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John Paul Jones

University of Richmond, jjones@richmond.edu

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The United States Supreme Court and Treasure Salvage: Issues Remaining After Brother Jonathan

JOHN PAUL JONES*

I INTRODUCTION

On April 22, 1998, the United States Supreme Court announced its decision in *California v. Deep Sea Research, Inc.*,¹ a case of shipwreck salvage begun as a maritime action *in rem*. Because the Court does not often accept cases of admiralty and maritime law, its decision was eagerly anticipated by American maritime lawyers and constitutionalists, both for what it might say about the Eleventh Amendment and sovereign immunity in a federal system and how it might limit Congressional power to alter the general maritime law and admiralty jurisdiction.

Also anxious for the Court's decision were the few maritime lawyers who practice what has become known as treasure salvage law. Recent advances in technologies for locating sunken wrecks and retrieving what remains have put within easy reach an accumulation of shipwrecks lost and forgotten for ages. As well as the lawyers, state governments, historic preservationists, marine archaeologists, professional shipwreck hunters, and recreational scuba divers all looked forward to the resolution of the case of the *Brother Jonathan*. They hoped for the Court's resolution of a variety of issues that recently had emerged on the line in general maritime law where the law of salvage abuts the law of finds. The case seemed to promise as well answers to a number of questions about the Abandoned Shipwreck Act of 1987 ("ASA"),² a sweeping legislative intervention apparently governing ship-

*Professor of Law, University of Richmond. Associate Editor, Journal of Maritime Law and Commerce. B.A., Marquette University; J.D., University of San Diego; LL.M., Yale University. The author is indebted to the professional staff of the William T. Muse Law Library for their generous and expert assistance in the research for this article, and to David G. Concannon, Esq., for his continuing interest and very useful comments.

¹118 S. Ct. 1464, 1998 AMC 1521 (1998).

²43 U.S.C. §§ 2101-2106.

wrecks and other marine archaeological sites on or in the bed of the territorial waters of the several United States.

What the Court actually decided, however, was far short of what it might have decided. The unanimous opinion of the Court offers a simple enough answer to one very narrow question about the Eleventh Amendment. In addition, it hints at the answer to one narrow question about the proof required in a small number of shipwreck salvage cases, and, at best, invites an answer from the lower courts to another. Many other questions are left unanswered. What follows is an examination of the Supreme Court's answers in *Deep Sea Research* and the more important questions left unanswered.

II BACKGROUND

The *Brother Jonathan* was a wooden-hulled, side-wheeled passenger steamship, 220 feet long. She was built in 1850 for the Panama route to the California gold fields. In 1856, she was sold to the California Steamship Company, which then ran her up and down the west coast.³ On July 28, 1865, she left San Francisco, bound for Portland and Vancouver, carrying 54 crew members and 109 passengers, as well as a shipment of gold bullion and an Army payroll.⁴ After a scheduled stop at Crescent City, she resumed her voyage the next morning. Encountering dangerously heavy seas, she turned back toward Crescent City. Approximately 4.5 miles off the coast, near St. George Reef, she struck a submerged rock and sank in less than an hour, to a depth of approximately 250 feet. Very few of her passengers and crew survived.⁵ Later, five insurance companies paid \$48,490 for the loss of the

³Brief for Petitioners at 2–3, *California v. Deep Sea Research, Inc.*, 118 S. Ct. 1464, 1998 AMC 1521 (1998) (No. 96–1400).

⁴The numbers of those aboard are from the opinion of the district court. See *Deep Sea Research, Inc. v. Brother Jonathan*, 883 F. Supp. 1343, 1347, 1995 AMC 1682 (N.D. Cal. 1995). In their brief to the United States Supreme Court, California and her State Lands Commission averred that, on her last voyage, the *Brother Jonathan* carried “approximately 250 passengers and crew.” Brief of Petitioners, *supra* note 3, at 4. That her cargo contained both gold bullion and an Army payroll is reported in the opinion of the Court, referring to a contemporary news story in the *San Francisco Chronicle*. 118 S. Ct. at 1467.

⁵According to the opinion of the district court, sixteen survived. 883 F. Supp. at 1347. According to the Brief for Petitioners, *supra* note 3, at 4, nineteen survived.

gold comprising a portion of her cargo.⁶ It is not clear that the vessel herself was insured, or the remainder of her cargo.

For many years, the exact location of the wreck was unknown. In the 1930's, a fisherman found 22 pounds of gold in bars somewhere in the vicinity of her resting place, but the finder went to his grave without sharing the location or details of his find. Although it was established that the fisherman's gold was minted in 1865, it could not be confirmed that it comprised part of the cargo shipped aboard the *Brother Jonathan*.⁷

In 1994, Deep Sea Research, Inc. ("DSR") brought an action *in rem* in the United States District Court for the Northern District of California, claiming to have found the wreck of the *Brother Jonathan*. DSR sought an order of arrest and recognition both as a salvor entitled to exclusive possession of the wreck and as the successor to the owners of the insured bullion, having obtained from their insurance companies title to the gold, which had passed to them when they paid the claims.

The State of California intervened, asserting title to the wreck under both the ASA and § 6313 of the California Public Resources Code,⁸ and moved for dismissal of the action on the ground that a suit *in rem* involving property to which a state claimed title was one prohibited by the Eleventh Amendment. In the ASA, the United States asserted title to certain shipwrecks on, or embedded in, the submerged lands of the states and transferred it to the state on (or in) whose submerged lands the wrecks were located.⁹ In § 6313, California asserted title to all abandoned shipwrecks on the submerged lands of California, as well as to all those in her tidal waters.¹⁰

DSR answered by denying that the wreck of the *Brother Jonathan* had

⁶According to the district court, the insurance companies paid for the loss of the vessel. 883 F. Supp. at 1347. According to their brief to the Supreme Court as amici curiae, the insurance companies paid for the loss of a commercial cargo of gold shipped aboard the vessel. Brief of Atlantic Mutual Insurance Co., et al., as Amici Curiae Supporting Respondent at 1, *California v. Deep Sea Research, Inc.*, 118 S. Ct. 1464, 1998 AMC 1521 (1998) (No. 96-1400).

⁷118 S. Ct. at 1467.

⁸Cal. Pub. Res. Code § 6313.

⁹In the Act, the United States asserts title to abandoned shipwrecks embedded in the submerged lands of a state or in coralline formations protected by a state on the state's submerged lands, as well as those ships on the submerged lands of a state that are included in the National Register of Historic Places or eligible for the National Register. The Act transfers title to such wrecks to the states in or on whose submerged lands the wrecks are found. According to the Act, the United States retains title to abandoned shipwrecks in or on submerged lands owned by the United States, and Indian tribes retain title to abandoned shipwrecks in or on submerged lands owned by the tribe. 43 U.S.C. § 2105. For purposes of the Act, a shipwreck is defined as "a vessel or wreck, its cargo, and other contents." 43 U.S.C. § 2102. The Act does not offer a definition of "abandoned."

¹⁰In § 6313, California also asserts title to all submerged sites with archaeological or historical interest. Salvage of abandoned shipwrecks is made subject to a permit to which the State Lands Commission may attach conditions, including compliance with "contemporary professional standards of archaeological date recovery." Cal. Pub. Res. Code § 6313.

ever been abandoned, so that neither the ASA nor § 6313 applied, and by attacking both statutes as unconstitutional if they did. The attack on the ASA prompted intervention by the United States, at first only to defend the federal statute, but later also to assert ownership of any federal property that might be recovered from the wreck.¹¹

To act on the motions, the district court scheduled hearings to determine, first, where the vessel's remains were located, and, second, whether the wreck had been abandoned within the meaning of the ASA or § 6313, so that the state could make a claim to title based on either of the statutes, and thereby implicate the Eleventh Amendment.¹² Before the first hearing could take place, DSR and California agreed that, as far as California's motion to dismiss was concerned, the wreck of the *Brother Jonathan* was in the state's territorial sea.¹³ This stipulation relieved DSR from having to reveal with greater exactitude the wreck's location, a fact of which the state was still at that time in ignorance.

At the second hearing, the court obliged the state not only to assert, but to prove that the *Brother Jonathan* was abandoned. According to California, the United States Supreme Court had ruled in *Florida Department of State v. Treasure Salvors, Inc.*,¹⁴ that the Eleventh Amendment left a federal court with no choice but to dismiss an action *in rem* when a state intervened, so long as the state could make a claim of title to the res that was at least "colorable." In California's view, the Court had intended to convey by that qualifier the point that a state's ownership claim could be sufficient to implicate the Eleventh Amendment without being proven by any evidence at all. The district court chose instead to interpret colorable as conveying an expectation that the state do more than baldly assert title if it would invoke

¹¹883 F. Supp. at 1348.

¹²*Id.*

¹³*Id.* at 1348 n.4.

¹⁴458 U.S. 670, 1983 AMC 144 (1982). In *Treasure Salvors*, those who located a 17th century shipwreck reached an agreement with the State of Florida for a share of what they recovered. Eventually, when it was determined that the site of the wreck was outside Florida waters after all, they sued in admiralty for a salvage award and for confirmation of their title to the wreck as its finders. When state custodians refused to return certain artifacts that had been recovered from the site by the salvors, the salvors petitioned the court for an order directing the state custodians to surrender the artifacts. The state intervened and moved to quash the order on the ground that it and the action from which it stemmed violated the Eleventh Amendment. The motion was denied, *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F. Supp. 507, 1980 AMC 646 (S.D. Fla. 1978), and the district court's decision was affirmed on appeal. See 621 F.2d 1340, 1981 AMC 1529 (5th Cir. 1980). The Supreme Court affirmed in part and reversed in part. No opinion attracted a majority of the Court, although all but Justice Brennan agreed that the Eleventh Amendment could bar an action *in rem* when title is at issue and the state appears and contests it. Three other justices joined an opinion written by Justice Stevens, in which Florida's statutory and contractual claims were assessed and found too tenuous to be "colorable," that is, to justify quashing on Eleventh Amendment grounds an order to the state custodians to yield possession of the artifacts.

the Eleventh Amendment to secure dismissal of an action *in rem*. The district court therefore opted to treat the state's demand for dismissal in accordance with the Eleventh Amendment as it would other affirmative defenses, putting the state to proof of its claim of title. Apparently out of deference to the state's correlative sovereignty, however, the federal court elected not to treat California as it would others who asserted title to a vessel as a result of her abandonment. Forgoing maritime law's ordinary standard of proof for abandonment—evidence both clear and convincing—the court settled for the ordinary standard of proof for affirmative defenses, a preponderance of the evidence.¹⁵

To meet this burden, the court expected California to prove more than simply that many years had passed during which owners of the vessel and her cargo had failed even to locate her final resting place.¹⁶ Mistakenly anticipating that its averment of the *Brother Jonathan's* abandonment would by itself be enough to warrant dismissal, the state proved able to offer little else in the way of real evidence of abandonment. The state's sole witness, a historian who had made only a cursory investigation during the eight days immediately before the hearing, admitted that he had neither searched insurance records nor contacted the companies that had paid on claims arising from the *Brother Jonathan's* loss. Nor could he produce any evidence of a public disclaimer by the vessel's owners or her insurers. Meanwhile, DSR proved that only in the last three years had there occurred technological improvements in sonar and mixed-gas breathing systems significantly enhancing the feasibility of locating the *Brother Jonathan* and of working at a depth such as that at which the wreck was to be found.

In the view of the district court, a preponderance of this evidence did not prove that the *Brother Jonathan* had been abandoned. Accordingly, the court denied California's motion and granted DSR's motion, issuing a warrant of arrest.¹⁷ In addition, the court named DSR both substitute custodian of the wreck and salvor in possession. After some negotiating of the description of the wreck's precise location, the court enjoined competing salvage operations in the vicinity of the wreck for eighteen months. Because the state had failed to establish that the vessel or her wreck had been abandoned, the court

¹⁵883 F. Supp. at 1348–50.

¹⁶In light of DSR's claim as successor to title to the insured portion of the bullion cargo, California tried unsuccessfully to persuade the court that abandonment sufficient for either statute could be partial where, as here, no claimant asserted title to the vessel or to her uninsured contents, cargo, or otherwise. The court was loathe to interpret the ASA in a manner that would have ousted an action *in rem* for only some of a shipwreck, so that both federal and state courts would then have to be involved. *Id.* at 1353–54.

¹⁷The court directed the United States marshal to serve the warrant on artifacts retrieved from the wreck, "brought into the district and deposited into the custody of the court." *Id.* at 1359.

found neither the ASA nor § 6313 applicable,¹⁸ and therefore decided that questions regarding the constitutionality of each could be left unanswered.

California appealed, assigning as errors both the district court's insistence that a state's claim of title had to be supported by sufficient evidence before it could compel dismissal of an action *in rem* and the court's insistence that something more than the passage of time and prolonged inaction by the owner was required to prove abandonment. The United States Court of Appeals for the Ninth Circuit affirmed, holding that the state was properly put to proof that it had a claim of title before it could compel dismissal of an action *in rem*. In both courts, California had relied heavily on *Marx v. Government of Guam*,¹⁹ in which the court of appeals had reversed a district court's denial of a motion by the territorial government to dismiss a salvor's action *in rem* for possession and title of the wrecks of two Spanish galleons.

In *Marx*, the court of appeals had found sufficiently colorable the government's claim to title of the wrecks by reason of their abandonment and the Underwater Historic Property Act,²⁰ a federal law conveying to Guam and other territories title to adjacent submerged lands. Guam therefore was not obliged to offer proof of any sort that the galleons had been abandoned before it could obtain dismissal pursuant to the Eleventh Amendment. In the instant case, however, the court of appeals found California's reliance on *Marx* misplaced because the ASA had meanwhile become effective. Because the very federal law from which California purported to derive its title also preempted state law on the subject, the question of title was now exclusively one of federal law, warranting greater inquiry by the court into the substance of the state's claim.

Having endorsed the district court's decision to put California to proof that its ownership claim was colorable because the *Brother Jonathan* had been abandoned, the court of appeals turned to the measure of abandonment. California argued that the district court had erred by following the decision of the United States Court of Appeals for the Fourth Circuit in *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*,²¹ thereby requiring the state to prove that the owner of the *Brother Jonathan* (or its successors) had expressly renounced its ownership of the vessel or her wreck. Apparently agreeing with California's interpretation of the Fourth Circuit's position in *Columbus-America Discovery Group*, the Ninth Circuit nevertheless disagreed that the court below had in fact required of California

¹⁸The district court also concluded that the ASA preempted § 6313, not only for shipwrecks covered by the federal statute but also for other shipwrecks in the navigable waters of the United States. *Id.* at 1357.

¹⁹866 F.2d 294, 1989 AMC 896 (9th Cir. 1989).

²⁰48 U.S.C. § 1705.

²¹974 F.2d 450, 1992 AMC 2705 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993).

nothing less than proof of express renunciation by the vessel's prior owners. Instead, the court of appeals found that the district court had held California to the traditional test for abandonment under maritime law, a test that could be satisfied by evidence of either an express renunciation by the owners of a wrecked vessel, or of the lapse of time and other circumstances from which a wreck's abandonment could be inferred. The appellate court then declined to treat as clearly erroneous the district court's finding that California had failed this test for proving the abandonment of the *Brother Jonathan*.²²

California then petitioned successfully to the United States Supreme Court for a writ of certiorari. To the Supreme Court, the case presented three issues: 1) whether a state had to prove that its claim of title to a res was at least colorable when the state sought on Eleventh Amendment grounds dismissal of a salvor's action *in rem*; 2) whether the ASA preempted application of state law regarding title to shipwrecks in state waters even when the wreck in question was not covered by the federal statute; and, 3) whether the *Brother Jonathan* was abandoned for purposes of the ASA despite the claim of insurers who had paid claims on a portion of her cargo.²³

In a unanimous opinion penned by Justice O'Connor, the Court found that the Eleventh Amendment does not apply to a maritime action *in rem* if the res is not in the possession of the state.²⁴ Drawing on *The Davis*,²⁵ *The Siren*,²⁶ and *The Pesaro*,²⁷ earlier cases involving maritime actions *in rem* in which the sovereign immunity of the United States or a foreign government was unsuccessfully interposed when the subject vessels were not in the government's possession, the Court found the same limitation apt for the similar immunity afforded states by the Eleventh Amendment.

Affirming the decisions of the courts below on this basis made moot the other questions presented to the Court.²⁸ For the time being at least, the

²²California also failed to persuade the court of appeals that the district court had erred in refusing to treat the remains of the vessel and the uninsured portions of her cargo as abandoned because nobody had appeared claiming their ownership. The reviewing court found treatment of the wreck, including both the insured and uninsured cargo and the vessel, as a single res to be well-justified both in maritime law and by the confusion the court foresaw from separate adjudication of various portions of the wreck in state and federal courts. 102 F.3d at 388-89.

²³118 S. Ct. at 1469-70.

²⁴*Id.* at 1473.

²⁵77 U.S. (10 Wall.) 15 (1869) (salvor's action against commercial vessel and cotton cargo shipped by an agent of the United States government).

²⁶74 U.S. (7 Wall.) 152 (1868) (claim for damages from collision while under the command of a prize master was not barred because condemnation amounts to a waiver of sovereign immunity).

²⁷255 U.S. 216 (1921) (ambassador's suggestion of government ownership made directly to the court does not warrant dismissal of action *in rem*).

²⁸Justice O'Connor explained this conclusion by writing:

In light of our ruling that the Eleventh Amendment does not bar complete adjudication of the competing claims to the *Brother Jonathan* in federal court, the application of the ASA must be reevaluated. Because the record before this Court is limited to the preliminary issues before the

Court could refrain from attempting to describe more precisely than it had in *Treasure Salvors* what burden could be imposed on a state in possession of the property subject of a maritime action *in rem* as a precondition to dismissal of the action in accordance with the Eleventh Amendment. The Court also excused itself from deciding whether the ASA preempted similar state laws even as to shipwrecks and marine artifacts beyond the reach of the federal statute and whether the ASA was constitutional. Beyond those questions relating to the new federal statute remains a second tier of unresolved or disputed issues of the general maritime law of salvage and finds. As to them, the Court remains for now silent.

Almost as an aside, the Court's opinion closes with very limited directions relevant to the ASA. Explicitly directing the district court to reconsider application of the Act to the wreck of the *Brother Jonathan*, the Supreme Court directed the court to reinterpret the ASA, this time free of any inhibition arising from Eleventh Amendment concerns. What the Supreme Court intended to convey by this direction is not perfectly clear, but it seems to suggest that California need not be excused from the burden of proof imposed generally in a maritime *in rem* action on private parties asserting ownership as a result of abandonment by the previous owners. In addition, the Court specified that the meaning to be imparted to the word "abandoned" in the ASA is the meaning abandoned is afforded in general maritime law.²⁹ The Court did not say more.

District Court, we decline to resolve whether the *Brother Jonathan* is abandoned within the meaning of the ASA. We leave that issue for reconsideration on remand, with the clarification that the meaning of "abandoned" under the ASA conforms with its meaning under admiralty law.

118 S. Ct. at 1473. It is not as if the Congressional authors of the ASA left for speculation the meaning they intended for the word "abandonment" as it appears in the statute. According to the House Report, "The Committee notes that the term 'abandoned' does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership rights may be implied, or otherwise inferred, as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck." H.R. Rep. No. 514(I), 100th Cong., 2d Sess., pt. 1, at 2 (1988), reprinted in 1988 U.S.C.C.A.N. 365, 366. Perhaps the sub-text of the Supreme Court's declaration in *Deep Sea Research*, that abandonment in the ASA means abandonment under admiralty law, is that the Court took the Committee's definition in its report merely as its attempt to say what admiralty law says, and that the Court is at least skeptical of the success of that attempt. Respecting shipwrecks older than the Rivers and Harbors Act of 1899, the ASA Guidelines published by the Department of the Interior ("DOI") say only that a shipwreck is abandoned if "title voluntarily has been given up by the owner with the intent of never claiming a right or interest in the future and without vesting ownership in any other person." 55 Fed. Reg. 50116, 50120 (1990).

²⁹118 S. Ct. at 1473.

III REMAINING QUESTIONS

Advances in the technologies of underwater search and recovery have abruptly opened to salvage wrecks long lost and put out of mind. What was once impossible, then merely prohibitively expensive and dangerous, is now commercially, even recreationally, viable. The very narrow holding of the Supreme Court in *Deep Sea Research* means that answers to most of the legal questions dividing shipowners, salvors, historic preservationists, marine archaeologists, recreational scuba divers, and the admiralty courts in which their divisions are presented must await another day. What follows is a list of ten of the most pressing questions, and the directions in which lower courts have moved toward their resolution.

1. What does abandonment mean for a salvor claiming a find?

The maritime law of salvage has traditionally treated abandonment simply as a factor going to the salvor's right to temporarily possess a ship, her cargo, or her equipment against the objections of her owner,³⁰ or as a factor in quantifying the risk from which the salvors have extricated whatever it is they have saved.³¹ The salvor's usual reward for locating and recovering an abandoned vessel or her remains, including her cargo or equipment, has been payment from the proceeds of a court-ordered sale of the recovered property, the remainder to be held by the court against a claim by the owner. Otherwise, in the owner's discretion, money or other things of value equal to that of the salvaged vessel or goods could be substituted prior to the judgment as a fund from which the salvor's reward would subsequently be deducted.³² In a few cases of derelict, where the owner failed to appear, either to defend against the salvor or else to assert ownership within a year and a day of the marshal's sale, courts have awarded to the salvor the remaining share of the sale proceeds.³³

³⁰T. Schoenbaum, Admiralty and Maritime Law § 14-7 (2d ed. 1994); M. Norris, The Law of Salvage, in 3A Benedict on Admiralty §§ 150-151 (7th rev. ed. 1997).

³¹Norris, supra note 30, § 130; G. Gilmore & C. Black, The Law of Admiralty § 8-10 (2d ed. 1975). A third aspect of traditional marine salvage for which abandonment is relevant is a claim of salvage by the salvor against the owner *in personam* (as distinct from a claim against the recovered property itself *in rem*). Gilmore & Black, id. § 8-13.

³²Norris, supra note 30, §§ 232-243; Schoenbaum, supra note 30, §§ 14-1, 14-5; Gilmore & Black, supra note 31, §§ 8-1, 8-8.

³³See, e.g., *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1988 AMC 1109 (1st Cir. 1987); *Bemis v. RMS Lusitania*, 884 F. Supp. 1042, 1995 AMC 1665 (E.D. Va. 1995), aff'd mem., 99 F.3d 1129 (4th Cir. 1996) (per curiam), cert. denied, 118 S. Ct. 1558 (1998); *Moyer v. Wrecked and Abandoned Vessel, known as Andrea Doria*, 836 F. Supp. 1099, 1994 AMC 1021 (D.N.J. 1993); *Wiggins v. 1100 Tons, More or Less, of Italian Marble*,

Modern advances in the technologies applied to locate submerged wrecks in deep water, and to recover objects from such locations, have produced a harvest season of long lost shipwrecks.³⁴ As a result, those who have located shipwrecks and recovered from them artifacts have applied to courts in admiralty with increasing frequency not only for the traditional salvor's reward but also for a finder's title to that which they have recovered.³⁵ Abandonment therefore has taken on a greater significance, especially in cases where the recovered goods may fairly be said to possess exceptional extrinsic value as cultural icons or historical evidence.

It is black letter salvage law that a vessel in distress may be abandoned to others by the affirmative act of her owner or master.³⁶ In recent derelict salvage cases, courts have split on the issue of whether abandonment of a ship (or its wreck) otherwise may be inferred from the mere passage of time

186 F. Supp. 452, 1960 AMC 1774 (E.D. Va. 1960); *Llewellyn v. Two Anchors and Chains*, 15 F. Cas. 711 (E.D.N.Y. 1866) (No. 8,428); *The Zealand*, 30 F. Cas. 917 (D. Mass. 1865) (No. 18,205); *Commonwealth v. Maritime Underwater Surveys, Inc.*, 1987 AMC 2590 (Mass. Super. Ct. 1987), *aff'd*, 531 N.E.2d 549, 1989 AMC 425 (Mass. 1988).

³⁴For a list of such advances, see Stevens, *The Abandoned Shipwreck Act of 1987: Finding the Proper Ballast for the States*, 37 Vill. L. Rev. 573, 575 n.6. (1992). For a detailed account of the employment of some of them in locating and recovering artifacts from a wreck at 8,000 feet, see G. Kinder, *Ship of Gold in the Deep Blue Sea* (1998).

³⁵In addition to *Deep Sea Research*, see, e.g., *Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel Known as the Captain Lawrence*, 105 F.3d 1078 (6th Cir. 1997), vacated and remanded, 118 S. Ct. 1558 (1998); *Zych v. Unidentified Wrecked and Abandoned Vessel, Believed to be the Seabird*, 19 F.3d 1136, 1994 AMC 2672 (7th Cir.), cert. denied, 513 U.S. 961 (1994); *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 1992 AMC 2705 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993); *Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel, Known as The Sindia*, 895 F.2d 116, 1990 AMC 305 (3d Cir. 1990); *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1988 AMC 1109 (1st Cir. 1987); *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1985 AMC 2970 (11th Cir. 1985); *Florida Dep't of State v. Treasure Salvors, Inc.*, 621 F.2d 1340, 1981 AMC 1529 (5th Cir. 1980), *aff'd in part, rev'd in part*, 458 U.S. 670, 1983 AMC 144 (1982); *Platoro Ltd. v. Unidentified Remains of a Vessel*, 614 F.2d 1051, 1981 AMC 1097 (5th Cir.), cert. denied, 449 U.S. 901 (1980); *Marex Int'l, Inc. v. Unidentified, Wrecked and Abandoned Vessel*, 952 F. Supp. 825, 1998 AMC 484 (S.D. Ga. 1997); *Bemis v. RMS Lusitania*, 884 F. Supp. 1042, 1995 AMC 1665 (E.D. Va. 1995), *aff'd mem.*, 99 F.3d 1129 (4th Cir. 1996) (*per curiam*), cert. denied, 118 S. Ct. 1558 (1998); *Sunken Treasure, Inc. v. Unidentified, Wrecked and Abandoned Vessel*, 857 F. Supp. 1129, 1995 AMC 1515 (D.V.I. 1994); *Moyer v. Wrecked and Abandoned Vessel, known as Andrea Doria*, 836 F. Supp. 1099, 1994 AMC 1021 (D.N.J. 1993); *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953 (M.D. Fla. 1993); *Sub-Sal, Inc. v. The DeBraak*, 1992 WL 39050 (D. Del. 1992); *MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Vessel*, 631 F. Supp. 308, 1987 AMC 537 (S.D. Fla. 1986); *Chance v. Certain Artifacts Found and Salvaged from The Nashville*, 606 F. Supp. 801, 1985 AMC 609 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302, 1986 AMC 1216 (11th Cir. 1985); *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186, 1983 AMC 966 (S.D. Fla. 1981); *People ex rel. Illinois Historic Preservation Agency v. Zych*, 687 N.E.2d 141 (Ill. App. Ct. 1997), appeal allowed, 690 N.E.2d 1387 (Ill. 1998); *Commonwealth v. Maritime Underwater Surveys, Inc.*, 1987 AMC 2590 (Mass. Super. Ct. 1987), *aff'd*, 531 N.E.2d 549, 1989 AMC 425 (Mass. 1988).

³⁶77A C.J.S. *Salvage* § 22 (1994); 68 Am. Jur. 2d *Salvage* § 53 (1993); Norris, *supra* note 30, § 134. See also D. Steel & F. Rose, *Kennedy's Law of Salvage* § 465 (5th ed. 1985).

and inactivity on the part of the owner. In *Deep Sea Research, Inc. v. Brother Jonathan*,³⁷ the Ninth Circuit found “the traditional rule” to be that abandonment could be inferred from “the lapse of time or the failure to pursue salvage efforts on the part of the owners.”³⁸ Previously, in *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*,³⁹ the Fourth Circuit had declared the rule to be that, ordinarily, a lapse of time following cessation of recovery attempts by the owner was insufficient to support an inference of shipwreck abandonment. According to the court, a different rule permitting such an inference from evidence of prolonged inactivity by the owner might nevertheless govern a shipwreck “ancient and long lost.”⁴⁰ In *Fairport International Exploration, Inc. v. Shipwrecked Vessel Known as the Captain Lawrence*,⁴¹ the Sixth Circuit followed the Ninth Circuit, taking the position that whatever might be the correct rule under the laws of salvage and finds, that espoused by the Fourth Circuit in *Columbus-America Discovery Group* would “render the [ASA] a virtual nullity,” given the infrequency with which abandonment would occur under a rule requiring proof of an affirmative act of renunciation by the owner for the inference of abandonment to be drawn.⁴² In *People ex rel. Illinois Historic Preservation Agency v. Zych*,⁴³ an Illinois state court followed the Sixth Circuit’s ill-fated lead in *Captain Lawrence*.

³⁷102 F.3d 379, 1997 AMC 315 (9th Cir. 1996).

³⁸Note that the Ninth Circuit presents lapse of time and inactivity as themselves alternative, citing only to *Martha’s Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1988 AMC 1109 (1st Cir. 1987). In that case, abandonment was hardly at issue. Competing salvors, each claiming the vessel abandoned and therefore a find, disputed possession; the ship’s owner did not appear to assert title at all. The court merely observed in passing that “without question, the [vessel] and its cargo had been long forsaken when discovered. . . .” It is surely incorrect to derive abandonment from the passage of time alone, if one can imagine time going by while recovery is diligently attempted. The disjunctive form did no harm in *Deep Sea Research* where the court of appeals eventually upheld the decision of the trial court that California had failed to produce adequate evidence from which abandonment could be inferred. Presumably this means that, if the court took the disjunctive form seriously, the state failed to proffer sufficient evidence that time had lapsed, as well as that the owners had been indolent. Because the lapse of time seems a fact appropriate for judicial notice, the amount of time that had lapsed between the vessel’s sinking on July 30, 1865 and discovery of her remains in October 1993 must have itself been inadequate for both courts.

³⁹974 F.2d 450, 1992 AMC 2705 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993).

⁴⁰*Id.* at 464–65.

⁴¹105 F.3d 1078 (6th Cir. 1997), vacated and remanded, 118 S. Ct. 1558 (1998).

⁴²*Id.* at 1085. That the Supreme Court reversed and remanded this case for reconsideration in light of its decision in *Deep Sea Research* means only that the Sixth Circuit now must choose without assuming that what Congress intended in the ASA could be something different from what admiralty courts have found sufficient for an inference of abandonment.

⁴³687 N.E.2d 141 (Ill. App. Ct. 1997), appeal allowed, 690 N.E.2d 1387 (Ill. 1998).

2. *What tolls the inference of abandonment?*

Even if it should be settled that abandonment to the advantage of a finder may occur without an affirmative act of renunciation on the part of the owner, courts have been willing so far to excuse an owner's inaction, even when prolonged. Failing to undertake or continue efforts at recovery has been found justified on grounds of technological feasibility—as well as grounds more akin to economic efficiency.

In *Deep Sea Research*, for example, the district court found that because shipwreck salvage under circumstances such as those of the *Brother Jonathan* was not technologically feasible until recently, prolonged inaction by the underwriters of the gold specie and bullion cargoes aboard was excused, foreclosing a finding that the wreck had been abandoned.⁴⁴ Similarly, in *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be SB Lady Elgin*,⁴⁵ the district court decided that the underwriter “was not required to engage in efforts to recover the wreck in order to avoid abandoning its interest *when such efforts would have had minimal chance of success.*”⁴⁶

If technological feasibility is to be a measure of excusable inaction, then the window of opportunity for doing nothing is clearly closing on owners (and their successors in interest), and recovery delay excused on such grounds should soon disappear from most shipwreck cases as courts take notice that technology has put all underwater wrecks within the reach of those with deep pockets and time to search.⁴⁷ The future for a defense of delay excused by the absence of a commercially practicable recovery venture proposal is more difficult to predict, and would make excusable recovery delay on the part of the owner that is unexcused on the part of the salvor.⁴⁸

3. *Will courts infer abandonment of a public vessel?*

That eventually the law might be settled so that abandonment to the advantage of a finder may occur generally without an affirmative act of renunciation on the part of the owner leaves open the question of whether

⁴⁴883 F. Supp. at 1351.

⁴⁵755 F. Supp. 213 (N.D. Ill. 1990), rev'd on other grounds, 960 F.2d 665, 1992 AMC 1817 (7th Cir. 1992).

⁴⁶*Id.* at 217 (emphasis added).

⁴⁷For a report on the newest and most inexpensive technologies, see Mather, *Technology and the Search for Shipwrecks*, 30 *J. Mar. L. & Com.* 175 (1999).

⁴⁸See *Eads v. Brazelton*, 22 Ark. 499 (1861) (aspiring salvor not excused for delay during which he salvaged another vessel, or attributable to the lack of steam power aboard his vessel).

such a judgment could occur respecting the wreck of a vessel in which some government asserts one sort of ownership interest or another. In *United States v. Steinmetz*,⁴⁹ the court, without discussing precedent to the contrary,⁵⁰ found that the wrecks of United States warships are to be treated differently.⁵¹ In that case, the district court considered itself foreclosed by both Article IV, § 3, clause 2 of the United States Constitution⁵² and international law⁵³ from finding a United States warship abandoned in favor

⁴⁹763 F. Supp. 1293, 1991 AMC 2099 (D.N.J. 1991), aff'd, 973 F.2d 212, 1992 AMC 2879 (3d Cir. 1992), cert. denied, 507 U.S. 984 (1993). Accord Kahn, *Sunken Treasures: Conflicts Between Historic Preservation Law and the Maritime Law of Finds*, 7 Tul. Envtl. L.J. 595, 637-38 (1994); Comment, *Finders Weepers Losers Keepers: United States of America v. Steinmetz, the Doctrine of State Succession, Maritime Finds, and the Bell of the C.S.S. Alabama*, 28 Conn. L. Rev. 479, 550-53 (1996). See Norris, *supra* note 30, § 150 (Cum. Supp. 1998).

⁵⁰State ex rel. Ervin v. Massachusetts Co., 95 So. 2d 902, 903, 1962 AMC 1061 (Fla.), cert. denied, 355 U.S. 881 (1957) (United States battleship wreck formerly used for target practice was derelict, so that title passed to sovereign Florida by common law). No appearance in the case was made for the United States. Cf. *Baltimore, Crisfield & Onancock Line, Inc. v. United States*, 140 F.2d 230 (4th Cir. 1944) (obsolete United States battleship used for target practice and eventually settling on the bottom was not, after 29 years, a "public vessel" within the meaning of the Public Vessels Act, 46 U.S.C. app. §§ 781-790). In *State ex rel. Bruton v. Flying "W" Enters., Inc.*, 160 S.E.2d 482, 1968 AMC 2125 (N.C. 1968), the wrecks of several Confederate blockade runners were found to be abandoned, but it is not clear whether ownership by the United States was suggested to the court, nor, indeed, is it clear that the blockade runners in question were property of the Confederacy; they could have been merely private vessels licensed by the Confederacy for such ventures.

⁵¹The actual holding was that abandonment of the wreck of the *Alabama*, a Confederate warship, could not be inferred from the prolonged failure to search for her. Judge Debevoise relied on *Hatteras, Inc. v. U.S.S. Hatteras*, 1984 AMC 1094 (S.D. Tex. 1981), aff'd mem., 698 F.2d 1215 (5th Cir.), cert. denied, 464 U.S. 815 (1983), which in turn relied upon *United States v. California*, 332 U.S. 19, 1947 AMC 1579 (1947) (competing, but non-maritime, state and federal claims to offshore oil and gas deposits).

⁵²"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

⁵³Judge Debevoise had relied for this point of international law on a memorandum of law prepared for the Maritime Administration by the Department of State's Deputy Legal Adviser:

After an extensive analysis of treaty law, commentaries, United States caselaw and foreign caselaw . . . it is clear that under well-established State practice, States generally do not lose legal title over sunken warships through the mere passage of time in the absence of abandonment. They do not lose title during combat in the absence of an actual capture of the warships. Although abandonment may be implied under some circumstances, United States warships that were sunk during military hostilities are presumed not to be abandoned and are considered not subject to salvage in the absence of express consent from the United States Government.

763 F. Supp. at 1299 (citing 1980 Digest of United States Practice in International Law 999, 1004-1005 (M. Leich ed.)). Even the portion of the memorandum relied upon by the court in *Steinmetz* admits that abandonment of sunken United States warships by the United States may be implied in circumstances other than military hostilities. Elsewhere in the memorandum, the Assistant Legal Adviser admits more generally that implied abandonment of warships is accepted in United States courts and by the executive branch of the government. Leich, *id.* at 1003 (citing, apparently with approval, *State ex rel. Bruton v. Flying "W" Enters., Inc.*, 160 S.E.2d 482, 1968 AMC 2125 (N.C. 1968) (Confederate "blockade runners" held abandoned)).

of a finder or salvor except when the abandonment has been communicated by a "formal act."⁵⁴ Thus, prolonged inaction by the federal government, otherwise inexcusable by a private owner, will not be enough to establish abandonment of the wreck in favor of a salvor or finder.

On appeal, the decision was affirmed, but only to the extent that it rested on the constitutional ground.⁵⁵ As far as the constitutional ground ought to go, the precise function and status of the derelict ought to be unimportant, so long as the government of the United States claims title by operation of one law or another, so that ships of the United States other than warships, or other public vessels for that matter, ought to be within its protection.⁵⁶

On the other hand, what about the alternative eschewed by the court of appeals in *Steinmetz*, namely that international law rules out an inference of the abandonment of a warship? Writing for the Third Circuit, Chief Judge Sloviter agreed with the appellant that the policy of the United States concerning abandonment of its sunken vessels has not always been consistent, observing that the Department of State recognized the practice of treating warships from the 17th and 18th centuries as abandoned by

⁵⁴763 F. Supp. at 1299. When its turn came, the court of appeals interpreted the clause as limiting abandonment to "explicit acts." 973 F.2d at 222. Either modifier seems to rule out an inference of abandonment.

⁵⁵973 F.2d 212, 1992 AMC 2879 (3d Cir. 1992), cert. denied, 507 U.S. 984 (1993).

⁵⁶The DOI assumes that abandonment may not be inferred with respect to any vessel entitled to sovereign immunity, including private vessels chartered or otherwise appropriated by the government when they are lost during any such government service. See ASA Guidelines, *supra* note 28, at 50121. The DOI's assertion that a "Colonial privateer" is within the class thus protected surely must be the outer limit.

For centuries before the Civil War . . . , the nations of Europe had developed a series of practices recognized in treaties and international law that allowed a nation to issue a license to an individual or group authorizing the recipient to arm a privately owned vessel for the purposes of making war on the commerce of an enemy. The license was known as a Letter of Marque and Reprisal and was subject to a series of customs and international regulations concerning the treatment of captured ships, cargoes, and crews. In the days before governments became so efficient at collecting revenues, it was a way of attracting private capital to support a war effort. In return for purchasing, arming, equipping, and crewing a ship, the owners were allowed to benefit monetarily from the capture of enemy merchant ships. . . . Once a letter of Marque had been issued, the government had no control over the quality of the crew, or the movements of the vessel.

W. Tidwell, April '65: Confederate Covert Action in the Civil War 83-84 (1995). During the War of 1812, for example,

[m]ost American merchant ships venturing out of port took out letters of marque. They were inexpensive and easily obtained; the ship ran no additional danger in carrying one, seeing that she and her cargo were forfeit in any case should she meet a British cruiser, and if by good fortune she should encounter an unescorted British merchant ship the letter of marque gave her a right to capture her if she could.

C. Forester, *The Age of Fighting Sail: The Story of the Naval War of 1812*, 87 (1956). One may wonder whether a privately-operated blockade runner was sufficiently engaged in Confederate service to join the class which the DOI would have excluded from abandonment by inference. See further *State ex rel. Bruton v. Flying "W" Enters., Inc.*, 160 S.E.2d 482, 1968 AMC 2125 (N.C. 1968) (Confederate and Spanish privateers). See also *supra* note 50.

implication of the long passage of time, and distinguishing United States warships of the 19th and 20th centuries, the titles to which ought to be presumed to remain in the United States.⁵⁷

Even if it is to be settled that United States warships and other public vessels are immune from an inference of abandonment, does this domestic rule oblige the same treatment for corresponding vessels of foreign sovereigns? Until quite recently, Spain had not appeared in court to contest abandonment of vessels from its imperial era, so that abandonment by their owner had been a foregone conclusion in disputes by rival claimants to title.⁵⁸ In *Sea Hunt, Inc. v. Unidentified, Shipwreck Vessel or Vessels*,⁵⁹ Spain, acting through the United States, asserted against Virginia title to two frigates, *La Galga* and *Juno*, wrecked by storms off the Virginia coast in 1750 and 1802.⁶⁰ Although the district court refused to permit the United States to act as Spain's representative, it found enough merit in Spain's position to grant it ninety days to retain proper counsel.⁶¹ If her claims ultimately are sustained, does Spain still own the *Nuestra Senora de Atocha*, and may she yet be heard to make that claim in our courts?

4. What standard of proof applies to a claim of abandonment?

In *Deep Sea Research, Inc. v. Brother Jonathan*,⁶² the Ninth Circuit held California to the standard applied in that circuit generally to proofs of affirmative defenses. Following the Ninth Circuit's lead, the Sixth Circuit held Michigan to the same standard in *Fairport International Exploration, Inc. v. Shipwrecked Vessel Known as the Captain Lawrence*. On the other

⁵⁷973 F.2d at 222. On the cusp of this distinction lies the wreck of the frigate *Hussar* in New York's East River. A British warship, she sank during the Revolutionary War in 1781 or 1782 and was rediscovered in 1823. In a dispute over possession between competing salvors, she was found by the New York Court of Chancery to have been abandoned. There is nothing in the report of the case to suggest that His Majesty's government presented any opposition. *Deklyn v. Davis*, 1 Hopk. Ch. 154 (1824).

⁵⁸See, e.g., *Florida Dep't of State v. Treasure Salvors, Inc.*, 621 F.2d 1340, 1981 AMC 1529 (5th Cir. 1980), *aff'd in part, rev'd in part*, 458 U.S. 670, 1983 AMC 144 (1982); *Platoro Ltd. v. Unidentified Remains of a Vessel*, 614 F.2d 1051, 1981 AMC 1097 (5th Cir.), *cert. denied*, 449 U.S. 901 (1980); *MDM Salvage, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 631 F. Supp. 308, 1987 AMC 537 (S.D. Fla. 1986); *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186, 1983 AMC 966 (S.D. Fla. 1981).

⁵⁹22 F. Supp. 2d 521 (E.D. Va. 1998).

⁶⁰See generally Duffy, *Treasure Hunting is No Job for a Guy Out to Avoid Stress*, *Wall St. J.*, July 17, 1998, at A1; Clancy, *Search for Shipwrecks Wins Justice Go-Ahead*, *Virginian-Pilot*, Jan. 26, 1998, at B2; Clancy, *On Treasure's Trail*, *Virginian-Pilot*, Sept. 21, 1997, at A1.

⁶¹22 F. Supp. 2d at 526.

⁶²102 F.3d 379, 1997 AMC 315 (9th Cir. 1996), *aff'd in part, rev'd in part*, 118 S. Ct. 1464, 1998 AMC 1521 (1998).

hand, in *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, the Fourth Circuit held the proponent to proof by evidence that was clear and convincing.⁶³ For cases like *Deep Sea Research* (where the state is not in possession), it should matter not whether the proponent of abandonment is a state or a salvor, now that the Supreme Court has made it clear that Eleventh Amendment considerations are irrelevant to the issue. This leaves the question of whether maritime law otherwise so frowns upon abandonment in the special context of a shipwreck, when abandonment is alleged to secure not just occupancy or possession for a salvor, but also title for a finder.⁶⁴

5. *When is a claim of title sufficiently colorable for a state out of possession?*

If the answer from *Deep Sea Research* is that, where the state is not in possession, the same burden of proof rests on a state proponent of abandonment as would rest on a salvor proponent, what about cases like *Treasure Salvors*, where the state proponent of abandonment was in possession? For the time being, *Deep Sea Research* may be viewed as merely restricting the application of the rule from *Treasure Salvors* to actions *in rem* in which the state has possession of the res.

After *Treasure Salvors*, admiralty courts were left to decide whether a claim of title was colorable enough to entitle a possessing state to dismissal of the salvage action *in rem* simply because the state asserted abandonment. In *Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*,⁶⁵ the First Circuit affirmed dismissal of an action *in rem* after Massachusetts entered a special appearance and sought dismissal, asserting title pursuant to the Submerged Lands Act⁶⁶ and a state statute. This was enough for the court so that it forbore further examination of the colorability of the state's claim.⁶⁷ In *Marx v. Government of Guam*,⁶⁸ the

⁶³974 F.2d 450, 464, 1992 AMC 2075 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993). Accord *Moyer v. Wrecked and Abandoned Vessel, known as Andrea Doria*, 836 F. Supp. 1099, 1104, 1994 AMC 1021 (D.N.J. 1993). In *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 546 F. Supp. 919, 1983 AMC 2040 (S.D. Fla. 1981), the district court, without first setting out the standard to be applied, found the evidence of abandonment "clear and convincing." *Id.* at 926.

⁶⁴"Where the circumstances are doubtful, the Court will be slow to infer that property of great value has been abandoned, unless it is proved that there was no reasonable hope of recovery." *Norris*, *supra* note 30, § 71, at 6-6 (quoting *Dr. Lushington in The Florence*, 16 Jur. 572).

⁶⁵717 F.2d 6, 1984 AMC 249 (1st Cir. 1983).

⁶⁶43 U.S.C. § 1311.

⁶⁷717 F.2d at 8.

⁶⁸866 F.2d 294, 300-301, 1989 AMC 896 (9th Cir. 1989).

Ninth Circuit followed the same approach.⁶⁹ These cases, because they suggest that a state's assertion of abandonment is unassailable, seem to beg the question of what makes a claim sufficiently colorable so as to entitle a state claimant to dismissal on Eleventh Amendment grounds.

6. *For a state, what is enough possession of a wreck or artifact?*

In *Treasure Salvors*, the state had physical custody, allegedly unlawful, of at least some artifacts from the wreck. In *Deep Sea Research*, the state did not even know where the wreck was to be found. A wide range of circumstantial possibilities exists between these extremes. If possession is critical to the Eleventh Amendment distinction between *Treasure Salvors* and *Deep Sea Research*, then what constitutes possession of the site sufficient to shift a state's claim from the class governed by *Treasure Salvors* to the class governed by *Deep Sea Research*? Possession and occupancy are closely related in cases where salvors compete for a wreck, and something more in the way of occupancy than press announcements and overhead buoys is required of a salvor who, asserting possession, would enlist the court in excluding competitors.⁷⁰ Now that artifact and wreck possession are critical to the involvement of the admiralty courts in such cases, will they hold a state possessor to the same degree of active possession as they have demanded from salvors?

7. *What if only part of the wreck has been abandoned?*

In theory, at least, the law of finds applies to more property on navigable waters than does the law of salvage. The latter is said to apply only to marine property, and marine property once meant vessels, their hulls, engines, tackle and appurtenances, as well as cargo, whether or not still aboard. It may now mean "anything rescued from navigable waters, without regard to what it is or how it got there."⁷¹ Because abandonment is so critical to jurisdiction and control of a shipwreck, as well as to title of what is found

⁶⁹In neither case was the government, state or territorial, in possession of the wreck or an artifact. When the court later affirmed, holding California to proof of abandonment by a preponderance of the evidence, it dwelt on the intervening passage of the ASA as a basis for limiting *Marx*.

⁷⁰*Indian River Recovery Co. v. Faithful Stewart*, 1986 WL 7513 (D. Del. 1986) (dismissal of salvage action *in rem* when libellant had yet to dive the wreck).

⁷¹Schoenbaum, *supra* note 30, § 14-2; Gilmore & Black, *supra* note 31, § 8-3, at 538; G. Robinson, *Handbook of Admiralty Law in the United States* § 98, at 712-13 (1939). In *Broere v. Two Thousand One Hundred Thirty-Three Dollars*, 72 F. Supp. 115, 1947 AMC 1523 (E.D.N.Y. 1947), the court held a wallet full of money subject to salvage after it had been recovered from a corpse found floating in the harbor. The court in *Broere* relied upon *The Emblem*, 8 F. Cas. 611 (D. Me. 1840) (No. 4,434), in which the court allowed a salvor's claim for recovery from a shipwreck of two trunks, one containing theatrical

there, what will happen when the successor in interest to cargo or its insurer intervenes, or the heirs of passengers lay claim to long lost baggage or other personal effects?

In *Bemis v. RMS Lusitania*,⁷² the shipwreck's finder, claiming title to the ship as successor in interest of her insurer, claimed title to cargo and personal effects both because he had title to the ship and as their finder. The district court declined to give him title to the cargo or personal effects just because he had title to the vessel in which they went down. Relying on cases relating only to cargo, the court concluded, however, that as their finder he could get title to both cargo and personal effects—but only after he had recovered them.

In *Deep Sea Research v. Brother Jonathan*,⁷³ the finder claimed title to some of the wrecked vessel's cargo as the successor in interest to the cargo's insurers. There was no evidence of insurance for the remainder of the cargo, the vessel herself, passenger baggage, or the personal effects of master and crew. California claimed title to the uninsured items by way of abandonment. Because, at that point, the aspiring salvor and finder sought only possession of the site of the shipwreck and not yet title to all that was recovered, the district court found premature inference of abandonment of the uninsured items. However, the court foresaw that the salvor and finder "could potentially face competing claims from the heirs of those lost at sea."⁷⁴

dresses and the other, belonging to the supercargo, containing 500 dollars. Bills of exchange and drafts in the same trunk were not subject to salvage. According to Judge Marvin:

Bills of exchange or other papers, evidences of debt or of title to property, are not liable to salvage; nor is the clothing of the masters and crew. In this district [Florida], the wreckers have never demanded salvage upon the clothing or personal baggage of the master, crew or passengers; nor upon the master's charts and instruments of navigation.

W. Marvin, *A Treatise on the Law of Wreck and Salvage* § 123 (1858).

⁷²884 F. Supp. 1042, 1995 AMC 1665 (E.D. Va. 1995), aff'd mem., 99 F.3d 1129 (4th Cir. 1996) (per curiam), cert. denied, 118 S. Ct. 1558 (1998).

⁷³883 F. Supp. 1343, 1995 AMC 1682 (N.D. Cal. 1995), aff'd, 102 F.3d 379, 1997 AMC 315 (9th Cir. 1996), aff'd in part, vacated in part on other grounds, 118 S. Ct. 1464, 1998 AMC 1521 (1998).

⁷⁴883 F. Supp. at 1354. Twenty-nine descendants and relatives of the passengers who had sailed aboard the *Central America* on her last voyage were at the pier when the salvage vessel *Arctic Discoverer* brought back artifacts from the shipwreck in 1988. Kinder, *supra* note 34, at 486. Among the items recovered two years later was a trunk in which had been well preserved a newspaper, toiletries, various items of clothing, dueling pistols, as well as wedding presents and personal keepsakes. The trunk belonged to passengers Addie and Astel Easton. *Id.* at 497–98. Still to be located is a portfolio of 200 drawings by the naturalist and illustrator John Woodhouse Audubon. Cf. *R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel*, 9 F. Supp. 2d 624, 636 (E.D. Va. 1998) (public interest prompts keeping together artifacts recovered from a wreck of considerable historical significance), and 1996 AMC 2497, 2499 (E.D. Va. 1996).

8. *How much of a wreck must be embedded?*

Under the ASA, Congress transferred to the states title to abandoned vessels embedded in coral or the bottom.⁷⁵ In *Deep Sea Research*, California had claimed that the *Brother Jonathan* was both abandoned and embedded in the ocean floor, failing to offer evidence of either sufficient to persuade the trial judge. Later, the Supreme Court remanded for reconsideration of the question of abandonment, but said nothing about reconsideration of the issue of embeddedness. Assuming that embeddedness is also a determination a priori to application of the ASA, and that the Eleventh Amendment is as irrelevant to embeddedness as it is to abandonment, it remains to be seen how much embedded is embedded enough, for the law of finds and the ASA.⁷⁶

9. *Is the ASA ultra vires because it impairs a central aspect of admiralty law?*

Perhaps this question might better be phrased as, “Is there really less to the ASA than meets the eye?” The courts that have ruled on the Act have so concluded, and found the statute therefore constitutionally unobjectionable. In *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be SB Seabird*,⁷⁷ the ASA was attacked as unconstitutional both because it impermissibly interferes with admiralty jurisdiction and because it destroys the uniformity constitutionally required of legislation affecting maritime law. Respecting the former, the district court first relied upon *Detroit Trust Co. v. The Thomas Barlum*⁷⁸ and *Lucas v. “Brinknes” Schiffahrts Ges.*

⁷⁵A wreck is embedded for purposes of the ASA when tools of excavation are required to gain access to the vessel. 43 U.S.C. § 2102(a). The DOI has opined in the ASA Guidelines that dredges, explosives, prop wash deflectors, air lifts, blowtorches, induction equipment, chemicals, and mechanical tools used to displace sediments or coral are tools of excavation, see *supra* note 28 at 50120, but that diving equipment normally worn by recreational divers is not. *Id.* at 50117.

⁷⁶In *Deep Sea Research*, the court found that the *Brother Jonathan* rested on the bottom and concluded that her settling into the bottom was, after 128 years, inevitable. 883 F. Supp. at 1355. In *Chance v. Certain Artifacts Found and Salvaged from The Nashville*, 606 F. Supp. 801, 1985 AMC 609 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302, 1986 AMC 1216 (11th Cir. 1985), it was enough for the court that a portion of the wrecked hull of the *Nashville* was partially embedded in the river bottom. Because this case preceded the ASA, the court was not invited to consider the necessity of using tools for access. Whether embeddedness is a transient condition also remains to be seen. In *Eads v. Brazelton*, 22 Ark. 499 (1861), the wreck of the steamboat *America* gradually disappeared under an island formed from the river’s action, until trees grew above it to thirty feet or more. Eventually, changes in the river’s action worked to erode the island until the wreck reappeared underwater. *Id.* at 508.

⁷⁷746 F. Supp. 1334, 1991 AMC 359 (N.D. Ill. 1990), *rev'd*, 941 F.2d 525, 1992 AMC 532 (7th Cir. 1991).

⁷⁸293 U.S. 21, 1934 AMC 1417 (1934).

*Franz Lange G.m.b.H. & Co., K.G.*⁷⁹ for a distinction between forbidden legislative changes to maritime jurisdiction and permissible legislative changes to the substantive maritime law, and then found that the ASA altered only the substantive law to be applied to abandoned wrecks.⁸⁰ Turning to the uniformity limit, the court found it only required a national law on maritime matters that was consistent from jurisdiction to jurisdiction. So long as embedded shipwrecks are treated the same from jurisdiction to jurisdiction, that they are treated differently by the ASA from shipwrecks not embedded does not violate the Constitution.⁸¹

With the trial court's finding in *SB Seabird* that the ASA altered substantive law, but not jurisdiction, the Seventh Circuit did not agree, finding to the contrary that Congress clearly intended to change from federal to state the forum in which certain shipwreck cases would be heard.⁸² By the same token, the court of appeals, relying on *Panama R. Co. v. Johnson*,⁸³ thought some Congressional changes to admiralty jurisdiction could be constitutional, so long as they worked only at the margins of that jurisdiction. The court stopped there, content to remand for a determination as to whether the *Seabird* was embedded in the first place.⁸⁴ With the trial court's finding that the ASA did no damage to the uniformity of maritime law, on the other hand, the court of appeals did agree, noting that what differences arose from variations in the state laws applied to such wrecks after title passed under the ASA were irrelevant as the matter had passed by then from the sphere of maritime law.⁸⁵ After the trial court on remand found the *Seabird* to be embedded in the bottom of Lake Michigan, the Seventh Circuit had another look at whether the ASA unconstitutionally interferes with admiralty jurisdiction when it prohibits application of salvage law to shipwrecks covered by the Act. The court of appeals found that, because the law of salvage does not apply to abandoned shipwrecks anyway, its displacement by the ASA is merely an illusion.⁸⁶

⁷⁹ 387 F. Supp. 440, 1975 AMC 1684 (E.D. Pa. 1974) (three-judge court).

⁸⁰ 746 F. Supp. at 1345.

⁸¹ *Id.* at 1347.

⁸² 941 F.2d at 531.

⁸³ 264 U.S. 375, 1924 AMC 551 (1924).

⁸⁴ 941 F.2d at 531-32.

⁸⁵ *Id.* at 532-33. In *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953 (M.D. Fla. 1993), the court relied on this reasoning in upholding National Park Service restrictions on salvage within the Cape Canaveral National Seashore. *Id.* at 957.

⁸⁶ *Zych v. Unidentified Wrecked and Abandoned Vessel, Believed to be the Seabird*, 19 F.3d 1136, 1140-1141, 1994 AMC 2672 (7th Cir.), cert. denied, 513 U.S. 961 (1994). Because the appellant had discarded his claim to title as the finder of the wreck by the time he returned to the court of appeals, the panel did not have to consider the ASA's displacement of the law of finds as applied to abandoned shipwrecks.

In *Sunken Treasure, Inc. v. Unidentified, Wrecked and Abandoned Vessel*,⁸⁷ the court found that the ASA does not violate the Constitution because it displaces the law of finds that would otherwise apply to abandoned and embedded shipwrecks. The court held that because, under the law of finds, the state would get title to a wreck embedded at the bottom of state waters anyway, that the ASA displaced the law of finds only to otherwise give states title did not make the Act unconstitutional. For this court too, the ASA worked merely an illusion, as title belonged to the state both before and after the Act's application.

These are both glib answers. There is an air of clever sophistry to the Seventh Circuit's delimiting of the law of salvage in *SB Seabird*. Once, it may have been true that the law of finds and the law of salvage were mutually exclusive, when the former determined possession and the latter title, but too often of late have admiralty courts applied the law of finds to claims of title based solely on possession through salvage for that doctrinal boundary to remain clear. The rule of *Panama R. Co. v. Johnson*, that Congressional changes to admiralty jurisdiction are constitutional only if they are marginal, however, surely encourages relativistic demarcation of the legal seascape. The same sophistry pervades the decision in *Sunken Treasure*, which assumes far too readily⁸⁸ that the law of finds puts title to shipwrecks in the state, so that the ASA is redundant. How ironic that an Act of Congress is only constitutional because it is ineffectual!

10. Does the ASA unconstitutionally encroach upon state sovereignty?

The Constitution restricts Congress' power to intrude through legislation on the sovereignty retained by states. In another phase of her finder's legal

⁸⁷857 F. Supp. 1129, 1995 AMC 1515 (D.V.I. 1994).

⁸⁸To the contrary, see *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 339, 1978 AMC 1404 (5th Cir. 1978); *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 555 n.14, 1983 AMC 1018 (S.D. Fla. 1982); *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186, 189-90, 1983 AMC 966 (S.D. Fla. 1981). *Contra Marx v. Government of Guam*, 866 F.2d 294, 1989 AMC 896 (9th Cir. 1989); *Chance v. Certain Artifacts Found and Salvaged from The Nashville*, 606 F. Supp. 801, 1985 AMC 609 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302, 1986 AMC 1216 (11th Cir. 1985); *Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel, Known as The Sindia*, 710 F. Supp. 1020, 1989 AMC 1319 (D.N.J. 1989), *rev'd on other grounds*, 895 F.2d 116, 1990 AMC 305 (3d Cir. 1990).

The majority of federal courts presented with a salvage claim to resolve have decided that (1) the [Submerged Lands Act] did not specifically assert U.S. title to shipwrecks and transfer that title to the states; and (2) state historic preservation laws whose provisions are inconsistent with federal common law admiralty principles are superseded by those principles under the supremacy clause of the Constitution. . . . At a minimum, these decisions have led to confusion over the ownership of, and responsibility for, historic shipwrecks in State waters.
H.R. Rep. No. 514(II), 100th Cong., 2d Sess., pt. II, at 2-3, reprinted in 1988 U.S.C.C.A.N. 370, 371.

campaign to secure rights in what is left of the *Seabird*, the ASA was attacked on the grounds that it violated the Tenth Amendment and notions of state sovereignty otherwise implicit in the Constitution. For this proposition, the finder relied upon *New York v. United States*,⁸⁹ in which the Supreme Court held unconstitutional a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (“LLRWPA”) that it found compelled states to take title, in certain circumstances, to radioactive waste produced within their borders.⁹¹

In this iteration of *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be SB Seabird*, the district court agreed with the government that two differences between the take-title provisions in the LLRWPA and the ASA sustained the latter against an attack based on *New York v. United States*: first, title to abandoned shipwrecks passed at Congressional command not from private parties to the state but from the United States to the state, and second, the title given was not to undesirable property but to property apparently welcome, as evidenced by the passage of historic shipwreck legislation in twenty-eight states.⁹²

The relevance of the first distinction to distribution of power among coordinate sovereigns has yet to emerge; the context of state legislation, more or less correspondent, does not change a command into an invitation.⁹³ Even if states would always welcome title to shipwrecks on the seabed of state waters, the fact remains that it is thrust on them by Congress, not left to take or decline at their option.

IV CONCLUSION

The decision of the Supreme Court in *California v. Deep Sea Research, Inc.* rests on very narrow constitutional grounds. Many questions of the traditional maritime law of salvage, and its foster child, the maritime law of finds, which have been prompted by the competition for control of newly accessible historic shipwrecks, are left unanswered in the wake of the *Brother Jonathan*. This is not necessarily cause for disappointment in view

⁸⁹505 U.S. 144 (1992).

⁹⁰42 U.S.C. §§ 2021b-2021j.

⁹¹42 U.S.C. § 2021e(d)(2)(C). According to the Supreme Court, Congress can neither commandeer state governments into the service of federal regulatory processes, nor can it command them to implement legislation enacted by Congress. For that reason, the statute under review could not compel the state of New York either to take title to waste generated in New York, nor could it otherwise compel New York to regulate the disposal of such waste.

⁹²811 F. Supp. 1300, 1317-19, 1993 AMC 2201 (N.D. Ill. 1992), *aff'd*, 19 F.3d 1136, 1994 AMC 2672 (7th Cir.), *cert. denied*, 513 U.S. 961 (1994).

⁹³The Tenth Amendment claim was not addressed by the court of appeals.

of the increasingly greater attention to them lately required of federal courts more comfortable and familiar with the law of admiralty.

Not without misstep, the courts with jurisdiction over United States waters are working through answers attending to the competing interests of all concerned: state governments, historic preservationists, marine archaeologists, professional shipwreck hunters, and recreational scuba divers. Meanwhile, the Supreme Court works its way toward reconciliation of the Eleventh Amendment and its associated doctrines with the jurisprudence of the admiralty jurisdiction clause of Article III.

