

THE ELEVENTH AMENDMENT SURFACES IN *FLORIDA DEPARTMENT OF STATE v.* *TREASURE SALVORS, INC. : A* RETROSPECTIVE

I. INTRODUCTION

The Eleventh Amendment of the United States Constitution has often served as an effective bar to lawsuits against the states of this country.¹ The Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State”² In *Florida Dept. of State v. Treasure Salvors, Inc.*,³ the United States Supreme Court refused to apply the Eleventh Amendment to an *in rem* admiralty action initiated to recover purportedly state-owned property.⁴ The case, a 5-4 plurality decision, concerned treasure recovered from a 17th-century shipwreck located in international waters and claims by the state of Florida to a contractually determined percentage of the treasure.⁵

The Court held that a federal court exercising admiralty *in rem* jurisdiction may seize property being held by state officials under a claim that the property belongs to the state.⁶ The Court also indicated that the decision was consistent with previously established principles in this area of law. This casenote will analyze the Court’s decision.

A. *Historical Background*

A brief history provides some perspective on the subject matter around which the issues were litigated. In 1622, King Philip IV of Spain sent fleets of merchant ships to the West Indies as part of an on-going

1. J. NOWAK, R. ROTUNDA, and J. YOUNG, CONSTITUTIONAL LAW § 2.11 (1986) at 46. The Amendment does not grant a true immunity since it does not exempt states from the restrictions of federal law. It only means that some types of suits against them must initially be brought in state rather than federal court. *Id.* at 46-47. It has been held to prohibit federal courts from exercising jurisdiction over state courts in certain circumstances. *Id.* (citing cases) [hereinafter NOWAK]

2. U.S. CONST. amend. XI.

3. 458 U.S. 670 (1982).

4. *Id.*

5. *Treasure Salvors, Inc. v. Abandoned Sailing Vessel*, 408 F. Supp. 907 (S.D. Fla. 1976). The district court here determined that the wreck was not in U.S. territorial waters nor within jurisdiction of the United States for purposes of the Abandoned Property Act, 40 U.S.C. § 310, nor controlled or owned by the United States under any other Acts. *Id.*

6. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 700.

process of financing Spain's role in the Thirty Years War.⁷

Two Spanish merchant vessels, the *Santa Margarita* and the *Nuestra Senora de Atocha*, sailed out of the Havana harbor on September 4, 1622.⁸ The ships were heavily armed and laden with gold and silver.⁹ On the following day, the ships encountered the outlying winds of a hurricane, which pushed them northward to the Florida Keys. On September 6, 1622, both ships sank.¹⁰ Wreckage of these ships, along with the remains of other sunken vessels, was strewn for more than fifty miles along the Florida Keys.¹¹ Within a year, another hurricane scattered the remaining wreckage.¹²

B. Recent History

In 1970, treasure hunter Mel Fisher and Treasure Salvors, Inc., his salvage company, began combing the Florida Keys in search of the *Santa Margarita* and the *Atocha*.¹³ In May 1973 they discovered large numbers of silver coins.¹⁴ More artifacts were soon recovered, including silver bars identified by inscribed numbers as belonging to the *Atocha*.¹⁵ Pursuant to these discoveries, the state of Florida claimed the *Atocha* as its

7. E. Lyon, *The Trouble with Treasure*, Nat'l Geo., June, 1976, at 787, 794-96. [hereinafter Lyon].

8. *Id.* at 796. The ships had sailed from Spain to the West Indies in April, carrying various goods which were exchanged for gold and silver. Havana was the last port of call before a return to Spain. *Id.* at 795-96.

9. *Id.* at 794-96. The *Atocha* alone carried 901 silver bars, 161 gold bars and approximately 255,000 silver coins. *Id.* at 796.

10. *Id.* at 796-97. A total of 387 persons from the ships drowned during the storm. *Id.* at 797.

11. *Id.* at 797. A total of 550 persons died, including those from other vessels which sank during the storm. *Id.* In June, 1989, a high technology ocean salvage team discovered what is possibly the *Merced*, sistership of the *Atocha*. The galleon is believed to be largely intact and probably contains several million dollars worth of treasure. The wreck is located further offshore and in deeper water than is the *Atocha*. Hous. Chron., June 28, 1989, at 15A, col. 2.

12. Lyon, *supra* note 7, at 800. The Spaniards had unsuccessfully attempted to salvage bullion from the wreckage after the disaster. *Id.* at 800.

13. *Id.* at 789-97. In early summer 1970, Fisher moved to Key West, Florida after receiving a tip as to the possible whereabouts of the *Santa Margarita*. *Id.* at 794. He and his salvage team charted and searched the Keys (with the help of information gathered in the Archives of the Indies in Seville, Spain) until June 1971, when they discovered part of the *Santa Margarita*. *Id.* at 794, 800. Trouble arising from his financial base, criticism, actions of rivals and an accidental death halted Fisher's activities in early 1973. *Id.* at 794, 800, 804. Two salvage teams, Treasure Salvors, Inc. and Armada Research Corp, were actually involved. *Id.* at 789. They were organized by the same parties and are referred to simply as "Treasure Salvors" as respondents at the Supreme Court level. For the purposes of this casenote, references will be made to Treasure Salvors only.

14. *Id.* at 804.

15. *Id.* at 804, 807.

own property.¹⁶ Under the authority of a Florida statute,¹⁷ treasure located on state submerged lands was state property.¹⁸ After threatening to arrest Fisher and confiscate his company's assets for not complying with the statute, the state persuaded him to enter into a salvage contract.¹⁹ The contract provided that Fisher would receive 75% of the salvage proceeds, with the remaining 25% going to the state.²⁰ The contract was subsequently renewed three times.²¹

On March 17, 1975, the U.S. Supreme Court decided a case which was to bring a decisive change to Fisher's treasure hunt. In *United States v. Florida*,²² a case unrelated to Fisher's saga, the Court defined the boundaries of state-owned lands along the continental shelf.²³ The case was soon to sweep Fisher and Treasure Salvors into a hotbed of litigation.

C. *The Controversy Unfolds*

United States v. Florida determined the seaward boundary of submerged lands in the Gulf of Mexico and the Atlantic Ocean to which Florida had natural resource rights.²⁴ The decision in the case was based on a report by a U.S. Special Master which placed the boundary to the landward side of the *Atocha*.²⁵ The Court accepted the findings of the

16. Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. at 673.

17. Fla. Stat. Ann. § 267.061(1)(b) (West Supp. 1988).

18. *Id.* "It is further declared to be the public policy of the state that all treasure trove, artifacts and such objects having intrinsic or historical and archeological value which have been abandoned on state-owned lands or state-owned sovereignty submerged lands shall belong to the state with title thereto vested in the division of archives, history, and records management of the department of state for the purpose of administration and protection." *Id.*

19. Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. at 674.

20. *Id.* at 675. The contract provided, in part: "In payment for the Salvager's satisfactory performance and compliance with this Agreement, the Division will award to the Salvager seventy-five percent (75%) of the total appraised value of all material recovered hereunder" *Id.*

21. *Id.* at 674. The salvaging was successful, and each party saw fit to renew the contract. However, Fisher encountered trouble of a different sort. The Securities and Exchange Commission (SEC) launched an investigation into the salvage group's activities in late 1973. Until the investigation was completed, he could not sell any stocks or shares of treasure. Without the ability to make such sales, Fisher and his team, comprised mostly of his immediate family, were without funds. As of 1973, the state had yet to divide any of the materials salvaged since 1971. Salvaging was finally resumed in 1974, when the investigation was completed. See Lyon, *supra* note 7, at 807.

22. 420 U.S. 530 (1975).

23. *United States v. Florida*, 420 U.S. at 532.

24. *Id.* at 531. In the the 1868 Florida Constitution, Florida claimed "Florida Bay" as a historic bay and therefore as inland waters of the state. The Court in *United States v. Florida* held that the area in which the *Atocha* lay was part of the Atlantic Ocean rather than the Gulf of Mexico. It was therefore not part of submerged lands to which Florida had rights. *Id.* at 532-33.

25. *Id.* at 532. Rule 53 of the Federal Rules of Civil Procedure allows a federal court to appoint a special master to act as a referee, auditor, examiner or assessor when an exceptional condition or complicated issue so requires. The master may report only on particular issues as

special master which determined that the United States had rights to minerals and other natural resources beyond the given boundary.²⁶ The ruling thus destroyed the basis upon which Florida's claim to the treasure was founded.²⁷

Treasure Salvors filed a complaint in the Federal Court for the Southern District of Florida demanding full possession of the *Atocha* and confirmation of title "against all claimants and all the world."²⁸ Artifacts recovered and retained by Treasure Salvors were served with process and brought into the court's custody under admiralty and maritime *in rem* jurisdiction.²⁹ Artifacts recovered and held by state officials in Tallahassee were not served.³⁰

Shortly thereafter, the United States intervened, seeking a declaratory judgment that it was the owner of the *Atocha* treasure.³¹ The district court held that Treasure Salvors was the rightful owner of the treasure against the United States and all others.³²

The Fifth Circuit Court of Appeals affirmed the judgment but modified the district court's decree.³³ The court agreed with the United States government that the district court would ordinarily lack admiralty *in rem* jurisdiction over parts of the *res* which lay outside the district.³⁴

directed by the court. These issues may include findings of fact and conclusions of law. The master sets forth such findings and conclusions in his report which is filed with the clerk of the court. Fed. R. Civ. P. 53. Upon consent of the parties, a judge may designate a magistrate to serve as special master in a civil case. Fed. R. Jud. 636. In such situations, exceptional or complicated conditions are not required. Fed. R. Civ. P. 53; Fed. R. Jud. 636. The ruling in *United States v. Florida* followed a government report. The report defined the seaward boundary of submerged lands of the continental shelf in the Atlantic Ocean in which Florida had rights to natural resources. The *United States v. Florida* case consolidated two proceedings. In the first one, the United States sought a decree defining Florida's Atlantic Ocean natural resource rights in continental shelf submerged lands. *United States v. Maine*, 395 U.S. 955 (1969). In the second one, both the United States and Florida sought a decree defining the same rights in the Gulf of Mexico. *United States v. Maine*, 403 U.S. 949 (1971). *Id.*

26. *United States v. Florida*, 420 U.S. at 533. The case gave the United States mineral and natural resource rights. However, such a claim was not enough to put a sunken vessel which lay on the continental shelf beyond the determined boundary under the jurisdiction and control of the United States. *Treasure Salvors, Inc. v. Abandoned Sailing Vessel*, *supra* note 5, at 907.

27. *See supra* note 17. Florida's claim to the *Atocha* as being on "state-owned sovereignty submerged lands" was destroyed. *See supra* note 18.

28. *Treasure Salvors, Inc. v. Abandoned Sailing Vessel*, 408 F. Supp. at 908.

29. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 676. An admiralty action *in rem* is brought against the vessel, while an *in personam* action is brought against the owner. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY*, 613 (2d ed. 1975) [hereinafter *Gilmore*].

30. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 673. The Florida Division of Archives officials held the artifacts in Tallahassee. *Id.* In the initial district court proceeding, these artifacts were not served. *Id.*

31. *Id.* at 676-77.

32. *Id.* at 677.

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

34. *Id.* at 334.

Nevertheless, the United States government had accepted the district court's authority to determine ownership of treasure located in international waters. The Fifth Circuit Court of Appeals held that in so doing, the United States had waived any jurisdictional bar.³⁵

Treasure Salvors then filed a motion in the district court for the arrest and detention of the artifacts held in Tallahassee.³⁶ The court issued the warrant and addressed it to two officers of the Florida Division of Archives.³⁷ The state moved to quash and the Fifth Circuit granted a stay. The motion was then dissolved under the district court's order to show cause.³⁸ The district court also ruled that the seizure was proper under Supplemental Admiralty Rule C(5).³⁹ The court then denied the state's motion to quash the warrant.⁴⁰

The state raised several arguments in the district court, among them, that the Eleventh Amendment barred the exercise of the court's jurisdiction,⁴¹ and that the state had a contractual claim to the treasure. The court rejected Florida's claims⁴², ruling that they were barred since Florida had been in privity with the United States in the earlier proceeding.⁴³ The court stated that the Division of Archives had never been the

35. *Id.* at 335. The court also denied claims which the United States had made under the Antiquities Act, 16 U.S.C. § 431-433, *et seq.*, the Abandoned Property Act, 40 U.S.C. § 310, and the Outer Continental Shelf Lands Act, 2, *et seq.*, 43 U.S.C. § 1331, *et seq.* The court held that, under the Antiquities Act, the government had claims only to historic landmarks and structures on lands controlled or owned by the U.S. government. The court held that the Abandoned Property Act was not a legislative enactment of sovereign prerogative. The United States had no property interest in a Spanish vessel sunk before the United States existed, and so the Act was not applicable. The court also held that the Outer Continental Shelf Lands Act applied only to minerals and natural resources. The court declared that the Convention on the Continental Shelf, a product of the United Nations Conference of the Law of the Sea, superceded any incompatible terminology of the domestic statute. The Convention's definition of natural resources excludes anything of the nature of sunken vessels. *Id.* at 335-42.

36. Florida Dept. of State v. Treasure Salvors, Inc., 459 U.S. at 507.

37. *Id.* at 678-79. The two officers were identified as L. Ross Morrell, Director of the Division of Archives, and James McBeth, Bureau Chief of the Historical Museum of the Division of Archives. *Id.* at 691.

38. *Id.* at 679-80. The state filed a motion to quash the warrant, asserting it had not waived jurisdiction and was not a party to the case. *Id.*

39. *Id.* at 679; Fed. R. Civ. P., Supplemental Rules for Certain Admiralty and Maritime Claims C(5). The Rule is as follows:

Rule C—Actions in Rem: Special Provisions

(5) *Ancillary Process.* In any action *in rem* in which process has been served as provided by this rule, if any part of the property that is the object of the action has not been brought within the control of the court because it has been removed . . . the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

40. Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. at 679.

41. *Id.* at 680. See *supra* note 2.

42. *Id.* at 681.

43. *Id.* at 680-81.

rightful owner of the treasure because the salvage contracts were invalid.⁴⁴ It further held that since the state was not the true owner, the Amendment did not bar seizure of the artifacts.⁴⁵ The Fifth Circuit affirmed, saying the resolution of the *res* ownership was necessary to decide whether the Eleventh Amendment applied.⁴⁶

D. *Surfacing In The Supreme Court*

The Supreme Court granted certiorari on the question of “[w]hether the Eleventh Amendment to the United States Constitution bars an *in rem* admiralty action seeking to recover property owned by a state.”⁴⁷ The Court held that state officials had no colorable basis for possession. Therefore, the district court had jurisdiction to obtain the property.⁴⁸ The Court concluded, however, that the district court had no authority to adjudicate the state’s interest in the property without state consent.⁴⁹

The Court held that: (1) the action had been brought against state officials, not the state itself,⁵⁰ (2) the officials had overstepped statutory authority in refusing to relinquish the property,⁵¹ and (3) the requested relief did not require the use of the state treasury fund.⁵²

The Court also noted that, even though the Eleventh Amendment did not bar the seizure of the artifacts, resolution of the state’s ownership had been improperly decided.⁵³ “While such an adjudication would be justified if the state voluntarily advanced a claim to the artifacts,⁵⁴ it may not be justified as part of the Eleventh Amendment analysis, the only issue before us.”⁵⁵ The Court affirmed the court of appeals on the Eleventh Amendment issue and reversed on the determination of state ownership.⁵⁶

44. *Id.*

45. *Id.*

46. *Id.* at 682.

47. *Id.* Nowak states that “[w]here the action is one for damages, past debts or retroactive relief of any type, it is barred whether it is brought in law, equity, or admiralty.” NOWAK, *supra* note 1, at 50 (citing cases).

48. Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. at 682. The court based this view on what it considered to be invalid salvage contracts between Treasure Salvors and the State. *Id.*

49. *Id.*

50. *Id.* at 691-92.

51. *Id.* at 692-97.

52. *Id.* at 697-98. If a suit demands payment from treasury funds for wrongful acts of the state, it is barred because the state is then the real party in interest. Nowak, *supra* note 1, at 50 (citing cases).

53. *Id.* at 699-700.

54. *Id.* at 700. *See infra* note 82.

55. Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. at 700.

56. *Id.* The case was remanded to the Fifth Circuit Court of Appeals. The court of appeals affirmed the district court’s opinion regarding the transfer of the artifacts to Treasure Salvors, Inc. It held Treasure Salvors, Inc. to be the owner of the artifacts as against all

Justice Brennan, concurring in part and dissenting in part,⁵⁷ asserted that the Eleventh Amendment was inapplicable because it does not bar federal suits against a state by its own citizens.⁵⁸ He thereby disagreed with the plurality's reasoning but reached the same conclusion. Brennan dissented on the issue of ownership, stating that the state had had the opportunity to present its position as to ownership and had failed.⁵⁹ Quoting from the plurality opinion, Brennan stated that the ownership issue had already been effectively decided in the minds of the plurality as well as by the lower courts,⁶⁰ despite the plurality's reversal on the issue. He favored affirming the court of appeals' judgment in its entirety.⁶¹

Justices Powell, Rehnquist, and O'Connor joined Justice White in concurrence and dissent.⁶² White said that the appellate court's opinion was inconsistent with prior cases in assuming that "a federal court may adjudicate a State's right to ownership of specific property within the possession of state officials without the State's consent."⁶³ The thrust of the dissent was that the plurality had incorrectly "divorced" the ownership of the *res* from the arrest of the *res*.⁶⁴ White asserted that the district court had already decided that Treasure Salvors owned the property; the seizure of the artifacts pursuant to that judgment was actually action taken against the state as well as against its agents.⁶⁵ White alternatively asserted that the action, if not against the state, was against state agents acting under a colorable claim of right.⁶⁶

II. CASE ANALYSIS

This case, as evidenced by the 5-4 decision and by the lengthy dissent, is somewhat confusing. The primary conflicts of opinion concerned: (1) whether the action was actually one against the state whereby the Eleventh Amendment could be invoked, and (2) whether

claimants. However, Florida's ownership was held to be in no way adjudged by the decision. *State of Florida, Dept. of State v. Treasure Salvors, Inc.*, 689 F.2d 1254 (5th Cir. 1982). The court stated that "Until the state voluntarily appears in federal court and asserts ownership of the artifacts, that issue is not before us . . ." *Id.* at 1255.

57. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 700.

58. *Id.* at 700-01. See *infra* note 69.

59. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 701.

60. *Id.* at 701-02. Brennan quoted from the plurality opinion to show how the plurality had considered the issue of ownership. "No statutory provision has been advanced that even arguably would authorize officials of the Division of Archives to retain the property at issue," and "the State does not even have a colorable claim to the artifacts." *Id.*

61. *Id.* at 702.

62. *Id.*

63. *Id.* at 703.

64. *Id.*

65. *Id.* at 705.

66. *Id.* at 711.

the arrest of the *res* was an issue properly severed from the issue of ownership.

Initially, it should be noted that Justice Brennan's concurrence was predicated upon the theory that the Eleventh Amendment need not even be considered in the case.⁶⁷ The Amendment provides that a federal court's jurisdiction does not extend to "any suit . . . against one of the United States by Citizens of another State" Brennan disagreed with the plurality's approach which held that "[a]lthough the Amendment does not literally apply to actions brought against a State by its own citizens, the Amendment has long been held to govern such actions."⁶⁹ He rejected this judicial gloss which, had the Amendment been applied, would have prevented two Florida corporations from suing the State of Florida.⁷⁰ The application of the Amendment to situations in which a state is sued by its own citizens is a long-held tradition in American jurisprudence.⁷¹ Other members of the Court did not consider the Amendment's inapplicability as reasoned by Brennan.

Secondly, Brennan strongly disagreed on the issue of ownership. He contended that the state had an opportunity to litigate its claim of ownership and that the claim was rejected by the lower courts.⁷² Brennan believed the state was getting a "second bite at the apple."⁷³ He was the only member of the Court to adopt this view, and in so doing, he did not support the dissenting minority. By asserting that the state had lost on the merits in the lower courts, he necessarily implied that (1) the suit was against the state itself, and (2) the state claimed ownership of the property.⁷⁴

Justices White, Powell, Rehnquist, and O'Connor proposed two points of contention, *supra*, in resolving the case. They contended that the action was against the state and not merely against its agents, and

67. *Id.* at 700.

68. *See supra* note 2.

69. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 683 n.17, 700-01. Here, Brennan cited the dissenting opinions of *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 309-22 (1973), and *Edelman v. Jordan*, 415 U.S. 651, 687 (1974). *Id.* at 701. These are the same cases cited by the plurality to establish the framework of state immunity. *Id.* at 683.

70. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 700. Both *Treasure Salvors* and *Armada Research* were incorporated under Florida law. *Id.*

71. *NOWAK, supra* note 1, at 49. The Amendment bars suits by citizens of the defendant state by implication under *Hans v. Louisiana*, 134 U.S. 1 (1890); all private plaintiffs are barred under the Amendment. *Id.*

72. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 701. The mere appearance of the state in federal court will not waive its immunity. Failure to plead immunity at the trial level does not constitute waiver—it can be raised on appeal. *NOWAK, supra* note 1, at 52.

73. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 702.

74. *Id.* at 701-02. If the state had lost on the merits in the district court, the state must have been a party to the action and had a chance to present its case in the district court. This is consistent with the belief that the Eleventh Amendment does not bar actions against the state by its own citizens. *Id.* at 700-01.

that the actions of state agents were not outside statutory or constitutional authority.⁷⁵ The following is an analysis of the disparate views held by the factions of the Court.

A. *The Contracts*

A logical approach is to consider the contracts between Treasure Salvors and the state of Florida. The plurality gave little consideration to the validity of the salvage contracts. Justice Stevens asserted that the contracts were executed on the basis of a mistaken understanding as to the ownership of the *Atocha* treasure.⁷⁶ This fact, he stated, did not provide Florida with a colorable claim of ownership: if the mistake had not occurred, no contracts would have been needed for Treasure Salvors to engage in salvage operations.⁷⁷ This view presupposes that Florida had no basis for a claim even prior to the *United States v. Florida* decision. However, given that there was no conclusive federal law allowing a claim upon the territory in question until that case, the authorizing Florida statute could have been given effect up to the time of the decision.⁷⁸ The retroactive implications of the decision apply a retrospective remedy.⁷⁹

A more practical approach was taken by the dissenters, who stated that a colorable claim was present.⁸⁰ But for the *United States v. Florida*

75. *Id.* at 704, 711-16.

76. *Id.* at 696.

77. *Id.*

78. *Id.* at 716. The law was not settled when the contracts were executed. *Id.* *United States v. Florida* "defined" the seaward boundary of submerged lands of the continental shelf to which Florida had natural resource rights. If the boundary was set in stone at that point, it is reasonable to allow some merit to contracts executed according to state laws which were not challenged until four years later.

79. 16A AM. JUR. 2D *Constitutional Law* § 1661 (1979). Retrospective laws are those which impair vested rights acquired under existing laws, or laws which create new obligations for past transactions. BLACK'S LAW DICTIONARY 1184 (5th ed. 1979). Such a law may be held invalid if it impairs contractual obligations. *Drehman v. Stifle*, 75 U.S. 595 (1870). This limitation applies only to states and not to the U.S. government or Congress. U.S. CONST. art. I § 10; *Continental Illinois Nat. Bank & Trust Co. v. Chicago, R.I. & P.R. Co.*, 294 U.S. 648 (1935). The limitation also does not generally apply to court judgments. *Barrows v. Jackson*, 345 U.S. 249 (1953). However, the U.S. Supreme Court has, in some situations, determined that its own judgments should not apply a void law retrospectively to certain cases. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). In *Chevron*, the Court held that its previous decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), should not apply retroactively to bar the plaintiff's action. *Rodrigue* established that state law, not federal admiralty law, applies to fixed structures on the outer continental shelf under the Outer Continental Shelf Lands Act. The *Chevron* court held that a Louisiana statute of limitations should not bar the plaintiff's action since retroactive application deprived him of any remedy. The Court applied a three part test. The test considered "the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect and whether retrospective operation will further or retard its operation." *Chevron*, 404 U.S. at 106-07. The Court also considered whether inequities would result from retroactive application of the law and whether injustice or hardship would result by "nonretroactivity." *Id.*

80. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 711.

decision, no second thought would have been given to Florida's claim.⁸¹ Justice White admitted that "[t]he State has never, in so many words, argued that the contracts conferred upon the State a right of ownership"⁸² He pointed out, however, that the intent of the contract should determine its interpretation.⁸³ The contracts were entered into pursuant to the claim of ownership made within the statute itself.⁸⁴ The fact that the contracts were signed by Treasure Salvors under threat of arrest by Florida officials may be considered in determining their validity.⁸⁵ Nonetheless, Florida's threat to arrest a knowing violator of a then-uncontested state statute should not be considered a "coercive act". The fact that Treasure Salvors signed the contracts and made no attempt to seek relief through other avenues provided evidence that it conceded the validity of the state law. In any event, the plurality placed little weight on the issue of coercion in the making of the contracts. The force of its argument was premised on the invalidity of the Florida statute.⁸⁶ At the very least, the state had a colorable claim to ownership of artifacts which it retained pursuant to the contracts.

History reveals that admiralty courts, given the "inherent uncertainty in contracts for salvage," are loath to reform a contract,⁸⁷ and as a general rule, such contracts should be sustained.⁸⁸ White also noted that

81. *Id.*

82. *Id.* at 712. Here, White echoed Stevens, who stated, "[i]t is noteworthy, however, that the State has never argued that the contracts conferred upon the State a right of ownership in the artifacts; the contracts simply 'determine the rights and the obligations of the contracting parties'" *Id.* at 693.

83. *Id.* at 712; E. FARNSWORTH, CONTRACTS, § 3.6. Farnsworth states that the question of intent has "provoked one of the most significant doctrinal struggles in the development of contract law" Subjectivists look to the subjective or actual intentions of the parties, while objectivists look to the external or objective appearance of the parties' intentions as manifested by actions. *Id.* Each of these doctrines suggest that the parties intended that the salvaged treasure should be divided under a claim of ownership by the state. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 675, 694.

84. *See supra* note 17. The statute provides, in part, that artifacts and the like abandoned "on state-owned lands or state-owned sovereignty submerged lands shall belong to the state" (emphasis added). *See supra* note 17, 18. A right of ownership is thus claimed through the wording of the statute—based on the mutual assumption that the *Atocha* lay on state-owned lands. Justice Stevens asserted that "[t]he Eleventh Amendment analysis in this case does not require any consideration of the doctrine of mistake." *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 696, n.34. If this is true, Stevens implies that no mutual mistake was made. Under this logic, it follows that no mistake was made because the Florida statute was valid at the time of contracting.

85. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 674. The state admitted it would have made arrests had the contracts not been signed. The contracts were entered into as a result of the "coercive acts of the Division of Archives in threatening arrest and confiscation." *Id.* at 674, n.4.

86. *Id.*

87. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 713, n.11. Salvage contracts are by their nature uncertain, and courts find few reasons to reform them. *Id.*

88. *Id.*, citing *The Elfrida*, 172 U.S. 186 (1898). "We do not think that a salvage contract should be sustained as an exception to the general rule, but rather that it should, *prima facie*, be enforced, and that it belongs to the defendant to establish the exception." *The Elfrida*, 172

the Eleventh Amendment “bars a federal court from deciding the rights and obligations of a state in a contract unless the state consents.”⁸⁹

The dissent cast doubt on the plurality’s somewhat hasty dismissal of the issue of contract validity.⁹⁰ The more appropriate position would be that the contracts, based upon a mistaken assumption of law, should be considered on the merits.

B. Interlocked Issues

The dissenters objected to the manner in which the plurality “divorced” the ownership claim from the Eleventh Amendment issue.⁹¹ They suggested that by virtue of deciding the Amendment issue, the Court effectively deprived the state of ownership. They felt that the two issues were so closely connected that it was impossible to consider one without the other.⁹² While the majority relied on *Ex parte Young*⁹³ to assert that the Eleventh Amendment does not bar suits against state officers,⁹⁴ the dissent contended that “the plurality dilutes the probative force behind that cornerstone decision by extrapolating it to allow federal courts to decide a property dispute between a State and one of its citizens, without the State’s consent.”⁹⁵

C. Action Against The State?

Whether the action is really against the state must be considered in

U.S. at 196. The most widely used type of salvage contract is the “no cure-no pay” contract by which the salvor only gets paid when he successfully completes a job—otherwise he gets nothing. Such a contract is universally enforceable, excepting invalidating causes such as fraud or duress. Gilmore, *supra* note 29, at 582.

89. Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. at 711. “The jurisdictional bar is not absolute and the state may consent to the suit in federal court. However, to constitute an express waiver the state must do more than merely allow suits to be brought in courts already having jurisdiction.” NOWAK, *supra* note 1, at 52.

90. Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. at 711-16. The validity or invalidity of the contract is the basis for the plurality’s whole opinion. *Id.* at 693-95. Unless the contracts were proven to be without any merit whatsoever, they should have been decided on the merits before the ownership issue was justly resolved. See *supra* note 88.

91. Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. at 703.

92. *Id.* Had the plurality first resolved the contracts/ownership issue, the Eleventh Amendment argument would have necessarily been decided. The resolution of one issue resolves the other. *Id.*

93. 209 U.S. 123 (1908).

94. Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. at 684. In *Ex parte Young* the Court ruled that a suit against a state official is not a suit against the state when the official acts under an unconstitutional state statute. The Court said that any such act by an official in attempting to use the state’s name to enforce a statute was void as unconstitutional. *Ex parte Young*, 209 U.S. at 157-59. Such conduct may be state action for Fourteenth Amendment purposes but not attributable to the state for Eleventh Amendment purposes. Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. at 705.

95. *Id.* at 704. The dissent contended that the plurality went too far in applying *Ex parte Young* to the instant case. While the plurality wanted to create a constitutional issue, the dissenters saw only a contract dispute to which the state was a party. *Id.*

light of the arguments advanced by both sides. Justice White asserted that Treasure Salvors sought enforcement on the original judgment, which was against the state of Florida.⁹⁶ The motion to command arrest of the treasure, initiated in an effort to enforce the judgment, caused Florida to be "privity to and bound by *Treasure Salvors I*."⁹⁷

White also noted that both parties' pleadings indicated that the action was against the state.⁹⁸ After the initial pleading, Treasure Salvors filed a supplemental complaint, requesting that the court rule "[t]hat the State has no right, title or interest" in the *Atocha* treasure.⁹⁹ In response, the district court issued an order directed against the state.¹⁰⁰ White concluded by observing that, as a rule, admiralty law rejects the distinction between *in rem* and *in personam* actions.¹⁰¹ The practical result of rejecting the distinction is to equate the *res* with the party which controls it. In this case, the state had possession of the artifacts. Therefore, an *in personam* action against property which is "arguably State-owned" is a suit directly against the state.¹⁰² This argument inevitably turns back to the question of the credibility of the salvage contracts.

The plurality, on the other hand, noted that Florida was not named as a party to the action or compelled to appear.¹⁰³ "Neither the fact that the State elected to defend on behalf of its agents, nor the fact that the District Court purported to adjudicate the rights of the State, deprived the federal court of jurisdiction that had been properly invoked over other parties."¹⁰⁴ The plurality contradicted itself here, stating that the district court "purported" to adjudicate the rights of the state.¹⁰⁵ If federal jurisdiction had been proper, however, the Eleventh Amendment immunity would have failed. The right of ownership would have then been

96. *Id.* at 704-05.

97. *Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978). In the district court, Treasure Salvors wanted to enforce the judgment against the state itself. It was the state's rights which were removed by the *United States v. Florida* decision, and it was the state which was bound by the district court's decision. The arrest and subsequent seizure of the artifacts were performed to enforce the district court's judgment. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 705.

98. *Id.*

99. *Id.*

100. *Id.* at 705-06. Florida submitted its Eleventh Amendment argument, but it was rejected by the district court. The pleadings directed to and answered by the state indicate that Treasure Salvors considered the action against the state. *Id.*

101. *Id.* at 710. Gilmore states that "the fiction of ship's personality has played a negligible role in the development of maritime lien law." GILMORE, *supra* note 29 at 614-15. The *in rem*, *in personam* jurisdiction distinction was rejected by Judge Learned Hand in *Burns Bros. v. Central R.R. of New Jersey*, 202 F.2d 910 (2d Cir. 1953). GILMORE, *supra* note 29, at 614-15, 804-05.

102. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 710-11; *see supra* note 101.

103. *Id.* at 691.

104. *Id.* at 691-92.

105. *Id.* at 692.

decided against the state, essentially affirming the "purported" adjudication of the district court. The fact that the contracts were invalid and that the United States had no claim to the treasure would seem to effectively place ownership of the items in Treasure Salvors.¹⁰⁶ Moreover, the dissent noted that "[i]t is settled that the Eleventh Amendment bars actions which are in effect against the State, even though the State is not the nominal party."¹⁰⁷ Assuming that the state has a colorable contract claim, a suit against state agents would implicitly address the state itself.

The plurality noted that the state had never argued that the contracts gave it a right of ownership in the treasure. Therefore, it had never actually claimed this right.¹⁰⁸ The plurality stated that "[t]he contracts did not purport to transfer ownership of any artifact to the State; they permitted Treasure Salvors to 'conduct underwater salvage from and upon . . . lands of and belonging to the State of Florida.'"¹⁰⁹ Nonetheless, the plurality here contradicted its earlier assertion that, in Stevens' words, "[t]he State of Florida immediately claimed that the *Atocha* belonged to the State. The State claimed ownership pursuant to Fla. Stat. § 267.061(1)(b) (1974)"¹¹⁰ The statute provides that "all treasure trove, artifacts and such objects . . . which have been abandoned on . . . state-owned land or sovereignty submerged lands shall belong to the state" (emphasis added by court).¹¹¹ Although the contracts did not explicitly state that Florida claimed the treasure, their intent and the circumstances surrounding their execution strongly imply that purpose.¹¹² In addition, two separate briefs filed by Florida expressly declared that the case was brought to decide the property rights and ownership of the artifacts.¹¹³

Both the plurality and the dissent applied some of the same cases to support their positions.¹¹⁴ Apparently, the Justices' preconceived notions of whether Florida's claim to the treasure was valid determined

106. *Id.*

107. Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. at 711 (citing Louisiana v. Jumel, 107 U.S. 711, 719-23, 727-28 (1883)).

108. *Id.* at 693.

109. *Id.* at 694; see *supra* note 17.

110. *Id.* at 673.

111. *Id.*; see *supra* note 17.

112. See *supra* notes 83, 84.

113. Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. at 712.

114. *Id.* at 685-716. In particular, the plurality and dissent used *In re New York (I)*, 256 U.S. 490 (1921) and *In re New York (II)*, 256 U.S. 503 (1921). *Id.* at 698-99; 708-09. In *In re New York (I)*, the plaintiff brought an *in rem* suit against vessels, chartered by the state of New York, which caused some damage. The Court held that the Superintendent of Public Works of the State of New York, against whom the action was really directed, was acting within his capacity and within constitutional law. The Eleventh Amendment stood firm. In the second case, an *in rem* action was brought under the same circumstances, but the vessel was owned by New York. The Court held that an *in rem* action was barred against state-owned property

which cases were used.¹¹⁵ In other words, the use of the cases depended upon the interpretation of language such as "owned by the State" and "State's property."¹¹⁶

D. State Action

The issue of whether the action is against the state is inexorably intertwined with that of whether the action of state agents is state action. More importantly, the question of whether acts committed were state acts depends to a large degree upon whether the contracts were valid.

The plurality noted that a suit against a state to recover real property does not become a suit against the state merely because state officers assert that they acted within their lawful capacities.¹¹⁷ Although a suit against such officers acting without legal authority is permitted, the subsequent award will not bind the state.¹¹⁸ Where the action is beyond legal authority, or within such authority but is unconstitutional, the Eleventh Amendment cannot be properly invoked.¹¹⁹ The plurality was careful to point out that a wrongful withholding of property within a given state power is state action.¹²⁰ The plurality further held that the action is protected unless the sovereign waives immunity or unless the action is an unconstitutional deprivation of property without due process.¹²¹

used for state purposes. *Id.* at 691-99. Justice Stevens indicated that neither case applied to the Treasure Salvors case. *In re New York (I)* did not apply because the state official acted under valid law. The second case stood for the proposition that an action barred *in personam* (in other words, against the state) could not be maintained by seizing state-owned property. *Id.* at 706-10. White disagreed, asserting that the cases applied in the instant case. They reflect the special admiralty concern "that maritime property of the sovereign is not to be seized." *In re New York (II)* is especially applicable because immunity does not fall even when the suit proceeds against the property and the owner is not an indispensable party. *Id.* at 706-10.

115. *Id.*

116. *Id.*

117. *Id.* at 686-87; Nowak, *supra* note 1, at 50, n.28.

118. Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. at 687-88 (citing *Tindal v. Wesley*, 167 U.S. 204 (1897)).

119. *Id.* at 689; see *United States v. Lee*, 106 U.S. 196 (1882); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Tindal v. Wesley*, *supra* note 119.

120. Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. at 689. The plurality quoted from *Larson v. Domestic & Foreign Commerce Corp.* :

[t]he mere allegation that the officer, acting officially, wrongfully withholds property to which the plaintiff has title does not meet [the requirement that the action to be restrained or directed is not action of the sovereign]. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers, the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented.

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. at 693. The plurality did not, however, believe that the instant case fit the *Larson* mold. *Id.*

121. Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. at 689, n.24.

The plurality's premise was that the contracts, invalid under an invalid Florida statute, did not give a colorable claim of possession to Florida.¹²² As a result, the actions of the agents constituted unconstitutional deprivation of property.¹²³

The dissenters also relied upon the validity of the contracts in asserting the legitimacy of the state agents' actions.¹²⁴ They cited one contract case, *Larson v. Domestic & Foreign Commerce Corp.*,¹²⁵ as particularly applicable.¹²⁶ The minority likened the instant case to the situation discussed in *Larson*.

III. CONCLUSION

This case is confusing. By virtue of the nature of the problems involved, the examination of one issue inevitably brings an examiner full circle. Each major disputed aspect of the case is hopelessly intertwined with the others. In view of this intertwining of issues, the position taken by the Court's dissenting faction was more consistent with the facts.

The case may be reduced to two dispositive issues: (1) validity of the contracts, and (2) the inseparable questions of state action and suit against the state. The contracts here were enough to give Florida a "colorable" claim to ownership of the treasure. Had this been established, the contracts should have been considered on the merits. By allowing the seizure of the *res*, the district court effectively decided that there was no colorable claim and that Florida did not own the treasure.

The plurality defied its own reasoning by reversing on the ownership issue. Stevens stated that the warrant merely secured possession but did not finally adjudicate the state's rights to the treasure. This is ironic, considering the ardent argument the plurality made regarding the invalidity of the contracts and state's claim to ownership.

Public policy may also have been an important factor and possibly served as a justifiable basis for the plurality's arguments. The plurality may have felt that Fisher, who had paid dearly for salvage success,¹²⁷

122. *Id.* at 692-93.

123. *Id.*

124. *Id.* at 711-13.

125. See *supra* notes 119, 120. In *Larson*, a private corporation brought suit in a federal district court against the administrator of a United States agency. Acting in his official capacity, he had contracted with the corporation to sell coal. He then breached the contract by not delivering and subsequently making a new contract with third parties. The Court allowed the Eleventh Amendment defense, since the administrator had acted within his capacity. The Court did not consider the issue of contract validity or whether the initial contract was breached. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682.

126. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 689, n.24.

127. See *supra* note 7 at 807, 809. Fisher had spent more than \$2 million on the salvage operation by the time the case was litigated. In addition, four people had been killed during

should not fall victim to oppressive state authority—especially under a seemingly questionable claim.

Florida Department of State v. Treasure Salvors, Inc. has had an uncertain impact on current law. It has become a new standard for the proposition that the Eleventh Amendment prevents federal courts from deciding state ownership of salvaged treasure without state consent.¹²⁸ Nevertheless, the opinion remains confusing and inconsistent—not surprising for a 5-4 plurality opinion. At best, the case may prompt a more careful deliberation of future controversies involving the invocation of the Eleventh Amendment.¹²⁹

Daniel J. Reat

the salvaging. An 11 year-old boy, visiting the wreck, was mortally wounded when accidentally caught in a boat propeller. Three of Fisher's crew drowned when a boat capsized, including one of his sons and a daughter-in-law. *Id.*

128. *Maritime Underwater Surveys v. Unidentified Vessel*, 717 F.2d 6 (1st Cir. 1983). (The court here noted that the Supreme Court has never defined "the precise contours of the Eleventh Amendment bar to admiralty jurisdiction . . ." *Id.* at 7); *Cobb Coin Co., Inc. v. Unidentified Vessel*, 549 F. Supp. 880 (E.D. Va. 1983); *Jupiter Wreck, Inc. v. Unidentified Sailing Vessel*, 691 F. Supp. 1377 (S.D. Fla. 1988). At least one court has adopted the three-part test used in *Treasure Salvors*. *Subaqueous Exploration v. Unidentified Wrecked Vessel*, 577 F. Supp. 597 (D. Md. 1983). (In *Subaqueous Exploration*, the court found that the Submerged Lands Act of 1953, 43 U.S.C. § 1301 *et seq.* and Md. Nat. Res. Code Ann. § 2-309 provided a colorable basis for Maryland's claim to three sunken vessels and their cargo. The court noted that the Maryland statute was "substantially similar to that Florida statute" discussed in *Treasure Salvors*. It quoted the dissent's view that the Florida statute was "an indisputable valid state statute, . . . providing title to treasure trove abandoned on state-owned submerged lands." *Subaqueous Exploration v. Unidentified Wrecked Vessel*, 577 F. Supp. at 608.

129. NOWAK, *supra* note 1, at 51, n.39. Nowak notes that it is difficult to distinguish *Florida Dept. of State v. Treasure Salvors, Inc.* from cases in which a restitution theory was rejected by the Supreme Court for money taken or withheld by the state on an unconstitutional basis.

It is possible that the Supreme Court . . . will find that the *Treasure Salvors* decision is used by lower federal courts to justify federal court jurisdiction over cases in which plaintiffs seek compensation from a state treasury for state interference with their property rights. If so, the Court may have to clarify, restrict, or reverse the *Treasure Salvors* ruling. *Id.*