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A Legal Perspective on the Protection of Underwater Cultural Heritage Resources in the United States: Is the Abandoned Shipwreck Act Lost at Sea, or Is It Worthy of Salvage?

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A LEGAL PERSPECTIVE ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE RESOURCES IN THE UNITED STATES: IS THE ABANDONED SHIPWRECK ACT LOST AT SEA, OR IS IT WORTHY OF SALVAGE?

I. INTRODUCTION

History and fiction alike have inspired adventurers to search for the Lost City of Atlantis and to hunt for sunken treasure. The desire to find and profit from artifacts of historical and monetary significance has, unfortunately, contributed to the imperilment of Underwater Cultural Heritage ("UCH") resources.

UCH consists of "material found underwater, generally lying on – or embedded in – the seabed, which has the potential to yield information about past human existence."[1] Shipwrecks are the predominant form of UCH,[2] and will be the main UCH resource discussed in this article. Due to the nature of its location, UCH, and shipwrecks in particular, offer unique educational and informational advantages for archaeologists, anthropologists, historians, and mariners:

> Where remains are lying on or in the seabed, the water column acts as a natural shield against human interference and the rate of natural decay is likely to be slowed by the environmental conditions . . . In the case of shipwrecks, an additional value is that they may form a 'closed deposit,' in other words a site containing material all in use at the same time. Such 'time-capsules' are rarely found in terrestrial archaeology and contain important information for dating purposes.[3]

The sea naturally preserves UCH *in situ* (in its natural position), potentially providing scholars with increased time to study

[1] SARAH DROMGOOLE, UNDERWATER CULTURAL HERITAGE AND INTERNATIONAL LAW 1 (2013).
[2] *Id.*
[3] *Id.*

important underwater resources, and affording humanity the concomitant ability to learn from these "time capsules" of our collective past. This is particularly important since UCH resources include artifacts discovered from ancient civilizations.[4]

Unfortunately, the key federal statute governing the protection of abandoned shipwrecks, the Abandoned Shipwreck Act ("ASA"), is poorly drafted and ill equipped to achieve one of its most important goals, namely "to promote archaeologically and environmentally sensitive historic shipwreck exploration."[5] This article will argue that the ASA should be amended to automatically vest title of UCH in the federal government.

This Article will present a discussion of the protection of UCH from an American legal perspective. Part II will describe the evolution of this body of law, focusing on the law of finds and the law of salvage through an examination of relevant case law.[6] Part III will begin by discussing the law of finds,[7] the law of salvage,[8] and statutes protecting land-based archaeological resources that are also applicable to protection of historic shipwrecks.[9] This section will also examine the key statute governing the protection of UCH: the Abandoned Shipwreck Act of 1987.[10] Finally, Part IV will propose legislative reform specifically tailored to address the threats that new technologies and unregulated salvage pose to the protection and preservation of UCH.[11] Ultimately, the ASA should be amended to automatically vest title of UCH in the federal government.

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[4] Marilyn Phelan & Marion P. Forsyth, *A Comprehensive Regime for the Protection of Underwater Cultural Heritage*, *in* LEGAL PERSPECTIVES ON CULTURAL RESOURCES 119 (Jennifer R. Richman & Marion P. Forsyth eds., 2004).

[5] Russell G. Murphy, *The Abandoned Shipwreck Act of 1987 in the New Millennium: Incentives to High Tech Piracy?*, 8 OCEAN & COASTAL L.J. 167, 168 (2003).

[6] *Infra* notes 6–26.

[7] *Infra* notes 29–64.

[8] *Infra* notes 65–104.

[9] *Infra* notes 105–131.

[10] *Infra* notes 132–162.

[11] *Infra* notes 206–214.

II. BACKGROUND

To lay the foundation for this discussion of American UCH law, this section will begin by focusing on the history of underwater salvage, with an emphasis on the increase of new technologies and the resulting threat they pose to UCH. It will also explore the legal history of UCH protection in the United States, with a focus on U.S federal admiralty law.

A. *History of Underwater Salvage*

The greatest threat to UCH is unregulated salvage.[12] Before the advent of new technologies, access to UCH resources was limited by how long one could hold his or her breath while diving underwater to locate and retrieve valuable goods from a wreck.[13] Since the advent of SCUBA (Self-Contained Underwater Breathing Apparatus) equipment during World War II, the underwater destructive abilities of unregulated salvors has increased exponentially.[14] In the 1960s, a treasure hunting and salvage industry evolved in Key West, Florida.[15] Treasure hunters began to use SCUBA, remote-sensing devices, and equipment capable of blowing away the seabed habitat to salvage gold, silver, and jewels that had been lost for generations.[16]

Further complicating the protection of American UCH are advances in deep water exploration and exploitation technology, such as submersible vehicles which provide access to previously unreachable depths.[17] Over time, new advances, such as cameras that can transmit through video the location of ship artifacts "[have] becom[e] much less expensive and thus more practical for use by treasure hunters."[18] The proliferation of these new

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[12] Ole Varmer & Caroline M. Blanco, *United States of America*, *in* LEGAL PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL AND INTERNATIONAL PERSPECTIVES 205 (Sarah Dromgoole ed., 1999). Salvage is the rescue of a wrecked ship and/or its cargo from loss.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Phelan & Forsyth, *supra* note 4, at 119.

technologies, along with their increased use by unscrupulous salvors, has accelerated the need to protect and preserve UCH through proper legislation.

B. *Legal Background: U.S. Federal Admiralty Law*

The body of federal law governing the disposition of underwater resources is referred to as maritime and admiralty law. Pursuant to Article III, Section 2, Clause 1 of the United States Constitution, the judicial power of the federal courts extends "to all Cases of admiralty and maritime Jurisdiction."[19] This constitutional grant of authority illustrates the importance of the sea to our Founding Fathers, as "maritime commerce was . . . the jugular vein of the Thirteen States."[20] This constitutional provision was later incorporated into the first Judiciary Act in 1789, and federal courts have retained admiralty and maritime jurisdiction ever since.[21]

In addition to constitutional authority governing UCH, pursuant to the "Admiralty, maritime and prize cases" statute of the U.S. Code,[22] "federal courts have original jurisdiction over maritime and admiralty cases, whereby they determine the disposition of shipwrecks and associated objects."[23] This jurisdiction encompasses "maritime causes of action begun and carried on as proceedings *in rem*, that is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien."[24] The law of admiralty includes the law of finds and the law of salvage.[25] According to

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[19] Cal. & State Lands Comm'n v. Deep Sea Research, Inc., 523 U.S. 491, 501 (1998) (quoting U.S. CONST. art. III, § 2, cl. 1).

[20] *Id.* (quoting F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 7 (1927)).

[21] *Cal.& State Lands Comm'n*, 523 U.S. 491 at 501; 1 Stat. 73, 1 Cong. Ch. 20.

[22] 28 U.S.C. § 1333(1) (2012).

[23] PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 804 (3d ed. 2012).

[24] *Cal. & State Lands Comm'n*, 523 U.S. 491, 501 (quoting Madruga v. Super. Ct. of Cal., Cnty. of San Diego, 346 U.S. 556, 560 (1954)).

[25] GERSTENBLITH, *supra* note 23, at 844. The law of finds applies when it is determined that the original owner intended to abandon his or her ship, in which case the first finder to reduce the property to his or her possession is deemed the new owner. The law of salvage applies to the recovery of ships or cargo in peril

maritime and admiralty law, either the law of salvage or the law of finds may apply, "depending on an initial determination of whether the owner of the ship intended to abandon it."[26] In *Commonwealth v. Maritime Underwater Surveys, Inc.*,[27] the Supreme Judicial Court of Massachusetts explained that the law of admiralty, "[u]nder usual circumstances . . . would lead to an award either of outright ownership of the recovered goods (applying the law of finds) or of entitlement to an appropriate salvage award."[28] The law of finds in the context of UCH, as explained below, is an interesting area of jurisprudence, and one which is often complicated by difficulties in interpretation and a lack of uniform application by the American courts.

III. DISCUSSION

A thorough discussion of the protection of American UCH requires a proper explanation of the substantive law involved in this subject area. This section will begin by discussing the development and application of the law of finds, with an emphasis on the concept of abandonment. It will then delve into an analysis of the law of salvage, with a focus on the requirements for a valid salvage claim. This section will also explore land-based statutes that apply to the protection of UCH. Finally, this section will analyze the ASA's legal operation and practical limitations in order to propose a solution to the problems I have described in the protection of American UCH.

A. The Law of Finds: Determining Intent to Abandon

The law of finds first developed at common law as applied to land-based resources. The law of finds as applied to land

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or lost at sea, in which case the salvor is often entitled to an award equivalent to the value of the property saved from danger. *Id.*

[26] Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U.L. Rev. 559, 602 (1995).

[27] 531 N.E.2d 549 (Mass. 1988) (involving the disposition of the *Whydah* wreck, a pirate ship "laden with plundered cargo" that crashed and capsized off the coast of Cape Cod).

[28] *Id.* (quoting Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 525 F. Supp. 186, 198 (S.D. Fla. 1981)).

resources naturally provided the foundation for jurisprudence pertaining to UCH resources found at sea. The most important inquiry within the law of finds is the determination of whether the original owner intended to abandon his or her property.

1. Land Resources

To better understand the historical development of the law of finds as applied to underwater resources, it is useful to understand the law of finds as it applies to archaeological resources on land. The main purpose of the law of finds is to reunite the original owner with an object he or she no longer possesses.[29] Allowing a finder of an object to keep that object furthers this purpose by providing notice of the find to the original owner, or by enabling the original owner to locate the property.[30] The law of finds divides found personal property into five categories:[31] (1) lost property,[32] (2) mislaid property, (3) abandoned property,[33] (4) embedded property[34], and (5) treasure trove. The law of finds

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[29] GERSTENBLITH, *supra* note 23, at 804.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 805-06:

> Lost property is property that the owner has lost involuntarily . . . and of whose whereabouts the owner is unaware. The finder of lost property acquires a complete right against all but the true owner. However, a finder who does not attempt to find the true owner or who commits trespass in finding the property may lose any right to it.

[33] *Id.* at 806:

> Abandoned property is property to which the original owner has relinquished all right, title, claim, and possession with the intention of terminating ownership but without vesting ownership in any other person and without any intention of reclaiming it in the future.

[34] GERSTENBLITH, *supra* note 23, at 806:

> Embedded property is any property, not made of gold, silver, or their paper equivalents, found buried or embedded in the ground. Embedded property is given to the real property owner in recognition of the real property owner's constructive possession of everything contained on and below the surface of the land.

applied to abandoned ships is similar to that applied to abandoned objects found on land.[35]

2. Underwater Resources

The law of finds, "developed originally at common law and . . . then incorporated in admiralty, gives legal force to the maxim 'finders-keepers.'"[36] In other words, the first finder to reduce abandoned property to his or her possession was the one entitled to enjoy its title and use. Traditionally, the law of finds was applied only to maritime property that had never been owned, such as flora and fauna.[37] The English common law approach to the law of finds was that title to abandoned property found on the seas is the prerogative of the crown.[38] Under the American rule, title to recovered property or treasure rests in the finder, absent a legislative exercise of sovereign prerogative.[39]

i. Historical Development of Application of Law of Finds to UCH Resources

Today, courts apply the law of finds to previously owned sunken property, such as a shipwreck, which has been abandoned by its previous owner.[40] Abandonment is an inquiry U.S. Courts have struggled with for hundreds of years.[41] The determination of abandonment is dispositive as to whether the law of finds governs, and also controls whether the analysis proceeds to the intent to abandon prong. If a court finds abandonment has occurred with respect to particular property, a ship for example, the title to and

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[35] *Id.* at 844.
[36] Zych v. Unidentified, Wrecked & Abandoned Vessel, 941 F.2d 525, 527 (7th Cir. 1991).
[37] Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450, 459-60 (4th Cir. 1992) (citing 3A Benedict on Admiralty § 158, at 11-15).
[38] Commw. v. Maritime Underwater Surveys, Inc., 531 N.E.2d 549, 551.
[39] *Id.* at 551–52.
[40] *Columbus-Am. Discovery Grp.*, 974 F.2d at 461.
[41] *See* Columbian Ins. Co. v. Ashby, 29 U.S. 139 at 143, 146 (1830) (holding that revocation of abandonment occurred, and was properly inferred from the conduct of the assured party pursuant to an insurance policy).

possession of the ship and its (potentially valuable) contents will be given to the finder.[42]

Early treasure salvage cases were characterized by salvors competing with both the federal government and state governments for rights to shipwrecks.[43] This was the case in *Treasure Salvors, Inc v. Unidentified, Wrecked & Abandoned Sailing Vessel*,[44] which involved the *Nuestra Señora de Atocha*, a ship that was part of the Spanish Plate Fleet of 1622 and was discovered approximately four miles off Florida's coast in 1971.[45] The finder, Treasure Salvors, Inc., argued that the wreck and its contents had been abandoned and that Treasure Salvors was entitled to the property recovered pursuant to the law of finds.[46] The claims of both the state of Florida and the federal government were denied.[47] The Fifth Circuit Court of Appeals affirmed the district court, finding that the latter had correctly applied the law of finds.[48] On a later appeal of a preliminary injunction, the Fifth Circuit concluded that,

> in extraordinary cases, such as this one, where the property has been lost or abandoned for a very long period . . . the maritime law of finds supplements the possessory interest normally granted to a salvor and vests title by occupancy

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[42] GERSTENBLITH, *supra* note 23, at 844.

[43] DROMGOOLE, *supra* note 1, at 185.

[44] Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 498 F. Supp. 907 (D. Fla. 1976), *aff'd*, 569 F.2d 330 (5th Cir. 1978) (known as *Treasure Salvors I*).

[45] DROMGOOLE, *supra* note 1, at 185 (citing *Treasure Salvors I*, *supra* note 38, at 569 F.2d 333, "In late summer of 1622 a fleet of Spanish galleons, heavily laden with bullion exploited from the mines of the New World, set sail for Spain."

[46] *Id.* at 186.

[47] 569 F.2d at 333; DROMGOOLE, *supra* note 1, at 186. Florida's claim was denied because the wreck was located on the continental shelf beyond the state's submerged lands. The Government's claim was denied in light of insufficient evidence that it had inherited the sovereign prerogative over the unclaimed wreck on the high seas.

[48] *Treasure Salvors I*, 569 F.2d at 343.

> in one who discovers such abandoned property and reduces it into possession.[49]

American courts have not always agreed that the passage of a long period of time constitutes abandonment, which further complicates this inquiry.

ii. Abandonment: A Complex and Important Inquiry

In *Columbus–America Discovery Group v. Atlantic Mutual Insurance Company*, the Fourth Circuit explained that while "abandonment has been simply described as 'the act of deserting property without hope of recovery or intention of returning to it,' . . . in the lost property at sea context, there is also a strong *actus* element required to prove the necessary intent."[50] The court also clarified that in regard to underwater resources, abandonment is the voluntary relinquishment of property and must be proved by a clear and unmistakable affirmative act to indicate a "purpose to repudiate ownership."[51] The court emphasized the high burden of proof required to prove abandonment, such as an express declaration by the owner to abandon the property at issue.[52] However, express renunciation of ownership is seldom present.

The court also provided examples of situations in which there is no abandonment, stating that "it has long been the law that 'when articles are lost at sea the title of the owner in them remains'" and that once an article has been lost at sea, "lapse of time and nonuse are not sufficient in and of themselves, to constitute an abandonment."[53] Additionally, the *Columbus–America Discovery Group* court conveyed that there is no abandonment when a finder "discovers sunken property and then,

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[49] 640 F.2d 560, 567 (5th Cir. 1981).

[50] *Columbus-Am. Discovery Grp.*, 974 F.2d at 461 (quoting Nunley v. M/V Dauntless Colocotronis, 863 F.2d 1190, 1198 (5th Cir. 1989); citing Zych v. Unidentified Wrecked & Abandoned Vessel, 755 F. Supp. 213, 214 (N.D. Ill. 1990) and The No. 105, 97 F.2d 425, 426 (5th Cir. 1938)).

[51] *Id.* at 461 (quoting The Port Hunter, 6 F. Supp. 1009, 1011 (D. Mass. 1934)).

[52] *Id.*

[53] *Id.* (quoting The Akaba, 54 F. 197, 200 (4th Cir. 1893); Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452, 456 (E.D. Va. 1960)).

after extensive efforts, is unable to locate its owner."[54] This statement stands for the principle that simply because the original owner cannot be located, that does not necessarily mean he or she intended to abandon the vessel forever.

Zych v. Unidentified, Wrecked & Abandoned Vessel [55] is a case involving the *Lady Elgin*, a shipwreck found in Lake Michigan. The Northern District Court of Illinois relayed the following factors pertaining to abandonment:

> (1) intent to abandon, and (2) physical acts carrying that intent into effect. Abandonment may be inferred from all of the relevant facts and circumstances. A finding of abandonment must be supported by strong and convincing evidence, but it may, and often must, be determined on the basis of circumstantial evidence.[56]

A party asserting that an original owner abandoned a shipwreck must show these elements. In terms of a finder's burden of proof to justify a defeasible award of title, the court in *Columbus–America Discovery Group* stated that "the law of finds requires the finder to demonstrate not only the intent to acquire the property involved, but also possession of that property, that is, a high degree of control over it."[57] This requirement of possession mirrors the Fifth Circuit's holding in *Treasure Salvors*.

In *Columbus-America Discovery Group*, the U.S. Court of Appeals for the Fourth Circuit expressed the widely held judicial view disfavoring the law of finds in admiralty.[58] The case involved many self–identified "finders" battling for one billion dollars in gold deposited on the ocean floor by the *S.S. Central America*, 160 miles off of the South Carolina coast.[59] The court stated that the law of finds is disfavored in admiralty because its

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[54] *Id.* (citing Weber Marine, Inc. v. One Large Cast Steel Stockless Anchor & Four Shots of Anchor Chain, 478 F. Supp. 973, 975 (E.D. La. 1979)).
[55] Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed to be *SB "Lady Elgin,"* 755 F. Supp. 213 (N.D. Ill. 1991).
[56] *Id.* at 214.
[57] *Columbus-Am. Discovery Grp.*, 974 F.2d at 460.
[58] *Id.* (*citing* 3A Benedict on Admiralty § 158, at 11-15).
[59] *Id.* at 454-55.

aims, assumptions, and rules encourage would-be finders "to act secretly, and to hide their recoveries, in order to avoid claims of prior owners or other would-be finders that could entirely deprive them of the property."[60] The court held that there was insufficient evidence to determine insurance underwriters with an ownership interest in the wreck affirmatively abandoned their interests in the gold.[61]

Judicial decisions have applied the law of finds in two types of situations: (1) owners have expressly and publicly abandoned their property; and (2) items are recovered from ancient shipwrecks and no owner appears in court to claim them, giving rise to an inference of abandonment.[62]

The location of the find is another important consideration in analyzing whether abandonment occurred. In *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel*,[63] the Eleventh Circuit described exceptions to the common law of finds. The court stated that two recognized exceptions exist to the general rule that the law of finds generally assigns ownership of abandoned property without regard to where it was found:

> First, when the abandoned property is embedded in the soil, it belongs to the owner of the soil; Second, when the owner of the land where the property is found (whether on or embedded in the soil) has constructive possession of the property such that the property is not "lost," it belongs to the owner of the land.[64]

If the law of finds does not apply, the law of salvage may govern archaeological excavation, recovery, and a claim of ownership in a shipwreck and the artifacts contained therein.

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[60] *Id.*
[61] *Id.* at 455.
[62] *Columbus-Am. Discovery Grp.*, 974 F.2d at 461. However, if an owner appears in court and there is no evidence of express abandonment, the law of salvage must be applied.
[63] 758 F.2d 1511 (11th Cir. 1985).
[64] *Id.* at 1514.

B. The Law of Salvage: Drawing a Line in the Sand Between Salvor and Pirate

The law of salvage is an ancient maritime doctrine, one which "unlike traditional common law, was meant to encourage the rescue of imperiled or derelict marine property by providing a liberal reward to those who recover property on or in navigable waters."[65] Under salvage law, title is not transferred initially to the finder; it is only transferred as part of a salvor's award. According to the Supreme Court in *The 'Sabine,'*[66]

> [s]alvage 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.[67]

Under the law of salvage, a "ship and vessel" are considered "maritime subjects" that are "capable of receiving salvage services."[68] According to principles of maritime and admiralty law, the law of salvage applies if the owner has not abandoned the ship.[69] As a matter of public policy, the law of salvage is often viewed more favorably in comparison to the law of finds, as it "focuses on the policy of encouraging salvors to aid in the rescue of both people and goods in peril by promising an award to the salvor without the necessity of entering into a contract with the ship's owner."[70] Therefore, it follows that "[c]ourts have

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[65] *Commonwealth*, 531 N.E.2d at 551. A salvor is a person that rescues a wreck or its cargo from the sea.

[66] *The "Sabine,"* 101 U.S. 384 (1880).

[67] *Id.*

[68] Cope v. Vallette Dry Dock Co., 119 U.S. 625, 626-30 (1887) (affirming dismissal of plaintiffs' lawsuit for law of admiralty and maritime jurisdiction, in an action to recover an award for salvaging the defendant company's dry-dock. The Supreme Court held that the definition of ship or vessel had not been construed to include a dry-dock, and that, therefore, the dry-dock was not subject to the law of salvage).

[69] GERSTENBLITH, *supra* note 23, at 844.

[70] *Id.*

traditionally displayed a preference for the law of salvage because it is viewed as encouraging such rescue."[71] The requirements for a valid claim under the law of salvage are:

> (1) the existence of maritime peril; (2) service voluntarily rendered and not required as an existing duty or pursuant to a special contract; and (3) success in whole or in part or proof that the service rendered contributed to such success.[72]

Disputes among litigants and variations among the courts in application have illustrated the differing views on what constitutes maritime peril, voluntary service, and success in salvage service. The concept of maritime peril is a central tenant of maritime law; this article will next consider the evolution of maritime peril.

1. Maritime Peril

In *Faneuil Advisors, Inc. v. O/S Sea Hawk*[73], the First Circuit Court of Appeals reviewed historic decisions applying the law of salvage to come to its own definition of maritime peril. The *Faneuil Advisors* court explained that,

> the cases make apparent that the threat must be something more than the inevitable deterioration that any vessel left untended would suffer; otherwise ordinary maintenance, repairs and storage — *i.e.*, "necessaries" — could easily give rise to salvage liens if a vessel's owner were particularly negligent in caring for his or her boat."[74]

A court's evaluation of whether maritime peril exists is a unique analysis, in the sense that with UCH, courts are often ruling on the

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[71] *Id. See* William M. Landes & Richard A. Posner, *Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 LEGAL STUD. 83 (1978).
[72] *Id.*
[73] 50 F.3d 88, 92 (1st Cir. 1995).
[74] *Id.*

disposition of shipwrecks which have been sitting at the bottom of the sea for a significant passage of time.

Sarah Dromgoole, Professor of Law at the University of Nottingham School of Law, notes that commentary on U.S. maritime law has deemed maritime peril inapplicable in cases relating to wrecks on the seabed for hundreds of years.[75] Professor Patty Gerstenblith, Distinguished Research Professor of Law at DePaul University College of Law, aptly illustrates the so-called legal "fiction" at work as follows:

> [I]n most cases the historic shipwreck has been submerged for a long time, often a matter of even hundreds of years. Even though an ancient shipwreck is lying safely in a watery grave without any present threat, most courts are willing to find that the ship is still in maritime peril. The notion that a commercial salvor is operating to rescue the property on behalf of the owner is thus a fiction.[76]

In *Faneuil Advisors*, the First Circuit explained that courts have found maritime peril to be present in a vast array of situations.[77] The *Faneuil Advisors* court gave as examples where maritime peril was found to exist instances where a vessel: "had run aground on a rocky ledge,"[78] "was adrift with no power within a short distance of the coast,"[79] "was docked but was close to a fire,"[80] and "was on course at sea but where its crew was stricken with yellow fever."[81] On the other hand, the First Circuit in *Faneuil Advisors* reported that courts have found no maritime peril to exist where a ship "had been holed but was secured in calm

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[75] DROMGOOLE, *supra* note 1, at 185.
[76] GERSTENBLITH, *supra* note *23*, at 844.
[77] 50 F.3d 88, 92 (1st Cir. 1995).
[78] *Id.* (*citing* B.V. Bureau Wijsmuller v. United States, 702 F.2d 333 (2d Cir. 1983)).
[79] *Id.* (*citing* The Plymouth Rock, 9 F. 413 (S.D.N.Y. 1881)).
[80] *Id.* (*citing* The John Swan, 50 F. 447 (S.D.N.Y. 1892)).
[81] *Id.* (*citing* Williamson v. The Alphonso, F. Cas. No 17749 (C.C. Mass. 1853)).

weather and was not sinking,[82] had drifted out to sea during a hurricane but subsequently came to rest and held fast to a mooring in calm waters,"[83] and "was adrift as the result of bad weather but could have returned to port under its own power once the weather cleared."[84] The determination of maritime peril seems to depend on the particular facts at issue, and, like the law of finds, lacks a standard for uniform application by the U.S. courts.

2. The Requirement of Voluntary Service

The second prong of a valid salvage claim is the voluntary rendering of service to rescue a vessel, crew, or cargo in peril. As a matter of public policy and to encourage good seamanship, courts have frequently rewarded salvors engaged in voluntary rescue on the seas. As explained *supra*,[85] the voluntary service rendered cannot be pursuant to an existing duty or contractual undertaking. In *Rickard v. Pringle*, the United States District Court for the Eastern District of New York stated, "[p]ublic policy is to encourage volunteers in the salvage of derelict, abandoned, or distressed property. For this reason, salvage awards in generous amounts have traditionally been given to successful salvors."[86] Generous salvage awards serve as an incentive to salvors to voluntarily rescue imperiled people and property on the seas. Salvors act knowing that a proper award commensurate with services rendered will be issued based on voluntary and successful salvage undertaken on behalf of a ship in maritime peril.[87]

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[82] *Faneuil Advisors*, 50 F.3d 88, 92 (citing Clifford v. M/V Islander, 751 F.2d 1 (1st Cir. 1984)).
[83] *Id.* (citing Phelan v. Minges, 170 F. Supp. 826 (D. Mass. 1959)).
[84] *Id.* (citing The Viola, 52 F. 172 (C.C. Pa. 1892), *aff'd*, 55 F. 829 (3d Cir. 1893)).
[85] GERSTENBLITH, *supra* note 23, at 844.
[86] Rickard v. Pringle, 293 F. Supp. 981, 984 (E.D.N.Y. 1968).
[87] *See* Lancaster v. Smith, 330 F. Supp. 65, 68 (S.D. Ala. 1971) ("It is public policy that these awards be liberal in order to encourage mariners to instinctively respond to need.").

Overall, the requirement of voluntary service is "usually easily satisfied unless the salvor is a member of the ship's crew or is under some other legal compulsion to assist the ship."[88]

3. Success Requirement

The third and final prong of the law of salvage analysis considers whether the salvage efforts were successful in bringing about the rescue of the persons and/or property in peril.

In addition to proving the existence of maritime peril and voluntarily saving imperiled people and property, the salvor must also be successful in his or her salvage efforts. Success has long been considered a necessary component of a valid salvage claim:

> Public policy encourages the hardy and adventurous mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to embezzlement and dishonesty, the law allows him, in case he is *successful*, a liberal compensation."[89]

More than 150 years ago, the Supreme Court declared in *The 'Sabine'* case that "[p]roof of success, to some extent, is as essential as proof of service, for if the property is not saved, or if it perishes, or, in case of capture, if it is not retaken, no compensation will be allowed."[90] *The 'Sabine'* case illustrates that it is the successful rendering of services that makes a salvor entitled to a salvage award.[91] Salvage efforts are laborious and risky, not only in regards to individual safety, but also due to the

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[88] Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U.L. REV. 559, 608 (1995).
[89] *The Blackwall*, 77 U.S. 1, 14 (1870) (emphasis added).
[90] 101 U.S. 384, 384 (1880).

[91] *Id.* at 390:
There is a broad distinction . . . between salvors who volunteer to go out and salvors who are employed by a ship in distress. Salvors who volunteer go out at their own risk for the chance of earning reward, and if not successful they are entitled to nothing, the rule being that it is success that gives them a title to salvage remuneration.

speculative nature of compensation, which is contingent upon satisfaction of the elements of a salvage award claim.

Having considered the three components necessary to a valid salvage award claim, this article will now turn to a discussion of how courts determine the proper amount of a salvage award.

4. Salvage Awards: An Incentive to Act as a Good Samaritan

For hundreds of years, American courts have recognized the public benefit served by salvage services through the issuance of an award.[92] In *The Blackwall*, the Supreme Court recognized the dangers faced by contemporary salvors, and the concomitant need to compensate such valiant efforts accordingly: "Compensation as salvage is not viewed by the admiralty courts merely as pay . . . but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property."[93]

A salvage award given to a salvor often exceeds the value of the services rendered, and if no owner comes forward to claim the property, the salvor is usually awarded the total value of the property.[94] A salvage award is often given *in specie*, that is, in actual cargo, rather than as a monetary payment.[95]

The Blackwall[96] is one of the most noted cases regarding the law of salvage and salvage awards. In *The Blackwall*, the salvors operated a steam tugboat that assisted the subject ship after it caught fire while anchored in the harbor of San Francisco.[97] The salvors claimed that if they had not acted, the cargo and ship would have been destroyed, and that their actions in helping to put out the fire and tow the ship to safety required great effort by and danger to the steam tugboat's master and crew.[98] The Supreme Court eventually reduced the amount of the salvors' award from one-tenth of the value of the property to five thousand dollars,

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[92] *See The Blackwall*, 77 U.S. 1, 14 (1870).
[93] *Id.*
[94] *Id.* at 13–14.
[95] GERSTENBLITH, *supra* note 23, at 844.
[96] *The Blackwall*, 77 U.S. 1 (1870).
[97] *Id.* at 8–9.
[98] *Id.*

reasoning that the amount of salvage finally awarded more accurately reflected the service rendered by firemen on the scene, not that of the master and crew.[99] The case is most often remembered for its announcement of factors courts traditionally include in a salvage award decree. These factors are:

> (1) The labor expended by the salvors in rendering the salvage service. (2) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4) The risk incurred by the salvors in securing the property from the impending peril. (5) The value of the property saved. (6) The degree of danger from which the property as rescued.[100]

The *Blackwall* factors provide a useful framework for courts when determining the amount of a salvage award. The courts have expanded upon the *Blackwall* factors in subsequent decisions. For example, over one hundred years later in *Cobb Coin v. Unidentified, Wrecked, & Abandoned Sailing Vessel,* the court stated that a salvage award should be given *in specie* when "the property saved is uniquely and intrinsically valuable beyond its monetary value."[101] Money is not the only additional factor considered in a salvage award analysis.

A finder's demonstrated respect for archaeological preservation of wreck sites is another factor considered in assessing a salvage award.[102] Archaeologists seek to maintain artifacts *in situ*, so that researchers, historians, and educators can glean important information from shipwrecks. For example, the court in *Columbus-America Discovery Group* declared that "salvors who seek to preserve and enhance the historical value of

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[99] *Id.* at 15.
[100] *Id.* at 13-14.
[101] Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 549 F. Supp. 540, 560 (S.D. Fla. 1982).
[102] *Columbus-America Discovery Group*, 974 F.2d at 468.

ancient shipwrecks should be justly rewarded."[103] The case is also noted for its direction that the salvor's preservation of archaeological remains and his use of appropriate scientific techniques should be taken into account as a factor in determining the size of the salvor's award.[104]

The law of maritime and admiralty, and within it the laws of finds and of salvage, govern the disposition of underwater cultural resources. Having assessed the historical and modern development of the law of finds and of salvage, this article now turns to an overview of two land-based statutes that contributed to the passage of the Abandoned Shipwreck Act.

C. Land-Based Statutes Also Apply to Protection of UCH

The Federal Government has used the Antiquities Act of 1906 and the Archaeological Resources Protection Act of 1979 to assert title to ancient vessels that sunk close to the U.S. coast in order to preserve the wrecks.[105] These Acts demonstrate that Congress has long considered the need to protect American antiquities from imperilment.

1. The Antiquities Act: An Old Statute with the Potential for Modern Application

Application of the Antiquities Act of 1906[106] to abandoned shipwrecks is limited to protected marine areas, such as national seashores, where the U.S. has either ownership of, or expressly asserted control over, UCH.[107] The Antiquities Act consists of two main components: (1) criminal enforcement, which provides for the prosecution of persons who appropriate, excavate, injure, or destroy any historic ruin, or any object of antiquity, situated on lands owned or controlled by the Federal Government; and (2) the authorization, through the granting of a permit, of the examination of ruins, the excavation of archaeological sites, and the gathering

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[103] *Id.*
[104] GERSTENBLITH, *supra* note 23, at 853.
[105] Phelan & Forsyth, *supra* note 4, at 128.
[106] 16 U.S.C. §§ 431–433.
[107] Varmer & Blanco, *supra* note 12, at 219.

of objects of antiquity on lands owned or controlled by the Government.[108]

The *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*[109] case successfully invoked the permitting provision of the Antiquities Act to prevent looting and unauthorized salvage on federal lands. The *Lathrop* case stands for the principle that the Antiquities Act's permitting provision can be used as a tool to protect UCH located in waters which the Government owns or controls (such as marine protected areas).[110]

The Antiquities Act remains relevant and potentially useful for protection of UCH in light of its permitting provision. Eventually, constitutional challenges to the Antiquities Act[111] led to the enactment of the Archaeological Resources Protection Act.

2. *The Archaeological Resources Protection Act: Stringent Regulations*

The Archaeological Resources Protection Act of 1979[112] ("ARPA") applies to "archaeological resources" of at least 100 years of age located in national parks and all other public lands owned and administered by the United States.[113] ARPA's definition of an archaeological resource limits the number of items that fall within its scope. For example, an item will not be protected by ARPA if it is 99 years old. ARPA requires a permit for the excavation, removal, or alteration of archaeological resources.[114] The statute is thorough in its language, and includes sections describing prohibited acts and criminal penalties,[115] civil penalties,[116] and enforcement.[117]

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[108] *Id.* at 218–19.
[109] 817 F. Supp. 953 (M.D. Fla. 1993).
[110] Varmer & Blanco, *supra* note 12, at 219.
[111] *See* U.S. v. Diaz, 499 F.2d 113 (9th Cir. 1974) (holding that the Antiquities Act was unconstitutionally vague and therefore a violation of due process); *but see* U.S. v. Smyer, 596 F.2d 939 (10th Cir. 1979) (holding that the Antiquities Act suffered "no constitutional infirmity").
[112] 16 U.S.C. §§ 470aa-mm.
[113] 16 U.S.C. § 470bb.
[114] 16 U.S.C. § 470cc.
[115] 16 U.S.C. § 470ee.
[116] 16 U.S.C. § 470ff.

ARPA's criminal enforcement provision was successfully invoked in *U.S. v. Hampton*,[118] a matter that eventually resulted in a plea bargain. In *Hampton*, a salvor was prosecuted for salvaging UCH in Florida's Key Biscayne National Park.[119] ARPA does not usually apply to the marine environment unless the federal government owns the seabed of the marine protected area[120] (as was the case in *Hampton*, where the salvor conducted illicit operations in a national park). Since ARPA's prohibition against trafficking archaeological resources has been applied to objects taken from private land,[121] the statute may also be used to prohibit trafficking in UCH.[122]

ARPA is a powerful statute protecting cultural heritage resources, based on its unambiguous language regarding penalties and its enforcement. ARPA could be applied to UCH resources, and should be looked to for guidance on improving the ASA. This proposal will be explored in further detail later in this article, but first a final land-based statute protecting cultural heritage resources will be discussed.

3. *The National Historic Preservation Act: Protection of Historic Properties*

The National Historic Preservation Act of 1966[123] (the "NHPA") opens with a declaration that "the preservation of . . . irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans."[124] Section 106 of the NHPA requires Federal agencies to consider the effect of any proposed federal, federally assisted, or federally funded "undertaking" on any historic property that is "included in or eligible for inclusion in the

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[117] 16 U.S.C. § 470gg.
[118] Varmer & Blanco, *supra* note 12, at 219.
[119] *Id.*
[120] DROMGOOLE, *supra* note 1, at 220.
[121] *See* U.S. v. Gerber, 999 F.2d 1112 (7th Cir. 1993).
[122] Varmer & Blanco, *supra* note 12, at 220.
[123] 16 U.S.C. §§ 470.
[124] 16 U.S.C. § 470(b)(4).

National Register [of Historic Places]."[125] The statute authorizes the Secretary of the Interior, "in consultation with national historical and archaeological associations," to "establish or revise criteria for properties to be included on the National Register."[126]

Section 110(a)(2) of the NHPA requires Federal agencies to manage historic properties under their "jurisdiction or control."[127] This includes a duty to identify, evaluate, and nominate eligible historic properties under such control for inclusion in the National Register.[128] The NHPA is procedural in nature and does not contain enforcement mechanisms to penalize violators that harm UCH.[129] Despite this loophole, the NHPA is an explicit recognition of the need to protect historic properties.

This brief overview represents just a portion of the legal and historical backdrop preceding the enactment of the Abandoned Shipwreck Act. As explained by Professor Russell G. Murphy of Suffolk University Law School, "[t]he ASA also seeks to fill gaps in federal legal protection of shipwrecks arising under the Archaeological Resources Protection…[and] Antiquities…Acts."[130] The Abandoned Shipwreck Act is discussed later in this article.

D. The Abandoned Shipwreck Act Complicates the Protection of The United States' UCH Resources

The Abandoned Shipwreck Act falls short of its goal of providing adequate legal protection of American UCH. To explain the problems with this key statute, I will begin by discussing the background and legislative history predating the passage of the Act. I will then describe the legal operation of the statute, its important definitions section, and focus on the statute's practical drawbacks.

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[125] 16 U.S.C. § 470f.
[126] 16 U.S.C. § 470(a)(2).
[127] 16 U.S.C. § 470h-2(a)(2).
[128] *Id.* The National Register of Historic Places is a list of places in the United States deemed worthy of preservation.
[129] Varmer & Blanco, *supra* note 12, at 220–21.
[130] Murphy, *supra* note 5, at 170–71.

1. Background and Legislative History: Congress Saw Change was Needed

American courts have varied in their application of the law of finds and the law of salvage. Congress enacted the ASA to ameliorate the confusion over the ownership of, and the responsibility for, historic wrecks within the jurisdiction of the individual states of the U.S., and to protect underwater archaeological resources located in these waters.[131] In fact, the ASA was introduced as a direct consequence of the outcome in *Treasure Salvors I*, where a finder, state government, and the Federal Government all battled over rights to a wreck.[132] The ASA controls the search for and exploration of historic wrecks and sets the legal framework for modern "treasure hunting" in the U.S.[133]

In terms of the ASA's historical development, Professor Gerstenblith explains that "[t]he conflict between state regulatory statutes and federal maritime jurisdiction resulted in enactment of the Abandoned Shipwreck Act of 1987 . . ."[134] Professor Gerstenblith further propounds that technological advances and the congressional reaction to judicial decisions during the 1980s applying the law of finds prompted Congress to enact the ASA.[135] In enacting the ASA, Congress also recognized that the focus of traditional salvage law was "commercial, not cultural resource management or recreation."[136] Another important rationale driving the enactment of the ASA was the view that the individual states were "better suited to deal with historic preservation concerns on the local level."[137] The ASA represents the federal codification that the states are the most adept stewards of UCH.

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[131] Phelan & Forsyth, *supra* note 4, at 128.
[132] Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 498 F. Supp. 907 (D. Fla. 1976), *aff'd*, 569 F.2d 330 (5th Cir. 1978) (known as *Treasure Salvors I*).
[133] Murphy, *supra* note 5, at 167.
[134] GERSTENBLITH, *supra* note 23, at 583.
[135] GERSTENBLITH, *supra* note 23, at 854.
[136] H.R. Rep. No. 514, 100th Cong., 2d Sess., pt. 1, at 3, reprinted in U.S.C.C.A.N. at 366.
[137] Murphy, *supra* note 13, at 171–72.

In the legislative history of the ASA, the Congressional House Committee on Merchant Marine and Fisheries declared:

> [A]dmiralty principles are not well-suited to the preservation of historic and other shipwrecks to which this Act applies. Abandoned shipwrecks . . . are not considered . . . to be in marine peril, necessitating their recovery by salvage companies. . . . In light of today's experience and conditions, the Committee does not believe that the law of finds and the law of salvage well serve the protection of our nation's maritime heritage. This heritage is best protected by states acting through their historic preservation programs consistent with federal guidelines.[138]

The ASA represents Congress' attempt to alleviate the confusion rampant in this area of jurisprudence, a worthwhile goal but one that has experienced several problems in application. Before discussing some of these problems, it is helpful to understand the statute's important definitions and its legal operational procedures.

2. *Legal Operation: A Complex Transfer and Drastic Changes to UCH Law*

The ASA abrogates the law of finds and of salvage as applied to shipwrecks that are abandoned and embedded in submerged lands of a state and instead vests title to such shipwrecks in the United States, which then automatically transfers title to the individual state.[139] This is no small task: an estimated 50,000 shipwrecks lie in U.S. territorial waters, and a high percentage of historic wrecks are located within state boundaries.[140] The statute's impact on the law of finds, the law of

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[138] H.R. Rep. No. 514, 100th Cong., 2d Sess., pt. 1, at 8, reprinted in U.S.S.C.A.N. 365, 377.

[139] GERSTENBLITH, *supra* note 23, at 853.

[140] Murphy, *supra* note 5, at 168. Territorial waters extend out three nautical miles from the coast of each state. 43 U.S.C. § 1312 (2002).

salvage, and, relatedly, on private salvors, is explained by Professor Murphy as follows:

> Marine archeologists, state natural resources officials, and various organizations are on record as condemning search and recovery practices of private salvors. The ASA effectively disempowers these salvors by subjecting them to unlimited, nonuniform and unreviewable state regulation, and by eliminating the system of incentives and rewards provided by federal admiralty courts that justified the salvor's work.[141]

The ASA has a positive focus in that its goal is to entrust individual states with the preservation of shipwrecks of historical and archaeological value. The ASA aims to protect "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."[142] Although its enactment was driven by positive policy goals, the ASA has proven difficult to apply in practice, due in part to its ambiguous statutory language.

3. *Definitions: Difficulties in Determining Abandonment Resurface*

The ASA offers several crucial definitions, but suffers from a lack of statutory clarity overall. The definitions are crucial to understanding the scope and operation of the statute. The Act defines "abandoned" shipwrecks as those that "have been deserted and to which the owner has relinquished ownership rights with no retention."[143] A "shipwreck" is defined as "a vessel or wreck, its cargo, and other contents."[144] "Embedded" is defined as "firmly affixed in the submerged lands or in coralline formations such that

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[141] *Id.* at 171-72.
[142] 43 U.S.C. § 2105(a) (1988).
[143] 43 U.S.C. § 2101(b) (1988).
[144] 43 U.S.C. § 2102(d).

the use of tools of excavation is required in order to move the bottom sediments and gain access to the shipwreck, its cargo, and any part thereof."[145] Additionally, "submerged land" means "lands beneath navigable waters," and includes submerged lands within Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands.[146]

Constitutional challenges to the territorial reach of the ASA have proven unfruitful. For example, in *Sunken Treasure, Inc. v. The Unidentified, Wrecked, and Abandoned Vessel*, the United States District Court for the District of Columbia upheld the ASA's application to U.S. territories, in a case involving the U.S. Virgin Islands.[147]

Although "abandoned shipwreck" is expressly defined, "abandonment" is not expressly defined by the ASA. Ole Varmer and Caroline M. Blanco explain that the reason for the missing definition "is because Congress relied on [the] *Treasure Salvors I* case and its progeny where federal admiralty courts traditionally inferred the abandonment of long-lost shipwrecks by the passage of time and absence of a claim therein."[148] Court decisions that have applied the ASA have been inconsistent as to whether abandonment must be explicit or can be implied from circumstantial evidence.

Another concern, as was the case with interpretation under the traditional maritime laws of find and salvage, is the court's interpretation of what type of proof must be shown to demonstrate abandonment pursuant to the ASA. The ASA's unclear statutory language has resulted in litigation in order to ascertain what type of abandonment must be shown. Some courts have ruled that express abandonment must be shown to prove abandonment under the ASA. In *Sea Hunt v. Unidentified Shipwrecked Vessel or Vessels*,[149] the state of Virginia claimed title to the *Juno* and *La Galga* warships under the ASA, arguing that Spain had abandoned

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[145] 43 U.S.C. § 2102(a).
[146] 43 U.S.C. § 2102(f).
[147] Sunken Treasure, Inc. v. The Unidentified, Wrecked, and Abandoned Vessel, 857 F. Supp. 1129, 1137 (D.V.I. 1994).
[148] Varmer & Blanco, *supra* note 12, at 207.
[149] Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel *et al.*, 221 F.3d 634 (4th Cir. 2000).

the vessels.[150] Spain argued that it had not abandoned the wrecks and notified Sea Hunt, Inc. of its desire to reject salvage services.[151] The district court held that Spain had abandoned one of the two ships.[152]

The Fourth Circuit later held that Spain had abandoned neither ship, declaring, "Under admiralty law, where an owner comes forward to assert ownership in a shipwreck, abandonment must be shown by express acts."[153] The court reasoned that the rule that the U.S. Government cannot be subject to an implied abandonment standard also applies to the vessels of a foreign nation that are discovered within United States' territorial waters.[154] In support of its conclusion, the court also looked to the fact that Spain did not engage in an express act demonstrating its intent to abandon the ships, and the wreck was the gravesite of Spanish sailors.[155] The court reasoned that Spain would not desire to abandon a site that was the final resting place of Spanish citizens, and therefore would not want excavation to occur without proper archaeological and scientific measures in place.

Other cases have demonstrated the willingness of courts to allow inferential abandonment under the ASA so long as such evidence of inferential abandonment is strong enough to satisfy the clear and convincing burden. For example, in *Fairport International Exploration, Inc. v. Shipwrecked Vessel*,[156] the court held that abandonment for purposes of the ASA may be proved inferentially.[157] The court stated that, in determining whether a shipwreck has been abandoned, neither lapse of time nor an owner's failure to return to a shipwreck site will necessarily establish abandonment, and that the state must establish abandonment by clear and convincing evidence.[158]

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[150] *Id.* at 638.
[151] *Id.* at 639.
[152] *Id.* at 640.
[153] *Id.* at 641.
[154] *Sea Hunt,* 221 F.3d 634, at 642-43.
[155] *Id.* at 647.
[156] Fairport International Exploration, Inc. v. Shipwrecked Vessel, 72 F. Supp. 2d 795 (W.D. Mich. 1999).
[157] *Id.* at 797.
[158] *Id.*

The Second Circuit in *Northeast Research v. One Shipwrecked Vessel*[159] also held that abandonment under the ASA may be inferred, but added the extra requirement that while such inferential abandonment may properly be gleaned from circumstantial evidence, such evidence must be sufficiently strong as to satisfy the clear and convincing burden.[160] The *Northeast* court found it probative that there were no efforts to locate the wreck for over 150 years. In addition, the court reasoned that the ship's poor working conditions and its spoilable contents strongly called into question the economic worth of the vessel and the then-owners' continued interest in recovery.[161]

E. The ASA "Guidelines" Provide Limited Guidance

Another interesting component of the ASA is found in the Act's "Guidelines" issued by the National Park Service in 1990.[162] The ASA Guidelines are advisory and non-binding.[163] Additionally, the ASA tasks the Secretary of the Interior with achieving the following lofty, goals:

> The Act directs the National Park Service to prepare the guidelines being issued herewith to assist the States and Federal agencies in developing legislation and regulations to carry out their responsibilities under the Act. In accordance with the Act, the guidelines are intended to maximize the enhancement of cultural resources; foster a partnership among sport divers, fishermen, archeologists, salvors, and other interests to manage shipwreck resources of the States and the United States; facilitate access and utilization by recreational interests; and recognize the interests of

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[159] Northeast Research L.L.C. v. One Shipwrecked Vessel, 729 F.3d 197 (2d Cir. 2013).
[160] *Id.* at 210.
[161] *Id.* at 212.
[162] Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50116 (1990) (to be codified at 50 C.F.R. pt. 17).
[163] GERSTENBLITH, *supra* note 23, at 854.

> individuals and groups engaged in shipwreck discovery and salvage.[164]

The Guidelines exacerbate the confusion regarding which authority governs protection of UCH by stating that they exist to merely assist local and national authorities to develop rules to carry out their responsibilities as stewards of UCH. In other words, the federal statute allows the states to carry on with their varied applications of stewardship. Another issue is that it is unrealistic to expect archaeologists and shipwreck salvors to agree on the same legal standard, as their personal interests in underwater resources are diametrically opposed. Additionally, despite the ASA Guidelines calling for the cooperation of salvors, the ASA, for wrecks within its scope, "eliminates the incentives and rewards provided by federal admiralty courts that justified the salvor's work."[165] By eliminating application of the law of salvage to wrecks that fall within the ambit of the ASA, salvors no longer are motivated by a potential salvage award to come to the aid of ships and passengers in maritime peril. As a result, private salvors may engage in operations with more nefarious motives by displaying utter disregard for the property they plunder.

F. An Increase in Litigation as a Result of the ASA

Another negative consequence of the ASA's lack of clarity is the significant number and variety of constitutional challenges that have been brought against it. For example, the ASA has experienced several constitutional challenges to its validity based on the Eleventh Amendment. The Eleventh Amendment states that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[166] The Eleventh Amendment has been interpreted to preclude suits in federal court against a state by citizens of the same state.[167] After

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[164] Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50, 116 (1990).
[165] Murphy, *supra* note 5, at 171–72.
[166] U.S. CONST. amend. XI.
[167] GERSTENBLITH, *supra* note 23, at 854.

passage of the ASA, the constitutional question arose whether the Eleventh Amendment would preclude admiralty *in rem* suits, because such suits would be brought in federal court against the state.[168]

Zych v. Wrecked Vessel believed to be Lady Elgin[169] is a fascinating and important case, both historically[170] and in terms of its implications for modern American law governing UCH. A diver named Zych located the 1860 shipwreck of the *Lady Elgin*, and commenced an *in rem* action under the law of admiralty.[171] The issue facing the Seventh Circuit was whether the Eleventh Amendment prevented the district court from declaring that a finder had rights superior to a state claiming an interest in a wreck.[172]

The ship had set sail from Wisconsin and was intended to reach Chicago as its final destination. The voyage had significant local importance, in the tumultuous time just before the U.S. Civil War.[173] After a political rally, a German band and 50 additional passengers boarded the ship for its return voyage.[174] As the band played and passengers danced, the *Lady Elgin* was sailing off the coast of Waukegan, Illinois, when another vessel struck her without warning. The negligent vessel was unlighted, had the *Lady Elgin* in her sights twenty minutes before the collision, did not attempt to change its course, and continued on to Chicago after the incident rather than remaining on site to ensure the safety of

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[168] *Id.*

[169] Zych v. Wrecked Vessel believed to be *Lady Elgin*, 960 F.2d 665 (7th Cir. 1992).

[170] *Id.* at 667. ("So many Irish political activists died on September 8, 1860, that the disaster has been credited with transferring the balance of political power in Milwaukee from the Irish to the Germans.").

[171] *Id.* at 666. An admiralty in rem action is an action in which a vessel is named as the defendant.

[172] *Id.*

[173] *Id.*:

> One hundred members of the Union Guards in Milwaukee's Irish, Democratic, "Bloody Third" Ward hired the *Lady Elgin* for passage the evening of September 6, 1860, taking their wives, children, and friends to Chicago for the rally the next day for Stephen Douglas, running for President against Abraham Lincoln.

[174] *Zych*, 960 F.2d 665, 667.

the *Lady Elgin* and her passengers.[175] Within thirty minutes of the collision, the *Lady Elgin* sank about ten miles off-shore.[176] Nearly 300 passengers perished, in what is remembered as the second-greatest tragedy in the history of the Great Lakes.[177]

Aetna Insurance Company paid and became the owner of the wreck after the disaster; it then instructed its agents not to abandon the *Lady Elgin*.[178] Nothing other than debris was found for 129 years, until Zych located the shipwreck in the deep water of Lake Michigan.[179] Zych sought a judgment confirming his title "against all claimants and the world," and both the United States Government and the Government of the State of Illinois intervened.[180] The Seventh Circuit, in an opinion penned by Judge Frank Easterbrook, held that it is the existence of a claim, rather than the strength of a legal claim to a wreck, that invokes a state's sovereign immunity arising under the Eleventh Amendment [181]

In 1998, the Supreme Court heard an Eleventh Amendment challenge in another landmark case.[182] In *California & State Lands Commission v. Deep Sea Research, Inc.*[183] (referred to as the *Brother Jonathan* decision), Deep Sea Research ("DSR") located the *S.S. Brother Jonathan* in California's territorial waters.[184] The *Brother Jonathan*'s cargo included a shipment of

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[175] *Id.*:

> Captain D.M. Malott of the *Augusta,* by contrast, was condemned for negligent sailing and leaving another vessel in distress. So strong was public sentiment that in May 1861 the *Augusta* (renamed the *Colonel Cook* in an unsuccessful attempt at disguise) abandoned her cargo in Milwaukee to avoid being burned by a mob and fled the Great Lakes. A few years later Malott and the crew of the *Augusta* met their fate on the bark *Major,* which vanished with all hands in Lake Michigan.

[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Zych*, 960 F.2d 665, 667.
[180] *Id.*
[181] *Id.* at 670.
[182] California and State Lands Commission v. Deep Sea Research, Inc., 523 U.S. 491 (1998).
[183] *Id.*
[184] *Id.* at 497.

up to $2 million in gold and a valuable U.S. Army payroll.[185] When DSR turned to the federal courts for resolution of its claims to the vessel, the State of California contended that the Eleventh Amendment precluded a federal court from considering DSR's claims in light of the State's asserted rights to the *Brother Jonathan* under federal and state law.[186]

The Supreme Court held, in an opinion penned by Justice Sandra Day O'Connor, "that the Eleventh Amendment does not bar the jurisdiction of a federal court over an *in rem* admiralty action where the *res* is not within the State's possession."[187] The Court instructed that competing interests to the title to wreckage of a ship or vessel must be resolved in federal court before the application of the ASA.[188]

The Court reasoned that although the Eleventh Amendment bars federal jurisdiction over general title disputes relating to State property interests, it does not necessarily follow that it applies to *in rem* admiralty actions, or that in such actions, federal courts may not exercise jurisdiction over property that the State does not actually possess.[189] The *Brother Jonathan* case limited the application of the Eleventh Amendment to cases involving claims to vessels in the state's actual "possession," and required trial courts to find abandonment by clear and convincing evidence of the type of "abandonment" defined and recognized by traditional admiralty and maritime law principles.[190]

The *Brother Jonathan* decision is pivotal because it weakens the application of the ASA to UCH by affecting the amount of historic wrecks that fall within its scope. "The number of historic shipwrecks to which the ASA applies, particularly in light of the *Brother Jonathan* decision's reliance on admiralty law which requires proof of abandonment by clear and convincing evidence, is limited."[191] The Supreme Court's decision, therefore, seems to

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[185] *Id.* at 495.
[186] *Id.* at 496.
[187] *Id.* at 494–95.
[188] *California and State Lands Comm'n*, 523 U.S. at 508.
[189] *Id.* at 506.
[190] *Id.* at 507.
[191] GERSTENBLITH, *supra* note 23, at 859.

have compromised Congress' goal in enacting the ASA to transfer the resolution of most of these cases to the states.[192]

Another constitutional challenge concerned "whether the ASA violates the Constitution's grant of exclusive jurisdiction over admiralty law to the federal courts by effectively transferring this area of admiralty law to the state courts."[193] As explained by Professor Murphy:

> [I]n essence, once it is determined that a shipwreck is covered by the ASA, all rights and claims to it are dependent on state law, must be asserted in state court, and will be evaluated without reference to the traditional body of admiralty law that has been applied by the federal courts since the enactment of the United States Constitution.[194]

Other courts have followed the *Brother Jonathan* precedent and considered the effect of the Eleventh Amendment on a state's claim to a shipwreck under the ASA by focusing on whether a state had "actual possession" of the shipwreck. Such analysis based on this language was present in the Western District of New York Court's decision in *Northeast Research, LLC v. One Shipwrecked Vessel, her Tackle, Equipment, Appurtenances, Cargo*,[195] in *Great Lakes Exploration Group, LLC v. Unidentified Wrecked and (For Salvage-Right Purposes), Abandoned Sailing Vessel*,[196], and in the *Fathom Exploration, LLC v. Unidentified Shipwrecked Vessel or Vessels*[197] decisions.

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[192] *Id.*
[193] *Id.*
[194] Murphy, *supra* note 5, at 170.
[195] Northeast Research, LLC v. One Shipwrecked Vessel, her Tackle, Equipment, Appurtenances, Cargo, 790 F. Supp. 2d 56 (W.D.N.Y. 2011).
[196] Great Lakes Exploration Group, LLC v. Unidentified Wrecked and (For Salvage-Right Purposes), Abandoned Sailing Vessel, 522 F.3d 682 (6th Cir. 2008).
[197] Fathom Exploration, LLC v. Unidentified Shipwrecked Vessel or Vessels, 352 F. Supp. 2d 1218 (S.D. Ala. 2005).

G. Other Practical Problems with the ASA

Another problem with the ASA is that despite its instructive Guidelines, the statute does not require any uniformity among states or the adherence to any particular archaeological, scientific, or other standards in the exploration of submerged historic wrecks.[198] Additionally, while protective of certain categories of UCH, the ASA has proven particularly vulnerable to legal attacks by treasure salvors:

> [i]nstead of mounting a strong argument that a wreck had been abandoned in order that finds law would be applied, they argued that the rights of existing owners should not be lightly dismissed in order to ensure that salvage law would be applied and a generous reward would ensue.[199]

These real-world consequences are in direct conflict with the ASA Guideline's stated mission, and the amount of resulting litigation illustrates that something is amiss in the application of the ASA. More focus should be placed on enforcing scientific and archaeological standards in the exploration and excavation of these underwater resources. Such standards are crucial to the maintenance of artifacts and the related information they can convey *in situ*. Without procedural safeguards in place, unregulated salvors will surely disregard cultural heritage concerns and retrieve precious artifacts at will, potentially displacing the objects from their current setting and causing a resultant loss of valuable context.

H. Local Protection of UCH Varies State-by-State

Shipwrecks are protected under Illinois law pursuant to the Illinois Historical and Paleontological Resources Act.[200] The Illinois Historic Preservation Agency ("IHPA") is the main legal

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[198] DROMGOOLE, *supra* note 1, at 188.
[199] *Id.*
[200] 20 ILCS § 3435/.01.

authority in charge of the state's stewardship of UCH.[201] The State of Illinois grants the IHPA the exclusive right and privilege to regulate, explore, excavate, or survey archaeological resources.[202] The Illinois statute, unlike ARPA, expressly defines a shipwreck as an archaeological resource.[203]

The statute is thorough regarding permits, penalties, and enforcement,[204] and even incentivizes citizens with information about violators to come forward (through the issuance of a reward). Not every state statute regarding protection of cultural resources is thorough and explicit, and each state cannot plausibly be expected to have nearly identical language. These statutory aspects affect the application of the ASA because states differ in how they protect local historic resources.

IV. FUTURE AMENDMENTS

The United States of America and its state governments are faced with the monumental task of protecting and preserving UCH for current and future generations.[205] This is a problem complicated by advances in technology, and "[w]ith increased underwater activity among treasure hunters, salvors, and archaeologists, the issue of title to sunken ships and to artifacts found on these vessels has become more prominent in recent years."[206] Among treasure hunters, salvors, and archaeologists, only the latter pledge to dedicate their efforts to cultural preservation and education. The ASA has been accused of inciting a rise in illicit activities involving UCH:

> An examination of these [ASA] cases suggests that current law regulating historic shipwrecks not only discourages lawful search and recovery but actually encourages covert, unauthorized and illegal salvage operations. Such decisions seem destined to lead to

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[201] 20 ILCS § 3435/1.
[202] *Id.*
[203] 20 ILCS § 3435/.02.
[204] 20 ILCS § 3435/3; 20 ILCS § 3435/3.2.
[205] Varmer & Blanco, *supra* note 12, at 205.
[206] Phelan & Forsyth, *supra* note 4, at 119.

> the emergence of a new breed of technologically sophisticated "pirates."[207]

The U.S. Government is thus faced with a conundrum: "how to preserve these antiquities and protect them from treasure hunters who recover underwater artifacts with little or no regard for scientific excavation, research, or public access."[208] It is a problem without a clear-cut solution, which must be addressed in a systematic manner if the United States is to preserve its UCH.

A. Amend the ASA to Vest and Keep Title to UCH in the Federal Government

Federal law preempts state law, a truth that buttresses the argument for one national policy governing protection of UCH. According to the *Cobb Coin v. Unidentified, Wrecked, & Abandoned Sailing Vessel* case,[209] when a state's laws concerning maritime salvage conflicted with federal maritime principles, the state laws were not given effect, and the federal court was not required to abstain from interfering with the criminal proceeding against a salvage company. Such conflict of laws within United States jurisdiction exemplifies the need to adopt a uniform body of law governing protection of American UCH.

The United States is a vast nation consisting of 50 diverse and unique states, each with its own particular concerns and political agendas; thus, political cooperation in Congress has become rare. For these reasons, it is nearly impossible to affect complete uniformity in this area of law. However, the Federal Government has superior resources to preserve and protect UCH, and to enforce penalties for violations. For example, although states are viewed as more adept stewards on the local level, can a state such as Illinois, which is in perpetual debt, be trusted to budget for measures designed for proper stewardship of UCH? Such belief seems unfounded in light of the fact that Illinois still

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[207] Murphy, *supra* note 13, at 168.
[208] Phelan & Forsyth, *supra* note 4, at 119.
[209] Cobb Coin Co. v. Unidentified, Wrecked &Abandoned Sailing Vessel, 549 F. Supp. 540, 562 (S.D. Fla. 1982).

has not approved a state budget for 2016 as of this writing in October of 2016.

Amending the ASA to automatically vest and keep title to UCH in the Federal Government would provide clarity from a legal perspective. Keeping title in the Federal Government would alleviate Eleventh Amendment concerns, and would help further the goal of uniformity by continuing to apply traditional admiralty law that has been the province of the federal courts since the drafting of the Constitution.[210] Such vesting in the Federal Government could perpetuate a policy of cultural property nationalism, since the Federal Government would be acting to protect and preserve UCH for the benefit of all current and future Americans.

Local officials, perhaps more than their national counterparts, understand the unique needs of each state in protecting and preserving its UCH. It is for this reason that these proposed amendments to the ASA would require each state to elect a local official to oversee compliance with the amended statute and with stewardship of the individual state's UCH. Local security experts, crime enforcement personnel, and customs officials can also help the cause. The police possess patrol boats that can be used to deter illegal excavations. The U.S. Navy and Coast Guard already enforce America's territorial waters, as do Customs and Border Protection personnel. Calling upon these authorities to help protect and preserve wreck sites and other important UCH resources could help maintain these jewels of the deep.

B. Amend the ASA to Define a Clear Standard of Abandonment

American courts have historically struggled with the issue of abandonment under traditional admiralty law principles. Therefore, it would make sense to amend the ASA to expressly define "abandoned." This amendment could codify the Supreme Court's holding in the *Brother Jonathan* decision. To make things more explicit, this proposed amendment could clearly spell out that proof of abandonment must be shown by clear and convincing evidence. The ASA should also state whether abandonment must

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[210] Murphy, *supra* note 5, at 184.

be proven by express acts or can be inferred by circumstantial evidence. Explaining which standard will apply to abandonment is crucial, since the courts have ruled that the clear and convincing burden may be satisfied in both situations.

C. Amend the ASA to Incentivize Archaeologically–Sensitive Methods

The ASA should be amended to make archaeological preservation an explicit goal of the statute. The amendment could guarantee an award for private discovery of historic shipwrecks and discovery of items by methods sensitive to archaeological and environmental concerns.[211] Perhaps the archaeological and scientific communities can be consulted to help draft this language. This proposed amendment could potentially balance and accommodate the competing interests of preservationists, commercial salvors, and sport divers.

D. Amend the ASA to Harmonize It with Land-Based Statutes

Another amendment could be to harmonize the treatment of underwater cultural resources with the treatment of land-based archaeological resources. One way to accomplish this would be to make the ASA Guidelines mandatory rather than advisory. The Guidelines reference the National Historic Preservation Act and the Archaeological Resources Protection Act.[212] The Archaeological Resources Protection Act features more stringent regulations regarding permits, excavation or removal, definitions of archaeological resources, prohibited acts, penalties, and enforcement. Similar language should be adapted into an ASA amendment, coupled with an enforcement mechanism. This would put the public on notice regarding what is allowed and what is prohibited, along with the penalties for violations. Such an amendment could help clarify the law to private citizens, and hopefully would lessen property disputes among salvors and public regulatory agencies.

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[211] *Id.* at 200.

[212] Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50116.

The thorough permitting provision of the Antiquities Act should also be looked to for guidance. An amendment to the ASA could feature a national licensing agency responsible for issuing permits for the archaeological exploration of wreck sites. This permitting system could work by having a state-elected UCH representative in charge of his or her individual state's compliance with the ASA's amended permitting provision. A permitting amendment such as this would feature federal government oversight, but would still involve state officials in local management.

The National Heritage Preservation Act offers several opportunities for harmonization with the ASA. The Secretary of the Interior manages national Historic Landmarks; perhaps the same could be done regarding historic wrecks. This would make administrative sense because the Department of the Interior has experience dealing in such matters. Additionally, the National Historic Preservation Act states that the Secretary of Interior has the authority to revise the criteria for properties to be included into the National Register of Historic Places.[213] Perhaps shipwrecks at least one hundred years old can automatically fall under the auspices of this statute; otherwise the ASA should be amended to define what constitutes a historic shipwreck. Such a definition could explain what types of wrecks are eligible for inclusion in the National Register.

V. CONCLUSION

These are just a few suggestions on how the ASA may be amended in order to improve America's protection of its invaluable UCH resources. Although the ASA represents a positive attempt to protect these important materials, it suffers from many problems in its real–world application. The amendments proposed in this article, if enacted, would further the goal of protecting and preserving UCH. These irreplaceable UCH resources, especially shipwrecks, offer an unmatched glimpse into our collective history. It is up to us to act in order to effect change

[213] 16 U.S.C. § 470a(a)(2).

in legislation and policy, so that these resources are available for future generations to learn from and enjoy.

The United States' invaluable UCH resources are endangered by unregulated salvage. The main statute designed to protect UCH, the ASA, is ill-equipped to do this job. The ASA should be amended to automatically vest title to UCH resources in the federal government, to define a clear standard of abandonment, to incentivize archaeologically-sensitive methods of exploration, and to harmonize it with land-based statutes protecting archaeological resources. These changes would improve the ASA and strengthen the United States' protection of its UCH.

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