52-82 (survey of all Supreme Court decisions on unclaimed property up to 1965).

⁷⁴ 161 U.S. 256, 264-65, 274 (1896).

⁷⁵ *Id.* at 262.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 274.

⁷⁹ *Id.* at 263.

⁸⁰ *Id.* at 274.

⁸¹ *Id.*

unclaimed intangible personal property.⁸² The female plaintiff in *Cunnius* had been entitled through dower rights to an annual interest payment from the defendant, but she had not been located for over nine years.⁸³ Pennsylvania law provided that the state could administer the estate of persons who had been previously domiciled in Pennsylvania, but who had been absent without contact for seven or more years.⁸⁴ The statute required publication and a court hearing and then allowed for a presumption of death of the owner of the estate.⁸⁵ In *Cunnius*, the plaintiff reappeared after nine years and sued for the previously owed payments, claiming that the Pennsylvania statute was unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment.⁸⁶

The *Cunnius* Court reasoned that the right to regulate estates of absent owners is a necessary power of government and that the statute was an appropriate exercise of Pennsylvania's legislative power.⁸⁷ The Court further reasoned that the procedural requirements provided sufficient protection of the absent owner's due process rights.⁸⁸ Thus, the *Cunnius* Court held that the Pennsylvania statute that provided for the administration of estates of long absent persons was valid and did not deprive the missing person of his or her property without due process of law.⁸⁹

Although both *Hamilton* and *Cunnius* support the states' right to escheat from individuals, they did not address the states' rights as against institutional entities holding the unclaimed property (the "holder"). In 1910, the United States Supreme Court addressed institutional entities in *Provident Institution for Savings v. Malone* and upheld a Massachusetts statute that provided for payment to the state of bank deposits that had been inactive for a period of thirty years.⁹⁰ Citing *Cunnius*, the *Malone* Court reasoned that the states had an undoubted right and power to legislate in the area of unclaimed property.⁹¹ The Court reasoned that because the Massachusetts statute was custodial and did not escheat title to the state, it protected the depositors and was merely a transference of custody

⁸² *Cunnius v. Reading Sch. Dist.* No. 165, 198 U.S. 458, 477 (1905).

⁸³ *Id.* at 460-61.

⁸⁴ *Id.* at 458-59.

⁸⁵ *Id.* at 459.

⁸⁶ *Id.* at 462, 469.

⁸⁷ *Id.* at 469.

⁸⁸ *Id.* at 477.

⁸⁹ *See id.*

⁹⁰ 221 U.S. 660, 661-62, 666 (1911).

⁹¹ *Id.* at 664.

from the bank to the state.⁹² Consequently, the *Malone* Court held that the Massachusetts statute was valid and constitutional.⁹³ Thus, *Malone*, *Cunnius* and *Hamilton* established the constitutionality of state escheat legislation regulating unclaimed real and personal property.

Commentators have asserted a number of rationales that support state collection and custody of unclaimed property.⁹⁴ Commentators advocating unclaimed property legislation have often used the "windfall" rationale: an individual holder of unclaimed property should not get a windfall simply because the owner never appears; rather, the windfall should benefit society as a whole.⁹⁵ The commissioners who drafted the first Uniform Disposition of Unclaimed Property Act stated that one of the main purposes for state unclaimed property legislation was to prevent an unfair windfall to fortuitous holders of property.⁹⁶

In addition, commentators have supported state custodial escheat as important for the protection of the missing owner's rights.⁹⁷ One commentator argues that because state unclaimed property acts generally require the state to make efforts to locate the missing owner, there is a higher likelihood that the property will be returned to the owner than if the holder could retain the property indefinitely.⁹⁸ In addition, at least one commentator argues that the owner is better protected, because the state is a safer custodian than most holders as its taxing power ensures repayment in perpetuity to the rightful owner.⁹⁹ The National Association of Unclaimed Property Administrators supports this argument with statistics showing that in 1991, the state returned previously unclaimed property valued at approximately \$230 million to owners.¹⁰⁰

In addition, the commissioners drafting the 1954 Uniform Act argued that state control of unclaimed property benefits the non-owner holder because it relieves the holder of responsibility and

⁹² See *id.* at 664-66.

⁹³ *Id.* at 666.

⁹⁴ See, e.g., 1 EPSTEIN ET AL., *supra* note 3, § 1.07; Note, *Modern Rationales of Escheat*, 112 U. PA. L. REV. 95, 96-103 (1963).

⁹⁵ See *Modern Rationales*, *supra* note 94, at 101-02.

⁹⁶ 1954 UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, 8A U.L.A. 215, 217 (1966).

⁹⁷ See, e.g., 1 EPSTEIN ET AL., *supra* note 3, § 1.06[2]; *Modern Rationales*, *supra* note 94, at 97.

⁹⁸ See 1 EPSTEIN ET AL., *supra* note 3, § 1.06[2].

⁹⁹ See, e.g., *Modern Rationales*, *supra* note 94, at 98 (owners are protected because of the state's taxing power).

¹⁰⁰ Telephone interview with Patty White, *supra* note 1.

liability related to accounting for the unclaimed property.¹⁰¹ They reasoned that the issue of liability had become especially critical in light of potential multistate claims to the same intangible property.¹⁰² By taking custody of the property, the state also takes over the responsibility of handling subsequent claims by other states or the owner.¹⁰³ In addition, the state takes on the holder's burden of maintaining permanent records on the abandoned property.¹⁰⁴

Finally, some commentators cite the revenue potential of unclaimed funds as the significant motivation for supporting state escheat rights.¹⁰⁵ One commentator suggests that since colonial times, state escheat has been a source of revenue whenever persons died intestate without heirs.¹⁰⁶ Escheat based on intestate death without heirs became less significant as the requirements for legal heirs became less restrictive.¹⁰⁷ Many commentators agree, however, that state unclaimed property statutes have become fiscally significant.¹⁰⁸ The commissioners drafting the 1954 Uniform Act noted that the actual possibility of owners claiming their abandoned property is not great.¹⁰⁹ Thus, the collection of abandoned property, such as bank accounts, insurance proceeds and stock certificates provides the state with a significant amount of non-tax revenue.¹¹⁰

Most states acknowledge that there is significant revenue earned under unclaimed property statutes.¹¹¹ In 1991, the fifty states collected unclaimed property valued at over \$1.2 billion.¹¹²

¹⁰¹ 1954 UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, 8A U.L.A. 216, 217 (1966); see also *State v. First Nat'l Bank*, 313 N.W.2d 390, 393 (Minn. 1981) (one of the purposes of the Minnesota unclaimed property act was to relieve holders of the annoyance, expense and liability of keeping such property); *In re Monks Club, Inc. v. State*, 394 P.2d 804, 806 (Wash. 1964) (the purpose of the 1954 Uniform Act was for state custody to relieve the holder from annoyance, expense and liability).

¹⁰² See 1954 UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, 8A U.L.A. 216, 217 (1966).

¹⁰³ See *id.* at 265.

¹⁰⁴ *Id.* at 216.

¹⁰⁵ See, e.g., McThenia & Epstein, *supra* note 1, at 1431-32; Prewitt, *supra* note 4, at 494-95.

¹⁰⁶ See Garrison, *supra* note 10, at 314.

¹⁰⁷ *Modern Escheat*, *supra* note 3, at 1321. Once illegitimate children and aliens were allowed to inherit, less property was subject to escheat. *Id.*

¹⁰⁸ See, e.g., 1 EPSTEIN ET AL., *supra* note 3, § 1.07; Garrison, *supra* note 10, at 314; McThenia & Epstein, *supra* note 1, at 1431-32; *Modern Rationales*, *supra* note 94, at 102-03; Prewitt, *supra* note 4, at 494-95.

¹⁰⁹ 1954 UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, 8A U.L.A. 215, 216 (1966).

¹¹⁰ *Id.* at 216-17.

¹¹¹ Telephone Interview with Patty White, *supra* note 1.

¹¹² *Id.* The National Association of Unclaimed Property Administrators compiles annual figures on state collection of unclaimed property. *Id.*

In addition, commentators suggest that as states become more fiscally strapped, and as many go deeply into debt, the non-tax source of revenue from collecting unclaimed property becomes increasingly important.¹¹³

In sum, modern state unclaimed property statutes were originally adopted from English common law, with numerous significant modifications.¹¹⁴ Unlike English law, United States escheat provides for a presumption of abandonment and statutes are generally custodial, covering primarily intangible property.¹¹⁵ The states assumed the sovereign rights of the English Crown, including escheat powers.¹¹⁶ The United States Supreme Court in *Hamilton, Cunnius* and *Malone* affirmed this Americanized escheat after the turn of the century.¹¹⁷ Advocates of state custodial escheat have concluded that state unclaimed property statutes are in society's, the owner's, the state's and the holder's best interests.¹¹⁸ These commentators conclude that the owner can appear and successfully reclaim property, the holder is relieved of liability and the state gets a significant amount of non-tax revenue, thus benefiting society.¹¹⁹

III. THE DEVELOPMENT OF ESCHEAT STATUTES: JURISDICTIONAL ISSUES AND A NEED FOR UNIFORMITY

Although as adopted from English common law, escheat power flowed from the Crown to state legislatures, the transfer of power was not without problems.¹²⁰ In the absence of a uniform approach, commentators note that early state escheat laws were often haphazard.¹²¹ As more states enacted comprehensive unclaimed property laws, abandoned intangible property became a source of conflict among various claiming states because it was not clearly located in any one state.¹²² These conflicts led to the drafting of uniform state legislation and several United States Supreme Court decisions.¹²³

¹¹³ E.g., McThenia & Epstein, *supra* note 1, at 1431-32; Prewitt, *supra* note 4, at 510.

¹¹⁴ See *supra* notes 36-65 and accompanying text.

¹¹⁵ See *supra* notes 55-62 and accompanying text.

¹¹⁶ See *supra* notes 67-72 and accompanying text.

¹¹⁷ See *supra* notes 73-93 and accompanying text.

¹¹⁸ See *supra* notes 94-113 and accompanying text.

¹¹⁹ See *supra* notes 97-113 and accompanying text.

¹²⁰ See Garrison, *supra* note 10, at 302-04.

¹²¹ 1954 UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, 8A U.L.A. 215, 216 (1966) (commissioners commented that statutory provisions were diverse and often not well formulated).

¹²² Survey, *supra* note 3, at 87.

¹²³ *Id.*

In the early 1900s, unclaimed property legislation was rarely comprehensive and often applied only to selective types of property.¹²⁴ For example, in 1872, Pennsylvania enacted a statute to claim abandoned bank deposits and in 1934, New York enacted legislation to take unclaimed utility refunds.¹²⁵ In 1940, Kentucky provided one of the first comprehensive plans for the disposition of many types of unclaimed property, such as bank deposits, utility deposits, money orders, stocks and dividends.¹²⁶ Kentucky's early state unclaimed property statutes established a statutory time period that property had to be unclaimed before there was a presumption of abandonment.¹²⁷ It also established its own requirements for trying to locate missing owners, such as publication in newspapers.¹²⁸ With the growing popularity of state unclaimed property statutes as a new source of state revenue in the 1950s, uniformity of such laws became a necessity.¹²⁹ The use of intangible property, such as stock certificates and money orders, made it unclear as to which state's statute controlled claims for abandoned property.¹³⁰

For example, if unclaimed intangible property, such as corporate stock, is abandoned, there are several states that might attempt to claim custody based on jurisdiction over the corporate issuer or holder of the property.¹³¹ The stock could be covered under the law of the state where the company was incorporated, or the state where the corporate headquarters was located.¹³² In addition, any state that was doing significant business with the corporation might claim the property.¹³³

The conflict among the states over competing escheat claims quickly became a widely litigated issue. In 1948, for example, in *Connecticut Mutual Life Insurance Co. v. Moore*, the United States Supreme Court considered the claim of nine insurance companies, all located outside of the State of New York, that custodial New

¹²⁴ See Garrison, *supra* note 10, at 307.

¹²⁵ *Id.* at 306.

¹²⁶ *Id.* at 308.

¹²⁷ *Id.* at 309.

¹²⁸ *Id.*

¹²⁹ See, e.g., Survey, *supra* note 3, at 87.

¹³⁰ See, e.g., McThenia & Epstein, *supra* note 1, at 1434; Survey, *supra* note 3, at 85. Because intangible property, such as stock certificates, is property that has no intrinsic value in and of itself, but is merely representative of value, it does not have a clear location. Survey, *supra* note 3, at 85.

¹³¹ McThenia & Epstein, *supra* note 1, at 1434.

¹³² *Id.*

¹³³ *Id.* at 1435.

York escheat laws were invalid as applied to unclaimed policy proceeds that they owed to New York residents.¹³⁴ Because no other state was party to the suit, the Court did not address competing state claims to the same property and held that the New York state escheat law was valid.¹³⁵ The plaintiffs in *Moore* were nonresident corporations that had claimed that enforcement of New York escheat statutes violated due process because New York did not have jurisdiction over the assets of out-of-state companies.¹³⁶ They further alleged that turning over the unclaimed policy proceeds to the State would impair their insurance contracts because the State did not have to fulfill the policy owners' obligations.¹³⁷

The *Moore* Court reasoned that the State was the best custodian and beneficiary of abandoned property.¹³⁸ In addition, the Court reasoned that the State was acting as a conservator and was not party to a contract between the policyholder and the insurance company.¹³⁹ The Court also noted that the contacts between the insurance companies and the State of New York as a result of selling policies to New York citizens were a significant fact when determining jurisdiction over intangible property.¹⁴⁰ Thus, concluding that there was no impairment of contract, and that New York had jurisdiction over the insurance companies through their contact with New York, the *Moore* Court held that the New York statute was valid.¹⁴¹

In his dissenting opinion to *Moore*, Justice Jackson argued that the Court failed to address competing claims by other states not party to the suit.¹⁴² He argued that the majority ruling that allowed jurisdiction when there was "sufficient contact" between a holder and a state was too vague.¹⁴³ He reasoned that the Court should not have made a declaratory judgment but rather should have

¹³⁴ 333 U.S. 541, 542 (1948). The Court noted that section 700 of article VII of the New York Abandoned Property Law, entitled "Unclaimed Life Insurance Funds," included foreign life insurance corporations and provided that most life insurance policies were to be presumed abandoned if the insured or the beneficiaries had not claimed the value of the policy within seven years after the policy reached its limiting age. *Id.* at 542-43.

¹³⁵ *Id.* at 551.

¹³⁶ *Id.* at 544-45.

¹³⁷ *Id.* at 545-46.

¹³⁸ *Id.* at 546.

¹³⁹ *Id.* at 547. Accordingly, the state was not required to satisfy certain policy terms. *Id.*

¹⁴⁰ *Id.* at 548-49.

¹⁴¹ *Id.* at 551.

¹⁴² *Id.* at 557 (Jackson, J., dissenting).

¹⁴³ *Id.* at 557-58 (Jackson, J., dissenting).

waited until there was a case where multiple states were party to the suit.¹⁴⁴

A few years later, in 1951, the United States Supreme Court again addressed a state escheat conflict; however, the Court did not settle the issue of competing state claims to unclaimed intangible property.¹⁴⁵ Rather, in *Standard Oil Co. v. New Jersey*, the Court upheld a New Jersey unclaimed property law that allowed escheat of unclaimed intangible property held by corporations domiciled in New Jersey.¹⁴⁶ The Court reasoned this time that the state of corporate domicile also had jurisdiction to escheat unclaimed property.¹⁴⁷

In *Standard Oil*, New Jersey law allowed absolute escheat of unclaimed stock and stock dividends of New Jersey corporations even when the stock had been issued to owners who were not residents of New Jersey.¹⁴⁸ In *Standard Oil*, although the corporation holding the unclaimed stock was a New Jersey corporation, the company did not have any tangible property in the state except for its stock and transfer books.¹⁴⁹ Pursuant to the New Jersey statute, personal service had been made on the corporation and attempts had been made to notify the missing owners through publication.¹⁵⁰

The *Standard Oil* Court reasoned that a state may use its legislative power to dispose of unclaimed property "within its reach."¹⁵¹ Thus, states with personal jurisdiction over the corporate holder could escheat the unclaimed property.¹⁵² Although the Court acknowledged that with intangible property the actual location of the stock was unclear, it reasoned that the holder would be protected from multiple claims by other states, because states must give full faith and credit to a valid court ruling of another state.¹⁵³ The Court further reasoned that the statute provided for sufficient notice to all involved parties.¹⁵⁴ Therefore, the *Standard Oil* Court

¹⁴⁴ *Id.* at 564 (Jackson, J., dissenting).

¹⁴⁵ See *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 429 (1951).

¹⁴⁶ *Id.* at 430, 443.

¹⁴⁷ See *id.* at 439-40.

¹⁴⁸ See *id.* at 430. The New Jersey Escheat Act provided that when the owner of any personal property within the state remained unknown for fourteen years, the property escheated to the state. *Id.*

¹⁴⁹ *Id.* at 437.

¹⁵⁰ *Id.* at 433.

¹⁵¹ *Id.* at 435-36.

¹⁵² See *id.* at 439.

¹⁵³ *Id.* at 437-38, 443.

¹⁵⁴ *Id.* at 443.

upheld the New Jersey law that provided for state escheat of unclaimed intangible property held by New Jersey corporations.¹⁵⁵ Thus, after *Connecticut Mutual Life Insurance Co. v. Moore* and *Standard Oil Co. v. New Jersey*, both the state of the property owner's domicile as well as the state of the corporate holder's domicile had authority to escheat unclaimed intangible property.¹⁵⁶ These cases created a race of diligence between two competing states.¹⁵⁷

Consequently, some states began to enact unclaimed property legislation that contained broad claims of sovereignty, providing for state escheat of intangible property from holders having any connection at all to the state.¹⁵⁸ States also began passing legislation that provided shorter time periods for presumed abandonment.¹⁵⁹ Thus, the result of the judicial ruling was that states competed to become the first to escheat unclaimed property.¹⁶⁰ In sum, in 1954, state escheat of unclaimed property was based on a state having jurisdiction over the holder.¹⁶¹ As in *Moore* and *Standard Oil*, as long as there were sufficient contacts between the holder and the state attempting to escheat, the state had a valid claim.¹⁶² Because several states could often claim such jurisdiction, it was unclear which state had a priority claim.¹⁶³

In 1954, in response to the "race to escheat" created under *Moore* and *Standard Oil*, and the lack of uniform comprehensive state escheat legislation, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Disposition of Unclaimed Property Act.¹⁶⁴ The commissioners stated that if the states widely adopted the Uniform Act, it could solve both the problem of diverse state statutes as well as that of multiple states claiming the same intangible property.¹⁶⁵ Although the 1954 Act continued

¹⁵⁵ *Id.*

¹⁵⁶ See McThenia & Epstein, *supra* note 1, at 1439; Prewitt, *supra* note 4, at 495-96.

¹⁵⁷ McThenia & Epstein, *supra* note 1, at 1439-40.

¹⁵⁸ See *id.* at 1436.

¹⁵⁹ See, e.g., 1 EPSTEIN ET AL., *supra* note 3, § 2.03[2][d] (abandonment periods of 14 to 20 years were common prior to the *Standard Oil* decision, but by 1954 several states had shortened the period to seven years).

¹⁶⁰ *Id.* at 1440.

¹⁶¹ See 1 EPSTEIN ET AL., *supra* note 3, § 12.00[1]; see also UNIFORM UNCLAIMED PROPERTY ACT, 8A U.L.A. 617, 619 (1981).

¹⁶² 1 EPSTEIN ET AL., *supra* note 3, § 12.00[1].

¹⁶³ See McThenia & Epstein, *supra* note 1, at 1437-38.

¹⁶⁴ 1954 DISPOSITION OF UNCLAIMED PROPERTY ACT, 8A U.L.A. 215, 215-16 (1966).

¹⁶⁵ *Id.* at 217. Several states still have a modified version of the 1954 Uniform Act as their principal unclaimed property law. See, e.g., GA. CODE ANN. §§ 44-12-190 to -243 (Michie 1982 & Supp. 1991); OKLA. STAT. ANN. tit. 60, §§ 651.1-685.1 (West 1971 & Supp. 1992).

to assume that personal jurisdiction over the holder was necessary for escheat of its unclaimed property, the 1954 Act also attempted to settle multistate claims to the same property by including a reciprocity clause.¹⁶⁶ The reciprocity clause established the state of the owner's domicile as the prevailing state when there were multiple state claims.¹⁶⁷

The 1954 version of the Uniform Act ("1954 Act") provides for state custodial escheat of various types of intangible property.¹⁶⁸ The 1954 Act defines and describes the circumstances under which various classes of property are to be presumed abandoned.¹⁶⁹ Specifically, the 1954 Act establishes a seven-year dormancy period for a presumption of abandonment for most types of intangible property.¹⁷⁰ The 1954 Act is organized according to the entity holding the property, for example, banks or utilities.¹⁷¹ Section 9 is an omnibus section that covers all other intangible personal property that the Act does not otherwise specifically mention.¹⁷²

Section 10 of the 1954 Act attempts to prevent multiple state claims for intangible property by including a reciprocal provision that designates the last known address of the owner as the basic test of jurisdiction.¹⁷³ Thus, under the 1954 Act, if two states claim custody of the same property, the law of the state of the last known address of the owner governs.¹⁷⁴ However, the reciprocal provision limits jurisdiction to the last known address of the owner only when both states have adopted the 1954 Act.¹⁷⁵

In 1954, the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the 1954 Uniform Disposition of Unclaimed Property Act.¹⁷⁶ Despite the 1954 Act's stated purpose of ending interstate jurisdictional

¹⁶⁶ See 1954 UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, 8A U.L.A. 215, 244-45 (1966).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 216. The Act also provides for state custodial escheat of the contents of safe deposit boxes which could include tangible property. *Id.* at 228.

¹⁶⁹ *Id.* at 216 (includes unclaimed property held by banks or other financial organizations, insurance corporations, public utilities, other business associations, trustees in corporate dissolution proceedings, fiduciaries, and state courts and other public agencies).

¹⁷⁰ *Id.* at 229.

¹⁷¹ *Id.* at 223-24.

¹⁷² *Id.* at 216-17.

¹⁷³ *Id.* at 217, 244-45.

¹⁷⁴ *Id.* at 244-45.

¹⁷⁵ *Id.* at 245.

¹⁷⁶ *Id.* at 215.

conflict, only twelve states had adopted the Act by 1961.¹⁷⁷ Consequently, litigation continued over state jurisdiction of intangible unclaimed property.

In 1961, in *Western Union Telegraph Co. v. Pennsylvania*, the United States Supreme Court again considered the issue of a state claim to abandoned intangible property that could have multiple states as claimants.¹⁷⁸ In *Western Union*, Pennsylvania had claimed escheat of unclaimed money orders issued by the Western Union Corporation and purchased in Pennsylvania.¹⁷⁹ The *Western Union* Court held that a Pennsylvania judgment could not bar claims from other states claiming the same property and did not protect Western Union from multiple liability; thus, the Pennsylvania court could not render an escheat judgment.¹⁸⁰

In *Western Union*, Pennsylvania obtained an escheat judgment in state court for money orders that were purchased in Pennsylvania and then unclaimed for over seven years.¹⁸¹ The holder, or issuer of the money orders, was a New York corporation, and the payees on the money orders were primarily from states other than Pennsylvania.¹⁸² The holder, Western Union, claimed that Pennsylvania should not be allowed to escheat because according to the decisions in *Moore* and *Standard Oil*, the state of the holder's domicile and the state of the owner's domicile could also assert escheat rights.¹⁸³

The United States Supreme Court reasoned that because no other states were party to the Pennsylvania escheat judgment, that escheat by Pennsylvania of the funds would not protect the holder from escheat claims by states such as the state of the holder's domicile.¹⁸⁴ The Court further reasoned that only the United States Supreme Court could act as the forum for settling multistate disputes over unclaimed property.¹⁸⁵ Thus, the Court held that Pennsylvania could not preclude other state claims by rendering an escheat judgment in Pennsylvania court.¹⁸⁶

¹⁷⁷ See UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, 8A U.L.A. 135, 136 (1966). By 1961, the 1954 Act was adopted in Arizona, California, Florida, Idaho, Illinois, Montana, New Mexico, Oregon, Utah, Virginia, Washington and West Virginia. *Id.*

¹⁷⁸ 368 U.S. 71, 73 (1961).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 80.

¹⁸¹ *Id.* at 72.

¹⁸² *Id.* at 72-73.

¹⁸³ *Id.* at 77-78.

¹⁸⁴ See *id.* at 80.

¹⁸⁵ *Id.* at 79.

¹⁸⁶ *Id.* at 80.

Shortly thereafter, in 1965, in *Texas v. New Jersey*, the United States Supreme Court addressed an escheat claim where multiple states were parties to the suit.¹⁸⁷ In *Texas v. New Jersey*, the Court reasoned that a single rule was necessary to end the multiple state claims to abandoned intangible property.¹⁸⁸ The *Texas* Court held that when multiple states potentially have jurisdiction for escheat over unclaimed intangible property, the state of the property owner's last known address had the priority claim to escheat.¹⁸⁹

In *Texas v. New Jersey*, Texas sought a declaratory judgment from the United States Supreme Court of its priority right over New Jersey, Pennsylvania and the Sun Oil Company to escheat title to unclaimed property from Sun Oil.¹⁹⁰ Texas based its claim on the grounds that the debts were on the books of the two Texas offices or owing to persons whose last known address was in Texas.¹⁹¹ New Jersey also sought escheat because Sun Oil was incorporated in New Jersey.¹⁹² Pennsylvania claimed the right to escheat the unclaimed property because the holder's principal offices were located in Pennsylvania.¹⁹³ Sun Oil, the holder of the unclaimed property, did not claim any interest in the property, but asked to be protected from double liability.¹⁹⁴ The State of Florida later intervened, claiming the right to escheat a portion of the unclaimed property because some missing owners had last known addresses in Florida.¹⁹⁵ The various parties in the case proposed that the governing law should either be (1) the state with which the corporate holder had the most contacts, or (2) the state of the holder's incorporation, or (3) the state of the last known address of the owner, or (4) the state of the holder's principal place of business.¹⁹⁶

In analyzing the various options, the *Texas* Court reasoned that the first option, allowing the amount of holder contact with the state to govern, would result in a subjective test that would require a

¹⁸⁷ 379 U.S. 674, 675 (1965). •

¹⁸⁸ *Id.* at 677.

¹⁸⁹ *Id.* at 681-82.

¹⁹⁰ *Id.* at 675.

¹⁹¹ *Id.* The unclaimed property held by Sun Oil consisted of debts totaling \$26,461.65 owed to approximately 1,730 small creditors who had never claimed or cashed checks. *Id.*

¹⁹² *Id.* at 676.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 677.

¹⁹⁶ *Id.* at 678-80.

case-by-case analysis.¹⁹⁷ The Court further reasoned that to allow escheat by the second option, the state of the holder's incorporation, would make what the Court saw as a minor factor—where the company happened to be incorporated—too significant.¹⁹⁸ The Court then reasoned that the fourth option, allowing escheat by the state where the holder's principal offices were located, would be "strange," because the unclaimed property is really a liability, not an asset, but would become an asset once it was escheated.¹⁹⁹

Thus, the Court held that the simplest, fairest rule was to allow escheat by the state of the owner's last known address—the third option.²⁰⁰ Thus, in 1965, *Texas v. New Jersey* established the rule that the state of the owner's last address has the priority claim to escheat unclaimed intangible property.²⁰¹ This changed the previous premise that personal jurisdiction over the holder of the property was necessary for state escheat.²⁰²

In 1966, the 1954 Act was revised.²⁰³ The National Conference of Commissioners on Uniform State Laws stated in the prefatory note that the revision was to address special problems that had arisen concerning money orders and traveler's checks.²⁰⁴ Whereas the dormancy period for all checks had been seven years under the 1954 Uniform Act, the 1966 Uniform Revision provided a special fifteen-year dormancy period for traveler's checks.²⁰⁵ In addition, the 1966 revision eliminated certain procedural requirements for issuers of traveler's checks and money orders.²⁰⁶

The revision did not mention the Supreme Court decision in *Texas v. New Jersey* and the new judicial rule that the state of the owner's last known address had the priority claim to escheat.²⁰⁷ The

¹⁹⁷ *Id.* at 679.

¹⁹⁸ *Id.* at 680.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 680–82.

²⁰¹ *Id.* at 681–82. The court stated that unclaimed property "is subject to escheat only by the State of the last known address of the creditor, as shown by the debtor's books and records." *Id.* at 682. Where there is no last known address or where the state of the last known address does not provide for escheat, the court held that "the property be subject to escheat by the state of corporate domicile, provided that another State could later escheat upon proof that the last known address of the creditor was within its borders." *Id.*

²⁰² UNIFORM UNCLAIMED PROPERTY ACT, 8A U.L.A. 617, 619 (1981).

²⁰³ UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, 8A U.L.A. 135, 135 (1966).

²⁰⁴ *Id.* at 136.

²⁰⁵ *Id.*

²⁰⁶ *See id.*

²⁰⁷ *See generally* UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, 8A U.L.A. 135 (1966). There is no clear explanation as to why the 1966 revision ignored the decision in *Texas v. New Jersey*.

1954 Act and the 1966 revision assumed that states having personal jurisdiction over the holder through contacts with the state could escheat the property.²⁰⁸ Therefore, the Uniform Act did not comply with the *Texas* ruling and needed to be amended.²⁰⁹

Rather than revise the 1954 Act again, the National Conference of Commissioners on Uniform State Laws decided to draft the 1981 Uniform Unclaimed Property Act ("1981 Act").²¹⁰ Commentators have suggested that the 1981 Act is essentially a revision of the 1954 Act designed to comply with the Supreme Court decision in *Texas v. New Jersey*.²¹¹ The Act provides that unclaimed intangible property is payable to the state of the last known address of the owner.²¹²

The prefatory note to the 1981 Act describes the other major changes made to the 1954 Act.²¹³ First, the time period during which the property must remain inactive before there is a presumption of abandonment has generally been shortened from seven years to five years.²¹⁴ The commissioners justified the reduction, stating that a high inflation rate had increased the cost to the owner of leaving property dormant.²¹⁵ Second, the 1981 Act provides for express custodial escheat of underlying shares of stock where the dividends have remained unclaimed.²¹⁶ Unlike the 1954 Act, this covers situations where the stock is not in the possession of the issuer or a transfer agent, but rather had been issued to the shareholder.²¹⁷ Third, the 1981 Act provides for regulation of service charges.²¹⁸ The commissioners stated that, over time, service charges levied against unclaimed property such as checking and savings accounts had often eliminated the otherwise unclaimed property.²¹⁹

The preface to the 1981 Act also states that the Act is designed to address changes in practice among the states for the reporting

²⁰⁸ See UNIFORM UNCLAIMED PROPERTY ACT, 8A U.L.A. 617, 619 (1981).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ 1 EPSTEIN ET AL., *supra* note 3, § 12.00.

²¹² UNIFORM UNCLAIMED PROPERTY ACT, 8A U.L.A. 617, 620 (1981).

²¹³ See *id.* at 620-23; see also 1 EPSTEIN ET AL., *supra* note 3, §§ 12.00-.37 (in-depth discussion of the 1981 Uniform Act).

²¹⁴ UNIFORM UNCLAIMED PROPERTY ACT, 8A U.L.A. 617, 622-23 (1981).

²¹⁵ *Id.* at 622.

²¹⁶ *Id.*

²¹⁷ *Id.* Several states had already passed similar legislation. *Id.*

²¹⁸ *Id.* at 623.

²¹⁹ *Id.* The commissioners stated that parts of the 1981 Act attempt to codify the case law regarding service charges on unclaimed property. *Id.*

and processing of unclaimed property.²²⁰ Rather than each state separately pursuing unclaimed property held in all states, the commissioners recognized that states have become cooperative in exchanging information and even property.²²¹ The commissioners noted that the National Association of Unclaimed Property Administrators ("NAUPA") has facilitated the exchange of information among the states.²²² NAUPA is a group of state unclaimed property administrators who meet regularly to discuss key issues and changes in state disposition of unclaimed property.²²³ Thus, the 1981 Act was drafted to encourage continued and increasing cooperation among the states by authorizing uniform reporting forms and joint agreements between states for collection of property.²²⁴

In sum, the 1954 Uniform Disposition of Unclaimed Property Act, its 1966 revision and the 1981 Uniform Unclaimed Property Act represent comprehensive unclaimed property legislation.²²⁵ The 1954 Act was drafted to help the states regulate unclaimed property and help clarify multiple state claims to intangible property.²²⁶ To remain consistent with the judicial ruling that the state

²²⁰ See *id.* at 621.

²²¹ *Id.*

²²² *Id.*

²²³ Telephone Interview with Patty White, *supra* note 1.

²²⁴ UNIFORM UNCLAIMED PROPERTY ACT, 8A U.L.A. 617, 621 (1981). The 1981 Act is organized into forty-three sections. *Id.* at 624-25. Section two sets forth the general rule that most intangible property held in the ordinary course of business that has remained unclaimed for more than five years is presumed abandoned. *Id.* at 630. This is the omnibus section that covers all property not otherwise specifically provided for in other sections of the 1981 Act. See *id.* Sections four through sixteen prescribe specific rules for certain types of property. *Id.* at 635-51. Unlike the 1954 Act, the 1981 Act is organized by type of property, rather than by type of institution holding the property. See *id.* at 624-25. The twelve specific categories are traveler's checks and money orders; checks and drafts; bank deposits; funds owing under life insurance policies; utility deposits; business refunds; stocks; property held in dissolution of business; property that agents or fiduciaries hold; property that courts and public agencies hold; gift certificates and credit memos; wages; and contents of safe deposit boxes. *Id.* at 624.

Section three, which outlines the rules for state custody of unclaimed property, conforms to the ruling in *Texas v. New Jersey*. *Id.* at 632-33. Sections seventeen through twenty-nine are administrative provisions concerning notification and the obligations of the state once it receives property, as well as the procedure for redeeming property after it is in state custody. *Id.* at 651-68. Sections thirty through thirty-five provide the state with enforcement provisions to ensure compliance with the statute. *Id.* at 668-75. The holders of property in state legislatures considering the Act have objected to these final provisions—specifically, the provisions for interest penalties and the payment of audit costs. See 1 EPSTEIN ET AL., *supra* note 3, § 12.00[1].

²²⁵ See *supra* notes 164-77, 203-06, 210-24 and accompanying text for a discussion of the various versions of the Uniform Acts.

²²⁶ 1954 UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, 8A U.L.A. 215, 215-16 (1966). See *supra* notes 168-71 and accompanying text.

of the missing owner's last known address has the priority claim, the commission drafted the 1981 Act.²²⁷ Presently, forty-two states and the District of Columbia have enacted some version of the 1951 Uniform Act, the 1966 Uniform Revision or the 1981 Uniform Act.²²⁸

IV. FEDERAL VERSUS STATE RIGHTS

Once the United States Supreme Court had affirmed state authority to enact comprehensive unclaimed property legislation, the states attempted to apply their laws to federally chartered institutions.²²⁹ Thus began an ongoing struggle between the states and the federal government over unclaimed money in federal custody.²³⁰ The states have asserted traditional unclaimed property rights while the federal government has argued federal preemption of state law.²³¹ Although the states have prevailed in some situations,²³² the federal government has prevailed in others.²³³ The effect has been that the federal government has carved out blocks of abandoned property from state control.²³⁴ The present-day conflict involves billions of dollars in potential non-tax revenue that will either go to state or federal coffers if the owners are not located.²³⁵

The doctrine of federal preemption is set forth in the Supremacy Clause in Article VI of the United States Constitution.²³⁶ As

²²⁷ UNIFORM UNCLAIMED PROPERTY ACT, 8A U.L.A. 617, 617 (1981).

²²⁸ 1 EPSTEIN ET AL., *supra* note 3, § 1.06[1] (Supp. 1991). All other states except one have enacted comprehensive unclaimed property legislation. *Id.* See *supra* note 14 for state statutes.

²²⁹ See, e.g., *Roth v. Delano*, 338 U.S. 226, 227 (1949) (the state of Michigan attempted to escheat unclaimed dividends remaining in bank liquidation); *Anderson Nat'l Bank v. Lockett*, 321 U.S. 233, 239 (1944) (the state of Kentucky attempted to escheat deposits remaining unclaimed in a liquidated national bank).

²³⁰ See, e.g., *Arizona v. Bowsher*, 935 F.2d 332, 334 (D.C. Cir.), *cert. denied*, *Alabama v. Bowsher*, 112 S. Ct. 584 (1991) (twenty-three states attempted to recover unclaimed funds held by the United States Treasurer).

²³¹ See *id.* at 334-35.

²³² See, e.g., *Lockett*, 321 U.S. at 252-53 (state could enforce its unclaimed property law against the national bank).

²³³ See, e.g., *United States v. Oregon*, 366 U.S. 643, 648-49 (1961) (federal government entitled to retain veterans' property pursuant to federal statute). See *infra* notes 313-28 and accompanying text for a complete case discussion of *Oregon*.

²³⁴ See *infra* notes 297-348 for a discussion of the federal government carving out areas of unclaimed property from state control.

²³⁵ See *infra* note 6 for a discussion of the amount of unclaimed property in federal custody.

²³⁶ U.S. CONST. art. VI, § 2. The Supremacy Clause states in pertinent part that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." *Id.*

long as Congress legislates pursuant to its delegated powers, state law and policy that conflict with a federal law must yield.²³⁷ For a federal law to have supremacy, it must be made in pursuance of the express or implied grants contained in the Constitution.²³⁸

The Necessary and Proper Clause of the United States Constitution often allows the federal courts to construe federal legislation as being constitutionally valid.²³⁹ Nevertheless, the Necessary and Proper Clause is not itself a grant of power, but a caveat stating that Congress possesses all the means necessary to carry out the powers that the Constitution specifically grants.²⁴⁰ Therefore, Congress must act in an area delegated to it in order for the federal law to be valid.²⁴¹

Once a federal law is deemed valid, there are several ways in which it can preempt state legislation.²⁴² The United States Supreme Court has divided preemption analysis into various categories.²⁴³ These categories include express preemption, conflict preemption and implied preemption.²⁴⁴

Express preemption occurs when Congress has explicitly declared its intention to preclude state regulation in a given area.²⁴⁵ Conflict preemption arises when Congress only partially displaces state legislation in a particular area.²⁴⁶ Conflict exists when compliance with both federal and state regulations is impossible or when state law obstructs the purposes and objectives of Congress.²⁴⁷ The third type, implied preemption, occurs when the federal interest has occupied the field, when the state law is in a field where the federal interest is extremely strong or when the state and federal

²³⁷ See generally Note, *The Preemption Doctrine: Shifting Perspective on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975); see also S. DOC. NO. 16, 99th Cong., 1st Sess. 917 (1982) [hereinafter ANNOTATED U.S. CONSTITUTION].

²³⁸ ANNOTATED U.S. CONSTITUTION, *supra* note 237, at 917.

²³⁹ *Id.* at 159. U.S. CONST. art. I, § 8. The Necessary and Proper Clause states in pertinent part that Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution, in the Government of the United States, or in any Department or Officer thereof."

²⁴⁰ *U.S. v. Oregon*, 366 U.S. 643, 653 (1961) (Douglas, J., dissenting) (arguing that the Court had recently stated that the Necessary and Proper Clause is "not itself a grant of power, but a caveat that the Congress possesses all the means necessary to carry out" the powers specifically granted).

²⁴¹ See *id.*

²⁴² See *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982).

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ See *id.* at 153.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

laws reveal the same purpose.²⁴⁸ The United States Supreme Court generally requires a strong showing of congressional intent when ruling that a state statute is preempted.²⁴⁹

Because the United States Constitution lacks a federal escheat provision, there is no explicit federal escheat power that parallels the states' right to escheat.²⁵⁰ Moreover, the federal government has made no attempt to enact uniform national legislation regarding unclaimed property.²⁵¹ Any uniformity of law that exists in the United States is due to the relatively widespread state adoption of the Uniform Unclaimed Property Acts.²⁵² Nevertheless, the United States Supreme Court has also stated that preemption principles are applicable with regard to real property law even though it is a matter of special concern to the states.²⁵³

A. Cases of Federal-State Conflict Over Unclaimed Property

In the state versus federal struggle over unclaimed property in federal custody, "conflict preemption" was indirectly addressed by early state-federal escheat cases.²⁵⁴ As early as 1923, when states attempted to escheat unclaimed funds from federal custody, the federal government claimed that state escheat interfered with the federal functions of the institution and therefore was in conflict.²⁵⁵ For example, in 1923, in *First National Bank v. California*, a national

²⁴⁸ See *id.* (Congress's intent may be inferred because "the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject" or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose").

²⁴⁹ *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2403 (1991) (in light of *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Court must be absolutely certain that Congress intended to preempt).

²⁵⁰ See *Modern Escheat*, *supra* note 3, at 1336 (the Constitution makes no provision for escheat and the federal government is considered to have no escheat power).

²⁵¹ *United States v. 5,644,540.00 in United States Currency*, 799 F.2d 1357, 1365 (9th Cir. 1986).

²⁵² See 1 EPSTEIN ET AL., *supra* note 3, § 1.06[1] (Supp. 1991). One commentator suggested in 1952 that the federal government should enact comprehensive unclaimed property legislation to settle the interstate problems over intangible unclaimed property. Note, *Escheat of Corporate Dividends*, 65 HARV. L. REV. 1408, 1413 (1952). This commentator asserted that the federal government could find authority under the Interstate Commerce Clause. *Id.*

²⁵³ *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

²⁵⁴ See, e.g., *First Nat'l Bank v. California*, 262 U.S. 366, 369 (1923).

²⁵⁵ See *id.*

bank successfully claimed that state escheat statutes were inapplicable to them because of their federal charter.²⁵⁶

In *First National Bank*, the Supreme Court of the United States held that California's state unclaimed property statute, which transferred title of abandoned property to the state, was invalid because it conflicted with the general objectives and purpose of congressional legislation concerning national banks.²⁵⁷ In *First National Bank*, the state statute provided that bank accounts that had remained dormant for over twenty years should be turned over to the state if the bank did not know whether the depositor was alive.²⁵⁸

The *First National Bank* Court reasoned that allowing seizure of such accounts under the state statute would dissolve the contract between the depositor and the national bank.²⁵⁹ The Court concluded that state escheat might dissuade depositors from using the bank for fear of confiscation.²⁶⁰ Thus, the *First National Bank* Court held that the California state statute that transferred title in escheat unduly interfered with the functions of a federal bank.²⁶¹

Twenty-one years later, in 1944, under a state escheat statute that transferred only custody of unclaimed bank deposits, the Supreme Court limited the *First National Bank* holding, and the states prevailed.²⁶² In *Anderson National Bank v. Lockett*, the United States Supreme Court again considered state escheat of unclaimed funds held by national banks.²⁶³ In *Lockett*, the United States Supreme Court held that a Kentucky statute that transferred custody of abandoned deposits was valid and did not interfere with the federal functions of the national bank.²⁶⁴

In *Lockett*, the Kentucky escheat statute was similar to the California statute in *First National Bank* except that it was custodial and did not escheat title to the property.²⁶⁵ The Kentucky statute transferred to the state custody of demand deposits after they were dormant for ten years and non-demand deposits after they were dormant for twenty-five years.²⁶⁶ The statute required the holder

²⁵⁶ *Id.* at 369-70.

²⁵⁷ *Id.* at 368-69, 370.

²⁵⁸ *Id.* at 366.

²⁵⁹ *Id.* at 369.

²⁶⁰ *Id.* at 370.

²⁶¹ *See id.*

²⁶² *See Anderson Nat'l Bank v. Lockett*, 321 U.S. 233, 236, 250, 252-53 (1944).

²⁶³ *Id.* at 236.

²⁶⁴ *Id.* at 252-53.

²⁶⁵ *See id.* at 250, 251-52.

²⁶⁶ *Id.* at 238.

to file a report of unclaimed deposits with both the state and the sheriff of the county where the bank was located; the sheriff would then post a copy of the report on the courthouse door.²⁶⁷

The United States Supreme Court did not reverse *First National Bank* but distinguished it, limiting its holding by stating that although states have the power to escheat unclaimed deposits from national banks, the terms under which escheat occurs cannot be so harsh so as to deter depositors.²⁶⁸ The Court reasoned that the California statute in *First National Bank* interfered with the federal functions of the bank because it escheated title, thus deterring potential depositors.²⁶⁹ In contrast, the Court reasoned that because the Kentucky statute was custodial and did not provide for absolute escheat of title unless abandonment had been proven, the depositors would not be deterred from using the national bank.²⁷⁰ The Court concluded that the custodial statute did not conflict with the bank's federal functions,²⁷¹ thus indirectly ruling that there was no conflict preemption between the state escheat and the federal bank charter. Consequently, after *Luckett*, states retained the right to custodial escheat of unclaimed property from national banks despite their status as federally chartered institutions.²⁷²

The right to escheat unclaimed funds in a national bank after the bank has been liquidated was addressed in the 1949 case, *Roth v. Delano*.²⁷³ In *Roth*, the United States Supreme Court, in dicta, restated its holding in *Luckett* and discussed the states' right to escheat.²⁷⁴ In *Roth*, an insolvent national bank had been liquidated and the state of Michigan claimed that the remaining bank property was subject to Michigan's escheat statutes.²⁷⁵ The federal liquidators refused to acknowledge the state claim.²⁷⁶

In *Roth*, the United States Supreme Court reasoned that, as in the case of *Luckett*, state escheat does not interfere with the bank's federal functions.²⁷⁷ The *Roth* Court further noted that it does not burden a bank's federal functions for it to give to a state acting in

²⁶⁷ *Id.* at 237.

²⁶⁸ *See id.* at 250.

²⁶⁹ *See id.* at 251-52.

²⁷⁰ *See id.*

²⁷¹ *See id.* at 252.

²⁷² *See* 1 EPSTEIN ET AL., *supra* note 3, § 7.12[1].

²⁷³ 338 U.S. 226, 227 (1949).

²⁷⁴ *Id.* at 230.

²⁷⁵ *Id.* at 227.

²⁷⁶ *See id.* at 227-28.

²⁷⁷ *Id.* at 230.

the shoes of the claimant that which the bank would have been required to give to the claimant.²⁷⁸ Although in *Roth* the Court reiterated states' rights to escheat, the case was remanded in light of a recent repeal of the underlying Michigan escheat statute.²⁷⁹ Thus, after *Luckett* and *Roth*, states retained the right to regulate unclaimed property in national banks despite the banks' federal charter, as there was no conflict between the state laws and the banks' federal functions.²⁸⁰

As with states' rights with respect to funds held in national banks, it has also been held that state escheat laws do not conflict with unclaimed funds held by a federal court.²⁸¹ In 1938, in *United States v. Klein*, the United States Supreme Court addressed the issue of whether state escheat of unclaimed bond funds, which had been collected by the court and then transferred to the United States Treasury, infringed on federal jurisdiction.²⁸² The *Klein* Court held that state escheat in this situation did not conflict and a state could escheat unclaimed bond funds that a federal court had collected and that had been transferred to the federal treasury.²⁸³

In *Klein*, Pennsylvania sought to escheat under its state statute unclaimed funds that had been paid in federal court for bonds but which had not been claimed after seven years.²⁸⁴ The Court stated that, according to 28 U.S.C. § 852, after the funds were unclaimed for more than five years, the money was deposited in the United States Treasury.²⁸⁵ The federal statute provided that the funds be turned over to any claimant entitled to the money.²⁸⁶ The federal government claimed that Pennsylvania had no jurisdiction to invade the sovereignty of the United States and that the state escheat statute was unconstitutional.²⁸⁷

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 230-31.

²⁸⁰ *Id.* Although there has not been subsequent litigation regarding states' rights to unclaimed property held by national banks, there has been ongoing litigation regarding state inspection of the records of national banks and state regulation of national bank service charges. 1 EPSTEIN ET AL., *supra* note 3, § 7.12[1]. One commentator stated that because *Roth* was not a clear decision regarding applicability of state unclaimed property laws to liquidated national banks, many state unclaimed property statutes were modified to exclude national banks in the process of liquidation. Prewitt, *supra* note 4, at 509.

²⁸¹ See *United States v. Klein*, 303 U.S. 276, 280-81, 283 (1938) (Court permitted state escheat of unclaimed bond funds collected by a federal court).

²⁸² *Id.* at 277.

²⁸³ *Id.* at 282-83.

²⁸⁴ *Id.* at 277-78.

²⁸⁵ *Id.* at 277.

²⁸⁶ *Id.* at 280.

²⁸⁷ *Id.* at 277, 279.

The *Klein* Court reasoned that the federal court retained jurisdiction over the unclaimed property for the sole purpose of paying back rightful claims.²⁸⁸ Because the federal government did not claim any right to escheat the funds, and the federal statute provided for payment to rightful claimants, the Court concluded that federal possession of the money did not curtail state escheat power.²⁸⁹ Thus, the *Klein* Court held that the state statute did not conflict with the federal jurisdiction of the court and the unclaimed funds were subject to state escheat.²⁹⁰

Several district and appellate courts have indirectly supported states' rights to escheat funds held in the custody of federal courts.²⁹¹ For example, in *Hodgson v. Wheaton Glass Co.*, the United States Court of Appeals for the Third Circuit addressed an employer's claim alleging rights to unpaid wages owed to employees under a 1970 court order.²⁹² The *Hodgson* court reasoned that under the 1970 court order, unclaimed wages were to be transferred to the United States Treasury but never escheat permanently to the United States.²⁹³ The court further reasoned in dicta that the wages remained subject to the owner's claim or state escheat.²⁹⁴

Thus, although the United States Supreme Court in *Luckett*, *Roth* and *Klein* did not directly address federal conflict preemption, in each of these cases, the Court reasoned that the state escheat statute did not conflict with federal law.²⁹⁵ At least one commentator has supported the conclusion that there is no conflict preemption between federal custody statutes and state escheat statutes because the funds in federal custody are subject to state escheat.²⁹⁶

²⁸⁸ *Id.* at 281.

²⁸⁹ *Id.* at 280, 282.

²⁹⁰ *Id.* at 282.

²⁹¹ See, e.g., *Hodgson v. Wheaton Glass Co.*, 446 F.2d 527, 535 (3d Cir. 1971) (money deposited in United States Treasury pursuant to 28 U.S.C. §§ 2041-42 never escheats permanently to the federal government but remains subject to owner's claim or state escheat); *State v. Goodbar*, 297 S.W.2d 525, 526, 528 (Mo. 1957) (insurance premiums impounded by a federal district court and held in the court registry are escheatable by state).

²⁹² 446 F.2d at 529. The judgment requiring payment of wages at issue in *Wheaton Glass* was from the ruling in *Schultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970). *Hodgson*, 446 F.2d at 529. The *Schultz* judgment provided that any sums not paid over to employees or their personal representative were to be transferred into the Treasury of the United States as miscellaneous receipts. *Id.*

²⁹³ *Id.* at 535.

²⁹⁴ *Id.*

²⁹⁵ See *supra* notes 263-90 and accompanying text for case discussions of *Luckett*, *Roth* and *Klein*.

²⁹⁶ See *Modern Escheat*, *supra* note 3, at 1337.

There are areas, however, where the federal government has successfully claimed rights to abandoned property.²⁹⁷ Despite the absence of formal federal authority for escheat rights, the federal government has enacted certain legislation that claims rights to abandoned property.²⁹⁸ For example, under current federal law, the United States takes title to unclaimed veterans' property under authority from congressional war powers.²⁹⁹ The law provides that when a veteran dies intestate in a veterans' hospital, title to his or her personal property vests in the United States.³⁰⁰

These statutes were initially upheld under a contract theory.³⁰¹ It was reasoned that a veteran's acceptance of federal benefits created a contract between the veteran and the federal government under which funds paid to the veteran returned to the government and did not become subject to state escheat.³⁰² Under the contract theory, the federal government effectively escheated the property and the courts avoided the issue of preemption of state escheat laws.

Subsequently, the contract theory was questioned because there was not always a contract between the veteran and the government.³⁰³ In *United States v. Oregon*, in 1961, the United States Supreme Court considered federal claims to property that had belonged to a veteran who had been incompetent when he had been admitted to the veterans' hospital and thus, could not have been bound to a contract.³⁰⁴ Reasoning that the federal statute was necessary and proper under the federal war powers, the *Oregon* Court held that the property was subject to federal, not state laws.³⁰⁵

²⁹⁷ See *infra* notes 297-348 and accompanying text for a discussion of several areas where the federal government has successfully claimed abandoned property.

²⁹⁸ See, e.g., 26 U.S.C. § 6408 (1988) (removing unclaimed tax refunds from the scope of state escheat and abandoned property law); 38 U.S.C. § 5220 (1988), amended by 38 U.S.C.A. § 8520 (West 1991) (allowing the federal government to take title to unclaimed veterans' property).

²⁹⁹ 38 U.S.C. § 5220 (1988). This section provides that when a veteran dies without a will or legal heirs in a veterans' hospital, his or her personal property "shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund." *Id.* U.S. CONST. art. I, § 8. The War Powers of Congress include the power "to declare War . . . To raise and support Armies . . . To provide and maintain a Navy . . . To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."

³⁰⁰ *Id.*

³⁰¹ See *Modern Escheat*, *supra* note 3, at 1337.

³⁰² *Id.*

³⁰³ See *id.* at 1338.

³⁰⁴ *United States v. Oregon*, 366 U.S. 643, 644 (1961).

³⁰⁵ *Id.* at 649.

In *Oregon*, the incompetent veteran had died without heirs in a veterans' hospital after receiving a \$13,000 inheritance from his brother.³⁰⁶ After his death, both the federal government and Oregon claimed the money.³⁰⁷ Oregon claimed it under its state unclaimed property laws, and the federal government claimed its veterans' statute was valid and therefore preempted the state law.³⁰⁸

The Supreme Court reasoned that because Congress had a strong interest in veterans, the federal statute was necessary and proper to the exercise of congressional administration of veterans' issues, a federal war power.³⁰⁹ The Court further reasoned that an applicable and valid federal statute preempts the state law.³¹⁰ Thus, the Court held that the federal statute was constitutional and the veteran's property went to the federal rather than the state government.³¹¹

The federal government's right to administer the area of veterans' benefits is a power granted to Congress as a constitutional war power.³¹² Therefore, preemption of state unclaimed property laws in this area is "implied preemption," because the federal government occupies the field of veterans' administration.³¹³

Justice Douglas questioned the validity of this implied preemption in his dissent to *Oregon*.³¹⁴ Justice Douglas argued that the property at issue in *Oregon* was an inheritance that the veteran had received from his brother.³¹⁵ Douglas argued that inheritance laws at issue in *Klein* are very different from general veterans' administration.³¹⁶ Reasoning that the Tenth Amendment provided the states with a definitive right to control the area of property succession and escheat, Douglas argued that federal claims to veterans' property are not necessary and proper to any federal power.³¹⁷ In addition, Douglas argued that the congressional use of veterans'

³⁰⁶ *Id.* at 643.

³⁰⁷ *Id.* at 643-44.

³⁰⁸ *Id.*

³⁰⁹ *See id.* at 648-49.

³¹⁰ *Id.* at 644.

³¹¹ *See id.* at 645.

³¹² *Id.* at 648-49. *See supra* note 299 for a discussion of congressional war powers granted by the United States Constitution.

³¹³ *See supra* notes 248-49 and accompanying text for a discussion of implied preemption.

³¹⁴ *See Oregon*, 366 U.S. at 649 (Douglas, J., dissenting).

³¹⁵ *Id.* at 650 (Douglas, J., dissenting).

³¹⁶ *Id.* at 651 (Douglas, J., dissenting).

³¹⁷ *Id.* at 654 (Douglas, J., dissenting).

property as a source for funding the General Post Fund was not a legitimate source of congressional revenue.³¹⁸ Further asserting that the federal government has been granted explicit constitutional means for raising money through taxation and borrowing, Douglas argued that "[r]aising money by appropriating assets of those who have a relationship with the Federal Government (as most people do today) is not among the enumerated powers."³¹⁹

Another area where the federal government has prevailed over state unclaimed property laws is in regard to federal income tax refunds.³²⁰ In 1987, Congress enacted legislation that expressly excluded unclaimed federal income tax refunds from state unclaimed property law.³²¹ This law was upheld as constitutional by the New York Court of Appeals as being a necessary and proper means of carrying out the federal government's taxing power.³²² Thus, the federal government expressly preempted state unclaimed property law in this specific area.

The federal government once again successfully claimed federal preemption in the most recent controversy over unclaimed property in federal custody in *Arizona v. Bowsher*.³²³ The controversy involved unclaimed trust fund monies that the United States Treasury claimed under 31 U.S.C. § 1322.³²⁴ Thirty-one U.S.C. § 1322 establishes an account that is a pool of unclaimed money from various trust funds.³²⁵ The federal statute provides that each year the Secretary of the Treasury pays into this account all monies that have owners with unknown locations and that have remained unclaimed for one year.³²⁶ The title of the account is "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown," and subsequent claims are to be paid from this fund.³²⁷ Thirty-one

³¹⁸ *Id.* at 654-55 (Douglas, J., dissenting).

³¹⁹ *Id.* (Douglas, J., dissenting).

³²⁰ See *In re Abrams*, 556 N.Y.S.2d 925, 926 (N.Y. App. Div. 1990).

³²¹ 26 U.S.C. § 6408 (1988). This section provides in pertinent part, that "[n]o overpayment of any tax . . . shall be refunded (and no interest with respect to any such overpayment shall be paid) if the amount of such refund (or interest) would escheat to a State or would otherwise become the property of a State under any law relating to the disposition of unclaimed or abandoned property." *Id.*

³²² *In re Abrams*, 556 N.Y.S.2d 925, 926 (1990). This case was first brought before the enactment of 26 U.S.C. § 6408; thus, the New York unclaimed property law prevailed. See *In re Abrams*, 512 N.Y.S.2d 962, 968 (N.Y. Sup. Ct. 1986).

³²³ 935 F.2d 332, 336 (D.C. Cir.), *cert. denied*, *Alabama v. Bowsher*, 112 S. Ct. 584 (1991).

³²⁴ *Id.* at 333.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

U.S.C. § 1322, unlike the income tax provision, 26 U.S.C. § 6408, does not contain language to expressly preempt state unclaimed property laws.³²⁸ Nor does 26 U.S.C. § 1322 take title to the unclaimed property as did the veterans' statute, 38 U.S.C. § 5200.³²⁹

In 1990, in *Arizona v. Bowsher*, acting under their unclaimed property laws, twenty-three states attempted to claim custody of unclaimed property held by the United States Treasury pursuant to 31 U.S.C. § 1322.³³⁰ The United States Court of Appeals for the District of Columbia held that state unclaimed property laws are preempted by the federal custody statute, 31 U.S.C. § 1322.³³¹ The court reasoned that the state unclaimed property laws stood as an obstacle to the accomplishment and execution of the full objectives of Congress because it would amount to direct regulation of federal operations or property.³³²

In *Bowsher*, the states argued that the fund established under 31 U.S.C. § 1322 was comprised of unclaimed money that was subject to state unclaimed property laws.³³³ The states further argued that the federal statute was merely a bookkeeping mechanism and that neither the language nor the legislative history of § 1322 showed congressional intent to preempt.³³⁴ The states further alleged that compliance with the state unclaimed property laws would not burden any federal interest; rather, the federal and state statutes dovetailed and both could be complied with.³³⁵

The District Court for the District of Columbia reasoned that because 31 U.S.C. § 1322 provided for federal custody of the money and did not provide for transfer to the states' custody, state and federal laws could not coexist.³³⁶ Thus, the court held that the Supremacy Clause of the Constitution requires the federal law to take precedence and 31 U.S.C. § 1322 preempts state unclaimed property laws.³³⁷

³²⁸ See *id.* See *supra* note 321 and accompanying text for a discussion of 26 U.S.C. § 6408.

³²⁹ See *Bowsher*, 935 F.2d at 333. See *supra* note 299 and accompanying text for a discussion of 38 U.S.C. § 5200.

³³⁰ *Bowsher*, 935 F.2d at 334.

³³¹ *Id.* at 333.

³³² *Id.* at 334-35.

³³³ *Id.* at 333.

³³⁴ Final Reply Brief of Plaintiff-Appellant at 3-4, *Arizona v. Bowsher*, 935 F.2d 332 (D.C. Cir.), *cert. denied*, *Alabama v. Bowsher*, 112 S. Ct. 584 (1991) (No. 90-5184).

³³⁵ *Id.* at 12.

³³⁶ See *Alabama v. Bowsher*, 734 F. Supp. 525, 542 (D.D.C. 1990).

³³⁷ *Id.*

The United States Court of Appeals for the District of Columbia Circuit affirmed the District Court opinion.³³⁸ The appellate court reasoned that the federal government had a property interest in the money because it was in the United States Treasury and states may not regulate the federal government's operations or property.³³⁹ The *Bowsher* court further reasoned that the state statutes stood as an obstacle to the accomplishment and execution of congressional objectives because Congress wanted to provide convenience to the claimant.³⁴⁰ Moreover, the court reasoned that the government and the owner would more likely recognize the federal government than the states as the payor.³⁴¹

In addition, the *Bowsher* court discounted the traditional strong state interest and authority in unclaimed property.³⁴² The court reasoned that because the state statutes that were preempted were custodial statutes, they were distinguishable from escheat where title is foreclosed and therefore did not have the same validity.³⁴³ Although the court acknowledged that the Supreme Court has treated custodial unclaimed property statutes the same as non-custodial statutes, the court concluded that they are not equivalent in all contexts.³⁴⁴ Nevertheless, the court, citing *United States v. Klein*, acknowledged that the state takes the place of the claimant in some situations.³⁴⁵

Thus, the United States Court of Appeals for the District of Columbia held that the states' claim to the unclaimed money in the fund under 31 U.S.C. § 1322 was prohibited as an attempt to regulate government property and was preempted under the Supremacy Clause.³⁴⁶ The state appealed to the United States Supreme Court for a grant of certiorari.³⁴⁷ It was denied in 1991.³⁴⁸

³³⁸ *Arizona v. Bowsher*, 935 F.2d 332, 333 (D.C. Cir.), *cert. denied*, *Alabama v. Bowsher*, 112 S. Ct. 584 (1991).

³³⁹ *Id.* at 334.

³⁴⁰ *Id.* at 335.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *See id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* See *supra* notes 282-90 for a discussion of *United States v. Klein*.

³⁴⁶ *Id.* at 334-35.

³⁴⁷ *Alabama v. Bowsher*, 112 S. Ct. 584 (1991).

³⁴⁸ *Id.*

B. *Current Federal-State Disputes Over Unclaimed Property*

Total unclaimed dollars held by the federal government approximate \$6.5 billion. A 1989 study by the Governmental Accounting Office ("GAO") states that \$1.5 billion of the unclaimed property is collected and held by six federal agencies included in the study.³⁴⁹ There are also at least \$5 billion of unclaimed United States Treasury checks as indicated by the Financial Management Service.³⁵⁰ The GAO report examined the existing methods a few of the agencies used for locating owners of unclaimed property.³⁵¹ The report acknowledged that the federal government does not have any universal requirements for federal agencies to locate owners.³⁵² Some agencies have recently established procedures, while others consider it too costly.³⁵³

The GAO report indicates that although a few agencies like the Office of Housing and Urban Development ("HUD") and the Internal Revenue Service ("IRS") are fully automated, and therefore relatively successful in finding owners and in returning unclaimed property, other agencies are not.³⁵⁴ The Office of Personnel Management has 35,000 file cabinets of unautomated federal retirement records and thus is less capable of identifying missing owners and processing claims than other agencies.³⁵⁵ The GAO report also acknowledges that there are wide information gaps in some federal agencies.³⁵⁶ For example, the Bureau of the Public Debt does not have social security numbers or current addresses for owners of currently maturing U.S. Savings Bonds that were issued thirty to fifty years ago.³⁵⁷ Thus, the report acknowledges that in some areas, locating missing owners is unlikely.

A former president of the National Association of Unclaimed Property Administrators ("NAUPA") revealed that the states are still involved in discussions with the federal government regarding unclaimed property in federal custody.³⁵⁸ One possibility currently

³⁴⁹ GAO REPORT, *supra* note 6, at 4.

³⁵⁰ Telephone Interview with Andy Montgomery, *supra* note 6.

³⁵¹ GAO REPORT, *supra* note 6, at 5.

³⁵² *See id.*

³⁵³ *Id.*

³⁵⁴ *See id.* at 26-34.

³⁵⁵ *See id.* at 4.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ Telephone Interview with Lorin Nielsen, former President of the National Association of Unclaimed Property Administrators (March 10, 1992).

being discussed is that the federal government might turn over the unclaimed property records, not the money, to the state.³⁵⁹ Under existing state unclaimed property legislation, the state will then attempt to locate the missing owners.³⁶⁰ Proponents of this plan suggest that it would further the interests of the missing owners, yet allow the federal government to keep any remaining unclaimed money.³⁶¹ This arrangement, they argue, would eliminate the need to create a completely separate federal unclaimed property bureaucracy to locate missing owners.³⁶² The argument concludes that the states benefit by getting even partial federal compliance with state unclaimed property statutes.³⁶³ In addition, because the federal government retains the billions of dollars in unclaimed funds, supporters contend that the federal government should contribute funding to help support the state administrative costs associated with locating missing owners.³⁶⁴

The states have been trying a legislative approach as well. NAUPA has supported an Unclaimed Property Bill that would require the federal agencies to turn over unclaimed property to the states.³⁶⁵ The Unclaimed Property Bill has been proposed several times without success.³⁶⁶ Commentators have noted that because complying with state unclaimed property laws will cost the federal government money, in the absence of a strong public push, it is unlikely that any congressional action will protect states' rights to unclaimed property in federal custody.³⁶⁷

In sum, the states have a long history of regulating the unclaimed property of their citizens.³⁶⁸ The judiciary has supported states' rights to unclaimed property, both for absolute and custodial escheat statutes.³⁶⁹ Most states have developed comprehensive un-

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.*; Telephone Interview with Patty White, *supra* note 1.

³⁶² Telephone Interview with Lorin Nielsen, *supra* note 358; Telephone Interview with Patty White, *supra* note 1.

³⁶³ Telephone Interview with Lorin Nielsen, *supra* note 358.

³⁶⁴ *Id.*

³⁶⁵ See S. 1612, 100th Cong., 1st Sess. (1987).

³⁶⁶ See *id.* (status indicated in 1 Cong. Index (CCH), 100th Cong., at 21,035 (1987); S. 1780, 99th Cong., 1st Sess. (status indicated in 1 Cong. Index (CCH), 99th Cong., at 21,034 (1985)).

³⁶⁷ Telephone Interview with Lorin Nielsen, *supra* note 358.

³⁶⁸ See *supra* notes 67-228 and accompanying text for a discussion of the history of state regulation of unclaimed property.

³⁶⁹ See *supra* notes 73-93, 134-56, 178-202 and accompanying text for a discussion of judicial support of state regulation of unclaimed property.

claimed property legislation modeled after the Uniform Unclaimed Property Acts.³⁷⁰ Despite the long history of state control of unclaimed property, over \$6.5 billion is held by the federal government and continues to be a significant legal and political issue.³⁷¹ The decision in *Arizona v. Bowsher* currently stands in the way of state legal remedies; however, the underlying issues are far from settled.

V. WHY THE STATES SHOULD RETAIN THEIR UNCLAIMED PROPERTY POWER

The United States adopted the doctrines of escheat and *bona vacantia* under a unified doctrine of escheat. States claim the right to escheat as an extension of their sovereign right of the people and under their general police power. States have gradually codified the escheat doctrine in the form of unclaimed property law. The Supreme Court has affirmed the states' rights to almost all types of unclaimed property.³⁷²

State custody of abandoned property benefits all parties involved in various ways. Missing owners can appear and successfully claim property, and society benefits through the states' custody of the property by having use of funds that would otherwise be a windfall to the holder, and the holders are relieved of liability and the expense of maintaining records.³⁷³

Despite the case law and state statutes governing unclaimed property, the right of states to claim custody of unclaimed obligations owed by the federal government remains unsettled. Under the authority of federal legislation, federal agencies have claimed rights to abandoned property including veterans' benefits and Treasury funds. The current conflict exists over whether the federal government should be the appropriate holder for unclaimed funds held by federal agencies. Although there is no express preemption under federal law, federal agencies hold approximately \$6.5 billion in unclaimed money.³⁷⁴

³⁷⁰ See *supra* notes 164-77, 203-06, 210-24 and accompanying text for a discussion of the Uniform Unclaimed Property Acts.

³⁷¹ See *supra* notes 254-348 and accompanying text for a discussion of the federal versus state conflict over unclaimed property.

³⁷² See *supra* notes 120-33 and accompanying text for a discussion of the development of state unclaimed property legislation.

³⁷³ See *supra* notes 94-119 and accompanying text for a discussion of rationales for state custody of unclaimed property.

³⁷⁴ See *supra* notes 254-348 and accompanying text for a discussion of the federal versus state conflict over unclaimed property in federal custody.

There are four key issues in the controversy over federal preemption of state unclaimed property laws. First, are federal statutes that expressly preempt state unclaimed property laws constitutional? Second, do federal custody statutes, absent express congressional intent to preempt, impliedly preempt state unclaimed property laws? Within this issue is the stated purpose of both federal and state statutes of returning property to missing owners. Third, should the Supreme Court precedent set in *United States v. Klein* for state escheat of funds in federal custody control subsequent cases? Finally, is Congress or are the courts best suited to settle this controversy?

A. Constitutionality of Federal Escheat

When the states challenged federal statutes governing unclaimed veterans' property and unclaimed federal income tax refunds which expressly preempted state unclaimed property laws, the federal government prevailed.³⁷⁵ Nevertheless, the federal government found constitutional authority for the veterans' property legislation as necessary and proper for acting under the federal war powers.³⁷⁶ For federal income tax refunds, the federal government's legislation was found to be necessary and proper for the administration of federal taxes.³⁷⁷ Thus, in each of these cases, the power for federal preemption of the state unclaimed property law was specific to a defined area of constitutional power. Congress does not necessarily have the power to enact preemptive legislation in an area where there is not a specific grant of federal power.

The district court in *Bowsher* reasoned that Congress has authority to place unclaimed money in the custody of the Secretary of the Treasury because disbursing funds and paying debts is a constitutional function.³⁷⁸ The question is not whether Congress has the authority to place the money in the federal treasury, but rather whether it has the right to retain the funds as revenue rather than disperse them to the states as rightful claimants.

³⁷⁵ See *United States v. Oregon*, 366 U.S. 643, 648-49 (1961) (upholding 38 U.S.C. § 17, which provides for federal claims to unclaimed veterans' property); *In re Abrams*, 556 N.Y.S.2d 925, 927 (N.Y. App. Div. 1990) (upholding 26 U.S.C. § 6408, which expressly removes unclaimed federal income tax refunds from the scope of state abandoned property law).

³⁷⁶ See *supra* note 299 and accompanying text for a discussion of the veterans' statute.

³⁷⁷ See *supra* note 321 and accompanying text for a discussion of the federal tax statute.

³⁷⁸ *Alabama v. Bowsher*, 734 F. Supp. 525, 540 (1990), *aff'd*, *Arizona v. Bowsher*, 935 F.2d 332 (D.C. Cir. 1991), *cert. denied*, *Alabama v. Bowsher*, 112 S. Ct. 584 (1991).

It is the revenue aspect of unclaimed property that suggests that federal claims to retain unclaimed property are unconstitutional. Because it is recognized that a large percentage of owners will not claim the funds, unclaimed property is a significant source of non-tax revenue.³⁷⁹ Numerous commentators and courts have acknowledged the revenue aspects of both custodial and non-custodial escheat.³⁸⁰ The issue is whether this is revenue that belongs to the federal or state governments.

Federal escheat, even custodial escheat, is an unconstitutional source of revenue. As Justice Douglas argued in his dissent in *United States v. Oregon*, the federal government has the right to tax and borrow to raise money.³⁸¹ Raising revenue by escheat of property of citizens who have a relationship with the federal government is an infringement on the Tenth Amendment rights of the states, particularly in view of the strong state interest and comprehensive state law regarding unclaimed property.

B. *Validity of Implied Preemption*

The federal government has gradually carved away specific areas of unclaimed property from state regulation through express preemption.³⁸² Congress has done this by legislating to exclude specific areas of federal control from being subject to state unclaimed property laws or by enacting its own escheat statutes.³⁸³ These incidents of congressional carving away of state control are clearly intended to preempt the state laws and, although it may not be completely within the authority of Congress to enact this legislation, the preemptive intent is clear in each case. Nevertheless, congressional intent to preempt state unclaimed property laws is not evident with regard to federal custody statutes.³⁸⁴ These types

³⁷⁹ See *supra* notes 105-13 and accompanying text for a discussion of the revenue aspects of unclaimed property.

³⁸⁰ See *supra* notes 105-13 and accompanying text for a discussion of the revenue aspects of unclaimed property.

³⁸¹ 366 U.S. 643, 654 (1961) (Douglas, J., dissenting).

³⁸² See *supra* notes 236-53, 297-348 and accompanying text for a discussion of federal preemption of state unclaimed property laws.

³⁸³ See *supra* notes 297-332 and accompanying text for a discussion of express federal preemption of state unclaimed property laws regarding veterans' property and unclaimed federal income tax refunds.

³⁸⁴ See *supra* notes 323-48 for a discussion of the federal implied preemption in *Arizona v. Bowsher*.

of statutes are bookkeeping statutes and do not include provisions to exempt them from state laws.

The appellate court in *Bowsher* addressed this type of custody statute and still focused on preemption, holding that the state unclaimed property laws obstructed the objectives of Congress.³⁸⁵ Compliance with the state laws does not interfere with the purposes and objectives of Congress. There is nothing in the statute to show congressional intent to preempt state laws.³⁸⁶ Rather, the stated purpose for enacting 31 U.S.C. § 1322 was to create a time-saving bookkeeping device to facilitate payment of claims by the Treasury. The federal statute simply creates an account to hold unclaimed funds. It does not mention locating missing owners or even maintaining records of the unclaimed property. On the agency level, although there are areas where the federal government is attempting to locate owners and process claims, only a few agencies are doing so.³⁸⁷ The fact that there are no established procedures among all of the agencies is a good reason why the states should have custody.

Some federal agencies are not capable of handling claims by missing owners, especially if the list of missing owners is to be published regularly as it is in many states. Rather than create a federal bureaucracy capable of handling the claims, the federal government should use the existing state administrators, who have an established system for processing claims. Because the stated purpose of the federal statute 31 U.S.C. § 1322 was to facilitate payments to missing owners, the Treasury should recognize the savings in time and money by turning over the unclaimed funds to the states. At the very least, the agencies should turn over the records to the states and assist in processing claims.

In *Bowsher*, the appellate court was clearly hostile to states' rights and did not even attempt to dovetail the federal statute with the state legislation. State unclaimed property legislation does not conflict with 31 U.S.C. § 1322 because both the federal and the state statutes can be complied with. Because the Treasurer is merely a

³⁸⁵ See *Arizona v. Bowsher*, 935 F.2d 332, 334-35, 336 (D.C. Cir.), *cert. denied*, *Alabama v. Bowsher*, 112 S. Ct. 584 (1991).

³⁸⁶ See *supra* note 334 and accompanying text for a discussion of federal intent behind 26 U.S.C. § 1322.

³⁸⁷ See *supra* notes 352-57 and accompanying text for a discussion of the limited federal efforts to locate missing owners of unclaimed property.

custodian for the funds, subsequent state escheat does not conflict with the federal statute.

C. Supreme Court Precedent

The second issue is whether the ruling in *United States v. Klein* should control state claims to unclaimed property in federal custody.³⁸⁸ In *Klein*, the United States Supreme Court held that a state escheat statute was applicable to unclaimed funds that had been collected by the federal court and subsequently transferred to the United States Treasury.³⁸⁹ The district court in *Bowsher*, however, distinguished *United States v. Klein* by stating that *Klein* involved escheat of title, whereas *Bowsher* involved custodial escheat.³⁹⁰ The court's reasoning on this issue was faulty. States began enacting custodial escheat legislation as early as 1897 and the United States Supreme Court has ruled on numerous state custodial escheat cases where the Court enforced states' rights.³⁹¹ For example, in *Anderson National Bank v. Luckett*, the Court reasoned that the state escheat statutes were valid as applied to the federal bank specifically because the state statute was custodial and the depositors were protected.³⁹² Commentators have argued that the United States Supreme Court has upheld state unclaimed property statutes whether they are custodial or whether they foreclose the owners' rights, either immediately or eventually.³⁹³

The courts favored the shift to state custodial statutes because they better protected the interests of the owners.³⁹⁴ All of the Uniform Unclaimed Property Acts are custodial statutes, so almost all states have custodial unclaimed property statutes.³⁹⁵ Thus, the distinction made by the *Bowsher* court between custodial and non-custodial escheat is meritless. It should not make any difference to the holder of the property whether or not the state is going to claim

³⁸⁸ See 303 U.S. 276, 282-83 (1938).

³⁸⁹ *Id.*

³⁹⁰ *Alabama v. Bowsher*, 734 F. Supp. 525, 534 n.13 (D.D.C. 1990), *aff'd*, *Arizona v. Bowsher*, 935 F.2d 332 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 584 (1991).

³⁹¹ See *supra* notes 73-93, 134-56, 178-202 and accompanying text for a discussion of the judicial support for state unclaimed property laws.

³⁹² 321 U.S. 233, 251-52 (1944).

³⁹³ *McThenia & Epstein*, *supra* note 1, at 1436.

³⁹⁴ See *supra* notes 58-65 and accompanying text for a discussion of the shift to custodial escheat.

³⁹⁵ See *supra* note 228 and accompanying text for a discussion of states adopting the Uniform Acts.

title to or custody of unclaimed funds. The relevant issue is that the state has a better claim than a fortuitous holder. The federal government in this situation is no less the lucky "windfall" holder than a private holder, especially those agencies that utilize the unclaimed property to fund their own operating expenses.

D. *Who Should Decide?*

The fourth question is whether this is an issue that is better suited for congressional rather than judicial action.³⁹⁶ It is unlikely that in light of the federal deficit, Congress is going to allow any source of revenue to be taken away. Although attempts are being made to get congressional legislation passed to require agencies to turn over unclaimed funds directly to the states, the bill has never even made it to committee. Unless pressured by constituents, congressional legislators are not likely to pass a bill that will make the federal deficit worse. Thus, the judiciary should take steps to protect the rights of the states and the missing owners.

VI. CONCLUSION

The current controversy between the state and federal government over custody of funds retained by federal agencies involves the fundamental historic right of states to regulate unclaimed property. Federal custodial escheat does not preempt state laws and does little to further the interests of the owners. Thus, state unclaimed property laws should be enforceable against the federal government. Although the appellate decision in *Arizona v. Bowsher* has halted states' legal recourse, at the very least, the federal agencies should work with the states and support state efforts to locate missing owners and reunite them with their abandoned property.

SUSAN T. KELLY

³⁹⁶ See *supra* notes 365-67 and accompanying text for a discussion of state attempts at legislative action.