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Rhode Island Facing the Wrongful Birth/Life Debate: Pro-Disabled Sentiment Given Life

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Notes and Comments

Has the Antiquities Act Gone Down With the Ship? A Preemption Analysis of Rhode Island's Shipwreck Laws

I. INTRODUCTION

During the summer of 2000, marine archeologist D.K. Abbass piqued international interest by announcing her theory that a shipwreck discovered just off the shore of Newport, Rhode Island, was the long-lost vessel of the esteemed explorer and navigator Captain James Cook.[1] The vessel, originally named *The Endeavour* and subsequently renamed *The Lord Sandwich,* was leased by the British Navy during the American War for Independence.[2] It is believed that *The Endeavour* was one of thirteen transport vessels scuttled by the British on August 8, 1780, to blockade Newport Harbor.[3] Although it was later found that the wreck was not the famed vessel,[4] the excitement has put the subject of state and federal control of shipwrecks on the table for discussion. Depending on the facts of each case, either federal legislation, state law or the general maritime law governs the treatment of shipwrecks.[5] This comment will address the preemptive effect that federal legislation

1. *See* Jerry O'Brien, *Rhode Island Wreck Is Not Lost Vessel of Capt. James Cook*, Prov. J. Bull., Dec. 14, 2000, at B-1.

2. *See* Australian National Maritime Museum, The Search for the Endeavour, *at* http://www.anmm.gov.au/findhmbe.htm (last visited May 5, 2001).

3. *See id.*

4. *See* O'Brien, *supra* note 1.

5. *See, e.g.,* Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101-2106 (1994); Antiquities Act of Rhode Island, R.I. Gen. Laws §§ 42-45.1-1 to 45.1-13 (1956) (1993 Reenactment); Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 640 F.2d 560, 567 (5th Cir. 1981) (Treasure Salvors II)

and the general maritime law have on Rhode Island's shipwreck laws.

Traditionally, the general maritime laws of salvage and finds have governed the treatment of shipwrecks.[6] However, in 1987, Congress approved the passage of the Abandoned Shipwreck Act of 1987 (ASA).[7] On April 28, 1988, President Ronald Reagan signed the bill into law.[8] Exercising its power to "fix and determine the maritime law which shall prevail throughout the country,"[9] Congress stated that shipwrecks subject to the ASA are no longer governed by the laws of salvage or finds.[10] Through the ASA, the United States asserts title to certain shipwrecks.[11] Title to those shipwrecks is simultaneously "transfer[red] to the state in or on whose submerged lands the shipwreck is located."[12] Rhode Island has also found it to be in its interest to govern the treatment of certain shipwrecks located in its waters.[13] Since 1974, the state has governed these shipwrecks through the Antiquities Act of Rhode Island (Antiquities Act).[14]

With this many regulatory cooks in the galley, a problem of preemption looms ominously on the horizon. The United States Supreme Court passed on its opportunity to clarify the interplay between state shipwreck laws, the general maritime law and the ASA.[15] In 1994, a company named Deep Sea Research, Inc. (DSR) filed suit *in rem* against a vessel named the *Brother Jonathan* in the United States District Court for the Northern District of California.[16] In 1865, the *Brother Jonathan,* a 220-foot, wooden-hulled, double side-wheeled steamship sank after striking a submerged rock off the coast of California.[17] The vessel came to rest

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(noting that shipwrecks are subject to the general maritime laws of salvage and finds).

6. *See Treasure Salvors II*, 640 F.2d at 567-68.

7. *See* Anne G. Giesecke, *The Abandoned Shipwreck Act Through the Eyes of its Drafter*, 30 J. Mar. L. & Com. 167, 168 (1999).

8. *See id.* at 167.

9. S. Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917).

10. *See* 43 U.S.C. § 2106(a).

11. *See id.* § 2105(a).

12. *See id.* § 2105(c).

13. *See* R.I. Gen. Laws § 42-45.1-2 (1956) (1993 Reenactment).

14. *See* 1974 R.I. Pub. Laws ch. 161, § 1.

15. *See* California v. Deep Sea Research, Inc., 523 U.S. 491, 508-09 (1998) (declining to undertake a preemption analysis of the ASA).

16. *See id.* at 496.

17. *See id.* at 495.

under 200 feet of water on submerged lands of the state.[18] Most of the *Brother Jonathan's* passengers and crew perished in the hour that it took for the ship to sink.[19] The ship's cargo, including a shipment of gold worth an estimated value of $2 million and a United States Army payroll worth an estimated $250,000, was also lost in the sinking.[20]

Based on its possession of several artifacts retrieved from the *Brother Jonathan*, DSR sought either an award of title to the ship or a salvage award for its efforts in recovering the wreck.[21] California intervened in the action claiming to have an interest in the *Brother Jonathan* based on the ASA and section 6313 of the California Public Resource Code (section 6313).[22] Section 6313 purports to vest title in the state "to all abandoned shipwrecks . . . on or in the tide and submerged lands of California."[23] California moved to dismiss the case arguing that, because the ASA and section 6313 vested title to the *Brother Jonathan* in the state, DSR's *in rem* action against the vessel was an action against the state and consequently, the Eleventh Amendment precluded a federal court from hearing the case.[24]

On appeal, the Ninth Circuit affirmed the district court's denial of California's motion to dismiss because the state had failed to establish a colorable claim to the wreck of the *Brother Jonathan* under the ASA because the state had not shown, by a preponderance of the evidence, that the wreck was abandoned.[25] Accordingly, California did not have title to the ship under the ASA.[26] Further, the circuit court affirmed the district court's holding that California's claim to the *Brother Jonathan* under section 6313 could not survive because the state statute was preempted to the extent that it granted California title to shipwrecks that are beyond the scope of the ASA.[27] Without a colorable claim of title to the *Brother*

18. *See id.* at 496.
19. *See id.* at 495.
20. *See id.*
21. *See Deep Sea Research*, 523 U.S. at 496.
22. *See id.*
23. *See id.* (quoting Cal. Pub. Res. Code § 6313 (West Supp. 2001)).
24. *See id.* at 496-97.
25. *See id.* at 498.
26. *See id.* at 498-99.
27. *See Deep Sea Research* 523 U.S. at 498.

Jonathan under the ASA, California could not have DSR's action dismissed on the basis of sovereign immunity.

California petitioned for, and was granted, certiorari. The Supreme Court considered: 1) whether a failure to dismiss the case against California would violate the Eleventh Amendment; 2) whether the *Brother Jonathan* is subject to the ASA and; 3) whether the ASA preempts section 6313.[28] First, the Court stated that the Eleventh Amendment would not be implicated in an *in rem* admiralty action in a case, such as the *Brother Jonathan*, where the state was not in possession of the wreck.[29] Second, addressing the applicability of the ASA to the wreck, the Court held that the requisite element of abandonment under the ASA is to be given its traditional admiralty meaning.[30] However, that issue was remanded to the district court for reconsideration because the district court's conclusion that California had failed to prove that the *Brother Jonathan* was abandoned "was necessarily influenced by the assumption that the Eleventh Amendment was relevant to the courts' inquiry."[31] Justice O'Connor opined that the lower court's determination was effected by a fear that a finding of partial abandonment would result in the adjudication of the *Brother Jonathan's* fate by both the state and federal courts.[32] If the district court subsequently made a finding of abandonment, California would have a colorable claim to the *Brother Jonathan* under the ASA and the third question, whether the ASA preempted section 6313, would be rendered moot.[33] Accordingly, that issue was not addressed.[34]

The question of whether the ASA preempts a state statute governing shipwrecks not meeting the enumerated requirements of the ASA remains unanswered by the Supreme Court. This comment will attempt to answer that question with respect to the Antiquities Act. Part II of this comment outlines the ASA as enacted by Congress. Part III outlines the Antiquities Act as enacted by the State of Rhode Island. The question of whether Congress intended to preempt state regulation of non-ASA shipwrecks is ad-

28. *See id.* at 500-01.
29. *See id.* at 507-08.
30. *See id.* at 508.
31. *Id.*
32. *See id.*
33. *See Deep Sea Research,* 523 U.S. at 508-09.
34. *See id.* at 509.

dressed in part IV. Part V considers whether the Antiquities Act is rendered invalid in light of the preemptive power had by the general maritime law.

II. THE ASA

The ASA is divided into six sections.[35] In order, those sections are listed as: findings; definitions; rights of access; preparation of guidelines; rights of ownership; and relationship to other laws.[36] Sections relevant to this preemption analysis are discussed below.

Under § 2101 (congressional findings) states have the responsibility for the management of resources in State waters and submerged lands.[37] By way of the ASA, Congress included in this list of resources "*certain* abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention."[38]

Section 2105, which refers to the rights of ownership of these *certain* abandoned shipwrecks, is the heart and soul of the ASA.[39] Under part (a) of this section, the United States asserts title to abandoned shipwrecks that are either: 1) embedded in submerged lands of a State;[40] 2) embedded in coralline formations protected by a State on submerged lands of a State;[41] or 3) on submerged lands of a State and are included in or determined eligible for inclusion in the National Register of Historic Places (National Register).[42] Part (c) of § 2105 transfers shipwrecks meeting the above enumerated requirements "to the State in or on whose submerged lands the shipwreck is located."[43]

Section 2106 addresses the relationship of the ASA to other laws.[44] In this section, Congress states that the admiralty laws of salvage and finds do not apply to shipwrecks subject to the ASA.[45]

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35. *See* 43 U.S.C. §§ 2101-2106 (1994).
36. *See id.*
37. *See id.* § 2101(a).
38. *Id.* § 2101(b) (emphasis added).
39. *See id.* § 2105.
40. *See id.* § 2105(a)(1).
41. 43 U.S.C. § 2105(a)(2).
42. *Id.* § 2105(a)(3). Under 16 U.S.C. .§ 470(a), the Secretary of the Interior has broad discretion to establish the requisite guidelines for an object's inclusion in the National Register. *See id.*
43. *Id.* § 2105(c).
44. *See id.* § 2106.
45. *See id.* § 2106(a).

However, Congress specifically states that "the laws of the United States relating to shipwrecks, other than those to which [the ASA] applies" shall not be changed.[46]

III. THE ANTIQUITIES ACT

Rhode Island governs the treatment of certain shipwrecks via the Antiquities Act.[47] "[S]ubject to any local, state, or federal statute, . . . [Rhode Island claims] title to any underwater historic properties lying on or under the bottoms of any . . . navigable waters of the state . . . ."[48] For purposes of the Antiquities Act, "'[u]nderwater historic property' means any shipwreck . . . that has remained unclaimed for more than ten (10) years on the bottoms of any navigable waters and territorial seas of the state."[49] It is through this acquisition of title that Rhode Island possesses the power to govern these shipwrecks.

In recognition of their scientific and archeological value,[50] the state claims title to such shipwrecks and empowers the state historical preservation commission to administer and prescribe regulations necessary "to preserve, protect, recover and display underwater historic properties and specimens derived from archeological sites."[51] The historical preservation commission may promulgate rules including, but not limited to: "(a) [i]ssuance of permits for the conduct of field investigations; (b) [r]equirements for reporting on the results of field investigations; [and] (c) [p]rovisions for the preservation and display of specimens . . . ."[52] "Field investigations" under the Antiquities Act means "the study of the traces of human culture at any . . . water site by means of surveying, sampling, excavating, or removing surface or subsurface objects, or going on a site with that intent."[53] Notably, the historical preservation commission also has the power to determine a fair compensation for the permittee who recovers such "underwater historic property."[54] While the state historical

46. *Id.* § 2106(b).
47. *See* R.I. Gen Laws §§ 42-45.1-1 to 1-13 (1956) (1993 Reenactment).
48. *Id.* § 42-45.1-4(b).
49. *Id.* § 42-45.1-3 (d).
50. *See id.* § 42-45.1-2.
51. *Id.* § 42-45.1-5(1).
52. *Id.* § 42-45.1-5.
53. R.I. Gen. Laws § 42-45.1-3(a).
54. *Id.* § 42-45.1-5(1)(d).

preservation commission may establish the protocol for issuing permits, the Antiquities Act imposes an obligation on any person conducting a field investigation to obtain permission from any federal or state agencies having jurisdiction prior to any recovery operation.[55] Additionally, Rhode Island retains title to all objects recovered from field investigations.[56]

IV. Is the Antiquities Act Preempted by the ASA?

Article VI of the United States Constitution states that federal law is the "Supreme Law of the Land."[57] This supremacy clause of Article VI gives force and effect to the doctrine of preemption.[58] The preemption doctrine holds that federal legislation supersedes any inconsistent state legislation when both regulate the same subject matter.[59] Thus, state action must succumb to conflicting federal legislation. In *Gibbons v. Ogden*,[60] Chief Justice Marshall made clear that the federal system presupposes the statutory dominance of federal law.[61] He stated that "the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."[62] In discussing the rationale behind the preemption doctrine, Justice Harlan noted that "[t]he constitutional principles of pre-emption . . . are designed . . . to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter."[63]

Preemption analysis requires an examination of congressional intent as determined by statutory language, structure and purpose.[64] The Supreme Court has recognized three methods by which state legislation will be preempted by federal law.[65] First, within constitutional limits, Congress may preempt state law by

55. *See id.* § 42-45.1-5(3).
56. *See id.*
57. U.S. Const. art. VI, § 2.
58. *See* Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 152-54 (1982).
59. *See* Black's Law Dictionary 1197 (7th ed. 1999).
60. 22 U.S. (9 Wheat.) 1 (1824).
61. *See id.* at 211.
62. *Id.*
63. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am. v. Lockridge, 403 U.S. 274, 285-86 (1971).
64. *See* Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 98 (1992).
65. *See id.*

expressly stating so.[66] Second, without expressly stating so, Congress' intent to preempt state law may be implied by the structure or purpose of the federal statute.[67] One type of implied preemption, field preemption, is recognized where the "scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it . . . .'"[68] Alternatively, state law is implicitly preempted to the extent that it actually conflicts with federal law.[69] This type of "conflict preemption" occurs when compliance with both federal legislation and a state law is physically impossible[70] or where state law frustrates the accomplishment and execution of Congress' purposes and objectives.[71]

Express Preemption by the ASA?

Within constitutional limits, Congress may expressly preempt state law.[72] The Supreme Court has provided a two-step test to determine if a state law is expressly preempted by federal law.[73] The first step requires studying the plain language of the federal statute.[74] Most express preemption clauses are clearly contained therein.[75] An example of such a clause is contained in the Federal Employment Retirement Income Security Act (ERISA). The ERISA expressly provides that "provisions of [the statute] . . . shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan . . . ."[76]

Second, if the federal statute clearly expresses Congress' intent to preempt a class of state laws, a court must find that a particular state law in question falls within the class of laws that Congress expressly intended to preempt.[77] In *Shaw v. Delta Air*

66. *See id.*
67. *See id.* (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).
68. *Id.* (quoting Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).
69. *See id.*
70. *See Gade*, 505 U.S. at 98 (quoting Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).
71. *See id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
72. *See id.* 98-99.
73. *See id.* at 95-107.
74. *See id.* at 96-97.
75. *See id.* at 112 (Kennedy, J., concurring)
76. 29 U.S.C. § 1144(a) (1994).
77. *See* Shaw v. Delta Airlines, 463 U.S. 85, 96-97 (1983).

Lines,[78] the Supreme Court considered whether a New York state law fell within the class of laws that were expressly preempted by the ERISA.[79] In its analysis, the Court referred to the plain language, structure and legislative history of the statute.[80] The Court held that New York's law, "which prohibit[ed] employers from structuring their employee benefit plans in a manner that discriminates on the basis of pregnancy, and . . . require[d] employers to pay employees specific benefits, clearly 'relate[d] to' benefit plans."[81] Accordingly, the New York law was expressly preempted by the ERISA.[82]

A review of the plain language of the ASA reveals no express congressional intent to preempt state legislation. Congress knows how to expressly preempt state law when it wants to do so.[83] While Congress does not need to use "any particular magic words" to expressly preempt state law,[84] the ASA contains no words that clearly evidence its intent to do so. Congress was free to include language similar to that contained in the ERISA if it wished to expressly preempt state legislation. Accordingly, the Antiquities Act is not expressly preempted by the ASA.

A failure on the part of Congress to expressly preempt state law does not end the inquiry of whether state law must succumb to "supreme" federal law. Preemption of a state statute by federal law may also be implied under the theories of field preemption and conflict preemption.[85]

Field Preemption

Field preemption acts to divest states of the ability to legislate in an area that Congress has reserved for federal control. If Congress has decided to "occupy the field," state legislation within that field will be invalidated regardless of how well it comports with the

78. 463 U.S. 85 (1983).
79. *See id.* at 100.
80. *See id.*
81. *Id.* at 97.
82. *See id.*
83. *See, e.g.*, 29 U.S.C. § 1144(a) (1994) ("provisions of [the statute] . . .shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan. . . .").
84. Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 112 (1992) (Kennedy, J., concurring).
85. *See infra* pp. 547-554 and accompanying notes.

federal scheme. Field preemption has been described as a facet of conflict preemption.[86] By occupying the field, state legislation would conflict with Congress' intent to be the sole authority in the field and would, therefore, be nullified.[87]

In *United States v. Locke*,[88] the Supreme Court addressed the question of whether a state could impose its own regulations on tankers operating in its waters in light of the then existing federal regulatory scheme.[89] The Court, in that case, struck down Washington state regulations purporting to impose navigation watch requirements, language proficiency requirements and training requirements on tanker crews.[90] The Court found that, by enacting comprehensive regulatory framework and ratifying an international treaty addressing the fields of tanker operation, personnel, and training requirements, Congress presumably intended to preclude any state legislation in these fields. Thus, the Washington laws were preempted.[91]

Additionally, under section 317-21-130 of the *Washington Administrative Code*, Washington required tankers reaching its state waters to report certain marine casualties, including: collisions, allisions and near miss incidents, to the state regardless of where in the world the incident may have happened.[92] Congress, however, in 46 U.S.C. § 6101, had evidenced its intent that the Coast Guard be the sole authority for imposing reporting obligations on vessels.[93] Section 6101 requires the Coast Guard to prescribe reporting regulations for specifically listed kinds of casualties.[94] The Court stated that Congress, by specifically stating the kinds of casualties that the regulations must cover, intended to subject vessels to uniform reporting requirements as imposed by the Coast Guard.[95] Hence, state-imposed reporting requirements, such as section 317-21-130, are preempted.[96]

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86. *See* English v. Gen. Elec., 496 U.S. 72, 79-80 n.5 (1990).
87. *See id.*
88. 529 U.S. 89 (2000).
89. *See id.* at 94.
90. *See id.* at 113-14.
91. *See id.*
92. *See id.* at 114-15 (quoting Wash. Admin. Code § 317-21-130 (1999)).
93. *See id.*
94. *See Locke*, 529 U.S. at 115-16.
95. *See id.* at 116.
96. *See id.*

The Antiquities Act was passed to protect and govern unclaimed shipwrecks in Rhode Island waters.[97] By its own terms, the Antiquities Act regulates in the field of determining ownership rights to unclaimed shipwrecks.[98] The ASA governs ownership rights to certain abandoned shipwrecks.[99] Under the ASA, ownership rights to these certain abandoned shipwrecks are addressed in § 2105.[100] Under § 2106, non-ASA shipwrecks are not effected by the ASA and continue to be subject to the laws of the United States.[101]

The language and structure of the ASA shows that Congress addressed all shipwrecks in the ASA. While the ASA's determination of ownership rights is limited to a specific class of shipwrecks, those shipwrecks that do not fall within that class are also specifically referred to.[102] Title to those shipwrecks meeting the ASA's enumerated requirements is transferred to the states.[103] The laws of the United States govern non-ASA shipwrecks.[104] Apparently, Congress intended to divide shipwrecks into two classes: those that are governed by the states through the ASA and those that are governed by the laws of the United States. The application of the ASA and its nullification of the laws of salvage and finds[105] grants states the opportunity to acquire title to, and the corresponding power to promulgate regulations relating to, a limited class of shipwrecks.[106] Non-ASA shipwrecks remain within the exclusive admiralty jurisdiction of the federal courts as provided by Article III, Section 2 of the United States Constitution.[107] This language is evidence that Congress intended the federal courts and the general maritime law to remain the authoritative bodies in the field of governing all shipwrecks not falling within the grasp of the ASA.

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97. *See* R.I. Gen. Laws §§ 42-45.1-2, 1-3 (1956) (1993 Reenactment).

98. *See id.* §§ 42-45.1-3(d), 1-4(b).

99. *See* 43 U.S.C. §§ 2101, 2105 (1994).

100. *See id.* § 2105.

101. *See id.* § 2106(b).

102. *Compare* 43 U.S.C. § 2105 *with* 43 U.S.C. § 2106 (referring to both ASA and non-ASA shipwrecks).

103. *See id.* § 2105(c).

104. *See id.* § 2106(b).

105. *See id.* § 2106(a).

106. *See id.* § 2105(c).

107. *See* Deep Sea Research v. The Brother Jonathan, 102 F.3d 379, 384 (9th Cir. 1996), *rev'd sub nom.* California v. Deep Sea Research, 523 U.S. 491 (1998) (reversing on other grounds).

The structure of the ASA is such that it would be unreasonable to infer that the determination of ownership rights to non-ASA shipwrecks is left for state legislation. The comprehensive regulatory scheme of the ASA is evidence that Congress has intended to control the manner in which ownership rights to shipwrecks will be determined. In *Castle v. Hayes Freight Lines, Inc.*,[108] the Supreme Court held that Illinois could not, pursuant to state law, take action to suspend an interstate carrier's federally granted right to operate in the state.[109] In that case, the Court held that states could not determine which interstate motor carriers could operate in the state because the federal regulatory scheme in the field was so comprehensive.[110] The federal law, the Motor Carrier Act (MCA), gave the Interstate Commerce Commission (the Commission) the right to issue interstate operating permits.[111] However, the MCA clearly prescribed the requisite steps that must be taken to revoke a license once issued.[112] Because the MCA so thoroughly covered the manner in which a license may be revoked, "it would be odd if a state could" do so pursuant to its own laws.[113]

Under the ASA, the United States asserts title to a limited class of shipwrecks. To fall within the limited class of shipwrecks governed by the ASA, it must be shown, by a preponderance of the evidence, that the shipwreck is: 1) abandoned and 2) either embedded in submerged lands of a state, or embedded in state protected corralline formations on submerged lands of a state, or on submerged lands of a state and eligible for or included in the National Register.[114] If it cannot be shown by a preponderance of the evidence that the shipwreck meets the above-enumerated requirements, the laws of the United States shall not be changed.[115] The laws of the United States relating to shipwrecks are those of the general maritime law. The restrictive nature of the requisite elements is evidence that Congress intended to carve out a narrow class of shipwrecks that would be controlled by the states rather than the general maritime law.

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108. 348 U.S. 61 (1954).
109. *See id.* at 65.
110. *See id.* at 63.
111. *See id.* at 63.
112. *See id.* at 63-64.
113. *Id.* at 64.
114. *See* 43 U.S.C. § 2105 (1994).
115. *See id.* § 2106(b).

The ASA's threshold requirement of abandonment comports with its admiralty meaning.[116] Notably, however, courts are typically reluctant to consider a vessel abandoned.[117] Thus, the requirement that a shipwreck be abandoned significantly limits the ASA's application.

The ASA also requires that subject shipwrecks be located in or on submerged lands of a state.[118] This language presumably comports with the Submerged Lands Act (SLA).[119] The SLA gives states title to and jurisdiction over the submerged lands and natural resources within three miles of their coastline, with the exception of the Texas and Florida coasts in the Gulf of Mexico where title and jurisdiction is extended to nine miles.[120] Accordingly, an ASA shipwreck must be located in or on submerged land owned by a state pursuant to the SLA or beneath its internal waters.

Lastly, Congress states that an ASA shipwreck must be either *on*[121] submerged lands of a state and included in, or determined eligible for inclusion in, the National Register or *embedded*[122] either in the submerged lands of a state or state protected corralline formations on submerged lands of a state.[123] Congress has defined embedded as "firmly affixed in . . . [the appropriate medium] such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck . . . ."[124] The fact that shipwrecks meeting the embedded requirement must be so embedded that tools are required for access is evidence of Congress' intent to narrow the class of shipwrecks subject to the act.

The restrictive nature of the ASA's enumerated requirements is evidence that Congress intended to preclude states' power to regulate with respect to ownership rights to non-ASA shipwrecks. Like the MCA, the ASA is so thorough in its regulation that it would be odd if states could control shipwrecks even if they do not meet the enumerated requirements of the ASA. A review of the

116. *See Deep Sea Research*, 523 U.S. at 508.

117. *See Zych v. The Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB "Lady Elgin,"* 755 F. Supp 213, 216 (N.D. Ill. 1991).

118. *See* 43 U.S.C § 2105.

119. *See id.* §§ 1301-1315.

120. *See id.* § 1301.

121. *See id.* § 2105(a)(3).

122. *See id.* § 2105(a)(1).

123. *See id.* § 2105(a)(2).

124. 43 U.S.C. § 2102(a)

history of the ASA reveals that Congress, in passing the legislation, intended to remove historical shipwrecks from federal control.[125] Senator Bill Bradley [D-NJ], who originally proposed the bill in the Senate, expressed his concern over the way in which federal courts sitting in admiralty jurisdiction were treating abandoned shipwrecks.[126] It was also hoped that the ASA would settle disputes between treasure salvors, state and federal governments.[127] Congress attempted to achieve these goals by giving the states the right to govern a limited class of shipwrecks. The fact that the class is so limited, even in the face of Congress' perceived presence of a problem, is additional evidence of Congress' intent to keep non-ASA shipwrecks strictly subject to the general maritime law as determined by the federal courts. Accordingly, the Antiquities Act is preempted to the extent that it acts to control shipwrecks to which the ASA does not apply.

Conflict Preemption?

Conflict preemption occurs where it is physically impossible to comply with both a federal and state statute[128] or where the state statute impedes Congress' ability to achieve and execute its purposes and goals.[129] The Supreme Court has held that "any state regulation is preempted if it interferes with the methods by which the federal statute was designed to reach . . . [its] goal."[130] Recognizing states' interest in managing *certain* abandoned shipwrecks located in its waters, Congress expressly gave states the power to regulate the resource.[131] That power to regulate arises when title to those *certain* abandoned shipwrecks is asserted by the United States and transferred to the state.[132]

The Antiquities Act purports to grant the state "title to any [shipwreck that has remained unclaimed and is] lying on or under

125. *See* 133 Cong. Rec. S7050-51 (Mar. 26, 1987).

126. *See id.* at S7050 ("Under the current system, Federal courts–sitting in admiralty–have substantial policymaking power, which has resulted in uneven judgments about the historical value of shipwrecks.").

127. *See* Joseph C. Sweeney, *An Overview of Commercial Salvage Principles in the Context of Marine Archeology*, 30 J. Mar. L. & Com. 185, 197 (1999).

128. *See* Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (quoting Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).

129. *See id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

130. *Id.* at 103 (quoting Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987).

131. *See* 43 U.S.C. §§ 2101(a), 2105(c) (1994).

132. *See id.* § 2105(c).

the bottoms of any other navigable waters of the state. . . ."[133] A comparison of the Antiquities Act and the ASA shows that the Antiquities Act may govern shipwrecks that are not within the class of shipwrecks governed by the ASA. An example of such a shipwreck would be a fishing vessel that has not been abandoned under traditional admiralty law but has remained unclaimed for eleven years and is resting on submerged lands of Rhode Island's Narragansett Bay. This shipwreck does not meet the ASA's threshold requirement of abandonment under traditional admiralty law.[134] Consequently, the ASA does not apply. Further, assuming that the fishing vessel is not eligible for inclusion in the National Register, the secondary ASA requirement of eligibility for or inclusion in the National Register or embedded in the submerged lands or corralline formations of a state is not met. The Antiquities Act does not require a shipwreck to be abandoned under admiralty law or embedded in submerged lands or corralline formations before it purports to grant title to the state. As this would be a shipwreck that has remained unclaimed for more than ten years and is lying on the bottom of navigable waters of Rhode Island, the state would have a right of title to the shipwreck under the Antiquities Act but not the ASA.

The ASA permits a state to govern shipwrecks meeting its enumerated requirements by transferring title to the state.[135] Therefore, the Antiquities Act does not conflict with the ASA to the extent it governs ASA shipwrecks. However, in § 2106(b) of the ASA, Congress has mandated that the laws of the United States shall apply to all non-ASA shipwrecks.[136] Accordingly, non-ASA "shipwrecks continue to be subject to the exclusive admiralty jurisdiction of the federal courts, as provided by Article III, section 2 of the United States Constitution."[137] Consequently, laws governing non-ASA shipwrecks remain those of the general maritime law as

133. *Id.* § 41-45.1-4(b). The actual wording of the statute is "underwater historic properties." *Id.* Section 41-45.1-3(d) provides that for purposes of the Antiquities Act of Rhode Island, "'[u]nderwater historic property' means any shipwreck . . . that has remained unclaimed for more than ten (10) years on the bottoms of any navigable waters and territorial seas of the State." *Id.* § 41-45.1-3(d).

134. *See* California v. Deep Sea Research, 523 U.S. 491, 508 (1998).

135. *See* 43 U.S.C. § 2105(c).

136. *See id.* § 2106(b).

137. Deep Sea Research v. The Brother Jonathan, 102 F.3d 379, 384 (9th Cir. 1996), *rev'd sub nom.* California v. Deep Sea Research, 523 U.S. 491 (1998) (reversing on other grounds).

determined by the federal courts. Hence, the Antiquities Act poses a potential conflict with § 2106(b) and the general maritime law to the extent that it governs non-ASA shipwrecks. As § 2106 implicitly states that non-ASA shipwrecks remain subject to the general maritime law, a discussion of conflict preemption by the ASA requires a review and comparison of the general maritime law and the Antiquities Act.

V. Is The Antiquities Act Preempted by The General Maritime Law?

Article III, Section 2 of the United States Constitution vests power in the federal courts to hear and decide cases involving admiralty or maritime jurisdiction.[138] The Supreme Court has interpreted this provision as implicit authorization for Congress to legislate in maritime matters.[139] Further, when federal legislation conflicts with the general maritime law, federal legislation will prevail.[140] In the absence of a controlling federal statute, "the general maritime law, as [determined] by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction."[141] As part of the national law, the general maritime law has preemptive power under the Supremacy Clause of the Constitution and will prevail over a conflicting state law.[142] The Supreme Court has, however, been less than clear in its attempts to provide a predictable analytical framework with which to analyze the problem of preemption in the admiralty context. Justice Scalia, speaking to the subject, noted that "it would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernable in our admiralty jurisprudence, or indeed is even entirely consistent . . . ."[143] Indeed, the situation can be so confusing as to defy coherent synthesis. As the First circuit once put it, "[d]iscerning the law in this area is far from easy; one might tack a sailboat into a fog bank with more confidence."[144]

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138. *See* U.S. Const. art. III, § 2.

139. *See* The Lottawanna, 88 U.S. (21 Wall.) 558, 577 (1874); *Jensen*, 244 U.S. at 215-16.

140. *See* Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1990).

141. *Jensen*, 244 U.S. at 215.

142. *See id.* at 215-16.

143. Am. Dredging Co. v. Miller, 510 U.S. 443, 452 (1994).

144. Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 624 (1st Cir. 1994)

Southern Pacific Co. v. Jensen[145] is the leading decision on maritime preemption.[146] In that case, the United States Supreme Court held that state legislation may not contravene the essential uniformity that is provided by the general maritime law.[147] Applying this principle, the Court struck down a New York state law providing compensation for injuries and deaths of maritime employees without regard to fault.[148] The Court noted the importance of uniformity in the obligations imposed on foreign ships entering state ports.[149] If New York could impose its own obligations on foreign ships entering its harbors, other states could do likewise.[150] The inevitable destruction of uniformity in maritime matters would impermissibly hamper the "freedom of navigation between the States and with foreign countries."[151] Accordingly, the New York state law was preempted to the extent that it conflicted with the uniformity in maritime matters as provided by the general maritime law and the Constitution.[152]

Over time, the *Jensen* principle has been fiercely attacked, and subsequent Supreme Court opinions have allowed state law to displace admiralty law in certain situations. For example, in *American Dredging Co. v. Miller*,[153] the Supreme Court addressed the question of whether a Louisiana state law rendering the doctrine of *forum non conveniens* unavailable in Jones Act and maritime law cases brought in Louisiana state courts was preempted by the general maritime law.[154] Applying the rule set forth in *Jensen*, the Court considered whether the doctrine of *forum non conveniens* was either a "characteristic feature" of admiralty law or a "doctrine whose uniform application is necessary to maintain the 'proper harmony' of maritime law."[155] As to the first question, the Court held that, although the doctrine of *forum non conveniens* "may have been given its earliest and most frequent expression in admi-

145. 244 U.S. 205 (1917).
146. *See* Ernest A. Young, *Preemption at Sea*, 67 Geo. Wash. L. Rev. 273, 291 (1999).
147. *See Jensen*, 244 U.S. 205, 215-16.
148. *See id.*
149. *See id.* at 217.
150. *See id.*
151. *Id.*
152. *See id.*
153. 510 U.S. 443 (1994).
154. *See id.* at 445-46.
155. *Id.* at 447.

ralty cases,"[156] it was not a characteristic feature of admiralty law because it neither originated nor had exclusive application in admiralty law.[157] Further, because the doctrine of *forum non conveniens* is a procedural rather than a substantive rule, its application would unlikely promote uniform results in maritime cases.[158] Accordingly, the Louisiana law was not preempted by the general maritime law.[159]

The question addressed by this section, therefore, is whether the general maritime law preempts a state law, such as Rhode Island's Antiquities Act, that purports to determine title to certain shipwrecks. Applying the *American Dredging* analysis to determine the preemptive effect that the general maritime law has on the Antiquities Act, one must begin by outlining the admiralty laws of salvage and finds. Those laws must then be compared with the Antiquities Act to determine whether a conflict exists. Conflicting provisions of the Antiquities Act will be preempted by the general maritime law to the extent they materially prejudice the "characteristic features" of the general maritime law or interfere with the "proper harmony and uniformity" of that law.[160] As Congress has stated that the laws of salvage and finds shall not apply to ASA shipwrecks,[161] any preemption by the general maritime law will be limited to the extent that the Antiquities Act applies to non-ASA shipwrecks.

Under the general maritime law, shipwrecks are governed by the doctrines of salvage and finds.[162] Salvage is the compensation awarded to persons whose voluntary assistance saves, in whole or in part, a ship at sea or her cargo or both.[163] Salvage is also awarded for the recovery of such property from "actual peril or loss, as in cases of shipwreck recovery, derelict, or recapture."[164] The purpose of granting a salvage award is to promote efforts to save property and lives that are in danger of being lost or de-

156. *Id.* at 449.
157. *See id.* at 450.
158. *See id.* at 455.
159. *See Am. Dredging Co.*, 510 U.S. at 450.
160. *See id.* at 447.
161. *See* 43 U.S.C. § 2106(a) (1994).
162. *See* Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560, 567-68 (5th Cir. 1981) (Treasure Salvors II).
163. *See* The Sabine, 101 U.S. 384, 384 (1879).
164. *Id.*

stroyed at sea and to discourage embezzlement.[165] Such efforts are promoted by setting and determining awards with care and with regard to the risk incurred by the salvor as well as the benefit conferred upon the property owner.[166]

There are three formal elements of a salvage claim under the general maritime law.[167] First, the salvaged property must be in marine peril, meaning that it is at risk of loss, destruction or deterioration.[168] Shipwrecks have been found to be in "peril" because the vessel is still in danger of being lost to its surrounding elements.[169] Second, the salvage service must be voluntarily rendered and not made pursuant to a contractual or other obligation.[170] Finally, the salvage efforts must be at least partially successful.[171] This distinguishes "pure" salvage from contract salvage where the parties are free to set compensation regardless of success.[172] A property owner, however, may refuse salvage service and avoid having to pay a salvage award.[173] In such cases, "salvor" has been referred to as "a gratuitous intermeddler."[174] A person who can show that his actions and the surrounding circumstances match the above elements is entitled to a monetary salvage award not exceeding the value of the property saved.[175] It is important to note that a salvage award is limited to monetary compensation rather than title to the salvaged property.[176]

A salvage act gives rise to a right to a salvage reward.[177] The salvage reward may be enforced by attaching a maritime lien and

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165. *See* The Blackwall, 77 U.S. (10 Wall.) 1, 14 (1869); *accord* Mason v. Ship Blaireau, 6 U.S. (2 Cranch) 240, 266-267 (1879).

166. *See* Thomas J. Schoenbaum, Admiralty and Maritime Law §16-7, at 367 (3d ed. 2001).

167. *See The Sabine*, 101 U.S. at 384.

168. *See id.*

169. *See* Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 569 F2d. 330, 337 (5th Cir. 1978) (Treasure Salvors I). *But see* Subaqueous Exploration & Archeology, Ltd. v. The Unidentified, Wrecked & Abandoned Vessel, 577 F. Supp. 597, 611 (D. Md. 1983) (holding that ancient shipwrecks are not in marine peril so the law of salvage is inapplicable).

170. *See The Sabine,* 101 U.S. at 384, 390; Schoenbaum, *supra* note 166, at 359.

171. *See The Sabine,* 101 U.S. at 384, 390.

172. *See* Flagship Marine Serv., Inc. v. Belcher Towing Co., 966 F.2d 602, 605 (11th Cir. 1992).

173. *See* Bonifay v. The Paraporti, 145 F. Supp. 879 (E.D. Va. 1956).

174. *See id.*

175. *See The Sabine*, 101 U.S. at 390.

176. *See id.* at 390-91.

177. *See* Schoenbaum, *supra* note 166 at 357-58.

proceeding *in rem* directly against the property salvaged or proceeding *in personam* against the owner of such property.[178] There are two main rationales underlying maritime attachment.[179] The first is to ensure that a judgment will be satisfied if the suit is successful.[180] The second rationale is that attachment will ensure that a defendant will appear in an action.[181] "[A]n *in rem* suit against a vessel is . . . distinctively an admiralty proceeding, and is hence within the exclusive province of the federal courts."[182] Consequently, "state courts 'may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction.'"[183]

The law of finds originated as a common law doctrine and has evolved into and developed its own application in admiralty cases.[184] The law of finds applies to those shipwrecks that have been abandoned.[185] A finding of abandonment requires clear and convincing proof, such as an express declaration of abandonment by the owner or the passage of time that gives rise to a reasonable inference that the shipwreck has been abandoned.[186] The federal district courts have exclusive jurisdiction to hear cases *in rem* involving the law of finds.[187] Under this doctrine, title to the "found" property vests in the person who reduces it to possession.[188]

As an initial question, one may wonder if the Antiquities Act is invalid simply because the state has taken title to certain "unclaimed shipwrecks." The Supreme Court has long held that "a state statute may grant rights which will be enforced in an admi-

178. *See The Sabine,* 101 U.S. at 388.

179. *See* Aurora Mar. Co. v. Abdullah Mohamed Fahem & Co., 85 F.3d 44, 48 (2d Cir. 1996).

180. *See id.*

181. *See id.*

182. Am. Dredging Co. v, Miller, 510 U.S. 443, 446-47 (1994) (quoting The Moses Taylor, 71 U.S. (4 Wall.) 411, 431 (1867)).

183. *Id.* at 446 (quoting Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 124 (1924)).

184. *See* Mark R. Baumgartner, *Federal Jurisdiction Over State Claims to Shipwrecks: Should the Eleventh Amendment go Down With the Ship?*, 8 Wm. & Mary Bill Rts. J. 469, 474-75 (2000).

185. *See* Adams v. Unione Medeterranea Di Sicurta, 220 F.3d 659, 671 (5th Cir. 2000).

186. *See id.*

187. *See* Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560, 567-68 (5th Cir. 1981) (Treasure Salvors II).

188. *See* Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 569 F2d. 330, 336-37 (5th Cir. 1978) (Treasure Salvors I).

ralty court."[189] However, those rights must not be had at the expense of national uniformity in admiralty law as provided by the Constitution.[190] Accordingly, the Antiquities Act's grant of title to certain unclaimed shipwrecks to Rhode Island, may be enforced in an admiralty court to the extent that it does not materially prejudice the "characteristic features" of the general maritime law or interfere with the "proper harmony and uniformity" of that law.[191]

There are, however, three main inconsistencies between the general maritime laws of salvage and finds and provisions of the Antiquities Act. The first relates to the Antiquities Act's apparent definition of abandonment. Although the statute makes no explicit reference to the term "abandonment," one may assume that the requirement that a shipwreck remain unclaimed for ten years before the state asserts title relates to a finding of abandonment.[192] Under the general maritime law, a salvor will not acquire title to a shipwreck unless the shipwreck is abandoned.[193] The general maritime law has traditionally found abandonment when ownership rights have been publicly and expressly renounced.[194] However, some courts have been willing to infer abandonment by the passage of time coupled with an owner's failure to attempt to recover the object. For example, the Fifth Circuit in *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel (Treasure Salvors I)*,[195] held that shipwrecks which have been lost for centuries may be presumed to be abandoned. In that case, the court stated that it would be absurd to assume that a vessel that had sank over 300 years before it was finally discovered was still owned.[196] However, in its 1991 decision in *Zych v. The Un-*

189. W. Fuel Co. v. Garcia, 257 U.S. 233, 240 (1921) (citing Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299 (1851)).

190. *See* Union Fish Co. v. Erickson, 248 U.S. 308, 314 (1919).

191. *See* Am. Dredging Co. v, Miller, 510 U.S. 443, 447 (1994).

192. *See* R.I. Gen. Laws § 42-45.1-4(b) (1956) (1992 Reenactment).

193. *See* Schoenbaum, *supra* note 166, at §§ 16-5 to 16-7 (absent a finding of abandonment, a salvor may be entitled to a salvage award not exceeding the value of the property salvaged).

194. *See* Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel, 221 F.3d 634, 641 (4th Cir. 2000)

195. 569 F.2d 330 (5th Cir. 1978).

196. *See id.* at 337 ("Disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths.").

identified, Wrecked and Abandoned Vessel, Believed to be the SB "Lady Elgin,"[197] the District Court for the Northern District of Illinois held that a 130 year period of inactivity on the part of a vessel owner was insufficient to infer abandonment.[198] The court excused the owner's inactivity because the owner had not taken any affirmative steps to express an intent to relinquish ownership rights to the *Lady Elgin* and, prior to the late 1980s, it was not technologically feasible to recover the wreck.[199] The court stated that an owner need not attempt to recover a shipwreck to avoid abandoning its interest when "such efforts would have . . . [a] minimal chance[ ] for success."[200]

Recent developments have made it technologically feasible to locate and access previously undiscoverable and unrecoverable shipwrecks.[201] If courts follow the reasoning in *Lady Elgin* and begin tolling the time of inactivity to infer abandonment upon the availability of technologically feasible methods of discovery and recovery, even the passage of centuries may not justify a finding of abandonment.

The Antiquities Act seems to allow a finding of abandonment after the passage of ten years even without an express renunciation of ownership rights.[202] However, as in *Treasure Salvors I* and the *Lady Elgin*, courts have spoken to the requisite lapse of time to infer abandonment in terms of centuries.[203] A finding of abandonment under the general maritime law is a prerequisite to an assertion of title to a shipwreck.[204] This requisite finding of abandonment as a precondition to a transfer of ownership rights under the law of finds is the fundamental distinction between the admiralty laws of salvage and finds.[205] Under admiralty law, if the shipwreck is not abandoned, a salvor may be entitled to a monetary salvage award, not ownership rights.[206] The Antiquities Act

197. 755 F. Supp. 213 (N.D. Ill. 1991).
198. *See id.* at 216.
199. *See id.*
200. *Id.*
201. *See generally* Roderick Mather, *Technology and the Search for Shipwrecks*, 30 J. Mar. L. & Com. 175 (1999) (discussing recent technological and analytical advances that have aided in the search and recovery of shipwrecks).
202. *See* R.I. Gen. Laws § 42-45.1-3 (1956) (1993 Reenactment).
203. *See supra* pp. 558-560 and accompanying notes.
204. *See* Schoenbaum, *supra* note 166, at 373-74.
205. *See* Schoenbaum, *supra* note 166, at 373-76.
206. *See The Sabine*, 101 U.S. at 390-91.

conflicts with the general maritime law in that it allows a finding of abandonment after an incredibly short time as compared to the general maritime law.[207] A state alteration of this fundamental admiralty characteristic would materially prejudice and disrupt the proper harmony of the general maritime law. If one state may provide a right of title upon the passage of ten years, another may presumably do so after five, ten or fifteen years. Consequently, the laws of different states may alter the relief granted in such cases, thereby destroying the uniformity sought by admiralty law. Accordingly, a state law purporting to grant a right of title to a shipwreck must do so subject to a finding of abandonment in accordance with admiralty rules. Hence, the Antiquities Act is preempted by the general maritime law to the extent that it alters the nature of rules governing abandonment.

The Antiquities Act is also suspect in its determination of the manner in which salvage awards are set. Under the terms of the Antiquities Act, the state historical preservation commission may set and determine a fair compensation to be awarded to a person who salvages a shipwreck claimed by the state.[208] Absent the statute, a salvor may retrieve the shipwreck and be granted a salvage award by the appropriate federal district court.[209] While there is no set formula for determining the amount of the award,[210] the amount must be limited to the value of the property salvaged.[211] Under the general maritime law, the federal district courts have discretion to determine the awards given to salvors.[212] In determining the appropriate salvage award, admiralty courts have traditionally considered:

> (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

207. *Cf.* R.I. Gen. Laws § 42-45.1-3 with Zych v. The Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB "Lady Elgin," 755 F. Supp. 213, 216 (N.D. Ill. 1991) (court was unwilling to infer abandonment even after a 130 year period of owner's inactivity).

208. *See* R.I. Gen. Laws § 42-45.1-5(d).

209. *See* The Blackwall, 77 U.S. (10 Wall.) 1, 13-14 (1869).

210. *See* Schoenbaum, *supra* note 166, at 364.

211. *See The Sabine*, 101 U.S. (11 Otto) 384, 390 (1879).

212. *See* Trico Marine Operators, Inc. v. Dow Chem. Co., 809 F. Supp. 440, 441 (E.D. La. 1992).

> 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 was rescued.[213]

Some courts have also considered the salvor's effort to protect the environment when calculating the amount of the award.[214] This discretion has led to a wide range of salvage awards. For example, in *Hernandez v. Roberts*,[215] the District Court for the Southern District of Florida applied these principles and awarded a pleasure boater a salvage award of only $500 because of the relatively minor risk and effort involved. In *Margate Shipping Co. v. M/V JA Orgeron*,[216] on the other hand, the Fifth Circuit granted a $4.125 million salvage award, the largest on record, for a private salvor's efforts in saving a valuable external fuel tank for NASA's space shuttle.[217]

Under the Antiquities Act, the state historical preservation commission may set and determine the award for salvage efforts rather than an independent Article III admiralty court.[218] A situation whereby the party holding title to the wreck, the state, will be setting the salvage award is prejudicial to the manner by which a salvage award is determined under the general maritime law. One may argue, however, that this prejudice to the general maritime law may not be *material* if the public is made aware that the available remedy, compensation set by the historical preservation commission, promotes salvage efforts. In setting salvage awards, the ultimate concern of federal courts is to promote the general maritime law's policy of encouraging "seamen and others" to undertake salvage operations.[219] If the compensation set by the historical preservation society encourages salvage operations, any prejudice inuring to the general maritime law may not be material if the general maritime law's ultimate goals are achieved, albeit through a different system.

Even if it can be successfully argued that the Antiquities Act's method of setting salvage awards does not *materially* prejudice the

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213. *The Blackwall*, 77 U.S. (10 Wall.) at 14.
214. *See Trico Marine Operators*, 809 F. Supp. at 443.
215. 675 F. Supp. 1329 (S.D. Fla. 1988).
216. 143 F.3d 976 (5th Cir. 1998).
217. *See id.* at 980.
218. *See* R.I. Gen. Laws § 42-45.1-5(d) (1956) (1993 Reenactment).
219. *See* Schoenbaum, *supra* note 166, at 365.

general maritime law, such a situation seems repugnant to John Locke's idea that no man should be a judge in his own case.[220] Theoretically, this basic principle is reflected and implemented in the separation of powers doctrine.[221] Under the Antiquities Act, the state will have the final say as to what compensation will be awarded to a salvor of its property. The presence of the state's pecuniary interest in the matter deprives a salvor of the right to have independent Article III admiralty judge determine the compensation justified for salvage efforts. This apparent conflict of interest seems to represent an unacceptable collapse of the separation of powers doctrine as posited by John Locke.

The third inconsistency between the Antiquities Act and the general maritime law is the Antiquities Act's prohibition of salvage efforts except upon permission of certain state or federal agencies.[222] Pursuant to section 42-45.1-5 (3) of the Antiquities Act, potential salvors must obtain permission from "any federal or state agencies having jurisdiction prior to conducting" any salvage operations.[223] A fundamental principle of the general maritime law is that all seafaring persons and potential salvors be free to explore the open waters for pleasure, commerce, or otherwise to ply their trades.[224] In *Cobb Coin Co., Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel,*[225] the District Court for the Southern District of Florida struck down a Florida statute that restricted a person's right to explore navigable waters for salvageable sites without receiving permission from the state.[226] Under the general maritime law, a person is free to undertake salvage operations unless another party has already secured an exclusive right to salvage a wreck site by demonstrating that salvage efforts are currently: "(1) undertaken with due diligence, (2) ongoing, and (3)

220. *See* John Locke, The Second Treatise of Government § 13 *in* Two Treatises of Government at 275 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689).

221. *See* Ronald J. Krotoszynski, Jr., *On The Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 Wm. & Mary L. Rev. 417, 430 (1997).

222. *See* R.I. Gen. Laws § 42-45.1-5(3).

223. *See id.*

224. *See* Cobb Coin Co., Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, 525 F. Supp. 186, 203 (S.D. Fl. 1981).

225. 525 F. Supp. 186 (S.D. Fl. 1981).

226. *See id.* at 203-04.

clothed with some prospect of success."[227] Thus, under the general maritime law, a potential salvor may undertake salvage operations unless another party has secured salvage rights to the exclusion of others.[228] Accordingly, the Florida statute was preempted by the general maritime law.[229]

Requiring a person to receive permission before commencing salvage activities prejudices the general maritime law's principle that navigable waters are free for exploration by potential salvors.[230] Thus, to the extent that section 42-45.1-5 (3) prevents a salvor from salvaging a non-ASA shipwreck without permission, the Rhode Island law poses an impermissible conflict with the general maritime law. Accordingly, this provision of the Antiquities Act is also preempted by the general maritime law.

VI. CONCLUSION

A preemption analysis of the Antiquities Act reveals some significant flaws with its potential application to non-ASA shipwrecks. Although Congress has not expressly preempted state legislation governing non-ASA shipwrecks, congressional intent to preclude state legislation in that field is implicit in the language and structure of the ASA. Also, to the extent that the Antiquities Act governs non-ASA shipwrecks, the Antiquities Act impermissibly conflicts with the general maritime law in its alteration of admiralty rules of abandonment, determination of salvage awards and restrictions on rights to salvage.

Michael J. Daly

227. Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059, 1061 (1st Cir. 1987); *Cobb Coin Co.*, 525 F. Supp. at 204.

228. *See Cobb Coin Co.*, 525 F. Supp. at 204.

229. *See id.* at 203-04.

230. *See id.* at 203.