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STATE ANTIQUITY LAWS AND ADMIRALTY SALVAGE: PROTECTING OUR CULTURAL RESOURCES

ADAM LAWRENCE*

In this article the author analyzes the constitutional power of the states to vest title to sunken artifacts in themselves. The legal nature of sunken property and the conflicting state and federal claims to which it is subject are examined through an historical presentation of the statutory and common law pertaining to sunken property. The author suggests how the possible conflicts between federal maritime and state jurisdiction can be resolved, both within the framework of the present law, and by enacting new legislation on the state and federal levels.

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I. INTRODUCTION

The Continental Shelves of the United States are richly endowed with a resource that promises neither to augment declining organic fuel reserves, nor to contribute to hard mineral self-sufficiency. While the exchange value of the resource may on occasion be significant, the resource which consists of sunken vessels and cargoes derives its transcendent value as a repository of cultural information.

It is arguably impossible to understand fully the demographic, commercial and military history and development of the Americas

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during the centuries when the mass transit of people and goods was dependent on river, lake, canal, and coastal waterways without an understanding of the information contained in the marine record. Certainly, the closer one approaches events of the pre-Columbian era, the more significant becomes the mute historical testimony of marine artifacts.¹

It is thus surprising that so few cases have discussed the legal issues surrounding the recovery of this unique, non-living marine resource. The most recent case to do so, *Treasure Salvors Inc. v. Abandoned Sailing Vessel Believed to be the Nuestra Senora de Atocha*,² concluded that traditional admiralty salvage principles governed archaeological salvage on the Continental Shelf beyond territorial waters. As will be shown, however, admiralty remedies are an inadequate means of protecting cultural property.

Alternatives to traditional salvage remedies must be explored and more of the uncertainty that surrounds the federal/state relationship in jurisdiction over marine antiquities must be resolved. To do this, relevant state and federal statutory, common law and admiralty principles applicable to lost and abandoned property and marine antiquities must be identified, analyzed and, if possible, reconciled, so that a conservational approach to marine antiquities may be developed.

II. THE LEGAL NATURE OF SUNKEN PROPERTY

A. *Abandonment and Dereliction in Admiralty*

It is necessary to define at the outset the terms "derelict" and "abandoned" as descriptive of sunken property in which someone other than the last owner or possessor at the time of the mishap can obtain a possessory or titular interest. A "derelict" is merely an article of marine property, frequently but not necessarily a vessel, that is not in the possession or control of its owner or someone acting on the owner's behalf. An object which is *res derelicta* is not *res nullius* or subject to a claim of ownership by its first possessor. The original owner retains title while the salvor of the derelict obtains, at most, a salvage lien in admiralty. "Abandoned" property refers

1. From approximately 1500 to 1800, Spain, to take a primary example, contributed heavily to the archaeological debris on the North American Gulf and Atlantic continental shelf. Pirates, primitive navigation, and unpredictable storms along La Carrera de Indias, took an enormous toll of the convoys that would marshall in Havana harbor for the treacherous first leg of the voyage, through the Florida Straights to Seville. See, J. PARRY, *THE SPANISH SEABORNE EMPIRE* 118-22, 135, 254 (1966); S. POTTER, *THE TREASURE DIVER'S GUIDE*, at xix-xx (1972).

2. 408 F. Supp. 907 (S.D. Fla. 1976), *aff'd.*, No. 76-2151 (5th Cir. Mar. 13, 1978).

to all other marine property in which the loss or relinquishment of physical possession necessary to render property derelict has merged with an intent permanently to relinquish possession and title. Property so abandoned is both possessorless and ownerless and is subject to a claim of ownership by its finder or salvor.³ Because some cases interchangeably refer to an "abandonment" of possession as an "abandonment" of title, and inconsistently use the term "derelict" as synonymous with each, confusion will be avoided and consistency with majority usage obtained if maritime property that has suffered something less than complete relinquishment of possession and title is called "derelict" rather than "abandoned."⁴

Salvors under traditional admiralty principles obtain a lien against the property they recover which enables them, in the case of derelicts, to proceed either *in rem* against the property or *in personam* against its owner, and solely *in rem* when the recovered property is abandoned. A salvor's lien against derelict property results only in lien satisfaction while a lien against abandoned property frequently results in outright ownership.⁵

Marine property becomes derelict when it reasonably appears to be abandoned. Determining the point at which derelict property becomes abandoned is a more difficult problem in the absence of an express relinquishment of title and interest by the last owner or occupier. It is clear that mere passage of time is insufficient, standing alone, to prove abandonment.⁶ Nonuse over an extended period of time, however, particularly when coupled with other facts and circumstances, may be the basis for inferring an intent to abandon. The inquiry in each case is essentially a factual one.⁷

If abandonment is to be defined as a voluntary and intentional

3. *The Island City*, 66 U.S. (1 Black) 121, 128 (1861); *Eads v. Brazelton*, 22 Ark. 499, 510 (1961); *Merrill v. Fisher*, 204 Mass. 600, 91 N.E. 132 (1910); *Morris v. Lyonesse Salvage Co., Ltd.*, [1970] 2 Lloyd's List L.R. 59, 60; *The Tubantia*, 18 Lloyd's List L.R. 158, 159-60 (1924). *But see* *Simon v. Taylor*, [1975] 2 Lloyd's List L.R. 338, 342-43. *But cf.* *Bryan's Case*, 6 Ct. Cl. 128, 134-35 (1870) (suggesting that even a salvage lien may be denied where the salvor should reasonably have known that the property was not abandoned). *See also*, M. NORRIS, *THE LAW OF SALVAGE* § 157 at 257-58 (1958).

4. *See, e.g.*, *The Island City*, 66 U.S. (1 Black) 121, 128 (1861); *The Port Hunter*, 6 F. Supp. 1009, 1011 (D. Mass. 1934); *Thompson v. United States*, 62 Ct. Cl. 516, 524 (1926); *Howard v. Sharlin*, 61 So. 2d 181 (Fla. 1952); *Merrill v. Fisher*, 204 Mass. 600, 91 N.E. 132 (1910); 1 C.J.S. *Abandonment* §§ 3, 4. *But see* M. NORRIS, *supra* note 3, at 258. *See generally* Korthols-Altes, *Submarine Antiquities: A Legal Labyrinth*, 4 SYRACUSE J. OF INT'L LAW & COM. 77, 84-85 (1976).

5. *See* *The Sabine*, 101 U.S. 384, 386 (1879).

6. *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960); 1 C.J.S. *Abandonment* § 3 (b)(2).

7. *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960).

relinquishment without hope of recovery or intention to return,⁸ it is difficult to regard the loss of a vessel with all hands, as might frequently have happened in the days of the Spanish treasure fleets, without more, as an abandonment. Those crew members who are lost to the weather, disease or enemy action, with the resultant loss of their vessel, can hardly be said to have abandoned their vessel.⁹ Reasonable men, and certainly colonial governments, divine monarchs and avaricious conquistadores, do not voluntarily abandon their valuables.

The intuitive notion that most rational persons do not abandon their valuables is confirmed in the history of the *Atocha* which in 1622 went down with heavy loss of life in a storm off the coast of Florida. The Spanish made repeated attempts to salvage what they could from the *Atocha* and her sister ships until storms carried away their marker buoys, and shifting sands covered the wreck and its cargo. Under these circumstances, proofs of formal abandonment by the Spanish are highly circumstantial at best.¹⁰ Nor can abandonment be presumed merely from a succession of Spanish governments, particularly if the vessel or cargo belonged to an agency of a former government and there has never been an express or official abandonment.¹¹

In addition to drawing inferences of abandonment from prolonged inaction, admiralty has attempted a partial solution of the abandonment problem by providing a means for all known claimants of the salvaged property to be noticed and heard. If no one other than the salvor appears, abandonment may be presumed and an inquiry into the recondite mental states of master, crew owner and country of registry avoided.¹² If there are competing claimants, as there probably will be where the salvaged vessel or cargo is of recent vintage, an inquiry into who harbored what intent and when,

8. *The Island City*, 66 U.S. (1 Black) 121 (1861).

9. Cf. *Bradley v. H. Newsom, Sons & Co.*, [1919] A.C. 16, 25, 27, where several judges drew distinctions between the legal consequences of involuntary acts of physical abandonment (for example, the crew dying on board of disease or being forced off the ship at gunpoint) and voluntary acts (such as the crew abandoning ship to save their lives but harboring an intent to return with aid). Some opinions suggested that third party salvage rights could only arise in the latter situation. The notion that one can intentionally and temporarily physically abandon marine property in an objectively imperiled state, but still avoid a salvage claim by a third party salvor, seems to have little if any vitality left. The majority rule may be found, for example, in *The Island City*, 66 U.S. (1 Black) 121, 128 (1861); *The Coromandel*, 166 Eng. Rep. 1097, 1099 (1857).

10. S. POTTER, *supra* note 1, at 215-18; R. MARX, *THE UNDERWATER DIG* 97 (1975); 149 NATIONAL GEOGRAPHIC 787, 800-01 (1976).

11. *Simon v. Taylor*, [1975] 2 Lloyd's List L.R. 338, 343.

12. *See M. O. Medina v. One Nylon Purse Seine*, 259 F. Supp. 769, 771 (S.D. Cal. 1966).

and who manifested what intent to possess or abandon, will be unavoidable. Naturally, with admiralty's emphasis on active exploitation, the longer marine property has lain undisturbed the more suspect will be a putative owner's claim and proofs of possession.

While the cases do not explore this aspect of abandonment, there undoubtedly is a belief extant in admiralty that after a certain point in time owners of vessels and cargoes and their private or governmental successors in interest need not even be noticed of an antiquities salvage proceeding. As will be shown later in this article, the risk of irretrievable loss of cultural artifacts will be heightened if admiralty adheres to this belief. It is precisely through its power to notice all potential claimants to a marine *res* that admiralty can display a greater cultural awareness than it has previously done.

Rather than catalogue cases in which abandonment has been found, it would be more relevant to examine what a finder or salvor must do to secure a possessory or titular interest in sunken property. One approach has been to determine whether the salvor or finder treated the sunken property as a "purchaser would prudently have done," and exercised only that "use and occupation of which the subject matter was capable."¹³ Under this view the salvor must manifest an intent to reduce the property to physical possession by dealing with the wreck as a whole in a way that would tend to warn, if not exclude, subsequent salvors.¹⁴

Most courts have required the presence of an intent to possess, and although not insisting on physical possession, do seem to demand an actively exploitative approach by the would-be salvor.¹⁵ Thus, merely marking trees for range lines on each side of a river and fixing buoys to the wreck was found indicative only of a desire to reduce the wreck to possession, but not the attainment of possession. In the absence of such unambiguous manifestations of exclusivity as placing a boat over the wreck site, actually salvaging some cargo, or otherwise guarding the property, no salvage lien would be recognized nor would title be obtained.¹⁶ Even boarding a vessel and publishing a notice of exclusive possession will not serve to mature a claim to abandoned property unless "coupled with a then present intention of conducting salvage operations."¹⁷ Intent and acts sym-

13. *The Tubantia*, 18 Lloyd's List L.R. 158, 160 (1924).

14. *Id.* See *Morris v. Lyonesse Salvage Co., Ltd.*, [1970] 2 Lloyd's List L.R. 59, 60-61.

15. See, e.g., *The Burlington*, 73 F. 258, 264 (E.D. Mich. 1896); *Brady v. The Steamship African Queen*, 179 F. Supp. 321, 324 (E.D. Va. 1960); *The John Wurts*, 13 F. Cas. 903, 905 (S.D.N.Y. 1847) (No. 7,434); *Eads v. Brazelton*, 22 Ark. 499, 510 (1861).

16. *Eads v. Brazelton*, 22 Ark. 499, 511-12 (1861).

17. *Brady v. The Steamship African Queen*, 179 F. Supp. 321, 324 (E.D. Va. 1960).

bolic thereof must immediately be followed by "activity in the form of constructive steps to aid the distressed property."¹⁸

The cases suggest that a higher degree of constructive or symbolic possession will be tolerated to establish possessory or titular rights where the wrecks lie in extremely deep water or other particularly inaccessible marine environments.¹⁹ In each case, an inquiry as to the salvor's state of mind and the adequacy of his efforts will be made and compared to what a reasonable and efficient owner of the abandoned property in question would have done to protect and recover his belongings. The important point is that the closer a salvor gets to physical possession, the more secure his claim. The more a salvage claim rests merely on fiat or pronouncement, the greater the rights of subsequent salvors and the less inclined a court will be to enjoin subsequent salvage efforts.

B. *Sunken Property and Federal Salvage Law*

The emphasis on active exploitation that was perceived to exist in decisions discussing dereliction and abandonment is reflected in the criteria that courts will follow in assessing noncontractual, or "pure", salvage awards against derelict property. As generally defined,

Salvage is the compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in cases of shipwreck, derelict, or recapture.²⁰

Salvors of derelict property are entitled to an award in salvage based on certain traditional criteria: labor expended, promptitude, skill and energy used, the value of the equipment employed in the salvage operation, the degree of danger to which the equipment was exposed, the personal risk incurred, the value of the property saved, and the degree of danger to which the property was exposed.²¹

The significant distinction between pure salvage awards and all other money judgments for rendition of beneficial services including contractual salvage awards, is that the former are not awarded on a quantum meruit basis. Rather, their essence lies in the public policy of encouraging voluntary aid to property in maritime distress

18. *Id.*

19. See *Morris v. Lyonesse Salvage Co., Ltd.*, [1970] 2 Lloyd's List L.R. 59, 62; *The Tubantia*, 18 Lloyd's List L.R. 158, 160 (1924).

20. *The Blackwall*, 77 U.S. (10 Wall.) 1, 12 (1869).

21. *Id.* at 14.

by bestowing on the successful salvor admiralty's largesse, albeit from the pocket of the owner of the salvaged property.²²

In contractual salvage the situation is slightly different. While both contract and pure salvage generate salvage liens, the measure of a contract salvage lien usually is to be derived from the terms of the contract and not from traditional admiralty criteria for salvage awards.²³ Admiralty clearly prefers to apply its own rules, however, and not the intentions of the parties, unless contractual intent is unambiguous.²⁴ Thus, if contract terms or circumstances can be construed in such a way that the "salvor's right to receive a meritorious award" rather than the contractual amount will be protected, they generally will be so construed.²⁵

In the salvage contract the parties may also dispense with otherwise applicable admiralty salvage principles by eliminating success as a condition of salvage recovery or so drafting the contractual terms governing actual field performance that the definitional requirement of impending peril is virtually eliminated. Because contract salvage of this type is neither rendered gratuitously nor dependent on the subsequent beneficence of admiralty, it is at the borderline of admiralty jurisdiction. Contractual recovery of marine antiquities, as provided for in most state antiquity statutes, similarly pushes admiralty jurisdiction to its applicable limits. Although there may be a basis for arguing that antiquities salvage is not a traditional maritime activity,²⁶ and however attenuated their other similarities to salvage principles may be, most state antiquity statutes do proceed on a success or "no cure, no pay" footing. For purposes of the present discussion the success term in state antiquity salvage contracts provides a sufficient nexus to matters over which admiralty has traditionally asserted a salvage jurisdiction.

In the case of sunken, abandoned or derelict marine property of no cultural interest, the concept of impending peril has already been modified in both pure and contract salvage situations to meet the demands of public policy and the realities of maritime practice. Once property is on the bottom, time is rarely of the essence and

22. *Id. Accord*, *The Sabine*, 101 U.S. 384, 389 (1879).

23. *See The Elfrida*, 172 U.S. 186, 192 (1898); *Veverica v. Drill Barge Buccaneer No. 7*, 488 F.2d 880, 883 (5th Cir. 1974).

24. "Nothing short of a distinct agreement to pay the stipulated sum, whether the service be successful or not, will change the character of a salvage contract of employment, or deprive it of its maritime lien." *Chapman v. The Engines of the Greenpoint*, 38 F. 671 (S.D.N.Y. 1889). *See The Excelsior*, 123 U.S. 40, 49-50 (1887); *The Camanche*, 75 U.S. (8 Wall.) 448, 477 (1869).

25. *Cf. Atlantic Towing Co. v. The Caliche*, 47 F. Supp. 610, 614 (S.D. Ga. 1942).

26. *See note 136 infra*.

salvage can be conducted on a nonemergency basis. Because the oceans are a vast and opaque medium, the opportunities for extrajudicial appropriation of property by finders and salvors are enormous. Even where work and risk are "trifling", admiralty has traditionally rewarded the secret finders of abandoned property liberally, both as remuneration for their self-denial and as a plea to other serendipitous and intentional finders to place their trust in admiralty's generosity.²⁷ "Impending peril" in these situations, has been functionally redefined to mean merely the increasing likelihood of permanent loss that attends marine property the longer it remains unsalvaged.²⁸

As a result of these principles—namely admiralty's high regard for salvors and its belief in the efficacy of generous remuneration as insurance against both undetectable acts of dishonesty and one mariner's indifference to another's peril—awards in derelict and abandonment situations have been high. When the recovered property has been found to be abandoned, its finder is traditionally entitled to its exclusive ownership and possession.²⁹ Substantially the same result obtains when the property is merely derelict, if it is of a minimal value far exceeded by the value of the salvor's work and expenditures.³⁰ In all other derelict salvage cases, admiralty rarely awards less than a third of the value of the salvaged property, generally awards a moiety (or one half of its value) and occasionally awards more.³¹

C. *The Salvor and the State*

The general rule applicable to abandoned marine property is

27. *Broere v. Two Thousand One Hundred Thirty Three Dollars*, 72 F. Supp. 115-18 (E.D.N.Y. 1947); *Rowe v. The Brig*, 20 F. Cas. 1281, 1283 (D. Mass. 1919) (No. 12,093).

28. *Gardner v. Ninety-nine Gold Coins*, 111 F. 552, 553 (D. Mass. 1899).

29. See notes 3-5 *supra*, and accompanying text. See also *Richard v. Pringle*, 293 F. Supp. 981, 985 (E.D.N.Y. 1968); *M.O. Medina v. One Nylon Purse Seine*, 259 F. Supp. 769, 771 (S.D. Cal. 1966).

30. *The Burlington*, 73 F. 258, 264-65 (E.D. Mich. 1896). See also *Llewellyn v. Two Anchors and Chains*, 15 F. Cas. 711 (E.D.N.Y. 1866) (No. 8,428); *The Zealand*, 30 F. Cas. 917 (D. Mass. 1865) (No. 18,205).

31. *The Brewster*, 4 F. Cas. 82 (S.D. Fla. 1848) (No. 1,852); *The John Wurts*, 13 F. Cas. 903, 905 (S.D.N.Y. 1847) (No. 7,434) (a "moiety"); *Rowe v. The Brig*, 20 F. Cas. 1281, 1283 (D. Mass. 1818) (No. 12,093) (a "moiety"). See also the catalogue of salvage award of fifty percent and over, collected in *The Lamington*, 86 F. 675, 685-89 (2d Cir. 1898). *But see Post v. Jones*, 60 U.S. (19 How.) 150, 161 (1856); "[N]o valid reason can be assigned for fixing a reward for salvaging derelict property at a moiety or any given proportion . . . the true principle is adequate award, according to the circumstances of the case." *Moiety as a maximum applies only to those situations in which the owner of the salvaged property appears. Other criteria for awards of more than a moiety are enumerated in K. McGUFFIE, KENNEDY'S CIVIL SALVAGE* 162-64 (4th ed. 1958).

that a government may proclaim itself owner of abandoned property within its jurisdiction, but without a clear legislative statement to this effect, the courts should adhere to traditional maritime law principles of finder and salvor.³²

With the possible exception of *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*,³³ *Ervin v. The Massachusetts Co.*,³⁴ and *Wade v. Flying "W" Enterprises, Inc.*,³⁵ there is no significant contemporary body of case law which holds that the government's title to abandoned marine property is an inherent prerogative of its sovereignty. The *Massachusetts Co.* case has been uniformly condemned by all commentators.³⁶ *Flying "W" Enterprises*, while citing *Massachusetts Co.* approvingly in support of its finding of sovereign prerogative, could have reached the same result by relying on traditional salvage principles. In *Flying "W" Enterprises*, North Carolina, commencing in March, 1962, had attempted to salvage cargoes from sunken Confederate blockade runners. Since the trespassory acts the state sought to enjoin occurred in 1965, the state could have been adequately protected as a first finder or salvor, without reliance on questionable precedent. *Platoro*, while rearticulating *Massachusetts Co.*'s disingenuous common-law rule of sovereign prerogative over "wrecks of the sea", and thus perpetuating *Massachusetts Co.*'s misanalysis, does eventually arrive at a substantively correct result.

The suggestion in *Massachusetts Co.*, *Flying "W" Enterprises*, and *Platoro*, that ownership of sunken property if not claimed within a reasonable period of time is in the state and not the salvor

32. *United States v. Tyndale*, 116 F. 820, 823 (1st Cir. 1902); *Murphy v. Dunham*, 38 F. 503, 509-10 (E.D. Mich. 1889); *Russell v. Forty Bales of Cotton*, 21 F. Cas. 42, 48-50 (S.D. Fla. 1872) (No. 12,154); *Thompson v. United States*, 62 Ct. Cl. 516, 524 (1926).

33. 371 F. Supp. 356 (S.D. Tex. 1973), *rev'd on other grounds*, 508 F.2d 1113 (5th Cir. 1975).

34. 95 So. 2d 902 (Fla. 1957).

35. 273 N.C. 399, 160 S.E. 2d 482 (1968).

36. In *The Massachusetts Co.*, the court concluded that the hulk of a former U.S. warship, scuttled in territorial waters in 1922, was "wreck" according to English case and statutory law. Since by statute the common law was still in force in Florida unless repealed or inconsistent with subsequent law, English precedent vested title to a "wreck" in the sovereign after a year and a day. The case has been criticized for: (1) misconstruing the pivotal concept of "wreck", which is property washed ashore but does not include property submerged considerably offshore, as the warship was here; (2) for disingenuously using only those few English precedents which were consistent with its hypothesis, and ignoring American case law to the contrary; (3) for generally ignoring the fact that some of the precedents relied upon post-dated July 4, 1776, the cut-off date of Florida's common law savings statute; and (4) for applying the wrong group of Florida abandoned property statutes. See *Kenny & Hornsoff, The Ownership of the Treasures of the Sea*, 9 WM. & MARY L. REV. 383 (1967-68); Note, 12 WM. & MARY L. REV. 97 (1970-71); Note, 21 U. FLA. L. REV. 360 (1969). See also *Treasure Salvors, Inc. v. The Unidentified Vessel*, No. 76-2151 (5th Cir. Mar. 13, 1978).

or finder, is not supported elsewhere in the case law. In *United States v. Tyndale*,³⁷ the court stated that it was not within the province of the courts to determine that "royal prerogatives" in the products of marine catastrophe, which were relied upon in England as a source of royal revenues, apply to an executive department funded by the U.S. Treasury. In *Murphy v. Dunham*,³⁸ the court stated that sunken property was *sui generis*. It was neither wreck because it was not washed ashore; nor flotsam, because it did not float upon the water; nor jetsam, because it had never been jettisoned; nor ligan, because it had not been buoyed. Since only objects in these categories accrued to the Crown, sunken property could never go to the state except by specific statute. *Russell v. Forty Bales of Cotton*³⁹ traced the Crown's historic interest in maritime property not to revenues but to its humane motivation of interceding on behalf of shipwrecked persons against the barbaric practices to which they were subjected by certain British coastal inhabitants. The idea that the Crown had an abstract revenue prerogative was not "sufficiently definite, regular, and certain to establish a principle of national law," at least in the United States.

Largely in response to the uncertainties that surrounded their title to sunken property in the absence of statute, many states have attempted to protect their marine antiquities legislatively. The Florida Archives and History Act⁴⁰ and its implementing regulations⁴¹ apply to "artifacts, treasure trove, and objects of antiquity which have . . . historical value or are of interest to the public, including . . . sunken or abandoned ships . . ." ⁴²The Act further provides that title to such objects on "state-owned sovereignty submerged lands" is vested in the state.⁴³ All underwater exploration and excavation must be done by qualified salvors pursuant to a permit.⁴⁴ The permit is issued after a contract is negotiated between the state and the salvor.⁴⁵ The Act also provides for on-site supervi-

37. 116 F. 820, 823 (1st Cir. 1902).

38. 38 F. 503, 509-10 (E.D. Mich. 1889).

39. 21 F. Cas. 42, 48-50 (S.D. Fla. 1872) (No. 12,154).

40. FLA. STAT. §§ 267.011-.14 (1975).

41. FLA. AD. REG. 1A-31.01-.12 (1975).

42. FLA. STAT. § 267.061(1)(a) (1975). FLA. AD. REG. 1A-31.02 (1975) purports to apply the Law to "All Articles of Ancient, historic or intrinsic value."

43. FLA. STAT. §§ 267.061(1)(b), .12(3) (1975). FLA. AD. REG. 1A-31.09 (1975) vests Florida with title to the same class of objects "Recovered in the Waters of the State of Florida." This would seem to be a broader jurisdictional grant than the statute contains. Cf. FLA. STAT. § 253.12 (1975) (vesting title to submerged lands in the state).

44. FLA. STAT. § 267.12 (1975).

45. FLA. STAT. § 267.031(5) (1975); FLA. AD. REG. 1A-31.03, .07, .08 (1975).

sion by state employees, record keeping, reporting and criminal penalties for violation.⁴⁶

While Florida's Act is more detailed than many, it contains several notable omissions. It applies on its face to objects which have intrinsic value, but are not necessarily antiquities, and to articles which are historic, but not necessarily old.⁴⁷ The Act provides no criteria for salvor remuneration, merely stating that whatever is salvaged is to be divided pursuant to the contract.⁴⁸ Neither the Act nor the regulations provide definite guidance on what can and cannot be included in the contract.

Georgia's statute, by comparison, provides that "archaeologically significant objects" remain the property of the State. It extends its protection to "ancient and abandoned ships and other similar sites and objects," and provides for a "reasonable finders' fee" for the salvor.⁴⁹ South Carolina's statute creates a property right in the State for "all shipwrecks, sunken vessels and all things therein, including . . . cargoes, tackle" and other artifacts and things of value "which have remained unclaimed for more than fifty years" Alternative provisions for salvor remuneration include "fair compensation," and, with the approval of the state, retention by the salvor of all or a portion of the relics or artifacts recovered.⁵⁰ North Carolina's statute is substantially similar to South Carolina's.⁵¹ Texas extends its marine antiquities jurisdiction to "pre-twentieth century ships" and cargoes that are "sunken or abandoned."⁵² Massachusetts' scheme also protects vessels and cargoes, if they are of historical value and have either been unclaimed for more than 100 years or are valued in excess of \$5,000.⁵³ Massachusetts allows its permittee-salvors to retain 75% of the value of the material recovered,⁵⁴ while Texas allows a fair compensation to the

46. FLA. STAT. § 267.13 (1975); FLA. AD. REG. 1A-31.10 to .12 (1975).

47. See FLA. STAT. § 267.061(1)(a)-(b) (1975).

48. See FLA. AD. REG. 1A-31.09 (1975). The predecessor to the present Archives and History Act, the Antiquities Act of 1965, FLA. STAT. §§ 267.01 - .08 (1965), did provide for a 75-25 percent division in favor of the salvor. It has been reported that, at least as of 1969, salvage contracts negotiated by the Florida Board of Archives and History still retain the 75-25 percent division. 21 U. FLA. L. REV., *supra* note 36, at 374 n.104. Use of the 75-25 salvage split, and even an 87 ½-12 ½ division when the salvor was a county historical society, antedate the 1965 and 1967 laws. MINUTES OF THE TRUSTEES OF THE INTERNAL IMPROVEMENT FUND, STATE OF FLORIDA, VOL. XXXIII at 176 (January 17, 1961), 192 (February 7, 1961).

49. GA. CODE ANN. § 40:813a (1975).

50. S.C. CODE §§ 54-7-210 to -280(Supp. 1976).

51. N.C. GEN. STAT. §§ 121-22 to -28 (1974).

52. TEX. REV. CIV. STAT. ANN. art. 6145-9, § 2 (Vernon 1970).

53. MASS. GEN. LAWS. ANN. ch. 6, § 180 (West 1976).

54. *Id.* ch. 91, § 63 (West Supp. 1977).

salvager in terms of either a percentage of the reasonable cash value of the objects recovered or a fair share of the objects themselves.⁵⁵ Virtually all statutes provide for public access or museum display of the state's share. It seems certain that an analysis of the antiquities statutes of other coastal, lacustrine or riverine states would reveal a similar array of legislative approaches.⁵⁶

As of the present, no reported cases have been found interpreting state marine antiquities statutes. However, in an analogous statutory area, namely, the states's *parens patriae* interest in shipwrecked articles and persons, a significant, and possibly portentous case appears. *Wiggins v. 1100 Tons, More or Less, of Italian Marble*,⁵⁷ construed a 1792 Virginia law which created the office of County Wreck Commissioner and vested in the Commissioner the power to take possession of wrecked property for the purposes of assistance and preservation. The Commissioner granted salvage rights to the claimants to remove marble from a vessel which had gone down off the county coast sixty-five years earlier, on the condition that the salvors remit a percentage of the value of the salvaged material to the county. In a subsequent dispute over the nature of the rights, if any, that the Wreck Commissioner purported to grant, the court first disposed of the county's argument that the state statute vested the Commissioner with exclusive possessory rights to all abandoned marine property and wrecks. It noted that in sixty-five years the Office of the Wreck Commissioner had never inventoried the vessel, hired guards or laborers, reduced the vessel to possession in any way, or treated it as unavailable for public salvage. As to the Commissioner's power to grant salvage rights under these circumstances, the court stated:

The statute gives no authority to the Wreck Commissioner to grant exclusive salvage rights. Indeed, it is extremely doubtful that any such statute could be constitutionally enacted. Certainly it is true that after 65 years, with no action ever having been taken by the Commissioner of Wrecks, his authority to grant such an exclusive right is no greater than that of any individual.⁵⁸

Although not directly passing upon the constitutionality of the 1792 statute, the court nevertheless voiced serious doubt that such a statute would be constitutional:

55. TEX. REV. CIV. STAT. ANN. art. 6145-9, § 9 (Vernon 1970).

56. See, e.g., ALASKA STAT. §§ 41.35.010 - .240, (1962); COLO. REV. STAT. §§ 24-80-401 to -409 (1973); VT. STAT. ANN. tit. 22, §§ 701 - 791 (Supp. 1977); WASH. REV. CODE ANN. §§ 27.53.010 - .090 (Supp. 1976).

57. 186 F. Supp. 452 (E.D. Va. 1960).

58. *Id.* at 455.

We do not reach the serious constitutional question as to the right of a state to lay claim to wrecked property, as opposed to the policy of maritime law encouraging the recovery of distressed property by holding out the right to be liberally rewarded. An analysis of the Wreck Commissioner statutes does not lead to the belief that the Wreck Commissioner is legally placed in possession of all wrecks and their contents by operation of law.⁵⁹

The remainder of this paper will explore the accuracy of the opinion expressed in *Wiggins*, that state antiquities laws may not effectively vest title to sunken artifacts in the state, by analyzing the conflict, if any, between state and federal law in this area.

III. STATE JURISDICTION OVER MARITIME PROPERTY UNDER THE SAVING TO SUITORS CLAUSE

Article III, section 2(1) of the United States Constitution extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. The Judiciary Act of 1789 vests federal district courts with exclusive jurisdiction over all civil cases of admiralty or maritime jurisdiction "saving to suitors in all cases all other remedies to which they are otherwise entitled."⁶⁰ The presence of state jurisdiction in admiralty and maritime matters is thus dependent on the availability of a remedy under the savings to suitors clause.

The issue, therefore, is whether states have a concurrent prescriptive salvage jurisdiction with the federal courts and Congress and, if they do not, one must ask what is the limit of their jurisdiction over marine property. In delimiting state jurisdiction in this area, the decisions ask one or both of the following questions: is the state remedy to be applied essentially one *in rem* or *in personam*, and is the remedy based on common law contract principles or admiralty salvage rules.

Considering the second criterion first, many courts have said that a state court has jurisdiction only where a contract for services

59. *Id.* See also M. NORRIS, *supra* note 3, § 157 at 258 which similarly noted:

The State's claim of ownership conflicts with the claims of a salvor in the respect that it may decrease the amount of his reward by reason of the state's claim. The state's claim can therefore be said to conflict with the policy of the maritime law of encouraging the recovery of distressed property by holding out the right to be liberally rewarded, and may raise a constitutional question.

60. 28 U.S.C. § 1333(1) (1970). Before the 1948 revision, what was saved to suitors was "the right of a common-law remedy where the common law is competent to give it." The amendment has been construed as in no way narrowing the jurisdiction of the state. *Madruca v. Superior Court*, 346 U.S. 556, 560 n.12 (1953).

is made.⁶¹ In such cases, the right of recovery depends upon whether the services were rendered pursuant to the contract, and not upon the success or failure of the salvage attempt.⁶² This is, of course, no more than a recognition by the courts that common law contract principles are within the scope of the savings to suitors clause. It is noteworthy that beyond stating this simple truth, the cases have not attempted to fashion or discern a logical basis for their rejection of concurrent state salvage jurisdiction.⁶³ One case, *Sturgis v. Law & St. John*,⁶⁴ stands as an exception. In *Sturgis*, the court was asked to reduce the amount of a state referee's award to a salvor. It was contended that the award had been computed using admiralty salvage rules rather than those principles governing common law recovery in *quantum meruit*. Predicated on the saving to suitors clause,⁶⁵ *Sturgis* had no difficulty in concluding, as a matter of law, that state salvage jurisdiction was fully concurrent with the salvage jurisdiction of admiralty; however, practical reasons militated against a state's insistence on exercising its concurrent jurisdiction. Primarily, *Sturgis'* holding was based on the court's belief that the expertise required to discern and apply the complex of factors comprising a salvage award was beyond the competence of state common law courts and lay juries. The court also stated that the virtually total absence of precedent for state common law jurisdiction over the subject militates against concurrency in salvage. *Sturgis'*

61. See *Reynolds v. Browning Wells & Co.*, 224 App. Div. 442, 443, 231 N.Y.S. 362, 364, (1928) in which the court stated: "The contract being one for services and the price being agreed upon, the state court has jurisdiction of the action, although it would not have jurisdiction if the action were one to recover salvage without any express contract in relation thereto." *Accord*, *Merritt & Chapman Derrick & Wrecking Co. v. Tice*, 77 App. Div. 326, 79 N.Y.S. 120 (1902). See also *The Cheeseman v. Two Ferryboats*, 5 F. Cas. 528 (S.D. Ohio 1870) (No. 2,633).

62. See cases cited in note 62 *supra*.

63. See generally *Houseman v. The Schooner North Carolina*, 40 U.S. (15 Pet.) 40, 48 (1841), in which the court questioned rhetorically: "What other court, but a court of admiralty, has jurisdiction to try a question of salvage?" See also M. NORRIS, *supra* note 3, § 14 at 18:

Cases of salvage were not tried in American common-law courts before the establishment of the Republic of the United States of America. Therefore, the savings to suitors clause of the Act of September 24, 1789 . . . does not apply to salvage suits. It does not give the common-law courts jurisdiction over a class of cases which it never possessed.

64. 5 Super. Ct. 451 (N.Y. 1850); *accord*, *O'Neill v. Schoenbrod*, No. 77-1922 (Fla. 3d D.C.A. Feb. 7, 1978).

65. *Sturgis* did not, in so many words, mention the saving to suitors clause. However, the language in *Sturgis* quite clearly alluded to the clause:

Strange as it may seem, there is no instance which we are aware of, where the question has been raised, whether a court of common law has jurisdiction to award a salvage compensation. It is generally supposed that courts of common law have concurrent jurisdiction, in cases of salvage, as they have in many other cases with courts of admiralty.

6 Super. Ct. at 456.

ultimate rejection of jurisdictional concurrency was clearly based not on an apprehension of legal disability or federal supremacy but on pragmatic considerations. Far from denying state court jurisdiction over salvage matters, *Sturgis*, after concluding that a state court should desist from rendering salvage awards, proceeded to award an amount admittedly in excess of *quantum meruit*.⁶⁶

The conclusions to be drawn from *Sturgis* are somewhat uncertain. Perhaps all that may safely be derived from this case is that the only court to consider the matter at any length found no legal impediment to concurrent state salvage jurisdiction.⁶⁷ What might, as a practical matter, preclude state jurisdiction was not the presence or absence of the success requirement or common law contract principles, but an esoteric body of nautical knowledge and admiralty procedure which was unfamiliar to the common law. There have been no subsequent cases discussing the problem that concerned *Sturgis*. While *Sturgis*, so interpreted, remains good law, it is on the distinction between *in rem* and *in personam* actions that later cases have relied in assessing the contemporary scope of state jurisdiction over maritime property generally and marine salvage in particular.

Prompted for the most part by the profusion of state lien laws that allowed creditors of maritime property to proceed *in rem* against the vessel and its appurtenances, the United States Supreme Court in *The Moses Taylor*⁶⁸ and *The Hine v. Trevor*⁶⁹ attempted to define the limits of federal and state jurisdiction over maritime property. The underlying subject matter of each *in rem*

66. *Id.* at 462.

67. Despite *Sturgis*' pragmatic rejection of state salvage jurisdiction, there is little indication that the states have been uniformly deterred from claiming a salvage competence for themselves. Several states retain statutes that to all outward appearances assert both *in rem* and *in personam* jurisdiction over derelict and abandoned vessels and cargoes. See, e.g., FLA. STAT. ANN. §§ 705.01-.16, 706.20, 707.13-.14 (West 1969 & Supp. 1973); DEL. CODE tit. 23, § 1304 (1974). The Delaware Code provides, in part:

The finder of a wrecked and abandoned vessel or goods and all persons rendering aid in saving or securing such vessel or goods, or in saving a vessel from wreck, shall be paid such reasonable salvage as may be agreed on or as shall be assessed by 3 judicious men, to be appointed by a Judge of the Superior Court. The sums awarded shall be a lien on such vessel or goods and upon the fund raised by any sale thereof

It is open to some doubt whether salvage statutes such as Delaware's are permissible variants of actions in trover (*Sturgis v. Law & St. John*, 5 Super. Ct. 451 (N.Y. 1850)), or replevin (*Mengel Box Co. v. Joest*, 137 Miss. 461, 90 So. 161 (1921); *Merrill v. Fisher*, 204 Mass. 600, 91 N.E. 132 (1910)), or are simply unabashed assertions of a concurrent salvage jurisdiction. See *Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638, 642-43 (1899).

68. 71 U.S. 441 (1866).

69. 71 U.S. 555 (1866).

action (marine passenger carriage in *The Moses Taylor*, and collision on internal navigable waters in *The Hine v. Trevor*) was clearly maritime and traditionally cognizable in admiralty. Both cases noted that state lien laws as written, construed and enforced within their jurisdiction, invested the state courts with jurisdiction identical to that possessed by federal admiralty courts. The Court decided that the statutes creating state liens were not permissibly predicated, pursuant to the mandate of the saving to suitors clause, on any enabling common law principles:

The case before us is not within the saving clause of the ninth section [of the Judiciary Act of 1789]. That clause only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it.' It is not a remedy in the common-law courts which is saved, but a common-law remedy. A proceeding *in rem*, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common-law courts, it is given by statute.⁷⁰

Thus, these cases hold that state *in rem* lien statutes affecting maritime property are preempted by an exclusive federal jurisdiction and, furthermore, provide the basis for restricted state jurisdiction over maritime property. Neither case, however, seriously questions the existence of the large but undefined area in which the states retain concurrent jurisdiction over maritime property under the saving to suitors clause.⁷¹ The problem of delimitation appeared at that time to be, and to a large extent still is, resolvable by defining the essential attributes of *in rem* remedies⁷² and leaving unelucidated the ambiguous term "common law remedy."⁷³

70. *The Moses Taylor*, 71 U.S. at 431. See *The Hine v. Trevor*, 71 U.S. at 571.

71. *The Moses Taylor*, 71 U.S. at 428-30; *The Hine v. Trevor*, 71 U.S. at 571.

72. An action against a vessel, by name, as though it were the defendant in the matter, followed by seizure, adjudication, judgment and sale of the vessel, is an *in rem* proceeding. As employed traditionally in admiralty, and under then existing state practice, the sale of the vessel following such an *in rem* action terminated all prior possessory and titular claims against it, and passed clear title against both revealed and unrevealed interests. In a proceeding of this sort, it was unnecessary to even notify the owners of the vessel of their legal predicament. An *in personam* action, in contrast, allows maritime property to be reached by attachment or lien but makes the *in rem* aspects of the action ancillary to, and dependent upon, an underlying action against named defendants. Property so reached can also be sold; however, what is obtained by a purchaser in an *in personam* action is not title good against the world, but a title no better than that possessed by the last owner. *E.g.*, *The Moses Taylor*, 71 U.S. 411 (1866); *The Hine v. Trevor*, 71 U.S. 555 (1866). See also *Rounds v. Cloverport Foundry & Machine Co.*, 237 U.S. 303 (1915); *Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638 (1899).

73. See, *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 148-49 (1943), where the Court noted

Following *The Moses Taylor* and *The Hine v. Trevor*, the extent of the state's jurisdictional grant under the saving to suitors clause remained unclear. Those two cases merely defined the procedural limits beyond which state actions could not go, at the risk of offending admiralty's exclusive *in rem* jurisdiction. Two questions remained: Whether there was also an *in personam* subject matter limitation on the states; and if there were admiralty and maritime areas exclusively subject to federal jurisdiction (*in rem* or *in personam*), whether there was nevertheless a regulatory niche in these areas permitted to the states. *The Hine v. Trevor* had cursorily addressed the last question and found no intent on the part of the drafters of the saving to suitors clause to permit states to legislate themselves into concurrency with any aspect of federal admiralty and maritime jurisdiction.⁷⁴ In the context of that case, however, dicta to this effect may well be limited to *in rem* proceedings.

In *Red Cross Line v. Atlantic Trust Company*,⁷⁵ the Court discussed the substantive as opposed to the procedural limitations of the saving to suitors clause and concluded that a state statute validating a written contract to arbitrate could be enforced by the state even though the arbitration clause was part of a clearly maritime contract of charter. Although the remedy of arbitration was not a "common law remedy," it neither modified existing substantive maritime law nor displaced or altered traditional maritime remedies. The Court's interpretation of the saving to suitors clause went considerably beyond the demands of the solely *in personam* action before it:

The 'right of a common law remedy', so saved to suitors, does not . . . include attempted changes by the States in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies *in pais*, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. . . . A State may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction But otherwise, the State, having concurrent jurisdiction, is free to adopt such remedies and to attach to them such incidents, as it sees fit.⁷⁶

that what the framers had in mind when they used the phrase "common law remedy" has never been clear.

74. 71 U.S. at 571-72.

75. 264 U.S. 109 (1924).

76. *Id.* at 123-25.

Red Cross Line, rather than circumscribing the notion of a common law remedy, expanded it to cover virtually every proceeding to enforce a right or redress an injury without regard to its judicial or legislative origin, as long as it did not interfere with existing maritime law and did not provide an *in rem* solution.

Red Cross Line's broad construction of the saving to suitors clause was subsequently expanded in *C. J. Hendry Co. v. Moore*.⁷⁷ In *C. J. Hendry*, state authorities seized and proceeded *in rem* against a fishing net used in violation of state fishing laws. A state statute had allowed equipment so used to be seized, forfeited after hearing, and then sold or destroyed. Limiting the exclusivity of the *in rem* remedy only to "suits between private persons," the Supreme Court concluded that the common law had always given an *in rem* remedy in cases of forfeiture. Thus, under the saving to suitors clause, "the states were left free to provide such a remedy in forfeiture cases where the articles are seized upon navigable waters of the state for violation of state law."⁷⁸

A further extension of state jurisdiction over maritime property under the saving to suitors clause occurred in *Madruga v. Superior Court*.⁷⁹ There, eight owners of 85% of a vessel and one owner of 15% disagreed about the wisdom of selling their ship. In allowing state concurrent jurisdiction over a partition action brought by the majority owners, the court stated that admiralty's jurisdiction is exclusive in a very specific type of *in rem* proceeding. It is not enough that the subject matter of the proceeding is maritime property and that the relief sought operates primarily to adjudicate rights in a marine *res*. Rather, for federal exclusivity to operate, the suit must begin and be carried on *in rem*. The property itself must be "treated as the offender and made the defendant by name or description in order to enforce a lien."⁸⁰ Since the "quarrel" of the majority owners was with their co-owner, not their ship, and the matter had proceeded below on an *in personam* basis, any judgment rendered would only affect personal interests, not those of the world in the *res*.⁸¹

The problem is really no clearer after the definitional approach to federal exclusivity attempted in *Madruga*. It is difficult to understand, as the dissent in *Madruga* points out,⁸² why much of the

77. 318 U.S. 133 (1943).

78. *Id.* at 153.

79. 346 U.S. 556 (1953).

80. *Id.* at 560.

81. *Id.* at 561.

82. *Id.* at 564-67.

preemptive thrust of the *in rem* doctrine cannot be vitiated by artfully captioning pleadings and drafting allegations to make the *in rem* aspects of the action appear ancillary to those *in personam*. *Madruga's* affirmation of state concurrency may be part of a general retreat from *Southern Pacific Co. v. Jensen*⁸³ in areas other than personal injury. The problems of uniformity and choice of law will be discussed further below.

Surveyed briefly, the saving to suitors clause now permits a state to entertain *in personam* actions with *in rem* remedies, *in rem* actions if forfeiture is sought, lien foreclosures and actions to quiet title,⁸⁴ *in rem* actions if they have not traditionally been considered maritime,⁸⁵ possessory actions,⁸⁶ and possibly *in rem* actions with *in personam* remedies. The last category is tentatively included based on the language in *Madruga* that a cause must be "begun and carried on" *in rem* in order to qualify as *in rem* in admiralty usage.⁸⁷ Although there is no case law which specifically approves its exercise of concurrent salvage jurisdiction, a state's general maritime property jurisdiction under the saving to suitors clause is obviously broad enough to include jurisdiction over marine antiquities.

The range of state control over maritime property permitted by the saving to suitors clause does not only permit the extension of state jurisdiction to marine antiquities, but suggests a variety of procedural provisions that might be included in state antiquity statutes. For example, contests over the terms and conditions of an antiquities recovery and division of the material recovered could nominally proceed *in personam* as possessory contests between state and salvor with ancillary *in rem* process allowed by way of attachment or execution. Most importantly, after *Hendry* there is no reason why the recovered material itself could not be the subject of an *in rem* forfeiture action if the salvors violated the terms of their contract or the state antiquity law. Furthermore, the possibilities for creatively employing possessory *in personam* remedies in state antiquity statutes (in the replevin and trover tradition) are endless.

83. 244 U.S. 205 (1916).

84. *Sellick v. Sun Harbor Marina, Inc.*, 384 F.2d 870, 871-72 (9th Cir. 1967) (lien for wharfage).

85. *Grow v. Steel Gas Screw Loraine K*, 310 F.2d 547 (6th Cir. 1962) (lien for unpaid ship insurance premium).

86. *O.F. Shearer & Sons, Inc. v. Decker*, 349 F. Supp. 1214 (S.D. W. Va. 1972); *Merrill v. Fisher*, 204 Mass. 600, 91 N.E. 132 (1910) (replevin of derelict stolen vessel from its salvors); *Mengel Box Co. v. Joest*, 137 Miss. 461, 90 So. 161 (1921) (replevin). See also *The Tietjen & Lang No. 2*, 53 F. Supp. 459 (D.N.J. 1944).

87. Cf. *Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638 (1899) (discussing the possible independence of remedy from its underlying action).

Finally, it should be noted that state jurisdiction over marine property is not derived solely from the saving to suitors clause but possesses independent constitutional underpinnings. The state's regulation of marine properties may derive legitimacy as well from the state's police and eminent domain powers and from the state's property rights in its submerged lands. Each of these powers is traditionally concomitant with state sovereignty. State police power has been exercised to preserve and regulate the use of valuable resources necessary for the public welfare.⁸⁸ The eminent domain power has been held to reach personal property of historical interest even if the property is already impressed with a public use.⁸⁹ The virtually complete proprietorship possessed by the state in its submerged lands may be asserted as a basis for the state's ownership or regulation of artifacts contained in those lands.⁹⁰ These independent bases for state antiquities regulation will be discussed further below.

IV. THE DEVELOPMENT OF FEDERAL UNIFORMITY AS A LIMITATION ON STATE JURISDICTION OVER MARINE PROPERTY

At times consequent and at others contrapuntal to the apparent expansion of the scope of state jurisdiction over marine property under the saving to suitors clause, there has been the sporadic development of a uniform federal admiralty and maritime jurisdiction over maritime torts and contracts. This section will trace briefly the uncertain emergence of a federal rule of maritime uniformity against which the constitutionality of state marine antiquities laws can better be assessed.

While the debate over federal maritime uniformity antedates *Jensen*,⁹¹ that case is generally taken as the commencement of modern uniformity developments.⁹² In *Jensen*, the widow of a longshoreman killed upon New York's navigable waters recovered a state workmen's compensation award for her husband's death. The

88. *Toomer v. Witsell*, 334 U.S. 385 (1948); *Skiriotes v. Florida*, 313 U.S. 69 (1941); *Geer v. Connecticut*, 161 U.S. 519 (1896).

The public welfare interest to be protected may be a cultural or an aesthetic one. See *E.B. Elliott Adv. Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir.), cert. denied, 400 U.S. 805 (1970); *Penn Central Transportation Co. v. City of New York*, 50 App. Div. 2d 265, 377 N.Y.S. 2d 20 (Sup. Ct. 1975).

89. See *Nixon v. Administrator of General Services*, 408 F. Supp. 321, 355-56 n.49 (D.D.C. 1976).

90. See *United States v. Alaska*, 422 U.S. 184, 188 (1975); *Submerged Lands Act*, 43 U.S.C. § 1311(a) (1970).

91. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

92. See, e.g., *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1874).

United States Supreme Court vacated the award and rejected the attempt by New York to extend workmen's compensation coverage to a subject traditionally within admiralty jurisdiction—injuries upon navigable waters. Although this left Jensen's widow without a statutory remedy since there was at that time no Longshoreman's and Harbor Workers Compensation Act, the Court was unwilling to risk endorsing a multiplicity of state compensation schemes in an area left unregulated by the intentional inaction of Congress. The Court admitted it was "difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation."⁹³ Nevertheless, state legislation would not be valid if it "contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."⁹⁴

The holding in *Jensen* was quickly circumscribed. *Western Fuel Co. v. Garcia*⁹⁵ created a "maritime but local" rule to cover situations in which an admiralty court would adjudicate claims arising under diverse state statutes if their disruptive effects on uniformity were not felt to be of national significance. *Just v. Chambers*⁹⁶ and *Standard Dredging Co. v. Murphy*⁹⁷ refused to expand the *Jensen* uniformity principle beyond its initial application to state workmen's compensation acts. *Davis v. Department of Labor and Industry*⁹⁸ perceived a "twilight zone" in which the applicability of uniformity principles was dependent not on an assessment of which side of the maritime but local line a case fell, but upon a factual determination, that is, whether the state statute in fact interferes with a harmonious and uniform federal maritime law.

Jensen and *Davis*⁹⁹ viewed the harmony/uniformity inquiry as being essentially similar to the inquiry that is conducted to determine whether state action has unduly burdened interstate commerce. By analogizing admiralty and maritime uniformity to interstate commerce uniformity, *Jensen* contained the seeds for its future limitation. States have traditionally been able to exercise their police powers over matters of local concern even if interstate commerce

93. 244 U.S. at 216.

94. *Id.* at 216.

95. 257 U.S. 233 (1921).

96. 312 U.S. 383 (1941).

97. 319 U.S. 306 (1943).

98. 317 U.S. 249, 254-57 (1942).

99. 317 U.S. 249 (1942).

is affected or partially regulated.¹⁰⁰ There is no presumption of federal preemption. To the contrary, there is a presumption which favors the validity of state action and "persuasive reasons" must be shown for federal preemption: "either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."¹⁰¹

A leading case of federal preemption under the commerce clause, *Huron Portland Cement Co. v. City of Detroit*,¹⁰² is illustrative of these principles. In that case a vessel whose boilers were licensed and approved under federal boiler inspection laws was penalized under a city ordinance for excessive boiler emissions. The Court, in upholding the state's pollution abatement power, cautioned against seeking "conflicts between state and federal regulation where none clearly exist."¹⁰³ The federal laws were "limited to affording protection from the perils of maritime navigation," while the ordinance was designed to "protect the health and enhance the cleanliness of the local community"; thus, neither conflicted nor overlapped in purpose.¹⁰⁴ The local regulation was an "even handed" attempt to "effectuate a local public interest" and was not "unduly burdensome on maritime activities or interstate commerce."¹⁰⁵

*Askew v. American Waterways Operators, Inc.*¹⁰⁶ affirms the continuing relevance to maritime uniformity of *Huron's* requirement of clear conflict between state and federal law, as a condition to preemption of state jurisdiction. In *Askew*, the Court concluded that Florida's oil spill law could apply to shore facilities and vessels on navigable waters, despite the presence of federal oil spill regulations covering similar areas and damages. "[T]he issue comes down to whether a state constitutionally may exercise its police power respecting maritime activities concurrently with the Federal Government."¹⁰⁷ Noting the absence of an express preemption of state action in the federal statute, and the inability of the federal regulations to remedy and provide damages for all local injuries that were of concern to the state, the Court answered its question in the affirmative. Pollution protection, an historical state police power, would not be taken away "silently" by federal regulation where, as

100. See *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938).

101. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

102. 362 U.S. 440 (1960).

103. *Id.* at 446.

104. *Id.* at 445-46.

105. *Id.* at 443-44.

106. 411 U.S. 325 (1973).

107. *Id.* at 337, 341.

in *Askew*, the federal regulations did not purport to provide the exclusive remedy.¹⁰⁸

Another area of interest in the development of federal uniformity with implications for state maritime jurisdiction is based on the inherent tension between *Jensen* and *Erie Railroad Co. v. Tompkins*.¹⁰⁹ At one end, *Jensen* and its similarly-minded successors espouse the necessity of a uniform federal maritime law. *Erie*, at the other end, requires state substantive law to be used on the law side of a federal district court sitting in diversity. Problems arise over whose law is to apply in diversity cases when the issues in the district court are essentially maritime. In this area there is a strong reaffirmation of *Jensen*. *Pope and Talbot, Inc. v. Hawn*,¹¹⁰ *Garrett v. Moore-McCormack Co.*,¹¹¹ and *Kossick v. United Fruit Co.*¹¹² all noted that whatever the remedy to be enforced, and wherever the forum, if federal maritime law controlled the underlying cause of action its supremacy would have to be upheld.¹¹³ These cases thus support the proposition that *Erie* will not be followed in diversity actions if its effect will be to destroy a necessary maritime uniformity by interjecting disharmonious state substantive law.¹¹⁴

Summarized briefly, uniformity doctrines dictate that when a federal court is sitting on maritime matters in diversity, state substantive law must be applied unless its application would frustrate principles of harmony and uniformity. When a federal court sits in admiralty, federal substantive law applies unless it is incomplete or nonexistent, in which case the legal nexus can be supplemented or supplied by state law subject to two caveats. The first is that admiralty can only apply state substantive law if traditional admiralty remedies are not diluted or compromised. The second caveat is that admiralty, like the law side, will not apply state law if substantial principles of harmony and uniformity will be contravened.¹¹⁵ Con-

108. Although *Huron* and *Askew* discuss federal statutory preemption while admiralty's supremacy rests for the most part in case law (see *Wilburn Boat Co. v. Fireman's Ins. Co.*, 348 U.S. 310 (1953)), the concepts of preemption and federal supremacy are sufficiently analogous for present purposes. See part IV, *infra*.

109. 304 U.S. 64 (1938).

110. 346 U.S. 406 (1953).

111. 317 U.S. 239 (1942).

112. 365 U.S. 731 (1961).

113. See *O.F. Shearer & Sons, Inc. v. Decker*, 349 F. Supp. 1214 (S.D. Tex. 1972).

114. See *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974), *cert. denied*, 419 U.S. 884 (1975).

115. See, e.g., *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974); *Houston-New Orleans, Inc. v. Page Eng'r. Co.* 353 F. Supp. 890 (E.D. La. 1972); *Kalyvakis v. The T.S.S. Olympia*, 181 F. Supp. 32 (S.D.N.Y. 1960).

versely, when a state court is litigating rights predicated on maritime law it must fully protect the federal rights of the parties even if this means rejecting case or statutory law of its own jurisdiction,¹¹⁶ unless a variant of the "maritime but local" doctrine can be applied.¹¹⁷

V. IS THERE FEDERAL SUBSTANTIVE LAW, OTHER THAN SALVAGE, APPLICABLE TO MARINE ANTIQUITIES?

This question, impliedly presented in *Treasure Salvors, Inc. v. Abandoned Sailing Vessel Believed to be the Nuestra Senora de Atocha*,¹¹⁸ appears to have been answered negatively. There, the United States claimed both title and possession to an apparently abandoned 17th century Spanish vessel and its cargo that lay on the United States continental shelf more than three miles off the Florida coast.¹¹⁹ Federal claims were predicated on the Antiquities Act¹²⁰ and the Abandoned Property Act.¹²¹ The Court held both inapplicable and concluded that in the absence of a clear expression of Congressional intent to retain title to abandoned property, the finder was entitled to possession and title, and jurisdiction was properly in admiralty applying salvage law.

The Abandoned Property Act, whose legislative origins have been unclear to the courts which have analyzed it, authorizes the

116. See generally, *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974); G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 51 (2d ed. 1975).

117. See, e.g., *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); *Wilburn Boat Co. v. Fireman's Ins. Co.*, 348 U.S. 310 (1955).

118. 408 F. Supp. 907 (S.D. Fla. 1976), *aff'd.*, No. 76-2151 (5th Cir. Mar. 13, 1978).

119. 46 U.S.C. § 724 (1847) provides, in pertinent part:

No vessel or master thereof, shall be regularly employed in the business of wrecking on the coast of Florida without the license of the judge of the district court for the district of Florida

In *Pent v. \$2,850*, 19 F. Cas. 205, (S.D. Fla. 1880) (No. 10, 961a), the statutory predecessor of 46 U.S.C. § 724 was held applicable to salvors in the business of saving lives and property in immediate distress. When an artifacts salvor sought a federal license in *In re Andrews*, 266 F. Supp. 162, 164 (M.D. Fla. 1967), the court analyzed the Act's brief legislative and judicial history and found it inapplicable to antiquities salvage. Unfortunately, without citation or analysis, a license was awarded to an antiquities salvor shortly after *Andrews* in *In re Marine Archeological Enterprises, Inc.*, 280 F. Supp. 477, 478 (S.D. Fla. 1968). Considering the early 19th Century origins of the Act, its legislative history and the language of the Act itself—alluding to vessels in "distress"—and the failure of the 1968 case to set forth its reasoning, it is safe to assume that the 1968 case was improperly decided. It is thus unnecessary to discuss the preemptive effects of federal vessel licensing. See *Douglas v. Seacoast Products, Inc.*, 97 S. Ct. 1740 (1977).

120. 16 U.S.C. §§ 432, 433 (1970).

121. 40 U.S.C. § 310 (1970).

General Services Administration to make contracts or provisions as it deems to be in the government's best interest,

for the preservation, sale, or collection of any property, or the proceeds thereof, which may have been wrecked, abandoned, or become derelict, being within the jurisdiction of the United States and which ought to come to the United States, and in such contracts to allow such compensation to any person giving information thereof, or who shall actually preserve, collect, surrender, or pay over the same¹²²

The phrase in the Abandoned Property Act "ought to come to the United States" has proved the most resistant to uniform judicial interpretation. Interpreting identical language in the statutory predecessor to the Act, *Russell v. Forty Bales of Cotton*¹²³ and *United States v. Tyndale*¹²⁴ rejected a claim of federal exclusivity similar to the one argued by the government in *Treasure Salvors*. In *Tyndale* the phrase was construed to apply not to all abandoned property but only property in which the United States had a special equity. *Russell* interpreted the section as having no prospective application, but rather as applicable only to the voluminous amount of debris generated by the Civil War.

Part of the *Russell* rationale on which the Court in *Treasure Salvors* relied was weakened by a subsequent executive determination that the section also covered vessels destroyed in the Spanish-American War lying off the Cuban coast, unless the United States had abandoned them or allowed them to become derelict.¹²⁵ The section continues to be utilized sporadically for wreck removal. Whether it has been administratively interpreted as limited to historical property is unclear.¹²⁶

The Court in *Treasure Salvors* rejected the Abandoned Property Act's application to the vessel on the additional ground that the vessel was not "within the jurisdiction of the United States"¹²⁷ as required by the Act. The Court read the Outer Continental Shelf Lands Act¹²⁸ in conjunction with the subsequently ratified Convention on the Continental Shelf,¹²⁹ and relied on the International Law Commission's 1956 commentary to a proposed treaty article which

122. *Id.*

123. 21 F. Cas. 42 (S.D. Fla. 1872) (No. 12,154).

124. 116 F. 820, 822 (1st Cir. 1902).

125. 23 OP. ATT'Y. GEN. 76 (1900).

126. See S. REP. No. 234, 89th Cong., 1st Sess. 1575 (1965).

127. *Treasure Salvors*, 408 F. Supp. at 910.

128. 43 U.S.C. §§ 1331-1343 (1970).

129. [1964] 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

excluded wrecks from the definition of "natural resources."¹³⁰ Analogous language in the Antiquities Act ("situate on lands owned or controlled by the Government of the United States") was similarly relied on by the Court to justify a rejection of its applicability.

The first section of the Antiquities Act allows the Secretaries of Interior, Agriculture and Army to issue permits to qualified institutions "for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions"¹³¹ The second section provides penalties for nonpermitted activities directed at "any historic or prehistoric ruin, or monument, or any object of antiquity, situate on lands owned or controlled by the Government of the United States"¹³² The Court concluded that the Act and supplemental regulations¹³³ were not meant to apply to the Outer Continental Shelf and that the phrase "object of antiquity" was too vague to support criminal sanctions.¹³⁴ *United States v. Diaz*,¹³⁵ cited by the Court for the latter proposition, concerned a conviction for pilfering Apache face masks (*circa* 1969 or 1970) from the reservation gravesite. The applicability of this holding to an object of undisputed antiquity in *Treasure Salvors*, a 1622 Spanish ship, is questionable.

The Court in *Treasure Salvors* concluded by inferring that the existing statutory scheme for shelf exploitation was limited to natural resources, and that it was for that purpose alone that the United States had extended its resource jurisdiction (and *not* its sovereignty). If the Court were to rule that federal shelf jurisdiction had been extended to nonresources, it envisioned that an "international controversy" might well be provoked.¹³⁶ Although *Treasure Salvors* drew acceptable inferences from the law it cited, it inexplicably failed to discuss relevant and significant trends toward the protection of cultural property in the international sector, which could have made the Court's fear of international repercussions unneces-

130. Report of the International Law Commission to the General Assembly 11 U.N. GOAR Supp. (No. 9), U.N. Doc. A/3159 (1956) reprinted in [1956] 2 Y.B. INT'L L. COMM'N 298, U.N. Doc. A/CN.4/SER.A/1956/Add.1:

It is clearly understood that the rights in question [to exploit the natural resources of the shelf] do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil.

131. 16 U.S.C. § 432 (1970).

132. 16 U.S.C. § 433 (1970).

133. 43 C.F.R. §§ 3.1-.17 (1976).

134. *Treasure Salvors*, 408 F. Supp. at 911, *aff'd.*, No. 76-2151 (5th Cir. Mar. 13, 1978).

135. 499 F.2d 113 (9th Cir. 1974), *rev'g.* 368 F. Supp. 856 (D. Ariz. 1973).

136. *Treasure Salvors*, 408 F. Supp. at 911, *aff'd.*, No. 76-2151 (5th Cir. Mar. 13, 1978).

sarily speculative and remote.¹³⁷ *Treasure Salvors* also failed, although in this instance understandably so, to discuss those numerous and diverse national evidences of renewed cultural interest that may well provide a basis for federal preemption of marine antiquities protection and recovery outside traditional admiralty practice.

Congress has tentatively addressed the problem of marine antiquities preservation in the Marine Protection, Research and Sanctuaries Act of 1972¹³⁸ ("Marine Sanctuaries Act"). The Secretary of Commerce under that Act is empowered to designate marine sanctuaries "for the purpose of preserving or restoring such areas for their conservation, recreational, ecological or esthetic value," as far seaward as the outer edge of the continental shelf, as the latter term is defined in the Convention on the Continental Shelf.¹³⁹ Since the "exploitability" test in the Geneva Convention establishes an ambulatory boundary for the continental shelf, sanctuary boundaries may well be coextensive with the conjunction of the continental rise and the abyssal plain. In any case, marine sanctuaries may be designated on the continental shelf, even if the legal status of the slope and rise remains unclear.

It is clear that sanctuary designations within the territorial sea of the United States are binding on both the United States and foreign nations, under elementary principles of territorial jurisdiction. In areas beyond the territorial sea, the Administrator of the National Oceanic and Atmospheric Administration, to whom sanctuary rulemaking authority was delegated by the Secretary of Commerce,¹⁴⁰ has had slightly more difficulty defining jurisdictional concepts.

The original draft of the regulation defining jurisdiction over United States citizens and foreign nationals in sanctuaries seaward of the territorial sea stated:

In accordance with international law, the United States has exclusive jurisdiction over resources within the territorial sea and the contiguous zone It is not anticipated . . . that use

137. See *State v. Bundrant*, 546 P.2d 530, 539-42 (Alas. 1976).

138. 16 U.S.C. §§ 1431-1434 (Supp. V 1975).

139. 16 U.S.C. § 1432(a) (Supp. V 1975). See generally 15 C.F.R. 922.1-.34 (1977).

The Convention on the Continental Shelf, *supra* note 129, art. 1(a), defines "continental shelf" as the seabed and subsoil seaward to where the superjacent water depth is 200 meters, or beyond that "to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."

Unfortunately, the Marine Sanctuaries Act also allows a State Governor to certify as unacceptable any portions of a proposed sanctuary lying within state waters. 16 U.S.C. § 1432(b) (1974).

140. 39 Fed. Reg. 10255 (March 18, 1974) (codified in 15 C.F.R. § 922.1 (1977)).

restrictions would be imposed on citizens beyond the contiguous zone without also restricting the use of the same area to foreign citizens¹⁴¹

The proposed rule was inconsistent with its enabling legislation which stated that in the absence of treaty or recognized principles of international law, "no regulation applicable to ocean waters outside the territorial jurisdiction of the United States shall be applied to a person not a citizen of the United States."¹⁴² The draft was also inconsistent with United States responsibilities under the Convention on the Territorial Sea and the Contiguous Zone which limited coastal state contiguous zone jurisdiction to enforcement of custom, fiscal, immigration and sanitary regulations.¹⁴³ The final version of the regulation, however, limited its application beyond the territorial sea to "foreign citizens only to the extent consistent with international law."¹⁴⁴

Pursuant to the Marine Sanctuaries Act, on January 1, 1975, the Secretary of Commerce designated a vertical cylinder of ocean water and seabed, one mile in diameter, 16.10 miles south-southeast of the Cape Hatteras Light, as the "Monitor Marine Sanctuary." The *U.S.S. Monitor* was the Union warship of *Monitor* versus *Merrimac* fame that foundered and sank in December, 1862, in a storm off Cape Hatteras.¹⁴⁵ Rules were established for mariners using the area including one prohibiting "any type of subsurface salvage or recovery operation" directed against the vessel. All work that would involve anchoring or diving within the circumference of the cylinder, required a permit.¹⁴⁶

If the federal government, through the Marine Sanctuaries Act, can assert paramount rights over antiquities like the *U.S.S. Monitor*, there is no reason why it cannot employ the Act to assert control over other marine antiquities of cultural significance. The initial application of the Act to the *U.S.S. Monitor*, however, while welcome as a portent of federal interest in marine antiquities, may ultimately frustrate the Act's wider application. The *U.S.S. Monitor* is such an undisputed historical treasure that its protection and salvage is an uncertain precedent for the application of the Marine Sanctuaries Act to less significant marine artifacts. Had a *Monitor*-type sanctuary been declared for a vessel not so promi-

141. *Id.* at 10256, § 922.12.

142. 16 U.S.C. § 1432(9) (Supp. V 1975).

143. [1964] 15 U.S.T. 1606 (pt. 11, Art. 24), T.I.A.S. 5639, 516 U.N.T.S. 205.

144. 15 C.F.R. § 922.12 (1977).

145. M. BOOTNER, *THE CIVIL WAR DICTIONARY* 560-61 (1959).

146. 15 C.F.R. §§ 924.1-.8 (1977). See also 40 Fed. Reg. 21706 (May 19, 1975). ◊

nently connected with United States naval history, the conclusions to be drawn from such a declaration would have been clearer. The fact that the *U.S.S. Monitor* was, and possibly still is, a commissioned United States Navy vessel, is also of some concern. The precedential value of the *Monitor* sanctuary for the preservation and salvage of nongovernment vessels will be diminished if the sanctuary may be narrowly viewed as an assertion of the United States government's policy of retaining salvage rights to all its vessels unless those vessels are specifically abandoned.¹⁴⁷

Despite its minor shortcomings, the *Monitor* sanctuary remains the most unequivocal assertion of federal interest in marine antiquities. The *Monitor* sanctuary, however, is just one manifestation of what seems to be a general national and international cultural awakening. Nationally, the federal awakening has found varied executive and legislative expression.

By executive order in 1971, the President pledged federal leadership in preserving, maintaining and restoring the historic and cultural environment of the nation. Federal agencies were called upon to administer cultural properties on lands under their control for future generations, and provision was made for the identification and preservation of sites, structures and objects located on federal lands and possessing historical, architectural or archaeological significance. There is no indication that marine antiquities were to be specifically protected. The language of the order suggests, if anything, a distinct orientation toward terrestrial artifacts.¹⁴⁸

The executive order complements diverse congressional efforts to protect the national cultural heritage. A significant body of relevant legislation and implementing regulations now exists in this area.¹⁴⁹ But here, too, marine artifacts are not singled out for an individualized regulatory treatment.

147. United States control over its sunken government vessels takes two main forms. The first, through 46 U.S.C. § 316(d), is a prohibition of all foreign salvage operations in United States waters except those conducted pursuant to treaty. The second is the protection of the salvage rights of the government in vessels which have gone down both on the high seas and in foreign territorial waters. See Secretary-of-State Rusk's airgram to the American Embassy, Port-of-Spain, Trinidad, April 29, 1965, in M. WHITEMAN, 9 DIGEST OF INTERNATIONAL LAW 221 (1968).

While Rusk's directions to the Embassy state that the United States "retains title [to its sunken vessels] subject to explicit transfer or abandonment," dicta in *Baltimore, Crisfield & Onancock Line Inc. v. United States*, 140 F.2d 230 (4th Cir. 1944) suggests that the United States by its less than explicit action or inaction can also effect an abandonment.

148. Exec. Order No. 11,593, 3 C.F.R. § 559 (1971-1975 Compilation).

149. *E.g.*, Historic Sites Act of 1935, 16 U.S.C. § 461 (1970); Natural Historic Preservation Act of 1966, 16 U.S.C. § 470 (1970); National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1970); Archeological and Historic Preservation Act of 1974, 16 U.S.C. § 469 (1970); American Antiquities Preservation Act; 16 U.S.C. § 431 (1970).

A more promising federal program is directed toward preserving parklands on the aquatic margins of the nation. There are many aquatic areas reserved by the federal government which, unlike the *Monitor* sanctuary, are not expressly designed to preserve marine antiquities, but will necessarily have this effect. The Key Largo Coral Reef Marine Sanctuary,¹⁵⁰ for instance, which extends eastward and seaward from the three mile territorial limit to the 300' isobath, undoubtedly encompasses and has provided for the protection of marine artifacts within its borders.¹⁵¹ Administrative protection for marine artifacts is also afforded within national seashores, lakeshores, scenic waterways, recreational areas and monuments, which usually include offshore buffer zones of submerged lands and superjacent waters.¹⁵² For one national seashore, at Point Reyes, California, whose offshore extent is one-quarter mile,¹⁵³ the House Report in support of the Bill establishing the seashore specifically alluded to certain marine archaeological features which made the area worthy of inclusion within the National Seashore system.¹⁵⁴

Finally, there are two federal enactments which, although of undetermined significance to the antiquities jurisdiction question, are nevertheless of importance when offshore resources are discussed. There is a possibility that the Outer Continental Shelf Lands Act, previously discussed in the context of *Treasure Salvors*, and the Submerged Lands Act,¹⁵⁵ have affected the relative jurisdiction of state and federal governments over marine antiquities.

Following the Submerged Lands Act, in which "natural resources" underlying state territorial waters were quitclaimed to the

150. See 16 U.S.C. §§ 1432-1433 (Supp. V 1975).

151. 15 C.F.R. § 929 (1977). 15 C.F.R. § 929.4(d) (1977) provides:

No person shall wilfully destroy, molest, deface, remove, displace or tamper with an archeological or historical resource or cargo pertaining to submerged wrecks within the boundaries of the sanctuary.

The National Oceanic and Atmospheric Administration, however, is authorized to permit salvage operations within the sanctuary. 15 C.F.R. § 929.6 (1977).

152. See, e.g., Cape Cod National Seashore, 16 U.S.C. § 459b (1970) (¼ mile offshore); Padre Island National Seashore, 16 U.S.C. § 459d (1970) (offshore to the two fathom line); Assateague Island National Seashore, 16 U.S.C. § 459f (1974) (out to ½ mile beyond the mean high water line). Generally prohibited in these coastal preserves is the possession or disturbance of "any relic, artifact, ruin, or historic or prehistoric feature . . ." 36 C.F.R. § 2.20(b)(2) (1976).

153. 16 U.S.C. § 459 (c-1) (Supp. V 1975).

154. The Point Reyes Peninsula offers a good site for archeological and historical exploration . . . Tradition, supported by most historians who have studied the subject . . . has it that it was here that Sir Francis Drake stopped to repair his *Golden Hind* in 1579 before starting across the Pacific. H.R. REP. NO. 1628, 87th Cong., 2nd Sess. 2, reprinted in [1962] U.S. CODE CONG. & AD. NEWS 2500, 2502.

155. 43 U.S.C. §§ 1301, 1302 (1970).

states, the federal government retained only an attenuated control over resource exploitation within state marine boundaries.¹⁵⁶ Conversely, the Outer Continental Shelf Lands Act¹⁵⁷ and the decision in *United States v. Maine*,¹⁵⁸ foreclosed state hopes of at least concurrent jurisdiction over "national resources" beyond their territorial waters.¹⁵⁹

But neither the Submerged Lands Act nor the Outer Continental Shelf Lands Act can be read as conclusively vesting either sovereign with exclusive ownership of regulatory power over nonnatural resources such as antiquities, on either side of the territorial boundary. Both statutes are natural resource statutes and were never legislatively intended, nor judicially construed, to be applicable to marine artifacts.¹⁶⁰ Similarly, the latest reaffirmation of federal control over the "offshore seabed" in *United States v. Maine*,¹⁶¹ and over "lands, minerals and other natural resources" in *United States v. Florida*¹⁶² neither tolls all state involvement in extraterritorial control of nonnatural resources, nor creates the type of unavoidable conflict over outer continental shelf antiquities regulation required by *Askew* and *Huron* to invoke federal preemption. As to the Submerged Lands Act and the Outer Continental Shelf Lands Act, marine artifacts are clearly a *sui generis* resource.¹⁶³

156. 43 U.S.C. § 1311(b)(1) (1970). See also, *Platoro Ltd. Inc. v. Unidentified remains of a Vessel*, 371 F. Supp. 351, 354 (S.D. Tex. 1970).

157. 43 U.S.C. §§ 1332(a), 1333(a)(3) (1970).

158. 420 U.S. 515 (1975).

159. "Natural resources" were defined in the Submerged Lands Act to include fuel and other minerals and all marine animal and plant life. 43 U.S.C. § 1301(e) (1970). State jurisdiction was specifically extended to these natural resources. But the term natural was not defined in the Outer Continental Shelf Lands Act which extended federal resource jurisdiction not to the natural resources of the outer continental shelf but to its "subsoil and seabed." 43 U.S.C. § 1333(a)(2) (1970). See CONFERENCE REPORT OF THE HOUSE MANAGERS, [1953] U.S. CODE CONG. & AD. NEWS 2184.

The Outer Continental Shelf Lands Act adopted state law for certain shelf resource matters, 43 U.S.C. § 1333(a)(2) (1970). It also excluded State jurisdiction "over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom." 43 U.S.C. § 1333(a)(3) (1970). It is likely that the word "property" was not meant to include marine artifacts but referred to artificial islands, fixed structures and other extractive facilities.

160. See *United States v. Maine*, 420 U.S. 515, 527-28 (1975); *United States v. California*, 381 U.S. 139, 148-49 (1965); *United States v. Louisiana*, 363 U.S. 1, 5 (1960); *Guess v. Read*, 290 F.2d 622, 625 (5th Cir. 1961), cert. denied, 368 U.S. 957 (1962); *State v. Bundrant*, 546 P.2d 530, 545-47 (Alas. 1976), appeal dismissed, 97 S. Ct. 40 (1976). Cf. *United States v. Texas*, 339 U.S. 707, 719 (1950) (alluding to possible extension of the Act's application to other than natural resources). But see *United States v. Louisiana*, 339 U.S. 699, 704 (1950).

161. 420 U.S. 515, 524 (1975).

162. 425 U.S. 791 (1976).

163. Hypothetical confrontations may easily be conjured between state or federal antiquities salvage, and federal marine resource jurisdiction. Cf. *United States v. Ray*, 423 F.2d 16

Internationally, particularly under the aegis of the United Nations Educational, Scientific & Cultural Organization (UNESCO), conventions have been held and resolutions of principles prepared on the inviolability of each nation's cultural patrimony.¹⁶⁴ Following the Caracas session of the Third United Nations Conference on the Law of the Sea, draft treaty provisions resulted which also reflected international concern for antiquities preservation and retention. Provision was made for preservation or disposal "for the benefit of the international community" of any objects of archaeological or historical value found in those areas of the seabed and subsoil beyond national jurisdiction. Rights of first refusal in these objects were given to, alternatively, the state of origin, the state of cultural origin, and the state of historical or archaeological origin.¹⁶⁵ This provision was retained in the Informal Composite Negotiating Text,¹⁶⁶ but presently there is no international law, in treaty or custom, that obligates the United States to act in any particular way toward most artifacts in its offshore waters.

The conclusion that has to be drawn from this brief review of congressional and executive developments is that there is presently no well defined federal substantive law of marine antiquities. While the acts reserving coastal, riverine and lacustrine lands as sanctuaries and parks evidence a federal concern with marine artifacts as a class of valuable marine resources, no coherent federal regulatory scheme over these resources can yet be discerned. It is still too early to tell how the Marine Sanctuaries Act will be interpreted. If a uniform federal law for marine antiquities recovery is to be predicated upon it, the Act must first be extensively and unambiguously used to assert federal supremacy over historically significant aban-

(5th Cir. 1970) (considering jurisdiction to prevent damage to living reefs by excavation methods); Key Largo Reef Preserve, 43 C.F.R. § 15.5 (1976).

164. See UNESCO Convention on the Illicit Movement of Art Treasures, Nov. 14, 1970; 826 U.N.T.S. No. I-11806 (1970), reprinted in 10 INT'L. LEGAL MATERIALS 289 (1971); UNESCO Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 4 U.N.T.S. 275 Doc. No. 17-c/106 (1972), reprinted at 11 INT'L. LEGAL MATERIALS 1358 (1972); Treaty of Cooperation with the United Mexican States Providing for the Return of Stolen Archeological, Historical and Cultural Properties, [1971] 1 U.S.T. 494; T.I.A.S. 7088. Of particular interest is the UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Properties, which provides in part that the States Partica will ". . . admit actions for recovery of lost . . . items of cultural property brought by or on behalf of the rightful owners." (Emphasis added). 14 INT'L. PROTECTION OF THE ENVIRONMENT 7216, 7222 (1970).

165. See *Informal Single Negotiating Text*, A/CONF. 62/WP.8/pt. 1, arts. 19(1), (2), (3) (May 7, 1975); *Revised Single Negotiating Text*, A/CONF.62/WP.8/Rev. 1/pt. 1, art. 19 (May 10, 1976).

166. Cf. *Informal Composite Negotiating Text*, A/CONF. 62/WP.10, art. 149 (July 15, 1977).

doned vessels and cargoes, and not just United States Navy vessels. Such an extensive use of the Act appears unlikely. Provision would also have to be made, either by statute or regulation, for contractual recovery of sunken antiquities. Since the *U.S.S. Monitor* is on the bottom in one of the more treacherous areas of coastal waters, it cannot fulfill its promise of visual appeal or practical historical importance unless it is raised; ample remuneration for this task will probably have to be agreed upon by contract.¹⁶⁷ Until the federal government has started actively identifying, preserving and recovering marine antiquities, both within and without its national sanctuaries, monuments and seashores, traditional concepts of salvage are still the best developed substantive law the federal system can offer.

VI. WHAT LAW SHOULD APPLY TO MARINE ANTIQUITIES?

A. *Choosing the Applicable Substantive Law*

The twin shibboleths of uniformity and harmony rarely point the way to a resolution of what is essentially a conflict of laws problem. Unless an established line of federal precedent or an unambiguous federal statute is clearly violated by state action, subtler tests must be employed than those which merely seek out overt incompatibilities. Invariably, both the federal and state governments seek to vindicate their prescriptive competences and to assert a legitimate interest and concern over the outcome.¹⁶⁸ The criteria that courts have used to determine which sovereign's interest was more intense, and whose concern more immediate, resolve largely into a balancing test.

If a federal statute is involved, the test of "clear conflict" enunciated in *Huron* and *Askew* will apply. Conflict is generally avoided when the state action is designed to meet a different evil from that reached by the federal statute and the action and statute thus complement or supplement each other. When federal preemption is to be inferred from federal case law alone, the inquiry becomes more demanding.

At the outset, it must be determined whether a federal rule in fact exists. If none exists, a choice must be made between creation of a federal rule and adoption of existing state practice. Even if the area to be scrutinized for the existence of a federal rule is clearly maritime, an inquiry must nevertheless be made as to whether the

167. Reconnaissance and preliminary salvage contracts for the *U.S.S. Monitor* have, in fact, been recently negotiated. *OCEAN SCIENCE NEWS*, August 1, 1977, at 5.

168. *Cf. Kossick v. United Fruit Co.*, 365 U.S. 731, 739 (1961).

area is of such local concern that deference can safely be paid to state court practice. "Local concern" as a ratio decidendi may encompass two situations: those in which the state or one of its subdivisions has a legitimate regulatory interest equal to or greater than that of the federal government; and those in which the federal government may have the superior interest, but either does not feel the problem significant enough to justify the imposition of a merely abstract or aesthetic uniformity, or fails to protect its own best interests.

Courts engage in an historical factual inquiry to determine how the subject matter concerned has been handled by the federal/state system in the past. If prescriptive jurisdiction over the subject matter has been a concomitant of state sovereignty for a long period, either exclusive of the federal system or concurrent with it, persuasive reasons probably exist for maintaining the status quo. Institutions and individuals may have detrimentally relied on the continuation of the existing state of affairs through irretrievable commitments of resources. Of course, local courts must have shown themselves equal to the task of formulating workable rules in the disputed area that have not proved injurious to interstate or foreign commerce. Were federal courts to assume plenary exclusive jurisdiction under these circumstances, new procedural and substantive rules might have to be adopted; frequently federal courts are less physically accessible and provide no greater procedural expediences for resolution of the dispute than state courts. A federal court may also feel that although a uniform federal rule may be desirable, the coalescence of all these complex factors makes Congress, rather than the courts, the proper branch to formulate that rule.¹⁶⁹

It is against this background of selection criteria and the "clear conflict" rules of *Huron* and *Askew* that the consistency of federal salvage principles with state antiquities laws must be considered.

B. *Evaluating the Conflict Between Admiralty Salvage Principles and State Antiquity Laws*

Before comparing admiralty salvage and state law for areas of conflict or congruence, it should be noted that admiralty jurisdiction over marine antiquities is not affected by the location of the antiquities landward or seaward of a state's offshore boundary. It is of no consequence where the antiquities are located between mean

169. See generally *id.* at 739; *Wilburn Boot Co. v. Firemans Fund Ins. Co.*, 348 U.S. 310, 316-20 (1955); *Madruza v. Superior Court*, 346 U.S. 556, 562-64 (1953); *In re M/T Alva Cape*, 405 F.2d 962, 970-71 (2d Cir. 1969); *Goldstein v. California*, 412 U.S. 546, 557-60 (1973).

high water and the seaward limits of the outer continental shelf since admiralty jurisdiction extends equally to all navigable waters.¹⁷⁰ However, state antiquity jurisdiction, unlike admiralty jurisdiction, is not as broad beyond state boundaries as within them. The rudiments of prescriptive jurisdiction obviously prevent a state from asserting the same power outside its territory as it exercises within.¹⁷¹ In short, within state borders admiralty salvage jurisdiction is at least coextensive with that of the state, but a state's antiquities jurisdiction is attenuated as a salvage dispute moves seaward past its marine boundaries. Because no state presently asserts an unqualified extraterritorial antiquities jurisdiction, the following discussion will stress those federal/state antiquities conflicts which occur within state borders.

The apparent conflicts between state antiquity law and federal salvage law are most evident in the differences in approach each takes to the recognition of a salvor's possessory interests and the measure of a salvor's award. Turning first to the problem of salvor possession, it appears that state assertions of title in objects that it has never reduced to physical possession run counter to admiralty's activist bias toward the quick and the strong. Admiralty liberally rewards and encourages salvage by recognizing a salvor's possessory claims to objects he recovers through the "prompt use of sufficient means, both in getting at property needing relief and abiding with it until its salvage is complete."¹⁷² In contrast, state law does not require the state as salvor actively to explore for or physically possess its marine antiquities as a condition to its claims of exclusive possession and title.

The differences between what state and federal law conceive to be the prerequisites for possession by a salvor may be attributed to the fact that state antiquity laws have borrowed more freely from principles of common law land salvage than from marine salvage. Common law and admiralty salvage differ significantly. The common law recognized at an early date the illogic of attributing to rational persons "abandonment" of valuable property, and resorted instead to the concepts of "lost" and "misaid" property and "property embedded in the soil." "Lost" property is property which must have passed unawares from the conscious control of its

170. See G. GILMORE & C. BLACK, *supra* note 116 §§ 1-11.

171. *Shaffer v. Heitner*, 97 S. Ct. 2569 (1977); *Chicago's Last Dept. Store v. Indiana Alcoholic Bev. Comm.*, 161 F. Supp. 1, 4 (N.D. Ind. 1958).

172. See *Brady v. S.S. African Queen*, 179 F. Supp. 321, 323 (E.D. Va. 1960) (possession of half a derelict insufficient to establish rights in other half, two miles distant); *The John Wurts*, 13 F. Cas. 903, 906 (S.D.N.Y. 1847) (No. 7,434).

true owner. The true owner of lost property retains rights of ownership paramount to both those of the finder and those of the owner of the *locus in quo*. In the absence of a claim or appearance by the true owner, as will happen after a chattel has been long lost, the possessory rights of the finder of the chattel will normally be superior to those of the owner of the *locus in quo*.¹⁷³ In recognizing the superior possessory claims of a finder, land salvage approximates admiralty's treatment of a salvor of abandoned property. But if the finder's discovery follows a trespass on the *locus in quo*, or the owner of the *locus in quo* has previously acquired a special equity in the find, it is possible that the possessory interest of the owner of the *locus in quo* will be paramount to that of the finder. It is in this situation that land salvage, unlike admiralty, will include in its possession equation a third possessory interest in lost chattels beside those of the true owner and the finder, namely, the interest of the owner of the *locus in quo*.

Land salvage invests the owner of the *locus in quo* with even greater possessory rights if the distressed chattels qualify as either "mislaidd" property or "property embedded in the soil." "Mislaidd" property, voluntarily parted with or cached away and then forgotten, is fictively presumed to create a bailment in the owner of the *locus in quo*, who thereby acquires possessory rights superior to those of the finder.¹⁷⁴ "Property embedded in the soil" is a protean category cutting across various combinations of true owners, finders and types of buried property. Under this category, buried chattels, usually of a hopelessly ancient and untraceable origin, belong to the owner of the *locus in quo* in his capacity as holder of a fee simple interest in both the surface and subsurface of his land.¹⁷⁵

It is apparent from this brief review that land "salvage" doctrines have created a substantial property right in the owner of land on which the true owner of chattels happens to have parted, voluntarily or involuntarily, with his possessions. The owner of the *locus*

173. *Groover v. Tippins*, 179 S.E. 634, 635 (Ga. Ct. App. 1935); *Durfee v. Jones*, 11 R.I. 588, 591, 23 Am. R. 528 (1877); *Schley v. Couch*, 155 Tex. 195, 196, 284 S.W.2d 333, 335 (1955).

174. *Schley v. Couch*, 155 Tex. 195, 284 S.W.2d 333, 335-36 (1955); *Bridges v. Hawkesworth*, 21 L.J.Q.B. 75, 78 (1851). See also *Armory v. Delamarie*, 1 Strange 505 (1722) (early leading English case stating the same general principle).

175. It is far from clear why finders of property embedded in the soil should be treated differently than finders of lost property. Perhaps a distinction is justified when the artifact, through changes wrought by extreme age, has functionally become one with the *locus in quo*, and the artifact's finder has never been expressly or impliedly licensed to excavate upon the *locus in quo*. See *Platoro Ltd. Inc. v. Unidentified Remains of a Vessel*, 371 F. Supp. 356, 359-60 (S.D. Tex. 1970); *Allred v. Biegel*, 240 Mo. App. 818, 219 S.W.2d 665 (1949) See also *Elwes v. Brigg Gas Co.*, [1886] 33 Ch. D. 562, 55 L.J. Ch. 734 (1886).

in quo obtains a possessory interest in chattels on or in his land without exerting the slightest physical effort or harboring the most fleeting possessory intent. Transpose these precepts to state antiquity statutes and it is seen that state claims of title to sunken artifacts are merely the predictable concomitants, in the land salvage tradition, of state control *qua* owner of the *locus in quo*, over their submerged lands.

Admiralty has clearly remained unaffected by these principles of land salvage. Admiralty has not only failed to create special rights in sunken property in the owners of the submerged *locus in quo*, but has coupled its indifference to land ownership as a decisional factor with a decided preference for those who are most active and successful in subjecting sunken property to physical possession. In summary, admiralty subscribes to a theory of possession which vests possessory rights only in those who reduce sunken property to de facto or physical possession; antiquity laws, drawing on land salvage principles, allow possession to vest in those (such as owners of the *locus in quo*) who merely intend to exclude others from possession of chattels on their lands.¹⁷⁶

Obviation of the conflict between admiralty and state law that the two underlying theories of possession may engender will depend on the extent to which these antithetical theories can be reconciled in practice. Under realistic physical circumstances of a type that would surround most salvage operations, the two theories of possession do share a common ground. Conceptually, it is impossible ever to possess and control completely any tangible object. A superior force, whether private, governmental or natural may always be posited that can destroy what purported to be the exclusive physical control exercised over an object by its first possessor. The elusiveness of complete physical control over objects becomes more apparent when those objects are artifacts buried in a hostile aquatic medium characterized by high density and pressure, and low temperature and visibility. Even if it is physically controlled to the extent the environment permits, no marine artifact before being raised and confined on board ship can ever be perfectly secured from the additional threat of outside interference by human agencies. Competing salvors, by stealth or superior equipment and technique, always have the potential to preempt the first salvors and subject the artifact to an even higher degree of physical domination.¹⁷⁷ Clearly, since the physical domination of an artifact by any salvor can never

176. *Hannah v. Peel*, 114 L.J.K.B. 533, 539 (1945).

177. *See, e.g., Rickard v. Pringle*, 293 F. Supp. 981 (E.D.N.Y. 1968).

be complete, de facto or physical control of an artifact must always consist of limited physical control supplemented by constructive acts designed to warn competitors that physical domination is, in fact, complete. Conversely, in state antiquity laws, the verbal or legislative manifestations by the owner of the *locus in quo* of an intent to exclude others from possession of a marine artifact are invariably accompanied by some de facto possessory activities that aid in communicating and forcing recognition of the intent to exclude.¹⁷⁸ The reconciliation of the two theories thus lies in the impossibility of one theory being implemented without the other. Every assertion of possession must be the sum of its physical and nonphysical indicia of possessory exclusivity.

Once it is recognized that the two theories of possession imperceptibly grade into each other, their reconciliation in the case of a particular state statute should not be frustrated by the a priori assumption that the declaration of title in the statute is offensive to admiralty's bias toward active possession. Rather, the inquiry in each case should be one of determining whether at the time a marine artifact is discovered it is already subject, or simultaneously with its discovery becomes subject, to a state possessory interest equal or superior to that of a salvor in admiralty.¹⁷⁹ The "state possessory interest" this inquiry would seek to reveal is one that can only be generated by a level of state de facto or physical possessory activity that is consistent with admiralty's activist bias. The inquiry demands an assessment both of the text of the state statute and the state's individual and joint field efforts with its licensed salvors for evidence of active state involvement in antiquities recovery beyond mere legislative fiat.

At the heart of most states' active possessory efforts are statutory provisions for both licensing private salvors and rendering various supportive services to these salvors and the antiquities salvaging venture generally. Through and in conjunction with its licensee-salvor, who functions as its field operations arm, the state assumes a status analagous to that of a co-salvor or co-possessor in every salvaging venture in state waters. Once the state becomes a co-salvor with its licensee, there is no longer a conceptual difficulty in applying agency principles and regarding the possessory field activities of the licensee as equally and simultaneously those of the state.

178. Cf. F. POLLOCK, AN ESSAY ON POSSESSION IN THE COMMON LAW 13, 25, 40 (1888) (tracing the concept of possession and its indices, including feudal customs as related to ownership).

179. See generally cases cited, *supra* notes 13-20; Tay, *Bridges v. Hawkesworth and the Early History of Finding*, 8 AM. J. LEGAL HIST. 224 (1964).

But there is no need to consider the state solely as a vicarious de facto possessor. The state may be quite active in its own right. If a state were to chart wrecks, provide bottom, hydrologic and meteorologic data, research and catalogue historical facts, and through its onboard supervisors aid the recovery effort in other active ways, there would be no difficulty in regarding the state as an active co-salvor.¹⁸⁰

Although it is helpful as an analogy to regard the state as a co-salvor, a literal application of this appellation to the state would be attendant with certain problems. It could be argued that if a state refuses to license a salvor until the contractual terms it desired were secured, the state would abuse its superior bargaining position, contribute to the peril in which the sunken goods remain, and should not be permitted to share in the fruits of the recovery.¹⁸¹ There is also a danger that if both the state and its licensee-salvor were to be strictly regarded as co-salvors, admiralty might find in this relationship added reason to subject the state and its licensee to its jurisdiction. Since admiralty would apportion a salvage award based on each salvor's physical efforts, the state would be stripped of control over its marine artifacts when the proceeds of the antiquities salvage were divided, on the rationale that the state's efforts were merely supportive. Despite these potential pitfalls, the co-salvor analogy is nevertheless helpful in analyzing the level of state activity necessary to create possessory interests consistent with those recognized by admiralty.

An ancillary means exists by which a state statute may express a state's de facto possessory interest in its antiquities. Through criminal and civil sanctions and provisions for their field implementation by land and marine police agencies, state antiquity statutes actively exclude the unlicensed antiquities salvor from state lands and from antiquities on those lands by prosecuting him, respectively, as both a trespassor and a thief.

It is thus apparent that what was at first called a conflict between the philosophies of possession subscribed to by state and federal salvors is hardly an irreconcilable one, if it deserves to be called a conflict at all. In actual practice, salvage under the antiquities laws of most states demands a considerable degree of active state participation. What conflict exists is likely to have been generated by those statutory provisions which insist on declaring antiqui-

180. See *The Blackwall*, 77 U.S. (10 Wall.) 1, 12 (1869).

181. Cf. *The Clarita and the Clara*, 90 U.S. (23 Wall.) 1, 19 (1874) (discussing denial of salvage claims to a party instigating or aggravating the endangered condition of a vessel).

ties to be, without more, the property of the state. While virtually all state statutes share these provisions, they usually may be disassociated from the remainder of the statute without affecting its overall validity as an exercise of the state's police and proprietary powers.

A second way in which state antiquity regulations may run afoul of admiralty salvage policy is through provisions for both bargaining with the salvor over the size of his reward and disassociating the size of the reward from the intensity of the salvage effort. Admiralty, it has been observed, traditionally allows a salvor of abandoned property his entire find, but no state statute is quite that permissive. The differences in approach create two areas of potential conflict.

The more fundamental conflict of the two is generated when a state sees fit to allow a salvor, by contract, arbitral award or judgment, less than what admiralty would award. In the case of abandoned property—where admiralty gives the salvor all and the state allows him less than all—the conflict is apparent. If ownership of derelict property is in question, another facet of the same problem is revealed. Admiralty will allow the salvor of a derelict at least a moiety while a state statute may well give the salvor less.

The second problem is that even if a state liberally awards its contractual salvors of derelict and abandoned antiquities, there may often be an uncertainty to the state's award system that differentiates it from the greater predictability of the admiralty practice. Admiralty is usually jealous of its methods of computing salvage awards and suspicious of competing systems of salvor recompense. In *The Star*,¹⁸² for example, the claimant defended against a salvage claim by arguing that the aid libellant gave him by pulling his boat off a reef was part of custom and usage of reciprocal gratuitous salvage that prevailed among fishermen in the area. The response of the court in defense of admiralty's system of reward is pertinent here:

While the expectation of like assistance in time of need may furnish a strong incentive to the owner of the boats in this trade to aid other boats, so employed, in distress, the receipt of such award is uncertain, and in no way dependent upon the risk taken or success achieved. The court cannot say that the incentive furnished by such a custom, if it exists, is as strong as that growing out of the right the admiralty law gives to a salvage award. Such

182. 130 F.2d 890 (W.D. Wash. 1931).

being the case, to give effect to such a custom as superceding the right to a salvage award would be contrary to public policy.¹⁸³

There are no statistical proofs of the efficacy of admiralty's much-touted system of predictable awards. It is not possible to prove that a salvor who recovers the entire value of his find will be more honest than a salvor who must share his find with the state. Notwithstanding this difficulty of proof, conflict between admiralty and state law may still be avoided by inquiring into the reasons for admiralty's generous rewards and determining how the evils admiralty sought to correct are remedied by state antiquity statutes.

Admiralty has always thought that if a salvor was liberally rewarded, his "every temptation to embezzlement and dishonesty" would be removed.¹⁸⁴ Unquestionably, the states believe the same to be true. But whereas admiralty has relied solely on the carrot, the states seek to insure salvor rectitude by a combination of carrot and stick. The conflict between admiralty and state law resolves into comparison of their respective effectiveness in preventing salvor dishonesty. If state statutes are relatively effective, then abandoned and derelict marine antiquities will be placed beyond the reach of a dishonest salvor since the state will be apprised of his interest and will license and supervise him, thus rendering groundless admiralty's fear of secret dishonesty. If state statutes are relatively ineffective, they will be so largely because it is not difficult to conduct a surreptitious pilferage of antiquated vessels and cargoes even though they are buried under many feet of sand off the coasts of a populous country. Given this situation, it is unlikely that admiralty's carrot will serve as a more effective restraint on secret dishonesty. A pilferer who would avoid state antiquity laws and risk criminal sanctions for an additional small percentage of the take would not be the type of salvor who would invoke admiralty's salvage jurisdiction in the absence of a state statute.

There is no reason to believe that admiralty's approach to the problem of salvor dishonesty is any more effective than that fashioned by the states. One may well intuitively feel, to the contrary, that there is more dissuasive power in the states' reward/punish-

183. *Id.* at 891. *But see* *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 371 F. Supp. 356, 361 (S.D. Tex. 1973), where the federal court approved a 50-50 split agreement between the salvor and the state: "Where the parties at interest have so agreed among themselves, this court sees no reason why it should interfere, if the negotiations carried on amounted in the eyes of this court, to a predetermined contract of salvage."

It is unclear from the opinion whether the court agreed with the adequacy of the reward, or was merely implementing the contractual intent of the parties.

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

ment combination. Nor is there any apparent reason to believe that the remuneration of antiquities salvors in an area which demands a uniform federal maritime rule. Clearly, admiralty and state law not only fail to conflict fatally, but are in complete agreement on their common goal of insuring salvor honesty.¹⁸⁵

Another conflict between salvage and state law may arise if too great a diversity develops among the provisions of state antiquity laws. However weakened the idea of federal uniformity has become, a point may be reached when a profusion of wildly differing state antiquity schemes will be deemed offensive to what vestiges of uniformity remain. The possibility of state regulations, by sheer number and uniqueness, posing a threat to general marine salvage seems remote, however. Antiquities salvage as a subcategory of salvage is just not that widespread. State laws do not differ radically in their basic provisions, and any argument against state antiquity laws predicated on uniformity violations is bound to beg the question if it assumes, as a starting point, that vestiges of uniformity still remain of a strength sufficient to conflict with state law. It has already been shown that the concept of federal uniformity has not evolved into a monolithic assertion of jurisdiction over marine property.

Finally, state antiquity statutes may conflict with federal salvage law because of their lack of precision in describing what sunken property the state purports to own. On the face of several state statutes, the state clearly claims title to all abandoned vessels and objects of any type or age within its waters. Yet it would be an impermissible burden on traditional salvage rights if a declaratory opinion on ownership had to be obtained by every salvor working within three or nine miles of the coast.¹⁸⁶ *United States v. Diaz* suggests that even the phrase "objects of antiquity" may be too vague to support a criminal conviction for illegal salvaging.¹⁸⁷ Resolution of these problems should not prove difficult, however. Since the problems are all definitional, they can be solved by adept redefinition.

185. Cf. *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1947) (holding that the application of the Michigan Civil Rights Act to a shipping company engaged in foreign commerce did not contravene the Commerce Clause of the Federal Constitution); *Allway Taxi, Inc. v. City of New York*, 340 F. Supp. 1120 (S.D.N.Y. 1972) (holding that a city ordinance requiring exhaust emission controls was compatible with the Federal Clean Air Act.)

186. In *United States v. Louisiana*, 363 U.S. 1 (1960), the court construed the Submerged Lands Act, 43 U.S.C. §§ 1301-1303 (1970), as not limiting a state's ownership of submerged lands to within three miles of its coast, but as allowing the state's boundary to extend to nine miles provided the existence of such a boundary is established in judicial proceedings.

187. 499 F.2d 113 (9th Cir. 1974).

C. Suggested Interim Protective Measures

1. STATE LEGISLATION

It is apparent that some of the most significant objections to state marine antiquities jurisdiction stem from the states' slavish adherence to the notion that their interests must be asserted in the form of property rights. If the states drafted marine antiquities legislation more as an exercise of their police power and less as a form of eminent domain,¹⁸⁸ the conflict with admiralty salvage, which is itself strongly oriented toward concepts of possession and title, would be largely diminished. It has already been demonstrated that state antiquity statutes are defensible as consistent with admiralty's activist bias. But continuing statutory references to state title and ownership, and the spectres of physical possession these terms invoke, create unnecessary nominal and substantive conflicts with admiralty principles. State antiquities law, redrafted as assertions of police and federal salvage law, would be providing different remedies for different problems. Federal law would be applied, for the most part, to nonantiquities salvage where traditional concepts of rewarding salvors of property in impending maritime peril are still very much alive. State antiquities recovery, in a distinctly "maritime but local" context, would be conducted primarily for historical purposes in situations bereft of significant maritime peril.¹⁸⁹

State reliance on theories of antiquities ownership also places entirely too much emphasis on the accident of an artifact's physical location. Mere location of a marine artifact on state submerged land, while unquestionably investing a state with significant and protectable interests in its preservation, is an unrealistic basis for a state's claim of exclusive property in the artifact. Some marine artifacts, such as the *Atocha*, went down long before state political boundaries were fixed. Others, like the *U.S.S. Monitor*, postdate the

188. See *United States v. McClain*, 545 F.2d 988, 1002-03 (5th Cir. 1977). See also *Toomer v. Witsell*, 334 U.S. 385 (1948), in which the court stated: "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." 334 U.S. at 402. *McKee v. Gratz*, 260 U.S. 127, 135 (1922). But see *Kleppe v. New Mexico*, 426 U.S. 529, 536-37 (1976).

189. A plausible argument could be formulated that marine antiquities recovery is too far removed from traditional maritime and salvage pursuits to conflict with admiralty's salvage jurisdiction. Borrowing liberally from *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), one could argue that most artifact recovery is more an exercise in archaeological and remote sensing technique than traditional salvage. The argument would be strengthened if the contractual provisions governing artifact recovery in a given jurisdiction partook of an employment rather than a "no cure, no pay" relationship.

creation of state boundaries but are as much a part of national as they are of local history. Thus, while marine artifacts, like minerals or sedentary marine species, are physically confined within state borders, their historical and cultural significance demands that they be recognized as both national and local property.

Despite the clear national interest in marine antiquities, the federal government has apparently defaulted in its duty to preserve these nonrenewable cultural resources.¹⁹⁰ It is impossible to recognize in uncodified federal admiralty principles a manifestation of a paramount and preemptive federal interest in antiquities. Unlike the situation in *Missouri v. Holland*,¹⁹¹ where migratory birds were not being protected by the states, here an irreplaceable national and local resource is receiving inadequate protection at the hands of the federal government.

Ultimately, the optimum cultural and historical yield from marine antiquities might best be obtained through uniform national regulation of marine antiquities salvage from the shore to the seaward limit of the outer continental shelf. But until some coherent national scheme of marine antiquities conservation embracing state waters is formulated, state marine antiquity laws must be enacted and strengthened. These laws must rest in doctrines that recognize a wider public property interest in antiquities than the doctrines of *res nullius* or *res derelicta* would allow. Marine antiquities must be regarded as both national and local wealth over which states should exercise their police power as trustees in the broader sense rather than as titleholders or proprietors.¹⁹²

In addition to minimizing friction with admiralty and more realistically reflecting the fiduciary capacity in which states administer cultural properties of local and national significance, state antiquity statutes redrafted as police power enactments will be the

190. The importance of cultural resources to both the local and national populace provides a basis for regarding both as cotenants in the resource. If the national sovereign has committed waste by its inaction, the local sovereign may still protect its citizens' full enjoyment of the resource. See *United States v. Washington*, 520 F.2d 676, 685 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

191. 252 U.S. 416, 434-35 (1920).

192. This suggestion draws on the cotenancy analogy discussed in note 190 *supra*. Whether marine antiquities are to be regarded as *res communes*, *res publicae*, *res universitatis* or by some other latinism is of minor importance as long as the idea of a marine artifact as something subject solely to limited ownership and control is dispelled. Cf. *Greer v. Connecticut*, 161 U.S. 519, 525, 529, 535 (1896) (discussing state ownership of wild birds). However, it cannot be contended that an assertion of a limited type of state ownership has no place in an antiquities statute. Such an assertion may be a necessary predicate for an interstate or foreign prosecution for stealing or receiving a marine artifact wrongfully removed from United States coastal waters. See *United States v. McClain*, 545 F.2d 988, 1000-01 (5th Cir. 1977).

beneficiaries of an extremely favorable sequence of precedents. These cases, such as *Huron Portland Cement Co. v. City of Detroit*,¹⁹³ *Kelly v. Washington ex rel. Foss Co.*,¹⁹⁴ and *Skiriotes v. Florida*,¹⁹⁵ tend to support the expansion of state police power and the extension of state jurisdiction.

Skiriotes, in particular, resolves two jurisdictional problems in favor of a broadened state competence over marine resources. In territorial waters, in the absence of conflicting federal legislation, a state has police power jurisdiction over resources in which it has a legitimate interest.¹⁹⁶ In waters beyond state boundaries, again assuming a legitimate state interest and no preemptive federal presence, the state has prescriptive jurisdiction over the resource-related activities of its citizens.¹⁹⁷ *Skiriotes* also permits a more expansive definition of state citizenship that will include as a constructive state citizen, not merely an actual state resident or domiciliary, but any United States national acting beyond state borders who significantly interacts with a resource in which the state is interested.¹⁹⁸

Finally, through the vehicle of *Skiriotes* and the police power and commerce clause cases, a state can also assert an extraterritorial resource jurisdiction to protect territorial resources under the principle of the so-called "landing law" cases. These cases permit a state to prohibit the in-state possession of extraterritorially obtained resources, if the in-state and out-of-state resources are indistinguishable.¹⁹⁹ Under the landing law principle, states may indirectly but legitimately affect antiquities pilferage on the outer continental shelf beyond their borders since marine antiquities taken legally beyond state borders are indistinguishable, unless their recovery has been officially witnessed, from those taken illegally within state waters. Every coastal state with an antiquity law should review the language and reach of its enactment in light of

193. 362 U.S. 440 (1960).

194. 302 U.S. 1 (1937).

195. 313 U.S. 69 (1941).

196. *Id.* at 75.

197. *Id.* at 77. *Accord*, *Felton v. Hodges*, 374 F.2d 337 (5th Cir. 1967).

198. *State v. Bundrant*, 546 P.2d 530, 554-56 (Alas. 1976), *appeal dismissed sub nom. Uri v. Alaska*, 429 U.S. 806 (1976).

199. *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422 (1936), wherein the court stated that: [Resources] taken from waters within the jurisdiction of the state and those taken from without are, of course, indistinguishable; and to the extent that the act deals with the use or treatment of [resources] brought into the state from the outside, its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy. 297 U.S. at 426. *Hjelle v. Brooks*, 377 F. Supp. 430, 441 (D. Alas. 1974).

Skiriotes and its aftermath, to insure that jurisdiction over infringement of its terms is not limited by state boundaries, or classes of objects alone, but includes specific extraterritorial controls over its natural and constructive citizens.

2. ADMIRALTY PRINCIPLES

In the absence of state statutory protection, there is no reason to believe that traditional salvage concepts will protect marine antiquities from the private collector or the casual souvenir hunter. While admiralty may feel that its system of recompense insures rectitude, empirical evidence is lacking. Without statutory compulsions, there is no motivation for an antiquities salvor either to excavate in an archeologically responsible manner or come before a court of admiralty to share his finds with the public since the economics of organized antiquities salvage virtually demand quick recovery and a private market for whatever is recovered.²⁰⁰ Nor has admiralty developed any procedures to insure that even those historical and abandoned marine artifacts which are brought before it remain in the public domain. Considering the likelihood of admiralty's continuing preeminence in antiquities salvage, particularly on the outer continental shelf and in navigable waters of states without antiquities laws, two methods by which admiralty might become more responsive to the problems of marine antiquities should be briefly considered.

With minor rule changes admiralty could allow a state, the federal government, a foreign government, or the subdivisions of each, to assert possessory or proprietary interests in abandoned marine artifacts. For the purpose of resolving contending claims to them, the artifacts would be regarded as constructively derelict rather than abandoned. In *Platoro Ltd., Inc. v. Unidentified Remains of a vessel*,²⁰¹ an admiralty salvage case, where ownership of a Spanish vessel which sank in 1554 and its cargo was in dispute, a monition was issued to the government of Spain. Apparently it was never answered; however, the use of the monition hints at the possibility of its wider application.²⁰² In all cases in which foreign origin or ownership is reasonably suspected, the monition process may

200. See generally Note, *Marine Archaeology and International Law: Background and Some Suggestions*, 9 SAN DIEGO L. REV. 668, 688-700 (1972).

201. 371 F. Supp. 356, 359 (S.D. Tex. 1973) *rev'd on other grounds*, 508 F.2d 1113 (5th Cir. 1975).

202. The broad power of admiralty to bring before it all claimants to the salvaged property has long been recognized. *Sturgis v. Law & St. John*, 5 Super. Ct. 451, 459-60 (N.Y. 1850).

provide the United States with a means of honoring its international non-treaty cultural obligations. A healthier federalism would also result if admiralty recognized, by monition, the reciprocal cultural claims of the federal government and the state or states off whose coasts the antiquities were found. If either the foreign government, the federal government or the states failed to answer the monition, an admiralty court could more readily justify a finding of abandonment as salvage law defines that term.

A second area ripe for judicial improvisation is that of selective adoption, by admiralty, of the non-conflicting features of state antiquity statutes, particularly for antiquities recovery in a state's territorial waters. If the proprietary assertions in state law are repugnant to admiralty, perhaps the expressions of cultural concern are not. Assuming the absence of an affront to surviving principles of harmony and uniformity and the continuing integrity of traditional admiralty remedies, the interstices in admiralty's indifferent approach to antiquities could be supplied by state substantive law. Different problems would, of course, arise if admiralty were sitting in a jurisdiction without an antiquities law, or the antiquities were recovered beyond state boundaries. Conversely, the issue arises whether federal salvage law should be applied in state courts, both in those jurisdictions with an antiquities law and those without one. While federal salvage law can, and sometimes must, be applied by state courts,²⁰³ the potential applicability of federal salvage principles to local antiquities recovery has not been explored.

VII. CONCLUSION

The recent abundance of statutory, judicial and executive expressions of concern over wasting cultural resources portends continuing efforts at their conservation. But presently, aside from protecting scattered marine sanctuaries and national seashores, the federal effort to locate and preserve submarine artifacts has been, at best, uncertain. As local and national resources, marine antiquities may ultimately receive their most effective protection from federal legislation. Such legislation, uniform in application from shore to shelf-break, could help resolve the complex jurisdictional problems that have traditionally plagued federal/state conflicts over offshore resources.²⁰⁴ Unfortunately, the trend, to the extent that one

203. See *O. F. Shearer & Sons, Inc. v. Decker*, 349 F. Supp. 1214, 1220 (S.D.W. Va. 1972).

204. On an interim basis until a preemptive federal scheme could be implemented, or as a permanent complement to state antiquities regulations in territorial waters, the federal

is discernible, is not towards the uniform federal regulation of antiquities recovery. Admiralty salvage jurisdiction remains comfortably unchallenged by superceding federal legislation despite the suspected ineffectiveness of admiralty in protecting submerged cultural artifacts.

State statutes are the one bright feature on an otherwise dismal marine horizon, although no reported cases have yet discussed their strengths or limitations. Certainly it is reasonable to predict that while state legislation will not fully protect the cultural resources of the outer continental shelf, it will afford more effective protection than admiralty within state waters, and neither in state waters nor on the outer continental shelf do the customary factual settings and legal aspects of antiquities salvage require a confrontation between state antiquities laws and admiralty salvage principles.

Short of a cultural awakening by admiralty, irrefutable proofs of the unconstitutionality of state antiquity laws, or a uniform federal legislative program, all of which are unlikely, it is suggested that the balance between the two sovereigns be struck, at least on an interim basis, in favor of state regulation.

government could easily move to protect marine antiquities on the outer continental shelf. Deriving power from the Property Clause of the Constitution, Congress could amend the Antiquities Act or redefine federal jurisdiction in The Outer Continental Shelf Lands Act to empower the Secretary of the Interior to regulate shelf antiquities recovery. It is far from clear that the Secretary does not already possess the requisite rule-making power in this area pursuant to the two Acts, as written, or Exec. Order No. 11,593, 3 C.F.R. § 559 (1971-1975 Compilation). The Geological Survey, an agency of the Department of the Interior, presently requires that subsurface reconnaissance, testing and drilling operations on the outer continental shelf show due regard for the presence of cultural resources. 30 C.F.R. §§ 251.8(b), 251.9(d) (1976).

In light of the federal government's limited reservation of commerce, navigation, defense and foreign affairs powers in state waters (Submerged Lands Act § 1314(a)), it is also interesting to ponder what the basis for federal antiquities preemption in state waters would be. Authority for antiquities salvage, unlike fishery regulation, does not rest in the Commerce Clause (*Compare* *Douglas v. Seacoast Products, Inc.*, 45 U.S.L.W. 4488 (1977) with *The Belfast*, 74 U.S. (7 Wall.) 624, 640-41 (1868)), and is only remotely related to the other powers reserved in the Submerged Lands Act. *But see* *Zabel v. Tabb*, 430 F.2d 199, 204-06 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).