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Jeffrey T. Scrimo

University of Maine School of Law

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RAISING THE DEAD: IMPROVING THE RECOVERY AND MANAGEMENT OF HISTORIC SHIPWRECKS

*Jeffrey T. Scrimo**

I. INTRODUCTION

Dead men tell no tales at the bottom of the sea. For thousands of years, this truth remained unalterable; but now, the rapid development of underwater technology is prying open the once impenetrable realm of Davy Jones's locker. This technology gives us access to the seas darkest secrets, and opens new windows to our past. Indeed, what once only lingered at the edge of dreams is now a reality. The sea has stubbornly begun to yield its treasures to those brave enough to search. In recent years, enterprising adventurers have reclaimed pirates' gold,¹ discovered the riches of past empires,² and peered into the ironic serenity of disaster.³ Bringing these

* University of Maine School of Law, Class of 2000.

1. Perhaps the most dream-like find of a sunken vessel was the discovery of the notorious pirate ship, the *Whydah*. Captained by Samuel Bellamy, the vessel, heavily laden with plundered treasure, capsized in a storm off of Cape Cod in 1717. See *Commonwealth v. Maritime Underwater Surveys, Inc.*, 531 N.E. 2d 549, 553 (Mass. 1988). The vessel's remains were located by Maritime Underwater Surveys, Inc. in 1982, only a mile off the coast and under only fourteen feet of water. See *id.* at 550. The *Whydah* reportedly held treasure valued in the millions, and contributed significantly to our understanding of 18th century pirate life. See generally Hank Burchard, *Pirate Lore and Gore*, WASH. POST, Apr. 2, 1999, at N31. For more on the *Whydah*, see *The Treasures of Expedition Whydah* (visited Apr. 6, 2000) <<http://www.whydah.com>>.

2. The most famous treasure hunter of the twentieth century was undoubtedly Mel Fisher. Fisher attained his fame by locating and salvaging the *Nuestra Senora de Atocha* in 1985. The *Atocha*, a member of the 1622 Spanish treasure fleet, sank in a hurricane off of Florida in 1622, carrying its full cargo of gold and jewels to the sea bottom. Fisher's recovery and salvage of the vessel led to a U.S. Supreme Court case, the enactment of the Abandoned Shipwreck Act, and the recovery of millions of dollars worth of treasure and artifacts. For more on the *Atocha* and Mel Fisher, see generally *Mel Fisher Maritime Museum* (visited March 1, 2000) <<http://www.melfisher.org>>.

3. When Dr. Robert Ballard first located the *Titanic*, he saw personal items of the victims that had laid undisturbed on dark sea bottom for almost a century. See Allen Pusey, *Legend of Titanic Still Looms Larger Than Life*, DALLAS MORNING NEWS, Sept. 8, 1985, at 1A.

artifacts to the light of the modern world has given a new voice to the bones of forgotten people, and has raised their stories from the dead.

Unfortunately, wherever there are bones, there are sure to be scavengers. Gold fever, which has infected some unscrupulous treasure hunters and commercial salvors, as well as chronic under funding of archaeologists, threatens to destroy what remains of America's unfound maritime heritage. To save what remains, we must immediately improve and clarify the purpose and structure of our underwater historic resource laws, and create a workable management plan for the recovery and management of these resources.

In order to preserve the knowledge that our historic shipwrecks could provide, Americans must begin to appreciate the value that these wrecks have as historic resources, and must demand that they be efficiently utilized in the best interests of all our citizens and future generations. This appreciation must be converted into laws which acknowledge and are based upon three principles: 1) that wreck sites are often also grave sites and should be treated with dignity and respect; 2) that the most important aspect of a historic wreck site is its potential to contribute to our knowledge of human history; and 3) that the public is entitled to the knowledge obtained from such wreck sites. Adherence to these principles would create laws which would mandate thorough and efficient excavation of sites, as well as full analysis and publication of the excavator's findings.

To best utilize America's historic shipwreck resources, a management scheme should be established that will encourage private salvors to work with archaeologists and the government under the direction of admiralty courts. This management scheme, termed "cooperative archaeology," could be established by fine-tuning the Abandoned Shipwreck Act (ASA)⁴ and admiralty law, as well as further establishing a code of ethics that all commercial salvors and archaeologists would be mandated to apply when excavating historic shipwrecks. This Comment will evaluate the debate for and against traditional salvage, full cultural resource preservation, and "cooperative archaeology" as means toward the efficient utilization of historic shipwreck resources. It will also examine the current state of historical preservation law, with special emphasis on the ASA, and analyze what changes must be made to transform the current legal environment into one that will provide for improved resource recovery and management through the encouragement of cooperation between the government, salvors, and archaeologists.

4. 43 U.S.C.A. §§ 2101-2106 (West Supp. 1999).

*A. Why Preserve Historic and Archaeological
Objects and Information?*

The study of history provides a culture with stories that give it meaning and direction, as well as an orientation to its own place in the sweep of human events. Maintaining a link to the past allows the members of a society to recognize who they are, study what forces have made them what they are, and understand what makes them different from other cultures.⁵ By preserving historic buildings and objects, we maintain our past in such a way that our daily expectations and anticipations are influenced, and our uniqueness is assured in an age of increasing homogeneity of cultures.⁶ Through the medium of historic objects, history is not dead, but maintains a living ability to conjure emotions and thoughts in our daily lives.

In the past, historians studied the written documents left by political leaders, the elite, and the minority of the masses with the ability and ambition to write about an event. Of course, it does not require much thought to realize that such a method leaves out a significant portion of a culture, and gives a skewed interpretation of the past. Therefore, many historians have turned to archaeology to fill in the large gaps left by the written record.⁷

Since the development of modern archaeological processes, archaeology has played an increasingly large role in the study of history. Archaeology contributes to historical knowledge by studying the remnants of everyday existence.⁸ To an archaeologist, the everyday actions of the masses can be read, not in diaries or official reports, but in the material footprints that they leave behind.⁹ Through the study of tangible objects left by a group of people, archaeologists gain an insight into the social and economic fabric of a society.¹⁰

It is recognized that the distinction between tangible and intangible cultural heritage is largely conceptual.¹¹ In fact, it has been said that "there is no basic difference between the material manifestation of abstract concepts of form and function fossilized in the attributes of artifacts and the

5. See JULIAN CONRAD JUERGENSMEYER AND THOMAS ROBERTS, LAND USE PLANNING AND CONTROL LAW 575 (1998) (quoting ROBERT STIPE, WHY PRESERVE HISTORIC RESOURCES? LEGAL TECHNIQUES IN HISTORIC PRESERVATION (1972)).

6. See JUERGENSMEYER, *supra* note 5, at 575-76.

7. See PETER THROCKMORTON, THE SEA REMEMBERS: SHIPWRECKS AND ARCHAEOLOGY FROM HOMER'S GREECE TO THE DISCOVERY OF THE TITANIC 11 (1987).

8. See *id.*

9. See *id.*

10. See ANASTASIA STRATI, THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA 7 (1995).

11. See *id.*

social manifestations of similar concepts ephemerally translated into social activities."¹² In modern archaeology, it is the tangible expressions left by a past culture that provide the bridge to its intangible attributes. In fact, when studying past cultures, the material expressions that they leave are most likely the only connection to the largely illiterate masses. Because the study of history has evolved beyond the mere analysis of battles and kings, historical artifacts left by the masses have acquired unparalleled importance to the field.¹³

B. Preserving Historic Vessels

One of the great expressions of past culture is the oceangoing vessel.¹⁴ For thousands of years, the oceangoing vessel was the ultimate manifestation of pre-industrial civilized society,¹⁵ and was the most efficient and manageable means to transport people and materials over great distances.¹⁶ From the Greek galley to the British ship of the line to the modern supertanker and nuclear equipped submarine, the oceangoing vessel has always connected cultures and driven world events.¹⁷

Throughout the thousands of years of ocean travel,¹⁸ many thousands of oceangoing vessels have been lost to the tyranny of war, the onslaught of weather, and plain old bad luck and poor navigation.¹⁹ In the days before accurate navigation systems and undersea exploration technology,²⁰ most

12. *Id.* (quoting D.L. CLARKE, *ANALYTICAL ARCHAEOLOGY* 20 (1968)).

13. *See generally* THROCKMORTON, *supra* note 7, at 11.

14. *See id.* at 9.

15. *See id.*; K. MUCKELROY, *ARCHAEOLOGY UNDER WATER: AN ATLAS OF THE WORLD'S SUBMERGED SITES* 24-25 (1980).

16. *See* GRANT GILMORE AND CHARLES BLACK JR., *THE LAW OF ADMIRALTY* 3 (1975).

17. *See generally* THROCKMORTON, *supra* note 7.

18. Modern archaeological studies indicate that *Homo Erectus* was capable of transporting himself across water by 200,000 BC and that Neanderthal man had constructed rafts. Archaeological evidence indicates that by 6000 BC, people had become fishermen and were regular users of watercraft transportation. *See* RICHARD WOODMAN, *THE HISTORY OF THE SHIP* 12 (1997).

19. For example, records show that approximately fifty percent of all vessels operating around the British Isles between 1700 and 1800 AD were lost at sea. *See* THROCKMORTON, *supra* note 7, at 222-23. Furthermore, records indicate that between 1864 and 1869, 10,000 British vessels were lost—1000 without a trace. *See* Willard Bascom, *Deep-Water Archaeology*, 174 *SCIENCE* 261, 265 (1971). In American waters, it is estimated that there are over 50,000 shipwrecks, of which approximately five to ten percent may be historically valuable. *See* H.R. REP. NO. 100-514(II), at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 370, 370.

20. Undersea technology was extremely limited prior to World War II. In fact, the ability to go underwater was limited in submarines to approximately 300 feet as late as the 1960s. *See* Adam Goodheart, *Into the Depths of History*, *PRESERVATION*, Jan. 1999, at 39. Similarly, S.C.U.B.A. gear, invented by Jacques Cousteau in the 1940s, only allows divers to submerge to a depth of 200-300 feet for a very limited time period due to the physiologi-

sunken vessels were considered to be lost forever. If anything remained of the vessel, it would often only be a few lucky survivors or some cargo washed ashore. As underwater technology finally opens long lost wrecks to exploration, however, it is that quality of a shipwreck's isolation that most excites archaeologists.²¹

Wrecks are particularly helpful to archaeologists because they can often be dated within a relatively narrow time frame.²² Because it can be assumed that sailors did not spend their last moments attempting to sterilize their belongings to obtain a favorable review in later historical interpretation, a shipwreck is a time capsule of a specific moment in time.²³ In theory, an archaeologist views an exact slice-of-life as it was lived at a known time in history when she peers into an undisturbed wreck.²⁴

Shipwrecks are also valuable for the information that they can tell maritime historians about the construction of a culture's vessels.²⁵ During the age of sailing, the construction of a ship was an occupation closed off and mysterious to the uninitiated.²⁶ The sailing vessel was the most technologically advanced machine of its time, and each culture's supremacy, or lack thereof, was reflected in its ability to build the most powerful and efficient ships.²⁷ This ability, of course, was dictated by a society's

cal effects of water pressure and breathing pressurized air. These extreme depths, however, are too hazardous for recovering objects with S.C.U.B.A. gear, which is limited to a safe salvaging depth—due to time limitations and dangers such as the bends—of approximately sixty feet or less. See GEORGE REID, *MARINE SALVAGE: A GUIDE FOR BOATERS AND DIVERS* 6 (1996). Military considerations during the Cold War pushed technological development for deep sea recovery efforts. See Goodheart, *supra* note 20, at 39–40. Using this technology, Dr. Robert Ballard was able to locate and explore the remains of the *Titanic*, which was 12,460 feet below the surface. See William Mullen, *Titanic Exhibition: History or Grave-Robbing? Technology Offers the Chance to Salvage Sunken Ships from Almost Any Depth. Many Want Them Left in Peace*, CHI. TRIB., Dec. 12, 1999, at 1, available in 1999 WL 2940921. This discovery made it clear that shipwrecks were no longer beyond the reach of human technology, no matter how deep. For more on the history of deep sea exploration, see WILLIAM BROAD, *THE UNIVERSE BELOW* (1997).

21. Shipwrecks are often compared to the archaeological find at the city of Pompeii, which was destroyed and fully preserved by a volcanic eruption. See, e.g., THROCKMORTON, *supra* note 7, at 10.

22. See *id.*

23. See *id.*

24. See *id.*

25. See *id.* at 9; STRATI, *supra* note 10, at 15.

26. See THROCKMORTON, *supra* note 7, at 9.

27. Sea power was utilized by civilizations to attain dominance over their neighbors as early as 2700 B.C., when an Egyptian Pharaoh sent a squadron of eight armed ships to raid the Syrian coast. See WOODMAN, *supra* note 18, at 13. The Phoenicians later honed their shipmaking and sailing abilities to establish trade routes as far away as the modern day British Isles. See *id.* at 15. Other examples of ships that reflected the cultures from which they came include the Viking Long Ship, the Greek Galley, the British Ship of the Line, and

social, political and economic situation, which can be interpreted from the artifacts and construction materials used on a vessel. Although the sailing vessel was of great importance to a society, the techniques used in their construction were often kept in the utmost secrecy and were passed from father to son without being written down.²⁸ Because of this fact, modern historians know very little about the construction of many historical vessels, and rely heavily on the discoveries of underwater archaeologists.²⁹ Ships were truly a microcosm of the societies that produced them, and the study of shipwrecks can open doors to knowledge once thought lost forever.

C. *The Debate: Salvage v. Scientific Excavation*

The current legislation and maritime law³⁰ pertaining to historic shipwrecks creates an environment ripe for dispute. Although the ASA mandates that states consider the interests of recreational divers, the archaeological community, and private salvagers,³¹ the general trend of archaeological laws has been to demand preservation.³² The inevitable movement of states toward that goal in the case of historic shipwrecks leaves two resource users, private salvors and historic preservationists, at polar opposite ends of the resource utilization question. What's more is that both parties have solid legal and philosophical arguments for their position. As with many resource utilization disputes, however, the long term resolution must consider the resource in context with all of its various users and within the confines of its own place in social and legal history.

D. *The User Groups*

The primary users of historic shipwrecks are private salvors, recreational divers, archaeologists, the public at large, and fishermen.³³ Private

the Spanish Galleon. See generally *id.* at 1-131.

28. See Jon Glass, *Stream Offers Glimpse of Seafaring Past: Indiantown Creek Holds Shipwrecks and Perhaps a Boatyard*, VIRGINIAN-PILOT & THE LEDGER STAR, Aug. 6, 1993, at D1, available in 1993 WL 8535309.

29. See *id.*

30. In America, the terms "admiralty" and "maritime" are virtually synonymous as far as the substantive law is concerned, even though the terms have different origins. See GILMORE, *supra* note 16, at 1. In this Comment, these terms will be used interchangeably.

31. See 43 U.S.C.A. § 2103(a)(2) (West 1988).

32. See Ole Varmer, *The Case Against the "Salvage" of the Cultural Heritage*, 30 J. MAR. L. & COM. 279, 283 (1999).

33. See Greg Stemmm, *Protection of our Underwater Cultural Heritage: Thoughts on the Future of Historical Shipwrecks* 1, 5-8 (March 30, 1998) (unpublished manuscript submitted to the Thirty First Annual Law of the Sea Institute). Although not ordinarily thought of as historic wreck users, fishermen consider the wrecks to be a great place to fish

salvors and archaeologists, however, seem to be the most directly affected and vocal users. Each of these parties, in turn, has its own perspective on how best to manage historic shipwreck resources for their and the public's benefit. The first step in creating an improved utilization scheme must be to evaluate these parties' positions and concerns. These positions and concerns must then be analyzed and discussed with reference to accurate facts and the current state of the law in order to determine if the positions and concerns are warranted.

1. Commercial Salvors

Private salvage is an ancient activity.³⁴ As imported to the American colonies from the common law of England, the law of salvage grants an award to a salvor to encourage others to undertake similar risks and expenses to rescue imperiled property at sea.³⁵ During the time period when such goods are still being traded, it makes economic sense to recover them, and thereby keep them in the stream of commerce. Through this process, a shipwreck does not have to be a complete financial disaster. Although commercial salvage companies still operate today, there is disagreement as to whether goods recovered from an historic wreck should be reentered into the stream of commerce or left undisturbed.³⁶ For the most part, any goods lost in the colonial or early American period are worthless for their intrinsic value in today's market.³⁷ As an historic object, however, an artifact may hold considerable value to antiquities dealers and collectors.³⁸ Of course, gold and silver still do have considerable value in today's market, and inevitably gain even more value due to historical significance.³⁹

because the structure acts as habitat for various fish species. One American fisherman reports annually catching in excess of \$100,000 worth of fish from one wreck site. *See id.* at 5.

34. Joseph Sweeney, *An Overview of Commercial Salvage Principles in the Context of Marine Archaeology*, 30 J. MAR. L. & COM. 185, 188 (1999). In maritime law, salvage is "a compensation allowed to persons by whose assistance a ship or its cargo has been saved, in whole or in part, from impending danger, or recovered from actual loss, in cases of shipwreck" BLACK'S LAW DICTIONARY 1340 (6th ed. 1990).

35. *See* GILMORE, *supra* note 16, at 532.

36. *Compare* Varmer, *supra* note 32, at 281, with Stemm, *supra* note 33, at 1 ("[Leaving an historical wreck undisturbed] is like leaving a box of fragile antiques in the middle of a highway, and believing they are protected by making it illegal to remove them."). *See also* Mullen, *supra* note 20, at 1.

37. *See* Stemm, *supra* note 33, at 6.

38. *See* D.K. Abbass, *A Marine Archaeologist Looks at Treasure Salvage*, 30 J. MAR. L. & COM. 261, 265 (1999); Mullen, *supra* note 20, at 1 (stating that experts agree that artifacts from the *Titanic* could be worth billions of dollars if sold).

39. *See generally* Goodheart, *supra* note 20, at 36 (stating the importance of finding gold to investors); Mullen, *supra* note 20, at 1 (suggesting that the historical value of the

Because of the great historic and intrinsic value sometimes inherent in historic shipwrecks, salvors argue that traditional maritime laws encouraging recovery of the objects before the destructive effects of saltwater and marine organisms destroy them are well reasoned.⁴⁰ Salvors also assert that the large amount of capital that they can acquire through stock sales and loans permits them to invest much more time and energy into locating a lost wreck than state archaeologists ever could. In the best interests of the resource, they argue, salvors should be permitted to find and salvage any vessel before time, fishing trawler activity, or the illegal activities of looters take their toll on the contents.⁴¹

Of course, the extremist attitude of commercial salvors fails to take into consideration the prime objection to economic arguments against similar environmental regulations, which is that a free market cannot really put a price tag on the intrinsic value of historical information. Indeed, there are horror stories concerning independent salvors' archaeological incompetence.⁴² The fact that most treasure salvage operations are organized and run for the sole purpose of profit dictates that archaeological considerations take a back seat to the "bottom line."⁴³ In such circumstances, society loses irreplaceable resources, as archaeological data is destroyed and artifacts are sold to the highest bidder.

2. Archaeologists and Preservationists

The archaeological and preservationist communities⁴⁴ are largely steadfast in their adherence to a principle of strict exclusion of profit seekers from historic shipwrecks. As people interested in the historical information that can be gleaned from shipwrecks, these individuals recognize the value of intact sites and public dissemination of information.⁴⁵ This group of users argues that the information obtained from shipwrecks is vastly more valuable, and common, than the gold that treasure seekers are destroying the

objects salvaged from the *Titanic* add to their monetary value).

40. See Stemm, *supra* note 33, at 3.

41. See *id.* at 1.

42. See Goodheart, *supra* note 20, at 38–39 (describing how the oldest-known European shipwreck in the Western Hemisphere was dynamited by salvors looking for gold, and how salvors accidentally dumped the contents of the 1798 British warship HMS *De Braak* back into the sea). But see Stemm, *supra* note 33, at 6 (listing several successful commercial excavations that rigorously adhered to archaeological guidelines).

43. See Varmer, *supra* note 32, at 295.

44. It should be noted that not all archaeologists are strict preservationists. Some archaeologists participate in commercial salvage operations, even though they are usually black-listed by their colleagues for such activities. For the purpose of clarity, this Comment groups all archaeologists with strict preservationists.

45. See *id.* at 289–90, 292.

integrity of the sites in an attempt to locate. Some preservationists and archaeologists would like to see archaeological sites left intact until proper procedures, improved techniques, and more advanced technology can be used to excavate the sites.⁴⁶

To an archaeologist, the location of every object relative to other objects, and the design and workmanship flaws and concepts, are critical to unraveling the mysteries of the past.⁴⁷ In the world of archaeology, an artifact taken out of context is like a word without a sentence—although by itself the artifact has some meaning, it is when taken in context with the whole that it takes on significant value for interpreting the past.⁴⁸ Some preservationists and archaeologists argue that it is therefore critical that only non-intrusive investigation of an undisturbed wreck occur until such time as it becomes clear that the site is deteriorating.⁴⁹ It is only through such a precautionary approach, argue preservationists, that historical data can be retained for future generations.⁵⁰

The largest problem with the preservationist point of view is that it does not take into adequate consideration the threats that natural deterioration and looters pose to the resource, as well as the legitimate demands for access by the sport diving public. In most cases, historic shipwrecks and their cargo located in shallow water are continuously deteriorating due to the ravages of storms, saltwater, and marine organisms.⁵¹ If many of these resources are not utilized when they are found, there is a good chance that they will be lost in shifting sand or destroyed by the corrosive qualities of sea water or the appetite of marine organisms.⁵² Even more threatening, however, is the reality that, once found, it is almost impossible to protect a wreck from unscrupulous looters. Due to budgetary restrictions and a lack of economic incentive, government agencies and employees may be unable or unwilling to invest the time and resources necessary to adequately protect and excavate an underwater site and preserve its artifacts. Grave robbing and piracy are ancient professions, and laws to protect shipwrecks are easy to ignore when there is a small chance of being caught. This inevitable

46. *See id.* at 287.

47. *See id.* at 289.

48. *See id.* at 289–90.

49. *See id.* at 288.

50. *See id.* at 287–91.

51. There is considerable debate as to whether historic wrecks and artifacts are in a state of deterioration, or whether they attain a level of equilibrium with their environment, such that no more damage is done until the wreck is disturbed. *Compare* Stemm, *supra* note 33, at 3 (arguing that shipwreck sites continue to deteriorate), *with* Varmer, *supra* note 32, at 280 (arguing that wreck sites do in fact equalize).

52. *See* *Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) (“Even after discovery of the vessel’s location it is still in peril of being lost through the actions of the elements.”).

breakdown or robbery of the resource means that its efficient utilization may demand immediate, but thorough, excavation. Furthermore, the resulting loss of the resource, or extended amount of time required to properly excavate the site, will cause sport divers and the public irreparable loss in recreational and educational opportunities. This exclusion of legitimate resource users can hardly be considered a proper utilization of a public resource.

3. Cooperative Archaeologists

As an alternative to the two extremist views just expressed, cooperation between commercial salvors, archaeologists, and the government provides an effective middle ground option to shipwreck recovery. Considering the diminishing and threatened nature of underwater historic resources, and the demands of the various users, cooperation is the best available option for efficient resource utilization.

Cooperative archaeology involves the private funding of an archaeological excavation for profit. The enterprise can be financed through an incorporated salvage company which acquires capital through the sale of shares to interested investors.⁵³ What makes cooperative archaeology companies different from traditional treasure hunters and salvors is that adequate provision for professional archaeologists, public dissemination of information attained from the site, sale of artifacts only after they are subjected to thorough study, and adherence to a professional code of ethics are all a defined part of the business plan.⁵⁴ In other words, investors know that the profit margin will not be as high from the excavation of an historic vessel as it would be from just salvaging the same vessel. Although at first glance it would appear that financing would be more difficult to obtain for cooperative archaeology companies, several similar commercial archaeology companies have been extremely successful in their venture.⁵⁵

53. For a description of the methods used by salvors to organize and finance treasure hunting expeditions, see Edward Horan, *Organizing, Manning, and Financing a Treasure Salvage Expedition*, 30 J. MAR. L. & COM. 235 (1999).

54. A list of these and other ethical considerations for companies involved in cooperative archaeology ventures can be found at the web site of the Deep Sea Explorer's Association, a non-profit association of companies involved in cooperative archaeology. See Deep Sea Explorer's Association, *The Deep Sea Code of Ethics* (visited Oct. 2, 1999) <<http://www.shipwreck.net/gpstemm/DEEPSEA.html>>.

55. See generally Goodheart, *supra* note 20, at 40–41. Odyssey Marine Exploration—the commercial archaeology company mentioned in the Goodheart article—has been successful in obtaining funding for its expeditions, and has successfully integrated archaeological concerns into its business. For more information, the company maintains an interesting web site. See Odyssey Marine Exploration, *Homepage* (visited Feb. 15, 2000) <<http://www.shipwreck.net/intro.html>>.

Cooperative archaeology companies provide a realistic solution to the problems posed by salvors and preservationists. For example, professional standards of ethics and inclusion of professional archaeologists can help ensure the proper treatment and excavation of wreck sites for the maximum extraction of archaeological data.⁵⁶ Also, because these companies have the potential to be well funded, they have the ability to expend great amounts of time and effort in locating and properly excavating these diminishing resources, as well as properly conserving their finds.⁵⁷ Furthermore, the ambition to make profit, and the corresponding use of better equipment and personnel, as well as the stern oversight of admiralty courts, will ensure that archaeological data is properly and quickly excavated. The speed with which a well funded company will be able to properly excavate a wreck will in turn shorten the time that the wreck must be isolated from the public, and will provide for quicker access to the site for recreational divers and underwater tourism.

In undertaking cooperative archaeology activities, a company will also derive a benefit by making its discoveries public. Not only will exposing its discoveries help to drive up the value of the artifacts and increase tourist attraction to government or private display institutions, but the publicity will assist in attracting new investors.⁵⁸ Therefore, the public will benefit from the historical knowledge and excitement that such discoveries produce. Of course, the public nature of the enterprise will also make government oversight and regulation easier to manage.

As expected, the idea of selling any artifacts from wreck sites is particularly disturbing to preservationists. The reality is, however, that without massive government investment historic wrecks will not be located before they have deteriorated or been pilfered by the first looter to slip in during the cover of night and sell the artifacts in underground markets.⁵⁹ Contrary to the strongly held beliefs of preservationists, the sale of non-historically essential artifacts will not deteriorate the knowledge that is attained from these resources.⁶⁰ Their sale, however, will provide the

56. See Deep Sea Explorer's Association, *supra* note 54.

57. See *id.* (requiring that companies not undertake an expedition unless they have adequate funding and planning for artifact conservation).

58. This tendency can be examined in the public excitement generated by the salvaging of the *Titanic*. It is clear that the money generated by public display of the artifacts will be extensive, estimated in the tens of millions of dollars. See Mullen, *supra* note 20, at 1. For information concerning the salvaging of the *Titanic* and the salvor's use of public display of the artifacts, see generally R.M.S. Titanic, Inc., *Homepage* (visited Apr. 10, 2000) <<http://www.titanic-online.com/>>.

59. There have been numerous incidents of illegal recovery activities resulting in the destruction of artifacts. See Stemm, *supra* note 33, at 1.

60. For example, if fifty cannonballs are found on a site and twenty-five of them are sold after being studied, the public will not lose one bit of historical knowledge.

funding necessary to preserve those artifacts that are most integral to the progression of historical knowledge. For example, the items that most commercial operations are searching for are gold and silver. In most instances, gold and silver bars and coins, or other raw natural materials found in American waters, will not contribute to historical knowledge beyond possibly giving significance to a particular vessel's departure and intended arrival point.⁶¹ Of course, if particular coins or other valuable objects are shown to be integral to the progression of historical knowledge, then properly drafted regulations and a workable management scheme can assure that the public retains access to such items, or at a minimum a preferential right to purchase them at fair market value.

Considering the benefits that cooperative archaeology can provide for the proper and efficient utilization of underwater historic resources, the current policy and laws pertaining to historic shipwrecks must be altered to incorporate the unfortunate reality of our nation's economic priorities and the diminishing and threatened nature of the resource. Before altering what we already have, of course, it is imperative that we understand the current legal framework in which we must work.

II. LAWS THAT APPLY TO HISTORIC SHIPWRECKS

A. *The Development of Historical Preservation Law in America*

Historical preservation, much like environmental preservation, is considered by many to be largely a luxury item to society.⁶² Although each person feels differently about historical preservation's place on the spectrum between necessity and luxury item, it can be readily conceded that most modern societies have traditionally not placed the preservation of historical vessels and objects on the top of their fiscal priorities.⁶³ This lack

61. Furthermore, these are the least interesting of cultural items, and the most easy to record without their actual continuous presence. *See Stemm, supra* note 33, at 4.

62. Peter Throckmorton, one of the fathers of underwater archaeology, once asked: "What difference does Marine Archaeology make to our tired planet, other than giving pleasure to a few harmless eccentrics who might otherwise be developing the pitless beach or observing waterfowl? The answer, equally rudely put, is probably not much." *Id.* at 7 (quoting PETER THROCKMORTON, *SHIPWRECKS AND ARCHAEOLOGY: THE UNHARVESTED SEA* 31 (1970)). Although Throckmorton was not saying that marine archaeology is unimportant, he was saying that it must only be considered along with other legitimate uses of the resource. *See id.*

63. An early example of a government's attempt to preserve a maritime artifact can be seen in Queen Elizabeth I's attempt to save *The Golden Hind*, Sir Francis Drake's flagship. Although an adequate amount of money was set aside for the project, failure to complete it resulted in *The Golden Hind* completely rotting away after eighty years of neglect. *See THROCKMORTON, supra* note 7, at 10. A more successful preservation attempt can be seen

of priority is evident in the historical preservation laws in the United States, which demand preservation, but do not provide adequate financial rewards to promote the active search and adequate preservation of archaeological sites and artifacts.

The federal government's first step toward the preservation of historical objects and sites came at the end of the nineteenth century.⁶⁴ At that time, the Congress began to buy and condemn private property in order to create a national battleground memorial consisting of Civil War battlefields.⁶⁵ A resulting case, *United States v. Gettysburg Electric Railway Co.*,⁶⁶ eventually worked its way to the United States Supreme Court. In *Gettysburg*, the Court held that condemnation of private land to establish a memorial to the country's past was a proper purpose,⁶⁷ thereby establishing the ability of Congress to legislate and condemn for the preservation of objects and sites that are important to the country's history.

Throughout the beginning of the Twentieth Century, historical awareness slowly evolved through the ratification of the American Antiquities Act of 1906,⁶⁸ the National Park Service Organic Act of 1916,⁶⁹ and the Historic Sites, Buildings, and Antiquities Act of 1935.⁷⁰ Historical preservation law did not take its next leap forward until the late 1960s and 1970s when several important landmarks were lost.⁷¹ During this time period, the Supreme Court displayed a willingness to acknowledge the value of historic preservation, and upheld preservation attempts in several trail-breaking cases.⁷² Also, Congress accelerated its involvement in historic preservation by passing several laws which would forever change the American legal landscape: the National Historic Preservation Act of 1966,⁷³ the National Environmental Policy Act of 1969,⁷⁴ the Convention

in the USS *Constitution*, one of the first frigates built for the U.S. Navy and launched in 1797. The vessel is continually restored and is open to the public in Boston Harbor.

64. See JUERGENSEMEYER, *supra* note 5, at 577.

65. *See id.*

66. *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668 (1896)

67. *See id.* at 683.

68. 16 U.S.C.A. §§ 431-33 (West 1993).

69. 16 U.S.C.A. §§ 1-4, 22, 43 (West 1992).

70. 16 U.S.C.A. §§ 461-467 (West 1985).

71. See Christopher Duerksen and David Bonderman, *Preservation Law: Where It's Been, Where It's Going*, in A HANDBOOK ON PRESERVATION LAW 11, 11-27 (Christopher Duerksen ed. 1983).

72. See *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (holding that a hot dog vendor could be excluded from an historic area because of the importance of the area's historic quality to the city's economy); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (holding that a city may place restrictions on the development of individual historic landmarks without effecting a taking requiring just compensation).

73. 16 U.S.C.A. §§ 470-470t (West 1985).

74. 42 U.S.C.A. §§ 4321-4370d (West 1994).

on Cultural Property Implementation Act,⁷⁵ and the Archaeological Resources Protection Act of 1979.⁷⁶ The President also got involved with historic preservation through Executive Order 11593 on the Protection and Enhancement of the Cultural Environment of 1971.⁷⁷

During the 1980s, historic preservation law took another turn when federal funding for preservation programs was drastically cut.⁷⁸ Along with the budget cuts for federal preservation programs, the federal government began to shift responsibility over such programs to state and local governments.⁷⁹ As fate would have it, it was during this shift toward state and local control over historic preservation projects that a conflict between the purposes of these laws and maritime law developed over the treatment of historic shipwrecks. Congress ultimately decided to reconcile the incompatibility by passing the Abandoned Shipwreck Act of 1987,⁸⁰ which gave states a significant role in the preservation of historic shipwrecks found on state submerged lands. In order to further understand the current interpretation of historical preservation laws as they pertain to underwater historic resources, a brief explanation of the above mentioned laws and maritime law is essential.

B. American Historic Preservation Laws

1. The American Antiquities Act

The first full scale legislation aimed at historic preservation was the American Antiquities Act of 1906.⁸¹ Under the Act, the President was authorized to "declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments."⁸² The President was instructed to confine the declaration to "the smallest area compatible with the proper care and management of the objects to be protected."⁸³ In

75. 19 U.S.C.A. § 2601 (West 1999).

76. 16 U.S.C.A. §§ 470aa-470ll (West 1985).

77. Exec. Order No. 11,593, 36 Fed. Reg. 8921, *reprinted in* 16 U.S.C.A. § 470 (West 1985).

78. *See Duerksen, supra* note 71, at 21.

79. *See id.* at 21-22.

80. 43 U.S.C.A. §§ 2101-2106 (West 1986 & Supp. 1999).

81. 16 U.S.C.A. §§ 431-433 (West 1993).

82. *Id.* § 431.

83. *Id.*

essence, the Antiquities Act simply shifted the smallest amount of necessary federal government land from one use to another.⁸⁴

The Antiquities Act further authorized the Secretaries of the Interior, Agriculture, and War to grant permits for excavation of sites located under their jurisdiction.⁸⁵ The Secretaries, however, were limited to granting such permits to:

institutions which they may deem properly qualified to conduct such examination, excavation, or gathering . . . provided, that the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums.⁸⁶

Finally, the Antiquities Act provided for fines or imprisonment for any individual who destroyed or attempted to excavate any protected historical resource found on federal lands.

The Antiquities Act was applied to an historic shipwreck case in *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*.⁸⁷ *Lathrop* arose after a diver found several gold coins, minted in Mexico City from 1777 through 1782, while diving in Cape Canaveral National Seashore waters.⁸⁸ Believing that the coins were part of a larger shipment of gold that remained submerged in an eighteenth century wreck, Lathrop brought an action seeking ownership of the unidentified vessel, or alternatively a salvage award for his services.⁸⁹ Pursuant to Lathrop's action, a federal court arrested the vessel and appointed him as substitute custodian.⁹⁰ When Lathrop began his salvaging activities, however, he met resistance from the U.S. Parks Service and the state of Florida, both of which took the position that allowing salvage activities within the park would be inconsistent with the designated use for the land.⁹¹ After obtaining a preliminary injunction against the federal and state governments to bar them from interfering with his salvaging activities under admiralty law, Lathrop ran into additional resistance from the Army Corps of Engineers for dredging the area to find

84. See *United States v. California* 436 U.S. 32, 40 (1978).

85. See 16 U.S.C.A. § 432.

86. *Id.*

87. *Lathrop v. The Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953 (M.D. Fla. 1993).

88. See *id.* at 956.

89. See *id.*

90. See *id.*

91. See *id.* at 957.

more artifacts.⁹² The Corps issued a cease and desist order, requiring Lanthrop to obtain a permit under the Rivers and Harbors Act.⁹³ Upon threat of arrest for violating the Corps of Engineers's order, Lanthrop sought a preliminary injunction against the United States to bar any further interference with his salvaging activities.

Although the court declared that it did not have in personam jurisdiction over the United States, and could not therefore issue an injunction against it, the judge decided to address the merits of the motion.⁹⁴ In evaluating the motion, the court concluded that "[c]ongressional enactments restricting the manner in which a potential salvor excavates property located on federally owned or managed lands does not offend" constitutional limitations imposed by the Admiralty Clause.⁹⁵ The court held, therefore, that since the United States could require Antiquities Act and Rivers and Harbors Act permits to salvage a vessel in Cape Canaveral National Seashore waters, and Lanthrop had not obtained the permits, he was not entitled to a salvage award or a preliminary injunction.⁹⁶

2. The National Parks Organic Act

The National Parks Organic Act⁹⁷ created the National Parks Service, and placed the federal areas known as national parks, monuments, and reservations under its authority.⁹⁸ The Secretary of the Interior was assigned jurisdiction over the National Parks Service, and was directed to manage the parks in conformity with their purpose, which is to "to conserve the scenery and the natural and historic objects...by such means as will leave them unimpaired for the enjoyment of future generations."⁹⁹ Areas under the jurisdiction of the NPS includes numerous underwater parks and shipwreck sites.¹⁰⁰ This congressionally granted control over the park areas will remove cooperative archeology management plans from consideration if the wreck is found on the submerged lands of a national park.¹⁰¹

92. *See id.* at 959.

93. *See id.*

94. *See id.* at 961.

95. *See id.* at 962.

96. *See id.* at 963-64.

97. *See* 16 U.S.C.A. §§ 1-4, 22, 43 (West 1992).

98. *See id.* § 1.

99. *Id.*

100. *See generally* DANIEL LENIHAN AND JOHN BROOKS, UNDERWATER WONDERS OF THE NATIONAL PARKS (1998).

101. The National Park Service has its own archaeology team, named the Submerged Cultural Resources Unit (SCRU), which conducts excavations on wrecks found on lands under the National Park Service's jurisdiction. *See generally* National Park Service, SCRUI (visited Feb. 18, 1999) <<http://www.nps.gov/scru/home.htm>>.

3. The Historic Sites, Buildings, and Antiquities Act

The Historic Sites, Buildings, and Antiquities Act¹⁰² declares that it is national policy to preserve for public use “historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States.”¹⁰³ Under the Act, the Secretary of the Interior, through the NPS, is granted the authority to examine historic sites and objects for the purpose of evaluating their value in commemorating the history of the United States.¹⁰⁴ The Secretary is also given the authority to undertake investigations and research into historic sites and objects, and to acquire them in the name of the United States.¹⁰⁵ Most importantly for the future viability of an historic shipwreck management scheme that utilizes cooperative archaeologists is section 462(e) of the Act, which grants the Secretary the authority to:

contract and make cooperative agreements with States, municipal subdivisions, corporations, associations, or individuals . . . to protect, preserve, maintain, or operate any historic or archaeologic building, site, object, or property . . . regardless as to whether the title thereto is in the United States.¹⁰⁶

This section provides a basis for the NPS to contract with cooperative archaeologists to properly recover shipwreck artifacts. The contract provision will enable the NPS to work out acceptable compensation with commercial archaeologists and receive bids from various museums, companies, individuals, or states to purchase the items for public display.

4. The National Historic Preservation Act

The National Historic Preservation Act¹⁰⁷ declares that “the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.”¹⁰⁸ This Act creates the National Register of Historic Places, a list of districts, sites, buildings, structures and objects significant in American history.¹⁰⁹ To be listed in the Register, the

102. See 16 U.S.C.A. §§ 461–467 (West 1985 & Supp. 1999).

103. See generally *id.* § 461.

104. See *id.* § 462(b).

105. See *id.* § 462(d).

106. *Id.* § 462(e).

107. 16 U.S.C.A. §§ 470–470t, 110 (West 1993).

108. *Id.* § 470(b)(2).

109. See *id.* § 470a(1)(A).

object must be of national, state, or local significance.¹¹⁰ Once a site or object is listed on the Register, all federal agencies having direct jurisdiction over a proposed federal, federally assisted, or federally licensed undertaking must evaluate the effect that the undertaking will have on the listed object or site. In order to receive funding and approval for the project, the agency must provide the Advisory Council on Historic Preservation¹¹¹ the opportunity to make comments and suggestions on how to reduce the impact on the federally listed site.¹¹²

With respect to underwater cooperative archaeology, it is significant that the Act recognizes that "the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role. . . ."¹¹³ This statement reflects the historical reality that it is the private sector, and not the government, that has made the largest and most vital contributions to historical preservation. The recognition that historical preservation laws should give "maximum encouragement to agencies and individuals undertaking preservation by private means . . ."¹¹⁴ indicates that private preservation had been successful in the past, and the continuation of such a trend, as of 1966, was considered to be a good policy decision. This policy provides significant proof that not all people involved in the recovery of cultural resources have a pirate's mentality.¹¹⁵

5. National Environmental Policy Act of 1969

Perhaps the most significant legislation for both environmental protection and historic preservation is the National Environmental Policy Act of 1969 (NEPA).¹¹⁶ NEPA mandates that federal agencies prepare an Environmental Impact Statement (EIS) for every major federal action that affects the natural and man-made environment. Under the Act, the federal government is to use the EIS "to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . preserve important historic, cultural, and natural aspects of our national

110. *See id.* § 470a(3), (4).

111. The Advisory Council is appointed by the President, and has implemented procedures to facilitate compliance with § 106 of the Act. *See* 36 C.F.R. Pt. 800.

112. *See* 16 U.S.C.A. § 470(f).

113. *Id.* § 470(b)(7).

114. *Id.*

115. *See* Goodheart, *supra* note 20, at 38 (stating that some feel that historic salvors should fly "a pirate's skull and crossbones" from their ships).

116. 42 U.S.C.A. §§ 4321-4370d (West 1994).

heritage. . . ."¹¹⁷ This legislation set an overarching policy that the Nation should preserve important historic objects and sites.

6. Executive Order 11593, Protection and Enhancement of the Cultural Environment

In 1971, President Richard Nixon issued Executive Order 11593, entitled, Protection and Enhancement of the Cultural Environment.¹¹⁸ Pursuant to NEPA, the Order mandated all federal agencies, bureaus, and offices to compile a list of all known cultural resources under their jurisdictions.¹¹⁹ Each agency was then required to nominate all of the government properties to the National Register of Historic Places, and to preserve those nominated resources.¹²⁰

7. The Archaeological Resources Protection Act

The first federal legislation pertaining specifically to archaeological resources was the Archaeological Resources Protection Act of 1979.¹²¹ This statute, which was amended in 1988, applies to all lands held in fee by the United States, but does not apply to the outer continental shelf.¹²² This application of the statute is notable, for although it imposes penalties for unpermitted excavations of archaeological resources found on land, it does not apply to very many shipwrecks. This is because wrecks located on submerged lands must lie on state land, granted through the Submerged Lands Act, or on the outer continental shelf as defined by the Outer Continental Shelf Lands Act. The only area where the Archaeological Resources Protection Act would apply is to federal submerged lands found within state waters, such as national parks or sanctuaries. Therefore, although the Act broadly defines "archaeological resource,"¹²³ establishes a permit system for excavation,¹²⁴ and requires that all items excavated

117. *Id.* § 4331(b)(4).

118. Exec. Order No. 11,593, 36 Fed. Reg. 8921(1971), *reprinted in* 16 U.S.C.A. § 470 (West 1985).

119. *See id.*

120. *See id.*

121. 16 U.S.C.A. §§ 470aa–470mm (West 1985 & Supp. 1999).

122. *See id.* § 470bb(3); *see generally id.* §§ 470cc, 470ee.

123. "The term 'archaeological resource' means any material remains of past human life or activities which are of archaeological interest . . ." and are at least 100 years old. *Id.* § 470bb(1).

124. *See id.* § 470cc.

remain the property of the United States,¹²⁵ the Act rarely will apply to underwater resources.¹²⁶

8. National Marine Sanctuaries Act

The National Marine Sanctuaries Act¹²⁷ empowers the Secretary of Commerce to designate specific marine areas as sanctuaries which have qualities that make them nationally significant.¹²⁸ Possessing important historical qualities qualifies an area for sanctuary status.¹²⁹ In fact, the first marine sanctuary was designated to protect the *Monitor*¹³⁰ from unwanted salvaging.

The National Marine Sanctuaries Act was successfully applied against salvors in *Craft v. National Park Service*¹³¹ and *United States v. Fisher*.¹³² Both cases resulted in large civil fines for undertaking salvaging activities within a sanctuary without a permit. In *Craft*, the fines were imposed against divers for removing artifacts from the Channel Islands National Marine Sanctuary. In *Fisher*, the salvor was fined \$600,000 for damaging seagrass beds in the Florida Keys National Marine Sanctuary, and ordered to return the salvaged artifacts. Significantly, the court held that salvaging activities which cause environmental damage in the national marine sanctuaries are actionable under the enforcement provisions of the act, even though regulations do not specifically exclude the activities.¹³³

C. Maritime Law and Cases Before the Abandoned Shipwreck Act

After the American Revolution, the Constitution of the United States incorporated the existing maritime law of England, and granted jurisdiction

125. *See id.* § 470cc(b)(3).

126. One case in which the Act was applied to a wreck in Key Biscayne National Park was *Klein v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985).

127. 16 U.S.C.A. § 1431 (West 1993).

128. *See id.* § 1431(a)(2).

129. *See id.*

130. The *Monitor* was one of the first iron-clad, steam-powered vessels to be used in war. *See* Daniel Nonte, *Greensboro Native Takes Dive to Monitor Off Cape Hatteras*, GREENSBORO NEWS & REC., Nov. 20, 1999, at B1. It sank during the Civil War and lies approximately 230 feet below the surface, accessible only to the most experienced divers. *See id.*

131. *See* *Craft v. National Park Service*, 34 F.3d 918 (9th Cir. 1994).

132. *See* *United States v. Fisher*, 22 F.3d 262 (11th Cir. 1994).

133. *See id.* at 269.

over admiralty matters to the federal courts.¹³⁴ Much of the common law that developed over the many centuries of maritime trade, therefore, still survives as the living maritime law of the United States. Relevant to the analysis of American historic shipwreck laws, the maritime jurisdiction of the federal courts includes actions for maritime finds and salvage, as well as sovereign prerogative.

1. Salvage and Finds

The salvage of maritime property occurs when a salvor voluntarily recovers items that are in "marine peril."¹³⁵ Under this legal theory, the salvor is entitled to a reward proportionate to the risk undertaken, the cost incurred in the rescue of the property, and the value of the property saved.¹³⁶ The policy behind the law of salvage is to encourage the enterprising mariner to render assistance in emergency situations¹³⁷ and to keep commercial items in the stream of commerce.¹³⁸ Similarly, the law of finds encourages the recovery of "abandoned" goods by vesting title in such goods in the first person to reduce them to possession.¹³⁹ Most commercial

134. See U.S. CONST. art. III, § 2, cl. 3 ("The Judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, under their Authority; . . . to all Cases of admiralty and maritime jurisdiction . . ."). The Judiciary Act of 1789 implemented the Constitutional grant. 28 U.S.C.A. § 1333 (West 1993)

135. See GILMORE, *supra* note 16, at 534.

136. In calculating the amount of a salvage award, courts often turn to the formula provided in *The Blackwall*:

Courts of admiralty usually consider the following circumstances as the main ingredients in determining the amount of the award to be decreed for a salvage service:

- (1) The labor expended by the salvors in rendering the salvage service.
- (2) The promptitude, skill and energy displayed in rendering the service and saving the property.
- (3) The value of the property employed by the salvors in rendering the service, and the danger to which the property was exposed.
- (4) The risk incurred by the salvors in securing the property from impending peril.
- (5) The value of the property saved.
- (6) The degree of danger from which the property was rescued.

See *The Blackwall*, 77 U.S. (10 Wall) 1, 13-14 (1869).

137. See *Kimes v. United States*, 207 F.2d 60, 63 (2nd Cir. 1953) ("[T]he fundamental public policy at the basis of awards of salvage [is] the encouragement of seamen to render prompt service in future emergencies.").

138. See H.R. No. 100-514(I), at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365, 366.

139. See *Treasure Salvors, Inc. v. The Unidentified, Wrecked, & Abandoned Sailing Vessel*, 569 F.2d 330, 336-37 (5th Cir. 1978); *Cobb Coin Co. v. The Unidentified, Wrecked, & Abandoned Sailing Vessel*, 525 F. Supp. 186, 213 (S.D. Fla. 1981).

salvors bring an *in rem* action under the law of finds when they locate what they believe is an "abandoned" wreck,¹⁴⁰ and alternatively bring an action asking the court to declare them the exclusive salvor of the wreck, entitled to an appropriate salvage award.¹⁴¹

The determination under traditional maritime law as to whether the law of finds or the law of salvage applies hinges on the determination of whether the vessel is "abandoned."¹⁴² "Abandoned" is a term of art that determines in whom the title for the vessel lies. If title is retained by the owner, then he can refuse any attempt to salvage.¹⁴³ If, however, abandonment occurs because of the passage of time without significant effort to recover the vessel, or through express abandonment, the law of finds would traditionally apply.¹⁴⁴ As the federal and state governments became increasingly interested in historic shipwrecks, however, the increase in state legislation pertaining to abandoned wrecks, state ownership of submerged lands through the submerged lands act, and the use of the doctrine of sovereign prerogative increasingly confused the application of maritime law.

2. Sovereign Prerogative

Sovereign prerogative was an English common law rule by which title to abandoned property found at sea by British subjects vested in the Crown.¹⁴⁵ Early in the historic shipwreck ownership debates, it was contended that the rule had been incorporated into American law.¹⁴⁶ The rule was believed to have been invoked in *Russell v. Proceeds of Forty Bales of Cotton*,¹⁴⁷ when the United States intervened and claimed right to goods found derelict at sea.¹⁴⁸ In *Treasure Salvors, Inc. v. The Unidentified, Wrecked, and Abandoned Sailing Vessel*, however, the court stated that in *Russell* the United States was only entitled to goods that should belong to it under a statute which only applied to property lost as a result of the Civil

140. See, e.g., *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 673 (1982).

141. See, e.g., *Subaqueous Exploration & Archaeology, Ltd. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 577 F.Supp 597, 600 (D. Maryland 1983).

142. See *Treasure Salvors, Inc. v. The Unidentified, Wrecked, & Abandoned Sailing Vessel*, 569 F.2d at 336.

143. See GILMORE, *supra* note 16, at 536.

144. See *Treasure Salvors, Inc. v. The Unidentified, Wrecked, & Abandoned Sailing Vessel*, 569 F.2d at 336.

145. See *id.* at 340.

146. See *id.* at 340-41.

147. *Russell v. Proceeds of Forty Bales of Cotton*, 21 F. Cas. No. 12,154, 42 (S.D. Fla. 1872).

148. See *Treasure Salvors, Inc. v. The Unidentified, Wrecked, & Abandoned Sailing Vessel*, 569 F.2d at 341.

War.¹⁴⁹ In other words, prior to the 1970s it was unclear whether sovereign prerogative applied to shipwrecks in American waters.

D. Sovereign Prerogative, Ownership of Submerged Lands, and the Eleventh Amendment

State and federal government interest in historic shipwrecks greatly confused the application of federal maritime law. The impetus for change came in 1975, when Mel Fisher became one of the most celebrated treasure hunters in American history through his discovery and subsequent salvage of the *Senora Nuestra de Atocha*.¹⁵⁰ After expenditures of \$2 million, Fisher and his team located and laid claim to the wreck.¹⁵¹ Both the United States and the state of Florida challenged Treasure Salvors's action for possession and confirmation of title to the wreck. The resulting cases, *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*¹⁵² and *Florida Department of State v. Treasure Salvors*,¹⁵³ declared the extent of ownership that the federal and state governments exerted over historic wrecks found on their submerged lands.

1. Sovereign Prerogative

In *Treasure Salvors v. The Unidentified Wrecked and Abandoned Vessel*, after conceding that the *Atocha* was located outside the territorial waters of the United States,¹⁵⁴ the federal government claimed title to the treasure by virtue of two legal arguments: (1) that the Antiquities Act applied to the lands claimed under the Outer Continental Shelf Lands Act (OCSLA),¹⁵⁵ and (2) that the United States was heir to the doctrine of sovereign prerogative as passed from the English Crown.¹⁵⁶ The court held that the Antiquities Act did not apply to items found on the outer continen-

149. *See id.*

150. The *Atocha* was the most heavily treasure-laden galleon of the 1622 Spanish treasure fleet. Fisher salvaged treasure worth millions of dollars. For a history of the *Atocha*, see Mel Fisher Maritime Museum, *Wrecks and Expeditions, Nuestral Senora de Atocha* (visited Mar. 1, 2000) <<http://www.melfisher.org>>; Lyon, *The Trouble with Treasure*, 149 NAT'L GEOGRAPHIC 787 (1976).

151. *See* *Treasure Salvors, Inc. v. The Unidentified, Wrecked, & Abandoned Sailing Vessel*, 569 F.2d at 333.

152. *See id.* at 330.

153. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982).

154. *See* *Treasure Salvors, Inc. v. The Unidentified, Wrecked, & Abandoned Sailing Vessel*, 569 F.2d at 909.

155. *See id.* at 337-38.

156. *See id.* at 340 (citing *The Aquila*, 1 C. Rob. 36, 41-42, 165 Eng. Rep. 87, 89 (1789)).

tal shelf because the OCSLA only claimed rights to the continental shelf for the purpose of mining natural resources, and did not assert full sovereignty.¹⁵⁷ The court also found that although it "may be within the constitutional power of Congress to take control of wrecked and abandoned property . . . legislation to that effect has never been enacted."¹⁵⁸ Therefore, the doctrine of sovereign prerogative did not apply.¹⁵⁹

2. State and Federal Ownership of Submerged Lands

Both the Submerged Lands Act¹⁶⁰ and the Outer Continental Shelf Lands Act¹⁶¹ are significant for the management of historic shipwrecks. After the Supreme Court declared that the federal government has superior rights over the states to all submerged lands within its internationally defined territorial sea,¹⁶² Congress passed the Submerged Lands Act to grant the states jurisdiction over submerged lands out to 3 miles, including natural resources.¹⁶³ Because the Supreme Court declared that states do not hold title to submerged lands beyond the intertidal zone by virtue of the equal footing doctrine or historical claim,¹⁶⁴ the states only have authority over such lands and resources as granted to them through an act of Congress.

This principle was applied in *Cobb Coin Company, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*,¹⁶⁵ a case brought by a salvor to enjoin a state's enforcement of its salvage regulations in such a way as to interfere with the company's salvage operations. In that case, the United States District Court for the Southern District of Florida concluded that "the Submerged Lands Act does not empower the State, through legislation which purports to derogate both federal jurisdiction and the application of admiralty principles, to lay claim to abandoned wreck sites within the three-mile limit recognized under that Act."¹⁶⁶ The court did comment, however, that Florida, as trustee for its citizens of the cultural heritage of the state, had an interest in ancient artifacts found in its territory. Accordingly, although the interest may not "abrogate either the operation

157. See *Treasure Salvors, Inc. v. The Unidentified, Wrecked, & Abandoned Sailing Vessel*, 569 F.2d at 339.

158. See *id.* at 341.

159. See *id.* at 340.

160. 43 U.S.C.A. §§ 1301-1315 (West 1986).

161. *Id.* §§ 1331-1356.

162. See *United States v. California*, 332 U.S. 19, 38-39 (1947).

163. See 43 U.S.C.A. §§ 1311-1313.

164. See *United States v. California*, 332 U.S. at 39.

165. *Cobb Coin Company Co. v. The Unidentified, Wrecked, & Abandoned Sailing Vessel*, 525 F. Supp. 186 (S.D. Fla. 1981).

166. *Id.* at 215-16.

of federal jurisdiction or the application of traditional admiralty principles in the disposition of maritime salvage claims, neither is that interest vitiated where historically significant artifacts are discovered on an ocean, rather than a terrestrial site."¹⁶⁷

In accordance with the Truman Proclamation¹⁶⁸ the Outer Continental Shelf Lands Act asserted the United States's claim to paramount rights to the seabed of the continental shelf beyond the three-mile limit established by the Submerged Lands Act.¹⁶⁹ In analyzing the OCSLA to determine if the Antiquities Act should apply to submerged lands beyond the territorial sea, the court in *Treasure Salvors* found that the purpose of the OCSLA was to facilitate leasing for mineral mining of the submerged lands beyond state jurisdiction, and that it therefore did not claim broad sovereignty.¹⁷⁰ The court also acknowledged that the Convention on the Continental Shelf became law in the United States eleven years after the OCSLA, and that any contradictory language in the domestic law was superseded by the Convention.¹⁷¹ Notably, as pertains to the United States's claim to control over abandoned shipwrecks found on the outer continental shelf, the International Law Commission stated that the rights gained by the Convention "do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil."¹⁷²

3. The Eleventh Amendment

In *Florida Department of State v. Treasure Salvors, Inc.*,¹⁷³ the United States Supreme Court was called upon to consider Florida's claim of Eleventh Amendment sovereign immunity to bar federal admiralty jurisdiction over a claim to title over treasure recovered from an historic and abandoned wreck.¹⁷⁴ Once again, it was the treasure of the *Atocha* that was

167. *Id.* at 216.

168. See Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945), reprinted in 59 Stat. 884. The Truman Proclamation asserted the United States's jurisdiction over the mineral resources of the continental shelf, but did not extend the range of the territorial sea. See *id.*

169. This claim was firmly established in *United States v. Maine*, when the United States asserted rights only over the seabed and subsoil lying more than three miles from the coastline. See *United States v. Maine*, 420 U.S. 515, 519 (1975).

170. See *Treasure Salvors, Inc. v. The Unidentified, Wrecked, & Abandoned Sailing Vessel*, 569 F.2d 330, 339 (5th Cir. 1978).

171. See *id.* at 340; see also *United States v. Ray*, 423 F.2d 16, 21 (5th Cir. 1970); *Cook v. United States*, 288 U.S. 102, 118-19 (1932).

172. See *Treasure Salvors, Inc. v. The Unidentified, Wrecked, & Abandoned Sailing Vessel*, 569 F.2d at 340 (citing 11 U.S. GAOR, Supp. 9 at 42, U.N. Doc. A/3159 (1956)).

173. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982).

174. Under the Eleventh Amendment, "the judicial power of the United States shall not

the object of the lawsuit. The suit evolved from a contract that Mel Fisher, acting on behalf of Treasure Salvors, had made with Florida. The contract was made after Florida threatened to arrest Mel Fisher and confiscate Treasure Salvors's boats and equipment if the company proceeded in salvaging the *Atocha* without a state permit.¹⁷⁵ In exchange for the permit, Treasure Salvors agreed to relinquish the treasure that was recovered in exchange for a salvage award of seventy-five percent of the proceeds from the operation.¹⁷⁶ Of course, the threat of arrest and requirement for a salvage permit were based entirely on a state law, and the contract was predicated on the belief that the *Atocha* was located on Florida's submerged lands.¹⁷⁷ Unfortunately for Florida, an unrelated case concerning its territorial boundaries and rights to natural resources on the Gulf and Atlantic coasts subsequently revealed that the *Atocha* did not in fact sit on Florida's submerged lands, but in international waters.¹⁷⁸ When the State Division of Archives refused to return artifacts already held by them pursuant to the contract, Treasure Salvors filed an admiralty action for the arrest of the items.¹⁷⁹ In response, the State raised the Eleventh Amendment as a bar to the suit, claiming that a citizen of the State could not bring a federal admiralty action against the State in federal court.¹⁸⁰

In a plurality opinion, Justice Stevens commented that "[s]tripped of its procedural complexities and factual glamour, this case presents a narrow legal question."¹⁸¹ The difficult question was "whether a federal court exercising admiralty *in rem* jurisdiction may seize property held by state officials under a claim that the property belongs to the State."¹⁸² Justice Stevens presented a three part test to determine if the Eleventh Amendment should apply: (1) Is the action against the State, or merely an official of the State?; (2) Does the withholding of the property constitute an unconstitu-

be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI. Although the language of the Amendment does not specify that a State's own citizens may not bring a suit against it, the Supreme Court has long declared that the Amendment does apply to such suits. See *Hans v. Louisiana* 134 U.S. 1, 10 (1890); *Employees v. Missouri Pub. Health Dep't*, 411 U.S. 279, 280 (1973). The Court has also held that the Amendment does apply to actions in admiralty. See *Ex Parte State of New York*, 256 U.S. 490, 500 (1921).

175. See *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 674 (1982).

176. See *id.* at 675.

177. See *id.* at 674-75.

178. See *id.* at 675. The unrelated case was *United States v. Florida*, 420 U.S. 531 (1975).

179. See *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. at 676.

180. See *id.* at 680.

181. *Id.* at 683.

182. *Id.*

tional withholding, or only a tortious interference with property rights?; and (3) Does the relief sought require payment of funds from the State treasury?¹⁸³

In conducting its analysis under the three prongs of the test, the Court found that the suit was not against Florida, but against its agents. This was so because the agents had acted without any authority of law, and "the Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without the authority of law."¹⁸⁴

The second part of the test required the determination of whether the agents had committed an unconstitutional withholding of property by acting beyond the scope of their official authority, or had merely committed a tortious deprivation by mistakenly acting on the provisions of an irrelevant contract.¹⁸⁵ In determining that the agents had acted beyond the scope of the irrelevant contract, the Court stated that the State did "not have even a colorable claim to the artifacts pursuant to these contracts,"¹⁸⁶ and therefore had no authority to "invoke the Eleventh Amendment to block execution of the warrant of arrest."¹⁸⁷ The Court also stated, however, that although the federal court had jurisdiction to "secure possession of the property from the named state officials . . . [t]he court did not have power . . . to adjudicate the State's interest in the property without the State's consent."¹⁸⁸ The Court's interjection of the term "colorable claim" would continue to cause confusion in historic shipwreck litigation for the next sixteen years.¹⁸⁹

In the final step of the analysis, the Court declared that the relief sought did not violate the third part of the test. Because Treasure Salvors only sought possession of specific property held wrongfully by the State, and "did not seek any attachment of state funds and would impose no burden on the state treasury," the third prong of the test was satisfied against the State.¹⁹⁰

In conclusion, application of the three part test for the operation of the Eleventh Amendment was found not to "bar the process issued by the District Court to secure possession of artifacts of the *Atocha* held by the named state officials."¹⁹¹ But, a federal court could not resolve the State's

183. *See id.* at 690.

184. *Id.* at 687 (quoting *Chicago B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897)).

185. *See Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. at 692-93.

186. *Id.* at 694.

187. *Id.* at 697.

188. *Id.* at 682.

189. *See California v. Deep Sea Research, Inc.*, 118 S. Ct. 1464, 1471 (1998) ("[Justice Stevens's] reference to a 'colorable' claim is at the crux of this case.").

190. *See Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. at 698.

191. *Id.* at 699.

interest in the property without its approval. As a result, Mel Fisher obtained title over the artifacts, and legally retained possession over all the treasure that the *Atocha* would surrender.

III. THE ABANDONED SHIPWRECK ACT: PAST AND PRESENT

A. *The Abandoned Shipwreck Act (ASA)*

The *Atocha* incident, as well as the discovery and salvage of another treasure loaded vessel, the *Central America*,¹⁹² left a bitter taste in the mouths of government officials and the preservation community. Not only had millions of dollars worth of artifacts been lost to private individuals, but priceless historical information had been lost due to their salvaging techniques. The incidents provided an impetus for the creation of federal legislation asserting title over abandoned historic shipwrecks located in or on federal or state controlled lands. Through the ASA, the government sought to remove jurisdiction over historic wrecks from admiralty courts and grant it to the states.¹⁹³ Although it was a valiant attempt, the ASA is an inadequate management tool for conserving and efficiently utilizing America's submerged historic resources.

The ASA operates by asserting title by sovereign prerogative for the federal government over "any abandoned shipwreck that is 1) embedded in submerged lands of a State; 2) embedded in coralline formations protected by a State on submerged lands of a State; or 3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register."¹⁹⁴ The Act requires notification to the public of the wreck's location, and a determination by the Secretary of the Interior whether the wreck meets the criteria for eligibility for inclusion in the National Register of Historic Places.¹⁹⁵ Finally, title to the wreck is immediately transferred to the state "in or on whose submerged lands the shipwreck is located."¹⁹⁶

The ASA specifically states in section 2106 that the "law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section

192. See Anne Giesecke, *The Abandoned Shipwreck Act Through the Eyes of its Drafter*, 30 J. MAR. L. & COM. 167-70 (1999). The S.S. *Central America* sank in a hurricane in 1857, bringing over 400 people and \$1,219,189 in gold to the bottom of the sea 160 miles off the South Carolina coast. See *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co. & The Unidentified, Wrecked, & Abandoned Sailing Vessel*, 974 F.2d 450, 455-56 (1991).

193. See Giesecke, *supra* note 192, at 169 (1999).

194. 43 U.S.C.A. § 2105(a) (West Supp. 1999).

195. See *id.* § 2105(b).

196. *Id.* § 2105(c). The only exception to this transfer occurs when the shipwreck is found on federal property or the property on an Indian tribe. See *id.* § 2105(d).

6 of this Act applies.”¹⁹⁷ This provision was intended to take wrecks for which the ASA applies out of the jurisdiction of admiralty courts. This withdrawal of jurisdiction was only intended to apply to a specific type of wreck, however, as is evident from section 2101’s restriction of the scope of the act to wrecks “which have been deserted and to which the owner has relinquished ownership rights with no retention.”¹⁹⁸

In exchange for the grant of title over these specific types of wrecks to the states, Congress required states to provide reasonable access to the wrecks to the public, and to develop policies to “(A) protect natural resources and habitat areas; (B) guarantee recreational exploration of shipwreck sites; and (C) allow for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites.”¹⁹⁹ States are also encouraged to establish “underwater parks or areas to provide additional protection for such resources.”²⁰⁰

B. Challenging the Abandoned Shipwreck Act

1. Constitutional Challenges

In *Zych v. Unidentified Wrecked & Abandoned Vessel, Believed To Be the “Seabird,”*²⁰¹ the potential salvor challenged the State’s claim to title over a wreck²⁰² by asserting that the ASA was an unconstitutional restriction on the original jurisdiction granted to federal admiralty courts in the United States Constitution.²⁰³ Zych’s constitutional challenge was based on the principle that Congress cannot exclude a thing that falls clearly within admiralty law.²⁰⁴ Zych argued that the ASA unconstitutionally excluded the law of salvage from abandoned wrecks that fall under its scope.²⁰⁵

The court responded to the challenge by holding that the ASA provision eliminating the law of salvage from abandoned shipwrecks which fall under its scope is not unconstitutional because “in a remarkable twist, this provision of the ASA has no effect on the law of salvage because the law

197. *Id.* § 2106.

198. *Id.* § 2101(b).

199. *Id.* § 2103(2).

200. *Id.* § 2103(2)(b).

201. *See Zych v. The Unidentified, Wrecked, & Abandoned Vessel*, 19 F.3d 1136 (7th Cir. 1994).

202. The wrecked vessel was the *Seabird*. It sank as the result of an onboard fire, and remained lost at the bottom of Lake Michigan for 121 years, when Zych found her. *See id.* at 1138.

203. *See id.* at 1139.

204. *See id.* at 1140.

205. *See id.* at 1141.

of salvage does not apply to abandoned shipwrecks.”²⁰⁶ According to the court, abandoned property is not owned, but “the law of salvage assumes that the salvaged property is owned by someone other than the salvor.”²⁰⁷ Because the action of the ASA granted title over the vessel to the State, the court reasoned that Zych was actually suing the State.²⁰⁸ Therefore, the suit was barred by the Eleventh Amendment.²⁰⁹ The court also affirmed the lower court’s decision that the responsibilities imposed under section 2103 of the Act were not an unconstitutional imposition on the states because the ASA “does not coerce states to accept title to something that is undesirable,” and the responsibilities imposed on the states are not actually requirements, but only suggestions.²¹⁰ Title to the vessel, therefore, was vested in the State by virtue of the ASA.²¹¹

2. The Eleventh Amendment and Admiralty Jurisdiction

Since the passage of the ASA, states have asserted title over historic shipwrecks found by individuals and salvors on state submerged lands by asserting that they have a “colorable claim” to the wreck under the ASA, and that the Eleventh Amendment therefore requires that the finder of the wreck bring his claim in state court.²¹² The interpretation of just what a “colorable claim” entailed, however, caused inconsistency between the federal circuit courts.

One interpretation of what constituted a “colorable claim” can be found in a decision by Sixth Circuit Court of Appeals in *Fairport International Exploration Inc. v. Shipwrecked Vessel*.²¹³ In that case, the court stated that “the only question under the ASA is whether a ship has been abandoned so as to give the state a claim.”²¹⁴ The query was in response to a salvor’s challenge of a District Court holding that the salvor’s unsubstantiated claims that the original owner of the vessel had attempted to salvage the vessel was not enough to show that the vessel had not been abandoned. The

206. *Id.*

207. *Id.*

208. *See id.*

209. *See id.*

210. *Zych v. The Unidentified, Wrecked, & Abandoned Vessel, Believed to Be the “Seabird,”* 811 F. Supp. 1300, 1319–20 (N.D. Ill. 1992).

211. *See Zych v. The Unidentified, Wrecked, & Abandoned Vessel, Believed to Be the “Seabird,”* 19 F.3d at 1143.

212. *See, e.g., Deep Sea Research, Inc. v. The Brother Jonathan*, 102 F.3d 379, 382 (9th Cir. 1996).

213. *Fairport Int’l Exploration v. Shipwrecked Vessel Known as the Captain Lawrence*, 913 F. Supp. 552 (W.D. Mich. 1995).

214. *Fairport Int’l Exploration v. Shipwrecked Vessel Known as the Captain Lawrence*, 105 F.3d 1078, 1085 (6th Cir. 1997).

Court of Appeals agreed with the District Court, and reasoned that "common sense makes readily apparent that the statute did not contemplate a court's requiring express abandonment."²¹⁵ Under this interpretation, therefore, all a state had to show to obtain title to an abandoned wreck and subsequent protection from suit in a federal court was that the vessel had been abandoned by the passage of time. A state, therefore, did not have to exert one ounce of energy or time to find a wreck, but could snatch the vessel from federal admiralty court jurisdiction simply by showing that the vessel was abandoned.

In *Deep Sea Research, Inc. v. Brother Jonathan*,²¹⁶ the Ninth Circuit Court of Appeals held that a state is required to prove by a preponderance of the evidence that it is entitled to a colorable claim to a wreck. The *Deep Sea Research* case arose when Deep Sea Research, Inc. located the remains of the *Brother Jonathan* approximately four and a half miles off the coast of California in approximately 250 feet of water and brought an *in rem* action under the law of salvage.²¹⁷ The vessel was a double-side wheeled steamer that sank in 1865, resulting in the deaths of over 100 people and the loss of a large shipment of gold bullion and coins.²¹⁸ At the time, several insurance companies paid claims for the loss of the vessel, but no salvage attempts had ever been made.

After intervening in the admiralty action, California claimed that it was entitled to a colorable claim to the *Brother Jonathan* because the wreck was on the submerged lands of the State, and there was a state statute giving it title to such wrecks.²¹⁹ The State argued that the facts in the present case were "virtually identical to those in *Marx v. Government of Guam*,"²²⁰ in which the Government of Guam was recognized to have a colorable claim to two wrecks by virtue of the fact that they were found on Guam's submerged lands and there was a statute which vested title to such wrecks in the government.²²¹ The *Marx* court, however, had not based its findings on the ASA because the case arose before the Act's adoption.²²² The

215. *Id.* at 1078.

216. *Deep Sea Research, Inc. v. The Brother Jonathan*, 102 F.3d 379 (9th Cir. 1996).

217. *See Deep Sea Research, Inc. v. Brother Jonathan*, 883 F. Supp. 1343, 1347 (N.D. Cal. 1995).

218. *See id.* at 1346-47. A recent auction of the coins from this wreck brought in \$5.3 million. *See* Brendan Koerner, *The Race For Riches Under the Sea, Treasure Hunters and Scientists Battle For History's Bounty*, U.S. NEWS & WORLD REP., Oct. 1999, available in Westlaw, 1999 WL 8433708.

219. *See Deep Sea Research, Inc. v. Brother Jonathan*, 102 F.3d at 385.

220. *Id.* at 385.

221. *See Marx v. Government of Guam*, 866 F.2d 294, 300-01 (9th Cir. 1989).

222. *See id.* at 300.

similar colorable claim in the present case, argued California, mandated that the federal action be barred under operation of the Eleventh Amendment.

According to the Ninth Circuit, however, the adoption of the ASA impacted the requirements for making a colorable claim to a wreck.²²³ The court reasoned that a state must prove that it is entitled to a colorable claim to a wreck by a preponderance of the evidence, because otherwise "the State could receive immunity simply by asserting that it was entitled to it."²²⁴ The Ninth Circuit concluded that the state law had been preempted by the adoption of the ASA,²²⁵ and that the state had not shown that the insurance companies had expressly abandoned their interest in the vessel and its cargo.²²⁶

C. The Supreme Court Speaks:
California v. Deep Sea Research, Inc.

From *Zych*, *Fairfield*, and *Deep Sea Research* it became apparent that District Courts and the Courts of Appeals were applying varying interpretations of "abandonment" and "colorable claim" in historic shipwreck cases. Although the ASA was specifically designed to apply to a distinct type of historic shipwreck, the varying interpretations meant that the application of the statute was inconsistent, and states were often gaining title over a very wide range of vessels. The vessel in *Fairfield*, for example, was lost in the 1930s, which was hardly the narrow range of vessels contemplated by the ASA. Furthermore, the holding in *Zych* that states were not required to follow the requirements of section 2103 meant that states were free to do with such vessels as they pleased, completely contrary to the nature and purpose of the constitutional grant of federal authority over maritime law. These interpretations, however, were addressed by the United States Supreme Court in *California v. Deep Sea Research*.²²⁷

California v. Deep Sea Research was the first case brought under the ASA to be heard by the Supreme Court. Because the Court rarely hears cases of a maritime or historical resource nature, a wide variety of resource users and attorneys eagerly awaited the decision.²²⁸ Although the Court did not make any profound holdings in the case, it did help to clarify the ASA and the meaning of colorable claim and abandonment.

223. See *Deep Sea Research, Inc. v. Brother Jonathan*, 102 F.3d at 385-86.

224. *Id.* at 386.

225. See *id.*

226. See *id.* at 388.

227. See *California v. Deep Sea Research, Inc.*, 118 S. Ct. 1464 (1998).

228. See John Paul Jones, *The United States Supreme Court and Treasure Salvage: Issues Remaining After Brother Jonathan*, 30 J. MAR. L. & COM. 205 (1999).

In *Deep Sea Research*, the state of California claimed that because the ASA gave it a "colorable claim" to a wreck found by a salvor on its submerged lands, Justice Stevens's holding in *Treasure Salvors* mandated that the salvor's claim to title be brought in state court. In determining what constitutes a colorable claim—preponderance of the evidence or bare assertion—the Court declared that both interpretations gloss over the important distinction in this case, which was that California did not have actual possession of the res.²²⁹ This fact, according to the Court, distinguished *Treasure Salvors* from the present case. The "colorable claim" language, the Court asserted, only applies in situations where the State has actual possession of the res.²³⁰ Accordingly, the Court held that the Eleventh Amendment does not bar the jurisdiction of a federal court to hear an *in rem* admiralty case when the res is not in the State's possession.²³¹

Before remanding the case to determine whether the vessel was abandoned, the Court also clarified the disputed definition of "abandoned" in the ASA.²³² The court held that the word "abandoned" in the ASA was intended to have the same meaning as the term in admiralty law.²³³ Although there is considerable uncertainty as to what this actually means, it is clear that abandonment requires an intent to abandon. Evidence of an intent to abandon can be found in the lapse of time, and where there are acts manifesting such an intent. The question in historic shipwreck litigation, however, is whether a lapse of time is significant where existing technology did not allow for a vessel's recovery. In such a situation, a lapse of time or failure to attempt to recover cannot be considered to be a manifestation of intent. What then becomes the applicable definition?

IV. A PLAN FOR THE IMPROVED MANAGEMENT OF UNDERWATER HISTORIC RESOURCES

A. Where Can Cooperative Archaeology Principles Currently Be Applied?

Under the current legislative scheme, cooperative archaeology can only be employed in a handful of locations. When dealing with abandoned historic wrecks, the federal government can invoke the Antiquities Act,²³⁴

229. See *California v. Deep Sea Research, Inc.*, 118 S.Ct. at 1471.

230. See *id.* at 1471

231. See *id.* at 1473.

232. See *id.*

233. See *id.*

234. See *supra* text accompanying notes 81–96.

the Archaeological Resources Protection Act,²³⁵ and the National Marine Sanctuaries Act²³⁶ to prevent the forced utilization of cooperative archaeology by admiralty courts in national parks and marine sanctuaries. Furthermore, the application of the current ASA will limit cooperative archaeology's utilization to recover abandoned historic wrecks on state submerged lands.²³⁷ Under the current law, however, states can opt to recover such wrecks found on their submerged lands by entering into contracts with cooperative archaeology companies.

The geographical area in which admiralty courts can currently apply a cooperative archaeology recovery scheme is to submerged lands lying beyond state submerged lands and within the territorial waters of the United States—between three and twelve nautical miles beyond the coastline. In addition, the ability to grant salvage awards in *in rem* actions against vessels found in international waters was established in *R.M.S. Titanic, Inc. v. Haver*.²³⁸ In *Titanic*, the Fourth Circuit Court of Appeals held that constructive possession²³⁹ over a res is enough to invoke an American admiralty court's jurisdiction over a vessel found beyond the sovereignty of the United States.²⁴⁰ The court concluded that although the jurisdiction over the vessel is shared among nations, an American admiralty court can grant an exclusive salvage award and issue an injunction against any persons over whom it has jurisdiction to prohibit them from interfering with the salvor's efforts.²⁴¹

The holding in *Titanic* makes it clear that U.S. admiralty courts can assert jurisdiction over a wrecked vessel in international waters, and can therefore control the means of the vessels recovery. This means that American admiralty courts can impose recovery schemes based upon cooperative archaeology principles in both international and federal waters. Cooperative archaeology principles that the courts will apply can come from an improved analysis under *The Blackwall*,²⁴² which will add several

235. See *supra* text accompanying notes 120–25.

236. See *supra* text accompanying notes 126–32.

237. See *supra* text accompanying notes 191–98.

238. *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 171 F.3d 943 (4th Cir. 1999).

239. In *Titanic*, the court found that while the res must be in the court's possession to exercise *in rem* jurisdiction, the possession may be actual or constructive, with constructive possession connoting "something less than physical seizure of a res by a court." *Id.* at 964.

240. See *id.* at 967.

241. See *id.* at 968.

242. In calculating the amount of a salvage award, courts often turn to the formula provided in *The Blackwall*:

Courts of admiralty usually consider the following circumstances as the main ingredients in determining the amount of the award to be decreed for a salvage service:

factors into the considerations for determining the salvor's recovery: (7) the degree to which the scientific value of the wreck was preserved and utilized; (8) the degree to which important historic artifacts are preserved and donated to museums; and (9) the degree to which the public has been granted access to the scientific discoveries and wreck site. These factors will ensure that historic wrecks are properly and efficiently excavated, and that the information and artifacts gathered will be published and displayed to the public. It will also predicate a salvage award on the salvor's efficient excavation of the site and subsequent notification of completion to the sport diving and underwater tourist public. Indeed, several admiralty courts have already shown a willingness and ability to apply such factors to real world salvage situations.²⁴³

One interesting question is whether states and the federal government can impose cooperative archaeology requirements in the salvage of historic, but not abandoned, vessels. This situation would arise when an historically significant vessel from the nineteenth century is found by a court not to be abandoned because of the previous lack of technology to recover it. It may be possible for the government to argue that it can impose legislation to make cooperative archaeology mandatory in the salvage of such wrecks under the holding of cases such as *Penn Central Transportation v. City of New York*.²⁴⁴ The question would be whether such impositions by the

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- (1) The labor expended by the salvors in rendering the salvage service.
 - (2) The promptitude, skill, and energy displayed in rendering the service and saving the property.
 - (3) The value of the property employed by the salvors in rendering the service, and the danger to which the property was exposed.
 - (4) The risk incurred by the salvors in securing the property from impending peril.
 - (5) The value of the property saved.
 - (6) The degree of danger from which the property was rescued.

The Blackwall, 77 U.S. (10 Wall.) 1, 14 (1869).

243. See, e.g., *MDM Salvage v. The Unidentified, Wrecked, & Abandoned Sailing Vessel*, 631 F. Supp. 308, 310 (S.D. Fla. 1986) ("Archaeological preservation, on site photography, and the marking of sites are particularly important . . . in circumstances in which a treasure ship . . . provides a unique opportunity to create a historical record of an earlier era. These factors constitute a significant element of entitlement to be considered when exclusive salvage rights are sought."); *Columbus-America Discovery Group v. Atlantic Mut. Ins.*, 974 F.2d 450, 468 (4th Cir. 1992) ("We thoroughly agree with all six [factors of *The Blackwall*] and, in cases such as this, would add another: the degree to which the salvors have worked to protect the historical and archaeological value of the wreck and items salvaged."); *Marex v. The Unidentified Wrecked and Abandoned Vessel*, 952 F. Supp. 825, 829 (S.D. Ga. 1997) (requiring salvors to document wrecks by "mapping or recording the location, depth and proximity of each artifact recovered in relation to other artifacts.").

244. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (holding that a city may place restrictions on the development of individual historic landmarks without effecting a taking requiring just compensation).

government over private property would be allowed to override traditional admiralty principles. There may be a good argument here, since the maintenance of historical information from the site would not deprive the owner of the majority of the economic value of the property and would benefit the public.

*B. What Adjustments In The Law Will Improve
Historic Shipwreck Utilization?*

The Supreme Court's clarification of the ASA has laid the foundation for an improved management program for America's underwater historic resources. As *Deep Sea Research* has indicated, every action brought under the law of salvage or finds must be brought before a federal admiralty court. The admiralty court must make the initial decision whether or not the wrecked vessel falls under the scope of the ASA. If the ASA is amended to accept the reality of the dangers that threaten our historic shipwrecks and better utilize the extensive private resources that are available in this country, this procedure will provide for a vast improvement in the quality and quantity of recovered information and artifacts.

In order to improve our historic shipwreck recovery and management, the ASA must be amended. The first thing that must be recognized is that most historic wrecks have more of a national than state quality. Historically, most vessels engaged in international or coastal trade, and were not limited to movement along the coast of a single state. Furthermore, the United States has traditionally acknowledged that admiralty principles should be treated as a whole, and not divided between states. These facts encourage the imposition of a single legal scheme for the recovery of historic shipwrecks. Therefore, the ASA should be adjusted to continue to apply sovereign prerogative, but only to grant title over the wrecks to the states if the states themselves have found the vessel. This would encourage states to actively search for wrecks by employing archaeologists and contracting with salvors. This would mean that more wrecks would be found and more archaeologists could be employed, creating an incentive for talented individuals to enter a field that currently has few employment incentives.

The ASA should also be extended to encompass all of the submerged lands out to the twelve mile limit. Within this area, the law of finds should continue not to apply to abandoned historic wrecks, but the ASA should be altered to allow the law of salvage to apply. Under such a setup, the federal government would have title to the wreck under sovereign prerogative and the ASA, and the salvor would be entitled to a salvage award for his or her services. Under the amended ASA, the government could not refuse a

salvor's services unless the admiralty court found that the salvor was unable to salvage the wreck in accordance with the principles of *The Blackwall*.

If a salvor met the requirements of the admiralty court, the government, through the National Park Service or the National Oceanic and Atmospheric Administration, would enter into negotiations under the direction of the admiralty court to determine an appropriate salvage award. Such an award could include outright payments, percentages of revenue from public display, or intellectual property rights. If the government decided that it was not interested in the wreck or its artifacts, it could also move under the Historic Sites, Buildings, and Antiquities Act to receive bids from states, corporations, associations, or individuals for the right to publicly display the items.²⁴⁵

C. *The Test Applied By the Admiralty Courts*

As the court from which cooperative archaeology measures will be imposed, the admiralty courts will have to develop a reliable test for applying them. Such a test should begin with an initial finding of whether or not the vessel is "historic."²⁴⁶ If the court determines that the vessel is not "historic," then traditional admiralty law will apply. However, if the wreck is historic, the court should proceed to determine which of two options for recovery should be followed by the salvor. This determination will depend on a whether or not the vessel is "abandoned."

If the court determines that the vessel is not abandoned, it will apply traditional admiralty principles to the salvage of the wreck. Cooperative archaeology should only be imposed on such a salvage operation if it is found that the government can do so under the holding of *Penn Central*. If the court finds that the vessel is abandoned, then it should use the ASA to conduct its further analysis.

The amended ASA will permit a competent cooperative archaeology company to negotiate with the government under the oversight of the admiralty court for an appropriate salvage award. The admiralty court must require the cooperative archaeology company to have adequate resources and skills to properly excavate the wreck. This requirement could be met by a national certification and permitting plan, or by a preponderance of the evidence standard. The government could also bring in a third party with whom it has contracted for the display of the items. When the salvage is

245. See *supra* text accompanying notes 102–106.

246. In most historic resource legislation an arbitrary date of 100–200 years is set as a determinate of whether or not a manmade object is "historic" or "archaeological" See, e.g., STRATI, *supra* note 10, at 179.

complete and the admiralty court is satisfied with the results, the salvor will be entitled to his award.

V. CONCLUSION

For history enthusiasts and archaeologists, this is an extremely exciting time to be alive. The incredible progression of undersea technology is opening up vast wilderness areas to the prying eyes of the modern world, and is finding historical treasures beyond what was ever thought possible. The current state of America's underwater historic resource policy and laws is inadequate, however, to efficiently utilize and protect these resources. It is only through consistent federal control over the resources, and a policy requiring the cooperation of scientists, salvors, and the government that our lost maritime heritage can be preserved from sure destruction. This policy can best be applied by fine tuning the ASA and providing adequate considerations for admiralty courts to follow in awarding salvage awards. By taking this course, America can preserve its underwater historic resources and raise its lost history from the dead.