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THE ABANDONED SHIPWRECK ACT OF 1987: FINDING THE PROPER BALLAST FOR THE STATES

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I. INTRODUCTION

> [T]he skeletal ribs of the wooden hull rested undisturbed on the ocean bottom. A variety of fish, crustaceans, and anenomes now make it their home. Centuries ago these same decks carried seafarers who spied the stars with navigational instruments, slaved over a hot galley stove and climbed high aloft to unfurl the bleach-white sheets of canvas capturing the wind that breathed new life into the ship and its crew.[1]

THE exploration of uncharted seas and unknown lands by ancient mariners on magnificent sailing vessels serves as a source of timeless wonderment. Poets write about the romance and passion which accompanied the adventures of these vessels on the high seas. Archaeologists and historians study the wrecks of old vessels in search of clues that will help unlock the mysteries of life in another era. Now, the United States Congress has taken cognizance of these ships and their voyages by enacting the Abandoned Shipwreck Act of 1987 (the Act) on April 28, 1988.[2] The

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1. Excerpt from the personal diary of Timothy T. Stevens (written while diving on HMS *Pandora* during 1986 expedition with Queensland Museum). The HMS *Pandora* is the British naval frigate that wrecked on the Great Barrier Reef in 1791 while returning 14 of the HMS *Bounty* mutineers to England for prosecution. *See* John Murray, *HMS Pandora: On the Trail of the Bounty*, 35 SEA FRONTIERS 328, 330-32 (1989) (chronicling story of HMS *Pandora*).

2. 43 U.S.C. §§ 2101-2106 (Supp. II 1990). Section 2101 provides:

> The Congress finds that—
>
> (a) States have the responsibility for management of a broad range of living and nonliving resources in State waters and submerged lands; and
>
> (b) included in the range of resources are certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention.

Id. § 2101. For a study of the legislative history of the Act, see David R. Owen, *The Abandoned Shipwreck Act of 1987: Good-bye to Salvage in the Territorial Sea*, 19 J. MAR. L. & COM. 499, 501-05 (1988) (tracking legislative history of Act from initial introduction of bills in 1979 to final passage in 1988).

Act vests title to certain abandoned historic shipwrecks buried in state land in the state and clarifies the authority of the state to manage those historic wrecks.[3]

This legislation arose in response to a pressing need for the

3. *See* 43 U.S.C. § 2105(a), (c)-(d). The pertinent sections of § 2105 provide:

(a) UNITED STATES TITLE

The United States asserts title to any abandoned shipwreck that is—

(1) embedded in submerged lands of a State;

(2) embedded in coralline formations protected by a State on submerged lands of a State; or

(3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.

(b) NOTICE OF SHIPWRECK LOCATION; ELIGIBILITY DETERMINATION FOR INCLUSION IN NATIONAL REGISTER OF HISTORIC PLACES

The public shall be given adequate notice of the location of any shipwreck to which title is asserted under this section. The Secretary of the Interior, after consultation with the appropriate State Historic Preservation Officer, shall make a written determination that an abandoned shipwreck meets the criteria for eligibility for inclusion in the National Register of Historic Places under clause (a)(3).

(c) TRANSFER OF TITLE TO STATES

The title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located.

(d) EXCEPTION

Any abandoned shipwreck in or on the public lands of the United States is the property of the United States Government. Any abandoned shipwreck in or on any Indian lands is the property of the Indian tribe owning such lands.

Id. § 2105(a)-(d); *see also* H.R. REP. No. 514, 100th Cong., 2d Sess., pt. I, at 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365, 365 (stating that purpose of bill "is to vest title to certain abandoned historic shipwrecks that are buried in State lands to the respective States and to clarify the management authority of the States for these abandoned historic shipwrecks").

Under the Act, the United States claims title to all abandoned shipwrecks that are within the three mile territorial sea. *See* 43 U.S.C. § 1301(b) (1988) (defining seaward boundary as not more than three geographic miles from state coast into ocean or gulf). Under § 2105(a), the United States asserts title to any abandoned shipwreck embedded in the submerged lands of a state. 43 U.S.C. § 2105(a). Under § 2102(f), "submerged lands" are defined as " 'lands beneath navigable waters' as defined in section 1301 of this title." *Id.* § 2102(f). Lands beneath navigable waters are defined as "all lands permanently or periodically covered by tidal waters . . . seaward to a line three geographical miles distant from the coast line of each such state . . . or as heretofore approved by Congress, [such boundary] extends seaward (or into the Gulf of Mexico) beyond three geographical miles." 43 U.S.C. § 1301(a)(2). This limit extends to nine nautical miles for Florida, Texas and Puerto Rico. *Id.* § 1301(b). A shipwreck is defined as "a vessel or wreck, its cargo, and other contents." 43 U.S.C. § 2102(d). In addition, the shipwreck must be "embedded" or must be eligible for inclusion in the National Register. *Id.* § 2105(a)(1), (a)(3). The Secretary of the Interior, after consulting with the state Historic Preservation Officer, will determine if the shipwreck meets the eligibility criteria for inclusion in the National Register of Historic Places. *Id.* § 2105(b).

protection of historic shipwrecks. An estimated 50,000 shipwrecks are located in the navigable waters of the United States.[4] Five to ten percent of these wrecks have historical significance.[5] These sites today face increasing dangers. Scientific advances, such as deep-diving submersibles, remote-operated-vehicles (ROVs) and mixed-gas diving, have made recovery of vessels and artifacts more feasible, and as a consequence, many interested groups have dusted off old ships' logs and naval records in an effort to seek out hidden treasure or merely to preserve important aspects of maritime history.[6]

In recent years, the silent undersea home of these shipwrecks has not only been more exposed to exploration, but has also increasingly become the focus of contention between competing factions.[7] This competition has resulted in multiple clashes in the courtroom between parties trying to claim rights in the abandoned wrecks.[8] Three main groups have emerged as having com-

4. H.R. REP. No. 514, *supra* note 3, pt. I, at 1, *reprinted in* 1988 U.S.C.C.A.N. at 365.

5. *Id.*

6. The following developments have made shipwrecks more accessible than ever before: the proton magnometer (device attached to ship's hull to detect ferrous metals on ocean bottom); the metal detector (hand-held device capable of locating metal several feet underground); sonar (use of sound waves to detect objects); aerial photographs (especially helpful to locate wrecks in clear tropical waters); submersibles and remote-operated-vehicles (most useful in exploration of deep-sea wrecks such as *Bismark* and *Titanic* which are located in deep portions of Atlantic); and Trimix (mixture of oxygen, nitrogen and helium gas enabling divers to explore greater depths without dangerous effects of nitrogen narcosis). *See* William C. Stone, *Fountains of the Deep: Initial Experiments in Mixed-Gas Cave Diving*, 68 EXPLORERS J. 4, 4-13 (1990); H. Peter Del Bianco, Jr., Note, *Under Water Recovery Operations in Offshore Waters: Vying for Rights to Treasure*, 5 B.U. INT'L L.J. 153, 153-54 (1987) (noting that advances in technology have fueled rising number of underwater recovery operations); *see also* Dana Yoerger, *Historical And Archaeological Treasures—The Titanic: A Case Study Of Technical Implications*, *in* NEW DEVELOPMENTS IN MARINE SCIENCE AND TECHNOLOGY—ECONOMIC, LEGAL AND POLITICAL ASPECTS OF CHANGE, PROCEEDINGS OF THE 22ND ANNUAL CONFERENCE OF THE LAW OF THE SEA INSTITUTE 80-83 (Lewis M. Alexander et al. eds., 1988) (commenting that technologies for locating and exploiting shipwrecks are evolving rapidly due to commercial offshore interests).

7. *See, e.g.*, Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 640 F.2d 560 (5th Cir. 1981) (concerning armed seaman who came on board vessel and challenged party to salvage rights to shipwreck); Sindia Expedition v. Wrecked & Abandoned Vessel, 710 F. Supp. 1020 (D.N.J. 1989) (concerning rights of shipwreck discoverer, condominium owner and State of New Jersey to wreck). *See generally* Paul Brodeur, *The Treasure of the Debraak*, THE NEW YORKER, Aug. 15, 1988, at 33, 33-60 (discussing situation where state troopers armed with shotguns descended on salvor's headquarters and vessel after artifacts and treasure were used by salvor for security on loan).

8. *See, e.g.*, Marx v. Guam, 866 F.2d 294 (9th Cir. 1989) (concerning challenge to Guam's claim to wrecks by explorer of shipwreck who was denied exploration and recovery permit from Guam government; Guam was granted

peting interests in historic shipwrecks: (1) sport divers; (2) professional salvors; and (3) preservationists.

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sovereign immunity); Fitzgerald v. Unidentified Wrecked & Abandoned Vessel, 866 F.2d 16 (1st Cir. 1989) (concerning competing claims of salvors to exclusive title and possession of shipwreck off coast of Puerto Rico; in rem admiralty action barred by Eleventh Amendment because adjudication of Commonwealth's claim to artifacts would be required); Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked & Abandoned Steam Vessel, 833 F.2d 1059 (1st Cir. 1987) (concerning competing claims of discoverer of wreck and salvor to salvage rights and title to shipwreck 60 miles south of Nantucket); Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 640 F.2d 560 (5th Cir. 1981) (concerning action for injunction by salvor to prevent competing salvors from salvaging in area around Spanish galleon *Atocha* wreck); Florida Dep't of State v. Treasure Salvors, Inc., 621 F.2d 1340 (5th Cir. 1980) [hereinafter *Treasure Salvors II*] (concerning in rem action by treasure hunters against State of Florida for possession and confirmation of title to *Atocha*), *cert. granted*, 451 U.S. 982 (1981), *aff'd in part and rev'd in part*, 458 U.S. 670 (1982), *on remand*, 689 F.2d 1254 (5th Cir. 1982); Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978) [hereinafter *Treasure Salvors I*] (concerning suit between salvor corporations and United States government for possession and title to *Atocha* located beyond nine nautical mile territorial limit); *Sindia Expedition*, 710 F. Supp. 1020 (concerning competing claims of salvors to title and salvage award of wreck 3,000 yards off beach in Ocean City, N.J.; holding that State of New Jersey had colorable claim and was indispensible party); Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 691 F. Supp. 1377 (S.D. Fla. 1988) (denying salvor's motion for preliminary injunction against the State of Florida's interference with salvage of shipwreck; holding based on Eleventh Amendment); Riebe v. Unidentified, Wrecked & Abandoned 18th Century Shipwreck, 691 F. Supp. 923 (E.D.N.C. 1987) (concerning in rem admiralty action to obtain title and possession of shipwreck as against state; holding that Eleventh Amendment barred federal court's determination of state's claim of title to shipwreck located within state's jurisdictional waters); Indian River Recovery Co. v. The China, 645 F. Supp. 141 (D. Del. 1986) (concerning competing claims of salvage company and not-for-profit corporation formed by sport scuba divers, charter boat operators and fishing boat captains to dive on and salvage 19th century shipwreck); MDM Salvage, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 631 F. Supp. 308 (S.D. Fla. 1986) (concerning claims of three competing parties to salvage rights in ocean area occupied by 18th century Spanish shipwrecks); Chance v. Certain Artifacts, 606 F. Supp. 801 (S.D. Ga. 1984) (concerning competing claims of state and salvor to wreck embedded in state property; upholding state's claim to wreck and denying salvor's claim for salvage award), *aff'd*, 775 F.2d 302 (11th Cir. 1985); Subaqueous Exploration & Archaeology, Ltd. v. Unidentified, Wrecked & Abandoned Vessel, 577 F. Supp. 597 (D. Md. 1983) (concerning competing claims of salvors to title or salvage awards to abandoned vessels; salvors' claims denied on Eleventh Amendment grounds because state had colorable claim of possession and had not waived sovereign immunity); Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel, 568 F. Supp. 1562 (S.D. Fla. 1983) (concerning finder's action to confirm title to shipwreck; confirming title in United States because wreck located in national park); Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 556 F. Supp. 1319 (S.D. Fla. 1983) (concerning competing claims of salvors and state to wreck of Spanish galleon *Santa Margarita*); Commonwealth v. Maritime Underwater Surveys, Inc., 531 N.E.2d 549 (Mass. 1988) (concerning salvager's motion for preliminary injunction to restrain state from granting or extending additional permits within salvager's permit area). For further references to litigation in this

The sport divers' main concern is maintaining free access to historic wrecks. Many divers, however, also share the goal of preserving the historical integrity of these shipwrecks. For example, a number of sport divers serve as volunteers on marine archaeological excavations and other underwater exploration projects. During the consideration of the Act in Congress, the sport divers waged letter campaigns against the passage of the Act, fearing that the Act would impose overly restrictive regulations on their access to historic shipwrecks.[9] Congressman Vento of Minnesota, however, stated that this reaction was mainly a product of a "concerted campaign of misinformation and distortion about the bill."[10]

The motivating force behind salvors, on the other hand, is the anticipated material gain from the shipwreck. From a salvor's perspective, abandoned vessels and their cargoes are treated as goods lying on the ocean bottom—goods that should be returned to the stream of commerce. In order to defray costs, salvors tend to incorporate the most efficient methods of removing the artifacts. These methods often conflict with the precise measuring and recording techniques employed by underwater archaeologists. Moreover, the salvaging method itself can harm the environment, particularly if methods such as blasting, dredging, winching or blow torching are employed. Archaeologists, in contrast, practice sound scientific techniques that, by their very nature, protect the fragility of the wreck with only a minimal impact on the environment. This difference was apparent in the salvaging of the *Debraak*, where salvors employed "cost-effective" methods of rapidly reeling in an 18th century British frigate with cables that scattered valuable artifacts into the Delaware River.[11] This type of makeshift technique is not uncommon among sal-

area, see David R. Owen, *Some Legal Troubles with Treasure: Jurisdiction and Salvage*, 16 J. MAR. L. & COM. 139, 139 n.1 (1985).

9. Another concern for sport divers is salvors, who have been known to exclude or attempt to exclude sport divers from wreck sites. *See, e.g., The China*, 645 F. Supp. at 143-44 (holding that, under law of finds, not-for-profit corporation formed by sport divers, charter boat operators and fishing boat captains had superior right as against professional salvors to dive wreck).

10. 134 CONG. REC. 6613 (1988) (statement of Rep. Vento) (stating that, although bill encourages states to establish underwater parks for sport divers, there is opposition to bill because of misinformation campaign); *see also id.* at 6614-15 (statement of Rep. Jones) (stating that proposed bill directs states to develop policies for recreational exploration of shipwreck sites and that "[s]port divers are clearly intended to be direct beneficiaries of this legislation").

11. *See* Brodeur, *supra* note 7, at 52-53 (discussing use of clamshell bucket to scoop up artifacts).

vors, whose main concern about the Act is to preserve their rights in realizing a profit.[12]

In contrast to the monetary motivation of the salvor and the recreational motivation of the sport diver, the main concerns of the preservationist are the historical and archaeological value of shipwrecks. In essence, preservationists focus on the protection of shipwrecks for the benefit of society as a whole, as opposed to the more narrow concerns of the other groups. A well-preserved shipwreck acts as a time capsule of centuries past. Experienced archaeologists can recreate life as it was on board the vessel by the use of careful recovery and recording procedures.[13]

Under the Act, the states now have the difficult task of balancing the concerns of these competing parties.[14] Even though

12. Not all salvors, however, use techniques that damage the environment or the wreck site. Some salvors have employed archaeologists in their recovery efforts. *See* David Seanor, *The Case With The Midas Touch*, A.B.A. J., May 1990, at 54 (discussing salvors' use of sophisticated scientific apparatus and archaeological methodology to recover treasure trove of gold from S.S. *Central America*).

13. Archaeological recovery techniques are extremely slow and meticulous, and often result in a multi-year excavation. *See, e.g.*, John D. Broadwater, *Yorktown Shipwreck*, 173 NAT'L GEOGRAPHIC 806 (1988) (discussing cofferdam with 26 foot walls and filter system constructed by archaeologists and engineers around shipwreck for more precise excavation); Luis Marden, *In Bounty's Wake: Finding the Wreck of the H.M.S. Pandora*, 168 NAT'L GEOGRAPHIC 423 (1985) (discussing scientific method of artifact preservation which involves soaking in chemical solutions for long periods of time so artifacts can withstand exposure to air); Murray, *supra* note 1 (discussing third major expedition on HMS *Pandora* in Australia).

14. Under § 2105(c) of the Act, title to abandoned shipwrecks is transferred to the state in which the wreck is located. 43 U.S.C. § 2105(c) (Supp. II 1990). Under § 2104, guidelines are to be provided for the states. Section 2104 states:

> (a) PURPOSES OF GUIDELINES; PUBLICATION IN FEDERAL REGISTER
>
> In order to encourage the development of underwater parks and the administrative cooperation necessary for the comprehensive management of underwater resources related to historic shipwrecks, the Secretary of the Interior, acting through the Director of the National Park Service, shall within nine months after April 28, 1988, prepare and publish guidelines in the Federal Register which shall seek to:
>
> (1) maximize the enhancement of cultural resources;
>
> (2) foster a partnership among sport divers, fishermen, archeologists, salvors, and other interests to manage shipwreck resources of the States and the United States;
>
> (3) facilitate access and utilization by recreational interests;
>
> (4) recognize the interests of individuals and groups engaged in shipwreck discovery and salvage.
>
> (b) CONSULTATION
>
> Such guidelines shall be developed after consultation with appropriate public and private sector interests (including the Secretary of Commerce, the Advisory Council on Historic Preservation, sport divers, State Historic Preservation Officers, professional dive operators, salvors, archeologists, historic preservationists, and fishermen).
>
> (c) USE OF GUIDELINES IN DEVELOPING LEGISLATION AND REGULATION

the congressional intent to protect historic shipwrecks is clear, how to apply this law so that it does not impinge too harshly on the rights of these rival parties is not so clear. In response to this need for clarification, this Article will discuss the common law basis of historic shipwreck legislation in the United States, review the international perspective on shipwreck laws, and analyze the salient legislative history and the specific provisions of the Act. With this background, this Article will then suggest possible amendments to the Act and make recommendations for the drafting of state statutes which will balance the various interests while still preserving the historical integrity of abandoned shipwrecks.

II. BACKGROUND ON THE ABANDONED SHIPWRECK ACT

A. *The Common Law Basis of Historic Shipwreck Legislation*

One motivating force behind the current shipwreck legislation was the confusion in the courts over the ownership of and authority to manage abandoned shipwrecks.[15] For example, states historically claimed title to, and authority over, abandoned shipwrecks on submerged lands under their jurisdiction.[16] Federal admiralty courts, however, have also claimed jurisdiction over the salvage of historic wrecks, even though ambiguity has traditionally plagued this area of admiralty law and admiralty law may not be particularly well-suited for furthering the goals of his-

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> Such guidelines shall be available to assist States and the appropriate Federal agencies in developing legislation and regulations to carry out their responsibilities under this chapter.

Id. § 2104.

15. H.R. REP. No. 514, *supra* note 3, pt. I at 2, *reprinted in* 1988 U.S.C.C.A.N. at 366; *see also id.* pt. II, at 14, *reprinted in* 1988 U.S.C.C.A.N. at 382 (additional views of Reps. Coble, Davis, Fields, Herger, Lent and Shumway) (stating that bill "is designed to address conflicting state and Federal court decisions which have created confusion over the ownership and control of abandoned shipwrecks located within state territorial waters").

16. *Id.* pt. I, at 2, *reprinted in* 1988 U.S.C.C.A.N. at 366. The House Report stated:

> In 1953, Congress passed the Submerged Lands Act [SLA] . . . and transferred ownership to the States of all natural resources and submerged lands . . . . Congress did not specify in the SLA whether the states also owned non-natural objects such as shipwrecks that rested on or within submerged lands. Notwithstanding this lack of clarity, some 28 States have laws that pertain to the management of abandoned or historic shipwrecks in state waters . . . . Existing State laws assert title to shipwrecks in State waters and prescribe regulations for the protection and salvage of wrecks of historic significance.

Id. pt. II, at 2, *reprinted in* 1988 U.S.C.C.A.N. at 370-71; *see also* Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1988) [hereinafter SLA].

toric preservation of shipwrecks.[17] As a consequence, numerous courts have attempted to apply historic preservation statutes[18] or a theory of sovereign prerogative,[19] approaches which collided directly with the well-established—though perhaps ill-suited—federal common law admiralty principles of salvage and finds.[20]

The law of salvage applies to the recovery of abandoned

17. *Id.* pt. I, at 2, *reprinted in* 1988 U.S.C.C.A.N. at 366; *see also* MARTIN J. NORRIS, THE LAW OF SALVAGE § 157 (1958) (stating that "there is no branch of salvage law so little understood and free from misconceptions . . . as the question pertaining to ownership of distressed, abandoned or wrecked property at sea"). One reason for this ambiguity and ill-suitedness could be that the focus of admiralty law traditionally has been "commercial, not cultural resource management or recreation." H.R. REP. No. 514, *supra* note 3, pt. I, at 2, *reprinted in* 1988 U.S.C.C.A.N. at 366. According to the House Report:

> Aspects of Admiralty law most applicable here are the "Law of Finds"—the principle that the person finding the shipwreck can claim ownership to it—and the "Law of Salvage"—which awards those who perform acts of salvage a portion of the goods retrieved. Historic shipwrecks that contain both historic information and tangible artifacts are subject to salvage operations, with resultant loss of historical information and artifacts to the public.

Id.

18. *See, e.g.*, Marx v. Guam, 866 F.2d 294, 300-22 (9th Cir. 1989) (recognizing Guam's colorable claim to shipwrecked Spanish galleons pursuant to SLA and Guam's Underwater Historic Properties Act).

19. Sovereign prerogative is an English common law principle under which all abandoned property that made it to shore was considered property of the Crown. *See* Robert A. Koenig, *Property Rights in Recovered Sea Treasure: The Salvor's Perspective*, 3 N.Y.L. SCH. J. INT'L & COMP. L. 271, 283-84 (1982) (discussing origins and meaning of sovereign prerogative); *see also* Platoro Ltd. v. Unidentified Remains of a Vessel, 371 F. Supp. 356 (S.D. Tex. 1973) (awarding Texas property recovered from Spanish galleon based on sovereign prerogative theory), *rev'd on other grounds*, 508 F.2d 1113 (5th Cir. 1975). *But see* Thompson v. United States, 62 Ct. Cl. 516 (1926) (recognizing federal government's right to claim title to property abandoned at sea, but denying assertion of sovereign prerogative on grounds that Congress never asserted federal rights through legislative enactment); United States v. Tyndale, 116 F. 820, 823 (1st Cir. 1902) (same).

20. Federal courts presented with salvage claims generally "decided that (1) the SLA did not specifically assert U.S. title to shipwrecks or transfer that title to the states; and (2) state historic preservation laws whose provisions are inconsistent with federal common law admiralty principles are superseded by those principles under the supremacy clause of the Constitution." H.R. REP. No. 514, *supra* note 3, pt. II, at 2, *reprinted in* 1988 U.S.C.C.A.N. at 371; *see Treasure Salvors I*, 569 F.2d 330, 339 (5th Cir. 1978) (stating that SLA consists of measures "to facilitate exploitation of natural resources on the continental shelf" and extension of jurisdiction for this purpose "is not necessarily an extension of sovereignty"); Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 525 F. Supp. 186, 215 (S.D. Fla. 1981) (holding that SLA did not empower State to "derogate both federal jurisdiction and the application of admiralty principles" to state statute). *But see* Subaqueous Exploration & Archaeology, Ltd. v. Unidentified, Wrecked & Abandoned Vessel, 577 F. Supp. 597 (D. Md. 1983) (holding that SLA did provide state with jurisdiction over shipwrecks in state waters).

property at sea.[21] Salvage is "the compensation allowed to persons by whose voluntary assistance a ship at sea or her cargo or both have been saved in whole or in part from impending sea peril, or in recovering such property from actual peril or loss, as in cases of shipwreck, derelict, or recapture."[22] Under salvage law, the salvor acquires a lien on the salved property—property that the law recognizes as still belonging to someone else—and is entitled to expenses and a salvage award.[23] Once salvaged, the property is returned to the owner if possible. If the owner is unavailable, however, the property may be publicly auctioned and the proceeds from that auction would be used for the salvage award.[24] Courts generally use three criteria as the basis of a salvage award: (1) the existence of maritime peril; (2) the voluntari-

21. *See, e.g.*, Hener v. United States, 525 F. Supp. 350, 358 (S.D.N.Y. 1981) (applying law of salvage over law of finds in action concerning dispute among divers for right to attempt to salvage silver from cargo of wrecked barge).

22. NORRIS, *supra* note 17, § 2.

23. *Cobb Coin Co.*, 525 F. Supp. at 207; *see also* NORRIS, *supra* note 17, § 150 (stating that salvor, person "who successfully saves imperiled property on navigable waters[,] . . . does not become the title holder of that property but saves the property for the benefit of the owner with the expectation of receiving an appropriate salvage award"). The relationship between the salvor and the property saved has been defined as follows:

> That the salvor has a perfect right to proceed against the goods saved, admits of no doubt. By saving them he acquires a sort of proprietary interest in the goods, a jus in re, and a complete possessory right, against all persons claiming an interest in them, to retain them until his compensation is paid, or until he can proceed to enforce his right against them by due course of law.

Id. § 143. In *Cobb Coin Co.*, the court discussed the policy behind this law:

> The consistent policy underlying admiralty's salvage awards is that salvors will be liberally rewarded. Admiralty holds out a continuing incentive to undertake the physical and financial risks entailed in salvage operations and to bring the property thus recovered into court for a salvage determination. Marine treasure salvors . . . are well aware of this policy, and are guided by its constancy.

Cobb Coin Co., 525 F. Supp. at 207.

24. *See* NORRIS, *supra* note 17, § 150. The salvor does not gain title by finding the shipwreck. *Id.* Rather, the salvor is obligated

> to bring the salved property before an admiralty court . . . where the owner will be given an opportunity to come in and claim the property. The salvor by bringing his salvage libel and by having the recovered property arrested by the marshall, is enabled to take the necessary steps for securing his reward. [If the owner does not claim the property or compensate the salvor,] . . . the property can be sold by the marshall on order of the court. The proceeds of the sale [are] placed in the registry of the court . . . for distribution to the salvor and the owner of the salved property.
>
> The salvor can purchase the property at the sale, if he so wishes, and can acquire title like any other purchaser in good faith.

Id.

ness of the salvor's act; and (3) the success, in whole or in part, in the rescue of the property.[25] If these elements are present, the admiralty court will then decide on the appropriate monetary award to be paid to the salvor.[26] Thus, the salvor only has the right to possession of the property and the right to be compensated for the rescue of the property until a court has passed on title and the salvage award.[27] Title to the property remains at all times with the owner, unless the property is found to have been abandoned.

Title, therefore, can be of key importance in the adjudication of disputes over the rights to shipwrecks, and courts have applied the law of finds as an adjunct to salvage law.[28] Under the law of finds, ownership is granted to the finder who reduces abandoned or relinquished property to actual possession and control.[29] Intent to relinquish title may be established by one of three possible methods of proof: (1) express notice from the owner; (2) implication from the owner's inaction or passage of time; or (3) lack of an identifiable owner.[30] If intent to abandon title is not found, however, recovered property will be controlled by the law of salvage rather than the law of finds.[31]

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25. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 534-35 (2d ed. 1975).

26. In determining the amount of the award, courts will take into consideration several factors:

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

Del Bianco, Note, *supra* note 6, at 159; *see also* NORRIS, *supra* note 17, § 244.

27. *See* Hener v. United States, 525 F. Supp. 350, 356-57 (S.D.N.Y. 1981).

28. *See, e.g., Treasure Salvors I*, 569 F.2d 330, 336-37 (5th Cir. 1978) (granting salvors title to shipwreck based on law of finds); Chance v. Certain Artifacts, 606 F. Supp. 801, 808 (S.D. Ga. 1981) (holding that title to res may be awarded under law of finds and not as reward to salvage claim), *aff'd*, 775 F.2d 302 (11th Cir. 1985); Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel, 568 F. Supp. 1562, 1566 (S.D. Fla. 1983) (denying salvage award where salvor fails to uphold archaeological provenience).

29. *See Hener*, 525 F. Supp. at 354. The underlying principle to the law of finds is the abandonment of the property. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 512 (1987) (stating that "[u]nder the general principles of maritime law abandonment is a repudiation of ownership, and a person taking possession under salvage operations may be considered a 'finder' ").

30. Del Bianco, Note, *supra* note 6, at 161.

31. *Id.*

One factor contributing to the confusion in the courts in applying admiralty law principles to abandoned shipwrecks stems from the different interpretations of "abandonment" in the British and American legal systems. Under British common law, abandoned property belongs to the sovereign.[32] The British rule states that found property is held for a year and a day.[33] If the owner fails to claim the property within this time, it will be determined abandoned and will then become the property of the sovereign.[34]

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32. *See* Koenig, *supra* note 19, at 283. The British rule is grounded in the concept of "sovereign prerogative." *Id.* For further discussion of this concept, see *supra* note 19 and accompanying text. Any property which was abandoned at sea was categorized by commentators such as Blackstone as wreck, jetsam, flotsam, or lagan. *Id.* at 284 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 280-84). According to Blackstone, a wreck is any ship that is lost at sea and its cargo thrown upon land; jetsam is where goods are cast into the sea, sink, and remain underneath the water; flotsam consists of those goods found floating on the sea; and lagan is where goods are cast overboard, as in a storm, but with a buoy attached to identify the owner. *Id.* (citing 1 BLACKSTONE, *supra*, at 290-94); *see also* Susan J. Lindbloom, Note, *Historic Shipwreck Legislation: Rescuing the Titanic from the Law of the Sea*, 13 J. LEGIS. 92, 98 n.53 (1986) (defining wreck, jetsam, flotsam and lagan). Any of the three latter categories, if they reached the shore, would then be classified as wreck. Koenig, *supra* note 19, at 284 (citing Frank H. Fee, III, Note, *Abandoned Property: Title to Treasure Recovered in Florida's Territorial Waters*, 21 U. FLA. L. REV. 360, 361 (1969).

33. *See* Lindbloom, Note, *supra* note 32, at 98 n.53.

34. *See id.* In 1275, this principle was codified in the Statute of Westminster, 3 Edw., ch. 4 (1275) (Eng.), *repealed*, S.L.R., 1863. The statute provided:

> Concerning Wrecks of the Sea, it is agreed, that where a Man, a Dog, or a Cat e[s]cape quick out of the Ship, that [s]uch Ship nor Barge, nor any Thing within them, [s]hall be adjudged Wreck: (2) but the goods [s]hall be [s]aved and kept by View of the Sheriff, Coroner, or the King's Bailiff, and delivered into the Hands of [s]uch as are of the Crown, where the Goods were found; (3) [s]o that if any [s]ue for tho[s]e Goods, and after prove that they were his, or peri[s]hed in his keeping, within a Year and a Day, they [s]hall be re[s]tored to him without Delay; and if not, they [s]hall remain to the King . . . .

Id. As written, the statute applied only to wreck, but in 1601, in Sir Henry Constable's Case, 77 Eng. Rep. 218 (K.B. 1601), the statute was given greater reach. In that case, the court held that sovereign prerogative extended to flotsam, jetsam and lagan. *Id.* at 223 (stating that King is entitled to flotsam, jetsam and lagan as well as wreck because "the sea is of the King's allegiance, and parcel of his Crown of England"). In 1789, an admiralty court reiterated the general rule that any property found abandoned at sea is property of the sovereign. The *Aquila*, 165 Eng. Rep. 87, 89 (Adm. 1789) (stating that while each country will determine ownership of shipwrecked property in its territory, "the general rule of civilized countries [is] that what is found derelict on the seas[] is acquired beneficially for the Sovereign, if no owner shall appear" and, in England, "this right is . . . firmly established"). For a further discussion of the historical basis of salvage law, see Rose Melikan, *Shippers, Salvors and Sovereigns: Competing Interests in the Medieval Law of Shipwrecks*, 11 J. LEGAL HIST. 163 (1990) (comparing and contrasting continental and English medieval rules on shipwrecked property; continental codes had commercial outlook by compensating seaman for the risks they

In contrast, the American common law rule vested title, in the absence of the original owner, in the finder who has actual possession and control of the property.[35] Although the American courts recognized, as do the British courts, the inherent power of the government to claim ownership over abandoned property, the majority of United States courts were reluctant to enforce this federal power without a clear legislative enunciation by Congress.[36] In essence, the courts themselves signaled a need for Congress to clearly designate the ownership rights of abandoned shipwrecks.

The discovery of the Spanish galleon, *Nuestra Senora de Atocha* (the *Atocha*), illustrated the courts' difficulty in applying the laws of salvage and finds to abandoned shipwrecks.[37] The ship sank in a hurricane near the Marquesas Keys off the coast of Florida in 1622.[38] The salvage attempts by the Spanish fleet were unsuccessful. Another hurricane struck soon after the first, battered the *Atocha's* hull and buried the ship in the sandy bottom.[39] With the

took, whereas England had more feudal outlook by extending salvage rights to sovereign).

35. *See* Koenig, *supra* note 19, at 286. In the United States, courts give preference "to the rights of the finder over those of the sovereign." *Id.* Thus, where a dispute over ownership of shipwrecked property is between the finder and the sovereign, "the majority view in the United States is that the finder's claim should prevail." *Id.* A caveat to this general rule is that title and ownership to warships and their artifacts remains with the United States. *See* United States v. Steinmetz, 763 F. Supp. 1293, 1297-1300 (D.N.J. 1991) (stating that "title to captured property always vests primarily in the government of the captors").

36. *See* Koenig, *supra* note 19, at 287; *see also Treasure Salvors I*, 569 F.2d 330, 340-43 (5th Cir. 1978) (holding that district court had correctly applied law of finds in determining corporations' right to Spanish shipwreck and that United States was not entitled to remains of vessel as successor to prerogative rights of English Crown); Thompson v. United States, 62 Ct. Cl. 516, 524 (1926) (stating that "Congress could undoubtedly provide that the proceeds of derelicts and abandoned vessels in the navigable waters of the United States be paid into the Treasury; but no such law has been passed, and until it is the principles of natural law must prevail"); United States v. Tyndale, 116 F. 820, 823 (1st Cir. 1902) (stating that "it is not within the province of the courts to determine that the treasury of the United States represents any particular royal prerogative"); see also Kenneth S. Beall, Jr., *State Regulation of Search for and Salvage of Sunken Treasure*, 4 NAT. RESOURCES L. 1, 17-18 (1971) (concluding that state statutes that enable states to take charge of abandoned property are valid and not in conflict with federal maritime law).

37. For further discussion of the *Atocha's* history, see *Treasure Salvors II*, 621 F.2d 1340, 1341-42 (5th Cir. 1980), *aff'd in part and rev'd in part*, 458 U.S. 670 (1982); *Treasure Salvors I*, 569 F.2d at 333; Charles A. Cerise, Jr., Comment, *Treasure Salvage: The Admiralty Court "Finds" Old Law*, 28 LOY. L. REV. 1126, 1135-36 (1982).

38. *Treasure Salvors I*, 569 F.2d at 333. The *Atocha* was one of a number of ships in the Spanish fleet that went down in that storm. *Id.*

39. *Id.* The Marquesas Keys were named after the reef where the Marquis

wreck presumably lost forever, the Spaniards abandoned their search in late 1623.[40] In 1971, a group of treasure hunters, relying upon Spanish archival reports, discovered the wreck approximately nine miles off the coast of Florida.[41] From this wreck, Treasure Salvors, Inc. recovered about six million dollars in artifacts—at a cost of four lives and two million dollars.[42] In the subsequent litigation over ownership rights to the *Atocha's* treasure, the courts struggled with the complex admiralty laws governing abandoned shipwrecks.

There were two legal battles for ownership of the treasure. The first, *Treasure Salvors I*, was between Treasure Salvors and the United States;[43] the second, *Treasure Salvors II*, was between Treasure Salvors and the State of Florida.[44] The basis for the appeal in *Treasure Salvors I* was a suit by Treasure Salvors and Armada Research Corporation for possession of and confirmation of title to the wreck of the *Atocha*.[45] The United States had unsuccessfully intervened and counterclaimed in that suit, asserting title to the wreck.[46] The government, on appeal, asserted two grounds for its claim to the treasure: (1) the application of the Antiquities Act[47] to objects located on the outer continental shelf; and (2) the right of the United States, under the theory of sovereign prerogative, to goods abandoned at sea and later found by its citizens.[48] The United States Court of Appeals for the Fifth Circuit held that the remains of the *Atocha* were not on lands owned or controlled by the United States under the provisions of the Antiquities Act, and that title to the *Atocha* vested in the finders under the widely accepted "American rule."[49] In *Treasure Salvors II*, the Fifth Cir-

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of Cadereita, the commander of the Spanish fleet, had camped while supervising the unsuccessful salvage operations. *Id.*

40. Cerise, Comment, *supra* note 37, at 1136. Later salvage attempts from 1626 to 1641 by Cubans, under royal salvage contract, were likewise unsuccessful. *Id.*

41. *See id.* at 1136.

42. *Treasure Salvors I*, 569 F.2d at 333. In 1978, the estimated value of the *Atocha's* cargo was $250 million. *Id.*

43. *Id.* at 330.

44. *Treasure Salvors II*, 621 F.2d at 1341.

45. *Treasure Salvors I*, 569 F.2d at 333.

46. *Id.* Summary judgment had been granted for the plaintiffs by the district court. Treasure Salvors, Inc. v. Abandoned Sailing Vessel, 408 F. Supp. 907, 907 (S.D. Fla. 1976).

47. 16 U.S.C. §§ 431-433 (1988).

48. *Treasure Salvors I*, 569 F.2d at 337.

49. *Id.* at 340, 343. For a further discussion of sovereign prerogative and the American rule, see *supra* notes 19 & 35 and accompanying text.

cuit held that Treasure Salvors and Armada Research Corporation had title to the *Atocha* artifacts as against the State of Florida as well.[50] Treasure Salvors had entered into a series of salvage contracts with the state on the assumption that the *Atocha* wreck was on state land.[51] The state, in accordance with these contracts, received its share of the artifacts recovered by Treasure Salvors from June 1973 to February 1975.[52] The Supreme Court, however, in 1975 held that the resting place of the *Atocha* had never been owned by Florida.[53] In addition, the Fifth Circuit, in *Treasure Salvors I*, had held that the corporations had title to and right to possession of the *Atocha* and its cargo,[54] and the district court then issued a warrant for arrest in rem, directing the marshal to take possession of all artifacts from the *Atocha* which were in the custody of the state.[55] When the court denied the state's motion to quash, Florida appealed the arrest order, asserting Eleventh Amendment protection.[56] After a full evidentiary hearing, the state was ordered to deliver the artifacts to the district court.[57] The state appealed this order as well, but the Fifth Circuit held that neither the Eleventh Amendment nor sovereign immunity

50. *Treasure Salvors II*, 621 F.2d 1340, 1341 (5th Cir. 1980). The trial court held that the state was bound by the judgment in *Treasure Salvors I*, and alternatively, a suit to determine title to the artifacts was not barred by the Eleventh Amendment, and that Florida's claim of ownership was without merit. Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 459 F. Supp. 507, 514 (S.D. Fla. 1978), *aff'd*, *Treasure Salvors II*, 621 F.2d 1340 (5th Cir. 1980), *aff'd in part and rev'd in part*, 458 U.S. 670 (1982).

51. *Treasure Salvors II*, 621 F.2d at 1349. Treasure Salvors would relinquish 25% of the items recovered in return for the salvage rights. *Id.*

52. *Id.* at 1343.

53. *Id.* (noting that report of special master to the Court in *United States v. Florida* confirmed that "Florida had *never* owned an interest in any of the lands involved in the case at bar" (citing United States v. Florida, 420 U.S. 531 (1975))).

54. *Id.*

55. *Id.* at 1344.

56. *Id.* The district court granted Treasure Salvor's motion to require Florida "to show cause why it should not be ordered to transfer the artifacts in its possession to the custodians appointed by the district court." *Id.* (footnote omitted).

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

The Fifth Circuit stated that "[a]lthough the Eleventh Amendment is not literally applicable to suits against a state by her own citizens, the Supreme Court has construed the Amendment to cover such actions." *Id.* at 1345 n.18 (citing Edelman v. Jordan, 415 U.S. 651, 662, 663, 677 n.19 (1974)).

57. *Treasure Salvors II*, 621 F.2d at 1344.

prohibited an action to adjudicate the state's ownership claim.[58] The court also held that the contracts between the state and Treasure Salvors were void on the grounds of mutual mistake and failure of consideration.[59]

In *Florida Dep't of State v. Treasure Salvors, Inc.*,[60] the Supreme Court dealt with the question of whether an admiralty in rem action may be precluded by the Eleventh Amendment.[61] A plurality of the Court held that the Eleventh Amendment did not bar the action.[62] The Court reasoned that an admiralty in rem action in which the plaintiffs assert only an ownership interest in the property, and do not seek personal jurisdiction over the state by seizure of the vessel, is not barred by the Eleventh Amendment.[63] The Court did note, however, that the Eleventh Amendment would bar an admiralty action brought in rem merely for the purpose of giving the court jurisdiction over a damage claim against a state.[64]

The excessive burden on the courts and the cost of the *Atocha* litigation acted as catalysts for Congress to enact legislation that would clarify the law in this area.[65] Through the passage of the Act, Congress first asserted its sovereign prerogative over abandoned shipwrecks and then transferred title to the states, removing the wrecks from the law of finds and enabling the states to develop their own shipwreck management programs on a local level. Although section 2106(a) of the Act has removed the maritime laws of salvage and finds, some underlying principles of mar-

58. *Id.* at 1350.

59. *Id.* at 1349. The contract provided: "In return for 25% of the finds the State of Florida offered Treasure Salvors the 'right' to conduct a salvage operation on lands in which the state had no interest." *Id.* The state argued that "the contracts should be declared valid because, at the time they were executed, the Florida Constitution stated that Florida owned the submerged lands holding the *Atocha*." *Id.* at 1350. The court rejected this theory.

60. 458 U.S. 670 (1982).

61. *Id.* at 673.

62. *Id.* at 682. The Supreme Court held that "the federal court had jurisdiction to secure possession of the property from the named state officials, since they had no colorable basis on which to retain possession of the artifacts." *Id.*

63. *Id.* at 699. The Court indicated that the suit was not barred because "[i]n this case, Treasure Salvors is not asserting a claim for damages against either the State of Florida or its officials. The present action is not an *in personam* action brought to recover damages from the State." *Id.*

64. *Id.* The Court stated that "an action—otherwise barred as an *in personam* action against the State—cannot be maintained through seizure of property owned by the State. Otherwise, the Eleventh Amendment could easily be circumvented." *Id.*

65. *See* H.R. REP. No. 514, *supra* note 3, pt. II, at 2-3, *reprinted in* 1988 U.S.C.C.A.N. at 370-72.

itime law will continue to guide the states in their historic shipwreck preservation programs.[66] The intent of the statute is to give the states a solid foundation upon which to build a coherent and consistent policy towards shipwreck management and remove the obstacles laid by the inconsistent common law standards that previously existed.

B. *The International Perspective*

Other nations had already taken legislative steps to protect historic shipwrecks.[67] The existence of this type of legislation in other nations demonstrates a global concern in protecting underwater antiquities and preserving our maritime heritage.[68] The laws, however, vary widely in their protection of shipwrecked property.

France, for example, enacted the *Decret* of 1961, legislation put in force in 1963.[69] Under the *Decret*, the *Ministre de la Marchande* may terminate the rights of an owner to property lost in French waters.[70] Salvors of that property are eligible for an award which is dependent on the value and importance of the find.[71] Although the *Decret* provides that shipwrecked property of historical interest belongs to the state, state officials may consent to leaving isolated objects with a salvor.[72]

In 1962, Spain enacted a similar statute under which the state acquires ownership of any ship sunk in Spanish waters three years

66. For a reference to current state shipwreck programs, see *infra* note 186 and accompanying text.

67. When the Act was being considered in the House, it was noted that "[o]f the 167 nations in the world, 155 of them have historic shipwreck protection laws." 134 CONG. REC. 6617 (1988) (statement of Rep. Bennett). According to Representative Bennett, this type of legislation "take[s] historic shipwrecks out of admiralty court." *Id.*

68. For example, in 1972, over 60 maritime museum representatives from all over the world passed a resolution which stressed the threat to unique cultural objects posed by unrestricted diving and asked for more money to make existing laws more effective. *See Editorial*, 2 INT'L J. NAUTICAL ARCHAEOLOGY & UNDERWATER EXPLORATION 225, 225 (1973).

69. Loi of Nov. 24, 1961, [1961] J.O. 10862, [1961] D.L. 333; Decret of Dec. 26, 1961, [1961] J.O. 374, [1962] D.L. 41-43; *see* A. Korthals Altes, *Submarine Antiquities: A Legal Labyrinth*, 4 SYRACUSE J. INT'L L. & COM. 77, 87 n.45 (1976).

70. *See* Altes, *supra* note 69, at 87. If the wreck is over five years old, the declaration can occur immediately. *Id.*

71. *Id.* at 88. If the French government keeps the right of salvage, the discoverer of the property is still eligible for an award. *Id.*

72. *Id.*

after the event.[73] The acquisition by the government occurs as a matter of law.[74] The Spanish statute, like that of France, also contains provisions for archaeological excavation in the course of intentional salvage.[75] The Scandinavian countries of Norway and Denmark enacted historic shipwreck legislation in 1963 after the successful salvaging of five Viking ships, but the laws only protect the hull of the ships—leaving the contents subject to the law of salvage.[76]

Italy, in contrast to these other nations, does not have specific legislation covering historic shipwrecks, but the Monuments Law vests title in the government to all finds located within Italian territory.[77] The only provision specifically for underwater shipwrecks is found in the *Codice della Navigazione* of 1942.[78] Article 51 of the *Codice* provides that historically significant objects found by chance belong to the state, but the state must pay a reward to the finder.[79]

Almost two decades ago, England passed the Protection of Wrecks Act, 1973.[80] The legislation, in an effort to improve on

73. Estuato No. 60/62 of Dec. 24, 1962, B.O.E., No. 310, Dec. 24, 1962 (Spain) [hereinafter Estuato No. 60/62]; *see* Altes, *supra* note 69, at 87 & n.46.

74. *See* Altes, *supra* note 69, at 87.

75. *Id.* at 88 (citing Estuato No. 60/62). The Spanish law does not provide, however, for chance finds. *Id.* (construing Estuato No. 60/62).

76. *Id.* at 89.

77. *Id.* at 87.

78. *See id.* at 87-88. For a discussion of the provisions of the *Codice della Navigazione* dealing with found objects, see ANTONIO L. D'OVIDIO ET AL., MANUALE DI DIRITTO DELLA NAVIGAZIONE 761-64 (7th ed. 1990).

79. *See* Altes, *supra* note 69, at 87-88. Italian salvage law, however, has no provisions covering submarine antiquities. *Id.* at 88.

80. Protection of Wrecks Act, 1973, ch. 33 (Eng.). The purpose of the act was to "secure the protection of wrecks in territorial waters and the sites of such wrecks, from interference by unauthorized persons." *Id.* The act provides in part:

> 1 PROTECTION OF SITES OF HISTORIC WRECKS
>
> (1) If the Secretary of State is satisfied with respect to any site in United Kingdom waters that—
>
> (*a*) it is, or may prove to be, the site of a vessel lying wrecked on or in the sea bed; and
>
> (*b*) on account of the historical, archaeological or artistic importance of the vessel, or of any objects contained or formerly contained in it which may be lying on the sea bed in or near the wreck, the site ought to be protected from unauthorised interference, he may by order designate an area round the site as a restricted area.
>
> (2) An order under this section shall identify the site where the vessel lies or formerly lay, or is supposed to lie or have lain, and—
>
> (*a*) the restricted area shall be all within such distance of the site . . . as is specified in the order, but excluding any area above high water mark of ordinary spring tides; and

earlier laws that did not properly protect shipwrecks, allows the British government to regulate the area where a shipwreck is located.[81] Under the Protection of Wreck's Act, permits are needed to dive in a restricted area and can only be acquired by experienced salvors.[82] Indeed, the British commitment to preserving its past through high standards of underwater archaeology is further demonstrated by the seventeen-year excavation of the *Mary Rose*, a flagship of King Henry VIII.[83] Prince Charles served as the patron for the *Mary Rose* project and even dove on the wreck itself, which was located one mile off the coast of Portsmouth.[84] Five hundred divers, many of whom were volunteers from the British Sub-Aqua Club, recovered over 17,000 artifacts using precise archaeological techniques.[85] Objects such as weapons, clothing, navigational instruments and human remains were essentially

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(*b*) the distance specified for the purposes of paragraph (*a*) above shall be whatever the Secretary of State thinks appropriate to ensure protection for the wreck.

(3) Subject to section 3(3) below, a person commits an offence if, in a restricted area, he does any of the following things otherwise than under the authority of a licence granted by the Secretary of State—

(*a*) he tampers with, damages or removes any part of a vessel lying wrecked on or in the sea bed, or any object formerly contained in such a vessel; or

(*b*) he carries out diving or salvage operations directed to the exploration of any wreck or to removing objects from it or from the sea bed, or uses equipment constructed or adapted for any purpose of diving or salvage operations; or

(*c*) he deposits, so as to fall and lie abandoned on the sea bed, anything which, if it were to fall on the site of a wreck (whether it so falls or not), would wholly or partly obliterate the site or obstruct access to it, or damage any part of the wreck; and also commits an offence if he causes or permits any of those things to be done by others in a restricted area, otherwise than under the authority of such a licence.

Id. § 1; *see also* Altes, *supra* note 69, at 91-93.

81. *See* Lindbloom, Note, *supra* note 32, at 101 (discussing Protection of Wrecks Act).

82. Protection of Wrecks Act, 1973, ch. 33, § 1(3), (5) (Eng.). Section 1(5) provides that the Secretary of State shall grant licenses only to persons who appear to him "to be competent, and properly equipped, to carry out salvage operations in a manner appropriate to the historical, archaeological or artistic importance of any wreck" or who has "any other legitimate reason for doing in the area that which can only be done under the authority of a licence." *Id.* § 1(5)(*a*).

83. *See Sea Gives Up the Mary Rose, Pride of Henry VIII*, N.Y. TIMES, Oct. 12, 1982, at A12, col. 3 [hereinafter *Sea Gives Up the Mary Rose*] (discussing successful excavation of 16th century British warship). When raising the shipwreck, marine archaeologists and scientists used a specially-designed winch to carefully lift the 130-foot oak hull from its resting place. *Id.*

84. *Id.* Prince Charles was president of the Mary Rose Trust which raised the funds for the recovery project. *Id.*

85. *Id.*

frozen in time because the ship sank into the muddy bottom and remained there undisturbed for several hundred years.[86] The recovery of these artifacts has enabled archaeologists to recreate life on board a British naval vessel in the sixteenth century.[87] The *Mary Rose* now sits in a museum in Portsmouth, where she serves as an exhibit for the public to enjoy. The revenues from visitors will help offset the seven million dollar cost of the project and will eventually serve as a source of revenue for future underwater archaeological research.[88]

The discovery and subsequent destruction of historic shipwreck sites were the impetus for the enactment of the Australian Historic Shipwrecks Act.[89] A number of seventeenth century Dutch trading vessels belonging to the United East Indian Company were discovered in Western Australia between 1950 and 1970.[90] In 1963, one of those ships, the *Vergulde Draeck*, was discovered, but within six months there were reports of extensive blasting on the wreck site and removal of large quantities of materials.[91] Similarly, in 1971, a museum expedition found that the *Tryal*, a seventeenth century English ship, had been devastated by charges that were set off in the mouths of the ancient

86. *Id.* "Among the artifacts removed were breech-loading and muzzle-loading guns, bows and arrows, the barber-surgeon's amputating saw and urethral syringes (for treating venereal disease), sundials, utensils, leather jerkins and a folding backgammon table." *Id.*

87. *Id.*; *see also* Margaret Rule, *The Search for Mary Rose*, 163 NAT'L GEOGRAPHIC 654 (1983).

88. *Sea Gives Up the Mary Rose*, *supra* note 83, at A12, col. 3.

89. Historic Shipwrecks Act 1976, 1976 Austl. Acts No. 190. The Act provides in part:

> 13. (1) Except in accordance with a permit, a person shall not—
> (a) damage or destroy a historic shipwreck or a historic relic;
> (b) interfere with a historic shipwreck or a historic relic;
> (c) dispose of a historic shipwreck or a historic relic; or
> (d) remove a historic shipwreck or a historic relic from Australia, from Australian waters or from waters above the continental shelf of Australia.

Id. § 13(1); *see also* R.D. Lumb, *The Law of Wrecks in Australia:* Robinson v. The Western Australian Museum, 52 AUSTL. L.J. 198, 205-06 (1978) (discussing provisions and constitutional validity of Historic Shipwrecks Act 1976); Patrick J. O'Keefe & Lyndel V. Prott, *Australian Protection of Historic Shipwrecks*, 6 AUSTL. YEARBOOK INT'L L. 119, 130-37 (1978) (discussing Historic Shipwrecks Act 1976).

90. O'Keefe & Prott, *supra* note 89, at 120-21. The treacherous Australian coast is littered with thousands of sunken vessels—including Dutch East India ships off the West Australian coast, English barques off the Bass Strait islands, and Japanese submarines off the northern coastline. *Id.* at 119. The earliest recorded shipwreck off the Australia coast is that of the *Tryal*, an English East India Company ship which sank in 1622. *Id.*

91. *Id.* at 121.

cannons and along the hull.[92] Considering the vastness of the Australian coastline and the thin population of the country, enforcement of the legislation will be more troublesome than in highly populated nations.[93] One Australian authority has noted:

> [T]he legislation is in one sense a moral code the observance of which will mean the protection of a very important part of our heritage. In a legal sense . . . . [i]t is intended as a deterrent to those who place their own interests before those of the nation . . . . [T]he Act is in fact a cooperative effort involving the Commonwealth Government, the State Governments and Australian citizens who dive as a sporting activity or as part of their profession . . . .[94]

Thus, while the actual protection afforded historic shipwrecks varies from nation to nation, one common purpose for the enactment of shipwreck legislation appears to be to create a heightened awareness of the intrinsic cultural and historical value of abandoned shipwrecks, and stemming from this, an increased importance placed on preservation of those vessels and sites.[95] This goal comes across in the legislation passed by each of the mentioned nations. It is to be hoped that the same can be said for the Abandoned Shipwreck Act of 1987.

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92. *Id.* The blast "not only scattered the relics but also brought down a cliff, thus burying many of the remains." *Id.* (citing *Report of the Committee of Inquiry on Museums and National Collections*, *in* MUSEUMS IN AUSTRALIA 1975, at 89 (1975)).

93. *See* 2 ENCYCLOPEDIA BRITANNICA 381 (1978). The island continent of Australia is approximately three million square miles, but has a population of only thirteen million people. *Id.*

94. Jennifer Amess, *Report on the Historic Shipwrecks Act 1976 for the Commonwealth Department of Home Affairs and the Environment, Heritage Branch*, *excerpted in* Great Barrier Marine Park Authority, *Reflections* (copy on file with *Villanova Law Review*).

95. Two other Commonwealth countries also have noteworthy historic shipwreck legislation. New Zealand has enacted the Historic Places Act 1980, R.S.N.Z. Vol. 1, No. 16, §§ 1-62, which specifically includes a vessel as an "archaeological site" if the wreck occurred more than 100 years ago and will "provide scientific, cultural or historical evidence as to the exploration, settlement or development of New Zealand." *Id.* § 2(b); *see also* Piers Davies, *Wrecks on the New Zealand Coast*, N.Z.L.J. 202, 204 (1983) (discussing Historic Places Act 1980 and Antiquities Act 1975 which imposes strict controls over "antiquities" recovered from wreck; "antiquity" is any chattel more than 60 years old and may include ship and its contents). Bermuda's shipwreck legislation can serve as an enlightening backdrop to the United States decisions that have applied the sovereign prerogative theory to abandoned property. *See* The Wreck And Salvage Act of 1959, V Revised Laws of Bermuda, title 22, item 5 (1965) (providing that title to historic wrecks vests in crown).

C. *Legistive History of the Act*

In 1979, Congressman Bennett of Florida, a dedicated preservationist, introduced the first of a series of bills to protect historic shipwrecks.[96] Congressman Bennett's original bill would protect any abandoned shipwreck more than 100 years old, located on the Outer Continental Shelf or on the lands beneath navigable waters within the boundaries of a state.[97] Congressman Bennett continued to introduce new bills in succeeding years.[98] In 1983, Congressman Jones of North Carolina introduced a bill which limited its focus to shipwrecks within the three mile territorial sea and shipwrecks that were "substantially buried" or listed in the National Register.[99] This bill passed in the House of Representatives on September 10, 1984, but its companion bill in the Senate died.[100] In March 1987, Senator Bradley of New Jersey, noting that the "United States is the only country in the world with a substantial number of historic shipwrecks that does not have a law recognizing the importance of preserving some of these sites," introduced a new historic shipwreck bill.[101] One concern, addressed adequately by the new bill, was the balancing of the interests of the salvors, sport divers, preservationists and the states.[102] Senator Graham, co-sponsor of the bill with Sena-

96. H.R. 1195, 96th Cong., 1st Sess. (1979); *see also* Owen, *supra* note 2, at 501 (providing numbers, sponsors and dates of proposed bills prior to passage of Act).

97. *See* 125 CONG. REC. 676 (1979). Representative Bennett's proposed bill read as follows:

> A bill to provide that any abandoned historic shipwreck located, in whole or in part, on the Outer Continental Shelf or on lands beneath navigable waters within the boundaries of a State shall be the property of the United States (subject to transfer to that State after adoption of an adequate State plan), and for other purposes; jointly, to the Committees on Interior and Insular Affairs, and Merchant Marine and Fisheries.

Id.

98. *See* Owen, *supra* note 2, at 501.

99. H.R. 3194, 98th Cong., 1st Sess. (1983); *see also* Owen, *supra* note 2, at 501 (stating that H.R. 3194 marked milestone in development of Act and that "Committees on Merchant Marine and Fisheries and Interior and Insular Affairs issued comprehensive reports recommending passage of the bill as amended").

100. 130 CONG. REC. 24,634 (1984) (noting passage of H.R. 3194 by House); *see also* Owen, *supra* note 2, at 502 (noting that S. 1504, companion bill to H.R. 3194, died in Senate).

101. 133 CONG. REC. 7050 (1987) (statement of Sen. Bradley introducing S. 858).

102. *See* S. REP. NO. 241, 100th Cong., 1st Sess. 1, 5 (1987) (recommending passage of bill; focus had been broadened "from primarily historic preservation to include the consideration of recreational and commercial interests as well"); 133 CONG. REC. 36,578 (1987) (statement of Sen. Bradley) (stating that bill was

tor Bradley, emphasized that "this extension of control of such sites to the States . . . provides the opportunity for appropriate recovery of shipwrecks by both the public and the private sectors, while also safeguarding the historical and environmental values of the sites and artifacts."[103] This bill passed in the Senate on December 19, 1987.[104]

On March 28, 1988, opponents in the House of Representatives set forth a number of anticipated legal problems with the bill.[105] The first argument was that the bill did not guarantee reasonable access to shipwrecks by sport divers and salvors.[106] According to the bill's opponents, because the guidelines to be developed would be nonbinding, the federal government could not ensure that the states' laws would not unreasonably restrict the rights of divers and salvors.[107] On April 13, 1988, Congressman Jones responded by asserting that an amendment for a federal enforcement provision was unnecessary and would "undercut the fundamental States rights objective of this bill."[108] Furthermore, according to Congressman Jones, the bill simply confirmed existing policies of the states on sport diver access, policies emphasizing cooperation between the interested groups.[109]

The second contention was that the bill did not comport with international law.[110] The argument was that international law recognizes management jurisdiction, but does not recognize title, to shipwrecks beyond the three mile territorial limit.[111] In response, Congressman Jones explained that a detailed committee report discussing the limited sovereignty rights intended by Congress under the bill had been sent to the State Department.[112] After a thorough review, the State Department officials confirmed

means of resolving "the conflicts—perceived and real—between salvors, archeologists, the States and sports divers").

103. 133 CONG. REC. 7052 (1987) (statement of Sen. Graham).

104. 133 CONG. REC. 35,578 (1987).

105. *See* H.R. REP. No. 514, *supra* note 3, pt. II, at 14, *reprinted in* 1988 U.S.C.C.A.N. at 382. These opponents included Congressmen Shumway, Herger, Davis, Lent, Coble and Fields. *Id.*

106. *Id.*

107. *Id.*

108. *See* 134 CONG. REC. 6615 (1988) (statement of Rep. Jones).

109. *Id.* (statement of Rep. Jones).

110. *See* H.R. REP. No. 514, *supra* note 3, pt. II, at 14, *reprinted in* 1988 U.S.C.C.A.N. at 382.

111. *Id.* This would affect the claims of Florida, Texas and Puerto Rico who extend their claims over abandoned shipwrecks to nine nautical miles. *Id.*

112. *See* 134 CONG. REC. 6615 (1988) (statement of Rep. Jones).

that the language of the report was fully consistent with international law principles.[113]

The third issue involved potential conflicts with the national Marine Sanctuary Program.[114] Under this federal program, the National Oceanic and Atmospheric Administration manages areas of national significance due to their conservation, ecological, historical, research or aesthetic importance that are within the United States' exclusive economic zone.[115] One such site is that of the U.S.S. *Monitor*, the famous civil war ironclad that went down off the coast of Cape Hatteras, North Carolina. The opponents of the bill argued that, under the proposed bill, states could take title to any abandoned shipwreck in a national marine sanctuary within their territorial waters and this could lead to conflicts between the state and federal regulations.[116]

Congressman Jones claimed, however, that the bill minimized the potential for conflict because it was fully consistent with the authority of the Secretary of Commerce to designate and manage marine sanctuaries.[117] Moreover, according to Congressman Jones, once a marine sanctuary is designated in State waters,

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113. *Id.* According to Congressman Jones, "[T]here is absolutely no intent . . . for the United States to assert any sovereignty under this bill inconsistent with international law principles. We [the committee] have been advised by State Department officials that our report language is perfectly satisfactory on this point and an amendment to the bill is not required." *Id.* (statement of Rep. Jones).

114. The program is established under Title III of the Marine Protection Research and Sanctuaries Act (MPRSA), 16 U.S.C §§ 1431-1445 (1988) (identifying and protecting areas of marine environment of special national significance). For a further discussion of the legal struggles in gaining diving access to a national marine sanctuary, see Peter E. Hess, *The Battle for the U.S.S. Monitor*, SHIPS & SHIPWRECKS, Nov. 1990, at 1, 1-3.

115. *See* 16 U.S.C. §§ 1431-1445. An exclusive economic zone is defined as "not extend[ing] beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." Convention on the Law of the Sea, Dec. 10, 1982, art. 57, 21 I.L.M. 1261 (not yet entered into force; not ratified by United States).

116. *See* H.R. REP. No. 514, *supra* note 3, pt. II, at 14, *reprinted in* 1988 U.S.C.C.A.N. at 382.

117. *See* 134 CONG. REC. 6615 (1988) (statement of Rep. Jones). According to Congressman Jones:

> Under current law, if the Secretary wants to designate a marine sanctuary in State waters, he must obtain the concurrence of the Governor since the resources to be protected with a marine sanctuary designation are State resources. This is the same approach taken in S. 858. The States will own the shipwrecks in State waters; if the Secretary wants to provide additional Federal protection for significant State shipwrecks, he will need to obtain the permission of the Governor of the affected State.

Id. (statement of Rep. Jones).

shipwrecks will be given additional protection because the bill has removed them from the laws of salvage and finds.[118] Essentially, the authority of the Secretary of Commerce to establish a marine sanctuary will be enhanced because the bill would eliminate the conflict of a salvor claiming rights to an historic shipwreck.

The fourth concern expressed by the bill's opponents was that abandoned shipwrecks which are retained by the United States on public lands via § 2105(d) of the Act would escape the guidelines under § 2104 which balance the interests of all parties.[119] This assertion has a tenuous basis because Congress expressly stated that the federal government must follow the mandatory language of § 2104(c), which states that "[s]uch guidelines *shall* be available to assist States and the appropriate Federal agencies in developing legislation and regulations to carry out their responsibilities."[120] Moreover, Congressman Jones succinctly stated that it would be "impossible to conceive that the Director of the National Park Service, who is responsible for developing the guidelines under S. 858, won't follow his own guidelines when managing shipwrecks located in national parks."[121]

The fifth point raised by the opponents of the bill was the bill's alleged lack of respect for admiralty law.[122] According to the opponents of the bill, § 2106 is inconsistent with Article III, Section 2 of the United States Constitution, which grants federal district courts jurisdiction over all admiralty and maritime issues.[123] Specifically, the bill's opponents argued that the Act abrogated the 200-year-old tradition of admiralty law by removing abandoned shipwrecks from the purview of salvage and finds.[124] In response, Congressman Jones asserted that the bill carved out only a limited exception from admiralty law principles for those shipwrecks covered under the bill.[125] All other shipwrecks, how-

118. *Id.*

119. For the text of § 2104, see *supra* note 14. For the text of § 2105(d), see *supra* note 3.

120. *See* 43 U.S.C. § 2104(c) (Supp. II 1990) (emphasis added) (statement of Rep. Jones).

121. *See* 134 CONG. REC. 6615 (1988).

122. *See* H.R. REP. No. 514, *supra* note 3, pt. II, at 14, *reprinted in* 1988 U.S.C.C.A.N. at 382.

123. U.S. CONST. art. III, § 2 (Admiralty Clause).

124. *See* H.R. REP. No. 514, *supra* note 3, pt. II, at 14-15, *reprinted in* 1988 U.S.C.C.A.N. at 382.

125. *See* 134 CONG. REC. 6616 (1988) (statement of Rep. Jones); *see also* 43 U.S.C. § 2106(a) (Supp. II 1990) (providing that laws of salvage and finds shall not apply to abandoned shipwrecks covered by § 2105).

ever, would remain subject to admiralty jurisdiction.[126]

The opponents' final argument declared the bill to be overbroad because it awarded title to wrecks that were "embedded" in land beneath state waters.[127] This could include recent shipwrecks that become covered with sand or silt over a short time period when exposed to storms, rough currents, pollution or other ocean conditions. To counter this point, Congressman Jones argued that the bill was not overbroad because the bill simply conformed to the existing state common law on the ownership of shipwrecks embedded in submerged lands.[128] Moreover, according to Congressman Jones, the state is in a better position to protect the environmental integrity of excavation on state lands.[129] Although these are valid reasons, the problem of overreaching will depend on how the courts, in future litigation, interpret Congress' intent in using the term "embedded."

V. PROVISIONS OF THE ACT SUBJECT TO CHALLENGE

Challenges to the Act can be anticipated in several areas. The first area is in the interpretation of the Act itself—more specifically, the types of shipwrecks to which the Act applies. The second area of potential litigation is to the constitutionality of the Act. For example, section 2106(a) of the Act provides that "[t]he law of salvage and the law of finds shall not apply to abandoned

126. *See* 134 CONG. REC. 6616 (1988); *see also* 43 U.S.C. § 2106(b) (providing that "[t]his chapter shall not change the laws of the United States relating to shipwrecks other than those to which this chapter applies"). Congressman Jones also stated that the American Law Division of the Congressional Research Service had confirmed that Congress has the authority to modify admiralty law, and that federal and state courts had recognized that the federal government has the prerogative "to assert its sovereignty over shipwrecks within territorial waters." 134 CONG. REC. 6615-16 (1988) (statement of Rep. Jones).

127. *See* H.R. REP. NO. 514, *supra* note 3, pt. II, at 15, *reprinted in* 1988 U.S.C.C.A.N. at 382. Under the Act, " 'embedded' means firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof." 43 U.S.C. § 2102(a).

128. *See* 134 CONG. REC. 6615 (1988) (statement of Rep. Jones); *see also* Sindia Expedition v. Wrecked & Abandoned Vessel, 710 F. Supp. 1020, 1022 (D.N.J. 1989) (noting that, under state common law, state cannot forfeit its title on basis of adverse possession, prescription or presumption of lost grant), *rev'd on other grounds*, 895 F.2d 116 (3d Cir. 1990); Chance v. Certain Artifacts, 606 F. Supp. 801 (S.D. Ga. 1984) (holding that title to ship embedded in river belonged to state), *aff'd*, 775 F.2d 302 (11th Cir. 1985); Klein v. Unidentified, Wrecked & Abandoned Sailing Vessel, 568 F. Supp. 1562 (S.D. Fla. 1983) (upholding state claim to wrecks embedded in state property).

129. *See* 134 CONG. REC. 6615 (1988) (statement of Rep. Jones).

shipwrecks to which section 6 [§ 2105] of this Act applies."[130] This disruption of the harmony and uniformity of admiralty law may be grounds for a constitutional challenge.

A. *Defining Historic Shipwrecks*

Congress, under the Act, has transferred to the states title to certain shipwrecks—shipwrecks of historical significance that are located on or embedded in a state's submerged land.[131] The lack of an historical requirement for "embedded" shipwrecks and the rather ambiguous nature of "embedded," however, creates a situation subject to multiple interpretations and implicitly hands to the states the complex problems of designating the historical significance of each shipwreck embedded under state waters.

Under the language of section 2105(a)(1), a state could assert control over any shipwreck that is embedded in its submerged lands. The term "embedded" has its origins in the common law of finds,[132] and one, as of yet unresolved, question under the Act is how the term should be applied.[133]

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130. 43 U.S.C. § 2106(a). Under salvage law, it is the responsibility of the salvor to bring distressed property to safety for the expected return to the owner, or to where the owner may at least be in a position to reclaim it. NORRIS, *supra* note 17, § 157. An assertion of a state claim to ownership would directly conflict with the finder's salvage reward. *Id.* For a discussion of the admiralty laws of salvage and finds, see *supra* notes 21-64 and accompanying text.

131. Where the abandoned shipwreck is *located* on submerged lands of a state *and* "is included in or determined eligible for inclusion in the National Register," the United States, under § 2105(a)(3), asserts title to the wreck and then transfers that title to the state under § 2105(c). 43 U.S.C. § 2105(a), (c). Where the abandoned shipwreck is *embedded* in the submerged lands of a state, however, there is no requirement for inclusion or eligibility for inclusion in the National Register in order for the United States to assert title and then transfer that title to the state. *See id.* § 2105(a)(1).

132. *See* Owen, *supra* note 2, at 504, 510-11; *see also* Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 691 F. Supp. 1377, 1386 (S.D. Fla. 1988) (holding that when abandoned property is embedded, it belongs to owner of soil). At common law, however, title to property embedded in land remained with the landowner; a finder would not get title. Owen, *supra* note 2, at 510 (citing 1 AM. JUR. 2D *Abandoned, Lost and Unclaimed Property* § 22 (1962)). Thus, under common law, title to any property embedded in the submerged lands of the state would belong to the state. *Id.* at 511.

133. One commentator believes that Congress, through its use of the term "embedded" in the Act, intended for this doctrine from the common law of finds to apply. *See* Owen, supra note 2, at 510-11; *see also* Zych v. Unidentified, Wrecked and Abandoned Vessel, 941 F.2d 525 (7th Cir. 1991) (remanding on issue of whether shipwreck was embedded); Marx v. Guam, 866 F.2d 294, 300 (9th Cir. 1989) (holding that Guam has control over its submerged lands under the Act); Chance v. Certain Artifacts, 606 F. Supp. 801, 804 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985) (claiming that, where vessel is "embedded," title to vessel rests with state); Klein v. Unidentified, Wrecked and Abandoned

"Embedded," standing alone, may not designate those shipwrecks which should be protected by the state. Shipwrecks can be viewed on a continuum where the most historically significant wrecks are at one end and those of minimal archaeological value are at the other. The need for state regulation increases proportionally with the level of historical importance. The state legislature or the agency in charge of administering the shipwreck preservation statute, however, may neglect or misinterpret the responsibility of establishing specific parameters for the designation of historic shipwrecks. In either case, the result could be either deficient or overly burdensome regulations. Further, the courts, when interpreting and applying the state statutes or regulations, could overlook the congressional intent to protect only those shipwrecks of intrinsic historical value.

Congress has explicitly indicated its intent that states protect only those shipwrecks of intrinsic historical value.[134] As congressional opponents of the bill pointed out, however, "embedded" could be construed as including recent shipwrecks that have become embedded as a result of adverse sea and weather conditions.[135] The question then becomes whether that type of shipwreck will be needlessly protected and perhaps subject to litigation by salvors or divers who would perceive no reason for restricted access to the site or property.[136]

A possible scenario is the discovery of a fifty-five-year-old fishing trawler by a salvage company two miles off the coast of a state. The salvage company files for a permit to salvage all of the scrap metal. This, in reality, would destroy any future attempts at meaningful archaeological excavation. In reviewing the permit, the state authority determines that, even though the wreck is over fifty years old, it is not listed in the National Register and is not eligible for listing because it lacks historical significance. The state, however, denies the permit because it finds that the wreck is

Sailing Vessel, 568 F. Supp. 1562, 1566 (S.D. Fla. 1983) (holding that United States acquired title to wrecked vessel embedded in its soil).

134. *See* H.R. REP. NO. 514, *supra* note 3, pt. II, at 5-6, *reprinted in* 1988 U.S.C.C.A.N. at 373-74.

135. *See id.* pt. II, at 14, *reprinted in* 1988 U.S.C.C.A.N. at 382 (statement of Congressmen Shumway, Herger, Davis, Lent, Coble and Fields).

136. Certain embedded shipwrecks, such as the U.S.S. *Monitor* and the *Yorktown*, have unquestioned historic significance. A thick fog rolls in, however, when dealing with embedded wrecks that cannot or will not be excavated with proper archaeological techniques because of the depth, adverse conditions or perhaps merely a lack of historical importance. These shipwrecks will be the ones vulnerable to challenges from salvors and recreational divers.

embedded. On appeal, the state supreme court grants the salvage company relief, interpreting "embedded" as applying only to shipwrecks of historical importance.

To avoid this needless litigation and resultant confusion, a statutory amendment is needed to clarify that the states have the responsibility of determining the historic nature of the shipwrecks in their waters. Section 2105(c) should be amended to include language that requires the proper state authority to determine the historical significance of their shipwrecks with standard criteria applied evenhandedly to each shipwreck site. This mandatory duty could be stated as follows:

> (c) TRANSFER OF TITLE TO THE STATES
>
> The title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located *and it will be the responsibility of the States to determine the requisite historical significance of each shipwreck in their waters subject to specific standards as set forth by the designated State authorities.*[137]

This addition of a historic significance requirement, coupled with the requirement that the shipwreck be "embedded," should more clearly establish the states' responsibility of delineating those shipwrecks which require protection under the state shipwreck preservation plan.

B. *Constitutional Challenges Under The Act*

In addition to challenges to the scope of the Act, there may be litigation over the validity of the Act itself under the Constitution. Congress intended with the Shipwreck Act of 1987 to modify admiralty law by removing an action based on salvage or finds for a limited number of shipwrecks.[138] Previous federal decisions

137. 43 U.S.C. § 2105(c) (Supp. II 1990) (with suggested amendment in italics).

138. Section 2106 of the Act provides:

> (a) LAW OF SALVAGE AND THE LAW OF FINDS. The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 6 of this Act applies.
>
> (b) LAWS OF THE UNITED STATES. This Act shall not change the laws of the United States relating to shipwrecks, other than those to which this Act applies.
>
> (c) EFFECTIVE DATE. This Act shall not affect any legal proceeding brought prior to the date of enactment of this Act [enacted April 28, 1988].

43 U.S.C. § 2106; *see also* Owen, *supra* note 2, at 512-13.

have acknowledged that Congress does have at least some power to modify admiralty law in this way.[139] The question is how far this power extends. In *Hurst v. Triad Shipping Company*, the Third Circuit found constitutional the legislative abolishment of a maritime cause of action based on the warranty of unseaworthiness.[140] In contrast, the Shipwreck Act of 1987 merely provides that the admiralty common laws of salvage and finds will no longer apply to certain shipwrecks; the states instead will provide the legislation to protect historic shipwrecks. This change to the common law does not appear to be the sort of "egregious meddling" or "extreme tampering with the territorial or subject matter jurisdiction of admiralty and maritime courts" which would exceed Congress' constitutional powers.[141]

Before discussing further the constitutional issues, it is necessary to probe the reasons why abandoned shipwreck preservation has been removed from the province of the admiralty courts. First, a number of courts have applied admiralty principles only because there was no legislation controlling abandoned shipwrecks in state waters.[142] Under this reasoning, while the sover-

139. Confirmation of this power was provided in Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir. 1977), *cert. denied*, 434 U.S. 861 (1977), where the Court of Appeals for the Third Circuit held that amendments to the Longshoremen's and Harbor Workers' Compensation Act were a "legitimate exercise of congressional power to alter the substantive law of admiralty." In *Hurst*, the Third Circuit discussed the limits of congressional power to alter admiralty law. The court first acknowledged that the Supreme Court had previously provided two limitations on Congress' power to modify the substantive law of admiralty: "(1) prevention of impermissible tampering with 'maritime law and admiralty jurisdiction' and (2) maintenance of uniform maritime rules throughout the nation." *Id.* at 1244 (citing Panama Ry. Co. v. Johnson, 264 U.S. 375, 386-87 (1924)). The court, however, then stated that "this ban on congressional interference with jurisdiction can relate only to extreme tampering with the territorial or subject matter jurisdiction of admiralty and maritime courts." *Id.* at 1245. The court gave examples of ways in which Congress might well exceed its constitutional power—"by bringing within the jurisdiction of an admiralty court a completely land-related accident or transaction," or by removing "from admiralty jurisdiction those types of accidents which occur on navigable waters since these are conceptually, traditionally, and constitutionally admiralty matters." *Id.* (quoting Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange Gm.B.H. & Co., K.G., 387 F. Supp. 440, 445 (E.D. Pa. 1974)).

140. *Id.* at 1244-46. The 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act abolished the longshoremen's cause of action for injuries based on unseaworthiness. Under the amendments, the administrative remedies provided by the act would be the injured seamen's exclusive no-fault remedy; "the ship owner will no longer bear the great burden of broad, no-fault liability via the warranty of seaworthiness." *Id.* at 1243-44.

141. *See id.* at 1245.

142. *See* Beall, *supra* note 36, at 16 (stating that "the vast majority of . . . [United States] courts hold that until the legislature manifests an intent to appropriate such property, the courts should continue to favor the finder").

eign has the inherent constitutional power to legislate with respect to abandoned property, where the legislature has not so legislated, the common laws of salvage and finds should be applied.[143] Through the Shipwreck Act, Congress now has enunciated the sovereign's claim over abandoned property in state waters and has thus validated the forecasts of earlier court decisions that admiralty law would eventually be replaced or modified—at least as it pertained to underwater antiquities.

Second, the application of admiralty law to ancient wrecks resting on the ocean bottom is often inappropriate. The inappropriateness of maritime law in this area is demonstrated by the use of the salvage law principle of "marine peril." For marine peril to exist, there must at least be a reasonable apprehension that the property is at a risk of loss, destruction or deterioration.[144] The historic shipwrecks protected by the Act, however, are not in marine peril and thus the law of salvage would not seem to apply.[145]

Third, the management of shipwrecks on the local level will enable the states to establish an internal consistency in their shipwreck preservation laws.[146] Specifically, state shipwreck statutes—as opposed to the application of admiralty law in the

143. *See, e.g., Treasure Salvors I*, 569 F.2d 330, 341 (5th Cir. 1978) (stating that while it may be within constitutional power of Congress to take control of shipwrecked property, no legislation has ever been enacted; court therefore applied laws of salvage and finds).

144. SCHOENBAUM, *supra* note 29, at 502. *But see Treasure Salvors I*, 569 F.2d at 337 (holding that, although lower court correctly applied law of finds, government's argument that salvage law did not apply because there was no marine peril to *Atocha* shipwreck was without merit; marine peril existed where *Atocha* was still in peril of being lost due to action of elements). For a discussion of other areas of the law in which application of salvage principles is inappropriate, see Brian F. Binney, Comment, *Protecting the Environment with Salvage Law: Risks, Rewards, and the 1989 Salvage Convention*, 65 WASH. L. REV. 639 (1990) (discussing international action needed to reform salvage law to make it more compatible with environmental protection).

145. *See* 134 CONG. REC. H1181 (daily ed. Mar. 28, 1988) (statement of Rep. Jones). Congressman Jones stated that "by passing this bill, Congress is saying that historic shipwrecks are not believed to be in marine peril . . . [and thus] the law of salvage is not required as a uniform admiralty rule for those specific classes of wrecks covered by [the Act]." This express rejection of the proposition that shipwrecks are in "marine peril" reflects an incompatibility of admiralty law and the management of abandoned shipwrecks.

146. *See* 134 CONG. REC. H1178 (daily ed. Mar. 28, 1988) (statement of Rep. Vento) (noting that states with shipwreck laws "spend a disproportionate amount of effort and expense in admiralty court arguing for jurisdiction over the shipwrecks on their State-submerged lands"; declaring that states can do better job of making sure that abandoned shipwrecks are available to all appropriate interests).

federal courts—are more effective at addressing the local needs of shipwreck preservation programs.[147] Piecemeal litigation in the federal courts over ownership rights to abandoned shipwrecks, however, can and has resulted in fluctuating interpretations of applicable admiralty law without the pursuit of any sound policy objectives for shipwreck preservation. For instance, in the *Cobb Coin Co.* decisions,[148] the United States District Court for the Southern District of Florida applied the law of salvage (rather than the law of finds), granted a salvage award *in specie*, disregarded the difference between the outer continental shelf and the territorial sea, and found Florida's statutes regulating salvage to be invalid—all of which were contrary to prior decisions.[149] Professor Schoenbaum has criticized the opinions in the *Cobb Coin Co.* cases as "completely misapprehend[ing] the law in this area."[150] The Abandoned Shipwreck Act alleviates this problem of inconsistency by carving out a special and limited area of admiralty law. The Act provides the states with the authority to address their particular needs for managing historic shipwrecks on a local level, rather than having the admiralty courts reach inconsistent decisions based on the common law of salvage and finds.

Although the Act excludes historic shipwrecks from admiralty law for sound legal and policy reasons, there are several constitutional issues which could threaten its validity. These issues include federal preemption, potential overregulation of interstate

147. For example, the Michigan legislature's protection of shipwrecks on the "bottomlands" of the Great Lakes required different statutory provisions than the protection of the Florida legislature for the preservation of shipwrecks embedded in coralline formations. *Compare* MICH. COMP. LAWS ANN. §§ 299.51-.57 (West 1984 & Supp. 1992) (requiring permit to remove abandoned property from bottomlands of Great Lakes) *with* FLA. STAT. ANN. § 267.061 (West 1975 & Supp. 1992) (delineating responsibilities of state agencies regarding historical resources and requiring permits for underwater excavations).

148. Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 549 F. Supp. 540 (S.D. Fla. 1982); Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 525 F. Supp. 186 (S.D. Fla. 1981).

149. *See Cobb Coin Co.*, 549 F. Supp. at 556, 563 (holding that law of finds did not apply in case at bar because law of salvage "provides a complete and adequate basis" for awarding plaintiff some of recovered artifacts); *Cobb Coin Co.*, 525 F. Supp. at 203 (holding that Florida statutory scheme, by forbidding general exploration, violated maritime law which provided fundamental right to search high seas). For further criticism of the *Cobb Coin Co.* opinions, see Marx v. Guam, 866 F.2d 294, 300-01 (9th Cir. 1989) (rejecting principles articulated in *Cobb Coin Co.* cases); Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 691 F. Supp. 1377, 1389-90 (S.D. Fla. 1988) (refusing to apply *Cobb Coin Co.* principles).

150. *See* SCHOENBAUM, *supra* note 29, at 518 n.46.

commerce by the states and possible improper legislative delegation by Congress.

1. *Preemption and the Preservation of the Uniformity of Admiralty Law*

The first issue is whether the federal common law of salvage preempts state laws that establish shipwreck preservation programs under Article III, Section 2[151] and the Supremacy Clause[152] of the United States Constitution. Federal preemption presumably would create and maintain uniformity in admiralty law throughout the United States.

Under the aegis of maintaining uniformity, several "uniformity doctrines" have developed. The potential application of state maritime law by federal courts is subject to two conditions: (1) admiralty courts can only apply state substantive law if normal admiralty remedies are not reduced or denied;[153] and (2) state law is applied in federal diversity cases only so long as the uniformity of maritime law is upheld.[154] Similarly, when a case that is based on maritime law is tried in state court, the court must fully protect the federal rights of the parties unless the "maritime but local rule" can be asserted.[155] Thus, under these uniformity doctrines, federal admiralty law would preempt state law in any case in which it appeared that uniformity of maritime law was threatened by the application of local law.

The United States Supreme Court's decision in *Offshore Logistics, Inc. v. Tallentire*[156] may add weight to the federal preemption

151. U.S. CONST. art. III, § 2, cl. 1 (stating that "[t]he judicial Power shall extend to . . . all Cases of admiralty and maritime Jurisdiction").

152. U.S. CONST. art. VI, cl. 2 (stating that "the Laws of the United States . . . shall be the supreme Law of the Land").

153. *See* Adam Lawrence, *State Antiquity Laws and Admiralty Salvage: Protecting Our Cultural Resources*, 32 U. MIAMI L. REV. 291, 313 (1977) (discussing idea that whether federal court sits on maritime issues in diversity or sits in admiralty determines if federal or state substantive law should apply). Under this doctrine, when a federal court sits in admiralty, federal substantive law applies—unless it is incomplete, in which case a legal nexus can be supplied by state law. *Id.*

154. *Id.* Under this doctrine, when a federal court is sitting in maritime matters in diversity, state substantive law must be applied—unless its application would disrupt the uniformity of maritime law.

155. The "maritime but local" rule applies to areas of maritime law where state regulations with local application are viewed as not disturbing the harmony and uniformity of maritime regulations. *See, e.g.*, Kossick v. United Fruit Co., 365 U.S. 731, 742 (1961) (applying maritime law, and not local law, to oral contract because there was sufficient maritime concern); Davis v. Department of Labor & Indus., 317 U.S. 249, 253 (1942) (stating that circumstances of case dictate whether state or maritime law applies).

156. 477 U.S. 207 (1986).

claim. This case involved the wrongful death of two oil platform workers who were killed in a helicopter crash approximately thirty-five miles off the coast of Louisiana.[157] The Court held that neither the Outer Continental Shelf Lands Act (OCSLA)[158] nor the Death on the High Seas Act (DOHSA)[159] required or permitted application of Louisiana law.[160] Rather, the Court found that the savings provision of DOHSA preempted the application of divergent state wrongful death statutes in order to preserve the uniformity of maritime law.[161]

In his dissenting opinion, however, Justice Powell argued that based on the plain meaning of the statute and its legislative history, Congress intended to preserve the state rights of action and state remedies for wrongful death without any territorial qualification.[162] Justice Powell believed that it was reasonable to conclude that Congress had intended to preserve state law remedies which sometimes could give rights to state residents *beyond* those provided by the federal statute.[163]

In a way, the congressional intent behind the Abandoned Shipwreck Act is analogous to Justice Powell's reasoning in *Tallentire*. Congress can be said, through the Act, to be preserving the rights of the states to enforce their shipwreck laws. The plain language of the Act, by vesting title of abandoned shipwrecks in the states, simply validates the existing state historic shipwreck statutes while also providing states with the authority to draft new preservation laws. Under this reasoning, with respect to a future claim of federal preemption, the courts must realize that it is not their role to reconsider the wisdom of policy choices that Congress has already made. Until and unless Congress legislates otherwise, courts should respect the outcome of the legislative

157. *Id.* at 209.

158. 43 U.S.C. §§ 1331-1356 (1988) (asserting jurisdiction of United States over subsoil and seabed of outer Continental Shelf and regulating exploration, development and production of minerals in outer Continental Shelf).

159. 46 U.S.C §§ 761-768 (1988) (establishing right of personal representative of decedent to maintain suit for damages in federal district court in admiralty where death was wrongful and on high seas).

160. *Tallentire*, 477 U.S. at 211.

161. *Id.* at 227. The Court determined that § 7 of DOHSA "acts as a jurisdictional saving clause, and not as a guarantee of the applicability of state substantive law to wrongful deaths on the high seas." *Id.* at 232. The Court concluded that, because § 7 acts as a saving clause, it is inevitable that the state statutes would be preempted by DOHSA. *Id.*

162. *Id.* at 239 (Powell, J., concurring in part and dissenting in part).

163. *Id.* at 240 (Powell, J., concurring in part and dissenting in part).

process and protect the states' right to develop historic shipwreck preservation programs.

Furthermore, the Act arguably maintains, not threatens, the harmony and uniformity of maritime law. The United States Supreme Court decision in *Askew v. American Waterways Operators, Inc.*,[164] dealing with a state spill statute and federal water pollution law, supports this proposition. In *Askew*, the Court held that Florida's oil spill law could apply to shore facilities and vessels on navigable waters, even though a federal water pollution law covered similar areas and damages.[165] In determining that the federal law did not preempt state law, the Court reasoned that: (1) the federal law permitted state regulation of oil spills; (2) the state legislation was not in conflict with the federal act because each of these laws covered different aspects of pollution control; and (3) the state pollution control legislation was a valid exercise of state police power in an area historically left to state police power control.[166] Thus, by upholding the state's water pollution statute in *Askew*, the Court might have been warning against seeking conflicts between state and federal law where none clearly exist.

Like the state oil spill statute in *Askew*, the Abandoned Shipwreck Act is not in clear conflict with admiralty law. The legislative intent behind the Act focuses on protecting the historical integrity of shipwrecks for the benefit of all citizens. This focus does not impinge on the policies behind admiralty law, policies that emphasize the return of goods to the stream of commerce. Moreover, the state can exercise its police powers in this area because the state's interest in protecting underwater antiquities from the pilferage of vandals should outweigh any claims of unfettered access to abandoned shipwrecks by salvors or divers. Therefore, a federal preemption claim based on salvage law should be foreclosed—the uniformity of admiralty law will not be disrupted because that law should not apply to historic shipwrecks in the first place.[167]

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164. 411 U.S. 325 (1973).

165. *Id.* at 328.

166. *Id.* at 328-39. For another example of a case in which the Court held that federal law did not preempt a state shipping law, see Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960). *Huron Portland Cement* involved a vessel whose boilers were regulated under federal law, but whose owners were fined under a local law for excessive emissions. *Id.* at 441-42. The Court upheld the local ordinance on the grounds that the ordinance was an even-handed attempt to effectuate a legitimate local public interest and was not unduly burdensome on maritime activities or interstate commerce. *Id.* at 448.

167. For further support of the validity of state authority over federal admi-

2. *Overregulation of Interstate Commerce*

The rather tenuous basis of a federal preemption claim on the grounds of preserving uniformity in admiralty law shifts the focus of a constitutional challenge to the Abandoned Shipwreck Act toward an inquiry of whether the Act will obstruct the channels of interstate commerce by virtue of allowing the state-originated statutes to be enforced. Like the potential preemption claim, this challenge is also on shaky ground.

In *Cooley v. Board of Wardens*,[168] the Supreme Court held that, unless otherwise stated by Congress, the states have the freedom to regulate those aspects of interstate commerce that are of such a local nature as to require different treatment in their respective states. With this standard, the Court upheld the validity of a Pennsylvania law which required ships entering or leaving the port of Philadelphia to hire a local pilot.[169] The Court determined that the Pennsylvania regulation was valid because the pilotage in local harbors was germane to local control, it was an area within the scope of the state's power, and it did not conflict with or interfere with any law passed by Congress.[170] Thus, under the reasoning of *Cooley*, where a state regulation impacts interstate commerce, the state's interest in regulating its local affairs is balanced against the national interest in uniformity to determine whether the state regulation is valid as against federal regulation of that subject matter.[171]

The *Cooley* decision, however, left several questions unanswered. First, the Court failed to make a clear distinction be-

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ralty law, see Sindia Expedition, Inc. v. Wrecked & Abandoned Vessel, 710 F. Supp. 1020, 1023 (D.N.J. 1989) (holding that state has colorable claim to abandoned wrecks in coastal waters), *rev'd on other grounds*, 895 F.2d 116 (3d Cir. 1990); Marx v. Guam, 866 F.2d 294, 299-300 (holding that Guam had colorable claim to shipwreck; sovereign immunity precluded cause of action); Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 691 F. Supp. 1377, 1393-94 (stating that "we are . . . unconvinced that an enforcement action based upon a state licensing scheme encroaches on any existing federal admiralty policy" and that salvage law does not preempt state statutes covering areas of continued ownership of distressed vessels, incentives for rescue and availability of salvage awards).

168. 53 U.S. (12 How.) 299 (1852).

169. *Id.* at 321.

170. *Id.*

171. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 325 (1978). According to Professor Tribe: "The validity of state action affecting interstate commerce must be judged in light of the desirability of permitting diverse responses to local needs and the undesirability of permitting local interference with such uniformity as the unimpeded flow of interstate commerce may require." *Id.* (emphasis omitted).

tween subjects in need of local regulation and subjects requiring national uniformity. Second, the Court failed to discuss the extent to which a state regulation may permissibly impact interstate commerce. The Court has since addressed these shortcomings by developing a more complex test for permissible state regulation of interstate commerce. Under this later test, a regulation must pursue a legitimate state end and must be rationally related to that legitimate end. Additionally, the regulatory burden imposed by the state on interstate commerce, and any discrimination against interstate commerce, must be outweighed by the state's interest in enforcing its regulation.[172] Application of this test depends, in part, on the type of regulation pursued by the particular state.[173] As a result, the Commerce Clause cases most likely to shed light on possible challenges to the Abandoned Shipwreck Act would seem to be those cases involving attempts by states to regulate their environment.

One such case is *City of Philadelphia v. New Jersey*,[174] a garbage disposal case in which the Supreme Court indicated that it will strictly scrutinize any discriminatory or protectionist state regulation, even if that regulation is enacted in pursuit of environmental or other non-financial reasons.[175] The case involved a New Jersey statute, enacted in response to the use of New Jersey landfills by New York and Pennsylvania, that prohibited the importing of solid or liquid waste into the state.[176] The Supreme Court held that the statute was basically a protectionist measure—rather than a legitimate means of solving local problems—which violated the Commerce Clause.[177]

The state regulation permitted by the Abandoned Shipwreck Act can be easily distiguished from the state regulation at issue in *City of Philadelphia*. In contrast to the New Jersey statute, the Abandoned Shipwreck Act does not give the states carte blanche to isolate themselves from a problem common to many by erecting a barrier against the flow of interstate trade. Although the Act

172. *See id.* at 326.

173. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322 (1979) (striking down Oklahoma statute prohibiting out-of-state transport of minnows because deemed most discriminatory means of protecting state interest); Brotherhood of Locomotive Firemen & Engineermen v. Chicago, Rock Island & Pac. R.R. Co., 393 U.S. 129 (1968) (upholding Arkansas law requiring minimum train crews because public safety interest outweighed burden on interstate commerce).

174. 437 U.S. 617 (1978).

175. *Id.* at 623-24.

176. *Id.* at 618.

177. *Id.* at 628-29.

encourages states to protect their underwater resources, it is not designed to promote discriminatory protectionism by the states. Rather, the Act enables the states to confront the problems of managing underwater resources on the local level with the understanding that all the states are working toward the collective goal of preserving historic shipwrecks. Further, any possible discriminatory element of the Act is arguably justified by the fact that the Act is the only reasonable means of controlling and managing valuable underwater antiquities.

The more appropriate analysis for the Abandoned Shipwreck Act follows the standard applied to environmental legislation that merely burdens interstate commerce rather than amounting to clear economic protectionism. For example, in *Minnesota v. Clover Leaf Creamery Co.*,[178] the Supreme Court sustained a state law which banned the sale of milk in plastic non-returnable, non-refillable containers, but allowed the sale of milk in non-returnable, non-refillable containers made of other substances (specifically cardboard cartons—a major Minnesota product).[179] The Court applied the following balancing test: "Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause."[180] The Court opined that the burden in this case was minimal because dairies package their milk in more than one type of container and plastic could be used in other products.[181] Conversely, the state's environmental concerns, such as a concern for solid waste disposal, were rationally related to a legitimate governmental interest.[182]

Under the *Clover Leaf* test, it is unlikely that a state shipwreck statute would impose a "clearly excessive" burden on interstate commerce. The substantial state interest of preserving historic shipwrecks would seem to outweigh the incidental effect of precluding salvage operations and unrestricted access to a limited number of historic shipwrecks. In fact, through the proper administration of shipwreck preservation programs under the Act, interstate commerce could ultimately be enhanced by the development of museum displays, tourism and recreational diving programs.[183] Thus, any attempt to find a state shipwreck statute

178. 449 U.S. 456 (1981).
179. *Id.* at 461.
180. *Id.* at 474.
181. *Id.* at 472-73.
182. *Id.* at 470.
183. 54 FED. REG. 13,642, 13,649 (1989) (idea proposed Apr. 4, 1988). For

invalid as an excessive burden on interstate commerce will encounter a significant hurdle in overcoming the substantial state interest of protecting these valuable underwater resources.

3. *Federal Delegation Of Powers*

Congress has the authority to occupy certain areas of admiralty law in appropriate circumstances. A problem emerges, however, with respect to the peculiar nature of the Abandoned Shipwreck Act—whereby the federal government has seized jurisdiction over abandoned shipwrecks from the admiralty courts under section 2105(a) and concurrently handed title to these wrecks to the states under section 2105(c). Essentially, Congress could be viewed as affirmatively consenting to state action which might otherwise be an unconstitutional violation of the Commerce Clause. The extent to which Congress can make this affirmative consent could be challenged, particularly under *Cooley v. Board of Wardens*, in which the Court implied that Congress lacks the authority to legitimize what would otherwise be an improper state intrusion upon interstate commerce.[184] A later approach, however, permits Congress to affirmatively consent to state interference with interstate commerce.[185]

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example, archaeologists discovered the remarkably well-preserved wreck of a seventeenth century Swedish warship, the *Vasa*, in the cold waters of Stockholm harbor. *Id.* The *Vasa*, after it was raised and conserved, has generated annual museum revenues of approximately $275 million for Sweden. *Id.*

184. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 320-21 (1852). The *Cooley* Court projected that "[i]f Congress were now to pass a law adopting the existing state laws, if enacted without authority, and in violation of the Constitution, it would seem to us to be a new and questionable mode of legislation." *Id.*

185. *See* Leisy v. Hardin, 135 U.S. 100, 123-24 (1890). The Court stated:

> [I]t is not for Congress to determine what measures a State may properly adopt as appropriate or needful for the protection of the public morals, the public health or the public safety; but notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action.

Id.

One reason for allowing Congress to sanction what would otherwise be a state violation of the Commerce Clause is to avoid the potential problem that would arise with each local part of the national economy protecting its own interests to the detriment of other sectors of the economy. Congressional consent under the Act constitutes action in favor of the "whole" rather than any separate part. As a result, all of the interests influenced by the congressional action are fairly taken into account by the political process.

Congress seemingly has drafted the Act in a way that would avoid the delegation problems that would erupt if the Act simply granted the states jurisdiction over the shipwrecks outright—rather than first establishing a federal claim to the shipwrecks. By first claiming federal authority over the shipwrecks, Congress has circumvented any intricate delegation problems. Congress has sanctioned the state regulation of abandoned shipwrecks rather than authorizing the states to modify admiralty law, an authorization which would be an unconstitutional violation of the Commerce Clause.

VI. STATE LEGISLATION

Even prior to the passage of the Act, many states claimed title and management authority over abandoned shipwrecks in their waters and controlled historic shipwrecks in a manner consistent with their historic preservation programs. To date, twenty-seven states have enacted laws that regulate historic shipwrecks.[186] The Act has legitimized the authority of these statutes by asserting federal title to certain abandoned shipwrecks located in state waters and then simultaneously transferring title to a majority of those shipwrecks to the states.[187] The Act also paves the way for those states presently without such a statute to enact legislation to protect historic shipwrecks on their submerged lands.

186. *See* ALASKA STAT. § 41.35.010 (1988); ARIZ. REV. STAT. ANN. § 41-841 (1992); COLO. REV. STAT. ANN. § 24-80-401 (West Supp. 1992); FLA. STAT. ANN. § 267.021 (West 1991 & Supp. 1992); GA. CODE ANN. § 12-3-80 (1992); HAW. REV. STAT. § 6E1-2 (1985); ILL. ANN. STAT. ch. 127, para. 133c.02-133c1 (Smith-Hurd Supp. 1992); IND. CODE ANN. § 14-3-3.3 (West 1983 & Supp. 1992); LA. REV. STAT. ANN. § 41:1601 (West 1990); ME. REV. STAT. ANN tit. 27, § 371 (West 1964); MD. CODE ANN., NAT. RES. § 2-309 (Supp. 1992); MASS. GEN. LAWS ANN. ch. 6, § 180 (West 1986); MINN. STAT. ANN. § 138.51 (West 1979 & Supp. 1992); MISS. CODE ANN. § 39-7-3 (Supp. 1989); MO. ANN. STAT. § 253.420 (Vernon Supp. 1992); MONT. CODE ANN. § 22-3-421 (1991); N.H. REV. STAT. ANN. § 227-C:1 (1989 & Supp. 1991); N.Y. PUB. BLDGS. LAW § 60 (McKinney Supp. 1992); N.C. GEN. STAT. § 121-22 (1986); N.D. CENT. CODE § 55-10-01 to 55-10-02 (1983 & Supp. 1991); S.C. CODE ANN. § 54-7-610 (Law. Co-op. 1992); TEX. NAT. RES. CODE ANN. § 191.091 (West Supp. 1992); VT. STAT. ANN. tit. 22, § 701 (1987 & Supp. 1991); VA. CODE ANN. § 10.1-2214 (Michie 1989); WASH. REV. CODE ANN. § 27.53.045 (West Supp. 1992); WIS. STAT. ANN. § 44.30 (West Supp. 1991). Guam, the Northern Mariana Islands and Puerto Rico had enacted historic shipwreck protection legislation as well. *See* GUAM GOV'T CODE § 13985.29-.35 (Supp. 1974); N.M.I. COMMONWEALTH CODE tit. 2, § 4811 (1991); P.R. LAWS ANN. tit. 18, §§ 1501-1518 (1989). For a further discussion of state shipwreck preservation statutes, see Anne G. Giesecke, *Shipwrecks: The Past in the Present*, 15 COASTAL MGMT. 179 (1987); Owen, *supra* note 2, at 508 n.44.

187. It is important to note that § 2105(d) provides an exception for shipwrecks located in underwater national parks and Indian lands. *See* 43 U.S.C. § 2105(d) (Supp. II 1990). For the text of § 2105(d), see *supra* note 3.

The laws needed to protect historic shipwrecks will vary depending on the situation of a particular state.[188] While some common requirements, such as the development of a management program, permit system and penalties, are included in most statutes, protection of all interested parties mandates careful attention to the details.[189] This Article thus suggests specific subjects to be considered in drafting or revising historic shipwreck statutes to ensure the proper balancing and protection of interests.

A. *Defining "Historic"*

State statutes should contain specific criteria for determining when a shipwreck is considered historic. Section 2105(c) should be amended to place a mandatory duty on the States to define in their shipwreck legislation what constitutes a "historic" shipwreck. One source for this suggested duty is the comments of the respondents to the public meetings for the Federal Guidelines issued by the National Park Service. Many of those respondents felt that the criteria used for determining a property's eligibility for the National Register of Historic Places was already sufficient for defining a historic shipwreck.[190] Others felt that varying combinations of age and historical significance should be used.[191] Whatever method a state selects, the emphasis should be to clearly establish a specific means of designating historic shipwrecks. By careful drafting in the early legislative stage, states will ward off troublesome litigation in the future.

B. *Public Access*

State statutes should limit the access of the general public to historic shipwrecks when unique shipwreck sites are involved. Historic shipwrecks are a finite, irreplaceable and invaluable part of human events which may be lost forever if proper protective

188. For a comparison of twenty-seven state shipwreck preservation statutes, see Giesecke, *supra* note 186, at 184-88.

189. *See* 54 Fed. Reg. 13,642, 13,644-45 (1989).

190. *Id.* at 13,644. It was suggested at the meeting that "states are familiar with the National Register criteria and that many states already use the criteria or similar specifications for historic shipwreck management." *Id.*; *see also* 55 Fed. Reg. 50,116 (1990) (noting that "[m]any [states] have not yet established programs to carry out the responsibilities they acquired under the Act," but also stating that "[m]any other States have established shipwreck management programs, some of which have been in operation since the 1970s").

191. 55 Fed. Reg. at 50,116. There were different opinions as to what age would be considered historic. *Id.* The age ranged from 10 to 500 years. *Id.*

legislation is not imposed. The designated sites should be protected from all interested parties until the state determines the site's historical significance and fragility.[192] The looting of the wreck of the *China*, a wreck that was a popular spot for sport divers and salvors in the Delaware Bay, demonstrates the need for more stringent regulations.[193] The cargo of china and other significant artifacts from that wreck were lost because the State of Delaware lacked historic shipwreck regulations. To prevent a similar occurrence, removal of artifacts should be prohibited prior to a state's determination of a shipwreck's historic value. Regulations should incorporate this prohibition on artifact removal, and include a permit system.[194]

Vermont, for example, has established a model program of shared access under which the State Division for Historic Preservation in partnership with private non-profit groups of historians and sport divers has located and documented many significant warships and other historic vessels.[195] Additionally, Vermont has developed a low-cost program called an "Underwater Historic Preserve," where surface moorings have been placed at three historic vessels, enabling sport divers to find and explore the wreck without causing anchor damage.[196] This cooperative effort in Vermont has resulted in diver money filtering into the economy and in a safer and more meaningful recreational experience for the participating divers.[197] In addition, perhaps the best indica-

192. 54 Fed. Reg. at 13,644. It was suggested, however, that sport divers be allowed unrestricted access to historic shipwrecks—as long as they do not disturb the site. *Id.*; *see also* 55 Fed. Reg. at 50,126 (delineating permit procedures).

193. *See* Indian River Recovery Co. v. The China, 645 F. Supp. 141, 145 (D. Del. 1986) (enjoining commercial salvaging of wreck by anyone other than finder). The court noted that thousands of divers had brought back pieces of ironstone ware from the wreck. *Id.* at 143.

194. 54 Fed. Reg. at 13,644. It was suggested at the public meeting that "permits be required for any person to conduct archeological recovery or salvage." *Id.* Some suggested that "only professional underwater archeologists or maritime historians, or wreck divers under their supervision, be allowed to remove artifacts." *Id. But see* 55 Fed. Reg. at 50,132-35 (providing for recovery of shipwrecks by public and private sector, including recovery of artifacts).

195. 134 CONG. REC. 2,417 (1988). The shipwrecks included in the program are: the *Boscawen*, a 1759 British warship; the *Congress*, a flagship of Benedict Arnold's first American Naval Fleet, built in 1776; the *Eagle*, a participant in the 1814 Battle of Plattsburgh Bay; the *Phoenix*, the oldest surviving steamboat hull; and a long forgotten vessel, a horse ferry. *Id.*; *see also* Donald G. Shomette, *Heyday of the Horse Ferry*, 176 NAT'L GEOGRAPHIC 548, 550 (1989) (discussing history of horse- and mule-powered cargo ferries and archaeological excavations of shipwrecks).

196. 134 CONG. REC. 2,417.

197. *Id.*

tion of the success of the program is the fact that there have been no reports of intentional vandalism.[198]

C. *Notice*

In order to provide free access to shipwrecks by all parties, Congress provided that "[t]he public *shall* be given adequate notice of the location of any shipwreck to which title is asserted under this section."[199] Congress also noted that the degree of specificity of the notice will depend on balancing the need to inform the public of the exact location of the shipwreck against the need to protect the wreck from possible vandalism.[200] The type of notice may vary from shipwreck to shipwreck and may be performed by publication in state or local newspapers, the Federal Register, or nautical charts, or by posting notices at local dive shops, on site markers, or some combination thereof.[201]

The case of the Civil War wreck the *New Jersey* warns of the dangers of improper notice. In 1978, the National Oceanic and Atmospheric Administration published the location of the wreck.[202] The cargo consisted of priceless glassware, ceramics, music boxes and other artifacts from 1870.[203] Since 1982, however, repeated assaults by salvors and treasure hunters has rendered the shipwreck a total loss to both archaeologists and sport divers.[204]

Therefore, based on the possible harm which can result from publishing indiscriminate notices, the Act should be amended by replacing the mandatory term "shall" in § 2105(b) with the following discretionary language: "The public *should* be given adequate notice of the location of any shipwreck to which title is asserted under this section *in appropriate circumstances where the needs of the public for free access will be weighed with the potential for vandalism of the wrecksite*."[205] Such an amendment would compel the states to consider the adverse consequences involved with a capricious notice system rather than blindly applying the literal language of the statute.

198. *Id.*

199. H.R. REP. No. 514, *supra* note 3, pt. I, at 3 (emphasis added), *reprinted in* 1988 U.S.C.C.A.N. at 367.

200. *Id.* pt. I, at 3, *reprinted in* 1988 U.S.C.C.A.N. at 367.

201. *Id.*

202. 133 CONG. REC. 7051 (1987).

203. *Id.*

204. *Id.*

205. For the present language of § 2105(b), see *supra* note 3.

D. *Reward Programs*

States should also include a reward provision in their statutes because rewards provide incentives for divers, salvors, fishermen and other parties to report useful information about shipwrecks. Very few state statutes, however, currently contain reward program provisions.[206] The suggestions for rewards from the respondents to the public meetings conducted by the National Park Service included: a percentage of the value of the find or the overall cost of the archaeological project; tax benefits; money from the sale of the artifacts recovered; possession of the artifacts recovered; and certificates and awards of appreciation.[207] Only a few claimed that mere civic duty without an expectation of compensation was sufficient.[208]

The states should clearly designate, however, that an award only applies to the disclosure of *information* pertaining to a shipwreck—such as its location, a detailed description or reports of vandalism. This qualification would deter the public from removing artifacts in such a way as to destroy their archaeological provenance because *no* rewards would be granted for retrieval of artifacts using unsound techniques. Interestingly, an award program under the Act would modify the previous policy of salvage law where an award hinged on the salvor's fiduciary obligation of using the utmost care in bringing the vessel and its cargo before the court.[209] In comparison, the proposed program under the Act would only reward citizens for their honest and expeditious reporting of pertinent information about an abandoned shipwreck to the proper state authorities. Thus, a standard policy of an award program would reduce the inclination for a finder of a

206. 54 Fed. Reg. 13,642, 13,644 (1989). The wisdom of compensating an individual for properly preserving a maritime artifact was discussed by United States District Judge D. R. Debevoise in a case in which the United States sought to recover a ship's bell from a celebrated confederate ship:

> I expressed my view at the hearing that fairness and equity suggest that, regardless of the legal merits of the case, the United States should at least reimburse Mr. Steinmetz for his expenses in acquiring, shipping and preserving the bell, since through these efforts the bell has been returned to the American people.

United States v. Steinmetz, 763 F. Supp. 1293, 1300 n.2 (D.N.J. 1991).

207. 54 Fed. Reg. at 13,644.

208. *Id.*

209. *See* David Paul Horan, *Historic Shipwreck Recovery, Past, Present, and Future: An Argument In Favor of Federal Admiralty Law*, Remarks at the N.C. Bar Foundation Continuing Legal Education Seminar, Wrightsville Beach, N.C. VIII-7 (Apr. 22-23, 1988) (transcript available at the University of North Carolina Law Library).

vessel to pilfer the site when there is knowledge of a reward for the disclosure of information about the shipwreck's discovery.

E. *Penalties*

Penalty systems should be a mandatory provision in all state shipwreck preservation statutes as long as any penalties are imposed in a fair, reasonable and flexible manner.[210] The reports of vandalism on wrecksites around the United States and other countries offer substantial support in favor of a policy that includes penalties as a necessary deterrent for noncompliance.[211] There are potential drawbacks, however, to a penalty system. One such drawback is the disruption of the trust, cooperation and information sharing among sport divers, salvors and preservationists which could result from an unfairly administered system. Another potential drawback is the possibility of an ineffectual fine sytem given potential difficulties in enforcement and the traditionally self-regulating nature of sport diving.[212]

F. *Underwater Archaeological Training and Volunteer Programs*

One last consideration is training and volunteer programs. The main purpose of the Act is to enhance cultural resources, foster a partnership among the various interested parties, provide recreational access to historic shipwrecks and balance the needs of those involved with shipwreck research and salvage. One means of achieving this goal is to provide training courses in proper archaeological excavation techniques. The majority of the respondents at the public meetings recommended that the private sector provide the training programs because it would relieve the cost burden from the states and it would foster goodwill between the states and the diving community.[213]

Another worthwhile effort would involve the establishment of volunteer programs which would enable sport divers to participate in underwater archaeology projects. A fine example of this

210. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 299.54h, 299.55-299.56 (West Supp. 1992) (providing for revocation of permit and penalties for violation of abandoned property laws).

211. For a discussion of injury to shipwrecks in United States waters, see *supra* notes 193 & 202-04 and accompanying text. For a discussion of damage to a shipwreck in Australia, see *supra* note 90 and accompanying text. For a discussion of international efforts to rectify this situation, see *supra* notes 67-95 and accompanying text.

212. *See* 54 Fed. Reg. 13,642, 13,644 (1989).

213. *Id.* at 13,645.

occurred in North Carolina, where divers found the remains of the Union gunboat, the *U.S.S. Underwriter*, which sank in the Neuse River during the Civil War.[214] Since the discovery, the divers and the North Carolina State Department of Cultural Resources have worked as a team to raise artifacts from the ship, including recovery of the ship's five-foot-long gun.[215] One of the volunteer divers stated: "If I go down and bring something out of the water and then take it home with me only a few people will be able to enjoy it. Part of fun for me is sharing with other people."[216] Indeed, access to historic shipwrecks through volunteer programs will bind all parties to the shared pursuit of increasing the knowledge of the past.

VII. CONCLUSION

Given the inconsistent decisions of United States courts and the international trend towards developing shipwreck preservation laws, the Abandoned Shipwreck Act of 1987 arrived in time to establish orderly procedures for excavating and protecting shipwrecks in the United States. The Act has removed the admiralty laws of salvage and finds from shipwrecks within state waters because the policy of returning goods to the stream of commerce was inappropriate for the protection of marine antiquities. Congress has decided that state abandoned shipwreck statutes regulate artifacts of historical and cultural significance more effectively because they address the local needs of the preservation programs. The states now have the responsibility of precisely tailoring their statutes in order to achieve a balance between preservationists, sport divers and salvors. Only through cooperation can this once-divided group move forward, bound by the common goal of protecting these valuable, historic resources for future generations.

214. *See* 134 CONG. REC. 6,611, 6,615 (1988).
215. *Id.*
216. *Id.*