

DREXEL LAW REVIEW

THOMAS R. KLINE SCHOOL OF LAW

VOLUME 16

2024

ISSUE 3

NOTE

ALL HANDS ON DECK: REVISING THE ABANDONED SHIPWRECK ACT OF 1987

*Peri Buch**

ABSTRACT

Our cultural consciousness is enamored by shipwrecks and cultural heritage submerged at the bottom of the sea. Submerged cultural heritage is not just fascinating, it encompasses incredibly important narratives of the past that inform our present. Not only does the Titanic remain in the depths of the ocean, so do warcraft and slave ships, ancient trade vessels, and harbors. Simply put, our world is connected by water and many of the nodes of civilization grew alongside water. In a world with constantly changing technologies and climate, cultural heritage resources embedded in our coasts and waters face increased threats from both humans and the environment. However, the Abandoned Shipwreck Act of 1987—a major source of underwater cultural heritage protection in the United States—remains unchanged instead of flowing with the tide of change.

* J.D. Candidate, 2024, Drexel University Thomas R. Kline School of Law; Fulbright and M.A. Maritime Civilizations, University of Haifa; B.A. History and Archaeology, The George Washington University. Thank you to Professor Amy Landers for her guidance throughout the writing process, my friends and peers who provided feedback, and *Drexel Law Review* for their time and edits. I would like to thank my parents and Sarah Weinbrom for their endless support. Finally, this Note is dedicated to the memory of Dr. Diane Harris Cline and Professor Alex C. Geisinger, two mentors who informed the way I study public access to both history and the environment.

The United States has a patchwork system to protect its cultural heritage resources, both on land and at sea. Different states have widely varying approaches to their implementation of the Abandoned Shipwreck Act. Nonetheless, by adapting the Abandoned Shipwreck Act for modern day concerns, the United States can preserve resources for future generations. Therefore, this Note proposes Congress reformulate the Abandoned Shipwreck Act to address modern concerns. In doing so, an Abandoned Shipwreck Act reformulation should incentivize the protection of cultural heritage for both public access and environmental protection, and thus better reflect global understandings of cultural heritage. Further, the United States should develop a plan for national consistency in the preservation and public accessibility of underwater cultural heritage.

TABLE OF CONTENTS

ABSTRACT	555
INTRODUCTION	557
I. IMPORTANCE OF UNDERWATER CULTURAL HERITAGE	561
A. Agency: Remain in Place or with Those Culturally Connected.....	564
B. Looters and “Treasure Hunters”	569
C. Benefits of Excavation.....	570
1. Promotion of Public Access and Diverse Voices	570
2. Protection from Climate Change and Environmental Harm.....	573
II. SHIPWRECK LAW HISTORY	576
A. Review of International Maritime Cultural Heritage Law and Different Approaches	577
1. British Protection of Wrecks Act 1973.....	579
2. The Valletta Treaty.....	579
3. The United Nations Conventions on the Law of the Sea 580	
4. The United Nations Educational, Scientific and Cultural Organization 2001 Convention.....	582
B. History of United States Shipwreck Laws	583
1. Abandoned Shipwreck Act of 1987	584
2. Other Federal Parts of the Patchwork	590
III. FORWARD THINKING ENDEAVORS: NATIONAL SYSTEM OF MARINE PROTECTED AREAS.....	592

IV. ABOVE BOARD: A NEW APPROACH TO THE ABANDONED SHIPWRECK ACT.....	596
A. <i>Definitional Expansion</i>	596
B. <i>State Requirements or Recommendations</i>	597
C. <i>Other Considerations</i>	600
CONCLUSION.....	601

INTRODUCTION

Cultural heritage is a catch-all phrase for both intangible and tangible vestiges of the past.¹ Cultural heritage can include, “artefacts, monuments, a group of buildings and sites, museums that have a diversity of values including symbolic, historic, artistic, aesthetic, ethnological or anthropological, scientific and social significance.”² A specific subset of cultural heritage—underwater cultural heritage—includes all vestiges of the past that are underwater.³ The very nature of underwater cultural heritage—the fact it is submerged underwater, often only accessible by boat and scuba or snorkeling gear, and may lie at international borders—makes accessing and protecting it more complex than land cultural heritage.⁴

Additionally, competing approaches, values, and laws add to the complexity of underwater archaeology.⁵ For instance, the

1. *Cultural Heritage*, UNESCO INST. FOR STAT., <https://uis.unesco.org/node/3079731> [<https://perma.cc/9P2S-YNPF>].

2. *Id.*

3. See *Underwater Heritage*, UNESCO, <https://en.unesco.org/underwater-heritage> [<https://perma.cc/G2MR-Z63Y>].

4. See Hyojung Cho, *Evaluation of the Abandoned Shipwreck Act of 1987: Impact and Challenges for Preserving Underwater Cultural Heritage*, 49 J. ARTS, MGMT., L., & SOC'Y 1, 1–4 (2019).

5. See Emily Enfinger, *Treasure Hunter Denied Coverage for \$7.5M IP Award*, LAW360 (Dec. 20, 2022, 9:43 PM), <https://www.law360.com/articles/1560184/treasure-hunter-denied-coverage-for-7-5m-ip-award> [<https://perma.cc/3AS8-U2P3>]; Raghavi Viswanath & Jessica Wiseman, *People Versus (State-Centric) International Cultural Heritage Law – Can Human Rights Mediate?*, LAW'S COMM. CULTURAL HERITAGE PRES. (Feb. 18, 2021), <https://www.culturalheritagelaw.org/page-1859650> [<https://perma.cc/Y37R-GDFN>] (discussing the political challenges involved in protecting cultural heritage, and surveying multiple legal approaches); *United States of America: National Cultural Heritage Laws*, UNESCO WORLD HERITAGE CONVENTION, <https://whc.unesco.org/en/statesparties/us/Laws> [<https://perma.cc/LKZ5FC5F>] (listing United States cultural heritage laws dating back to 1906); Robert A. Darwell, United States, in ART LAW: RESTRICTIONS ON THE EXPORT OF CULTURAL PROPERTY AND ARTWORK 113–14, 117 (2020),

United States does not place the same value on the legal protection of cultural heritage compared to other countries.⁶ This may be the product of the differing approaches to, and values placed on, cultural heritage. Some believe that the people and institutions that invest money and effort into salvaging underwater cultural heritage should reap the rewards of their work, while others are concerned about ensuring public access and preventing environmental harm to the complex and important history of the sea.⁷ Moreover, domestic and international institutions who uncover maritime cultural heritage, countries with water borders, and the public who want access to the collective memory of the seas deal with overlapping domestic and international laws.⁸ These laws guard cultural heritage from looting, provide security from climate change, and aim for long-term stewardship, preservation, and public access.⁹ The complexity of underwater excavation and overlapping of international and domestic law adds additional wrinkles to coastal and underwater archaeology not as present within land archaeology.¹⁰

Within this patchwork, the Abandoned Shipwreck Act of 1987 (“ASA”) provides a major source of United States federal underwater cultural heritage protection.¹¹ However, the ASA does not adequately reflect international cultural heritage preservation and access concerns. Congress implemented the ASA to mitigate the rising levels of salvage teams uncovering and ruining shipwrecks in the Great Lakes and along the coasts

<https://www.ibanet.org/MediaHandler?id=606a80f9-9d89-4d62-954e-137eeb95964d>
[<https://perma.cc/6F9V-CKUM>] (discussing United States restrictions and allowances on the import and export of cultural property).

6. See Darwell, *supra* note 5, at 113–114; cf. Viswanath & Wiseman, *supra* note 5; *infra* Section II.A; *United States of America: National Cultural Heritage Laws*, *supra* note 5.

7. See *infra* Part I (describing the strained history between salvagers, academics and the public); *Great Am. Ins. Co. v. May*, No. C21-1002-JCC, 2021 U.S. Dist. LEXIS 190063, at *1–3 (W.D. Wash. Oct. 1, 2021); Enfinger, *supra* note 5 (showing an example of the great sum of money implicated in this subject).

8. See Cho, *supra* note 4, at 3–4.

9. *Id.* at 2–3, 5.

10. *Id.* at 1.

11. *Id.* at 11–12; 43 U.S.C. §§ 2101–2106.

of the United States.¹² Previously, the Law of Salvage and the Law of Finds applied to shipwrecks.¹³ These maritime law doctrines incentivized the destructive practice of treasure hunting, as it could directly reward the “treasure hunter.”¹⁴ The ASA changed the nature of this entirely by placing the title of all material embedded in coastal land in the hands of the government.¹⁵ At the same time, state laws enforcing the ASA provide a patchwork of inconsistent protection, partially because of the limited nature of the ASA itself.¹⁶

The ASA has become increasingly antiquated in light of increased discoveries of shipwrecks and other underwater cultural heritage.¹⁷ Newer technologies, which make it easier to access underwater cultural heritage, were not considered when Congress enacted the ASA in 1987, thus expanding concerns for stewardship, preservation, and public access.¹⁸ Generally, with

12. Cho, *supra* note 4, at 2; see Denise B. Feingold, Note, *The Abandoned Shipwreck Act of 1987. Navigating Turbulent Constitutional Waters?*, 10 UNIV. BRIDGEPORT L. REV. 361, 362–64 (1990).

13. Danielle Han, *Wreckonomics: “Finders Keepers” in Maritime Law*, JSTOR DAILY (Nov. 14, 2022), <https://daily.jstor.org/wreckonomics-finders-keepers-in-maritime-law> [https://perma.cc/64TL-JNWG]. The law of salvage applies when an owner is known, while the law of finds applies when a site was considered abandoned. *Id.* Typically, “[t]he law of salvage focuses on shipwrecks with cash value, identifying original ownership, and ensuring salvor compensation. The law of finds—which assigns the first finder as the new owner—generally governs shipwrecks with more of a historical, rather than monetary, value.” *Id.* See generally Justin S. Stern, Note, *Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights in Historic Shipwrecks*, 68 FORDHAM L. REV. 2489, 2498 (2000) (discussing the history and context of the law of salvage and shipwrecks).

14. See Han, *supra* note 13.

15. Denise B. Feingold, *supra* note 12, at 363–64.

16. See *State Submerged Cultural Resources Laws*, NPS, <https://home1.nps.gov/Archeology/SITES/stateSubmerged/index.htm> [https://perma.cc/KX8D-3NM4]; see also *infra*, Section II.B.1; *Summary of Management Authorities Applied to Submerged Cultural Resources in U.S. Waters and in the Areal/High Seas*, MPAS [hereinafter *Summary of US Management Authorities*], <https://nmsmarineprotectedareas.blob.core.windows.net/marineprotectedareas-prod/media/docs/us-cultural-heritage-laws.pdf> [https://perma.cc/FBC2-ZZGB] (outlining different national legal authorities that implicate underwater cultural heritage).

17. See Cho, *supra*, note 4, at 4; Christopher A. Noel, *Salvage at Your Own Peril: A Common Law Approach to Maritime Treasure Recovery*, 46 U. MIAMI INTER AM. L. REV. 89, 92 (2014); Kieren Mulvaney, *Why More and More Shipwrecks Are Being Discovered*, HISTORY, <https://www.history.com/news/shipwreck-exploration-advances-technology> [https://perma.cc/BKY5-2Z8K] (Sept. 22, 2023).

18. See Philip J. Hilt, *Marine Archaeology Goes High-Tech*, SCI. AM. (Sept. 29, 2014), <https://blogs.scientificamerican.com/expeditions/marine-archaeology-goes-high-tech/> [https://perma.cc/S7AE-J4TT]; *New Technologies and Tools to Map and Protect Underwater*

rising water levels, even more cultural heritage—not originally contemplated by the ASA—will be inundated by the sea.¹⁹ Accordingly, this Note argues that Congress should reformulate the ASA to adequately reflect international underwater cultural heritage preservation and public access concerns, and expand beyond just shipwreck protection to be an all-encompassing framework for underwater cultural heritage. A reformulated ASA would incentivize the protection of underwater cultural heritage for public access and for environmental protection, better reflecting global understandings of cultural heritage.

Part I of this Note discusses the importance of underwater cultural heritage in our societal collective memory and describes why there is an increasing need for a new framework to protect underwater cultural heritage. Further, this Part recognizes the tension between cultural agency, excavating for private benefit, and excavating for public benefit. Finally, this Part provides an overview of the benefits and detriments of current domestic and international underwater cultural heritage law. Part II examines international laws and treaties, as well as the history of shipwreck and underwater archaeology law in the United States. Part III looks to the internationally and domestically integrated endeavors of the Marine Protected Areas. Part IV proposes that the Congress adopt the values of the Valletta Treaty and United Nations Convention on the Law of the Sea and adopt certain methods already seen in some state programs for national consistency while adding some limited protections and incentives to those that invest in underwater excavation and preservation.

Treasures, CORDIS, <https://cordis.europa.eu/article/id/118859-new-technologies-and-tools-to-map-and-protect-underwater-treasures> [<https://perma.cc/M9VM-TZ26>] (Mar. 1, 2016), Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 199 (2000). See generally 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, 602–03 (2001) (noting “[n]ot only has recent technology created the ability to further search the re-mains of shipwrecks, but it also resulted in increased exploration of oceans by novice divers.”).

19. COP 21 - *The Importance of Underwater Cultural Heritage for Understanding Climate Change*, UNESCO, <https://www.unesco.org/en/articles/cop-21-importance-underwater-cultural-heritage-understanding-climate-change> [<https://perma.cc/AY8K-2VVN>] (Apr. 20, 2023).

I. IMPORTANCE OF UNDERWATER CULTURAL HERITAGE

Archaeologists, anthropologists, art historians, museum professionals, and other material-culture focused professionals are the primary groups who study cultural heritage.²⁰ While a large part of cultural heritage study focuses on land excavations and assemblages, underwater cultural heritage encompasses material found in the much less accessible underwater context and only came into academic study in the 1960s.²¹ The United Nations Educational, Scientific and Cultural Organization's ("UNESCO") 2001 Convention defines underwater cultural heritage "as all traces of human existence of a cultural, historical or archaeological nature which, for at least 100 years, have been partially or totally immersed, periodically or permanently, under the oceans and in lakes and rivers."²²

There are several reasons why both the public and professionals are enamored by shipwrecks and cultural heritage submerged in the sea.²³ Water connects our world, and many of the nodes of ancient civilization grew by water.²⁴ Professionals in this field see "interaction—maritime interaction in particular—as a crucial social activity in the formation of communities and cultures," and extract significant information not only from charming shipwrecks, but from a multitude of other mundane

20. See generally *Cultural Heritage – An Overview*, SCIEDIRECT, <https://www.sciencedirect.com/topics/social-sciences/cultural-heritage> [<https://perma.cc/HZD6-VFUA>] (providing a collection of contemporary topics in the field of cultural heritage).

21. See generally Cynthia Jones Eiseman, *Underwater Archaeology & George F. Bass*, EXPEDITION, Fall 2014, at 12.

22. *All About the 2001 Convention*, UNESCO, <https://en.unesco.org/underwater-heritage/2001> [<https://perma.cc/R73B-3QVS>]; see *UNESCO in Brief*, UNESCO, <https://www.unesco.org/en/brief> [<https://perma.cc/BD7P-YQF2>].

23. *Why Do We Study Shipwrecks?*, NOAA, <https://oceanexplorer.noaa.gov/facts/whyshipwrecks.html> [<https://perma.cc/QUF4-RETF>].

24. Diane Harris Cline, *A Field Map for Untangling the Entangled Sea*, 8 J. E. MEDITERRANEAN ARCHAEOLOGY & HERITAGE STUD. 226, 227, 230 (2020) (using network theory to illustrate ancient connectivity by the sea); Justin Leidwanger, Carl Knappett, Pascal Arnaud, Paul Arthur, Emma Blake, Cyprian Broodbank, Tom Brughmans, Tim Evans, Shawn Graham, Elizabeth S. Greene, Barbara Kowalzig, Barbara Mills, Ray Rivers, Thomas F. Tartaron & Robert Van de Noort, *A Manifesto for the Study of Ancient Mediterranean Maritime Networks*, 88 ANTIQUITY, Dec. 2014, <https://www.antiquity.ac.uk/projgall/leidwanger342> [<https://perma.cc/3LEP-378F>].

submerged material.²⁵ For example, ceramics are the most common artifact found in association with an archaeological site.²⁶ An archaeologist can not only use a ceramic fragment to date an associated archaeological site, but can also glean endless meaningful information regarding the “cultural change and colonisation; the identities of groups and individuals; the social and economic status of consumers; the emergence of changing practices relating to the consumption of food and drink; patterns of trade and of local and regional variations in trade; and technological change and industrialisation.”²⁷

Highlighting this space of increased human interaction sheds light on advancements; however, it also sheds light on the transgressions and terrors people committed using the ocean, such as the Atlantic slave trade.²⁸ Indeed, society’s growth via the ocean made many complicit in these evils.²⁹ Institutions and teams dedicate themselves to presenting and preserving the past for the public, evidenced by projects such as the Independence Seaport Museum,³⁰ the 1619 Project,³¹ and the

25. Leidwagner et al., *supra* note 24; see Paula López-Arce, Ainara Zornoza-Indart, Luz Gomez-Villalba, Elena Mercedes Pérez-Monserrat, Mónica Alvarez de Buergo, Gustavo Vivar, & Rafael Fort, *Archaeological Ceramic Amphorae from Underwater Marine Environments: Influence of Firing Temperature on Salt Crystallization Decay*, 33 J. EUR. CERAMIC SOC’Y 2031, 2031 (2013); L. Dillon Gorham, & Vaughn M. Bryant, *Pollen, Phytoliths, and Other Microscopic Plant Remains in Underwater Archaeology*, 30 INT’L J. NAUTICAL ARCHAEOLOGY 282, 282–83 (2001); Andrea M. Berlin, *What’s for Dinner? The Answer Is in the Pot*, 25 BIBLICAL ARCHAEOLOGY REV. 46, 46 (1999).

26. David Barker & Teresita Majewski, *Ceramic Studies in Historical Archaeology*, in THE CAMBRIDGE COMPANION TO HISTORICAL ARCHAEOLOGY 205 (Dan Hicks and Mary C. Beaudry ed., 3d. ed., 2010).

27. *Id.*

28. *Slave Wrecks Project*, NAT’L MUSEUM AFR. AM. HIST. & CULTURE, <https://nmaahc.si.edu/explore/initiatives/slave-wrecks-project> [https://perma.cc/EME6-8RQS].

29. *See id.*

30. *About*, INDEP. SEAPORT MUSEUM [hereinafter *About the Independence Seaport Museum*], <https://www.phillyseaport.org/about/> [https://perma.cc/T399-PDY5] (noting the mission of the museum “is to discover Philadelphia’s river of history and world of connections”).

31. *The 1619 Project*, N.Y. TIMES MAG., <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> [https://perma.cc/D9WS-TDSD] (noting the Project “aims to reframe the country’s history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative”).

Smithsonian's Slave Wrecks Project.³² These institutions and more ensure maritime narratives are not lost in our understanding of global history and play a critical role in the protection of maritime cultural heritage.³³

While the protection of maritime cultural heritage is relevant to our societal values, it is complex in execution.³⁴ There are numerous destructive forces threatening cultural heritage, both on land and underwater.³⁵ These includes looters, the environment, and archaeological excavation.³⁶ There are two main approaches to alleviate such concerns: keeping cultural heritage in place and excavating cultural heritage.³⁷ Certain people, who

32. *Slave Wrecks Project*, *supra* note 28 (“The Slave Wrecks Project uses maritime archaeology, historical research and the study of sunken slave ships to take a distinct approach to the study of the transatlantic slave trade.”).

33. *About the Independence Seaport Museum*, *supra* note 30; *The 1619 Project*, *supra* note 31; *Slave Wrecks Project*, *supra* note 28.

34. See Cho, *supra* note 4, at 11–12.

35. See Tim Williams, *The Conservation and Management of Archaeological Sites: A Twenty-Year Perspective*, in CONSERVATION PERSPECTIVES (Getty Conservation Inst., Los Angeles, C.A.), Spring 2018, at 5.

36. *Id.*; see *infra* Sections I.B–C (outlining the competing interests and results from looting, environmental forces, and archaeology).

37. See Yasmin Anwar, *Indigenous Archaeology Plows Forward, Despite Anthropology's Checkered Past*, BERKELEY NEWS, (Feb. 4, 2021), <https://news.berkeley.edu/2021/02/04/indigenous-archaeology-plows-forward-despite-anthropologys-checkered-past/> [<https://perma.cc/X38D-JHJA>]; Am. Inst. for Conservation & Found. for Advancement in Conservation, *What Is Conservation*, CULTURAL HERITAGE, <https://www.culturalheritage.org/about-conservation/what-is-conservation> [<https://perma.cc/XN5S-579L>]. This is a simplistic view but broadly reflects tensions within the field as efforts of legal schemes, investigators, and community stakeholders may differ. See generally Indigenous Archaeology Collective, *Open Letter from the Indigenous Archaeology Collective*, NEWS FROM NATIVE CAL. (June 29, 2020), <https://newsfromnativecalifornia.com/open-letter-from-the-indigenous-archaeology-collective/> [<https://perma.cc/X898-6Y56>] (supporting the University of California's “efforts to comply with the Native American Graves Protection and Repatriation Act (NAGPRA) and CalNAGPRA and to develop policies that reflect the letter and the spirit of this U.S. federal law in consultation with California Tribal Nations as well as the sovereign rights and perspectives of these Nations,” and criticizing the Society for American Anthropology's attempts to “undermine the [University's] efforts to revise and modernize its Native American Cultural Affiliation and Repatriation Policy.”); see Rebecca Tsosie, *Indigenous Rights and Archaeology*, in NATIVE AMERICANS AND ARCHAEOLOGISTS STEPPING STONES TO COMMON GROUND 65 (Nina Swidler, Kurt Dongoske, Roger Anyon & Alan Downer eds., 1997) (explaining a history of archaeologists not involving community stakeholders and a trend towards dialogue); see also *Debating NAGPRAS's Effects*, ARCHAEOLOGY (Feb. 26, 1999), <https://archive.archaeology.org/online/features/native/debate.html> [<https://perma.cc/BV7Z-TCRW>] (highlighting a debate in the 1990s between scientific interest and community stakeholders with one arguing that reburial and repatriation was “the equivalent of the historian burning documents after he has studied them” and the other scholar wisely stating that “[w]hen

come from a wide variety of scientific and public communities, see the value of both.³⁸ Those who advocate for preserving cultural heritage often set forth arguments related to agency and culture, namely that the excavation of sites can be exploitative and problematic without the consent of the communities that left material behind,³⁹ while those who advocate for excavating material culture argue for increased public access to the past and aim to promote narratives of people who left behind material evidence of their lives rather than written evidence.⁴⁰ Indeed, since all humans leave material behind, the archaeological record—which encompasses the breadth of the material cultural heritage record—is by default more diverse than the written historical record.⁴¹

There are many areas of law and ethics implicated with the excavation of maritime material culture, but two stand at unique tension: how to reward those who invest, excavate, and analyze material culture versus how to honor and give access to the public. It is first important to provide an overview of why excavation is at times inappropriate.

A. Agency: Remain in Place or with Those Culturally Connected

Many parties involved in archaeological ethics prefer protecting cultural heritage sites from excavation, as they recognize

archaeologists say that the Native American past is gone, extinct, or lost unless archaeology can find it, they send a strong message that Native Americans themselves are extinct.”).

38. See Anwar, *supra* note 37; e.g., *What Is Conservation*, *supra* note 37; Indigenous Archaeology Collective, *supra* note 37; Tsosie, *supra* note 37; *Debating NAGPRAS’s Effects*, *supra* note 37.

39. See *Introduction to NATIVE AMERICANS AND ARCHAEOLOGISTS*, *supra* note 37, at 18; Tsosie, *supra* note 37, at 66.

40. *Ethics in Archaeology*, SOC’Y FOR AM. ARCHAEOLOGY, <https://www.saa.org/career-practice/ethics-in-professional-archaeology> [<https://perma.cc/LPV5-L7YL>]; see also Sitwe Benson Mkandawire, *Literacy Versus Language: Exploring Their Similarities and Differences*, 2 J. LEXICOGRAPHY & TERMINOLOGY 37, 49 (2018) (explaining that for much of history, literacy was reserved for the elite.).

41. See generally Pedro Paulo A. Funari, Siân Jones & Martin Hall, *Introduction: Archaeology in History*, in *HISTORICAL ARCHAEOLOGY: BACK FROM THE EDGE* 1 (Pedro Paulo A. Funari et al. eds, 1999) (examining the cross-section of history and archaeology, a field known as historical archaeology, and discussing the implications of diverse forms of literacy and diverse narratives).

excavation's inherent destructiveness.⁴² Parts of archaeological sites are destroyed through the process of excavating through layers of earth.⁴³ While the Society for American Archaeology notes this, stating "archaeologists generally excavate only when there is a threat of destruction or when they may reveal vital information about past cultures," the fact remains that once excavated, a site can never be fully reassembled.⁴⁴

Communities have many reasons for wanting sites to remain untouched, including cultural reasons or simply for agency—wanting to reserve the right to excavate or not to excavate for themselves.⁴⁵ Moreover, advocates in this camp honor the intent of those who left a site to the earth and work to honor the wishes of their descendants.⁴⁶ In the United States, cultural reasons and agency are particularly relevant in relation to Native American artifacts and remains, which were stolen or excavated and put on display at intellectual institutions throughout the country without the consent of Native American communities.⁴⁷

42. Frank G. Matero, *Heritage, Conservation, and Archaeology: An Introduction*, ARCHAEOLOGICAL INST. AM. (June 18, 2008), <https://www.archaeological.org/pdfs/Matero.pdf> [<https://perma.cc/KL39-U8VK>].

43. *What Do Archaeologists Do?*, SOC'Y FOR AM. ARCHAEOLOGY, <https://www.saa.org/about-archaeology/what-do-archaeologists-do> [<https://perma.cc/BAK9-4L7C>].

44. *Id.*; see *infra* notes 74–76 and accompanying text.

45. Zachary Small, *Push to Return 116,000 Native American Remains Is Long-Awaited*, N.Y. TIMES, (Aug. 6, 2021) <https://www.nytimes.com/2021/08/06/arts/design/native-american-remains-museums-nagpra.html> [<https://perma.cc/JJK6-CA44>] (quoting a NAGPRA officer as stating "[t]he right to protect the graves of your ancestors and relatives is one of the most fundamental human rights on the planet").

46. See Debating NAGPRAS's Effects, *supra* note 37. Indeed,

[m]any archaeologists view the past as everyone's heritage. This implies that archaeologists, because of their special skills, are the most capable of preserving and interpreting it. Many indigenous peoples don't agree. At the 1982 meeting of the Australian Archaeological Association, Rosalind Langford, an Australian aboriginal, commented, "You. . . say that as scientists you have the right to obtain and study information of our culture. You. . . say that because you are Australians you have a right to study and explore our heritage because it is a heritage to be shared by all Australians. . . We say that it is our past, our culture and heritage, and forms part of our present life. As such it is ours to control and it is ours to share on our terms.

Id.

47. Small, *supra* note 45; see also Kathleen Sharp, *An Exclusive Look at the Greatest Haul of Native American Artifacts, Ever*, SMITHSONIAN MAG. (Nov. 2015), <https://www.smithsonianmag.com/history/exclusive-greatest-haul-native-american-artifacts-looted-180956959/>

Several federal statutes govern the excavation of domestic sites and the return of human remains and objects taken from cultural heritage sites—namely the Native American Graves Protection and Repatriation Act (“NAGPRA”).⁴⁸ NAGPRA represents the federal government’s intent to repatriate “certain Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony.”⁴⁹ Repatriation, within the context of archaeology, means the return of cultural objects to their area or people of origin.⁵⁰ Within the framework of NAGPRA, “repatriate means to transfer physical custody of and legal interest in Native American cultural items to lineal descendants, culturally affiliated Indian tribes, and Native Hawaiian organizations.”⁵¹ By enacting NAGPRA, “Congress recognized that human remains of any ancestry ‘must at all times be treated with dignity and respect.’”⁵² Moreover, Congress acknowledged “human remains and other cultural items removed from Federal or tribal lands belong, in the first instance, to lineal descendants, Indian Tribes, and Native Hawaiian organizations.”⁵³ Noncompliance can result in civil

[<https://perma.cc/ZW2T-8L4L>]. This phenomenon is seen through other forms of looting as well, describing a federal raid finding:

some 40,000 objects—a collection so big it now fills a 2,300-square-foot warehouse on the outskirts of Salt Lake City. . . . Twenty-four [people, none of whom were Native American] were charged with violating the federal Archaeological Resources Protection Act and the Native American Graves Protection and Repatriation Act, among other laws.

Id.

48. *Native American Graves Protection and Repatriation Act Facilitating Respectful Return*, NAT’L PARK SERV. [hereinafter *NAGPRA Facilitating Respectful Return*], <https://www.nps.gov/subjects/nagpra/index.htm> [<https://perma.cc/JHS3-6YX9>]; see also *Native American Graves Protection and Repatriation Act (NAGPRA)*, 25 U.S.C. §§ 3001–3013.

49. *NAGPRA Facilitating Respectful Return*, *supra* note 48.

50. Cara Krmpotich, *Repatriation*, OXFORD BIBLIOGRAPHIES, <https://www.oxfordbibliographies.com/display/document/obo-9780199766567/obo-9780199766567-0234.xml> [<https://perma.cc/5M7H-H3CG>] (Jan. 15, 2020); Tom Mashberg, *New York Returns 142 Looted Artifacts to Italy*, N.Y. TIMES (Jan. 20, 2022), <https://www.nytimes.com/2022/07/20/arts/design/new-york-italy-looted-artifacts-steinhardt.html> [<https://perma.cc/FTL7-6DCA>].

51. *Native American Graves Protection and Repatriation Act: Glossary*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nagpra/glossary.htm> [<https://perma.cc/LB2Q-KN8G>]; see 25 U.S.C. §§ 3005(f), 3009.

52. *NAGPRA Facilitating Respectful Return*, *supra* note 48.

53. *Id.*

penalties, and trafficking in violation of NAGPRA specifically can result in criminal penalties in the form of imprisonment and fines.⁵⁴

NAGPRA created a system to show compliance with its framework, though there are many instances of noncompliance and revelations after the fact.⁵⁵ For example, Harvard University delayed the return of 6,400 remains of Native American people and 13,600 Native American funerary objects from its Peabody Museum and, after much delay, the University of California, Berkeley, is now repatriating 9,500 Native American remains.⁵⁶ The University of California, Berkeley, previously cited its own research interests as a reason to keep the human remains, but began to transfer “at least 297 individuals and 15,792 of their belongings back to tribes.”⁵⁷ Once returned, tribes often rebury the remains and artifacts.⁵⁸ These are only a few of many examples of noncompliance; yet, however ineffective in compliance, NAGPRA shows federal recognition that cultural heritage property rights deserve special protection and involvement with those directly impacted.⁵⁹

Many examples of repatriations are seen where colonizers took items from the places they colonized.⁶⁰ Museums, institutions, and private collections around the world hold many items stolen through colonization.⁶¹ Of the eight million objects

54. 18 U.S.C. § 1170; 25 U.S.C. § 3007.

55. See Notice of Inventory Completion: Department of Anthropology Museum at the University of California, Davis, 85 Fed. Reg. 62320 (Oct. 2, 2020); e.g., John Raby, University Fined for Violating Indian Remains Law, ASSOCIATED PRESS, <https://apnews.com/general-news-3f42019968f647848a2c399a2543f3ae> [<https://perma.cc/ES75-DFR5>] (Apr. 26, 2018, 5:17 PM) (explaining that a university was fined for failing to complete inventories of Indigenous peoples’ remains and artifacts in violation of NAGPRA); see also Small, *supra* note 45 (explaining that the Interior Department seeks to make changes to NAGPRA by “eliminating ambiguities” and “correcting inaccuracies” among other goals).

56. Small, *supra* note 45.

57. *Id.*

58. *Id.*

59. *Id.*

60. See Dipo Faloyin, *The True Stories of 10 of the Most Disputed Objects at the British Museum*, VICE (Dec. 8, 2021, 9:11 AM), <https://www.vice.com/en/article/3abdd3/unfiltered-history-tourten-disputed-artefacts-british-museum> [<https://perma.cc/A5SV-2CRG>].

61. *Id.*; see Efforts to Protect and Repatriate Native American Cultural Items and Human Remains, GAO (Nov. 1, 2022), <https://www.gao.gov/blog/efforts-protect-and-repatriate-native->

held in the British Museum, about 99% of those not on display are items illegally taken from their places of origin.⁶² These include items like the Rosetta Stone taken from Egypt, Hoa Hakanai'a taken from Rapa Nui (Easter Island), the Parthenon Marbles taken from Greece, the Benin Bronzes taken from the Benin Kingdom, among many other items.⁶³ As outlined above, when over-viewing NAGPRA, the British Museum is not alone in its complicity.⁶⁴

This history of people and institutions acquiring, excavating, looting, and/or displaying cultural heritage is important to understand in the context of maritime cultural heritage, because it reinforces an antiquated idea that in a discussion of archaeological ethics, not everyone is entitled to said cultural heritage.⁶⁵ Archaeologists often take community building steps to ensure they are not infringing, but rather honoring the wishes of the communities in which they serve and study.⁶⁶ Archaeologists are now trained and encouraged to do community outreach and to cause as little destruction as possible when excavating.⁶⁷ However, many laws surrounding cultural heritage are in place to inhibit a specific group of actors—those who salvage or loot for sport or commercial gain—from stealing cultural artifacts.⁶⁸

american-cultural-items-and-human-remains [https://perma.cc/NGF8-Y5JH]; Small, *supra* note 45.

62. Faloyin, *supra* note 60.

63. *The Unfiltered History Tour*, VICE, <https://theunfilteredhistorytour.com/> [https://perma.cc/9333-PEA2]. See generally DAN HICKS, *THE BRITISH MUSEUMS: THE BENIN BRONZES, COLONIAL VIOLENCE AND CULTURAL RESTITUTION* (2020) (discussing background and ongoing cultural heritage issues in relation to British institutions and private collections).

64. See, e.g., Ella Feldman, *Was that Painting Stolen by Nazis? New York Museums Are Now Required to Tell You*, SMITHSONIAN MAG. (Aug. 16, 2022), <https://www.smithsonianmag.com/smart-news/nazi-looted-paintings-new-york-museums-180980587/> [https://perma.cc/B2DU-4FMV] (providing another similar example of the efforts to return stolen items from European Jews during the Holocaust).

65. See Tim Murray, *Archaeologists and Indigenous People: A Maturing Relationship?*, 40 ANN. REV. ANTHROPOLOGY 363, 364–65 (2011).

66. See *id.* at 365; e.g., Grants & Awards, ARCHAEOLOGICAL INST. OF AM., <https://www.archaeological.org/programs/professionals/grants-awards/> [https://perma.cc/93AP-XHFB] (listing grants, some of which encourage or require community outreach).

67. *Ethics in Professional Archaeology*, *supra* note 40.

68. See, e.g., Abandoned Shipwreck Act, 43 U.S.C. §§ 2101–2106.

B. Looters and “Treasure Hunters”

A great deal of American understanding of shipwrecks and other underwater cultural heritage centers around the idealized vision of the “treasure hunter,” a glamorous adventurer who discovers valuable material at sea.⁶⁹ Two facts contradict this image, however. First, the glamorous adventurer is often not trained in the art of archaeology.⁷⁰ Archaeology is a destructive force, but modern archaeologists are trained in how to study the past in the least destructive capacity possible.⁷¹ Second, a significant part of archaeological study and understanding hinges upon the *context* of excavated material; so, even just picking through and removing *monetarily* valuable material could destroy the ability of an archaeologist to understand the historical and cultural significance of a site.⁷² While there are valuable materials at sea, the material an untrained eye might pick through and destroy the context of, like ceramic fragments, to get to the “treasure” is largely not monetarily valuable, but instead is culturally and historically valuable.⁷³ Here lies a tricky balance of wanting to incentivize the finding of material culture but also wanting it to be carefully excavated and studied for the public benefit.

69. See Mark A. Hall, *Romancing the Stones: Archaeology in Popular Cinema*, 7 EUR. J. ARCHAEOLOGY 159, 164–65 (highlighting the portrayal of archaeologists in popular culture as treasure hunters).

70. See *id.* at 164; Katherine Hodge, *Modern Issues in Archaeology: Looting*, PROJECT ARCHAEOLOGY, <https://projectarchaeology.org/2021/03/26/modern-issues-in-archaeology-looting/> [<https://perma.cc/FQN7-HVNY>] (describing the value of archaeological education as a potential solution to address the problem of looting).

71. *What Do Archaeologists Do?*, *supra* note 43 (“[A]rchaeologists rarely excavate (dig) entire sites! Archaeology is a destructive science—meaning that once a site is excavated, it is gone forever.”). Archaeologists intentionally and meticulously excavate sites to learn about the past. In so doing, the site is irreparably changed. Archaeological methods have changed over time to be as little destructive as possible, however the very nature of excavation means that at the very least, a small portion of the site will be removed to uncover and study the past. *Id.*

72. Becker, *supra* note 18, at 583–84 (“Archeologists prefer to study recovered artifacts in the environment they are found because removing the artifacts from their resting places result in a large loss of information about the culture.”); Hodge, *supra* note 70.

73. Gerstenblith, *supra* note 18, 198–99 (“Only carefully preserved [archaeological materials and] original contexts can furnish the data upon which the reconstruction of our past depends. Once this context is lost, the inherent value, that is the historic, cultural and scientific information that informs us about the object, is irreparably injured.”).

C. Benefits of Excavation

There are three main benefits of excavation: (1) promoting public access to the past; (2) uncovering and highlighting voices not in the written narrative of history but, which leave behind traces within material culture; and (3) protecting sites from environmental harms. Indeed, excavating, analyzing, and presenting finds to the public is a great way to close gaps in our conscious history.⁷⁴

1. Promotion of Public Access and Diverse Voices

Public access to cultural heritage is important for many reasons.⁷⁵ It promotes an understanding between archaeologists and the communities in which they excavate and preserve.⁷⁶ Additionally, it provides an understanding of the dangers of looting and destroying sites.⁷⁷ As UNESCO notes, “the Underwater Cultural Heritage is the witness of our common memory, for several millennia. The oceans, seas, lakes and rivers hide from view and protect under the surface a priceless heritage, largely unknown and underestimated. No one can protect what is unknown.”⁷⁸ By ensuring public access to the past—giving the public a tangible stakehold through museum and cultural heritage experience—there is hope for public investment in its protection.⁷⁹

74. See Matero, *supra* note 42, at 1.

75. *Ethics in Professional Archaeology*, *supra* note 40 (noting ethical importance of public accountability, education and outreach, and reporting to archaeology). Public archaeology is specific field of archaeology. “Public archaeologists investigate the outcomes of the various innovative ways we can engage the public in archaeological research as an audience, as clients, and as equal partners.” *What Is Public Archaeology?*, SOC’Y FOR AM. ARCHAEOLOGY, <https://www.saa.org/education-outreach/public-outreach/what-is-public-archaeology> [<https://perma.cc/H4Y9-JDXA>].

76. See Murray, *supra* note 65, at 365.

77. Dan Weinberger, *Student Post: Public Outreach in Archaeology*, ARCHAEOLOGY SW., <https://www.archaeologysouthwest.org/2011/08/10/student-post-public-outreach-in-archaeology> [<https://perma.cc/2Y8N-ACTS>]; see Gerstenblith, *supra* note 18, at 197 (finding that looting, “made the question of preservation of the past, so that knowledge and understanding in the future can benefit, of ever greater urgency for the public interest and has led to the development of particular legal and public responses”).

78. *Underwater Heritage*, *supra* note 3.

79. See *What Is Public Archaeology?*, *supra* note 75.

Public access to cultural heritage also compliments a discussion of diverse voices.⁸⁰ Public access and interaction with cultural heritage in museums and through educational institutions benefit society by ensuring public engagement and investment in a multitude of narratives.⁸¹ Some of these programs work specifically to engage more diverse populations, often at young ages, both to ensure diversity within future archaeological academia as well as to engage a more diverse public.⁸²

Public access to cultural heritage provides a deeper understanding of the past that is not just tied to the literate voices embedded in written histories.⁸³ Those who operate in this space walk the line between honoring the agency of communities connected to cultural heritage while working to preserve historical narratives derived from material culture.⁸⁴ For example, archaeologists who engage with indigenous communities and their

80. See *id.*; see also Laura Heath-Stout, *Building a Diverse and Inclusive Archaeology*, ANTHROPOLOGY NEWS (Aug. 12, 2019), <https://www.anthropology-news.org/articles/building-a-diverse-and-inclusive-archaeology/> [<https://perma.cc/JEP8-36WA>].

81. See *What Purposeful Public Engagement Means for Archaeology*, SOC'Y FOR HIST. ARCHAEOLOGY (Sept. 18, 2012), <https://sha.org/blog/2012/09/what-purposeful-public-engagement-means-for-archaeology/> [<https://perma.cc/ZYX4-9WMA>]; *What Is Public Archaeology?*, *supra* note 75; see also Heath-Stout, *supra* note 80 (discussing how those from white and middle-class families discovered or had access to archaeology earlier. The author conducted interviews with 72 archaeologists where the author stated "I found that most of us who discovered our passion for archaeology as children were white and middle-class. Finding archaeology in college is also something that white, middle-class students do, but it was notably common among my informants who were of color or from working-class backgrounds."). The St. Croix Archaeological Field School trains local students in excavation and oral history and also "host[s] students and train[s] students from Historically Black Colleges and Universities in archaeological methods." The terrestrial field school takes place at the Estate Little Princess and "focus[es] on the lives of enslaved Africans who lived and labored on the eighteenth-century sugar plantation." The field school also works in conjunction with Diving with a Purpose, a program that trains local students, who are SCUBA certified, in underwater archaeology. *St Croix Archaeological Field School*, JUSTIN DUNNAVANT, <https://justindunnivant.com/st-croix/> [<https://perma.cc/XH6T-VBA2>].

82. See Heath-Stout, *supra* note 80; e.g., *St Croix Archaeological Field School*, *supra* note 81.

83. *What Is Public Archaeology?*, *supra* note 75; *About Archaeology*, SOC'Y FOR AM. ARCHAEOLOGY, <https://www.saa.org/about-archaeology> [<https://perma.cc/Y88B-8FFM>]; see also Funari et al., *supra* note 41 and accompanying text.

84. See Lynn Gamble, Debra Martin, Julia Hendron, Cologero Santoro, Sarah Herr, Christina Rieth, Sjoerd van der Linde, Christopher Rodning, Michelle Hegmon & Jennifer Birch, *Statement and Commitments from SAA Editors to Change the Underrepresentation of Black, Indigenous, and Other Scholars from Diverse Backgrounds in Our Publications*, SOC'Y FOR AM. ARCHAEOLOGY, (July 1, 2020), <https://www.saa.org/quick-nav/saa-media-room/saa-news/2020/07/01/statement-and-commitments-from-saa-editors-to-change-underrepresentation> [<https://perma.cc/RJK3-J2H4>].

material culture work to protect sites, to the extent such communities may want, from environmental harm while excavating other sites in a culturally aware fashion.⁸⁵ The nature of archaeology provides increased access to past people who either did not write or were omitted from the narrative by studying the material left behind.⁸⁶ This partnership is often encouraged by grants and other sources of funding, though is not yet reflected within the law.⁸⁷ This perhaps can increase the potential for diverse historical narratives.⁸⁸

There is a trend within the discipline of archaeology to elevate both diverse narratives and diverse archaeologists.⁸⁹ This movement recognizes archaeology is destructive,⁹⁰ as excavation often destroys a site to study the past.⁹¹ As such, investing in diverse perspectives in the present increases the ability of archaeological teams to discern a wider breadth of past life from this finite resource.⁹² The Slave Dwelling Project, for example,

85. "Community archaeology seeks to incorporate local, descended, and stakeholder communities in all aspects of the archaeological enterprise. . . ." Ayana Omilade Flewelling, Alicia Odewale, Justin Dunnivant, Alexandra Jones & William White III, *Creating Community and Engaging Community: The Foundations of the Estate Little Princess Archaeology Project in St. Croix, United States Virgin Islands*, 26 INTL. J. HIST. ARCHAEOLOGY 147, 148 (2022); see William White & Catherine Draycott, *Why the Whiteness of Archaeology Is a Problem*, SAPIENS (July 7, 2020), <https://www.sapiens.org/archaeology/archaeology-diversity/> [https://perma.cc/4CT9-38K6] (stating that "[w]e need to break down colonial-era hierarchies that distinguish 'archaeologists' as authority figures and treat community contributors as peripheral").

86. See Funari et al., *supra* note 41.

87. See *Grants & Awards*, *supra* note 66; see also *infra* Section II.B.

88. See Gamble et al., *supra* note 84.

89. Steve Goldstein, *The Field of Archaeology Has Lacked Diversity. How Black, Indigenous Voices Are Making Their Marks*, KJZZ (Jan. 27, 2022, 1:45 PM), <https://kjzz.org/content/1751064/field-archaeology-has-lacked-diversity-how-black-indigenous-voices-are-making-their> [https://perma.cc/C8JP-FHFC].

90. "The practices of archaeology and conservation appear by their very nature to be oppositional. Excavation, as one common method by which archaeologists study a site, is a subtractive process that is both destructive and irreversible." Matero, *supra* note 42, at 2.

91. See *supra* notes 72–73 and accompanying text.

92. White & Draycott, *supra* note 85. "[A] lack of diversity [within the discipline of archaeology] is especially problematic in archaeology because archaeologists help shape humanity's understanding of the past. Who archaeologists are—our backgrounds, experiences, and mental models—can shape which questions we ask and how we interpret archaeological evidence." *Id.*; see Gamble et al., *supra* note 84; Funari et al., *supra* note 41; e.g., *Promoting Academic Excellence and Social Responsibility: About the Society of Black Archaeologists*, SOC'Y BLACK ARCHAEOLOGISTS, <https://www.societyofblackarchaeologists.com/about/> [https://perma.cc/56NV-2EV2] (describing the Society of Black Archaeologists' vision as, in part, an effort "to create a strong network

preserves slave dwellings for public access to “[c]hange the narrative of American history and address the legacies of slavery.”⁹³ The Project,

envision[s] a future in which the hearts and minds of Americans acknowledge a more truthful and inclusive narrative of the history of the nation that honors the contributions of all our people, is embedded and preserved in the buildings and artifacts of people of African heritage, and inspires all Americans to acknowledge their Ancestors.⁹⁴

In total, the promotion of diverse histories connects closely to the value of promoting public access to cultural heritage.⁹⁵ Public access to cultural heritage is important because it can promote diverse historical narratives in our collective global history.⁹⁶ However, the public would not be able to have access to the past if sites are weathered and destroyed by a changing environment.⁹⁷

2. *Protection from Climate Change and Environmental Harm*

An understanding of harm to archaeological sites not only highlights that they are “threatened by looting and commercial exploitation, industrial trawling, coastal development, exploitation of natural resources and the sea bed,” but that “[t]hese vestiges are also weakened by global warming, . . . water

of archaeologists that advocates to ensure the proper treatment of African and African diaspora material culture,” and “promotes more people of African descent to enter the field of archaeology”).

93. *About Us*, SLAVE DWELLING PROJECT, <https://slavedwellingproject.org/about-us/> [<https://perma.cc/V3UU-7GSB>].

94. *Id.*

95. See White & Draycott, *supra* note 85; see also Heath-Stout, *supra* note 80.

96. See Heath-Stout, *supra* note 80 (“If we want to understand the nuances of human history, we must make sure that [archaeologists] are not all rich white people If we each do our part, we can build a discipline that is as diverse as the past peoples that we study.”).

97. *Climate Change and Archaeological Sites*, N.C. OFF. OF STATE ARCHAEOLOGY, <https://archaeology.ncdcr.gov/programs/education-outreach/climate-change> [<https://perma.cc/6SRD-YUV2>].

acidification and [water] pollution.”⁹⁸ Typical weathering patterns outside of climate change, like the incursion of plant and animal life into a site, cause the destruction of a site over time, as well.⁹⁹ This, in fact, is the current concern with the Titanic, where

[t]he hulking wreck had become a magnet for sea life, with iron-eating bacteria burrowing into its cracks and turning some 400 pounds of iron a day into fine, eggshell-delicate ‘rusticles,’ . . . [and] . . . Molluscs and other underwater critters chomped away at the ship, while eddies and other underwater flows have broken bits off the wreck, dispersing them back into the ocean.¹⁰⁰

Nevertheless, global climate change also poses an increased risk.¹⁰¹ While excavation poses the risk of destroying underwater cultural heritage, non-excavation—or rather keeping

98. *Underwater Heritage*, *supra* note 3. See generally Ryan Rowberry, Ismat Hanano, Sutton Freedman, Michelle Wilco & Cameron Kline, *Coastal Cultural Heritage Protection in the United States, France and the United Kingdom*, 3 J. COMPAR. URB. L. & POL’Y 2, 2 (2019) (discussing how more legal protections are needed in the United States for underwater cultural heritage because of the dangers of climate change and rising sea levels).

99. See *Predicting Effects of Climate Change on Archaeological Sites*, N.C. OFF. OF STATE ARCHAEOLOGY, <https://archaeology.ncdcr.gov/programs/education-outreach/climate-change/predicting-effects> [<https://perma.cc/AW2Z-9UEM>]; Kris De Baere, Sven Van Haelst, Igor Chaves, Deirdre Luyckx, Krista Van Den Bergh, Kim Verbeken, Ewoud De Meyer, Katrijn Verhasselt, Raf Meskens, Geert Potters & Rob Melchers, *The Influence of Concretion on the Long-Term Corrosion Rate of Steel Shipwrecks in the Belgian North Sea*, 56 INT’L J. CORROSION PROCESSES & CORROSION CONTROL 71, 71 (2020) (Studying the impact of sea water on steel shipwrecks can also help modern society in a more tangible way. For example, studying these wrecks can provide insight into the sturdiness and lifetime of infrastructure—like bridges and harbors—made of similar materials.); Tess Joosse, *When Wrecks Become Reefs*, SMITHSONIAN OCEAN (Jan. 2022), <https://ocean.si.edu/ecosystems/coral-reefs/when-wrecks-become-reefs> [<https://perma.cc/8WJ4-M6EU>] (discussing how in some cases, algae overgrowth and fish found new homes in sunken vessels and caused “adverse knock-on effects on surrounding reef life,” and noting an example invasive non-native anemone, drawn to an iron-rich vessel creating a “black reef” that “stretched for over half a mile around the shipwreck and smothered the existing coral in the area”). *But see* Becker, *supra* note 18, at 582–83 (explaining that in some circumstances the sea preserves cultural heritage sites naturally, and archaeological excavation disturbs and destroys that protection).

100. Natasha Frost, *The Titanic Wreck Is a Landmark Almost No One Can See*, ATLAS OBSCURA, (Aug. 1, 2018), <https://www.atlasobscura.com/articles/can-you-visit-the-titanic-wreck> [<https://perma.cc/D3DE-65XJ>].

101. *Predicting Effects of Climate Change on Archaeological Sites*, *supra* note 99.

cultural heritage in place—poses similar destructive risks as well.¹⁰² Thus, archaeologists must weigh the pros and cons of excavation while abiding by the complex laws that govern underwater recovery.

Like the Earth's natural resources, the Earth's cultural heritage sites are finite, as they "consists of the fragile and non-renewable physical evidence of humankind's origins and behavior."¹⁰³ Maritime sites experience increased risk from environmental danger.¹⁰⁴ For instance, rising sea levels will submerge more cultural heritage as the climate continues to change.¹⁰⁵ Researchers are working on schemes to identify, mitigate, and protect endangered sites.¹⁰⁶ As for sites already submerged, there are less obvious harms that require sites be studied and preserved before they are lost in events such as violent storm surges.¹⁰⁷ Notably, there is increasing concern for the harm that can come from a change in water depth as a result of

102. See, e.g., *id.* "Predicting the effects of these threats is difficult. We know they are increasing with climate change, but we do not know the speed or size of their impacts. Erosion to coastal and river sites is visible, but other threats are not . . . Archaeologists must consider all potential threats, visible and invisible, when assessing at-risk locations." *Id.*

103. See Gerstenblith, *supra* note 18, at 198; see also *Underwater Heritage*, *supra* note 3; Paul R. Spencer, *Broadcasting Video Online from 5000 Feet Underwater: A Proposal to Help Ensure an Archaeological Duty of Care for Historic Shipwrecks*, 49 CAL. W.L. REV. 135, 152 (2012).

104. *Threats to the Underwater Cultural Heritage*, UNESCO, <https://en.unesco.org/underwater-heritage/threats-and-protection> [<https://perma.cc/DS3H-M6ZD>].

105. Abby Neal, *Cultural Heritage Is a Necessary Component of Climate Solutions*, ENV'T & ENERGY STUDY INST. (Aug. 14, 2020), <https://www.eesi.org/articles/view/cultural-heritage-is-a-necessary-component-of-climate-solutions> [<https://perma.cc/SY9Y-FSND>]; Jessica Leigh Hester, *Climate Change Is Coming for Underwater Archaeological Sites*, WIRED (July 31, 2018, 8:00 AM), <https://www.wired.com/story/climate-change-is-coming-for-underwater-archaeological-sites/> [<https://perma.cc/3A23-SLMC>]; Lena Reimann, Athanasios T. Vafeidis, Sally Brown, Jochen Hinkel, & Richard S. J. Tol, *Mediterranean UNESCO World Heritage at Risk from Coastal Flooding and Erosion Due to Sea-Level Rise*, 9 NAT. COMMUN'S 1, 1 (2018) ("[O]f 49 cultural WHS [World Heritage Sites] located in low-lying coastal areas of the Mediterranean, 37 are at risk from a 100-year flood and 42 from coastal erosion, already today.").

106. See Sandra Fatorić & Erin Seekamp, *Are Cultural Heritage and Resources Threatened by Climate Change? A Systematic Literature Review*, 142 CLIMATE CHANGE 227, 228 (2017); e.g., Greg Allen, *Protecting and Preserving Ancient Sites at Risk from Sea-Level Rise in Florida*, NPR (Mar. 12, 2020, 5:01 AM), <https://www.npr.org/2020/03/10/812972727/protecting-and-preserving-ancient-sites-at-risk-from-sea-level-rise-in-florida> [<https://perma.cc/HJY6-XSUU>] (discussing protections for ancient sites in Florida). There are also efforts to digitally document at risk sites. See e.g., *About*, CHRONOPOINTS, <https://chronopoints.eecs.ucf.edu/about/> [<https://perma.cc/DZ42-HSAA>].

107. Hester, *supra* note 105.

sea level change because it “can trigger changes that cascade through the environment.”¹⁰⁸ Also, the earth’s oceans have become a sink for the planet’s carbon dioxide, increasing the acidity of the water and in turn harming the life and cultural heritage beneath.¹⁰⁹

Various countries and international organizations balance these archaeological values differently, including the honoring of autonomy and agency alongside the promotion of public access, preservation, and diverse voices.

II. SHIPWRECK LAW HISTORY

It is imperative to review the history of shipwreck law to understand the context of the ASA. This includes history ranging back to medieval European customs about underwater cultural heritage and early United States salvage law. While underwater archaeological sites can encompass more than just shipwrecks, the bulk of underwater archaeological law history largely focuses on shipwrecks and their cargo.¹¹⁰ Early European law relied on the “Right of Wreck,” a medieval custom governing property rights to items lost at sea.¹¹¹ This custom held that all items recovered at shore or by the wreck became property of the people or lord of the associated land, including “the ship and its parts, cargo, personal belongings, and, in certain historical circumstances, even the crew and passengers themselves.”¹¹² While the language centered around the term for shipwreck, “in some settings, especially in Central, Northern and Eastern Europe, this legal custom is designated as ‘coastal’ or ‘beach’ right,” and not centered on submerged wrecks.¹¹³

108. *Id.*

109. *Id.*

110. See Hance D. Smith & Alastair D. Couper, *The Management of the Underwater Cultural Heritage*, 4 J. CULTURAL HERITAGE 25, 25–26 (2003).

111. Kate Rose, *The Right of Wreck*, NAT’L ARCHIVES (Jan. 31, 2022) <https://blog.nationalarchives.gov.uk/the-right-of-wreck/> [<https://perma.cc/P8E5-Z73C>].

112. Nebojša Porčić, *The Right of Shipwreck in Medieval Serbia*, 70 *Анали Правног факултета у Београду* [BLR] 1, 2 (2022).

113. *Id.* at 2 n.1.

A. *Review of International Maritime Cultural Heritage Law and Different Approaches*

The underwater cultural heritage laws of other countries and regions reflect the values other nations place individually and collectively on the preservation of cultural heritage.¹¹⁴ Some of these laws require an understanding of the different maritime zones.¹¹⁵ Maritime zones are made based on a “baseline” that is a fixed point at the low-water line of coasts.¹¹⁶ Internal waters are waters that are on the land side of this baseline, which often includes waters like rivers and lakes.¹¹⁷ Territorial waters extend away from the baseline up to twelve miles.¹¹⁸ Further, the Contiguous Zone extends up to twenty-four miles from the baseline, where states can “both prevent and punish infringement of fiscal, immigration, sanitary, and customs laws within its territory and territorial sea.”¹¹⁹ Even further, the Exclusive Economic Zone (“EEZ”) extends up to 200 miles from the baseline where the coastal State has the “exclusive right to exploit or conserve any resources found within the water, on the sea floor, or under the sea floor’s subsoil.”¹²⁰ The Continental Shelf has

114. While this Note broadly compares some underwater cultural heritage laws and frameworks enacted around the same time as the ASA as well as some international guidance, an overview of the entirety of worldwide underwater cultural heritage protection schemes are outside the scope of this Note. *See, e.g.*, Act on Protection and Inspection of Buried Cultural Heritage Act, No.15172 Dec. 12, 2017, translated in Korea Legislation Research Institute’s online database, https://elaw.klri.re.kr/eng_service/main.do (search required) (“The purpose of this Act is to maintain and accede to the original form of national culture by preserving buried cultural heritage and to efficiently protect, inspect and manage buried cultural heritage.”). South Korea’s Cultural Heritage Administration oversees multiple organizations charged with the safeguarding and preservation of cultural heritage including the National Research Institute of Maritime Cultural Heritage. *Organizational Chart*, CULTURAL HERITAGE ADMIN., https://english.cha.go.kr/html/HtmlPage.do?pg=/aboutCha/Oraganizational_Chart.jsp&mn=EN_04_05 [<https://perma.cc/XY6-ZEK8>]; *infra* Sections II.A.1–4.

115. *See, e.g.*, United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

116. FLETCHER SCH. OF L. & DIPL., LAW OF THE SEA A POLICY PRIMER 11 (John Burgess, Lucia Foulkes, Philip Jones, Matt Merighi, Stephen Murray & Jack Whitacre eds. 2017), <https://sites.tufts.edu/lawofthesea/files/2017/07/LawoftheSeaPrimer.pdf> [<https://perma.cc/KWM4-89LJ>].

117. *Id.* at 12.

118. *Id.*

119. *Id.*

120. *Id.*

both legal and geologic definitions, but generally “is a natural seaward extension of a land boundary.”¹²¹ The Continental Shelf creates a region called the continental margin, which contains a gradual slope to a steep slope to a more gradual slope that ends at the seabed.¹²² Different laws provide for different rights in relation to this area.¹²³ Once past the EEZ, the area is generally known as the High Seas, or international waters.¹²⁴ The High Seas are generally considered to be outside a specific jurisdiction.¹²⁵

Maritime cultural heritage law is a realm of overlapping international treaties and domestic laws aimed at sometimes competing goals situated within these various maritime zones.¹²⁶ Treaties like the Valletta Treaty impact regions.¹²⁷ Meanwhile, international laws, overseen by the United Nations via UNESCO and the United Nations Convention on the Law of the Sea (“UNCLOS”) impact all who adopt.¹²⁸ The United States has not adopted all policies, specifically for guidelines relating to items that lay within the substantial continental shelf.¹²⁹ Nonetheless, these are still worth mentioning because they reflect current conversations and societal consensus towards underwater cultural heritage, promoting ideas that the United States can encompass within its own cultural heritage laws.

121. *Id.* at 13.

122. *Id.*

123. *See id.* at 13–14.

124. *Id.* at 14.

125. Fae Sapsford, *What Is High Seas Governance?*, NOAA OCEAN EXPL. (July 20, 2022), <https://oceanexplorer.noaa.gov/facts/high-seas-governance.html> [https://perma.cc/6QU6-EMJ6].

126. Ole Varmer & Mariano Aznar, *Cultural Heritage Law*, NAUTICAL ARCHAEOLOGY DIGIT. LIBR., <https://shiplib.org/index.php/resources/law/> [https://perma.cc/H352-L7WK].

127. *See infra* Section II.A.2.

128. *See Underwater Heritage*, *supra* note 3; United Nations Convention on the Law of the Sea, *supra* note 115.

129. *See* United Nations Convention on the Law of the Sea, *supra* note 115; *U.S. Position on the U.N. Convention on the Law of the Sea*, 97 INT’L L. STUD. 81, 86 (2021), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2949&context=ils> [https://perma.cc/3XXK-ETX3] (citing United States’ concern for authority over its “extended continental shelf.”); *Public International Law UNCLOS*, CURTIS, <https://www.curtis.com/glossary/public-international-law/unclos> (last visited Mar. 15, 2024) [https://perma.cc/62SJ-7QUA] (noting the United States’ concern for “economic and security interests” on “the seabed and ocean floor”).

1. *British Protection of Wrecks Act 1973*

The British territorial waters contain a high volume of shipwrecks.¹³⁰ Therefore, it is unsurprising such shipwrecks are afforded some legal protection.¹³¹ Under the British Protection of Wrecks Act, legal protection is afforded for specific wrecks within designated British territorial waters.¹³² The Act requires the Secretary of State to designate such protected areas, mandates divers obtain a license to dive at a protected site and to excavate material, and makes it a criminal offense to do so without a permit.¹³³

The 1973 Act was created as a response to salvage law and looting.¹³⁴ However, to ensure the Act would pass, lawmakers made several concessions that, in turn, weakened enforcement.¹³⁵ Evidence shows earlier forms of the law likely held blanket protection over all sites, but the law as passed required the Secretary of State to affirmatively list a specific site before it could be protected.¹³⁶ Due to these concessions, only fifty-seven wrecks are protected under this law.¹³⁷ The total number of wrecks in, specifically, England's waters is likely more than 37,000.¹³⁸

2. *The Valletta Treaty*

The Valletta Treaty is a European-specific treaty that is value-driven, for the protection and study of archaeological

130. *Protected Wrecks*, HISTORIC ENG., <https://historicengland.org.uk/advice/hpg/has/protectedwrecks> [<https://perma.cc/SS69-2UU5>].

131. *See id.* (providing a map of wrecks subject to the Wrecks Act).

132. Protection of Wrecks Act, 1973, c. 33 (UK).

133. *Id.*

134. Antony Firth, *Making Archaeology: The History of the Protection of Wrecks Act 1973 and the Constitution of an Archaeological Resource*, 28 INT'L J. NAUTICAL ARCHAEOLOGY 10, 11 (1999).

135. *Id.* at 13.

136. *Id.*

137. *See Innovative Marking Technology Will Help Protect Nation's Protected Shipwrecks from Heritage Crime*, HISTORIC ENG. (Oct. 11, 2023), <https://historicengland.org.uk/whats-new/news/innovative-marking-technology-protect-shipwrecks-heritage-crime/> [<https://perma.cc/FJS4-99FG>].

138. *Id.*

heritage.¹³⁹ The treaty covers “archaeological heritage,” defined as “a source of the European collective memory.”¹⁴⁰ The 1992 treaty notes the major problems facing cultural heritage sites are the impact on the environment, the impact of illegal excavation, and the lack of conservation, public investment and access.¹⁴¹

The Valletta Treaty highlights, generally, Europe’s ongoing recognition that non-scientific excavation has a destructive effect on the body of cultural heritage, and implicitly invests in scientific study.¹⁴² The treaty does not distinguish between cultural heritage found on land or underwater, thus creating consistency,¹⁴³ though underwater sites have different challenges than land sites.¹⁴⁴ The Valletta Treaty not only invests in the public access to archaeological sites, but also invests in actively educating the public on the value of cultural heritage.¹⁴⁵ Moreover, the treaty requires states to invest in archaeological research and conservation.¹⁴⁶

3. *The United Nations Conventions on the Law of the Sea*

UNCLOS was signed in 1982 and became effective in 1994.¹⁴⁷ UNCLOS “defines the general principles of jurisdiction at sea,” and provides “protection and preservation for the marine environment” as well as guidelines for the cultural heritage found within.¹⁴⁸ Additionally, it outlines delineations in care between

139. See European Convention on the Protection of the Archaeological Heritage (Valletta Treaty), Jan. 16, 1992, C.E.T.S. 143.

140. *Id.* at art. 1.

141. *Id.*

142. *Id.* at preamble, art. 3.

143. See *id.* at art. 1.

144. See Cho, *supra* note 4, at 1–4.

145. European Convention on the Protection of the Archaeological Heritage (Valletta Treaty), *supra* note 139, at arts. 9–10.

146. *Id.* at art. 6.

147. United Nations Convention on the Law of the Sea, *supra* note 115; CAITLIN KEATING-BITONTI, CONG. RSCH. SERV., R47744, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS): LIVING RESOURCES PROVISIONS (2023). See generally Stern, *supra* note 14 (describing the development to UNCLOS and the hurdles to enforceability).

148. United Nations Convention on the Law of the Sea, *supra* note 115. The International Tribunal for the Law of the Sea (ITLOS) was created by UNCLOS. It is meant to be a tribunal to oversee disputes that arise through UNCLOS. *The Tribunal*, INT’L TRIBUNAL FOR THE LAW OF THE

internal, territorial, and archipelagic waters as well as the contiguous zone, exclusive economic zones, the continental shelf, and “The Area” meaning the High Seas.¹⁴⁹

Numerous Articles of UNCLOS apply to underwater cultural heritage. For instance, Article 149 pertains to cultural heritage, and states that “[a]ll objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.”¹⁵⁰ Article 303 outlines: (1) that States have a duty to protect cultural heritage of the sea; (2) how States may control the traffic of cultural heritage; (3) that there will be no impact on “identifiable owners” and “cultural exchanges”; and (4) that it “is without prejudice” to other laws and safeguards.¹⁵¹ The European Union and 168 non-European Union countries are parties to UNCLOS.¹⁵² Again, however, the United States is not one of them.¹⁵³ Although UNCLOS has been largely unenforceable, its values remain central to modern discussions regarding underwater cultural heritage preservation and study.¹⁵⁴

SEA, <https://www.itlos.org/en/main/the-tribunal/the-tribunal/> [<https://perma.cc/S892-EZKX>]. Twenty-one judges that are elected by states party to UNCLOS comprise the tribunal. *Members, INT’L TRIBUNAL FOR THE LAW OF THE SEA*, <https://www.itlos.org/en/main/the-tribunal/members> [<https://perma.cc/REB6-5E9R>].

149. United Nations Convention on the Law of the Sea, *supra* note 115, at preamble–art.1.

150. *Id.* at art. 149.

151. *Id.* at art. 303.

152. *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements*, UNITED NATIONS (March 24, 2024), https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm [<https://perma.cc/6RMB-D2WZ>].

153. See *Law of the Sea Convention*, U.S. DEP’T OF STATE, <https://www.state.gov/law-of-the-sea-convention/> (last visited Mar. 29, 2024) (providing a timeline of UNCLOS development, as well as a list of those who support U.S. signing).

154. Stern, *supra* note 13, at 2507; see Anne M. Cottrell, *The Law of the Sea and International Marine Archaeology: Abandoning Admiralty Law to Protect Historic Shipwrecks*, 17 FORDHAM INT’L L. J. 667, 715 (1994). “While articles 149 and 303 of UNCLOS III attempt to impose archaeological duties upon signatories, the provisions are weak, ambiguous, and largely without practical effect.” Christopher R. Bryant, *The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle over Salvaging Historic Shipwrecks*, 65 ALB. L. REV. 97, 132 (2001).

4. *The United Nations Educational, Scientific and Cultural Organization 2001 Convention*

UNESCO, seeks to “build peace and security by promoting international cooperation in education, sciences and culture.”¹⁵⁵ Further, “[b]y promoting cultural heritage and the equal dignity of all cultures, UNESCO strengthens the bonds between nations.”¹⁵⁶ At the UNESCO 2001 Convention, UNESCO noted concerns for specific risks including (1) the development of the seabed through drilling and other economic activities, (2) commercial exploitation and looting of artifacts and sites, (3) environmental damage through climate change, and (4) fishing by cultural heritage sites.¹⁵⁷

The Convention, recognizing these risks to underwater cultural heritage, sought to “research and protect their underwater heritage while ensuring its preservation and sustainability.”¹⁵⁸ Approximately 71 states ratified the Convention including the United States.¹⁵⁹ The Convention states the best practices are those that (1) increase responsible public access to underwater cultural heritage, (2) educate the public on the value of the preservation of cultural heritage, (3) invest in the frameworks for implementing legal protections on the national level, (4) assist in the development of scientific knowledge and provide access to cultural heritage, and (5) assist in the preservation of cultural heritage.¹⁶⁰ UNESCO, thus, creates a legal framework where states promote scientific research and investment in public access to cultural heritage.¹⁶¹

155. *UNESCO in Brief*, *supra* note 22.

156. *Id.*

157. *Practical Measures of Protection*, UNESCO, <https://en.unesco.org/underwater-heritage/threats-and-protection> [<https://perma.cc/NLD5-GGLL>].

158. *All About the 2001 Convention*, *supra* note 22.

159. *See id.*

160. *Best Practices*, UNESCO, <https://en.unesco.org/underwater-heritage/best-practices> [<https://perma.cc/Y5X6-XFWL>].

161. *UNESCO's Actions in Favour of the Protection of Underwater Cultural Heritage*, UNESCO, <https://en.unesco.org/underwater-heritage/actions-of-protection> [<https://perma.cc/98PK-RGXH>]. The International Council on Monuments and Sites' ("ICOMOS") International Committee on the Underwater Cultural Heritage ("ICUCH") recognizes the uniqueness of underwater cultural heritage and aims “to promote international cooperation in the protection and

B. History of United States Shipwreck Laws

Cultural heritage embedded off the shores of the United States comes in many forms, including the form of slave, trade, and war ships, sunken harbors, the material associated with these sites, and more.¹⁶² Until the enactment of the ASA in 1987, there were competing claims over the cultural heritage embedded in states' shores between salvagers and states.¹⁶³ "Federal admiralty courts also claimed jurisdiction" and found such sites were subject to the Law of Salvage, and, therefore, treated sites as "commodities in marine peril that needed to be returned to commerce."¹⁶⁴ In placing an emphasis on salvor's rights, the Courts placed the cultural heritage in jeopardy because "[s]alvage awards often disregarded a shipwreck's historical or archaeological values, thereby causing a loss of important scientific information."¹⁶⁵ Perpetuating this approach to ownership of maritime cultural heritage ensured the destruction and loss of certain narratives.¹⁶⁶ Conversely, States' claimed title to the same sites through the Submerged Lands Act of 1953.¹⁶⁷ Through the Submerged Lands Act, States believed they could claim "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the

management of underwater cultural heritage." *The ICOMOS International Committee on the Underwater Cultural Heritage (ICUCH)*, INT'L COUNCIL ON MONUMENTS & SITES ICUCH, <https://icuch.icomos.org/icuch/> [<https://perma.cc/X4GS-4F26>]. Central to ICUCH's mission is the promotion of the 2001 UNESCO Convention. *See id.*

162. *See Under Water*, NAT'L PARK SERV., <https://www.nps.gov/subjects/archeology/underwater.htm> [<https://perma.cc/K3AD-9CCS>].

163. Cho, *supra* note 4, at 2–3.

164. *Abandoned Shipwreck Act of 1987*, NAT'L PARK SERV., <https://www.nps.gov/subjects/archeology/abandoned-shipwreck-act.htm> [<https://perma.cc/HH55-KX98>]. *See generally* Michael Peil, *A Brief Guide to the Law of Salvage*, CORNELL, <https://www.law.cornell.edu/background/amistad/salvage.html> [<https://perma.cc/9NSV-96VC>] (A valid claim of salvage must prove three things: (1) "the event involved a ship and its cargo, or things committed to and lost at sea or other public, navigable waterways;" (2) "the ship or its cargo have been found or rescued;" and (3) "the service performed by claimant must have been of benefit to the property involved in the rescue.").

165. Michele Aubry, *Abandoned Shipwreck Act (ASA)*, in *ENCYCLOPEDIA OF UNDERWATER AND MARITIME ARCHAEOLOGY* 16 (James P. Delgado ed., 1997).

166. *See supra* text accompanying notes 71–73; *see also* Aubry, *supra* note 161.

167. Aubry, *supra* note 165.

natural resources within such lands and waters.”¹⁶⁸ In turn, these overlapping jurisdictional issues caused “confusion and inconsistency from court to court and from State to State over ownership and regulatory control of abandoned shipwrecks.”¹⁶⁹ Congress intended the ASA to solve these inconsistencies.¹⁷⁰

1. *Abandoned Shipwreck Act of 1987*

The Submerged Lands Act of 1953 only protected natural resources and not cultural heritage.¹⁷¹ Natural resources under the Submerged Lands Act included “oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life.”¹⁷² To address the main issue related to shipwrecks of the Submerged Lands Act—the jurisdictional conflicts between states and the Federal Admiralty Court—Congress enacted the Abandoned Shipwreck Act of 1987 (“ASA”).¹⁷³

In enacting the ASA, Congress found the breadth of resources to consider was broad, noting “[s]tates have the responsibility for management of a broad range of living and nonliving resources in State waters and submerged lands.”¹⁷⁴ Through the ASA, Congress “sought to curb the application of the Law of Salvage or the Law of Finds from historic shipwrecks in state waters, and to greatly reduce salvors’ advantages, which are commonly 75–80 percent in terms of salvage gains.”¹⁷⁵ At this time, technology had increased as well, enabling those who wanted to salvage for profit to more easily find and loot sites.¹⁷⁶

168. 43 U.S.C. § 1311(a).

169. Aubry, *supra* note 165.

170. *Id.*; see Cho, *supra* note 4, at 2.

171. See 43 U.S.C. § 1301(a), (e).

172. *Id.* § 1301(e).

173. 43 U.S.C. §§ 2101–2106; Aubry, *supra* note 165.

174. 43 U.S.C. § 2101(a).

175. Cho, *supra* note 4, at 2.

176. See *id.* But see *Innovative Marking Technology Will Help Protect Nation’s Protected Shipwrecks from Heritage Crime*, HIST. ENG. (Oct. 11, 2023), <https://historicengland.org.uk/whats-new/news/innovative-marking-technology-protect-shipwrecks-heritage-crime/> [https://perma.cc/FJS4-99FG] (discussing new technology that may protect cultural heritage from looting by, for example, forensically marking and tracing artifacts). See generally

Additionally, the ASA established the United States has title to wrecks embedded in specific submerged lands of the United States, and, in turn, the United States government “transferred its title to the government entity that owns the submerged lands containing the shipwrecks.”¹⁷⁷ Further, wrecks at least 50 years old, and thus eligible for the National Register of Historic Places, are covered by the ASA.¹⁷⁸ This applies to shipwrecks,

located within three nautical miles of the US coastline and in the internal navigable waters of the United States. The Act covers abandoned shipwrecks that are embedded in submerged lands, abandoned shipwrecks that are embedded in coralline formations protected by a State, and abandoned shipwrecks that are on submerged lands and included in or determined eligible for inclusion in the National Register of Historic Places.¹⁷⁹

This affects to states, federal government land, and Indian lands, but does not apply to warships and other wrecks with sovereign immunity, in which the United States federal government retains title.¹⁸⁰ Vesting title with local authority was a central part of the ASA.¹⁸¹

However, the ASA had limitations in its effectiveness and applicability from the start and is in need of changes.¹⁸² First, the

Technologies for Survey, Identification, Navigation, Excavation, Documentation, Restoration, and Conservation, in TECHNOLOGIES FOR UNDERWATER ARCHAEOLOGY AND MARITIME PRESERVATION — BACKGROUND PAPER 38, 38–43 (1987).

177. Aubry, *supra* note 165.

178. See Nat'l Reg. of Hist. Places, FAQs, NAT'L PARK SERV., <https://www.nps.gov/subjects/nationalregister/faqs.htm> [<https://perma.cc/43W7-T5JE>] (May 19, 2023); see also Trevor Hass, Note, *Try Not to Give up the Ship! The Abandoned Shipwreck Act of 1987 and Its Effect on Great Lakes Shipwrecks*, 93 U. DET. MERCY L. REV. 293, 317 (2016); Cottrell, *supra* note 154, at 699.

179. Aubry, *supra* note 165.

180. *Id.*

181. See *id.* But see Jeffrey Cohn, *A Legal Perspective on the Protection of Underwater Cultural Heritage Resources in the United States: Is the Abandoned Shipwreck Act Lost at Sea, or Is It Worthy of Salvage?*, 27 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 24, 35–37 (2016) (arguing for amending the ASA to vest title solely to the federal government).

182. Cho, *supra* note 4, at 3–4; see Casey J. Snyder, *Law, Cultural Heritage, and Climate Change in the United States*, 36 PACE ENV'T L. REV. 95, 130 (2018) (noting that the ASA, “is a problematic

ASA has a limited scope of protection caused by its vague conception of applying only to “abandoned” “shipwrecks.”¹⁸³ Second, a competing tension continued here because archaeology is an expensive and time-intensive endeavor.¹⁸⁴ The law incentivized those who would invest money to salvage and thereby protected these sites.¹⁸⁵ Third, by vesting title with the states, the law does not provide safeguards or investments in nonprofit and academic institutions educated in how to properly excavate and invest in providing public access.¹⁸⁶ Finally, The ASA does not provide the federal resources necessary to deal with the now large known quantity of underwater cultural heritage, but rather defers to individual states.¹⁸⁷

Today each state manages its underwater cultural heritage in its own way in conjunction with the ASA.¹⁸⁸ Since each state has different needs and a different relationship with water, this creates different levels of preservation and inconsistencies in cultural heritage ownership and research.¹⁸⁹ Some states reserve the exclusive right of excavation, and have set up permitting systems that regulate access to underwater cultural heritage sites with varying requirements.¹⁹⁰ Some systems require that a

law which often invites legal challenges . . . [and is a] . . . candidate for repeal and replacement or overhaul by Congress”).

183. Cho, *supra* note 4, at 3–4; Noel, *supra* note 17 at 95; Becker, *supra* note 18 at 581.

184. Lauren Bussiere, *Why Protect Archaeological Sites?*, UNIV. OF TEX. AT AUSTIN: TARL BLOG (Oct. 2, 2016), <https://sites.utexas.edu/tarl/2016/10/02/why-protect-archaeological-sites/> [<https://perma.cc/L57Q-UZRV>]; *What Do Archaeologists Do?*, *supra* note 43.

185. See Aubry, *supra* note 165, at 16–17.

186. See Cho, *supra* note 4, at 7.

187. See *id.* at 12 n.1 (noting an example of the federal government transferring the excessive cost of preservation to the states).

188. Aubry, *supra* note 171, at 16; Snyder, *supra* note 188, at 130 (noting that the ASA “is a problematic law which often invites legal challenges.”).

189. See *State Submerged Cultural Resources Laws*, NAT’L PARK SERV., <https://home1.nps.gov/Archeology/SITES/stateSubmerged/index.htm> [<https://perma.cc/KX8D-3NM4>]; *The Past Has Layers*, Nat’l Park Serv., <http://www.nps.gov/archeology/sites/stateSubmerged/index.htm> [<https://perma.cc/UVD2-M8V9>]; see also *Florida*, NAT’L PARK SERV., <https://home1.nps.gov/Archeology/SITES/stateSubmerged/florida.htm> [<https://perma.cc/UD8P-3LRB>]. Some states have less water than others, for example, Florida has so many submerged sites and so many people requesting access, the state limits the number of permits to ensure proper state supervision. *Id.*

190. See, e.g., 22 V.S.A. § 762 (“The State reserves to itself the exclusive right of field investigation on sites owned or controlled by the State in order to protect and preserve archaeological

university, museum, or scientific institution request a permit while others require that an archaeologist or qualified individual request a permit.¹⁹¹ Some ask that someone on the team be an archaeologist or someone with experience.¹⁹² Some states have different tiers of permits.¹⁹³ Some states do not require a permit be issued for recreation, photography, and other activity so long as it does not disturb the site, and a different permit for survey and excavation.¹⁹⁴ Of the states that allow excavation through permitting, many require some form of plan or report; however, such requirements also differ in whether the applicant provides an excavation plan, proof of funds, proof of resources, or a plan to provide a research report for the state afterwards.¹⁹⁵ Many states require all finds be given over to the

and scientific information, matter, and objects"); *see also Vermont*, NAT'L PARK SERV., <https://home1.nps.gov/Archeology/SITES/stateSubmerged/vermont.htm> [<https://perma.cc/TKK8-XH92>] *Alaska*, NAT'L PARK SERV., <https://home1.nps.gov/Archeology/SITES/stateSubmerged/alaska.htm> [<https://perma.cc/4EUY-6L2J>]; *Florida*, *supra* note 195; *Georgia*, NAT'L PARK SERV., <https://home1.nps.gov/Archeology/SITES/stateSubmerged/georgia.htm> [<https://perma.cc/D3DJ-JZT9>]; *Missouri*, NAT'L PARK SERV., <https://home1.nps.gov/Archeology/SITES/stateSubmerged/missouri.htm> [<https://perma.cc/U75H-U2CW>]; *South Carolina*, NAT'L PARK SERV., <https://home1.nps.gov/Archeology/SITES/stateSubmerged/southcarolina.htm> [<https://perma.cc/BP6T-49FP>].

191. *See, e.g.*, ALASKA ADMIN. CODE tit. 11, § 16.030-040 (*Alaska*); GA. COM. R. & REGS. 391-5-9-.05(1)(a)(7) (2024) (*Georgia*).

192. *See, e.g.*, FLA. ADMIN. CODE ANN. r. 1A-31.030 (2024) ("Any permit issued under this rule shall require the participation of a professional underwater archaeologist who shall serve as the project archaeologist"); MO. REV. STAT. § 253.420 (2023) (requiring that applicants either be "or shall hire a professional archaeologist as a staff member or consultant."). *See also Alaska*, *supra* note 190; *Florida*, *supra* note 189; *Georgia*, *supra* note 190; *Missouri*, *supra* note 190; *South Carolina*, *supra* note 190.

193. *See, e.g.*, 13 TEX. ADMIN. CODE § 26.15; (showing Texas has fourteen categories of permits).

194. *See e.g., Michigan*, NAT'L PARK SERV., <https://home1.nps.gov/Archeology/SITES/stateSubmerged/michigan.htm> [<https://perma.cc/Q4MQ-CE6H>].

195. *See e.g., 13 TEX. ADMIN. CODE § 26.15(13); Texas*, NAT'L PARK SERV., <https://home1.nps.gov/Archeology/SITES/stateSubmerged/texas.htm> [<https://perma.cc/H4XS-PAFL>]; *Pennsylvania*, NAT'L PARK SERV., <https://home1.nps.gov/Archeology/SITES/stateSubmerged/pennsylvania.htm> [<https://perma.cc/4FJH-47YF>]; *North Carolina*, NAT'L PARK SERV., <https://home1.nps.gov/Archeology/SITES/stateSubmerged/northcarolina.htm> [<https://perma.cc/NUB9-QRZB>] ("You need a permit from the state to explore, recover, or salvage abandoned shipwrecks and underwater archeological artifacts. Applicants must have adequate funds, equipment, and facilities to undertake and complete the operation; use accepted techniques of survey, excavation, recovery, recording, preservation, and analysis; and the purpose must further archeological knowledge in the public interest.").

state, but some require an applicant to have a curatorial plan or identify a museum or university to give the finds to, and a few allow individuals to keep finds in exchange for information about the finds.¹⁹⁶

In Pennsylvania, for example, underwater cultural heritage is overseen by the Pennsylvania Historical and Museum Commission.¹⁹⁷ Individuals can receive permits from the commission for archaeological investigations of shipwrecks and are required to submit a detailed report of information disseminated from the investigation.¹⁹⁸ The Commonwealth of Pennsylvania reserves the exclusive right to the artifacts collected during such investigations.¹⁹⁹ Virginia has a similar structure, requiring individuals receive permits from the Marine Resources Commission before investigating underwater cultural heritage.²⁰⁰ Like in Pennsylvania, any objects obtained are the property of the Commonwealth of Virginia.²⁰¹ Unlike in Pennsylvania, Virginia notes that the investigator may retain some of the objects found or a percentage of its value, at the discretion of the Commonwealth.²⁰²

196. See, e.g., *Hawaii*, NAT'L PARK SERV., <https://home1.nps.gov/Archeology/SITES/stateSubmerged/hawaii.htm> [<https://perma.cc/CF6P-35DM>] ("Applicants must . . . reach agreement on curation of recovered objects, which are the property of the state." (emphasis added)); *Virginia*, NAT'L PARK SERV., <https://home1.nps.gov/Archeology/SITES/stateSubmerged/virginia.htm> [<https://perma.cc/58KS-TQLF>] ("Objects recovered are property of the Commonwealth . . . unless objects are released to the applicant by the Department of Historic Resources. Applicants may be provided with a fair share of the objects recovered or, in the discretion of the Department of Historic Resources, a reasonable percentage of the cash value of the objects recovered.").

197. *Pennsylvania*, *supra* note 195.

198. *Id.* (showing that Pennsylvania requires a "report of the investigation, containing relevant maps, documents, drawings and photographs" for a permit to be issued); see also *What Do Archaeologists Do?*, *supra* note 43 ("In addition to primary historical documents, archaeologists will look for site reports that other archaeologists have written about this area. These reports will describe what the archaeologist found in this area during any previous investigations. These older site reports can help guide the new research. The State Historic Preservation Office maintains documentation files for all the recorded archaeological sites in each state. This will include previous archaeological research reports about sites in the state.").

199. See *Pennsylvania*, *supra* note 195; *About Pennsylvania Historical and Museum Commission*, PA. HIST. & MUSEUM COMM'N, <https://www.phmc.pa.gov/About/Pages/default.aspx> [<https://perma.cc/QCH5-FLZ4>].

200. *Virginia*, *supra* note 203.

201. *Id.*

202. *Id.*

Many states are concerned with the plans and qualifications of permit applicants.²⁰³ For instance, Connecticut requires that a “[permit] applicant’s research design must advance the public’s knowledge of archaeological heritage and maximize the *in situ* conservation of the resources.”²⁰⁴ Hawaii requires that “[a]pplicants must have a professionally qualified principal investigator, submit a research plan, complete a report, and reach agreement on curation of recovered objects, which are the property of the state of Hawaii.”²⁰⁵ Georgia requires that applicants be “a scientific or educational institution or an individual with evidence of financial responsibility sufficient to determine that the operation can be completed as proposed,”²⁰⁶ while Indiana requires the “principal investigator have two years of supervisory experience in underwater archeological techniques and research.”²⁰⁷

Michigan does not require a permit for those who “search for, dive on, explore, or photograph a shipwreck site as long as no artifacts are disturbed and nothing is recovered,” but does require a permit for artifact moving and recovery and asks that discovered shipwrecks are reported to the state.²⁰⁸ In Florida, only a limited number of contracts for exploration and salvage are issued to allow the state to “closely monitor, supervise, and administer the activity associated with them.”²⁰⁹ Minnesota

203. See, e.g., Connecticut, NAT’L PARK SERV., <https://home1.nps.gov/Archeology/SITES/stateSubmerged/connecticut.htm> [<https://perma.cc/BUA7-SM3P>].

204. *Id.*; “In situ, Latin for ‘in the place,’ refers to an artifact that has not been moved from its original resting place or the place where it was deposited” retaining its context. *Definition: In Situ*, SMITHSONIAN NAT’L MUSEUM OF NAT. HIST., <https://naturalhistory.si.edu/sites/default/files/media/file/wibinsitufinal.pdf> [<https://perma.cc/JV4H-DKGW>].

205. *Hawaii*, *supra* note 196.

206. GA. COMP. R. & REGS. 391-5-9.05(3)(a)(2) (2024).

207. *Indiana*, NAT’L PARK SERV., <https://home1.nps.gov/Archeology/SITES/stateSubmerged/indiana.htm> [<https://perma.cc/4UTX-S52S>]. Alaska, for example, requires an individual with a degree in related field and “a minimum of six months of field work in archaeology. ALASKA ADMIN. CODE tit. 11, § 16.040(2)(B) (2024).

208. *Michigan*, *supra* note 194.

209. *Florida*, *supra* note 189.

requires a data recovery and curatorial plan for artifacts.²¹⁰ United States Territories have plans as well; for example, the Virgin Islands requires applicants to

submit an archeological research design demonstrating professional qualifications and indicating the methods and techniques planned for recovery, analysis and dissemination of data, and proper conservation, permanent storage, and documentation of specimens and records. Permits are issued to scientific, research, and land-use planning institutions, organizations or corporations for the purpose of furthering scientific and cultural knowledge in the public interest.²¹¹

These many examples show the inconsistent patchwork at play across state borders, but also show the investment many states and territories make in their underwater cultural heritage, valuing it as a finite public resource in need of stewardship and preservation.

2. *Other Federal Parts of the Patchwork*

There are numerous other laws that can apply to underwater cultural heritage, creating a patchwork of inconsistency alongside federal, state, and local laws.²¹² These federal laws include but are not limited to the Antiquities Act of 1906,²¹³ the Archaeological Resources Protection Act of 1979,²¹⁴ National Historic

210. Minnesota, NAT'L PARK SERV., <https://home1.nps.gov/Archeology/SITES/stateSubmerged/minnesota.htm> [<https://perma.cc/3797-MPRK>].

211. Virgin Islands, NAT'L PARK SERV., <https://home1.nps.gov/Archeology/SITES/stateSubmerged/virginislands.htm> [<https://perma.cc/FK5T-R8ZP>].

212. For comprehensive lists of titles, see *Summary of US Management Authorities*, *supra* note 16. In total, these laws address two main concerns regarding cultural heritage. First is the destruction of culturally significant items "without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for . . . [economic use]. The second is a . . . belief that . . . [cultural heritage] . . . enhance[s] the quality of life for all." Becker, *supra* note 18, at 582 (quoting Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 108 (1985)).

213. 16 USC 470 et seq.

214. 16 U.S.C. 470aa et seq.

Preservation Act of 1966,²¹⁵ Coastal Zone Management Act,²¹⁶ and the Rivers and Harbors Act of 1899.²¹⁷ Most of these only apply to cultural heritage found on public land or otherwise within a federal undertaking.²¹⁸ Many scholars critique this patchwork of laws and advocate for an alternative that is all-encompassing and applicable to both land and underwater cultural heritage.²¹⁹ However, underwater cultural heritage has different needs and jurisdictional challenges than land cultural heritage.²²⁰

There is more access to underwater cultural heritage today than in 1987.²²¹ New technologies—including unmanned submarines, autonomous underwater vehicles (“AUVs”), and sonar advancements—increase access to cultural heritage and the volume of this cultural heritage was not considered under the ASA.²²² Generally with rising water levels, even more cultural heritage—like modern sites not considered previously by ASA—will be inundated by the sea, thus increasing the amount of material governed by underwater cultural heritage law.²²³ There is a need to adapt domestic law to better approach this increasing need.

215. 16 USC 470 et seq.

216. 16 U.S.C. § 1451 et seq.; see *Protecting Water*, NAT'L PARK SERV., <https://www.nps.gov/subjects/protectingwater/nps-responsibilities.htm> [<https://perma.cc/5B4W-Z3YS>].

217. 33 U.S.C. § 401 et seq.; see *Rivers and Harbors Act*, NOAA, <https://www.fisheries.noaa.gov/inport/item/59646> [<https://perma.cc/5G4Z-CBZZ>] (May 30, 2023).

218. For example, the Rivers and Harbors Act applies to dredging activities within navigable harbors. 33 U.S.C. § 401 et seq.; see *Summary of US Management Authorities*, *supra* note 16.

219. See, e.g., Snyder, *supra* note 182, at 134–35.

220. See Cho, *supra* note 4, at 1–4 (stating “[d]ue to its nature, salvaging under water involves greater policy challenges than archeological looting on land”); Eiseman, *supra* note 22, at 12–14; see also Yakov Malkiel, *An Evolutionary Look at the Law, Technology, and Economics of Sunken Treasure*, 44 J. MAR. L. & COM. 195, 198–202 (2013) (explaining that the technologies involved in excavating and retrieving at sea are complex and developing).

221. See Cho, *supra* note 4, at 2.

222. See Hilt, *supra* note 19; Malkiel, *supra* note 220, at 198–202 (outlining technological developments, like scuba diving, enhanced detection, and retrieval systems makes underwater cultural heritage more accessible today).

223. See *supra* note 105 and accompanying text.

III. FORWARD THINKING ENDEAVORS: NATIONAL SYSTEM OF MARINE PROTECTED AREAS

The increased international investment in coordinating the protection of marine resources under Marine Protected Areas (“MPAs”) reflects additional steps to international uniformity and cooperation in the oceans.²²⁴ MPAs are marine areas that have a level of protection against human activity and exploitation.²²⁵ MPAs are governed by different authorities and standards, but generally the designation shows there are conservation standards in place for the area and affords the area coordination within national and international conservation and study efforts.²²⁶ This largely comes in the form of environmental protection, namely using fishing standards to protect biodiversity.²²⁷ United States Executive Order 13158, signed by President Bill Clinton, defines MPA as “any area of the marine environment that has been reserved by Federal, State, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein.”²²⁸ Notably, in North America, this includes the Great Lakes, whereas elsewhere in the world it is limited to seas, oceans, and estuaries.²²⁹ Twenty-six percent of United States waters are MPAs and 3% are no-take zones.²³⁰

224. See Kim Rutledge, Melissa McDaniel, Santani Teng, Hilary Hall, Tara Ramroop, Erin Sprout, Jeff Hunt, Diane Boudreau & Hilary Costa, *The Importance of Marine Protected Areas (MPAs)*, NAT’L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/importance-marine-protected-areas> [https://perma.cc/49AL-HDSA] (Mar. 4, 2024).

225. *Id.*

226. *Id.*

227. See *id.*; Kim Rutledge, Melissa McDaniel, Santani Teng, Hilary Hall, Tara Ramroop, Erin Sprout, Jeff Hunt, Diane Boudreau & Hilary Costa, *No-Take Zone*, NAT’L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/no-take-zone> [https://perma.cc/2LVN-HLUR]. No-take zones (“NTZs”), for example, are areas where all human exploitation is prohibited. *Id.*

228. Exec. Order No. 13158, 65 Fed. Reg. 34909 (2000).

229. See NAT’L MARINE PROTECTED RES. CTR., MARINE PROTECTED AREAS 2020: BUILDING EFFECTIVE CONSERVATION NETWORKS 1 (2020), <https://marineprotectedareas.noaa.gov/media/docs/2020-mpa-building-effective-conservation-networks.pdf> [https://perma.cc/Q8T9-HUA3].

230. *About Marine Protected Areas*, NAT’L MARINE PROTECTED AREAS CTR., <https://marineprotectedareas.noaa.gov/aboutmpas> [https://perma.cc/XXY6-CF63]; *Marine Protected Areas*, NAT’L

Executive Order 13158 called for the development of a framework for a National System of MPAs, “requiring collaboration with coastal states and territories, tribes, Regional Fishery Management Councils and other entities.”²³¹ Furthermore, it “specified that the national system be scientifically based, comprehensive, and represent the nation’s diverse marine ecosystems and natural and cultural resources.”²³² Through the execution of the Order, the MPA Center was established within National Oceanic and Atmospheric Administration (“NOAA”).²³³ The Framework for a National System of Marine Protected Areas was developed and revised with federal, state, public, and MPA Federal Advisory Committee (“MPA FAC”) input.²³⁴

The United States MPA Framework emphasizes that it is a national system, not a federal system, and the requirements of the Order apply to federal agency actions only.²³⁵ The United States MPA Framework does not bring management under federal oversight, and some states, like California, increased their list of Marine Protected Sites and increased the protection of such sites, while other states have not.²³⁶ This, again, creates a patchwork and inconsistent system, yet ensures local involvement.²³⁷ The United States MPA Framework also recognizes the national system is just one of many tools in a patchwork of conservation, stating “[t]he implementation of the national system must be both coordinated and integrated within the larger, evolving ecosystem-based approach to managing marine resources.”²³⁸ The National System of Marine Protected Areas and

MARINE PROTECTED AREAS CTR., <https://marineprotectedareas.noaa.gov/> [<https://perma.cc/99XM-PLRQ>].

231. NAT’L MARINE PROTECTED AREAS CTR., FRAMEWORK FOR THE NATIONAL SYSTEM OF MARINE PROTECTED AREAS OF THE UNITED STATES OF AMERICA 1 (2015), <http://marineprotectedareas.noaa.gov/nationalsystem/framework/final-mpa-framework-0315.pdf> [<https://perma.cc/RDL2-G3CY>] [hereinafter MPA FRAMEWORK]; see Exec. Order No. 13158, 65 Fed. Reg. 34909 (2000).

232. MPA FRAMEWORK, *supra* note 231.

233. *Id.*

234. *Id.*

235. *Id.* at 3, 6.

236. *Id.* at 17.

237. *See id.*

238. *Id.* at 4.

the Order that established it do not create “any new legal authorities to designate, manage, or change MPAs, nor do they alter any existing federal, state, local, or tribal MPA laws or programs . . . [and] is intended to support, not interfere with, agencies’ independent exercises of their own existing authorities.”²³⁹ About 100 legal authorities govern the existing Marine Protected Areas in the United States, including federal, state, tribal, and territorial agencies and entities.²⁴⁰

The National System for Marine Protected Areas works to coordinate how MPAs in the United States are managed and conserved.²⁴¹ The United States MPA Framework sets forth benefits including: enhancing stewardship, building partnerships, increasing the understanding and support for marine conservation, connecting marine protected areas by creating healthier resources, supporting coastal communities socially and economically, identifying gaps, providing educational opportunities (including those related to cultural heritage), enhancing research opportunities, increasing international coordination, and *promoting cultural heritage*.²⁴² The Framework states “[p]articipation in the national system elevates the recognition of and appreciation for the cultural heritage value of MPA sites such as shipwrecks, archaeological sites and areas of cultural significance to tribal and indigenous people, an often overlooked focus of marine conservation.”²⁴³

To be a Marine Protected Area within the National System a site must be nominated, go through notice and comment, and be reviewed and accepted.²⁴⁴ As seen with the British Protection of Wrecks Act of 1973, a list system is important for known major identifiable sites, but does little to protect other unknown sites.²⁴⁵ However, as stated, the United States MPA Framework

239. *Id.*

240. *Id.* at 5.

241. *See id.* at 1.

242. *Id.* at 6–7.

243. *Id.* (emphasis omitted).

244. *Id.* at 14.

245. *See supra* Section II.A.1.

is intended to be a tool alongside existing laws and not the only form of protection.²⁴⁶

The MPA FAC created the Cultural Heritage Resources Working Group (“CHRWG”) to provide cultural heritage-specific recommendations.²⁴⁷ The CHRWG proposed, and the National System of Marine Protected Areas Framework, adopted a cultural landscape approach to “[a]dvance comprehensive conservation and management of cultural resources that reflect the nation’s maritime history and traditional cultural connections to the sea, as well as the uses and values they provide to present and future generations.”²⁴⁸ The CHWRG recognized the overlapping laws at play, the expense of resource assessments underwater, and that Marine Protected Areas could increase “integration and protection to the management of cultural heritage resources in coastal and marine environments.”²⁴⁹

The Framework, proposed by CHWRG, establishes three criteria to be eligible for national system nomination and a fourth for cultural heritage sites, including: (1) meet the definition of Marine Protected Area; (2) have a management plan in place; (3) support a goal in the national system; and (4) be “on the National Register of Historic Places, or” as recommended by the CHWRG and adopted by the framework, “be considered important by Indian Tribes and tribal communities, Alaska Natives, Native Hawaiians, and Pacific Islanders, or have the potential to provide information important to understanding cultural and natural heritage.”²⁵⁰ Sites that meet this criteria are added to an integrated system of conservation, research, and public access goals.²⁵¹ Again, this system is intended to include

246. MPA FRAMEWORK, *supra* note 231, at 1.

247. MARINE PROTECTED AREAS FED. ADVISORY COMM., RECOMMENDATIONS FOR INTEGRATED MANAGEMENT USING A CULTURAL LANDSCAPE APPROACH IN THE NATIONAL MPA SYSTEM 1 (2011), http://marineprotectedareas.noaa.gov/pdf/helpful-resources/mpafac_rec_cultural_landscape_12_11.pdf [<https://perma.cc/T6PV-PRYN>] [hereinafter RECOMMENDATIONS FOR INTEGRATED MANAGEMENT]; *see* MPA FRAMEWORK, *supra* note 231, at 12.

248. MPA FRAMEWORK, *supra* note 231, at 13.

249. RECOMMENDATIONS FOR INTEGRATED MANAGEMENT, *supra* note 247, at 8.

250. MPA FRAMEWORK, *supra* note 231, at 31; *id.* at 32–33.

251. MPA FRAMEWORK, *supra* note 231, at 14.

cultural heritage resources, but is largely focused on environmental conservation and study.²⁵²

IV. ABOVE BOARD: A NEW APPROACH TO THE ABANDONED SHIPWRECK ACT

The ASA should expand beyond just shipwreck protection to be an all-encompassing framework for underwater cultural heritage, while still retaining title with local government and also increasing the base requirements of underwater cultural heritage protections.²⁵³ Further, the ASA should be reformulated to adequately reflect international cultural heritage preservation and public access concerns, incentivize the protection of cultural heritage for public access, and, for environmental protection reasons, better reflect global understandings of cultural heritage.²⁵⁴ While some scholars advocate for a comprehensive cultural heritage approach that considers all cultural heritage both on land and at sea,²⁵⁵ this approach recognizes that underwater cultural heritage is unique and requires a tailored approach.²⁵⁶

A. *Definitional Expansion*

First, the reformulated ASA should adopt some definitional changes for the sake of uniformity and applicability. The ASA should expand its protection beyond just shipwrecks, and should apply to all underwater cultural heritage, as defined by UNESCO to include “all traces of human existence of a cultural, historical or archaeological nature which, for at least 100 years, have been partially or totally immersed, periodically or

252. See *id.* at 13; Rutledge et al., *supra* note 227.

253. See 43 U.S.C. §§ 2101–06; Cho, *supra* note 4, at 4; Kieran Mulvaney, *Why More and More Shipwrecks Are Being Discovered*, HISTORY, <https://www.history.com/news/shipwreck-exploration-advances-technology> [<https://perma.cc/5C85-G865>] (Sept. 22, 2023).

254. Cho, *supra* note 4, at 4.

255. See Snyder, *supra* note 182, at 134 (discussing the need for uniformity across all cultural heritage study and proposing a single comprehensive cultural heritage law); Cohn, *supra* note 181, at 38–39 (proposing that suggested amendments to the ASA would “harmonize” it with land-based statutes).

256. See Cho, *supra* note 4; see also Malkiel, *supra* note 220.

permanently, under the oceans and in lakes and rivers.”²⁵⁷ However, the reformulated ASA should retain the original time frame of protection of fifty years, which is more protective than UNESCO.²⁵⁸ Eliminating the problematic limitations of the ASA will ensure protection of more sites and a better record of the past. The ASA should also retain certain attributes, like its recognition of cultural heritage not just at sea but also within rivers and lakes.²⁵⁹ Additionally, the ASA should continue to vest title of all cultural heritage found in such contexts to local governments as a way of emphasizing the value of community agency, engagement, and education.²⁶⁰ While this would keep the burden on the states, it would also incentivize local involvement in cultural heritage protection.²⁶¹

B. State Requirements or Recommendations

Second, the reformulated ASA should bolster protections while still allowing local governments to retain title and regulate local sites and other cultural heritage. Overall, the new Act should establish a few requirements and recommendations for local governments across the board. The first two are: (1) the establishment of a national online repository for both recreational divers and academics to submit photos, video, and drawings of sites; and (2) require the reporting and recording of all isolated finds to local government and to an open access system, thus expanding protection to unknown cultural heritage sites and material.

The reformulated ASA national repository—a system of reporting and recording all finds in one coordinated integrated space—is central to the public access goal. This can include a

257. *All About the 2001 Convention*, *supra* note 22.

258. *See id.*; Cottrell, *supra* note 154, at 715.

259. *See Abandoned Shipwreck Act of 1987*, NAT'L PARK SERV. (Jan. 12, 2023), <https://www.nps.gov/subjects/archeology/abandoned-shipwreck-act.htm> [<https://perma.cc/3HVF-GMRH>]; 43 U.S.C. § 2105(a).

260. *Abandoned Shipwreck Act of 1987*, *supra* note 259; 43 U.S.C. § 2105(c); *see supra* Sections I.A–C.

261. *See supra* Sections I.A–C.

range of things including full reports from academic institutions to amateur drawings, videos, and photographs.²⁶² For example, a ceramic fragment found by a recreational diver could be reported and recorded online for all to access, see, and research, creating an open access forum for archaeologists to utilize and the public to learn and socially invest.²⁶³ Some scholars have suggested similar repositories that could be open to governments and institutions,²⁶⁴ though this Note's proposal suggests opening it to the public to be inclusive and encouraging for public cooperation.

The requirements and recommendations for local governments also include the establishment of (3) a two-tiered permit system for known sites and survey with one tier (a) for permits for activities that will not disturb sites (including drawing and photography) and (b) a second tier for survey and excavation that would require an archaeologist on staff and a report of finds for public access afterwards. Within these tiers, the ASA should encourage states to require proof of funds, equipment, curation plan, research design, and environmental impact statement.²⁶⁵ States should also (4) establish a turnaround time for scientific institutions to give a report on findings for public access that they deem appropriate. This time should be long enough to encourage study but short enough to ensure prompt accessibility of the finds to the public. Altogether, these efforts would protect both known and undiscovered sites from non-scientific destructive investigation.²⁶⁶

262. See, e.g., Spencer, *supra* note 103, at 140 (advocating for an open access system of salvor video broadcasting of sites).

263. See, e.g., *About*, LEVANTINE CERAMICS PROJECT, <https://www.levantineceramics.org/about> [<https://perma.cc/8A95-7AP4>] (describing the site's open access system for ceramic study).

264. See, e.g., Snyder, *supra* note 182, at 135–37 (discussing the benefits of a single open access repository into which only the federal government, state governments, and institutions could input data, and, while noting that this would increase the risk of looting, the author emphasizes the public benefit and suggests ways to protect sites).

265. Cf. National Environmental Policy Act of 1969, 42 U.S.C. § 4332. The National Environmental Policy Act (NEPA) is an example of a law that already requires such environmental impact statements. *Id.*

266. See *supra* Part I.

This system, however, may make it harder for recreational divers to access sites. To address this concern, states should formulate a list of known sites that are safely accessible with a low risk of disturbance from both experienced and novice divers, perhaps with the caveat that archaeologists have already conducted extensive survey or excavation of the site. This hopefully will add to the transparency and public accessibility of sites as more information will be available in an open-access system about the known cultural heritage sites and resources.²⁶⁷ While there are burdens to these requirements, ultimately this framework aligns to modern societal values and goals regarding cultural heritage preservation and public access.²⁶⁸ This proposed system will aim to increase public interest and investment in sites through transparency, encouraging reporting and curiosity of the past.

A minority of states and territories allow individuals to retain material recovered and most either retain title to all material recovered or ask that it be deposited in a museum for public access.²⁶⁹ A reformulated ASA should also account for this, and require items of historic value 50 years or older be submitted to the state or museum for inspection and recording. It should remain at the discretion of the state whether it would ask for all material to be returned to the state, as not every state has all the resources available to care for and store underwater cultural heritage.²⁷⁰ Items of historical value should be given to the state within three years of excavation or study, or to a museum or other curatorial facility for protection and public access. Again, the recording of objects for public knowledge is important to add to the historical record and narrative.²⁷¹

267. See generally *What Is Public Archaeology?*, *supra* note 75; *About Archaeology*, *supra* note 83.

268. See *supra* Part I.

269. E.g., Virginia, *supra* note 196; see also *supra* Section II.B.

270. See *supra* Section II.B; see also Cohn, *supra* note 181, at 36–37.

271. See *supra* Section I.C.1.

C. Other Considerations

A reformulated Act should also adopt the values of the National System of Marine Protected Areas and the Valletta Treaty.²⁷² The Framework for the National System of Marine Protected Areas is a good tool, but as seen with other cultural heritage laws, a list system is not effective on its own.²⁷³ The National System of Marine Protected Areas also does not apply to all waters—just seas, estuaries, oceans, and the Great Lakes.²⁷⁴ Its values and goals, however, should be reflected in the rest of the cultural heritage laws of the United States, as it promotes public access, works to identify gaps in the system, promotes education, and encourages partnership and research as well as international coordination.²⁷⁵ A reworked ASA can work to encourage states to list known sites on the National System of Marine Protected Areas and establish a system for encouraging divers to report newly found sites.²⁷⁶ The ASA already implicitly, like the Valletta Treaty, recognizes that non-scientific excavation is destructive to underwater cultural heritage.²⁷⁷ Like the National System of Marine Protected Areas, the Valletta Treaty also heavily invests in public access and education.²⁷⁸

The National System of Marine Protected Areas likewise values international coordination, and in accordance with this, the United States should consider adopting the values and techniques of UNCLOS and other international underwater cultural heritage guidance as a form of international uniformity and

272. See discussion *supra* Section II.A.2, Part III.

273. MPA FRAMEWORK, *supra* note 231, at 1, 19–20; see discussion *supra* Section II.A.1.

274. MPA FRAMEWORK, *supra* note 231, at 27.

275. *Id.* at 7–8.

276. See *supra* Part III.

277. See European Convention on the Protection of the Archaeological Heritage (Valletta Treaty), pmbl., art. 1, Jan. 16, 1992, E.T.S. No. 143 (aiming “to reduce the risk of deterioration and promote conservation” of European archaeological heritage); see 43 U.S.C. § 2104(a)(1) (seeking to “foster a partnership” among various actors to “maximize the enhancement of cultural resources”).

278. Compare European Convention on the Protection of the Archaeological Heritage (Valletta Treaty), pmbl., art. 1, Jan. 16, 1992, E.T.S. No. 143, art. 9 (undertaking “to conduct educational actions” and “promote public access”), with MPA FRAMEWORK, *supra* note 231, at 13 (aiming to provide for educational and research opportunities).

coordination of underwater cultural heritage conservation and study efforts.²⁷⁹ Committing to these endeavors would support the preceding outlined efforts.

CONCLUSION

A concern for the finite underwater cultural resources and its endangerment by climate change and non-scientific excavation requires countries to adopt plans to preserve and study underwater cultural heritage. This is even more imperative for a country like the United States, with a large mass of water territories both at sea and inland in the form of rivers and lakes. Increased coordination with other countries in the preservation and study of underwater cultural heritage is appropriate as the world's waters are a part of our global collective memory.

The history of protection of cultural heritage in the United States is one that has grappled with integration of scientific study, input of diverse communities, and differing perspectives on the benefits and detriments of excavation. Cultural heritage is a finite resource and, as the nation debates which historical narratives we teach in schools, it is important to recognize the significance of the narratives found within archaeological material. The United States, however, currently has a patchwork system of protection specifically for underwater cultural heritage.

Therefore, the ASA should expand beyond just shipwreck protection to be an all-encompassing framework for underwater cultural heritage and a base-level of requirements across state lines. A reworked ASA should establish the need for a plan for increasing public access and international coordination. Combined, this will ensure that fewer pieces of our collective past will disappear and ensure preservation for future generations to come.

279. See *supra* Parts II, III; MPA FRAMEWORK, *supra* note 231, at 1–2.