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Paul Neil

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I. INTRODUCTION

Consider the following: Following a dream and an old treasure map, Charles convinced many of his friends to invest their life savings into a search for an old abandoned shipwreck that sunk centuries ago off the northern Atlantic coast. After spending hundreds of thousands of dollars and decades of his life hunting, Charles finally discovered the motherlode. He immediately proceeded to federal court in order to make a claim to the wreck and its artifacts. The state in whose waters the wreck was found heard about the new discovery and immediately sought to have the claim removed to State court via the Eleventh Amendment in an effort to take some, if not all, of Charles' new discovery for State purposes.

Traditionally, claims to abandoned shipwrecks fall under the jurisdiction of the federal courts as required by the Constitution. A person or organization who finds a wreck will usually make a claim to the discovery in federal court under either the common law of salvage or the common law of finds. However, in 1987, Congress passed the Abandoned Shipwreck Act (ASA), which vests title in all shipwrecks discovered to the state in whose territorial waters the wreck was found, provided the ship was abandoned. Thus, the ASA deprives private salvors of any rights to a shipwreck meeting the requirements of the ASA, regardless of the energy and time invested searching for the ship. In addition to the ASA, the Eleventh Amendment's provision that a state cannot be sued by one of its own

1. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").
2. See U.S. CONST. art. III, § 2, cl. 1 (stating that "the judicial Power [of the United States] shall extend to . . . all Cases of admiralty and maritime Jurisdiction.").
4. See id.
6. See id. at § 2105 (articulating that all abandoned shipwrecks within state territorial waters fall under the purview of the federal ASA).
7. See generally id. (granting states complete title to abandoned shipwrecks discovered in their territories, implying no grant of rights to private salvors).
citizens in federal court has often proved troublesome for salvors in times past. By removing a maritime or admiralty claim out of federal court through asserting Eleventh Amendment sovereign immunity, states have historically been successful in depriving salvors of any rights to abandoned shipwrecks discovered in state territorial waters. Thus, claimants were often deprived of the more objective and competent federal courts.

California v. Deep Sea Research, Inc. ("DSR") is the latest case to analyze the controversial issue of whether and to what extent the Eleventh Amendment applies to admiralty/maritime cases. It sets a new standard of federal jurisdiction in admiralty cases, stating that a state cannot use the Eleventh Amendment where the state has no preexisting possessory claim to the res at the time the case was brought to federal court. Hence, in light of DSR, as long as the State was without any valid right of possession to the wreck before Charles made his claim in federal court, Charles and his investors will likely be spared from having their claim removed to State court. The result is that Charles and his investors will have an increased chance of making a successful claim to their wreck and will thus reap the rewards of their risk, devotion, and investments.

This Note will review DSR and consider its consequences to those who discover abandoned aqueous shipwrecks and their artifacts who then seek to make a claim to the wreck and/or its artifacts. Part II discusses the history of the application of Article III § 2, clause 1, and the Eleventh Amendment to in rem admiralty cases. Part III sets forth the progression of federal shipwreck law from traditional admiralty law through the creation of the ASA, and also briefly explores the law(s) of various other jurisdictions. Part IV recites the facts and procedural

8. See U.S. CONST. amend. XI. Eleventh Amendment immunity has been judicially extended to include suits by citizens suing their state of citizenship in federal court. See Hans v. Louisiana, 134 U.S. 1, 20 (1890).
9. See infra note 10 and accompanying text.
10. See, e.g., Zych v. Wrecked Vessel Believed To Be The "Lady Elgin", 960 F.2d 665, 670 (7th Cir. 1992) (holding that the State of Illinois appropriately used the Eleventh Amendment to remove an abandoned shipwreck case out of federal court); Maritime Underwater Surveys, Inc. v. Unidentified Wreck & Abandoned Sailing Vessel, 717 F.2d 6, 8 (1st Cir. 1983) (using the Eleventh Amendment to remove a claim for a shipwreck discovered in State waters out of federal court); Subaqueous Exploration & Archaeology, Ltd. v. Unidentified, Wrecked & Abandoned Vessel, 577 F. Supp 597, 614 (D. Md. 1983) (mandating that the federal court had no jurisdiction over property discovered in Maryland's territorial waters because the State had not waived it's Eleventh Amendment immunity). See also Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 682 (1982) (declaring that "[t]he [lower] court did not have power . . . to adjudicate the State's interest in the property without the State's consent [because of the Eleventh Amendment].").
11. See David C. Frederick, A LOOK AT ... Sunken Treasure: Legally, the Waters are Murky, WASHINGTON POST, Aug. 30, 1998, at C03.
13. See id. at 496.
14. See id. at 500.
15. See infra notes 21-40 and accompanying text.
16. See infra notes 41-126 and accompanying text.
history of DSR,\(^\text{17}\) ensued by an examination of the reasoning and opinions of the majority and concurring opinions in Part V.\(^\text{18}\) Part VI explores the probable impacts of DSR on bankruptcy law, the states, commercial salvors, and other various interests and parties.\(^\text{19}\) Part VII adjourns by observing that although DSR chartered a good beginning towards clarifying admiralty cases involving the Eleventh Amendment, additional clarification is required if the government truly wishes to eliminate the various negative effects of abandoned shipwreck law as it currently stands.\(^\text{20}\)

II. HISTORICAL ANALYSIS OF CONSTITUTIONAL ADMIRALTY JURISDICTION AND THE ELEVENTH AMENDMENT AS APPLIED TO IN REM ADMIRALTY CASES

A. Article III, § 2, clause 1

The Constitution provides that federal courts have authority to hear “all Cases of admiralty and maritime Jurisdiction”.\(^\text{21}\) Although this appears to be a clear vestiture of power, the original intent of the framers in granting federal jurisdiction over admiralty cases remains a mystery.\(^\text{22}\) Some of the founding fathers, however, did write on this issue after the Constitution’s passage.\(^\text{23}\) Over the years the Court has used the justification that the federal courts must be vested with exclusive admiralty jurisdiction in order to provide “uniformity” in admiralty and maritime law, but this has been hindsight application.\(^\text{24}\) Inferentially, it is because of the lack

17. See infra notes 127-46 and accompanying text.
18. See infra notes 147-80 and accompanying text.
19. See infra notes 181-258 and accompanying text.
20. See infra notes 259-64 and accompanying text.
22. See David J. Bederman, Uniformity, Delegation and the Dormant Admiralty Clause, 28 J. MAR. L. & COM. 1, 2 (1997). Despite scholars statements to the contrary, it is interesting that the Court in DSR declared that the “need for a body of law applicable throughout the nation was recognized throughout the Constitutional Convention”. Deep Sea Research, Inc., 523 U.S. at 497 (emphasis added) (citations omitted).
23. See Bederman, supra note 22, at 2. Alexander Hamilton stated that admiralty jurisdiction needed to be exclusive in federal courts in order to provide uniformity. See id. at 3 (quoting Federalist No. 80, at 478). However, there is current scholarly debate as to whether uniformity was truly the framers’ original intent. See id. (citations omitted).
24. See, e.g., Southern Pacific Co. v. Jensen, 244 U.S. 205, 215 (1917). Jensen opined that federal congressional law preempts state maritime law and that even in the absence of positive congressional action, general maritime law principles preempt state law; all of this was in an effort to promote harmony and uniformity in maritime law. See id. at 215-16.
of understanding as to why the founding fathers wanted admiralty cases to have original jurisdiction in federal courts in the first place that the Supreme Court has had a difficult time defining where the federal courts' admiralty/maritime jurisdiction ends and where the states' begins. Clearly, this is partially why DSR posed a problem for the Court.

B. The Eleventh Amendment and Sovereign Immunity

Similar to the mystery behind the intent of Article III, §2, clause 1 of the Constitution, there are also unanswered questions as to why the drafters of the Eleventh Amendment failed to mention admiralty or maritime cases as being the subject of state sovereign immunity. Historical sources do, however, make clear that the original intent of the Eleventh Amendment, in general, was to "limit the jurisdiction of federal courts over suits in which states were named as defendants without their consent."

Currently, two main theories are circulating in academic circles to explain why state sovereign immunity has been encapsulated in the Eleventh Amendment. The first is that sovereign immunity preexisted the constitutional framing, which, after Chisolm v. Georgia, had to be written to be maintained. The second explanation is that the Amendment was created to fix an inadvertent error by the founding fathers who accidentally granted too much jurisdiction to the federal courts in Article III of the Constitution.

Whatever the purpose of the Eleventh Amendment, there is definitely a long "convoluted history of admiralty and the Eleventh Amendment . . ." At least one scholar believes that this is because of the Court's anti-textualist approach to the Eleventh Amendment through the years as well as its failure to follow originalist

25. Compare, e.g., The Lottawanna, 88 U.S. (21 Wall.) 558, 574-75 (1874) (submitting that there was no Constitutional restraint on the states legislating over areas of maritime issues that were "local" in nature) with Jensen, 244 U.S. at 216 (preventing states from even regulating over local issues if the state law in any way interfered with the uniform nature of general or federal maritime law).

26. See generally Deep Sea Research Inc., 523 U.S. at 497-500 (comparing previous Supreme Court maritime cases in an effort to determine the scope of federal admiralty jurisdiction versus state jurisdiction and state sovereign immunity, purposefully avoiding the issue of whether the Federal ASA preempts California's conflicting maritime law).

27. See David J. Bederman, Admiralty and the Eleventh Amendment, 72 NOTRE DAME L. REV. 935, 936 (1997) (proposing that drafters of the Eleventh Amendment may have purposefully left admiralty and maritime cases out of the bestowal of sovereign immunity to the states).

28. See id.

29. See id.

30. 2 U.S. (2 Dall.) 419 (1793) (maintaining that a state could be sued by one of its own citizens in federal court).

31. See Bederman, supra note 27, at 936.

32. See id.

33. See id. at 938.
In this scholar's opinion, the courts have wrongfully expanded the reach of Eleventh Amendment sovereign immunity, removing admiralty cases out of the federal system in ways never imagined by the original drafters. As originally drafted, the Eleventh Amendment precluded suits commenced or prosecuted against a state by citizens of a foreign state or a foreign country. However, striving to provide uniformity in the Eleventh Amendment's applicability to the states, through *Hans v. Louisiana*, the Court extended state sovereign immunity to suits against a state by one of its own citizens. As it stands now, the "history of admiralty and the Eleventh Amendment, far from being marginal or irrelevant to the balance of power between states and the federal courts, is actually central to that dispute." Hence, the Eleventh Amendment stands as an important symbol of the preservation of federalism, especially as applied to admiralty cases.

III. ABANDONED SHIPWRECK LAW-A HISTORY AND COMPARISON

A. Traditional Admiralty Law

One of the oldest living bodies of law in use today, the law governing shipwrecks and shipwreck discoveries in the United States is admiralty (or maritime) law. Admiralty law utilizes a proceeding which does not exist in common law—the in rem proceeding. An in rem proceeding grants a person or group bringing a maritime claim the rights to the tangible property at issue. Though it developed out of the common law, this maritime 'lien', as it is called, is still the current method most often utilized to claim rights to a ship.

Largely utilizing the in rem proceeding, salvors traditionally make claims to

34. See id. at 936-37 (noting that the Supreme Court's interpretation of the Eleventh Amendment over time has given the Amendment a "teleological gloss").
35. See id. at 938.
36. See U.S. CONST. amend. XI
37. 134 U.S. 1 (1890).
38. See id. at 15 (reasoning that it would be a strain of the Constitution to suppose a state could be sued in federal court by foreigners and outsiders, but not by one of its own citizens).
39. See Bederman, supra note 27, at 938.
40. See id.
42. See id. at 318.
43. See id.
44. See id.
shipwrecks and their articles through one of two means: the law of salvage or the law of finds. The law of salvage was created to give sailors the incentive to save ships and other objects which are in danger of being sunk or otherwise destroyed by accident or nature. The law of salvage compensates a salver, who saves a ship or other maritime object in peril, with a salvage award. In connection with the law of salvage is the law of finds. Whereas the law of salvage requires the salver to reduce a threatened object to his or her sole possession in order to earn a salvage award, the law of finds, conversely, allows for the discoverer of an object who reduces the object to his or her sole possession to be deemed the new owner of the discovered property. Thus, the two laws often overlap with the only difference between the two being a determination to see if the object(s) are lost or abandoned for an extended time. If they are, the law of finds is the proper law to apply and it vests title in the abandoned property to the finder.

B. State Intervention and The Submerged Lands Act

Prior to the creation of the ASA, states began attempts to gain control over the submerged land that lay within their borders because states saw the “jackpot discoveries” being made by salvors and finders of sunken property and because they also wanted a piece of the action. At the time of the ASA’s passage, twenty-seven states had enacted laws which effectively gave a respective state title to all archeological finds made within its boundaries. Furthermore, over thirty states had their own legislation which regulated abandoned shipwrecks discovered within state boundaries.

In addition to states direct enactments which sought to divest treasure salvors and finders of their admiralty rights in federal court, Congress passed the Submerged Lands Act (“SLA”) in 1953, which “gave the states title to submerged lands and the natural resources thereon up to a distance of three miles from state shores.” Although shipwrecks were not listed as one of the “natural resources” to be managed by the states, many states nonetheless decided that the SLA included such objects. Under this false guise, states would often file restricted appearances in maritime actions involving submerged shipwrecks in order to strip title away

45. See id. at 319-24.
46. See id. at 319. For further details on this law, see id. at 319-21.
47. See id. at 320.
48. See id. at 323.
49. See id.
50. See id.
51. See id. at 323-24.
52. See McLaughlin, supra note 3, at 174.
53. See id.
54. See id. at 193.
56. See id. at 174-75.
from the original finder.\textsuperscript{57} The states were successful in this effort because by intervening in the federal maritime claim, a state would use the Eleventh Amendment protection of sovereign immunity.\textsuperscript{58} All a state had to do was show that it merely had a bare, "colorable claim" to title in order to successfully dismiss the suit, thereby derailing a finder's entire claim to a wreck.\textsuperscript{59}

State-enacted legislation and the SLA thus created hard barriers for the private treasure salvor. What made matters worse was that prior to the creation of the ASA, persons bringing a treasure claim in federal court would receive highly differential treatment depending on the court in which the claim was brought.\textsuperscript{60} All of these problems combined to result in a serious conflict between state police power and federal maritime law.\textsuperscript{61}

C. A Sampling of Abandoned Shipwreck Laws in Other Jurisdictions

1. California

California’s current abandoned shipwreck law states that "[t]he title to all abandoned shipwrecks and all archeological sites and historic resources on or in the tide and submerged lands of California is vested in the state."\textsuperscript{62} According to the Code, this statute is to be given the broadest possible meaning,\textsuperscript{63} the result of which is to render almost anything that could ever possibly be found in California’s territorial waters as being of sufficient interest to the State to automatically vest title in it.\textsuperscript{64}

As a catch all, California’s Code states that "[a]ny submerged archeological site or submerged historic resource remaining in state waters for more than 50 years shall be presumed to be archeologically or historically significant".\textsuperscript{65} Through this all-encompassing language, California could effectively claim a piece of trash that had been under water for fifty years as of sufficient State concern to merit a

\textsuperscript{57} See id. at 175.
\textsuperscript{58} See id.
\textsuperscript{59} See id.
\textsuperscript{60} See id. at 174, 178 (stating that "[u]tter discord characterized the judicial decisions of the pre-ASA period.").
\textsuperscript{61} See id.
\textsuperscript{62} CAL. PUB. RES CODE § 6313 (WEST 1998).
\textsuperscript{63} See id.
\textsuperscript{64} See generally id. (using very generalized terms to describe the items protected, such as "submerged object[s]" and "fixture[s]").
\textsuperscript{65} See id.
vestiture of ownership in the State. This overly expansive language was originally one of the major issues litigated by DSR, the company claiming that California's law conflicted with the federal ASA. Because it was so broad, the district court pronounced the California statute void and stated that the ASA preempted it.

2. North Carolina

In stark contrast to California's apparent desire to claim anything and everything of any possible value as belonging to the state, North Carolina seems to be flexible in sharing the benefits of abandoned shipwrecks discoveries with others. For example, in the recent discovery of a ship called the Queen Anne's Revenge, the State retained title to the ship and its artifacts. However, the State awarded the commercial treasure hunters who found the wreck in State territorial waters the rights to make books, films, videos, and software based on the wreck. Additionally, the State granted the company a permit to search for more treasure ships in State waters and decided to split the cost of the previous search with the company. From the willingness demonstrated by the State in granting incentives to salvors while simultaneously reaping benefits itself, North Carolina's shipwreck law demonstrates an obvious elasticity which benefits both governmental and commercial interests.

3. The Laws of Various Nations

In England, the Merchant Shipping Act of 1894 codified the country's ownership interest in shipwrecks. Under this Act, items recovered from a wreck...
are delivered to a disinterested third party.\textsuperscript{75} Failing to report a discovered artifact to the third party is a summary offense.\textsuperscript{76} The third party makes a list of any items found, and the true owner has twelve months to claim an item after paying salvage and other fees.\textsuperscript{77} If not claimed within twelve months, however, the discovery automatically becomes the property of the Crown by sovereign prerogative, and the salvors are paid a salvage fee for their services.\textsuperscript{78}

In 1973, England passed a second act which was intended to specifically protect historic shipwrecks because the government felt that salvors were damaging or destroying too many historic wrecks in their search for gold and glory.\textsuperscript{79} The Protection of Wrecks Act provides protection for the site of any vessel that is or may be of historic, archeologic, or artistic worth.\textsuperscript{80} The Act makes the wreck area off limits, it being an offense for any person to dive to the restricted area without a State granted license.\textsuperscript{81} The Secretary of State considers competent persons or companies to carry out the excavation and then grants them a license to salvage.\textsuperscript{82} The old 1894 Act still determines the amount of a salvage award, but the new 1973 Act is an added barrier to prevent historic shipwreck destruction.\textsuperscript{83}

France enacted the Decret in 1963.\textsuperscript{84} Under the Decret, a salvor receives an award based on the value and importance of the discovery.\textsuperscript{85} The State takes automatic ownership of any discovery with historical significance while retaining the option of allowing salvors to retain ownership.\textsuperscript{86}

Spain's abandoned shipwreck law grants the State ownership of any wreck lying in its waters three years after the sinking.\textsuperscript{87} Similar to the law in France, the 1962 Spanish law allows for archeological excavation in certain circumstances by commercial or private salvors.\textsuperscript{88}

Norway and Denmark enacted legislation in 1963 to protect historic
shipwrecks. However, these laws cover only the hull of a ship, leaving the remainder of discovered ships subject to traditional salvage law.

Unlike most other nations, Italy has no specific legislation to deal with historic shipwrecks. The country does, however, have a law which protects all discoveries located within Italian borders.

Lastly, Australia protects historic shipwrecks lying in their territorial waters in accordance with the Australian Historic Shipwrecks Act. This legislation was passed after various wrecks were destroyed by discoverers through blasting efforts.

4. International Historic Shipwreck Law

Prior to the twentieth century, the idea that shipwrecks were cultural property led to the return of many artifacts found in international waters to their country of origin. The twentieth century, with its developments in technology which makes it easier than ever to discover and exploit the deep sea, has added a new need to create internationally respected shipwreck laws. Hence, shipwrecks found in international waters are subject to some international admiralty laws. However, thus far the international community has been slow to protect wrecks discovered in international waters.

The primary source of international shipwreck law stems from conventions held by the United Nations ("U.N."). The U.N. held various conferences, each called the United Nations Conference on the Law of the Sea ("UNCLOS"), from the 1950's through the 1980's. Most current international shipwreck law developed through the UNCLOS conventions. The UNCLOS convention of

89. See id.
90. See id.
91. See id.
92. See id.
93. See id. at 591.
94. See id.
95. See Sean R. Nicholson, Mutiny as to the Bounty: International Law's Failing Preservation Efforts Regarding Shipwrecks and Their Artifacts Located in International Waters, 66 UMKC L. REV. 135, 141 (1997) (observing that most nations prior to this century followed the tradition of returning cultural artifacts based on a respect for a nation's cultural heritage).
96. See id.
97. See infra notes 99-106 and accompanying text.
98. See Nicholson, supra note 95, at 153.
99. See id.
101. See generally Nicholson, supra note 95, at 153 (recognizing that the U.N. has taken the responsibility "to place restrictions on what finders can do with wrecks and their treasure.").
1982 was the true first modern international law to respect shipwrecks and their articles discovered in international waters. Through this convention, international UNCLOS laws protect shipwrecks found in international waters which sank before 1533 AD, while those occurring after 1533 have no such protection.

In addition to the U.N. Conferences, further protection for abandoned shipwrecks may come from the 1954 Hague Convention and the 1970 UNESCO Convention. However, these two conventions are limited in that they have been traditionally used to protect items determined to be cultural property. Nevertheless, because many consider shipwrecks to be cultural property, these two Conventions can also extend to shelter shipwrecks.

D. The ASA

Congressional enactment of the Abandoned Shipwreck Act ("ASA") of 1987 was an opportunity for legislative clarification of the extent to which the states were to have control over abandoned shipwrecks. The states had been using their own laws as well as the SLA to strip ownership away from those who discovered shipwrecks. In addition, prior to the ASA the federal courts were utterly confused at how to decide shipwreck cases, especially when states would claim Eleventh Amendment immunity. Thus, Congress presented the ASA to provide simplification and clarification, it being the prevailing law that courts, states, and all others could look to for guidance in deciding how to approach abandoned shipwreck claims. The ASA replaced the SLA and currently preempts salvors rights to use the Law of Salvage or Finds as a means to claim an...
abandoned shipwreck discovered in state waters.\textsuperscript{112} Despite all the hype over the easy new ASA, hindsight reveals that the ASA is not the light in the darkness that Congress intended it to be.\textsuperscript{113}

1. Organization and Scope of the ASA

The ASA vests title to the United States to all abandoned\textsuperscript{114} shipwrecks\textsuperscript{115} that are: "(1) embedded\textsuperscript{116} in submerged lands of a State; (2) embedded in coralline formations . . . on submerged lands of a State; or (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register [of Historic Places]."\textsuperscript{117} After the shipwreck is determined to meet the above criteria, the United States transfers title to the ship and its artifacts to the state in whose aqueous borders the property was discovered.\textsuperscript{118}

Once a state has ownership of a shipwreck, the ASA charges the state with the responsibility to manage the wreck and its artifacts and to provide access to the ship and its artifacts for recreationalists, educationalists, sport divers, and other interested groups, as well as to the public in general.\textsuperscript{119} The state is to manage the site, the vessel, and any artifacts in line with the stated purposes of the ASA to: "protect natural resources . . . [,] guarantee recreational exploration of shipwreck sites; and . . . allow for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and the environmen-

\textsuperscript{112} See Horrell, supra note 41, at 347 (labeling the effect of the ASA as removing all abandoned and historical shipwrecks from traditional federal admiralty law and placing such claims under historic preservation law); see also 43 U.S.C.A. § 2106 (West 1998) (stating that "[t]he law of salvage and the law of finds shall not apply to abandoned shipwrecks to which [the ASA] applies.").

\textsuperscript{113} See, e.g., Mclaughlin, supra note 3, at 180 (complaining that the ASA is not as clear as its proponents had suggested and that "the sponsors of the ASA prized simplicity over forethought.").

\textsuperscript{114} Only abandoned ships fall under the penumbra of the ASA. See 43 U.S.C.A. §§ 2101-2106 (West 1998) (referring only to abandoned shipwrecks). Unfortunately, the ASA does not define the term "abandoned", but inferentially it connotes ships discovered in state submerged territory which are deserted and which have been relinquished by the original owner(s) without any intention of retention. See 43 U.S.C.A. § 2101 (West 1998); see also Deep Sea Research, Inc. v. The Brother Jonathan, 883 F. Supp. 1343, 1350 (N.D. Cal. 1995), aff'd en banc, 102 F.3d 372 (9th Cir. 1996), cert. granted sub nom. California v. Deep Sea Research, Inc., 523 U.S. 491 (1998). A negative inference of the definition provided by the ASA is that the only ships which are not bound by the Statute are those which are either found lying on the top of the soil of submerged lands, or those which are not eligible to be registered in the National Register. Id. Abandoned ships not falling under the ASA, however, are subject to the traditional admiralty laws of salvage and finds, laws over which federal courts retain exclusive jurisdiction. Id.

\textsuperscript{115} "Shipwrecks" under the ASA includes the actual vessel and any cargo or other contents of the wreck. See 43 U.S.C.A. § 2102 (West 1998).

\textsuperscript{116} The ASA defines "embedded" as "firmly affixed in the submerged lands or 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."). Id.

\textsuperscript{117} Id. at § 2105 (West 1998).

\textsuperscript{118} See id.

\textsuperscript{119} See id. at §§ 2101, 2103 (West 1998).
2. The ASA as a Cultural Property Law

The ASA closely parallels art law, otherwise known as cultural property law, in that it seeks to protect sentimental antiquities.121 Traditional cultural property law asks the question: "Who should own the past?"122 This is increasingly an important query because nations are largely defined through the heritage of relics they create over time.123 Traditional cultural property principles world-wide follow the belief that the state should own cultural property, not free-market parties.124 Opponents of the ASA, however, decry the ASA as bad legislation due to its failure to learn a crucial lesson from art law: if the government seeks to adequately preserve cultural property, it must in some way force states owning cultural property to actually follow through with protectionist policies.125 Regardless, it is important to understand that the ASA is clearly a form of cultural property law whose fundamental purpose is to protect and preserve artifacts of historical value and significance.126

IV. FACTS AND PROCEDURAL HISTORY OF CALIFORNIA v. DEEP SEA RESEARCH, INC.

On Friday, July 28, 1865, the Brother Jonathan, a 220 foot wooden steamship headed for Portland, Oregon, collided against a submerged rock off the Pacific coast of Northern California.127 The ship carried to its watery grave an abundant amount of valuable cargo, including cash, gold coins, and bullion.128 In October 1993, after 138 years of wet isolation, Deep Sea Research, Inc., discovered the wreck site of the Brother Jonathan about four miles off the coast of Crescent City.
California. Deep Sea Research had spent nineteen years searching for the ship and had previously paid the insurance companies who insured the ship for any ownership rights they still possessed to the boat.

As is typical when salvors discover shipwrecks, Deep Sea Research quickly instituted an in rem proceeding in federal court, claiming a maritime lien against the ship and seeking a court order appointing Deep Sea Research the sole salvor of the vessel and its cargo. California, however, voluntarily intervened and contended that the State had proper ownership rights of the ship under the Abandoned Shipwreck Act of 1987, or in the alternative, under State law. Furthermore, California claimed that because the State was now a party to the claim, the Eleventh Amendment barred the federal court from deciding any issue of who held proper ownership to the ship and its contents.

However because the Constitution gives federal courts original jurisdiction in admiralty cases, the district court sought to clarify the issue of whether or not the salvage company’s claim could be heard in federal court. Because the Brother Jonathan did not meet the requirements of the ASA, the United States District Court for the Northern District of California denied California’s sovereign immunity defense and held that the claim was subject to federal court jurisdiction. The court simultaneously awarded Deep Sea Research a warrant to arrest the ship and sole rights to salvorship of the ship and its cargo, an award contrary to California law. Adding insult to injury, the court also held that the ASA, a federal law, preempted California’s shipwreck law. The Court

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129. See id. at 1347.
130. See Brother Jonathan, 102 F.3d at 382.
131. See id.
134. See Brother Jonathan, 883 F. Supp. at 1347; see also CAL. PUB. RES. CODE § 6313 (West 1998) (setting out a much broader law than the ASA which mandates that California obtains title to all abandoned shipwrecks within its territorial waters, without any limitations).
135. U.S. CONST. amend. XI.
137. See id.
138. See U.S. CONST. art. III § 2, cl. 1.
139. See generally Brother Jonathan, 883 F. Supp. at 1347-65 (taking a backwards approach to address this issue: the court looked first to see if the ASA applied, which then would determine whether California could assert Eleventh Amendment immunity).
140. See id. at 1351-57 (finding that the Brother Jonathan did not fall under any of the three classes of protected shipwrecks under the ASA). To observe the protected classes under the ASA, see supra notes 115-16 and accompanying text.
142. See id. at 1364. California’s Code is much broader than the ASA, transferring title to all shipwrecks discovered in California’s watery realms to the State. See CAL. PUB. RES. CODE § 6313 (West 1998).
143. See Brother Jonathan, 883 F. Supp. at 1363.
of Appeals for the Ninth Circuit affirmed in all respects.\textsuperscript{144}

The Supreme Court granted certiorari in order to "address whether a State's Eleventh Amendment immunity in an in rem admiralty action depends upon evidence of the State's ownership of the [property] . . . ."\textsuperscript{145} Also, the Court sought to undertake "the related questions [of] whether the Brother Jonathan [was] subject to the ASA and whether the ASA pre-empt[ed] [California Code] § 6313."\textsuperscript{146}

V. ANALYSIS OF THE OPINIONS

A. The Majority Opinion

Justice O'Connor delivered the Court's unanimous ruling.\textsuperscript{147} Justice O'Connor began by noting that the district and appellate courts in this case diverged from the rulings of other appellate courts by requiring California to "prove its claim to the Brother Jonathan by a preponderance of the evidence in order to invoke the immunity afforded by the Eleventh Amendment. . . [because other] Courts of Appeals . . . have held that a State need only make a bare assertion to ownership of a res."\textsuperscript{148} Continuing, Justice O'Connor recounted the fact that the Constitution grants original jurisdiction to the federal courts in admiralty cases.\textsuperscript{149} According to Justice O'Connor, the founders' purpose in vesting such power to the federal courts was in recognition of the need for a uniform body of law applicable equally throughout the nation.\textsuperscript{150}

Justice O'Connor continued the analysis by citing to the Eleventh Amendment\textsuperscript{151} and its broad grant of immunity to states from being sued by their own citizens in federal court.\textsuperscript{152} Noting that the Court previously had not explained how the Eleventh Amendment interplays with the exclusive jurisdiction of federal

\textsuperscript{144} See Deep Sea Research, Inc. v. The Brother Jonathan, 102 F.3d 379, 381 (9th Cir. 1996).
\textsuperscript{146} Id. at 500-501.
\textsuperscript{147} See id. at 494.
\textsuperscript{148} Id. at 500. As support for its proposition, the Court noted, for example, Zych v. Wrecked Vessel Believed to be the Lady Elgin, 960 F.2d 665, 670 (1992) (holding that "[t]he strength of the state's legal position is irrelevant; the eleventh amendment prevents the district judge from exercising jurisdiction," in an in rem admiralty case).
\textsuperscript{149} See Deep Sea Research, 523 U.S. at 501 (referring to U.S. CONST. art. III § 2, cl. 1).
\textsuperscript{150} See id. Specifically, the Justice clarified that this jurisdiction encompasses "maritime causes of action begun and carried on as proceedings in rem, that is, where a vessel or thing is itself treated as the offender and made the defendant . . . ." (quoting Madruga v. Superior Court, 346 U.S. 556, 560 (1954)). Id.
\textsuperscript{151} U.S. CONST. amend. XI.
\textsuperscript{152} See Deep Sea Research, 523 U.S. at 501-502 (citing Hans v. Louisiana, 134 U.S. 1 (1890)).
courts in an in rem action, Justice O'Connor analyzed how the Court and its prior justices interpreted the interaction between the two. Quoting early Court justices, Justice O'Connor proposed that as originally interpreted, the federal court could pass judgment in an in rem case involving disposition of property, even where a state made immunity objections. Later decisions, she noted, carved some exceptions to federal court authority, thus giving rise to instances where the Eleventh Amendment could be successfully used as a jurisdictional shield by states in cases of in rem admiralty.

Referencing the recent keystone case of Florida Dept. of State v. Treasure Salvors, Inc., which mirrored some similar issues to DSR, Justice O'Connor extensively analyzed Treasure Salvors. In Treasure Salvors, the Court held that because the State of Florida did not have a "colorable claim" of possession over the ship at issue, the State could not invoke an Eleventh Amendment jurisdictional shield. The "colorable claim" issue also was at the crux of deciding DSR according to Justice O'Connor. Justice O'Connor distinguished DSR from Treasure Salvors, however, noting that unlike the State of Florida in Treasure Salvors, California never actually possessed the Brother Jonathan or its cargo at the

154. The justices quoted were Justice Story (1891) and Justice Washington (1809). See J. Story, Commentaries on the Const. of the United States, § 1689, 491-92 (5th ed. 1891). See also United States v. Bright, 24 F. Cas. 1232, 1236 No. 14.647 (C.C. Pa. 1809). Justice Story opined that in an in rem admiralty action "the jurisdiction of the [federal] court is founded upon the possession of the thing; and if the State should interpose a claim for the property, it does not act merely in the character of a defendant, but as an actor". See Deep Sea Research, 523 U.S. at 502 (citations omitted).
155. See id. (citations omitted).
156. See Ex parte New York, 256 U.S. 490 (1921); see also Ex parte New York, 256 U.S. 503 (1921).
159. See Deep Sea Research, 523 U.S. at 503.
160. After salvors discovered a ship with hordes of bullion, Florida claimed ownership rights but lacked any legal authority to do so, hence lacking a colorable claim in the property. See Treasure Salvors, 458 U.S. at 697. Usually a "colorable claim" is met when a state makes a bare assertion to ownership in some property, though both the Ninth Circuit Court of Appeals and the District Court for the Northern District of California required the State to prove by a preponderance of the evidence that California had a valid ownership claim to the Brother Jonathan under the criteria of the ASA, thus imposing a much higher standard for the State to meet in demonstrating a colorable claim. See Deep Sea Research, 523 U.S. at 503.
162. See id. at 504.
163. The Court primarily compared the case at bar to Treasure Salvors, but distinguished the two because in Treasure Salvors the State at least claimed some possessory rights to the ship, even though it was unlawful, whereas in DSR the State never possessed the ship when the State intervened. See id. at 505-06. Furthermore, the Court rejected the proposition that federal courts lacked authority to adjudicate property claims by states as held in Idaho v. Couer d'Alene Tribe of Idaho, 521 U.S. 261, 276-78 (1997), since the in rem admiralty jurisdiction of federal courts is a specialized and separate jurisdiction of the federal courts from their general jurisdictional powers. See Deep Sea Research, 523 U.S. at 506.

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time Deep Sea Research first made their claim in the District Court.\textsuperscript{164}

To give additional credence to her argument, Justice O'Connor lastly compared the doctrine of sovereign immunity allowed in an in rem admiralty proceeding by the Federal Government versus that permissible by the states.\textsuperscript{165} She made the comparison through a brief examination of various old cases.\textsuperscript{166} After doing so she held that the State could not impose a bar of Eleventh Amendment sovereign immunity "[b]ased on longstanding precedent respecting the federal courts' assumption of in rem admiralty jurisdiction over vessels that are not in the possession of a sovereign..."\textsuperscript{167} Thus, she revested the District Court with the necessary jurisdictional authority to determine who has valid ownership rights to the Brother Jonathan, Deep Sea Research or the State of California.\textsuperscript{168}

In light of her Eleventh Amendment holding, Justice O'Connor remanded to the district court the issue of whether the Brother Jonathan was truly abandoned under the ASA.\textsuperscript{169} Furthermore, Justice O'Connor decided that because the district court would need to reevaluate the issue of abandonment, there was no need for the Court to consider pre-emption issues.\textsuperscript{170} Thus, the Court did not discuss whether the ASA preempted California's abandoned shipwreck statute.\textsuperscript{171} Lastly, aside from the federal jurisdictional issue, Justice O'Connor vacated the decision of the Ninth Circuit Court of Appeals.\textsuperscript{172}

\textbf{B. The Concurring Opinions}

Justice Stevens wrote a concurrence.\textsuperscript{173} He acknowledged a previous erroneous assumption on the part of himself and other justices that the Eleventh Amendment was as uniformly applicable to in rem admiralty actions as it was to

\begin{footnotesize}

\begin{enumerate}
\item[164.] \textit{See Deep Sea Research}, 523 U.S. at 506.
\item[165.] \textit{See id.} at 506-08.
\item[166.] Justice O'Connor cited to old cases such as \textit{The Pesaro}, 255 U.S. 216, 219 (1921); \textit{Tindal v. Wesley}, 167 U.S. 204, 213 (1897); \textit{The Davis}, 77 U.S. 15 (1869), and \textit{The Siren}, 19 L.Ed. 129 (1868), all of which held that federal sovereign immunity can only be used in an in rem proceeding where the sovereign actually possesses the property at issue. \textit{See Deep Sea Research}, 523 U.S. at 502.
\item[167.] \textit{See Deep Sea Research}, 523 U.S. at 507.
\item[168.] \textit{See id.} at 508.
\item[169.] \textit{See id.} Justice O'Connor observed that the record before the Court was confined to the preliminary issue faced by the District Court of whether the Eleventh Amendment applied to the case at hand, and thus refused to resolve the further issue of whether the Brother Jonathan was truly abandoned as defined by the ASA. \textit{See id.} at 508-09.
\item[170.] \textit{See id.}
\item[171.] \textit{See id.}
\item[172.] \textit{See id.}
\item[173.] \textit{See id.} at 509.
\end{enumerate}

\end{footnotesize}
all other cases where property claims were at issue. Because of the attention Justice O'Connor gave to statements made by prior Supreme Court Justices, however, Justice Stevens conceded that in rem admiralty cases are clearly to be treated differently from other property actions where a state seeks Eleventh Amendment immunity. Hence, he opined that California should be subject to federal jurisdiction in this case.

Justice Kennedy, joined by Justices’ Ginsburg and Breyer, wrote a separate two sentence concurring opinion. Despite his concurrence, Justice Kennedy asserted that the distinction brought up by Justice O’Connor of possession versus non-possession by a state in an in rem proceeding was not well embedded in prior law. Thus, he contended that the correctness of the majority’s differentiation was open to reconsideration.

VI. IMPACTS OF DSR

A. Effects on Bankruptcy and Other areas of law

There are clear “parallels between federal district court jurisdiction over vessels in admiralty cases and district court/bankruptcy court . . . jurisdiction over property of bankruptcy estates . . . “ Hence, various lawyers have recently argued that the holding in DSR – that the federal court’s jurisdiction trumps Eleventh Amendment rights – could be extended to bankruptcy proceedings. Applying the “DSR exception” in the bankruptcy context would mean that a state’s ability to invoke an Eleventh Amendment immunity would be ineffective in federal bankruptcy court. In fact, expanding the DSR exception to bankruptcy could have such important repercussions on bankruptcy law that some view the exception to be “the most fertile basis for change” in bankruptcy law, having the potential for “enormous implications in bankruptcy.”

Of course, others predict that federal bankruptcy proceedings will not apply

174. See id.
175. See id. (referring to id. at 502, which quoted Justices’ Story and Washington for their explanation that states cannot claim Eleventh Amendment immunity where a federal court is adjudicating an in rem admiralty proceeding).
176. See id.
177. See id.
178. See id.
179. See id.
180. See id.
182. See id. at 13.
183. See id.
Apart from its application to in rem admiralty cases, they argue that *DSR* has no applicability because the Court in *DSR* stated that "it was not addressing any other circumstances in which in rem jurisdiction exceptions might apply." By the same token, however, because the Court did not specifically preclude extension of *DSR* to other areas of law, the *DSR* exception appears to be a loose cannon that may encompass bankruptcy and possibly other types of federal proceedings currently unforeseen.

### B. On States

#### 1. Effects on All States

The likely outcome of the Court's holding will affect every state in one way or another. This is apparent by the blatant implication of the Court's decision on principles of federalism. "The extent of the Eleventh Amendment is crucial to solving questions of federalism," and the Court's decision clearly professes that the States' Eleventh Amendment protection is simply not as important as the federal courts' jurisdiction over in rem admiralty cases.

#### 2. Effects On Specific States

Despite its possible effects on federalism towards all states, *DSR* has special implications to those states which border oceans or which have large bodies of water in their territories because the Court's decision is, for the time being at least, strictly limited to admiralty cases. These ocean-bordering states demonstrated *DSR*'s importance by filing amicus curiae briefs in support of California's

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186. See id.
187. Cf. Gerson, *supra* note 184, at 3 (comparing the similarities outlining the federal courts' jurisdiction over admiralty and bankruptcy cases).
188. See infra notes 189-207 and accompanying text.
190. Bederman, *supra* note 27, at 938; cf. Farrell, *supra* note 69, A1 (quoting an assistant attorney general for Florida: "The ability to control the archeological preservation and recovery of abandoned shipwrecks is at stake in the Deep Sea case.").
192. See generally, id. (limiting the decision to in rem admiralty proceedings).
position. By requiring everyone who makes a claim to a shipwreck to litigate in federal court, states included, DSR’s holding proves to be harsh for states with ownership claims. The practical effect is that states no longer have the right to wait and see if a federal court will find disfavorably towards the state and then, as a separate independent sovereign, have the state courts retry the whole affair.

In addition to the problems noted above, states generally see the resources on their submerged lands as part of each state’s own treasury. Thus, some state authorities claim DSR diminishes a state’s ability to have sovereignty over its own laws and resources, equating DSR to an invasion of the state’s treasury by private salvors.

Also, because the ASA is so broad in its grasp on almost all shipwrecks found in a state’s territorial water, it appears that the ASA will be the prevailing law over any state law. Of course, this is questionable since the Supreme Court refused to answer this precise issue in DSR, but it seems clear enough that similar to other supremacy issues, federal shipwreck law trumps state law. It was due to federal supremacy grounds that both lower courts in DSR concluded that the ASA pre-empted California’s law. One of DSR’s probable impacts, then, is to limit the states ability to handle abandoned shipwreck issues according to a valid exercise of their police power in a manner they deem adequate.

193. See David G. Savage, High Court to Weigh Claims to Steamer Wrecked in 1865, L.A. TIMES, June 10, 1997, at A3 [hereinafter Steamer] (recognizing that the general consensus among the states who filed briefs is that governments should have authority to determine the fate of historic shipwrecks). For the list of the fifteen states, see Richard Carelli, High Court to Decide Rights to Shipwreck, ANCHORAGE DAILY NEWS, June 10, 1997, at A4.

194. See Laurie Asseo, Court Hears Dispute Over Sunken Gold Calif. Seeking Possession of 1865 Shipwreck, PITTSBURGH POST-GAZETTE, BEE, Dec. 2, 1997, at A12 (Justice Ginsburg said that "such a policy would be impractical.").

195. See, e.g., Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 673-74 (1982) (stating that Florida claimed the bullion discovered by a salvor as belonging to the State’s treasury); Laurie Asseo, High Court Tries to Decide Who Owns Shipwreck, ROCKY MOUNTAIN NEWS, Dec. 7, 1997, at A20 (noting that California’s view of the property found by salvors was that it was part of the State’s treasury).

196. See Asseo, supra note 195, at A12 (stating that the suit is “as if our treasury was being invaded”).

197. See supra notes 68 and 111 and accompanying text.

198. See supra note 170 and accompanying text.


200. See Deep Sea Research, Inc. v. The Brother Jonathan, 883 F. Supp. 1343, 1357-58 (N.D. Cal. 1995) (defining three situations where federal law pre-empts state law, the case at bar containing one of those situations because the state and federal law actually conflict in this case); 102 F.3d at 384.

201. This is precisely what happened to California when the appellate court declared the State’s shipwreck law to be subordinate to the ASA and invalidated the State statute to the degree it did not conform with the ASA. See Brother Jonathan, 102 F.3d at 384. Luckily for California, the Supreme Court vacated this holding by the appellate court. See Deep Sea Research, 523 U.S. at 504. But as long as lower federal courts hold that the ASA preempts conflicting state laws, it will be “infinitely more
The last and possibly largest effect on states after DSR is that they will have to meet an extremely high barrier in order to claim Eleventh Amendment immunity in a federal court in rem admiralty action. The barrier is especially harsh for states not only because of the Court’s decision in DSR, but also because in the fairly recent case of Treasure Salvors, the Court held that even if the state had possession of an abandoned shipwreck, the state would have to prove that its claim to the property was “colorable”. Determining the degree of colorability required a look at the merits of the case. Like the Court in Treasure Salvors, the District Court for the Northern District of California similarly reviewed the merits of California’s claim in DSR to determine whether the Eleventh Amendment applied. Thus, the problem under both DSR and Treasure Salvors is that “if a state has to prove the merits of its ownership claim in order to establish its Eleventh Amendment immunity, then it [effectively] has no Eleventh Amendment immunity.” Of what real value, then, is the Eleventh Amendment to states in an in rem admiralty case at all?

C. Effects of Leaving Some Important Issues Open

After DSR, the Court, at minimum, left open three very important issues. The first is the issue of what is abandonment? The effect of leaving this issue open is that the lower courts will continue to struggle over the definition of abandonment, while forcing parties to litigate their claims to determine if the ASA even applies to their claim(s).

The second remaining issue is to what degree must a claim be colorable for a difficult for states to manage historic abandoned vessels on their property.” See Carelli, supra note 193, at 4.

202. See Deep Sea Research, 523 U.S. at 503 (holding that a state must have actual possession of the sunken property at issue in order to successfully use sovereign immunity).


204. Id. at 697.

205. See generally id. at 683-700 (examining, for example, whether State officials were acting within valid statutory authority).


207. Brother Jonathan, 102 F.3d at 385 (quoting argument of the State of California as to why the district court erred) (emphasis added).

208. See Frederick, supra note 11, at C03.

209. See id.
state to be able to invoke Eleventh Amendment immunity? Although the Court’s holding makes this question moot for an in rem proceeding where the state has no possessory claims, the Court’s failure to be clear on this issue will cause continued confusion as to the degree of colorability a state must prove when the state makes at least some claim of possession. The most the Court was willing to say on this issue was that the district and appellate courts who decided the case had applied an awkwardly high standard.

The last major issue left open concerns what power states have after DSR to recover money or articles discovered in their submerged lands? Currently, some states have laws which allow for private recovery if the state receives a share of the profits, while others do not allow for private recovery at all. This third unanswered issue raises various sub-questions. For example, can a state recover any portion of government ships discovered? Should the state be allowed any portion of a sunken ship owned by the state? Or to what degree should international and other admiralty laws play into a states share in ships discovered in state waters which belong to foreign governments?

**D. Effects on Salvors**

The consequences of the Court’s decision on private salvors is not clear, but most likely DSR will prove a boon for these treasure hunters. DSR appears to give added incentive for salvors to continue in their trade of searching for sunken ships and abandoned treasure. It is important to understand that salvors often make large expenditures of their own time and money, as well as spending the

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210. Both lower courts examined the issue of whether California’s claim to the ship was colorable enough to impose sovereign immunity. See Brother Jonathan, 883 F. Supp. 1343 at 1349; see also Brother Jonathan, 102 F.3d at 383. However, the Supreme Court did not address this issue. See Deep Sea Research, 523 U.S. at 501-02.

211. See John D. Cox, Court to Decide Fate of Sunken Ship, SACRAMENTO BEE, July 28, 1997, at A1 (noting that federal appellate courts are split in their interpretations of how bald an assertion can be by a state before it lacks sufficient colorability).

212. See supra note 146 and accompanying text.

213. See Frederick, supra note 11, at C03 (noting, for example, that currently Texas entirely prohibits private companies or salvors from recovering shipwrecks for profit, while Florida and Virginia allow it as long as they receive a cut of the proceeds); see also supra note 196 and accompanying text.

214. See Frederick, supra note 11, at C03.

215. See id.

216. See id.

217. See id.


219. Because states will now be largely burdened in their efforts to use the Eleventh Amendment, see infra notes 202-07 and accompanying text, the logical effect is that salvors will be more apt to search for treasure because of the commercial incentives involved in finding treasures lost at sea. See Farrell, supra note 69, at A1 (submitting that as long as states do not take away the commercial incentives, that divers will continue to search for abandoned shipwrecks).
resources of other investors.\textsuperscript{220} For example, there were approximately one-
hundred investors of modest means who participated in the search for the Brother
Jonathan.\textsuperscript{221} Their pooled investment topped over one million dollars.\textsuperscript{222} This price
tag, attached to the fact that the ship took over twenty years\textsuperscript{223} to find, made for no
small stakes to the investors. However, the potential returns from treasure hunting
can be behemoth.\textsuperscript{224} For example, the Brother Jonathan and its artifacts have an
estimated value somewhere between twenty-five and 108 million dollars.\textsuperscript{225} These
high stakes play an especially important role for salvors and investors when, as
with the Brother Jonathan, there are numerous salvors racing to discover the same
shipwreck.\textsuperscript{226} Thus, it is obvious that the business of treasure hunting is not to be
taken lightly and any Court decision affecting the industry is crucial in its
consequences on many salvors, investors and untold millions of dollars.\textsuperscript{227} As
such, the Court’s DSR holding is very important to the industry.\textsuperscript{228}

\textsuperscript{220} See, e.g., John Aloysius Farrell, 
\textit{Justices to Rule if Same-Sex Harassment is Covered by Law}, 
insurance companies for ownership rights to the Brother Jonathan and spent almost two decades
searching for the ship).

\textsuperscript{221} See David G. Savage, \textit{California and the West Court Rejects State’s Claim to Historic Ship
Savage: Justices Say Federal Maritime Courts Must Decide Whether Treasure-Hunting Company
[hereinafter “$2 million’].

\textsuperscript{222} See id.

\textsuperscript{223} See David G. Savage, \textit{Supreme Court to Ponder New Law of the Sea}, \textit{Baton Rouge
Advocate}, Dec. 2, 1997, at 12A.

\textsuperscript{224} See Nicholson, supra note 95, at 140 (observing that treasure hunters often harvest artifacts
worth millions of dollars); see, e.g., Aaron Epstein, \textit{Legal Fights Surface Over Sunken Treasure High-
(noting that Mel Fisher’s discovery of the Atocha in 1985 has an estimated value of $400 million dollars
in emeralds and coins made of gold and silver).

\textsuperscript{225} See Steamer, supra note 193, at A3. This includes the value of a United States Army payroll
and over 1,000 gold coins pulled from the wreckage. See Epstein, supra note 224, at B6.

\textsuperscript{226} See Cox, supra note 211, at A1.

\textsuperscript{227} There are an estimated 5000 sunken ships along the nation’s coastlines still waiting to be
discovered. See $2 million, supra note 221, at A3. The legal debates over who should control these
and other wrecks is important inasmuch as the hunt by salvors to find lost treasure is continually
increasing. See Epstein, supra note 224, at B6; see also Stevens, supra note 84, at 575 (asserting that
more and more people are pursuing the business of treasure hunting because of newer technologies).

\textsuperscript{228} Most salvors should view DSR as a good decision because it minimizes state interference on
the industry. Cf. Nicholson, supra note 95, at 138 (stating that the prevailing attitude among treasure
hunters is that the less regulation the better); cf. also Epstein, supra note 224, at B6 (pointing out that
laws which provide incentives to search for shipwrecks are crucial if treasure hunters are going to
continue to have motivation to invest money exploring); Keepers, supra note 218, at 12B (noting that
the Court’s ruling is a boon to Deep Sea Research); Associated Press, \textit{Court Rules on Sunken Ship –
Says Federal Courts Have Power to Resolve Ownership Claims}, \textit{Sacramento Bee}, Apr. 23, 1998,
at A5 (remarking that the Court’s decision essentially gives lower courts the incentive to award Deep
Regardless of the Court's favorable holding, some argue that the ASA leaves salvors with no incentive at all because it grants title to almost all shipwrecks discovered on United States territory to the states.229 Hence, these ASA opponents argue that the only real incentive left to salvors is to search for sunken wrecks in deeper international waters.230 However, deep diving often requires very expensive high-tech equipment.231 Furthermore, if salvors fail to search and discover shipwrecks in state territories, the states who currently have hidden shipwrecks will receive no benefit from wrecks which either they could own and exploit, or for which they stand to gain financially through salvage agreements.232

The Court failed to define “abandonment” under the ASA.233 As such, salvors cannot be sure if they are wasting money and time searching for wrecks which, if found, will become automatic property of the government.234 In this light, DSR is not a good decision for treasure hunters since they will likely expend great resources searching for ships only to find that they will have to spend much more in litigation to find out who owns the discovery.235

As a historical note, treasure hunters were traditionally seen as daring heroes who should be handsomely rewarded for their efforts.236 But largely due to environmentalists and archeologists, salvors have been more recently viewed as

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229. See Horrell, supra note 41, at 347.
230. See id. This is a logical reaction because many salvors feel that the state is the enemy and that the state's greedy desires over the property discovered by salvors is insatiable. See Epstein, supra note 224, at B6 (warning treasure hunters that the government should be salvors biggest fear because of its covetousness).
231. See Horrell, supra note 38, at 314 (noting that deep ocean exploration requires high-tech equipment that costs several million dollars and that this expense creates the largest disincentive for deeper shipwreck exploration); see also id. at 342 (noting that deeper dives require equipment such as remote-operated-vehicles (ROV's) and submersibles which explore vast depths); Epstein, supra note 224, at B6 (commenting that robots are essential in exploring depths that scuba divers cannot).
232. See, e.g., supra notes 68-72 and accompanying text; see also Epstein, supra note 224, at B6 (relating that governments generally want to protect artifacts for the public benefit and often want part of the profits derived from salvaging, but also opining that shipwreck regulations must assure adequate incentives for salvors to continue in their trade).
233. See supra, notes 208-09 and accompanying text.
234. See Frederick, supra note 11, at C03 (observing that “until the courts definitively resolve the meaning of ‘abandoned,’ interested parties in shipwreck cases will be forced to litigate over when the ASA applies and when it does not.”). Justice O'Connor, specifically discussing this point during oral arguments, asked the lawyer for Deep Sea Research what the result would be if the Court were to determine the wreck to be legally abandoned. See James Kilpatrick, Tragedy at Sea Makes for Meaty Case, SAN ANTONIO EXPRESS-NEWS, Dec. 11, 1997, at O7B. The lawyer, responding to Justice O'Connor, said the result would be that the company would receive “nothing”. See id.
235. For example, David Flohr, one of the investors in Deep Sea Research, Inc., stated that the litigation over who owns the Brother Jonathan was a legal nightmare. See Cox, supra note 211, at A1. See also supra note 234 and accompanying text.
plunderers. However, *DSR* has the social impact of raising the industry to the level of commercialists with viable interests.

One final positive outcome of the Court’s decision deserves discussion. The traditional purposes of the laws of salvage and finds is to reward the risk, difficulty, and efforts of endeavors to recover ships and their goods. Allowing federal courts who have little interest in the outcome of abandoned shipwreck cases to adjudicate these claims will force states to litigate in front of objective federal judges instead of state judges who are funded by and subject to the states. Thus, states will be kept from disregarding the travails of private salvors by easily removing claims to state court. Hence, the traditional purposes of admiralty law will be better served under the Court’s holding, allowing salvors to be handsomely rewarded for their discovery efforts.

**E. Effects on Courts**

One of the best impacts of *DSR* is that it clears up previous confusion in lower courts about the applicability of the Eleventh Amendment to in rem admiralty cases. Also, the decision is a positive one for salvors seeking justice and competence in the court system because federal courts unquestionably have greater expertise in maritime cases than state courts.

**F. Effects On Litigation**

*DSR* will probably increase the amount of litigation in light of the crucial
issues still left open by the Court and because abandoned shipwreck cases are notoriously litigious. This is especially true because DSR will force the courts to decide carefully the applicability of the ASA to particular litigants on a case by case basis.

G. Effects on Archeologists and the Environment

Because DSR is such an asset to salvors, the decision, without question, strikes a reciprocal blow to archeologists in light of their desires to preserve historical artifacts, an interest in juxtaposition to the economic aims of salvors to sale antiquated artifacts to the highest bidder. Additionally, encouraging salvors to search for treasure indirectly increases harm to underwater environments in view of the typical methods used to salvage: blasting, dredging, winching, and blow torching the ocean floor. Thus, environmentalists lose through the DSR decision, too.

H. Effects on the Public at Large

Possibly the worst consequence of DSR is that which will be borne by the public. The public suffers a potentially huge loss because by giving salvors increased incentive to discover and sell shipwreck artifacts to private buyers, the public will be deprived of the historical, educational, and cultural benefits otherwise available to it by having the state manage the shipwreck and its artifacts on behalf of the people. On the flip side, however, DSR may actually prove to

245. See supra notes 208-17 and accompanying text.
246. See Cox, supra note 211, at A1.
247. See $2 million, supra note 221, at A3.
248. See Farrell, supra note 69, at A1 (opining that placing shipwrecks and artifacts into the stream of commerce instead of preserving them unfairly benefits the few over the many, an effect which the ASA was specifically designed to prohibit); see also id. (noting that DSR was a war between salvors and archeologists).
249. See Miller, supra note 74, at 796 (professing that these salvage methods are commonly used because they are the least expensive means to remove artifacts).
250. See Stevens, supra note 84, at 577 (pointing out that traditional salvage methods destroy the environment).
251. This depends on what one considers to be a terrible impact. However, it is clear that the underlying purpose most countries have in creating shipwreck law is to respect the concept that shipwrecks are part of the cultural heritage of mankind, thus belonging to the public as a whole, not to individuals. See Stevens, supra note 84, at 592.
252. See Farrell, supra note 69, at A1 (contending that privately salvaging shipwrecks for commercial gain unfairly places antiquities into the hands of a few people instead of the public at large, an effect which the ASA was specifically designed to prohibit); see also $2 million, supra note 221, at A3 (submitting that California’s efforts to preserve the wrecks found on its submerged lands for public purposes was set back by DSR). There is an opposing view which maintains that the public does not lose out when salvors have incentives to explore, but that the reverse is actually true. See Nicholson, supra note 95, at 138. This is because it is the salvors, not the states, who typically have the resources to search for shipwrecks. Id. Thus, if treasure hunters are stripped of economic inducements, no one
be beneficial to the public in at least one regard. People are always looking for others who symbolize adventure and heroism, and treasure hunters fill this need for many people by sparking the public’s imagination.  

I. Effects on Technology Companies

Because DSR spurs the treasure hunting industry, it also has the logical effect, however big or small, of promoting technology companies to continue developing the new equipment that makes treasure hunting possible. As long as the need exists, technology companies will continue to develop innovative technology to use in searching the seas.

J. Effects on People Who Have Family or Friends Lost At Sea

Treasure hunters who disturb ships on which people perished will always affect those who are in some way close to persons lost at sea. Many complain that authorities allow such ships to be touched at all because they are, in effect, the caskets of those killed. Similar to its implications on technology, even though the affects may be slight, it is no strain of reason to see that DSR is likely to affect the survivors of persons lost at sea by giving increased incentives for salvors to search for and disturb the wrecks that also serve as watery coffins.

VII. CONCLUSION

Obviously DSR clarifies the important issue of when a state cannot claim sovereign immunity in an in rem admiralty proceeding. But the Court’s decision has left the door of litigation wide open for future decisions regarding other
important issues which DSR failed to address. In the meantime, the decision will likely force salvors and states alike to continue wasting unnecessary time and money in efforts to protect rights which they cannot even be sure they own.

Despite its weaknesses, however, DSR clearly appears to be a boon for treasure salvors and a simultaneous blow to state sovereignty. Furthermore, extending DSR’s Eleventh Amendment exception to areas of law outside of admiralty is a very real possibility with unknown implications. In the end, even though the Court still has a long journey ahead in clarifying the scope and limits of the ASA, it has at least taken the colossal first step of tightening the reigns on the Eleventh Amendment to increase salvors chances of having their claims adjudicated in federal court.

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260. See supra notes 208-17 and accompanying text.
261. See Farrell, supra note 220, at A29 (claiming that the conflicting standards imposed by the lower courts over interpretational issues such as how to define ‘abandonment’ under the ASA will unquestionably lead to increased litigation); see also Editorials, The 'Brother Jonathan' Shipwreck, SAN FRANCISCO CHRONICLE, Apr. 27, 1998, at A24 (observing that the battle between Deep Sea Research, Inc. and California over who owned the Brother Jonathan had been going on since 1993).
262. See supra notes 218-28 and accompanying text; see also supra notes 189-91 and accompanying text.
263. See Browning, supra note 181, at 13 (speculating that DSR may “prove to be the proverbial magic bullet to defeat states’ Eleventh Amendment [immunity]”).
264. See Steamer, supra note 193, at A3 (prophesying that DSR will have a broad effect on salvors). Cf. $2 million, supra note 221, at A3 (stating that DSR dealt a blow to California because the Court denied the State’s ability to use the Eleventh Amendment to protect wrecks within its borders).