Roots, Relics and Recovery: What Went Wrong With the Abandoned Shipwreck Act of 1987

by Sabrina L. McLaughlin*

There is a prickly debate in the field of art law which takes its cue from issues of trade and ethics and is ultimately cast as the question: Who should own the past? It is a given that the trade in precious artifacts is first and foremost a business. Art has no intrinsic immunity from the marketplace. But when the items for sale have totemic significance to a certain nation or culture, ownership becomes a privilege; why should the highest bidder prevail? The sale of "cultural property," sentimental antiquities variously defined, is the subject of increasing controversy. Nations that have come to define their heritage through a legacy of artifacts challenge the casual exchange of the modern art market.[1] Such nations claim a special right to ownership of beloved artifacts. Meanwhile, art dealers and auction houses maintain that national pride is no excuse for national hoarding, and fear that a policy of retention will cause the cultural impoverishment of the art world. Art law's challenge has been sensitively to handle the trade in emotionally-charged artifacts.

But in the din surrounding the issue, an entire genre of cultural property has been overlooked. Art law has been concerned solely with terrestrial cultural property such as archaeological treasures, and with the protection of sites from plunder. Yet underwater is another important type of cultural property. It has been estimated that there are some fifty thousand shipwrecks located in the navigable waters of the United States.[2] Between five and ten percent of these shipwrecks are of historic

---

* Ms. McLaughlin received her law degree from Yale Law School in 1994, and earned her undergraduate degree *magna cum laude* from Princeton University in 1991. She will be the law clerk of Hon. Marilyn Huff, S.D. Cal. in 1995-96. This article received the 1994 Thomas I. Emerson Prize at Yale Law School. The author wishes to thank Professors Ruth Wedgwood and John H. Merryman for their insights.

1. Perhaps the best example of the emotional force of cultural property is its use by the former British colony of Southern Rhodesia. Upon independence and in a spirit of cultural pride, Southern Rhodesia christened itself Zimbabwe — the name of its foremost archaeological monument. *See* ARCHAEOLOGICAL HERITAGE MANAGEMENT IN THE MODERN WORLD 8 (Henry Cleere, ed., 1989).

2. H.R. REP. NO. 514(I), 100th Cong., 2d Sess. 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365. As of 1987, 2,883 wrecks had been discovered in state waters, of which 671 were identified as historic based upon state or federal criteria. Anne G. Giesecke, *Shipwrecks: The Past in the Present*, 15 COAST. MGMT. 179, 189 (1987).

significance.[3] As with art, so with shipwrecks and their related artifacts: who should own the past?

On April 28, 1988, the question was answered when the Abandoned Shipwreck Act (ASA) was signed into law.[4] The ASA voices a belief shared by nations leery of the art trade: cultural property should belong to the State. Under the Act, title to nearly all of the shipwrecks in state territorial waters is conferred to the respective states. A state need not discover or even document a shipwreck to be named its owner. The Abandoned Shipwreck Act purports to cover three categories of abandoned shipwrecks located either within state borders or up to three miles from state shores.[5] In fact, coverage is almost universal. The Act pertains to: a) shipwrecks embedded in the submerged lands of a State, b) submerged wrecks lodged in coralline formations protected by a State, and c) submerged wrecks worthy of inclusion in the National Register of Historic Places.[6] The only shipwrecks excluded from the Act's purview are wrecks that are located upon (rather than embedded in) the submerged lands of a state and wrecks that are ineligible for inclusion in the National Register. In a single gesture, the Act grants the United States title to the shipwrecks and simultaneously transfers ownership to the state in whose territory the shipwreck is located.[7] By the terms of the transfer, states are given responsibility for the protection and management of the shipwrecks within their territories.[8]

The motive behind the ASA was the protection of allegedly endangered shipwrecks. The ASA was a heated response to the practice of shipwreck

---

3. The Great Lakes region is home to many. The floor of Lake Champlain is littered with the wreckage of early 19th century vessels. The Florida Straits and Keys also hide a historical goldmine. Much of the archaeological debris in this area is the legacy of the Spanish presence in the New World. In the 16th through 19th centuries, Spanish ships returning to Seville would gather in flotillas near Havana so as ride the Gulf Stream past Florida and on to Europe. The numerous Spanish galleons now resting on the Florida sea bed are testimony to the unpredictability of the currents and conditions during hurricane season. *See generally* Eugene Lyon, *The Trouble with Treasure*, 149 NAT'L GEOG. 787 (1976).

4. Pub. L. No. 103-336, 43 U.S.C. §§ 2101-06 (1988).

5. Territorial waters are defined as those within three geographical miles of the coast of each state. 43 U.S.C. § 1312 (1988).

6. 43 U.S.C. § 2105(a) (1988). As of late 1988, some 43 sites encompassing 200 or more shipwrecks were included in the National Register or were deemed eligible for inclusion. David R. Owen, *The Abandoned Shipwreck Act of 1987: Good-bye to Salvage in the Territorial Sea*, 19 J. MAR. L. & COM. 499, 505 (1988).

7. 43 U.S.C. § 2105(c) (1988). An exception is made for those shipwrecks located on or in public lands of the United States, which remain the property of the U.S. government, and those shipwrecks located on or in any Indian lands, which are the property of the Indian tribe owning the land. 43 U.S.C. § 2105(d) (1988). "State," for the purposes of the ASA, means all fifty states, as well as the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Northern Mariana Islands. 43 U.S.C. § 2102(e) (1988).

8. H.R. REP. NO. 514(II), 100th Cong., 2d Sess. 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365, 370.

salvage. In salvage, an individual or team (known as salvors) launches a search for the wreck of a certain vessel, locates the site, and conducts dives to recover the wreck itself or the artifacts on board. If salvage is not performed properly, the vessels and the marine environment can be harmed. Sponsors of the ASA feared that shipwreck salvage as conducted by private salvors was a form of plunder that would destroy historic vessels in the name of self-interest. By vesting ownership in the states, the ASA intended for states to assume the work of salvors and to undertake the recovery of artifacts, responsibly. Presumably, state title would lead to state action.

The Abandoned Shipwreck Act answered the cultural property dilemma with respect to shipwrecks, but the answer it gives is the wrong one. The Act's sponsors ignored the lesson of art law and defied the tradition of admiralty law. American art law, faced with mirror concerns of preservation and plunder, has nonetheless frowned on state assertions of theoretical title. In positing state ownership of abandoned shipwrecks, the ASA undercuts the established art law position. The sponsors of the Act failed to see that the challenge of the ASA, although differently conceived, is no different from the cultural property struggle.

The Act's effect is profound. Enactment of the ASA has meant the displacement of federal admiralty law. The system of salvage has been skewed and, with it, incentives to discover shipwrecks and recover artifacts. The Abandoned Shipwreck Act renounced the incentive rationale and other traditional principles of Federal admiralty law, but offered nothing in their stead. Under the ASA, the business of salvage has gone public; the Act substitutes state agencies for private salvors. States are given the privilege of title without any duties of ownership. The Abandoned Shipwreck Act takes the side of preservation generally, but does so blindly.[9] As a result, the preservation of shipwrecks remains an ever elusive goal.

Part I of this paper will analyze the American art law stance on foreign cultural property statutes which, like the ASA, indiscriminately vest title in a State. This section points to the policies that are violated by blanket declarations of state ownership. Part II will consider the ASA's distortion of the venerable body of admiralty law. Part III traces the conduct of shipwreck litigation prior to the passage of the ASA. Part IV examines the background of the Abandoned Shipwreck Act and the questionable motives at the core of the Act. Part V of this paper will

---

9. S. Res. 858 was approved 340 to 64 in the House of Representatives. 134 Cong. Rec. H1488 (daily ed. Apr. 13, 1988). The Act's assumptions have also gone unchallenged by a spate of commentators whose support is merely an endorsement of preservation in the abstract. *See generally* Anne G. Giesecke, *The Abandoned Shipwreck Act: Affirming the Role of the States in Historic Preservation,* 12 COLUM.-VLA J.L. & ARTS 379 (1988); Timothy T. Stevens, *The Abandoned Shipwreck Act of 1987: Finding the Proper Ballast for the States,* 37 VILL. L. REV. 573 (1992).

survey the state response to the Act, focusing on the limitations to state action. Part VI revisits these themes.

I. UMBRELLA STATUTES AND THE AMERICAN ART LAW POSITION

Art-rich "source"[10] nations are wary of the success of the art market. The increasing demand for cultural artifacts has brought such nations wealth, but at a great price. Commercial success abroad has created a situation of cultural deprivation at home.[11] The foreign market commands higher prices, and creates incentives for the looting and export of native antiquities. Today the United States is one of the world's largest markets for what has become one the world's largest illicit trades — trafficking in cultural property.[12] Source nations are responding to the trade in at least two ways. The countries have sought to prevent the plunder of archaeological sites that fosters the trade, generally with limited success.[13] On a larger scale, many source nations have passed "umbrella" statutes purporting to vest the State with title to all archaeological finds.[14] So as to ensure the effectiveness of these statutes, source nations plead for international help to thwart the foreign import of illegally-exported goods.

The United States has been reluctant to support these umbrella statutes. Most often, this country has taken the position that bald assertions of national ownership are suspect. The American attitude is that cultural property is, in some respect, the heritage of *all* mankind;

---

10. Contrast with "market" nations, the would-be purchasers of the majority of cultural contraband.

11. The resulting cultural drain has spurred a cry for restitution of source nation artifacts. In the emotional parlance of the movement, the request is one for "repatriation." *See* John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1889 (1985).

12. Although black markets are hard to measure, the international trafficking in stolen and smuggled art is said to be rivalled only by the drug trade. Earle A. Partington & Yves-Louis Sage, *The American Response to the Recovery of Stolen and Illegally Exported Art: Should the American Courts Look to the Civil Law?* 12 COLUM.-VLA J.L. & ARTS 395, 396 (1988).

13. The task is made difficult by the inaccessibility of sites, and the fact that *huaqueros*, *tombaroli*, and other offenders are professional looters with powerful incentives.

14. Umbrella statutes are most often associated with Latin and Southern American countries including Argentina, Belize, Bolivia, Brazil, Chile, Costa Rica, El Salvador, Mexico, Nicaragua, Panama, and Venezuela. *See* Jonathan S. Moore, Note, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L. J. 466, 471 n.26 (1988). However, other countries asserting title to all relics include: Brunei, Bulgaria, China, Cyprus, the Dominican Republic, Greece, Haiti, Hungary, Iceland, Iraq, Israel, Italy, Kenya, Kuwait, Libya, Malaysia, New Zealand, Romania, Sri Lanka, Sudan, Taiwan, Tanzania, Tunisia, Turkey, and Yemen. 1 LYNDEL V. PROTT & P.J. O'KEEFE, LAW AND THE CULTURAL HERITAGE § 606 (1984).

cosmopolitan exchange is preferable to parochial policy. The umbrella statutes presuppose that a State has a superior claim to cultural goods simply because the artisans happened to be within that State's political boundaries. In contrast, the U.S. conceives of cultural property as a shared legacy, and therefore calls upon all nations to protect cherished art and to promote the use of art as a national ambassador. The American philosophy is that umbrella statutes prevent the flow of artistic goods, frustrating both educational goals and free enterprise. Viewed from this ideological stance, the Abandoned Shipwreck Act is highly irregular. The United States does acknowledge the need for basic archaeological protection in art law, but tends to take carefully circumscribed steps to assist in the effort. The ASA, as an umbrella statute, is out of step with the American art law approach.

The enactment of an umbrella statute by a foreign state does not guarantee its enforcement in the United States. Among the factors considered by this country is the nature of the cultural property at issue. A crucial distinction is made between movable and immovable property. The concerns that govern treatment of movable cultural property may not apply to architectural works, and vice versa. In general, immovable cultural property is given the more solicitous treatment, since marketplace demand is often destructive of immovables. The sale of architectural structures is typically accompanied by their dismemberment. Even when pieces are removed systematically, the integrity of the whole is compromised. Structures and buildings derive meaning from context. When untrained hands are at work, the damage can be still more severe. The growth of a market in immovables has spawned a class of looters and plunderers, ever ready to sever pieces for a profit. Hasty, haphazard looting destroys both the artistic and the archaeological worth of an immobile site.

In recognition of the special plight of immovables, the United States is receptive to foreign statutes protecting architectural works. An American statute dating from 1972 is instructive.[15] The Importation of Pre-Columbian Monumental or Architectural Sculpture or Mural Act provides that no pre-Columbian work of this nature may be imported into the United States absent a statute from the country of origin certifying export. The Act is a response to both the brisk business in pre-Columbian works and the unique nature of immovables. Noticeably, the Act is limited to immobile monuments or stone carvings wrenched from the walls of architectural structures.

The United States position on movable cultural property is less resolute. Even supporters of retentive laws concede that the argument

15. The Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals Act, 19 U.S.C. §§ 2091-2095 (1988). The Act stipulates forfeiture and is enforceable by the U.S. Customs Service.

for detached objects is weaker.[16] Isolated items may have the same need for context, but their integrity and preservation are often irrelevant to their removal. Archaeological sites are no exception. A site that has been excavated in a professional, scientific manner has been documented to such extent that context is no longer an issue. Removing an artifact from a documented site poses no threat to the concerns of archaeology; the information is already stored. The logic of this observation would extend to shipwreck sites. After a proper excavation, a State need not have dominion over every last artifact pulled from the site. In fact, legislation in Israel, Kenya, Malaysia, Newfoundland, Saudi Arabia, the Sudan, and Syria allows for eventual State renunciation of ownership rights.[17] A broad umbrella statute that targets movable property can be an excessive exercise in control.

American policy emphasizes that umbrella statutes are appropriate only as to clearly defined items of movable property. For example, the United States itself has in place an Archaeological Resources Protection Act.[18] The Act asserts U.S. title to certain archaeological resources found on public or Indian lands. Coverage is limited by the definition of an archaeological resource; an item must be over a century old before it qualifies.[19] In contrast, the Abandoned Shipwreck Act sets no age limits on coverage.[20] The ASA sweeps in the vast majority of shipwreck artifacts regardless of age and historic value.

Consistent with the general tack of art law, the American government has entered into bilateral treaties or executive agreements with the governments of Ecuador, Guatemala, Mexico, and Peru, providing for the recovery and return of certain cultural properties.[21] The treaty with Mexico is typical in scope. By its terms, the treaty encompasses cultural

---

16. *See, e.g.*, John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L.R. 1179, 1201 (1989).

17. PROTT & O'KEEFE, *supra* note 14, § 611.

18. 16 U.S.C. § 470(aa)-470(mm) (1988). In contrast with the ASA, the ARPA is in harmony with the common law rule on terrestrial finds and in conflict with no established body of law.

19. *Id.* 16 U.S.C. §470(bb)(1) (1988). Beyond the field of cultural artifacts, state endangered wildlife legislation can also be conceived as umbrella statutes. *See, e.g.*, LA. REV. STAT. ANN. § 56-3 (West, 1987).

20. *See infra* text accompanying notes 222-25.

21. These, too, are enforced by the U.S. Customs Service. Commentators suggest that the few bilateral treaties endorsed by the U.S. have been conciliatory gestures to win support for the alleged war on drugs. *See, e.g.*, Alexander Stille, *U.S. Courts Help Protect Art Heritage*, NAT'L L. J., Nov. 14, 1988, at 32. The suggestion is perhaps supported by comments of Senator Joseph Biden: "It may be of mutual interest to many of these small nations who ask us to do more thorough law enforcement agreements in locating and returning archeological artifacts to reciprocate by doing more in stemming the flow of drugs and narcotics leaving their country." *Relating to Stolen Archeological Material: Hearings on S. 605 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 1 (1985) [hereinafter *Hearings on S.605*].

properties that are owned by federal, state, or municipal governments and their instrumentalities. Mexico's umbrella statute creates instant government ownership. The treaty protects only those archaeological, historical, and cultural properties that are "of outstanding importance to the national patrimony."[22] Mexican sentiment is not controlling. The importance of a particular item of cultural property is to be judged jointly by the two governments or, failing agreement, by a panel of experts.[23] The United States in bilateral agreements rejects the indiscriminate enforcement of umbrella statutes.

The multilateral approach to cultural properties has its genesis in the 1970 UNESCO Convention.[24] The UNESCO Convention is the most important international agreement to date concerning cultural property. Nations party to the Convention must enact legislation at home to implement the provisions of the Convention. However, the international agreement is important in that it highlights the few areas of consensus. The sixty plus signatories to the Convention pledge:

> (i) to prohibit the import of cultural property *stolen from a museum or a religious or secular public monument or similar institution* in another State Party to this Convention after the entry into force of this Convention . . . *provided that such property is documented as appertaining to the inventory of that institution*;
>
> (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property . . .[25]

Earlier versions of the agreement had condemned the import of all "stolen" cultural property unaccompanied by an export certificate.[26] The final agreement is in marked contrast. The United States resisted the Secretariat Draft because it would have allowed a nation to unilaterally define "stolen" artifacts and force the definition upon other UNESCO

---

22. Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Property, July 17, 1970, art. I, 22 U.S.T. 494, T.I.A.S. No. 7088.

23. *Id.*

24. United Nations, Economic and Social Council, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 4, 1970, 823 U.N.T.S. 231 (1972), *reprinted in* 10 INT'L LEGAL MATERIALS 289 (1971).

25. *Id.*, art. 7(b). In the mostly hortatory provisions of the Convention, signatories vow to undertake the protection of cultural properties at home and to list works of major importance. (Italics are as reprinted in 10 INT'L LEGAL MATERIALS 289, 291 (1971)).

26. *See* PAUL M. BATOR, THE INTERNATIONAL TRADE IN ART 95 (1981) (describing the Convention and its concerns).

signatories as enforcers. Nations party to the Convention would be obliged to respect any umbrella statute conceived. American discomfort with the notion of theoretical title led to the current agreement. Only items that have been taken from the actual possession of an institution are covered. Undiscovered sites and undocumented artifacts are not.

The United States gave force to the Convention with the Convention on Cultural Property Implementation Act of 1983 (CPIA).[27] The decade-long span between the 1970 UNESCO Convention and the passage of the CPIA reveals the considerable debate surrounding vesting statutes. Under the CPIA, the United States will impose import restrictions only in conjunction with a multinational effort once it has been determined that collaborative action may help to stem a specific, severe problem of pillage.[28] To qualify for this elusive relief, a country must issue a formal request to the United States and support that request with adequate information. Protection may extend only to artifacts that have been discovered and documented,[29] are over two hundred and fifty years old,[30] and face plunder of stunning proportions.[31] A final prerequisite is that if other market nations agree to the restrictions, the prohibition will have a sufficient impact.[32]

Needless to say, the CPIA is of limited utility to most source nations. One of the larger obstacles of the Act is the requirement of concerted, multinational effort. The United States and Canada have been the only major market nations to become signatories to the 1970 UNESCO Convention. Other key players, including Belgium, France, Germany, Japan, the Netherlands, and Switzerland, declined to join.[33] The failure of most market nations to join UNESCO is suggestive of their reluctance to assist in the regulation of imports based on "outrage." Only two actions have even been initiated under the CPIA. In 1987, El Salvador petitioned for, and the U.S. triggered, protection of certain archaeological items. Canada has yet to hear about its 1985 petition.[34] The Cultural Property Implementation Act is a remarkably conservative piece of legislation.

By and large, the American position on umbrella statutes has been firm. Perhaps the only meaningful departure arose in litigation concerning the application of the National Stolen Property Act to

---

27. 19 U.S.C. §§ 2601-13 (1988).
28. 19 U.S.C. § 2602 (1988).
29. 19 U.S.C. § 2601 (1988).
30. 19 U.S.C. § 2601(2) (1988).
31. 19 U.S.C. § 2602(a) (1988).
32. 19 U.S.C. § 2602(a)(1) (1988).
33. John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 843 (1986).
34. *See* Leah A. Hofkin, *The Cultural Property Act: The Art of Compromise*, 12 COLUM.-VLA J.L. & ARTS 423, 443-44 (1988).

instances of cultural property smuggling. The National Stolen Property Act (NSPA) creates criminal penalties for anyone who transports or sells goods worth $5000 or more, knowing them to be stolen.[35] Importantly, the NSPA was not designed with cultural property in mind. Nevertheless, the Act has been applied in this context twice.

United States v. Hollinshead addressed the conviction of a dealer in pre-Columbian artifacts.[36] The dealer had arranged for the sale of a monumental Mayan stela that he knew had been thinned and sliced into nineteen pieces to facilitate its illegal export. Under Guatemalan law, the stela belonged to the State. The conviction was upheld with little offense to standard cultural property notions. The stela was pre-Columbian, its dismemberment was reprehensible, and the site — uncommonly — had been documented to UNESCO perfection.[37]

More surprising was the decision in *United States v. McClain*.[38] In *McClain*, the defendants had taken movable items including terra cotta figures, pottery, and beads, as well as a few stucco pieces. The artifacts were neither documented nor taken from any institution. Rather, the defendants had knowingly purchased goods that were considered stolen only by virtue of a Mexican umbrella statute.[39] The *McClain* question was whether it would be appropriate to use the NSPA to punish encroachments upon Mexican ownership, when Mexican agents had never possessed the artifacts. A conspiracy conviction was affirmed.

The holding in *McClain* was exceptional, and provoked a heated response. It appears that no case since has imposed NSPA liability on an importer of cultural property.[40] Following the decision in *McClain*, a series of bills was introduced in the Senate with the express intent of reversing *McClain*.[41] For present purposes, S. 605 is noteworthy. The bill would have amended the National Stolen Property Act so as to preclude a *McClain* reoccurrence. S. 605 provided that the NSPA should

---

35. 18 U.S.C. § 2314 (1993 & Supp. I 1993).

36. United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974).

37. Following the conviction was a forfeiture proceeding. The stolen stela was returned to Guatemala. Moore, *supra* note 14, at 474-75 n.43.

38. United States v. McClain, 545 F.2d 988 (5th Cir. 1977), *reh'g denied*, 551 F.2d 52 (1977), United States v. McClain, 593 F.2d 658 (5th Cir. 1979), *cert. denied*, 444 U.S. 918 (1979).

39. *McClain*, 545 F.2d at 992.

40. *See* Hofkin, *supra* note 34, at 433. *See generally* James R. McAlee, *The McClain Case, Customs, and Congress*, 15 N.Y.U. J. INT'L L. & POL. 813 (1983); James F. Fitzpatrick, *A Wayward Course: The Lawless Customs Policy Toward Cultural Properties*, 15 N.Y.U. J. INT'L L. & POL. 857 (1983).

41. S. 1523, 99th Cong., 1st Sess., 131 CONG. REC. S10,288 (daily ed. July 29, 1983) (to create a federal statute of limitations against civil suits by foreign governments seeking the return of cultural properties); S. 605, 99th Cong., 1st Sess., 131 CONG. REC. S2611 (Wednesday, March 6, 1985); S. 1559, 98th Cong., 1st Sess., 129 CONG. REC. 9343 (1983); S. 2963, 97th Cong., 2d Sess., 128 CONG. REC. 12,418 (1982).

not govern certain instances of taking of archaeological or ethnological materials from a foreign country. The bill explains:

> No object shall be considered to be an object of archaeological interest unless such object is of cultural significance, is at least two hundred and fifty years old, and was normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water, and no object shall be considered to be an object of ethnological interest unless such object is the product of a tribal or nonindustrial society and is important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people.[42]

In addition to these subject matter constraints, the bill continues, the National Stolen Property Act is not to apply where:

> (1) The claim of ownership is based only upon —
>
> (A) A declaration by the foreign country of national ownership of the material; or
> (B) Other acts by the foreign country which are intended to establish ownership of the material and which amount only to a functional equivalent of a declaration of national ownership . . . .[43]

The Senate hearings surrounding S. 605 echo the traditional aversion to umbrella statutes. Senator Moynihan proposed the bill as an attempt to put cultural property law back in line with the conservative CPIA approach.[44] He criticized the title claim of the Mexican government in *McClain*, insisting: "[T]hey have nationalized [cultural property], so to speak, by simply passing a law saying anything under the ground belongs to us; we do not know where it is, but wherever it is, if you find it it is ours." Senator Laxalt agreed: "It was not established at trial that the artifacts had been stolen or taken in the American legal sense from the rightful possession of anyone in Mexico."[45]

The response of the two senators suggests a distinctly American sentiment that ownership means possession. American art law has looked askance at umbrella statutes because the reward of ownership is often incommensurate with the actual labor expended.[46] Idle sites

---

42. *Hearings on S. 605, supra* note 21, at 5.
43. *Id.*
44. *Id.* at 4-5.
45. *Id.* at 1.
46. Leading art law commentator John Henry Merryman refers to umbrella statutes as "rhetorical law," and suggests that the declaration of state ownership may be an "empty formalism, intended primarily for a foreign audience, or it may be an act of expropriation of questionable internal legality." Merryman, *supra* note 11, at 1891.

awaiting discovery are, *de facto*, state property. Undocumented artifacts are transferred from their finders to state coffers. The typical umbrella statute creates a positive disincentive to discovery or enterprise.

The Abandoned Shipwreck Act, a typical umbrella statute in most respects, is atypical in the context of American cultural property law. The ASA contradicts the art law consensus on theoretical title; without rightful possession by nations aspiring to ownership, title claims are not respected. The underlying theme of UNESCO 1970, the CPIA, and other agreements has been that umbrella statutes are of dubious validity. The solution to problems of plunder and preservation is not a blanket declaration of ownership. Proposed bill S. 605 would have required that an artifact satisfy three criteria before a state might assert title: the item must be discovered, must meet certain age limits, and must be of cultural significance. The artifacts the ASA claims fail each of these tests. To consider the general orientation of art law is to understand that the Abandoned Shipwreck Act is an about-face.

II. ADMIRALTY/MARITIME LAW

The Abandoned Shipwreck Act replaces maritime law as once applied to territorial waters.[47] With the passage of the ASA, Congress determined that the admiralty principles of salvage law and the law of finds were insufficient to protect the shipwrecks to which the Act applies.[48] Congress feared that shipwreck salvors were akin to plunderers, and that maritime law could not save the ships from ruin. The premise of the Act is that shipwreck preservation is a state concern, not a federal question.[49]

The ASA upends a tradition of maritime law. Article III of the Constitution extends the judicial power of the United States to all cases arising out of admiralty and maritime jurisdiction.[50] The Judiciary Act of 1789 implements the constitutional provision by vesting federal courts with exclusive jurisdiction over all admiralty or maritime cases.[51] The

47. 43 U.S.C. § 2106(a) (1988).

48. H.R. REP. NO. 514(II), *supra* note 8, at 8.

49. "Under the current system, Federal courts — sitting in admiralty — have substantial policymaking power, which has resulted in uneven judgments about the historical value of shipwrecks." 113 CONG. REC. S3988, 3989 (daily ed. March 26, 1987) (statement of Sen. Bradley).

50. U.S. CONST. art. III, § 2.

51. 28 U.S.C. § 1333 (1988). The interpretation given the "saving to suitors" clause permits state courts to adjudicate maritime causes of action in *in personam* proceedings alone. *See* Zych v. Unidentified, Wrecked and Abandoned Vessel, 941 F.2d 525, 533 n.12 (7th Cir. 1991) (citing Offshore Logistics v. Tallentire, 477 U.S. 207, 222 (1986)). The difficulty with using an *in personam* action to reach maritime property is that the *in rem* aspects become both ancillary to, and dependent upon, the underlying action against the defendants. Adam Lawrence, *State Antiquity Laws and Admiralty Salvage: Protecting Our*

effect of the Abandoned Shipwreck Act is both to abolish admiralty principles as they pertain to state shipwrecks and to prohibit federal courts from exercising their jurisdiction over cases involving shipwrecks in state waters. Before the passage of the Act, state common law courts had jurisdiction only over maritime cases involving *quantum meruit* services or breach of salvage contract.[52] The supporters of the ASA recognized the obvious constitutional implications of the change. There have since been challenges to the constitutionality of the ASA, but the Act's supporters maintain that the limitations are permissible.[53]

A. THE LAW OF SALVAGE AND THE LAW OF FINDS

Maritime law distinguishes the finder of abandoned property from the salvager, or salvor, of the property of another. The law of salvage is held to apply to circumstances in which the owner of the maritime property is known. The law of finds prevails when the property appears to have been intentionally deserted. Much turns on the distinction. A salvor who acts of her own volition to rescue property from marine peril is entitled to healthy compensation.[54] However, a finder who reduces property to possession is entitled to outright ownership.[55] Although both salvage law and finds law have the same jurisdictional basis in Article III, only finds is governed by common law concepts.[56]

Courts sitting in admiralty generally prefer salvage law over the law of finds. The reason is that the law of finds encourages a would-be finder to act hurriedly and secretly so as to gain singular control over the property.[57] The appearance of prior owners means that title eludes the finder. Under the law of finds, one is either a keeper or a loser.[58] Salvage law concerns itself with the preservation of property in oceans or waterways that has been taken involuntarily out of an owner's control.

Cultural Resources, 32 U. MIAMI L. REV. 291, 306 n.72 (1977).

52. 3A MARTIN J. NORRIS, BENEDICT ON ADMIRALTY § 14 (7th ed. 1993).

53. *See* H.R. REP. NO. 514 (II), *supra* note 8, at 8. ("The Committee also believes that it is acting fully within its authority under Art. III, § 2 of the Constitution and the Necessary and Proper Clause . . . by modifying admiralty law in this way.").

54. This is in marked contrast to common law, which does not reward a volunteer for saving or preserving the terrestrial property of another. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 15-1 (1987).

55. The court in Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059, 1065 (1st Cir. 1987) calls it "the ancient and honorable principle of 'finders, keepers'."

56. Owen, *supra* note 6, at 510-11. Owen notes that many courts confuse the issue by referring to "salvage" generally.

57. Columbus-America Discovery Group v. Atlantic Mutual Insurance Co., 974 F.2d 450, 460 (4th Cir. 1992) (citing Hener v. United States, 525 F. Supp. 350, 356 (S.D.N.Y. 1981)).

58. *Id.*

Although salvage, too, requires that a salvor gain possession over the property, possession in salvage is not necessarily to the exclusion of others. Salvage has an equity component that guarantees even joint salvors an exceptional reward.[59]

Traditional *in rem* admiralty actions proceed as follows.[60] A finder or salvor of maritime property first manifests control over the property or intent to possess. This may be done by such means as guarding the property, physically marking it, or salvaging some items.[61] The party then files a complaint in a federal court that has jurisdiction over the area of the site.[62] The court assumes jurisdiction pursuant to 28 U.S.C. § 1333, and a warrant of arrest on the property follows. Pending resolution, the plaintiff may be appointed substitute custodian. As relief, a plaintiff may either seek title to the property under the law of finds or a salvage award under the law of salvage. Claimants in cases involving marine wrecks commonly request both forms of relief, one to operate in the alternative of the other.

The question frequently arises whether treasure cases are squarely within admiralty's salvage jurisdiction.[63] Indeed, the usual concern of marine salvage law is general property salvage, rather than treasure salvage.[64] The archetypical salvage activity is the towing of a disabled vessel. However, federal courts in admiralty jurisdiction accept without comment the propriety of shipwreck actions. The range of property held subject to salvage law includes such items as airplanes crashed in navigable waters, a fishing net adrift at sea, floating logs, money found on a floating corpse, and even slaves that were considered cargo aboard a capsized vessel.[65] The single subject constraint on the application of salvage law is that the property involved be so-called maritime property.[66] This description was held to prevent application of salvage

---

59. *Id.* at 461.

60. *See, e.g.*, Jupiter Wreck, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 691 F. Supp. 1377 (S.D. Fla. 1988). If the property involved is owned by another, a salvor may obtain a lien against the recovered property so as to proceed either *in rem* against the actual property, or *in personam* against its owner.

61. The test for possession or constructive possession of maritime property is what a reasonable, efficient owner might have done to safeguard or recover his goods. Lawrence, *supra* note 51, at 295-96.

62. The technical requirements of Supplemental Admiralty Rule C govern *in rem* jurisdiction. Under the Rule, there must be a claimed maritime lien and the contested property must be located within the district. FED. R. CIV. P. Adm. Supp. Rule C(1) & C(2).

63. *See, e.g.*, Lawrence, *supra* note 51, at 333 n.189 (proposing that artifact recovery is "more an exercise in archaeological and remote sensing technique" than an activity contemplated by traditional salvage); Zych v. Unidentified, Wrecked and Abandoned Vessel, 941 F.2d 525, 531 (7th Cir. 1991) (calling it a close question whether abandoned shipwreck litigation was ever "properly, firmly within the scope of admiralty jurisdiction").

64. SCHOENBAUM, *supra* note 54, § 15-1.

65. NORRIS, *supra* note 52, §§ 35-43.

66. SCHOENBAUM, *supra* note 54, § 15-2.

law to a dry dock that had been moored to a shore for over twenty years.[67] Treasure salvage, the recovery of sunken vessels and related cargo, easily falls within the subject matter of salvage law. As property that has been lost at sea, shipwrecks can safely be called maritime property.

For many courts the more pressing question is whether all of the elements of salvage are met in treasure cases. Three elements exist in a valid salvage claim: 1) property in peril on navigable waters, 2) voluntary efforts to rescue the property, and 3) partial or total success.[68] The success of a treasure salvor who initiates admiralty proceedings is usually conceded by all parties. By the time a claim is brought, a salvor has discovered the wreck and often salvaged a number of items that date or otherwise identify the ship. As for voluntariness, most salvors operating today are not under contract with the owner of the wrecked ship. The fact that a salvor was motivated by gain does not detract from the noncompulsory nature of her action or disqualify her as a salvor.[69] The remaining issue is whether marine peril can be said to exist vis-a-vis sunken vessels.

In the typical salvage case of a vessel disabled at sea, the marine peril is the clear and present danger of sinking. Salvage in such a case is an emergency procedure. Shipwrecks present an altogether different situation. Detractors of shipwreck salvage note that wrecks that have rested underwater for years, sometimes centuries, hardly face the type of peril cognizable by salvage law.[70] They are mistaken. By the terms of salvage, marine peril exists whenever a danger can reasonably be apprehended; there need not be a threat of imminent harm.[71] A salvage award is appropriate whenever there is a present or foreseeable danger to the property. The actual degree of marine peril is just one factor in the calculation of the amount of a salvage award.[72] Most courts in treasure salvage cases make a factual finding of marine peril, observing that even embedded shipwrecks continue to face the erosive action of the elements.[73]

---

67. Cope v. Valette Dry-Dock Co., 119 U.S. 625 (1887).

68. NORRIS, *supra* note 52, § 63.

69. *Id.* § 97.

70. Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985); Subaqueous Exploration and Archeology, Ltd. v. The Unidentified Wrecked and Abandoned Vessel, 577 F. Supp. 597, 611 (D. Md. 1983), *aff'd without opinion*, 765 F.2d 139 (4th Cir. 1985).

71. SCHOENBAUM, *supra* note 54, § 15-1.

72. NORRIS, *supra* note 52, § 63.

73. Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 337 (5th Cir. 1978), *aff'd*, 621 F.2d 1340 (5th Cir. 1980), *aff'd in part and rev'd in part*, 458 U.S. 670 (1982); Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 695 F.2d 893, 901 n.9 (5th Cir. 1983); Jupiter Wreck, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 691 F. Supp. 1377, 1382 (S.D. Fla. 1988); Cobb Coin Co. v.

Salvage law bestows a notoriously liberal reward upon those salvors who voluntarily and successfully rescue property at sea. The principles behind the award are unique to admiralty law. Salvage awards, which can only be granted by an admiralty court, are determined by no set formula.[74] Instead, admiralty intends that salvage compensation be akin to a bounty exceeding the salvor's sacrifice.[75] *Quantum meruit* has no place; salvors tend to receive at least one-third of the value of the property, more generally one-half ("a moiety") of the value, and often a still larger percentage of the value.[76] In an *in rem* action, the only ceiling on a salvage award is the property's worth. Such generosity is explained on grounds of public policy. The award is seen as necessary to induce risky intervention, promote commerce and trade, save property in distress, and encourage investment in salvage equipment.[77] From the perspective of maritime law, "efficiency . . . demands more generous awards than does justice."[78]

The law of finds is the counterpart to salvage law. The law of finds, unlike salvage, is a common law notion, and grants title to property in the first finder to reduce that property to possession. Under the common law, there are only two exceptions to the "finders, keepers" rule.[79] The first exception applies when the owner of the discovered goods is known. In this case, the property cannot be considered abandoned, and the owner retains title. The second exception applies when a finder unearths certain goods on land that is owned by another. In that case, the owner of the land on which the goods were found is said to be in constructive possession of the goods.[80] However, there is an exception within this second exception. Under the common law, a landowner is *not* said to be in constructive possession when the goods that are found constitute "treasure trove."[81] The term "treasure trove" generally describes goods of some antiquity including gold, bullion, coin, and the paper representative of precious metals.[82] "Treasure trove" may describe the cache on

---

Unidentified, Wrecked and Abandoned Sailing Vessel, 549 F. Supp. 540, 557 (S.D. Fla. 1982).

74. Courts analyze a number of factors in setting the precise amount of a salvage reward. These factors, many of which have been culled from the *Blackwall* list, are discussed *infra* at 168-69. The Blackwall, 77 U.S. (10 Wall) 1 (1869).

75. NORRIS, *supra* note 52, § 232.

76. *Id.* § 240; Lawrence, *supra* note 51, at 298.

77. NORRIS, *supra* note 52, § 232.

78. Note, *Calculating and Allocating Salvage Liability*, 99 HARV. L. REV. 1896, 1899 n.18 (1986).

79. Jupiter Wreck, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 691 F. Supp. 1377, 1386 (S.D. Fla. 1988).

80. Annotation, *Modern Status of Rules as to Ownership of Treasure Trove as Between Finder and Owner of Property on Which Found*, 61 A.L.R.4th 1180 (1993).

81. *Id.*

82. *Id.*

board many sought-after shipwrecks. When treasure trove is discovered, the finder of the goods maintains a possessory right that is superior to all, save the true owner. Because of the advanced age of most treasure trove, the owner often cannot be identified; the finder is usually the keeper. The exception in finds law for constructive possession presents slight difficulty for the average finder/claimant.[83] In the vast majority of law of finds cases, the biggest hurdle to recovery is proving that the discovered object has been abandoned by its rightful owner.

Abandonment is defined as the act of deserting property without hope of recovery or intent to return.[84] A finding of abandonment requires that an owner relinquish control of an item of property and suggest by some action (or lack thereof) that she has forsaken ownership.[85] More often than not, abandonment must be inferred. It is an awkward task. The lapse of a significant amount of time, the non-use of property, and the failure to launch a search for the property are relevant, but not always definitive.[86] Likewise, abandonment is not a legal conclusion when the owner is simply inaccessible.[87] A finder can often be proven a keeper, but this takes some gap-filling effort.

There is no consensus about the propriety of inferring abandonment from long-sunken shipwrecks. The dominant line of thinking acknowledges that the "[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence

---

83. However, this exception was often invoked in pre-ASA shipwreck contests, with the states asserting constructive ownership under the Submerged Lands Act of 1953. 43 U.S.C. §§ 1301-1315 (1988 & Supp. V 1993). *See* discussion *infra* Part III. States advanced this claim despite the treasure trove exception because the common law rule on finds can be modified by statute. The state argument was that the SLA gave the states a valid constructive possession of *all* living and nonliving resources within the state's territorial waters.

84. NORRIS, *supra* note 52, § 134.

85. By way of negative example, the United States only abandons sunken U.S. warships by affirmative declaration. H.R. REP. NO. 514(I), *supra* note 2, at 3-4. Legislation can revoke any presumption of abandonment, and thus remove property from the default province of the law of finds.

86. Owen, *supra* note 6, at 506; Zych v. Unidentified, Wrecked and Abandoned Vessel, 755 F. Supp. 213, 216 (N.D. Ill. 1991); Hatteras, Inc. v. The U.S.S. Hatteras, 1984 A.M.C. 1094, 1097 n.5 (S.D. Tex. 1981) ("while mere nonuse of property and lapse of time without more do not establish abandonment, they may, under circumstances where the owner has otherwise failed to act or assert any claim to property, support an inference of intent to abandon.") (citing Columbus-America Discovery Group v. Atlantic Mutual Insurance Co., 974 F.2d 450, 472 (4th Cir. 1992)).

87. Columbus-America Discovery Group v. Atlantic Mutual Insurance Co., 974 F.2d 450, 461 (4th Cir. 1992) (citing Weber Marine, Inc. v. One Large Cast Steel Stockless Anchor and Four Shots of Anchor Chain, 478 F. Supp. 973, 975 (E.D. La. 1979)). *But cf.* E.H. Wiggins v. 110 Tons, More or Less, of Italian Marble, 186 F. Supp. 452 (E.D. Va. 1960) (lapse of time as conclusive evidence that vessel and cargo were abandoned); Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059 (1st Cir. 1987) (passage of decades as proof of abandonment).

stretches a fiction to absurd length."[88] The reasoning for this position is persuasive. In most of the shipwreck cases, no party (or none save the state, claiming ownership under an exception to the law of finds) appears to challenge the finder's claim to ownership. Interestingly, two of the most lucrative finds in shipwreck history involved Spanish galleons in which the present government of Spain failed to assert a claim.[89] The descendants of shipwreck victims rarely intervene as successors in interest in a finder's proceedings.[90] In such instances, the finder of sunken property carries a lighter burden of proof. The law of finds should apply.

The "insurance cases" present a more complex issue. Three courts to date have pondered whether a finding of abandonment should attach to shipwrecks when both a finder and an insurer stake claims.[91] In *Columbus-America*, the court was faced with a wreck of extreme financial significance. When the *S.S. Central America* sunk well off the coast of South Carolina in 1857, she was carrying some six hundred passengers and $1,200,000 (1857 valuation) in gold. The gold is rumored to be worth as much as one billion dollars today.[92] The ship was *en route* from California to New York, via the Panama Canal, and the gold was intended to offset the so-called Panic of 1857. The cargo had been heavily insured. New York insurance companies were responsible for one-third of the gold, and London insurers accounted for the rest.[93] The underwriters paid off the claims. In doing so, the insurers incidentally became successors in interest — owners by right of subrogation. By

---

88. Treasure Salvors, Inc. v. Abandoned Sailing Vessel, 569 F.2d 330, 337 (5th Cir. 1978). The authors of two key treatises concur with the *Treasure Salvor* court. *See* SCHOENBAUM, *supra* note 54, § 15-7; NORRIS, *supra* note 52, § 158. *See also* Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985) (eighteenth century vessel), *aff'd*, 758 F.2d 1511 (11th Cir. 1985); Chance v. Certain Artifacts Found and Salvaged from the Nashville, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985) (confederate ship downed in 1863); Indian River Recovery Co. v. The China, 645 F. Supp. 141 (D. Del. 1986) (nineteenth century vessel). Two courts have endorsed a finding of abandonment in wrecks of relatively recent vintage. Rickard v. Pringle, 293 F. Supp. 981 (E.D.N.Y. 1968) (item from a 1902 wreck); *Martha's Vineyard*, 833 F.2d 1059 (vessel sunk in 1909).

89. The ships were the *Santa Margarita* and the *Nuestra Senora de Atocha*. Immediately following the capsizing of these 17th century vessels, Spain contracted for the performance of salvage work. The missions were partially successful but were later halted.

90. Columbus-America Discovery Group v. Atlantic Mutual Insurance Co., 974 F.2d 450, 465 (4th Cir. 1992) (remarking that despite an abundance of passenger gold, valued in 1857 at several hundred thousand dollars, no descendants of any of the passengers on the downed vessel had come forth).

91. *See Columbus-America*, 974 F.2d 450; Moyer v. Wrecked and Abandoned Vessel known as the Andrea Doria, 836 F. Supp. 1099 (D.N.J. 1993) (wrecks found in international waters); Zych v. Unidentified, Wrecked and Abandoned Vessel, 755 F. Supp. 213, 216 (N.D. Ill. 1991) (wreck found in state waters).

92. *But see infra* note 114.

93. *Columbus-America*, 974 F.2d at 456.

contrast, the finders of the *S.S. Central America* wreck had raised several million dollars from small investors, invented equipment to further their search, and devoted years to the task.[94] They sought application of the law of finds.

Abandonment was the crux. The district court in *Columbus-America* determined that the underwriters had relinquished ownership over the passage of time. The court noted the insurers' failure to search, their erratic interest in the wreck, and their failure to maintain critical documents. The circuit court reversed on appeal, declining to equate insurer inaction with abandonment.[95] The latter court recommended that a clear and convincing standard govern abandonment whenever a prior owner makes her presence known.[96] Salvage law was suggested on remand.

Zych, too, involved a competing claim by an insurer as a successor in interest.[97] The finder of a Lake Michigan shipwreck asserted title to the vessel, contending that the insurer had terminated ownership through lapse of time (approximately 130 years) and disinterest in recovery. The court disagreed. Much of the *Zych* court's reluctance to find abandonment can be attributed to its discomfort with the lack of precedent.[98] The insurer's inactivity was excused in light of only recent development in technology enabling wreck discovery. The finder countered that lack of technology had not hindered him or others. Nonetheless, the court found dispositive the likely futility of the insurer's unlaunched mission.[99] Ownership was held to remain vested in the insurers.

The case of *Moyer* revisits the theme of a well-known shipwreck in international waters.[100] In *Moyer*, a salvor was requesting a preliminary injunction in order to find and salvage certain artifacts from the *Andrea Doria*, an ocean liner which sank in 1956 beyond the New Jersey coast. The injunction appears to have been a preemptive measure; the court had already arrested the ship in proper *in rem* fashion, and no competing salvor had come forth. However, the vessel was known to have been insured by the Italian conglomerate Societa D'Assicurazione. Like the insurers in *Columbus-America* and *Zych*, the Societa acquired title

---

94. Ian Brodie, *Insurers Win Right to Gold Sunk in 1857 Hurricane*, TIMES NEWSPAPERS LTD., Mar. 24, 1993, at 13.

95. The strenuous dissent of Judge Widener argues that the original conclusion was not "clearly erroneous" and thus should have been upheld on appeal. *Columbus-America*, 974 F.2d at 471.

96. The reference in *Columbus-America* is to a "strong and convincing" evidence requirement. *Id.* at 464-5. *See also* Zych v. Unidentified, Wrecked and Abandoned Vessel, 755 F. Supp. at 213, 216 (N.D. Ill. 1991) (requiring strong and convincing evidence).

97. *Zych*, 755 F. Supp. 213.

98. *Id.* at 215.

99. *Id.* at 216.

100. Moyer v. Wrecked and Abandoned Vessel known as the Andrea Doria, 836 F. Supp. 1099 (D.N.J. 1993).

to the ship by virtue of subrogation. The Societa had not contested plaintiff's ongoing salvage activities, although the plaintiff clearly feared that the insurer might do so.

The *Moyer* court distinguished the unusual facts of the case. Because the *Andrea Doria* was a wreck of relatively recent vintage, her location was common knowledge. Indeed, the vessel was even photographed on the ocean floor on the day after the accident. The court observed that unlike the situation of Aetna in *Zych*, the state of technology could not excuse the insurer's failure to act. Numerous divers had descended to the site, and a televised salvage operation received international coverage. Meanwhile, the Societa had idly watched, expressing little interest in organizing a salvage operation of its own. Profound inaction on the part of the Societa led the court to conclude that the insurer had abandoned the ship and its contents.[101] It is restated that the *Moyer* court did *not* grant the plaintiff title to the ship. The preliminary injunction merely enjoined interference with the salvage efforts. Nonetheless, *Moyer* is significant as the only insurance case thus far to deduce abandonment despite an identifiable owner.

B. THE IMPACT OF THE ASA

As noted previously, the enactment of the ASA altered many of the above rules.[102] At least two of the changes are critical. First, Congress overturned the law of salvage and the law of finds and left no legal principles in their place. Second, Congress removed shipwreck cases to which the Act applies from the admiralty jurisdiction of the federal courts.[103] The logic of these changes is questionable.

1. The Overthrow of Admiralty Law

With the passage of the ASA, Congress renounced traditional admiralty principles.[104] Sponsors of the bill that would become the Act cited admiralty's failure to protect the national maritime heritage.[105] Admiralty law encourages salvage activity, and poorly-performed salvage can damage shipwrecks. Moreover, ASA supporters condemned "finders,

---

101. *Id.* at 1105.

102. The ASA has no impact on the outcome of the insurance cases because the insurers remain the legally-cognizable owners, and thus the Abandoned Shipwreck Act does not apply.

103. All other classes of shipwrecks remain subject to admiralty law. 43 U.S.C. § 2106(b) (1988).

104. 43 U.S.C. § 2106(a)(1988) ("The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 of this title applies.").

105. H.R. REP. NO. 514(II), *supra* note 8, at 8.

keepers" as applied to wrecks of historical stature.[106] Supporters by fiat declared salvage law inapplicable because shipwrecks are in no "marine peril."[107] The conclusion contradicts established maritime authority. With both the law of finds and salvage law out of commission, the states substitute themselves as the owners of wrecks with no titled owner in sight. It is true that the Act does not prevent a state from compensating salvors and divers for their efforts.[108] The question is how, in the absence of admiralty principles, a state is equipped to do this.[109]

By the terms of the ASA, a reward of ownership is impermissible. The law of finds cannot apply. Instead, a state reward to a salvor must take something of the form of a salvage award. Yet the traditional state approach to compensation is at odds with the federal maritime approach. To apply *quantum meruit*, as states are accustomed to do, would be to sabotage salvage principles.[110] Proper salvage awards are tallied by such factors as:

1) the degree of danger faced by the property;
2) the value of the salvaged property;
3) the risk incurred by the salvors;
4) the salvors' skill; which some courts in treasure cases have taken to mean the degree to which salvage was conducted in due regard to the historical and archaeological value of the wreck;[111]
5) the value of the salvor's equipment; and
6) time and labor expended in the salvage operation.[112]

The concern of *quantum meruit* is simply the reasonable value of the services rendered. A *quantum meruit* award may recommend itself in the instance of the rescue of a sinking ship. Yet the award is manifestly inadequate to inspire the discovery of sunken ships and the recovery of

---

106. 113 CONG. REC. S3988-89 (daily ed. March 26, 1987) (statement of Sen. Bradley). However, the Act extends to even insignificant, embedded wrecks. It is also noteworthy that the Senator made comparison to ancient ruins on land.

107. H.R. REP. NO. 514(II), *supra* note 8, at 8.

108. *Id.* at 6. ("It is not the intent of the Committee that states discourage private salvage of shipwrecks that is consistent with the protection of historical values and the environmental integrity of the shipwrecks and sites.").

109. The ASA provides neither a cause of action nor a right to relief. 43 U.S.C. §§ 2101-2106 (1988).

110. NORRIS, *supra* note 52, § 14; SCHOENBAUM, *supra* note 54, § 15-1 n.8. ("It is submitted that state law concepts of *quantum meruit* are inapplicable to salvage cases because the law of salvage is federal maritime law.").

111. Columbus-America Discovery Group v. Atlantic Mutual Insurance Co., 974 F.2d 450, 468 (4th Cir. 1992); Jupiter Wreck, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 691 F. Supp. 1377, 1382 (S.D. Fla. 1988).

112. NORRIS, *supra* note 52, § 237 (recognizing the influence of the *Blackwall* factors). The Blackwall, 77 U.S. (10 Wall) 1 (1869).

their cargo.[113] The incentive system of admiralty necessitates a more generous award.[114] However, a state court lacks authority to impose a salvage-style award.[115]

A state court is allowed to assess damages based upon the violation of a salvage contract.[116] But again, traditional admiralty frowns upon the arrangement. A valid salvage claim can only arise from voluntary action on the part of a salvor. When the price has been set in advance, a salvor is under a legal duty to act, and this duty negates a finding of voluntariness.[117] Courts in admiralty favor pure salvage law over the prior arrangements of the parties.[118] Distrust of contract salvage is largely derived from the extortionary potential of the average salvage situation. A would-be salvor is capable of withholding assistance to a ship that is in distress and on its way to the ocean bottom until favorable terms are met. Therefore, contract salvage requires more stringent standards of proof than the typical business contract.[119]

Even when the subject is treasure salvage, contracts can be unwieldy.[120] The *Blackwell* ingredients of a salvage award rightly contemplate the conduct as well as the success of a salvor. Thus a court can make financial allowances for the treatment of an archaeological site. The flexibility of an award in pure salvage reflects an ongoing awareness of the salvor's conduct. Contract salvage, as well as exclusive salvage rights, are premised on the assumption that the conduct of a would-be salvor can be assessed *before* the salvage right is granted. The duty of care is predicted, not policed. A state's sole response to a perceived

---

113. In a 1993 settlement between the finder in *Zych* and the state of Illinois, the state received title to the wreck and Zych received the privilege of claiming discovery and a total of $20,000 for his 21-year search. James Hill, *Sea Hunt for History*, CHIC. TRIB., Sept. 17, 1993, at 1.

114. As for the alleged billion dollar cache at stake in *Columbus-America*, the court stipulated that on remand the salvors were to recover "a significant portion of the recovered gold" of the treasure in accordance with salvage law. *Columbus-America*, 974 F.2d at 468. On remand, the district court questioned the actual market value of the gold, estimating its worth at $21 million. The salvors collected a healthy 90%. Columbus-America Discovery Group v. Unidentified, Wrecked and Abandoned Sailing Vessel, No. 87-363-N, 1993 U.S. Dist. LEXIS 18482 (E.D. Va. Nov. 18, 1993).

115. NORRIS, *supra* note 52, § 14.

116. *Id.*

117. SCHOENBAUM, *supra* note 54, § 15-1.

118. Lawrence, *supra* note 51, at 297.

119. NORRIS, *supra* note 52, § 160. The salvage contract of choice is Lloyd's Open Form (LOF) 1980, *reprinted in* Donald R. O'May, *Lloyd's Form and the Montreal Convention*, 57 TUL. L. REV. 1412, 1439-47 (1983). Unfortunately, the contract is of limited benefit in treasure cases.

120. One pre-ASA case involved a salvor protesting the state's breach of an alleged salvage contract. The salvor, thinking the parties bound by agreement, forwarded shipwreck items to Texas state agencies for preservation. The salvor filed an action *in rem* when the state neglected to return the artifacts. Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 695 F.2d 893, 897 (5th Cir. 1983).

environmental violation would be to withhold payment altogether. The resulting suit for breach of contract would leave the court mulling over a combination of the *Blackwell* factors. Pure salvage is simply more adaptable than contract salvage to the environmental and archaeological concerns of the treasure cases.

Often contract salvage is compensated without regard to a salvor's success.[121] But where shipwrecks are involved, a contract is less an employment deal than a discovery mission. Financial recovery requires artifact recovery. The nature of treasure salvage will often result in the inclusion of a "no cure, no pay" provision in the contract. While this arrangement is agreeable from the state's point of view, it can disadvantage the salvor. A considerable investment is required to survey and uncover a shipwreck site. There must be adequate research on the general location of the wreck, suitable equipment and search vessels, and sufficient financing.[122] The costs of equipment alone can inhibit recovery. Serious salvors are outfitted with equipment including magnometers (to detect ferrous materials at the bottom of a body of water), side-scan sonar (to generate a shadow picture of the water's floor), sub-bottom profilers (to penetrate the floor), and submersibles and remote-operated vehicles (for deep-sea sites).[123] If the terms of the salvage contract are not generous and the investment cannot be recouped, then a would-be salvor may find that salvage is not worthwhile.

2. The Removal of Federal Court Jurisdiction

Not content to change substantive law alone, the ASA shrank admiralty jurisdiction.[124] The Abandoned Shipwreck Act divests the federal courts of jurisdiction over any maritime claim to which the Act

---

121. SCHOENBAUM, *supra* note 54, § 15-1.

122. *See generally* Sumner Gerard, *The Caribbean Treasure Hunt*, 38 SEA FRONTIERS 53 (1992), noting the evolution of the practice from hobby to big business. One outfit salvaging a deep-sea wreck off the Bahamas estimates its expense at $6000 per day. The group has been on site for six years. *Nova* (transcript of PBS television broadcast, Feb. 23, 1993), *available in* LEXIS, News Library, Script File (hereinafter *Nova*). *See also* Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, No. 87-363-N, 1993 U.S. Dist. LEXIS 18482 (E.D. Va. Nov. 18, 1993) (describing the tremendous undertaking of the salvors of the *S.S. Central America* and the 1400 miles of ocean floor that were surveyed in search of the shipwreck).

123. JEREMY GREEN, MARITIME ARCHAEOLOGY: A TECHNICAL HANDBOOK 44-50 (1990); Stevens, *supra* note 9, at 575 n.6. It was sonar that located the 1985 wreckage of the Air India jet bombed over the Atlantic. Sonar also found the scattered remains of the space ship Challenger.

124. *See* Zych v. Unidentified, Wrecked and Abandoned Vessel Believed To Be the "Seabird," 941 F.2d at 531 (N.D.Ill. 1990) (disapproving the lower court's contention, Zych v. Unidentified, Wrecked and Abandoned Vessel Believed To Be the SB "Lady Elgin," 746 F. Supp. 1334, 1345 (N.D. Ill. 1990), that the ASA rearranged remedies, not jurisdiction).

applies. In a waiver of preemption, the ASA hands jurisdiction to the states. The language of the ASA does not advertise the limitation, but the consequence of the Act is unequivocally clear. Whereas admiralty once gave the federal courts automatic subject matter jurisdiction, a post-ASA litigant must resort to state courts for the resolution of a dispute.

It was the intent of ASA sponsors that state law provide a recourse to aggrieved individuals.[125] Guidelines issued pursuant to the Act clarify that affected persons should be given opportunity to challenge under state law decisions to:

> a) withhold public notice of the locations of shipwrecks to which, under the Act, the State holds title;
> b) deny a person's request for nondestructive recreational exploration of or public access to State-owned shipwrecks;
> *c) deny a person's request for the recovery of State-owned shipwrecks when the person believes the proposed recovery is consistent with the historical values and environmental integrity of the shipwreck and the site; and*
> d) assess a civil penalty against a person who is convicted of willfully violating the State's shipwreck management program.[126]

The guidelines are thorough. Unfortunately, they are also non-binding.[127] With the ASA, Congress delegated full legislative responsibility to the states. States are under no obligation to pass laws providing for any legal relief. Meanwhile, the doors to the federal court system are closed.

Several commentators have noted the arguably uncertain constitutionality of the Act.[128] To date, there has been only one constitutional challenge to the ASA in federal courts because the terms of the Act exempt all legal proceedings brought prior to passage.[129] The challenge arose in the context of the aforementioned *Zych* litigation.[130] The circuit court in *Zych* first analyzed the constitutional inquiry and then assigned resolution to the lower court on remand.

The *Zych* court on appeal saw two constitutional hurdles for the ASA. The first hurdle would entail proof that Congress did not improperly excise jurisdiction from a class of cases "falling clearly within" admiralty

---

125. H.R. REP. NO. 514(II), *supra* note 8, at 6.

126. 55 Fed. Reg. 50,125 (1990) (emphasis added).

127. *Id.* at 50,117.

128. *See, e.g.*, Denise B. Feingold, Note, *The Abandoned Shipwreck Act of 1987: Navigating Turbulant Constitutional Waters?*, 10 U. BRIDGEPORT L. REV. 361, 391-97 (1990); Stevens, *supra* note 9, at 600-11 (citing possible challenges of federal preemption, overregulation of interstate commerce by states, and improper legislative delegation); Owen, *supra* note 6, at 512-16 ("The issue [of constitutionality] is not free from doubt.").

129. 43 U.S.C. § 2106(c) (1988).

130. Zych v. Unidentified, Wrecked and Abandoned Vessel Believed to be the SB "Lady Elgin," 746 F. Supp. 1334 (N.D. Ill. 1990); *rev'd*, 941 F.2d 525 (7th Cir. 1991).

jurisdiction.[131] Congress cannot divest the federal courts of the admiralty authority assigned to them under article III of the Constitution. In other words, only if shipwreck cases were not clearly contemplated by traditional admiralty would the preclusion of federal jurisdiction be allowed. This paper has already discussed the standard application of admiralty in treasure cases.[132] Notwithstanding the common accord, the *Zych* court believed proper jurisdiction to be debatable in the shipwreck context.[133] The circuit court declined to decide whether the first hurdle was successfully overcome.

The second constitutional hurdle would require a showing that the ASA conforms with admiralty's oft-stated goal of uniformity.[134] State legislation may address admiralty concerns, but must be consonant with the overarching federal scheme. Widely divergent state statutes are held preempted. The court in *Zych* did not labor over the second hurdle, readily declaring it overcome.[135] This conclusion is not as evident as the court would suggest. There is no evidence that state shipwreck laws, where they exist, are sufficiently uniform to satisfy admiralty. Different state statutes encompass varying classes of shipwrecks, and provide varying forms of relief.[136] The *Zych* court evades the question by implying that shipwrecks are an aside in maritime law, and thus the need for uniformity is less urgent.[137]

Loath to strike down the ASA, the appeals court remanded for what it perceived to be a key factual finding.[138] "Embeddedness" had not been proven in the case of the contested wreck. Assumptions of embeddedness do not suffice; evidence must show that the wreck is "firmly affixed" in submerged state land.[139] Without a finding of embeddedness, the ASA does not apply. The circuit court's opinion clears the way for similar challenges to the Act's purview. Such challenges seem likely, given the limited access to proof of embeddedness.[140]

---

131. *Zych*, 941 F.2d at 531 (citing Panama R.R. Co. v. Johnson, 264 U.S. 375, 386 (1924)).

132. *See supra* text accompanying notes 63-67.

133. *Zych*, 941 F.2d at 531 (calling the question a close one).

134. *Id.* (citing *Panama*, 264 U.S. at 386-87).

135. *Zych*, 941 F.2d at 532.

136. For example, North Carolina law extends state ownership to vessels and cargo that have remained sunken for over ten years. N.C. GEN. STAT. § 121-22 (1993). Massachusetts law presumes abandonment after the lapse of one century. MASS. ANN. LAWS ch. 6, § 180 (1993).

137. *Zych*, 941 F.2d at 533.

138. *Id.* at 534.

139. *Id.* at 530.

140. Often the finder/salvor will be the only party qualified to testify to the fact.

The constitutional framework the circuit court provided was flawed. The district court's analysis on remand was unintelligible.[141] The lower court struggled to escape a conclusion that the ASA was unconstitutional. Zych, the finder of the ship, conceded that the *Seabird* was indeed embedded. The escape hatch was closing. The court turned to federal admiralty jurisdiction as it pertains to shipwreck cases. Against the weight of all evidence, the *Zych* court found that salvors in wreck litigation essentially had no claim in admiralty court for a salvage award.[142] The court continued: the law of finds was not clearly within the admiralty jurisdiction.[143] To sum up, the ASA contravened no constitutional principle.

The *Zych* court made two insupportable points. The first point, dismissing the law of finds, was a misunderstanding of theory. The court held, without any foundation in law, that the law of finds did not clearly fall within the admiralty jurisdiction.[144] The second point, rejecting the law of salvage, was an argument about practice. Speaking to salvage, the court declared that the standard practice of admiralty was to reject application of the law of salvage in shipwreck cases.[145] Therefore, the court reasoned, if the ASA were to eliminate recourse to the law of salvage, no injustice would be worked. Federal admiralty would scarcely notice.[146] The *Zych* court appears to be confusing the fact of admiralty jurisdiction with an admiralty judge's preference of law. A federal court may entertain a suit in admiralty regardless of whether the judge opts to apply the law of finds or salvage law. Even the assumption in *Zych* of a judicial preference for finds law is debatable. As discussed above, pre-ASA courts did not uniformly favor finds law over salvage law.[147]

The lower court determined that the ASA does, in fact, *permit* federal admiralty jurisdiction over salvage claims. By the terms of the ASA, the *Zych* court is painfully mistaken. The law of salvage cannot apply to embedded shipwrecks in state waters.[148] Admiralty jurisdiction is predicated on salvage law (and/or the law of finds). In the unheeded words of the circuit court, "[D]epriving those who find embedded shipwrecks of causes of action based on the law of salvage and the law

---

141. Zych v. Unidentified, Wrecked and Abandoned Vessel believed to be the Seabird, 811 F. Supp. 1300 (N.D. Ill. 1992).

142. *Id.* at 1313.

143. *Id.* at 1315.

144. *Id.*

145. *Id.* at 1311.

146. *Zych*, 811 F. Supp. at 1311.

147. Strangely, the *Zych* court observed this phenomenon as well. The court contradicts itself by citing *Columbus-America* for the premise that courts in admiralty favor the application of salvage over finds. *Id.* at 1314 n.12. One will assume that the *Zych* court's conclusion is that salvage law is inappropriate in the shipwreck context.

148. 43 U.S.C. § 2106(a) ("The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which . . . this title applies.").

of finds divests federal courts of their admiralty jurisdiction over such claims, and concurrently vests state courts with jurisdiction over the same claims."[149] In the instant case, the *Zych* district court found abandonment, and dismissed the action for failure to state a claim upon which relief could be granted.[150]

The question of the ASA's constitutionality remains open. The impenetrable opinion of the lower court in *Zych* dispels few doubts. Contrary to the court's assumptions, the Act does preclude federal admiralty jurisdiction over shipwreck salvage claims.[151] Neither the issue of jurisdiction nor the problem of uniformity has been suitably addressed by any court to date.

III. SHIPWRECK LITIGATION IN THE PRE-ASA ERA

One of the purposes of the Abandoned Shipwreck Act was to resolve rampant judicial confusion over state claims to sunken wrecks. In partial defense of the Act, the treatment of treasure claims by federal courts was highly uneven prior to the enactment of the ASA. As we have seen, admiralty principles provide a straightforward approach to treasure claims. The law of finds and salvage played no part in the legal uncertainty. However, the pre-ASA period witnessed increasing efforts by states to assert control over the submerged lands within their borders. The publicity and profit associated with jackpot discoveries by private salvors piqued state interest. Twenty-seven states had passed legislation purporting to entitle a state to any archaeological find in its territory.[152] States also began to invoke federal legislation dating from 1953, discussed below, as authority for sudden claims to ownership.[153] In such instances, issues of state police power collided with federal prerogatives and maritime principles. Courts were divided as to the correct response.

The Submerged Lands Act of 1953 (SLA) gave the states title to submerged lands and the natural resources thereon up to a distance of three miles from state shores.[154] The intent of the SLA was to charge the states with the administration and development of lands and resources beneath navigable waters. The SLA offered a partial list of the "natural resources" that were contemplated: oil, gas, minerals, "fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine

149. *Zych*, 941 F.2d at 531.

150. *Zych*, 811 F. Supp. at 1304.

151. *See, e.g.*, Deep Sea Research v. The Brother Jonathan, No. C91-3899BAC, 1992 U.S. Dist. LEXIS 4575 (N.D. Cal. Mar. 20, 1992).

152. H.R. REP. NO. 514(I), *supra* note 2, at 2.

153. Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1988 & Supp. V 1993).

154. *Id.*

animal and plant life."[155] This definition notwithstanding, a number of states felt that the Submerged Lands Act conveyed title to shipwrecks beneath navigable waters. The state interpretation was that the Act made states responsible for both the living and the nonliving resources within submerged state land. Armed with this belief, states began to file restricted appearances in finder admiralty actions to aver title in themselves.

State invocation of the SLA triggered a complex series of events. Generally, a state would cite the combination of the SLA and a related state archaeological statute as evidence of its right to title. The state's possible role in the litigation meant that a finder's action was, essentially, one against the state. Because the Eleventh Amendment prohibits suits against a state,[156] federal courts could not settle the matter of ownership.[157] If a state could demonstrate that it had so much as a "colorable claim" to title, then the action was dismissed. The Eleventh Amendment as a jurisdictional bar could readily frustrate the aims of maritime law. The bar may be raised at any point in a proceeding;[158] an ongoing action to determine ownership is instantly rendered inconclusive. A state with a "colorable claim" to a wreck and no waiver of state immunity[159] could thus derail any action in admiralty.[160]

In fact, judicial opinions are split as to the requirement that a claim even be colorable. The premise that the Eleventh Amendment may confer immunity upon a weak claim is perhaps exemplified by the case of

---

155. 43 U.S.C. § 1301(e) (1988 & Supp. V 1993).

156. By its terms, the Eleventh Amendment bars suits brought by a non-citizen against a state. Subsequent interpretation has extended the rule to prohibit suits against a state by its own citizens. Hans v. Louisiana, 134 U.S. 1 (1890).

157. *But cf.* discussion *infra* accompanying notes 179-82.

158. Edelman v. Jordan, 415 U.S. 651, 678 (1974).

159. Waivers of immunity were naturally rare. Two exceptions include: Platoro Ltd. v. Unidentified Remains of a Vessel, 695 F.2d 893, 898-901 (5th Cir. 1983) (although the holding was that federal immunity had been waived, the court ponders at inexplicable length the state's claim that a resolution waiving immunity had restricted an action to state court); Chance v. Certain Artifacts, 606 F. Supp. 801, 803-04 (S.D. Ga. 1984), *aff'd without opinion*, 775 F.2d 302 (11th Cir. 1985) (state consented to adjudication of title but invoked 11th Amendment as to salvage claim).

160. *See, e.g.*, Subaqueous Exploration and Archaeology, Ltd. v. Unidentified, Wrecked and Abandoned Vessel, 577 F. Supp. 597 (D. Md. 1983). The common law protection of sovereign immunity is available to territorial governments resisting admiralty. Marx v. Government of Guam, 866 F.2d 294 (9th Cir. 1989) (holding that the SLA gave Guam a colorable claim to wreck and that sovereign immunity precluded the exercise of federal jurisdiction). At least one court has held that in the absence of a state statute vesting title to archaeological sites, the SLA could function alone to require a court to dismiss for failure to join an indispensible party. Sindia Expedition v. Wrecked and Abandoned Vessel, 710 F. Supp. 1020 (D.N.J. 1989) (applying FED. R. CIV. P. 19(b) to protect New Jersey's colorable claim), *rev'd*, 895 F.2d 116 (3rd Cir. 1990); *but cf.*, Zych v. Unidentified, Wrecked and Abandoned Vessel, 941 F.2d 525, 534 n.16 (7th Cir. 1991) ("state is not an indispensible party to this admiralty *in rem* action.").

Treasure Salvors.[161] At stake in the lengthy *Treasure Salvors* litigation was $250 million in treasure salvaged from the 1622 wreck of the Spanish galleon the *Atocha*.[162] The specifics of the case implicated assorted legal concerns and occupied a number of courts. However, the issue to reach the Supreme Court was one regarding the Eleventh Amendment.

At the time of the *Atocha*'s discovery, Florida law contained an archaeological provision much like those in place in other states. The statute stipulated:

> It is further declared to be the public policy of the state that all treasure trove, artifacts and such objects having intrinsic or historical and archaeological value which have been abandoned on state-owned lands or state-owned sovereignty submerged lands shall belong to the state with the title thereto vested in the division of archives, history, and records management of the department of state for the purpose of administration and protection.[163]

The Florida Division of Archives threatened the finders of the wreck with prosecution, and thus were able to coerce the relinquishment of the salved artifacts. Subsequently, the finders filed an admiralty action in federal court. They sought and obtained an *in rem* arrest warrant. Ordered to deliver the artifacts, Division officials balked and claimed Eleventh Amendment immunity. The State stepped in to defend on behalf of its agents.

The Supreme Court, addressing immunity, concluded that the Eleventh Amendment was no bar to an action that is brought against a state official and based upon the *ultra vires* conduct of that official.[164] However, the Supreme Court declined to follow the lead of the court of appeals and adjudicate the actual matter of ownership. Instead, the Court found that the Eleventh Amendment would not permit a determi-

---

161. Reported opinions in the case are as follows: Treasure Salvors, Inc. v. Abandoned Sailing Vessel, 408 F. Supp. 907 (S.D. Fla. 1976), *aff'd*, 569 F.2d 330 (5th Cir. 1978); Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 459 F. Supp. 507 (S.D. Fla. 1978), *aff'd sub nom.*, State of Florida, Department of State v. Treasure Salvors, Inc., 621 F.2d 1340 (5th Cir. 1980), *aff'd in part and rev'd in part*, 458 U.S. 670 (1982), *revisited*, 689 F.2d 1254 (5th Cir. 1982).

162. The *Atocha* was one of a fleet that was first battered then capsized by a hurricane that struck as the ships were passing through the Florida Keys en route to imperial Spain. The full story of the wreck and its discovery are chronicled in Lyon, *supra* note 3.

163. FLA. STAT. ch. 267.061(1)(b) (1974).

164. The Eleventh Amendment prohibits suit against a state or a state agency, but does not necessarily bar suit against a state official. Under the *Ex Parte Young* exception, the amendment may leave unprotected the conduct of a state official acting in her official capacity. *Ex Parte* Young, 209 U.S. 123 (1908).

nation of state versus finder ownership.[165] The Court's refusal to settle title is remarkable for a number of reasons.

First, the site of the *Atocha* wreck was nine and one-half miles from the Florida Keys — beyond state jurisdiction altogether. The state of Florida did not advance the Submerged Lands Act because the SLA has no effect in international waters. Instead, Florida submitted the cryptic argument that its boundaries for purposes of sunken vessel ownership extend further than its boundaries for purposes of mineral resource ownership.[166] Florida also suggested that the state archaeological statute might be relevant.[167] The statute lays claim to artifacts on *state-owned* land. In the words of the plurality, "No statutory provision has been advanced that even arguably would authorize officials of the Division of Archives to retain the property at issue."[168] The Supreme Court could not pinpoint so much as a colorable claim.[169]

The lack of colorability did not preclude Eleventh Amendment protection. The circuit court judgment had given title to the finder of the *Atocha*. Although the Supreme Court belittled the state claim to title, the Court expressed its disapproval of adjudication by invalidating only that portion of the holding that addressed Florida's claim.[170] It may be argued that the Court's disposition of the case was half-hearted. The Court did not overturn the decision to execute the warrant; the artifacts were to be transferred to their finder. Indeed, the court of appeals would revisit the case and decree the *Atocha*'s finder to be its keeper against all claimants, save the state of Florida.[171] However, few courts have interpreted the Supreme Court ruling as an endorsement of this "false modesty" approach. In *Fitzgerald*, the court affirmed the dismissal of an action between rival shipwreck salvors, due to the Eleventh Amendment implications of any *in rem* adjudication. The court expressly declined to consider the colorability of Puerto Rico's claim to ownership; other courts

165. *Treasure Salvors, Inc.*, 458 U.S. at 699 (1982).

166. *Id.* at 695 n.33.

167. *Id.* at 695.

168. *Id.* at 696.

169. *Id.* at 694.

170. *Id.* at 700. A dissent by Justice Brennan could not reconcile the plurality's findings on colorability with its reversal of the lower court's judgment. "Why should the State now get a second bite at the apple?" *Id.* at 702.

171. *Treasure Salvors*, 689 F.2d at 1256. In a tone best read as annoyance, the court declared its intent to enter final *in rem* judgment unless the state should present an actual case or controversy through its voluntary appearance. The court in *Riebe* followed the *Treasure Salvors* example by declaring title against all others, save the state. Riebe v. Unidentified, Wrecked and Abandoned 18th Century Shipwreck, 691 F. Supp. 923, 926 (E.D.N.C. 1987).

have followed suit.[172] *Treasure Salvors* stands as a strong statement of the breadth of Eleventh Amendment immunity.

Utter discord characterized the judicial decisions of the pre-ASA period. In the case of *Maritime*, finders sought title to a Cape Cod wreck that would later be identified as the ruins of the infamous pirate ship the *Whydah*.[173] The state of Massachusetts countered by filing the standard restricted appearance to raise the objections of the SLA, a state archaeological statute, and the Eleventh Amendment. Irrespective of the merits of the state's claim to title, the court accepted the state motion to dismiss. Soon, courts in other treasure cases would describe the *Maritime* decision as controlling.[174]

Buoyed by its success, Massachusetts proceeded to state court for an adjudication of title. There, the Supreme Judicial Court repudiated the assertion of the Submerged Lands Act.[175] Surprisingly, the court found that the SLA contemplated no transfer to the states of any rights in underwater artifacts. Federal admiralty law would prevail. Since the wreck of the *Whydah* had lain in its grave for nearly three centuries, the court declared the wreck abandoned and the finders to be keepers.

A number of recent theories have cast doubt on the propriety of applying the Eleventh Amendment to cases in admiralty. Scholars and commentators have posed two questions — one narrow in scope, one broad. The narrow question that is asked is whether states in treasure cases summon Eleventh Amendment immunity in error.[176] The policy basis behind the Eleventh Amendment is the protection of state treasuries.[177] Neither the remedy offered by the law of finds nor the remedy of salvage law threatens the public purse. Finds law grants title; salvage awards a percentage of the wreck's value. Salved items can be sold to satisfy a judgment, or an award *in specie* can be given. Net depletion of state funds is impossible under admiralty. At least one court

---

172. Fitzgerald v. Unidentified, Wrecked and Abandoned Vessel, 866 F.2d 16 (1st Cir. 1989). *See also Riebe*, 691 F. Supp. 923 (colorability not addressed, but 11th Amendment bar upheld); Sub-Sal, Inc. v. The Debraak, No. 84-296-CMW, 1992 U.S. Dist. LEXIS 2461 (D. Del. Feb. 4, 1992) (disregarding 1984 *in rem* action by finder, court granted Delaware title). *See generally* Paul Brodeur, *The Treasure of the DeBraak*, THE NEW YORKER, Aug. 15, 1988, at 33 (discussing Sub-Sal's difficult salvage).

173. Maritime Underwater Surveyors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 717 F.2d 6 (1st Cir. 1983). Investors are currently planning a $70 million tourist park with the slave ship turned pirate ship as its centerpiece. *See* Paul F. Johnston, *Treasure Salvage, Archaeological Ethics and Maritime Museums*, 22 INT'L J. NAUT. ARCH. 53, 58 (1993).

174. *Fitzgerald*, 866 F.2d at 17; *Riebe*, 691 F. Supp. at 925-26.

175. Commonwealth v. Maritime Underwater Surveys, Inc., 531 N.E.2d 549, 552-53 (Mass. 1988).

176. SCHOENBAUM, *supra* note 54, § 15-7.

177. "[A] suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." Edelman v. Jordan, 415 U.S. 651, 663 (1974).

has agreed.[178] Mindful of the alleged policy tensions, the court in *Cobb Coin* rejected Florida's assertion of Eleventh Amendment immunity. The court held the SLA to be contrary to admiralty, and liberally awarded the salvors of an 18th century wreck.

The broad, in fact revolutionary, Eleventh Amendment question is whether the amendment truly precludes federal jurisdiction over admiralty suits brought against a state. A group of scholars, led by William Fletcher, conclude that the adopters of the Eleventh Amendment intended no such result.[179] Fletcher maintains that there is a "diversity explanation" to the amendment. Article III of the Constitution confers two types of federal jurisdiction — subject matter jurisdiction (for example, in admiralty cases and cases arising under federal law) and jurisdiction according to the status of the parties (for example, in suits between states and citizens of different states, or suits between states and citizens of foreign states).[180] Examples of the second type describe "state-citizen diversity" jurisdiction. Fletcher's "diversity explanation" proposes that the effect of the Eleventh Amendment is to modify the state-citizen diversity clause of article III so as to confer diversity jurisdiction only when a state sues an out-of-state citizen. Under this interpretation, the Eleventh Amendment leaves admiralty and federal question jurisdiction intact. That is, federal jurisdiction exists when the suit of a private citizen against a state is based upon a valid federal claim, and not upon diversity jurisdiction. Put another way, a federal court that could entertain a suit against a state under either admiralty jurisdiction or federal question jurisdiction *prior* to passage of the amendment may hear such cases *after* passage of the amendment.[181] Admiralty has always been a basis for the exercise of federal judicial power, and so continues to be.

If the diversity explanation holds,[182] then state invocation of the Eleventh Amendment in treasure cases is illegitimate. There can be no Eleventh Amendment immunity because the suit "against" the state (as

---

178. Cobb Coin Co., Ltd. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 549 F. Supp. 540, 554 (S.D. Fla. 1982).

179. *See* William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989).

180. U.S. CONST. art. III, § 2. *See also* 28 U.S.C. § 1331 (1988 & Supp. V 1993) (federal question jurisdiction) and 28 U.S.C. § 1333 (1988) (admiralty jurisdiction).

181. Fletcher, *The Diversity Explanation, supra* note 179, at 1264.

182. The theory has its share of problems. Under the "diversity explanation," a state has no accountability in federal court for actions taken against non-citizens. Only aggrieved citizens may sue the state. The diversity explanation also leaves unresolved the question of whether federal question jurisdiction existed prior to passage of the Eleventh Amendment. *See* William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989).

rival claimant to title) is one in admiralty. However, acceptance of Fletcher's theory has thus far been limited to academia. The diversity explanation has gathered no steam in modern jurisprudence. No court in a treasure case has ever rejected a state claim of Eleventh Amendment immunity based upon Fletcher's historical evidence. As the shipwreck cases reveal, the Eleventh Amendment question of the courts in the pre-ASA period was the relevance of the amendment to what was essentially an *in rem* action against a ship. Nonetheless, the specter of the Eleventh Amendment, plus the existence of the SLA, was sufficient to convince many courts of a state prerogative over abandoned shipwrecks.

The Abandoned Shipwreck Act presented Congress with an opportunity to clarify. Sponsors of the ASA considered the Act to be a recognition of the already extensive management authority that the SLA had given to states. The ASA would "confirm" that authority.[183] The Act sprang from an atmosphere of judicial bewilderment at a time when any clarity would have been welcome. Unfortunately, the sponsors of the ASA prized simplicity over forethought.

The resulting Act simply fails to consider that shipwrecks are unlike any other resource contemplated by the SLA. Wrecks cannot be "managed"[184] before they are discovered and inventoried, and these require skills that are foreign to the average (underfunded) state agency. Moreover, the Act ignored the gravity of its change. In most areas of the law, cries for regulation are met with suspicion. Yet the Act rushes towards regulation with barely a nod to the tradition of maritime law. Expanding the SLA was the expedient thing to do. The Act might instead have chosen admiralty.

IV. THE UNSPOKEN AGENDA OF THE ASA

In the spring of 1971, the company Treasure Salvors, Inc. located the wreck of the Spanish galleon the *Atocha* after years of plumbing the ocean floor and three century-old maritime records in Seville. The treasure on board the *Atocha* was worth $250 million. It was perhaps the most publicized find by a salvor to date. Although the site of the wreck was miles beyond Florida's territorial waters, the state quickly sought ownership of the ship and its treasure. In 1976, a district court conferred

183. H.R. REP. NO. 514(II), *supra* note 8, at 5. Courts in *in rem* proceedings initiated prior to the passage of the ASA were unsure whether the new Act supplemented or supplanted the SLA. *See* Commonwealth v. Maritime Underwater Surveys, Inc., 531 N.E.2d 549, 553 (Mass. 1988) (ASA as proof that SLA did not encompass shipwrecks); Marx v. Government of Guam, 866 F.2d 294, 300 (9th Cir. 1989) (ASA did not contradict wide scope of SLA).

184. H.R. REP. NO. 514(II), *supra* note 8, at 6.

title on the finders of the *Atocha*.[185] In 1978, the court of appeals affirmed.[186] In 1979, the first legislation proposing state title over abandoned shipwrecks was introduced into the 96th Congress by Congressman Charles Bennett of Florida.

Congressman Bennett spearheaded a campaign that would last almost a decade. Bennett and like-minded legislators reintroduced shipwreck bills in each subsequent Congress until 1987, when accord was finally reached.[187] The result was the Abandoned Shipwreck Act that is the law today. One art law commentator of renown has suggested that there exist three plausible reasons why so-called source nations try to prevent the export of cultural property: A) protection, B) "Byronism," and C) "opportunity preservation."[188] The enactment of the ASA involved an appeal to each of these sentiments.

A. PROTECTION

Congressman Bennett offered the original bill, H.R. 1195, as a preservationist measure. The bill carried the assumption that state-controlled salvage would protect the shipwrecks and preserve the environment as well. Heedless salvors can damage the marine environment through the use of sloppy, profit-maximizing techniques. The challenge of most salvage missions is to uncover artifacts that are obscured both beneath water and beneath centuries of shifted sand and ocean vegetation. While the environmental effects of some site-clearing techniques (such as explosives) is clear, the effect of other methods is uncertain. For instance, in the controversial practice of "mailboxing," the propellers of a salvage vessel are pointed downward at the seabed, their force punching through sand layers and sea grass in search of buried riches. Detractors of the practice suggest that mailboxing pockmarks the coral reefs that are the focus of much sea life.[189] Supporters note the extreme resilience of the reefs. Hidden coral reefs are the cause of most

185. Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 408 F. Supp. 907 (S.D. Fla. 1976), *aff'd*, 569 F.2d 330 (5th Cir. 1978).

186. Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978). However, the controversy did not end there. See *supra* note 161.

187. The list of bills that vied to become the Abandoned Shipwreck Act includes H.R. 1195, 96th Cong., 1st Sess. (1979); H.R. 132, 97th Cong., 1st Sess. (1981); H.R. 69, 98th Cong., 1st Sess. (1983); H.R. 3194, 98th Cong., 1st Sess. (1983); S. 1504, 98th Cong., 1st Sess. (1983); H.R. 25, 99th Cong., 1st Sess. (1985); H.R. 3558, 99th Cong., 1st Sess. (1985); S. 2569, 99th Cong., 2nd Sess. (1986); H.R. 74, 100th Cong., 1st Sess. (1987); S. 858, 100th Cong., 1st Sess. (1987); and H.R. 2071, 100th Cong., 1st Sess. (1987).

188. John H. Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477, 511 (1988).

189. *See* Larry Rohter, *Treasure-Hunt Ban is Fought in the Keys*, N.Y. TIMES, June 21, 1992, at A16.

of the historic shipwrecks in this country, and the brunt of innumerable ships striking the reefs has caused them surprisingly little damage. Propeller "mailboxes" are no match for the wrecked ships themselves, or for fierce weather. Strong storms, claim advocates, can churn the ocean floor more thoroughly than mailboxes.[190] The mailbox debate notwithstanding, it is beyond question that negligent salvage can pose a risk to the underwater environment. Legislative bill H.R. 1195 and its progeny claimed to diminish the risk.

However, the central concern of all of the proposed wreck legislation was the protection of shipwrecks. At the same time that the success of salvors captured the attention of the press, dire warnings of shipwreck extinction began to surface.[191] Archaeologists and others predicted that the rise of the salvor would mean the destruction of countless shipwrecks in hasty attempts to wrench treasure from fragile, sunken vessels. Gold and precious metals are rare finds; the real value of most shipwrecks is archaeological and contingent upon careful salvage.

First, salvage must be performed systematically. Then, once a wreck is salvaged, the artifacts must be carefully preserved. Upon sinking, a vessel initially suffers a period of severe deterioration. At some point, the ship and its cargo acclimate to the underwater environment and deterioration slows. An underwater wreck may face physical damage from any number of sources (the action of the elements, dredging projects, vandalism, etc.), but chemical decay is generally not one of them. However, sudden exposure to an above-water clime can retrigger decay if precautions are not taken. The stabilization and maintenance of artifacts from a marine clime require costly, time-consuming measures. Without these measures, mere possession of shipwreck items is a guarantee of their slow destruction. H.R. 1195 and each subsequent bill presupposed that the state would be the party best equipped to perform systematic salvage and to manage the physical preservation of recovered shipwrecks and artifacts.

In keeping with the spirit of preservation, H.R. 1195 imposed an important condition on state ownership of shipwrecks. H.R. 1195 endorsed a contingent and defeasible title in the states. Under the bill, the Secretary of the Interior was given the authority to transfer title of an abandoned wreck to the relevant state only upon a finding that the state maintained an appropriate program of shipwreck management. A state that subsequently fell out of compliance with the Secretary's standards of preservation would automatically lose title. Later legislative proposals, including H.R. 74 and H.R. 132, would echo the requirement

190. *Id.*

191. One former head of Florida's underwater archaeology program predicted, "In this decade, you're going to see the destruction of all shipwrecks in the state waters." Mark Starr & Bill Belleville, *Florida: Diving for Dollars*, NEWSWEEK, Mar. 18, 1985, at 27.

that states be given duties along with title. In hearings before Congress, the Director of Maritime Preservation testified on behalf of the National Trust for Historic Preservation about the pressing need for federal oversight of state shipwreck management.[192]

As the Abandoned Shipwreck Act stands today, there is no such mandate. States are given absolute title, subject only to the reservation of basic federal sovereign rights over submerged lands.[193] Instead of instituting either contingent or defeasible title, the Act merely directs the States to carry out their "responsibilities" to develop appropriate and consistent policies, and then charges the Secretary of the Interior, acting through the National Park Service, with the preparation of guidelines to assist the States in policy development.[194] The final guidelines are non-binding and strictly advisory,[195] and, at any rate, the extent of the legal authority of the National Park Service is unclear. Given the preservationist bent of the Act, it remains a valid question how and why the ASA was diluted.

The answer, in a word, is that the federal government did not want to assume responsibility for the oversight or protection of shipwrecks. In congressional hearings on H.R. 132, a version that stipulated defeasible title, an Associate Director from the National Park Service (NPS) voiced his objections to federal involvement. Noting the "very troubling element" of the bill, he commented, "[I]f a State violates its approved plan when dealing with an historic shipwreck, then all right and title would revert to the Secretary [of the Interior]."[196]

As the ASA now stands, states are free to vest authority for shipwreck management and program development in agencies other than the local historic preservation office. This was not always the case. In the draft guidelines issued by the National Park Service, state historic preservation offices were designated as the agencies best suited to handle shipwrecks.[197] After state commentators expressed concern, the guideline was changed. The final NPS guidelines permit states to

---

192. *Protection of Historic Shipwrecks: Hearings on S. 1504 Before the Subcomm. on Public Lands and Reserved Water of the Senate Comm. on Energy and Natural Resources,* 98th Cong., 1st Sess. 28 (1983) [hereinafter *Hearings on S. 1504*] (testimony of Capt. Harry Allendorfer, USN (ret.), Director of Maritime Preservation).

193. 43 U.S.C. § 2105(c) (1988).

194. 43 U.S.C. §§ 2101, 2104 (1988).

195. "While recognizing that the guidelines are non-binding, the Committee [on Merchant Marine and Fisheries, to whom the bill was referred] strongly encourages the states to act consistently with the guidelines." H.R. REP. NO. 514(II), *supra* note 8, at 7.

196. *Abandoned Historic Shipwrecks: Hearings on H.R. 132 Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries,* 97th Cong., 1st Sess. 141 (1982) (statement of Jerry L. Rogers, Associate Director, Archaeology and Historic Preservation, National Park Service).

197. 54 Fed. Reg. 13,643 (1989).

establish authority elsewhere.[198] The change has significant consequences. The National Park Service regularly polices state historic preservation programs for compliance with the National Preservation Act and with the terms and conditions of Historic Preservation Fund grant awards.[199] However, because state shipwreck programs need not be pursuant to local historic preservation activities, a state's noncompliance with the Act carries no financial repercussions. As emphasized in the final guidelines issued by the National Park Service, there is no penalty for the states that refuse to implement the Act's provisions.[200] There is also no congressional review of state participation. Concurrently, the Committee on Interior and Insular Affairs announced its intention to "carefully monitor the implementation of this legislation to ensure compliance" and conceded that no specific oversight hearings had been conducted.[201]

From the standpoint of the federal government, the problem with preservation is the expense. Active management of abandoned shipwrecks would be a strain on public funds and agency resources. The Congressional Budget Office dutifully noted that "[n]either the [National Park Service] nor the affected states are expected to incur significant additional costs as a result of this bill."[202] Yet a state must have adequate funds to cover both the salvage of a wreck and the preservation of found artifacts. Even before the point of salvage, a state must have sufficient funds to survey local waterways for shipwreck sites. In areas such as the Florida Keys and its National Marine Sanctuary, the remains of an estimated two thousand ships lie somewhere beneath the waters' surface.[203] Unless a state is aware of the presence of a site, the state may inadvertently destroy the wreck through dredging projects in territorial rivers, harbors, and bays. In fact, critics charge state dredging with the majority of damage to sunken vessels.[204] The ASA gives the power of shipwreck management to state agencies whose finances often preclude efforts to survey, salvage, or preserve the wrecks.

The Congress that passed the Abandoned Shipwreck Act of today wanted preservation, but without any of the hassle of federal interven-

198. 55 Fed. Reg. 50,120 n.1 (1990).

199. The NPS conducts a review of ten aspects of each state's program in order to determine whether a state program is to receive full approval and, therefore, full funding. CULTURAL RESOURCES MANAGEMENT 127 (Ronald W. Johnson & Michael G. Schene, eds. 1987). *See also* 55 Fed. Reg. at 50,117.

200. 55 Fed. Reg. at 50,119.

201. H.R. REP. NO. 514(I), *supra* note 2, at 4.

202. *Id.* at 5.

203. Rohter, *Treasure-Hunt, supra* note 189, at A16.

204. *See Abandoned Shipwreck Act of 1987: Hearings on S. 858 Before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources*, 100th Cong., 1st Sess. 99 (1987) [hereinafter *Hearings on S. 858*] (testimony of Jack Fullmer, Legislative Committee Chairman of the New Jersey Council of Diving Clubs).

tion and any of the expense of state programs. Unwilling to assign federal responsibility, unable to change limited state budgets, the Act offers a preservation that it cannot deliver. The intent of the ASA was to prevent a damaging free-for-all over shipwreck artifacts. Perversely, the Act's result may be a system of "destructive retention."[205]

B. BYRONISM

"Byronism" is allusive shorthand for the romantic equation of the national character of certain cultural objects with the need for national retention.[206] The term has its origin in a notorious act by Lord Elgin. In the early 1800's, Elgin removed a large portion of a frieze from the wall of the Parthenon and transported the piece to its current home in the British Museum. The Elgin Marbles, as they have come to be known, are the *cause célèbre* of the movement for cultural return.[207] Byron was one among many who believed that Elgin's act was more petty theft than preservationist impulse,[208] and that the sculptures must be returned to their homeland.[209]

As a nation that places no restriction upon the export of legally-obtained cultural artifacts, the United States is virtually alone. Yet, curiously, the Abandoned Shipwreck Act plays to a Byronist sensibility that equates rightful ownership with state ownership. Illustrations from art law are rarely applied in the maritime context. However, in hearings on the bill S. 1504, Senator Bentsen spoke to a Byronist zeitgeist, commenting:

> You've got a situation where we know people of our own country have gone down to foreign countries and bought their artifacts, bought their treasures and brought them back here. Now we pass laws our own selves to protect those countries from that. It is high time that we did the same thing for our own historic treasures.[210]

---

205. Merryman, *supra* note 188, at 507.

206. *Id.* at 494. The expression appears to be of Merryman's creation, inspired by the French recognition of "elginisme" (loosely translatable as the hijacking of national treasures).

207. JEANETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES 47 (1989).

208. The Parthenon has faced threats ranging from vandalism and Venetian artillery, to traffic pollution and the ravages of tourism.

209. For perhaps the fullest analysis to date of the controversy surrounding the marbles, see John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985).

210. *Hearings on S. 1504, supra* note 192, at 16. Laws such as those referred to by Senator Bentsen include the Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601-13 (1988) and the Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals Act of 1972, 19 U.S.C. §§ 2091-95 (1988). *See* discussion *supra* Part I.

But whose treasures are these, and why does the ASA support state ownership rather than federal ownership of common treasures? Some of the most-publicized shipwreck discoveries have been Spanish vessels such as the *Atocha* and the *Santa Margarita*.[211] American claims to title of Spanish wrecks are tenuous at best. The coincidence of a tragic shipwreck in waters that would centuries later became U. S. territory is slight justification for the assertion of American, much less state, title.

Likewise, the solution of state ownership of abandoned shipwrecks is an odd solution to a problem defined as "the protection of our nation's maritime heritage."[212] The Department of Commerce expressed concern that the Abandoned Shipwreck Act did not adequately protect the national interest in shipwrecks of special nationwide significance.[213] Only the fortuity of a sinking in or on public lands of the United States, rather than on state lands, will create federal title in a nationally-significant shipwreck.[214] By the ASA's tidy act of appropriation, national heirlooms have become state property.

Sheer sentiment underlies most of the Byronist justifications for the state ownership of shipwrecks. Among the most impassioned pleas for the ASA came from George Bass of the Institute of Nautical Archaeology. Bass crafted a fable that likened the practice of private salvage to the stealing of stars from the night sky.[215] Emotional appeals aside, there is one rational reading of the ASA's take on Byronism. At an intuitive level, there is a sense that shipwrecks, and shipwreck artifacts, belong to everyone if they belong to any one individual at all.[216] Thus, the Abandoned Shipwreck Act appoints the states titleholders so as to create trustees.

The corollary to this argument must necessarily be that shipwreck artifacts be accessible to the general public. Artifacts can only be made available for public viewing if they are first brought to the surface. As one salvor observed, abandoned wrecks "have no social or cultural value

---

211. The Spanish brigantine *El Cazador* is a recent discovery. The *El Cazador* sunk in 1784 in the Gulf of Mexico, well beyond the territorial waters of Louisiana (and thus is not subject to the ASA). The ship's cargo of Mexican coins, intended to stabilize the currency of Spanish Louisiana, has instead become a treasure trove. William J. Broad, *1784 Spanish Ship is Found in the Gulf*, N.Y. TIMES, Dec. 19, 1993, at A38.

212. H.R. REP. NO. 514(II), *supra* note 8, at 8.

213. *Id.* at 10-11. Letter from Robert Brumley, Deputy General Counsel of the Dep't of Commerce, to Walter B. Jones, Chairman of the Committee on Merchant Marine and Fisheries (Feb. 17, 1988).

214. 43 U.S.C. § 2105(d) (1988).

215. *See Hearings on S. 858, supra* note 204, at 176-79.

216. One cultural property commentator observes that there are three answers to the question of who owns the past: 1) everyone, since the past is common heritage; 2) some specific group, such as a nation or a museum, in a representative capacity; or 3) no one, since the past cannot be conceived as ownable. THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY? 3 (Phyllis M. Messenger ed., 1989).

as long as they remain in the seabed. They are simply abandoned."[217] However, public availability is not tied to the enactment of the ASA. Under the Act, there is no incentive for the states to survey for shipwreck locations, much less to excavate the wrecks. One Congressman who opposed the bill that would become the ASA queried, "How . . . , by passing S. 858, are we protecting shipwrecks and promoting opportunities for learning from these historic vessels if the likely result will be state laws which create major disincentives to private efforts to discover shipwrecks?"[218] The discovery of a shipwreck artifact on state territory gives the state an interest in that object's preservation, but an interest that need not be confused with the prerogative of ownership.

Moreover, the Byronist argument loses sight of the widespread phenomenon of gifting. Through private contributions and bequests to museums, gifting makes possible the public display of precious items.[219] The extraordinary expense and expertise associated with stabilizing items that have long been underwater often lead a private owner to loan or donate the artifacts to a public institution.[220] Relatedly, tax laws have a marked effect on philanthropy. Even in the absence of legislation, shipwreck artifacts have long shifted from private hands to public collections.[221] Of the cache of items privately salvaged from the *Atocha*, over one-half now reside in state or federal museums.[222]

Even Byronism cannot justify the broad coverage of the Act. The drafters of the ASA suggested that they were carving out a "limited

---

217. Melvin A. Fisher, *The Abandoned Shipwreck Act: The Role of Private Enterprise*, 12 COLUM.-VLA J.L. & ARTS 373, 376 (1988).

218. Norman D. Shumway (R-Cal.). H.R. REP. NO. 514(II), *supra* note 8, at 16-17.

219. Perversely, nautical archaeologists have been fighting to *limit* museum display of commercially-recovered shipwreck items. *See* discussion *infra* at 190-92.

220. Telephone Interview with John McDonald, Associate Director, Yale University Museum (Nov. 30, 1993). Also, it is not uncommon for salvors to auction discovered artifacts via prominent auction houses, and for museums to be among the most fervent bidders. In 1986, Christie's of Amsterdam auctioned the Nanking Cargo, porcelain and gold items recovered from the wreck of the *Geldermalsen*. In 1988, Christie's New York auctioned assorted gold and silver items from the wrecks of the *Atocha* and the *Santa Margarita*. Christie's of London has also handled the sale of jewelry and artifacts from the wreck of the *Marabias*. In 1989, Sotheby's New York auctioned items from the Cape Cod wreck of the *Whydah*. *See* Johnston, *supra* note 173, at 54.

221. Joe Kimbell, the Director of the Caribbean Shipwreck Museum in Key Largo, Florida, was a one-time treasure hunter who gathered his finds and those of his friends to create a treasure museum open to the general public. The famous treasure salvor Mel Fisher has also opened his own Florida museum, the Mel Fisher Maritime Heritage Society.

222. Among the donations were astrolabs (compass devices of great archaeological interest) salvaged from the 17th century ship. Telephone Interview with David Paul Horan, Esq., counsel for Treasure Salvors, Inc. and preeminent shipwreck salvage attorney (Dec. 17, 1993). Horan has handled the litigation in *Cobb Coin, Jupiter Wreck, the Sindia*, and *Treasure Salvors*.

exception" to admiralty, a modification inapplicable beyond the three-mile state limit.[223] Yet only a minority of shipwrecks occur beyond the reefs and shoals of coastal waters.[224] The only territorial shipwrecks that are excluded from the Act's coverage are those shipwrecks that are both ineligible for inclusion in the National Register and are situated *upon* the submerged lands of a state. The ASA facially applies to each and every "embedded" shipwreck in state waters.[225] In contrast, the original shipwreck bill, H.R. 1195, limited coverage to any shipwreck that was over one hundred years old.[226] The fact that a wreck is embedded does not, in and of itself, warrant the conclusion that the wreck is historic. Embeddedness can be the direct result of ocean currents and shifting sands, opponents of the ASA protested.[227] Few wrecks that reach the ocean bottom do not readily become embedded by the action of the elements.[228] By positing age as a proxy for historic significance, the prior bill sought to isolate the specific interests at stake.

Likewise, the Byronist sentiment focuses on those objects that symbolize or embody a national/historical spirit. The usual candidates are objects that exemplify national ideals (as in the case of the Statue of Liberty), national history (the Liberty Bell), or culture (the Aztec Calendar Stone), or objects that serve as a talisman (as in the Cameroonian sculpture the Afo-A-Kom, said to spiritually protect a clan).[229] Such mythic dimensions are absent from the vast majority of shipwrecks covered by the ASA. The Act is indiscriminate in its claim to all embedded shipwrecks and all related artifacts. A state asserting ownership is entitled to retain not just significant artifact specimens, but duplicates as well. Common items and redundant items equally are

---

223. H.R. REP. NO. 514(II), *supra* note 8, at 8.

224. Giesecke, *Shipwrecks, supra* note 2, at 181 (estimating that 93 percent of all the known, historic wrecks in this country more than fifty years old are in state waters). The *Titanic*, which sunk well into international waters off the coast of Newfoundland, is a notable exception to the rule.

225. The requirement that a shipwreck be embedded if it is not historic *per se* has become a point of attack in litigation challenging a state's assertion of title. *See, e.g.*, Zych v. Unidentified, Wrecked and Abandoned Vessel Believed to be the "Seabird," 941 F.2d 525 (7th Cir. 1991).

226. Spain casts its net more broadly. Under a 1962 statute, the country acquires ownership of any sunken ship lying in Spanish waters for three or more years. Stevens, *supra* note 9, at 588-89 n. 73 (citing Estado No. 60/62, B.O.E., No. 310, Dec. 24, 1962 (Spain)). Portugal claims ownership after five years. PROTT & O'KEEFE, *supra* note 14, § 608.

227. H.R. REP. NO. 514(II), *supra* note 8, at 15.

228. *See Certain Abandoned Shipwrecks: Hearings on H.R. 74 and H.R. 2071 Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 100th Cong., 1st Sess. 70 (1987) (hereinafter *Hearings on H.R. 74)* (statement of Peter E. Hess, Representative, Ocean Watch) ("I have yet to see a shipwreck in 10 years of diving which is not embedded in the bottom. It covers all wrecks.").

229. Merryman, *supra* note 188, at 496.

declared state property. Speaking to a similar practice in the art context, UNESCO issued a Recommendation Concerning the International Exchange of Cultural Property. By the terms of the Recommendation, dated November 26, 1976, sovereign States are discouraged from amassing cultural objects in multiples.[230] The ASA makes slight effort to separate precious artifacts from profane ones, and instead charges the taxpaying public with the costs of keeping the hoard.

C. OPPORTUNITY PRESERVATION

"Opportunity preservation" can fairly be described as a possessive maneuver designed to limit access to and competition over an item.[231] A mission less noble than Byronism, opportunity preservation in the art field has meant that countries sequester cultural artifacts within their borders in order to keep the items off the international market and on hand for an ill-defined future disposal. Jealous safeguarding — opportunity preservation — appears to have been a latent element in the passage of the Abandoned Shipwreck Act.

There is a defensiveness in the field of underwater archaeology. Public awareness of the historic potential of underwater sites did not develop until the 1960's.[232] As it were, the birth of marine archaeology as a serious enterprise coincided with the rise in recreational diving. The comparison was not lost on academia. At a time when underwater archaeologists sought legitimacy, classical archaeologists were quick to dismiss the marine efforts of their counterparts as sport.[233] Archaeology, a traditional field, saw terrestriality as a shibboleth. Marine archaeologists scrambled to redefine their identity.

Some chose to affiliate with the growing movement of "cultural resource management." "Cultural resource management" was a term coined by marine anthropologists and archaeologists in an attempt to distinguish their task from that of aboveground historic preservation.[234] In a cultural resource vein, Charles Beeker of the University

---

230. United Nations, Economic and Social Council, U.N. Doc. IV B.8 (1976).

231. Merryman, *supra* note 188, at 501.

232. Shipwrecks, as discrete time capsules, contain a number of archaeologically-significant features. The actual construction of the ship gives insight into the technology of the era, the cargo suggests the items most prized by a parent culture in colonial development, the ship stores reveal the subsistence provisions of the crew, the armament indicates military strategy, and the bilge permits analysis of the ship's refuse. Daniel J. Lenihan, *Rethinking Shipwreck Archaeology, in* SHIPWRECK ANTHROPOLOGY 37, 52-63 (Richard A. Gould ed., 1983).

233. George Bass, one of the leaders of nautical archaeology, describes his early struggle to gain archaeological respectability. George F. Bass, *A Plea for Historical Particularism in Nautical Archaeology, in* SHIPWRECK ANTHROPOLOGY 91, 91-94 (Richard A. Gould ed., 1983).

234. CULTURAL RESOURCES MANAGEMENT, *supra* note 199, at 1.

of Indiana protested the treatment of Florida shipwrecks: "But they're not wrecks. These are submerged cultural resources."[235] The proliferation of "submerged cultural resource" units in agencies such as the National Park Service bears witness to the recent allegiance.

Other marine archaeologists chose to pursue status as archaeologists in their own right. Accordingly, qualified underwater archaeologists distanced themselves from treasure-hunters by disparaging the work of salvors.[236] Although archaeologists recognized that salvors had proven themselves more adept at actual wreck discovery,[237] the archaeologists opted to work against, rather than with, the salvors. The issued statement from one meeting of shipwreck archaeologists is instructive of the specialists' stance:

> Archaeology for gain, by selling gold and other materials taken from wrecks for personal or corporate profit, is not acceptable. Nor is any indirect involvement by archaeologists in activities that foster a market in such antiquities. We urge that our colleagues refrain from working or consulting for treasure hunters . . .[238]

The official position effectively blackballs those marine archaeologists who would work in conjunction with salvors so as to document discovered relics.[239] The alternative might have been a cooperative venture between salvors and archaeologists. In fact, salvors seek to employ archaeologists out of recognition that a documented history gives an artifact worth.[240] By condemning joint efforts, the academics succeeded in creating an either/or polemic that gave force to arguments supporting passage of the ASA.

Academia's distaste for salvors reaches its apotheosis in the CAMM agreement, an extraordinary pact between maritime museums to thwart the public display of commercially-recovered artifacts. The Council of American Maritime Museums (CAMM), a coalition of forty-eight

---

235. *Nova, supra* note 122.

236. *See generally Abandoned Historic Shipwrecks: Hearings on H.R. 132 before the Subcomm. on Oceanography of the Committee on Merchant Marine & Fisheries*, 97th Cong. 2nd Sess. 43 (1982) (testimony by assorted marine archaeologists about the commercial motives and destructive practices of salvors).

237. It is said that "qualified marine archaeologists" have yet to discover a single shipwreck site in North American waters. *Nova, supra* note 122 (statement of Robert Marx).

238. Statements by seminar participants in the School of American Research Advanced Seminar Series, *Introduction* to SHIPWRECK ANTHROPOLOGY, *supra* note 232, at xiii.

239. *See, e.g., Nova, supra* note 122 (statement of Dr. Margaret Rule).

240. "[Y]ou can buy a silver coin from some unknown, unidentified galleon in the Bahamas for $150 while a very similar silver coin from the *Atocha* sold for more than $1000. The only difference between these two coins is that good archaeology and good history have added to the value of the salvaged items." *Hearings on H.R. 74, supra* note 228, at 46 (statement by Mel Fisher, noted salvor).

maritime museums on the North American continent, formed a committee in the mid-1980's to examine the ethical issues surrounding museum acquisition of shipwreck artifacts.[241] This committee, staffed by nautical archaeologists and curators, concluded that excavation for profit was unacceptable. Considering the question to be an ethical rather than a legal one, the committee felt that museums should shun both illegally-acquired *and* legally-acquired donations. The result was a statement adopted by CAMM in 1987, expressing the following policy:

> CAMM member institutions shall adhere to archaeological standards consistent with those of the American Association of Museums/International Congress of Museums (AAM/ICOM), and shall not knowingly acquire or exhibit artifacts which have been stolen, illegally exported from their country of origin, illegally salvaged *or removed from commercially exploited archaeological or historic sites.*[242]

In 1989, CAMM made full voting privileges in the group contingent on the passage of this amendment.[243]

The CAMM agreement is remarkable in that it clears the field for marine archaeologists. Unable to accept donations from the outcast salvors or their affiliated archaeologists, member museums must instead rely fully upon "respectable" archaeological initiative to fill their collections. The proffered explanation is that the agreement removes one of the traditional markets for commercially obtained specimens.[244] Yet it remains to be seen how disdain for private contributions to museums will advance the cause of public access to shipwreck artifacts. It seems unlikely that the institutional rejection of gifts will result in the wholesale abandonment of salvage activities.

The Abandoned Shipwreck Act is very much a product of internecine conflicts.[245] Academics urge that knowledge be the treasure pur-

---

241. Johnston, *supra* note 173, at 54.

242. *Id.* at 54-55 (emphasis added) (citing an amendment to the By-laws of the Council of American Maritime Museums).

243. *Id.* at 55. This requirement forces the hand of museums that are loath to offend generous would-be contributors.

244. *Id.* at 57. Interestingly, a variation on this awkward theme has been raised in the conventional cultural property context, suggesting that demand for antiquities will shrink if collectors and dealers face legal sanctions. *See* Moore, *supra* note 14, at 466-67.

245. Consider the following exchange between Fred Wendorf, Chairman of the Texas State Antiquities Commission, and Representative Tauzin:

> WENDORF: But there is a fundamental difference between the work done by the Texas A & M and the work of some private treasure hunter.
>
> TAUZIN: What is that difference?
>
> WENDORF: The fundamental difference is that the material found belongs to the public, not the private salvor, where he distributes it for sale.
>
> TAUZIN: So a lot of your concern is not just the question of how the excavation occurs, although that is a concern.

sued,[246] yet would prevent shipwreck artifacts from sharing a wide audience. Academics deplore the excavation methods of commercial salvors, yet refuse to assist in improving them or discredit those who do. Notably, CAMM was an avid supporter of the ASA.[247] Congress's intent in drafting the Act was to mediate between archaeologists, salvors, fishermen, and sport divers.[248] But marine archaeology had already framed the question that Congress would attempt to answer. Having created a deliberate dichotomy between "preservationists" and "special interest groups," marine archaeologists steered the debate over the Act into a weighing of values. The result is that academic bias and "opportunity preservation" are thick strands in the fabric of the ASA.

The Abandoned Shipwreck Act was largely inspired by instincts of protection, Byronism, and opportunity preservation. In the context of the Act as in the context of cultural property theory, these justifications are understandable but inadequate. Protection is not assured under the current ASA because states are given wide latitude in the treatment of wrecks found within state territory. Byronism, despite its romantic appeal, makes only superficial sense. Opportunity preservation prioritizes the squabbling of professionals over the welfare of the artifacts. Given the ASA's troubled provenance, the next question is the Act's impact.

V. STATE RESPONSE TO THE ASA

The premise of the ASA was that state title would galvanize state management of abandoned shipwrecks. Several years after the enactment of the ASA, that premise is unproven. States continue to be ill-equipped to address matters of wreck discovery and care. The problem is threefold. First, there is no cohesive, nationwide harmony in the management of shipwrecks. Wide divergence in state shipwreck laws has multiplied the paperwork without providing clarity for the law-abiding salvor. Under admiralty law, a salvor simply isolated a site, began salvage, and filed suit for determination of title. Under the current system, a salvor must consult a discouraging host of state laws,

---

WENDORF: That is a concern.

TAUZIN: But the second concern is who owns the product of the find . . . .

Historic Shipwrecks: Hearings on H.R. 3194 Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries, 98th Cong., 1st Sess. 329 (1983).

246. Paul F. Johnston, *Knowledge: The Real Treasure*, 51 SEA HISTORY 6 (1989).

247. Johnston, *supra* note 173, at 55. The CAMM agreement will soon have global application. The International Congress of Maritime Museums (ICMM), with over three hundred members, the largest professional association of maritime museums, met in September 1993 and voted to adopt the CAMM guidelines. *Underwater Archaeology Resolutions Adopted by ICMM*, ICMM NEWS (International Congress of Maritime Museums, Philadelphia, PA), Fall 1993, at 5.

248. *See, e.g.*, H.R. REP. NO. 514(II), *supra* note 8, at 6.

administrative codes, and uninformed agencies before salvage work can begin. Second, the limited budgets of most state agencies assure that shipwrecks remain undiscovered and unsalvaged. The third, perhaps most serious, problem is that issues of care and preservation have effectively become invisible because they are shunted into the administrative regime.

A survey of the states' response to the Act is difficult. As explained in Part IV, no single state agency is charged with compliance, and no punitive measures are assessed against states which flout the ASA.[249] Moreover, states do not aspire to uniformity. The draft guidelines issued by the National Park Service noted that Congress indended for states to conform to develop programs, or review and revise existing programs that, with the Act and the guidelines, will be consistent from state to state.[250] The final guidelines signal a retreat from uniformity. The current NPS position is that states are free to adopt the guidelines in full, *or* to "make changes to accommodate the diverse and sometimes unique needs of each state . . . , reject parts as inapplicable, or use alternative approaches."[251]

More than thirty states as defined in the Act have legislation regulating the abandoned shipwrecks within state territory.[252] Many of these states purported to manage shipwrecks even before the enactment of the ASA. However, at least twelve states were directly influenced by the Act. The speed with which states moved to respond appears to be linked to the size of the state bureaucracy, and the cohesiveness of the local diving community.[253] The content of each state's law determines the scope of claims to title, the agency charged with administration, and agency ability to promulgate permit rules.

There is wide variation among states in the kinds of shipwrecks subject to state control and in the agencies charged with administration. Some states assert title and dominion over sunken vessels that have remained unclaimed for over ten years.[254] Other states target unclaimed wrecks thirty years old,[255] fifty years old,[256] or more than

---

249. *See supra* text accompanying notes 199-201.

250. 54 Fed. Reg. 13,643 (1989).

251. 55 Fed. Reg. 50,120 (1990).

252. Alaska, Ala., Ariz., Cal., Colo., Fla., Ga., Haw., Ill., Ind., La., Me., Md., Mass., Mich., Minn., Miss., Mt., N.H., N.Y., N.C., N.D., Or., R.I., S.C., Tex., Va., Wash., Wis., Guam, N. Mar. I., and P.R. *See* Owen, *supra* note 6, at 508.

253. Arthur B. Cohn, The Federal Abandoned Shipwreck Act of 1987 and its Implications for State Submerged Cultural Resources Programs 7-8 (April 21, 1993) (unpublished manuscript, on file with the author).

254. *See, e.g.*, PUB. L. 12-126 (Guam); N.C. GEN. STAT. § 121-22; R.I. GEN. LAWS § 42-45.1-3 (1994); 22 VT. STAT. ANN. tit.22, § 701(10) (1987).

255. *See, e.g.* WASH. REV. CODE § 27.53.045 (1995).

256. *See, e.g.*, CAL. PUB. RES. CODE § 6313 (West 1993); GA. CODE ANN. § 12-3-80 (1993); P.R. LAWS ANN. tit. 18, § 1502(h) (1989) (Puerto Rico).

fifty years old.[257] Many states neglect to define coverage.[258] Such states appear unwilling to restrict their ownership to shipwrecks whose historic worth is suggested by the years spent underwater. In a questionable move, the state of Massachusetts has defined coverage to include either ancient vessels or valuable ones. Massachusetts law considers an "underwater archaeological resource" to be any wreck that is over a century old or, in the alternative, worth $5000 or more.[259] Any of a number of state agencies may be responsible for matters relating to shipwrecks — an Underwater Archaeological Resource Board,[260] a Department of Historic Resources,[261] an Antiquities Committee,[262] a Department of Cultural Resources,[263] a State Lands Commission,[264] or a Department of Culture, Recreation and Tourism,[265] among other entities.[266] As these names suggest, few of the agencies responsible for wreck management have experience with the special needs of shipwrecks.

The National Park Service (NPS) guidelines contemplate a comprehensive scheme of shipwreck management. The guidelines suggest that states take such measures as establishing a shipwreck advisory board, actively surveying for shipwrecks, and creating long-term management policies. As for the relationship between the relevant state agency and the general public, the NPS guidelines propose that the states provide public access, consider salvage contracts where appropriate, prosecute persons who willfully breach the program's provisions, and provide legal recourse for persons affected by the program.

Many states are unable to adopt the NPS suggestions. State laws regularly fail to provide for expansive agency authority. Without express authority from the legislature, a shipwreck agency cannot implement the guidelines. For example, Ohio law charges the Department of Natural Resources with responsibility for all matters concerning the care of Lake Erie.[267] Importantly, the statute does not envision a permit procedure; several state statutes do not. A subsequent opinion by the Ohio Attorney General clarifies. The Department has no authority to issue a salvage

257. *See, e.g.*, LA. REV. STAT. ANN. § 41:1605 (West 1990) (pre-20th century ships); TEX. NAT. RES. CODE ANN. § 191.091 (West 1993) (pre-20th century ships).

258. *See, e.g.*, FLA. STAT. § 267.061 (1992); ILL. COMP. STAT. ANN. ch. 615, ICLS 20/3 (1995); VA. CODE ANN. § 10.1-2214 (Michie 1993).

259. MASS. ANN. LAWS ch. 6, § 180 (Law. Co-op. 1993).

260. *Id.*

261. *See* VA. CODE ANN. §§ 10.1-2201, 10.1-2214 (Michie 1993).

262. *See* TEX. NAT. RES. CODE §§ 191.011, 191.051(a) (West 1993).

263. *See* N.C. GEN. STAT. § 121-23 (1994).

264. *See* CAL. PUB. RES. CODE § 6002, 6313 (1995).

265. *See* LA. REV. STAT. ANN. § 41:1605 (West 1990).

266. Board of Natural Resources (Ga.), Division for Historic Preservation (Vt.), etc.

267. OHIO REV. CODE ANN. § 1506.10 (Baldwin 1994).

permit that will effect any disposition of a shipwreck or its cargo.[268] Thus, no private salvor may obtain permission to conduct salvage in the state of Ohio. Louisiana law allows for permits only in the case of purely scientific or educational ventures. Furthermore, *quantum meruit* is the sole compensation; all recovered materials remain state property.[269] Generally, legal recourse for aggrieved salvors is left to the jurisdiction of administrative codes, if recourse is provided at all.

The limited financing and staffing of most state agencies preclude full implementation of the ASA, a problem acknowledged by the National Park Service.[270] The NPS itself was well aware of the financial shortcomings that plague government agencies. In 1989, NPS's own Submerged Cultural Resources Unit had but $180,000 at its disposal to fund underwater exploration in a total of sixty-one national parks.[271] Fiscal constraints have been a major factor in the failure of many state shipwreck programs. The waters of Lake Michigan are rumored to conceal over three hundred shipwrecks of some historic interest.[272] Nonetheless, neighboring Illinois has been slow to dedicate funds to shipwreck discovery. The chief archaeologist of the state Historic Preservation Agency conceded in 1989 that "zero budget" was devoted to sunken vessels.[273]

A combination of limited budgets and esoteric appeal has made shipwreck matters low on the priority lists of many states. NPS guidelines discourage the recovery and display of intact shipwrecks, due to the cost associated with stabilization and maintenance.[274] Instead, the National Park Service proposes that states establish underwater parks to increase awareness, generate revenue, and amuse divers.[275]

---

268. *See id.*, note 2, (noting OAG 90-093.)

269. LA. REV. STAT. ANN. 41:1605(B) (West 1990).

270. 55 Fed. Reg. 50,120 (1990).

271. Steven R. Strahler, *Save Our Ship: History's Treasure Trove Lies on Bottom of Lakes*, CRAIN'S CHICAGO BUSINESS, Feb. 6, 1989, at 57.

272. The *Zych* litigation addressed two wrecks in Lake Michigan waters — the *Seabird* and the *Lady Elgin*. The sinking of the sidewheel steamer the *Lady Elgin* was perhaps the most famous shipwreck in the history of the Great Lakes. The steamer was returning about 450 passengers from a Chicago presidential rally in 1860 when she was fatally struck. So many Irish politicians died that night that the wreck resulted in a shift of political power in Milwaukee from the Irish to the Germans. *See Zych v. Unidentified, Wrecked and Abandoned Vessel Believed to be SB "Lady Elgin,"* 746 F. Supp. at 1336.

273. Strahler, *supra* note 271.

274. 55 FED. REG. 50,135 (1990). The U.K. excavation of the *Mary Rose*, an English warship that sank in 1545, was the world's costliest salvage. It took twelve years (from 1971 to 1982) and over twenty-eight thousand different dives to raise the hull of the ship and the thirty-odd thousand artifacts found thereon. *See generally Nova, supra* note 122.

275. 55 Fed. Reg. 50,137(1990). On the international level, an ambitious plan by the discoverer of the *Titanic* would create the world's first underwater museum from the wreckage of the infamous *Lusitania*. The wreck would be connected by fiber-optic cable and satellite to an onshore British maritime museum. Remote control cameras would allow

Quipped the Illinois archaeologist, "It doesn't take much to keep an underwater park. You don't even have to cut the grass."[276] But even underwater parks and preserves are a struggle for many states. The Florida Division of Historical Resources has repeatedly requested, and been denied, funds to conduct a shipwreck survey of Pensacola Bay.[277] Likewise, a bureaucratic budgetary process has frustrated plans for the creation of New York's first underwater park.[278] Shipwrecks can be successfully converted into underwater parks,[279] but the project is not as simple as it might seem.

Perhaps the biggest problem in practice is that wrecks in state waters are subject to the baroque rules and varying whims of administrative agencies. Understaffed, uninformed agencies set the game and make the rules. Florida, for instance, was one of the first states to adopt laws on underwater resources. Florida waters are home to countless wrecks, and Florida agencies determine the fate of many historic and high-profile shipwrecks. At present, there is no coherent system for the disposition of shipwrecks in the state of Florida.

A simple call to the state Division of Natural Resources verifies this fact.[280] The Florida legislature appointed the Division of Natural Resources as the state shipwreck agency. Title to all abandoned, submerged cultural properties which rest on submerged lands over which states have sovreignty is vested in the Division.[281] The Florida Administrative Code outlines shipwreck procedures for the Division of Historical Resources.[282] When contacted by this author, the Florida Division of Natural Resources (DNR) identified the Division of Environment Protection (DEP) as the relevant authority. The DEP indicated that the Marine Patrol was in charge, though the Marine Patrol insisted that the DEP had jurisdiction. The Department of Environmental Regulation (DER), headquarters of the DEP, thought that shipwreck inquiries "sounded like [them]." The DER was mistaken. It would appear that the

---

visitors to vicariously explore the wreck. Barry O'Brian, *Lusitania to become 'Museum Piece'*, DAILY TELEGRAPH, March 23, 1992, at 9.

276. Strahler, *supra* note 271.

277. David Tortorano, *Agency Hopes to Get $212,000 to Find Deluna Fleet*, UPI, Feb. 4, 1989; David Tortorano, *Agency Tries Again to Get Money for Shipwreck Survey*, UPI, Jan. 14, 1990. This author is unaware of any subsequent success.

278. *Diving for Diversion*, N.Y. TIMES, June 2, 1992, at B6; Bill Bleyer, *Eye on Long Island*, NEWSDAY, July 11, 1993, at 8. The plan, which had as its centerpiece the wreck of the frigate *HMS Culloden*, would have had to survive review from three separate state departments.

279. Florida and North Carolina are among the states to succeed in organizing underwater parks around historic shipwrecks.

280. Telephone Interview with various officials of the Florida Division of Natural Resources (Dec. 9, 1993).

281. FLA. STAT. ANN. § 267.061 (West 1991).

282. FLA. ADMIN. CODE ANN. r. 1A-31.0025 (West 1993).

Division of Natural Resources and the Division of Environmental Protection have merged. Permit and preservation policies were not yet sorted out.

To be fair, agency disorganization does not always equal incompetence. Regardless, the administrative process is a poor substitute for the straightforward approach of admiralty. Agency disarray has had the ironic result of favoring the very salvors that the ASA once snubbed. Nationwide, there are only about one half dozen treasure hunters of prominence.[283] The big salvors, those with funds, influence and attorneys, can negotiate the state maze. State officials come to be familiar with the salvage techniques and artifact treatment of a particular salvor of stature.[284] Where administrative regulations do not set a salvage price, a powerful salvor can nonetheless secure a favorable award from the state.[285] Smaller salvors, lacking in reputation or administrative finesse, may not receive such advantages. For the lucky salvor with patience and influence, the reward at the end of the labyrinth is the same one admiralty law would have given in the first place.

CONCLUSIONS

The mission of the Abandoned Shipwreck Act of 1987 was to create a future for the past. Under banners of preservation and posterity, the Act's supporters charged against the unseen foes of shipwrecks everywhere. Salvors, who were once hailed for their efforts to raise the remains of long-forgotten wrecks, were suddenly denounced as plunderers.[286] States, who were once accused of destroying shipwrecks through dredging projects, were suddenly seen as rescuers.[287] In reality, there were no clearcut enemies. Congressional rhetoric of protection, Byronism, and opportunity preservation was misguided.

---

283. *See* Michael D. McNickle, *Treasure Hunting Beckons the Thrill-Seeking Investor*, INT'L HERALD TRIBUNE, Nov. 27, 1993 (commenting on the limited market for the treasure salvage enterprise).

284. Alan Albright, state underwater archaeologist for South Carolina, discussed one permit relationship: "We have one salvage license outstanding, and that is to a Florida man, and he has worked very closely with us for a period of 6 years. We have issued him three separate licenses over these 6 years, and he has fulfilled every single requirement." *Hearings on H.R. 74, supra* note 228, at 37.

285. David Paul Horan, Esq., notes that he has negotiated awards of 80% of the salved items, with cross-sectional and unique items passed to the state. "There is no permit procedure." Telephone Interview (Dec. 17, 1993).

286. Mel Fisher, one of the unnamed villains of the Senate hearings, had once been crowned a national hero. Pete Axthelm, *Where Have All the Heroes Gone?* NEWSWEEK, Aug. 6, 1979, at 44, 49-50.

287. *Hearings on S. 858, supra* note 204, at 99 (state dredging projects in rivers, harbors, and bays have been to blame for the vast majority of damaged shipwrecks).

The drafters of the ASA cast the protection of sunken vessels in the most convenient terms — ownership. The Act bypasses a tradition of admiralty law to impose an overbroad and arbitrary regime. The ASA covers each and every shipwreck that is embedded in state waters, and each and every item found on the ship. Any number of alternatives were available. The Act might have regulated the private salvage of shipwrecks by creating reporting obligations.[288] The Act might have provided for oversight by requiring that certain items salvaged from historic wrecks be registered and the sale of such items be tracked.[289] The Act might have followed the lead of proposed bill H.R. 2071 and left admiralty law intact, while giving government agencies the ability to intervene on behalf of the public interest in *certain* shipwrecks meeting strict historic criteria.[290] The Abandoned Shipwreck Act of today chooses none of the above.

An underlying assumption of the Act is that shipwrecks are *sui generis*. The supporters of the ASA wrongly guessed that admiralty did not apply. ASA supporters also failed to link the treatment of submerged cultural property with the treatment of terrestrial cultural property. Had this analogy been made, the plan to vest states with theoretical title to shipwrecks may well have foundered. The American position has been that foreign umbrella statutes are suspect; a state cannot fairly lay claim to items that are neither discovered nor possessed. Yet the ASA does just that.

For all its good intentions, the ASA has been of no demonstrable benefit. There is no formal mechanism by which the activities of assorted state agencies are surveyed and no indication that states are living up to the premise of the Act. The protection of shipwrecks and their related artifacts has become an invisible problem because states are given no duties to go with title. The ASA mistook possession for preservation, and may have done so at the expense of the shipwrecks themselves.

---

288. This is the practice in French relic legislation, which has a special offense for concealment of finds. PROTT & O'KEEFE, *supra* note 14, § 603. The 1956 UNESCO *Recommendation on international principles applicable to archaeological excavations* obliges finders to declare remains immediately to the authorities, imposes penalties for infringement, and makes undeclared objects subject to confiscation. *Id.* § 629

289. This is a provision in relic legislation of Iraq, Libya, Saudi Arabia, and Tanzania. *Id.* § 616.

290. H.R. 2071, 100th Cong., 1st Sess. (1987).