

SUNKEN TREASURES: CONFLICTS BETWEEN HISTORIC PRESERVATION LAW AND THE MARITIME LAW OF FINDS

*“Squire Trelawney, Dr. Livesey, and the rest of these gentlemen having asked me to write down the whole particulars . . . keeping nothing back but the bearings . . . and that only because there is still treasure not yet lifted, I take up my pen . . . .”*<sup>1</sup>

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I. INTRODUCTION

Ships have carried conquerors, explorers, and traders to new and distant lands. Studies of history are incomplete if they do not take into account the effects of waterborne travel. Unlike our architectural history, however, there are very few surviving historical maritime vessels that are more than 100 years old.<sup>2</sup> “The wealth of our maritime heritage lies in the thousands of ships that were lost at sea. Fortunately many of these are on coastlines making them accessible when discovered.”<sup>3</sup> The value of sunken treasure has been recognized by such diverse writers as Shakespeare<sup>4</sup> and the U.S. Tax

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1. ROBERT LOUIS STEVENSON, TREASURE ISLAND 1 (Roberts Brothers 1888).

2. COLIN PEARSON, CONSERVATION OF MARINE ARCHAEOLOGICAL OBJECTS iii (Butterworth and Co. 1987).

3. *Id.*

4. *See, e.g.*, WILLIAM SHAKESPEARE, RICHARD III act I, sc. 4, 24-33 (A.L. Rowse ed.) (describing treasures beneath the sea).

Courts.<sup>5</sup> The last several decades have seen an increase in subaqueous expeditions which have led to the discovery of shipwrecks.<sup>6</sup> “[B]ut they have often been looted for the bullion or simply for souvenirs. Some shipwreck excavations have been carried out with every good intent to preserve the recovered material, but . . . much of the material has been lost.”<sup>7</sup> The recovery of items from sunken ships and their study is invaluable towards the understanding of our history. “A shipwreck is a unique piece of history in that it is a time capsule. Every item on the ship and the ship itself can be dated. Artifacts recovered from shipwrecks . . . [are] in many instances . . . the only ones of their kind in existence.”<sup>8</sup>

Those interested in historic conservation are necessarily interested in preserving objects found on sunken ships and making these items available to historians and museums. The law of finds, however, grants title to whomever finds abandoned property and takes possession of it.<sup>9</sup> Successful application of the law of finds to sunken treasure can reduce valuable historic objects to the personal property of private collectors. The implementation of the law of finds aggravates the conflicting interests of historians and finders of shipwrecks.

In order to understand the conflict between historic preservation law and the law of finds, it is necessary to evaluate the objectives of each before examining the legal problems faced by both treasure hunters and by those interested in the location, preservation,

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5. See, e.g., *Perdue v. Commissioner of Internal Revenue*, 62 T.C.M. (CCH) 845 (1991) (evaluating the taxes for certain items recovered from a Spanish galleon sunk in 1622).

6. PEARSON, *supra* note 2, at iii. The question of ownership of shipwrecks, however, is at least two hundred years old. In 1798, Sir Walter Scott, Judge of the Admiralty, said:

It is certainly very true that property may be so acquired : but the question is, to whom is it acquired? By the law of nature, to the individual finder or occupant; But in a state of civil society, although property may be acquired by occupancy, it is not necessarily acquired to the occupant himself; for the positive regulations of the State may have made alterations on the subject; and may, for reasons of public peace and policy, have appropriated it to other persons, as, for instance, to the State itself, or to its grantees.

*The Aquila*, 165 ENG. REP. 87, 89 (1798).

7. PEARSON, *supra* note 2, at iii.

8. *Id.*

9. *Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 336-37 (5th Cir. 1978). See *infra* notes 60-79 and accompanying text.

and study of undersea finds. After providing overviews of the goals of historic preservation law and the law of finds, this Comment will explore these issues by analyzing salvage operations in three different theaters of operation: rivers, coastal waters and the Great Lakes, and international waters. This Comment will propose a method by which both treasure hunters and preservationists may find satisfaction.

## II. GOALS OF HISTORIC PRESERVATION LAW

The early days of the historic preservation movement were concerned mainly with “the buildings in which famous people had lived or great events had taken place, not with preservation of architectural gems . . . .”<sup>10</sup> These efforts were generally funded by individuals.<sup>11</sup> Only occasionally were state or local governments involved in preservation disputes.<sup>12</sup> “The U.S. Congress entered the preservation picture some years later when it began buying Civil War battlefield sites as memorials. This action gave rise to the first significant preservation-related litigation, *United States v. Gettysburg Electric Railway Co.*”<sup>13</sup> In that case, the Court rejected the railroad’s view that the taking of private property for the preservation of an historic site was not a proper “public purpose.”<sup>14</sup> The Court found

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10. Christopher J. Duerksen and David Bonderman, *Preservation Law: Where It’s Been, Where It’s Going*, in A HANDBOOK ON HISTORIC PRESERVATION LAW 1 (Christopher J. Duerksen ed., 1983). “Salvation [of Mount Vernon] appeared in the form of Miss Pamela Sue Cunningham of Virginia, who shamed her countrymen into opening their pocketbooks to save George Washington’s home.” *Id.* at 1-2.

11. *Id.* at 1.

12. *Id.* at 2. “In 1816 the city of Philadelphia appropriated \$70,000 to save the old state capitol and its environs, which the state of Pennsylvania proposed to sell off for building lots.” *Id.*

13. *Id.* (citing 160 U.S. 668 (1896)). “Other early cases involving the taking of private property for public preservation or beautification purposes include *Woodstock v. Gallup*, 28 Vt. 587 (1856); *Shoemaker v. United States*, 147 U.S. 282 (1893); *In Re Clinton Ave.*, 68 N.Y. 196 (1901); [and] *Roe v. Kansas ex rel. Smith*, 278 U.S. 191 (1929).” *Id.* at 2 n.2.

14. *United States v. Gettysburg Electric Railway Co.*, 160 U.S. 668 (1896). The Court held that the importance of preserving the site of the Battle of Gettysburg “is rendered plainer and more durable by the fact that the Government of the United States, through its representatives in Congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition.” *Id.* at 682. Owners of historic property often assert this defense in order to have the full use and enjoyment of their property. This argument has been largely unsuccessful.

that the preservation of an important monument to the country's past was a legitimate government goal.<sup>15</sup>

The United States Supreme Court expanded this first goal of historic preservation nearly sixty years later in *Berman v. Parker*.<sup>16</sup> There, the Court condemned an urban renewal project, stating that "[t]he concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary."<sup>17</sup> Despite this expansive view of the purpose of preservation law, the destruction of historic buildings and areas continued due to urban renewal and highway projects.<sup>18</sup> A 1965 report, *With Heritage So Rich*,<sup>19</sup> finally clarified the needs and goals of historic preservation law:

Out of the turbulence of building, tearing down and rebuilding the face of America, more and more Americans have come to realize that as the future replaces the past, it destroys much of the physical evidence of the past. The current pace of preservation effort is not enough. It is as though the preservation movement were trying to travel up a down escalator. The time has come for bold, new measures and a national plan of action to insure that we, our children, and future generations may have a genuine opportunity to appreciate and to enjoy our rich heritage . . . . If the preservation movement is to be successful, it must go beyond saving bricks and mortar. It must go beyond saving occasional historic houses and opening museums. It must be more than a cult of antiquarians. It must do more than revere a few precious national shrines. It must attempt to give a sense of orientation to our society, using structures and objects of the past to establish values of time and place.<sup>20</sup>

Nowhere was the objective to save a structure from the past to establish values of time and place more evident than in the famous *Penn Central*<sup>21</sup> decision. In *Penn Central* the Court allowed New

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15. *Id.*

16. *Berman v. Parker*, 348 U.S. 26 (1954).

17. *Id.* at 33.

18. Duerksen and Bonderman, *supra* note 10, at 8-9.

19. Special Committee On Historic Preservation, United States Conference Of Mayors, *With Heritage So Rich* (1966).

20. *Id.* at 204, 207.

21. *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978).

York City's designation of Grand Central Terminal as a historic landmark to stand without effecting a "taking" of Penn Central's property.<sup>22</sup> The Court supported the New York City Landmarks Commission's finding that "to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke . . . . The 'addition' would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity."<sup>23</sup> The Court thereby held that the government could require property owners to preserve that property in its present state without effecting a taking.<sup>24</sup>

The romantic appeal of the treasures to be found on the thousands of ships beneath the waves is interpreted differently by various parties. Salvors are most likely to be interested in the recovery of bullion, armaments, and other high-value artifacts. Historians, however, are interested in the bullion and the armaments, but are also interested in cookware, clothing, human remains, and the vessels themselves. For the historian, ordinary objects tell as much, if not more, than fantastic objects about the realities of life at the time. Unlike historic buildings which need to be first analyzed for modern alterations, sunken ships provide the unique opportunity to observe a virtually unchanged object from the past. The exclusion of shipwrecks from historic preservation efforts is antithetical to the goal of historic preservation law—to save the physical remnants of the past to establish values of time and place. A sunken ship is a time capsule that provides archaeologists a ready means to study life at the time of the sinking.

### III. FEDERAL HISTORIC PRESERVATION STATUTES

In 1935, Congress passed the Historic Sites, Buildings, and Antiquities Act (Antiquities Act).<sup>25</sup> Congress declared that "it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the

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22. *Id.* at 138. Penn Central argued that the designation, which precluded the building of a skyscraper on the site, was a "taking" of their property without just compensation, in violation of the Fifth Amendment. *Id.* at 128-31. *See* U.S. CONST. amend. V.

23. *Penn Central Transp.*, 438 U.S. at 117-18 (quoting the Landmarks Preservation Commission Record).

24. *Id.* at 138.

25. Antiquities Act, 16 U.S.C. § 461 (1988).

people of the United States.”<sup>26</sup> In furtherance of this objective, Congress designated a number of national sites as historic.<sup>27</sup> Congress arranged for the National Trust for Historic Preservation in the United States (Historic Trust) to “receive donations of sites, buildings, and objects significant in American history and culture, [and] to preserve and administer them for public benefit.”<sup>28</sup> Although shipwrecks do fall within the definition of “objects of national significance,”<sup>29</sup> Congress did not see fit to designate any shipwrecks as National Historic Sites.<sup>30</sup>

The Antiquities Act requires potential excavators of historic sites to “apply to the Federal land manager for a permit to excavate or remove any archaeological resource located on public lands or Indian lands and to carry out activities associated with such excavation or removal.”<sup>31</sup> In addition to the permit requirement, the government may protect historic sites by “withhold[ing] from disclosure to the public, information relating to the location or character of historic resources whenever the head of the agency or the Secretary determines that the disclosure of such information may create a substantial risk of harm, theft, or destruction to such resources . . . .”<sup>32</sup> The Government has not been successful in applying the Antiquities Act to shipwrecks outside the territorial waters of the United States, however.<sup>33</sup>

In 1972, Congress passed the Marine Sanctuaries Act.<sup>34</sup> Congress recognized that the emphasis of public domain protection

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26. *Id.*

27. *Id.*

28. *Id.* § 468.

29. National Historic Preservation Act, 16 U.S.C. 470a(a)(1)(A) (1988).

30. 16 U.S.C. § 461. It is unclear whether any shipwrecks were even considered.

31. 16 U.S.C. § 470 cc (a). The Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. § 1331, provides that “the subsoil and seabed of the Outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition. . . .” *Id.* § 1332 (1). The primary purpose of this subchapter was the resolution of competing claims to ownership of natural resources of offshore seabed and subsoil. *Treasure Salvors, Inc. v. Unidentified and Abandoned Sailing Vessel*, 569 F.2d 330, 331 (5th Cir. 1978).

32. 16 U.S.C. § 470w-3.

33. *See, e.g., Treasure Salvors, Inc.*, 569 F.2d at 330. In this case, the court concluded that the Antiquities Act did not extend to the *Atocha*, a seventeenth century Spanish treasure ship, which rested on the continental shelf, because it was in international waters and beyond the reach of the federal statute.

34. 16 U.S.C. § 1431 (1988).

had focused on land<sup>35</sup> and that the marine environment possessed historical qualities which gave it special national significance.<sup>36</sup> Congress' purposes in enacting the Marine Sanctuaries Act included the identification of areas "of the marine environment of special national significance due to their resource or human use values. . . and to support, promote, and coordinate scientific research on, and monitoring of, the resources of these marine areas[.]"<sup>37</sup> This was to be accomplished by the designation of various areas as "sanctuaries."<sup>38</sup> The Marine Sanctuaries Act defined a sanctuary resource as "any living or nonliving resource . . . that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the sanctuary."<sup>39</sup> Congress included the term historic value within the Act in part to cover shipwrecks.<sup>40</sup> To illustrate, the Marine Sanctuaries Act declared the wreck of the United States ship *Monitor* to be a sanctuary and directed that "a suitable display of artifacts and materials from the United States ship *Monitor* be maintained permanently at an appropriate site in coastal North Carolina."<sup>41</sup>

Although the Marine Sanctuaries Act provided for the protection of certain shipwrecks like the *Monitor*, Congress delegated the responsibility of protecting other shipwrecks to the respective states in which these wrecks are located.<sup>42</sup> In 1987, Congress passed

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35. *Id.* § 1431(a)(1). "[T]his Nation historically has recognized the importance of protecting special areas of its public domain, but these efforts have been directed almost exclusively to land areas above the high water mark[.]" *Id.*

36. *Id.* § 1431(a)(2). "[C]ertain areas of the marine environment possess conservation, recreational, ecological, historical, research, educational, or esthetic qualities which give them special national significance[.]" *Id.*

37. *Id.* § 1431(b)(1) and (3).

38. *Id.* § 1432(8).

39. *Id.* To propose an area as a sanctuary, notice must be given in the Federal Register, and a prospectus on the proposal must be given to the House of Representatives' Committee on Merchant Marine and Fisheries and to the Senate's Committee on Commerce, Science, and Transportation. An environmental impact statement must be drafted and a public hearing must be held. *Id.* § 1434(a)(1) and (2).

40. 16 U.S.C. § 1445(a) (1988). See generally Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, 1972 U.S.C.A.N. (86 Stat.) 4234-80.

41. *Id.* The *Monitor* was the first iron-clad Union warship, famous for its engagement with the CSS *Merrimac*. The *Monitor* sunk in a storm in 1862. DAVID STICK, GRAVEYARD OF THE ATLANTIC 53-57 (1952).

42. Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101(a) (1988) [hereinafter ASA].

the Abandoned Shipwreck Act (ASA),<sup>43</sup> giving the states the responsibility for the management of abandoned shipwrecks in state waters.<sup>44</sup> The ASA requires states to “guarantee recreational exploration of shipwreck sites[] and 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.”<sup>45</sup> This legislation’s design was to protect the shipwrecks found in the submerged lands of the United States.<sup>46</sup> It makes funds available to states interested in creating underwater parks for the protection of shipwrecks. Congress allocated these funds from the Historic Preservation Fund of the National Historic Preservation Act “for the study, interpretation, protection, and preservation of historic shipwrecks and properties.”<sup>47</sup> The ASA purports to encourage partnerships “among sport divers, fishermen, archeologists, [and] salvors, and . . . recognize[s] the interests of individuals and groups engaged in shipwreck discovery and salvage.”<sup>48</sup> Through the ASA, the United States claims title to all abandoned shipwrecks found embedded in submerged lands, on coralline formations protected by states, or included or eligible to be included in the National Register.<sup>49</sup> The ASA also states that the “law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 of this title applies.”<sup>50</sup> How then, is the ASA to inspire

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43. *Id.* § 2101.

44. *Id.* § 2101(b). Before the ASA, there was confusion as to the ownership of abandoned shipwrecks. The ASA first claimed all shipwrecks as property of the federal government and then transferred title to the various states. *Id.* §§ 2105(a) and (c).

45. *Id.* § 2103(a)(B) and (C).

46. The definition of submerged lands can be found in the Submerged Lands Act, 43 U.S.C. § 1301 (1988).

47. *Id.* § 2103(b).

48. *Id.* § 2104(a)(2) and (4).

49. *Id.* § 2105(a). The ASA requires that the public be given “adequate notice of the location of any shipwreck to which title is asserted . . . [and] a written determination that an abandoned shipwreck meets the criteria for eligibility for inclusion in the National Register of Historic Places [must be composed] . . .” *Id.* § 2105(b). The ASA also transfers title of all abandoned shipwrecks (except those on public lands or on Indian lands) to the state in whose land the shipwreck is embedded. *Id.* § 2105(c) and (d).

50. *Id.* § 2106(a). The law of salvage and the law of finds do not apply, then, to shipwrecks that are: “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.” *Id.* § 2105(a)(1)-(3). The law of salvage and the law of finds still applies to shipwrecks not covered by the ASA, though. *Id.* § 2106(b); *see supra* note 33.



partnerships among the various groups listed in section 2104(a)(2) through (4) if profit motives are eradicated? It seems more likely that finders of sunken treasure will seek to unite only to find a way to avoid application of the ASA, which requires that the shipwrecks be both abandoned and embedded in the submerged lands of a state.<sup>51</sup>

#### IV. OWNERSHIP RIGHTS IN FOUND PROPERTY

John Locke posited that commingling labor with a thing establishes ownership of it.<sup>52</sup> However, the common law has a different approach. “For the common law, *possession* or ‘occupancy’ is the origin of property.”<sup>53</sup> Furthermore, “first” possession is the origin of title.<sup>54</sup> “[W]hat counts as possession, and why is it the basis for a claim to title?”<sup>55</sup> Possession, as defined in *Pierson v. Post*, includes both notice to the world through a clear act and reward for useful labor.<sup>56</sup> In *Brumagin v. Bradshaw*, the California Supreme Court illustrated the principle of a “clear act.”<sup>57</sup> This case was the result of two parties contesting ownership of the Potrero district of San Francisco. Each party claimed ownership through an original possessor’s title, and the case turned on whether the first of these supposed owners had committed some clear act to establish possession.<sup>58</sup> If he had not, then his successors in interest could not claim ownership, and a later “first possessor” could then pass title to

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51. *Id.* § 2101. Embeddedness depends on whether the shipwreck is “firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof.” *Id.* § 2102(a). The concept of abandoned property is discussed in Part III of this Comment, *infra*.

52. John Locke, *Second Treatise of Government* § 25, TWO TREATISES OF GOVERNMENT 327 (P. Laslett rev. ed. 1960) (1st ed. London 1690). There are problems with this theory of ownership, however. “First, without a prior theory of ownership, it is not self-evident that one owns even the labor that is mixed with something else.[] Second, even if one does own the labor that one performs, the labor theory provides no guidance in determining the scope of the right that one establishes by mixing one’s labor with something else.” Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 73-4 (1985) (footnote omitted).

53. Rose, *supra* note 52, at 74 (citing 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*8).

54. *Id.* at 75.

55. *Id.* at 74-75. Professor Rose’s article analyzes the “quaint old cases” with which property law teachers “love to challenge their students.” *Id.*

56. *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805); Rose, *supra* note 52, at 77.

57. *Brumagin v. Bradshaw*, 39 Cal. 24 (1870).

58. *Id.*

his successors in interest.<sup>59</sup> The concept of “adverse possession” illustrates the principle of a reward for labor.<sup>60</sup> Essentially, then, the individualistic act of separating property from the commons of unowned things and declaring possession of that property is the foundation of ownership.<sup>61</sup>

There are, however, methods other than adverse possession by which one can establish ownership of property. Ownership rights on newly found, previously owned property vary greatly depending on whether the property in question was either lost or abandoned. If the owner of property parts from that property involuntarily and does not know the location of it, then the common law classifies that property as “lost.”<sup>62</sup> Finders of lost property have titular ownership that is enforceable against all but the true owner.<sup>63</sup> Property is abandoned, though, when the owner has purposely and completely relinquished all ownership interest.<sup>64</sup> The courts have reasoned that abandoned property has reverted to a state of nature, and a finder of ownerless property receives absolute title over it.<sup>65</sup> “Although an owner of lost property may eventually abandon it, the owner must perform some positive act and show intent to withdraw ownership before the property is classified as abandoned.”<sup>66</sup>

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59. Rose, *supra* note 52, at 78; *see also* Brumagin v. Bradshaw, 39 Cal. at 24.

60. 7 RICHARD POWELL, THE LAW OF REAL PROPERTY ¶ 1012 (P. Rohan rev. ed. 1984). Although property rights acquired by adverse possession present many interesting questions and difficulties, a discussion of this topic is outside the scope of this Comment, since the process of adverse possession requires possession for a certain length of time. *Id.* Since salvors of sunken treasure seek to establish ownership immediately upon possession, the principles of adverse possession are not germane.

61. Rose, *supra* note 52, at 88.

62. Campbell v. Cochran, 416 A.2d 211, 221 (Del. Super. Ct. 1980); 1 Am. Jur. 2D *Abandoned, Lost, and Unclaimed Property* § 2 (1962) [hereinafter *Abandoned, Lost, and Unclaimed Property*]; 36 C.J.S. *Finding Lost Goods* § 1 (1961) [hereinafter *Finding Lost Goods*].

63. *Finding Lost Goods*, *supra* note 62, § 3.

64. 1 C.J.S. *Abandonment* § 2 (1985); *Abandoned, Lost, and Unclaimed Property*, *supra* note 62, § 2.

65. *Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 336-37 (5th Cir. 1978) (citing *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456-57 (E.D. Va. 1960); *Abandoned, Lost, and Unclaimed Property*, *supra* note 62, § 16).

66. Douglas S. Cohen, Comment, *Should Noli Forfendi Apply to Sunken Ships?*, 73 B.U. L. REV. 193, 194 (1993) (citing *Abandoned, Lost, and Unclaimed Property*, *supra* note 62, § 11 (stating that “[t]he primary elements [of abandonment] are the intention to abandon, and the external act by which that intention is carried into effect”). It should be noted that

The English common law doctrine of *bona vacantia*<sup>67</sup> governed certain types of abandoned property, including wrecks<sup>68</sup> and treasure troves.<sup>69</sup> Once the United States adopted the common law, however, *bona vacantia* lost its importance, and the doctrine of escheat began to govern state acquisition of both real and personal property.<sup>70</sup> Principles of escheat do not apply to treasure troves, however.<sup>71</sup> “The ‘finders keepers’ rule governing treasure trove rewards . . . trespassers by allowing them to keep the trove they find without reimbursing the owner of the land. The landowner has no rights to treasure trove discovered by a trespasser.”<sup>72</sup> American law distributes treasure trove to the finder by awarding possession, as though the property was merely “lost” or “mislaid” and ownership accrues only when the true owner cannot be found.<sup>73</sup> The finder of the property can obtain title to newly found, previously owned property if that property has reverted to the state of nature or if the true owner cannot be discovered.<sup>74</sup>

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“*noli forfendi* is not a Latin term but . . . means ‘finders keepers, losers weepers.’” *Id.* at 193 n.1.

67. *Bona vacantia* literally means “vacant goods.” BLACK’S LAW DICTIONARY 177 (6th ed. 1990). Under the doctrine of *bona vacantia*, the rights to certain types of property passed to the sovereign, since society’s claim through the Crown was stronger than the claim of the finder or other holder of the property. See generally F. ENEVER, *BONA VACANTIA UNDER THE LAW OF ENGLAND* (1927) (thoroughly discussing the *bona vacantia* doctrine).

68. “Wrecks” are goods or cargo thrown onto land from a shipwreck for which no owner can be ascertained. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*290-1.

69. Treasure trove evolved from the Old French phrase “tresor trové” which meant found treasure. G. HILL, *TREASURE TROVE IN LAW AND PRACTICE* 1 (1936). A “treasure trove” is “money or coin, gold, silver, plate, or bullion . . . found hidden in the earth, or other private place, the owner thereof being unknown.” BLACKSTONE, *supra* note 68, at \*295 (emphasis in original).

70. “Escheat” generally is “reversion of property to the state in consequence of a want of any individual competent to inherit.” BLACK’S LAW DICTIONARY 545 (6th ed. 1990). See 1 A. ANDREOLI & D. SHUMAN, *GUIDE TO UNCLAIMED PROPERTY AND ESCHEAT LAWS* 2:1 (1985); Note, *Origins and Development of Modern Escheat*, 61 COLUM. L. REV. 1319, 1319-20 (1961).

71. Some authors have argued that neither escheat nor the law of finds should apply to treasure troves. See generally Leeanna Izuel, Comment, *Property Owners’ Constructive Possession of Treasure Trove: Rethinking the Finders Keepers Rule*, 38 UCLA L. REV. 1659 (1991).

72. *Id.* at 1662.

73. *Id.* at 1662 n.22.

74. *Id.* at 1671-72.

## V. APPLICATION AND DISTINCTION OF SALVAGE LAW AND FINDS LAW

Salvage is the voluntary service of saving lives or a vessel or her cargo from marine peril by those with no legal duty to do so.<sup>75</sup> The determination of whether salvage law or the law of finds applies to shipwrecks depends upon whether the property is determined to be lost or abandoned. If the property was lost, then salvage law applies.<sup>76</sup> If the property was abandoned, then the law of finds applies.<sup>77</sup> The law of salvage is presumed to apply unless the salvor can invoke the law of finds by proving that the property was abandoned.<sup>78</sup> Salvors obtain liens on retrieved property that entitle them to awards payable by the owner of the property as compensation for their expense and effort in the salvage operation.<sup>79</sup> “Although the finder of the shipwreck seeks title to the treasure or find, the law of salvage creates a presumption that the finder saved the property for the true owner and is thus only entitled to the award.”<sup>80</sup> Salvors must overcome significant hurdles if they are to obtain title to shipwrecks. A salvor’s claim must defeat the claims of numerous other parties, including the state in which the property was found, the previous owner, any prior finders, and the federal government.<sup>81</sup> The determination of who gets title to the shipwrecks is important to the preservation of these artifacts. Salvors need to know whether they can keep the objects they find, just as previous owners need to know whether they may claim any of the recovered treasures. Similarly, the state and federal governments need to know whether they have title in order to determine their responsibilities toward the preservation of objects raised from the vessel. Other interested groups will need to know who has title to the various artifacts in order to lobby for proper preservation. This section will analyze several cases in order to develop an understanding of the competing interests in claims of

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75. *The Sabine* established the three elements involved in a salvage claim: voluntary service, successful salvage, and marine peril. *The Sabine*, 101 U.S. 384 (1879). See also MARTIN J. NORRIS, *THE LAW OF SALVAGE* § 2 (1958).

76. NORRIS, *supra* note 75, § 158.

77. *Id.*

78. *Id.*

79. *Id.* § 12.

80. Cohen, *supra* note 66, at 195; accord NORRIS, *supra* note 75, § 157.

81. Cohen, *supra* note 66, at 195.

salvage from sunken vessels.<sup>82</sup> It is helpful to divide these cases into three categories: 1) vessels found in riverbeds; 2) vessels found along the coast or in the Great Lakes; and 3) vessels found in international waters. It is additionally helpful to look at each of these categories in a chronological fashion. Interested groups and their positions have changed over time. There is also a noticeable difference in the treatment of shipwrecks found in these various locations.

A. *Vessels in Riverbeds*

A number of facets make vessels found in riverbeds unique. The remains of riverbed shipwrecks are less likely to be spread over a great distance,<sup>83</sup> and are more likely to be completely within a particular state's jurisdiction.<sup>84</sup> The case of the iron tanker *Gut Heil*,<sup>85</sup> although of little historical interest, sets the tone for wrecks found in rivers: courts will apply the law of finds unless Congress passes a contrary law. The *Bertrand*<sup>86</sup> presents a situation in which a riverboat was found on federal land. The government's claim to the vessel and its artifacts was uncontested, and preservation efforts were successful enough to make the remains of the *Bertrand* a special exhibit at the DeSoto National Wildlife Refuge. A court reached a very different result in the case surrounding the *Harold*.<sup>87</sup> Although no one had found the vessel, the court was ready to give salvors the right to search discrete areas of the river in order to recover a valuable cargo of silver. The *Harold* court did not obligate the salvors to make

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82. It is appropriate at this time to mention an interesting peculiarity of maritime law. Admiralty jurisdiction may be assumed *in rem*, over the ship itself, as though the vessel was a legal person upon whom process can be served. This legal fiction is criticized in G. Gilmore & C. Black, *The Law Of Admiralty*, 615-22 (2d ed. 1975), but remains in force. Since the past owners of so many shipwrecks are unknown to most finders, many suits in fact proceed *in rem* against the vessel, her tackle, and appurtenances. The ship does not even need to be named for effective service of process. See, e.g., *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 333-34 (5th Cir. 1978).

83. See generally Joe J. Simmons III, *Steamboats on Inland Waterways: Prime Movers of Manifest Destiny*, in *SHIPS AND SHIPWRECKS OF THE AMERICAS* 189-206 (George F. Bass ed., 1988).

84. See generally *Chance v. Certain Artifacts Found and Salvaged from The Nashville a/k/a The Rattlesnake*, 606 F. Supp. 801 (S.D. Ga. 1984) (The wreck of *The Nashville* was located on the Ogeechar river which is entirely within the state of Georgia).

85. See *infra* notes 90-93 and accompanying text.

86. See *infra* notes 95-98 and accompanying text.

87. See *infra* notes 99-106 and accompanying text.

provisions to preserve the historical value of the ship when and if found. A court awarded artifacts removed from the *Nashville*,<sup>88</sup> on the other hand, to the state of Georgia. The *Nashville* divers had not salvaged these artifacts because their lack of care exposed the artifacts to greater peril. The court reasoned that mere removal of objects from a wreck is not worthy of a salvage award. Yet, extreme lack of care for the preservation of historical objects resulted later that year in what may have been the greatest destruction of an underwater archaeological find in the case of the *DeBraak*.<sup>89</sup> In the wanton search for treasure, the nearly intact 200-year-old vessel was raised, breaking her apart and spilling archaeological treasures into the mouth of the Delaware River. Shipwrecks found in riverbeds demonstrate examples of both incredibly successful preservation efforts and numbing disregard for the value of underwater archaeological finds.

In April of 1913, the German-owned iron tanker *Gut Heil* collided with two other vessels in the Mississippi River and sank near Baton Rouge, Louisiana.<sup>90</sup> After several unsuccessful attempts to raise the vessel, the owner abandoned her and notified the Engineer's office of the United States Army.<sup>91</sup> More than three years later, John W. Thompson took possession of the vessel as an abandoned wreck, and contracted to have the vessel raised.<sup>92</sup> The Court of Claims found well-settled law that a derelict and abandoned vessel in the navigable waters of the United States "belongs to that person who finds it and reduces it to possession."<sup>93</sup> The court noted that Congress could have provided that abandoned vessels in the navigable waters of the United States become the property of the Treasury, "but no such law has been passed, and until it is the principles of natural law must

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88. See *infra* notes 108-120 and accompanying text.

89. See *infra* notes 122-134 and accompanying text.

90. *Thompson v. United States*, 62 Ct. Cl. 516, 517 (1926).

91. *Id.*

92. *Id.* Thompson paid taxes on the vessel in 1917, nearly eight months before she was successfully raised. On August 7, 1918, the Secretary of the Navy requisitioned the *Gut Heil* for use in the war effort, and awarded Thompson \$700,000 as just compensation. Thompson later proved that the vessel was worth \$1,100,000, and the Court of Claims enforced payment by the government of the difference with interest. The United States attempted to argue that the vessel was the property of the United States, or alternatively, was seized as the property of an alien enemy. *Id.* at 517-24.

93. *Id.* at 524.

prevail.”<sup>94</sup> Four years after the vessel’s loss, the raised *Gut Heil* certainly was not considered historically important. The parties to this action were interested solely in the value of the vessel itself. The Court of Claims, however, set the tone for the future disposition of abandoned shipwrecks—that the law of finds would apply unless Congress passed a law contrary to that principle.

The important discovery of the steamship *Bertrand* occurred on federal land in 1968. The government protected the remains of the steamboat under the auspices of the Antiquities Act. In 1864, a local newspaper reported, “[t]he *Bertrand* leaves today on her first trip for St. Louis; . . . [s]he is a nice trim little steamer, neat but not gaudy, and sits upon the water like a duck.”<sup>95</sup> Five months after the *Bertrand* steamed out of Wheeling, West Virginia, the ship which sat on the water like a duck was beneath the waters of the Missouri River. Rumored to have held “a cargo of quicksilver, whiskey, and even gold, the story of her sinking became a legend of remarkable proportions. For a century she had been the object of many searches, and only until her remains were discovered in 1968 was the full impact of her role in early river traffic on the frontier appreciated.”<sup>96</sup> Salvors Jesse Pursell and Sam Corbino found the *Bertrand* at the DeSoto National Wildlife Refuge in Nebraska and, like hundreds before them, hoped to recover the valuable cargo. Although they never found the gold and whiskey, “the real treasure—that of the riverboat and the cargo in its holds—has become a part of the heritage of the people of the United States . . . . The remains of very few historic sites in the United States can compare with the diversity and number of cultural objects recovered from the riverboat’s holds.”<sup>97</sup> This resulted in the “saving of one of America’s most meaningful treasures of the past [at the DeSoto National Wildlife Refuge].”<sup>98</sup> The federal government assumed ownership of the *Bertrand* due to its

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94. *Id.*

95. WHEELING DAILY INTELLIGENCER, Wheeling, W. Va. (Nov. 26, 1864), reprinted in JEROME E. PETSCH, THE STEAMBOAT BERTRAND 5 (1974).

96. PETSCH, *supra* note 95, at 6. For an interesting account of the discovery and role of the *Bertrand*, see *id.* at 21-127.

97. *Id.* at vi.

98. *Id.* at vii.

location on federal land. The government's ownership resulted in the intense study and preservation of the vessel.<sup>99</sup>

In the case of a Confederate monument in Georgia, however, the district court was more careful. In 1984, three salvors brought suit in the District Court for the Southern District of Georgia to determine their rights to artifacts they salvaged from *The Nashville*, a side-wheel steamship sunk during the Civil War.<sup>100</sup> *The Nashville's* mission was to raid and plunder Union merchant ships.<sup>101</sup> In February of 1863, *The Nashville* ran aground in the Ogeechee River, and a Union ship, the *USS Montauk*, fired upon and sunk *The Nashville*.<sup>102</sup> *The Nashville* remained in place for more than a century when the plaintiffs applied for and failed to obtain a state permit to excavate the ship. Nevertheless, the plaintiffs began diving activities and removed a number of artifacts from the wreck.<sup>103</sup> The plaintiffs sought title to the artifacts, or, alternatively, a salvage award for their efforts in recovering the items.<sup>104</sup> The state of Georgia consented to the court's jurisdiction as to the adjudication of title to the artifacts, but raised an Eleventh Amendment immunity defense to the salvage

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99. *Id.* at 28-112. It appears as though the government's claim of ownership of the *Bertrand* was uncontradicted, and it can be assumed that Messrs. Pursell and Corbino were rewarded for their salvage efforts. A similar occurrence of a discovery of a vessel is described in Warren Riess, *History From The Sea* 185-87 (Peter Throckmorton, ed., 1987). Throckmorton's account is of a late eighteenth-century tobacco ship found underground in lower Manhattan in New York City. The ship had apparently been used as a landfill when the city expanded in 1737 in order to better service ships of over 100 tons. Developer Howard Ronson, who had bought the property under which the ship was found, discovered it during a routine preconstruction archaeological investigation. The ship was partly excavated, but to attempt to save the entire vessel and properly store it would have cost millions of dollars. "After long consultations among the various parties and with outside consultants . . . it was agreed that the bow was such an important treasure it had to be saved. The rest of the ship, after careful study, was to be let go. Ronson stepped forward and offered to underwrite the removal and conservation of this unique relic." *Id.* at 186. The ship was subject to the law of finds, since the vessel was a treasure trove, and ownership rights rested with Ronson. This situation shows an interesting compromise between the finder-owner and conservationists. The former was free to build his thirty-story office building, and the latter were given the time to study and excavate the ship and save a piece of it for the Mariners' Museum in Newport News, Virginia. *Id.* at 186-87.

100. *Chance v. Certain Artifacts Found and Salvaged from The Nashville a/k/a The Rattlesnake*, 606 F. Supp. 801 (S.D. Ga. 1984).

101. *Id.* at 803.

102. *Id.*

103. *Id.*

104. *Id.*



claim.<sup>105</sup> The court reasoned that since “*The Nashville* has rested at the bottom of the Ogeechee, unclaimed by its owner since 1863, . . . the law of finds applies.”<sup>106</sup> The court held, however, that since the vessel was “embedded” in state property (the riverbed is part of the submerged lands of the state),<sup>107</sup> the embeddedness exception to the law of finds caused title to the vessel to vest with the state.<sup>108</sup> The court determined that “even those artifacts found resting in ‘loose surface soil’ satisfy the embeddedness requirement as anticipated by common law.”<sup>109</sup> Therefore, both the state’s Eleventh Amendment immunity defense and a failure to satisfy all of the elements of a successful salvage barred plaintiffs from a salvage award.<sup>110</sup> The court relied on scientific evidence that stated that after a number of years, a sunken vessel enters into a state of equilibrium that protects its contents.<sup>111</sup> The court found that the plaintiffs had failed to take adequate steps to ensure the conservation of the artifacts, and had also subjected *The Nashville* to “new environmental stimuli, which, if allowed to continue, could increase the deterioration process.”<sup>112</sup> The court denied both title and salvage to the finders, and awarded the artifacts to the State of Georgia.<sup>113</sup> The lack of care for historic preservation resulted in a loss for the would-be salvors, but a partial victory for preservationists.

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105. *Chance*, 606 F. Supp. at 808. The Eleventh Amendment provides, “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States . . .” U.S. CONST. amend. XI.

106. *Chance*, 606 F. Supp. at 804.

107. See Submerged Lands Act, 43 U.S.C. § 1301 (1988).

108. The embeddedness exception is well settled law that had its origins in the United States in the 1904 decision *Ferguson v. Ray*. *Ferguson v. Ray*, 77 P. 600 (1904). In that case, the plaintiff noticed gold-bearing quartz stones near the surface of the defendant’s property. After excavating more than seventeen pounds of the mineral, Ferguson claimed ownership under the law of finds. The court held, though, that “the possession of the land carries with it in general, by our law, possession of everything which is attached to or under that land, and in absence of better title elsewhere, the right to possess it also.” *Id.* at 603.

109. *Chance*, 606 F. Supp. at 806.

110. *Id.* at 809.

111. *Id.* at 808.

112. *Id.* at 808-9. The court stated that the artifacts removed from *The Nashville* were only “removed,” and not “salved,” because they were now “subject to a much greater rate of deterioration than if they had remained on the river bottom.” *Id.* at 809. A number of the artifacts had been piled in the plaintiffs’ backyard where they were subject to “random and deleterious exposure to the various elements.” *Id.*

113. *Chance*, 606 F. Supp. at 809.

Unfortunately, care for important historical data is not always a priority in dealings between states and salvors. In 1984, Sub-Sal, Inc., a Nevada corporation, obtained a permit from the Delaware Department of Natural Resources and Environmental Control (DNREC) to search for the *DeBraak*.<sup>114</sup> The H.M.S. *DeBraak* was a Dutch cutter captured by the British navy and recommissioned as a sloop of war in 1797.<sup>115</sup> This vessel sank at the mouth of the Delaware River in 1798, and was reputed to have held a cargo of gold bullion, jewels, and specie.<sup>116</sup> The case of the *DeBraak* is particularly noteworthy because her salvage had a great influence on preservation law. *DeBraak's* fate helped America “[come] to grips with the controversial question of what to do with historic shipwrecks.”<sup>117</sup> The question pitted treasure salvors and sport divers against underwater archaeologists and other preservationists. “*DeBraak* weighed in as the cause célèbre and . . . turn[ed] the tide in this conflict. As an example of legally sanctioned destruction of a historic ship for profit, *DeBraak* was ‘exhibit number one’ in the indictment of ‘business as usual.’”<sup>118</sup>

Once *DeBraak's* identity had been verified, “the State of Delaware . . . negotiate[d] a salvage lease for an area of 1.6 square miles. The state’s share would be the usual twenty-five percent of the

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114. Sub-Sal, Inc. v. *The DeBraak*, No. 84-296-CMW, 1992 U.S. Dist. LEXIS 2461, at \*3 (D. Del. Feb. 4, 1992).

115. *Id.* at \*1.

116. *Id.* at \*1-2. “Few shipwrecks in American waters have generated the interest that followed in *DeBraak's* wake . . . .” DONALD SHOMETTE, *THE HUNT FOR HMS Debraak* vii (1993).

117. SHOMETTE, *supra* note 116, at viii. This book is an excellent account of the history of the *DeBraak* and the salvage efforts that eventually all but destroyed her.

118. *Id.* Salvage operations on the *DeBraak* were costly. Sub-Sal paid \$1,500 for the search permit and an additional \$7,500 security bond in addition to leasing the bottomlands section of the Delaware for \$20,000. Diving operations alone cost over \$2,000 a day. *Id.* at 208-10. The costs increased dramatically after the wreck was found and experts were needed to verify the identity of the *DeBraak*. *Id.* at 211.

The “treasure” of *DeBraak*, a little over 650 coins, yielded a paltry return for the millions of dollars invested in their recovery. *DeBraak's* real treasure is the historical picture gleaned from the study of the commonplace, the familiar, and the long-forgotten objects of everyday life left to us in her wreck. They comprise the ignored and incidental objects for the salvor but the very stuff of history for the rest of us.

*Id.* at viii.

total value of all treasure and artifacts recovered.”<sup>119</sup> It seemed as though the State of Delaware was more interested in *DeBraak's* booty than necessarily in the preservation of the vessel's unique artifacts.<sup>120</sup> Under the advice of an admiralty lawyer, Sub-Sal arrested the *DeBraak*. By arresting the wreck, “the site would technically come under the jurisdiction of the United States district court, and sub-Sal [sic] would be its agent. The procedure, although arcane, had been employed throughout the Western world for hundreds of years and formed the very basis of salvage law. . . . [O]n July 26, Chief Justice Walter K. Stapleton signed an order designating Sub-Sal the wreck's legal custodian.”<sup>121</sup> The court did not debate the issue of history and archaeology versus the objectives and the methods of treasure salvage. The fact that the *DeBraak* was a site of great historical and archaeological significance eluded the attention of Delaware's state government.<sup>122</sup> “[T]he prospects for conflict between business and archaeology that lay ahead seemed to be of little concern to . . . Governor (and presidential hopeful) Pierre S. Dupont, IV, [who] granted Sub-Sal, Inc., a one-year lease with exclusive salvage rights to the remains of HMS *DeBraak*.”<sup>123</sup> The frustration of finding so little treasure prompted the salvors to engage in what was, for sport divers and archaeologists alike, the most horrific event in the search for the *DeBraak's* treasure—the raising of the remains of the vessel.<sup>124</sup> As a number of the archaeologists predicted, the raising of the vessel both destroyed much of the fabric of the ship architecture

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119. *Id.* at 214. “‘The stage was then set for a three-year salvage operation,’ as one later agent for Delaware wrote, ‘that would end in one of the worst maritime archaeological disasters in recent history.’” *Id.* (citing DAVID V. BEARD, *HMS DeBraak: A TREASURE DEBUNKED, A LEGEND REVEALED* 39 (1989) (in published thesis, East Carolina University)).

120. *Id.* at 214-16.

121. SHOMETTE, *supra* note 116, at 214 (citing BRODEUR, *TREASURE OF THE DeBraak*; 37 GRIFFITH, *THE LEGEND REVEALED*).

122. *Id.* at 216.

123. *Id.* “Owing to both the salvors' priorities and the selective nature of the retrieval process, many artifacts which were of historical or archaeological significance . . . were lost.” *Id.* at 221. Shomette lists among the lost artifacts *DeBraak's* galley stove, known as a Brodie Stove, which was one of only two such stoves ever recovered. Also lost were the physical remains of *DeBraak's* crew and Spanish prisoners as well as other items of no apparent monetary value. *Id.* One of the most intriguing finds was not actually part of the *DeBraak* at all. A United States Light House Service buoy was found less than two feet from the hull of the wreck. “[F]or several of the salvors the implications were clear. It was just possible that one of the earlier expeditions had actually recovered the [*DeBraak's*] treasure and never reported their success--for obvious reasons.” *Id.* at 246-47.

124. *Id.*

and resulted in the loss of uncountable artifacts that fell from the wreck as sediments shifted during the moving process.<sup>125</sup> After a lengthy court battle, the United States District Court for the District of Delaware found that “title to the *DeBraak* and its artifacts belongs to the State of Delaware.”<sup>126</sup> The famed treasure of the *DeBraak* was a myth with unusually damaging consequences—the nearly complete destruction of one of the most important underwater archaeological sites in the United States.

Historic preservationists would of course prefer to see more *Bertrand*-like results. There, salvors helped the government discover a vessel loaded with archaeological treasures, and great efforts were made to preserve the vessel and its artifacts. The lack of a lawsuit involving the *Bertrand* leads to the conclusion that the government had placated the salvors. Unfortunately, this example stands alone in the case of shipwrecks in riverbeds. It was not a direct concern for historic value that awarded *The Nashville*'s artifacts to the State of Georgia, but rather a conclusion that since the would-be salvors had not properly cared for the vessel or her appurtenances, the divers had not satisfied all of the requirements of a successful salvage. If Chance and the others had made adequate efforts to preserve the artifacts, it seems as though the court may have awarded custody of these items to their finders. *Gut Heil*, *Harold*, and *DeBraak* are examples of complete disregard for archaeological value. Preservationists and courts must develop a means to ensure more *Bertrand*-like results and fewer *DeBraak*-like results. Clearly, the saddest case is that of *DeBraak*. The groups that aided in her destruction were motivated by greed. The search for sunken treasure resulted in the deliberate disregard for objects of historical importance. Any solution to this problem, however, must provide for both the protection of artifacts and the financial appeasement of finders, for the very discovery of underwater archaeological data depends upon the activities of finders.

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125. *Id.* at 249-58

126. *Sub-Sal, Inc. v. The DeBraak*, No. 84-296-CMW, 1992 U.S. Dist. LEXIS 2461, at \*4 (D. Del. Feb. 4, 1992).

*B. Vessels in U.S. Coastal Waters and the Great Lakes*

Vessels found in the coastal waters of the United States and the Great Lakes are like those found in riverbeds in that they are subject to the jurisdiction of the federal courts. Unlike their river-bound sisters, however, these vessels are more likely to be notorious for their historical value and for the masses of treasure they have aboard. It is for these reasons that the states within whose waters these ships are found take an active interest in the vessels. When three Spanish treasure ships, *Santa Rosalea*, *San Lorenzo de Escoral*, and *Santa Clara* and one English ship, *Royal George*, were found near Ocean City, Maryland, the state contested federal jurisdiction under the Eleventh Amendment immunity defense.<sup>127</sup> This defense prevented the court from awarding the finder either title or a salvage award.

In contrast, however, when *Whydah*, the flagship of the infamous pirate Captain Bellamy was found near Cape Cod in 1982, the State of Massachusetts also raised the immunity defense in federal court.<sup>128</sup> When the finders pressed their claim to the shipwreck in state court, they were awarded title to the vessel, her cargo, and her appurtenances.<sup>129</sup> The court reasoned that the Submerged Lands Act was inapplicable because that Act applied only to natural, not man-made resources.<sup>130</sup> Furthermore, the court found that Congress' enactment of the ASA would have been unnecessary if the Submerged Lands Act applied to shipwrecks.<sup>131</sup> This defeat for preservationists was followed by a successful conviction in Michigan of a man accused of receiving and concealing state-owned stolen property. The property in question was two wood stock anchors from *The Richard Winslow*, the first four-masted sailing vessel on the Great Lakes.<sup>132</sup> Michigan successfully argued its claim to the wreck and the anchors in state court, scoring a victory for historic preservationists.

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127. See *infra* notes 146-150 and accompanying text.

128. See *infra* notes 151-152 and accompanying text.

129. See *infra* notes 153-160 and accompanying text.

130. See *infra* note 156 and accompanying text.

131. See *infra* notes 157-160 and accompanying text.

132. See *infra* notes 161-163 and accompanying text.

In a case similar to the *Harold*,<sup>133</sup> a salvor attempted to lay claim to a Spanish galleon he believed had sunk off the shore of Cape Canaveral.<sup>134</sup> Although the State of Florida finally prevented his salvaging efforts, he succeeded in causing damage to whatever ship may have been there and to the seabed adjoining the Cape Canaveral National Seashore. Successful prevention of this salvor's activities was a victory for both preservationists and environmentalists.

Historic preservationists recorded another victory with the eighteenth century shipwreck, *El Salvador*, found off the coast of North Carolina.<sup>135</sup> The court paid deference to a North Carolina statute claiming the wreck, and dismissed the salvor's motion claiming title to *El Salvador*. Courts reached similar results in Guam regarding the Spanish galleons *Nuestra Senora del Bien Viaje* and *Nuestra Senora del Pilar*.<sup>136</sup>

This tide of preservationist successes began to turn with the finding by Harry Zych of two vessels, *Lady Elgin* and *Seabird* in Lake Michigan.<sup>137</sup> Although the court eventually awarded *Seabird* to the State of Illinois, it awarded *Lady Elgin* to an organization backed by Zych, the Lady Elgin Foundation, which bought the rights to the vessel from an insurance company that was the successor to an insurance company that had insured the vessel in 1851. The court held that the vessel, untouched for over one hundred thirty years, had not been abandoned by its now defunct insurer, and that the insurer's successor was the owner of the lost property, and was free to sell the rights to the lost *Lady Elgin*. Shipwrecks found in coastal waters and the Great Lakes have generally been protected by the states in whose waters they lie. Generally, preservation efforts have been successful and a number of states and territories have specifically protected shipwrecks near their shores. Cases such as the *Whydah* seem to be aberrations. The fate of the *Lady Elgin* is disturbing, however, and sets the precedent for *Central America*, a wreck found in international waters.

In January of 1981, Subaqueous Exploration & Archaeology, Ltd. instituted three separate *in rem* actions for the arrest of four

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133. See *supra* notes 98-107 and accompanying text.

134. See *infra* notes 168-177 and accompanying text.

135. See *infra* note 186.

136. See *infra* notes 178-186 and accompanying text.

137. See *infra* notes 213-227 and accompanying text.

abandoned shipwrecks, the *Santa Roselea*, *Royal George*, *San Lorenzo de Escoral*, and *Santa Clara*, found off the shore of Ocean City, Maryland.<sup>138</sup> The United States Marshal for the District of Maryland arrested the ships. The State of Maryland entered a special appearance and, “specifically preserving its sovereign immunity, filed motions to dismiss for lack of subject matter jurisdiction and to vacate the arrests of the seized vessels.”<sup>139</sup> The plaintiff argued that federal admiralty and maritime law governed the actions, and that state regulation of submerged lands were both vague and contrary to the principles of admiralty law *in rem* proceedings.<sup>140</sup> The court found that it lacked jurisdiction over the vessels. “[T]hese actions are proceedings directly against the State of Maryland; that the State of Maryland has a colorable claim of possession of the defendant vessels and their cargo . . . . The Court, therefore, further finds that its Orders directing the United States Marshal to arrest the defendant vessels were improvidently issued, and that this Court improperly took possession of such vessels.”<sup>141</sup> Despite Subaqueous’ protests,<sup>142</sup> the court could not award the salvor possession of the vessels. By implication, the court charged Maryland with the care of these historic shipwrecks.

In November of 1982, Maritime Underwater Surveys, Inc. (Maritime) located the *Whydah*, “a notorious pirate ship which foundered off the Cape Cod coast in April, 1717 . . . [and] prayed for title and possession of the vessel, her tackle, armament and cargo . . . .”<sup>143</sup> The state of Massachusetts intervened, and moved for dismissal of the action due to lack of federal jurisdiction under the Eleventh Amendment immunity defense. The court granted the motion, which

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138. Subaqueous Exploration & Archaeology, Ltd. v. Unidentified, Wrecked and Abandoned Vessel, 577 F. Supp. 597 (D. Md. 1983), *aff’d* 765 F.2d 139 (4th Cir. 1985). The three vessels were “believed to be carrying a king’s ransom in gold altarplate and other riches. . . .” *Id.* at 600.

139. *Id.*

140. *Id.* at 601.

141. *Id.* at 603.

142. “Dr. Richard Passwater, a biochemist and head of [Subaqueous Exploration & Archaeology] Ltd., said the operation would carefully preserve historical artifacts. ‘We’re not just hunting for gold or silver.’” *Maryland Regional News*, UPI, June 17, 1982, available in LEXIS, Nexis Library, UPI File.

143. *Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 717 F.2d 6 (1st Cir. 1983) [hereinafter *Maritime I*].

was affirmed by the First Circuit.<sup>144</sup> Maritime persisted, however, and challenged the state's claim of ownership in state court.<sup>145</sup> Maritime's claim was successful because the court applied the maritime law of finds and discounted the state's claim of sovereignty.<sup>146</sup> The court concluded that the Submerged Lands Act applied only to offshore natural resources, and not to abandoned shipwrecks.<sup>147</sup> The court reasoned that since "[t]he Act itself explicitly cautions that nothing therein should 'be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation,'"<sup>148</sup> that admiralty jurisdiction still applied to sunken vessels on or in the seabeds belonging to the states. The court supported this with a reference to the ASA.<sup>149</sup> The court reasoned that there would have been no need for Congress to pass the ASA if the states already had a legitimate claim to abandoned shipwrecks under the Submerged Lands Act.<sup>150</sup> The court thereby reasoned that the United States was sovereign, and that the federal maritime law of finds applied to the *Whydah*.<sup>151</sup> Maritime, as first finder, had title to the *Whydah* and her treasures. "Thus, the claim of the Commonwealth founders on the shoals of Federal sovereignty as surely as the *Whydah* foundered on the shoals off Wellfleet, ironically suffering the same fate as the 1717 proclamation of the Colony's Royal Governor Samuel Shute, which claimed the wreck for the Crown."<sup>152</sup> The court thereby condemned *Whydah*, the flagship of

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144. *Id.* at 8.

145. *Commonwealth v. Maritime Underwater Surveys, Inc.*, 531 N.E.2d 549 (Mass. 1988) [hereinafter *Maritime II*]. Neither of the parties deny the historical importance of the *Whydah*, the flagship of the notorious pirate Captain Samuel Bellamy. A well-written account of the history of the *Whydah* from the time of its capture by Bellamy to its foundering on the coast of Cape Cod and the attempts of the Royal Governor to secure the wreck for the Crown appears in the Appendix of this case. *Id.* at 553-56.

146. *Id.* at 552.

147. *Id.*

148. *Id.* at 552 (citing Submerged Lands Act, 43 U.S.C. § 1311(d) (1988)).

149. *Maritime II*, 531 N.E.2d at 553. The ASA, by its own terms, did not apply to any legal proceedings brought before April 28, 1988. ASA, 43 U.S.C. § 2106(c).

150. *Maritime II*, 531 N.E.2d at 552.

151. *Id.*

152. *Id.* Royal Governor Samuel Shute issued a proclamation claiming everything of value recovered from the wreck for the Crown. He sent the famous Captain Cyprian Southack to enforce his order, but when Captain Southack arrived, locals had already taken virtually all of the valuables. What Captain Southack recovered was, ironically, plundered by pirates on his return voyage to Boston. *Id.* at 555. The court noted that "the luckless



the infamous Captain Bellamy, to the possession of Maritime. The salvor was then free to tear her apart in the search for coins, gold, silver, ivory and other valuables. Since *Whydah* was Maritime's property, the salvage company was under no legal obligation to protect her historical artifacts.

In a contrasting state court action, in 1984, a man was convicted of receiving and concealing state-owned stolen property.<sup>153</sup> The court convicted Mark Massey for removing two wood stock anchors from the bottom of Lake Michigan near the Straits of Mackinac from the sunken wreck, *The Richard Winslow*, which sank in the late 1800s. *The Richard Winslow* was the first four-masted sailing vessel on the Great Lakes.<sup>154</sup> He appealed the conviction, claiming that the Michigan law that protects abandoned property of historical or recreational value<sup>155</sup> unconstitutionally interfered with federal maritime salvage law. Massey claimed that the anchors were the subject of marine salvage and were not the property of the state. The court found that “[t]itle and dominion over the actual lands which are covered by the waters of the Great Lakes and which are within state boundaries belong to each state within which those lands are located. In Michigan, the title to such lands is held in trust for the public . . . It is clear, therefore, that the actual land upon which submerged ships or other property lie . . . belongs to the State of Michigan.”<sup>156</sup> The court found that there was no conflict between the Michigan statute and federal maritime salvage law, since the statute did not place limits on exploration or fix compensation; it “simply controls the preservation of historical, cultural or recreational articles, a matter traditionally within the competence of the state and within

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Captain Southack, though he failed miserably in his own efforts to secure the treasure, aided significantly in Maritime's successful search efforts by accurately mapping the site of the wreck.” *Id.* at 556.

153. *People v. Massey*, 358 N.W.2d 615 (Mich. 1984).

154. *Id.* at 617.

155. MICH. STAT. ANN. § 13.21 *et seq.* (Callaghan 1987 & Supp. 1993-1994). The relevant statute provides: “(2) The state reserves to itself a possessory right or title superior to that of a finder to abandoned property of historical or recreational value found on the state owned bottomlands of the [Great Lakes]. This property shall belong to this state with the administration and protection vested in the department of natural resources and the secretary of state.” MICH. STAT. ANN. § 13.21(2) (brackets in original).

156. *Massey*, 358 N.W.2d at 618.

the concept of the state's police power."<sup>157</sup> The court therefore reinstated the conviction against Massey.<sup>158</sup>

Unlike Massey, amateur sport diver Randy Lathrop found a treasure without finding the ship.<sup>159</sup> He was diving off the coast of Cape Canaveral National Seashore, Florida in 1984 when he discovered several Spanish silver coins bearing the bust of King Charles III of Spain that had been milled in Mexico City from 1777 through 1782. In January of 1988, he returned to the site and instituted an *in rem* proceeding against the alleged Spanish galleon he believed sank there.<sup>160</sup> Both the State of Florida and the National Park Service denied him a permit to attempt to locate and salvage the vessel. He attempted to gain ownership to the alleged vessel by having her arrested. Lathrop, using dredging equipment, failed for three years to find the vessel. At that point, the Army Corps of Engineers informed Lathrop "that the Court's admiralty jurisdiction would not preclude the United States from regulating salvage activities that occurred within their dredge-and-fill jurisdiction."<sup>161</sup> Lathrop continued his search for the alleged galleon using dredging machinery that created enormous craters in the seabed. Within a week, the Army Corps of Engineers issued a cease and desist order.<sup>162</sup> The State of Florida also vigorously sought to stop the destruction of the seabed. Florida claimed, and the United States did not dispute, that it had given the seashore to the federal government subject to a reverter clause.<sup>163</sup> Lathrop's excavation methods were directly contrary to the purposes and specific allowable uses of the

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157. *Id.* at 620 (citing *Cobb Coin Co., Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186 (S.D. Fla. 1981)).

158. *Id.* at 620.

159. *Lathrop v. Unidentified, Wrecked and Abandoned Vessel*, 817 F. Supp. 953 (M.D. Fla. 1993)

160. *Id.* at 956. "For centuries, Cape Canaveral, Florida has been known for its numerous navigational hazards. Historical records indicate many ships--possibly in the hundreds--have been lost on the Cape's treacherous shoals." *Id.* at 956 n.1.

161. *Id.* at 959.

162. *Id.*

163. *Id.* at 963. The reverter clause stated that if the United States used the lands for any purpose other than "to preserve and protect the outstanding natural, scenic, scientific, ecologic, and historic values of certain lands, shoreline, and waters of the State of Florida, and to provide for public outdoor recreation use and enjoyment," the property would revert to the State of Florida. *Id.* (citing 16 U.S.C. § 459j (1988)).

land grant to the government, and the Park Commission feared “that it would lose an important national park.”<sup>164</sup>

Both the State of Florida and the United States sought to prevent Lathrop from continuing his search and salvage activities. There was a conflict between Florida and the United States, however, that impeded the litigation. Each government believed that title to the alleged shipwreck rested with itself. The State of Florida argued that the grant reached only up to the shoreline, and did not include the submerged lands adjacent to the Parkland. The United States argued that the grant included the submerged lands adjacent to the Parkland. The Lathrop court did not decide this conflict, because the State of Florida entered the litigation and the United States appeared only as an *amicus curiae*.<sup>165</sup>

Curiously, the court engaged in a lengthy discussion of the substantial likelihood of Lathrop’s success, the validity of his salvage claim, the validity of his ownership claim in a vessel he had not yet found, the injury he caused to the alleged vessel and the park, and the disservice caused to the general public before it denied Lathrop’s motion for a preliminary injunction against interference with his salvage efforts.<sup>166</sup> This analysis is unusual only because a discussion of the applicable law, the Abandoned Shipwreck Act, is absent from the entire opinion. The ASA clearly establishes that either Florida or the United States can prevent the salvage of a wreck by denying a permit.<sup>167</sup> If either governmental agency can stop the excavations, then certainly, both should have the power to prevent the salvage operation.<sup>168</sup> The court may have reasoned that the Abandoned Shipwreck Act could not be applied when no abandoned shipwreck had been found.

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164. *Lathrop*, 817 F. Supp. at 957.

165. *Id.* at 959-60 and n.7.

166. *Id.* at 961-67.

167. Abandoned Shipwreck Act, 43 U.S.C. § 2105-6 (1988).

168. In a similar earlier decision, the Court of Appeals for the Eleventh Circuit affirmed a decision by the District Court for the Southern District of Florida that held that an unidentified eighteenth century English shipwreck found in Biscayne National Monument was the property of the United States. The court based its decision on the maritime law of finds and the Submerged Lands Act. *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985) and *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 568 F. Supp. 1562 (S.D. Fla. 1983).

Unlike Lathrop, a diver named Robert Marx successfully found the wrecks of two Spanish galleons off the coast of Guam.<sup>169</sup> He brought an *in rem* suit against the two galleons after the government of Guam denied him a permit to explore and recover items from the wrecks. Guam claimed sovereign immunity against the *in rem* action, which the Court of Appeals for the Ninth Circuit supported.<sup>170</sup> Marx and Guam believed that the two wrecks found were the remains of the *Nuestra Senora del Bien Viaje (Viaje)* and the *Nuestra Senora del Pilar (Pilar)*. Both wrecks lie within three miles of the coast of Guam. Marx claimed to be the first finder of the wrecks, and sought title to them, or, in the alternative, a salvage award for recovered artifacts. The government of Guam, however, claimed title to the wrecks based on its “Protection and Recovery of Underwater Historic Property Act,” which is the aegis to “underwater historic properties situated under the navigable waters and territorial seas of the territory.”<sup>171</sup> Marx fought Guam, stating that the government claim to sovereign immunity was not colorable, since Guam did not have actual possession of the *res*. The court found, however, that

actual possession of the *res* is not a prerequisite in an *in rem* action to the assertion of a claim to sovereign immunity . . . . [P]ossession is more relevant when the ship’s crew can sail away then [sic] when its primary value may be found in having it left alone, preserved for posterity.<sup>172</sup>

Marx contended that the need for the adoption of the Abandoned Shipwreck Act of 1987 demonstrated that Guam did not, in fact, own either the *Pilar* or the *Viaje*.<sup>173</sup> The court found, however, that the

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169. Marx v. Government of Guam, 866 F.2d 294 (9th Cir. 1989).

170. *Id.* at 301.

171. *Id.* at 295. (citing GUAM GOV’T CODE §§ 13985.29-.35 (Supp. 1974) (Underwater Historic Property Act)).

172. Marx, 866 F.2d at 299 and n.5. The court cites *Compania Espanola v. Navemar*, which held that the sovereign nation of Spain did not have a colorable title to an active sailing vessel that was no longer in its possession. *Compania Espanola v. Navemar*, 303 U.S. 68 (1938). The court found that Guam did need a colorable claim to the wrecks in order to succeed with its immunity defense. Marx, 866 F.2d at 299-300.

173. 43 U.S.C. § 2101. The ASA was found to be inapplicable due to the fact that it was adopted after the commencement of the suit, and the ASA “specifically exempts legal proceedings brought prior to its enactment.” Marx, 866 F.2d at 300.

Conveyance of Submerged Lands to Territories Act,<sup>174</sup> and Guam's Underwater Historic Property Act<sup>175</sup> gave Guam at least a colorable claim to the wrecks.<sup>176</sup> The court ordered the U.S. Marshal to turn over the artifacts from the *Pilar* and the *Viaje* to the Guam government.<sup>177</sup> The court's deference to Guam's preservation statute is an indication of the effectiveness of such statutes.<sup>178</sup>

In 1989, Illinois had no statute that protected underwater historic property. In 1988 and 1989 respectively, diver Harry Zych found the remains of the SB *Lady Elgin* and the SB *Seabird* in Lake Michigan in Illinois state waters.<sup>179</sup> Zych filed two *in rem* actions

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174. 48 U.S.C. § 1705 (1988). Section 1705 was modeled after the Submerged Lands Act, 43 U.S.C. § 1311 (1988), and gave Guam control over submerged lands within three miles of its shores.

175. GUAM GOV'T CODE §§ 13985.29-.35 (Supp. 1974).

176. *Marx*, 866 F.2d at 301.

177. *Id.* at 301. One week after the *Marx* decision in the Ninth Circuit, a similar result was reached in the First Circuit. In *Fitzgerald v. Unidentified Wrecked and Abandoned Vessel*, a group of salvors were denied title to the HMS *Defiance*, a wreck off the coast of Puerto Rico. The Court of Appeals for the First Circuit held that exclusive title rested with the government of the Commonwealth of Puerto Rico, which could deny contrary claims to ownership via immunity provided by the Eleventh Amendment. *Fitzgerald v. Unidentified Wrecked and Abandoned Vessel*, 866 F.2d 16 (1st Cir. 1989).

178. The court's deference to local historic preservation statutes is also seen in a 1987 case involving diver Alan Riebe. In 1987, Riebe brought an *in rem* proceeding in the District Court for the Eastern District of North Carolina to obtain title and possession of an eighteenth century shipwreck, the *El Salvador*. *Riebe v. Unidentified, Wrecked and Abandoned 18th Century Shipwreck*, 691 F. Supp. 923 (E.D.N.C. 1987). Although the court found that it could determine the disposition of title as to parties other than the State of North Carolina, North Carolina's assertion of Eleventh Amendment immunity prevented the federal court from determining North Carolina's ownership status so long as the state had a colorable claim. The court found that North Carolina's claim was indeed colorable based on the state's assertions of title based on the Submerged Lands Act, 43 U.S.C. § 1311 (1988), and N.C. GEN. STAT. § 121-22 (1993) that gave the state exclusive title, dominion, and control of all underwater archaeological finds in state waters for more than ten years. *Riebe*, 691 F. Supp. at 924. The court therefore allowed the state's motion to dismiss as to determination of its claim. *Id.* at 927.

179. *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB Lady Elgin*, 746 F. Supp. 1334 (N.D. Ill. 1990) [hereinafter *Zych I*].

The *Lady Elgin*, built in 1851, was a celebrated sidewheel steamer which carried passengers, mail and freight on Lake Michigan and Lake Superior. On September 8, 1860, she was overloaded with approximately 450 passengers returning to Milwaukee after attending a Democratic Party rally in Chicago for presidential candidate Stephen Douglas. A violent storm arose, decreasing the visibility, and she was fatally rammed by the lumber schooner *Augusta*. She sank soon afterwards in what is perhaps the most famous shipwreck in the history of the Great Lakes. At least 100 passengers were saved, but some 300 perished in the calamity. Those

seeking ownership of each vessel or a salvage award.<sup>180</sup> Initially, the court consolidated both cases because they raised identical issues.<sup>181</sup> Zych's purpose in filing the federal *in rem* proceedings was to become the exclusive owner of the sunken vessels. Before the court could rule on Zych's case, Illinois intervened "for the limited purpose of moving to dismiss the cases on the basis of the State's sovereign immunity . . . ."<sup>182</sup> Zych argued that Illinois' claim of immunity was invalid and that the ASA was unconstitutional.<sup>183</sup> The United States

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who went down with the ship included so many Irish political activists that the sinking has been credited with transferring the balance of power in Milwaukee from the Irish to the Germans . . . . Even the United States Supreme Court has had occasion to comment on the wreck of the *Lady Elgin*: "The marine disasters upon these [Great] [L]akes, in consequence of the few natural harbors for the shelter of vessels, and the consequent losses of life and property, are immense . . . . The appalling destruction of life in the loss of the *Erie* upon Lake Erie, and of the *Superior* and *Lady Elgin* upon Michigan, are still fresh in the recollections of the country."

*Id.* at 1336 and n.1 (citing *Moore v. American Transportation Co.*, 65 U.S. (24 How.) 1, 38 (1860) (footnote omitted) (brackets omitted)).

The *Seabird*, another sidewheel steamship, was carrying one hundred passengers when it sank in Lake Michigan in 1868. Although of less political importance, the sinking of the *Seabird* was recounted by author James L. Elliot:

The *Seabird* . . . was given a thorough going over and freshly painted inside and out . . . . Everything went well on that first trip until *Seabird* was off Waukegan, a little after 6:00 A.M. on the morning of April 9. The night had been cold and the large stove in the main cabin had been kept going all night to provide some warmth and comfort for the passengers. As daylight came, the porter cleaned the fire in the cabin stove and then stepped to the rail to throw the still hot ashes over the side. Unfortunately he emptied his container into the wind and the hot ashes, fanned by the brisk northwesterly wind, blew back aboard and into the cargo stowed on the main deck. Some highly varnished tubs, packed in excelsior, were quickly ignited and the dread cry of "Fire!" swept the ship! As the flames made their way topside and into the cabin area they were fed by the newly painted woodwork and the entire steamer was soon engulfed in a mass of flame. There was no place for the terrified passengers and crew to go except over the side into the numbing cold waters of Lake Michigan. Survival in the 36-degree water lasted only a few minutes for most . . . . Only two passengers were saved.

*Zych I*, 746 F. Supp. at 1337 (quoting J. ELLIOTT, RED STACKS OVER THE HORIZON 41-43 (1967)).

180. *Zych I*, 746 F. Supp. at 1336-37.

181. *Id.* at 1337.

182. *Id.*

183. The U.S. Constitution gives federal courts jurisdiction over all admiralty and maritime cases. "The judicial Power shall extend to . . . all Cases of admiralty and maritime Jurisdiction." U.S. CONST. art. III, § 2. Zych argued that the ASA removed maritime

intervened and submitted a brief defending the constitutionality of the ASA. Other interested parties submitted amicus curiae briefs.<sup>184</sup>

“While the motion to dismiss was pending, plaintiff formed the Lady Elgin Foundation in order to pursue another avenue of gaining possession of the wreck.”<sup>185</sup> The Foundation entered into a contract with CIGNA Property & Casualty Company, by which the Foundation acquired title to *Lady Elgin*. The insurance company was the successor to the company that had insured the hull and cargo of the vessel in the 1850s.<sup>186</sup> CIGNA claimed that it held valid title to the wreck by virtue of its payment on a claim by its insured.<sup>187</sup> The Foundation then intervened in the case and joined the argument opposing Illinois’ motion to dismiss. “Because this development placed the *Lady Elgin* case in a very different posture than the *Seabird* case, the Court vacated its consolidation order.”<sup>188</sup> *Zych I* continued as two separate cases—one against the *Lady Elgin*, and another against the *Seabird*. The court found that the State’s Eleventh Amendment argument did not preclude the form of relief that Zych sought.<sup>189</sup> The court found that the state had no colorable claim under existing state law,<sup>190</sup> but that the Submerged Lands Act gave the state a colorable claim to the shipwrecks if they were “embedded.”<sup>191</sup> Despite Zych’s contention that the State needed to prove embeddedness, the court decided that, given similar cases, “the shipwrecks are *likely* embedded in submerged lands which the State owns pursuant to the Submerged Lands Act, and the embeddedness exception of the common law of finds gives the State a colorable

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jurisdiction over the law of finds and the law of salvage from the federal system, and that this action violated article three, section two of the Constitution. *Zych I*, 746 F. Supp. at 1337.

184. *Zych I*, 746 F. Supp. at 1337. The American Sport Divers Association submitted an amicus brief on behalf of Zych and The National Trust for Historic Preservation in the United States submitted an amicus brief on behalf of Illinois. *Id.* at 1337 n.2.

185. *Zych I*, 746 F. Supp. at 1337.

186. *Id.* at 1337-38.

187. *Id.*

188. *Id.* at 1338.

189. *Zych I*, 746 F. Supp. at 1339. The court also concluded that if the state had a colorable claim to the property, then the suit was against the state; conversely, if the state’s claim was not colorable and the state would have no right to intervene and dismiss the case. *Id.* at 1341.

190. *Id.* at 1342. “The Illinois statutes identified by the State . . . do not grant the State an ownership interest in the shipwrecks.” *Id.*

191. *Id.* at 1343.

claim of ownership in the shipwrecks.”<sup>192</sup> The court concluded that the ASA merely reinforced what was already true about title to embedded abandoned shipwrecks found on submerged lands in a state—that such shipwrecks were owned by the state in which they were found under the provisions of the law of finds and the Submerged Lands Act. The court then analyzed the constitutionality of the ASA and found that the Act did not offend constitutional principles.<sup>193</sup> The court concluded with a discussion of whether it should dismiss one or both actions entirely. The court held that both actions should be dismissed, but only dismissed Zych’s claim against the state in the *Lady Elgin* action. Judge Rovner expressed sympathy for Zych’s position. “It was plaintiff who expended considerable time and resources in pursuing the wrecks. Without plaintiff’s efforts, the wrecks might remain undiscovered. The State, by contrast, appears to have sat idly by, showing no interest in the wrecks until plaintiff brought this lawsuit. Plaintiff’s contention . . . is attractive.”<sup>194</sup>

Approximately three months later, Zych again brought an *in rem* complaint against the *Lady Elgin*.<sup>195</sup> The complaint asserted that the ship was abandoned and that he was the rightful owner pursuant to the law of finds. The state once again intervened, moving for dismissal and claiming ownership under the ASA and newly revised Illinois statutes. The *Lady Elgin* Foundation also intervened and claimed ownership.<sup>196</sup> The Foundation’s claim was based on the fact that “Aetna Insurance Co. became the owner of the shipwreck when, in 1860, it paid out \$11,993.20 on the loss pursuant to an insurance

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192. *Id.* (emphasis added). The issue of embeddedness returned on appeal. *See infra* note 207 and accompanying text.

193. *Id.* at 1344-49.

194. *Zych I*, 746 F. Supp. at 1351. The court also noted that “[i]t could reasonably be concluded that state ownership of abandoned shipwrecks is necessary to protect the wrecks against those divers and salvors who may be unscrupulous.” *Id.* Less than two weeks later, Zych filed a second action in the district court. *Zych v. The Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB Lady Elgin*, No. 89 C 6501, 1990 U.S. Dist. LEXIS 12909 (N.D. Ill. Sept. 26, 1990) [hereinafter *Zych II*]. Zych and The *Lady Elgin* Foundation retained the same attorney even though both were seeking ownership of the vessel. The court granted the Foundation’s motion for leave to file its claim and answer only on two conditions: “that the Foundation retain independent counsel, and the plaintiff pursues his claim of title and thus maintains a case or controversy.” *Id.* at \*4 (citation omitted). *Zych II* set the scene for a third trial in district court.

195. *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB Lady Elgin*, 755 F. Supp. 213 (N.D. Ill. 1991) [hereinafter *Zych III*].

196. *Id.* at 214. *See also Zych II*, 1990 U.S. Dist. LEXIS 12909 at \*2.



contract covering the vessel and her cargo. In April of 1990, the Foundation executed an agreement with CIGNA, the successor of Aetna.”<sup>197</sup> According to that agreement, CIGNA transferred its ownership interest in the *Lady Elgin* to the Foundation for twenty percent of the sale of artifacts from the shipwreck.<sup>198</sup> Due to evidence of Aetna’s and CIGNA’s record keeping, the court concluded that as between the Foundation and Zych, “Zych ha[d] not provided sufficient evidence from which a reasonable fact-finder could conclude that Aetna abandoned the wreck of the *Lady Elgin*.”<sup>199</sup> The court upheld the Foundation’s claim and dismissed Zych’s claim for ownership.<sup>200</sup> As between the State of Illinois and the Foundation, Mr. Kane, the state’s attorney, announced that “we are no longer a party before this court.”<sup>201</sup> The court was surprised by the state’s announcement. In the previous litigation in which the state was found to be immune (*Zych I*), the court held that the state had a colorable claim of ownership pursuant to the common law of finds and the ASA.<sup>202</sup> The court concluded that since both of these claims were based on the assumption that the vessel has been abandoned, the State no longer had a colorable claim of ownership to the vessel.<sup>203</sup> Accordingly, the court entered judgment declaring the Foundation the sole owner of the *Lady Elgin*.<sup>204</sup>

Within two months, Zych returned to the district court and entered a motion for a preliminary and permanent injunction, requesting “that the Court enter an injunction prohibiting the interference by any person with Zych’s exclusive salvage rights in the *Lady Elgin*.”<sup>205</sup> The court concluded that since the Foundation had title to the *Lady Elgin* and had contracted with Zych to be the sole salvor of the vessel, the injunction was reasonable. Furthermore, the court found that “[t]he public’s interest lies in the protection of the historically significant artifacts immersed in the waters of Lake

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197. *Zych III*, 755 F. Supp. at 214.

198. *Id.*

199. *Id.* at 216.

200. *Id.* at 218.

201. *Id.* at 217.

202. *Zych I*, 746 F. Supp. at 334.

203. *Zych III*, 755 F. Supp. at 217.

204. *Id.* at 217-18.

205. *Zych v. The Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB Lady Elgin*, No. 89 C 6501, 1991 U.S. Dist. LEXIS 2962, at \*2 (N.D. Ill. Mar. 13, 1991) [hereinafter *Zych IV*].

Michigan. Interference by unauthorized salvors, which would disrupt Zych's authorized salvage operation, would subvert the public interest in maintaining historically significant items to the greed of individual salvors."<sup>206</sup>

The following month, Zych had a partial triumph in the Court of Appeals for the Seventh Circuit.<sup>207</sup> Although the *Lady Elgin* affair appeared to have been concluded, the *Seabird*'s title had not. Zych's argument in *Zych I* was that the State had not proven that the *Seabird* was "embedded," and therefore could not claim ownership under the law of finds or the ASA.<sup>208</sup> Zych also renewed his argument that the ASA was unconstitutional as being an impermissible interference with admiralty jurisdiction and destructive of the uniformity of admiralty law. The court criticized the district court's analysis, finding that both colorability assessments and the Eleventh Amendment immunity defense were irrelevant.<sup>209</sup> The court held that the ASA was dispositive, if it was constitutional.<sup>210</sup> "[I]f the ASA constitutionally can be applied to the *Seabird*, Zych has simply failed to state a right to relief."<sup>211</sup> The court raised two questions that it needed to resolve with respect to the *Seabird*. The first question was whether the ASA should apply at all—was *Seabird* a wreck of historical significance within the scope of the statute?<sup>212</sup> The court found that the result of the issue of embeddedness was sufficient to determine "historicity."<sup>213</sup> Second, the court considered whether the ASA contravened any constitutional principles by removing a certain block of cases from admiralty jurisdiction.<sup>214</sup> The court decided that even though it would prefer to resolve a suit on its first appeal, it would not entertain the "constitutionality of a federal statute on the mere assumption that it might be relevant."<sup>215</sup> The court then reversed the district court's judgment to dismiss and remanded with instructions "to find whether the *Seabird* is embedded and, if so,

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206. *Id.* at \*15.

207. *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the Seabird*, 941 F.2d 525 (7th Cir. 1991) [hereinafter *Zych V*].

208. *See supra* note 198 and accompanying text.

209. *Zych V*, 941 F.2d at 528.

210. *Id.* at 530.

211. *Id.* at 528.

212. *Id.* at 530.

213. *Id.*

214. *Id.*

215. *Id.* at 534.

whether the ASA is constitutional so as to permit its application to this case.”<sup>216</sup>

The end of December of the following year saw the final disposition of the *Seabird*.<sup>217</sup> The court noted that the *Seabird* was, indeed, embedded in the seabed under Lake Michigan.<sup>218</sup> The court then concluded that the ASA did not restrict federal admiralty jurisdiction, did not violate due process, and did not violate the Tenth Amendment by forcing the states to implement a federal program.<sup>219</sup> The court concluded the litigation of the *Seabird* by dismissing Zych’s case for lack of jurisdiction.<sup>220</sup> The results in the differing disposition of titles to the *Lady Elgin* and the *Seabird* lead to a question of the effectiveness of the ASA.

The success of preservation efforts depends, to a great extent, on local historic preservation laws. If Massachusetts had had, at the time of the discovery of the *Whydah*, a statute that protected underwater archaeological finds, the artifacts aboard may not have been lost. It is clear that Michigan’s law protected the anchors of *The Richard Winslow*, and that Guam’s law protected *Nuestra Senora del Bien Viaje* and *Nuestra Senora del Pilar*. Illinois had no relevant statute at the time of Zych’s discoveries of *Lady Elgin* and *Seabird*. Although *Seabird* was eventually awarded to the State under the ASA, this Act failed to keep *Lady Elgin* from the salvor. This may not be due entirely to some deficiency in the federal act. By releasing control over historic shipwrecks to the states, the ASA absolves itself of responsibility for these archaeological finds. The states, by implication, become the parties responsible for the protection of historic shipwrecks. *Lady Elgin* was awarded to Zych’s Lady Elgin Foundation because state law allowed a one hundred thirty year old insurance claim held by a successor company to prevail over the state’s claim. This situation finds a successor in the theater of vessels found in international waters in the case of the *Central America*.

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216. *Id.*

217. Zych v. Unidentified, Wrecked, and Abandoned Vessel, Believed to be the SB *Seabird*, 811 F. Supp. 1300 (N.D. Ill. 1992) [hereinafter *Zych VI*].

218. *Id.* at 1308.

219. *Id.* at 1308-21. The Tenth Amendment argument stemmed from the Supreme Court’s decision in *New York v. United States*, 112 S. Ct. 2408 (1992).

220. *Zych VI*, 811 F. Supp. at 1321.

C. *Vessels in International Waters*

Sunken shipwrecks in international waters generally escape the jurisdiction and legislative control of the United States. International waters are generally very deep. Due to the great depth of the water in which most sunken vessels lie, these wrecks are difficult to find and expensive to salvage. Yet, incentives remain to find these vessels. The richest Spanish galleon ever to have sunk, *Nuestra Senora de Atocha*, was found in international waters off the Florida coast and the finder was granted exclusive title to the vessel and any treasures he could recover.<sup>221</sup> The treasure on board *Atocha* was valued at over \$250 million, and it belonged entirely (less taxes) to the finder. The government's interest was not solely for the historical integrity of the vessel. If the federal government owned the vessel, then it could keep or sell the gold, silver, and other valuables on board. It was just as upsetting to historic preservationists to realize that the government could not claim the vessel as it was that there was no way to guarantee that the items rescued from the depths would remain in one collection.

Another defeat for historic preservationists followed the *Atocha* in the case of the *Central America*.<sup>222</sup> After the decision in the case of the *Lady Elgin*,<sup>223</sup> a number of insurance companies and other interests laid claim to the more than one billion dollars in gold aboard the *Central America*, which salvors found off the coast of South Carolina. The discovery of the *Titanic* in 1987 aroused great public sentiment and spurred the government into action to protect the shipwreck from salvors.<sup>224</sup> The federal government, recovering from its defeat in the case of the *Atocha*,<sup>225</sup> attempted a new strategy. The Congress passed an act that protected the vessel and obligated the executive branch to enter into treaties with other nations to respect the sanctity of the final resting place of the *Titanic*. The government's efforts with the *Titanic* were so successful that it again attempted this strategy with the *Alabama*, a Civil War Confederate battleship found off the coast of France.<sup>226</sup> It is clear that in the international arena,

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221. See *infra* notes 235-246 and accompanying text.

222. See *infra* notes 247-257 and accompanying text.

223. See *supra* notes 187-228 and accompanying text.

224. See *infra* notes 258-270 and accompanying text.

225. See *infra* notes 235-246 and accompanying text.

226. See *infra* notes 271-276 and accompanying text.

the archaeological integrity of vessels will depend upon international treaties.

One of the most heavily litigated cases involving sunken treasure revolved around the 1971 discovery of the *Nuestra Senora de Atocha* (*Atocha*) off the Marquesas Keys forty nautical miles from Key West, Florida.<sup>227</sup> A number of Spanish galleons sank in a hurricane while en route from the Spanish Indies to Spain, including the richest galleon in the fleet, the *Atocha*. "Five hundred fifty persons perished, and cargo with a contemporary value of perhaps \$250 million was lost."<sup>228</sup> Treasure Salvors, Inc. (TSI), a Florida corporation, found the wreck, declared it abandoned, and had the ship arrested by a federal marshal.<sup>229</sup> The court granted the State of Florida an injunction against TSI's salvaging operations until such time as TSI entered into a contract with the state that guaranteed the latter twenty-five percent of the value of all salvaged artifacts.<sup>230</sup> TSI entered into such a contract under protest.<sup>231</sup> The United States then claimed the wreck under the Antiquities Act and the Abandoned Property Act.<sup>232</sup> The court held, though, that neither act applied to the outer continental shelf, where the *Atocha* was located.<sup>233</sup> The

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227. See *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel Believed to be the Nuestra Senora De Atocha*, 408 F. Supp. 907 (S.D. Fla. 1976); *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel Believed to be the Nuestra Senora De Atocha*, 569 F.2d 330 (5th Cir. 1978) [hereinafter *TSI I*]; *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel Believed to be the Nuestra Senora De Atocha*, 459 F. Supp. 507 (S.D. Fla. 1978) [hereinafter *TSI II*]; *Florida v. Treasure Salvors, Inc.*, 621 F.2d 1340 (5th Cir. 1980) [hereinafter *TSI III*]; *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir. 1981); *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, Nuestra Senora De Atocha*, 546 F. Supp. 919 (S.D. Fla. 1981); *Florida v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982) [hereinafter *TSI IV*]; *Florida v. Treasure Salvors, Inc.*, 689 F. 2d 1254 (5th Cir. 1982).

228. *TSI I*, 569 F.2d at 333. A historical summary of the loss of the *Atocha* and the difficulties encountered in salvaging her can be found in Lyon, *The Trouble with Treasure*, 149 NAT'L GEOGRAPHIC 787 (June 1976).

229. *TSI IV*, 458 U.S. at 675.

230. *TSI II*, 459 F. Supp. 507 (S.D. Fla. 1978).

231. *Id.*

232. *TSI I*, 569 F.2d at 335 (citing Abandoned Property Act, 40 U.S.C. § 310 (1988)).

233. OCSLA, 43 U.S.C. § 1331 (1988), brought the Convention on the Continental Shelf into effect in the United States.

Interpretations of the Convention and the Act by legal scholars have, with remarkable accord, reached the same conclusion regarding the nature of control of the United States over the continental shelf. The most compelling explication of the Convention regarding national control over

United States also failed in its attempt to claim the treasures of the *Atocha* as its sovereign prerogative. The court denied this claim based on an 1872 case that denied the government property other than the abandoned and derelict wrecks left behind by the Civil War.<sup>234</sup> The court quickly dismissed the government's argument that the law of salvage did not apply because there was no marine peril.<sup>235</sup> In a new action, the State of Florida challenged the court's finding that awarded TSI title to the *Atocha*, and challenged the arrest of property the state had seized from TSI's salvaging efforts according to the terms of their contract.<sup>236</sup> The Supreme Court, on certiorari, affirmed that part of the Fifth Circuit's holding that stated that the Eleventh Amendment did not bar the process by which the property was seized.<sup>237</sup> TSI had won a major victory, and needed only to pay taxes on the results of its enormous haul. It is fortunate that TSI was responsible enough to preserve most of the historical artifacts it

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non-resource-related material in the shelf area is contained in the comments of the International Law Commission: It is clearly understood that the rights in question 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.

*TSI I*, 569 F.2d at 340 (citing 11 U.S. GAOR, Supp. 9 at 42, U.N. Doc. a/3159 (1956)) (citation omitted).

234. The naval and military operations of both the Northern United States and the Confederate States during the late war had strewn the harbors of the entire coast with numerous wrecks, and also many portions of the country with abandoned or derelict property that rightfully "should come to the United States," either from being originally the property of the United States, or the property of the public enemy, or from having been engaged in violating the blockade. The continuation of the resolution points more plainly at the fact that in the mind of the legislator the property, dues, and claims "that ought to come to the United States" through the late war were intended, and no others. *Russell v. Proceeds of Forty Bales Cotton*, 21 F. Cas. 43 (S.D. Fla. 1872) (No. 12,154).

235. "We believe the government misconstrues both the nature of the law . . . and the law of salvage itself." *TSI I*, 569 F.2d at 336. In a more recent action several months ago, a diver named John Moyer was awarded exclusive salvage rights to the *Andrea Doria*, a Swedish luxury liner that sank in 1956 in international waters 200 miles east of Sandy Hook, New Jersey and 50 miles south of Nantucket, Massachusetts. *Moyer v. The Wrecked and Abandoned Vessel, Known as the Andrea Doria*, No. 93-2377, 1993 U.S. Dist. LEXIS 16447 (D. N.J. Nov. 18, 1993).

236. *TSI IV*, 458 U.S. 670, 678 (1982). The contract between TSI and Florida was held to be invalid in the District Court for the Southern District of Florida and the Fifth Circuit Court of Appeals for lack of consideration. *TSI III*, 621 F.2d at 1350.

237. *TSI IV*, 458 U.S. at 683-99.

recovered.<sup>238</sup> TSI was under only a moral obligation to place these artifacts in a museum.

The Columbus-America Discovery Group (Columbus-America) was not quite as fortunate as TSI. They too found a shipwreck in international waters laden with treasure. However, in a case that followed on the success of Harry Zych in the case of *Lady Elgin*,<sup>239</sup> a large number of parties submitted competing claims. Columbus-America found the ruins of the *Central America*, a vessel that sank 160 miles off the coast of Charleston, South Carolina in 1857 carrying 336 lives and over \$200 million (1857 value) worth of newly prospected gold to a watery grave.<sup>240</sup> Columbus-America filed an *in rem* action seeking title to the wreck.<sup>241</sup> Columbus-America was not the only party interested in the *Central America's* gold, however. All told, there were nearly fifty claimants to the treasures of the *Central America*.<sup>240</sup>

In *Central America I*, the District Court for the Eastern District of Virginia held that the law of finds applied to the ship which had laid undisturbed one and a half miles below the ocean for 130 years, and that Columbus-America had earned the title to the vessel and her treasure by being the first finder of an abandoned vessel.<sup>242</sup> The Fourth Circuit reversed the lower court, holding that there was insufficient evidence to find that the underwriters had abandoned their interests in the gold.<sup>243</sup> The Fourth Circuit concluded, therefore, that the law of salvage, and not the law of finds,

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238. Part of the collection may be viewed at the Mariners' Museum in Newport News, Virginia.

239. See *supra* notes 187-228 and accompanying text.

240. Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel (Believed to be the S.S. *Central America*), 742 F. Supp. 1327, 1328 (E.D. Va. 1990) [hereinafter *Central America I*]. The *Central America* was one of two luxury passenger ships that plied the route from Aspenwall, Panama to New York. Prior to the construction of both the transcontinental railroad and the Panama Canal, the principal route from San Francisco to New York was by steamer to Panama, by train across Panama to Aspenwall, and then by steamer to New York. Much of the gold mined in California arrived on the East Coast by this route. *Id.*

241. *Id.* at 1331.

242. *Central America I*, 742 F. Supp. at 1348. "Plaintiff is entitled to and is vested with the ownership to all of the gold or other artifacts recovered from the *Central America*." *Id.*

243. *Central America II*, 974 F.2d at 459-69. "No matter what exact award is given, though, we are confident that Columbus-America will be justly rewarded for its extensive efforts in salvaging the *Central America*." *Id.* at 469.

was the applicable rule.<sup>244</sup> Judge Widener wrote a very spirited dissent,<sup>245</sup> declaring that his colleagues had reversed the trier of fact simply because they would have decided the case differently. Judge Widener thought the court should have given more deference to the finding of abandonment, since the wreck had been left alone for more than a century and the claimants had not taken an active part in the search for the vessel. Indeed, many of the claimants were corporations that had not come into existence until long after the 1857 disaster.<sup>246</sup>

On remand, the district court dismissed certain claims for the salvaged gold, and distributed much of the rest of the claims to the gold, by percent, to the remaining parties. Some of the gold, the court deemed, was uninsured, and belonged to the finder, Columbus-America.<sup>247</sup> Columbus-America had not learned the lesson that the insurers of the *Central America* had understood from the *Lady Elgin*.<sup>248</sup> An old insurance claim is valid against a shipwreck if the insured had been paid. For the salvor to collect more than a salvage award, that party would need to purchase the rights owned by the companies holding the receipts of old policies.

Certainly, the most famous shipwreck ever to be discovered is the RMS *Titanic*.<sup>249</sup> On April 14, 1912, shortly before midnight, the *Titanic*, dubbed "Unsinkable" collided with an iceberg, sending over 1500 of the wealthiest men and women of Britain and the United States to their deaths. The vessel had been insured for £1,000,000, and nearly all of the property and other valuables aboard went down with the ship. *Titanic* eluded salvors for seventy-five years before a joint team of U.S. and French scientists rediscovered her 560 miles

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244. *Id.* at 468.

245. *Id.* at 470-80. "I respectfully dissent. Erasmus is a tough act to follow. But even tougher is the Supreme Court of the United States." *Id.* at 470 (referring to *Anderson v. Bessemer City*, 470 U.S. 564 (1985) (holding that a reversal is warranted only when the finder of fact is clearly in error)).

246. *Central America II*, 974 F.2d at 471.

247. *Columbus-America Discovery Group v. The Unidentified, Wrecked and Abandoned Sailing Vessel (Believed to be the S.S. Central America)*, No. 87-363-N, 1993 U.S. Dist. LEXIS 18482 (E.D. Va. Nov. 18, 1993).

248. *See supra* notes 187-228 and accompanying text.

249. An excellent account of the discovery of the *Titanic* can be found in Dr. Robert D. Ballard's *The Discovery of the Titanic* (1987). For the classic account of the sinking of the *Titanic*, see W. LORD, *A NIGHT TO REMEMBER* (1955).



off the coast of Newfoundland in over 13,000 feet of water.<sup>250</sup> Many groups quickly planned salvaging operations,<sup>251</sup> but few of these expeditions have taken place. Most historians “feel that there is not enough ‘booty’ aboard to justify the expense of a salvage operation.[] The *Titanic*’s cargo was insured for only \$420,000 for such items as 500 cases of shelled walnuts, 860 rolls of linoleum, and eight cases of orchids—all of which now would be worthless.”<sup>252</sup> Dr. Ballard, the discoverer of the *Titanic*, suggested that the wreck and all it contains should be photographed but otherwise left in place in deference to those who lost their lives in the tragedy, and that commercial salvors should be prevented from ravaging the site.<sup>253</sup>

It is clear that salvage operations on the *Titanic* would have results that are closer in effect to the *Columbus-America* cases<sup>254</sup> than to the *Treasure Salvors* cases,<sup>255</sup> because a number of claimants have already made their claims known.<sup>256</sup> Indeed, the last two years have seen a court battle for exclusive salvage rights to the *Titanic*.<sup>257</sup> In these cases, two salvaging companies, Marex Titanic and Titanic Ventures, each sought exclusive salvage rights. Titanic Ventures was a member of the French and American team that originally discovered the vessel, and by 1992 had recovered approximately 1800 artifacts. Marex Titanic, on the other hand, had never been to the *Titanic*, but claimed that all competing salvors had abandoned salvaging attempts.

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250. Mary S. Timpany, Note, *Ownership Rights in the Titanic*, 37 CASE W. RES. L. REV. 72, 72-73 (1986). Due to the then recent discovery of the *Titanic*, Timpany’s note includes much conjecture on ownership rights and potential future dives on the vessel.

251. “‘Titanic fever’ has would-be salvors planning a myriad of ways to bring the ship, or at least parts of it, to the surface.” *Id.* at 78 (citing Davis, *Titanic: Lost and Found*, POPULAR MECHANICS, Jan. 1986, at 75; Marbach, Katz and Pedersen, *The Sea Gives Up a Secret*, NEWSWEEK, Sept. 16, 1985, at 46; Angier, *After 73 Years, a Titanic Find*, TIME, Sept. 16, 1985, at 70).

252. Timpany, *supra* note 250, at 78 (citing H.R. REP. NO. 393, 99th Cong., 1st Sess. 6 (1985) (statement of Jon Hollis, Spokesperson, Titanic Historical Society)).

253. *The R.M.S. Titanic Maritime Memorial Act of 1985: Hearings on H.R. 3272 Before the Comm. on Merchant Marine and Fisheries*, 99th Cong., 1st Sess. 14 (1985).

254. See *supra* notes 245-252 and accompanying text.

255. See *supra* notes 235-246 and accompanying text.

256. Likely claimants include The Cunard Shipping Line, survivors, heirs, and the survivors’ and heirs’ insurance companies, as well as marine underwriters, such as Lloyds of London, which insured the hull, machinery, and appointments of the *Titanic*. Timpany, *supra* note 250, at 81-85.

257. *Marex Titanic v. The Wrecked and Abandoned Vessel, RMS Titanic*, 805 F. Supp. 375 (E.D. Va. 1992) [hereinafter *Marex I*]; *Marex Titanic v. The Wrecked and Abandoned Vessel, RMS Titanic*, 2 F.3d 544 (4th Cir. 1993) [hereinafter *Marex II*].

Marex introduced two artifacts, the authenticity of which are in doubt. Due to factual misrepresentations on both parts, the district court denied Marex's claim and ruled in favor of Titanic Ventures.<sup>258</sup> The Fourth Circuit, however, found that the district court had violated the Federal Rules of Civil Procedure and reversed the lower court's ruling.<sup>259</sup>

These rulings became moot, however, when later that year Congress passed into law *The R.M.S. Titanic Maritime Memorial Act of 1985*.<sup>260</sup> This Act supported Dr. Ballard's wish by preventing alteration, disturbance, and salvage of the *Titanic* and requiring the United States to enter into international agreements to establish guidelines for the research, exploration and, if appropriate, salvage of the vessel.<sup>261</sup> The federal government had learned the importance of the archaeological value of vessels in international waters, and *The R.M.S. Titanic Maritime Memorial Act* is a clear victory for both the government and for historic preservationists.

An extremely unusual case surfaced in 1992 when the United States claimed that a ship's bell offered for auction in New York was federal property.<sup>262</sup> In 1864, the U.S.S. *Kearsarge*, a Union man-of-war secretly outfitted with iron chain mail covering its hull concealed by planking, fired upon and sunk the C.S.S. *Alabama*, a Confederate commerce raider off the coast of Cherbourg, France.<sup>263</sup> An English

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258. *Marex I*, 805 F. Supp. at 376-79.

259. *Marex II*, 2 F.3d at 545-46. The court held that Marex had violated Fed. R. Civ. P. 41(a)(1)(i) by not having filed an action for dismissal prior to the service by their opponents of an answer.

260. *The R.M.S. Titanic Maritime Memorial Act of 1985*, 16 U.S.C. § 450rr (1988).

261. *Id.*

I wanted to place a memorial plaque on the stern in memory of my friend Bill Tantum and to all those lost on the *Titanic*. More than anybody else, Bill had kept my *Titanic* dream afloat. And a memorial to him would also be a tribute to the members of the *Titanic* Historical Society, who have done so much to keep the memory of the ship alive. . . . I had originally thought of putting the plaque on the more nobly preserved bow. But those who died on the *Titanic* had gathered on the stern as the ship tilted bow first. The stern had been their final haven.

BALLARD, *supra* note 249, at 156-57.

262. *United States v. Steinmetz*, 973 F.2d 212 (3d Cir. 1992).

263. *Id.* at 214. The international dispute between the United States and England which arose from the latter's having built warships for the Confederacy became known as the "Alabama Claims." *Id.* at 215. "The battle has also been celebrated in the fine arts. Edouard

diver recovered the ship's bell and sold it to a local bar on the Isle of Guernsey. During World War II, Guernsey fell to the Germans and Allied bombing destroyed the bar. The bell was later recovered and passed through a number of hands before Steinmetz bought it in London. Upon Steinmetz's attempt to sell it, this action arose. Steinmetz's claims were all in vain, including his argument that the bell had been a find from an abandoned vessel that he had legally purchased.<sup>264</sup> The government contended that the *Alabama* was federal property by right of capture, and that since federal property is held in the public trust, it can never be abandoned, nor can its property be adversely possessed.<sup>265</sup> The court, finding for the government, was duly sympathetic to Steinmetz, who had to surrender the bell, but concluded, "our function is to decide the law, and thus decide for whom the *Alabama's* bell tolls after 128 years: it tolls for the United States."<sup>266</sup> The United States did not rest merely with the recovery of the *Alabama's* bell, however. The United States acted to preserve and study the vessel by entering into a treaty with the French government.<sup>267</sup>

It is clear that the best protection the government can offer a sunken vessel in international waters is a statute that protects the shipwreck from American salvors and obligates the government to enter into treaties with foreign nations to respect the archaeological value of the wreck. Such federal statutes best serve historic preservation interests. Only the moral responsibility of its finder averted disaster in the case of the *Atocha*.<sup>268</sup> Lack of government action resulted in the division of the *Central America's* wealth.<sup>269</sup> It is fortunate that the government acted to save the *Titanic* and the *Alabama*. Preservationists need to encourage the government to give similar protection to other finds in international waters. Such protection, it should be noted, does not discourage the finding of these

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Manet's famous painting of the battle is in the permanent collection of the Philadelphia Museum of Art." *Id.* at 215 n.4.

264. *Id.* at 215.

265. *Id.* at 215-16, 222-23.

266. *Id.* at 223.

267. Agreement Between the Government of the United States of America and the Government of the French Republic Concerning the Wreck of the CSS *Alabama*, Oct. 3, 1989, U.S.-Fr., art. 1-9, T.I.A.S. No. 11,687.

268. *See supra* note 247 and accompanying text.

269. *See supra* notes 248-257 and accompanying text.

vessels, but is actually requested by the most famous of the discoverers of deep-sea shipwrecks, Dr. Robert Ballard.<sup>270</sup>

## VI. SUMMARY, RECENT CONFLICT, AND PROPOSAL

The preceding analysis demonstrates that there are diverse interests that are often at odds with each other regarding the proper use of sunken vessels. Vessels embedded in land are the owner of the land's possession.<sup>271</sup> Vessels embedded in the submerged lands of the federal government are the property of the government.<sup>272</sup> Before the ASA's enactment, vessels embedded in the submerged lands of a state often belonged to the finder.<sup>273</sup> Pursuant to the Act, however, these vessels now belong to the states.<sup>274</sup> Abandoned vessels in international waters belong to the finder, unless a treaty or statute protects the vessel as a memorial.<sup>275</sup> There is a serious question as to what constitutes "abandonment," however, which determines whether the law of finds or salvage<sup>276</sup> applies. Often, the finder of a sunken vessel has been a salvor intending to locate and plunder a particular wreck, such as in the *DeBraak* situation, but occasionally, the finder is a scientist interested in the preservation of the vessel, such as the *Titanic*.

The interests of the state, the salvor, and the preservationist are divided. The competing interests include those interested in collecting valuable treasure and reducing it to possession, even at the expense of less marketable, but more historically important, artifacts and those interested in preserving all of the artifacts.<sup>277</sup> While salvors are generally on the treasure-collecting side and underwater archaeologists are generally on the other, various interests have aligned themselves in somewhat surprising ways. Although the media is generally more interested in stories of millions of dollars of

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270. Scott LaFee, *Unlocking History, Mystery of Ocean Depths Underwater Exploration Endless, Fascinating Task*, SAN DIEGO UNION-TRIBUNE, Oct. 27, 1993, at E1.

271. See *supra* notes 95-148 and accompanying text.

272. See, e.g., *supra* notes 115-116 and accompanying text.

273. See *supra* notes 146-160 and accompanying text.

274. See *supra* notes 161-228 and accompanying text.

275. See *supra* notes 235-273 and accompanying text.

276. For a discussion of the law of salvage and the law of finds, see *supra* notes 75-82 and accompanying text.

277. There are two methods by which these artifacts can be preserved. They can be raised and put in a museum, or they can be left in place and intact in an underwater park.

gold bullion, sport divers, anglers, and tourist-attracting property owners tend to side with the preservationists. The difficulty is in understanding the state's interest. The ASA gives the state title to the vessels embedded on its submerged lands. The state has a real interest in collecting taxes and generating publicity from valuable underwater finds. The recreational and educational opportunities such shipwrecks offer, however, should outweigh the interest in collecting additional tax dollars. Creating museums or underwater parks attracts visitors and scientists to the state. Therefore, museums and parks will generate income over a sustained period of time. Shipwrecks can offer something that most land-based preserved items cannot—the opportunity to view a unique period of time through the examination of the time capsule that is a sunken ship. Preservation of shipwrecks also fosters education, interest, and pride in the history of the state.

The ASA does not specifically address an issue that has recently become much more important to the international community. Early in September, a professional diver found a German World War II U-boat, the U-1226, in 12 meters of water off Cape Cod, Massachusetts.<sup>278</sup> It was not the first such wreck of the German Admiralty found in state waters. The U-853 was found off the coast of Rhode Island, the U-352 was found off Cape Lookout in North Carolina, and the U-858 was found off the coast of Delaware.<sup>279</sup> Dieter Graf von der Schulenburg, the German Consul in New York, has expressed concern over the sanctity of the vessels<sup>280</sup> which,

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278. Von Horst Rademacher, *Vermißt im Atlantik*, FRANKFURTER ALLGEMEINE ZEITUNG, July 1, 1993, at 9 (J. Pohlenz, trans. 1994).

The German government said it objected to plans by a marine salvage and film crew to videotape the exploration of a World War II U-boat sunk in shallow waters off Cape Cod, an embassy spokesman said Wednesday. "We have been in touch with the State Department," embassy spokesman Ekkehard Brose said. "They share our view that the peace of those buried down there should not be disturbed" . . . Ekkehard said he understood the U.S. Coast Guard will be charged with enforcing the German government's wish that no one dive on the U-1226, which the State Department said remains German property even though it sank 49 years ago.

*Germany Rejects Plan to Explore U-Boat Off Cape Cod*, REUTERS, June 16, 1993.

279. *Vermißt im Atlantik*, *supra* note 278, at 10.

280. Letter from Dieter Graf von der Schulenberg, Consul, Federal Republic of Germany, to the author (Dec. 3, 1993) (on file with the *Tulane Environmental Law Journal*). Germany's concern has increased since the bones of some German crewmembers found on a

according to international law<sup>281</sup> are still German property. Mr. Schulenburg writes that the “German Federal Government and the U.S. State Department, in line with the Geneva Convention [regard the U-boats] as . . . war cemeter[ies].”<sup>282</sup>

Does the ASA give states ownership over newly-discovered U-boats like the U-1226? If so, the ASA may be in conflict with the United Nations Convention on the Law of the Sea (“UNCLOS”).<sup>283</sup> Article 149 of UNCLOS obligates the United States to preserve objects of archaeological or historical value “for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, . . . or the State of historical and archaeological origin.”<sup>284</sup> UNCLOS and the Geneva Convention may exempt these U-boats from the application of the ASA. Yet, the *Black Panther* (U-1105), one of ten German U-boats coated with rubber to avoid sonar detection, may become an underwater park. U-1105 lies at the bottom of the Potomac River, near Piney Point, Maryland, a mere forty miles from Washington, D.C.<sup>285</sup>

Does the ASA, which purports to help the preservation effort, succeed in its objective? By reducing all shipwrecks within state territorial waters to state-owned property, incentives to invest time or money have foundered. States have enacted legislation that severely limits the recovery of sunken treasure. Salvors will only look for vessels they can hope to claim—those in international waters. Salvage techniques for deep-sea shipwrecks are generally more destructive, and with a financially-driven focus on vessels in the outer continental shelf, we may be dooming those valuable archaeological finds that are beyond the reach of state law.

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wrecked U-boat off the coast of Rhode Island were sold as souvenirs. *See Vermißt im Atlantik*, *supra* note 278, at 10.

281. Geneva Convention, Oct. 18, 1907, arts. 3, 4, 36 Stat. 2415, 2417, 205 CTS 395, 397. *See also* Letter from Schulenberg, *supra* note 280.

282. *Id.*

283. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, U.N. Doc. A/CONF 62/122; 21 I.L.M. 1261 (1982).

284. *Id.* at 21 I.L.M. 1295.

285. Eugene L. Meyer, *A Real Water Park; Md. Preservationists, U.S. Navy Agree to Let Divers Visit U-Boat*, WASH. POST, Jan. 18, 1994, at D1. *See also* Ray Delgado, *American Album: Dive! Dive! Idea Hatched for Sunken U-Boat Park; The Rubber-Coated German Sub Lies in the Potomac. History Buffs Could Come Calling in Scuba Gear*, L.A. TIMES, Feb. 28, 1994, at A5, col. 1.

On what basis *should* title be awarded to sunken shipwrecks? Clearly, salvors and treasure hunters need to be encouraged to find abandoned wrecks. They cannot be allowed, however, to plunder these wrecks to the point where they are destroying valuable historical records. The preservation of these vessels is of the utmost importance, particularly when the ownership of the vessels is not necessarily established.

The purpose for preserving these sunken treasures is clear. The field of underwater archaeology has expanded in recent years,<sup>286</sup> and the information yielded to us by sunken vessels is invaluable in helping us to understand our history. The State of Florida, among others, reserves for itself twenty-five percent of all archaeological finds from sunken vessels in its waters.<sup>287</sup> The remaining seventy-five percent of the artifacts are left to the salvor. This may not be the best way to preserve artifacts from sunken vessels for study.

Many states have enacted laws that determine the ownership of vessels by declaring unclaimed vessels abandoned after a certain time period. North Carolina's law grants the state title to shipwrecks that remain unclaimed for more than ten years,<sup>288</sup> and Massachusetts' law grants the state title to shipwrecks that have been unclaimed for at least a hundred years.<sup>289</sup> To complete the ability of states to protect these archaeological resources, however, every state needs to adopt a new definition of "abandonment" that limits the time that a sunken vessel can remain "lost." This will prevent future occurrences of results like those in the case of the *Lady Elgin*. If courts consistently allow ancient insurance claims to be successful, then no vessel will

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286. For a study of Spanish shipwrecks off the coast of Historic Padre Island, Texas, see J. Barto Arnold III & Robert Weddle, *The Nautical Archeology of Padre Island* (1978). For a study of wrecks from postmedieval times, see Carl Olof Cederlund, *Postmedieval Boat and Ship Archaeology* (1985). For a study of wrecks from the ancient Mediterranean world, see A.J. Parker, *Ancient Shipwrecks of the Mediterranean and the Roman Provinces* (1992). For a study of wrecks from the Baltic, see Carl Olof Cederlund, *The Old Wrecks of the Baltic Sea* (1993). For information on underwater exploration, see Mendel Peterson, *History under the Sea* (1965); Sydney Wignall, *In Search of Spanish Treasure* (1982); Robert F. Marx, *Shipwrecks in the Americas* (1987).

287. FLA. STAT. ANN. § 267.061 and n.2 (West, 1991). See *Florida v. Treasure Salvors Inc.*, 458 U.S. 670, 673-74 (1982). See also FLA. STAT. ANN. § 267.12 and n.1 (West, 1991).

288. *Salvage of Abandoned Shipwrecks and Other Underwater Archaeological Sites*, N.C. GEN. STAT. § 121-22 (1993).

289. MASS. GEN. L. ch. 6, § 180 (1990).

ever be considered abandoned, so long as a record has been preserved.

Just as the states are adopting a claim period, there needs to be a federal determination of a time-encumbered abandonment. Only then can finders guarantee their fortunes. They will enter into contracts with those having clearly-defined stronger titular claims, and can be forced to go about their salvaging operations in an archaeologically sound manner. States should also be encouraged to claim all of the artifacts recovered by the salvor, and pay the salvor for the monetary value of seventy-five percent of the finds. This will encourage both the search for sunken vessels and the careful preservation of raised artifacts because artifacts that are intact are necessarily worth more than those that have been allowed to deteriorate. States can recoup their monetary outlays by selling the artifacts they collect to museums, which will profit through general admission fees and payments by archaeologists and historians to study the finds. States must be encouraged to also pay salvors to keep shipwrecks intact, so that the states can create underwater parks. These parks are a financial benefit to anglers, sport divers, and the local businesses that profit from visitors. The preservation of sunken shipwrecks can be a boon to more than just the "cult of antiquarians."

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