

RECENT DEVELOPMENTS IN LITIGATION CONCERNING THE RECOVERY OF HISTORIC SHIPWRECKS*

Douglas B. Shallcross** and Anne G. Giesecke***

I. INTRODUCTION

Since the 1950's, rapid advances in the technology of diving and remote sensing equipment have for the first time made historic shipwrecks accessible to many people. Three groups have a special interest in historic shipwrecks: the sport diving community, members of the archeological and historic preservation communities, and professional treasure salvors.¹

The increasing demand on the historic shipwreck resource base by these three groups has created a multiple-use conflict, much like demands made on other finite resources in the environment. Each group has a different use for the resource. For the sport diver, the wrecks are an important focus for recreational diving. The diver can see evidence of past sailors' lives and how they met their fates. The goals of the treasure salvor and the archeologist conflict in that the treasure salvor is primarily interested in what remains, while the archeologist is primarily interested in what is missing. The treasure salvor's goal is primarily economic; he wants to minimize his cost while recovering gold, silver, or artifacts that have maximum commercial value. The archeologist's goal, on the other hand, is to reconstruct past ways of life.

A historic shipwreck is a time capsule, a sealed self-sufficient

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** B.A., 1971, Heidelberg College (Ohio); M.A., 1976, University of Toledo; J.D., 1982, University of Toledo. Currently a member of the Massachusetts Bar engaged in private practice.

*** B.A., 1969, Boston University; MED, 1970, Boston University; MA, 1974, SUNY Binghamton. Currently a Staff Consultant on Committee on Merchant Marine and Fisheries, U.S. House of Representatives.

1. *Treasure Hunting: There's Gold in Them Thar Galleons*, NATION'S BUS. 61 (Aug. 1980). There are approximately two million sport divers in the United States, several thousand individuals who are members of the archaeological and historic preservation community and about twenty professional treasure salvors.

social unit from a past age. To the archeologist, the social, economic, and technological systems of the past are reflected in the patterned pieces of ship and cargo spread across the ocean floor. Reconstruction of the past requires the precise recording of the location of each object, a study of the relationships among the objects, and the reconstruction of objects found either as molds in the sand, or as molds in mineral concretions. The recovery of this conceptual information is as high a priority for the archeologist as the recovery of gold and salable artifacts are for the treasure salvor. The quick recovery techniques employed by the treasure salvor, however, often destroy this conceptual information.²

Not surprisingly, the competition among these groups has led to efforts by governments, particularly state governments,³ to regulate the right to search for and recover historic shipwrecks. This has in turn prompted the litigation which is the subject of this

2. ARCHAEOLOGY UNDERWATER 178-79 (K. Muckelroy ed. 1980).

3. Since 1963 twenty-five states have passed legislation to manage the historic shipwrecks in their waters for the public good. No state prohibits sport diving on historic shipwrecks and most laws provide in some way for recovery activities by private parties. The following states have statutes. This list is taken from Giesecke, *Shipwreck Archaeology and the Law*, Ph.D. dissertation, Washington, D.C., (1984).

- Alaska - ALASKA STAT. § 41.35 (1977)
- Arizona - ARIZ. REV. STAT. ANN. § 41.841 (1982)
- Colorado - COLO. REV. STAT. § 24.80.400 (1973)
- Florida - FLA. STAT. ANN. ch. 267 (West 1982)
- Georgia - GA. CODE ANN. § 12.3 (1981)
- Hawaii - HAWAII REV. STAT. § 6E (1976)
- Indiana - IND. CODE ANN. § 14.3.3.3-4 (Burns 1981)
- Louisiana - LA. REV. STAT. ANN. § 41.1601 (West 1982)
- Maine - ME. REV. STAT. ANN. tit. 27, § 373-378 (1982)
- Massachusetts - MASS. GEN. LAWS. ANN. ch. 6, § 179-180 (West 1976)
- Michigan - MICH. COMP. LAWS. ANN. § 299.51-54 (West 1982)
- Minnesota - MINN. STAT. ANN. § 138 (Callaghan 1979)
- Mississippi - MISS. CODE ANN. § 39.7 (1972)
- Montana - MONT. CODE ANN. § 22.3 (1981)
- New Hampshire - N.H. REV. STAT. ANN. § 227.C (1981)
- New York - N.Y. NAV. LAW ANN. § 14 (McKinney 1982)
- North Carolina - N.C. GEN. STAT. § 121.22-28 (1981)
- North Dakota - N.D. CENT. CODE § 55.02, .03 and .10 (1981)
- Rhode Island - R.I. GEN. LAWS § 42.45 (1977)
- South Carolina - S.C. CODE ANN. § 54.7.400 (Law. Co-op 1982)
- Texas - TEX. CODE ANN. § 191 (1978)
- Vermont - VT. STAT. ANN. tit. 22, § 701 (1978)
- Virginia - VA. CODE § 10.145 (1983)
- Wisconsin - WIS. STAT. § 27.012 (West 1973)
- Northern Mariana Islands - Pub. L. No. 3-39, § 11.

article.⁴ Recently, the clash between one Florida-based salvage company, Treasure Salvors, Inc.,⁵ the State of Florida, and the United States government substantially altered the status of state and federal regulation of historic shipwreck resources. This article will examine the current status of that regulation in light of this recent litigation.

Two sets of cases will be specifically examined. The first set involves attempts by the United States Government and the State of Florida to regulate control over the recovery, by private salvage companies, of culturally significant shipwrecks that are discovered on the Outer Continental Shelf. The second set concerns attempts by state governments, in particular the State of Florida and the Commonwealth of Massachusetts, to regulate the recovery of such wrecks within the so-called "three-mile limit."

II. FEDERAL REGULATION OF HISTORIC SHIPWRECKS

The first series of cases resulted from the discovery of the Spanish treasure galleon *Nuestra Señora de Atocha*. During the 17th century, the Spanish empire organized a system of treasure fleets to safeguard the transport of their riches from the colonies in the Americas to the home ports of Spain. Normally, the fleets were scheduled to depart the Caribbean prior to the start of the hurricane season, June through October, but the fleet of 1622 was late in forming and did not set sail until September of that year. The Flagship of the fleet, the *Atocha*, carried an immense treasure: 901 silver bars, 161 gold bars or disks, and about 255,000 silver coins. In addition, it is generally assumed that the ship's titled passengers carried a substantial amount of contraband. As the fleet approached the Florida Keys, a hurricane struck and three galleons went down about nine miles offshore. The total value of the sunken cargo is estimated today to be in excess of 250 million dollars.⁶

In 1970, aided by a search of historical records in the Spanish Archives in Seville, Treasure Salvors, Inc. began a search for the *Atocha* and its sister ship the *Santa Margarita*. In June 1971, the company made the first discovery of gold artifacts from what was

4. For a brief discussion of these same cases see Moyer, *The Law of Historic Shipwrecks: Conflict and Controversy*, PRESERVATION L. REP. (Nov. 1983).

5. Treasure Salvors, Inc. and its sister corporations, Armada Research Corporation and Cobb Coin, Inc. were all formed by Melvin Fisher, a long-time Florida treasure hunter.

6. See generally Lyon, *The Trouble With Treasure*, 149 NAT'L GEOGRAPHIC 787 (1976) and Lyon, *Treasure from the Ghost Galleon*, 161 NAT'L GEOGRAPHIC 228 (1982).

believed to be the wreck of the *Atocha* at a site some nine miles off the Florida Keys in waters which were then thought to be territorial waters of the State of Florida.⁷ As required by the Florida Archives and History Act, Treasure Salvors entered into a series of contracts with the State.⁸ These contracts granted the company the exclusive right to search for and salvage the *Atocha*, and provided that seventy-five percent of the proceeds of any recovery would be retained by the salvor, with the remaining twenty-five percent being retained by the State of Florida.⁹ From 1971 to 1975, Treasure Salvors recovered an estimated six million dollars in gold, silver, and artifacts, and confirmed that the treasure recovered was indeed from the *Atocha*.¹⁰ During this period, the treasure recovered was divided pursuant to the contract.¹¹

In 1975, the United States Supreme Court, in an unrelated case, held that the State of Florida had no interest in, nor exercised any control over, the waters or submerged lands containing the *Atocha* wreck site.¹² Treasure Salvors subsequently repudiated its contract with the State, and initiated an admiralty action *in rem* in the Southern District of Florida to establish possession of, and confirmation of title to, the *Atocha*.¹³ Treasure Salvors based its claim on the theory that "where a vessel has been abandoned [at sea] the finder in possession becomes the owner of the vessel" under general principles of maritime law.¹⁴ Thus, by undertaking to salvage the *Atocha*, Treasure Salvors argued that it had effectuated possession

7. Lyon, *The Trouble With Treasures*, 149 NAT'L GEOGRAPHIC 787, 800 (1976); see also *Florida Department of State v. Treasure Salvors, Inc.*, 621 F.2d 1340, 1343 (5th Cir. 1980).

8. FLA. STAT. ANN. ch. 267.13 (1965). The Florida Archives and History Act claim ownership of all historic shipwrecks found in state waters. A salvor who wishes to search for historic shipwrecks must obtain a license from the Florida Department of State, Division of Archives. Upon discovery of a wreck the salvor must contract with the state for recovery of any artifacts.

9. See FLA. STAT. ANN. ch. 267 (1965).

10. Lyon, *supra* note 6, at 809.

11. *Id.*

12. *United States v. Florida*, 420 U.S. 531 (1975).

13. Actions for a salvage award in the case of property abandoned at sea are brought *in rem*; that is, jurisdiction is had on the property salvaged since there is no owner who has interest in the property and who would be subject to *in personam* jurisdiction. Such an action gives rise to a maritime lien on property salvaged; thus the property may be executed on in order to satisfy a judgment. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 8-13 (2d ed. 1975).

14. *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 408 F. Supp. 907, 909 (S.D. Fla. 1976).

of the wreck and was therefore entitled to ownership and salvage rights.¹⁵

At the request of the State of Florida, the United States Government intervened in the action and claimed title to the wreck on the theory that "objects of antiquity recovered by persons subject to the jurisdiction of the United States are taken in the name of the sovereign and are the property of the people of this country as a whole, not the finders alone."¹⁶ This is the English common law rule of "sovereign prerogative," with regard to property lost or abandoned at sea.¹⁷ The rule provides that in the absence of a claim by the original owner, property which has been found to be derelict at sea is acquired on behalf of the sovereign.¹⁸ The Federal Government maintained that the theory of sovereign prerogative was legislatively asserted by the Congress through either the Abandoned Property Act,¹⁹ or, alternatively, the Antiquities Act²⁰ through the operation of the Outer Continental Shelf Lands Act (OCSLA).²¹ The Abandoned Property Act provides, in part, that:

The Administrator of the General Services Administration is authorized to make such contracts and provisions as he may deem for the interest of the Government, for the preservation, sale or collection of *any property*, or the proceeds thereof, which may have been *wrecked, abandoned or become derelict*, being within the jurisdiction of the United States and which ought to come to the United States²²

Since the OCSLA purports to extend the jurisdiction of the United States to include the area occupied by the wreck, the Federal Government argued that the wreck and the artifacts recovered from it belong to the United States.²³

Alternatively, the Federal Government argued that the Antiquities Act applies to all objects of antiquity found on federal lands.²⁴

15. *Id.*

16. *Id.*

17. For a detailed discussion of the theory of sovereign prerogative and its origins, see Kenny & Hrusoff, *The Ownership of the Treasures of the Sea*, 9 WM. & MARY L. REV. 383 (1967).

18. *The Aquila*, 165 Eng. Rep. 87 (Adm. 1798).

19. 40 U.S.C. § 310 (1976).

20. 16 U.S.C. § 431 (1976).

21. 43 U.S.C. § 1331 (1976).

22. 40 U.S.C. § 310 (1976) (emphasis added).

23. 408 F. Supp. at 910.

24. 16 U.S.C. §§ 431 & 432 (1976).

It prohibits the removal of such objects without the permission of the Secretary of the Interior.²⁵ Again relying on OCSLA, the Federal Government contended that the artifacts removed from the wreck site of the *Atocha* were from lands owned and controlled by the United States, and therefore the theory of sovereign prerogative should attach.²⁶

The trial court rejected both these claims. While the theory of sovereign prerogative is recognized by American courts, the trial court held that it must be explicitly asserted in legislation.²⁷ The court concluded that neither the Abandoned Property Act, nor the Antiquities Act provided the basis for such an assertion.²⁸ As for the Abandoned Property Act, the court held that it applied only to property which was abandoned as a consequence of the Civil War, and therefore could not be used as a means to assert sovereign prerogative in this case.²⁹

In analyzing the Government's claim that the Antiquities Act applies to the wreck site of the *Atocha*, the court noted that for the Act to apply, the wreck must be on lands owned and controlled by the United States.³⁰ As noted earlier, the Federal Government claimed that the site in question was located on lands within the jurisdiction and control of the United States by operation of OCSLA.³¹ The court rejected this argument, finding that OCSLA

25. *Id.*

26. 408 F. Supp. at 909.

27. *Id.* Generally, American courts have held that, absent a claim by the original owner, title to property which has been shown to be lost or abandoned shall rest in the finder rather than the sovereign. Kenny & Hrusoff, *supra* note 17. Property has been abandoned when its possession has been forsaken by its owner, or when all reasonable hope of recovery has ceased. *Eads v. Brazelton*, 22 Ark. 499, 509 (1861). While American courts have acknowledged the English rule, they have also held that colonial policy had altered the English common law rules as to the ownership of abandoned property. *United States v. Tyndale*, 116 F. 820, 823 (1st Cir. 1902).

While it is difficult to trace its origins, the English rule of sovereign prerogative provides that in the absence of a claim by the original owner, property lost at sea belongs to the sovereign rather than the finder. See Kenny & Hrusoff, *supra* note 17, at 383-85.

28. 408 F. Supp. at 909-10.

29. *Id.* at 909. The court relied on *Russel v. Forty Bales Cotton*, 21 F. Cas. 42 (S.D. Fla. 1872) (No. 12,154) which held the doctrine of sovereign prerogative must be legislatively asserted. Absent an assertion of such prerogative the burden of abandoned property requires title. The *Russel* court held that the Abandoned Property Act, first passed in 1870, applies only to the abandoned and derelict property strewn around the country as a result of the Civil War. Since the property in *Russel* was not a product of that conflict, the Government could not rely on that Act to assert sovereign prerogative.

30. 408 F. Supp. at 910.

31. *Id.* at 910. 43 U.S.C. § 1332 (1976) reads in full:

It is hereby declared to be the policy of the United States—

was enacted primarily for the purpose of asserting ownership of, and jurisdiction over, mineral resources.³² Further, the court pointed to the 1958 Geneva Convention on the Continental Shelf which provides that coastal states may exercise sovereign rights over the Continental Shelf only for exploring and exploiting its natural resources.³⁴ Finally, the court quoted the report of the International Law Commission on the Convention on the Continental Shelf which stated that "[I]t is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil."³⁵

(1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter;

(2) this subchapter shall be construed in such a manner that the character of the waters about the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected;

(3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments —

(A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts; and

(B) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf;

(5) the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized; and (6) operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

32. 408 F. Supp. at 910, citing *Guess v. Read*, 290 F.2d 622, 625 (5th Cir. 1961), *cert. denied*, 368 U.S. 457 (1962).

33. The Convention on the Continental Shelf, U.N. Doc. A/Conf. 13/L 55, done April 29, 1958, [1964] 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311, in force June 10, 1964.

34. 408 F. Supp. at 910.

35. 11 U.N. GAOR, Supp. (No. 9) at 42, U.N. Doc. A/3159 (1956).

Since the United States adopted the Continental Shelf Convention after the passage of OCSLA, the Convention supersedes any incompatible language in OCSLA.³⁶ Thus, the court concluded that the Government had no basis for asserting sovereign prerogative based on the Antiquities Act through the operation of OCSLA.³⁷ Accordingly, since the shipwreck in question was outside the territorial waters of the United States, and since Congress had not specifically asserted sovereign prerogative, the court concluded that Treasure Salvors was entitled to claim ownership to the wreck under the law of finds.³⁸

A. TREASURE SALVORS I³⁹

On appeal, the Federal Government reasserted its claim that the Abandoned Property Act and the Antiquities Act represented an assertion of sovereign prerogative, and also claimed that it need not specifically assert the doctrine legislatively because it was the successor to the prerogative rights of the English crown.⁴⁰ The Federal Government also argued that marine peril,⁴¹ a necessary element in a salvage action, was missing and that the district court had erred in applying salvage law.⁴²

The appellate court began its analysis with an extensive discussion of the jurisdictional basis of the Treasure Salvors action, something the district court apparently assumed.⁴³ In addition to the substantive arguments noted above, the Federal Government also contended that the district court lacked *in rem* jurisdiction over that part of the wreck that was not within the territorial jurisdiction of the court. The appellate court acknowledged that *in rem* admiralty actions normally require the presence of the vessel or other res within the "territorial confines of the court."⁴⁴ One of the purposes for this requirement is to allow actions to be brought

36. *United States v. Ray*, 423 F.2d 16, 21 (5th Cir. 1970). "To the extent that any of the terms of the [OCSLA] Act are inconsistent with the latest adopted Geneva Convention on the Continental Shelf they should be considered superseded."

37. 408 F. Supp. at 910.

38. *Id.* at 911.

39. *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978) (*Treasure Salvors I*).

40. *Id.* at 340.

41. Marine Peril is a requirement for a salvage action. While the doctrine is usually applied on a case by case basis, "peril" is generally considered to be a situation that requires some action to remove a vessel or its cargo from the danger of being damaged, lost or destroyed. See 3 A. BENEDICT ON ADMIRALTY § 63 (7th ed. 1980).

42. *Treasure Salvors I*, 569 F.2d at 336.

43. *Id.* at 333.

44. *Id.*

against a vessel when its owner cannot be reached.⁴⁵ When the situation is such, however, that employing the legal fiction of suing the res does not serve to effectuate the adjudication of such disputes, then admiralty courts have shown no hesitation in declining to employ it.⁴⁶ As a practical matter, the court recognized the impossibility of bringing the entire wreck within its territorial jurisdiction. As the court noted, there was little danger that the wreck, which was buried under tons of sand in international waters, would be lost.⁴⁷

The Fifth Circuit then concluded that the district court had *in personam* jurisdiction over both claimants.⁴⁸ "The United States intervened in plaintiffs' *in rem* action as a party defendant" and stipulated to the court's admiralty jurisdiction.⁴⁹ By so doing, the United States had waived the usual requirement that the wreck be present within the territorial jurisdiction of the court.⁵⁰ Further, the court noted that the parties had consented to the court's jurisdiction to decide the competing claims over the extraterritorial portion of the wreck.⁵¹

Turning to the merits of the Government's claim, the court found that there was no question that the *Atocha* was abandoned and that in prior cases of this type, American courts applied the law of finds whereby title to abandoned property at sea vests in the person who reduces it to his or her possession.⁵² Such a result, according to the court, is not inconsistent with salvage law.⁵³

In considering the application of the Antiquities Act and the extension of U.S. territorial jurisdiction through OCSLA, the court adopted the district court's view that the wreck of the *Atocha* did not lie on lands owned and controlled by the United States.⁵⁴ The court considered in detail the history of OCSLA, its companion piece of legislation, the Submerged Lands Act (SLA),⁵⁵ and the relationship of OCSLA to the 1958 Geneva Convention on the Outer Con-

45. *Id.* at 334. See also *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 22-23 (1960).

46. 569 F.2d at 334, and case cited therein.

47. *Treasure Salvors I*, 569 F.2d at 335.

48. *Id.*

49. *Id.*

50. *Id.* Alternatively, the court declared that it had an independent basis for jurisdiction derived from 28 U.S.C. § 1337 to decide the applicability of the Abandoned Property Act and the Antiquities Act to that portion of the vessel found in international waters.

51. *Id.*

52. *Id.* at 336-37.

53. *Id.* at 337.

54. *Id.* at 340.

55. 43 U.S.C. § 1301 (1976).

tinental Shelf. The court found that both the SLA and OCSLA were intended to resolve competing claims over the exploitation of natural resources between the states and the Federal Government.⁵⁶ Relying on *United States v. Maine*,⁵⁷ the court concluded that Congress had established, through OCSLA, that the United States' rights were paramount to the states' interests in submerged lands beyond the three-mile limit.⁵⁸ While the purpose of OCSLA might have been to extend the jurisdiction and control of the United States to the Outer Continental Shelf, the court noted that the legislative history of the Act, as an amendment to the Submerged Lands Act, indicated that its purpose was to establish boundaries, between the Federal Government and the states, for the exploration and exploitation of natural resources.⁵⁹ The court also noted that OCSLA itself was almost exclusively concerned with measures designed to facilitate the development of underwater *natural* resources.⁶⁰

Like the trial court, the appellate court found the subsequent ratification by the United States of the Geneva Convention on the Continental Shelf persuasive. "[A]n extension of jurisdiction for purposes of controlling the exploitation of the natural resources of the continental shelf is not necessarily an extension of sovereignty."⁶¹ The court went on to cite, as did the lower court, the International Law Commission's comments on article 2 of the Convention which noted that the Convention intended that rights granted to coastal states did not extend to shipwrecks and their cargoes.⁶² The court concluded that in view of the limited control of the United States over the wreck site of the *Atocha*, the *Atocha* did not lie on lands owned or controlled by the United States, and thus the Antiquities Act could not apply to its recovery.⁶³

56. *Treasure Salvors I*, 569 F.2d at 338.

57. 420 U.S. 515, 526 (1975).

58. *Treasure Salvors I*, 569 F.2d at 338. See also *Guess v. Read*, 290 F.2d 622, 625 (5th Cir. 1961), *cert. denied*, 368 U.S. 957 (1962).

59. *Treasure Salvors I*, 569 F.2d at 339. The Submerged Lands Act, 43 U.S.C. § 1301, granted the states jurisdiction over submerged lands within three miles of their territorial boundaries. Its purpose was to overturn the Supreme Court's decision in *United States v. California*, 332 U.S. 19 (1947), which held that the United States held superior rights to the offshore seabed, including that portion within the so-called three-mile limit. See *Treasure Salvors I*, 569 F.2d at 338.

60. *Treasure Salvors I*, 569 F.2d at 339.

61. *Id.*

62. *Id.* at 340 (citing 11 U.S. [sic] GAOR Supp. (No. 9) at 42, U.N. Doc. A/3159 (1956)). See *supra* notes 34, 35 and accompanying text.

63. *Id.*

In considering the Government's claims under the Abandoned Property Act, the appellate court agreed with the trial court's conclusion that it was not a legislative assertion of sovereign prerogative.⁶⁴ The appellate court, however, modified the district court's reasoning as to the application of the Act. Rather than rejecting the Act as applying only to abandoned Civil War property, the court reasoned that it applied only to property to which the United States had an equitable claim.⁶⁵ Because, in the court's words, "the United States has no claim of equitable ownership in a Spanish vessel wrecked more than a century before the American Revolution, and the wreck is not 'within the jurisdiction of the United States' the Abandoned Property Act has no application to the present controversy."⁶⁶

Finally, the court examined the Government's argument that it need not assert sovereign prerogative legislatively because it was the successor in interest to the English crown's right of sovereign prerogative, and concluded that the United States could not assert such a claim. The court held that "the notion of sovereign prerogative never took root in America."⁶⁷ The court found that while at least one Florida court has followed the English rule of sovereign prerogative,⁶⁸ the "American rule" of vesting title in the finder in possession is clearly favored.⁶⁹ In summary, the Fifth Circuit affirmed the district court's conclusion that Treasure Salvors was entitled to possession of all treasures and artifacts recovered from the *Atocha* and remanded the case to the district court for further action.

B. TREASURE SALVORS II⁷⁰

Upon remand, Treasure Salvors moved the district court to issue an ancillary warrant to compel the State of Florida to release

64. *Id.* at 342.

65. *Id.* at 341-42. See *United States v. Tyndale*, 116 F. 820 (1st Cir. 1902).

66. *Treasure Salvors I*, 569 F.2d at 342.

67. *Id.* at 342. The court based its conclusion on *United States v. Tyndale*, 116 F. 820 (1st Cir. 1902), which overturned an earlier case, *Peabody v. Proceeds of Twenty-eight Bags of Cotton*, 19 F. Cas. 39 (D. Mass. 1829) (No. 10869) which had supported the assertion of sovereign prerogative.

68. 569 F.2d at 343 (citing *Ervin v. Massachusetts Co.*, 95 So.2d 902 (Fla. 1956), cert. denied, 355 U.S. 881 (1957)). See *Kenny & Hrusoff*, *supra* note 17, at 397-98.

69. *Treasure Salvors I*, 569 F.2d at 343.

70. *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 459 F. Supp. 507 (S.D. Fla. 1978); *Fla. Dep't of State v. Treasure Salvors, Inc.*, 621 F.2d 1340 (5th Cir. 1980).

to the court that portion of the treasure which was in its possession as a result of prior contracts between Treasure Salvors and the State. Florida refused, alleging that it owned the artifacts in question by operation of its contracts with Treasure Salvors and that the district court's attempt to adjudicate its claim amounted to a suit against the State and was therefore barred by the Eleventh Amendment.⁷¹ Further, the State argued that it had specifically asserted the theory of sovereign prerogative legislatively through the passage of section 267.061 of the Florida Archives and History Act⁷² which provides, in part, that:

It is hereby declared to be the public policy of the state to protect and preserve historic sites and properties . . . sunken or abandoned ships, . . . or any part thereof, relating to the history, government and culture of the state. It is further declared to be the public policy of the state that all treasure trove, artifacts and such objects having intrinsic or historical and archaeological value which have been abandoned on state-owned lands or state-owned sovereignty [sic] submerged lands shall belong to the state with the title thereto vested in the division of archives, history, and records management of the department of state for the purpose of administration and protection.⁷³

The district court quickly disposed of the Eleventh Amendment claim by noting that the Eleventh Amendment "is not a sword whereby the agents of the state can take and appropriate the property and the lives of its citizens without due process."⁷⁴

Treasure Salvors argued that Florida was in privity with the United States in regard to the prior litigation and was bound by the court's decision.⁷⁵ Florida claimed that it was not bound by the prior litigation because it was not in privity with either of the

71. 629 F.2d at 511. The Eleventh Amendment provides in relevant part: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . ." U.S. CONST. amend. XI.

72. *Treasure Salvors Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 459 F. Supp. 507, 522 (S.D. Fla. 1978).

73. FLA. STAT. ANN. § 267.061 (West 1976). The statute has been amended by the insertion of a comma after "artifacts" and by the capitalization of "Division of Archives, History, and Records Management of the Department of State." FLA. STAT. ANN. § 267.061 (West Supp. 1983).

74. *Id.* at 528.

75. The court in *Treasure Salvors I* held that the prior adjudication of the claim between Treasure Salvors and the United States extended only to parties or their privies and not to other claimants, if there by any. 569 F.2d at 335-36.

parties in the previous action and, therefore, it lacked mutuality of interest with the United States. Thus, Florida was free to adjudicate its claim independent of the prior litigation.⁷⁶ The court summarily rejected that argument, holding that the State of Florida, through its Division of Archives, knew and participated in the prior litigation and was fully aware that the proceedings were *in rem*, were brought to settle the ownership of the treasure against the entire world.⁷⁷ The State was thus in privity with the United States in relation to the previous action and was bound by the court's prior decision.⁷⁸

The court then went on to consider the question of the State's claim that its "salvage contract" with Treasure Salvors vested it with a contract right to the treasure. The court found that both parties to the contract had mistakenly thought that the State of Florida exercised sovereignty over the wreck site of the *Atocha*.⁷⁹ Because this was not the case, the doctrine of mutual mistake operated to void the contract.⁸⁰ Additionally, the court found that the contract failed for lack of consideration, since in return for a \$1,200 permit fee, Treasure Salvors was granted salvage rights to a wreck site in waters in which the State of Florida had no interest.⁸¹

Finally, the court dealt with the State's assertion of sovereign prerogative. Florida argued that section 267.061 of the Archives and History Act operated as a legislative determination of sovereign prerogative. The court held that a state cannot constitutionally alter general admiralty and maritime jurisdiction, nor congressional acts concerning admiralty and maritime law.⁸² To allow Florida to assert sovereign prerogative would conflict with the judicial power of United States courts to exclusive jurisdiction over all cases of admiralty and maritime jurisdiction.⁸³

The court also found that section 267.061 was unconstitutionally vague based on the Ninth Circuit's holding in *United States v. Diaz*.⁸⁴

76. 459 F. Supp. at 512-13.

77. *Id.* at 513.

78. *Id.*

79. *Id.* at 522.

80. *Id.*

81. *Id.*

82. *Id.* at 524.

83. *Id.* at 525.

84. *United States v. Diaz*, 499 F.2d 113, 114 (9th Cir. 1974). *But see United States v. Smyer*, 596 F.2d 939, 941 (10th Cir. 1979), which held that the Antiquities Act was not unconstitutionally vague and expressly refused to follow *Diaz*.

Diaz declared that a section of the Antiquities Act,⁸⁵ which attempted to define certain types of ancient artifacts, was void for vagueness.⁸⁶ The *Treasure Salvors* court found that the Florida statute was substantially the same as the federal statute in *Diaz*, because many of the terms used to describe the class of items to which Florida claimed ownership, such as "artifacts," "objects of antiquity," and "monuments and memorials" were not defined.⁸⁷ Additionally, the one term the Florida statute did define, "treasure trove," the court found confusing and at variance with the common law meaning of the term. In the statute, treasure trove is defined as gold, silver, bullion, jewelry, pottery, ceramics, antique tools and fittings, ancient weapons, etc.⁸⁸ The meaning of treasure trove in the common law refers, according to the court, to treasure trove which is concealed by the owner and does "not include articles of salvage."⁸⁹

Florida appealed to the Fifth Circuit, which affirmed the district court's opinion on all but the privity issue, which it refused to affirm or reverse.⁹⁰ The appellate court dealt in some detail with the Eleventh Amendment issue which the district court had decided in summary fashion. The Fifth Circuit concluded that while the Eleventh Amendment does apply to *in rem* actions in admiralty, it does so only in a case where there is an *uncontroverted* claim of ownership by the state.⁹¹ In the case of a controverted claim, the merits of the plaintiff's claim are inextricably bound together and the court must determine the merits of the claim in order to decide the question of jurisdiction.⁹² The court decided that the company's claim to the *Atocha* was determinative of both the jurisdictional question and the merits.⁹³ Since Florida lacked any ownership interest in the artifacts recovered, or for that matter, the wreck site itself, *Treasure Salvors'* *in rem* admiralty action was not a suit against a state for the purposes of the Eleventh Amendment.⁹⁴

85. 16 U.S.C. § 433 (1976).

86. *Diaz*, 499 F.2d 113, 114 (9th Cir. 1974).

87. 459 F. Supp. 507, 525 (S.D. Fla. 1978).

88. *Id.*

89. *Id.*

90. *Florida Department of State v. Treasure Salvors, Inc.*, 621 F.2d 1340 (5th Cir. 1980) [*Treasure Salvors II*].

91. *Id.* at 1345 (emphasis added).

92. *Id.*

93. *Id.* at 1346.

94. *Id.*

Florida subsequently appealed to the United States Supreme Court, which granted review solely on the narrow issue of whether the Eleventh Amendment barred an *in rem* admiralty action which seeks to recover property held by state officials under a claim that the property belonged to the state.⁹⁵

C. *TREASURE SALVORS II IN THE SUPREME COURT*⁹⁶

In considering Florida's claim, a plurality of the Court⁹⁷ held that the Eleventh Amendment "does not bar an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority, or if within that authority, that such authority is unconstitutional."⁹⁸ The relief granted in such cases is limited to "permissible prospective relief."⁹⁹ "Permissible prospective relief" is relief which does not require retroactive payment from the state's treasury.¹⁰⁰ Retrospective relief, on the other hand, does require the payment of funds from the state's treasury.¹⁰¹

The plurality opinion applied a three-part test to determine whether the Eleventh Amendment should apply in this case:

- (a) Is this action asserted against officials of the State or is it an action brought against Florida itself? (b) Does the challenged conduct of state officials constitute an *ultra vires* or unconstitutional withholding of property or merely a tortious interference with property rights? (c) Is the relief sought by Treasure Salvors permissible prospective relief or is it analogous to a retroactive award that requires "the payment of funds from the state treasury?"¹⁰²

In applying this test, the Court found that Treasure Salvors' action was not directed against the State, but rather at certain State

95. Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670, 682 (1982).

96. *Id.*

97. The plurality opinion was by Justice Stevens in which the Chief Justice and Justices Marshall and Blackmun joined. Justice Brennan concurred in the result, but held that the Eleventh Amendment is inapplicable in this case because Treasure Salvors is a Florida corporation, thus the suit was not "commenced or prosecuted against one of the United States by citizens of another State." 458 U.S. at 700 (emphasis added).

98. *Id.* at 689.

99. *Id.* (citing *Quern v. Jordan*, 440 U.S. 332, 346-47 (1979)). Permissible prospective relief is relief which does not require retroactive payment from the state treasury. In *Quern* the court held that the Eleventh Amendment bars a federal court from requiring a state to pay back welfare payments which had been illegally withheld from welfare recipients. The court, however, did require the state to send a notice to welfare recipients informing them of a state administrative procedure which then lead to recovery of back benefits.

100. 458 U.S. at 690.

101. *Id.*

102. *Id.* at 691.

officials.¹⁰³ Treasure Salvors' original complaint was in the form of an *in rem* action which sought title to an abandoned sailing vessel, and was not against the State of Florida.¹⁰⁴ Further, the warrant for the arrest of the artifacts was directed at certain named State officials, not at the State itself.

In considering the second question, the Court held that the State did not have a "colorable claim of title" to the artifacts in question.¹⁰⁵ The salvage contracts upon which the State relied as the basis for its claim did not, according to the Court, purport to grant title or ownership of any other artifacts to the State.¹⁰⁶ In fact, neither party's ownership rights were in any way affected by the existence of the contracts.¹⁰⁷ Rather, Florida's claim of ownership was based solely upon the Archives and History Act which, as noted earlier, purported to assert State ownership of all historically significant shipwrecks discovered in State waters.¹⁰⁸ Because the Court had previously ruled in *United States v. Florida*¹⁰⁹ that the submerged lands upon which the artifacts were found were not owned by the State, the Court concluded that the Florida statute did not provide a basis for asserting a claim that the artifacts at issue belong to the State.¹¹⁰

Finally, the Court considered the question of the relief granted by the Fifth Circuit which allowed the execution of the district court's ancillary warrant, and which subsequently awarded the artifacts to Treasure Salvors. The Court concluded that such relief was not an action that resulted in "attachment of state funds and [thus] would impose no burden on the state treasury."¹¹¹ Accordingly, the Court sustained the Court of Appeals' decision insofar as it held that the Eleventh Amendment did not bar the district court from issuing a warrant to secure the possession of the *Atocha* artifacts which were then in possession of named Florida officials.¹¹² Nevertheless, to the extent that the appellate court adjudicated the State's rights to the artifacts as part of its Eleventh Amendment analysis,

103. *Id.*

104. *Id.*

105. *Id.* at 693.

106. *Id.*

107. *Id.*

108. *Id.* at 694.

109. 420 U.S. 531 (1975).

110. 458 U.S. at 695.

111. *Id.* at 697.

112. *Id.* at 699.

a clear majority of the Supreme Court reversed the Fifth Circuit's decision.¹¹³

Apparently the trial court should have limited its analysis to whether the State had a "colorable claim of title" to the wreck. If the State can establish a colorable claim, Treasure Salvors' suit is barred by the Eleventh Amendment. The Court apparently rejected the appellate court's theory that the jurisdictional issue was intrinsically tied to a determination on the merits of the State's Eleventh Amendment claim. Exactly how the appellate court is supposed to separate the question of a "colorable claim of title" from a determination on the merits is not discussed in the plurality's opinion.¹¹⁴

Upon remand, the appellate court affirmed the district court's original order insofar as it transferred possession of the artifacts to Treasure Salvors.¹¹⁵ The court noted that the Supreme Court's plurality opinion found that the district court's warrant "merely secured possession of the property and its execution did not finally adjudicate the State's rights to the artifacts."¹¹⁶ The appellate court ordered the district court to enter a final order declaring "Treasure Salvors to be the owner of the artifacts as against all claimants except the State of Florida."¹¹⁷ The court emphasized that its decision in this matter did "not determine in any way whether the State of Florida was the owner of the artifacts."¹¹⁸

While, as a practical matter, Florida lost its claim to the artifacts at issue, this case does not establish a rule that if a state can demonstrate a "colorable claim of title" to a historic shipwreck (i.e., one found within its territorial waters and to which it claims title), it can assert that a salvor's *in rem* action to establish title to a wreck is in fact a suit against the state and thus barred by the Eleventh Amendment. Title to a particular wreck would then be litigated in the courts of that state.

113. *Id.* Justices White, Powell, Rehnquist and O'Connor concurred with the plurality opinion to the extent that it held that the lower court's adjudication of the state's claim of title to the artifacts was improper. Justice Brennan was the sole dissenter. *Id.* at 705.

114. Justice White, joined by Justices Powell, Rehnquist and O'Connor, argued that the suit was against the state within the meaning of the Eleventh Amendment and thus barred. The plurality opinion, according to the dissenters, was based upon "the fantasy that the enforcement of process by arrest of the *res* [artifacts] is somehow divorced from the action to determine the state's claim to the *res* . . ." *Id.* at 705.

115. *Florida Department of State v. Treasure Salvors*, 689 F.2d 1254, 1256 (11th Cir. 1982).

116. *Id.*

117. *Id.*

118. *Id.*

This approach has been successfully used by the Commonwealth of Massachusetts in *Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*.¹¹⁹ The facts in this Massachusetts case are strikingly similar to the facts in *Cobb Coin, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*.¹²⁰ A private salvage company discovered what it believed to be the wreck of the British pirate ship *Windah*, which reportedly sank one-quarter mile off the coast of Massachusetts in April, 1717. The Federal admiralty court in Massachusetts held that the private salvor was precluded from bringing an *in rem* action for title to a historic shipwreck whose title was claimed by the Commonwealth of Massachusetts.¹²¹ The court reasoned that as long as a state can present a "colorable claim of title" to the wreck, the Eleventh Amendment precludes the Federal court from adjudicating the state's claim to the wreck.¹²² In *Maritime Surveys*, the Federal court found that Massachusetts had in fact presented a "colorable claim of title" to the wreck through the operation of a statute very similar to both the Florida Archives and History Act, and the Submerged Lands Act.¹²³ Therefore, in light of the Federal court's lack of jurisdiction over the claim, the salvor's suit was dismissed.¹²⁴

On appeal, the First Circuit upheld the district court's dismissal on different grounds.¹²⁵ The appellate court did not reach the issue of colorability of title, although it noted parenthetically that it did not doubt that the State's claim was "at least" colorable.¹²⁶ Rather, the court held that because *Maritime's* complaint was framed in terms of an action against any "state" which claimed an interest in the wreck, the suit was in fact an action against the state and was thus barred by the Eleventh Amendment.¹²⁷

D. TREASURE SALVORS III¹²⁸

Prior to the Supreme Court's review of *Treasure Salvors II*,

119. No. 82-3553, slip op. at (D. Mass. Jan. 14, 1983). See also N.Y. Times, Dec. 12, 1982, at 38, col. 1.

120. 525 F. Supp. 186 (S.D. Fla. 1981). See *infra* note 129 and accompanying text.

121. *Id.*

122. *Id.*

123. See MASS GEN. LAWS ANN. ch. 6, § 180 and ch. 91, § 63 (West 1976).

124. *Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, No. 82-3553, slip op. at (D. Mass. Jan. 14, 1983).

125. *Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 717 F.2d 6 (1st Cir. 1983).

126. *Id.* at 7.

127. *Id.* at 6, 8.

128. *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir. 1981).

the Fifth Circuit decided *Treasure Salvors III*, which had set the stage for the *Cobb Coin, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*¹²⁹ decision which is discussed below. *Treasure Salvors III* also reaffirms the application of both salvage law and the law of finds, to property abandoned at sea, including property from historically significant shipwrecks. Most importantly, this decision supports the principle whereby the finder of a historic shipwreck may legitimize his or her find by filing an *in rem* action in Federal admiralty court.

The *Treasure Salvors III* controversy began when a rival salvor attempted to conduct salvage operations within the area described and claimed by Treasure Salvors as the wreck site of the *Atocha*.¹³⁰ At the request of Treasure Salvors, the district court issued a preliminary injunction against any interference with the company's recovery operations. The rival salvor appealed,¹³¹ and the court of appeals affirmed the district court's injunction, although it modified the period for which the injunction would be effective.¹³² The appellate court also reaffirmed its holdings in the previous *Treasure Salvors* cases: namely, that international maritime law gave the United States admiralty courts jurisdiction over salvage operations on the high seas, regardless of the nationality of the vessels or the parties conducting the salvage operations.¹³³ The court noted that the salvor had a vested interest in the salvage operation because he is compensated only by what he recovers.¹³⁴ Admiralty law protects the exclusivity of his operation as long as he "appears ready, willing and able to complete the salvage project," and as long as he brings the proper *in rem* action before an admiralty court.¹³⁵

The court further affirmed that the law of finds applies in circumstances similar to those of *Treasure Salvors III*, particularly given the extraordinary fact that the *Atocha's* cargo had been lost for over 300 years.¹³⁶ Treasure Salvors, according to the court, had a maritime lien on the wreck site itself, as well as on any property recovered, and had a possessory interest in any of the cargo which it acquired.¹³⁷ Thus, the court concluded that Treasure Salvors was

129. *Cobb Coin, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186 (S.D. Fla. 1981), and 549 F. Supp. 540 (S.D. Fla. 1982); See *supra* note 139.

130. *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 563-64 (5th Cir. 1981) [*Treasure Salvors III*].

131. *Id.* at 564.

132. *Id.*

133. *Id.* at 567.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

entitled to protection in the form of an injunction prohibiting any interference with its salvage operations.¹³⁸

III. THE COBB COIN CASE AND STATE REGULATION OF HISTORIC SHIPWRECKS¹³⁹

A. THE BACKGROUND

In 1978, Treasure Salvors' president and principal stockholder, Melvin Fisher, formed a new corporation, Cobb Coin, Inc., for the purpose of exploring a section of ocean thought to contain the wreck of a Spanish treasure galleon from the Plate Fleet which reportedly sank off the Florida coast in 1715.¹⁴⁰ The site in question was within the three-mile limit over which the State of Florida asserted sovereignty and, consequently, the Florida Archives and History Act¹⁴¹ became applicable in reference to the salvage of underwater antiquities.¹⁴² Not long after commencing salvage operations, Cobb Coin found a number of artifacts thought to be from the galleon. Accordingly, the company filed an *in rem* action in Federal admiralty court asking that it be declared the owner in possession of the wrecked vessel, or alternatively that it be awarded compensation for salvage services performed on the vessel.¹⁴³

The State of Florida intervened and counterclaimed. Florida asked the court to declare it the owner of the vessel and to award it restitution from Cobb Coin for all items that the latter had salvaged from the wreck.¹⁴⁴ The State further asserted that because it was the owner of the wreck by virtue of the Florida Archives and History Act¹⁴⁵, it had plenary authority to regulate the salvage of the vessel.¹⁴⁶ The State also attempted to enforce its claim in the Florida courts by initiating criminal action against Cobb Coin, its president, and its employees.¹⁴⁷

In response, Cobb Coin asked for and received a temporary

138. *Id.* at 573.

139. *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186 (S.D. Fla. 1981) (Motion for preliminary injunction); *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540 (S.D. Fla. 1982) (Final Judgment); [Though there is but one case, the two parts have been denominated as Cobb Coin I & II, respectively, for ease of reference].

140. *Cobb Coin I*, 525 F. Supp. 186.

141. FLA. STAT. ANN. ch. 207 (1975). See *supra* text accompanying note 72.

142. 525 F. Supp. at 194.

143. *Id.* at 190.

144. *Id.*

145. *Id.*

146. *Id.* at 191.

147. *Id.*

restraining order from the Federal court enjoining the State and its employees from "interfering with the plaintiff's ongoing salvage operations by carrying out their threatened arrests."¹⁴⁸ Both parties subsequently made motions for temporary restraining orders and preliminary injunctions.¹⁴⁹ After a hearing on the motions, the court issued an extensive opinion that, in part, granted Cobb Coin's request for a preliminary injunction to prevent both the State of Florida, and a rival salvor from interfering with its salvage operation at the contested site.¹⁵⁰ In a subsequent proceeding, the court made permanent its preliminary injunction, and reaffirmed its conclusion that Cobb Coin was entitled to exclusive salvage rights of the wreck.¹⁵¹ The court's opinion gives a clear indication that where a state regulation of historic shipwreck resources conflicts with federal principles of admiralty and maritime law, the state statute will be struck down as unconstitutional.

B. JURISDICTIONAL ISSUES

At the outset of its opinion, the court reviewed in detail the basis for its jurisdiction.¹⁵² Consideration of the jurisdictional issues is important, for the court's opinion on this matter forms the basis by which salvors may use federal admiralty courts to legitimize their claims to historic wrecks found in state waters. The Court considered whether it possessed *in rem* jurisdiction "as to that portion of the wreck which had not been recovered and whether the court's *in personam* jurisdiction was properly asserted over the State."¹⁵³ The court also considered whether the suit was barred by the Eleventh Amendment.¹⁵⁴

The court first held that its jurisdiction "is properly founded on traditional maritime, *in rem*, and *in personam* principles."¹⁵⁵ Florida apparently argued that the case was not properly before the court because the vessel in question no longer remained intact.¹⁵⁶ The court rejected this argument, noting that the court's *in rem* jurisdiction extends to the wreck site and to identifiable cargo, and not merely to the salvagable material contained within an intact

148. *Id.* at 192.

149. *Id.*

150. *Id.* at 220.

151. *Cobb Coin II*, 549 F. Supp. at 563.

152. *Cobb Coin I*, 525 F. Supp. at 194-99.

153. *Id.* at 194-95. The court's *in rem* jurisdiction as to those artifacts recovered and turned over to the court's interim order was not in dispute.

154. *Id.* at 196.

155. *Id.* at 194.

156. *Id.* at 194-95.

hull.¹⁵⁷ The court also found that jurisdiction "is predicated on *in personam*, rather than *in rem* principles" in a case where two parties are claiming rights to salvage a vessel.¹⁵⁸ This observation is based upon the notion that the dispute centers on the parties' claim to the same wreck and is not an action *in rem* seeking "to recover against the vessel for salvage in which the *in rem* fiction is used to personify the vessel."¹⁵⁹ The court then went on to describe a process by which a salvor who finds archaeologically or historically significant shipwrecks may invoke the jurisdiction of the federal admiralty courts to establish a claim for a salvage award:

[O]nce a salvor who discovers and brings up an artifact from an identifiable wreck site initiates suit by taking that object into federal court. . . . The filing of such suit is, as here, an open invitation . . . for claimants and competing salvors to come before the court and make their alleged interests known.¹⁶⁰

The court also found that Cobb Coin's suit was not barred by the Eleventh Amendment, as Florida had contended.¹⁶¹ Subsequent to the court's entry of its order which partially granted Cobb Coin's motion for a preliminary injunction, the Supreme Court decided *Treasure Salvors II*.¹⁶² Consequently, in its final order, the court dealt extensively with Florida's Eleventh Amendment claim. As noted in the earlier discussion, the Supreme Court applied a three-part test in deciding whether *Treasure Salvors'* claim was barred by the Eleventh Amendment.¹⁶³ In applying the test to *Cobb Coin*, the district court concluded that this suit was not an action against a state within the meaning of the Eleventh Amendment.¹⁶⁴ The court found that the plaintiffs filed an *in rem* action in admiralty court asking for a declaration that they were the owners in possession of a lost or abandoned sailing vessel.¹⁶⁵ The plaintiffs did not state a claim against the State of Florida, and determination of the State's ownership was not necessary to determine the plaintiff's rights

157. *Id.* at 195.

158. *Id.*

159. *Id.* at 195-96, (quoting *Treasure Salvors III*, 640 F.2d at 567-68).

160. *Cobb Coin I*, 525 F. Supp. at 197.

161. *Id.*

162. 458 U.S. 670 (1982).

163. *Cobb Coin II*, 549 F. Supp. at 550-51. See *supra* note 102 and accompanying text. The court indicated that because no state officials were named as parties, the second element of the test did not apply.

164. *Id.* at 551.

165. *Id.*

under federal law.¹⁶⁶ Indeed, as the court noted, the wreck was not in the possession of the State or any of its officers and there was, according to a majority of the judges, a requirement that such possession exist in order to determine ownership.¹⁶⁷

The third element of the *Treasure Salvors* test is that an action against a state for "unconstitutional or *ultra vires* conduct . . . is permissible only if it seeks prospective relief and not relief analogous to a retroactive award that requires 'the payment of funds from the state treasury.'"¹⁶⁸ Even though the State claimed all of the sunken treasure through the Archives and History Act, it could not "exercise that dominion which would supersede the plaintiff's" rights.¹⁶⁹ Florida, therefore, could not assert superior rights over "the plaintiff's federal salvage rights under the [federal] maritime law."¹⁷⁰ Additionally, Cobb Coin would still be entitled to a salvage award even if Florida did own the wreck in question.¹⁷¹ Moreover, the court reasoned that because of the unique nature of the wreck site, the normal salvage award, usually a monetary award derived from the sale of the recovered cargo, was not appropriate.¹⁷² The court concluded that where the items recovered are "uniquely and intrinsically valuable beyond their monetary worth, an award *in specie* is more appropriate."¹⁷³ Accordingly, since the plaintiff, Cobb Coin, would receive a salvage award in artifacts, there would be, the court reasoned, no money expended from the State's treasury and therefore the plaintiff's action was not barred by the Eleventh Amendment.¹⁷⁴

The court also noted that the Eleventh Amendment cases relied

166. *Id.* at 552.

167. *Id.* at 551-52. The court also found that the instant case was not an action against the state with reference to state law. While the Florida statutory scheme purports to vest ownership of the wreck and its artifacts in the state, the court held the Florida statute ineffective in this respect. *Id.* at 553. Thus a suit for relief from state actions which are unconstitutional is not a suit against the state for the purposes of the Eleventh Amendment. *State Road Dept. of Florida v. Tharp*, 146 Fla. 745, 1 So.2d 868 (1941), cited in *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 709 (1982) (White, J., concurring in part, dissenting in part).

168. *Cobb Coin II*, 579 F. Supp. at 554 (quoting *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 692 (1982)).

169. *Cobb Coin I*, 525 F. Supp. at 196.

170. *Id.*

171. *Id.*

172. *Id.* *Cobb Coin II*, 549 F. Supp. at 554.

173. *Cobb Coin I*, 525 F. Supp. at 198.

174. *Id.*

upon by Florida, involve circumstances in which "public property [was] used and employed by the state for a public purpose."¹⁷⁵ Clearly, according to the court, property which had lain on the bottom of the ocean for 260 years could not have been used for any governmental purpose.¹⁷⁶ Accordingly, the court found that the State's Eleventh Amendment argument was not appropriate.

C. THE MERITS

Concluding that jurisdiction was proper, the court then turned to a lengthy discussion of the merits of Cobb Coin's claim. The court began by examining the Florida Archives and History Act and its attendant regulations in light of the principles of federal maritime law.¹⁷⁷ It concluded that Florida's regulatory scheme conflicted with the essential purposes of federal maritime law, and thus violated the Supremacy Clause of the U.S. Constitution.¹⁷⁸ According to the court, the basic rule for resolving conflicts between state statutes and federal maritime law is found in *Southern Pacific Co. v. Jensen*:¹⁷⁹

[W]ell established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. . . . And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an Act of Congress, or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of the law in its international and interstate relations.¹⁸⁰

The court acknowledged that states may supplement the remedies available to enforce federal rights, and to legislate over matters implicitly and explicitly left to them by Congress;¹⁸¹ but it found that this case involved neither situation.¹⁸² The court found that there were a number of federal salvage rules with which the Florida scheme conflicted, and because of the dominant federal interest in maritime matters, the Florida Statute and the rules promulgated under it must necessarily give way.¹⁸³ Specifically, the

175. See *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945).

176. *Cobb Coin I*, 525 F. Supp. at 198-99.

177. *Id.* at 200.

178. *Id.* at 201; U.S. CONST. art. VI, § 2.

179. 244 U.S. 205 (1916).

180. *Cobb Coin I*, 525 F. Supp. at 201 (citing *Southern Pacific v. Jensen*, 244 U.S. 205, 216 (1916)).

181. *Cobb Coin I*, 525 F. Supp. at 201.

182. *Id.*

183. *Id.*

court found three major flaws in the Florida statutory scheme:

- (1) The Florida statute forbidding exploration except to [state] licensees violates potential salvors' rights to explore the ocean for salvageable sites.¹⁸⁴
- (2) Under the Florida licensing scheme, unmeritorious salvors may be granted exclusive rights to salve in contravention of the maritime law.¹⁸⁵
- (3) Florida's system of fixed salvor compensation conflicts with admiralty's flexible method of remuneration based on risk and merit.¹⁸⁶

The Florida statute requires that any salvor who searches for archaeological or historic shipwrecks must first obtain a license from the State Division of Archives and History.¹⁸⁷ This allows the salvor the exclusive right to search for and salvage any wreck found within a "specified" area. The salvor is prohibited from searching outside that area. The principles of salvage law on the other hand, allow any salvor, without restriction, to explore all navigable waters, in search of potential sites.¹⁸⁸ This right, according to the courts, is a fundamental adjunct to the American principle of freedom of the high seas.¹⁸⁹ Thus, the plaintiff, Cobb Coin, had a right to search and salvage the site in question without interference from the State of Florida.¹⁹⁰ Further, the court found that the licensing of the wreck site in question to another salvor was immaterial,¹⁹¹ since that salvor did not invoke the federal court's jurisdiction for an appropriate salvage award.¹⁹²

The second defect the court found in the Florida statutory scheme stems from the principle that salvage awards shall be made on the basis of diligence and effort, and that undeserving salvors shall not be granted awards.¹⁹³ As mentioned earlier, a salvor who discovers a historic shipwreck may bring an *in rem* action to

184. *Id.* at 203.

185. *Id.* at 204.

186. *Id.* at 207.

187. FLA. STAT. ANN. ch. 267 (West 1975) and FLA. ADMIN. CODE § 1A-31.01-.12.

188. *Cobb Coin I*, 525 F. Supp. at 203.

189. *Id.*

190. *Id.* at 207.

191. The rival salvor, Quest Corp., was an intervenor in this case.

192. *Cobb Coin I*, 525 F. Supp. at 203-04.

193. *Id.* at 204.

establish his exclusive right to salvage the wreck.¹⁹⁴ In order for a salvor to receive an exclusive right to salvage a wreck site, he must, according to one commentator, "manifest an intent to reduce the property to physical possession by dealing with the wreck in a manner which would tend to warn off . . . [other] salvors."¹⁹⁵ This does not necessarily mean that the salvor must take and maintain immediate physical possession of the wreck, but rather he must undertake a continuing program of recovery.¹⁹⁶ If, on the other hand, the "first finder" abandons his claim, his rights to a wreck pass to any salvor who diligently undertakes salvage operations.¹⁹⁷ In comparing the above principles with the State licensing program the court noted that,

[I]t is readily apparent that, at least for the period of his lease with the State, a salvor's diligence in conducting his operations is irrelevant to his continued exclusive right to work a particular wreck site. Contrary to federal salvage principles, after an initial assessment of the salvors apparent abilities, the State's lessee is permitted sole occupancy of wreck site regardless of his diligence.¹⁹⁸

The court seem particularly influenced by the fact that Florida had granted a license for this site two years earlier to another salvor.¹⁹⁹ In these two years, the salvor, Quest Corporation, had worked the site for a total of forty-nine days with minimal success.²⁰⁰ Cobb Coin, on the other hand, had managed to recover substantial treasure after working the site only a few months.

The third area of conflict results from the fact that "Florida's system of fixed salvor compensation conflicts with admiralty's flexible method of remuneration based on risk and merit."²⁰² Florida's regulatory scheme requires that upon discovery of a historic or archaeologically significant wreck, the salvor enter into a contract with the State which provides, among other things, for a predetermined percentage payment to the salvor for recovery of any

194. See *supra* note 135 and accompanying text.

195. *Id.* at 204 (citing Lawrence, *State Antiquity Laws and Admiralty Salvage: Protecting our Cultural Resources*, 32 U. MIAMI L. REV. 291, 295 (1978)).

196. *Cobb Coin I*, 525 F. Supp. at 204.

197. *Id.* at 205.

198. *Id.* at 206.

199. *Id.* at 206-07.

200. *Id.* at 207.

201. See generally, *Cobb Coin I*, 525 F. Supp. at 190-96.

202. *Id.* at 207.

artifacts.²⁰³ As a practical matter, the evidence before the courts showed that most of the contracts provided for a 75-25 percent split between the salvor and the State, respectively.²⁰⁴ The court found such an arrangement inconsistent with traditional salvage laws requiring that the salvor be liberally rewarded.²⁰⁵ Under maritime rules the salvor is usually paid his expenses plus a bonus depending on the cost and the merit of his services.²⁰⁶ In addition, until the salvage award is actually made, the salvor receives a lien against the salvaged property.²⁰⁷ In the case of abandoned property, such as the items salvaged in the present case, the salvor may receive an award equal to the entire amount of abandoned property recovered.²⁰⁸ The Florida statute, however, mandates that all artifacts recovered belong to the State of Florida.²⁰⁹ This, according to the court, directly conflicts with the admiralty principle that a salvage award reflect the efforts of the salvor on an individual basis.²¹⁰

The court noted that not only must the state statute conflict with federal maritime principles, but the federal interest affected must be substantial.²¹¹ The court recognized that even when federal interests were affected, they may be outweighed by a presumption in favor of state statutes.²¹² The court concluded, however, that in this case the federal principle of uniformity, as applied to the principle of maritime law, was an important consideration when dealing with the salvage of historically important shipwrecks.²¹³ The court was apparently fearful that a plethora of different state laws would undermine federal uniformity in salvage law.²¹⁴ The court further noted that any state interest could be addressed by fashioning an appropriate remedy in admiralty.²¹⁵

The court also considered whether this was "peculiarly a matter

203. FLA. ADMIN. CODE § 1A-31.04.

204. *Cobb Coin I*, 525 F. Supp. at 207.

205. *Id.* at 203, 207.

206. *Id.* at 207.

207. *Id.* at 203.

208. *Id.* at 207.

209. FLA. ADMIN. CODE § 1A-31.09.

210. *Cobb Coin I*, 525 F. Supp. at 207-08.

211. *Id.*

212. *Id.* at 209.

213. *Id.*

214. *Id.* at 209-10.

215. *Id.* at 210.

of state and local concern."²¹⁶ It characterized the Florida interest as one concerned with "obtaining and preserving cultural and historical artifacts."²¹⁷ The court concluded that those instances could be adequately protected by federal admiralty courts, while at the same time insuring that "the paramount federal rights of salvors" are protected.²¹⁸

The court also rejected Florida's argument that its statute was an exercise of state police-powers and that it had minimal impact on federal maritime concerns.²¹⁹ The court found that the impact on federal maritime law was substantial because it directly affected the salvage rights of vessels lost at sea.²²⁰ Under the Supremacy Clause, when the state laws conflict with the federal maritime law, the state rules must give way.²²¹

Notwithstanding the arguments over federal maritime law, Florida also argued that the Submerged Lands Act ceded to the states the right to regulate maritime activities within the three-mile limit.²²² In passing the Submerged Lands Act, Congress sought to overturn the Supreme Court's decision in *United States v. California*,²²³ which held that the United States had paramount rights to all submerged lands extending three miles out from the low water mark on the California shore.²²⁴ The court in *Cobb Coin* construed this decision as applying only to the disposition of the natural resources of the submerged lands within the three-mile limit, and not as a pronouncement which would overturn federal maritime jurisdiction.²²⁵ The basis for this conclusion is found in an analogy to the Court's analysis in *Treasure Salvors I* that gave a limited interpretation to OCSLA.²²⁶ In that case the Fifth Circuit concluded that OCSLA allowed the United States to exercise the right to regulate only the natural resources on the outer continental shelf.²²⁷ The *Cobb Coin* court reasoned that since the Submerged Lands Act

216. *Id.* (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 741 (1961)).

217. *Cobb Coin I*, 525 F. Supp. at 210.

218. *Id.*

219. *Id.* at 211.

220. *Id.* at 213.

221. *Id.*

222. *Id.* at 214.

223. 332 U.S. 19 (1947).

224. *Id.* at 38.

225. *Cobb Coin I*, 525 F. Supp. at 215.

226. *Treasure Salvors I*, 569 F.2d at 339.

227. *Id.* at 338-40. See *supra* notes 55-63 and accompanying text.

was a companion piece of legislation to OCSLA, its application should also be limited to the extraction of natural resources.²²⁸ Since cultural artifacts are not a part of the seabed's natural resources, the Submerged Lands Act did not operate to delegate admiralty and maritime matters to the states.²²⁹

While the court rejected Florida's claim of ownership to the wreck, it did attempt to address the State's interest in historic preservation. Indeed, the court seemed particularly concerned that salvors address the issue of the historical and archaeological significance of their finds. The court indicated, in responding to Florida's argument, that the State intended to use the artifacts recovered for the cultural benefit of its citizens,²³⁰ that the State's concern was valid, and that the court "would certainly fashion relief which would fully recognize the State's historic and cultural interests without interfering with the plaintiff's federal maritime rights."²³¹

On Cobb Coin's motion for a preliminary injunction, it appeared that the court might award a portion of Cobb Coin's finds to the state, because of repeated references to such an award throughout the opinion.²³² In its final judgment, however, the court declined to make any salvage award to the State, although it did indicate that the State of Florida could intervene when annual salvage awards would be made as the salvage of the wreck continued.²³³ The court noted that the State already possessed, and had placed upon public display, numerous artifacts from the 1715 fleet as a result of salvage contracts with other salvors prior to the *Cobb Coin* and *Treasure Salvors* decisions.²³⁴

Perhaps of greater interest to state officials is the court's decision of the salvage methods required in the recovery of historic shipwrecks. Specifically, the court noted that "salvaging methods which fail to safeguard items and the invaluable archaeological information associated with the artifacts salvaged" would not be sanctioned by federal admiralty procedures.²³⁵ Presumably, this means

228. *Cobb Coin I*, 525 F. Supp. at 215-16.

229. *Id.* at 216.

230. *Id.* at 210.

231. *Id.* at 199.

232. *Id.* at 210, 216 & 218.

233. *Cobb Coin II*, 549 F. Supp. at 561-62.

234. *Id.* at 562.

235. *Cobb Coin I*, 525 F. Supp. at 208.

that a salvor must use acceptable salvage techniques designed to collect as much archaeological information as possible. The salvor is also expected to use acceptable preservation techniques in handling recovered artifacts to insure that they do not deteriorate after they are removed from the seabed.²³⁶ This decision is important, for the court expressly rejects the holding of a Texas case in which a district court declined to hold salvors to the standard of expertise required of marine archaeologists.²³⁷ The *Cobb Coin* court held "that in order to state a claim for a salvage award on an ancient vessel of historical and archaeological significance, it is an essential element that the salvor document to the Admiralty Court's satisfaction that it has preserved the archaeological provenance of a shipwreck."²³⁸

It appears that Florida may realize some of its objectives through its intervention in the *Cobb Coin* admiralty action. The State should be able to intervene in all actions of this type for the purpose of insuring that appropriate recovery techniques are utilized, and to claim a portion of the recovered artifacts to satisfy the State's historical and cultural interests. Exactly how the court intends to decide which artifacts are of such historical importance that they should go to the State is not discussed in either of the court's opinions of this case.

After *Cobb Coin*, when a state's underwater antiquities legislation conflicts with federal admiralty and maritime law, the state law will be, in all likelihood, held invalid. Because most antiquities laws (of those states that have them) are patterned after the Florida Archives and History Act in that they assert ownership by the state of all underwater cultural resources and utilize a permit system coupled with a fixed system of recovery,²³⁹ it seems likely that they too will be held invalid.

A caveat to this analysis is the *Maritime Surveys* case discussed earlier.²⁴⁰ Relying on the Supreme Court's plurality opinion in *Treasure Salvors II*,²⁴¹ the *Maritime Surveys* Court held that if a

236. *Id.* at 216.

237. *Platoro Limited, Inc. v. Unidentified Remains of a Vessel*, 518 F. Supp. 816, 822 (W.D. Texas 1981).

238. *Cobb Coin II*, 549 F. Supp. at 559.

239. Note, *Cultural Resource Preservation and Underwater Archaeology: Some Notes on the Current Legal Framework and a Model Underwater Antiquities Statute*, 15 SAN DIEGO L. REV. 623, 654-55 (1978).

240. See *supra* notes 119-125 and accompanying text.

241. 458 U.S. 670 (1982).

state can show a colorable claim of title to a historic shipwreck through the operation of the Submerged Lands Act, and a state statute which claims ownership of historic shipwrecks, it may succeed in defeating the federal admiralty court's jurisdiction to adjudicate a private salvor's claim.²⁴¹

The *Maritime Surveys* opinion, however, may be limited in application since the appellate court found that plaintiffs went out of their way in an attempt to join the state in its *in rem* admiralty action.²⁴³ It is at least arguable that the outcome might have been different had *Maritime* framed its complaint differently, or had it waited until state officials had taken some action to enjoin their ongoing salvage operations. The *Maritime Surveys* court distinguished the *Cobb Coin* decision by noting that the State of Florida had, in effect, consented to the federal admiralty court's jurisdiction in that action and thus waived its Eleventh Amendment rights.²⁴⁴ The *Maritime Surveys* opinion, however, ignores the *Cobb Coin* analysis that found that, regardless of the State of Florida's waiver, *Cobb Coin's in rem* admiralty action, which is for all practical purposes identical to the action brought by *Maritime Surveys*, was not a suit against the State.²⁴⁵ Rather, the *Cobb Coin* court concluded that plaintiff's action was a suit against property which lay untouched and, from a legal standpoint, undiscovered before the plaintiff began his suit.²⁴⁶

The *Cobb Coin* court suggested that the wreck in question was not in the possession of the State or any of its officers.²⁴⁷ The court also noted that the plaintiff asked for a salvage award.²⁴⁸ According to the court, no determination of the State's ownership is necessary to provide for a salvage award. It thus appears that the *Maritime Surveys* case fails to resolve all of the jurisdictional problems raised by the salvors *in rem* admiralty actions for ownership and salvage awards of historic shipwrecks. Taken together, both these cases, *Cobb Coin* and *Maritime Surveys*, have served only to confuse the situation with regard to the rights of private salvors to search and

242. *Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 717 F.2d 6, 8 (1st Cir. 1983).

243. *Id.* at 6.

244. *Id.* at 7.

245. *Cobb Coin II*, 549 F. Supp. at 551.

246. *Id.*

247. *Id.*

248. *Id.* at 551.

recover historic shipwreck resources, and the rights of states to regulate such activity.

IV. CONCLUSION

In concluding this discussion of the status of the regulation of historic shipwreck resources, it is readily apparent that it is in a state of disarray. At present, no clear operating framework exists for the government or the salvor. As a result of the *Treasure Salvors* line of cases, there is currently no federal or state regulation in the area beyond the so-called three-mile limit. The only exceptions are major federal actions (such as offshore oil drilling and mineral extraction) which require an environmental impact statement under the National Environmental Policy Act,²⁴⁹ and several very limited areas designated as marine sanctuaries under the Marine Protection, Research and Sanctuaries Act of 1972.²⁵⁰

As far as regulation within state territorial waters is concerned (the so-called three-mile limit), *Cobb Coin* raises serious questions as to the validity of those regulatory programs which conflict with basic principals of federal maritime law. As noted earlier, this probably would include most of the programs of the twenty-five states which currently have legislation regulating such activity. Adding to the confusion over state regulation is the *Maritime Surveys* decision which calls into question the jurisdiction of federal admiralty courts over private salvage claims when state governments assert an Eleventh Amendment defense in actions brought *in rem*, by salvors, to validate their finds. The practical effect on *Maritime Surveys* will not be to discourage salvors from conducting recovery

249. 42 U.S.C. § 4321 (1976).

250. 33 U.S.C. § 1432 (1976). Another exception is historic shipwrecks which are found in lands owned by the United States in fee simple. See *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 568 F. Supp. 1562 (S.D. Fla. 1983). In *Klein*, the court rejected a claim by a sport diver for ownership and, alternatively, for a salvage award for a historic shipwreck discovered on submerged lands within the Key Biscayne National Monument. The area encompassing the Key Biscayne National Monument is owned by the United States in fee simple. *Id.* at 1565.

The court found that since the wreck was located on lands owned and controlled by the United States it was in the constructive possession of the United States and thus was not legally lost. *Id.* at 1565-67. Accordingly, the common law of finds did not apply. The court also rejected the plaintiff's salvage claim by noting that since the United States was in possession of the wreck it was entitled to refuse unwelcomed salvage offers. *Id.* at 1568. The court further found that because Klein did not use acceptable salvage methods (i.e., methods designed to protect the archaeological provenance of artifacts he recovered), he was not entitled to a salvage award. *Id.*

operations on historic shipwrecks; rather it will simply shift the legal battles which occur over the discovery of these wrecks from the federal courts to the state courts.

It thus appears that the only reasonable way to avoid the continuing uncertainty in this area is through federal legislation. While a detailed discussion of the legal issues raised by the possible legislative alternatives is beyond the scope of this article, at a minimum federal legislation should address three major questions. The first concern is what type of shipwrecks deserve protection. Legislation may deal with all abandoned shipwrecks, or shipwrecks which meet some state, or federal, statutory or regulatory criteria. Once a decision is made regarding the kinds of resources to be protected, the next major question concerns which level of government is best suited to administer such a program—the states or the federal government, or perhaps a combination of both.

On the federal level, two possibilities exist. The first provides for the creation of a federal regulatory program with no state involvement. The second approach would be to modify federal admiralty law to authorize the protection of an appropriate class of abandoned historic shipwrecks. The legislation could modify the states' right to intervene in *in rem* proceedings in federal admiralty court based on historic qualities of the shipwreck or state interest in the shipwreck, and to assert a superior claim of ownership to a qualifying wreck, or, as an alternative, assert a right to regulate the activities affecting the wreck for the purposes of preserving and protecting it.

Alternatively, state authority may be extended to ownership of the resource or may be limited to management of the resource. In this regard, state ownership or management of shipwrecks may be conditioned on federal agency approval of state plans or state legislation that meets minimum federal standards. Alternatively, Congress could pass legislation providing for restricted or unrestricted state ownership of the resources without federal agency involvement.

Finally, any federal legislation should address the geographical scope of any protection program; that is, whether it should extend only to resources found within the territorial sea of the United States (three miles), or beyond to include the limits of the Outer Continental Shelf (two hundred miles).

These questions do not address all the possible options, but do catalog most of the recently proposed legislative alternatives.

In summary, the approaches are: (1) modification of admiralty law; (2) an unconditioned declaration of state ownership of historic shipwrecks by Congress; (3) a conditioned declaration or transfer of the ownership of historic shipwrecks by the Congress to the states; (4) federal regulation of activities affecting historic shipwrecks beyond the territorial sea. Careful consideration of these questions should provide a basic framework through which much of the legal uncertainty over the regulation of historic shipwrecks can be resolved.