

Saving Salvage: Avoiding Misguided Changes to Salvage and Finds Law

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In recent years, as technology permitting previously impossible underwater salvage operations has become available,¹ ancient principles of the laws of salvage and of finds as applied to sunken ships have come under attack. Those who would limit or preclude the application of salvage and finds principles and the conduct of salvage operations in the context of shipwrecks have advocated changes in both the common law of admiralty and in related statutory law. They have also supported an international convention on the subject. Academic commentary favoring heightened preservation praises these developments and promotes further initiatives to protect the “underwater cultural heritage” from salvors who are said to be encouraged by traditional salvage and finds law to pay no heed to historic preservation or the protection of the environment.

The methods of preservation enacted and suggested thus far, however, are not the only ones available, and are not the means best suited to the task. The preservation advocated by commentators is too strict to permit salvors to perform their useful work. Indeed, it may be so strict as to be self-defeating, as the very items embodying the “heritage” to be preserved remain undiscovered, inaccessible, deteriorating, and possibly subject to theft. Preservationists’ attempts to forbid or deter salvors of sunken property from performing salvage services should be rejected in

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1. See Timothy T. Stevens, *The Abandoned Shipwreck Act of 1987: Finding the Proper Ballast for the States*, 37 VILL. L. REV. 573, 575 n.6 (1992).

favor of a more balanced approach that will provide incentives for raising sunken maritime property, while ensuring that legitimate historical and environmental interests are protected.

Evaluation of the validity of the arguments for reform, and the legal vehicles devised by proponents of change, requires an examination of the substance of salvage and finds law and the legitimacy of its underlying rationales in the context of sunken property. Three elements are needed to make out a valid salvage claim. First, the property salvaged—including vessels, cargo, and other items²—must be threatened by a “marine peril.”³ Secondly, the salvage services must be “voluntarily rendered,” without the compulsion of any pre-existing duty to salvage arising by statute or contract.⁴ Finally, the salvor’s efforts to save or contribute to the saving of the imperiled property must be at least partially successful.⁵

The reward of compensation for salvage services performed upon maritime property is unparalleled in the law governing the salvage of

2. See *Broere v. Two Thousand One Hundred and Thirty-Three Dollars*, 72 F. Supp. 115, 118 (E.D.N.Y. 1947); see also *Provost v. Huber*, 594 F.2d 717, 719–20 (8th Cir. 1979) (acknowledging that the money rescued from the floating body in *Broere* was a “proper subject of salvage,” but distinguishing the case before it on jurisdictional grounds). Salvage law has been described as applicable to “anything rescued from navigable waters, without regard to what it is or how it got there.” GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 538 (2nd. ed. 1975). While no award was available under traditional maritime salvage principles for the saving of human life unrelated to the saving of property, courts were willing to indirectly consider lives saved in calculating an award for the salvage of property, see *The Emblem*, 8 F. Cas. 611, 612 (D.C.Me. 1840), and an award was available for saving a slave’s life even “unconnected with the saving of property.” *The Mulhouse*, 17 F. Cas. 962, 967 (D.C. Fl. 1859). The reach of salvage law was extended to allow direct awards for salvage of human lives not viewed as property, see 46 U.S.C. app. § 729 (2005) (executing into domestic law a provision of the International Salvage Treaty, art. 11, 12, Sept. 23, 1910, 37 Stat. 1658), but the coverage of the life salvage statute is in some respects limited. See, e.g., *St. Paul Marine Transp. Corp. v. Cerro Sales Corp.*, 313 F. Supp. 377, 379 (D. Haw. 1970) (“prerequisite” of life salvage award is claimant’s “forego[ing] an opportunity to engage in the really profitable work of property salvage”); *Ta Chi Nav. Corp. v. M.V. Eurypylus*, 583 F. Supp. 1322, 1329 (D. Wash. 1984) (life salvage service must be “contemporaneous” with traditional salvage service); *In re Yamashita-Shinnihon Kison*, 305 F. Supp. 796, 800 (D.C. Or. 1969) (reading into the statute, along with other limitations, a bar on application to cases involving contract salvage); see also Steven F. Friedell, *The Future of Maritime Law in the Federal Courts: A Faculty Colloquium—Salvage*, 31 J. MAR. L. & COM. 311, 312–13 (2000).

3. *The Sabine*, 101 U.S. 384, 384 (1879). Suit must ordinarily be brought within the two-year statute of limitations applicable to salvage actions. 46 U.S.C. § 730.

4. *Id.* Courts use the term “pure salvage” to describe situations in which the salvor and the property owner have not come to any agreement regarding the amount of compensation to be paid to the salvor. *Veverica v. Drill Barge Buccaneer No. Seven*, 488 F.2d 880, 883 (5th Cir. 1974). Pure salvage is to be distinguished from contract salvage, in which a contractual duty to salvage exists before the salvage operation is undertaken. See, e.g., *The Elfrida*, 172 U.S. 186, 192 (1898).

5. *The Sabine*, 101 U.S. at 384.

property on land. The most that a rescuer of property found on land can ordinarily hope to recover for his voluntarily-rendered assistance is restitution for the value of services performed to accomplish the rescue.⁶ In many cases, the person who rescues property on land will receive nothing for his trouble.⁷ In contrast, the law of salvage provides “very ample compensation for those services, (one very much exceeding the mere risk encountered, and labour employed in effecting them). . . .”⁸ This compensation is not in the nature of restitution or “pay”, but instead assumes the character of a reward, and acts as an inducement in a way that mere restitution could not.⁹

This enhanced compensation is offered to encourage potential salvors to undertake the difficult, time consuming, and dangerous task of preventing or recovering maritime losses.¹⁰ Property and the vessels carrying it over water are vulnerable to total loss by sinking and in other ways that property found on land is not.¹¹ The value of the vessels and the cargo they transport is likely to be higher than the value of many losses on land,¹² owing to the generally high cost of vessels and the potentially large amounts of cargo on board. The measures needed to prevent or recover losses to maritime property, even at a time of great technological facility and improvement, are likely to be more complex and expensive than rescue measures undertaken on land. Additionally, the market for assistance in the water is much more limited than on land.¹³ Persons and property confronted with danger on land are more likely to find assistance than persons and property imperiled in the

6. See, e.g., RESTATEMENT (FIRST) OF RESTITUTION § 117 (1936) (stating the general rule providing for restitution recovery; Reporter’s Note adds that “[t]he common law has never recognized as a general principle the rule of the sea, born of necessity, which permits recovery for salvage services”).

7. See *Mason v. Ship Blaireau*, 6 U.S. 240, 266 (1804); cf. *id.* (reciting elaborate requirements common law imposes on claimants of restitution in rescue cases on land).

8. *Blaireau*, 6 U.S. at 266.

9. *Id.*; see also *The Henry Ewbank*, 11 F. Cas. 1166, 1170 (Cir. Ct. Mass. 1833) (Story, J.) (artfully describing the salvage award and its purpose).

10. *The Sabine*, 101 U.S. 384, 384 (1879).

11. See *Margate Shipping Co. v. M/V The JA Orgeron*, 143 F.3d 976, 984 (5th Cir. 1998) (noting “peculiar dangers” posed by the sea).

12. *Id.*

13. See William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 87, 100 (1978) (suggesting that owners of imperiled property will be forced by the market to pay more as the probability of salvage decreases, and recognizing the likely scarcity of salvors where property is imperiled at sea).

water; fewer people have access to the water, and those that do, and are equipped to render assistance, have no duty to intervene and are likely to be going about other business. Because the sea is a vast, empty expanse, lacking the relatively dense population found on land, the presence of even a single potential salvor with the requisite skill and equipment nearby is a godsend. The willingness of potential salvors to aid an imperiled vessel or property will be greatly diminished if they are expected either to act as uncompensated Good Samaritans or to receive mere restitution for the services they perform. Taken together, these considerations suggest that generous maritime salvage awards are needed to create appropriate economic incentives to ensure the salvage of valuable property imperiled at sea.¹⁴

Generous awards to successful salvors advance the interests of both the property owner and the state by preventing “depredat[ions]” on hapless owners of property that is lost or may be lost at sea.¹⁵ Absent the liberal awards contemplated by the law of salvage, potential salvors might opt to create their own scheme of incentives in exchange for assistance in the recovery of the property. Instead of turning to admiralty courts, salvors might instead use the (perhaps increasingly) grim situation of imperiled property to extort outrageous sums from property owners. If the extortionate price approaches or exceeds the value of the property, owners will become more likely to refuse the assistance of salvors,¹⁶ leading to a wasteful loss of property.¹⁷ Salvors who are unable to look forward to a court-ordered award of more than mere restitution will be unlikely to undertake the costly ventures required to recover the goods. Thus, generous salvage awards prevent extortionate practices and the loss and waste of otherwise salvable property.

Conversion and embezzlement are other likely deprivations that would be worked on property owners with greater frequency if the law eliminated salvage awards or replaced them with mere restitution.¹⁸

14. *Id.* at 100; *see also Margate Shipping*, 143 F.3d at 986–88; *Nolan v. A.H. Basse Rederiaktieselskab*, 267 F.2d 584, 591 (3rd Cir. 1959) (stating that “[p]ublic policy is contravened by scanty awards to salvors”).

15. *The Barque Island City*, 66 U.S. 121, 130–31 (1861).

16. *See Landes & Posner, supra* note 13, at 91 (noting high transaction costs in such a situation).

17. *Cf. Sea Services of the Keys v. Abandoned 29’ Midnight Express Vessel*, 16 F. Supp. 2d 1369, 1372–73 (S.D. Fla. 1998) (applying the law of finds, and noting the existence of “a very simple policy” to ensure that sunken property is “return[ed] to a socially useful purpose”).

18. *See The Blackwall*, 77 U.S. 1, 14 (1869). A salvor gains only the right to possession, rather than title, when he recovers property. *See The Akaba*, 54 F. 197, 200 (4th Cir. 1893). After recovering the property, the salvor must bring a salvage action in court for the disposition of the property if he and the owner do not make other

Such misappropriation is a matter of concern where the recovered property is no longer in the control of the owner or his agents, as when a vessel and its cargo sink. Faced with such a situation, a potential salvor who stands to gain a generous salvage award will be less tempted to simply appropriate the property.¹⁹ In the absence of generous salvage awards, the gains to be reaped by stealing the sunken property would likely be greater than the best possible outcome the salvor could obtain in court.²⁰ This threat to the owner's rights in the property would result in inefficient outcomes, including potentially requiring the owner to increase surveillance of the property in the interim between its loss and recovery, or risk its surreptitious recovery by others.

A salvor who simply keeps salvaged property permanently is acting unlawfully, because the salvage of property affords only the right to temporary possession.²¹ The salvor also gains a maritime lien on the saved property.²² Extinguishment of the lien by the owner also extinguishes the salvor's right to possess the property.²³ However, where property is deemed abandoned, a court presented with a question of a salvor's rights will hold that the salvor, and not the former owner, has title to the property. In the case of abandonment, the law of finds applies instead of the law of salvage.²⁴ Rather than compelling people who abandon sunken property to pay salvage awards, the law of finds recognizes that by the time a sunken item is recovered, its owner may have given up his interest in the property.²⁵ In such a case, title to the property will vest in

arrangements. *Heuer v. United States*, 525 F. Supp. 350, 358 (S.D.N.Y. 1981). A salvor's intentional disposition of the property by other means may amount to conversion. *See, e.g., Adams v. Unione Mediterranea Di Sicurtà*, 220 F.3d 659, 673 (5th Cir. 2000).

19. *The Clarita and the Clara*, 90 U.S. 1, 16–17 (1874); *see Blaireau*, 6 U.S. at 276–77.

20. *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 962 (4th Cir. 1999).

21. *R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel*, 286 F.3d 194, 202 (4th Cir. 2002).

22. *Id.* at 203.

23. *Id.*

24. *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked, & Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987); *see also Klein v. Unidentified, Wrecked, and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985) (acknowledging this rule, and also noting two exceptions vesting title in the owner of land on which abandoned property is found—if the property is embedded in the soil, or if the landowner has constructive possession of it). The law of finds has other maritime applications outside the context of abandonment, such as a fisherman gaining title to the fish he catches, and its application is not limited to the sea. *See Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805) (applying law of finds to dead fox).

25. *Martha's Vineyard Scuba Headquarters, Inc.*, 833 F.2d at 1065.

a finder who takes control of the abandoned property with the intent to assume ownership of it.²⁶

Some admiralty courts regard the law of salvage and its underlying policy choices as better aligned with the needs of maritime activity and less likely to encourage secretive and competitive behavior.²⁷ By awarding title to finders, the law of finds unquestionably presents them with incentives to be the first to reach and to take control of property.²⁸ When the finder is forced to leave the found property for a period of time, the law provides good reason to act quickly to return to the site and extract the valuables. The finder will likely decline to inform other potential finders of the location of the property, and may well attempt to conceal it, because no possessory right flows from the simple discovery of the property or from efforts to control it.²⁹

While the court's reluctance to find abandonment seems reasonable,³⁰ the law of finds nonetheless serves a valuable purpose as a counterpart to salvage law in the context of sunken property. Its application eliminates the absurd results that would arise if courts, confronted with the recovery of property that circumstantial evidence indicates has been abandoned, felt compelled to apply salvage instead of finds law, and to conclude that such property is still owned.³¹ The potential windfall available in the event that recovered property is held to have been abandoned constitutes a powerful incentive for salvors to undertake recovery operations in the first place.³² Finds law also gives property owners a reason to avoid

26. *Moyer v. Wrecked & Abandoned Vessel, Known as The Andrea Doria*, 836 F. Supp. 1099, 1106 (D.N.J. 1993).

27. *Hener*, 525 F. Supp. at 356.

28. *Bemis v. R.M.S. Lusitania*, No. 95-2057, 1996 WL 525417, at *2-3 (4th Cir. Sept. 17, 1996) (unpublished opinion; referenced in table at 99 F.3d 1129).

29. *Hener*, 525 F. Supp. at 356.

30. *Id.* (noting that salvage law is favored over finds law "because salvage law's aims, assumptions, and rules are more consonant with the needs of marine activity and because salvage law encourages less secretive. . . forms of behavior.").

31. *See Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, believed to be the *Nuestra Senora de Atocha*, 569 F.2d 330, 336-37 (5th Cir. 1978) (case involving long-sunken wreck, noting existence of some authority for refusing to apply finds law in the maritime context, but nevertheless applying it because "[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths."). However, the judicial preference for salvage law is strong enough to produce language in some opinions suggesting that courts should sometimes refuse to apply finds law to abandoned property. *Treasure Salvors*, 640 F.2d at 567 (stating general rule that "salvage of a vessel or goods at sea, even when the goods have been abandoned, does not divest the original owner of title or grant ownership rights to the salvor," but "except[ing] extraordinary cases where the property has been lost or abandoned for a very long period," and applying the exception). *But see Hener*, 525 F. Supp. at 356.

32. *See Landes & Posner*, *supra* note 13, at 105. *Cf. Hener*, 525 F. Supp. at 356 (noting a "would-be finder's longing to acquire is exacerbated by the prospect of being found to have failed to establish title.").

simply hiding behind legal fictions and leaving their property lying unavailable for productive use.³³ Thus, application of finds law discourages owners from leaving valuable property underwater for long periods of time in a manner that could constitute abandonment.³⁴

Those opposed to the application of salvage and finds law in the context of sunken property base their criticisms on concerns for historical and environmental preservation.³⁵ According to these critics, historical and environmental preservation has always been inherently important, but has been disregarded by courts applying the salvage and finds doctrines. The growing recognition of these values in modern times, they argue, invites a change in the law.³⁶ These commentators suggest that traditional salvage and finds law often provides the wrong incentives to potential salvors of sunken maritime property.³⁷ Preservationists have promoted—and courts, legislatures, and states have adopted or considered—various legal mechanisms aimed at displacing the incentives created by traditional salvage and finds law. First, courts have been encouraged by preservationists to apply a modified version of the traditional law of salvage, incorporating changes that include limiting the more salvor-friendly law of finds to the most exceptional cases. Though the law has long encouraged salvors to recover sunken maritime property,³⁸ the Antiquities Act and the National Marine Sanctuaries Act have been employed to carve out exceptions to this principle by limiting salvage activity in particular contexts. Finally, the Abandoned Shipwreck Act and a recent international convention focus directly on

33. *E.g.*, *Moyer v. Wrecked & Abandoned Vessel, Known as The Andrea Doria*, 836 F. Supp. at 1105–06 (inferring from considerable circumstantial evidence of the shipowner's inaction that it had abandoned this well-known sunken ship).

34. *See Sea Services of the Keys v. Abandoned 29' Midnight Express Vessel*, 16 F. Supp. 2d 1369, 1372–73 (S.D. Fla. 1998) (noting that policy underlying law of finds protects those who “endeavor to return lost or abandoned goods to society” by “actually retrieving the property and returning it to a socially useful purpose”).

35. *See generally* Anne G. Giesecke, *The Abandoned Shipwreck Act through the Eyes of its Drafter*, 30 J. MAR. L. & COM. 167 (1999); Richard T. Robol, *Legal Protection for Underwater Cultural Resources: Can We Do Better?*, 30 J. MAR. L. & COM. 303 (1999); Ole Varmer, *The Case Against the “Salvage” of the Cultural Heritage*, 30 J. MAR. L. & COM. 279 (1999); *See also* United Nations Educational, Scientific and Cultural Organization: Convention on the Protection of the Underwater Cultural Heritage, Nov. 6, 2001, 41 I.L.M. 40 (raising concerns for preservation in preamble).

36. *See* Sarah Dromgoole, *Introduction*, in *LEGAL PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL AND INTERNATIONAL PERSPECTIVES* xvii, xix (Sarah Dromgoole ed., 1999); Robol, *supra* note 35.

37. *See* Varmer, *supra* note 35, at 301–02.

38. *See The Blackwall*, 77 U.S. at 14.

the traditional salvage and finds rules with a view toward limiting their applicability as a general matter.

One strictly judicial method promoted by preservationists makes the application of finds law to sunken ships highly unlikely. It establishes a rule requiring express proof of affirmative abandonment, “such as an owner’s express declaration abandoning title,” when deciding whether to apply finds or salvage law (except in cases of ancient shipwrecks), and then denies the applicability of the exception in cases where someone appears in court claiming ownership.³⁹ Thus, the salvor faced with the burden of proving abandonment⁴⁰ must show that the sunken property was expressly abandoned, and that the prior owner clearly and affirmatively expressed an intention to abandon the property and relinquish rights in it.⁴¹ Other circumstances besides the presence or absence of such an affirmative expression, although potentially relevant to the issue of abandonment, will be ignored unless the exception for ancient shipwrecks applies.⁴² Also, in courts adopting the approach favored by preservationists, a salvor’s attempt to prove abandonment can be thwarted by the mere appearance of a putative owner, whose presence as a party to the suit will automatically result in the application of the law of salvage instead of the law of finds.⁴³ Only the slimmest possibility remains that the law of finds will be applied, because courts adopting this approach generally require that salvors show “strong and convincing” evidence of abandonment.⁴⁴ The infrequency with which owners intending to abandon property are likely to see the need to declare their intent to the world, and the relative antiquity of much sunken property, make it likely that the required evidence of abandonment will be sparse. Thus, where the preservationists’ approach to abandonment is applied, it is unlikely that salvors will be treated as finders of property.

Courts unwisely impair potential salvors’ willingness to recover property when they limit the concept of abandonment of sunken maritime property to situations in which the former owner expressly affirms abandonment. While courts apply salvage law in the absence of a finding of abandonment, the generous reward to which salvors are entitled will rarely approach the value of the property recovered.⁴⁵ Salvors’

39. *Columbus–Am. Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 461–62 (4th Cir. 1992).

40. *See Zych v. Unidentified, Wrecked & Abandoned Vessel, believed to be The SB Lady Elgin*, 755 F. Supp. 213, 214 (N.D. Ill. 1990).

41. *Columbus–Am. Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d at 461–62.

42. *Id.*

43. *See id.*

44. *The SB Lady Elgin*, 755 F. Supp. at 214.

45. GILMORE & BLACK, *supra* note 2, at 563. The treatise notes that awards are likely to be less than the “moiety” of one half of the value of the salvaged property

motivation to recover sunken property will decrease as the opportunity for profit diminishes. Much sunken maritime property may be so situated that salvors' willingness to risk the expense of an attempt to retrieve it will be contingent on the existence of a legal means to obtain more than a salvage award is likely ever to afford them.⁴⁶ Also, where the mere presence of the former owner as a party in the suit is held automatically to require the application of salvage law, salvors will be further discouraged by the possibility that a former owner or purported successor in interest to such an owner will find it convenient, upon hearing of property's recovery, to intervene in a suit deciding its disposition. In situations where the difficulty or cost of recovering sunken property is likely to exceed the salvage award, the practical effect of foreclosing application of the law of finds, thereby denying salvors title, will be the cessation of efforts to recover such property.⁴⁷ The property will thus remain owned but unavailable for economically productive use, even though its owners may well have intended to abandon it to the sea and to leave it to potential salvors.

A rule requiring express abandonment would be justified if all intentional acts of abandonment were accompanied by express declarations to that effect, but such is not the case. Because abandonment is rarely accompanied by such declarations, a rule requiring courts to find express abandonment may well render the law of finds inapplicable without allowing for ascertainment of the owner's actual intentions as to the property.⁴⁸ Thus, under an express abandonment rule, protecting the former owner's interests will frequently be a pointless exercise, because the owner's intention may have been to abandon the property even

awarded to salvors under a traditional but obsolete rule. *Id.* While some courts may still take the moiety concept into consideration when determining an award, *see, e.g.,* Tracor Marine Inc. v. The M/V Margoth, 403 F. Supp. 392, 394–95 (D.C.Z. 1975), even one half of the value of the salvaged property may not be enough to induce salvors to act depending on the situation of the imperiled property.

46. *Margate Shipping*, 143 F.3d at 986. It is possible, however, for a salvage award to be as large as the whole value of the property. *See* Platoro, Ltd. v. Unidentified Remains of a Vessel, Her Cargo, Apparel, Tackle, and Furniture, 695 F.2d 893, 904 (5th Cir. 1983).

47. *Id.*

48. *See* Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel, known as The Captain Lawrence, 177 F.3d 491, 499–500 (6th Cir. 1999) (indicating that results seemingly not in conformity with the facts are likely where a rule of express abandonment is employed, and noting that judicial opinions purporting to follow this rule sometimes cannot consistently maintain the fiction even throughout the whole of the opinion).

though he never openly declared it in a manner sufficient to satisfy the rule.⁴⁹ The express abandonment rule may therefore bring about the absurd result of protecting only illusory interests of former owners.⁵⁰

The interest of potential salvors in gaining title to the found property stands in stark contrast to the lack of interest of the former owner. In the case of a considerable amount of sunken maritime property, title to the property may have to be available before salvage attempts become worthwhile from an economic standpoint. If salvors are unwilling to retrieve valuable property because of rules denying them the ability to take title to it, the effect of the law would be to ensure that the sunken property remains economically unproductive. This is just the result desired by preservationists, who view the historical value of a small number of shipwrecks and the protection of the underwater environment from damage that may result from careless removal of lost property from the bottom as adequate justification for imposing rules that will prevent the retrieval of a considerable amount of property.⁵¹

Owners' property rights ought not to be trifled with, but owners' interests receive adequate protection in courts that allow for proof of abandonment of sunken property by inference.⁵² In such courts, salvors hoping to be treated as finders must show, clearly and convincingly, that the owner's abandonment of the property is inferable from the circumstances.⁵³ The evidentiary burden that a rule allowing inferential abandonment places on the salvor is considerable, but it serves as less of a deterrent to attempts at recovery than an express abandonment

49. The express declaration of abandonment demanded by some courts in the salvage cases far exceeds the showing needed to establish the abandonment of property in other contexts, where abandonment may occur without express declarations and even without affirmative acts. See, e.g., *J.W.S. Delavau, Inc. v. Eastern Am. Transport and Warehousing, Inc.*, 810 A.2d 672, 684–85 (Pa. Super. Ct. 2002) (raising the issue of abandonment of goods in a warehouse, stating that “[a]bandonment involves an intention to abandon, together with an act or omission to act by which such intention is apparently carried into effect,” and permitting circumstantial proof). Similarly, the refusal of some courts to apply finds law when a former owner appears is inconsistent with the usual rule that “[a]bandonment of property divests the owner of his ownership, so as to bar him from further claim to it, [e]xcept that he, like anyone else, may appropriate it once it is abandoned if it has not already been appropriated by someone else.” *Right Reason Publications v. Silva*, 691 N.E.2d 1347, 1351 (Ind. Ct. App. 1998). See also *Nippon Shosen Kaisha, K.K. v. United States*, 238 F. Supp. 55, 59 (N.D. Ca. 1964) (“[o]nce abandoned property has been appropriated by another, the former owner who relinquished such property cannot reclaim it.”).

50. See *The Nuestra Senora de Atocha*, 569 F.2d at 337.

51. See, e.g., *Ole Varmer & Caroline M. Blanco, United States of America*, in *LEGAL PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL AND INTERNATIONAL PERSPECTIVES 205–21* (Sarah Dromgoole, ed., 1999).

52. See, e.g., *The SB Lady Elgin*, 755 F. Supp. at 214–16 (applying circumstantial evidence test, but concluding that the property was not abandoned).

53. *Id.* at 214.

standard. The blanket imposition of salvage law to the exclusion of finds law by some courts in any action to which the most recent owner of the property becomes a party⁵⁴ renders evidence on the question of abandonment irrelevant, and is not justified by any valid public policy. Instead, it hampers the operation of a useful mechanism of incentives designed to retrieve property that would otherwise be lost to the sea.⁵⁵ If salvors anticipate insufficient court awards, they are more likely to conceal their work and avoid the judicial process altogether. Eliminating restrictions on finds law would allow courts to consider a variety of relevant facts to decide whether an inference of abandonment should arise.⁵⁶ As to asserted interests in historical and environmental preservation, it seems clear that application of other rules can achieve those goals without impeding salvage activity.⁵⁷

Some of those attempting to effect a change in judicially-crafted rules to forestall application of the law of finds and of salvage have argued that an element essential for a salvage claim is lacking in the case of sunken maritime property.⁵⁸ Their contention is that once property is lying on the bottom, the only possible peril it faces is its deterioration in the water.⁵⁹ This danger, they say, is not so great, because the pace of deterioration once an item has sat on the bottom for a time is actually quite slow, and is probably no greater than the perils which could befall it on land.⁶⁰ The adoption of such a rule would render “pure” salvage awards—those for salvage not performed pursuant to contract—unavailable for recoveries of sunken property.

Courts addressing this argument have stated that adopting it would break with precedent, which holds sunken maritime property to be imperiled for salvage purposes.⁶¹ This precedent is best understood as

54. *Columbus—Am. Discovery Group*, 974 F.2d at 464–65 (suggesting that abandonment will not be found where “previous owner appear[s]”).

55. *Cf. Blaireau*, 6 U.S. at 267 (noting, in the context of a discussion of salvage law, that “the general interests of society require that the most powerful inducements should be held forth to men[] to save. . . property about to perish at sea”).

56. *See The Captain Lawrence*, 177 F.3d at 499–500 (noting that a “combination of several facts, proved clearly and convincingly,” will give rise to an inference of abandonment); *see also Andrea Doria*, 836 F. Supp. at 1105 (identifying more specific factors to which courts look in deciding whether to infer abandonment).

57. *See infra* at 34–39.

58. *See Platoro Ltd. v. Unidentified Remains of a Vessel*, 614 F.2d 1051, 1055 (5th Cir. 1980) (argument made as to ship sunk more than 400 years earlier).

59. *Id.*; *see also Varmer*, *supra* note 35, at 280–81.

60. *Varmer*, *supra* note 35, at 280–81.

61. *See, e.g., The Nuestra Senora de Atocha*, 569 F.2d at 337.

suggesting that the peril with which salvage law is concerned is not merely the danger of damage to the property, but also the danger of harm to the owner's interest in that property.⁶² The validity of this argument can be understood by considering the example of precious metals lost at sea. Just like precious metals found on land, their value may appreciate while they rest on the bottom. Those wishing to limit salvage law's applicability would argue that this situation does not call for the application of salvage law because the owner's property faces no peril, and is actually increasing in market value. This understanding ignores the diminution in the sunken items' value to their owner who, as a practical matter, cannot dispose of his interest in them at their market value because he cannot deliver possession of them to a buyer. The market price of property in the possession of its owner is not a useful measure of the value of sunken property that cannot be brought to market. That sunken property remains out of the owner's control should thus be a sufficient reason to treat it as imperiled, because the owner's lack of possession of the property makes it less valuable to him.⁶³

Other reasons exist for continuing to recognize sunken property as imperiled. Although sunken property may not deteriorate rapidly in the water, it does actually deteriorate.⁶⁴ Moreover, the lack of possession of property by the owner or his agent exposes the property to loss at the hands of thieves,⁶⁵ whose "depredat[ions]" are one reason why salvage law offers incentives to salvors to bring property before the court to permit its disposition.⁶⁶ On these grounds, courts have agreed that danger to sunken property can reasonably be apprehended, and therefore found it to be imperiled.⁶⁷

Failure to recognize sunken property as imperiled would limit awards to persons who recover it to the remedies available under the law of finds—which, as noted above, have themselves become more difficult to

62. See *Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 56 F.3d 556, 572-73 (4th Cir. 1995).

63. *Id.* (noting, in the case of millions of dollars worth of sunken gold, that although the gold itself was not damaged by being underwater, the gold was in the "ultimate peril" because any value society attributed to it was dependent on its "continued utility as property"). See also *Thompson v. One Anchor and Two Anchor Chains*, 221 F. 770, 773 (W.D. Wis. 1915) (property held to be imperiled for purposes of salvage claim because it was "actually lost"; "the 'marine peril' certainly was not diminished or extinguished by the fact they were actually lost").

64. See *International Aircraft Recovery L.L.C. v. The Unidentified, Wrecked, and Abandoned Aircraft*, 54 F. Supp. 2d 1172, 1174 (S.D. Fla. 1999) (*rev'd on other grounds* at 218 F.3d 1255 (11th Cir. 2000)) (noting the corrosion caused by presence of sunken aircraft in saltwater).

65. *Cobb Coin Co. v. The Unidentified, Wrecked, and Abandoned Sailing Vessel*, 549 F. Supp. 540, 557 (S.D. Fl. 1982) (mentioning this risk).

66. See, e.g., *The Blackwall*, 77 U.S. at 14.

67. E.g., *Cobb Coin*, 549 F. Supp. at 557.

obtain in some courts. Legitimate attempts at salvage of most sunken property might well cease entirely.⁶⁸ Eliminating salvage relief would encourage individuals to convert sunken property by retrieving and keeping it.⁶⁹ Owners of the sunken property would thus endure the harm wrought by this attempt to change the rule, because their property would be less likely to be retrieved and returned, and more likely to be stolen.

It is true that the elimination of pure salvage in cases of sunken property does not foreclose all possible salvage, because of the continued availability of contract salvage to the owner as a means of retrieving his property. While contract salvage may provide a useful alternative where the probability of successful recovery of the property is high and the value of the work to be performed can be fairly readily ascertained, in instances of salvage of sunken items, such conditions will not often prevail. As the probability of recovery and the parties' certainty as to the value of the salvage services required decreases, parties will find it more difficult to agree to a salvage contract.⁷⁰ The rules of pure salvage offer an important detour around what may sometimes appear to be intractable obstacles to bargaining in the salvage context,⁷¹ which are probably common in the field of sunken salvage, where costs may be high and not readily ascertainable at the outset of a salvage operation. Contract salvage can function only where the parties can agree to terms, and thus cannot adequately substitute for all awards of pure salvage,⁷² which would be rendered unavailable in cases of sunken property by a rule that such property is not imperiled.

Those seeking to deny salvors resort to salvage and finds law have also sought to advance their cause by resort to a few preservation statutes of a general character that predate efforts to pass statutes targeting salvage and finds law in particular. The oldest of these is the Antiquities Act of

68. See *Margate Shipping*, 143 F.3d at 986 (suggesting that economic reality would prevent such a salvage operation).

69. The very "depredat[i]ons" sought to be prevented by courts would occur. See, e.g., *The Barque Island City*, 66 U.S. 121, 130-31 (1861).

70. Landes & Posner, *supra* note 13, at 100-05 (describing how the operation of salvage law helps overcome high transaction costs that impede contractual salvage arrangements).

71. *Margate Shipping*, 143 F.3d at 986-87 (noting that "most meetings of salvor and salvee cannot be resolved" through "freely negotiated contract," and adopting analysis of economic underpinnings of salvage law found in Landes & Posner, *supra* note 13).

72. Landes & Posner, *supra* note 13, at 100-05.

1906.⁷³ The Act criminalizes the appropriation, excavation, injury, or destruction of “any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the government of the United States,” unless permission to engage in such activity has been obtained from the government.⁷⁴ The broad language of the Act is applicable to “lands owned or controlled by the government of the United States,” even when those lands are located underwater.⁷⁵

The utility of the Antiquities Act for preservationists of sunken property was considerably diminished by the Fifth Circuit’s reading of the Act in conjunction with the Outer Continental Shelf Lands Act.⁷⁶ The court construed the Continental Shelf Act as extending U.S. jurisdiction over the outer continental shelf for purposes of controlling and exploiting the natural resources of the shelf, but not for other purposes.⁷⁷ The limited assertion of jurisdiction over natural resources—and implicitly, the non-assertion of jurisdiction over non-natural resources like sunken property—means that the submerged shelf lands are not “owned or controlled by the Government of the United States”⁷⁸ unless the property

73. 16 U.S.C. § 431 *et seq.* (2000).

74. *Id.* § 433.

75. *See The Nuestra Senora de Atocha*, 569 F.2d at 337–38 (implying that it is applicable at least in the territorial sea of the United States).

76. *See id.* at 338–40 (discussing reach of Antiquities Act in connection with Outer Continental Shelf Lands Act, and concluding that the Antiquities Act did not protect a shipwreck located on the outer continental shelf); 43 U.S.C. § 1331 *et seq.* (2000) (the Outer Continental Shelf Lands Act). This Act defines the extent to which the United States asserts jurisdiction over the Outer Continental Shelf. *See* 43 U.S.C. § 1333 (United States “laws and jurisdiction” extend to the “subsoil and seabed of the outer continental shelf”).

77. *The Nuestra Senora de Atocha*, 569 F.2d at 339–40. The court noted Congress’s identification of a “national...interest” in exploiting mineral wealth under the ocean. *Id.* at 337. It also looked to the Act’s limited primary purpose of resolving competing claims to ownership of offshore natural resources. *Id.* at 339. Finally, it noted that a limited reading of the Act was consistent with the Convention on the Continental Shelf, to which the U.S. was a party, and which had superseded inconsistent provisions of the Continental Shelf Act. *Id.* at 339–40. *See also* Convention on the Continental Shelf, *opened for signature* Apr. 29, 1958, 15 U.S.T. 471, art. 2 (entered into force June 10, 1964) (recognizing sovereign rights of states over the “continental shelf...for the purpose of exploring it and exploiting its natural resources”). The court noted that the Convention’s drafters had “clearly understood that the [sovereign] rights” being defined by the treaty “do not cover objects such as wrecked ships and their cargoes ... lying on the seabed or covered by the sand of the subsoil.” *The Nuestra Senora de Atocha*, 569 F.2d at 340 (*citing* Comments of International Law Commission on the Convention, 11 U.S. G.A.O.R., Supp. 9 at 42, U.N. Doc. A/3159 (1956)). The conclusion drawn by the Fifth Circuit was consistent with an earlier decision of that court. *See* *Guess v. Read*, 290 F.2d 622, 625 (5th Cir. 1961) (Continental Shelf Act was “enacted for the purpose, primarily, of asserting ownership of and jurisdiction over the minerals in and under the continental shelf”).

78. *The Nuestra Senora de Atocha*, 569 F.2d 330, 337 (5th Cir. 1978).

on the shelf is a natural resource. Thus, sunken property found on the submerged shelf lands is not protected by the Antiquities Act.

The size of the area excluded from the coverage of the Antiquities Act by this ruling is considerable. This exclusion does not mean, however, that the Antiquities Act is of no consequence to salvors. In those parts of the territorial seabed over which the federal government either asserts ownership or exercises control, the Antiquities Act forbids interference with historically valuable property without a permit.⁷⁹ Salvors who discover sunken property cannot be sure at the time of the discovery whether it is of a historic nature for purposes of the Act.⁸⁰ Uncertainty surrounding the exact characteristics of the items to be protected—"objects," "ruins," and "monuments"—leaves the statute's applicability and the permit process subject to abuse by officials to whom the vague language of the statute imparts considerable discretion. Salvors may also be unsure whether the submerged lands on which they find property are included in the area covered by the Act.

79. *Id.* at 337–38.

80. The uncertainty surrounding the application of the statute may take on a constitutional dimension. The Ninth Circuit has held the Antiquities Act to violate the due process clause of the Fifth Amendment. In *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974), the subject matter of which occurred on land, the court reversed the conviction under the Act of a thief of ritual masks from a tribal reservation. The government's evidence included the testimony that the recent vintage of the masks, which were agreed to have been between two and three years old, did not prevent them from having the historical significance required for protection under the Act because of their association with tribal ceremonies which had a long history. *Id.* at 114. The Court reversed the conviction, because the statute, which creates a criminal sanction, was unconstitutionally vague as applied to that case, as it failed to give sufficient notice to the public of what activities it criminalized. *Id.* at 115. The *Diaz* holding has not led other circuits to strike down the Act as applied to facts more clearly demonstrating the historical significance of the artifacts. See *United States v. Smyer*, 596 F.2d 939, 941 (10th Cir. 1979) (discussing artifacts between eight and nine hundred years old). However, Congress was prompted to enact more specific legislation in the form of the Archaeological Resources Protection Act of 1979. 16 U.S.C. § 470(aa)-(mm). This more recent law operates in the same manner as the Antiquities Act, stating that "[n]o person may excavate, remove, damage, or otherwise alter or deface" or attempt to do any of these things without a permit authorizing them to do so. 16 U.S.C. § 470(ee)(a). It aims to cure the constitutional defect found in the Antiquities Act by the Ninth Circuit by limiting its application to archaeological resources more than 100 years old. Its geographical scope expressly excludes the outer continental shelf, 16 U.S.C. § 470(bb)(3)(B). It also provides for stiffer criminal penalties, 16 U.S.C. § 470(ee)(d), and adds to these the possibility of civil penalties. 16 U.S.C. § 470(ff). Perhaps owing to its limited applicability, it has yet to be applied in a reported decision in a case of maritime salvage.

Potential salvors who intend to comply with the law by proceeding through the courts for a determination as to the disposition of the property⁸¹ must either inquire in advance as to whether a permit is needed or proceed as though it is not, risking a finding of criminal liability.⁸² Cautious salvors will incur costs associated with ascertaining the Act's applicability and seeking a permit where the Act applies, thereby increasing the amount of resources required to conduct salvage operations.⁸³ If salvors inquire about a permit, they risk a determination that the statute does apply. The government is under no obligation to grant a permit,⁸⁴ so the salvors may well be out of luck. Alternatively, salvors may try their luck by engaging in one of the "depredat[ions]" sought to be avoided by salvage law: the covert removal and retention of the recovered property without any attempt on the part of the salvor to determine the property's status in court.⁸⁵

The application of this old Act in the maritime context is misguided, as is apparent from an evaluation of the legislation's purpose to preserve history, which is treated as a limited resource.⁸⁶ The Antiquities Act was originally enacted in response to the vandalism of ancient ruins in the Southwest, and similar damage that had occurred over the years at locations like Mount Vernon.⁸⁷ Such historical sites possess a common characteristic not shared by sites that recent commentators regard as comprising the "underwater cultural heritage": removal of artifacts at the sites would reduce the public's opportunity for exposure to their historical and cultural significance. For example, Mount Vernon's many visitors would not leave Washington's residence with the same appreciation of its historical significance if prior visitors had removed most of the contents of the home and adjacent buildings.

81. *Hener*, 525 F. Supp. at 358.

82. 16 U.S.C. § 433 (2000).

83. Increasing the resources required itself decreases the likelihood that salvage operations will take place. See *Margate Shipping*, 143 F.3d at 986; Landes & Posner, *supra* note 13, at 100–05 (emphasizing that salvage law is meant to overcome already-high transaction costs—without considering the addition of greater costs due to legislation).

84. See 16 U.S.C. § 432 (2000).

85. See *Blaireau*, 6 U.S. at 266 (suggesting the potential for "embezzlement" by salvors).

86. Patty Gerstenblith, *Protection of Cultural Heritage Found on Private Land*, 13 ST. THOMAS L. REV. 65, 69 (2000); see also M. Catherine Vernon, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 CASE W. RES. J. INT'L L. 435, 436 (1994).

87. H.R. Rep. No. 96-1457, at 17–18 (1980), as reprinted in 1980 U.S.C.C.A.N. 6378, 6380 (noting that the Antiquities Act was a response to damage wrought at sites in the Casa Grande Mountains in Arizona, and discussing earlier private efforts to save Mount Vernon from damage); Gerstenblith, *supra* note 86, at 71–72.

By contrast, submerged shipwrecks are not accessible to anyone without the proper equipment, training, and physical capabilities.⁸⁸ When items are removed from the seabed, the general public likely has no less access to the artifacts than it had before their removal. Indeed, if historically significant items that are recovered are put on display in a museum, then the “supply” of history available to the public as “consumers” would increase rather than decrease as a result of the salvors’ recovery of the property and its subsequent disposition. The Act’s deterrent effect on salvors and their exploration means that sunken property which has a known location will remain inaccessible and that much sunken property will remain undiscovered.⁸⁹

Another statute of a fairly general character, the National Marine Sanctuaries Act,⁹⁰ vests authority in the Secretary of Commerce to “designate any discrete area of the marine environment as a national marine sanctuary. . . .”⁹¹ Designation by the Secretary is discretionary, based on his evaluation of a given area in terms of a list of “standards” provided by Congress. The evaluation must be accompanied by “consideration” of a separate list of “factors” and “consultation” with specified governmental bodies and “other interested persons.”⁹² Unlike the Antiquities Act as construed by the Fifth Circuit, the Sanctuaries Act applies even to areas extending as far as 200 miles offshore.⁹³ To be

88. See Christopher R. Bryant, *The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle over Salvaging Historic Shipwrecks*, 65 ALB. L. REV. 97, 110 n.93 (2001) (noting that costs can be “prohibitive”). The impediment underlying salvors lack of access to these necessities is the need for money—often a substantial amount of it—to gain access to underwater sites. *Id.* at 137 n.234 (noting the difficulty of reaching preserved underwater sites). The costly nature of salvage activity imposes risks on salvors, whose success is often uncertain and whose very enterprise is a speculative one. The *Lamington*, 86 F. 675, 678 (2nd C.C.A. 1898) (the “salvage enterprise . . . is, after all, a speculation, in which desert and reward will not always balance”).

89. See Jeffrey T. Scrimo, *Raising the Dead: Improving the Recovery and Management of Historic Shipwrecks*, 5 OCEAN & COASTAL L.J. 271, 278–79 (2000) (suggesting the inability of archaeologists to pick up the slack where salvors are legally inhibited).

90. 16 U.S.C. § 1431 *et seq.* (2000).

91. *Id.* § 1433.

92. *Id.*

93. See 16 U.S.C. § 1433 (sanctuaries may be established in “any discrete area of the marine environment”); 16 U.S.C. § 1437(k) (giving statutory penalties same potential scope); See also 16 U.S.C. § 1432(3) (defining the “marine environment” to include “those areas of coastal and ocean waters, the Great Lakes, and submerged lands over which the United States exercises jurisdiction, including the exclusive economic zone, consistent with international law”).

designated a sanctuary, an area must be found by the Secretary to possess “special national significance due to—(A) its conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, or esthetic qualities; (B) the communities of living marine resources it harbors; or (C) its resource or human-use values.”⁹⁴

Regardless of the characteristics of an area cited by the Secretary as reasons for establishing a sanctuary, the impact on potential salvors of sunken property in the sanctuary will be great. The Act establishes civil penalties and a forfeiture remedy and permits injunctive relief⁹⁵ against persons who “destroy, cause the loss of, or injure any sanctuary resource managed under law or regulations for that sanctuary,” or who possess or traffic in “any sanctuary resource taken in violation of this section.”⁹⁶ One may “injure” a sanctuary resource under the law by merely “chang[ing] adversely, either in the short or long term, a chemical, biological, or physical attribute of, or the viability of,” the resource.⁹⁷ “Sanctuary resources” include “any living or non-living resource...that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the Sanctuary.”⁹⁸ These include “submerged features” and “historical resources.”⁹⁹ It seems unlikely that any salvage effort could be undertaken in a Sanctuary without “adversely affecting” one of its protected attributes and thereby triggering potentially substantial penalties.¹⁰⁰ It is possible to obtain a permit to engage in salvage, but regulations suggest that this requires considerable effort, and the government is under no obligation to grant one.¹⁰¹ Further restrictions may be applied in the Secretary’s discretion to particular Sanctuaries, potentially placing further limitations on salvage activity.¹⁰²

Reported decisions applying the National Marine Sanctuaries Act to the activities of salvors are infrequent, but make clear the impact of an

94. 16 U.S.C. § 1433(a)(2). Other requirements also apply. *See id.* § 1433(a).

95. *See id.* § 1437(d) (providing for civil penalties); § 1437(e) (providing for forfeiture of items retrieved and vessels used); § 1437(j) (providing for injunctive relief when sought by the Attorney General at the request of the Secretary of Commerce). *See also* 16 U.S.C. § 1437 (providing for criminal penalties for interference with the enforcement of the Sanctuaries Act within the meaning of 16 U.S.C. § 1436(3)).

96. 16 U.S.C. § 1436 (2000).

97. 15 C.F.R. § 922.3 (2005).

98. *Id.*

99. *Id.*

100. Civil penalties can be as high as \$100,000 per violation, with violations committed over time being treated as giving rise to one violation a day. 16 U.S.C. § 1437(d).

101. 15 C.F.R. § 922.48 (describing the grant of a permit as a matter of “discretion”).

102. *E.g. id.* § 922.163(a)(9) (2005) (restricts salvage activity in Florida Keys National Marine Sanctuary); *id.* § 922.91(a)(7) (restricts salvage activity in Gray’s Reef National Marine Sanctuary); *id.* § 922.132(a)(3),(4) (restricts salvage activity, as well as prohibits “altering the seabed,” in Monterey Bay National Maritime Sanctuary).

area's Sanctuary status and related regulations on the ability to salvage property within the area. The Eleventh Circuit relied on the Act to affirm the issuance of a preliminary injunction forbidding salvors from employing a particular method of salvage to recover artifacts within the Florida Keys National Marine Sanctuary, after the government alleged that environmental harms had been caused.¹⁰³ The salvors' activities were alleged to have adversely affected the Sanctuary's seagrass and its coral reef ecosystem.¹⁰⁴ Later, the district court awarded a permanent injunction forbidding any salvage without an authorizing permit.¹⁰⁵ In addition, the salvors were penalized for the damage they caused and for "response costs" incurred by the government as a result of their activities.¹⁰⁶

The salvors employed practices that were probably unnecessarily harmful to the environment,¹⁰⁷ so their case did not test the extent to which a court would be willing to apply the "change[d] adversely" test for injury caused by salvors to sanctuary resources.¹⁰⁸ While the courts have not had occasion to suggest whether and to what extent an adverse change caused to sanctuary resources could be too small to be treated as an "injury," the statute suggests that any change that cannot be characterized as "negligible" would be sufficient.¹⁰⁹ In any event, the meaning of these decisions for all salvors is apparent. The courts confirmed that the National Marine Sanctuaries Act could prevent all unauthorized salvage in Sanctuaries and impose penalties on salvors.

The resulting disincentive to salvors' recovery of sunken property from Sanctuaries does not guarantee better protection for resources targeted by the Act, and leaves society without the benefits of salvage that have traditionally made it a subject of judicial encouragement. When faced with the designation of large areas as Sanctuaries, salvors, who are likely to become more numerous and better equipped as technology improves and becomes more generally available, are deprived in the sanctuary areas of any incentive to bring their recoveries before a court

103. *United States v. Fisher*, 22 F.3d 262, 270 (11th Cir. 1994). The court outlined the procedure for enforcement of the Act's provisions by injunction, and found that the determination by the Secretary and his request to the Attorney General to bring an enforcement action did not require further Congressional involvement. *Id.* at 269.

104. *Id.* at 265.

105. *United States v. Fisher*, 977 F. Supp 1193, 1202 (S.D.Fla. 1997).

106. *Id.* at 1200-01.

107. *See id.* at 1196-98 (describing the methods used by these salvors, which caused more than 100 holes to be made in the sea floor).

108. 15 C.F.R. § 922.3 (2005).

109. *See* 16 U.S.C. § 1443(a)(3)(C) (2000) (defense allowed where harm is "negligible").

for disposition. While some salvors may relocate to areas outside sanctuaries that are more favorable for salvage, many may be faced with the choice of ceasing their operations entirely or continuing them covertly and illegally. Moreover, sunken property well-suited to salvage may be located in the Sanctuaries,¹¹⁰ making salvors less willing to leave them. The sorts of activities in which salvors might engage are indicated by the facts of the *Craft* case, which was tried before an administrative law judge.¹¹¹ The divers in that case traveled by boat to an area replete with sunken property, some of which was evidently worthy of the attention of salvors, and dove to remove it.¹¹² They were aware that diving was illegal because the area was within the Channel Island National Marine Sanctuary. Because of the illegality, the salvors tried to avoid being discovered by taking precautionary measures,¹¹³ but these were unsuccessful, and they were assessed penalties.¹¹⁴

The rare cases in which salvors are caught in a protected area and fined should not be taken to suggest that the Act has served as an effective deterrent to this activity, or that it is well designed for the purpose. The brazenness of the protagonists' activities in *Craft* suggests that craftier lawbreakers may be doing similar deeds in Sanctuaries without facing any punishment, and recovering property that they never bring before a court. Because they are unable to look to a judicial award and are unlikely to be caught, salvors in Sanctuaries may covertly dispose of recovered property without judicial involvement.¹¹⁵ The quality of salvage efforts may be affected as well. When salvors are unconcerned about statutory penalties, they will be less prone to engage in hasty, careless salvage efforts to recover property.¹¹⁶ Attempting to

110. See, e.g., Christopher L. Meazell, *Being and Embeddedness: The Abandoned Shipwreck Act's Historical Proxy is All at Sea*, 34 GA. L. REV. 1743, 1761–61 (2000) (noting optimal conditions for salvage of sunken property in Florida Keys National Marine Sanctuary, specifically describing underwater reefs which are objects of preservation but also the site of many shipwrecks); see also *In the Matter of Craft*, 6 O.R.W. 150, 151 n.2 (1990) (describing site consisting of seven ships wrecked long ago on a reef in what is now Channel Islands National Marine Sanctuary).

111. *Craft*, 6 O.R.W. at 180–82 (case in which divers characterized by judge as “looters” engaged in “wreck raiding” that constituted “predatory activity;” opinion describes “a deliberate and successful effort to plunder . . . closed areas of [a] Marine Sanctuary,” led by a dive master whose misconduct was “gross” and “mocked the law”).

112. *Id.* at 151–52.

113. *Id.* at 152. The failure of the divers' scheme and their ultimate punishment was due in part to an undercover operation staged by park rangers. *Id.* at 150–52.

114. *Id.* at 152–53, 182. At the hearing, the divers' counsel advanced the argument that the site at which the events took place was not historically or archaeologically significant, which argument was emphatically rejected by the judge. *Id.* at 181.

115. *Id.* at 182 (noting that the fines imposed under the Act are likely not enough to prevent further illegal recovery operations).

116. The divers in *Craft* received warnings as to the possibility that they would have to leave the site quickly to avoid detection by authorities, and in the event of such

keep sunken property from salvors by banning their activities if undertaken without permission is thus likely to result in theft and harm to the very property and surrounding environment that are intended to be preserved.

It is also plain that the long-acknowledged benefits of giving salvors incentives to perform their useful work cannot be realized in Sanctuaries. The benefits of retrieving property that accrue to property owners (in the nature of the recovery of their property), salvors (in the nature of the receipt of the award they are due), and to society as a whole (in the nature of the return of sunken items to economically productive uses) cannot be realized in Sanctuaries, as even salvors of non-historic property may fear that they will be held to have “change[d] adversely” some sanctuary resource, like seagrass or possibly even micro-organisms near the salvage site.¹¹⁷ Property is thus likely to go to waste, and owners are likely to remain divested of possession of their property by the water. Salvors may decide to operate illegally, but when they do, owners of the salvaged property are not likely to see it returned because courts punish salvors rather than rewarding their efforts.

The Act’s impairment of salvors’ work may actually thwart historical preservation, one of the very reasons asserted for the creation of sanctuaries. The raising of the turret of the U.S.S. Monitor in 2002 was undertaken at the behest of the Monitor National Maritime Sanctuary, which was first established in 1975.¹¹⁸ Requests to dive for purposes of observing and photographing the Monitor in the early 1990s were denied, leaving the divers to go through an administrative appeals process to gain access for even limited purposes.¹¹⁹ However, it was later discovered that the so-called preservation of the Monitor on the sea floor had left it in an increasingly deteriorated condition.¹²⁰ The salvage of the Monitor a decade

detection, they were alerted by an “underwater alarm system” to quickly get back on board. *Id.* at 157–58. Such measures can only make for hasty, destructive removal of property, but they are likely to be undertaken by salvors compelled to operate illegally.

117. The Act and its regulations are typically broad enough to restrict the salvage of even recently-sunken property. *See, e.g.*, 15 C.F.R. § 922.102(a)(5)(6) (2005) (forbidding removal or tampering with and “historical or cultural resource,” as well as “[d]isturbing the benthic community” by “altering the seabed”).

118. *See National Marine Sanctuaries, Press Release: Monitor’s Historic Gun Turret Closer to Recovery*, http://www.sanctuaries.nos.noaa.gov/news/pressreleases/pressrelease07_08_02.html (last visited Nov. 10, 2005) (describing the operation); *see also* 15 C.F.R. § 922.60 (boundary of Sanctuary).

119. *See generally* Gentile, 6 O.R.W. a (1990); Hess, 6 O.R.W. 720a (1992).

120. *See Bad Weather at USS Monitor Dive Site*, <http://www.cbsnews.com/stories/>

earlier would probably have saved it from some of this damage. For a variety of reasons, the improvidence of creating Sanctuaries that obstruct salvors from going about their work should be recognized and corrected by modifying the law.

Unlike the Antiquities Act and the National Marine Sanctuaries Act, the Abandoned Shipwreck Act's sole focus is sunken ships, to which the latter Act limits the applicability of salvage and finds rules.¹²¹ Under the Abandoned Shipwreck Act, the "United States asserts title to any abandoned shipwreck" if it is "embedded in submerged lands of a State, embedded in coralline formations protected by a State on submerged lands of a State, or on submerged lands of a state and is included in or determined eligible for inclusion in the National Register."¹²² The submerged lands of states referred to include their territorial seas and navigable waterways.¹²³ The U.S. government's freshly-minted title is immediately transferred under the Act to the state "in or on whose submerged lands the shipwreck is located."¹²⁴ The impact of this unusual assertion and transfer of title is hinted at by the Act's statement that the "law of salvage and the law of finds shall not apply to abandoned shipwrecks" to which title is asserted.¹²⁵

Even without explicitly stating that the law of finds does not apply, however, the Act forecloses the application of the law of finds to sunken property to which its title-taking provision applies. Only abandoned property can ever be subject to the law of finds,¹²⁶ the former owner of such property has divested himself of title to it, and a new owner may take possession of the property with intent to control it and thus take title to it. Under the Act, where applicable, the United States asserts title to the property before anyone else, preventing salvors from recovering the property and asserting title to it as abandoned and unowned.¹²⁷

The Act's impact on the law of salvage, at first glance, does not seem as clear. The Act is applicable only to abandoned vessels,¹²⁸ which were previously treated as subject to the application of the law of finds. Although, on the right facts, results under the law of salvage can sometimes

2002/08/05/eveningnews/main517590.shtml (last visited Nov. 10, 2005) (reporting that the wreck was in "the final stages of deterioration and [was] about to collapse.").

121. See 43 U.S.C. § 2101 (2000) *et seq.*

122. *Id.* § 2105(a). The state seeking to show its title to a shipwreck bears the burden of proving the applicability of the Abandoned Shipwreck Act to a given wreck. *The Captain Lawrence*, 177 F.3d at 500.

123. 43 U.S.C. § 2102(f).

124. *Id.* § 2105(c).

125. *Id.* § 2106(a).

126. *Andrea Doria*, 836 F. Supp. at 1105.

127. 43 U.S.C. § 2105(a) (2000).

128. *Id.*

approximate the results produced by application of the law of finds, salvage law applies to property which has not been abandoned. The property's abandonment triggers the application of finds law, conversely preventing the application of salvage law. While it is true that the Act recites that the law of salvage, like the law of finds, "shall not apply to abandoned shipwrecks" to which title is asserted, the preexisting inapplicability of salvage law to abandoned sunken property suggests that salvage claims are still available when a shipwreck otherwise meeting the Act's criteria is found not to be abandoned.¹²⁹

The Act might appear to leave salvors with adequate incentives to continue to perform their work, even on sunken property to which the Act applies. However, the Act's drafter noted a few years after its enactment that she believed it had contributed to a reduction in the number of suits for salvage awards brought, and, by implication, to a reduction in salvage activity itself.¹³⁰ Three aspects of the Act deter salvage operations on shipwrecks within states' territorial seas, in which a large concentration of salvageable ships are likely to be found. The first of these deterrents to salvage operations has already been mentioned: the elimination of the law of finds as a means of obtaining title to the property. An award as valuable as title to property is the most the salvor can hope to obtain for his service. With the possibility of this award greatly reduced, salvors' incentive to work to recover property has been reduced commensurately.¹³¹

The second aspect of the Act that deters potential salvors from retrieving sunken property also relates to the elimination of the law of finds. Generally, the applicability of the Act must be determined judicially, on a case-by-case basis. Therefore, salvors must make a difficult choice. They may undertake the salvage operation, gambling that the court will not decide the Act was applicable and thereby deny them a recovery.

129. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 146-47 & n.71 (4th ed. 2004). The Act "did not affect the meaning of 'abandoned.'" *The Captain Lawrence*, 177 F.3d at 498. The Act therefore places salvors in the unusual position of arguing for the application of salvage law instead of finds law, and creates a rare instance in which they benefit from the rule in some courts that an express declaration is required for abandonment. See *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels, Their Apparel, Tackle, Appurtenances and Cargo*, 221 F.3d 634, 640-47 (in an Abandoned Shipwreck Act case, requiring express abandonment).

130. See Giesecke, *supra* note 35, at 168 (noting reduction in the number of salvage claims brought before the courts since passage of the Act).

131. See *Hener*, 525 F. Supp. at 356 (noting the extensive incentives made available by finds law).

Or, to avoid incurring potentially monstrous losses due to the denial of an award,¹³² potential salvors may avoid performing salvage services on any sunken property to which the Act could possibly be applied. The uncertainty faced by salvors who risk the loss of their entire investment in a salvage effort if courts are unwilling to compensate them may deter salvors in the territorial sea from attempting salvages at all. Except for large salvage companies prepared to absorb a financial blow, salvors may be unable to risk the loss of the resources expended to undertake a salvage effort. Given the relatively large numbers of sites where shipwrecks can be found in territorial seas,¹³³ salvors may be hard pressed to simply ignore the territorial seas as a potential locus for salvage operations.¹³⁴ The result of the Act is to increase the probability of financial harm to salvors, whether they choose to continue salvaging potentially Act-covered property or not. It thus deters specific acts of salvage within the relevant geographical areas, and threatens the continued viability of sunken salvage.¹³⁵

132. See Edward W. Horan, *Organizing, Financing, and Manning a Treasure Salvage Operation*, 30 J. MAR. L & COM. 235, 235–38 (1999) (noting that much capital is at stake in such an operation and describing the process of preparation).

133. See H.R. Rep. No. 100-514(I), at 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365, 365 (House Report of Abandoned Shipwreck Act, indicating that at the time of the Act's passage there were approximately 50,000 shipwrecks in the navigable waters of the United States).

134. See H.R. Rep. No. 100-514(I), at 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365, 365 (House Report of Abandoned Shipwreck Act, indicating that at the time of the Act's passage there were approximately 50,000 shipwrecks in the navigable waters of the United States). Although salvage technology has allowed for deep sea salvage in a manner never before possible, see UNESCO Convention (perambulatory language noting the awareness of the parties "of the availability of advanced technology that enhances discovery of and access to" underwater sites), it remains the case that wrecks requiring the least equipment and labor to reach will be those most accessible to salvors. See Nobuo Shimizu, *The Raising of the 'Ehime-Maru' and the Current State of Salvage Operations from the Deep-Sea*, SHIP AND OCEAN NEWSLETTER, No. 20, June 5, 2001, available at http://www.sof.or.jp/ocean/newsletter_e/pdf/ssp2.pdf (last visited Nov. 11, 2005) (noting commercial infeasibility of deep sea sunken salvage, and conversely, the availability of salvage of sunken property in shallower waters); Rob Regan, *When Lost Liners Become Found*, 29 TUL. MAR. L.J. 313, 316 (2005) (noting increased traffic at shallow wreck sites). Many salvors may lack the equipment needed for deep water operations, which although available, is not cheap. Greg Stemm, et al., *Shipwrecks in the Deep Freeze*, MAR. HERITAGE MAG., Apr. 1998, available at http://www.prosea.org/articles-news/exploration/Shipwrecks_in_the_Deep_Freeze.html (last visited Nov. 10, 2005) (noting "exorbitant costs" of high-tech salvage, placing it "well beyond the reach of most commercial applications").

135. It is true that a concerned salvor could bring a declaratory judgment action, see 28 U.S.C. § 2201, but use of this procedure increases the initial capital requirements of salvors, demanding of them the time and money needed for litigation. Moreover, obtaining the facts a court would need to decide the action might still necessitate going to the wreck site.

The third aspect of the Act that deters salvage activity in the territorial sea is the burden it places on salvors to bear the cost of litigating jurisdictional issues raised by the interaction of the Act and the Eleventh Amendment, and the possibility of being deprived of an award should a court find that sovereign immunity protects the state. The Eleventh Amendment limits the power of the Federal judiciary to adjudicate admiralty cases against non-consenting states,¹³⁶ and the Supreme Court held the Eleventh Amendment to be applicable to in rem admiralty actions in which state officials are in possession of the res that is the subject of the suit.¹³⁷ The Supreme Court relied on republican principles of accountability and sovereign immunity to hold that, where the Eleventh Amendment applies, non-consenting states cannot be sued in state courts.¹³⁸

This combination of immunities, if applicable, amounts to a significant obstacle to salvors' claims. Assumption of title to sunken property under the Act has allowed states to argue that they are entitled to Eleventh Amendment immunity to suitors claiming salvage awards. Since the Act's passage, the extent to which states' immunity applies has been ambiguous. Questions about the colorability and nature of the claim asserted to the shipwreck by the state and the meaning of the term "abandoned" in the Act were among the jurisdictional issues adjudicated repeatedly after the Act's passage.¹³⁹ The Supreme Court purported to clarify these issues when it held that where "vessels. . . are not in the possession of a sovereign . . . the Eleventh Amendment does not bar federal jurisdiction" over in rem claims to the ships.¹⁴⁰ The Court added that abandonment under the Act has the same meaning as it does in admiralty law generally.¹⁴¹ Unfortunately, the Court failed to explain how much "possession" of a shipwreck a sovereign needed before the Eleventh Amendment could be invoked, leaving for future resolution questions about the nature of constructive possession required.¹⁴² By

136. *Ex parte* New York, No. 1, 256 U.S. 490, 497–501 (1921) (in personam suit, although styled as *in rem*).

137. *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 696–97 (1982); see also *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 503–04, 507 (1998).

138. *Alden v. Maine*, 527 U.S. 706, 754 (1999) (suit based on Congressional legislation).

139. See *Deep Sea Research*, 523 U.S. at 498–501 (discussing cases in lower courts).

140. *Id.* at 507–08.

141. *Id.* at 508.

142. *Id.* at 507–08. Although the court refers to an earlier case requiring "actual" and not "constructive" possession, *The Davis*, 77 U.S. 20, 21 (1869), these characterizations

merely pointing to the word's "meaning under admiralty law" to define the word "abandoned" under the Act, the Court left unresolved the question of whether abandonment "under admiralty law" must be express or may be inferred from the circumstances.¹⁴³ These and other issues remain largely unresolved,¹⁴⁴ confronting salvors with the potential for further costly jurisdictional and preliminary disputes that must be adjudicated before a salvage award will even be considered.¹⁴⁵

By limiting salvors' remedies—and possibly their ability to obtain consideration of their claims on the merits if the Eleventh Amendment's jurisdictional bar is applied—the Act largely eliminates the incentives that existed under traditional admiralty law for salvage operations upon sunken property located within areas covered by the Act. Salvors are recognizing and reacting in a predictable manner to the salient possibility that their legitimate work will go unrewarded.¹⁴⁶ Unfortunately, the least palatable option for salvors operating under the Act is to continue raising property and bringing it before admiralty courts in the expectation of receiving an award. Instead, with their prospects limited, salvors may simply go out of business or find other avocations. Some are pleased by this result,¹⁴⁷ which leaves thousands of shipwrecks, ranging from the truly historic to the recent, facing poor prospects of being recovered. This result comports with preservationists' goals of absolute historical and environmental preservation, but leaves salvors, owners, and society unable to realize any of the benefits of salvage activity. Salvors may also opt to become thieves, employing the improving technologies of salvage and the impossibility of thorough surveillance of wreck sites to "depredate" upon the sunken property and dodge the legal obstacles with which the Act confronts them.¹⁴⁸ This conduct, though risky and reproachable, may seem rational to salvors confronted with the Act because of their

really amount only to legal conclusions about the status of property. In other words, courts will still have to adjudicate and may disagree upon the meaning of those terms in the context of the Eleventh Amendment as applied to *in rem* admiralty actions.

143. See *supra* pp. 180–82 (question of whether abandonment must be expressed by an affirmative act or can be inferred from the circumstances).

144. See generally John Paul Jones, *The United States Supreme Court and Treasure Salvage: Issues Remaining After Brother Jonathan*, 30 J. MAR. L. AND COM. 205 (1998).

145. See Horan, *supra* note 132 (discussing extent of necessary and "protracted" litigation).

146. See Giesecke, *supra* note 35, at 168 (stating that the number of salvage claims in waters covered by the act has dropped dramatically).

147. See *id.*; Varmer & Blanco, *supra* note 51 (describing the Act as "alive and well," and looking forward to a time when it will "ultimately prevail in protecting shipwrecks").

148. In so depredating, they would do what courts have long warned they would in the absence of the availability of relief in court. See *The Clarita and the Clara*, 90 U.S. 1, 17 (1874).

existing investments in salvage equipment, the improbability of being caught, and the ever-present allure of sunken valuables.

Preservationists defend the Act as a useful measure to preserve historic wrecks and avoid environmental damage caused by careless salvors.¹⁴⁹ Preserving history, however, does not require the law to obstruct salvage of large numbers of wrecks that are not historical, which is the result under the Act.¹⁵⁰ The purpose of preserving the “underwater cultural heritage” is also defeated by leaving historical artifacts to deteriorate underwater, and by keeping the history and culture sought to be preserved out of the reach of most people who take an interest in it.¹⁵¹ Prohibiting all activity that may harm the environment is not recognized as a viable option in other areas of the law,¹⁵² and is no more sensible in the context of salvage. Greatly limiting salvors’ activities likely is not the best means of preserving the environment, since salvors perform socially useful functions, and technological improvements accompanied by related changes in the law might allow salvage and preservation to coexist. Thus, the Act’s limitations upon salvage and finds law are both costly and unjustifiable.

Preservationists have tried to advance their agenda in international as well as American law-making fora, and have achieved some success with the United Nations Economic and Social Council’s approval of the Convention on the Protection of the Underwater Cultural Heritage.¹⁵³ The Convention applies to the “underwater cultural heritage,” which it defines as “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years.”¹⁵⁴ Underwater

149. See generally Stevens, *supra* note 1.

150. See House Report of Abandoned Shipwreck Act, H.R. Rep. No. 100-514(I), at 1 (1988), reprinted in 1988 U.S.C.C.A.N. 365, 365 (indicating that only a small percentage of wrecks covered by the Act were likely to have any historical significance); see also Meazell, *supra* note 110, at 1747-49 (2000).

151. See Bryant, *supra* note 88, at 136 n.244 (describing the prospect of deteriorating, inaccessible underwater sites being “left to rot” due to legal changes obstructing salvage).

152. See, e.g., 42 U.S.C. § 7651b (2000) (example of law calling for “annual allowances” of emissions of an air pollutant, rather than absolute prohibition of emissions).

153. United Nations Educational, Scientific and Cultural Organization: Convention on the Protection of the Underwater Cultural Heritage, Nov. 6, 2001, 41 I.L.M. 40 [hereinafter “UNESCO Convention”].

154. *Id.* art. 1.

cultural heritage is therefore not limited to property that is abandoned or that possesses great cultural or historical significance.¹⁵⁵

For property to which the Convention is applicable, the law of finds and salvage is inapplicable unless the salvage activity is authorized by “competent authorities,” is in “full conformity” with the Convention and its Annex, and “ensures that any recovery of the underwater cultural heritage achieves its maximum protection.”¹⁵⁶ The Convention’s Annex states that the “first option” will be “in situ preservation” of the property, with any “activities directed at underwater cultural heritage” to be “authorized in a manner consistent with [its] protection . . . for the purpose of making a significant contribution to protection or knowledge or enhancement” of it.¹⁵⁷ The application of the law of salvage or finds to underwater cultural heritage is authorized only in very limited circumstances that appear to allow little or no opportunity for these doctrines’ use.¹⁵⁸ The need to sell and disperse the property to pay a salvage award and the vesting of title in a finder would likely be deemed “fundamentally incompatible” with the objectives of the Convention.¹⁵⁹ The “competent authorities” differ depending upon location, but plans to engage in activities directed at the underwater cultural heritage must be developed by potential salvors and presented to the relevant authorities for approval.¹⁶⁰ Parties to the Convention have the duty to ensure the reporting of discoveries and intended activities of their nationals and flag vessels with respect to underwater cultural

155. K. Russell LaMotte, *Introductory Note to UNESCO: Convention on the Protection of the Underwater Cultural Heritage*, 41 I.L.M. 37, 38 (2002).

156. UNESCO Convention, *supra* note 153, art. 4.

157. *Id.*, Annex, Rule 1.

158. *See id.* art. 4. The requirements for the application of salvage or finds law are that the salvage activity was “authorized by the competent authorities,” “in full conformity with the Convention,” and ensures that any recovery [of the property] achieves its maximum protection.” *Id.* Groups performing what is ordinarily thought of as salvage work are not likely to have a much luck obtaining authorization, because the activity they will propose is motivated by their desire to profit from their discovery, see *id.* art. 2 (stating that “[u]nderwater cultural heritage shall not be commercially exploited,” and using other language suggesting that the Convention’s protection of underwater cultural heritage is strong); *id.* Annex, Rule 2 (stating that “[t]he commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods”), and must also overcome the Convention’s preference for in situ preservation. *Id.* art. 2 & Annex Rule 1 (calling this “the first option”).

159. *Id.* Annex, Rule 2; *see also id.* art. 2. An Italian delegate involved in the preparation of the Convention suggests that the heavy limitations were placed on salvage in part based on the argument that underwater property is not in peril. Guido Carducci, *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 96 AMJ. INT’L L. 419, 424 (2002).

160. UNESCO Convention, *supra* note 153, Annex, Rules 9, 10.

heritage in the state's exclusive economic zone, on the continental shelf, and on the high seas.¹⁶¹ The Convention has yet to be ratified by the required number of parties, and is not currently in force. The United States is not among the states that have ratified the Convention thus far.¹⁶² Nevertheless, the possibility of future entry into force of the Convention, ratification and execution of the Convention into American law, and the potential for the Convention to one day give rise to customary international law obligations,¹⁶³ make the Convention a cause for salvors' concern.

The consequences of the Convention are seemingly inescapable for salvors, who until this time have been confronted only with laws of limited geographical application. International waters had been largely free of regulation, although until recently, large areas of these waters were beyond the technological reach of salvors. Courts of admiralty in the United States have traditionally exercised jurisdiction over salvage cases arising in international waters, based on the theory that salvage is part of the law of nations.¹⁶⁴ But if other nations adopt and apply the Convention and the United States does not, their law of salvage will be at odds with that which is applied in the United States. If salvage law under the Convention comes to differ substantially from U.S. law, U.S. courts may be drawn to reconsider their own understanding of the substantive law of salvage, because it is at odds with the *jus gentium* as modified by widespread application of the Convention¹⁶⁵

161. *Id.* art. 9, 11.

162. The treaty specifies that twenty states must become parties to the treaty before it enters into force. *Id.* art. 27. As yet, the only states to ratify this relatively new treaty are Panama, Bulgaria, Croatia, Spain, and Libya. See UNESCO.org, <http://erc.unesco.org/cp/convention.asp?KO=13520&language=E> (last visited Nov. 10, 2005).

163. Customary international law obligations arise when the states follow a practice generally and consistently, and do so out of a sense of legal obligation. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102. Customary international law is incorporated into the law of the United States, *The Paquete Habana*, 175 U.S. 677, 700 (1900), so if courts find that customary obligations for the United States have arisen under it, they will enforce them.

164. See, e.g., *Treasure Salvors, Inc. v. The Unidentified, Wrecked, and Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981).

165. See *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d at 967 (“[t]he need for courts of admiralty to apply the law similarly is fundamentally important to international commerce and to the policies supporting order on the high seas. It is therefore prudent for [a] court sitting in admiralty, to ensure enforcement in harmony with these shared maritime principles”); *The Epsilon*, 8 F. Cas. 744, 746 (E.D.N.Y. 1873) (looking to the law of “great maritime nations” for guidance, because “uniformity is almost the essence of the maritime law”). Cf. *Warshauer v. Lloyd Sabaudo S.A.*, 71 F.2d 146, 147 (2nd Cir.

No matter where salvors operate, enactment of the Convention into law would place obstacles in their path whenever they seek to recover older property. This is particularly problematic in stretches of the oceans which were inaccessible due to their depth and conditions until the advent of modern salvage technology. In these areas, the Convention's reporting and authorization requirements,¹⁶⁶ as well as the improbability of obtaining a permit for salvage for the purpose of disposing of the property in court and receiving an award or title,¹⁶⁷ will likely thwart salvors' efforts to recover shipwrecks that have remained inaccessible for centuries. Modern deep sea salvage equipment will not be able to recover this long-lost property, preventing the retrieval, study and exhibition of the historical and cultural artifacts that the Convention aims to protect.

The Convention will not only cause modern technology to go to waste, but will also deprive society of the benefit of the items which salvors are prevented from recovering. The Rule set forth in the Annex describing the "project design" that must be submitted to gain approval for "activities directed at underwater cultural heritage" does not contemplate that the incentives for recovery operations will come from the possibility of an award of money or title to property.¹⁶⁸ Instead, the Annex is essentially a set of guidelines for responsible archaeology. It is naïve of the Convention's drafters to think that enough funding for archaeological exploration will be forthcoming to allow for recovery of property, even in those instances where the Convention's preference for "in situ preservation" is rebutted.¹⁶⁹ Archaeologists typically must wait for a grant of funds to commence recovery activities, while salvors have long been able to generate their own funding by bringing property before a court. The Convention's apparent elimination of this traditional means of funding will hinder whatever recovery efforts are permitted by "competent authorities" under the Convention, by requiring that such efforts be funded by whatever capital salvors can generate in the absence of court awards. This will likely entail competition for the scarce monies available for archaeological research,¹⁷⁰ because the Convention's foreclosure of

1934) ("a court should be slow to establish a new legal principle not in harmony with the generally accepted views of the great maritime nations").

166. See UNESCO Convention, *supra* note 153, art. 9, 11, Annex Rules 9, 10.

167. *Id.* Annex, Rule 2 (specifying that the property to which the convention applies is not to be "commercially exploited" or "traded, sold, bought, or bartered," presumably enjoining salvage awards and sales of the property).

168. See *id.* Annex Part II, Rule 17.

169. See *id.* Annex, Rule 1 ("in situ preservation shall be considered as the first option").

170. Bryant, *supra* note 88, at 110 (2001) (stating that "[t]he disparity in funding between salvors and archaeologists is often stark").

commercial exploitation of the recovery makes salvage operations a poor investment from a business standpoint.

Like the Abandoned Shipwreck Act, the Convention would keep from the reach of salvage and finds law a wider variety of property than is necessary, given that the purpose of the Convention is to keep historic sunken property underwater. Under the Convention, all sunken property more than 100 years old is considered part of the “underwater cultural heritage.” No distinction is made between property of historical significance and what is probably the much larger amount of property with little historical significance.¹⁷¹ An untold amount of old sunken property of all sorts lies on the sea floor, and the mere fact that property sank more than 100 years ago should not be assumed to confer historic value upon it.¹⁷²

Of course, the validity of the use of so-called “in situ preservation” as a method of preservation can itself be called into question. Deterioration of the underwater property suggests that “in situ preservation” is not preservation at all.¹⁷³ Furthermore, the impossibility of giving to more than a few members of the interested public the opportunity for interaction with what is said to be their “heritage” suggests that supporters of “in situ preservation” adhere to an exclusivist view of history, viewing it as available only for the enjoyment of the privileged.¹⁷⁴

171. LaMotte, *supra* note 155, at 38.

172. *Cf.* Meazell, *supra* note 110, at 1475 (noting that, while some wrecks are treasure-laden or historic, the “vast majority” are neither).

173. Bryant, *supra* note 88, at 111–16; *see also* *The Nuestra Senora de Atocha*, 569 F.2d at 337 (noting that a sunken vessel, even after it has been discovered, “is still in peril of being lost through the actions of the elements”).

174. Bryant, *supra* note 88, at 114 (in situ preservation leaves historic shipwrecks “accessible only by a few”). While access to underwater sites has improved, it cannot be said that they are as accessible to the general public as are many historic sites on land. *Id.* at 114–15 (in situ preservation would “limit access to historic shipwrecks to recreational divers, high-end tourist ventures, those capitalizing on wrecks via underwater movies and video feeds, and . . . archaeologists”). While there may be special reasons to leave some otherwise-useful property lying idly at the bottom of the briny deep, see 16 U.S.C. § 450(r)(b)(4) (2000) (site-specific preservation statute protecting the Titanic), the law should be careful not to allow arguments for in situ preservation of particular sites to become unduly elevated into sweeping justifications for depriving society of the historical knowledge and economic value that can be derived from raising the property. *Cf.* RALPH WALDO EMERSON, *THE PORTABLE EMERSON* 283 (Viking Press, 1974) (while perhaps “[y]ou cannot overstate our debt to the past, has the present no claim?”). It is worth noting the words of Emerson: “The world exists for the education of each man,” and the “secret of education lies in respecting the pupil,” as “it is not for you to choose what he shall know. . . .” *Id.* at 142, 260.

The Convention would harm salvors, property owners, and society as a whole, by preventing useful salvage activity where property is more than 100 years old, and by putting far too much stock in “in situ preservation.” It would prevent the efficient return of otherwise wasted resources into the economy, and wrest from property owners much of their remaining interest in the sunken property after 100 years.¹⁷⁵ The Convention would keep historical artifacts out of the reach of both historians and the public,¹⁷⁶ who cannot rely on either legally-limited salvors or cash-strapped archaeologists to retrieve sunken items.¹⁷⁷ As a result, promising modern salvage technologies would be rendered unable to perform the previously impossible tasks for which they were designed.

Analysis of each of the measures discussed above indicates that the important purposes served by salvage and finds law warrant the rejection of each of the specific proposals employed so far by preservationists. Their concern with salvage activities on sunken ships, particularly those that have sunk recently and have little historical significance, often appear to unjustifiably value minimal interests in preservation over the recovery of large amounts of valuable property. By limiting the operation of salvage law, preservationists’ plans may in fact encourage salvors currently trying to operate within the law to steal salvaged property. Also, preservationists’ imposition of restrictive rules forbidding or deterring the salvage of historical items prevents the very people of whose “heritage” these “underwater cultural” resources form a part—the public as a whole—from having contact with or gaining more knowledge about that heritage.

The preservationists’ initiatives reflect an unwillingness to compromise, promoting preservation *uber alles* without regard to the wasteful and self-defeating results of that approach. However, it would be wrong to infer from flaws in the preservationists’ approach or their specific

175. As the states parties are charged with enforcing the provisions, enforcement of the Convention’s prohibition on the recovery of the sunken property by the U.S. government would likely raise issues under the takings clause of the Fifth Amendment. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 512 (1997) (noting that “government regulation is a taking if it leaves no reasonable economically viable use of property”).

176. For this reason, it seems odd that the term “heritage” was used by the Convention’s drafters to describe the sunken matter to be preserved. The word descends from French and ultimately from Latin words for “heir,” and is defined as “property that descends from an heir,” something . . . acquired from a predecessor: legacy, inheritance,” “tradition,” or “birthright.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 543 (10th ed. 1999) (defining heritage); see also *id.* at 1251 (defining “tradition” in terms of “inherit[ance]” or “a handing down”). The Convention’s drafters, who described as “heritage” the very sunken items which the Convention aims to keep underwater “in situ,” ignore the term’s proprietary and possessory undertones.

177. Bryant, *supra* note 88, at 111–13.

proposals that the underlying goal of preservation should never be permitted to constrain salvors' behavior. Salvors of sunken property do sometimes engage in practices that cause damage to artifacts and the environment.¹⁷⁸ If courts and legislatures are to deal with this problem sensibly, they should craft rules with a view toward allowing the realization of as many benefits of both salvage and preservation as possible. This approach dictates that absolute rules permitting or preventing salvage should not be adopted. Instead, salvage and finds law should continue to apply, but a measure of protection for history and the environment must be devised. Any limitations should not function as a barrier to all salvage, but should instead operate as a filter designed to eliminate those activities of salvors that are most antithetical to the legitimate concerns of preservationists.

Two noteworthy legal alternatives to the legal regimes discussed above secure the greatest possible preservation without having the same deleterious effects on salvage activity. One of them has already been employed, at least in part, in salvage cases.¹⁷⁹ It involves adding a seventh factor to the existing formula for calculating salvage awards.¹⁸⁰ Long-standing precedent holds that the six "main ingredients" to be taken into account by a judge fashioning a salvage award are: (1) the labor expended by the salvors in rendering the salvage service; (2) the "promptitude, skill, and energy" shown by the salvors; (3) the value of the salvors' equipment used in the salvage operation and the risks to which it was exposed; (4) the risk run by the salvors in conducting the operation; (5) the value of the property saved; and (6) the degree of danger from which it was saved.¹⁸¹ The Blackwall factors focus on the property that is the subject of the salvage effort, the economic value of that property, and the salvors themselves. None of them consider the impact the salvage effort has on the environment or on the quality of

178. See, e.g., *United States v. Fisher*, 977 F. Supp 1193, 1196–98 (S.D. Fla. 1997) (example of environmentally unsound procedures); *Craft*, 6 O.R.W. at 150–52, 181 (facts of case involve risk to historic items, with divers seeking to recover the sunken artifacts by means of "booty bags" and in haste so as not to be caught); Carducci, *supra* note 159, at 421 (noting that advancing salvage technology has placed historically-significant sunken property within reach of persons "not necessarily keen on its preservation or schooled in methods for achieving it").

179. See, e.g., *Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 468 (4th Cir. 1992) (suggesting a seventh factor, considering protection of historical and archaeological value).

180. See *The Blackwall*, 77 U.S. at 13–14.

181. *Id.*

sunken historical and cultural items.¹⁸² The continued use of these factors in calculating salvage awards indicate that they have done well at performing the function assigned them. However, concerns about historical and environmental impacts caused by salvors of sunken property, and repeated legislative action placing obstacles in the path of salvors that has resulted from those concerns, suggest that salvage law may need some fine-tuning so that it may continue to reflect a societal consensus. Legitimate concerns over historical and environmental impacts should be addressed, and the flexible Blackwall test seems well-suited to the task of accommodating these modern interests.¹⁸³

The solution is to add another factor: “the degree to which the salvors have worked to protect [both] the historical and archaeological value of the wreck and items salvaged”¹⁸⁴ and the quality of the surrounding marine environment. Some cases already call for consideration of salvors’ protection of the historical and archaeological value of the items in cases of “ancient shipwrecks.”¹⁸⁵ However, authority supporting application of a factor concerned with the efforts of salvors at environmental preservation remains very weak,¹⁸⁶ even though the United States is party to a treaty

182. To the extent that the salvage effort negatively affects the historical and cultural qualities of the item salvaged, and this has an impact on the economic value of the item, both the law of salvage and the law of finds already give the salvor an incentive to act responsibly to minimize such harm. Any carelessness will tend to reduce the value of the property, and thus, the amount of the potential award, see *id.* 13–14, or the value of title to the property, or may result in an offsetting or forfeiture of the award upon a finding of negligence. GILMORE & BLACK, *supra* note 2, at 554.

183. See *The Blackwall*, 77 U.S. at 13–14. The factors are, after all, only the “main ingredients” to be considered, not the exclusive ingredients. *Id.*

184. *Columbus-Am. Discovery Group*, 974 F.2d at 468. For more on the content of this duty, see Bryant, *supra* note 88, at 138.

185. *Id.*; see also *Cobb Coin Co. Inc. v. The Unidentified, Wrecked, and Abandoned Sailing Vessel*, 525 F. Supp. 186, 2108 (D.C. Fla. 1981).

186. The Eastern District of Louisiana has indicated that salvors’ protection of the environment may be considered as an independent factor in calculating the salvage award. *Trico Marine Operators, Inc. v. Dow Chemical Co.*, 809 F. Supp. 440, 443 (E.D. La. 1992). However, in a later case, the Fifth Circuit cast doubt on the Trico Marine Operators court’s addition of the environmental factor. *Margate Shipping*, 143 F.3d at 988–89 (noting *Trico Marine’s* additional factor, and stating that the “additional factor [of] general protection of the environment by salvors...has never been endorsed by this court”). Other courts citing *Trico Marine* have either noted its suggestion of a seventh factor in dicta, *Fine v. Rockwood*, 895 F. Supp. 306, 310 (S.D. Fl. 1995) (predating *Margate Shipping Co.*), cited its new approach and applied it but then expressly disclaimed reliance on it, *New Bedford Marine Reserve, Inc. v. Cape Jewelers, Inc.*, 240 F. Supp. 2d 101, 118–19 (D. Mass. 2003) (stating that salvors’ award was unaffected by consideration of this factor), or treated it as authority for the different and less controversial proposition that potential “liability for environmental damage” under other law may be considered as one of the risks run by salvors in conducting the salvage operation. *United States v. Ex-USS Cabot/Dedalo*, 179 F. Supp.2d 697, 711 n.33 (S.D. Tex. 2000).

calling for application of such a factor.¹⁸⁷

The regular inclusion of the proposed two-part factor in calculation of the award would not give rise to anomalous results. The factor can be employed in all cases where sunken property is salvaged, regardless of its historical value or the quality of the surrounding environment, because the very nature of the factor-based approach to determining a salvage award allows for factors to receive different weight in different cases.¹⁸⁸ The weight assigned by the court will be affected by the property's actual historical value and by the environmental quality of its surroundings. When sunken property has little or no historical or archaeological significance, and when the salvage operation occurs where the environment is already in poor condition, salvors' harm to historical or environmental interests should be given less weight.

187. See International Convention on Salvage, Apr. 28, 1989, 1953 U.N.T.S. 193, available at http://untreaty.un.org/English/UNEP/salvage_English.pdf (last visited Nov. 10, 2005). Article 13 of the treaty sets forth a modified regime for calculating salvage awards, which includes a factor specifically addressed to the salvors' preservation of the environment. *Id.* art. 13. The *Trico Marine* court placed reliance on the International Convention on Salvage, signed in London, Apr. 28, 1989, which entered into force with the ratification of the United States in 1992. See *id.* However, "U.S. courts usually decide salvage controversies under the principles of the general maritime law without reference to international conventions," see ROBERT FORCE, ADMIRALTY AND MARITIME LAW, ch. 8, § 153 (available on Westlaw, at Admmarlaw 153), or even in contravention of them. See *Margate Shipping*, 143 F.3d at 988–89 (indicating the Fifth Circuit has never approved the use of an environmental factor, despite existence of treaty suggesting an environmental factor is required). Concerns about judicial authority, which are often implicated when courts give short shrift to valid legislative and executive judgments, do not apply because of the unique situation of admiralty law in the constitutional context. See *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d at 960–63 (discussing the place of admiralty law in the constitutional scheme, and noting that a case in admiralty is not considered to "arise under the constitution or laws of the United States" because of admiralty's pre-constitutional origins). Thus, the 1989 Convention has had little, if any, impact on the calculation of salvage awards, as the paucity of cases relying on its factors and the abundance of cases adhering to the suggests. See, e.g., *Margate Shipping*, 143 F.3d at 983, 984, 986 (referring to the Blackwall factors as "venerable factors" and noting that they are the ones traditionally applied by district courts, while declining to mention the 1989 Convention and casting doubt on *Trico Marine*); *R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel*, 286 F.3d at 204 (without mention of the 1989 Convention, stating that "[i]n determining the appropriate award, courts generally rely on the six factors set out in *The Blackwall*. . ."); *Offshore Marine Towing, Inc. v. MR23*, 412 F.3d 1254, 1257 (11th Cir. 2005) (in setting forth a "guide" for determining salvage award, reciting the Blackwall factors while making no mention of the 1989 Salvage Convention or its added environmental factor).

188. The application of the factors is a matter for the district court's discretion, and receives considerable deference on appeal. See *Margate Shipping*, 143 F.3d at 983–84.

The addition of this seventh factor will give salvors a strong incentive to avoid the harms that have caused so much consternation among preservationists. Without depriving salvors of the chance to recover a fair reward for their troubles, the addition of the seventh factor can effectively punish salvage methods that give short shrift to historical and environmental preservation. The first salvors who fail to pay heed to the new seventh factor may have to be made an example for their peers, but the reduction of their awards will send a strong message: avoid harm to historical artifacts and the environment, or lose money.¹⁸⁹ On the other hand, where salvors do especially meritorious work from the standpoint of preservation, demonstrating exceptional skill in avoiding historical and environmental harm, courts may increase the award.¹⁹⁰ Such an application of the seventh factor would make preservation an important objective for salvors rather than an obstacle in their path.

Just as salvors will do what is necessary to avoid losing their awards, the owners of the recovered property have good reason to argue for application of the seventh factor to reduce the award. The owner's incentive arises when the seventh factor is applied, because less of the value of the recovered property will have to be paid to a salvor whose acts trigger the application of that factor to reduce the award. Because the salvor is likely to be in the best position to present evidence on the environmental and historical quality of the salvage site before and after the salvage effort, the salvor should bear the burden of producing evidence pertaining to the conformity of his action with the dictates of the seventh factor. Enforcement of preservation requirements would thus be ensured without destroying the structure of incentives that gives salvors reason to engage in their useful occupation.

Of course, applying the seventh factor can only be effective where salvage law is applied. Where the law of finds is applied, the size of the award is not contested, because the award is title to the property.¹⁹¹ Salvors can avoid their seventh-factor duty under salvage law by arguing

189. Courts have desired to send this message in the past without explicitly applying a seventh factor. See *Cobb Coin Co. v. The Unidentified, Wrecked, and Abandoned Sailing Vessel*, 525 F. Supp. 186, 208 (D.C. Fla. 1981). It is consistent with the message sent by courts in other contexts to deter misconduct by salvors. See, e.g., *The Barque Island City*, 66 U.S. at 130 (any "plunder" or "embezzlement" by salvors "works a forfeiture" of their claim); *Nolan v. A.H. Basse Rederi Aktieselskab*, 164 F. Supp. 774, 777 (E.D. Pa. 1958) (noting that this rule of forfeiture of salvage claims for "plundering" may be applied as against all salvors of an item of imperiled property when only a few commit misconduct if the misconduct was open enough so that salvors not actually engaged in wrongdoing "could be charged with responsibility for permitting, concealing or failing to report it").

190. See *Columbus-Am. Discovery*, 974 F.2d at 468.

191. *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked, and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987).

for the application of finds law. Moreover, even under salvage law supplemented by the seventh factor, salvors would face no greater a sanction than the reduction of their award. While the loss of award may be substantial, it may not go far enough when a salvor has behaved in an egregiously destructive manner. Therefore, another legal mechanism may be needed to ensure preservation without bringing an end to the salvage of sunken property.

Such a mechanism could be legislatively created by combining relevant aspects of the law of salvage with enforcement tools known in other areas of the law. For example, the right to sue salvors for negligent, reckless, or intentional harm to historically significant or environmentally sound salvage sites could be conferred by statute on both the government and other interested parties. Rather than a traditional award of damages for negligence, however, the remedy for the salvor's negligent harm to the historical or environmental quality of the site and property would be in the nature of a penalty sufficient to deter similar conduct in the future. The penalty would be payable to the government, regardless of the identity of the party that brought the suit. Finally, the new statute should also provide salvors with a cause of action for damages for frivolous suits brought under the new negligence cause of action.

Creating such a cause of action would employ existing legal concepts in a different factual setting. Liability for salvors already exists where their negligence results in damage to the property salvaged.¹⁹² The standard of care is one of "good faith and reasonable judgment and skill,"¹⁹³ and can be applied to both the salvor's activities during the operation and the salvor's disposition of the property after it is removed

192. See, e.g., *Basic Boats, Inc. v. United States*, 352 F. Supp. 44, 48 (E.D. Va. 1972).

193. *Dorrington v. City of Detroit*, 223 F. 232, 240 (6th Cir. 1915), (citing *The Laura*, 81 U.S. 336, 344 (1871)). Courts require a showing of gross negligence when liability is sought to be imposed solely on the basis of the ineffectiveness of the salvage efforts. See, e.g., *Dorrington*, 223 F. 232, at 241 (requiring "clear evidence of culpable negligence or willful misconduct"), but "[c]onversely there will be no award made because the operation was unsuccessful." *Basic Boats*, 352 F. Supp. at 48. In some courts, if a salvor's activities cause the salvaged property to "suffer[] some distinguishable injury . . . other than that which would have been suffered had not salvage efforts been undertaken," ordinary negligence is the standard. *Id.* But other courts have required a showing of gross negligence as a general matter. *P. Dougherty Co. v. United States*, 207 F.2d 626, 636 (3rd Cir. 1953). Damages, when assessed, need not be limited to a set-off against the salvage award, but may exceed it and constitute an affirmative award. *Dorrington*, 23 F. 232, at 240.

from peril.¹⁹⁴ At present, however, salvors' duties to owners of the salvaged property do not include a duty to avoid negligent harm to environmental or historical interests that do not impact the value of the salvaged property. The idea of creating a cause of action to remedy harms recognized by statute and allowing interested parties to sue to enforce the statute is not new.¹⁹⁵

Perhaps the only novel aspect of the proposed statutory scheme is the idea that damages will be paid into government coffers regardless of who sues. This provision is sensible for three reasons. First, it will prevent opportunistic third parties from suing to enrich themselves. Allowing claimants other than the government to retain the proceeds of their victory, beyond perhaps attorney fees, would be an unjust outcome in light of the lack of harm actually done to them and would not further the policy goals of the proposed legislation. Second, by limiting the incentive of private parties to sue to further their interest in ensuring that historical and environmental harms are deterred, the provision is designed to encourage these parties to ascertain before suing whether, and to what extent a salvage operation has actually caused such harm.¹⁹⁶ Along with the provision allowing damages for frivolous suits, the fact that the penalty will be paid to the government will encourage potential claimants to limit their claims to those regarding salvage sites and operations in which historical and environmental values are actually implicated. A third reason for the government to collect the penalty can be discerned from the nature of the harms the statute aims to deter. The impact of harm to history and the environment is not felt merely by a few individuals but by public at large, so the proposed legislation would recognize the public's interest by turning penalties assessed over to the government.¹⁹⁷

194. *The Henry Steers*, 110 F. 578, 582–83 (E.D.N.Y. 1901) (noting that actionable negligence can arise both before and after the time at which the property is saved from peril, and indicating that a court should be reluctant to find negligence in the former situation). *See also* *Serviss v. Ferguson*, 84 F. 202, 203 (2nd C.C.A. 1897) (affirming imposition of damages for negligent harm to salvaged property caused while the property was in the salvor's care).

195. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401–02 (1968) (describing action of private persons as “private attorneys general” as the mechanism for enforcement of the Civil Rights Act of 1964).

196. In any event, the claimants would have to establish standing to prosecute the action. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 124 S.Ct. 2301, 2308–09 (2004) (setting forth the rules that comprise “standing jurisprudence[s] two strands: Article III standing . . . and prudential standing”).

197. *See Cobb Coin Co. v. The Unidentified, Wrecked, and Abandoned Sailing Vessel*, 525 F. Supp. 186, 218 (D.C. Fla. 1981) (recognizing as valid state's valid interest in preservation of artifacts in question).

The proposed statute would not provide for strict liability, because the object of the statute is not to discourage salvage generally, but only to penalize those salvors who undermine historical and environmental preservation. Strict tort liability, which imposes liability on a defendant regardless of fault, has been employed instead of a negligence standard where an activity is such that, "while it will be tolerated by the law, [it] must pay its way."¹⁹⁸ Salvage activity cannot be said to fit this description. Rather than being merely tolerated, salvage has long been positively encouraged by the law.¹⁹⁹ Rather than posing "unduly great" dangers,²⁰⁰ salvage has been perceived as conferring remarkable benefits on society that would not be realized without the existence of incentives to encourage salvors. Strict liability for historical and environmental harms would burden salvors with liability even for harms caused by accidents that may occur in their work. Its application would therefore result in the anomaly that salvors will be held to a higher standard of care for historical and environmental preservation than the duty of ordinary care and reasonable diligence they currently owe to owners of the salvaged property.

Critics of both of the proposals described above will point out that there is no provision made for the total prevention of salvage of any sunken property. Unlike any of the schemes described above, these two proposals do not aim to take away incentives for acts of salvage or to forbid it altogether. Absolute preservationists will, no doubt, chafe at the notion that their brand of protection is not, at a minimum, extended to some sunken property. Preservationists might argue that the historical and environmental interests as to some property are so great that the protection offered by the two proposals is simply not sufficient. There is no need to respond to such criticisms by showing that there are never situations where absolute, in situ preservation is warranted. Instead, it is enough to say that situations in which such preservation is necessary ought to be identified by Congress on a case-by-case basis, rather than addressed by a general law, the applicability of which is not clearly linked to the actual historical or environmental value of a particular piece of sunken property. A site-specific law of this kind is currently in

198. W. PAGE KEETON, ET AL, PROSSER AND KEETON ON THE LAW OF TORTS § 75, at 536 (5th ed. 1984).

199. See, e.g., *Blaireau*, 6 U.S. at 266–77.

200. KEETON, *supra* note 198, at 536.

force to prevent salvage activity on the site of the Titanic.²⁰¹ Absolute preservation of sunken property on the sea floor, without allowing for any prospect of recovery, is a drastic measure, forever removing those items from the possession of the property owner and preventing the items' economically valuable use. Therefore, the decision to employ such absolute preservation should be treated as a significant one that should be made by reference to the particular property to be preserved, rather than through general laws like the Abandoned Shipwreck Act and the UNESCO Convention. These laws may bar the recovery of sunken property that has no historical value and can be salvaged with minimal impact on the environment. At the same time, the laws are inapplicable to a considerable amount of property that does warrant protection.

Replacing the existing laws and preservationist proposals with one or both of the changes suggested above would bring about enhanced preservation without eliminating the salvage of sunken property or causing substantial declines in salvage activity. Technological changes have improved salvors' ability to salvage responsibly, making it possible to impose duties with respect to historical and environmental preservation that would have been unthinkable in the past. Furthermore, new laws would be sure to drive the development of salvage technology, as salvors would demand tools which would allow them to comply more easily with the law. These useful developments are less likely to occur if—as is contemplated by the more drastic measures promoted by preservationists—the incentives created by traditional salvage and finds law are eliminated, or the scope of the property to which any remaining incentives apply is minimized.

Additionally, these proposals allow for the historical value and environmental condition of individual sites of salvage to be appraised by courts on the basis of a more relevant and complete factual record than is available to legislatures when they enact blanket statutory prohibitions of and disincentives to salvage. Courts assessing whether to adjust salvage awards or grant damages under the proposed rules will require evidence of the historical and environmental qualities of wreckage in order to make their determinations. Penalties or restrictions will be applied only where it is shown that they are needed, and can be tailored in their severity by the court to fit the situation. Limitations on salvage that are responsive to the facts of a given case allow property owners, salvors, and society as a whole to continue to realize the benefits of salvage, while at the same time requiring changes in the practices of salvors where these offend against protected interests in preservation.

201. See 16 U.S.C. § 450(rr)(b)(4) (2000). Other parts of this act call for an international agreement to protect the Titanic. 16 U.S.C. § 450(rr)-(4).

By comparison, judicial and legislative preservation schemes proposed by preservationists and utilized thus far do not allow for the same differentiation of outcomes in their application. Those schemes do not give salvors an incentive to preserve historical artifacts and the environment to the extent that those interests are implicated. Instead, salvors are forbidden from doing their work altogether, or are deprived of the incentives that have long impelled their actions. Preservationist schemes are applied based on criteria that are largely irrelevant to determining the extent to which historical or environmental concerns are implicated by a given salvage effort. As a result, their operation will discourage even those salvors who do no harm to these important interests—an outcome that should suit no one other than those most implacably opposed to the application of salvage and finds law.

In conclusion, the protection of history and the environment does not require the discouragement of the useful practice of salvage. The heavy-handed solutions proposed or implemented so far will likely prevent a great deal of salvage activity. This result is harmful to the interests of owners of sunken property, salvors, and society as a whole. Owners of sunken property want to recover as much of its value as possible, a result which requires for its achievement the recovery of some or all of the property. This outcome benefits society as a whole by placing the recovered items back into the economy.²⁰² Salvors rely on legal incentives to entice them to recover property, however, so restrictions that eliminate or drastically reduce those incentives (like those backed thus far by preservationists) forfeit the advantages produced by application of traditional salvage and finds law. Rather than impose such restrictions, society ought to protect legitimate historical and environmental interests by using approaches that generally allow salvors to continue to perform their useful work. By employing the proposed seventh factor for calculating salvage awards and by adopting the suggested new cause of action, courts and Congress can see to it that history and the environment are preserved, while at the same time “encourag[ing] the hardy and adventurous mariner to engage in these laborious and sometimes dangerous enterprises.”²⁰³

202. See *Margate Shipping*, 143 F.3d at 986 (“the law of salvage seeks to preserve society’s resources”).

203. *The Blackwall*, 77 U.S. at 14.

