

5-1-2013

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## Recommended Citation

Pitt, Isabella Regina, "Beware of New Jerseyans Bearing Gift Cards: New Jersey Gift Card Legislation and the Corporate Effect" (2013). *Law School Student Scholarship*. 287.  
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# *Beware of New Jerseyans Bearing Gift Cards: New Jersey Gift Card Legislation and the Corporate Effect*

*Isabella Pitt*

## **Introduction**

The act of giving a gift is a complex aspect of human interaction that various experts agree is vitally important to the relationships we develop with friends and family.<sup>1</sup> The communal benefit of generosity is not a new concept.<sup>2</sup> “For thousands of years, some native cultures have engaged in the potlatch, a complex ceremony that celebrates extreme giving. Although cultural interpretations vary, often the status of a given family in a clan or village was dictated not by who had the most possessions, but instead by who gave away the most.”<sup>3</sup> In this tradition, a gift given was meant to be a reflection on the status of the gift giver.<sup>4</sup> The more extravagant the gift, the more prestigious the gift giver was deemed.<sup>5</sup> In a society based on class, it is easy to see why individuals went to great lengths to give grand gifts. Some researchers even link gifts with the evolution of people, finding that “[m]en who were the most generous may have had the most reproductive success with women.... Women who were skilled at giving — be it extra food or a well-fitted pelt — helped sustain the family provider as well as her children.”<sup>6</sup> But as the pace of society has quickened, there has been a great transition from lavish gift giving to gifts of convenience and gifts of currency.

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<sup>1</sup> Tara Parker-Pope, *A Gift That Gives Right Back? The Giving Itself*, N.Y. TIMES, Dec. 11, 2007, [http://www.nytimes.com/2007/12/11/health/11well.html?\\_r=0](http://www.nytimes.com/2007/12/11/health/11well.html?_r=0).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

As cash became a more common gift form, retailers decided to “cash in” on the shift by preserving a method whereby a cash equivalent could be given with limited flexibility, i.e. the gift certificate.<sup>7</sup> Major department stores were the first creators of the gift certificate in the 1930s, but these stores utilized gift cards very sparingly.<sup>8</sup> “In 1995, Mobile introduced a plastic card that could be used for gas fill-ups and phone calls. Borrowing technology from prepaid phone cards, a customer’s balance was stored in a database and reflected on a number in the card’s magnetic strip.”<sup>9</sup> Starbucks was the next company to create a major innovation in the world of gift cards.<sup>10</sup> In 2001, the company created a gift card that could be used more than once by allowing customers to add value.<sup>11</sup>

By the year 2000, the American Express Retail index recorded gift certificates to be the second most popular holiday gift.<sup>12</sup> The index noted shoppers had spent approximately twenty two billion dollars on gift certificates that year.<sup>13</sup> A little over a decade later in 2011, individuals more than tripled their gift card purchases by spending nearly one hundred billion dollars.<sup>14</sup> A significant number of gift cards and certificates, such as the ones described above, go unredeemed each year.<sup>15</sup> Consumer advocate groups estimate that between two to five percent, or at least three billion dollars, of gift cards go unredeemed annually.<sup>16</sup> Stored value cards<sup>17</sup> are

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<sup>7</sup> *The Evolution of Gifting and Gift Cards*, GIFT CARD GRANNY, Nov. 29, 2010, <http://www.giftcardgranny.com/blog/the-evolution-of-gifting-and-gift-cards/>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Matt Buchanan, *The Vile History of Gift Cards and How They Came to Destroy Christmas*, GIZMODO, Dec. 27, 2009, <http://gizmodo.com/5434783/the-vile-history-of-gift-cards-and-how-they-came-to-destroy-christmas>.

<sup>11</sup> *Id.*

<sup>12</sup> Todd G. Friedland, *Gift Certificates in California: The Gift that Keeps on Giving*, 45 ORANGE COUNTY LAWYER 32, March 2003.

<sup>13</sup> *Id.*

<sup>14</sup> David Louie, *Consumer experts warn many gift cards go unused*, ABC NEWS, Dec. 26, 2011, <http://abclocal.go.com/kgo/story?section=news/business&id=8480466>.

<sup>15</sup> See Erica Alini, *Governments Grab Unused Gift Cards*, WALL ST. J., June 30, 2009, at A3.

<sup>16</sup> Louie, *supra* note 14.

<sup>17</sup> The term stored value card refers to a card which stores monetary value such as a gift card, prepaid card. Within this Note the term stored value card and gift card can be used interchangeably.

one of the largest grossing products that many major retailers sell.<sup>18</sup> Following the success of gift card sales, states have attempted to devise plans whereby they profit from the sales as well.<sup>19</sup>

New Jersey is one of many states to implement legislation in order to regulate and benefit from the sale and expiration of stored value cards.<sup>20</sup> New Jersey is a state known for its strict stance on consumer protection, but has it gone too far this time?<sup>21</sup> As the new legislation continues to favor the State itself, corporations have been left in the dark to fend for themselves.<sup>22</sup> In order to protect the interest of the majority, New Jersey must shift their stance on consumer protection to create a more corporate friendly approach to gift card legislation. New Jersey's legislation has shifted the benefits of corporate labor away from businesses and consumers towards the State, resulting in many unintended and unforeseeable consequences.<sup>23</sup>

This Note argues against the implementation of New Jersey's gift card legislation. Part I of this Note discusses the current federal and state laws regulating gift cards and examines the United States Court of Appeals decision in *New Jersey Retail Merchants Association v. Sidamon-Eristoff*<sup>24</sup> to determine how future law will be affected. Part II analyzes New Jersey's new gift card legislation under the scrutiny of traditional contract law, as well as policies relating to the freedom to contract. Part III evaluates relevant property rights in regard to the current legislation and traces the principles that support those policies. Finally, Part IV examines the unintended consequences this legislation precipitates and how other states have regulated similar concerns. New Jersey's gift card legislation casts a wide net of potential harm. The State

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<sup>18</sup> Friedland, *supra* note 12.

<sup>19</sup> See N.J.S.A. 46:30B-1 (West 2002).

<sup>20</sup> *Id.*

<sup>21</sup> See N.J. Stat. Ann. § 56:8-2 (West).

<sup>22</sup> Y. Angela Lam, *The Gift That Keeps on Taking: How Federal Banking Laws Prevent States from Enforcing Gift Card Laws*, 93 MINN. L. REV. 311, 312 (2008).

<sup>23</sup> Retail Industry Group, Morgan, Lewis & Bockius LLP, *New Jersey Revised Gift Card Law*, THE NAT'L L. REV., Aug. 9, 2009, <http://www.natlawreview.com/article/new-jersey-revised-gift-card-law>.

<sup>24</sup> *New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374 (3d Cir. 2012) cert. denied, 133 S. Ct. 528 (2012).

continues to modify laws to appease its own needs while actively isolating corporations and doing nothing to ratchet up consumer protection. While this legislation is still in its infancy, the law must be modified to obtain a more corporate friendly approach.

## **Part I: The State and Federal Stance on Stored Value Cards**

In 2010, New Jersey created an amendment to its unclaimed property law.<sup>25</sup> This amendment included a number of provisions affecting stored value cards.<sup>26</sup> Specifically, the law classified gift cards as abandoned property after they went unused for a period of two or more years.<sup>27</sup> This change shortened the length of time for classification and made it easier to transfer ownership of property to the State.<sup>28</sup> Additionally, the 2010 law mandated that if there were insufficient records relating to the gift card owner's last known address, the value of the card was to escheat to the owner's place of purchase. This was referred to as the "place of purchase requirement." Previously, the value of the card escheated to the holder's domicile, which had traditionally been the rule.<sup>29</sup> All of these aforementioned provisions were to be applied retroactively.<sup>30</sup> New Jersey also created a system whereby the State coached retailers to inquire about the name and zip code of the owner or purchaser of these cards, requiring retailers to maintain records of such information in-house.<sup>31</sup> This amendment marks a notable shift for a State whose initial stance was to exclude all gift and stored value cards from escheat.<sup>32</sup>

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<sup>25</sup> Retail Industry Group, *supra* note 23.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Retail Industry Group, *supra* note 23.

<sup>32</sup> Keane Unclaimed Property Team, *New Jersey Amending Gift Card Escheatment Laws*, KEANOTES, June 27, 2012, <http://unclaimed-property.keaneco.com/new-jersey-amending-gift-card-escheatment-laws>.

This move by the New Jersey Legislature was seen by many in the retail industry as a selfish ploy to increase the State's ability to claim access to these unused funds.<sup>33</sup> The new unclaimed property law sparked legal upheaval and several retailers and other corporate groups brought claims against the State.<sup>34</sup> "The New Jersey Retail Merchants Association, the New Jersey Food Council and American Express Prepaid Card Management Corporation filed a motion for preliminary injunction in the United States District Court against the New Jersey Treasurer and the New Jersey Unclaimed Property Administrator."<sup>35</sup> These groups filed this motion "on the basis that enforcement of certain provisions of the 2010 changes ("Chapter 25") violated various constitutional provisions."<sup>36</sup> This injunction barred many of the more onerous provisions of the unclaimed property law from taking immediate effect.<sup>37</sup>

Ultimately, on January 5, 2012, in the case of *New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff*, the United States Court of Appeals for the Third Circuit reaffirmed the preliminary injunction, finding that the retroactive application of New Jersey's unclaimed property law as well as the "place of purchase" requirement was likely a violation of federal law.<sup>38</sup> On their motion for a preliminary injunction, gift card issuers showed a likelihood of success on their contract clause claim.<sup>39</sup> The contract clause claim alleged that the New Jersey statute, which provided for a custodial escheat of gift card balances, substantially interfered with an issuers' contractual relationship with card purchasers.<sup>40</sup> The statute required card issuers to turn over the entire cash balance of a gift card to the State at end of the proscribed abandonment

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<sup>33</sup> Retail Industry Group, *supra* note 23.

<sup>34</sup> *Id.*

<sup>35</sup> McNeese Wallace & Nurick LLC, *Court Affirms Injunction Against NJ Unclaimed Property Law*, JD SUPRA LAW NEWS, Feb. 23, 2012, <http://www.jdsupra.com/legalnews/court-affirms-injunction-against-nj-uncl-02730/>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* See also Retail Industry Group, *supra* note 23.

<sup>39</sup> *Id.*

<sup>40</sup> *Sidamon-Eristoff*, *supra* note 24 at 387.

period, even though the gift cards would not be redeemable for cash by the card holder themselves under the issuers' original contract.<sup>41</sup> This statutory requirement transfers the expected benefits of gift cards to state custody and imposes unexpected obligations on retailers in an area where reliance and predictability is vital.<sup>42</sup>

This case was not a complete win for consumerism. The court found that the data-collection requirement was permissible and the injunction was lifted to that end.<sup>43</sup> Both sides of this case have appealed the decision to the U.S. Supreme Court, which denied certiorari.<sup>44</sup> Following this case, the data-collection requirement of New Jersey's unclaimed property law was to begin in 2012. As a result, there was a move for a corporate shift out of the State. "In spring 2012, three of the largest gift card sellers in New Jersey decided to stop selling gift cards in the state rather than comply with the data-collection requirement."<sup>45</sup> Seemingly frightened by this unintended consequence, New Jersey agreed to defer the implementation of the data collection requirement for at least four years.<sup>46</sup>

On July 29, 2012, Governor Chris Christie signed into law Senate Bill No. 1928 (S.1928), again creating law to regulate gift cards in New Jersey.<sup>47</sup> The Creation of N.J.S.A. 46:30B was "aimed at revising New Jersey escheat law (N.J.S.A. 2A: 37-1 et seq.) to conform to the 'Uniform Unclaimed Property Act (1981),' promulgated by the National Conference of Commissioners on Uniform State Laws."<sup>48</sup> The Uniform Unclaimed Property Act's primary purpose is "consumer protection and public interest legislation, protecting the interests of the true owner of property against confiscation by the holder while giving the state the benefit of its use

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Sidamon-Eristoff, supra* note 24.

<sup>45</sup> Retail Industry Group, *supra* note 23.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> N.J.S.A. 46:30B (West 2002).

until the owner claims it.”<sup>49</sup> Under New Jersey’s new property law, stored value cards will be presumably abandoned after a five-year dormancy period.<sup>50</sup> Sixty percent of the remaining balances on these abandoned cards will now escheat directly to the State.<sup>51</sup>

Because the State agreed to initially defer data collection, “beginning on July 1, 2016 all issuers of stored value cards in the state of New Jersey must obtain the name and address of the purchaser or owner of the card issued or sold and must keep record of the buyer’s zip code.”<sup>52</sup> In a move that has been called a “compromise” between retailers and the State, the new law provides for the deferment of the data collection policy while requiring retailers to provide a cash redemption for gift cards that have been used at least once and have less than a five dollar remaining balance.<sup>53</sup> Retailers are required to provide this type of refund upon request by a customer.<sup>54</sup> This new requirement became effective September 1, 2012, but does not apply to cards whose initial value is five dollars or less. Additionally, the new law provides that the funds associated with a stored value card will never expire.<sup>55</sup> The cards may still contain an expiration date to the extent permitted by federal law, but the expiration date will apply only to the card or other tangible mediums.<sup>56</sup> Stored value cards may not generally have any fees or charges associated with them “except that the issuer may charge (1) an activation fee when the stored value card is purchased and when reloading an existing stored value card; and (2) a replacement

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<sup>49</sup> *Clymer v. Summit Bancorp.*, 726 A.2d 983 (Ch. Div. 1998) rev'd sub nom. *Clymer v. Summit Bancorp.*, 758 A.2d 652 (App. Div. 2000) rev'd sub nom. *Clymer v. Summit Bancorp.*, 792 A.2d 396 (2002).

<sup>50</sup> Grant Thornton’s Washington National Tax Office, *United States: New Jersey Amends Treatment of Stored Value Cards*, MONDAQ, Sept. 19, 2012, <http://www.mondaq.com/unitedstates/x/197082/tax+authorities/New+Jersey+Amends+Treatment+Of+Stored+Value+Cards>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Retail Industry Group, *supra* note 23.

<sup>54</sup> *Id.*

<sup>55</sup> Grant Thornton’s Washington National Tax Office, *supra* note 49.

<sup>56</sup> Keane Unclaimed Property Team, *supra* note 32.



card fee if the fees are disclosed in writing prior to issuance.”<sup>57</sup> There are strict penalties for violating this new law, including a fine of up to \$500 per violation.<sup>58</sup>

This new law seems to have some disconnect from its intended purpose to its effect in practice. Consumer protection seems to be the championing theme behind this new law, yet the retailer has no obligation to inform consumers of the new policies.<sup>59</sup> Specifically, retailers do not have to tell consumers they are entitled to a cash refund if their card has less than five dollars remaining on it.<sup>60</sup> Under the law, retailers are even allowed to continue to include a statement on their gift card to the effect that “[t]his card is not redeemable for cash except as required by law.”<sup>61</sup>

There is also federal law which regulates gift cards. Under federal law, gift cards are regulated by many mediums including the Credit Card Accountability, Responsibility, and Disclosure (CARD) Act of 2009, the Electronic Fund Transfer Act, and the Consumer Financial Protection Bureau. On May 22, 2009, President Barack Obama signed into law the CARD Act of 2009 as part of his goal to regulate financial matters and institutions.<sup>62</sup> This new law took effect on August 22, 2010, and contains a provision that amends the Electronic Funds Transfer Act, effecting gift cards with federal regulations, governing fees, and expiration dates.<sup>63</sup> “The law spells out in great detail that pre-paid cards, gift certificates, and gift cards publicly marketed as such products are covered by the new federal law.”<sup>64</sup> Gift cards sold on or after the effective date of this law may maintain the use of expiration dates; however, the date of expiration must be at

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<sup>57</sup> *Id.*

<sup>58</sup> Retail Industry Group, *supra* note 23.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Jennifer S. Martin, *Professor Jennifer S. Martin on the Proposed Rules on Gift Cards*, Emerging Issues (LexisNexis), March 2010, at 4908; *Federal Gift Card Law Explained in Simple Terms*, ALL THINGS GIFT CARD, June 14, 2010, <http://www.allthingsgiftcard.com/2010/06/federal-gift-card-law-explained-in-simple-terms/>.

<sup>63</sup> *Federal Gift Card Law Explained in Simple Terms*, *supra* note 61.

<sup>64</sup> *Id.*

least five years from the date the card was issued or the date when value was last added to the card.<sup>65</sup> The sale of gift cards, pre-paid cards, and gift certificates with expiration dates of less than five years is specifically prohibited.<sup>66</sup> States without their own gift card legislation are automatically opted into this law, while states that afford greater consumer protection through their own legislation are able to maintain those individual standards.<sup>67</sup> The Electronic Fund Transfer Act clearly prevents state laws “relating to electronic fund transfers, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency.”<sup>68</sup> However, the Fair Credit Reporting Act further clarifies that “[a] State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter.”<sup>69</sup> Federal regulation makes no mention of what is to happen to stored value cards once they have been deemed abandoned in accordance with an escheat statute.<sup>70</sup>

In dicta, the court in *Am. Exp. Travel Related Services Co., Inc. v. Sidamon-Eristoff*<sup>71</sup> engaged in some discussion of the difference between the New Jersey laws and the Federal laws regulating gift cards. The court noted that Chapter 25<sup>72</sup> provides greater protection for consumers than the CARD Act’s expiration provision provides.<sup>73</sup> The CARD Act imposes a five-year ban on expiring gift cards, while Chapter 25 provides an indefinite right for consumers to recover

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<sup>65</sup> *Id.* See also 15 U.S.C. § 1693l-1(c) (West 2009); see 12 C.F.R. 205.20(e).

<sup>66</sup> *Federal Gift Card Law Explained in Simple Terms*, *supra* note 62.

<sup>67</sup> *Id.*

<sup>68</sup> 15 U.S.C. § 1693q (West)

<sup>69</sup> *Id.*

<sup>70</sup> *Am. Exp. Travel Related Services Co., Inc. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 589 (D.N.J. 2010), order clarified (Jan. 14, 2011), *aff’d sub nom. Am. Exp. Travel Related Services, Inc. v. Sidamon-Eristoff*, 669 F.3d 359 (3d Cir. 2012) cert. denied, 133 S. Ct. 345 (U.S. 2012) and *aff’d sub nom. New Jersey Retail Merchants Ass’n v. Sidamon-Eristoff*, 669 F.3d 374 (3d Cir. 2012) cert. denied, 133 S. Ct. 528 (U.S. 2012).

<sup>71</sup> *Id.*

<sup>72</sup> Chapter 25 refers to a section of the New Jersey Unclaimed Property law.

<sup>73</sup> *Am. Exp. Travel Related Services Co.*, *supra* note 69.

funds.<sup>74</sup> Furthermore, Chapter 25 acts to convert stored value cards that are meant to be redeemable purely for goods or services into a cash value.<sup>75</sup> Thus, a consumer who possesses a stored value card for goods and services may be entitled to receive cash back following the abandonment period, a right which that individual did not, and would not, possess under the original agreement with the card issuer.<sup>76</sup> “The right to receive cash back is a form of protection afforded by Chapter 25 that is not afforded, or even addressed, by the CARD Act.”<sup>77</sup> Providing an individual with a greater benefit than they bargained for significantly impedes traditional contract policy. Individuals should be on equal footing in their dealings, without unnecessary interference by the government.

## **Part II: Contractual Freedom and State Protection**

New Jersey currently holds fourth place in a ranking of states by indebtedness.<sup>78</sup> In an attempt to raise state funds, New Jersey has reduced corporate and contractual rights.<sup>79</sup> The ability to freely contract is one of the founding principles of our legal system. “States may not deprive businesses and consumers in other States of ‘whatever competitive advantages they may possess based on the conditions of the local market.’”<sup>80</sup> The Supreme Court has consistently recognized this ideal, stating, “no state shall pass any law impairing the obligation of contracts.”<sup>81</sup> Thus, corporations should have the ability to freely contract with their consumers.

When attempting to preserve the freedom to contract while still promoting greater consumer protection, public policy is often split. The theory of unconscionability is frequently

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Jared Kaltwasser, *N.J. has fourth-highest debt among states*, NJ BIZ, Aug. 28, 2012, <http://www.njbiz.com/article/20120828/NJBIZ01/120829835/NJ-has-fourth-highest-debt-among-states>.

<sup>79</sup> See N.J.S.A. 46:30B (West 2002).

<sup>80</sup> *SPGGC, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007); see also *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 105 L. Ed. 2d 275 (1989) (quoting *Brown-Forman*, 476 U.S. at 580,)).

<sup>81</sup> U.S. Const. art. I, § 10, cl. 1.

endorsed in contract settings where the bargaining power between individuals is so fragrantly uneven, and the terms of the deal are so blatantly one sided, that the court will not allow the deal to stand. Courts recognize that the unconscionability doctrine promotes vital public policy objectives because it is “a potent tool for shielding disadvantaged and uneducated consumers from overreaching merchants.”<sup>82</sup> But courts recognize the short falling of this doctrine as well.<sup>83</sup> Instead of instantly reverting to the bold usage of unconscionability to protect consumers, courts will restrain themselves in favor of corporate protection because they believe they have an obligation to apply law that “protects the freedom of parties to contract.”<sup>84</sup> Courts often decline to be overly paternalistic in protecting consumers from “bad bargains” and instead rely on the principles of *caveat emptor*.<sup>85</sup> Courts will likely decline to find that a deal’s terms are unconscionable, unless they think that a “decent, fair-minded person would view the ensuing result of enforcing the challenged term with . . . a profound sense of injustice.”<sup>86</sup> Previous gift card policies were never found to be unconscionable, yet the State insists on modifying these policies.

In the case of stored value cards, there should be no such excuse or finding of unconscionability. There is no monopoly on gift cards, nor is there some great lack of bargaining power on the side of consumers. Arguably, consumers have the upper hand in dealings involving the sale of gift cards and retailers are held at the whim of the consumer. The choice to buy a gift card is one of convenience for shoppers. The individual who buys a gift card chooses to trade currency in exchange for the pigeonholed bartering equivalent. Corporations spend billions of

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<sup>82</sup> *NEC Technologies, Inc. v. Nelson*, 478 S.E.2d 769, 774 (1996).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *NEC Technologies*, 478 S.E.2d 769, 774 quoting *Fotomat Corp. of Florida v. Chanda*, 464 So.2d 626, 630 (Fla. Dist. Ct. App. 1985).

<sup>86</sup> *NEC Technologies*, *supra* note 81.

dollars advertising specific goods; gift cards in turn are rarely advertised or forcefully peddled to the buyer. With a lack of unfair bargaining or unconscionability, regulatory legislation has no place modifying the right to contract. Contracts are central to our current day economy and supply the vehicle through which individuals can negotiate for their own advantages; as such, they should be left unencumbered when at all possible.<sup>87</sup> People must be able to freely contract without government intrusion.

The foundation of contract represents “the legal expression of free market principles, and every interference with the contract system ... was treated as an attack on the very idea of the market as a natural and neutral institution for distributing rewards.”<sup>88</sup> In the case *Barnitz v. Beverly*, Justice George Shiras stated: “No provision of the [C]onstitution of the United States has received more frequent consideration by this [C]ourt than that which provides that no state shall pass any law impairing the obligation of contracts.”<sup>89</sup> Traditionally, American jurisprudence has recognized the importance of allowing private individuals the freedom to contract and will not interfere with everyday bargains. *Caveat emptor* provides a guiding principle for consumers in this regard.<sup>90</sup> Consumers have an interest in thoroughly investigating all deals before entering into them and in turn they have an interest in making informed decisions and investments. When legislation is created that interferes with a corporation’s freedom to contract, it often provides an unfair advantage to one party. Historically, individuals have not objected to these interferences when the party negatively affected is a corporation. In the United States, corporations generate more than half of the gross domestic product.<sup>91</sup> A corporation is

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<sup>87</sup> See generally Lawrence M. Friedman, *Contract Law in America, a Social and Economic Case Study*, 79 HARV. L. REV. 876 (1966).

<sup>88</sup> Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*, page 33 (1992).

<sup>89</sup> *Barnitz v. Veverly*, 163 U.S. 118, 121 (1896).

<sup>90</sup> Latin phrase meaning buyers beware.

<sup>91</sup> Bureau of Economic Analysis, U.S. Dept. of Com., Surv. Current Bus. (Jan. 1994).

recognized under the law as a separate person. For all intents and purposes, the law recognizes corporations as having the same rights as individuals, who are able to sue and be sued just like their living breathing counterparts. Thus, corporations should be given the same advantages to freely contract as traditional individuals are given, as well as the same level of protection.

New Jersey consistently favors consumers over corporations in the context of all transactions. In an attempt to protect consumers, New Jersey has enacted greater restrictions and requirements of corporations in contracting with consumers. These policies are in strict contrast to traditional contract policies, which seek to enhance the abilities of parties to freely contract with each other.<sup>92</sup> To ascertain whether there has been a contract clause violation, a court must first inquire whether the change in state law has “operated as a substantial impairment of a contractual relationship.”<sup>93</sup> The amendments to New Jersey’s Unclaimed Property Law have caused a substantial impairment of the contractual relationship between buyers and sellers. The current law provides cardholders greater protection than they bargained for. “The State of New Jersey’s stated goal of protecting the unclaimed property interests of gift card purchasers is illusory because such purchasers have no expectation of a refund that requires protection.”<sup>94</sup> Plaintiff’s brief for New Jersey Retail Merchants Associations argued that New Jersey’s true goal was to ensure “the biggest revenue ‘haul’ through conspicuously absent audit trails and no reclamation procedure.”<sup>95</sup> The brief went on to argue that of the total number of gift cards purchased annually, the majority were purchased for separate individuals other than the

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<sup>92</sup> Phillip W. Bohl, Kathryn J. Bergstrom, Kevin J. Moran, *Prepaid Cards and State Unclaimed Property Laws*, 27 FRANCHISE L.J. 23 (2007).

<sup>93</sup> *General Motors v. Romein*, 503 U.S. 181, 186; *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1243 (3d Cir. 1987); *Energy Reserves Group, Inc. v. Kansas Power Light Co.*, 459 U.S. 400, 411 (1983).

<sup>94</sup> NEW JERSEY RETAIL MERCHANTS ASSOCIATION, Plaintiff/Appellee-Cross-Appellant, v. Andrew P. SIDAMON-ERISTOFF, Treasurer of the State of New Jersey; and Steven R. Harris, Administrator, Unclaimed Property Administration of the State of New Jersey, Defendants/Appellants., 2011 WL 1653401 (C.A.3), 12-13.

<sup>95</sup> *Id.*

purchaser themselves.<sup>96</sup> As such, purchasers are not warranted great levels of protection since they never have an expectation of a personal refund that needs to be protected by New Jersey.<sup>97</sup> The State continues to put forth consumer protection as a guise to collect state funds and infringe on the right to contract. There is no presumption of bad dealings between retailers and consumers in terms of gift cards, and so the State cannot infringe for its own benefit and remove citizen's rights to recover their property, whether abandoned or not.

The new gift card legislation has even dissuaded some bank issuers from continuing to issue these cards since they are no longer profitable.<sup>98</sup> Banks, as well as retailers, earn income through stored value card fees.<sup>99</sup> Bankers have estimated significant financial setbacks relating to the legislation, noting for example that “the inability to charge dormancy fees on gift cards will cause a significant drop in revenue during the coming year,” leading to the decision to stop issuing the cards.<sup>100</sup> Banks have endured substantial hardship over the past few years. The legislation now in place in New Jersey further handicaps banks and prevents them from receiving profits through a means they have come to rely on.<sup>101</sup> The choice by banks to halt the issuance of gift cards will also affect consumers. Shoppers will no longer be given the more convenient option of purchasing gift cards from as many businesses as before.

Further, New Jersey's gift card laws will dissuade corporations from transacting business in the state of New Jersey.<sup>102</sup> The law will create a loophole whereby big businesses will utilize

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Stuart Hoberman and Susan Storch, *Look Into The Crystal Ball*, 266 NEW JERSEY LAWYER MAGAZINE 65, 68 (Oct. 2010).

<sup>100</sup> *Id.*

<sup>101</sup> NEW JERSEY RETAIL MERCHANTS ASSOCIATION, Plaintiff/Appellee-Cross-Appellant, v. Andrew P. SIDAMON-ERISTOFF, Treasurer of the State of New Jersey; and Steven R. Harris, Administrator, Unclaimed Property Administration of the State of New Jersey, Defendants/Appellants., 2011 WL 1653401 (C.A.3), 12-13.

<sup>102</sup> Retail Industry Group, *supra* note 23.

federal banks in order to avoid state mandates.<sup>103</sup> Already we see this trend in the case of American Express who has stopped selling gift cards in New Jersey stores. Currently, the only way for New Jersey consumers to purchase American Express gift cards is direct from the company online.<sup>104</sup> A spokeswoman for American Express said that this is necessary “because American Express sells its gift cards through third-party independent retailers” and they are thus unable to ensure compliance with New Jersey’s new law.<sup>105</sup> If large companies like American Express refuse to do business in New Jersey, the State’s economy will be negatively impacted.<sup>106</sup>

The requirement that businesses collect data regarding gift cardholder’s personal information under State law is also potentially harmful to consumers and further interferes with the freedom to contract. Retailers sell gift cards anonymously as a method of protecting consumer privacy.<sup>107</sup> Asking consumers to provide personal information relating to their address, as well as information regarding the gift card’s recipient, creates privacy concerns.<sup>108</sup> The requirement would also create greater transaction costs because of the time incurred collecting and maintaining the data and neither the consumer nor the purchaser will benefit from the efforts exerted.<sup>109</sup> If the business was to maintain the data for its own personal use and notified card owners when their cards were due to expire or when they had remaining balances, the time incurred in data collection and maintenance would be worth it both for the owner of the card and the retailer. The owner of the card would be able to redeem his or her gift card value and the

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<sup>103</sup> Arent Fox, *New Jersey Gift Card Law Forces Gift Card Retailers to Leave the State*, Arent Fox, April 13, 2012, [http://www.arentfox.com/publications/index.cfm?fa=legalUpdateDisp&content\\_id=3690](http://www.arentfox.com/publications/index.cfm?fa=legalUpdateDisp&content_id=3690).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Grant Thornton’s Washington National Tax Office, *supra* note 49.

<sup>107</sup> *See* Erica Alini, *supra* note 15.

<sup>108</sup> Sean M. Diamond, *Unwrapping Escheat: Unclaimed Property Laws and Gift Cards*, 60 Emory L.J. 971, 983 (2011).

<sup>109</sup> *Id.*



retailer would be able to lure their customer back into the store for subsequent sales.<sup>110</sup>

Companies exert labor and marketing forces in order to funnel economic gain from consumers.<sup>111</sup> Gift card laws should protect consumers, yet in the case of New Jersey's laws, the State is the beneficiary and the consumer is left with nothing.<sup>112</sup> Consumers lose their rights to products and services offered through gift cards because of the length of time of inactivity. The company owes a duty for a limited period of time and after that time has passed, the benefit of the property should move to the retailer, who unswervingly upheld its end of the bargain.

### **Part III: Property Rights and the Historical Context**

New Jersey derives its claim to abandoned property under the principles of escheat. Escheat is defined as “the reverting of property to the state or some agency of the state, or, as in England, to the lord of the fee or to the crown, when there is a failure of persons legally qualified to inherit or to claim.”<sup>113</sup> Under the doctrine of escheat, there is a long-standing tradition for states to claim custody rights of abandoned property in order to create a bailment for the true owner.<sup>114</sup> Escheat law traces its history back to feudal tenure under William the Conqueror.<sup>115</sup> “While in its traditional usage ‘escheat’ was a term which signified the reversion of real property to the state where no individuals exist who are entitled to inherit the property, the term has come to be used in a broader sense, including the situation where a government acquires title to abandoned personal property.”<sup>116</sup>

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<sup>110</sup> *Id.*

<sup>111</sup> Mark Furletti, Prepaid Card Markets & Regulation 2 (Fed. Reserve Bank of Phila., Payment Cards Center Discussion Paper No. 04-01, 2004), available at [http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2004/Prepaid\\_022004.pdf](http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2004/Prepaid_022004.pdf).

<sup>112</sup> *Am. Exp. Travel Related Services Co., Inc.*, *supra* note 69.

<sup>113</sup> “Escheat,” Dictionary References Online, November 28, 2012, <http://dictionary.reference.com/browse/escheat?s=t>.

<sup>114</sup> Teagan J. Gregory, *Unclaimed Property and Due Process: Justifying “Revenue-Raising” Modern Escheat*, 110 MICH. L. REV. 319. Nov. 2011.

<sup>115</sup> John V. Orth, *Escheat: Is the State the Last Heir?*, 13 GREEN BAG 2d 73, 74. Autumn, 2009.

<sup>116</sup> 27A Am. Jur. 2d Escheat § 1.

As budgets have declined in the last few decades, states have turned to property law and expanded their escheat statutes to increase collection efforts, encapsulating additional unclaimed property as an unconventional source of profits.<sup>117</sup> A prime illustration of this inclination is state movement toward controlling gift cards by imposing legislation to claim the remaining value on unused gift cards. The money remaining on these cards can range from pennies to dollars, often unsubstantial amounts but, in the aggregate, this small change can amount to a sizeable sum. The traditional theory of unclaimed property law is to reunite the lost property with the original owner by reverting the property back to the state in trust for the rightful owners and protecting consumerism by preventing an undue windfall to sellers.<sup>118</sup> This justification is not applicable here, where the State does not know who the real owner of the property is.<sup>119</sup>

In *Texas v. New Jersey*, the United States Supreme Court established the “primary rule” for escheat. There, the Court held that “each item of property ... is subject to escheat only by the State of the last known address of the creditor....”<sup>120</sup> In explaining the primary rule, the Supreme Court stated that “[b]y using a standard of last known address, rather than technical legal concepts of residence and domicile, administration and application of escheat laws should be simplified. It may well be that some addresses left by vanished creditors will be in states other than those in which they lived at the time the obligation arose or at the time of the escheat ....”<sup>121</sup>

It is evident that the Supreme Court looks to the address requirement of the escheat rule in order

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<sup>117</sup> See Diann L. Smith & Matthew P. Hedstrom, *Will Unclaimed Property Prove an Irresistible Well?*, Sutherland, (June 4, 2009), <http://www.sutherland.com/files/News/9508e3c1-a85a-433c-b0cb-0bfd8d13f054/Presentation/NewsAttachment/ded2153e-872a-4b88-9101-11dd0925870a/Article6.4.09.pdf> (“The reality, however, is that if states change unclaimed property laws with the purpose of obtaining more property or obtaining the property faster, the *raison d’être* of those laws also becomes abandoned.”).

<sup>118</sup> See *Clymer*, *supra* note 48.

<sup>119</sup> See Philip Keitel, *The Laws, Regulations, Guidelines, and Industry Practices That Protect Consumers Who Use Gift Cards*, 63 CONSUMER FIN. L.Q. REP. 163 (2009).

<sup>120</sup> *Texas v. New Jersey*, 379 U.S. 674 (1965).

<sup>121</sup> *Id.* at 681.

to substantiate where the creditor resided when the contractual obligation between retailer and consumer was created, or alternatively, at the time the property is to escheat.<sup>122</sup>

The Uniform Unclaimed Property Act of 1981 defines “last known address” as “a description of the location of the apparent owner sufficient for the purpose of the delivery as mail.”<sup>123</sup> In order to allow gift cards to escheat to the state, New Jersey’s property statute now require retailers to maintain a list of gift card purchaser’s zip codes.<sup>124</sup> A zip code unaccompanied by additional information is inadequate under the Uniform Unclaimed Property Act’s definition to operate as a last known address. Holders of unclaimed property have certain procedural duties to locate and notify owners.<sup>125</sup> A person’s zip code alone does not provide retailers with sufficient information for the purposes of reunification. Therefore, New Jersey should have no superior right to the unclaimed property since they are not holding that property in bailment for the true owner. New Jersey openly acknowledges this fact in their Appellate Brief to the Third Circuit, stating that the Property Act “will require issuers to obtain and retain sufficient information to identify the State of the creditor's last known address” but will not require issuers to maintain information relevant to actually finding the creditor himself.<sup>126</sup> Maintaining a list of gift card purchaser’s zip codes is arduous and does virtually nothing to aid the State in tracking down the true owner of abandoned property. An individual cannot be located by their zip code alone.

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<sup>122</sup> New Jersey Retail Merchants Association, *supra* note 93 at 8.

<sup>123</sup> *Uniform Unclaimed Property Act*, 8B U.L.A. 567 (1981) (“1981 Model Act”).

<sup>124</sup> N.J. Stat. Ann. § 46:30B-42.1 (West 2012)

<sup>125</sup> *Benson v. Simon Prop. Group, Inc.*, 642 S.E.2d 687 (2007).

<sup>126</sup> NEW JERSEY RETAIL MERCHANTS ASSOCIATION, Appellee, v. Andrew P. SIDAMON-ERISTOFF, et al., Appellants. New Jersey Food Council, Appellee, v. Andrew P. Sidamon-Eristoff, et al., Appellants. American Express Prepaid Card Management Corp., Appellee, v. Andrew P. Sidamon-Eristoff, et al., Appellants. New Jersey Retail Merchants Association, Cross-Appellant, v. Andrew P. Sidamon-Eristoff, et al., Cross-Appellees. New Jersey Food Council, Cross-Appellant, v. Andrew P., 2011 WL 1230250 (C.A.3), 10.

Certainly, New Jersey’s policy imperative rooted in reuniting consumers with their lost gift card money is laudable. Hence, the traditional justifications for escheatment to the state tend to fail miserably in the presence of that imperative. The Unclaimed Property Act regulates the State’s treatment of unclaimed property. “The Uniform Unclaimed Property Act is consumer protection and public interest legislation, protecting the interests of the true owner of property against confiscation by the holder while giving the state the benefit of its use until the owner claims it.”<sup>127</sup> The Act provides protection, convenience, accessibility, equality, and public benefit as its avowed goals.<sup>128</sup> Since it is virtually impossible for the State to locate card owners, none of the goals of the Act can be satisfied.

In order to provide a better scheme for reunification, retailers would have to be obligated to follow a more stringent regiment, such as inquiring about additional personal information including the purchaser’s name, physical address, and the personal information for the intended ultimate holder of the card.<sup>129</sup> This retention of additional personal information would cause an array of problems as discussed above. Consequently, New Jersey’s statutory requirement for retailers to maintain a list of zip codes is purely self-serving so that the State will be able to maintain a rebuttable presumption that the property can properly escheat to the State. There is no form of consumer protection taking place in this scenario. In fact, by maintaining only zip code information, New Jersey is harming consumers by creating a policy whereby no true owner will ever “appear to be entitled to payment” as mandated by New Jersey’s unclaimed property law.<sup>130</sup>

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<sup>127</sup> See *Clymer*, *supra* note 48.

<sup>128</sup> Diamond, *supra* note 106 at 980 *citing* Network Branded Prepaid Card Ass’n, NBPCA White Paper--Abandoned Property Laws and Network Branded Prepaid Cards: Questions and Concerns Raised When Trying to Fit Cards into the Existing Abandoned Property Legal Framework 3 (2009).

<sup>129</sup> NEW JERSEY RETAIL MERCHANTS ASSOCIATION, *supra* note 120.

<sup>130</sup> *Id.*

There is no evidence that retailers, as opposed to the state, would not be in the optimal position to reunite gift card holders with their abandoned property. The dispute that the state is in an inferior position to protect the consumer is further supported by the fact that the Unclaimed Property Act does not provide any provisions or procedures for a consumer to follow in order to make a claim for compensation for their forfeited gift card.<sup>131</sup> Moreover, as the funds from unclaimed gift cards will be pooled into the State of New Jersey's "general fund," the State cannot assure that the monies would be available to "the rightful owner" should he or she make a claim.<sup>132</sup> "New Jersey is not seeking 'custody' of unclaimed gift card proceeds as is required by unclaimed property law; New Jersey is seeking to use unclaimed gift card proceeds as a tool to balance its state budget."<sup>133</sup> It would seem to be more convenient and comprehensive to have a system where gift cardholders went to the original source, i.e. the retailer, to provide for relief instead of the state. There cannot be a claim for inconvenience or burden since the consumer has already proven an ability to get to the retailer through their original purchase. Gift card legislation should focus on the reunification of consumers with their goods, not on promoting greater consumer protection.<sup>134</sup>

The other stated objective of escheat, to prevent a windfall, is also inefficient in terms of gift cards.<sup>135</sup> In terms of abandoned property, a windfall occurs when someone is entitled to undeservedly collect to the detriment of the true owner.<sup>136</sup> There would be no claim of windfall as applied to the escheat of gift cards if the money reverted to the retailers, since unclaimed value remaining on a gift card could be returned to a more carefully tailored group, specifically those

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<sup>131</sup> *Id.*, See also N.J.S.A. 46:30B (West 2002).

<sup>132</sup> NEW JERSEY RETAIL MERCHANTS ASSOCIATION, *supra* note 93 at 8.

<sup>133</sup> *Id.*

<sup>134</sup> *Benson v. Simon Prop. Group, Inc.*, 642 S.E.2d 687 (S. Ct. GA 2007).

<sup>135</sup> *Diamond*, *supra* note 106 at 985.

<sup>136</sup> Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1491 (1999).

who exerted the initial efforts.<sup>137</sup> There are no unfair winnings when remaining balances escheat back to retailers since those businesses have invested considerably in the development of that gift card.<sup>138</sup> The existence of an unused remaining balance is due back to retailers, instead of to the state, because the retailers have engaged in productive business activities, such as costs of development of the gift cards. The state, on the other hand, has exerted no effort up until that point. The escheatment of gift card balances to the state would create an undue windfall.<sup>139</sup> Legal theorists also argue that allowing unused balances to escheat back to retailers is more likely to result in an economic gain back to the gift card owner.<sup>140</sup> “In a competitive market, businesses that retain breakage<sup>141</sup> are likely to pass on the savings to consumers, who are a smaller population than the general public, and this subgroup is more likely to encompass gift card owners and purchasers.”<sup>142</sup> Reverting unused gift cards back to retailers could reduce costs, encourage additional spending, and benefit society as a whole.<sup>143</sup> Preventing cards from escheating to the state would provide an incentive for retailers to honor gift cards for longer periods of time and would lead to a greater influx of cash into the economy.

A further disparagement exists when the state is entitled to unclaimed property as applied to gift cards because there is a violation of the derivative rights doctrine. Under the derivative rights doctrine, the right of the state to maintain unclaimed property is supposed to derive from a custodial right to maintain that property in anticipation for the true owner.<sup>144</sup> The derivative

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<sup>137</sup> *Id.* at 1554.

<sup>138</sup> Mark Furletti, *Prepaid Card Markets & Regulation 2* (Fed. Reserve Bank of Phila., Payment Cards Center Discussion Paper No. 04-01, 2004), available at [http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2004/Prepaid\\_022004.pdf](http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2004/Prepaid_022004.pdf).

<sup>139</sup> Kades, *supra* note 120.

<sup>140</sup> Diamond, *supra* note 106.

<sup>141</sup> This term is used to refer to the circumstance when a portion of a gift card remains unused.

<sup>142</sup> Diamond, *supra* note 106. *citing* Eric Kades, 108 YALE L.J. 1489, 1554.

<sup>143</sup> Kades, *supra* note 123 at 1554.

<sup>144</sup> Ethan D. Millar & John L. Coalson, Jr., *The Pot of Gold at the End of the Class Action Lawsuit: Can States Claim It As Unclaimed Property?*, 70 U. PITT. L. REV. 511, 515 (2009).

rights doctrine limits the rights of the state, placing the state on equal footing with the true owner.<sup>145</sup> When buying a gift card, purchasers acknowledge that they are exchanging currency for the ability to purchase future merchandise. The owners of gift cards have a limited right to exchange their prepaid cards for products. Gift cards are not a form of bailment for currency that can be retrieved upon request. The standard terms of gift cards provide that once purchased, a card can never be returned for cash.<sup>146</sup>

New Jersey's escheat law essentially transforms unused gift cards to cash by requiring retailers to turn over sixty percent of remaining gift card balances to the State after the cards have been deemed abandoned.<sup>147</sup> For practical purposes, this requirement provides the State a greater right than the owner of the gift card was ever entitled.<sup>148</sup> Courts have recognized this inconsistency but are in disagreement as to its permissibility.<sup>149</sup> For example, in *Connecticut Mutual Life Insurance Co. v. Moore*, the Supreme Court allowed for the state to step into the role of "owner" for an individual, but did not require other procedural requirements that the owner would typically need to satisfy, thus effectively ratcheting up the state's power.<sup>150</sup> If the state is given additional powers in violation of the derivative rights doctrine, the subsequent restrictions on the retailer's right to performance must be appropriate.<sup>151</sup> The derivative rights doctrine should be upheld in the circumstance of gift cards, since acting otherwise will create an unfair cost to retailers. When an individual utilizes a gift card for the purchase of goods, the value of the card is put towards the good's retail value. "[T]he business retains the profit from the

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<sup>145</sup> *Id.*

<sup>146</sup> See Diane Green-Kelly, *Gift Certificate and Gift Card Programs: The State Law Quagmire*, 23 FRANCHISE L.J. 211, 213 (2004).

<sup>147</sup> N.J.S.A. 46:30B (West 2002).

<sup>148</sup> Millar, *supra* note 128 at 530.

<sup>149</sup> *Connecticut Mutual Life Insurance Co. v. Moore*, 333 U.S. 541 (1948); see also *State ex rel. Callahan v. Marshall Field & Co.*, 404 N.E.2d 368 (Ill. App. Ct. 1980); *Murdock v. John B. Stetson Co.*, 1963 WL 6456 (Ct. Com. Pl. 1963).

<sup>150</sup> *Moore*, 333 U.S. 541.

<sup>151</sup> David J. Epstein, *Unclaimed Property Law and Reporting Forms* §1.04 (Matthew Bender rev. ed. 2010).

difference between the wholesale and retail prices. Therefore, a State claiming the full value of the breakage violates the [derivative rights] doctrine by obtaining a right to the merchandise's wholesale value instead of its lesser retail value."<sup>152</sup>

The new requirement of returning remaining balances of less than five dollars to consumers would also create a greater property right for those consumers. Since it is understood that gift cards are non-refundable, providing a monetary refund, no matter how minimal, creates an additional obligation on behalf of retailers. This obligation should be optional and voluntarily entered into. "The 'voluntary payment doctrine' bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law."<sup>153</sup> Thus, New Jersey should have no power to regulate de minimis returns since these original transactions were voluntarily entered into.<sup>154</sup> Cards with small remaining balances encourage future sales. Originally, consumers had to use every penny of their gift cards or risk wasting the money. Many purchasers thus chose to put their remaining balances toward another purchase in order to make a dent on the new price. With the option to cash out cards with little value on them, the incentive to purchase other items at the retailer's location is void. Buyers will likely choose to cash out rather than spend more.

Under the United States Constitution, private property must not be taken for public use without proper compensation.<sup>155</sup> New Jersey interferes with individual's rights in terms of the takings clause when it takes economic benefit away from the consumer.<sup>156</sup> Under the Unclaimed Property Act the State is able to take private property without just compensation, thus depriving

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<sup>152</sup> Diamond, *supra* note 106 at 985-987.

<sup>153</sup> *Lonner v. Simon Prop. Group, Inc.*, 57 A.D.3d 100, (2008).

<sup>154</sup> *Id.*

<sup>155</sup> USCS Const. Amend. V- Just Compensation.

<sup>156</sup> *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1012 (1992).



the true owner of any economically viable use. Since the state has no means of reuniting gift card owners with their abandoned property, this is a taking with no intention of compensation. The state cannot justify their takings under property law when the historical purpose of that law is at odds with current practice. Current law allows for an uncompensated taking of private goods for public use, converting those goods into state spending. The State is not retaining this money in order to return it to the consumer, nor is it properly compensating the owner for his or her loss. Thus, New Jersey's gift card legislation is clearly at odds with traditional property law.

#### **IV: Conclusion**

There are many unintended consequences of New Jersey's gift card laws. This legislation will have a negative effect on banks, retailers, consumers, and the State. New Jersey should utilize lessons learned from other states and develop a more corporate friendly approach. Delaware's current gift card policies provide no limits on expiration dates.<sup>157</sup> There are also no regulations guiding when monthly fees may begin.<sup>158</sup> Unlike New Jersey, there is no requirement for merchants to offer cash back.<sup>159</sup> New York's current policies also provide for no limits on expiration dates.<sup>160</sup> New York may impose post-sale fees of any amount after one year of inactivity.<sup>161</sup> Again, that State does not require merchants to offer cash back.<sup>162</sup> Lastly, the District of Columbia's current gift card policy provides no limits on expiration dates.<sup>163</sup> There is currently no maximum post-sale fee or minimum time frame before charging monthly fees.<sup>164</sup>

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<sup>157</sup> *Delaware Gift Card Law*, SCRIP SMART, Mar. 18, 2011, <http://www.scripsmart.com/states/5-delaware-gift-card-law>.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *New York Gift Card Law*, SCRIP SMART, Jan. 3, 2011, <http://www.scripsmart.com/states/9-new-york-gift-card-law>.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *District of Columbia Gift Card Law*, SCRIP SMART, Mar. 11, 2011, <http://www.scripsmart.com/states/35-district-of-columbia-gift-card-law>.

<sup>164</sup> *Id.*

Again, merchants are not required to give cash back to consumers upon request.<sup>165</sup> The District of Columbia also does not maintain a consumer-centric web page dedicated to gift card laws.<sup>166</sup> This brief summary provides an understanding of how other states treat gift cards and reflects how New Jersey's policies could shift in favor of corporations.

Remaining funds, which are determined "abandoned," should escheat to the original company, who will best be able to utilize those profits for the benefit of the consumer and the economy as a whole.<sup>167</sup> There should also be no requirement of record keeping, unless such requirement is voluntarily entered into for the mutual benefit of the consumer and the retailer. There should be no return of nominal funds, as those funds were fairly traded for the right to collect merchandise. As consumers have become more and more savvy, they require less protection from big corporations. Alternatively, corporations must not be villainized purely based on their size or apparent wealth. Companies must be fairly compensated for services rendered, such as the sale of gift cards. The State must reevaluate current gift card legislation if it hopes to attract big business. There must be a shift toward a more corporate friendly approach so that the current law is able to benefit the State, retailers, and consumers.<sup>168</sup>

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Robert S. Peters and Matthew J. Beintum, *Going Fishing: State Budget Deficits Drive an Expanding Net of Unclaimed Property Collections*, JOURNAL OF MULTISTATE TAXATION AND INCENTIVES, July 2009, 19-JUL JMTAX 28.

<sup>168</sup> Jim Duggan, *New Jersey Corporate Protection*, Asset Protection Society, <http://www.assetprotectionsociety.org/new-jersey-corporate-protection/>. 2012.