

# **WILL FLORIDA'S NEW NET BAN SINK OR SWIM?: EXPLORING THE CONSTITUTIONAL CHALLENGES TO STATE MARINE FISHERY RESTRICTIONS**

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[Santiago] was sorry for the great fish that had nothing to eat and his determination to kill him never relaxed in his sorrow for him. How many people will he feed, he thought. . . . I do not understand these things . . . . [b]ut it is good that we do not have to kill the sun or the moon or the stars. It is enough to live on the sea and kill our true brothers.<sup>1</sup>

Today, very few fishermen harvest the sea with the same archaic tools used by Hemingway's noble protagonist. Gaffs and harpoons have long yielded to the more swift, more efficient and more profitable use of drift, gill and other entangling nets which snare virtually anything unfortunate enough to encounter them<sup>2</sup> More recently though, repercussions of this indiscriminate and extremely resourceful method of fishing are generating a mass wave of social, political and environmental awareness; the widespread collapse of specific fisheries, the disruption in the aquatic foodchain, and the increased "by-catch" of non-targeted marine species are prompting nationwide campaigns aimed at curtailing or altogether prohibiting the use of entanglement nets in coastal waters. Preservation and

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1. ERNEST HEMINGWAY, *THE OLD MAN AND THE SEA* 75 (MacMillan 1986) (1952).

2. A gill net consists of one or more walls of netting constructed of light, limp transparent monofilament line tied into square openings of various "mesh" sizes. Capture is accomplished when a fish swims through the mesh; as only the head fits into the opening, the plastic line slips under the fish's gills, thereby compressing the gills and eventually suffocating the fish. Often exceeding six football fields in length, gill nets are typically thrown overboard and suspended vertically by means of a buoy and lead weight at each end. The net is dispensed as the fisherman motors along. Later, it is pulled back aboard the boat for retrieval of the entangled fish.

Unlike the gill net, a drift net is not anchored to the sea floor and instead drifts with the current, ensnaring its prey in much the same manner. Other entangling nets commonly used in the commercial fishing industry include: the trammel net, a cousin to the gill net formed by hanging three walls of mesh to a single float and lead line; and the stab net, which operates with heavy weights that sink the net to the lower portion of the water column and render it invisible from the surface. Stab nets are frequently used near the mouths of creeks and channels and remain in place for an extended period of time. Robin Smillie & Biff Lampton, *Dictionary of Destruction*, *FLORIDA SPORTSMAN*, Oct. 1994, at 37-38.

proper management of these important resources are top priority. But in this flood of environmental consciousness and the legislation it is propagating, the livelihood of commercial fishermen is taking a considerable beating. Nets are indispensable to the commercial fisherman's way of life, and with minimal vocational skills, many of these fishermen fear net bans as a grim road to unemployment. Nevertheless, subtract net bans from any coastal community's agenda and the road will lead to unemployment and much more.

On November 8, 1994, the voters of Florida settled the fate of their state's marine resources by passing a constitutional amendment prohibiting the use of entangling nets in all Florida waters, as well as other nets larger than 500 square feet of mesh area in nearshore and inshore waters.<sup>3</sup> The amendment, effective July 1, 1995, reflects the

3. Article X of the Florida Constitution is effectively amended to read as follows:

Section 16. Limiting Marine Net Fishing

(a) The marine resources of the State of Florida belong to all of the people of the state and should be conserved and managed for the benefit of the state, its people, and future generations. To this end the people hereby enact limitations on marine net fishing in Florida waters to protect saltwater finfish, shellfish, and other marine animals from unnecessary killing, overfishing and waste.

(b) For the purpose of catching or taking any saltwater finfish, shellfish or other marine animals in Florida waters:

(1) No gill nets or other entangling nets shall be used in any Florida waters; and

(2) In addition to the prohibition set forth in (1), no other type of net containing more than 500 square feet of mesh area shall be used in nearshore and inshore Florida waters. Additionally, no more than two such nets, which shall not be connected, shall be used from any vessel, and no person not on a vessel shall use more than one such net in nearshore and inshore Florida waters.

(c) For purposes of this section:

(1) "gill net" means one or more walls of netting which captures saltwater finfish by ensnaring or entangling them in the meshes of the net by the gills, and "entangling net" means a drift net, trammel net, stab net, or any other net which captures saltwater finfish, shellfish, or other marine animals by causing all or part of heads, fins, legs, or other body parts to become entangled or ensnared in the meshes of the net, but a hand thrown cast net is not a gill or an entangling net;

(2) "mesh area" of a net means the total area of netting with the meshes open to comprise the maximum square footage. The square footage shall be calculated using standard mathematical formulas for geometric shapes. Seines and other rectangular nets shall be calculated using the maximum length and maximum width of the netting. Trawls and other bag type nets shall be calculated as a cone using the maximum circumference of the net mouth to derive the radius, and the maximum length from the net mouth to the tail end of the net to derive the slant height. Calculations for any other nets or combination type nets shall be based on the shapes of the individual components;

(3) "coastline" means the territorial sea base line for the State of Florida established pursuant to the laws of the United States of America;

(4) "Florida waters" means the waters of the Atlantic Ocean, the Gulf of Mexico, the Straits of Florida, and any other bodies of water under the jurisdiction of the State of Florida, whether coastal, intracoastal or inland, and any part thereof; and

long-awaited outcome of an extensive statewide campaign by many Floridians who, frustrated by politicians' inaction on the issue, felt the time was ripe to enact conservation measures to protect Florida's valuable sealife.<sup>4</sup> The pre-amendment controversy essentially boiled down to a hot debate between recreational and commercial fishermen, the tension best explained by the respective mottos: "Save our Sealife" versus "Save Our Jobs."<sup>5</sup> Recreational fishermen emphasized the need to protect disappearing fish resources from the zealous activities of environmentally-careless fishermen trying to earn the biggest buck for the biggest catch. Commercial fishermen presented a very different dilemma—the need to protect citizens struggling to pursue their only means of livelihood against the activities of avid sportslovers just playing for food.<sup>6</sup>

Although recreational fishermen indeed won the battle, the war is far from over. Florida's initiative amendment is sure to spawn the legion of constitutional challenges that other states in Florida's posture are now braving. California, Georgia, New York, South Carolina, Texas and many of the Great Lake States are among a growing class of coastal communities that outlaw the use of entangling nets in their fresh and salt waters.<sup>7</sup> The purpose of this article, therefore, is to

(5) "nearshore and inshore Florida waters" means all Florida waters inside a line three miles seaward of the coastline along the Gulf of Mexico and inside a line one mile seaward of the coastline along the Atlantic Ocean.

(d) This section shall not apply to the use of nets for scientific research or governmental purposes.

(e) Persons violating this section shall be prosecuted and punished pursuant to the penalties provided in section 370.021(2)(a),(b), (c)6. and 7., and (e), Florida Statutes (1991), unless and until the legislature enacts more stringent penalties for violations hereof. On and after the effective date of this section, law enforcement officers in the state are authorized to enforce the provisions of this section in the same manner and authority as if a violation of this section constituted a violation of Chapter 370, Florida Statutes (1991).

(f) It is the intent of this section that implementing legislation is not required for enforcing any violations hereof, but nothing in this section prohibits the establishment by law or pursuant to law of more restrictions on the use of nets for the purpose of catching or taking any saltwater finfish, shellfish, or other marine animals.

(g) If any portion of this section is held invalid for any reason, the remaining portion of this section, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application.

(h) This section shall take effect on the July 1 next occurring after approval hereof by vote of the electors.

**FLA. CONST. art. X, § 16 (as amended by ballot Nov. 8, 1994).**

4. Editorial, *Signatures for Sealife*, ST. PETE. TIMES, July 6, 1994, at I4A; Bob Epstein, *Coalition Seeks Ban on Gill Net Fishing*, MIAMI HERALD, Oct. 22, 1992, at 1B.

5. See Jeff Klinkenberg, *Both Sides of the Net*, ST. PETE. TIMES, Oct. 23, 1994, at F1-3.

6. *Id.*

7. See CAL. CONST. art. XB; CAL. FISH AND GAME CODE § 8610.3 (West 1990); GA. CODE ANN. §§ 27-4-7,-114,-133 (Michie 1993); N.Y. ENVTL. CONSERV. LAW §§ 13-0341,-0343 (McKinney

survey the constitutional challenges to those states' fishery regulations so that we may better assess the viability of Florida's newly enacted net ban.<sup>8</sup>

## I. THE POWER TO REGULATE FISHERIES

### A. General Powers of the State

Until reduced to a fortunate fisherman's possession, free-swimming fish within a sovereign's territorial waters remain public property. As Justice Marshall wrote in *Douglas v. Seacoast Products*:<sup>9</sup>

[I]t is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture.<sup>10</sup>

The decision removed much of the confusion surrounding the "ownership" rationale prevalent in earlier cases,<sup>11</sup> which Justice Marshall characterized as "no more than a 19th century legal fiction expressing the 'importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'"<sup>12</sup>

The state, often by constitutional mandate, shoulders the responsibility of preserving its resources for the benefit of all its citizens. Indeed, Florida's very constitution declares it the policy of the state to "conserve and protect its natural resources and scenic beauty."<sup>13</sup> Some of this responsibility is legislatively relegated to the Marine Fisheries Commission and the Game and Fresh Water Fish Commission, both of which possess some rule-making authority with respect to Florida's marine life.<sup>14</sup> Many environmentalists, however, accuse state

1984); OHIO REV. CODE ANN. §§ 1533.45,.54 (Anderson 1990); S.C. CODE ANN. §§ 50-17-410,-422,-440 (Law. Co-op. 1976); TEX. PARKS AND WILDLIFE CODE ANN. § 66.006 (West 1994).

8. The constitutional amendment is not Florida's first attempt at restricting or prohibiting the use of entangling nets in its coastal waters. Regulations to this effect have been promulgated and enforced in local regions. See FLA. STAT. §§ 370.08,.082,.0821 (1993) (outlawing the use of certain nets in designated counties). While none have the amendment's geographical magnitude, they seek an identical goal and any judicial decisions which bear on their constitutional validity will be discussed in this article.

9. 431 U.S. 265 (1977).

10. *Id.* at 284.

11. See *Manchester v. Massachusetts*, 139 U.S. 240, 259-60 (1891) (states have an ownership interest in territorial waters and the fish within those waters); *McCready v. Virginia*, 94 U.S. 391, 395 (1876) ("There has been no . . . grant of power over the fisheries [to the United States.] These remain under the exclusive control of the State . . .").

12. *Douglas*, 431 U.S. at 284 (citations omitted).

13. FLA. CONST. art. II, § 7.

14. See FLA. STAT. §§ 370.026,.027 (1993) (Marine Fisheries Commission); FLA. STAT. §§ 372.0225,.0651,.07,.072 (1993) (Game and Fresh Water Fish Commission). Their responsibilities

politicians of having largely ignored their responsibilities in this area.<sup>15</sup>

Given the potential for misuse, waste or eradication of a state's fisheries and wildlife, regulation by the state is critical. A state's regulatory power, however, is by no means absolute. Measures chosen by a state legislature when fostering socially, environmentally and economically-desirable goals are still governed by constitutional principles.<sup>16</sup> Not surprisingly, then, courts have entertained a host of constitutional assaults on fishery regulations: takings claims, equal protection challenges and alleged Commerce Clause violations are among the notable few. Such constitutional challenges are sure to follow in the wake of Florida's recent net ban, but net ban proponents need not be too concerned. Individuals bringing fishery legislation under the judicial microscope have been largely unsuccessful when trying to invalidate such legislation on constitutional grounds. Courts consistently uphold fishery regulations, recognizing a state's superseding interest in protecting and preserving its dwindling supply of marine resources.<sup>17</sup>

### B. *Exercise by the People*

What makes Florida's net ban particularly distinct from most regulatory measures is the means by which it was enacted. To effect the statewide ban, the people of Florida took action pursuant to Article XI, section 3, of the state constitution,<sup>18</sup> which reserves to the people the power to propose constitutional amendments by

and the extent of their powers will not be addressed in this article, as Florida's net ban was promulgated not by legislative and administrative bodies, but through a constitutional amendment initiated and adopted by the people of Florida.

15. See FLORIDA CONSERVATION ASSOCIATION, WHY AMEND THE CONSTITUTION TO LIMIT MARINE NET FISHING (1993). To mirror Florida's constitutional commitment to its natural resources, the Florida legislature has statutorily announced "the policy of the state to be management and preservation of its renewable marine fishery resources . . . emphasizing protection and enhancement of the marine and estuarine environment in such a manner as to provide for optimum sustained benefits and use to all the people of this state for present and future generations." FLA. STAT. § 370.025 (1993).

16. See generally, 36A C.J.S. *Fish* § 26, at 535 (1955) ("The power of a state to regulate fisheries in the waters of the state is plenary, and is subject only to such limitations as may be imposed by constitutional provisions . . .").

17. See *New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303 (2d Cir. 1994); *Louisiana ex rel. Guste v. Verity*, 853 F.2d 322 (5th Cir. 1988); *Burns Harbor Fish Co. v. Ralston*, 800 F. Supp. 722 (S.D. Ind. 1992); *State v. Raffield*, 515 So. 2d 283 (Fla. Dist. Ct. App. 1987), *approved*, 565 So. 2d 704 (Fla. 1990), *cert. denied*, 498 U.S. 1025 (1991); *State v. Perkins*, 436 So. 2d 150 (Fla. Dist. Ct. App. 1983); *Fulford v. Graham*, 418 So. 2d 1204 (Fla. Dist. Ct. App. 1982); *Anthony v. Veatch*, 220 P.2d 493 (Or. 1950); *Morgan v. State*, 470 S.W.2d 877 (Tex. Crim. App. 1971); *Washington Kelpers Ass'n v. State*, 502 P.2d 1170 (Wash. 1972), *cert. denied*, 411 U.S. 982 (1973); *State v. Moses*, 483 P.2d 832 (Wash. 1971), *cert. denied*, 406 U.S. 910 (1972).

18. FLA. CONST. art. XI, § 3.

initiative.<sup>19</sup> The initiative process is one course available to the people to enact, independent of the legislative assembly, measures where the legislature has apparently failed or declined to act.<sup>20</sup> Although legislation by initiative is not the workmanship of the state's appointed legislative body, laws enacted pursuant to the initiative process are accorded equal dignity as those passed by the legislature.<sup>21</sup>

Accordingly, because the legislature is given great judicial deference when passing laws, and those laws carry a presumption of validity, the people, as a coordinate legislative body with co-extensive legislative power, similarly share that deference, and the measures enacted pursuant to its power possess the same presumption.<sup>22</sup>

Of course, constitutional limitations like those imposed on the legislature are equally obligatory on the people.<sup>23</sup> As the United States Supreme Court reminded the citizens of Akron, Ohio, in *Hunter v. Erickson*<sup>24</sup> when they sought to amend a city charter, "[t]he sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed."<sup>25</sup> Consonant with this declaration, then, is that Florida's initiative net ban is not insulated from the various constitutional analyses simply because it is a product of direct democratic decisionmaking. Its provisions shall be probed with the same judicial scrutiny that regulations promulgated by legislative and administrative assemblies must endure.<sup>26</sup>

19. *Id.*

20. See generally, 82 C.J.S. *Statutes* §§ 115-116 (1953).

21. See *Wyoming Abortion Rights League v. Karpan*, 881 P.2d 281, 285 (Wyo. 1994) ("Through the initiative, the people are a coordinate legislative body with co-extensive legislative power exercising the same power of sovereignty in passing on measures as that exercised by the legislature in passing laws.") (citing 82 C.J.S. *Statutes* § 118 (1953)).

22. See *James v. Valtierra*, 402 U.S. 137, 141 (1971) ("[P]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."); see also *Anthony v. Veatch*, 221 P.2d 575, 576 (Or. 1950) (initiative act prohibiting the taking of certain fish was not shown to fail test of reasonableness and consequently presumption in favor of reasonableness would prevail).

One author commenting on the *Valtierra* case characterized the decision as the first modern case in which the Supreme Court accorded state referendum and initiative schemes broad respect as illustrations of direct democracy. Ronald H. Rosenberg, *Referendum Zoning: Legal Doctrine and Practice*, 53 U. CIN. L. REV. 381, 400 (1984).

23. See, e.g., *State ex rel. Palagi v. Regan*, 126 P.2d 818, 826 (Mont. 1941) (stating that the people under their reserved power are no less subject to the constitution than is the legislative assembly).

24. 393 U.S. 385 (1969).

25. *Id.* at 392.

26. See *supra* notes 20-25.

## II. CONSTITUTIONAL CHALLENGES

### A. Equal Protection Claims

Scarce commodities such as marine resources are not sufficiently abundant to survive unrestricted taking by all competing users. Consequently, fishery conservation necessarily implies a system of allocation among competing users.<sup>27</sup> Preferably, allocation is accomplished by identifying who or what is responsible for the decline in fisheries (i.e., anglers, commercial fishermen, pollution, or coastal development), but the difficulty in assessing the causes and effects of the decline inevitably compels a no-fault approach toward fishery restoration and management.<sup>28</sup>

The ideal blueprint for any state regulatory scheme is one whose operation affects its citizens indiscriminately and evenhandedly. Nonetheless, the frustrating reality is that it is virtually impossible, irrespective of a legislature's good intentions, to frame fishery regulations in a way that equally affects all individuals.<sup>29</sup> For example, regulations imposing closed seasons on a particular species inevitably spark battles between fishermen of competing seafood industries. Similarly, regulations imposing gear restrictions also have a discriminatory effect, severely hindering those who employ the restricted gear while skirting others, even within the same industry, who use alternative but permissive methods to achieve the same end. Finally, fishery regulations deal an especially hard blow to the commercial fishing industry as a whole, while the recreational fishing industry remains relatively undisturbed.<sup>30</sup> Thus, it becomes obvious that framing fishing legislation is a difficult task. Fishing legislation unavoidably generates imprecise and unfair classifications. Though some classifications are admittedly tolerable, they cannot be so arbitrary or unreasonable as to infringe upon basic constitutional guaranties.<sup>31</sup> Yet, by virtue of their imprecision and disparate

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27. Robert B. Ditton, *A Social and Economic Assessment of Major Restrictions on Marine Net Fishing*, May 15, 1994, at 25 (report prepared for the Florida Conservation Association).

28. *Id.*

29. See *State v. Terrell*, 303 S.W.2d 26, 28 (Mo. 1957) ("[N]o fishing regulation could be so framed as to operate equally on all persons.").

30. In *Organized Fishermen of Florida v. Florida Marine Fisheries Comm'n* (DOAH 86-2716R), 8 FALR 5537 (1986), *rev'd in part*, 503 So. 2d 935 (Fla. Dist. Ct. App. 1987), commercial fishermen argued that the proposed restrictions on redfish would put them out of work such that recreational fishermen could have all the redfish taken from state waters.

31. *Harper v. Galloway*, 51 So. 226, 228 (Fla. 1910); *State v. Terrell*, 303 S.W.2d 26, 28 (Mo. 1957).

allocation among competing users, fishery regulations remain a prime target for equal protection claims.

The course that equal protection challenges follow today largely springs from the United States Supreme Court's decision in *Skiriotes v. Florida*,<sup>32</sup> a case involving the forbidden use of diving apparatus for the taking of commercial sponges. The *Skiriotes* court declared that a statute which applies equally to all persons within a state's jurisdiction is not repugnant to the Equal Protection Clause.<sup>33</sup> Decisions following *Skiriotes* similarly reject the notion that gear restrictions are violative of the Equal Protection Clauses of federal and state constitutions.<sup>34</sup> Such restrictions do not amount to unfair classifications or discriminate between persons, but only discriminate as to the appliances a fisherman may lawfully employ.<sup>35</sup> Gear restrictions apply uniformly to all fishermen, irrespective of the industry to which the user belongs; each user may operate the restricted gear (if at all) under exactly the same conditions and limitations as all other competing users. Therefore, since net bans treat alike all users similarly circumstanced—irrespective of their commercial or recreational status—and subject users to the same sanctions, net bans are not violative of equal protection guaranties.<sup>36</sup> Any disparate effect is merely incidental.

Most commercial fishermen hardly view the disparate effects as incidental. Typically, commercial fishermen bear the burden and expense of net restrictions, while their recreational counterparts seemingly elude comparable accountability. For these reasons, many commercial fishermen challenge net bans as a denial of equal protection under the law.

Before addressing the merit of these claims, however, one must first understand the groundwork for equal protection challenges. Challenges grounded on the Fourteenth Amendment<sup>37</sup> of the United States Constitution proceed under the three-tier analysis established by the United States Supreme Court. Where legislation addresses a suspect class (i.e., those based on race, national origin or alienage) or

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32. 313 U.S. 69 (1941).

33. *Id.* at 75.

34. *Louisiana ex rel. Guste v. Verity*, 853 F.2d 322 (5th Cir. 1988); *LaBauve v. Louisiana Wildlife & Fisheries Comm'n*, 444 F. Supp. 1370 (E.D. La. 1978); *State v. Raffield*, 515 So. 2d 283 (Fla. Dist. Ct. App. 1987); *State v. Perkins*, 436 So. 2d 150 (Fla. Dist. Ct. App. 1983); *Morgan v. State*, 470 S.W.2d 877 (Tex. Crim. App. 1971); *Washington Kelpers Ass'n v. Washington*, 502 P.2d 1170 (Wash. 1972).

35. *Washington Kelpers Ass'n*, 502 P.2d at 1177 (quoting *Barker v. State Fish Comm'n*, 152 P. 537, 538 (Wash. 1915)).

36. See *supra* note 34.

37. U.S. CONST. amend. XIV, § 1, cl. 3.

interferes with a fundamental right (i.e., voting or exercising personal choices), strict scrutiny requires a compelling state interest, and the legislation must be narrowly tailored to serve that interest.<sup>38</sup> Classifications based on gender or illegitimacy invoke an intermediate level of review that will uphold legislation if it is fairly and substantially related to an important governmental interest.<sup>39</sup> Finally, if the classification calls for neither strict nor immediate scrutiny, then review proceeds under the "rational basis" test, requiring the legitimate state interest to be rationally related to the legislation's enactment.<sup>40</sup>

The status of fishermen and the rights they assert are not sufficient to warrant strict scrutiny. First, unlike recognized suspect classes, commercial fishermen have not experienced a "history of purposeful unequal treatment,"<sup>41</sup> nor have they been "political[ly] powerless as to command extraordinary protection from the majoritarian political process."<sup>42</sup> In fact, through persistent lobbying, organized fishermen associations have secured a very powerful voice in the political process. Second, the asserted right to earn a livelihood is merely an economic privilege that falls outside the company of fundamental rights which exact judicial scrutiny.<sup>43</sup>

The intermediate standard must similarly be rejected. Classifications emerging from gear restrictions are based not on gender or legitimacy, but rather on a chosen occupation and the means employed to pursue that occupation. Accordingly, all that remains is review under the "rational basis" test, and it is here that courts begin their inquiry.

### 1. *The "Legitimate Interest" Requirement*

Does a state have a legitimate objective in regulating its fishery resources, and is the conservation, protection and preservation of its marine life such an objective? The answer is invariably yes. Courts announce time and time again that a state does possess a legitimate

38. See, e.g., *Bullock v. Carter*, 405 U.S. 134 (1972) (right to vote is a fundamental right); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (race is a suspect class).

39. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976).

40. See, e.g., *Harris v. McRae*, 448 U.S. 297, 324 (1980).

41. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

42. *Id.*

43. See *Dandridge v. Williams*, 397 U.S. 471 (1970) (the right to pursue employment opportunities is not sufficiently fundamental as to warrant strict scrutiny); *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (the right to pursue a particular occupation is not fundamental for equal protection purposes); *LaBauve v. Louisiana Wildlife & Fisheries Comm'n*, 444 F. Supp. 1376 (E.D. La. 1978) (a fisherman's interest in the pursuit of livelihood is economic and is not fundamental within scope of the Equal Protection Clause).

interest in regulating its fisheries, and the protection and preservation of this valuable resource is an appropriate subject for legislative enactment.<sup>44</sup> "We consider the States' interests in conservation and protection of wild animals as legitimate local purposes similar to States' interests in protecting the health and safety of their citizens."<sup>45</sup>

As commercial fishing practices today yield higher landings to meet increased market demands, concerns as to the long term consequences of overfishing provide the catalyst for many fishery management schemes. Although the numbers are disputed, the alarming pace at which netting practices currently operate can have nothing less than an adverse impact on limited fish stocks. For example, in a recent survey conducted in the Tampa Bay region, commercial landings for menhaden increased almost twenty-fold from less than one-half million pounds in 1984 to eight million pounds in 1987.<sup>46</sup> However, menhaden landings declined very rapidly to one-half million pounds by 1989,<sup>47</sup> the sudden decrease likely explained as a result of commercial overharvesting. Similarly, the virtual collapse of the redfish and mackerel fishery in Florida, and the emergency rules which followed, further illustrate the devouring effects of commercial overharvesting.<sup>48</sup> Only after the Marine Fisheries Commission imposed a prohibition on the commercial harvest and sale of redfish and a corresponding one-fish limit on recreational anglers did redfish begin to reappear in Florida waters and recover from their near earlier demise.<sup>49</sup>

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44. See *supra* note 17.

45. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

46. FLORIDA CONSERVATION ASSOCIATION, COMMERCIAL LANDINGS OF SPANISH SARDINE, THREADFIN HERRING AND MENHADEN - TAMPA BAY REGION (July 1992). Sources of the report include fishery statistics from the National Marine Fisheries Commission, 1961-1985, and landings data from the Florida Department of Natural Resources, 1985-1991.

47. *Id.*

48. Florida Administrative Code provision 46-22.001 presently designates redfish as a protected species in Florida waters. FLA. ADMIN. CODE ANN. r. 46-22.001(3) (1991). The rules explicitly state that "[t]he purposes of this designation are to increase public awareness of the need for extensive conservation action in order to prevent this resource from becoming endangered and to encourage voluntary conservation practices." *Id.*

Similarly, in an effort to renew and assure the continuing health and abundance of the king mackerel fishery in Florida waters, the Marine Fisheries Commission adopted a number of restrictions, including bag and possession limits, regional season harvest limits, landing limits for commercial harvesters, and season closure for commercial harvesters. FLA. ADMIN. CODE ANN. r. 46-12.001 (1990). The measure was apparently prompted by evidence indicating that the king mackerel was dangerously depleted through excessive harvesting by commercial and recreational harvesters alike. FLA. ADMIN. CODE ANN. r. 46-12.001(1) (1990).

49. See Robin Smillie, *Redfish and the Nassau Sound Incident*, Aug. 1, 1994, at 4 (Special Report for the Florida Conservation Association).

An added shortcoming of commercial netting practices is the incidental capture or "by-catch" of unintended fish species and wildlife such as sea turtles and dolphins, which often meet their untimely deaths once entangled in fishermen's nets.<sup>50</sup> Despite claims by commercial fishermen that drift nets and gill nets are highly selective gear able to precisely earmark specific species, empirical evidence suggests otherwise.<sup>51</sup> As a rising number of abandoned "ghost" nets wash upon the coastal shores of Florida clutching the dead carcasses of turtles, crabs, sharks and other unintended fishes, the by-catch problem becomes all too real.<sup>52</sup>

When a state announces its interest in guarding against the evils of by-catch and the exploitation of its marine resources, controversy arises as to whether sufficient biological evidence exists to support conservation measures. Opponents of net bans maintain that until comprehensive scientific studies are conducted on entanglement nets and their effect on the underwater ecosystem, legislation cannot be adequately designed to tackle the causes of endangered, threatened or overexploited fisheries. Legislative bodies are often accused of having knee-jerk reactions to warnings by environmentalists that the aquatic community is in drastic peril, despite the lack of sound biological evidence showing reason for alarm. Most recently, several commentators criticized the United Nations General Assembly for terminating large-scale pelagic driftnets in high seas fishing without adequate scientific evidence to support its resolutions<sup>53</sup>

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50. See Dennis Cushman, *Controversy About Fishing Nets: Problems Surface After Whale's Death*, L.A. TIMES, Apr. 5, 1985, at B1. Beginning in 1980, the Pacific Region National Coalition for Marine Conservation had already reported 27 incidents over a five-year period of whales being entangled in gill nets off the coast of Southern California alone. Of the 27 whales, 18 died.

51. During an observer trip conducted in April of 1993 by the National Marine Fisheries Service (NMFS), the following list of species were landed and discarded in the course of one commercial netting operation targeting pompano: one bonnethead shark (dead); one nurse shark (released alive); one skate (dead); 250 pounds of ladyfish (discarded dead); 150 pounds of catfish (discarded dead); and three green sea turtles (all released alive). *NMFS Observer Trip 2*, conducted by Tim Brandt, Apr. 13, 1993.

52. The increased incidents of by-catch have prompted federal and state agencies to enact emergency measures aimed at reducing indiscriminate killings. In response to the increased fatalities of entangled green sea turtles, the Florida Marine Fisheries Commission, in 1991, adopted an emergency turtle protection rule which imposed a 600-yard net length limit, as well as a maximum one hour "soak" time requiring netters to begin retrieving their nets after one hour. FLA. ADMIN. CODE ANN. r. 46-4.0081(e) (1993). Similar measures were recently enacted on a federal level when the Commerce Department, through its National Marine Fisheries Commission, required shrimp trawlers in the Gulf and South Atlantic to install and use certified "turtle excluder devices" or "TEDs" in each of their trawl nets. 50 C.F.R. § 227.72(e) (1993).

53. William T. Burke et al., *United Nations Resolutions on Driftnet Fishing: An Unsustainable Precedent for High Seas and Coastal Fisheries Management*, 25 OCEAN DEV. & INT'L LAW 127 (1994).

Collecting sufficient evidence to corroborate conservation efforts, however, is somewhat troublesome. State and federal marine research dollars are minimal and actual research operations require the support and cooperation from commercial net fishermen.<sup>54</sup> Moreover, the accuracy of scientific evidence, particularly with respect to incidents of by-catch, is potentially skewed given the possibility that fishermen will alter their behavior when aware that their activities are being observed and recorded.

Notwithstanding the difficulties in securing reliable evidence, a state should not be required to sit idly by and watch the killing of its fisheries until there reaches a point where the state can unequivocally be concerned about fishery destruction. A state should be permitted to take prophylactic measures even before its natural resources appear threatened with extinction or before the state incurs substantial costs in maintaining or rehabilitating the resource.<sup>55</sup> The Magnuson Act<sup>56</sup> adopts a similar stance. Although standards under the Act require that conservation and management measures be based upon the "best scientific information available,"<sup>57</sup> the fact that scientific information is incomplete does not prevent the creation and implementation of fishery management plans.<sup>58</sup>

A government may not have marine preservation as its ultimate intention in enacting fishery regulations. Other legitimate objectives may also include promoting tourism, enhancing the public welfare,

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The authors noted that the UN General Assembly, in adopting the 1989 and 1991 resolutions, "disregarded the most basic canons of sound fisheries management, the use of best scientific data available and the conscious assessment of alternative means to achieve the conservation objective." *Id.* at 128. Apparently, the only scientific support cited for the UN's gear prohibitions was a single review of one high seas fishery in a particular part of the North Pacific Ocean. *Id.*

54. Robin Smillie, *Gill Nets and Ghost Nets: Indiscriminate Killing*, SEAWATCH: FLORIDA CONSERVATION ASSOCIATION SPECIAL REPORT, Aug. 1, 1994, at 1.

55. See *Burns Harbor Fish Co. v. Ralston*, 800 F. Supp. 722, 732 (S.D. Ind. 1992) (noting that even if the Indiana legislature relied upon erroneous information when enacting its gill net ban, this fact would not transform the legislature's otherwise rational decision into an irrational one).

56. Pub. L. No. 94-265, 90 Stat. 331 (1976) (codified in 16 U.S.C. §§ 1801-1882 (1988 & Supp. V 1993)). An in-depth review of the Magnuson Act is discussed *infra* at notes 147-74 and accompanying text.

57. 16 U.S.C. § 1851(a)(2) (1988).

Florida Statutes similarly provide that fishery conservation and management measures "shall be based upon the best information available, including biological, sociological, economic, and other information deemed relevant by the [Marine Fisheries Commission.]" FLA. STAT. § 370.025(2)(b) (1993).

58. 50 C.F.R. § 602.12(b) (1993); see also *National Fisheries Inst., Inc. v. Mosbacher*, 732 F. Supp. 210, 220 (D.D.C. 1990) ("[We] will not construe the Magnuson Act to tie the Secretary's hands and prevent him from conserving a given species of fish whenever its very nature prevents the collection of complete scientific information.").

encouraging public and private recreation, or maximizing the economic benefits that states typically enjoy from both the sports fishing and commercial fishing industries. But must a state's fishery regulation be directed exclusively toward conservation purposes or are these other objectives sufficiently legitimate? A regulatory scheme fostering multiple aims, one of which is conservation oriented, undoubtedly satisfies the rational relationship standard. Yet, is the same true where the legislative intent is solely economic? A state may be guided exclusively by economic policy and enact legislation that regulates its fish stocks in a manner yielding the greatest dollars for the state. Under an economically-driven model, the significance of marine resources is simply reduced to a cash value, and management and allocation of those resources are structured to favor the industry whose activities surrender the highest cash value.

To better understand this model, consider the economic importance of the recreational fishing industry in Florida. Recreational fishing is a tremendously popular sport. Its participants expend in the upwards of hundreds of millions of dollars each year<sup>59</sup> These expenditures alone account for much of Florida's billion dollar tourism industry and provide a wealth of jobs in the retail and service sectors.<sup>60</sup> Inevitably then, in a coastal community heavily dependent upon recreational fishing for income, fishery management and allocation are particularly susceptible to being shaped single-handedly by economic policy.<sup>61</sup> Where a law has as its sole underpinning an economic objective, the concern is that its enforcement inequitably favors one economic group to the detriment of a less resourceful economic group. Such economic favoritism, it is often argued, runs

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59. F.W. Bell et al., *The Economic Impact and Valuation of Saltwater Recreational Fisheries in Florida*, (Florida Sea Grant College Program, Gainesville) 1982.

60. One report estimates that roughly 5.6 million tourists participated in saltwater recreational fishing in Florida during 1991, accounting for about 16.5% of all tourists visiting the state. Coupled with the estimated \$1.3 billion spent by sportsfishing aficionados, the recreational fishing activities supported some 23,518 retail and service jobs and accounted for about \$235 million in wages for 1991. Additional expenditures in gasoline, sales and corporate income taxes also constituted new money for Florida's economy. Ditton, *supra* note 27, at 16 (citing F.W. Bell, *Current and Projected Tourist Demand for Saltwater Recreational Fisheries in Florida*, (SGR-111, Florida Sea Grant College Program, Gainesville) 1993.

61. As one commentator noted:

From an economic perspective, the recreational use of nearshore fishery resources is more valuable to the state of Florida than the commercial net fishery of these same resources. This should be sufficient to justify a reallocation of common property resources to the public for recreation and tourism purposes and to commercial fishermen willing to use hook and line gear in keeping with conservation objectives.

Ditton, *supra* note 27, at 26.

afoul of the constitution.<sup>62</sup> Very few courts agree.<sup>63</sup> Interestingly, Congress has already announced its position on the issue of economic favoritism in the very language of the Magnuson Act. The Act declares that "conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources, *except that no such measure shall have economic allocation as its sole purpose.*"<sup>64</sup>

Of course, the economic influences that direct a legislature to enact fishery regulations can similarly persuade a legislature not to enact these regulations. For instance, in an economy such as Alaska where the seafood industry accounts for almost ninety percent of the private sector income,<sup>65</sup> a passive legislature on the issue of marine resource management is more conducive to the economy. Quotas, closed seasons or gear restrictions may reduce the industry's intake and create corresponding setbacks to the state's economy. With total investment by the Alaskan seafood industry recently estimated at four billion dollars,<sup>66</sup> economic policy dictates that the fewer restrictions on the commercial industry the better.

But if economic concerns in this context are to be paramount, environmental concerns necessarily take a backseat. Under an economically-motivated policy, commercial fishermen are encouraged to maximize their intake of a state's fisheries in order to maximize economies to the state. They do so, however, at the expense of an

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62. Most recently, in *New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303 (2d Cir. 1994), a group of fishermen attacked a New York conservation law which altogether prohibited trawlers from taking, landing or possessing lobsters in state waters. The Trawlers Association argued that New York was constitutionally restrained from enacting legislation that simply promotes one economic interest or group over another, citing for support *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). The Second Circuit disagreed with the fishermen's reliance on *Moreno*, and instead recognized *Moreno* as standing for the proposition that "a bare [legislative] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." 16 F.3d at 1310 (citations omitted). The record in *Jorling* made no indication that harming the trawler fishermen was the sole legislative purpose behind the amendment. *Id.*

63. See *Sevin v. Louisiana Wildlife and Fisheries Comm'n*, 283 So. 2d 690, 695 (La. 1973) (dissenting opinion) (concluding that a law designed solely to enhance the economic position of one group over another is arbitrary and discriminatory and constitutionally impermissible).

64. 16 U.S.C. § 1851(a)(5) (1988) (emphasis added).

65. Were we to characterize Alaska as a separate nation, it would rank among the world's top ten in total fish harvest. *Implementation of the Fishery Conservation Amendments of 1990: Senate Hearing 102-1034 Before the National Ocean Policy Study of the Committee on Commerce, Science and Transportation*, 102 Cong., 2d Sess. 1034, at 45 (1992) (statement of David Benton, Director of External and International Fisheries Affairs, Alaska Dept. of Fish and Game).

66. *Id.*

environmental policy which urges the protection and conservation of those very same fisheries.<sup>67</sup>

## 2. *Less Intruding Alternatives?*

If a statute purportedly seeks to conserve the limited marine resources of a state's waters, then logically, regulations should target those fishermen making the most concentrated catches of fish. Fishermen who do not employ nets may fall within the purported classification (i.e. fishermen who make concentrated catches of fish), but by virtue of using permissible substitute gear, they are excluded from the statute's application. While one might characterize such a statute as being underinclusive, an underinclusive statute is not necessarily invalid simply because it ameliorates one evil but not another.<sup>68</sup> As courts have repeatedly emphasized, the Equal Protection Clause does not require that "all evils of the same genus be eradicated,"<sup>69</sup> nor does it require a legislature to choose between attacking every aspect of a problem or not attacking the problem at all.<sup>70</sup> Although other factors such as pollution, dredging, and oil and gas development damage the aquatic ecosystem, a legislature need not address these evils as well in order to sustain the validity of net restrictions.<sup>71</sup> It is for the legislature, not the judiciary, to decide which means of solving a particular problem is most consistent with

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67. See JOSEPH J. KALO ET AL., *COASTAL AND OCEAN LAW* 360 (1994). The authors theorize that an unregulated open access environment operates as a disincentive for any fisherman to conserve. Absent some assurance that competing fishermen will also act to conserve marine resources, there simply is no incentive for the individual fisherman to conserve the same resources.

The shortcomings of affording unrestricted access to a publicly-owned resource were discussed at length by Garrett Hardin in his renown essay entitled *Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968). The "commons dilemma" explained by Hardin presented a situation where herdsmen grazed livestock in a common pasture open to the public. To maximize each herdsman's economic gain, one may graze as many cattle as possible. Each herdsman has an incentive to increase herd size but the group will suffer as a whole when the combined actions of all herdsmen exceed resource capacity and result in depletion.

68. See *Phillips Chemical Co. v. Dumas School Dist.*, 361 U.S. 376, 385 (1960) ("Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this perfection is by no means required."); see also, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955); *Morgan v. State*, 470 S.W.2d 877, 880 (Tex. Crim. App. 1971) (concluding that because a statute allows other methods for taking fish does not place it in violation of the Equal Protection Clauses of the federal and state constitution).

69. *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1948); *LaBauve v. Louisiana Wildlife & Fisheries Comm'n*, 444 F. Supp. 1376, 1384 (E.D. La. 1978).

70. See *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955); *Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 333 (5th Cir. 1988).

71. See *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935) ("[T]he [government is] not bound to deal alike with all . . . classes, or to strike at all evils at the same time or in the same way.").

an overall scheme to conserve and manage valuable fisheries<sup>72</sup> The judiciary need only inquire into whether the regulation at issue is rationally based and conforms to the mandates of federal and state constitutions.<sup>73</sup> Consequently, the availability of less intruding and more class-inclusive alternatives does not, in itself, render net restrictions constitutionally defective under an equal protection analysis.

### B. Deprivation of Property Rights

Restrictions on access to marine resources may also precipitate legal challenges from a property standpoint, the grievance being that such restrictions impermissibly interfere with the right to pursue an occupation and deflate property values in fishing boats, licenses and fish-snaring devices.<sup>74</sup> These "property" rights, the argument goes, are given protection by the Fifth Amendment,<sup>75</sup> prohibiting governmental takings without just compensation, and by the Fourteenth Amendment,<sup>76</sup> providing that no person shall be deprived of life, liberty or property without due process of law. However, the property interests afforded protection by the Takings Clause are not necessarily co-extensive with those protected by the Due Process Clause.<sup>77</sup> Consequently, courts entertain a dual inquiry into whether the asserted right is a protectible property interest—one for takings purposes and a second for purposes of due process<sup>78</sup>

#### 1. Takings Claims

Netting restrictions have the undeniable effect of unraveling the small bundle of rights that commercial fishermen typically enjoy in their vessels, snaring devices and fishing licenses. Many net prohibitions, however, do not compel fishermen to actually relinquish their property to the state.<sup>79</sup> Fishermen can pursue alternative uses of the

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72. See, e.g., *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413 (1983) (courts must defer to legislative judgment as to necessity and reasonableness of a particular measure).

73. *Id.*

74. See *Burns Harbor Fish Co. v. Ralston*, 800 F. Supp. 722 (S.D. Ind. 1992).

75. U.S. CONST. amend. V, cl. 5.

76. U.S. CONST. amend. XIV, §1, cl. 3.

77. *Burns Harbor*, 800 F. Supp. at 726; *Reed v. Village of Shorewood*, 704 F.2d 943, 948 (7th Cir. 1983).

78. *Burns Harbor*, 800 F. Supp. at 726-29.

79. Some state statutes, however, will confiscate nets and other fishing gear where their use is prohibited by law and an individual is employing the device in violation of that law. See, e.g., GA. CODE ANN. § 27-4-7 (Michie 1993) (confiscating all nets violative of statute prohibiting use of gill nets in state waters).

regulated property provided such uses are not censured by the state. Legal challenges under the Takings Clause typically pivot then not upon any actual confiscation of property but upon the drastic diminution of the property's economic value.

Despite the financial hardships that may emerge from such regulations, economic restraints do not necessarily rise to an unconstitutional taking. In *Andrus v. Allard*,<sup>80</sup> the United States Supreme Court noted that loss of future profits, absent any physical restriction, is a weak foundation upon which to rest a takings claim.<sup>81</sup> Moreover, anticipated gains are traditionally viewed as less compelling than other property-related interests.<sup>82</sup> The "bundle of rights" that fishermen possess is by no means impervious to state interference. Personal property, in particular (as opposed to land), has historically been subject to rigorous state control and regulations which strip all economically viable use of that property are not presumably inharmonious with the Takings Clause.<sup>83</sup> As Justice Holmes observed: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."<sup>84</sup> The fisherman who purchases property to pursue a commercial livelihood necessarily assumes a risk that uses of his property may be abruptly restricted by a state exercising its legitimate police powers, as well as a risk that regulations enacted pursuant to that exercise may significantly diminish the worth of that property.<sup>85</sup> With society's spiraling concern for the environment, the risk is particularly high where use of the property poses significant environmental hazards.<sup>86</sup>

In line with this "assumption of the risk" approach is that a fisherman securing a license to engage in certain activities in state owned waters does not thereby acquire "property" that is protectible under the Takings Clause. As the Eleventh Circuit illuminated in *Marine One, Inc. v. Manatee County*,<sup>87</sup> "[p]ermits to perform activities on public land—whether the activity be building, grazing, prospecting, mining or traversing—are mere licenses whose revocation cannot rise to the level of a Fifth Amendment taking." Individuals possess no

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80. 444 U.S. 51 (1979).

81. *Id.* at 66.

82. *Id.*

83. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2899 (1992); *see also Andrus*, 444 U.S. at 66-67.

84. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

85. *See Andrus*, 444 U.S. at 66-67; *Anthony v. Veatch*, 220 P.2d 493, 506 (Or. 1950).

86. *Burns Harbor Fish Co. v. Ralston*, 800 F. Supp. 722, 726 (S.D. Ind. 1992).

87. 898 F.2d 1490, 1492-93 (11th Cir. 1990).

proprietary right in free-swimming fish,<sup>88</sup> nor do they possess an unfettered right to commercially harvest a state's waters for fish. However, a state may decide, pursuant to its inherent right to regulate its public resources, to grant individuals the licensed privilege of capturing fish, subject to such limitations as the state may legitimately exact.<sup>89</sup> Accordingly, any license for which the state has the power to "giveth" is subject to the state's concomitant power to "taketh" or, alternatively, to limit in a manner just short of wholesale prohibition<sup>90</sup> When a state acts upon these powers, any economic losses the licensee may incur do not amount to a taking which requires just compensation; the losses simply illustrate the expectant costs of doing business in the community.<sup>91</sup>

## 2. Statutory Compensation

Although the Fifth Amendment does not compel the government to compensate fishermen for their economic losses, some states, politically sensitive to these hardships, have incorporated buyout programs into their fishery regulations. California, for example, has sought to mitigate commercial netters' losses by offering a one-time compensation equal to the average annual ex vessel value of the fish formerly taken by gill and trammel nets.<sup>92</sup> To finance this buyout scheme, anglers are statutorily mandated to affix to their sportsfishing licenses a three dollar marine resources protection stamp<sup>93</sup> Other states such as New York and Ohio have similar compensation plans<sup>94</sup> The Florida legislature is presently considering the development of a service program designed to retrain commercial saltwater fishermen and others adversely affected by the passage of the constitutional amendment. Its recent appropriations bill contains proviso language directing the Florida Department of Labor and Employment Security

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88. *Douglas v. Seacoast Products*, 431 U.S. 265, 284 (1977).

89. See generally, 36A C.J.S. *Fish* § 36 (1955).

90. *Burns Harbor*, 800 F. Supp. at 728.

91. See *Andrus*, 444 U.S. at 67; *Burns Harbor*, 800 F. Supp at 729.

92. CALIF. FISH AND GAME CODE § 8610.8 (West 1992).

93. CALIF. FISH AND GAME CODE § 8610.8(c) (West 1992).

94. In New York, gill netters affected by a fishing restriction were compensated through the proceeds of a three dollar special stamp imposed on anglers. Netters were paid one lump sum payment based on the average catch level times the average price over the best two years. Ditton, *supra* note 27, at 24. Similarly, in Ohio, the sale of fishing licenses helped accumulate \$2.4 million in unappropriated wildlife funds which were then used to support a buyout program. *Id.*

to use funds under the Economic Dislocated Worker Assistance Act<sup>95</sup> to institute such a plan.<sup>96</sup>

### 3. *Entitlement to Procedural Due Process*

While a fishing license does not qualify as a "property interest" for purposes of the Fifth Amendment, it nevertheless has sufficient property attributes for purposes of the Due Process Clause of the Fourteenth Amendment.<sup>97</sup> A person must pay for a license to fish. Because that very license entitles him to earn his living, and because he justifiably relies on that license when purchasing the tools for his trade, the license has value such that it merits protection by the Fourteenth Amendment. Licensing schemes, therefore, must be administered fairly. A state cannot arbitrarily and capriciously deny or revoke a fishing license so as to deny an individual due process<sup>98</sup> At the same time, however, licenses are not guaranteed by the Due Process Clause, and a state can alter the terms of licenses (or eliminate them altogether), if by doing so, it promotes a legitimate interest such as the public's health, safety, and general and economic welfare<sup>99</sup>

But if we determine that process is in fact due, the question then becomes: *How much* process is due? Some courts espouse the view that where the legislature enacts general laws eliminating statutory rights or otherwise adjusting the benefits and burdens of economic life, absent any substantive constitutional infirmity, the legislative determination affords all the process due.<sup>100</sup> Those same courts note that by accepting a license which conditions the privilege of fishing with the added proviso that the legislature may limit the type of equipment used to catch fish, the licensee impliedly agrees that it is entitled to no more process than that available through the legislative process.<sup>101</sup>

### C. *Limitations of the Commerce Clause*

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95. FLA. STAT. § 443.231 (1993).

96. 1994 Fla. Laws ch. 94-357, at 3169-70.

97. *Burns Harbor Fish Co. v. Ralston*, 800 F. Supp. 722, 730 (S.D. Ind. 1992); *LaBauve v. Louisiana Wildlife & Fisheries Comm'n*, 444 F. Supp. 1376, 1378-79 (E.D. La. 1978).

98. *New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1311 (2d Cir. 1994).

99. *Id.*

100. *See Atkins v. Parker*, 472 U.S. 115, 129-30 (1985) ("The procedural component of the Due Process Clause does not 'impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits. . . . The legislative determination provides all the process that is due.") (citations omitted); *see also Hoffman v. City of Warwick*, 909 F.2d 608, 619-620 (1st Cir. 1990); *Burns Harbor*, 800 F. Supp. at 730.

101. *Burns Harbor*, 800 F. Supp. at 731 n.13.

It was Chief Justice John Marshall who first enlightened us on the true might of the Commerce Clause when he spoke over a century ago in *Gibbons v. Ogden*:<sup>102</sup> "Commerce among the States cannot stop at the external boundary of each State, but may be introduced into the interior . . . and the power of Congress, whatever it may be, must be exercised within the territorial jurisdiction of the several States."<sup>103</sup> What *Gibbons v. Ogden* made clear, and what its progeny repeatedly emphasizes, is that Article I, section 8 of the United States Constitution confers upon Congress the exclusive power to regulate commerce among the several states;<sup>104</sup> and by virtue of this power bestowed upon Congress, the states' ability to reach and regulate interstate commerce is limited.<sup>105</sup>

As free-swimming fish migrate their way into the stream of commerce, state fishery regulations dictating how, when and where these fish may be accessed pose important considerations in the context of the Commerce Clause. The Constitution reminds the states, when enacting fishing legislation, to be cognizant of the constraints imposed on them by both the Supremacy and Commerce Clauses. A state cannot enforce local fishery restrictions which conflict with federal laws or which *impermissibly* burden interstate commerce. *Douglas v. Seacoast Products*<sup>106</sup> emphasized that "[t]he business of commercial fishing must be conducted by peripatetic entrepreneurs moving, like their quarry, without regard for state boundary lines."<sup>107</sup> Nevertheless, the limitations imposed by the Commerce Clause are by no means absolute; a state still retains some authority under its general police powers to regulate its fresh and saltwater boundaries in matters of legitimate local concern.<sup>108</sup> Socially, politically, and

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102. 22 U.S. (9 Wheat.) 1 (1824).

103. *Id.* at 194.

104. U.S. CONST. art. 1, § 8, cl. 3.

105. See *infra* notes 106-29.

Although the Constitution does not explicitly limit or prohibit state legislation in matters affecting commerce, the judiciary, beginning with *Gibbons*, has identified such limits as flowing by negative implication from the express grant to Congress to regulate commerce. Thus, even where Congress is not exercising its power under the Commerce Clause, the very existence of such power precludes states from legislating in matters restricting the flow of commerce. At the same time, though, the "dormant commerce clause" still leaves substantial room for the states to regulate in areas of legitimate local concern. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 266-74 (1983).

106. 431 U.S. 265 (1977).

107. *Id.* at 285.

108. See *Maine v. Taylor*, 477 U.S. 131 (1986) (Maine's ban on importation of live baitfish did not violate Commerce Clause where ban served legitimate state interest in protecting indigenous fish population from parasites in out-of-state baitfish); see also *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) ("We consider the States' interests in conservation and protection of

judicially, we recognize that the environmental protection and conservation of our marine resources meets that concern.

How do we decide, then, if and when a state has exceeded its role in regulating matters affecting interstate commerce? Resolution begins with an inquiry into the regulatory statute itself. Fishery statutes that affirmatively discriminate against interstate transactions, either facially or in practical effect, exact high judicial scrutiny, i.e., they must serve a legitimate local purpose that cannot be equally served by other available nondiscriminatory means.<sup>109</sup> Conversely, statutes that only *incidentally* burden interstate transactions violate the Commerce Clause if the burdens they impose are "clearly excessive in relation to the putative local benefits."<sup>110</sup> A sparse number of fishery regulations tumble into the first grouping; those dropping into the second repeatedly surface with passing marks.

### 1. Discriminatory Statutes

In 1948, the United States Supreme Court confronted a South Carolina statute which required owners of shrimp boats fishing in the state's maritime belt to dock at state ports and unload, pack and stamp their catch before transporting it to a fellow state.<sup>111</sup> In deciding the case of *Toomer v. Witsell*, the Supreme Court suspiciously studied South Carolina's eagerness to stimulate employment and income within its own shrimp industry by diverting business which would have otherwise gone to neighboring states.<sup>112</sup> Costs to foreign fishermen were materially increased by the requirement of having their shrimp unloaded and packed in South Carolina ports rather than at their home bases in Georgia where they maintained their own docking, warehousing and packing facilities.<sup>113</sup> Sensitive to the all too familiar evil of economic protectionism—shielding in-state economies from out-of-state competition—the Court struck down the statute as an impermissible burden on interstate commerce.<sup>114</sup>

Another discriminatory state statute arose in the 1979 case of *Hughes v. Oklahoma*,<sup>115</sup> in which the state of Oklahoma forbade the out-of-state transportation of its natural minnows. Oklahoma

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wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens.").

109. See *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

110. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

111. *Toomer v. Witsell*, 334 U.S. 385 (1948).

112. *Id.* at 403-04.

113. *Id.*

114. *Id.* at 406.

115. 441 U.S. 322 (1979).

maintained that the statute served the legitimate local purpose of preserving the ecological balance of its waters that would otherwise be jeopardized by the removal of inordinate numbers of natural minnows for sale in other states.<sup>116</sup> In response, the Supreme Court concluded that while Oklahoma's interest possibly qualified as a legitimate local purpose, the state nonetheless chose to "'conserve' its minnows in the way that most overtly discriminate[d] against interstate commerce."<sup>117</sup> Oklahoma imposed no limits on the numbers of minnows which could be taken by licensed minnow dealers and similarly placed no limits on the means by which minnows could be disposed of within the state. In invalidating the statute, the *Hughes* court underscored the principle that "when a wild animal 'becomes an article of commerce . . . its use cannot be limited to the citizens of one State to the exclusion of citizens of another State.'"<sup>118</sup>

A few years later, the Supreme Court took a surprising turn in *Maine v. Taylor*<sup>119</sup> when it declared as constitutional a Maine statute which prohibited the importation of live baitfish into the state. Oddly enough, the Court characterized the statute as restricting interstate trade "in the most direct manner possible."<sup>120</sup> In exacting the highest scrutiny, the Court held that Maine's ban on the importation of live baitfish served legitimate concerns given the potentially damaging effects that baitfish parasites would have on the state's population of wild fish.<sup>121</sup> Additionally, the Court concluded that Maine's ecology concerns could not be adequately served by any available nondiscriminatory alternatives, particularly since screening procedures for baitfish parasites were largely unreliable.<sup>122</sup>

In a dissenting opinion, Justice Stevens, noting "something fishy about this case," took issue over the finding that alternative non-discriminatory procedures were unavailable.<sup>123</sup> Maine was the only state flatly prohibiting imported baitfish; other states, sharing Maine's interest in the health of their fish and ecology, had developed far less restrictive procedures. Stevens remarked, in closing, that Maine had engaged in obvious discrimination against out-of-state commerce, and accordingly should have been put to its proof.<sup>124</sup>

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116. *Id.* at 337.

117. *Id.* at 338.

118. *Id.* at 339.

119. 477 U.S. 131 (1986) (citations omitted).

120. *Id.* at 137.

121. *Id.* at 151-52.

122. *Id.*

123. *Id.* at 152.

124. *Id.*

## 2. *Less-Intrusive Statutes*

The preceding cases illustrate the more egregious interferences that fishing legislation can effect on commerce, but most regulatory schemes aimed at preserving marine resources are upheld as incidental burdens on interstate commerce.<sup>125</sup> For example, conservation laws prohibiting trawlers from taking, landing or possessing lobsters,<sup>126</sup> forbidding the taking of food fish with the use of certain fishnets,<sup>127</sup> or banning the importation of undersized shrimp taken outside of territorial waters<sup>128</sup> have all been declared consistent with the Commerce Clause. Courts consistently hold that whatever incidental impacts such regulatory schemes may have on interstate transactions, they fall outside the purpose of, and are insufficient to invalidate, conservation laws.<sup>129</sup> State fishery conservation and management plans (by their very name) steer for the protection of the aquatic ecosystem against the devouring effects of commercial fishing operations. Such plans do not profess to interfere with navigation; fishing vessels may, with considerable impunity, cross in and out of state waters. Nor does economic protectionism rear its ugly head; conservation measures are evenhandedly directed and enforced against all fishermen, residents and nonresidents alike, who overexploit or otherwise destroy a state's precious fisheries.

In conclusion, the trend in affording states considerable latitude under the Commerce Clause reflects the judiciary's awareness of the dangers that may unfold if coastal waters were to go wholly unregulated. Tying the hands of states in this respect would eventually lead to a total depletion of our fishery resources. Commerce would surely feel that effect.

### *D. Pre-Emption and the Supremacy Clause*

In addition to the Commerce Clause, attacks on fishery legislation frequently summon the edicts of the Supremacy Clause as well. Embodied in Article VI, clause 2, the Supremacy Clause states that the laws of the United States (including properly enacted federal

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125. The following legislative schemes were all declared as incidental burdens on interstate commerce clearly non-excessive in view of the local putative benefits: *New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303 (2d Cir. 1994); *State v. Millington*, 377 So. 2d 685, 688 (Fla. 1979); *State v. Raffield*, 515 So. 2d 283 (Fla. Dist. Ct. App. 1987); *Fulford v. Graham*, 418 So. 2d 1204 (Fla. Dist. Ct. App. 1982); *Commonwealth v. Trott*, 120 N.E.2d 289 (Mass. 1954); *Ampro Fisheries, Inc. v. Yaskin*, 606 A.2d 1099 (N.J.), *cert. denied*, 113 S. Ct. 409 (1992).

126. *New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303 (2d Cir. 1994).

127. *State v. Raffield*, 515 So. 2d 283 (Fla. Dist. Ct. App. 1987).

128. *State v. Millington*, 377 So. 2d 685, 688 (Fla. 1979).

129. *See supra* notes 125-28.

regulations) are the supreme law of the land,<sup>130</sup> and accordingly take precedence over state laws. The Supremacy Clause is potentially a virile source for invalidating state restraints on fishing activities—particularly with the enactment of the Fishery Conservation and Management Act of 1976,<sup>131</sup> which as a federal decree, preempts state fishery schemes. To understand preemption challenges as they relate to fishery legislation, one should first explore the constitutional framework from which they emerge.

Pre-emption of state law by federal law can occur in several ways: when Congress expressly defines the extent to which it intends to preempt state law;<sup>132</sup> when it evidences an intent to occupy an entire field of regulation;<sup>133</sup> or when state and federal laws are in actual conflict.<sup>134</sup> Actual conflict arises when it is impossible to comply with both federal and state law or similarly when state law impedes the accomplishment of congressional purposes.<sup>135</sup> Despite these guidelines, the issue of federal preemption in and outside of state territorial waters continues to generate considerable confusion.

### 1. Historical Background

#### a. Pre-MFMCA Era

Prior to the enactment of the Magnuson Fishery Conservation and Management Act (MFCMA or "Magnuson Act"),<sup>136</sup> the federal government remained largely indifferent to coastal fisheries, instead diverting most of its limited attention to fishing activities in foreign waters.<sup>137</sup> The scarcity of federal fishery regulations thereby enabled states to levy extensive control over domestic fishing operations, even

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130. U.S. CONST. art. VI, cl. 2.

131. Pub. L. No. 94-265, 90 Stat. 331 (1976) (codified in 16 U.S.C. §§ 1801-1882 (1988 & Supp. V 1993)). The official title of the Act was subsequently changed in 1980 to the Magnuson Fishery Conservation and Management Act.

132. See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

133. See, e.g., *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 713 (1985).

134. See, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

135. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 298 (1988); *Bateman v. Gardner*, 716 F. Supp. 595, 598 (S.D. Fla. 1989), *aff'd without opinion*, 922 F.2d 847 (11th Cir. 1990), *cert. denied*, 500 U.S. 932 (1991).

136. See *supra* note 132.

137. Eldon V.C. Greenberg & Michael E. Shapiro, *Federalism in the Fishery Conservation Zone: A New Role for the States in an Era of Federal Regulatory Reform*, 55 S. CAL. L. REV. 641, 642 (1982). For an in-depth discussion of the parameters of the states' authority over coastal fisheries prior to the MFCMA, see John Winn, Comment, *Alaska v. F/V Baranof: State Regulation Beyond the Territorial Sea After the Magnuson Act*, 13 B.C. ENVTL. AFF. L. REV. 281 (1986).

outside state territorial waters.<sup>138</sup> Provided a state had a legitimate interest in monitoring extraterritorial fisheries and providing that it demonstrated a sufficient basis for exercising jurisdiction over individual fishermen,<sup>139</sup> a state could regulate the conduct of its fishermen on the high seas. The state's power was constrained only by such constitutional limitations as those found in the Commerce, Supremacy and Equal Protection Clauses.<sup>140</sup>

The case of *Skiriotes v. Florida*<sup>141</sup> best illustrates the parameters of the States' regulatory power during this era. The statute at issue in *Skiriotes* forbade the use of diving suits, helmets and other equipment when harvesting commercial sponges from waters in and outside the territorial limits of Florida.<sup>142</sup> The defendant convicted under the statute challenged its validity, contending that the state had exceeded its power by imposing its jurisdiction in extra-territorial waters.<sup>143</sup> In response, the Supreme Court found no reason why a state could not govern the conduct of its citizens upon the high seas with respect to matters in which it held a legitimate interest and where the action did not conflict with federal legislation.<sup>144</sup> Because Florida demonstrated a legitimate interest in the proper maintenance of its sponge fishery, and no corresponding federal statute existed, the statute was upheld.<sup>145</sup>

Although descendants of *Skiriotes* later broadened the jurisdictional basis to include any fisherman having sufficient minimum contacts with the state,<sup>146</sup> the *Skiriotes* decision set an important precedent for state fishery legislation. *Skiriotes* provided the avenue for many states to regulate fishing activities—both in and outside state boundaries—that adversely affected the integrity of their marine ecosystems. That avenue narrowed, however, with the arrival of the Magnuson Act.

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138. Greenberg & Shapiro, *supra* note 137, at 642.

139. Initially, personal jurisdiction over individuals operating beyond the territorial sea was accomplished either through state citizenship or landing laws. See Greenberg & Shapiro, *supra* note 137. The case of *State v. Bundrant*, 546 P.2d 530 (Alaska), *appeal dismissed sub nom.*, *Uri v. Alaska*, 429 U.S. 806 (1976), provided a third basis for jurisdiction by extending authority over any individual having sufficient minimum contacts with the state. Greenberg & Shapiro, *supra* note 137, at 651-52.

140. Greenberg & Shapiro, *supra* note 137, at 649-56; see also, Winn, *supra* note 137, at 285.

141. 313 U.S. 69 (1941).

142. *Id.* at 70.

143. *Id.* at 75.

144. *Id.* at 77.

145. *Id.* at 78-79.

146. See *State v. Bundrant*, 546 P.2d 530 (Alaska), *appeal dismissed sub nom.*, *Uri v. Alaska*, 429 U.S. 806 (1976); see also Winn, *supra* note 137, at 291.

*b. Post-MFMCA Era*

The passage of the Magnuson Act<sup>147</sup> in 1976 signified a landmark victory for the nation's fisheries. Under the MFMCA, Congress established a regulatory scheme to promote the complementary goals of management and conservation of U.S. fishery resources. The Act vests the federal government with exclusive fishery management authority over all fish within the exclusive economic zone (EEZ),<sup>148</sup> an area extending from the seaward boundary of each of the coastal states to 200 miles offshore.<sup>149</sup> To accomplish its outlined tasks, the Magnuson Act sets up a network of eight regional management councils<sup>150</sup> assigned to adopt and administer Fishery Management Plans (FMPs) within the EEZ. Each Council is comprised of the principal state official holding the responsibility and expertise of marine fishery management for the constituent state; the regional director of the National Marine Fisheries Service (NMFS) for the concerned geographic area; and individuals appointed by the Secretary from the lists of qualified persons submitted by governors of the respective states.<sup>151</sup> Any FMPs prepared by the individual councils and any regulations promulgated to implement such plans must conform to the seven national standards set forth by Congress in the Act.<sup>152</sup> FMPs which successfully meet these requirements are then

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147. 16 U.S.C. § 1801 et seq. (1988 & Supp. V 1993).

148. 16 U.S.C. § 1811(a) (1988).

149. 16 U.S.C. § 1802(6) (1988).

150. 16 U.S.C. § 1852(a)(1)-(8) (1988 & Supp. V 1993). The eight councils are divided as follows: (1) New England Council (Maine, New Hampshire, Massachusetts, Rhode Island and Connecticut); (2) Mid-Atlantic Council (New York, New Jersey, Delaware, Pennsylvania, Maryland, and Virginia); (3) South Atlantic Council (North Carolina, South Carolina, Georgia and Florida); (4) Caribbean Council (Virgin Islands and Puerto Rico); (5) Gulf Council (Texas, Louisiana, Mississippi, Alabama and Florida); (6) Pacific Council (California, Oregon, Washington and Idaho); (7) North Pacific Council (Alaska, Washington and Oregon); and (8) Western Pacific Council (Hawaii, American Samoa, Guam and the Northern Mariana Islands).

151. 16 U.S.C. § 1852(b)(1),(2) (1988 & Supp. V 1993).

152. 16 U.S.C. § 1851(a)(1)-(7) (1988). Section 1851(a) identifies the national standards as follows:

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conser-

submitted to the Secretary of Commerce for ultimate approval and implementation.<sup>153</sup>

## 2. *Preemptive Effects in Federal Waters*

The exhaustive scope of federal fishery management plans and the preemptive status they enjoy leave fishermen, state regulators and courts alike to ponder and test the true force of the Magnuson Act.<sup>154</sup> At first blush, the Act seems to leave little room for state participation in federal offshore fisheries; its provisions state that the United States shall have *exclusive fishery management authority* over all fish and all Continental Shelf fishery resources within the exclusive economic zone.<sup>155</sup> The MFMCA further confines the states' extra-territorial jurisdiction by prohibiting any state from directly or indirectly regulating any fishing vessel outside its boundaries, unless the vessel is registered under the laws of that State.<sup>156</sup> These jurisdictional constraints mark a significant departure from prior law which merely required a state to demonstrate a legitimate exercise of its extra-territorial jurisdiction; the MFMCA effectively abandoned the citizenship or "minimum contacts" tests employed earlier and replaced them with the singular jurisdictional requirement of vessel registration.<sup>157</sup>

By effectively crippling the states' regulatory powers over the ocean's fisheries, the MFCMA has serious preemptive implications for any state fishery scheme invading federal waters. In cases decided since the passage of the Act, state restrictions on access to fisheries

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vation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, promote efficiently in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

### *Id.*

153. 16 U.S.C. §§ 1852(h), 1854 (1988 & Supp. V 1993).

154. See *Davrod Corp. v. Coates*, 971 F.2d 778 (1st Cir. 1992); *Vietnamese Fishermen Ass'n of America v. California Dept. of Fish & Game*, 816 F. Supp. 1468 (N.D. Cal. 1993); *South eastern Fisheries Ass'n v. Martinez*, 772 F. Supp. 1263 (S.D. Fla. 1991); *Bateman v. Gardner*, 716 F. Supp. 595 (S.D. Fla. 1989); *People v. Weeren*, 607 P.2d 1279 (Cal.), *cert. denied*, 449 U.S. 839 (1980); *Livings v. Davis*, 465 So. 2d 507 (Fla. 1985); *Southeastern Fisheries Ass'n v. Department of Natural Resources*, 435 So. 2d 1351 (Fla. 1984); *State v. Raffield*, 515 So. 2d 283 (Fla. Dist. Ct. App. 1987).

155. 16 U.S.C. § 1811(a) (1988).

156. 16 U.S.C. § 1856(a)(3) (1988).

157. See *supra* notes 139-146 and accompanying text.

outside territorial limits typically surrender to the mandates of the Supremacy Clause.<sup>158</sup> For instance, in *Vietnamese Fishermen v. California Department of Fish & Game*,<sup>159</sup> the people of California sought to enforce a state ban (incidentally adopted by initiative) of gill and trammel nets in federal waters. As the governing federal body over offshore California waters, the Pacific Fishery Management Council previously addressed the issue of net restrictions by prohibiting such gear in all areas north of thirty-eight degrees north latitude.<sup>160</sup> The FMP was silent, however, as to netting activities occurring south of the geographical mark. Ban proponents sought an interpretation of the statute which would accord the state discretion to decide whether to allow gill nets south of thirty-eight degrees north latitude. The California court declined to adopt such an interpretation, instead noting that the federal law permitted gill nets in the disputed area while the state law prohibited them.<sup>161</sup> Concluding that the conflict between the two schemes justified preemption, the court enjoined the state from enforcing the ban in federal waters.<sup>162</sup> Tacit, then, in the *Vietnamese Fishermen* decision, and consonant with companion cases, is the principle that where a state fishery scheme is deemed irreconcilable or incompatible with a corresponding federal scheme, the state scheme must necessarily yield the right of way.<sup>163</sup>

Despite the congressional decision to assert exclusive federal jurisdiction over the fisheries in the EEZ, courts are split on whether the Magnuson Act allows state regulation in extraterritorial seas.<sup>164</sup>

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158. See *Vietnamese Fishermen Ass'n of America v. California Dept. of Fish & Game*, 816 F. Supp. 1468 (N.D. Cal. 1993) (state constitutional amendment which conflicted with federal regulations was preempted by the Magnuson Act); *Southeastern Fisheries Ass'n v. Martinez*, 772 F. Supp. 1263 (S.D. Fla. 1991) (Florida landing law which restricted catches of Spanish mackerel by Florida fishermen in EEZ conflicted with, and was preempted, by MFMCA); *Bateman v. Gardner*, 716 F. Supp. 595 (S.D. Fla. 1989) (Florida statute which prohibited shrimping where federal regulations allowed it was preempted by Magnuson Act); *State v. Sterling*, 448 A.2d 785 (R.I. 1982) (MFMCA preempted state restrictions on commercial fishing for flounder where corresponding federal regulations were already established).

159. 816 F. Supp. 1468 (N.D. Cal. 1993).

160. *Id.* at 1471.

161. *Id.* at 1475.

162. *Id.* at 1475-76.

163. See *supra* notes 158-62.

164. See, e.g., *Davrod Corp. v. Coates*, 971 F.2d 778, 786 (1st Cir. 1992) (Magnuson Act does not preempt state's regulatory authority of its offshore waters); *Raffield v. State*, 515 So. 2d 283, 284 (Fla. Dist Ct. App. 1987) (observing that the MFMCA did not altogether preempt right of state to regulate commercial fishing outside its territorial limits) (citing *Livings v. Davis*, 465 So. 2d 507 (Fla. 1985)); cf. *Southeastern Fisheries Assoc. v. Chiles*, 979 F.2d 1504, 1509 (11th Cir. 1992) (concluding that Congress in enacting the MFMCA "left nothing pertaining to the EEZ for the states to regulate.").

One need only peruse the language of section 1856(a),<sup>165</sup> which explicitly allows regulation of state registered vessels outside state boundaries, to recognize that states possess concurrent authority, albeit minimal, over fishing operations conducted in adjacent federal waters. To read the statute otherwise offends the very *raison d'être* of the Act. For instance, were the federal government to overlook or ignore a particular fishery in the EEZ, and one strictly read the Act as prohibiting states from regulating within the zone, the ignored fishery would become increasingly prone to exploitation, or worse, total depletion—an outcome which the Act is specifically designed to prevent.<sup>166</sup> Accordingly, as illustrated by a handful of post-MFMCA opinions, a state may manage and control the fishing in extraterritorial waters when the regulation does not conflict with federal law,<sup>167</sup> where there exists a legitimate state interest served by the regulation, and the vessel is duly registered pursuant to the state's registration scheme.<sup>168</sup>

### 3. *Preemptive Effects in State Waters*

Respecting the Magnuson Act's preemptory status in federal waters presents an often impenetrable barrier for many states in the field of fishery management. States, however, should not and can not disregard the potential reach of the MFMCA within their own, presumably sheltered, territorial waters. While the Magnuson Act declares that "nothing in [its] chapter shall be construed as extending or *diminishing* the jurisdiction or authority of any State *within its boundaries*,"<sup>169</sup> it provides for one exception embodied in section 306(b).<sup>170</sup> Section 306(b) states:

If the Secretary finds, after notice and an opportunity for a hearing . . . , that—

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165. 16 U.S.C. § 1856(a) (1988).

166. This example is to be distinguished from the situation in which the federal government makes a conscious decision that no federal regulation in a particular fishery or area is needed. Accordingly, should one of the respective Councils affirmatively decide that federal regulations are inappropriate, the states are not permitted to exercise their police power to enact regulations in that area. See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978).

167. A state regulation is in conflict with applicable federal fishery regulation where any of the following conditions is realized: (1) No federal regulation exists for the subject fishery but there is an affirmative decision by the federal government that any regulation in such fishery would be inappropriate; or (2) compliance with both federal and state fishery schemes is impossible; or (3) enforcement of the state regulation interferes with the fulfillment of the objectives of the applicable federal regulation. Greenberg & Shapiro, *supra* note 137, at 682-83.

168. See *Alaska v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984); *People v. Weeren*, 607 P.2d 1279, 1286 (Cal. 1980); see also Greenberg & Shapiro, *supra* note 137, at 680-83.

169. 16 U.S.C. § 1856(a) (1988) (emphasis added).

170. Magnuson Act § 306(b), 16 U.S.C. § 1856(b) (1988).

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the [EEZ] and beyond such zone; and  
 (B) any state has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such [FMP];

the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery *within the boundaries of such State* (other than its internal waters), pursuant to such [FMP] and the regulations promulgated to implement such plan.<sup>171</sup>

Thus, even locally imposed fishing restrictions extending no further than the outer fringe of a state boundary face possible preemption by the Act.

To date, no case has tested the true preemptory force of the 306(b) provision, but it seemingly opens another gateway to invalidate state fishery schemes such as Florida's net ban.<sup>172</sup> Although Florida's amendment restricts the ban's application to Florida coastal waters extending outward to the three mile mark,<sup>173</sup> conceivably it could be undercut by 306(b) if its effects are inimical to the implementation of an existing or subsequently enacted federal fishery management plan.<sup>174</sup>

### III. CONCLUSION

Promoters of Florida's net ban have already conquered a number of obstacles to convince Florida's electorate to adopt the constitutional amendment, and they will likely brave a number more as fishermen and other ban opponents take their challenges to the courts.

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<sup>171</sup> *Id.* (emphasis added).

<sup>172</sup> One source indicates that one use of section 306(b) occurred in Oregon in 1982 when the Secretary of Commerce preempted an Oregon salmon fishing regulation and directed the National Oceanic and Atmospheric Administration to adopt regulations for the concerned area. KALO ET AL., *supra* note 67, at 391 (citing *Secretary of Commerce Preempts Oregon Salmon Regulations*, 2 TERRITORIAL SEA NO. 2 at 6 (Dec. 1982)). The Secretary's action was pursuant to a finding that a salmon fishery management plan was in place for the waters off Oregon, that salmon fishing occurred primarily within the EEZ and that Oregon's action would substantially and adversely affect the implementation of the FMP. 2 TERRITORIAL SEA No. 2 at 9.

<sup>173</sup> See *supra* note 3.

<sup>174</sup> See 50 C.F.R. § 619.3 (1992) (addressing preemption of state authority under section 306(b)). Under the code, any effects of state action which are important, material or considerable in degree are deemed to "substantially affect" the carrying out of an FMP. Such effects include: (1) the achievement of the FMP's goals or objectives for the fishery; (2) the achievement of optimum yield from the fishery on a continuing basis; and (3) the attainment of the national standards for fishery conservation and management (as set forth in section 301(a)) and compliance with other applicable law; or (4) the enforcement of regulations implementing the FMP.

Preemptory challenges under the Magnuson Act and Supremacy Clause may ultimately prove to be a successful route. Much of the framework, however, has been erected by other tribunals which have largely respected reasonable state measures aimed at managing and preserving the coastal fisheries. Only constitutional boundaries will prevent states from abusing or misusing their regulatory powers in this field.

As fishery management is best accomplished through harmonic efforts of state and federal authorities, regulatory programs at both levels should concentrate on providing controlled but viable access to marine resources. By affording the commercial fisherman the economic opportunity to live off the sea, the recreational angler the pleasure of the sport, and the diver the unspoiled view of underwater ecosystems, states can effectuate economic and social objectives, and at the same time, foster the conservation of their valuable fisheries.