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Federal Jurisdiction over State Claims to Shipwrecks: Should the Eleventh Amendment Go Down with the Ship?

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FEDERAL JURISDICTION OVER STATE CLAIMS TO SHIPWRECKS: SHOULD THE ELEVENTH AMENDMENT GO DOWN WITH THE SHIP?

The Eleventh Amendment prohibits citizens from bringing actions in law or equity against individual states in federal courts. The Amendment does not address whether states are subject to federal jurisdiction for actions in admiralty in which both a shipwreck salvor and a state claim title to a shipwreck. Analyzing applicable admiralty, federal, and common law in the context of Eleventh Amendment jurisprudence, this Note examines whether the states are subject to pure admiralty actions in federal court by citizen-salvors seeking either title to or reward for salvaging a shipwreck. The original intentions of admiralty law: rewarding salvors for their efforts, uniformity, and encouraging the recovery and preservation of shipwrecked property, are considered in answering this jurisdictional question. The Eleventh Amendment remains afloat to protect states from some admiralty actions, but there are circumstances in which federal courts should have jurisdiction over citizens and states competing for claim to shipwrecks.

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INTRODUCTION

This Note considers whether the Eleventh Amendment[1] protects a state from being subject to a federal court's jurisdiction in an admiralty *in rem* proceeding over the right of salvage or title to a shipwreck. The Supreme Court recently examined this question in *California and State Land Commission v. Deep Sea Research, Inc.*[2] Deep Sea Research, Inc. filed an action in federal court asserting that it had found a shipwreck in waters off the California coast.[3] Deep Sea Research claimed it had purchased the rights to the vessel from some of the insurance companies that had originally paid claims on the ship's cargo and that, under the rules of subrogation, Deep Sea Research now held title to the vessel.[4] Deep Sea Research argued, in the alternative, that it should receive a salvage award based on its efforts to locate and recover the vessel.[5]

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

[2] 523 U.S. 491 (1998).

[3] *See id.* at 494-96; *see also* Deep Sea Research, Inc. v. The Brother Jonathan, 883 F. Supp. 1343 (N.D. Cal. 1995).

[4] *See id.* at 496.

[5] *See id.*

California claimed title to the vessel under either the Abandoned Shipwreck Act of 1987 (ASA)[6] or, if the ASA did not apply, a California statute that purportedly conferred title to the state.[7] California argued that, by merely asserting a claim, a state could invoke the Eleventh Amendment and deny the federal court jurisdiction to adjudicate California's claims of title to the vessel.[8]

This Note argues that the Eleventh Amendment is wholly inapplicable to *pure* admiralty actions.[9] The Eleventh Amendment only protects a state from suits in law or equity and from admiralty actions that closely resemble *in personam* or *quasi in rem* common law actions.[10] The Eleventh Amendment does not preclude federal courts from adjudicating competing claims, including the claims of a state, to the title of a shipwreck.

Part I of this Note examines the basis for admiralty jurisdiction and continues with a brief history of the development of some of the unique aspects of admiralty law, including the laws of salvage and finds. Part II describes the origin of the Eleventh Amendment and analyzes the application of the Amendment to both admiralty and non-admiralty cases. Part III takes a closer look at *Deep Sea* and uses post-*Deep Sea* cases to predict possible future trends. The conclusion provides a brief summary of the competing interests and argues that those interests are best served by an even application of admiralty principles.

I. ADMIRALTY

The United States Constitution states that the federal "judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."[11] The Judiciary Act of 1789 implemented the clause and vested exclusive jurisdiction of admiralty cases in the federal courts of the United States.[12] The "Saving to Suitors" Clause of the Judiciary Act of 1789 permits concurrent jurisdiction in state courts for remedies available in the common law.[13] This clause allows state courts to exercise jurisdiction

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[6] 43 U.S.C. §§ 2101-2106 (1994).

[7] *See Deep Sea*, 523 U.S. at 496; *see also* CAL. PUB. RES. CODE § 6313 (West Supp. 1998).

[8] *See id.* at 496-97.

[9] For the purposes of this Note, a pure admiralty action is an action that is unique to admiralty and has no remedy in law or equity.

[10] For a discussion regarding admiralty actions that closely resemble *in personam* or *quasi in rem* common law actions, see *infra* notes 108-223 and accompanying text.

[11] U.S. CONST. art. III, § 2.

[12] *See* Judiciary Act of 1789, ch. 20, § 7, 1 Stat. 73 (1789).

[13] *See id.* § 9; *see also* 28 U.S.C. § 1331(1) (1994). Common law actions include contract claims and tort actions that occur in a maritime setting. *See* GERARD J. MANGONE, UNITED STATES ADMIRALTY LAW 65 (1997).

in all areas in which the common law provides a remedy.[14] *In personam* and *quasi in rem* actions are known to the common law and can be pursued in state courts. Courts, however, sitting in admiralty have created a number of unique institutions that have no comparable common law actions.[15] One such unique institution is the *in rem* action.

An *in rem* action is a proceeding against the vessel itself.[16] The *in rem* action is unique because it can convey to a party title to a vessel that is good against the whole world.[17] State law attachments or foreclosure actions only "convey[ ] the defendant's interest in the thing"[18] and are not binding on parties not present in the proceeding.[19] Federal courts retain "exclusive admiralty jurisdiction over proceedings *in rem*" because "the *in rem* action was not known to the common law."[20] Admiralty proceedings in federal courts are governed by the Federal Rules of Civil Procedure and its Supplemental Rules for Certain Admiralty and Maritime Claims.[21]

Federal Rule of Civil Procedure 9(h) states that if a complaint has an admiralty cause of action as well as an independent source of federal jurisdiction, the complaint may include a statement invoking "an admiralty or maritime claim .... [However, i]f the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not."[22]

The unique rules in admiralty proceedings are a result of the special circumstances attendant in the maritime setting.[23] The supplemental rules for admiralty govern, *inter alia*, actions *in rem*.[24] An *in rem* action is available to enforce any maritime lien, or when otherwise authorized by statute.[25] A maritime lien can arise in any case in which a vessel's owner has failed to pay debts incurred by the vessel.[26] These debts can include "claims for injuries, wages, salvage, and other

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[14] *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, § 2-2 (2d ed. 1994).

[15] *See id.*

[16] *See id.*

[17] *See id.* § 2-2, at 80 n.3. The *in rem* process is used to enforce a maritime lien. The maritime lien is based on the legal fiction that the ship is a party to the action. This concept allows a lien to attach without regard to who is in possession of the vessel. A lienholder can institute an action and get title, even if the vessel is in the hands of a bona fide purchaser acting in good faith. *See id.* § 7-1, at 421-22 n.1.

[18] *Id.* § 2-2, at 80 n.3.

[19] *See* D. ROBERTSON, ADMIRALTY AND FEDERALISM 127 (1970).

[20] SCHOENBAUM, *supra* note 14, § 2-2, at 80.

[21] *See* FED. R. CIV. P. 9(h).

[22] *Id.* This means that an action "cognizable only in admiralty" does not require a statement invoking admiralty procedures. *See id.*

[23] *See* SCHOENBAUM, *supra* note 14, § 2-2, at 80 n.3 (explaining the need to adjudicate title as to the world and not only between parties).

[24] *See* FED. R. CIV. P., Supp. A(2).

[25] *See id.* Supp. C(1).

[26] *See* MANGONE, *supra* note 13, at 59 (discussing the maritime lien and its uses). This

products or services."[27] The 1993 International Convention on Maritime Liens and Mortgages currently dictates the priority of various types of liens, with salvage liens taking priority over all claims other than those for the crew's wages and for loss of life or personal injury.[28] Salvage claims are prioritized in chronological order, with the most recent salvage claim taking first priority.[29]

The admiralty *in rem* procedure is designed to protect maritime lienholders from the danger of the vessel literally sailing away, hence avoiding its bills. The procedure provides a method for arresting the vessel while a court determines the disposition of the claim. The vessel's owner can pay off the lien and secure the release of his vessel, or the court can order the vessel sold to pay off the liens.[30]

The admiralty *in rem* proceeding begins when a creditor files a claim in admiralty court asserting an interest in a vessel. The court then issues a warrant instructing a U.S. Marshall to take possession of the vessel and to present it to the court for disposition.[31] The court then considers all of the competing claims to the arrested vessel and rules accordingly. If the titleholders of the vessel cannot, or will not, pay the judgment, the vessel is sold, and the proceeds are distributed to its creditors.[32]

Plaintiffs can use the admiralty *in rem* proceeding for a wide variety of claims, including claims for payments for supplies, crew wages, wharfage fees, drydock services, and maritime rescue.[33] In addition, the *in rem* action is used to determine the rights to a vessel claimed as a "prize" in time of war between sovereigns.[34]

Numerous Supreme Court cases have ruled that the United States, as a sovereign, is not exempt from *in rem* judgments regarding cargo, damages, or suits in general average,[35] in cases in which normal shippers would be liable.[36] The Court, however,

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rests on the fiction that the vessel itself incurred the debt. *See supra* note 16 and accompanying text.

[27] MANGONE, *supra* note 13, at 59.

[28] *See* May 6, 1993, 33 I.L.M. 353. Salvage claims are accorded such high priority because, without the efforts of the salvor, there would be no vessel against which to bring an action. *See* SCHOENBAUM, *supra* note 14, § 7-6, at 448.

[29] *See* MANGONE, *supra* note 13, at 59.

[30] *See id.*

[31] *See* Florida Dep't. of State v. Treasure Salvors, Inc., 458 U.S. 670, 678-80 (1982) (describing the procedure for arresting the *res* in that case).

[32] *See* SCHOENBAUM, *supra* note 14, § 7-6, at 447.

[33] *See id.* § 7-6, at 447-48; *supra* notes 25-30 and accompanying text.

[34] *See, e.g.*, The Siren, 74 U.S. (7 Wall.) 152, 161-63 (1868) (determining the rightful title of a vessel claimed as a prize during the Civil War).

[35] A suit in general average apportions a partial loss of the cargo among all shippers on the vessel. It is an equitable principle used in situations in which one shipper's loss benefits other shippers on the same voyage. It prevents a sole shipper from losing his entire cargo while another shipper loses nothing, merely because of some twist of fate; a general average suit apportions the loss so that all shippers are treated equally. *See* SCHOENBAUM, *supra* note 14, §§ 15-1, 15-2, at 811-13.

[36] *See, e.g.*, The Davis, 77 U.S. (10 Wall.) 15, 22 (1869) (finding no claim of sovereign

in *The Siren*[37] noted that this result is obtained only because the United States Treasury is not invaded and, thus, the United States is not liable for any damages in excess of the value of the arrested *res*.[38]

Marine salvage is another area in which unique considerations require the uniform application of *in rem* proceedings. The Law of Salvage developed as an incentive for seamen to undertake voluntarily extraordinary measures to preserve life and property at sea.[39] Its history dates as far back as 900 B.C. to the Rhodians, with further development by the Romans, and later, the British.[40] American courts, sitting in admiralty, have long recognized the law of salvage.[41]

There are three prerequisites to a salvage claim:[42] the rescue must be voluntary; the salvage must be successful in whole or in part; and the vessel must be in danger from a marine peril.[43] The requirement that the rescue be voluntary precludes a hired salvor from later discarding his contract and pursuing a salvage claim.[44] Because salvage is an equitable principle, a court will not grant an award if the rescue is either wholly unsuccessful or unnecessary.[45]

Once a salvor demonstrates that he or she is eligible for an award, the court considers numerous factors in determining the award amount.[46] The basis of the

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immunity where the marshal could attain possession of the *res* without "interfering with any officer or agent of the government"); The Siren, 74 U.S. (7 Wall.) 152 (1868) (holding that the United States could not assert sovereign immunity in order to protect the proceeds of a prize sale from admiralty claims in court); United States v. Wilder, 28 F. Cas. 601 (C.C.D. Mass. 1838) (No. 16,694) (examining the history of sovereign immunity in admiralty proceedings and finding no justification for a prerogative in either salvage or general average proceedings *in rem*).

[37] 74 U.S. (7 Wall.) 152 (1868).

[38] *See id.* at 154.

[39] *See* MANGONE, *supra* note 13, at 203-04 (outlining the history of the law of salvage).

[40] *See id.* at 201-04.

[41] *See, e.g., Mason v. The Blaireau, 6 U.S. (2 Cranch) 240 (1804) (recognizing the incentive effects of a large reward to salvors).*

[42] *See* MANGONE, *supra* note 13, at 210.

[43] *See id.*; SCHOENBAUM, *supra* note 14, § 14-1, at 784.

[44] *See* SCHOENBAUM, *supra* note 14, § 14-1, at 785-86 (stating that even an oral contract will preclude a salvor from recovering a salvage award). Similarly, anyone under a duty to perform a rescue is not entitled to a salvage award. *See id.*

[45] *See id.* § 14-1, at 786. In treasure salvage cases, the most controversial element is often that of marine peril. *See id.* Many courts will consider the possible loss of the wreck through decay sufficiently perilous to support a salvage award. *See id.* § 14-1, at 785. In *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978), the Fifth Circuit held that "marine peril" included salvage of a ship from the ocean bottom because the sea is capable of inflicting continuing damage through erosion and wave action. *See id.* at 337; *see also* SCHOENBAUM, *supra* note 14, § 14-1, at 784-86.

[46] Courts typically weigh such factors as the degree of danger facing the property, the value of the salvaged property, the risk incurred by the salvors, the salvors' skill and

valuation is not *quantum meruit*, but rather more "akin to a bounty" for valiant service.[47]

Court awards typically have been very generous in order to encourage and reinforce the incentive for salvors to undertake rescues despite the dangers and high costs of these endeavors. Awards of fifty percent of the rescued property are common, and, in some instances, awards have reached ninety percent.[48]

One important facet of salvage law is that it does not convey title to the salvor.[49] The law of salvage proceeds from the assumption that there is an owner who holds title; the award to the salvor is simply payment for returning the property to its owner.[50]

The law of finds is closely related to the law of salvage, particularly in treasure salvage cases.[51] The main distinction is that the law of finds applies when the property was intentionally abandoned with no intention, on the part of the original

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energy, the value of the salvors' equipment, the amount of risk of loss of such equipment, and the time and labor expended in the operation. For a good discussion of the factors, see *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450, 468 (4th Cir. 1992) (citing The Blackwall, 77 U.S. (10 Wall.) 1 (1869)); *see also* SCHOENBAUM, *supra* note 14, § 14-1, at 790.

In deciding the salvage award for the salvors of the *S.S. Central America*, the court in *Columbus-America* added a new element to the aforementioned factors. The court considered the "degree to which the salvors have worked to protect the historical and archeological value of the wreck and items salved." *Columbus-America*, 974 F.2d at 468.

[47] Sabrina L. McLaughlin, *Roots, Relics and Recovery: What Went Wrong with the Abandoned Shipwreck Act of 1987*, 19 COLUM.-VLA J. L. & ARTS 149, 163 (1995). In *Mason v. Blaireau*, 6 U.S. (2 Cranch) 240 (1804), Chief Justice Marshall stated:

> The allowance of a very ample compensation for those services, (one very much exceeding the mere risk encountered, and labour employed in effecting them,) is intended as an inducement to render them, which it is for the public interests, and for the general interests of humanity, to hold forth to those who navigate the ocean.

Id. at 266. The enhanced award is justified for public policy reasons as a way to encourage salvors to take risks to save property. *See* SCHOENBAUM, *supra* note 14, § 14-5. The award, however, is limited to the value of the property salvaged and under normal circumstances is capped at 50% of the rescued property. *See id.*

[48] *See, e.g.*, *Columbus-America*, 974 F.2d at 467-68 (indicating that awards often greatly exceed the costs of salvage and approach the total value of the find); *see also* McLaughlin, *supra* note 47, at 160-67 (providing examples of awards).

[49] *See* MANGONE, *supra* note 13, at 214.

[50] *See id.*

[51] *See* McLaughlin, *supra* note 47, at 160.

owner, to recover it.[52] Although the law of finds is not exclusively an admiralty remedy, it has, over time, developed its own special application in admiralty cases.[53]

The law of finds is based on the common law precept of "finders keepers."[54] In fact, this is a misnomer because rarely can a finder actually keep what he or she has found.[55] The basic doctrine dictates that the finder of an object holds title superior to all except the original owner of the property in question. If no original owner claims the property, the finder can keep the title.[56]

A common law exception to the law of finds was the discovery of property embedded in land. In that case, the found property was said to be in the constructive possession of the landowner.[57] The idea of constructive possession by the landowner is not recognized in cases involving "treasure trove."[58] The treasure trove doctrine applies when goods of antiquity, such as gold bullion or coins, are found in the land of a third party. A finder of treasure trove has a claim subordinate to the original owner, but superior to the landowner's claim.[59]

Because the law of finds is not strictly maritime law, it is possible to prosecute such an action in a state court.[60] Federal courts in admiralty, however, can still assume original jurisdiction to make the initial decision regarding whether to apply the pure admiralty action of salvage.[61]

Once the admiralty court has jurisdiction over the case and invests the time necessary to determine whether to apply the law of salvage or finds, the doctrine of

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[52] *See id.* Courts in admiralty are reluctant to apply the law of finds because it encourages finders to secret away discoveries in order to prevent the true owner from claiming title. The law of salvage, on the other hand, promotes the recovery of property and, because it is an equitable notion, ensures that the salvor will get a just and ample reward for his efforts. *See id.* at 160-61; *see also Columbus-America*, 974 F.2d at 460-65 (discussing the reluctance of courts in admiralty to apply the law of finds absent express abandonment).

[53] *See* McLaughlin, *supra* note 47, at 163-65 (describing the common law doctrine of finds and its special application in a marine setting).

[54] *See* MANGONE, *supra* note 13, at 223.

[55] *See id.* at 223-24 (explaining that a finder can only keep the property if the rightful owner is not known and does not assert a claim).

[56] *See id.*

[57] This is the basis under which the United States claims title under the Abandoned Shipwreck Act (ASA), 43 U.S.C. §§ 2101-2106 (1994), to the shipwreck and then transfers that title to the states. *See id.* The ASA defines embedded as "firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof." 43 U.S.C. § 2102(a).

[58] *See* McLaughlin, *supra* note 47, at 163-64.

[59] *See id.*

[60] *See supra* notes 13-14 and accompanying text.

[61] *See id.*

judicial efficiency makes a strong policy argument in favor of allowing the court to take the issue to final judgment.[62]

Admiralty courts do not use the doctrine of finds often because they rarely consider an item to be abandoned by the original owner.[63] Admiralty courts always have required a showing of abandonment before applying the law of finds.[64] An express statement by the owner is usually necessary to demonstrate abandonment.[65] Under some circumstances, however, courts have inferred abandonment "from lapse of time and non-use of the property."[66] Abandonment in either case must be shown by "clear and convincing" evidence.[67]

Congress has passed two statutes that, in varying degrees, allow states to claim title to shipwrecks and attempt to prevent the application of either the law of salvage or finds to treasure salvors' claims.

In 1953, Congress passed the Submerged Lands Act (SLA),[68] giving states title to the underwater lands and natural resources within three miles of their respective coastlines.[69] The purpose of the SLA was to allow the states to manage and develop these underwater resources.[70] In listing examples of what were considered natural resources, the SLA notably omitted any mention of shipwrecks or other manmade artifacts.[71] Nonetheless, many states claimed title to wrecks under the SLA, arguing

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[62] It would waste valuable court resources to hear facts sufficient to determine whether "finds" or "salvage" applied and then require a state court to rehear all of the evidence in order to rule.

[63] *See, e.g.*, Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., 974 F.2d 450, 460 (4th Cir. 1992) (discussing the reluctance of admiralty courts to use the law of finds).

[64] *See* SCHOENBAUM, *supra* note 14, § 14-7, at 798.

[65] *See id.*; *see also* Sea Hunt Inc. v. The Unidentified, Shipwrecked Vessel, 47 F. Supp. 2d 678, 687 (E.D. Va. 1999) (holding that if the original owner appears, abandonment may not be inferred, but must be proven by clear and convincing evidence).

[66] SCHOENBAUM, *supra* note 14, § 14-7, at 799.

[67] *Id.* § 14-7, at 799 n.23 (citing *Columbus-America*). In *Columbus-America*, the court indicated that in almost all cases courts should use salvage law and that they only should resort to finds law if there has been an express renunciation of ownership or no owner claims title after the wreck has been discovered. *See Columbus-America*, 974 F.2d at 464-65. *But see* Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 337 (5th Cir. 1978) (asserting that the application of the doctrine of salvage law that presumes the existence of an owner of a "wrecked vessel whose very location has been lost for centuries . . . stretches a fiction to absurd lengths").

[68] 43 U.S.C. §§ 1301-1315 (1994).

[69] *See* 43 U.S.C. § 1301(a)(2).

[70] *See* 43 U.S.C. § 1311(a); *see also* McLaughlin, *supra* note 47, at 174.

[71] Listed examples of natural resources included "oil, gas, minerals, fish, shrimp . . . and other marine animal and plant life." 43 U.S.C. § 1301(e).

that, under the law of finds, they were in constructive possession of all embedded wrecks within three miles of their coastline.[72]

After asserting title to the wrecks, states invariably invoked the Eleventh Amendment against any attempt by salvors to claim salvage for any wreck within three miles of the coast.[73] Some attempts by states to assert ownership were successful,[74] while others "founder[ed] on the shoals of Federal sovereignty."[75]

Congress, in an attempt to clear up the confusion regarding the SLA and shipwrecks and to promote consistency in the way that shipwrecks were managed,[76] passed the Abandoned Shipwrecks Act of 1987 (ASA).[77] The bill's sponsors were concerned with the preservation of historic shipwrecks and introduced the bill in the hope that states would regulate and manage the discovery and preservation of historic artifacts.[78]

The ASA asserts that the United States claims title, as sovereign, to all abandoned shipwrecks that are either embedded in the submerged lands of a state,[79] embedded in the coral formations of a state,[80] or listed in the National Register of Historic Places.[81] The ASA then transfers title of the specified shipwrecks to the states in whose submerged land the wreck is embedded.[82] It also directs the U.S. Secretary of the Interior to promulgate non-binding guidelines for the states to manage historic shipwrecks.[83]

One of the most controversial features of the ASA is that shipwrecks covered under it are not subject to the admiralty laws of salvage and finds.[84] Congress was

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[72] *See* McLaughlin, *supra* note 47, at 174.

[73] *See id.* at 175.

[74] *See, e.g.*, Marx v. Guam, 866 F.2d 294 (9th Cir. 1989) (holding that the SLA provided Guam with a colorable claim and that, because of the Eleventh Amendment, the court could not determine Guam's claims).

[75] Commonwealth v. Maritime Underwater Surveys, Inc., 531 N.E.2d 549, 553 (Mass. 1988) (finding that the SLA did not act to convey non-natural resources to the states and citing the passage of the then newly enacted Abandoned Shipwreck Act as evidence that the earlier SLA had not transferred title to lost shipwrecks); *see also* Cobb Coin Co. v. Unidentified Wrecked and Abandoned Sailing Vessel, 549 F. Supp. 540, 549 (S.D. Fla. 1982) (holding that the SLA did not supercede general maritime law and therefore did not grant Florida a claim to the vessel).

[76] *See* Anne M. Cottrell, Comment, *The Law of the Sea and International Marine Archaeology: Abandoning Admiralty Law to Protect Historic Shipwrecks*, 17 FORDHAM INT'L L.J. 667, 681 (1994).

[77] 43 U.S.C. §§ 2101-2106 (1994).

[78] *See* 43 U.S.C. § 1311(a); McLaughlin, *supra* note 47, at 182.

[79] *See* 43 U.S.C. § 2105(a)(1).

[80] *See* 43 U.S.C. § 2105(a)(2).

[81] *See* 43 U.S.C. § 2105(a)(3).

[82] *See* 43 U.S.C. § 2105(c).

[83] *See* 43 U.S.C. § 2104.

[84] *See* 43 U.S.C. § 2106.

concerned that traditional rules of admiralty would compromise historical artifacts found on covered shipwrecks.[85] However, according to the Supreme Court's holding in *Panama Railroad Co. v. Johnson*,[86] Congress cannot entirely relinquish the federal courts' constitutionally granted admiralty jurisdiction.[87] In *Panama Railroad*, the Court set boundaries to Congress' regulation of the federal courts' admiralty jurisdiction. First, the Court held that "the spirit and purpose" of the constitutional provision assigning admiralty jurisdiction to the federal courts mandates that any regulation be "coextensive with and operate uniformly in the whole of the United States."[88] Second, the Court held that there were certain boundaries to admiralty and maritime jurisdiction that were well established by history, and that Congress could neither exclude something clearly within this scope, nor include actions clearly outside of it.[89] The ASA arguably violates both of these principles.[90]

The ASA violates the uniformity principle because it allows and even encourages states to implement their own programs regarding shipwrecks.[91] The ASA provides states with only non-binding suggestions on how to manage their individual shipwreck programs.[92] Furthermore, the Act encourages states to pass their own regulations concerning salvage rights.[93]

The ASA violates the exclusivity principle because shipwrecks traditionally have been considered within the legitimate domain of admiralty.[94] Admiralty courts consistently have found shipwrecks within their jurisdiction.[95] The ASA explicitly states that the law of salvage and the law of finds do not apply to shipwrecks covered

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[85] *See* Cottrell, *supra* note 76, at 698 (discussing the legislative history of the ASA).

[86] 264 U.S. 375 (1924).

[87] *See id.* at 386-91.

[88] *Id.* at 386-87.

[89] *See id.* at 386.

[90] This Note outlines some of the constitutional arguments surrounding the ASA but does not purport to give them complete coverage. Even assuming that the ASA is constitutional in abrogating the applicability of admiralty law to wrecks covered under the ASA, the determination of whether a shipwreck is covered should be considered within admiralty law. This Note argues that a state cannot escape federal admiralty jurisdiction by making the bald assertion that it holds title under the ASA. For more arguments regarding the constitutionality of the ASA, see Denise B. Feingold, *The Abandoned Shipwreck Act of 1987: Navigating Turbulent Constitutional Waters?*, 10 U. BRIDGEPORT L. REV. 361 (1990).

[91] *See Panama R.R.*, 264 U.S. at 392 (discussing the need for uniformity).

[92] *See* Feingold, *supra* note 90, at 396.

[93] *See id.* at 395-96.

[94] *See, e.g.*, Houseman v. The Schooner North Carolina, 40 U.S. (15 Pet.) 40 (1841) (stating that no court could have jurisdiction over shipwrecks other than a court in admiralty).

[95] *See, e.g.*, Zych v. Unidentified, Wrecked and Abandoned Vessel Believed to be the "Seabird," 941 F.2d 525, 528-30 (7th Cir. 1991) (discussing jurisdiction of admiralty courts over wrecks).

by the Act.[96] Because the law of salvage is an action unique to admiralty, it would seem that the ASA is a clear violation of the *Panama Railroad* principle.

It could be argued that the ASA applies only to vessels that are embedded in the state's land. Therefore, the law of finds, which is not an exclusive admiralty action, applies rather than the law of salvage.[97] The first difficulty with this argument is that, in order to use the law of finds, a court must determine that the shipwreck is abandoned.[98] The second is that the ASA covers ships "eligible" for inclusion in the *Federal Register of Historic Shipwrecks*, whether or not these ships are "embedded."[99] If a wreck is not embedded, the rationale behind the state's assertion of title evaporates. The law of finds only grants title to a landowner if the found property was embedded in his land.[100] A court must make a threshold determination regarding abandonment and embedment in order to determine which law applies. The determination of whether a vessel has been abandoned and whether it is embedded is squarely within traditional admiralty jurisdiction.[101]

The Supreme Court, in *Deep Sea*, explained that the term abandonment in the ASA retained its historical meaning under the principles of admiralty law.[102] This clarification was crucial because of the special meaning of abandonment in admiralty. Abandonment in admiralty requires that there be some affirmative action on the part of an owner to relinquish ownership in the property.[103]

In some circumstances, abandonment can be inferred from such factors as the passage of time and the lack of any action to attempt recovery.[104] Courts in admiralty, however, are extremely reluctant to find abandonment and have found non-abandonment even when ships have been lost for hundreds of years with no attempt at salvage.[105] Particularly in cases in which new technology has recovered a vessel,

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[96] *See* 43 U.S.C. § 2016 (1994).

[97] *See* Peter Tomlinson, *Full Fathom Five: Legal Hurdles to Treasure*, 42 EMORY L.J. 1099 (1993) (discussing the historical application of both principles).

[98] Admiralty courts will apply the law of finds only if there is clear and convincing evidence of abandonment. *See supra* notes 63-67 and accompanying text.

[99] *See* 43 U.S.C. § 2105(a)(3).

[100] *See supra* note 57 and accompanying text.

[101] *See, e.g.*, Zych v. Unidentified, Wrecked and Abandoned Vessel Believed to be the "Seabird," 941 F.2d 525, 532 (7th Cir. 1991) (discussing the assertion that admiralty jurisdiction over shipwrecks was "unquestioned before passage of the ASA").

[102] *See* California v. Deep Sea Research, Inc., 523 U.S. 491, 508 (1998) (clarifying that "the meaning of 'abandoned' under the ASA conforms with its meaning under admiralty law").

[103] *See supra* notes 63-67 and accompanying text.

[104] The Court in *Deep Sea* struggled, in vain, to define a more certain indicator of abandonment. One Justice humorously suggested, during oral arguments, using "lives in being plus 21 years" as the time limit to assert a claim. U.S. Supreme Court Official Transcript at *33, *Deep Sea* (No. 96-1400), *available in* 1997 WL 751917.

[105] *See, e.g.*, Columbus-America Discovery v. Atlantic Mut. Ins., 974 F.2d 450, 467-68

earlier attempts at recovery are often deemed not made because they were not sufficiently likely to succeed.[106]

It is important that even in these cases, abandonment is only presumed, and can be rebutted if an owner simply shows up and makes a claim stating that he or she had no intent to abandon.[107] Therefore, it is appropriate to allow federal courts to entertain the original action to preclude necessitating removal if an owner appears at any time during the process to assert a claim.

II. THE ELEVENTH AMENDMENT

A. *The Eleventh Amendment Generally*

Congress passed the Eleventh Amendment in direct response to *Chisholm v. Georgia*,[108] which held that a state could be sued in federal court by a citizen of another state.[109] The holding in that case outraged citizens and Congress alike.[110] In response, Congress drafted the Eleventh Amendment and, in 1795, the states ratified it.[111] The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[112]

Hans v. Louisiana[113] clarified both the scope of the Eleventh Amendment and the nature of the jurisdiction granted by the Constitution in suits between states and

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(4th Cir. 1992) (finding non-abandonment despite 130 years of nonuse); Sea Hunt v. Unidentified, Shipwrecked Vessel, 47 F. Supp. 2d 678 (E.D. Va. 1999) (finding the Spanish vessel *Juno* not abandoned after being lost at sea for almost two hundred years). The court in *Sea Hunt* also adjudicated the rights to another vessel, the *La Galga*. The court held that the *La Galga*, shipwrecked in 1750, had been expressly abandoned by Spain's adoption of the Definitive Treaty of Peace Between France, Great Britain, and Spain on February 10, 1763. *See id.* at 688-90; *see also* Definitive Treaty of Peace Between France, Great Britain and Spain, Feb. 10, 1763, 278 Parry's Consol. T.S. 279. The treaty granted Britain "'all that Spain possesses on the continent of North America.'" *Sea Hunt*, 47 F. Supp 2d. at 689 (quoting 1763 Treaty, art. XX).

[106] *See Columbus-America*, 974 F.2d at 463.

[107] *See id.* at 464-65 (finding that an inference of abandonment with respect to an ancient shipwreck "would be improper . . . should a previous owner appear and assert his ownership interest"); *see also Sea Hunt*, 47 F. Supp. 2d at 688 (agreeing with *Columbus-America* that inferring abandonment would be improper if a previous owner asserted his interest).

[108] 2 U.S. (2 Dall.) 419 (1793).

[109] *See id.* at 420-24.

[110] *See* David J. Bederman, *Admiralty and the Eleventh Amendment*, 72 NOTRE DAME L. REV. 935, 952-54 (1997).

[111] *See id.* at 935, 954-57.

[112] U.S. CONST. amend. XI.

[113] 134 U.S. 1 (1890).

citizens.[114] *Hans* was an action against the State of Louisiana, filed by one of its own citizens, to recover interest on bonds issued by the state.[115] Hans contended that, as a citizen of the State of Louisiana, he was not subject to the restrictions of the Eleventh Amendment; therefore, he was free to institute an action against the state.[116] In rejecting Hans' claim, the Court explained that the Eleventh Amendment was intended to be merely an extension of the common law doctrine of sovereign immunity.[117] The language of the amendment states that the judicial power should not be considered to "*extend* to any suit in law or equity,"[118] meaning that the judicial power under Article III should not grant any additional jurisdiction that was otherwise not available in law or equity.[119] In other words, the sovereign immunity of a state from its own citizens was already recognized, and the Eleventh Amendment merely clarified that Article III should not be interpreted as changing that immunity merely because the citizen in question was from another state.[120] Therefore, Hans, who was filing an action against his own state of Louisiana, was wholly unaffected by the Amendment and was instead subject to the common law doctrine of sovereign immunity. However, there were certain actions that were recognized historically as acceptable, despite the doctrine of sovereign immunity.[121]

One exception to the sovereign immunity doctrine, recognized by the Court in *Cunningham v. Macon & Brunswick Railroad Co.*,[122] is the instance when property belonging to the state, or in which the state claims an interest, "comes before the court and under its control, in the regular course of judicial administration, without being forcibly taken from the possession of the government."[123] In such an action, a

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[114] *See id.*

[115] *See id.* at 1. Hans' claim concerned federal laws, which put his action within the jurisdiction of the federal court, which extends, according to Article III of the U.S. Constitution, to all cases involving the Constitution and the laws of the United States. *See id.* at 9; *see also* U.S. CONST. art. III, § 2.

[116] *See Hans*, 134 U.S. at 10. Hans relied on the literal text of the Amendment, which applies to "Citizens of another State." U.S. CONST. amend. XI.

[117] *See Hans*, 134 U.S. at 10-13.

[118] U.S. CONST. amend. XI (emphasis added).

[119] "[I]t was not the intention [of the Eleventh Amendment] to create new and unheard of remedies . . . ." *Hans*, 134 U.S. at 12 (citing Justice Iredell's dissenting opinion in Chisholm v. Georgia, 2 U.S. (Dall.) 419, 429 (1793) (Iredell, J., dissenting)). Justice Iredell's dissent in *Chisholm* largely supplied the basis for the Eleventh Amendment. *See Hans*, 134 U.S. at 12, 14.

[120] *See Hans*, 134 U.S. at 10-15 (articulating that the doctrine of sovereign immunity protected Louisiana from suit by its own citizens, like Hans, and that the Eleventh Amendment did not change that fact).

[121] *See* Cunningham v. Macon & Brunswick R.R. Co., 109 U.S. 446, 451 (1883) (discussing three common exceptions to the doctrine of sovereign immunity).

[122] 109 U.S. 446 (1883).

[123] *Id.* at 451.

federal court will "proceed to discharge its duty"[124] and determine the rightful titleholder. Another exception is when a person is sued in tort and claims as a defense that he was acting under the orders of the government.[125] The court's jurisdiction is not removed until the defendant shows that his authority from the government is sufficient to protect him at law.[126] The third exception is the writ of mandamus, whereby a purely ministerial action of a government official can be commanded by the court once the party requesting the writ can demonstrate that the government official may not exercise discretion in the performance of his or her duty.[127]

B. *Eleventh Amendment Application in Admiralty*

The Eleventh Amendment is quite specific in its language and, textually, only applies to suits in law or equity.[128] The Framers of the Constitution and of the Eleventh Amendment were well-versed in legal language and in the important distinctions between different actions.[129] If the Framers intended the Amendment to apply to admiralty, they could have manifested that intention clearly in its language. In fact, early jurisprudence indicated that the understanding at the time was that the Eleventh Amendment did not apply to admiralty actions in which a state was a party.[130] As time passed, the distinction was lost and the Supreme Court held in certain cases that the Eleventh Amendment did apply to certain actions in admiralty.[131]

Some commentators have argued that the Court should reexamine its position on this issue and return to the original understanding of the Amendment's Framers.[132]

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[124] *Id.*

[125] *See id.* at 452.

[126] *See id.*

[127] *See id.* at 452-53; *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[128] *See* U.S. CONST. amend. XI ("Judicial power . . . shall not be construed to extend to any suit in law or equity . . . .").

[129] The Framers made a distinction between law and equity when necessary and granted jury trials as a right in law but not in equity. *See* U.S. CONST. amend. VII (granting a jury to suits at common law). The Seventh Amendment has been interpreted so as not to confer a right to a jury in an equitable action. *See, e.g.*, Dixon v. Northwestern Nat'l Bank, 297 F. Supp. 485 (D. Minn. 1969). Nor does the Seventh Amendment apply to suits in admiralty. *See* FED. R. CIV. P. 38(e) (denying a right to a jury for admiralty or maritime claims).

[130] *See infra* notes 137-69 and accompanying text.

[131] *See infra* notes 170-223 and accompanying text.

[132] *See, e.g.*, William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983). This particularly persuasive article was recognized by the Court in *Deep Sea*. *See* California v. Deep Sea Research, Inc., 523 U.S. 491, 510 n.* (1998) (Stevens, J., concurring).

Until recently, this line of thought was rarely pursued outside of purely academic circles. However, with its decision in *Deep Sea*, the Court indicated its willingness to reconsider the issue, at least to some extent.

The Court in *Deep Sea* did not overrule any of its prior holdings; rather, its holding was contingent on the fact that the state did not have possession of the item in question, thereby giving the federal courts jurisdiction in admiralty.[133] The *Deep Sea* holding, however, left two important questions unanswered. First, *Deep Sea* did not determine what type of possession is necessary. The justices spent some time in oral arguments attempting to discern what actions a state would have to take to be considered "in possession" of a wreck.[134] Second, the Court did not indicate whether the relevant distinction in determining the possession of a wreck by the state is between "permissible admiralty" and "non-permissible admiralty" suits, or whether possession is merely a factor[135] in some other dispositive characteristic.[136]

In attempting to answer these questions, it is important to review the background of *in rem* admiralty cases in the United States. One of the most controversial early admiralty cases was *United States v. Judge Peters*.[137] *Judge Peters* concerned a writ of mandamus issued against Judge Peters, a judge of the District Court of the United States for the District of Pennsylvania, after he refused to enforce a judgment of the

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[133] *See Deep Sea*, 523 U.S. at 507-08.

[134] The oral argument demonstrated an attempt by the Justices to focus the distinction:

> **Question**: [I]f states want to get control of these abandoned vessels [should they] send the local police out in the appropriate vessels and just take possession . . . ?
>
> . . . .
>
> **Question**: [What] if they had located them, and sent a diver down affixing a sign saying, claimed by the State, that would be enough for the possession rule, would it?
>
> . . . .
>
> **Question**: Well maybe it doesn't have to send a diver down. It could just go and drop a big rock . . . that says the State owns this . . . .
>
> . . . .
>
> **Question**: What about putting a buoy, as divers often do . . . ?
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> . . . .
>
> **Question**: I thought possession and assertion of ownership are two different things.

U.S. Supreme Court Official Transcript at **35-38, *Deep Sea* (No. 96-1400), *available in* 1997 WL 751917.

[135] One such factor might be whether the action would remove assets from the state's treasury or whether the assets were in the service of the state.

[136] Justices Kennedy, Ginsburg, and Breyer joined in a concurring opinion questioning whether possession was the relevant distinction. *See Deep Sea*, 523 U.S. at 510 (Kennedy, J., concurring).

[137] 9 U.S. (5 Cranch.) 115 (1809).

federal court in favor of Gideon Olmstead and others.[138] Judge Peters' reluctance stemmed from an order issued by the Pennsylvania legislature directing the Governor to "call out an armed force to prevent the execution of any process to enforce" the judgment.[139]

The underlying action of *Judge Peters* was founded in an admiralty proceeding instituted by Olmstead and his companions.[140] A British vessel had captured Olmstead and his companions during the Revolutionary War and impressed them into service.[141] Later Olmstead and others overwhelmed the captain and crew of the vessel and proceeded to take it to Pennsylvania as a prize of war.[142]

When in sight of Egg Harbor, New Jersey, Olmstead and his companions were pursued and captured by the armed brig *Convention*, which was owned by Pennsylvania.[143] Upon arrival at the Port of Philadelphia, Olmstead instituted an action to recover a prize.[144] The State of Pennsylvania also entered the action, claiming the vessel as its prize.[145]

The state trial court awarded one fourth of the vessel's value to Olmstead, with the balance divided among Pennsylvania and the other claimants.[146] Olmstead appealed to the Court of Commissioners of Appeals in Prize Causes for the United States of America and was awarded sole possession.[147] Pennsylvania violated the appellate court order by selling the vessel and distributing the proceeds to David Rittenhouse, Treasurer of Pennsylvania.[148]

Judge Peters then ruled in an action to recover the balance from the Treasurer of Pennsylvania. It was the enforcement of that ruling that the Pennsylvania legislature ordered be resisted by force.[149]

The Supreme Court, in an opinion by Chief Justice Marshall, held that the appeals court was within its rightful power when it "extinguished the interest of the State of Pennsylvania,"[150] thereby asserting that the rights of a state can be

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[138] *See id.* at 135.

[139] *Id.* at 115 n.*.

[140] *See id.* at 136-37.

[141] *See id.* at 119.

[142] *See id.*

[143] *See id.*

[144] A prize action is an *in rem* admiralty action in which the title to a vessel captured during war is conveyed to the capturing party. *See* MANGONE, *supra* note 13, at 58.

[145] *See Judge Peters*, 9 U.S. (5 Cranch) at 137.

[146] *See id.* at 119 (dividing the residue "between the state and the owners of the privateer, and the officers and crews of the *Convention* and *Le Gerard* [another vessel involved in the capture]").

[147] *See id.*

[148] *See id.* at 137-38.

[149] *See id.* at 139.

[150] *Id.* at 140.

adjudicated in an *in rem* proceeding.[151] Furthermore, the Court held that because the property was not in the possession of the State itself,[152] but rather in the possession of David Rittenhouse's heirs, the State had no right to assert an Eleventh Amendment privilege and to resist the legal process.[153]

This holding stands for the proposition that federal courts have jurisdiction to determine the relative rights of all parties, including a state, in an *in rem* proceeding.[154] *Judge Peters* also held that a state cannot prevent the execution of a federal warrant merely by asserting a claim to that property.[155]

In *The Davis*,[156] Mr. Simeon Draper, a Treasury agent of the United States, contracted with a vessel to deliver a shipment of cotton from Savannah to New York.[157] En route, the vessel encountered a storm and would have been lost if not for the "meritorious service of one Douglas."[158] Douglas delivered the vessel to New York and, immediately upon arrival, instituted a libel action against the vessel.[159] The U.S. Marshalls arrested the vessel and delivered possession to the court for disposition.[160]

The United States appeared and declared that its cotton could not be arrested and that it could not be held liable for any award to Douglas.[161] The Court held that proceedings *in rem* to enforce liens against the United States were "only forbidden in cases where, in order to sustain the proceeding, the possession of the United States

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[151] However, the Court explicitly withheld an opinion on whether it could have adjudicated the state's interest in property that it had in its own possession. *See id.* at 139.

[152] *See id.* at 141.

[153] *See id.*

[154] *See id.* at 139.

> The right of a state to assert, as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals, in one of the courts of the United States, is not affected by [the Eleventh] Amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested.

Id. Despite the fact that this holding is more than 180 years old, it has never been explicitly overruled in whole or in part. The holding seemingly was contradicted by the views expressed by some Justices in *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982), in which they assumed that they did not have the power to decide the state's claim. *See id.* at 699-700; *see also infra* note 209 and accompanying text.

[155] *See Judge Peters*, 9 U.S. (5 Cranch) at 139.

[156] 77 U.S. 15 (10 Wall.) (1869).

[157] *See id.* at 16.

[158] *Id.*

[159] *See id.* A libel action was the initial pleading in an admiralty action that was equivalent to a civil complaint. In 1966, the Supplemental Rules of Admiralty were incorporated into the Federal Rules of Civil Procedure, and actions are now commenced through a complaint. *See* BLACK'S LAW DICTIONARY 632 (6th ed. abridged 1991).

[160] *See The Davis*, 77 U.S. (10 Wall.) at 16.

[161] *See id.*

must be invaded under process of the court."[162] The Court asked, "But what shall constitute a possession which, in reference to this matter, protects the goods from the process of the court?"[163] The Court answered the question by asserting that only actual possession, not constructive possession, would suffice.[164]

Constructive possession, or possession by implication, was not sufficient to invoke sovereign immunity because it was possible to refute the implication without attacking the physical possession of the government.[165] Determination of title to property that is in the actual possession of the Court did not create "unseemly conflict between the court and the other departments of the government."[166]

In *The Davis*, the marshall obtained possession without any contact with officers of the United States.[167] The Court reasoned that because the United States was not in possession of the goods when the action was instituted, the United States was legitimately "reduced to the necessity of becoming claimant and actor in the court to assert her claim."[168] In other words, a lien against the property of the United States is "only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court."[169]

The first cases widely regarded as applying the Eleventh Amendment to suits in admiralty[170] are the companion cases known as *New York I*[171] and *New York II*.[172] *New York I* involved an *in rem* action against tugboats owned by a company called Fix Brothers for damages alleged to have been caused by the vessels.[173] Fix Brothers answered that, at the time of the alleged incident, the State of New York operated the tugs; therefore, the state should answer for the damages.[174] New York appeared

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[162] *Id.* at 20.

[163] *Id.* at 21.

[164] *See id.* The Court required, for immunity, "a possession which can only be changed under process of the court by bringing the officer of the court into collision with the officer of the government, if the latter should choose to resist." *Id.* at 21.

[165] *See id.*

[166] *Id.*

[167] *See id.* at 22.

[168] *Id.* It follows that, for purposes of immunity, states would hold no greater privilege than the United States as a whole. The Supreme Court has "recognized a correlation between sovereign immunity principles applicable to the States and the Federal Government." California v. Deep Sea Research, Inc., 523 U.S. 491, 506-07 (1998).

[169] *The Davis*, 77 U.S. (10 Wall.) at 20.

[170] *See, e.g.*, Zych v. Unidentified, Wrecked and Abandoned Vessel Believed to be the Lady Elgin, 960 F.2d 665, 669 (7th Cir. 1992) (arguing that a district court judgment against Illinois' property interest in a sunken ship is contrary to the Eleventh Amendment).

[171] *Ex parte* State of New York, 256 U.S. 490 (1921) [hereinafter New York I].

[172] *Ex parte* State of New York, 256 U.S. 503 (1921) [hereinafter New York II].

[173] *See New York I*, 256 U.S. at 495.

[174] *See id.* Specifically the action was against Edward S. Walsh, Superintendent of Public Works of the State of New York, as agent of the state. There was no charge that Walsh acted in an unconstitutional manner in his operation of the tugs; therefore, the suit was one

specially and suggested that the federal court did not have jurisdiction to proceed against New York in the absence of the State's consent.[175]

The Court held that "the immunity of a State from suit *in personam* in the admiralty brought by a private person without its consent, is clear."[176] Equally clear is that *New York I* did not address the question of *in rem* admiralty jurisdiction regarding a *res* that was properly in the possession of the court.[177] The *res* was in the possession of the state and was being used for public purposes.[178] Any award granted to the plaintiff in the case would have been paid out of the Treasury of the State of New York.[179] *New York I* need not, in any way, rest on the operation of the Eleventh Amendment; rather, it quite correctly recognized that nothing in the Constitution changes admiralty law or the doctrine of sovereign immunity to allow *in personam* suits against a sovereign without the sovereign's approval.[180]

New York II[181] was a true *in rem* action against the vessel *Queen City*, a tugboat wholly owned and operated by the State of New York. The Court, citing *The Schooner Exchange v. McFaddon*,[182] held that it could not adjudicate title with respect to a sovereign state that was at peace with the United States.[183] *New York II* recognized that numerous courts in admiralty had held that "property and revenue necessary for the exercise of [governmental] powers are to be considered as part of the machinery of government exempt from seizure and sale under process against the city."[184] Further, the Court stated, "The principle so uniformly held to exempt the

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brought by individuals against the State. *See id.* at 502.

[175] *See id.* at 496.

[176] *Id.* at 500.

[177] "[T]he proceedings against which prohibition is here asked have no element of a proceeding *in rem*, and are in the nature of an action *in personam* against Mr. Walsh, not individually, but in his capacity as Superintendent of Public Works of the State of New York." *Id.* at 501.

[178] *See id.* at 495-96.

[179] *See id.* at 501-02 (citing the state statute authorizing such payments).

[180] The Court agreed with *Hans v. Louisiana*, 134 U.S. 1 (1890), that the Eleventh Amendment *did not apply* to *in personam* suits against a state by its citizens whether they be in law, equity, or admiralty. *See New York I*, 256 U.S. at 498.

[181] *New York II* was an action filed against the vessel *in rem* to recover damages sustained through the death of Evelyn McGahan. *See* New York II, 256 U.S. 503, 508 (1921). This was different from *New York I*, in which the suit was filed against an official of the State of New York. *See New York I*, 256 U.S. at 494-96.

[182] 11 U.S. (7 Cranch) 116 (1812).

[183] *See New York II*, 256 U.S. at 510-11. *The Schooner Exchange* was an *in rem* proceeding whereby crewmembers on board the *Exchange* challenged the title of the Emperor Napoleon, who claimed the vessel as a prize of war. The vessel entered the territory of the United States under peaceful circumstances. *See The Schooner Exchange*, 11 U.S. (7 Cranch) at 117.

[184] *New York II*, 256 U.S. at 511 (citing primarily Long v. The Tampico, 16 F. 491 (D.C.S.D. N.Y. 1883); and citing secondarily The Protector, 20 F. 207 (C.C.D. Mass.

property of municipal corporations employed for public and governmental purposes from seizure by admiralty process *in rem*, applies with even greater force to exempt public property of a State *used and employed for public and governmental purposes*."[185]

The Court had an opportunity to consider the application of this doctrine in 1982 when Treasure Salvors, Inc. filed an admiralty *in rem* action seeking a declaration of title to a shipwreck, presumed to be the *Atocha*, located off of the Florida Keys.[186] Certain portions of the vessel were in the possession of the Florida Division of Archives.[187] The district court issued a warrant for the arrest of the artifacts possessed by the Division and ordered the artifacts delivered to the possession of the court.[188]

The Division officials had obtained the artifacts under the terms of a contract between the State of Florida and Treasure Salvors, Inc.[189] The contract was entered into after Florida threatened Mel Fisher, president of Treasure Salvors, with arrest for commencing salvage operations without a permit from the state.[190] The contract was predicated on the assumption that the artifacts were legally the property of Florida under a statute that assumed title to all artifacts buried in Florida's lands.[191]

The contract provided that Florida convey title of seventy-five percent of any found treasure to Treasure Salvors in exchange for fees, a performance bond, and excavation in a manner specified by the state.[192] After the contract was signed, there was unconnected litigation between the United States and Florida concerning the extent of Florida's boundaries in the underwater regions near the Florida Keys.[193] When that litigation was settled, the *Atocha* was found outside of territory controlled by Florida.[194]

1884); The F. C. Latrobe, 28 F. 377 (D.C. Md. 1886); The John McCraken, 145 F. 705 (D. Or. 1906)).

[185] *New York II*, 256 U.S. at 511 (emphasis added). *In rem* proceedings involving shipwrecks, in contrast, usually concern vessels whose existence was not even known to the state prior to the claim. *See, e.g.*, Deep Sea Research, Inc. v. Brother Jonathan, 102 F.3d 379, 382 (9th Cir. 1996) ("Until DSR discovered the wreck, neither the State nor anyone else knew its location, and the State had not made any attempt to locate the wreck."); Commonwealth v. Maritime Underwater Surveys, Inc., 531 N.E.2d 549, 550 (Mass. 1988) ("The Commonwealth was neither actively searching for nor aware of the location of the wreck."). These wrecks are not used and employed for public and governmental purposes.

[186] *See* Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 673-74 (1982).

[187] *See id.* at 678.

[188] *See id.* at 678 & n.10.

[189] *See id.* at 679 n.11.

[190] *See id.* at 674.

[191] *See id.* at 673-74 (citing FLA. STAT. ANN. § 267.061(1)(b) (West 1974)).

[192] *See id.* at 675.

[193] *See id.* at 675-76 (citing United States v. Florida, 420 U.S. 531 (1975)).

[194] *See id.* at 676 (citing United States v. Florida, 425 U.S. 791 (1976)). As between the

Treasure Salvors quickly instituted an action to claim title to the *Atocha*.[195] The United States intervened and claimed title under the doctrine of sovereign prerogative.[196] The district court rejected the United States' claim and held that "possession and title are rightfully conferred upon the finder of the res derelictae."[197] Treasure Salvors then instituted the action for the return of the artifacts it gave to the officials at the Division of Artifacts.[198]

A plurality opinion, written by Justice Stevens, framed three questions to decide the case. First, Justice Stevens asked whether Treasure Salvors was asserting a claim against the state or against the state officials.[199] Next, he asked whether the conduct of the officials constituted an unconstitutional withholding of property.[200] Finally, he asked whether the relief sought constituted permissible prospective relief or "'require[d] the payment of funds from the state treasury.'"[201]

The plurality opinion held that the federal court had jurisdiction to compel the arrest of the property from the possession of state officials because the officials had no colorable claim to retain possession.[202] The officials lacked this basis because the contract did not give the officials any authority to hold the artifacts.[203] Rather, the contract gave Treasure Salvors the right to salvage items found on Florida's property.[204] The contract did not expressly or impliedly transfer any rights from Treasure Salvors to Florida.[205]

The Court applied doctrines enunciated in *Tindal v. Wesley*[206] and *United States v. Lee*.[207] These cases held that the:

United States and Florida, "the United States was entitled to the lands, minerals and other natural resources in the area in which the remains of the *Atocha* had come to rest." *Id.*

[195] *See id.* at 676 (citing Treasure Salvors, Inc. v. Abandoned Sailing Vessel, 408 F. Supp. 907 (S.D. Fla. 1976)).

[196] *See Treasure Salvors*, 408 F. Supp. at 909. Sovereign prerogative is an English doctrine whereby the sovereign has the right to any property found by its citizens. *See* Leanna Izuel, Comment, *Property Owners' Constructive Possession of Treasure Trove: Rethinking the Finders Keepers Rule*, 38 UCLA L. REV. 1659, 1669 (1991).

[197] *Treasure Salvors*, 408 F. Supp. at 911.

[198] *See id.* at 678.

[199] *See id.* at 683-85.

[200] *See id.* at 688-89.

[201] *Id.* at 690 (quoting Quern v. Jordan, 440 U.S. 332, 347 (1979)).

[202] *See id.* at 694.

[203] *See id.*

[204] *See id.* The contract, by its terms, transferred Florida's rights in the property to Treasure Salvors. However, since Florida had no rights to transfer, the contract had no effect. In other words, the contract did not transfer any rights *from* Treasure Salvors *to* Florida. *See id.*

[205] *See id.*

[206] 167 U.S. 204 (1897).

[207] 106 U.S. 196 (1882).

> settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the State simply because the defendant holding possession happens to be an officer of the State and asserts that he is lawfully in possession on its behalf.[208]

Using this analysis, the Court sidestepped the Eleventh Amendment issue completely. The plurality *assumed* that it could not decide the issue of the state's claims to title but declined to broach the issue.[209]

Justice Brennan concurred in the judgment in part and dissented in part.[210] He agreed that the Eleventh Amendment did not apply, but for a different reason than the plurality. He maintained that the Eleventh Amendment did not apply to suits against a state by citizens of the same state.[211]

Justice Brennan disagreed that the lower court erred in deciding the title issue *vis-á-vis* the state's interest. Instead, he argued that the Supreme Court's holding that the state officials had no colorable basis for a claim of ownership[212] precluded the necessity of overturning the district court's determination of the state's interest.[213]

Justice White, joined by Justices Powell, Rehnquist, and O'Connor, concurred in part and dissented in part. Justice White's opinion agreed with the plurality that the court below erred in determining title *vis-á-vis* the state.[214] He argued that the plurality erred in its distinction regarding the state officials and in finding that the contract failed to provide a "colorable claim."[215]

The dissent favored having the state officials maintain possession of the artifacts under the doctrine of the *New York* cases,[216] whereby a state's assertion of title to articles in its *possession* was enough to justify the application of the doctrine of

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[208] *Tindal*, 167 U.S. at 221.

[209] *See Treasure Salvors*, 458 U.S. at 700. The Court did reverse the appellate court's determination of the state's claim of ownership. *See id.*

[210] *See id.* (Brennan, J., concurring in part and dissenting in part).

[211] Justice Brennan asserted that the Court in *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding that a state cannot be sued by its own citizens), "did not rely upon the Eleventh Amendment, and that the Amendment does *not* bar federal court suits against a State when brought by its own citizens." *Treasure Salvors*, 458 U.S. at 700-01 (Brennan, J., concurring in part and dissenting in part). Justice Brennan adpopted the view, explained *supra* note 120 and accompanying text, that the Eleventh Amendment merely clarified that Article III did not remove the sovereign immunity of a state when an action was brought by a citizen of another state.

[212] *See Treasure Salvors*, 458 U.S. at 694.

[213] *See id.* at 701-02 (Brennan, J., concurring in part and dissenting in part).

[214] *See id.* at 702 (White, J., concurring in part and dissenting in part).

[215] *See id.* at 703 (White, J., concurring in part and dissenting in part).

[216] *See* New York I, 256 U.S. 490 (1921); New York II, 256 U.S. 503 (1921).

sovereign immunity.[217] The dissent thereby subtly expanded the holding of *New York II*, which held that property in a state's possession and "used and employed for public and governmental purposes" justified the application of the doctrine of sovereign immunity.[218] Given that *New York II* was already an extension from the original idea of warships in government service,[219] it is not clear that this extension by the *Treasure Salvors* dissent is warranted.[220]

The Court's fractured holding caused considerable confusion in the lower courts, which struggled to apply *Treasure Salvors* to a variety of salvage cases.[221] Particularly confusing was the "colorable claim" language in the *Treasure Salvors* opinion. Lower courts often interpreted this to mean that a state needs to assert only a colorable claim to possession to invoke the Eleventh Amendment.[222] The Supreme Court revisited the subject in 1998 with its decision in *California v. Deep Sea Research, Inc.*[223]

III. *DEEP SEA RESEARCH*

In 1865, the *Brother Jonathan* sank off the coast of California.[224] Five insurance companies maintained records indicating payment on losses incurred in the tragedy.[225] It is unclear whether the vessel itself was covered by insurance or whether any other claims were filed against the cargo.[226] There is no evidence that any of the insurance companies or the State of California ever actively searched for the vessel.[227]

In 1994, Deep Sea Research (DSR) discovered the wreck in approximately 200 feet of water off the coast of California.[228] DSR filed an admiralty action seeking

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[217] *See Treasure Salvors*, 458 U.S. at 702.

[218] *New York II*, 256 U.S. at 511.

[219] *See supra* notes 181-85 and accompanying text.

[220] Florida could, perhaps, have argued that the artifacts were intended for public display for educational reasons. This assertion would have put the artifacts in the state's possession and in the service of the state. However, this is a factual question that was never addressed.

[221] *See, e.g.*, Zych v. Unidentified, Wrecked and Abandoned Vessel Believed to be the Lady Elgin, 960 F.2d 665, 670 (7th Cir. 1992) (finding that the district court misunderstood *Treasure Salvors*); Zych v. Unidentified, Wrecked and Abandoned Vessel Believed to be the Seabird, 941 F.2d 525, 534 (7th Cir. 1991) (noting that the Eleventh Amendment issue sidestepped by the Court in *Treasure Salvors* was central to *Seabird*).

[222] *See, e.g.*, California v. Deep Sea Research, Inc., 523 U.S. 491, 497 (1998) (describing the district court's holding as relying on California's failure to assert a colorable claim).

[223] 523 U.S. 491 (1998).

[224] *See id.* at 495.

[225] *See id.*

[226] *See id.*

[227] *See id.*

[228] *See id.* at 496.

either title to or a salvage award for the vessel and her contents.[229] DSR also asserted a claim of ownership based on the purchase of subrogation rights from the vessel's five known insurers.[230] California moved to dismiss the action for lack of jurisdiction, claiming that it possessed title to the vessel under the ASA and that the action was against the state in violation of the Eleventh Amendment.[231] The district court concluded that the state failed to demonstrate that it had maintained a "colorable claim" to the *Brother Jonathan*.[232] The court held that the state had not established, by a preponderance of the evidence, that the vessel was abandoned, embedded, or eligible for inclusion in the national register as required by the ASA.[233]

The district court appointed DSR as exclusive salvor, pending the court's disposition of the items recovered or the proceeds therefrom.[234] The district court declined to find any particular portions of the wreck as abandoned or non-abandoned.[235] California appealed, arguing that it was not required to establish "by a preponderance of the evidence" that it had title to the wreck.[236] California argued that it was sufficient for it to show that it had a colorable claim.[237]

The Supreme Court's majority opinion recognized that the court had not "charted a clear path in explaining the interaction between the Eleventh Amendment and the federal courts' *in rem* admiralty jurisdiction."[238] The Court held that the district court could adjudicate the state's title and decide whether the ASA applied to the *Brother Jonathan*.[239] The majority did not overrule *Treasure Salvors*, but expressly limited that decision to its facts.[240] The Court also distanced itself from its dicta in *Treasure Salvors*, in which it assumed it did not have jurisdiction to decide Florida's title.[241] Rather than overturning some of its earlier opinions, the majority based its holding on the distinction that the State of California was not in possession of the vessel; therefore, the *in rem* proceeding was not "against the state."[242]

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[229] *See id.* at 496-97; *see also* Deep Sea Research, Inc. v. Brother Jonathan, 883 F. Supp. 1343 (N.D. Cal. 1995).

[230] *See Deep Sea Research*, 523 U.S. at 496.

[231] *See id.* at 496-97.

[232] *See id.* at 497.

[233] *See id.* Subsequent to the filing of the claim, the vessel was deemed eligible for inclusion in the National Register. *See id.* at 498.

[234] *See id.* at 497.

[235] *See id.* at 499-500 (citing Deep Sea Research, Inc. v. The Brother Jonathan, 102 F.3d 379, 389 (9th Cir. 1996)).

[236] *Deep Sea Research*, 523 U.S. at 504.

[237] *See id.*

[238] *Id.* at 502.

[239] *See id.* at 508.

[240] *See id.* at 505 (pointing out that, in *Treasure Salvors*, the state had actual possession of the artifacts that were subject to the suit).

[241] *See id.* at 504-07.

[242] *See id.* at 505.

Justice Stevens wrote a concurring opinion expressing his belief that all eight Justices, including himself, who, in *Treasure Salvors*, had believed that the Eleventh Amendment applied to admiralty *in rem* actions were likely mistaken. Justice Stevens wrote, "I am now persuaded that all of us might well have reached a different conclusion if the position of Justices Story and Washington . . . had been brought to our attention."[243]

Justices Kennedy, Ginsburg, and Breyer joined in a concurring opinion stating that the majority's discussion should not lead to the conclusion that the Court has made a distinction based upon the state's possession or non-possession in analyzing admiralty *in rem* actions.[244] This concurring opinion closed with an invitation to reconsider the issue.[245]

Although *Deep Sea* was decided only recently, it already has affected admiralty *in rem* actions. Three months after the Supreme Court's decision in *Deep Sea*, the Eleventh Circuit cited *Deep Sea* in ruling that the State of Florida was not immune to a federal court's decision on whether to grant limitation of liability to a shipping company.[246] Bouchard Transportation Co. had filed for limitation of liability, in regards to an oil spill, under the Oil Pollution Act of 1990.[247] Florida filed a motion to dismiss, arguing that its claims could not be adjudicated in federal court without its permission.[248] The court held that the limitation of liability proceeding was sufficiently analogous to a traditional maritime *in rem* proceeding to permit the application of the Supreme Court's holding in *Deep Sea*.[249]

In another shipwreck case, the Sixth Circuit held that once Michigan had demonstrated a colorable claim to the shipwreck, the Eleventh Amendment barred federal jurisdiction.[250] The Supreme Court vacated and remanded that decision for further consideration.[251] The Sixth Circuit, in turn, remanded the case to the district court with instructions to completely adjudicate the competing claims to the vessel.[252]

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[243] *Id.* at 509 (Stevens, J., concurring).

[244] *See id.* at 510 (Kennedy, J., concurring).

[245] *See id.*

[246] *See* Bouchard Transp. Co., Inc. v. Updegraff, 147 F.3d 1344, 1349 (11th Cir. 1998), *cert. denied sub nom.* Department of Envtl. Protection of Fla. v. Bouchard Transp. Co., 119 S. Ct. 1030 (1999).

[247] 33 U.S.C. § 2704 (1994) (permitting a vessel to limit its liability for oil spill cleanup costs to $1200 per gross ton).

[248] *See Bouchard*, 147 F.3d at 1348-51.

[249] *See id.* at 1349.

[250] *See* Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel Known as the Captain Lawrence, 105 F.3d 1078, 1083-84 (6th Cir. 1997), *vacated*, 523 U.S. 1091 (1998).

[251] *See* Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel Known as the Captain Lawrence, 523 U.S. 1091 (1998).

[252] *See* Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel Known as the Captain Lawrence, 177 F.3d 491, 501 (6th Cir. 1999).

The Sixth Circuit called the Eleventh Amendment argument a "red herring"[253] and clarified that there was no jurisdictional bar preventing the district court's determination of the proper titleholder.[254]

CONCLUSION

The admiralty law of salvage developed to provide incentives to save lives and find salvageable property.[255] Over the years, treasure hunters have expended enormous sums in attempts to find shipwrecks. If salvors had no hope of maintaining significant awards from the salvage, many important historical artifacts might never be found.[256] States do not have the resources or the desire to search for vessels.[257] If states did spend resources on treasure hunting, it possibly would be considered by some as a gross misallocation of taxpayer money.

In deciding admiralty *in rem* cases, courts should base their analysis on the effect of their judgments before allowing assertions of the Eleventh Amendment or sovereign immunity. Those *in rem* actions that are actually *in personam* actions, which are available at common law, should be given Eleventh Amendment immunity.[258]

In cases in which the property in question is in the actual possession of the state *and* is being used for a public or governmental purpose, the doctrine of sovereign immunity would apply and the court would be precluded from enforcing a judgment against the government.[259] In cases in which a court's arrest of the *res* would cause

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[253] *Id.* at 496.

[254] *See id.* at 500. The Sixth Circuit also instructed the district court to require the state to demonstrate by clear and convincing evidence that the vessel was abandoned before awarding the state title under the ASA. *See id.* Subsequently, the district court held that *The Captain Lawrence* had, indeed, been abandoned and vested title in the State of Michigan. *See* Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel Known as the Captain Lawrence, No. 2:94-CV-164, 1999 WL 1000204, at *6 (W.D. Mich. Nov. 2, 1999).

[255] *See* MANGONE, *supra* note 13, at 201-04.

[256] Arguably the most famous shipwreck of all time, the *Titanic*, would never have been found but for the diligent efforts of salvors.

[257] *See* McLaughlin, *supra* note 47, at 184 (noting that states were not expected to incur any significant costs as a result of the ASA).

[258] This supports the decision made by the Supreme Court in *New York I*, 256 U.S. 490 (1921), which was an *in personam* suit against Edward S. Walsh, Superintendent of Public Works of the State of New York. *See supra* note 174 and accompanying text. Alternatively, in the case of a suit by a citizen of the same state, the sovereign immunity doctrine enunciated in *Hans v. Louisiana*, 134 U.S. 1 (1890), would properly apply.

[259] This is the proper basis for the decision in *New York II*, 256 U.S. 503 (1921). In *New York II*, the tugboat *Queen City* was owned and operated by the city of New York and was in its sole possession at the instigation of the action. *See supra* note 181 and accompanying text. In *New York II*, there would have been no way for the court to enforce a judgment without a direct conflict with the state.

a "collision with the officer of the government,"[260] the action would not be allowed within the jurisdiction of the federal courts. In either instance, the plaintiff would have to rely on remedies provided in state courts, such as tort or contract claims.[261] Alternatively, the plaintiff could allege, as the plaintiff did in *Treasure Salvors*, that the officials were acting *ultra vires* or that the state had violated the Fifth Amendment.[262]

However, if the property is properly within the possession of the court and the state is merely asserting a claim, whether colorable or not, to property that is not in its actual possession, a federal court must exercise the admiralty jurisdiction granted to it by Article III of the United States Constitution.[263] In the cases of shipwrecks located in the waters off of a state, there is no bar to adjudication of the state's claims by federal courts.[264]

Allowing federal courts to determine the respective claims of various parties in shipwreck cases would provide uniformity among the states and ensure proper adjudication based on traditional maritime principles. Uniformity provides the stability that is necessary for salvors to make considerable investment in time and money to locate wrecks of historical importance.

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[260] *The Davis*, 77 U.S. (10 Wall.) 15, 21 (1869). Such a collision would occur, for instance, if a state had its own research vessel working on archeological research at a wreck site.

[261] *See supra* notes 13-14 and accompanying text.

[262] "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

[263] This reflects the view expressed in *The Davis*, in which cotton belonging to the United States was subject to an *in rem* action that was filed before the United States gained physical possession of the cotton. *See The Davis*, 77 U.S. (10 Wall.) at 15; *supra* notes 156-69 and accompanying text.

[264] As recognized by the Court in *Deep Sea*, a shipwreck is not in the possession of the state even if it *might* be embedded. *See* California v. Deep Sea Research, Inc., 523 U.S. 491, 498-99 (1998).