I. INTRODUCTION

In the 1980s, an estimated 2,500 to 5,000 historically significant shipwrecks were located in the navigable waters of the United States.\(^1\) During this time, advances in technology made access to many of the shipwrecks more feasible.\(^2\) Confusion arose between state and federal courts because states claimed ownership of what appeared to be abandoned shipwrecks on their submerged lands, while federal courts resolved disputes concerning the discovery and contents of these shipwrecks by applying admiralty principles.\(^3\)


2. E.g. H.R. Rpt. 100-514(I), at 1; Mary Ann Becker, *Regulating the Business of Culture: The Abandoned Shipwreck Act—Can Preservationists, Salvors, and Divers Sail in Calmer Waters?*, 51 DePaul L. Rev. 569, 598 (2001) (noting that the ASA “passed, in light of new technologies, with the overriding goal of preserving historic shipwrecks and allowing more people greater access to abandoned shipwrecks”).

3. E.g. H.R. Rpt. 100-514(I), at 2; Kevin Berean, Student Author, *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels: How the Fourth Circuit Rocked the Boat*, 67 Brook. L. Rev. 1249, 1258-59 (2002) (“The Act was also drafted in response to the confusion that existed over the ownership and authority
In 1988, to clarify management and ownership responsibility for abandoned historic shipwrecks found in state waters, Congress enacted the Abandoned Shipwreck Act (ASA or the Act). The ASA transfers title to abandoned shipwrecks from the federal government to a state entity when the shipwreck is embedded on the state’s submerged lands or the coralline formations on those lands, or when the shipwreck is found on the state’s submerged lands and is on or is eligible for inclusion in the National Register of Historic Places (National Register).

The ASA also provides that neither the law of finds, nor the law of to manage abandoned shipwrecks. Individual states were claiming title to historic shipwrecks located on submerged lands under their jurisdiction, while the federal admiralty courts were also asserting jurisdiction over the wrecks.


5. 43 U.S.C. §§ 2105(a)(1)-(3), (c); see David J. Bederman, Maritime Preservation Law: Old Challenges, New Trends, 8 Widener L. Symp. J. 163, 165 (2002) (ASA “applies only to historic wrecks located within state waters (typically three nautical miles from shore) which have been both (i) abandoned, and (ii)
salvage, applies to those abandoned shipwrecks.⁶

Since its enactment over fifteen years ago, the application of the ASA has been the subject of litigation, some of constitutional dimension. For example, does the Eleventh Amendment bar an admiralty in rem suit by a finder of a shipwreck to ascertain whether it has been abandoned?⁷ Is the suppression of the either embedded in the state’s submerged lands or found to be of historic significance by being listed on the National Register of Historic Places.”); D. David Lorello, Jr., Student Author, *The Abandoned Shipwreck Act of 1987: Navigating Through the Fog*, 35 Gonz. L. Rev. 75, 96 (1999-2000) (“A wreck that has been abandoned, but is not embedded, can still be eligible for protection under the ASA if it is on the National Register or is determined eligible for inclusion on the National Register.”).


law of finds and the law of salvage for abandoned shipwrecks covered by the ASA constitutional when the statute arguably transfers to state courts an area reserved brought in federal court by the finder to determine such issues as whether the shipwreck was in fact abandoned and, if so, whether the finder is entitled to a salvage award.”); see generally Madruga v. Super. Ct. of Cal., 346 U.S. 556, 560 (1954) (In a maritime proceeding in rem, “a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien.”); Fed. R. Civ. P. 9(h) (2003) (governing admiralty proceedings); Mark R. Baumgartner, Student Author, Federal Jurisdiction over State Claims to Shipwrecks: Should the Eleventh Amendment Go Down with the Ship?, 8 Wm. & Mary Bill Rights J. 469, 471 (2000) (“An in rem action is a proceeding against the vessel itself. The in rem action is unique because it can convey to a party title to a vessel that is good against the whole world.”); Paul Neil, Student Author, California v. Deep Sea Research: Leashing in the Eleventh Amendment to Keep Sinking Shipwreck Claims Afloat, 27 Pepp. L. Rev. 657, 661 (2000) (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.”).
for admiralty law?\(^8\) What about abandonment and embeddedness, two critical elements that trigger the application of the ASA?\(^9\) How have courts interpreted whether a shipwreck has been abandoned, since that term is not defined in the Act?\(^10\) Does a different standard apply if a U.S. warship or a non-commercial

8. E.g. Becker, *supra* n. 2, at 580 (“Opponents of the ASA argued that the transfer of title to the state contradicts Article III of the Constitution, which gives federal courts jurisdiction over all admiralty and maritime issues as this power includes the right to salvage wrecks.”); Braunstein, *supra* n. 7, at 312 (“Some have argued that by precluding the law of salvage under the ASA, a central aspect of admiralty law is actually impaired.”); Gerstenblith, *supra* n. 7, at 616 (“Fundamental issue is whether the ASA itself is unconstitutional because it transfers an area of admiralty law to state courts and thus arguably conflicts with the Constitution’s grant of exclusive jurisdiction over admiralty law to the federal courts.”); Joseph C. Sweeney, *An Overview of Commercial Salvage Principles in the Context of Marine Archaeology*, 30 J. Mar. L. & Com. 185, 198 (1999) (“It can be argued that salvage law and the law of finds are themselves embedded in the federal courts, so that removal of such jurisdiction requires a constitutional amendment.”).


10. E.g. Braunstein, *supra* n. 7, at 307 (“[D]espite courts’ attempts to interpret the term abandoned correctly, the ambiguity still gives rise to much confusion
vessel from another sovereign is involved?\footnote{11} Insofar as the term embedded is concerned, although defined under the ASA, how have courts interpreted that term?\footnote{12} Lastly, an abandoned wreck that is not embedded in a state’s submerged lands may still fall within the purview of the ASA if it is on the National Register or eligible for inclusion therein.\footnote{13} Who has the authority to make this designation and how far along must the process be to trigger the Act and transfer to the state title to an abandoned shipwreck?

This article, which is divided into three parts, addresses these questions and is designed to provide a general overview and synthesis of the developing case law interpreting and applying the key provisions of the ASA. First, the article

\footnote{11} E.g. Deirdre O’Shea, The Evolution of Maritime Historic Preservation Jurisprudence, 8 Widener L. Symp. J. 417, 425 (2002) (“[N]ational property such as shipwrecks lost during war are unlikely to be deemed abandoned.”).

\footnote{12} E.g. Braunstein, supra n. 7, at 312 (noting that “there is always the question of how embedded the ship needs to be”); O’Shea, supra n. 11, at 431-32 (“One problem with applying the concept of embeddedness to shipwrecks is that due to tidal shifts, a wreck’s status as embedded may change overnight.” (citation omitted)).

\footnote{13} 43 U.S.C. § 2105(a)(3).
discusses the background leading to the enactment of the ASA and provides an outline of its provisions. Next, the article discusses whether the inapplicability of the laws of salvage and of finds to those abandoned shipwrecks that meet the ASA’s criteria comports with the Constitution. This is followed by a discussion of the case law addressing the interplay between the Eleventh Amendment and admiralty in rem suits. Finally, the article discusses how cases have interpreted the critical element of abandonment under the ASA, as well as the determination that a shipwreck is embedded or eligible for inclusion in the National Register, which are additional necessary elements that must be satisfied for application of the Act.