

# JUDICIAL ACTIVISM IN ENFORCEMENT OF FLORIDA’S NET BAN

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## Table of Contents

I. Introduction .....	55
II. Background Events Leading to the Passage of the Net Ban....	60
III. Suspect Decisions by Panhandle County Courts.....	63
A. Withholding Adjudication .....	64
B. Ignoring Intent.....	66
C. Judicial Nullification.....	72
IV. Factors Motivating Panhandle Courts.....	74
A. Political Pressures .....	75
B. Economic and Social Pressures .....	77
V. Are Panhandle County Courts Activist?.....	78
VI. Is Activism by Panhandle County Courts Legitimate?.....	87
A. Procedural Model .....	88
B. Substantive Model .....	91
VII. Conclusion .....	95

## I. INTRODUCTION

*The Mullet is a Bird.*

*Roderick Donald McLeod . . . was Judge in Crawfordville from 1901 to 1928. His greatest acclaim was for his decision regarding mullet fishing.*

*In the early 1900’s a bill established January and February as the “open” season for mullet. In Wakulla County, November and December were the best time for mullet fishermen. Some men were arrested for fishing*

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*out of season and brought before Judge McLeod. With his reputation for being a fair man, the fishermen were sure they would get a proper judgement. He sent them on their way, however, with no real solution to their problem. He was very concerned about the livelihood of these fishermen, but had to obey the law . . . . It was pointed out to [the judge's wife] that mullet had gizzards, a unique feature, as other fish do not have gizzards. Upon hearing this, the judge was then assured of the course to take. When presented with the offending fishermen, he declared the mullet not a fish, since it had a gizzard, and released the fishermen! The entire state rejoiced over the victory brought about by Judge McLeod . . . [N]ewspapers throughout the state ran headlines proclaiming the mullet to be a bird! <sup>1</sup>*

On November 8, 1994, Floridians did something unusual; they voted in favor of a citizen initiative petition to amend the state constitution.<sup>2</sup> The constitutional amendment, commonly called the

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1. This legend is inscribed on a placard in Azalea Park in Crawfordville, Florida, a small Panhandle fishing town in Wakulla County. The legend illustrates that sentiment against laws adversely affecting commercial fishing has an eighty year history in the Panhandle.

2. Article XI, section 3, of the Florida Constitution allows citizens to amend the constitution by initiative. See Art. XI, § 3, FLA. CONST. The process requires that a petition stating the text of the amendment be filed with the Secretary of State. See *id.* The petition must be signed by the number of people equal to eight percent of the votes cast in the presidential election, which immediately proceeded the filing of the petition. See *id.* The geographical distribution of the signatures from throughout the state must also meet certain requirements. See *id.* For example, the signatures must be distributed over at least one-half of congressional districts in the state. See *id.*

Constitutional amendment via citizen initiative has not met with great success in Florida. See *infra* notes 34-37 and accompanying text. In a 1997 presentation to the Constitution Revision Commission, former Florida Governor Reubin Askew stated, “[a] true citizen initiative is not an easy task.” COASTAL CONSERVATION ASSOCIATION OF FLORIDA (CCA), OUTLINE FOR PRESENTATION TO FLORIDA CONSTITUTION REVISION COMMISSION, July 22, 1997 (on file with the CCA, Tallahassee, Florida.) [hereinafter CCA PRESENTATION]. A number of studies regarding commercial fishing and restrictions on net fishing are appended to the CCA PRESENTATION. See *id.*

net ban, prohibits the use of entangling nets in all Florida waters and the use of non-entangling nets larger than 500 square feet in nearshore and inshore Florida waters.<sup>3</sup> The net ban is really nothing more than a gear restriction, the type of fishing regulation which is typically promulgated by rule in Florida.<sup>4</sup> The net ban's

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3. Article X, section 16, of the Florida Constitution contains the net ban language, the relevant portions of which provide that:

(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 the 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 net or an entangling net;

....

(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

(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.

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Art. X, § 16, FLA. CONST.

4. From 1983 to 1997, the Florida Marine Fisheries Commission (MFC) was authorized to make rules pertaining to management of saltwater fisheries. See § 370.027(1), FLA. STAT. (1997). In 1998, the MFC was merged with the Florida Game and Fresh Water Fish Commission to create the Fish and Wildlife Conservation Commission. See Art. XII, § 12, FLA. CONST. The new agency now has the authority to manage saltwater fisheries. At the time of publication of this Article, the MFC technically does not exist and state statutes and rules are being amended to reflect the merging of the two agencies. Because this

anomalous place in the state constitution resulted from a political debate so divisive that it stalled efforts to manage inshore net fishery species for upwards of six years.<sup>5</sup> The key opponents in this debate were those with interests in the commercial fishing industry and those with interests in conservation and the sports fishing industry.<sup>6</sup>

The Florida Marine Fisheries Commission (MFC) was the state agency authorized to manage most marine species when the net ban was enacted<sup>7</sup> and it never proposed to limit the use of nets to such an extent. Most of the management strategies the MFC proposed over the years were much less restrictive than the ban.<sup>8</sup> Finally, however, frustrated by the lack of action to protect net fisheries,<sup>9</sup> the Florida Conservation Association proposed a constitutional amendment, which was supported by numerous

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Article addresses actions that pre-date the merging of the agencies, continued reference is made to the MFC, statutes governing the MFC and rules promulgated by the MFC.

The MFC had the authority to implement specific management methods including prohibiting the use of certain types of gear. See § 370.027(2)(b), FLA. STAT. (1999). Examples of rules in which the MFC has exercised this specific authority include: 1) prohibiting the harvesting of Spanish mackerel by any net on the east coast, see FLA. ADMIN. CODE R. 46-23.003 (1997); 2) allowing king mackerel to be harvested only by hook and line gear, see FLA. ADMIN. CODE R. 46-12.0047(1) (1993); and, 3) allowing grouper and snapper to be harvested only by hook and line or a specific type of fish trap, see FLA. ADMIN. CODE R. 46-14.005(1) (1997).

5. See ROBERT Q. MARSTON & RUSSELL S. NELSON, NEW DIRECTIONS IN THE MANAGEMENT OF FLORIDA'S MARINE FISHERIES: A REPORT TO THE FLORIDA MARINE FISHERIES COMMISSION FOLLOWING PASSAGE OF ARTICLE X, SECTION 16, OF THE CONSTITUTION OF THE STATE OF FLORIDA 38-43, 46-49 (1995) [hereinafter MARSTON]. This report documents the efforts of the MFC to manage six species of fish prior to the passage of the net ban. See *id.*

6. See *id.*

7. See discussion *supra* note 4.

8. See MARSTON, *supra* note 5, at 38-43, 46-49.

9. See, e.g., William E. Clague, *Florida's Net Ban: A Civic Republican Critique of Florida's Law of Fisheries*, 11 J. LAND USE & ENVTL. L. 537, 553 (1996) (citing unsuccessful efforts by the MFC to regulate marine fishery resources as a key factor contributing to the drive to pass the ban); Andrew Barnes, *No. 3: Vote to Limit Nets*, ST. PETE. TIMES, Oct. 31, 1994, at A8 (stating that the constitutional amendment was a last resort by anti-net groups who unsuccessfully tried "every other avenue for change," including the Governor, state Cabinet, and Legislature).

conservation and sports fishing organizations.<sup>10</sup> The signatures of 540,000 Floridians<sup>11</sup> assured the amendment's place on the ballot.

Although the net ban now has a secure place in the constitution, enforcement of its provisions has met with much resistance from the commercial fishing industry and elected judges who rely on industry votes.<sup>12</sup> Enforcement problems are especially pronounced in the Panhandle counties of Florida, where commercial fishing is one of the primary sources of revenue.<sup>13</sup> This Comment examines the litigation of net ban cases in Panhandle county courts and evaluates the legitimacy of the decisions by applying two models. The goal of this analysis is to decipher whether the decisions are influenced primarily by political, economic, and social factors, or whether they result primarily from rational application of the law.

Part II of this Comment describes the background events leading to the development of the net ban. Decisions issued by Panhandle county judges are presented and analyzed in Part III of this Comment to illustrate why the legitimacy of the judicial decisions is questionable. Some of the political, economic, and social factors that may be influencing the decisions of Panhandle county judges are discussed in Part IV. Part V applies to the Panhandle court opinions a framework for analyzing whether judicial decisions are activist and concludes that they are activist. The legitimacy of judicial activism by Panhandle judges is evaluated in Part VI by applying two models, one procedurally

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10. See CCA PRESENTATION, *supra* note 2. In 1997, the Florida Conservation Association changed its name to the Coastal Conservation Association of Florida. See *id.* Organizations that supported the net ban included the Florida Audubon Society, the Wilderness Society, the Florida Wildlife Federation, the Florida League of Anglers, and the Florida Coalition of Fishing Clubs. See *id.*

11. See *id.*

12. See discussion *infra* Part III. A press release by the CCA provides data showing that net ban related arrests increased dramatically from July 1995, the month the ban became effective, through December 1996. See Press Release from CCA, *Illegal Netting Arrests Soar to Record Numbers as Outlaw Netting Increases* (Jan. 9, 1997) (stating that "the court system has been lax on punishing violators") (on file with the CCA, Tallahassee, Florida).

13. See Bill Moss, *Lifelong Fisherman Tears at Net Ban*, ST. PETE. TIMES, July 2, 1995, at B1.

oriented and the other more substantively oriented. Finally, Part VII concludes that because judicial decisions do not comport with models of legitimate activism, those decisions are better explained by the political, economic, and social pressures that affect Panhandle county court judges.

## II. BACKGROUND EVENTS LEADING TO THE PASSAGE OF THE NET BAN

Much of the debate which prompted the net ban focused on the efforts of the MFC to manage the mullet fishery, which is the largest component of the inshore net fishery in the state.<sup>14</sup> Mullet are valued not only for their meat but also for their roe.<sup>15</sup> Sales of mullet roe can earn millions of dollars in a single season.<sup>16</sup> The value of the 1990 commercial inshore net harvest in Florida was approximately \$42,800,000,<sup>17</sup> or 20% of the total commercial harvest in Florida.<sup>18</sup>

The MFC began conducting rulemaking workshops to manage the mullet fishery in 1989 when it first recognized the need to implement measures to conserve the species.<sup>19</sup> Caught in the struggle between commercial fishermen on one side, and conservationists and recreational fishermen on the other, however, the MFC could not pass a rule without it being petitioned.<sup>20</sup> Compromise became an impossibility as concessions made to one group were invariably challenged by the other.<sup>21</sup> The MFC also met with resistance from the Governor and Cabinet, most notably when that

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14. See MARSTON, *supra* note 5, at 38.

15. Roe are fish eggs.

16. See MARSTON, *supra* note 5, at 46.

17. See CCA PRESENTATION, *supra* note 2, app. 11. The CCA estimate is based on data collected by the Florida Department of Environmental Protection. See *id.*

18. See *id.*; see also MARSTON, *supra* note 5, at 5 (stating 80% of the Florida commercial fishery will not be adversely affected by the net ban and that the industry is expected to benefit from the ban).

19. See MARSTON, *supra* note 5, at 38.

20. See *id.* at 38-43. The MFC must conduct rulemaking in accordance with the Florida Administrative Procedures Act, Chapter 120 of the Florida Statutes. See § 370.027(3)(a), FLA. STAT. (1999). Chapter 120 describes rulemaking procedures for all agencies and provides that all proposed rules must be noticed and can be challenged by filing a petition. See § 120.56, FLA. STAT. (1999).

21. See MARSTON, *supra* note 5, at 38-42.

body refused to approve a temporary emergency rule needed to protect the fishery during the pendency of a protracted rule challenge.<sup>22</sup> Despite the quantity and high quality of data available to support mullet management efforts, the “legal and political torsion brought to bear on the management process for mullet was extraordinary and sufficient to stall, if not preclude, implementation of a successful recovery plan.”<sup>23</sup> The MFC’s inability to obtain approval for a management plan and the corresponding unresolved political conflict between commercial and recreational fishermen served as the impetus for the net ban amendment.<sup>24</sup>

The issue of mullet conservation was particularly salient in the Panhandle counties of Florida, where commercial net fishing is a significant source of income.<sup>25</sup> Panhandle legislators followed the MFC’s rulemaking process closely. In 1990, Panhandle legislators asked the MFC to exempt the Panhandle counties from the statewide restricted species designation for mullet, despite the fact that data showed more stringent conservation measures were needed.<sup>26</sup> When the MFC did not remove the restricted species designation in the Panhandle, the legislators accomplished their goal by revising the statutes during the 1991 legislative session to eliminate the restriction over mullet in Panhandle counties.<sup>27</sup> In 1992, the MFC proposed a net ban that would prohibit the use of gill net in rivers but allow the use of such nets in coastal waters.<sup>28</sup> This type of ban would have worked a compromise between commercial fishermen and their opponents by protecting juvenile fish while allowing harvests of adult fish.<sup>29</sup> The MFC withdrew

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22. See *id.* at 42. All rules the MFC promulgates are subject to approval by the Governor and Cabinet. See § 370.027(1), FLA. STAT. (1999). The approval requirement frustrates and often impedes MFC rulemaking efforts. See Clague, *supra* note 9, at 562. “Review by the Governor and Cabinet functions largely as a method of political review of MFC action . . . . The cursory and adversarial nature of this review often discounts the economic and scientific considerations that drive MFC rulemaking.” *Id.* at 570.

23. MARSTON, *supra* note 5, at 46.

24. See Clague, *supra* note 9, at 553.

25. See Moss, *supra* note 13.

26. See MARSTON, *supra* note 5, at 39-40.

27. See *id.* at 40.

28. See Clague, *supra* note 9, at 553-54.

29. See *id.* at 554, n.132.

the proposal, however, in response to threats by a Panhandle legislator to eliminate the MFC.<sup>30</sup> During an early stage in the state budget process for the 1995 legislative session, Panhandle legislators in the House Appropriations Committee cut funding for the MFC's research staff in response to proposed regulations implementing the net ban.<sup>31</sup> The research staff provides the MFC with data needed to justify proposed rules and to meet standards of judicial review.<sup>32</sup> Sufficient funding was ultimately restored in the state budget.<sup>33</sup>

In areas of the state other than the Panhandle, the net ban amendment was welcomed by a majority of the state's voters.<sup>34</sup> The initiative is one of the few successful citizen initiative petitions undertaken in the state. Since 1968, when the state constitution was amended to allow citizen initiatives, 132 petitions have been filed with the Secretary of State.<sup>35</sup> Of the 132 petitions, fifteen have made it to the ballot and only ten won voter approval.<sup>36</sup> In fact, the net ban initiative set a national record for the most signatures collected in a single day - 201,000.<sup>37</sup> The editorial boards of many major newspapers in the state recommended voting for the amendment.<sup>38</sup> At the polls, the initiative won by a 72% majority.<sup>39</sup>

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30. See *id.* at 554. The legislator threatened to eliminate the MFC by invoking the sunset provision that requires re-authorization of the MFC every five years. See *id.* at 553-4.

31. See *id.*

32. See *id.*

33. See *id.* at 554, n.135.

34. See *infra* notes 39-41 and accompanying text.

35. See CCA PRESENTATION, *supra* note 2.

36. See *id.*

37. See *id.*

38. See, e.g., David Lawrence Jr., *Amendment 3 - "Net Ban,"* MIAMI HERALD, Oct. 28, 1994, at A20; Tom Giuffrida, *No Red Herring: Net Ban Will Save Fishing For All,* PALM BCH. POST, Oct. 31, 1994, at A10; Barnes, *supra* note 9; L. John Haile Jr., *Net Ban Protects Fish Resource,* ORLANDO SENT., Oct. 19, 1994, at A16; Scott C. Smith, *Amendment 3: Floridians Should Vote "Yes" For Limits On Net Fishing,* FT. LAUD. SUN SENT., Oct. 26, 1994, at A14; Carrol Dadisman, *Voters Should Ban Gill Nets To Protect Our Marine Life,* TALL. DEM., Oct. 14, 1994, at A12; Michael J. Coleman, *Floridians Should Approve Proposal To Ban Gill Nets,* FLA. TODAY, Oct. 26, 1994, at A10; Don R. Whitworth, *Sealife Amendment: Yes,* THE LEDGER, Oct. 21, 1994, at A12.

39. See Clague, *supra* note 9, at 538.

The amendment passed in forty-five of Florida's sixty-seven counties.<sup>40</sup> The twenty-two counties where it was defeated are located in the Panhandle and North Florida.<sup>41</sup>

Concerns that county court judges, who are elected, would strike down the amendment began to surface shortly after it became effective.<sup>42</sup> The concern was particularly acute in the Panhandle counties.<sup>43</sup> Commercial fishermen in these counties and those in the seafood industry were expected to lose jobs.<sup>44</sup> The economic hardship was expected to threaten the social structure and unique culture of small fishing villages along the northern coast of the Gulf.<sup>45</sup> Given the potential economic and social consequences of the net ban in the Panhandle, it is not surprising that its deliberate violation has been supported by this region of Florida.<sup>46</sup>

### III. SUSPECT DECISIONS BY PANHANDLE COUNTY COURTS

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40. See *State v. Kirvin*, 718 So. 2d 893, 896, n.2 (Fla. 1st DCA 1998) (listing the counties in which the net ban was defeated).

41. See *id.* The net ban was defeated in the following counties: Bay, Calhoun, Dixie, Franklin, Gadsden, Gilchrist, Gulf, Hamilton, Holmes, Jackson, Jefferson, Lafayette, Levy, Liberty, Madison, Nassau, Suwannee, Taylor, Union, Wakulla, Walton, and Washington. See *id.*

42. See Steve Waters, *So Far, So Good For Net Ban Enforcement*, TALL. DEM., July 27, 1995, at C1.

43. See *id.*

44. Estimates of the number of jobs that would be lost are highly variable. The Organized Fishermen of Florida, a group representing commercial fishermen, estimated that up to 50,000 jobs would be lost as a result of the net ban. See Dadisman, *supra* note 38. Save Our Sea Life, a coalition of conservation and recreational fishing groups, estimated that 453 to 1,120 jobs would be lost. See *id.* Based on United States Department of Commerce methodology, a net ban is likely to affect 1,200 jobs. See Lawrence, *supra* note 38.

45. See Melissa Thorn, *Saving an Endangered Species: Florida Fishermen*, VI-30, VI-46-48, in *LOOKING SEAWARD* (Donna R. Christie ed., 1997). The author explains why Florida fishermen and their communities should be regarded as a unique cultural resource and how the net ban threatens the culture and communities of Florida fishermen. See *id.*

46. Illustrative of the support for net ban violators in this region is the reaction Jonas Porter, a lifelong commercial fisherman, received when he set out to challenge the law by violating it on the day the ban became effective. See Moss, *supra* note 13. Porter found "nothing but sympathy and cheerleading in the small Panhandle fishing towns." *Id.*

Decisions issued by judges in Panhandle courts have confounded efforts to enforce the net ban in that part of the state.<sup>47</sup> This Part introduces the enforcement problem by examining three ways in which county court judges, sitting as triers of fact, have impeded efforts to enforce the ban. County court judges have withheld adjudication of guilty defendants, ignored the intent and goals of the net ban amendment, and nullified the amendment. This Part provides evidence that such enforcement problems exist and delineates the nature and extent of the problems.

### A. *Withholding Adjudication*

Florida judges have the discretion, when confronted with a guilty defendant, to withhold adjudication of guilt.<sup>48</sup> One way in which Panhandle county judges have frustrated efforts to enforce the net ban is by exercising this discretion, perhaps too freely. When adjudication is withheld, the defendant does not receive a judgment of conviction.<sup>49</sup> The defendant must be put on probation but does not have to serve a minimum sentence.<sup>50</sup> Withholding adjudication is only appropriate when “the defendant is not likely again to engage in a criminal course of conduct and . . . the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law.”<sup>51</sup> The purpose of withholding adjudication is to avoid giving a criminal record to individuals who have good prospects for rehabilitation.<sup>52</sup> A decision to withhold adjudication is therefore based on the unique circumstances surrounding the crime and the defendant’s character. Adjudication for violation of the net ban may only be withheld for first-time offenders.<sup>53</sup>

Section 370.092(8)(b), *Florida Statutes* (1995), provided penalties for persons *convicted* of violating the net ban. Within

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47. See discussion *infra* Parts III.A.

48. See § 948.01(2), FLA. STAT. (1999).

49. See *id.*; see also *State v. Gloster*, 703 So. 2d 1174, 1176 (Fla. 1st DCA 1997).

50. See § 948.01(2), FLA. STAT. (1999).

51. *Id.*

52. See *Holland v. Florida Real Estate Comm’n*, 352 So. 2d 914, 916 (Fla. 2d DCA 1977).

53. See § 370.092(4)(a)(3), FLA. STAT. (1999).

months of the enactment of this statute, the Florida Marine Patrol (FMP) identified a loophole.<sup>54</sup> Certain judges were, "more often than not"<sup>55</sup> finding defendants guilty but not adjudicating them guilty.<sup>56</sup> In December 1995, the FMP reviewed seventeen net ban violations that had gone to court in Panhandle counties and reported that adjudication was withheld for all but one of the defendants despite findings of guilt.<sup>57</sup> In Franklin County, an offender cited twice in one day for violating the net ban had adjudication withheld on both charges.<sup>58</sup> These defendants were fined \$25-\$125 in court costs.<sup>59</sup> However, the sentence required for first-time violators is a civil penalty of \$2,500 and a ninety-day suspension of their saltwater products license.<sup>60</sup>

In 1996, the legislature amended section 370.092(4), *Florida Statutes* (1997), to provide that any person "receiving any judicial disposition other than acquittal or dismissal" would be subject to the penalties in section 370.092. Thus, the benefit of withholding adjudication was eliminated.<sup>61</sup>

Since the withholding of adjudication appears to be relatively common in net ban cases tried in the Panhandle, one questions whether the decisions are based on assessment of unique circumstances and individual character traits. Furthermore, if economic hardship, and perhaps political protest, is driving fishermen to violate the ban, it is unlikely that their prospects for rehabilitation are good because the hardship will continue. Finally,

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54. See *Childers v. D.E.P.*, 696 So. 2d 962, 965-66 (Fla. 1st DCA 1997) (reviewing the legislative history of section 370.092(8)(b), *Florida Statutes* (1995), and its subsequent amendment in 1996).

55. *Id.* at 966.

56. *See id.*

57. See Florida Conservation Association, *FCA Special Report Illegal Gill Netting in Florida Waters* (on file with the CCA, Tallahassee, Florida) [hereinafter *FCA Special Report*].

58. See Charles L. Shelfer, Presentation at *The Second Annual Public Interest Environmental Conference* 6 (Mar. 1, 1996) (on file with the MFC, Tallahassee, Florida) [hereinafter Shelfer Presentation].

59. See *FCA Special Report*, *supra* note 57, at 4.

60. See § 370.092(4)(a)(1), FLA. STAT. (1999).

61. Act effective Oct. 1, 1996, ch. 96-300, § 2, at 1312, Laws of Fla. (codified at section 370.092(4)(a), *Florida Statutes* (1997)); see also *Childers*, 696 So. 2d at 966 (discussing the legislative history of the statutory amendment).

withholding adjudication of guilt so frequently promotes violation of the law, not justice or the welfare of society. The prevalence of withholding adjudication suggests Panhandle courts are attempting to mitigate the harsh effects of the net ban itself, rather than the harsh effects a criminal conviction would impose on a uniquely situated defendant. Like the admired Judge McLeod, perhaps present day judges are primarily concerned with protecting the livelihood of fisherman.

### *B. Ignoring Intent*

A second way Panhandle courts have confounded enforcement of the net ban is by ignoring its intent. Insight into the intent of the amendment can be derived from its text, which states that “[n]o gill nets or other entangling nets shall be used in any Florida waters”<sup>62</sup> and “no other type of [non-entangling] net containing more than 500 square feet of mesh area shall be used in nearshore and inshore Florida waters.”<sup>63</sup> These excerpts make clear that the voters intended to prohibit harvesting through nets that entangle fish and through other types of nets, such as seines, that confine and collect fish. Since passage of the net ban, fishermen have devised a number of alterations to standard types of nets.<sup>64</sup> The letter of the law does not address them explicitly because such alterations could not have been anticipated. However, the new gear actually entangles fish or is larger than 500 square feet.

When confronted with net alteration cases, Panhandle county courts have relied on the rationale that penal laws must be strictly construed and have thus allowed the use of the altered nets.<sup>65</sup> The courts have ignored textualist interpretations consistent with intent and have issued textualist decisions inconsistent with the intent of the law.<sup>66</sup> Consequently, the county court decisions

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62. Art. X, § 16(b)(1), FLA. CONST.

63. Art. X, § 16(b)(2), FLA. CONST.

64. See *infra* notes 67-70, 82-86 and accompanying text.

65. See *infra* notes 103-21 and accompanying text.

66. See *infra* notes 67-82 and accompanying text.

seem strained, as if they are struggling to reach an outcome favorable to the fishermen.

In *State v. Taylor*, fishermen were cited for sewing entangling material into seines and deploying the seines in the manner used for gill nets.<sup>67</sup> The fishermen moved to dismiss the charges arguing that their nets did not meet the definition of “gill net” or “entangling net” as provided in the amendment and that those definitions were unconstitutionally vague.<sup>68</sup> The Franklin County Court granted the motion but offered little justification for its holding.<sup>69</sup> The county court did not explain why it considered the definitions vague, but the court stated that the manner in which a net is used should not be a factor in determining whether the net satisfies the definition for a gill net or an entangling net.<sup>70</sup>

*Taylor* was reversed on appeal by *State v. Kirvin*.<sup>71</sup> The First District Court of Appeal (First DCA) determined the state could properly characterize nets as entangling based on the manner of use.<sup>72</sup> The First DCA observed that the language of the amendment explicitly prohibited the use of entangling nets.<sup>73</sup> Furthermore, the First DCA addressed the issue of whether the prohibition on nets was vague with respect to the actual type of net used by the fishermen.<sup>74</sup> The court noted that the definition of “entangling net” in the amendment did not specifically exclude seines, although it did exclude other types of nets.<sup>75</sup> The court thus

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67. No. 97-62-MMA (Fla. Franklin County. Ct. 1997). The Marine Patrol officers who issued the citations observed mullet entangled by the gills in four nets measuring larger than the 500 square feet limit. See *State v. Kirvin*, 718 So. 2d 893, 895 (Fla. 1st DCA 1998), *rev'g* *State v. Taylor*, No. 97-62-MMA (Fla. Franklin County. Ct. 1997). The officers also observed a two inch strip of mesh attached at the end of each net. See *id.*

68. See *Taylor*, No. 97-62-MMA at 1.

69. See *id.*

70. See *id.* at 2.

71. 718 So. 2d 893, 894 (Fla. 1st DCA 1998).

72. See *id.* at 898.

73. See *id.*

74. See *id.* at 897.

75. See *id.* The Florida Constitution provides that “[n]o gill nets or other entangling nets shall be used in any Florida waters.” Art. X, § 16(b)(1), FLA. CONST. The Constitution defines the terms “gill net” and “entangling net” and exempts from the definition hand-thrown cast nets, which can be deployed by an individual standing in a boat or on a dock. See Art. X, § 16(c)(1), FLA. CONST. Hand-thrown cast nets, typically used by recreational

determined that a seine could qualify as an entangling net if it was used as such.<sup>76</sup>

To illustrate, the First DCA analogized the use of nets “in these types of cases”<sup>77</sup> to burglary tools.<sup>78</sup> The burglary statute cannot criminalize the possession and use of all objects that may be employed in a burglary, such as screwdrivers and tire irons, but the statute can and does criminalize the use of objects to effectuate burglaries.<sup>79</sup> A screwdriver or tire iron is a burglary tool only if used to commit a burglary. The First DCA reasoned that because the newly-devised nets were used to effectuate entanglement of fish, they should be deemed entangling nets.<sup>80</sup> Accordingly, the First DCA held that the challenged provisions of the amendment were constitutional and that the nets violated the net ban.<sup>81</sup>

Both the First DCA and the Franklin County Court relied on the amendment’s text to reach their decisions. However, the First DCA’s decision comports with the intent of the amendment, while the county court’s decision does not. The county court’s decision was short on reasoning, providing no basis for decision. Given the lack of explanation, the county court is justifiably subject to the criticism that it unnecessarily ignored intent.

In *State v. Moore*, the defendant was charged with violating the net ban by using a non-entangling net larger than 500 square feet within nearshore waters.<sup>82</sup> The fisherman attached sheets of “shade material” to both sides of his otherwise legal size seine so that the entire piece of gear exceeded 500 square feet.<sup>83</sup> The shade material had a small mesh size that allowed water to pass through it and allowed for harvesting larger quantities of fish than could be

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fishermen, are not prohibited because the nets are small and cannot harvest commercial quantities of fish efficiently.

76. See *Kirvin*, 718 So. 2d at 897.

77. *Id.*

78. See *id.*

79. See *id.*

80. See *id.* at 898.

81. See *Kirvin*, 718 So. 2d at 898.

82. No. 96-282-MM (Fla. Gulf County. Ct. 1996).

83. See *id.* at 1.

obtained if a standard 500 square foot seine were used.<sup>84</sup> The state argued that the entire piece of equipment was a net and that the measurement of its size should include the shade material.<sup>85</sup> The defendant filed a motion to dismiss, arguing that the shade material was not a net and that only the seine itself should be included in the measurement of size.<sup>86</sup>

The Gulf County Court granted the motion to dismiss on three grounds. First, the state had not prohibited tarps,<sup>87</sup> which are impervious to water, from being attached to seines.<sup>88</sup> The court indicated that allowing attachment of tarps, but not shade material, was inconsistent, and that the state's attempt to distinguish between the two materials on the basis of permeability was irrelevant.<sup>89</sup> The court reasoned that if a tarp was not a net, the shade material could not be a net.<sup>90</sup> Since the seine portion of the gear did not contain more than 500 square feet of mesh area, it did not violate the amendment.<sup>91</sup> Second, the court considered the state's interpretation of the term "net" overbroad.<sup>92</sup> The court maintained that the terms of the constitution must be strictly construed and given their usual, obvious meaning.<sup>93</sup> The court reasoned that neither the public, nor those in the industry, would consider the shade material a net.<sup>94</sup> Finally, the court found that only the equipment, rather than the conduct or activity of fishermen, was regulated.<sup>95</sup> Thus, the court found the fact that the gear was used like a net to be irrelevant. The case was not appealed.

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84. *See id.* at 2-3.

85. *See id.* at 1.

86. *See id.*

87. *See State v. Moore*, No. 96-282-MM at 1 (Fla. Gulf County. Ct. 1996).

88. *See id.* at 1-2.

89. *See id.*

90. *See id.*

91. *See id.* at 3.

92. *See Moore*, at 2-3.

93. *See id.* at 2.

94. *See id.* at 3.

95. *See id.*

Although *Moore* was decided before *State v. Kirvin*,<sup>96</sup> the county court could have employed the reasoning of *Kirvin* that the amendment proscribes certain types of gear as well as the manner in which gear is used.<sup>97</sup> The net ban provides that “no other type of net containing more than 500 square feet of mesh area shall be used in nearshore and inshore Florida waters.”<sup>98</sup> The net ban defines “mesh area” as “the total area of netting with the meshes open to comprise the maximum square footage.”<sup>99</sup> Shade material functions exactly like a net. The defendant was using the gear to catch fish in the same manner one would use a seine net to catch fish. Furthermore, mesh size is not addressed in the amendment, only the total amount of mesh area is addressed. Because the shade material allowed water to pass through it, it could be considered mesh. Under the reasoning of *Kirvin*, the gear would have likely been considered a net measuring more than 500 square feet since it was made of material that functioned like a net and was used by the defendant as a net. Although the *Moore* court felt obliged to construe the text strictly, it could have done so in a way that acknowledged the intent of the amendment.

The tendency of Panhandle county courts to ignore intent is apparent in cases involving disputes over the geographic limits of the net ban. The amendment states that the net restrictions apply “three miles seaward of the coastline.”<sup>100</sup> Whether the three mile distance should be measured in nautical or statutory miles has been controversial in the Panhandle region of the state,<sup>101</sup> whereas, the issue is subject to little debate outside the Panhandle.<sup>102</sup>

In *State v. Conner*,<sup>103</sup> the defendant was cited for fishing with a non-entangling net containing more than 500 square feet of mesh area within nearshore waters.<sup>104</sup> The defendant moved to

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96. 718 So. 2d 893 (Fla. 1st DCA 1998).

97. See *id.* at 897.

98. Art. X, § 16(b)(2), FLA. CONST. (emphasis added).

99. Art. X, § 16(c)(2), FLA. CONST.

100. Art. X, § 16(c)(5), FLA. CONST.

101. See *infra* notes 104-11 and accompanying text.

102. See *infra* notes 123-24 and accompanying text.

103. No. 96-328-MMA (Fla. Wakulla Cty. Ct. 1996).

104. See *id.*

dismiss the charges on several grounds; one reason was that the MFC exceeded its rulemaking authority by promulgating a rule defining nearshore and inshore waters as “all Florida waters inside a line three *nautical* miles seaward of the coastline . . . .”<sup>105</sup> The amendment defines these waters as being “three miles seaward of the coastline.”<sup>106</sup> The MFC added the term “nautical” to its rule. Because a nautical mile is 0.15 miles longer than a statutory mile, the defendant argued that the MFC expanded the area over which the amendment could be enforced and, therefore, exceeded its delegated legislative authority.<sup>107</sup>

In granting the motion to dismiss, the Wakulla County Court stated it was obligated to conduct a “strict construction analysis,”<sup>108</sup> and that the term should be given its plain and simple meaning because a penal statute carrying criminal penalties was at issue.<sup>109</sup> The court first examined the use of the terms “miles” and “nautical miles” throughout the Florida Constitution and Florida Statutes.<sup>110</sup> The court found that the term “miles” appears over 200 times in the statutes and “would appear to mean statute mile.”<sup>111</sup> The court did not discuss whether the majority of the 200 citations referred to a distance over water or land. The court also noted that the term “nautical” could have been included in the amendment if so intended.<sup>112</sup> The court concluded that the plain and simple meaning of the term “miles” was not nautical miles but rather statute miles.<sup>113</sup> The court’s second reason for granting the motion to dismiss was that doubts should be resolved in favor of the accused since a penal statute was at issue.<sup>114</sup> Finally, the court

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105. *Id.* at 3 (quoting FLA. ADMIN. CODE R. 46-31.0035(3)(b) (1996)) (emphasis added by court).

106. Art. X, § 16(c)(5), FLA. CONST.

107. *See Conner*, No. 96-328-MMA at 3.

108. *Id.* at 4.

109. *See id.*

110. *See id.* at 3-4.

111. *Id.* at 4.

112. *See Conner*, No. 96-328-MMA at 4.

113. *See id.*

114. *See id.*

found that the rule was an invalid exercise of delegated legislative authority because it enlarged the jurisdiction of the amendment.<sup>115</sup>

The issue in *Conner* was ultimately certified to the First DCA as a question of great public importance.<sup>116</sup> The First DCA held that the MFC did not exceed its rulemaking authority.<sup>117</sup> Relying on existing case law, the court determined that the proper definition of the term “mile” should be based on common usage and understanding of the term as it appears in the amendment.<sup>118</sup> For example, the unit of measure under consideration by the court referred to a distance over water, not over land.<sup>119</sup> Applying this standard, the First DCA concluded the distance should be measured in nautical miles.<sup>120</sup> In response to the Wakulla County Court’s argument that the term “nautical” could have been included in the amendment if intended, the First DCA noted the term “statutory” could have been included as well.<sup>121</sup> The Wakulla County Court’s narrow analysis entirely ignored the amendment’s context.

### C. Judicial Nullification

In addition to withholding adjudication of guilty defendants and ignoring intent, county courts in the Panhandle have held the amendment and related statutes and rules unconstitutional.<sup>122</sup> Some of these decisions provide little or no justification for striking down the net ban.<sup>123</sup> Since constitutional amendments are to be

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115. *See id.* at 5.

116. *See* State v. Conner, 717 So. 2d 179, 180 (Fla. 1st DCA 1998).

117. *See id.* at 181.

118. *See id.*

119. *See* Initial Brief for Appellant at 28, State v. Conner, No. 97-3283 (Fla. 1st DCA 1997).

120. *See id.*

121. *See id.* at 180.

122. *See, e.g.,* State v. Corbin, No. 96-414-MM (Fla. Dixie County Ct. 1997); State v. Taylor, No. 97-62-MMA (Fla. Franklin County Ct. 1997); State v. Conner, No. 96-328-MMA (Fla. Wakulla County Ct. 1996).

123. *See, e.g.,* State v. Corbin, 715 So. 2d 1017 (Fla. 1st DCA 1998), *rev’g* State v. Corbin, No. 96-414-MM (Fla. Dixie County Ct. 1997); State v. Kirvin, 718 So. 2d 893 (Fla. 1st DCA 1998), *rev’g* State v. Taylor, No. 97-62-MMA (Fla. Franklin County Ct. 1997).

granted a greater degree of judicial deference than statutes,<sup>124</sup> a well reasoned justification should be provided for declaring the net ban amendment unconstitutional.

The three cases of nullification that were appealed were reversed.<sup>125</sup> In *State v. Taylor*, the defendants moved to dismiss charges against them on grounds that article X, sections 16(b)(1), 16(b)(2), 16(c)(1), 16(c)(3) and 16(c)(5) were unconstitutionally vague and violated their rights to due process.<sup>126</sup> The Franklin County Court granted the motion to dismiss without explaining why the challenged sections were vague.<sup>127</sup> Similarly, in *State v. Corbin*, the Dixie County Court held that six sections of the Florida Statutes, which provide penalties for net ban violations, were facially vague.<sup>128</sup> This opinion also gives no explanation for the holding.<sup>129</sup> In *State v. Conner*, the Wakulla County Court held that the definitions of “nearshore and inshore Florida waters” and “coastline” in the amendment were unconstitutionally vague.<sup>130</sup> The First DCA reversed all of these decisions.<sup>131</sup>

Significant aspects of the amendment’s constitutionality were examined by the Florida Supreme Court in *Lane v. Chiles*.<sup>132</sup> The Florida Supreme Court upheld the net ban against vagueness,

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124. See *Lane v. Chiles*, 698 So. 2d 260, 263 (Fla. 1997).

125. See, e.g., *State v. Corbin*, 715 So. 2d 1017 (Fla. 1st DCA 1998), *rev'g State v. Corbin*, No. 96-414-MM (Fla. Dixie County. Ct. 1997); *State v. Kirvin*, 718 So. 2d 893 (Fla. 1st DCA 1998), *rev'g State v. Taylor*, No. 97-62-MMA (Fla. Franklin County. Ct. 1997); *State v. Conner*, 717 So. 2d 179 (Fla. 1st DCA 1998), *rev'g State v. Conner*, No. 96-328-MMA (Fla. Wakulla County. Ct. 1996).

126. See No. 97-62-MMA at 1 (Fla. Franklin County. Ct. 1997).

127. See *id.* The Florida Supreme Court has established a test for vagueness, which asks “whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice,” *State v. Hagan*, 387 So. 2d 943, 945 (Fla. 1980), and whether the statute can be uniformly enforced, see *Southeastern Fisheries Ass'n v. Dept. of Natural Resources*, 453 So. 2d 1351, 1353 (Fla. 1984). However, no reference to this test appeared in the *Taylor* decision.

128. See No. 96-414-MM at 1 (Fla. Dixie County. Ct. 1997). The court found sections 370.092(1), (2), (3), (4), (5) and (6), *Florida Statutes* (1995), to be vague. See *id.*

129. See *id.*

130. No. 96-328-MMA at 5 (Fla. Wakulla County. Ct. 1996).

131. See *State v. Conner*, 717 So. 2d 179, 180 (Fla. 1st DCA 1998).

132. 698 So. 2d 260 (Fla. 1997) (involving a facial challenge to the validity of the net ban initially brought in circuit court).

takings, equal protection, impairment of contract, and due process challenges.<sup>133</sup> The Florida Supreme Court's decision in *Lane*, as well as the reversal rate of county court decisions, provides some indication that the net ban amendment is reasonable and that nullification by Panhandle judges should be viewed critically.

#### IV. FACTORS MOTIVATING PANHANDLE COURTS

Part IV examines the political, economic, and social pressures that may influence the decisions of county court judges in the Panhandle.

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133. *See id.*

### A. Political Pressures

County court judges in Florida are elected every four years.<sup>134</sup> For this reason, recent trends in judicial elections are worth examining. Judicial elections throughout the country have received increasing amounts of public attention and, consequently, judicial candidates have become increasingly subject to political pressures.<sup>135</sup> Possible causes for this trend include increasing media coverage of courts, increasing interest of lobbyist and special interest groups in court decisions, and increased partisan politics.<sup>136</sup> Judicial decisions are no longer scrutinized only by academics and practitioners but also by those who can reach a broader audience.<sup>137</sup> The experience of one Tennessee Supreme Court justice, Penny White, is an example. During her first year on the court she sided with the majority in reversing a death penalty decision.<sup>138</sup> Justice White was the only justice up for re-election in the year after that decision.<sup>139</sup> The Governor of Tennessee, seeing an opportunity to gain another Republican seat on the court, campaigned against her re-election by characterizing her as being soft on crime.<sup>140</sup> The Governor's efforts succeeded and she was defeated.<sup>141</sup>

In an effort to test the hypothesis that politics were influencing judicial decisions, one commentator surveyed death penalty decisions issued by six state supreme courts over a ten year period.<sup>142</sup> The affirmance rate of death penalty cases increased from sixty-three percent in 1985 to ninety percent in 1995 in those

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134. See Art. V, § 10(b), FLA. CONST.

135. See, e.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995); Julian E. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733 (1994).

136. See Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1134 (1997).

137. See *id.* at 1134-35.

138. See *id.* at 1133.

139. See *id.*

140. See *id.*

141. See Uelmen, *supra* note 136, at 1133.

142. See *id.* at 1136.

states.<sup>143</sup> Since laws on the issue did not change significantly over the study period, other than by possibly becoming more settled,<sup>144</sup> one conclusion drawn from the results was that judges are susceptible to electoral pressures.<sup>145</sup> The conclusion of the study is bolstered by the results of a ten-state survey of judges subject to retention elections.<sup>146</sup> A high percentage of the nearly 1,000 judges surveyed acknowledged that elections exert a “major influence” on their behavior.<sup>147</sup> The survey results suggested that fear of losing an election was influential on decision making, even when losing was unlikely.<sup>148</sup> Thus, the fact that Panhandle county judges are subject to election may be a factor in the decision making process.

Judges stand the greatest risk of removal when they overturn constitutional amendments passed by voter initiatives.<sup>149</sup> Two factors make overruling initiatives risky. First, sponsors must reach a large portion of the electorate to pass an initiative, so voters are familiar with the issue by the time it is ruled on by a court.<sup>150</sup> Second, the sponsors are well situated to track judicial decisions on their initiatives and to initiate campaigns against judges because an organized structure is already in place.<sup>151</sup> Thus, judges place themselves at risk when they rule against constitutional amendments passed by citizen initiative.

Conversely, Panhandle county court judges subject themselves to voter reprisal by ruling in favor of the net ban amendment. Most constituents of Panhandle county court judges voted against the amendment and have much to lose by its enforcement. Florida’s county court judges may be subject to an

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143. *See id.*

144. *See id.*

145. *See id.*

146. *See Eule, supra* note 135, at 738.

147. *See id.* at 738-39.

148. *See id.*

149. *See Uelmen, supra* note 136, at 1147-49. One well-publicized example is the removal of Justice David Lanphier from the Nebraska Supreme Court for authoring a unanimous opinion that stuck down a term limits initiative. *See id.* at 1148. Sponsors of the initiative mounted a well-organized campaign against Lanphier, raising \$200,000 for mass mailings, advertising, neighborhood canvassing, and telephone polling. *See id.*

150. *See id.*

151. *See id.*

even greater degree of pressure because they participate in contested elections,<sup>152</sup> which may be more competitive than retention elections. One cannot presume to read the minds of judges who make difficult decisions under difficult circumstances, yet one cannot ignore that these difficulties may influence their decisions. As one commentator notes, “[i]n spite of the empirical difficulties . . . it hardly seems far-fetched that even the most principled of jurists may hesitate to avoid an electoral mandate in the face of an impending election.”<sup>153</sup>

### B. Economic and Social Pressures

Electoral pressures are only one of several factors that may influence judicial decisions in the Panhandle. Economic and social factors which significantly affect judges’ constituents may also affect judges’ decisions.

The net ban has threatened the livelihood of fishermen throughout the state, but its impact on the economies, not just the fishermen, of Panhandle counties is probably more devastating than in other parts of the state. Commercial fishing and harvesting of timber are the primary sources of revenue in many Panhandle counties.<sup>154</sup> Furthermore, most Panhandle counties do not gain significant income from tourism or recreational fishing.<sup>155</sup> In Wakulla County, nearly one quarter of the 20,000 residents derived their income from net fishing prior to the amendment.<sup>156</sup> It has been estimated that the ban will result in the loss of 2,000 jobs in the coastal area south of Tallahassee.<sup>157</sup>

Economic considerations led Wakulla, Franklin, Gulf, Dixie, Taylor, and Jefferson counties to propose resolutions declaring fishing a governmental activity.<sup>158</sup> Article X, section 16(d) of the

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152. See Art. V, § 10(b), FLA. CONST.

153. Eule, *supra* note 135, at 739.

154. See Moss, *supra* note 13.

155. See *id.*

156. See Bill Bergstrom, *Tempers Flare As Cabinet May Face Net Ban Opponents*, TALL. DEM., June 27, 1995, at C3.

157. See Bill Bergstrom, *Governor And Cabinet OK 2-Inch Limit On Net Mesh*, TALL. DEM., Mar. 25, 1998, at C6.

158. See Waters, *supra* note 42.

amendment provides that the ban does not apply to the use of nets for scientific or governmental purposes.<sup>159</sup> Wakulla County sought an injunction against enforcement of the net ban until it could adopt and implement a “governmental program for the management of marine resources”<sup>160</sup> whereby commercial fishermen who entered into fishing contracts with the county would be exempt from the ban.<sup>161</sup> Wakulla County maintained that commercial fishing served governmental purposes because counties would not be able to provide governmental services if the seafood industry could not contribute to the revenue base.<sup>162</sup> The circuit court did not grant the injunction, noting that commercial fishing, by definition, is not a governmental activity.<sup>163</sup>

The net ban has also been viewed as a cultural threat.<sup>164</sup> Small fishing communities began developing in the state around the turn of the century, yet few remain today.<sup>165</sup> Members of these tight-knit communities rely on each other for support during hard times.<sup>166</sup> In addition, many commercial fishermen believe their trade can only be mastered through long-term apprenticeship.<sup>167</sup> Thus, there is a history of one generation passing on its knowledge to the next through the shared experience of fishing.<sup>168</sup> Some maintain these small fishing villages are cultural resources that are worthy of protection and that the value of this resource was not adequately considered in the debate on the net ban.<sup>169</sup>

## V. ARE PANHANDLE COUNTY COURTS ACTIVIST?

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159. See Art. X, § 16(d), FLA. CONST.

160. *Wakulla County v. State*, 3 Fla. L. Weekly S263, 264 (Fla. 2d Cir. Ct. 1995).

161. See *id.*

162. See *id.*

163. See *id.* at 265.

164. See *Thorn*, *supra* note 45.

165. See *id.* at VI-32.

166. See *id.* at VI-35.

167. See *id.* at VI-34.

168. See *id.*

169. See *id.*

Judicial activism is difficult to define, or perhaps more accurately, the term has many definitions.<sup>170</sup> Examples of judicial activism include instances where a court makes “decisions [that] conflict with those of other political policy-makers”;<sup>171</sup> nullifies legislation;<sup>172</sup> violates “its obligation of comity to the other branches of government”;<sup>173</sup> abandons “neutral principals” in deciding cases;<sup>174</sup> or becomes unnecessarily involved in making policy or deciding matters which are essentially political.<sup>175</sup>

In an effort to bring cohesion and uniformity to scholarly debate on the subject, one commentator developed a framework for analyzing judicial activism in the United States Supreme Court’s constitutional decisions.<sup>176</sup> Because the net ban is a provision of the state constitution, the framework is useful here. The framework includes six concepts of judicial activism that appear consistently in the literature, overlap only minimally, are not limited to a particular political ideology, and are not “restricted to particular jurisprudential eras.”<sup>177</sup> The six concepts and brief explanations are:

1. Majoritarianism—the degree to which policies adopted through democratic processes are judicially negated.
2. Interpretive Stability—the degree to which earlier court decisions, doctrines, or interpretations are altered.

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170. See Bradley C. Canon, *A Framework for Judicial Activism*, in *SUPREME COURT ACTIVISM AND RESTRAINT* 385 (Steven C. Halpern & Charles M. Lamb eds., Lexington Books, 1982) (enumerating the many ways judicial activism has been defined) [hereinafter Canon].

171. Canon, *supra* note 170, at 385 (quoting David Forte, *The Supreme Court: Judicial Activism Versus Judicial Restraint* 17 (D.C. Heath, 1972)).

172. *See id.*

173. *Id.*

174. *See id.*

175. *See id.*

176. *See* Canon, *supra* note 170, at 386.

177. *Id.*

3. Interpretive Fidelity—the degree to which constitutional provisions are interpreted contrary to the clear intentions of their drafters or the clear implications of language used.

4. Substance-Democratic Process Distinction—the degree to which judicial decisions make substantive policy rather than affect the preservation of the democratic process.

5. Specificity of Policy—the degree to which a judicial decision establishes policy itself as opposed to leaving discretion to other agencies or individuals.

6. Availability of an Alternative Policymaker—the degree to which a judicial decision supersedes serious consideration of the same problem by other governmental agencies.<sup>178</sup>

Before discussing each concept individually, an explanation of how the framework functions is needed. Each concept incorporates a range in degree of activism.<sup>179</sup> For example, nullification of a statute is generally considered more activist than nullification of an administrative rule.<sup>180</sup> However, for some of the concepts, assessment of the degree of activism reflected in a decision is highly individualized.<sup>181</sup> For example, opinions may differ with respect to the degree to which judicial decisions make substantive policy.<sup>182</sup> Furthermore, all six concepts may not be applicable to a single decision.<sup>183</sup> For example, the concept of Interpretive Stability will not be applicable when precedential cases do not exist.<sup>184</sup> To be considered activist, a decision need only satisfy one of the six

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178. *Id.* at 386-87.

179. *See id.* at 387.

180. *See id.*

181. *See Canon, supra* note 170, at 388.

182. *See id.*

183. *See id.* at 387.

184. *See id.*

criteria, although some individuals may deem certain criteria more indicative of activism than other criteria.<sup>185</sup> Individuals may also rank the significance of each concept differently.<sup>186</sup> The order in which the concepts are listed above should not be construed as a ranking. The purpose of the framework is to facilitate more cohesive discussion on judicial activism not to quantify it.

The United States Supreme Court is activist in the Majoritarian sense when it declares acts of Congress, state legislatures, city councils, or agencies unconstitutional.<sup>187</sup> The degree of activism decreases as the number of citizens represented by each governmental body decreases.<sup>188</sup> Since Congress represents the entire nation, while a state legislature represents the population of a state, nullification of a federal law would be deemed more activist than nullification of a state law.<sup>189</sup> Nullification of administrative rules is also activism in the Majoritarian sense because agencies answer to elected officials and regulations are authorized by legislatures.<sup>190</sup>

The Majoritarian concept analysis is directly applicable to courts in Florida. For example, nullification of a state law would be deemed more activist than nullification of a local ordinance because the state law presumably reflects the desires of a greater number of the electors. Arguably, nullification of a constitutional amendment enacted through the initiative process would be more activist than nullifying a state statute because the electors vote on the constitutional amendment directly. In Florida, the supreme court has stated that constitutional amendments deserve greater judicial deference than state statutes.<sup>191</sup>

Under the Majoritarian principle, the actions of county courts in the Panhandle are highly activist. Panhandle county courts have nullified the amendment itself, statutes implementing

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185. *See id.* at 388.

186. *See Canon, supra* note 170, at 388.

187. *See id.* at 391-92.

188. *See id.*

189. *See id.*

190. *See id.*

191. *See Lane v. Chiles*, 698 So. 2d 260, 263 (Fla. 1997).

the amendment, and a rule implementing the amendment.<sup>192</sup> While nullification of rules is the least activist of the nullification decisions, in the context of Florida's political structure it is more activist than nullification of a federal regulation by the United States Supreme Court for several reasons. MFC rules must be approved directly by the Governor and Cabinet,<sup>193</sup> while most federal regulations do not need approval of the President and Cabinet. Florida's Cabinet is comprised of elected officials.<sup>194</sup> Meetings of the Governor and Cabinet to decide on rules are open to the public, public input is allowed, and the body usually makes a decision at the meeting in public's presence.<sup>195</sup> When proposed rules are controversial, the body must make a decision in a politically charged atmosphere.<sup>196</sup> In the rulemaking context, linkage of the Governor and Cabinet to the electors in Florida is more direct than the linkage of the President and Cabinet to the national electorate, therefore nullification of an MFC rule is more activist than nullification of a federal rule.

Interpretive Stability is essentially the same concept as *stare decisis*.<sup>197</sup> The Interpretive Stability concept measures the degree to which a court follows or abandons judicial precedent.<sup>198</sup> Due to the principal that law should be predictable is fundamental, and because disturbing settled law can be highly disruptive to society, the explicit or implicit overruling of precedential decisions is activist.<sup>199</sup>

Florida Panhandle county courts have been activist with respect to Interpretive Stability. In *Corbin*<sup>200</sup> and *Taylor*,<sup>201</sup> the courts found the net ban amendment unconstitutionally vague

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192. See *supra* Part III.

193. See § 370.027(1), FLA. STAT. (1999).

194. See Art. IV, § 5, FLA. CONST.

195. See ALLEN MORRIS, THE FLORIDA HANDBOOK 9 (25th ed. 1995-96).

196. See Bergstrom, *supra* note 156 ("Emotional debates over fish nets, offshore oil and an election-panel appointment by Gov. Lawton Chiles promise to pack today's cabinet meeting.").

197. See Canon, *supra* note 170, at 392-95.

198. See *id.* at 392.

199. See *id.*

200. State v. Corbin, No. 96-414-MM (Fla. Dixie County. Ct. 1997).

201. State v. Taylor, No. 97-62-MMA (Fla. Franklin County. Ct. 1998).

without applying the Florida Supreme Court's established test for vagueness.<sup>202</sup> Thus, county courts abandoned binding judicial precedent. In addition, county courts were activist to a lesser degree by frequently withholding adjudication of guilt, stretching the limits established by prior cases regarding the types of defendants deserving of leniency.<sup>203</sup>

Interpretive Fidelity gauges activism in a court's actual or inferential construction of constitutional provisions.<sup>204</sup> A court is deemed activist when its interpretation does not comport with the plain meaning of the text of the Constitution or with the intentions or goals of its drafters.<sup>205</sup> Those who believe a court's function is to make a document, centuries old, relevant to the current times, would not regard this form of activism as problematic, or may not regard it as activist.<sup>206</sup> In any case, the concept of Interpretive Fidelity appears frequently in literature and is deemed by many to comprise a type of judicial activism.<sup>207</sup>

With respect to plain meaning, decisions are considered activist under the Interpretive Fidelity principle when they contradict the textual meaning of one or more constitutional provisions.<sup>208</sup> An example is the Minnesota Mortgage Moratorium<sup>209</sup> case in which the court upheld a state law impairing contracts despite the express prohibition against such statutes in the Contracts Clause of the Constitution of the United States.<sup>210</sup> Also in this category are decisions that read additional rights into existing provisions, an example is the extension of the due process clause to include corporations although the text refers only to

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202. For an explanation of the Florida Supreme Court's established test for vagueness, see discussion *supra* note 127.

203. See discussion *supra* Part III.A.

204. See Canon, *supra* note 170, at 395.

205. See *id.*

206. See *id.*

207. See *id.*

208. See *id.*

209. HomeBuilding & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S. Ct. 231 (1934).

210. See Canon, *supra* note 170, at 396.

individuals.<sup>211</sup> Although this addition may have been welcome, it is no less activist.<sup>212</sup>

The concept of Interpretive Fidelity is applicable to interpretation of the net ban by Florida's courts. With respect to the text of the amendment, county courts in the Panhandle have interpreted text strictly and narrowly, an approach that would not be considered activist. For example, in the net alteration cases,<sup>213</sup> the text of the amendment does not explicitly make the altered nets illegal, nor do the rules implementing the amendment. Accordingly, the county court dismissed the charges against the defendant. Because the county courts interpreted the text narrowly, they were not activist in this respect.

However, the county courts were activist by ignoring the intent and goals of the amendment because they applied interpretations which unnecessarily ignored intent.<sup>214</sup> In *Kirvin*, the First DCA expanded the application of the amendment beyond that of the *Taylor* court. The First DCA determined that the amendment banned nets not only based on physical characteristics but also based on function. Thus, a net which incorporated entangling nets and which was deployed like a gill net was found to violate the amendment, even though such a net was probably not envisioned when the amendment was drafted.

Alternatively, the county courts since *Taylor* and *Moore* could have relied on their gap-filling authority to evaluate the net alteration cases. Gap-filling, which is typically not considered activist, can be defined as the making of law, by courts, where the legislature cannot act because it cannot predict all situations in which the law will apply, or because it can not formulate rules comprehensive and specific enough to cover all situations.<sup>215</sup> The

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211. See *id.* (citing *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394 (1886)). The author states that the extension of the due process clause from individuals to corporations is "well known but hardly well reasoned." *Id.*

212. See *id.*

213. See, e.g., *State v. Taylor*, No. 97-62-MMA (Fla. Franklin County. Ct. 1997); *State v. Moore*, No. 96-282-MM (Fla. Gulf County. Ct. 1996).

214. See discussion *supra* Part III.B.

215. See Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 315-16 (1997). Peters proposes conditions under which judicial activism should be

exclusion of gap-filling from the six criteria in this framework for activism is also evidence that it is generally not considered activist. Since it would be impossible for statutes or rules to specifically prohibit the multitudes of conceivable net modifications, it would not be activist for a county court to rely on intent to fill in gaps pertaining to altered nets.

In *Conner*, the Wakulla County Court ignored intent when it ruled that the term "miles" meant statutory miles.<sup>216</sup> The court ignored the context of the amendment and case law on interpretation of constitutional provisions. When construing a constitutional provision, a court should give the words "reasonable meanings according to the subject matter, but in the framework of contemporary societal needs and structure. Such light may be gained from historical precedent, from present facts, or from common sense."<sup>217</sup> The *Conner* court overlooked simple and relevant facts. For example, the amendment refers to a distance over water; NOAA nautical charts, commonly used for navigation by fisherman, is calibrated in nautical miles. Given these facts and some common sense a court could have readily ascertained that the intended unit of measure was nautical miles. Because the court ignored these types of considerations, it ignored the intent of the amendment and its decisions are properly categorized as activist.

County courts were also activist with respect to Interpretive Fidelity by withholding adjudication of guilt. In taking this action, as set forth in section 948.01(2), *Florida Statutes*, judges must consider, case-by-case, a defendant's character and the circumstances surrounding the crime. Yet, in the Panhandle, the frequency with which adjudication has been withheld points to systematic rather than individualized application of the statute. A systematic application of the statute is inconsistent with its

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considered legitimate. See *id.* at 315-17. His proposal is discussed in greater detail in Part VI.A of this Article.

216. See No. 96-328-MMA at 4 (Fla. Wakulla County. Ct. 1996).

217. *In re Advisory Opinion to Governor*, 276 So. 2d 25, 29 (Fla. 1973) (citing *State ex rel. West v. Gray*, 74 So. 2d 114, 116 (Fla. 1954)).

purpose, so it is not surprising that the statute was amended in a manner which deters its liberal application.<sup>218</sup>

The Substance-Democratic Process Distinction refers to courts scrutinizing laws that impinge upon political processes more closely than those which do not.<sup>219</sup> Under this principle, decisions that alter political processes are considered activist.<sup>220</sup> This type of activism is not applicable to the net ban litigation, however, because neither the net ban nor county court decisions interpreting the net ban alter the political process.

The Specificity of Policy principle is applicable when courts develop new policy.<sup>221</sup> Simple nullification of a law leaves policy makers free to pursue approaches to solving a problem other than that struck down.<sup>222</sup> When the Court limits these alternative approaches by setting a particular approach itself, its decisions are considered activist under the Specificity of Policy standard.<sup>223</sup>

The Specificity of Policy standard is not applicable to county courts. County courts constitute the first tier of courts in the state, so other courts are not bound by their decisions. Policy makers with jurisdiction over marine fisheries issues such as the legislature, the Governor and Cabinet, and the MFC are also not restricted by county court decisions. The state can continue to prosecute net ban violators in Panhandle county courts regardless of county court decisions. Aside from this, county court decisions have not actually created new policy as much as they have attempted to negate existing policy.<sup>224</sup> Typically, their decisions are short and devoid of legal or policy analysis.<sup>225</sup>

The Availability of Alternate Policymaker principle looks at the extent to which another agency could make policy similar to

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218. Act effective Oct. 1, 1996, ch. 96-300, § 2, at 1308, 1311-13, Laws of Fla. (amending section 370.092, *Florida Statutes* (1995)).

219. See Canon, *supra* note 170, at 398-99.

220. See *id.*

221. See *id.* at 400.

222. See *id.*

223. See *id.*

224. See discussion *supra* Part III.B-C.

225. See *id.*

that found in a decision of the courts.<sup>226</sup> Since the Panhandle county courts have not been particularly active in affirmatively making policy, this standard is inapplicable.

Three of the six measures of activism discussed above are applicable to net ban issues: Majoritarianism, Interpretive Stability, and Interpretive Fidelity. Each of the suspect characteristics of the county court decisions—*withholding adjudication, ignoring intent, and nullification*,—fits into one or more categories of activism. *Withholding adjudication of guilt* is activist under the Interpretive Stability and Interpretive Fidelity principles. *Ignoring intent of the amendment* is activist under the Interpretive Fidelity principle. The *nullification decisions* are activist under the Majoritarian and Interpretive Stability principles. Thus, the decisions of the Panhandle county courts can properly be characterized as activist within the given framework.

#### VI. IS ACTIVISM BY PANHANDLE COUNTY COURTS LEGITIMATE?

Decisions by Panhandle county judges are surprising and unsettling. Panhandle judges have summarily nullified the net ban amendment and statutes imposing penalties for violations and failed to consider intent. Additionally, Panhandle county judges exploited a loophole in a statute that required convictions for imposing penalties by withholding adjudication of guilt. These actions are activist. The actions also leave the impression that the judges are more concerned with the political agenda of those who elect them than with rational application of the law.

This section evaluates whether the Panhandle county courts' activism is legitimate by considering two theories, one procedurally based and the other substantively based. The purpose is to discern whether judges are responding to the law or instead to political, economic, and social pressures. If the theories show the activism is legitimate, the judicial decisions have not exceeded legal bounds. If the theories show that the activism is not legitimate, the judicial decisions are based on something beyond the law. Looking

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226. See Canon, *supra* note 170, at 402.

beyond the law, the political, economic, and social pressures brought to bear on county judges rationally explain their decisions.

#### A. *Procedural Model*

A commonly held belief is that activist courts are inherently undemocratic because they eschew application of the laws enacted through the democratic process;<sup>227</sup> those who view judicial activism as undemocratic generally consider it illegitimate.<sup>228</sup> In *Adjudication as Representation*,<sup>229</sup> Christopher Peters proposes that adjudication incorporates fundamentally democratic processes and that, to the extent these processes are followed, judicial activism is legitimate because it is not a threat to democracy. Peters argues that activism is not inherently undemocratic and, therefore, that it is not inherently illegitimate.<sup>230</sup> When the common law system functions as intended, it produces law through a process of representation akin to the legislative process and so imbues adjudicatory lawmaking with the same type of legitimacy as legislative lawmaking.<sup>231</sup>

Peters discusses two aspects of democracy, participatory decision-making and interest representation, and explains how the judicial process embodies these features.<sup>232</sup> Peters' premise is that adjudication is democratic to the extent that it incorporates these principles.<sup>233</sup>

The participatory decision-making principle posits that judicial lawmaking, like legislation, involves participation by those affected in the decision-making process.<sup>234</sup> Litigants participate by setting the course of the litigation through such means as selecting claims, pre-trial motions, proofs, and arguments.<sup>235</sup> Judicial decisions result from "a process of participation and debate among

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227. *See id.* at 313.

228. *See id.* at 314.

229. *See* Peters, *supra* note 215.

230. *See id.*

231. *See id.* at 319.

232. *See id.* at 340.

233. *See id.*

234. *See id.* at 347.

235. *See id.*

the parties.”<sup>236</sup> The autonomy of judges is limited because participation by the parties restricts the decisional options available to the court,<sup>237</sup> the court is expected to respond to the arguments of the litigants, and the court is expected to articulate reasons for its decision.<sup>238</sup>

Litigants participate actively in judicial decision-making, probably more so than the average citizen participates in legislating.<sup>239</sup> The decision is shaped largely by the participation of the parties just as a law may be shaped by public input.<sup>240</sup> Like democratic processes, “adjudication allocates much of the decisionmaking power to those who will be most affected by a decision: the litigants.”<sup>241</sup>

Peters acknowledges that the validity of adjudication as a democratic process relies on judges respecting the scope of their authority.<sup>242</sup> There is always the risk of a judge ruling “by fiat”<sup>243</sup> and of a judge exercising disproportionate power over the litigants.<sup>244</sup> When a judge rules by fiat or exercises disproportionate power, the participation of the litigants is constrained.<sup>245</sup> Under such circumstances, the litigants cannot adequately represent their interests, and adjudication loses an important attribute of the democratic process.<sup>246</sup>

The second democratic principle Peters discusses, interest representation, is manifested in our judicial system via *stare decisis*.<sup>247</sup> A judicial decision, properly applied, should bind only those individuals similarly situated to the litigants.<sup>248</sup> So, parties to precedential cases function as representatives for subsequent

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236. *Id.*

237. *See id.* at 347.

238. *See id.* at 352.

239. *See id.* at 356.

240. *See id.*

241. *Id.* at 358.

242. *See id.* at 358.

243. *Id.* at 359.

244. *See id.* at 360.

245. *See id.*

246. *See id.*

247. *See id.* at 347.

248. *See id.*

litigants.<sup>249</sup> The binding force of a precedential case on a litigant diminishes as the degree of factual similarity between the precedent and the ongoing action diminishes.<sup>250</sup> In this way, the common law principle of *stare decisis* ensures that litigants only represent those with a common interest and that decisions are only applied to that subset of individuals.<sup>251</sup> Litigants may have more in common with those they “represent” than candidates for office have with their constituents and so may represent those interests more effectively.<sup>252</sup>

Peters recognizes that constraints on interest representation may exist in the adjudicatory context. Effective representation requires courts to adhere to *stare decisis*, which courts may not do.<sup>253</sup> In addition, an unfavorable precedent cannot be overruled as readily as a statute can be amended and cannot be replaced like a politician up for reelection.<sup>254</sup>

Under the Peters approach to activism, Panhandle county court judges did not act legitimately when they nullified the net ban amendment for vagueness in *Taylor* and in *Corbin*.<sup>255</sup> In these cases, the courts did not apply the test for determining vagueness established by the Florida Supreme Court.<sup>256</sup> The county court opinions never even acknowledged the test. Further, the courts erred because they did not acknowledge the limits that *stare decisis* places on their autonomy.

The Panhandle county court decisions were also procedurally deficient in that they often failed to articulate their reasoning in decisions.<sup>257</sup> Due to constitutional amendments receiving great deference, conclusory statements regarding

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249. *See id.*

250. *See id.* at 365.

251. *See id.* at 367.

252. *See id.* at 369.

253. *See id.* at 366.

254. *See id.* at 371.

255. *See State v. Taylor*, No. 97-62-MMA (Fla. Franklin County. Ct. 1997); *State v. Corbin*, No. 96-414-MM (Fla. Dixie County. Ct. 1997).

256. For an explanation of the Florida Supreme Court’s established test for vagueness, see discussion *supra* note 127.

257. *See supra* notes 67-70 and accompanying text.

nullification are suspect within the context of Peters' model. In one case, the court failed to articulate the arguments put forth by both parties, so the extent to which the court responded to those arguments, if at all, cannot be ascertained.<sup>258</sup> The extent to which the court allowed the litigants to participate in the decision, or whether the courts simply ruled by "judicial fiat," is also indeterminable.

The county courts paid little attention to *stare decisis* when they withheld adjudication so frequently. In their leniency, the courts expanded the subset of litigants to whom the law applied. Since they violated the principle of interest representation, their decisions are not legitimate under the procedural model.

In summary, nullification and withholding of adjudication by county courts may be deemed illegitimate using Peters' approach to activism. The courts violated the principle of participatory decision making in their decisions to nullify the amendment. They violated the principle of interest representation by liberally withholding adjudication of guilt.

### *B. Substantive Model*

Proponents of judicial activism, especially in the form of nullification, usually consider activism justified to the extent that constitutional rights of minorities or the democratic structure of government are protected.<sup>259</sup> The legislative and executive branches of government represent majority interests. When these branches exercise their powers in ways that infringe upon constitutional rights of minorities or democratic processes, minorities have little power to stop them. However, minorities do have recourse in the courts. Courts are expected to protect individual rights and maintain checks and balances among the

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258. See *Corbin*, No. 96-414-MM at 1 (articulating only the defendant's vagueness argument).

259. See, e.g., Croley, *supra* note 138, at 704; Roger A. Fairfax, Jr., *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER J. 17, 17-18, 27-30 (1998); Lois D. Brandeis, *Public Choice Theory: A Unifying Framework for Judicial Activism*, 110 HARV. L. REV. 1161, 1162-63 (1997) (reviewing CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996)).

branches of government. The following analysis is based on this substantive model justification for activism.

The critical question is whether the constitutional rights of net fishermen are violated by the amendment. The amendment is a gear restriction and does not affect democratic processes. Since the amendment was subject to a statewide election, and net fishermen are a minority group in the state, it is appropriate to consider them a minority.

In assessing whether the net ban infringes on the constitutional rights of commercial fishermen under commonly accepted principles of constitutional law, fishermen have a heavy burden of proof that makes it difficult for them to legitimately claim that their rights have been violated. If one accepts that well established law is an appropriate benchmark from which to measure existing constitutional rights, the net ban does not violate the constitutional provisions commonly challenged by commercial fishermen. If the rights of fishermen have not been violated, then nullification of the amendment is not legitimate.

The First DCA and Florida Supreme Court have upheld the net ban amendment against a variety of constitutional challenges, including vagueness, takings, equal protection, and due process.<sup>260</sup> This Comment does not address all constitutional challenges fishermen have brought or could bring in the future.<sup>261</sup> However, this Comment does address the heart of the tension: the economic impact the amendment has on commercial fishermen and the disparate impact it has on commercial fishermen with respect to recreational fishermen. The effect of the net ban on the ability of commercial fishermen to earn a living would be challenged as a deprivation of a right to due process in a liberty or property

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260. See, e.g., *State v. Kirvin*, 718 So. 2d 893 (Fla. 1st DCA 1998) (upholding the net ban against a vagueness challenge); *Lane v. Chiles*, 698 So. 2d 260 (Fla. 1997) (upholding the net ban against equal protection, due process, and takings challenges).

261. For a thorough analysis of constitutional claims which could be brought against the net ban, see Alexandra M. Renard, *Will Florida's Net Ban Sink or Swim?: Exploring the Constitutional Challenges to State Marine Fishery Restrictions*, 10 J. LAND USE & ENVTL. L. 273 (1995).

interest.<sup>262</sup> The disparate effect would be challenged as a violation of the equal protection clause.<sup>263</sup>

States have a legitimate interest in conserving their natural resources.<sup>264</sup> Use of gear restrictions as a method of conservation has withstood constitutional challenge since at least the 1940's when, in *Skiriotes v. Florida*, the United States Supreme Court upheld a Florida statute prohibiting the use of diving gear by sponge harvesters.<sup>265</sup> Today, in Florida, the Fish and Wildlife Conservation Commission is specifically granted the authority to implement gear restrictions in order to conserve fisheries.<sup>266</sup> Consequently, most of the Florida's gear restrictions have been promulgated as rules and appear in the *Florida Administrative Code*, not in the state constitution.<sup>267</sup>

Courts have reviewed the due process and equal protection claims under the rational basis test, the most lenient standard of review.<sup>268</sup> Strict scrutiny is not applied because commercial fishermen are not a suspect class.<sup>269</sup> Commercial fishermen have not experienced deliberate, unequal treatment historically and have not been rendered powerless in majoritarian processes.<sup>270</sup>

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262. See *Lane*, 698 So. 2d at 264.

263. See *id.*

264. See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (stating that a state's interest in conserving fish and maintaining balanced fish populations in its waters is legitimate and similar to its interest in protecting the health and safety of its citizens); *Maine v. Taylor*, 477 U.S. 131, 142 (1986) (stating that a state's interest in protecting its fish from imperfectly understood risks is legitimate).

265. 313 U.S. 69 (1941).

266. See § 370.027(2)(b), FLA. STAT. (1997).

267. See *supra* note 4.

268. See, e.g., *Renard*, *supra* note 260, at 279; *Marine Fisheries Comm'n v. Organized Fishermen of Fla.*, 503 So. 2d 935, 938-39 (Fla. 1st DCA 1987) (holding that MFC rules will be sustained against an equal protection challenge if the requirements of the rules are rationally related to the ends they are trying to achieve); *Lane v. Chiles*, 698 So. 2d 260, 262 (Fla. 1997) (holding that the rational basis test should be used to test the validity of the net ban because it should be granted at least as much deference as a statute).

269. See *Renard*, *supra* note 260, at 281.

270. See *id.* Although they are a minority in the state, Panhandle legislators have actively represented commercial fishermen's interests, and commercial fishermen have exerted a good deal of influence on the rulemaking process. See the discussion *infra* Part II for examples of how fishermen exerted influence in the legislative and rulemaking processes.

Furthermore, it is well established that the right to earn a living by working in a specific job is not fundamental.<sup>271</sup> An intermediate level of scrutiny is not applied because gear restrictions do not draw lines based on gender or legitimacy.<sup>272</sup>

Under the rational basis test, a statute must be upheld if it is reasonably related to the purpose it serves and if the purpose is a legitimate one for the state to pursue.<sup>273</sup> As stated previously, the interest of a state in conserving natural resources and the use of gear restrictions as a rational means of achieving conservation are well accepted.<sup>274</sup> One could argue, however, that this particular restriction is not reasonable. Since the rational basis test is very deferential to the lawmaker, in this case the citizens of Florida, it is a difficult argument to win. Under the rational basis test, a court starts with the assumption that the enactment is legitimate.<sup>275</sup> The burden of the plaintiff in proving that the statute is not legitimate is, therefore, very heavy. Proving that restricting the use of entangling nets and large seine-type nets is not rationally related to conserving fisheries would be difficult.

Laws that disparately affect commercial fishermen and sports fishermen are not deemed discriminatory.<sup>276</sup> With respect to gear restrictions, such laws “do not amount to unfair classifications or discriminate between persons, but only discriminate as to the appliances a fisherman may lawfully employ.”<sup>277</sup> The laws treat

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271. See, e.g., *LaBauve v. Louisiana Wildlife & Fisheries Comm'n*, 444 F. Supp. 1370, 1382 (E.D. La. 1978) (holding that the pursuit of a livelihood is not a fundamental liberty or property interest); *Fraternal Order of Police v. State*, 392 So. 2d 1296, 1301 (Fla. 1980) (holding that state regulations violate a property interest only when they entirely preclude one from engaging in an occupation); *Renard*, *supra* note 260, at 281 (“the asserted right to earn a livelihood is merely an economic privilege that falls outside the company of fundamental rights which exact judicial scrutiny”).

272. See *Renard*, *supra* note 260, at 281.

273. See *Lite v. State*, 617 So. 2d 1058, 1059-60 (Fla. 1993).

274. See cases cited *supra* note 263.

275. See *State v. Kinner*, 398 So. 2d 1360, 1363 (Fla. 1981).

276. See *Skiriotes v. Florida*, 313 U.S. 69, 75 (1941) (holding that a prohibition on the use of diving gear was not discriminatory because it applied to all citizens of the state equally); *Renard*, *supra* note 260, at 280 (“Gear restrictions apply uniformly to all fishermen, irrespective of the industry to which the user belongs”).

277. *Renard*, *supra* note 260, at 280 (citing *Washington Kelpers Ass'n v. State*, 502 P.2d 1107 (Wash. 1972)).

all fishermen alike with respect to both the gear they can use and the sanctions they impose.<sup>278</sup> Disparate effects are therefore deemed incidental.<sup>279</sup> Courts have repeatedly upheld gear restrictions against equal protection challenges.<sup>280</sup>

Property and liberty interests in earning a living are not fundamental.<sup>281</sup> Equally important, the net ban does not prevent commercial fishermen from continuing to earn a living in their chosen field.<sup>282</sup> Commercial fishermen can continue to fish with a variety of gear in Florida's nearshore and inshore waters. In addition, the ban does not render their entangling nets or seines greater than 500 square feet in size devoid of economic value. Commercial fishermen may continue to use these nets three nautical miles from the coastline.<sup>283</sup>

The net ban does not contravene well established principles of equal protection and due process jurisprudence. Thus, the net ban does not infringe on those rights of commercial fishermen as discussed above. Under the theory that nullification of statutes is legitimate when constitutional rights of minorities are violated, nullification of the net ban by Panhandle county courts is not legitimate.

## VII. CONCLUSION

Based on the preceding analysis, suspect decisions by Panhandle county courts can properly be characterized as activist and, as demonstrated, this activism is not legitimate. Panhandle county

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278. *See id.*

279. *See id.*

280. *See id.* (citing *Louisiana ex rel. Guste v. Verrity*, 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. 1st DCA 1987); *State v. Perkins*, 436 So. 2d 150 (Fla. 2nd DCA 1983); *Morgan v. State*, 470 S.W.2d 877 (Tex. Crim. App. 1971); *Washington Kelpers Ass'n v. State*, 502 P.2d 1170 Wash. 1972)).

281. *See Renard*, *supra* note 260, at 281; *see also LaBauve v. Louisiana Wildlife & Fisheries Comm'n*, 444 F. Supp. 1370, 1376 (E.D. La. 1978) (holding pursuit of a livelihood is not a fundamental right); *Sisk v. Texas Parks & Wildlife Dep't*, 644 F.2d 1056, 1058 (5th Cir. 1981) (stating the ability to fish for a living is not a fundamental right).

282. *See Lane v. Chiles*, 698 So. 2d 260, 264 (Fla. 1997) (citing *Fraternal Order of Police v. State*, 392 So. 2d 1296 (Fla. 1980)).

283. *See id.*

courts have not provided rational, substantive justifications for their decisions to nullify the net ban. When appealed, the higher state courts consistently reversed the county court decisions. Furthermore, higher courts consistently upheld the amendment against constitutional challenges that were not initiated at the county court level. By failing to adequately justify their decisions, Panhandle county courts have left themselves vulnerable to the criticism that their decisions resulted from extra-legal considerations.

Like Judge McLeod in the legend, Panhandle county courts seem concerned about the livelihood of the fishermen and, in this way, the county court decisions withholding adjudication, ignoring intent, and nullifying the net ban are not unlike Judge McLeod's pronouncement that the mullet is a bird. That is, the Panhandle county court decisions appear to be trying to reach an outcome favorable to the fishermen. The net ban directly threatens the income of commercial fishermen and indirectly threatens the seafood industry and the economies of Panhandle counties, where commercial fishing and the seafood industry contribute substantially to the revenue base. Economic demise due to the net ban could destabilize the culture of fishing communities. Thus, strong judicial intolerance of the net ban in the Panhandle is understandable and can be better explained by the political, economic, and social factors, rather than current law.

