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ALASKA V. F/V BARANOF: STATE REGULATION BEYOND THE TERRITORIAL SEA AFTER THE MAGNUSON ACT

*John Winn**

I. INTRODUCTION

The enactment of the Fishery Conservation and Management Act of 1976[1] (MFCMA) marked a new era concerning federal regulation of fisheries off American shores. The MFCMA, better known as the Magnuson Act, with its complementary goals of conservation and management, represented the first federal attempt at comprehensive management of ocean fisheries.[2] Prior to the passage of the MFCMA, fishery management was left primarily to the states.[3] The relaxed posture of the federal government, however, failed to provide for effective management of ocean fisheries, particularly over foreign fishing operations within two hundred miles of the U.S. coast.[4]

The inadequacies of international treaties and enforcement policies were the primary catalyst for the passage of the Magnuson Act.[5]

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* Managing and Articles Editor, 1985–1986, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

[1] Pub. L. No. 94–265, 90 Stat. 331 (codified at 16 U.S.C. §§ 1801–82 (1976)). The official title of the Act was later changed to the Magnuson Fishery Conservation and Management Act. Pub. L. No. 96–561 § 238, 94 Stat. 3296 (amending 16 U.S.C. § 1801 (1982)).

[2] H.R. REP. NO. 445, 94th Cong., 2nd Sess. 44, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 593, 612 [hereinafter cited as H.R. REP. NO. 445].

[3] H.R. REP. NO. 445, *supra* note 2, at 29–30. The Magnuson Act defines a "fishery" as: (A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and (B) any fishing for such stocks. 16 U.S.C. § 1802(7) (1982).

[4] *Id.*

[5] STAFF OF THE SENATE COMMITTEE ON COMMERCE, 94th Cong., 2d Sess., REPORT ON NATIONAL OCEAN POLICY STUDY 229 (Comm. Print 1976). Sen. Kennedy made the following statement:

> while our stocks continue to be depleted, the number of foreign fishing vessels off our coast increases each year and the American fishing industry continues to decline.

Technological innovations after World War II gave rise to intensified fishing efforts in the fertile waters off the American coast.[6] Congress found that while the yield of American commercial fishermen remained constant during the 1960's, the average catch from mechanically sophisticated foreign fishing vessels had risen dramatically.[7] This was because the harvest quota levels negotiated by the State Department substantially exceeded the maximum sustainable yields for the species involved.[8] In addition, enforcement of these multinational agreements was ordinarily vested in each member country with respect to its own vessels.[9] All too often the result was nonenforcement.[10] Due to the combination of these factors, Congress found a serious depletion in the stocks of at least ten major fisheries by 1975.[11]

The problems resulting from these bilateral agreements with foreign nations led to increased pressure on Congress to support the domestic fishing industry and to protect the valuable food fish located off the American coast.[12] Congress responded to this widespread call for federal involvement by enacting the Magnuson Act.[13] The MFCMA created the Fishery Conservation Zone, which extended ocean jurisdiction out two hundred miles from the United States shoreline.[14] As a result, 2,500,000 square miles of ocean and approximately twenty percent of the world's fisheries were brought under United States control.[15] Basically, the Magnuson Act sets the Fishery Conservation Zone as the 197–mile band between the individual states' three–mile territorial sea and the two hundred–mile limit drawn from the shoreline.[16]

Prior to the Magnuson Act, fishery regulation was carried out by the states pursuant to their traditionally recognized police powers.[17]

Massachusetts fishermen in 75 foot long vessels are watching 400 foot factory trawlers from other nations take seventy percent of the fish within two hundred miles of the North Atlantic coast.

[6] H.R. REP. NO. 445, *supra* note 2, at 34.

[7] *Id.* at 32.

[8] *Id.*

[9] Greenberg & Shapiro, *Federalism in the Fishery Conservation Zone*, 55 S. CAL. L. REV. 641, 648 (1981) [hereinafter cited as Greenberg and Shapiro].

[10] *Id.*

[11] H.R. REP. NO. 445, *supra* note 2, at 36.

[12] Greenberg & Shapiro, *supra* note 9, at 648.

[13] 16 U.S.C. § 1801 (1982).

[14] 16 U.S.C. § 1811 (1982).

[15] Greenberg & Shapiro, *supra* note 9, at 658 n.93 (citing U.S. DEPT. OF COMMERCE, U.S. OCEAN POLICY OF THE 1970'S: STATUS AND ISSUES, pt. III, at 18 (1978)).

[16] 16 U.S.C. § 1811 (1982).

[17] U.S. CONST. amend. X (powers not delegated to the federal government by the Consti-

What limited federal involvement existing before 1976 affected primarily foreign fishing activities. State jurisdiction included all waters within three miles of the shoreline, an area historically referred to as the territorial sea.[18] For most purposes, the outer boundary of the territorial sea was considered the limit of permissible state authority.[19] However, the legislatures of coastal states recognized that the geographical mobility of both fish stocks and fishermen hampered the effectiveness of regulations applying inside the territorial sea.[20] As a result, the activities of domestic fishermen operating on both the territorial and high seas were subject primarily to state scrutiny.[21]

Because of its declaration of exclusivity and comprehensive nature, the Magnuson Act appears to sharply limit the regulatory jurisdiction states have traditionally exercised over domestic fishermen.[22] In the years immediately following the enactment of the MFCMA, a number of commentators assumed that all state extraterritorial regulation was prohibited since they envisioned a comprehensive federal management scheme beyond the territorial sea.[23] Indeed, according to these commentators, the Magnuson Act required an extensive management plan for each fishery located in the Fishery Conservation Zone.[24]

Now, nine years after the passage of the Magnuson Act, there is a general consensus that it is neither practical nor desirable for this much federal regulation of domestic fishing initiatives.[25] The Alaska Supreme Court's decision in *Alaska v. F/V Baranof*[26] signals a ju-

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tution, nor granted to the people, are reserved to the states). *See also*, Alaska v. Arctic Maid, 366 U.S. 199 (1961); Skiriotes v. Florida, 313 U.S. 69 (1941); Manchester v. Massachusetts, 139 U.S. 240 (1891).

[18] Gross, *The Maritime Boundaries of the States*, 64 MICH. L. REV. 639, 640 (1966). The "Cannon Shot" rule of customary international law set the seaward boundary of the territorial sea at three miles, based upon the premise that the coastal state could control and protect territory only up to the maximum range of its land-based firepower.

[19] *Id.* at 644.

[20] Taylor, *Recent State Court Decisions Create Uncertainty For State Extraterritorial Jurisdiction*, TERRITORIAL SEA, Vol. III, No. 1 at 6 (1983).

[21] *Id.*

[22] Curtis, *Alaska's Regulation of King Crab on the Outer Continental Shelf*, 6 U.C.L.A.-ALASKA L.REV. 375, 405 (1977); Schoenbaum & McDonald, *State Management of Marine Fisheries After the FCMA of 1976: An Accommodation of State, Federal, and International Interests*, 10 CASE W. RES. J. INTL. L. 703, 731 (1978).

[23] Schoenbaum & McDonald, *supra* note 22, at 738.

[24] *Id.*

[25] Alaska v. F/V Baranof, 677 P.2d. 1245 (Alaska 1984), *cert. denied*, 105 S. Ct. 98 (1984); *see also* Anderson Seafoods v. Graham, 529 F. Supp. 512 (N.D. Fla. 1982); People v. Weeren, 26 Cal. 3d 654, 607 P.2d 1279, 163 Cal. Rptr. 255, *cert. denied*, 449 U.S. 839 (1980).

[26] *Baranof*, 677 P.2d at 1250.

dicial recognition that the scope of federal jurisdiction over domestic fishermen operating beyond the territorial sea is to be more limited. The decision in *Baranof*[27] stands for the principle that state fishery regulation on the high seas should be allowed when it promotes management and conservation, which are the complementary goals of the Magnuson Act. More effective fishery management will result when the burden of domestic regulation is borne by both levels of government, enabling federal authorities to concentrate on foreign fishing operations within the FCZ, the primary cause of the overfishing problem.

The first section of this article provides a general overview of the bases of state regulation of fishing activities on the high seas. This section examines the permissible means chosen by the states to broaden the scope of their regulatory jurisdiction by managing fisheries beyond the three-mile limit of the territorial sea.[28] The next section analyzes the goals and scope of federal authority under the Magnuson Act. The two major goals of the Magnuson Act are: 1) to conserve the fishery resources found off the coast of the United States[29] and 2) to assume primary management authority over all fish within the Fishery Conservation Zone.[30] The final section discusses the balance of power between the state and federal governments concerning the management of ocean fisheries since the passage of the Magnuson Act. In particular, this section focuses on the major areas of dispute over the appropriate application of the Magnuson Act as litigated in *Baranof*.[31]

This article concludes that a system of state extraterritorial enforcement is a valuable complement to the federal involvement demanded by the Magnuson Act. The *Baranof*[32] court concluded that the Magnuson Act permits state legislatures to enact statutes that further the Act's complementary goals of management and conservation. Since many coastal states have enacted systems for management of domestic fishing activities, the federal authorities should now concentrate enforcement activities on the source of the overfishing problem: the rapid rise in the efficiency and number of foreign vessels operating in the Fishery Conservation Zone.

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[27] *Id.* at 1251.
[28] *See infra* notes 40–134.
[29] 16 U.S.C. §§ 1801(c)(1) and (3), 1851(a), 1852(h) (1982).
[30] *Id.*
[31] *Baranof*, 677 P.2d at 1245.
[32] *Id.*

II. State Extraterritorial Fishery Authority Prior To The Magnuson Act

Prior to passage of the Magnuson Act, state fishery management was the rule, not the exception. Under the broad grant of police power, states maintained primary control over ocean fisheries. States traditionally used this authority to regulate citizens[33] and noncitizens[34] within the territorial sea. Many coastal states also broadened the scope of their regulatory jurisdiction by managing fisheries beyond the three-mile limit of the territorial sea.

To assert jurisdiction over high seas fishing operations, three basic requirements were necessary before a state regulation could pass muster under the U.S. Constitution. First, the state had to establish a legitimate interest in regulating extraterritorial fisheries.[35] Second, the state had to demonstrate a sufficient basis for the assertion of jurisdiction over individual fishermen.[36] Third, state regulation of ocean fisheries was subject to constraints imposed by the United States Constitution. The three most common limitations on the states' police power were the Commerce Clause,[37] the Privileges and Immunities Clause,[38] and the Supremacy Clause.[39]

A. Legitimate State Interest: Enforcement and Conservation

Prior to the enactment of the Magnuson Act, the case law identified two bases for finding a legitimate state interest in managing high seas fisheries: enforcement and conservation.

When a state has proven that an enforcement problem exists within its waters, extraterritorial regulation has been sustained on the ground that such regulation is necessary to prevent deception by fishermen who claim to harvest their catch on the high seas when,

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[33] Lawton v. Steele, 152 U.S. 133 (1894); Manchester v. Massachusetts, 139 U.S. 240 (1891).

[34] Glenovich v. Noerenberg, 346 F. Supp. 1286, 1293 (D. Alaska), *aff'd*, 409 U.S. 1070 (1972); Corsa v. Tawes, 149 F. Supp. 771, 776 (D. Md.), *aff'd*, 355 U.S. 37 (1957).

[35] Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1936); State v. Bundrant, 546 P.2d 530 (Alaska), *appeal dismissed sub nom.* Uri v. Alaska, 429 U.S. 806 (1976).

[36] Skiriotes v. Florida, 313 U.S. 69 (1941); State v. Sieminski, 556 P.2d 929 (Alaska 1976); State v. Bundrant, 546 P.2d 530 (Alaska), *appeal dismissed sub nom.* Uri v. Alaska, 429 U.S. 806 (1976).

[37] Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. *See also* Alaska v. Arctic Maid, 366 U.S. 199 (1961); Toomer v. Witsell, 334 U.S. 385 (1948).

[38] Privileges and Immunities Clause, U.S. CONST. art. IV, § 2, cl. 1. *See also* Douglas v. Seacoast Products, 431 U.S. 265 (1977); Toomer v. Witsell, 334 U.S. 385 (1948).

[39] Supremacy Clause, U.S. CONST. art. VI, cl. 2. *See also* Douglas v. Seacoast Products, 431 U.S. 265 (1977); *Bundrant*, 546 P.2d at 530.

in fact, they obtained their catch within the three-mile limit.[40] Since it is impossible to distinguish between fish taken from inside and outside territorial waters, state enforcement of fishery laws would be difficult, if not impossible, if the state were required to prove where the fish in question were caught.[41]

The United States Supreme Court recognized this enforcement need in *Bayside Fish Flour Co. v. Gentry*.[42] In this case, the Bayside Company challenged several California fish and game laws that regulated the processing of sardines in the state, regardless of where the sardines were harvested.[43] The California legislature had enacted these statutes to promote effective management of the sardine fishery.[44] The legislature determined that the migratory range of sardine, as for many commercial food fish, includes waters within, as well as beyond, the territorial sea and that much of the stock was harvested from the high seas.[45] For these reasons, the Supreme Court upheld the California statutes because their primary purpose was determined to be the protection of a local food source, an area traditionally considered a state interest.[46] The Court also noted that this conclusion promoted effective enforcement of the state's fishery management scheme within the territorial sea.[47]

In contrast to *Bayside Fish Flour Co.*,[48] an Alaskan case furnishes an example of state authority operating without a sufficient enforcement objective to establish a legitimate interest in the extraterritorial regulation of a fishery. In *Hjelle v. Brooks*,[49] a group of fish-

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[40] Comment, *The Fishery Conservation and Management Act of 1976: State Regulation of Fishing Beyond the Territorial Sea*, 31 ME. L. REV. 303, 307 (1979) [hereinafter cited as Comment, *The Fishery and Conservation Management Act of 1976*].

[41] *Id.*

[42] 297 U.S. 422 (1936).

[43] *Id.* at 424–25.

[44] *Id.* at 426. Traditional acceptance of state control over food items is based on the policy of protecting state citizens from fraudulent food sales as well as on the goal of excluding unsafe or unhealthy commodities from the marketplace. *See, e.g.*, Plumely v. Massachusetts, 155 U.S. 461, 472 (1894); Savage v. Jones, 225 U.S. 525–29 (1912).

[45] *Id.* at 424. *See* Van Camp Sea Food Co. v. California, 30 F.2d 111 (9th. Cir. 1929).

[46] *Id.* at 426. *See also infra* note 59.

[47] *Id.* The Court concluded that this statute provided "a shield against covert depletion of the local supply and, thus, tended to effectuate the policy of the law by rendering evasion of it less easy." *Id.* Covert depletion results when fishing vessels enter state waters, engage in fishing, move beyond the three-mile limit and then claim their catch from the high seas. Such conduct would diminish local fish stocks and the state would have no recourse against these vessels since it is impossible to distinguish fish taken in state waters from those taken on the high seas.

[48] *Id.*

[49] Hjelle v. Brooks, 377 F. Supp. 430 (D. Alaska 1974).

ermen successfully enjoined the enforcement of an Alaskan regulation controlling king crab fishing beyond the territorial sea. According to the court, the weight of evidence demonstrated that the percentage of king crab taken within Alaskan waters was quite small in comparison with the percentage taken in the remainder of the Bering Sea Shellfish Area.[50] The Bering Sea Shellfish Area was a zone restriction; it was an area on the high seas that the Alaskan legislature deemed to be economically and environmentally important enough to regulate.[51] Since the court found an insufficient percentage of crabs located within the territorial sea, petitioner's argument for effective enforcement of the king crab management plan within state waters was dismissed.[52]

In addition to recognizing an enforcement problem within the territorial sea, some courts have simply concluded that coastal states have a legitimate conservation interest in the regulation of high seas fisheries. For example, in *Kenny v. Kirk*,[53] a Florida court found that a state's interest in conservation alone was sufficient to support their claim to high seas jurisdiction. In *Kenny*,[54] the disputed statute called for a closed season when taking saltwater crawfish both inside and outside territorial waters. This court held that conservation of the crawfish fishery on the high seas was a sufficient state interest to withstand due process and commerce clause challenges.[55]

More recently, in *State v. Bundrant*,[56] the Alaska Supreme Court concluded that conservation was a sufficient state interest to permit

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[50] 377 F. Supp. at 441.

[51] ALASKA STAT. ANN. §§ 16.10.180, .190, .250 (1983).

[52] 377 F. Supp. at 442. The percentage of king crab taken within Alaskan waters was small in comparison to the amount taken in the rest of the Bering Sea Shellfish Area. The Alaskan fishing regulations which purported to close crab fishing in the entire Bering Sea Shellfish Area after the quota of crab had been reached and which prohibited possession in Alaska only of crab taken seaward of Alaskan waters had a direct impact on extraterritorial conduct. As a result, there was not a sufficient nexus between the regulations and the state's interest in conserving crab fishing within Alaskan waters to withstand constitutional challenge.

[53] 212 So. 2d 296 (Fla. 1968).

[54] *Id.* at 297.

[55] *Id.*

[56] *Bundrant*, 546 P.2d at 530. The Alaska Supreme Court held that regulation of crabbing on the Bering Sea, both within and without the three-mile limit, was not under the exclusive jurisdiction of the national government. Neither the Submerged Lands Act, nor the Outer Continental Shelf Land Act, had preempted regulation of sedentary marine life on the outer continental shelf. The court also concluded that Alaska had the power to prosecute nonresidents arrested on the high seas for violations of Alaskan crabbing regulations. *Id.* at 530.

Concerning the conservation principle, the state was allowed to extend its jurisdiction to control marine resources outside the territorial sovereignty of Alaska when the exercise was based on conservation principles inherent in their migratory characteristics and not based on artificial boundaries or political circumstances. *Id.* at 554.

extraterritorial regulation of the king crab fishery. The *Bundrant*[57] court found that the existence of an enforcement problem in state waters was not a necessary precondition for a finding that Alaska had a legitimate interest in controlling a fishery on the high seas. As in *Hjelle v. Brooks*,[58] this case focused on an Alaskan statute regulating the king crab, a valuable state resource. The court described the crab's life cycle, which begins along the shoreline and ends in the deeper waters of the Bering Sea, thus emphasizing the interdependence of local and extraterritorial resources.[59] As a result, the court found that an Alaskan management scheme encompassing the entire migratory range of the king crab was necessary because unregulated fishing outside state waters could lead to the destruction of the fishery.[60]

B. Personal Jurisdiction

In addition to establishing a legitimate interest in regulating a high seas fishery under the police powers, states were required to assert sufficient personal jurisdiction over individuals operating beyond the territorial sea. The previous section addressed the issue of state authority to regulate extraterritorial fisheries. This section involves a different although related matter; that is state court jurisdiction to enforce these legislative directives over the violating parties. Courts have found three independent bases sufficient to establish personal jurisdiction; they are state citizenship,[61] landing laws,[62] and jurisdiction based on minimum contacts between the nonresident and the forum state.[63]

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[57] *Bundrant*, 546 P.2d at 552–53.

[58] *Id.* at 540–41. ALASKA STAT. ANN. §§ 16.05.720, 16.10.200 (1983).

[59] *Id.* at 551. Most of the developmental stages in a crab's life occur in the territorial waters of the state. Overfishing during these developmental periods could deplete the entire stock of the fishery to a point where the species is endangered.

[60] *Id.* This limited circumscription on the freedom of high seas fishing is based, in part, on a recognition of the special interest that a coastal state has in the living resources adjacent to territorial waters. *See generally*, Convention on Fishing and Conservation of the Living Resources of the High Seas, April 29, 1966, art. 6, § 1, 17 U.S.T. 138, 141, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

[61] Skiriotes v. Florida, 313 U.S. 69 (1941). The Skiriotes Doctrine, which stands for the notion that, absent some federal statutory restriction, state citizenship is a sufficient basis for jurisdiction, was partially eroded by the Magnuson Act. State jurisdiction is now based on the registration requirement of 16 U.S.C. § 1856(a) (1982). *See infra* notes 210–55.

[62] Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1936).

[63] State v. Bundrant, 546 P.2d 530 (Alaska), *appeal dismissed sub. nom.* Uri v. Alaska, 429 U.S. 806 (1976); State v. Sieminski, 556 P.2d 929 (Alaska 1976).

1. State Citizenship

The right of a state to regulate the extraterritorial fishing activities of its citizens was recognized in 1941 by the United States Supreme Court in *Skiriotes v. Florida.*[64] The defendant Skiriotes was convicted of violating state law by using illegal diving apparatus while taking sponges in waters outside Florida's territorial sea.[65] The Supreme Court held that, even when the statute claimed jurisdiction over only territorial waters, the state's authority was not so restrained:

> if the United States may control the conduct of its citizens on the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the state has a legitimate interest and there is not conflict with Congress.[66]

Skiriotes[67] was important precedent for state fishing management interests since it allowed an easy manner to assert personal jurisdiction. The so-called *Skiriotes*[68] jurisdiction permitted the coastal states to govern the conduct of its citizens on the high seas with respect to matters in which the state had a legitimate interest. As a result of this decision, most jurisdictional disputes involving state citizens prior to the Magnuson Act focused upon the legitimacy of the state interest, that is, whether the state's regulation was within the scope of its police powers.

2. Landing Laws

Coastal states also obtained personal jurisdiction over fishermen operating on the high seas by enacting landing laws, since any violator of one of these statutes was deemed to be subject to state

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[64] 313 U.S. 69 (1941).

[65] *Id.* at 69. FLA. COMP. GEN. LAWS § 8087 (1927). The current version is FLA. STAT. ANN. § 370.17(2) (West 1974). *See also* Lipscomb v. Gialourakis 101 Fla. 1130, 133 So. 104 (1931).

[66] *Id.* at 77.

[67] *Id.* Florida state and federal courts have curtailed another aspect of *Skiriotes* jurisdiction. The Court has implied that the state's regulations apply beyond the territorial sea. Recently, the Florida Supreme Court held that another states restrictions apply beyond Florida's waters only if the legislature expressly declares an intent that the statute apply extraterritorially. Southeastern Fisheries v. Dept. of Natural Resources, 453 So. 2d 1351, 1353 (Fla. 1984), *aff'd*, Bethell V. Florida, 741 F.2d 1341 (11th Cir. 1984).

[68] Comment, *The Fishery Conservation and Management Act of 1976*, *supra* note 40, at 313.

jurisdiction.[69] For many years, states adopted landing laws to make it unlawful to land, transport, or possess fish at state ports in violation of specific requirements.[70] Typical landing laws specify the quota of fish harvested per vessel, the size of the particular fish, or the species of fish caught.[71] These laws represented a practical solution to the enforcement problems of coastal states. Without these statutes, fishing vessels could capture their prey within state waters, but claim they were taken on the high seas.[72] Because an ocean patrol to observe fishing operations would be of prohibitive expense, the restrictions imposed at state ports through landing laws represent a practical method for the enforcement of commercial fishing regulations.[73]

Landing laws are also important tools in the enhancement and conservation of migratory fish populations.[74] The restrictions imposed under a landing law do not distinguish between those fish caught within state waters and those harvested on the high seas.[75] Since many species of fish move freely between the territorial and high seas, state landing laws in operation apply to the adjacent extraterritorial zone, thereby increasing the enforcement jurisdiction of coastal states.[76] Thus, a state's enactment of a landing law is evidence that the state legislature considers the regulation of a fishery on both sides of the boundary line of sufficient state interest to subject violators to the jurisdiction of the coastal state's courts.

In *Bayside Fish Flour Co. v. Gentry*,[77] the Supreme Court upheld a landing law that regulated the processing of sardines in California,

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[69] Frach v. Schoettler, 46 Wash. 2d. 281, 280 P.2d 1038 (1955). In this case, the court sustained a Washington statute prohibiting the transportation in state waters or the delivery to state ports of salmon caught during closed seasons. The court established personal jurisdiction by holding the possession and sale of salmon to be subject to the state's power to regulate its natural resources. Even though the fish were taken beyond the territorial sea, the Washington Supreme Court found that regulation of possession and sale fell within the state's jurisdiction.

[70] Greenberg & Shapiro, *supra* note 9, at 652.

[71] N.J. STAT. ANN. § 23:5–1 (West Supp. 1981) (prohibits the taking or possession of bass, salmon, or perch during certain seasons); ALASKA STAT. ANN. § 16.10.200 (1984) (concerns the unlawful taking, sale, or possession of fish and shellfish); R.I. GEN. LAWS § 20–4–10 (1982) (unlawful possession or sale of undersized bass); WASH. CODE ANN. TIT. 75–18.050 (West 1984) (unlawful possession or transportation of chinook salmon from a certain district).

[72] Greenberg & Shapiro, *supra* note 9, at 652.

[73] *Id.*

[74] Comment, *The Fishery Conservation and Management Act of 1976*, *supra* note 40, at 307.

[75] *See* N.J. STAT. ANN § 23:5–5.7 (West Supp. 1981) ("No person shall, sell, possess, or offer for sale, any striped bass measuring less than eighteen inches in length, whether caught within the jurisdictional limits of this state or otherwise").

[76] *Id.*

[77] 297 U.S. 422 (1936). CAL. FISH & GAME CODE § 1064 (1933) was one provision enforced

regardless of whether the fish were caught inside or outside state waters. California successfully established a legitimate state interest by revealing that the protection of a local food source lies within the general grant of the state's police power.[78] The court also found the landing of the fish to be a significant enough contact with California to enable the court to assert personal jurisdiction over the Bayside Company.[79]

3. State Regulation of Noncitizens

In *State v. Bundrant*,[80] the Alaska Supreme Court enlarged the traditionally recognized bases for asserting state jurisdiction over fishermen. The court broadened the *Skiriotes* jurisdiction, which granted high seas authority over all state citizens, to include any Americans having minimum contacts with the state.[81] The basic rationale of the *Bundrant*[82] court was that if these individuals had enough contacts with the state to derive a benefit from Alaskan resources, then the state could impose requirements or burdens on these individuals.

The *Bundrant*[83] case involved the appellate review of a trial court's conviction of nonresident fishermen found violating king crab closure regulations. The Alaskan statute at issue prohibited the capture of the crabs within a specified area located sixteen to sixty miles offshore.[84] King crab harvesting was prohibited in this closed area in an attempt by the legislature to encourage the repopulation of the

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by the state: "[I]t is unlawful to cause or permit any deterioration or waste of any fish taken within the waters of this state, or brought into the state, or to take, receive or agree to receive more fish than can be used without deterioration, waste, or spoilage. Except as allowed by this code, it is unlawful to use any fish or part thereof, except fish offal in a reduction plant or by a reduction process."

[78] *Id.* at 426.

[79] *Id.* at 424. Judicial review of state extraterritorial regulation generally searches for a relationship between the regulated entity and the particular state. *Bayside Fish* represents a decision that the possession of fish stock in state waters establishes the required nexus for jurisdiction over the parties.

[80] 546 P.2d 530 (Alaska), *appeal dismissed sub nom.* Uri v. Alaska, 429 U.S. 806 (1976).

[81] *Id. See also* Greenberg & Shapiro, *supra* note 9, at 653.

[82] 546 P.2d at 555–56.

[83] *Id.* at 533–34. These regulations prohibit the taking and possession of crabs within a closed area. ALASKA ADMIN. CODE tit. 5, § 34.005 (May 1974) created statistical areas consisting of:

1. a registration area comprising of all the waters within the statistical area which are waters subject to the jurisdiction of the state

2. an adjacent seaward biological influence zone comprising of all the waters within the statistical area which are not part of the registration area.

[84] ALASKA ADMIN. CODE tit. 5, § 34.005 (May 1974).

species.[85] The primary difference between this closure regulation and a landing law is that the crabs do not have to be possessed in an Alaskan port or transported in state waters in order to violate the closure statute.

The Alaskan Supreme Court took an interesting approach to establish personal and subject-matter jurisdiction over the sixteen fishermen involved in this case. To assert personal jurisdiction, the court in *Bundrant*[86] held that Alaska could control the conduct of nonresidents on the high seas whenever they derive a benefit from the resources of the state. The court reasoned that acts done outside a state that produce detrimental effects inside the state justify the punishment of the one who caused the harm, just as though he had been present at the place of its effect.[87] The state successfully argued that the unregulated capture of king crabs on the high seas would emasculate the state's management plan.[88]

As part of this benefit-burden analysis, the court held that the nonresidents must have various contacts with the state in order to be subject to Alaskan regulation.[89] The Alaska Attorney General's office established that there were extensive contacts between the fishermen and the state: the fishermen held Alaskan commercial fishing licenses; they registered their vessels in the state; and they made use of Alaskan warehouses, fuel depots, repair yards, and other service operations.[90]

Although it took a new step, the court in *Bundrant*[91] followed the pattern of earlier decisions by recognizing that extraterritorial fisheries jurisdiction must be premised upon a clear nexus between state interests and the high seas resource. It is clear that a state can demonstrate an important interest in any stock that migrates be-

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[85] *Bundrant*, 546 P.2d at 557 (Rabinowitz, J., concurrence).

[86] *Id.* at 556. The Alaska Supreme Court applied the reasoning of Jacobson v. Maryland Racing Comm., 261 Md. 180, 274 A.2d 102 (1971). There, appellant, Jacobson, was licensed in Maryland to own and train horses. He acquired three horses in a Maryland claim race and within 60 days sold these horses in New York. The Maryland court determined that although the sale occurred in New York, it violated Maryland regulations since Jacobson had become a "racing citizen" of Maryland. This implied citizenship gave the state a sufficient basis of personal jurisdiction over Jacobson in matters concerning licensed horse racing. This allowed the court to enjoin the sale of these horses.

The *Bundrant* court found, by analogy, that Alaska could control the conduct of nonresidents when their conduct has a detrimental impact inside the state.

[87] *Id.*

[88] *Id.* at 554.

[89] *Id.* at 556 n.106.

[90] Greenberg & Shapiro, *supra* note 9, at 653.

[91] 546 P.2d 530 (Alaska), *appeal dismissed sub nom.* Uri v. Alaska, 429 U.S. 806 (1976).

tween state waters and the adjacent high seas, if it is established that the stock serves as a source of food and income for the people of that state.[92] Most courts recognize that effective fishery management beyond the territorial sea is often necessary in order to assure an ongoing yield from that stock.[93] The significance of the court's decision in *Bundrant*[94] is that the Alaskan Supreme Court realized that proper management of the king crab fishery is impossible without state jurisdiction over nonresident fishing operations on the high seas.[95] By establishing jurisdiction over nonresidents who violated statutes other than landing laws, the decision in *Bundrant*[96] filled a void left by *Bayside Fish*[97] and *Skiriotes*.[98] The *Bundrant*[99] court helped to fulfill the ultimate goal of rebuilding the fish stock for future generations through a uniform system of regulation.[100]

C. Constitutional Limits On The Exercise Of State Authority

Constitutional constraints limit the scope of state police power with respect to ocean fishing. Because the tenth amendment is phrased in residual language, the state police power can be described only by reference to matters beyond its scope as they are delineated by the other provisions of the Constitution.[101] The tenth amendment assigns to the states the power "not delegated to the United States by the Constitution, nor prohibited by it to the states."[102] As a result, the source of federal constraints on the exercise of state police power

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[92] The State of Alaska has played a leading role in the conservation of offshore resources. This is particularly true with respect to the king crab fishery, which constitutes a vital part of the economy of western Alaska. *See* Alaskan King Crab Marketing and Quality Control Act, ALASKA STAT. ANN. § 18.90.010 (1974) (repealed 1984).

The Alaska legislature found management controls were necessary since otherwise the king crab fishery would be open to overfishing resulting in a depletion below minimum levels of sustained yield. Since the federal government had expressed no intention to occupy this field, the State of Alaska assumed primary responsibility for the conservation of the king crab fishery on the high seas.

[93] *Bundrant*, 546 P.2d at 552–54.

[94] 546 P.2d 530 (Alaska), *appeal dismissed sub nom.* Uri v. Alaska, 429 U.S. 806 (1976).

[95] *Id.* at 554–55. The *Bundrant* court concluded that "[i]f the state has no authority to regulate nonresident fishermen, it has no effective authority to regulate the fishery".

[96] *Id.*

[97] 297 U.S. 422.

[98] 313 U.S. 69.

[99] 546 P.2d 530 (Alaska), *appeal dismissed sub nom.* Uri v. Alaska, 429 U.S. 806 (1976).

[100] Comment, *The Fishery Conservation and Management Act of 1976*, *supra* note 40 at 321.

[101] Curtis, *Alaska's Regulation of King Crab on the Outer Continental Shelf*, 6 U.C.L.A.-ALASKA L. REV. 375, 399 (1978).

[102] U.S. CONST. amend. X.

are the limitations expressly set forth in the Constitution.[103] In cases involving state fishing regulations, the most commonly asserted challenges are based on the Commerce Clause,[104] the Privileges and Immunities Clause,[105] and the Supremacy Clause.[106]

l. The Commerce Clause

As a general rule, states may not adopt local fishing regulations that unduly burden interstate commerce.[107] For example, in *Foster Fountain Packing Co. v. Haydel*,[108] the Supreme Court struck down a Louisiana statute which, in effect, required that all shrimp taken in state waters be processed in Louisiana prior to interstate shipment.[109] Louisiana argued that the Shrimp Act was premised on a valid conservation purpose.[110] The *Foster Fountain*[111] Court rejected the state's argument, and noted that, in challenging the validity of a statute on the ground that it is repugnant to the Commerce Clause, the Court is not bound by the state's declaration of purpose but may find that the practical operation of the statute's provisions directly burden interstate commerce. The Court held that the Louisiana Shrimp Act had no valid conservation purpose, but was instead designed to benefit Louisiana shrimp processors.[112] As a result, the Louisiana Shrimp Act was found constitutionally defective in that it burdened interstate commerce by having no reasonable relation to a valid exercise of the state police power.[113]

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[103] NOWAK, ROTUNDA, AND YOUNG, CONSTITUTIONAL LAW, Ch. 10, § C at 302 (West 2d ed. 1983) [hereinafter cited as NOWAK].

[104] Commerce Clause, U.S. CONST. art. 1, § 8, cl. 3.

[105] Privileges and Immunities Clause, U.S. CONST. art. IV, § 2, cl. 1.

[106] Supremacy Clause, U.S. CONST. art. VI, cl. 2.

[107] Greenberg & Shapiro, *supra* note 9, at 655.

[108] 278 U.S. 1 (1942).

[109] The Louisiana Shrimp Act of 1926, as interpreted in Foster–Fountain v. Packing Haydel, 278 U.S. 1 (1942), declared that all shrimp and parts thereof in Louisiana waters are property of the state. The statute forbade the exportation of shrimp from which the head and shells have not been removed, but granted the taker a qualified interest which may be sold within the state. The meat did belong to the taker and could be moved beyond the state without restriction. The raw shells, however, were not allowed to be exported.

In effect, the statute required in-state processing of shrimp prior to interstate shipment. The Court found that this legislation was primarily designed to help a Louisiana shrimp processing plant and was therefore unconstitutional. *Id.* at 11.

[110] *Foster-Fountain Packing*, 278 U.S. at 4.

[111] *Id.* at 13 (citing Geer v. Connecticut, 161 U.S. 519 (1896)).

[112] *Id.* at 10.

[113] *Id.* at 13.

2. The Privileges and Immunities Clause

In addition to limits imposed by the Commerce Clause, states may not adopt fishing regulations that impermissibly discriminate against noncitizens.[114] Any discriminatory treatment between citizens and noncitizens must be justifiable under the Privileges and Immunities Clause.[115] This clause is a special type of equal protection provision which guarantees to all citizens that classifications which burden persons because they are not state citizens must reasonably relate to a legitimate state purpose.[116]

In *Toomer v. Witsell*,[117] the Court struck down a South Carolina statute that imposed a licensing fee on nonresidents one hundred times greater than for citizens. The Court found that by requiring nonresidents to pay a $2500 license fee for each shrimp boat while residents were able to license a boat for $25, South Carolina was enforcing an impermissible discrimination under the Privileges and Immunities Clause.[118] The test developed in *Toomer v. Witsell*[119] to determine a violation of the Article IV Privileges and Immunities Clause is whether there are valid reasons for the state to make a distinction based on citizenship and, if so, whether the degree of discrimination bears a close relation to those reasons.

The Supreme Court found that South Carolina's justification for this discrimination, namely to conserve the shrimp supply, did not withstand judicial scrutiny in view of the state's overall management plan for the fishery.[120] The Court noted that the lack of a statutory limit on the number of boats that could be licensed by residents evidenced a lack of concern for the conservation of the shrimp fishery.[121] Thus, while differing treatment may be valid when reasonably related to a legitimate conservation interest, the *Toomer*[122] Court held that, in this case, the nonresident license fee was an impermis-

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[114] Greenberg & Shapiro, *supra* note 9, at 655.

[115] U.S. CONST. art. IV, § 2, cl. 1.

[116] NOWAK, *supra* note 103, at 302.

[117] 334 U.S. 385, 395 (1947).

[118] *Id.* at 403.

[119] *Id. See* NOWAK, *supra* note 103, at 302.

[120] *Id.* at 397.

[121] *Id.* at 397, n.30.

[122] *Id.* at 398. The *Toomer* court stated: "[n]othing in the record indicates that nonresidents use larger boats or different fishing methods than residents, that the cost of enforcing the laws against them is appreciably greater, or that any substantial amount of the state's general funds is devoted to shrimp conservation. But assuming such were the facts, they would not necessarily support a remedy so drastic as to be a near equivalent to total exclusion."

sible violation of the guarantees set forth by the Privileges and Immunities Clause.

3. The Supremacy Clause

Finally, the principles of federal supremacy[123] and preemption[124] are important considerations in the context of state fishery management. This is particularly true since the passage of the Magnuson Act. Today, the Supremacy Clause has become the principal constitutional constraint on state fishing regulations.[125] The Supremacy Clause mandates that a congressional exercise of an enumerated power overrides, or preempts, any state regulation where there is an actual conflict between the two sets of legislation such that both cannot stand.[126] Moreover, where Congress acts pursuant to a plenary power, it may specifically prohibit parallel state legislation.[127]

In a case decided just prior to the enactment of the MFCMA, the Supreme Court considered two Virginia statutes that purported to limit the right of nonresidents to fish in state waters.[128] In *Douglas v. Seacoast Products, Inc.*,[129] the restricted vessels were both enrolled and licensed under the documentation laws of the United States. These federal vessel licenses explicitly granted fishing privileges to the holder.[130] The Court found that, since the Virginia statutes sought to deny nonresidents a federally granted privilege to fish on the same terms as Virginia residents, the state laws were preempted pursuant to the Supremacy Clause.[131]

The *Douglas*[132] Court emphasized that its holding did not prevent states from imposing upon federal licensees reasonable conservation measures otherwise within the state's police power. However, the Court rejected Virginia's claim that the challenged statutes were based on a legitimate conservation objective by noting that the state made no attempt to restrict the amount of fish caught by residents.[133] The Court reasoned that a statute that leaves a state's residents

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[123] U.S. CONST. art. VI, cl. 2.
[124] *See infra* notes 291–348.
[125] Greenberg & Shapiro, *supra* note 9, at 656.
[126] NOWAK, *supra* note 103, at 292.
[127] *Id.*
[128] Douglas v. Seacoast Products, 431 U.S. 265 (1977).
[129] *Id. See* Greenberg & Shapiro, *supra* note 9, at 656.
[130] *Id. See also infra* notes 225–43.
[131] Greenberg & Shapiro, *supra* note 9, at 285–87.
[132] *Id.* at 277.
[133] *Id.* at 285, n.21.

free to deplete a natural resource while excluding nonresidents cannot serve a valid conservation purpose.[134]

III. The MFCMA — The Scope of Federal Extraterritorial Jurisdiction

A. Background

As noted above, the Magnuson Act was the first attempt by the federal government to create a uniform management scheme for marine resources on the high seas. The MFCMA represents a congressional response to two basic problems in fishery management plans. First, the international agreements entered into by the United States were ineffective in safeguarding ocean fishery stocks.[135] Congress found that the decline in many of the fisheries off the United States coast coincided with increased foreign fishing in areas outside the territorial sea.[136] The diplomatic efforts were simply not successful in preventing the depletion of the fishery resources of great economic importance.[137] Even when international agreements have been reached, the problem of enforcement has been chronic. Traditionally, international fishery agreements provided that each signatory nation was responsible for enforcement as to their own citizens.[138] Nations like Japan and the USSR, which direct their fleets to return a high quota of fish, were not as diligent as is necessary to enforce full compliance with international agreements.[139] Congress concluded that nations possessing long distance fleets, capable of fishing all over the world, were not strongly concerned with conserving fisheries in any one area.[140] In contrast, United States fishermen who live a relatively short distance from fishing grounds have a much greater interest in conserving fish that inhabit the waters near their homeports.[141]

The second problem of previous federal management schemes concerned the inappropriate territorial area set out for regulation. The Contiguous Fisheries Zone Act of 1966 extended the regulatory powers of the federal government over fisheries to twelve nautical miles

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[134] *Id.*
[135] Greenberg & Shapiro, *supra* note 9, at 658.
[136] H.R. Rep. No. 445, *supra* note 2, at 35.
[137] *Id.* at 42.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*

from the United States coast.[142] Except for foreign fishing recognized by previous treaty, foreign operations were excluded from this nine-mile zone contiguous to the territorial sea.[143] The Bartlett Act of 1964 had already banned foreign fishing vessels from state waters.[144] By 1976, Congress realized that a twelve-mile coastal zone was not effective in protecting the most valuable and overfished species because these fish often dwell outside this twelve-mile limit.[145]

The Magnuson Act, therefore, expanded federal authority from this twelve-mile band to a 197-mile zone. This expansion increased the United States' legal jurisdiction from an area of 545,000 square nautical miles to over 2.2 million square nautical miles.[146] The inner boundary of this Fishery Conservation Zone is a line coterminous with the seaward boundary of each of the coastal states, while the outer boundary represents the two hundred mile baseline from which the territorial sea is measured.[147] In addition to this increased territorial jurisdiction, Congress set forth a more complete scheme of fishery management. Prior to the passage of the MFCMA, the federal role was limited mainly to data gathering and inspection of foreign fishing activities.[148] The Magnuson Act established an extensive process for the formulation and implementation of regulations designed to promote the complementary goals of management and conservation.[149]

Although it was primarily a reaction to foreign fishing and a measure to protect offshore resources, the legislative purpose of the Magnuson Act extended beyond these concerns. The legislation was designed to provide for the "development . . . administration, and enforcement of fishery management plans and regulations . . . for fishery conservation and management."[150] The MFCMA was designed to assure both that an optimum supply of fish products be available on a "continuing basis and that irreversible or long term

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[142] Greenberg & Shapiro, *supra* note 9, at 648.

[143] *Id.*

[144] *Id.* at 648–49. Pub. L. No. 88–308, 78 Stat. 194 (1964) (repealed 1977).

[145] *Id.*

[146] Greenberg & Shapiro, *supra* note 9, at 658, n.93, (citing U.S. DEPT. OF COMMERCE, U.S. OCEAN POLICY IN THE 1970'S: STATUS AND ISSUES, part III at p.18 (1978)). *See also* 16 U.S.C. § 1811 (1982) (establishing the Fishery Conservation Zone at the 200-mile mark).

[147] 16 U.S.C. § 1811 (1982).

[148] H.R. REP. NO. 445, *supra* note 2, at 29.

[149] Rogalski, *Regional Councils Under The FCMA*, 9 B.C. ENVTL AFF. L. REV. 163, 165–73 (1979) [hereinafter cited as Rogalski].

[150] S. REP. NO. 94–711, 94th Cong., 2d Sess. at 37, *reprinted in* 1976 U.S. CODE & CONG. AD. NEWS 593, 661.

adverse effects on fishery resources be minimized."[151] The legislation reflects a congressional awareness that fisheries are vulnerable resources that need careful management and conservation to prosper, even in the absence of foreign involvement.[152]

B. Scope of Federal Authority

To promote its complementary goals of management and conservation, the Magnuson Act vests authority to formulate Fishery Management Plans in eight regional councils.[153] These Fishery Management Councils represent the organizational backbone of the federal management regime.[154] The jurisdictional scope of each of the regional councils is extremely large since the Magnuson Act provides for exclusive jurisdiction over all fish located in the 197–mile expanse of the Fishery Conservation Zone.[155] It is through these councils that the needs of the states, the fishing industry, and environmental organizations are intended to be channelled.[156]

The extent of local authority under the Magnuson Act is revealed by the allotment of voting rights in the Fishery Management Councils.[157] The voting members of these councils include state fishery management officials,[158] regional directors of the National Marine Fisheries Service,[159] and other individuals appointed by the Secretary of Commerce from the lists of persons submitted by the governors of the states represented on these councils.[160] On the other hand, the nonvoting members of the regional Fishery Management Councils are the federal officials responsible for the implementation of the council's plans.[161]

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[151] *Id.* at 39.

[152] Rogalski, *supra* note 149, at 170.

[153] Each council is identified according to its constituent states or possessions and has responsibility for developing plans for fisheries within its jurisdiction. The eight councils are: 1) New England (Me., N.H., Mass., R.I., Conn.); 2)Mid-Atlantic (N.Y., N.J., Del., Pa., Md., Va.); 3) South Atlantic (N.C., S.C., Ga., Fla.); 4) Gulf (Tex., La., Miss., Ala., Fla.); 5) Pacific (Ca., Or., Wash.); 6) North Pacific (Alaska, Wash., Or.); 7) Western Pacific (Hawaii, Am. Samoa, Guam); and 8) Carribean Council (V. I. and P. R.). *See* 16 U.S.C. § 1852(h) (1982).

[154] Rogalski, *supra* note 149, at 171.

[155] 16 U.S.C. § 1811 (1982).

[156] H.R. REP. NO. 445, *supra* note 2, at 63.

[157] 16 U.S.C. § 1852(b) (1982).

[158] *Id.* at § 1852(b)(1)(A).

[159] *Id.* at § 1852(b)(1)(B).

[160] *Id.* at § 1852(b)(2)(B).

[161] *Id.* at 1852(c).

The format utilized by the regional councils when preparing fishery management schemes is the Fishery Management Plan (FMP).[162] The regional councils are granted authority to prepare FMP's consistent with the seven national standards set forth in the Act.[163] The

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[162] *Id.* at § 1853. The legislative history of the Magnuson Act indicates that FMP's would be prepared only on an as-needed basis. *See* H.R. REP. NO. 445, *supra* note 2, at 66–67.

> (b)Scope of Management Plans (1) In general this paragraph would require any management plan prepared by any Council to contain such conservation and other measures which the Council deems appropriate with respect to management of the species concerned. In addition, the Council would be required to specify such conditions and limitations governing fishing by domestic or foreign vessels as the Council believes should be implemented to carry out such measures . . . .
>
> (3) Specific Plan Requirements — This paragraph would describe in detail the specific requirements that could be imposed on a fishery for which the Council has prepared a management plan.
>
> (A) The plan could designate zones where, and designated periods when, fishing would be limited, not permitted at all, or permitted only by certain types of vessels and gear.
>
> (B) The plan could establish a system under which access to the fishery would be limited both as to domestic and foreign vessels and both as to recreational and commercial fishermen. If the system provided for limited entry, then consideration would be required to be given by the Council to such things as the present participation in the fishery concerned, historical fishing practices, value of existing investments in vessels and gear, capability of existing vessels to engage in other fisheries, and the history of compliance with any fisheries regulations imposed pursuant to this Act.
>
> (C) The plan could establish limitations on the catch of fish based on such things as area, species, size, number, weight, sex, incidental catch, total biomass, and other relevant factors necessary to carry out the policy and purposes of the Act.
>
> (D) The plan could prohibit, limit, condition, or require the use of specified types of fishing gear, vessels, or other equipment or devices for such vessels which may be required to facilitate the enforcement of the provisions of this Act.
>
> (E) The plan could specify those licenses, permits, or fees which could be required as a condition to engaging in any fishery regulated by this Act. In this regard, such licenses, permits, or fees, could vary between domestic and foreign fishermen, between different categories of domestic fishermen (both recreational and commercial fishermen), and between different categories of foreign fishermen.
>
> (F) The plan could require the submission to the Secretary of pertinent statistics such as the type of gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, and number of hauls.
>
> (G) The plan could require such other requirements as the Council deems appropriate.

[163] 16 U.S.C. § 1851(a) (1982). The seven national standards are:

> (1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery.
>
> (2) Conservation and management measures shall be based on the best scientific information available.
>
> (3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range and interrelated stocks of fish shall be managed as a unit or in close coordination.
>
> (4) Conservation and management measures shall not discriminate between resi-

first, and most important, of these seven national standards is to prepare plans which achieve and maintain the optimum yield from fisheries subject to their management.[164] Optimum yield is a fishery management concept which is the biological measure of the safe upper limit of the harvest that can be taken year after year without diminishing the stock.[165] In addition to satisfying these seven national standards, an FMP prepared by a council must describe the fishery, and include information concerning vessels and gear allowed, management costs, actual revenues, and potential revenues.[166] The FMP must further specify the capacity of domestic fishermen to harvest the optimum yield in relation to allowable foreign fishing.[167] The comprehensive nature of federal regulation under the Magnuson Act is evidenced by the extensive scope of these Fishery Management Plans.

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dents of different states. If it becomes necessary to allocate fishing privileges among various U.S. fishermen, such allocation shall be (A) fair and equitable to all such fishermen, (B) reasonably calculated to promote conservation, and (C) carried out in such a manner that no particular individual, corporation, or other entity acquires an extensive share of the privileges.

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

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

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

[164] 16 U.S.C. § 1851(a)(1) (1982).

[165] "Optimum yield" is defined by MFCMA as that quantity of fish which will provide the greatest overall benefit to the nation, with particular reference to food production and recreational opportunities. It is prescribed on the basis of the maximum sustainable yield from the fishery as modified by any relevant economic, social, or ecological factor. *See* 16 U.S.C. § 1802(18) (1982).

The first step in determining optimum yield is the calculation of maximum sustainable yield. This is a fishery management concept which designates the safe upper limit of harvest which can be taken consistently without diminishing the stock so that it is truly inexhaustible and perpetually renewable. H.R. REP. NO. 445, *supra* note 2, at 47.

Optimum yield is determined by factoring in such elements as: a recognition of resources use other than harvesting, social and economic considerations such as the commercial well-being of the commercial fishermen, the interests of recreational fishermen, environmental quality, demand for fishery products, present conditions and long-term plans of the given fish habitat. Fishery Conservation and Management. 50 C.F.R. § 602.2(b)(3) (1978).

[166] 16 U.S.C. 1853(a)(2) (1982).

[167] *Id.* at § 1853(a)(4) (1982). In addition, there are a number of aspects of management that the councils may consider in a discretionary manner. These include subjecting domestic vessels to permit and fee requirements, the designation of zones where vessel and gear restrictions apply, and limiting the number or type of vessels in a fishery. *See* 16 U.S.C. § 1853(b) (1982).

16 U.S.C. § 1853(b)(5) (1982) is the most important provision for the purposes of this article. This section allows an FMP to incorporate the relevant fishery conservation and management measures of the coastal states nearest to the fishery.

Once prepared by the regional council, a Fishery Management Plan is then sent to the Secretary of Commerce, who is required to immediately review the plan, and then determine its consistency with the seven national standards as well as any other applicable laws.[168] The Secretary must also publish notice in the Federal Register stating that written data and comments may be submitted during a 75-day period beginning on the date of the Secretary's receipt of the FMP.[169] The FMP will take effect if the Secretary does not notify the council of his disapproval before the 95th day from receipt,[170] or if at any time subsequent to the 75th day, the Secretary notifies the council that he does not intend to disapprove or partially disapprove of the FMP.[171] Following public review, the Secretary issues final regulations and is then responsible for their implementation.[172]

The provisions of the Magnuson Act, as well as the FMP's created by the regional councils, are enforced by the Secretary of Commerce through the United States Coast Guard.[173] The Coast Guard and any other federal or state agencies that entered into agreement with the Secretary, are given broad enforcement powers, including both warrantless arrest of individuals and warrantless seizure of vessels.[174] An authorized officer may also issue citations in lieu of the arrest and seizure procedures.[175]

The Magnuson Act also designates exclusive jurisdiction to United States District Courts to decide any case or controversy arising under the provisions of this Act.[176] The District Courts are granted

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[168] *Id.* at 16 U.S.C. § 1854 (a)(1)(A) (1982).

[169] *Id.* at § 1854(a)(1)(B).

[170] *Id.* at § 1854(b)(1)(A).

[171] *Id.* at § 1854(b)(1)(B).

[172] *Id.* at § 1855(c).

[173] *Id.* at § 1861(a).

[174] *Id.* at § 1861(b)(1).

> Any officer who is authorized . . . to enforce the provisions of this chapter may (A) with or without a warrant or other process:
>
> (i) arrest any person, if he has reasonable cause to believe that such person has committed such an act prohibited by section 1857 of the title;
>
> (ii) board, search, or inspect any fishing vessel which is subject to the provisions of this chapter;
>
> (iii) seize any fishing vessel used or employed in, or with to which reasonably appears that such vessel was used or employed in, a violation of any provision of this chapter;
>
> (iv) seize any fish (wherever found) taken or retained in violation of any provision of this chapter;
>
> (v) seize any other evidence related to any violation of a provision of this chapter."

[175] *Id.* at § 1861(c) (1982).

[176] *Id.* at § 1861(d) (1982). This provision was the focus of one of the controversies in *Baranof*, 677 P.2d at 1252. *See infra* notes 256–90.

authority to issue restraining orders, impose civil penalties and forfeiture, impose criminal penalties, or take any other actions in the interests of justice.[177]

Through the creation and implementation of Fishery Management Plans, the Magnuson Act reveals a congressional attempt to balance federal and state interests. For instance, in order to counter-balance the heavy state representation in the regional council voting membership, the MFCMA set up a federal review procedure that limits the management policies of the councils.[178] In this sense, the MFCMA attempts to balance federal and state interests. The Magnuson Act thus can be viewed as a two-tiered decision-making mechanism where basic policy determinations, such as optimum yield and management strategies, rest with the councils, while rulemaking and enforcement authority is vested with the Secretary of Commerce.[179] Since the Magnuson Act itself defers to local fishery management policy under the federal regime, many courts have held that the Magnuson Act implicitly allows for state regulation of extraterritorial fisheries in the absence of an applicable FMP.[180]

IV. *ALASKA V. F/V BARANOF*: STATE EXTRATERRITORIAL AUTHORITY AFTER THE MAGNUSON ACT

A. Background

Despite provisions declaring an exclusive management role in the Fishery Conservation Zone, the overall goals of the Magnuson Act suggest a more limited federal obligation beyond state waters.[181] By its own terms, the Magnuson Act was not intended to impose unnecessary burdens on the commercial fishing industry.[182] In fact, several sections of the Act indicate the federal role should be limited to managing only those fisheries where preparation of an FMP is

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[177] *Id.* at § 1861(d)(1)–(4) (1982).

[178] Rogalski, *supra* note 149, at 175.

In a sense, the strictest limit on the councils' power is their lack of ability to regulate. The councils set policy for fishery management by formulating plans — FMP's. This policy set by the council is translated into law through the promulgation and implementation of regulations by the Secretary of Commerce.

[179] *Id.* at 171–72.

[180] *Baranof*, 677 P.2d 1245 (1984); Anderson Seafoods v. Graham, 529 F.Supp 512 (N.D. Fla. 1982); People v. Weeren, 26 Cal. 3d 654, 607 P.2d 1279, 163 Cal. Rptr. 255, *cert. denied*, 449 U.S. 873 (1980).

[181] Greenberg & Shapiro, *supra* note 9, at 665.

[182] *Id.*

necessary to achieve the purposes of Congress.[183] This means that the Act's basic goals of conservation and management may be met in some fisheries where state regulation fulfills the policies and standards set out in the Magnuson Act.[184]

The decision in *Alaska v. F/V Baranof*[185] signals a judicial recognition of this more limited federal role in the regulation of domestic fishing operations. In this case, the Alaska Supreme Court recognized not only that the scope of federal authority over domestic fishermen operating beyond the territorial sea need not be exclusive, but that state high seas fishery management can help achieve the goals of the Magnuson Act.[186] Decisions like the one in *Baranof*[187] illustrate the importance of promoting a more cooperative federal-state relationship in the supervision of domestic fishermen. The hopeful result of this trend will cause a greater allocation of federal resources to the source of the overfishing problem–foreign fishing operations in the Fishery Conservation Zone.[188]

The Baranof was a vessel owned by Baranof Fisheries,[189] a Washington State limited partnership.[190] The Baranof was registered with the U.S. Coast Guard and had its home port in Seattle, Washington.[191] The vessel was also licensed to fish in Alaska and had been issued an Alaskan Department of Fish and Game vessel number.[192] On May 9, 1981, officers of the Alaska State Division of Fish and Wildlife Protection seized the Baranof in Dutch Harbor, Alaska under the authority of a valid warrant.[193] On May 11, 1981, the State of Alaska filed a civil complaint *in rem* (the vessel was the only

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[183] *Id. See also* 16 U.S.C. § 1851(a)(7) (1982). One of the seven national standards the regional councils is required to follow is: "(7) Conservation and management measures, where practicable, shall minimize costs and avoid unnecessary duplication."

The legislative history of the MFCMA also suggests a more limited federal obligation to manage. There was deliberate mention that FMP's would be prepared only on an as needed basis. *See* H.R. REP. NO. 445, 94th Cong., 1st Sess. at 13 (1975).

Also, current guidelines to the regional councils specify that each council should assess "all the fisheries within the geographic area of authority" and "identify those fisheries requiring plan development and . . . set priorities for plan development." 50 C.F.R. § 602.5(a)(1) (1982).

[184] Greenberg & Shapiro, *supra* note 9, at 633–34.

[185] Alaska v. F/V Baranof, 677 P.2d 1245, 1252 (Alaska 1984), *cert. denied*, 105 S. Ct. 98 (1984). *See infra* notes 349–68.

[186] *Baranof*, 677 P.2d at 1245.

[187] *Id.*

[188] H.R. REP. NO. 445, *supra* note 2, at 34.

[189] *Baranof*, 677 P.2d at 1247.

[190] *Id.*

[191] *Id.* at 1247.

[192] *Id.* at 1248.

[193] *Id.*

named defendant) in the Superior Court for the forfeiture of the Baranof pursuant to Alaska law.[194] It was undisputed that the alleged violations occurred outside the three-mile limit of the Alaskan territorial sea.[195]

In its answer, the Baranof alleged that Alaska fishing regulations should not apply to a vessel operating beyond the territorial sea. The Baranof argued that the Magnuson Act forbids the enforcement of state law in the Fishery Conservation Zone, particularly since the enforcement was attempted against a vessel that was registered and home-ported outside Alaska.[196] Indeed, at the time this litigation began, the courts were not in complete agreement concerning the proper state role in extraterritorial fishery management after 1976.[197] By authorizing state regulatory jurisdiction beyond the three-mile limit over any fishery not subject to an FMP, the *Baranof*[198] decision allows states a more substantial role in the management of domestic fishing operations.

The court in *Alaska v. F/V Baranof*[199] discussed three areas of dispute concerning the application of state fishery regulations beyond the territorial sea after the Magnuson Act. Two of the court's concerns involve the interpretation of specific provisions of the Magnuson Act. The preemption of state law under the Supremacy clause was the final issue resolved by the Alaskan Supreme Court.

First, the *Baranof*[200] court concluded that section 1856(a) of the Magnuson Act permits extraterritorial state regulation of vessels registered with the forum state. The fact that a vessel was licensed under federal documentation statutes and home-ported outside Alaska did not preclude it from being considered registered under state law and thus subject to Alaskan king crab regulations beyond state waters.[201]

Second, the Alaska Supreme Court agreed with petitioners that section 1861(d) of the Magnuson Act does indeed grant federal courts exclusive jurisdiction over cases arising under provisions of the Act.[202] However, the court found that the violations at issue in the

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[194] *Id.*

[195] *Id.*

[196] *Id.* at 1245–48. *See infra* notes 225–55.

[197] Taylor, *Recent State Court Decisions Create Uncertainty For State Extraterritorial Jurisdiction*, TERRITORIAL SEA, Vol. III, No. 1 at 6 (1983).

[198] 677 P.2d 1245 (1984).

[199] *Id.*

[200] *Id.* at 1251–52. *See infra* notes 210–55.

[201] *Baranof*, 677 P.2d at 1251.

[202] *Id.* at 1252–53. *See infra* notes 256–90.

Baranof[203] case did not arise under the provisions of the Magnuson Act, but from Alaskan statutes and regulations. As a result, Alaska state courts have the authority to hear cases involving violations of Alaska law in the Fishery Conservation Zone.[204]

Third, the *Baranof*[205] court concluded that in the present case the Magnuson Act did not implicitly or explicitly preempt state regulation beyond the territorial sea. The Alaska Supreme Court rejected the petitioners' preemption argument on the ground that the regional council representing Alaska had not promulgated a regional management plan for the king crab fishery.[206] As a result, the court concluded that there existed no direct conflict between the Magnuson Act and Alaska law.[207] The court also found that, in any event, the Alaskan regulations were consistent with the overall goals of the Magnuson Act.[208] Indeed, the absence of any state regulation would frustrate the most important purpose of the Magnuson Act, which is to provide proper management to ensure the conservation of ocean fisheries.[209]

B. Section 1856(a): The Role Of The States In Extraterritorial Management

Section 1856(a) is the only portion of the Magnuson Act that attempts to delineate the scope of a state's authority beyond its territorial waters.[210] The relevant portion of the provision reads that "no state may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such state."[211] According to this provision, a state may no longer base jurisdiction over high seas fisheries upon contacts sufficient to establish personal and subject-matter jurisdiction.[212] Now, the specific nexus of state registration

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[203] *Baranof*, 677 P.2d at 1251.

[204] *Id.*

[205] *Id.* at 1249–51. *See infra* notes 291–348.

[206] *Baranof*, 677 P.2d at 1249–51.

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] 16 U.S.C. § 1856(a) (1982). 16 U.S.C. § 1853(b)(5) also discusses state management authority. It allows an FMP to "incorporate (consistent with national standards, the other provisions of this chapter, and any other applicable law) the relevant fishery conservation and management measures of the coastal state nearest the fishery."

[211] *Id.*

[212] *See, e.g.*, State v. Bundrant, 566 P.2d 530 (Alaska), *appeal dismissed sub nom.* Uri v. Alaska, 429 U.S. 806 (1976); Skiriotes v. Florida, 313 U.S. 69 (1941); Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1936); Manchester v. Massachusetts, 139 U.S. 240 (1891).

is required.[213] When the nexus is established, states may exercise jurisdictional authority over high seas fisheries subject to federal constitutional restraints.[214]

Although it appears to provide for exclusive federal conservation and management authority over fisheries in the FCZ, section 1856(a) has been interpreted to negate those provisions of the Magnuson Act that call for exclusive federal authority on the high seas.[215] Section 1856(a) explicitly grants management authority to the coastal states over vessels registered under their laws that operate on the high seas. Most courts allow state jurisdiction in federal waters by interpreting the Magnuson Act's other provisions concerning exclusive federal jurisdiction in the FCZ to mean exclusive in regard to foreign nations, not the individual states.[216]

The first issue addressed by the court in *Baranof*[217] involves the question of how a vessel is registered under the laws of the state according to section 1856(a). The legislative history provides little guidance when interpreting this clause for the purposes of the Magnuson Act.[218] The major debate regarding the interpretation of section 1856(a) in the cases preceding *Baranof*[219] focused on whether Congress intended to confine this provision to federal registration requirements, or whether Congress intended instead to give effect to state registration laws. A second and related issue addressed by the court *Baranof*[220] was whether section 1856(a) permitted Alaska to apply state fishing laws upon a vessel home-ported in Seattle, Washington.

Basically, the *Baranof*[221] court refused to attach a federal meaning to section 1856(a) and held that this provision was intended to include all vessels registered with Alaska for the purpose of commercial

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[213] Greenberg & Shapiro, *supra note* 9, at 669.

[214] *Id.*

[215] *Baranof*, 677 P.2d 1245; Anderson Seafoods Inc. v. Graham, 529 F. Supp. 512 (N.D. Fla. 1982); People v. Weeren, 26 Cal. 3d 654, 607 P.2d 1279, 163 Cal. Rptr. 255, *cert.denied*, 449 U.S. 803 (1980).

[216] Respondent's Brief In Opposition To Writ of Certiorari at 16, Alaska v. F/V Baranof, 677 P.2d 1245 (1984), *cert. denied*, 105 S. Ct. 98 (1984) (citing H.R. REP. No. 445, *supra* note 2, at 42).

[217] 16 U.S.C. § 1856(a) provides in relevant part: "[n]o state may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such state." 16 U.S.C. § 1856(a) (1982).

[218] Comment, *The Fishery Conservation and Management Act of 1976*, *supra* note 40, at 322.

[219] 677 P.2d at 1251–52.

[220] *Id.*

[221] *Id.*

fishing. The Alaska Supreme Court reasoned that the federal documentation system for ocean vessels bore absolutely no relation to the state's regulation of fisheries.[222] The *Baranof*[223] holding also means that vessels docked outside the state are subject to Alaskan regulation in the FCZ, as long as they are registered with the state for the purposes of commercial fishing. The *Baranof*[224] court undoubtedly recognized that a broad reading of section 1856(a) promotes the federal objective of conserving and managing the nation's off-shore resources as set out in the Magnuson Act.

1. The Issue of Federal Registration

In *Alaska v. F/V Baranof*,[225] the court considered the state's registration clause in the context of a state prosecution of a vessel that had illegally harvested king crabs in the FCZ. The Baranof was regulated by three different governments: it had federal documentation, including an issued Coast Guard number; it was licensed through the State of Washington; and it carried a commercial registration issued by the Alaska Fish and Game Department permitting it to harvest king crab.[226]

The Baranof was unsuccessful in proving that, in light of its federal documentation, it should not be subject to Alaskan regulations in federal waters.[227] The Baranof contended that this registration provision was confined to the federal registration requirements that existed at the time the Magnuson Act was enacted.[228] According to the federal scheme, the Baranof was registered only in the state of Washington.[229] The court reasoned that to limit the scope of section 1856(a) in this manner would render the Magnuson Act's express recognition of state extraterritorial jurisdiction virtually meaningless.[230] An understanding of the terminology of the federal documen-

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[222] *Id.*

[223] *See infra* notes 225–55.

[224] *Id.*

[225] 677 P.2d at 1252.

[226] *Id.* at 1247–48.

[227] *Id.* at 1252.

[228] *Id.* at 1251.

[229] 46 U.S.C. § 17 *repealed* by Vessel Documentation Act, Pub. L. No. 96–594, § 127, 94 Stat. 3459 (1980).

"Every vessel not enrolled or licensed, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or if more than one, the husband or acting or managing owner of such vessel usually resides."

[230] *Baranof*, 677 P.2d at 1252. Many states do not require state identification numbers for

tation system is necessary to fully understand the *Baranof*[231] decision.

The federal vessel documentation system begins with the classification of only those vessels over five net tons; lighter vessels are exempt from all federal requirements.[232] The federal system then makes a distinction between those vessels that are enrolled and those that are registered.[233] Registration is a very old term of art under the federal scheme and is reserved solely for ships engaged in foreign trade.[234] The term has no meaning in the domestic fishing context since the basic purpose of federal registration is to declare a vessel's nationality, and thus to assure the proper payment tariffs and taxes.[235]

Under the federal documentation system, enrolled vessels are distinguished from registered vessels in that they are engaged in domestic trade or fishing activities.[236] Enrollment is another way to declare the nationality of a vessel; but it is also a prerequisite to the procurement of a license in the federal system.[237] A license, in turn, regulates the use to which a vessel is put.[238] Uses like fishing or commercial trade are statutorily mandated, and federal law provides that only properly enrolled and licensed vessels are entitled to the privilege of the specific use delineated in the license.[239]

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vessels that are federally licensed and enrolled. 1) MASS. GEN. LAWS ANN. ch. 90(B) § 2(6) (West 1969).

2) Cal. Veh. Code § 9840–9860. (West 1971).

Thus, if regulation were meant to mean only documentation under state law, many fishing vessels would simply not be so documented. In such circumstances, even where no FMP covers a fishery meaningful state regulation would be precluded. This would result in a jurisdictional void and run counter to one purpose of the MFCMA, which is to coordinate and integrate federal and state roles in fishery management.

[231] *Id.*

[232] Douglas v. Seacoast Products, 431 U.S. 265, 273 (1976) (citing 46 C.F.R. § 67.01–11(a)(5) (1976)).

[233] *Id.* at 272–73.

[234] *Id.* (citing 46 U.S.C. § 11–85 (1982)).

[235] The Mohawk, 3 Wall. 566, 571 (1866).

See also Greenberg & Shapiro, *supra* note 9, at 670 n.160. For a number of reasons it seems unlikely that Congress in section 1856(a) was contemplating an analogous classification at the state level. First, the term "registration" as used in federal statutes has no meaning in the domestic fishing context. Second, the basic purpose of federal documentation laws is to declare a vessel's nationality — a purpose unrelated to the management and conservation goals of the MFCMA. Third, the licenses issued by the United States government for fishing are mainly to prevent fraud on the federal revenue. The licenses are issued upon satisfaction of certain requirements relating to identification, measurement, safety and U.S. ownership. These requirements also have no particular relevance to fisheries management.

[236] *Douglas*, 431 U.S. at 273. *See generally* 46 U.S.C. §§ 251–351 (1982).

[237] The Mohawk, 3 Wall. 566, 567 (1866).

[238] *Douglas*, 431 U.S. at 273.

[239] *Id.*

The terminology of the federal documentation system reveals four reasons why Congress never intended section 1856(a) to mean registration under federal documentation laws. First, federally registered vessels are not engaged in fishing operations, but instead are involved solely in foreign trade.[240] Second, the major purpose for registration in the federal system is to declare a vessel's nationality, not to supervise fishing operations.[241] Third, courts assume that Congress understands the terminology of federal statutes. Accordingly, under a federal interpretation of section 1856(a) Congress would have called for licensed vessels, not vessels registered under state law.[242] Fourth, a vessel registered under federal system would probably never engage in the harvest of king crabs off the coast of Alaska. As a result, the *Baranof*[243] court held that the only manner in which a vessel can be registered under section 1856(a) is with the state of Alaska.

2. The Home-Port Argument

In maritime practice, a vessel is recognized as having only one official home; the port identified as the place of registration is considered the legal domicile of the vessel.[244] The Baranof was homeported in Seattle, Washington, and petitioner claimed that Washington is the only state that can claim authority over the vessel.[245]

The Alaska Supreme Court rejected the Baranof's argument for several reasons. First, the court concluded that the analogy to maritime law was incorrect. The Magnuson Act was not directly concerned with vessel registration and navigation; rather, it was directed toward the management and conservation of the nation's fisheries.[246] The *Baranof*[247] court decided that the proper method of

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[240] 46 U.S.C. § 252, repealed by Vessel Documentation Act, Pub. L. No. 96–594, § 127, 94 Stat. 3459 (1980).

[241] *Douglas*, 431 U.S. at 272–73.

[242] *Id.*

[243] 677 P.2d 1252.

[244] Respondent's Brief In Opposition To Writ Of Certiorari at 14, (citing 46 U.S.C. § 17 (1976), repealed by Vessel Documentation Act, Pub. L. No. 96–594, § 127, 94 Stat. 3459 (1980)).

[245] *Baranof*, 677 P.2d at 1251.

This has also been asserted in a law review article. *See* Fidell, *Enforcement of the FCMA of 1976: The Policeman's Lot*, 52 WASH. L. REV. 513, 596 n.467 (1977). *See also* Comment, *The Fishery Conservation and Management Act of 1976*, *supra* note 40, at 325.

[246] *Baranof*, 677 P.2d at 1251.

[247] *Id.*; *See also* C. SANDS, STATUTORY CONSTRUCTION, § 46.06 at 63 (4th ed. 1973).

Section 46.06 is part of the Plain Meaning Rule of section 46.01. Section 46.06 provides, "It

statutory construction requires a court to determine the interpretation that is most consistent with congressional intent. To interpret section 1856(a) as limited to vessels docked in Alaska would run counter to the purposes of management and conservation and, consequently, would violate a cardinal principal of statutory construction.[248]

The court's second reason for rejecting the home-port argument was that while the Baranof was docked in Seattle, a significant number of its operations occurred in and around Alaskan waters. The court noted that the Baranof complied with all the necessary vessel and gear registration requirements in order to fish in Alaska.[249] In fact, the Baranof was registered, or regulated, by the state under five different sections of the Fish and Game Code of the State of Alaska.[250] As a result, the *Baranof*[251] court found that the plain meaning of the language "under the laws of such state" in section 1856(a) should give effect to Alaskan registration requirements.

Third, the Alaska Supreme Court recognized that a restrictive interpretation of section 1856(a) would give free reign to commercial fishermen operating on the high seas. At the time the Baranof was seized, only the state of Alaska was authorized to manage king crab fisheries in the FCZ because no FMP concerning the king crab had been promulgated by the regional council representing the area.[252] The *Baranof*[253] court cited to cases from other jurisdictions to find that exclusion of state regulation on the high seas would create a danger of wholly unregulated exploitation of the king crab fishery. If Congress had intended such a drastic curtailment of state fishery jurisdiction, the *Baranof*[254] court reasoned that this intent would have been declared explicitly in the Magnuson Act. Undoubtedly aware of the various state mechanisms for establishing extraterri-

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is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute. A statute should be construed so that effect is give to all its provisions, so that no part will be inoperative, superfluous, or insignificant."

[248] 2A C. SANDS, STATUTORY CONSTRUCTION, § 46.06 at 63 (4th ed. 1973).

[249] *Baranof*, 677 P.2d 1251–52.

[250] *Id.* at 1252 n.10.

[251] *Id.*

[252] *Id.* at 1249. At the time the case reached the Alaska Supreme Court, the North Pacific Management Council had prepared an FMP and proposed regulations covering king crab fishing in the FCZ. Under this proposed plan, the fishery will be governed by federal standards which wholly incorporate the Alaskan king crab regulations.

[253] *Id.* at 1252, (citing People v. Weeren, 26 Cal. 3d 654 (1980), 607 P.2d 1279, 163 Cal. Rptr. 255, *cert. denied*, 449 U.S. 839 (1980)).

[254] *Id.*

torial jurisdiction, the Alaska Supreme Court concluded that Congress avoided all reference to traditional terms used in federal documentation laws, and premised continued state jurisdiction on the undefined and generic concept of local registration.[255]

C. Section 1861(d): The Dispute Over The Exclusive Jurisdiction of Federal Courts

A second argument raised by the petitioners in *Baranof*[256] was that the state courts of Alaska lack the authority to enforce fishing regulations beyond their territorial sea. The Baranof claimed that, while section 1856(a) grants to the state the right to exercise rulemaking authority in some instances, section 1861(d) sets forth the proper forum for enforcing the entire regulatory scheme.[257] Section 1861(d) reads, in relevant part, that "[t]he district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under the provisions of this chapter."[258] Basically, the Baranof argued that if Alaska has the authority by virtue of section 1856(a) to enforce its regulations against state registered vessels in the FCZ, then Alaska was required to utilize a federal

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[255] *Id.* Despite being homeported in the state of Washington, it was clear that the Baranof was exploiting resources off the Alaskan coast. Also, most vessels harvesting from this fishery will be registered with the state. This is not true for other areas of the coastal U.S..

For example, the New England Fishery Management Council has approved an FMP which establishes a licensing scheme over the American lobster fishery for the five state area. This plan reflects the jurisdictional problems in managing this lucrative fishery — there are one federal plan and three state schemes within 20 miles of one another off the coast of New Hampshire. *See* 48 Fed. Reg. 36,267 (Aug. 10, 1983).

The implementing provisions of the New England Regional Council's FMP for the American lobster fishery provide that any person choosing to fish only in state waters can continue to do so and still remain governed by state rules alone. However, a person fishing in the FCZ must comply with the more restrictive rule (which can be either a federal or state plan) regardless of whether the lobsters are taken in the territorial sea or the FCZ.

One commentator believes this proposal may be open to constitutional challenge. Such a challenge could be successful provided that Massachusetts and New Hampshire fishermen are both fishing in the FCZ and the Massachusetts regulations are stricter than the regional council's FMP, and the New Hampshire rules are more lenient than those governing the lobster fishery. Presumably, the Massachusetts fishermen must comply with state regulations even in the FCZ, while the New Hampshire residents would be subject to federal standards. The Massachusetts resident could then argue that there was a violation of the Privileges and Immunities Clause and National Standard 4 of the MFCMA — "conservation and management measures shall not discriminate between residents of different states." TERRITORIAL SEA Vol. IV, No. 1 at 10 (1984).

[256] *Baranof*, 677 P.2d at 1252.

[257] Appellee's Brief at 14–15, Alaska v. F/V Baranof, 677 P.2d 1245 (Alaska 1984), *cert. denied*, 105 S. Ct. 98 (1984).

[258] 16 U.S.C. § 1861(d) (1982).

forum to enforce the application of state regulations beyond the territorial sea.[259]

On this issue, the Alaska Supreme Court overruled the State Superior Court by holding that state courts are authorized to hear cases concerning violations of state regulations on the high seas.[260] According to the Alaska Supreme Court, the central issue of this dispute focused on whether this case "arose under" the provisions of the Magnuson Act.[261] The court held that the alleged violations of the Alaska Fish and Game Code did not arise under the provisions of the Magnuson Act and, accordingly, that state court was the proper forum to litigate this dispute.[262]

Baranof contended that state regulatory authority existed in the FCZ only as authorized by the Magnuson Act and, therefore, became part of the federal fishery scheme enforced in United States District Courts.[263] The petitioner argued that the Magnuson Act expressly declares exclusive authority to regulate fisheries in section 1817 and circumscribes state extraterritorial jurisdiction in section 1856(a) to only vessels registered with the forum state.[264] The Baranof asserted that this language indicated that the source of Alaskan authority beyond the territorial sea does not derive from its traditional police powers, but from a limited grant of federal authority to Alaska in section 1856(a).[265] Since every action to enforce state regulations in the FCZ is allowed by section 1856(a), the Baranof claimed that the present case arose under the provisions of the Magnuson Act.[266]

The Alaskan Attorney General's office successfully argued that this was an incorrect interpretation of section 1861(d).[267] As noted earlier, the Magnuson Act provides exclusive federal jurisdiction only over cases "arising under the provisions of this chapter."[268] Section 1861(e) defines the "provisions of this chapter" as regulations passed by the federal government,[269] federally issued permits,[270] and international fishery agreements.[271] The state emphasized that in

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[259] Appellee's Brief at 14–15.
[260] *Baranof*, 677 P.2d at 1253.
[261] *Id.*
[262] *Id.*
[263] Appellee's Brief at 15.
[264] *Id.* at 13–14.
[265] *Id.* at 14.
[266] *Id.* at 15.
[267] *Baranof*, 677 P.2d at 1253.
[268] 16 U.S.C. § 1861(d) (1982).
[269] 16 U.S.C. § 1861(e)(1)(A) (1982).
[270] *Id.*
[271] 16 U.S.C. § 1861(e)(1)(B) (1982).

Congress' careful allocation of fishery management between state and federal agencies, and of jurisdiction between state and federal courts, no mention was made in the definition of section 1861(e) of "arising under" to include state statutes or regulations.[272] In addition, the state noted that the legislative history also helped to define the enforcement actions Congress intended would arise under the Magnuson Act. The legislative history of the Magnuson Act indicates that the jurisdictional statement of section 1861(d) was inserted solely to ensure an American forum for foreign vessels and alien fishermen who violated the Act.[273] It was not intended to divest state courts of their existing jurisdiction over domestic violations.[274]

Moreover, the *Baranof*[275] court found that petitioner's argument ran counter to the well-established principle articulated in *Gully v. First National Bank*,[276] that cases arise under federal law only if a federal right is a substantial and essential element of the claim upon which the result of the action depends. A suit based upon a violation of an Alaskan statute should therefore be heard in state court since the cause of action did not arise under an act of Congress or the U.S. Constitution — the sources of federal question jurisdiction.[277] The court noted that it was uncontested that the Baranof was cited and charged under Alaska Fish and Game regulations.[278] Accord-

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[272] Appellant's Brief at 19, Alaska v. F/V Baranof, 677 P.2d 1245 (Alaska 1984), *cert. denied*, 105 S. Ct. 98 (1984).

[273] *Id.* at 20. *See also*, H. R. REP., NO. 445, *supra* note 2, at 42.

Under the international agreement (ICNAF), each member country is expected to levy penalties on their own fishermen who violate the agreement and are apprehended by other member nations. In essence, the ICNAF asked violating nations to police themselves; this optimistic proposition did not work.

[274] *Id.*

[275] 677 P.2d 1245, 1252 (Alaska), *cert. denied*, 105 S. Ct 98 (1984).

[276] Gully v. First Nat'l Bank, 299 U.S. 105 (1936). The U.S. Supreme Court recently reaffirmed precedent by finding that the nature of an action, rather than its source, determines subject matter jurisdiction. Franchise Tax Board v. Laborers' Vacation Trust, 463 U.S. 1 (1983) (citing Gully v. First Nat'l Bank, 299 U.S. 109, 116 (1936)).

In this decision, the Court reaffirmed the principle that a suit based upon a state statute does not arise under federal law because prohibited thereby. The Court also ratified the theory that a case arises under federal law when the vindication of a right under state law necessarily turns on some construction of federal law. The federal question must also appear on the face of the plaintiff's well-pleaded complaint.

As in *Baranof*, the dispute in *Franchise Tax Board* centered on state regulations promulgated by the California legislature. In *Baranof*, the MFCMA entered the proceedings only as a defense to a prosecution arising from the Alaskan Fish & Game Code. Attorney General's brief at 20.

[277] *Baranof*, 677 P.2d at 1253 (citing *Franchise Tax Board v. Laborers' Vacation Trust*, 463 U.S. 1, 8 (1983)).

[278] *Baranof*, 677 P.2d at 1253.

ingly, the Alaska Supreme Court followed the well-pleaded complaint rule which allows for the removal of cases from a state forum only when plaintiff's complaint establishes that the case arises under federal law.[279] In this case, however, the Baranof merely asserted section l86l of the Magnuson Act as a defense to a state law claim.[280]

Even if the source of state authority did derive from section 1856(a), the nature of this state action was not a matter of federal question jurisdiction.[281] Instead, the nature of the state enforcement action derived from the traditional police power authority to regulate a local food source.[282] The United States Supreme Court has traditionally ruled that it is the federal nature of an action, not its source, that determines federal subject-matter jurisdiction.[283] As argued by counsel for the Alaska Attorney General, the present action was state in nature since it pleaded only issues of state law[284] and did not depend upon an interpretation of any federal statutes or regulations.[285] For these reasons, the Alaska Supreme Court held that the *Baranof*[286] case arose under state law, rather than from provisions in the Magnuson Act.

The *Baranof*[287] court also ruled that pragmatic concerns should be a factor in determining whether this suit arose under federal law. The Supreme Court of Alaska accepted the argument that denial of state court jurisdiction over cases like *Baranof*[288] would injure the conservation and management purposes of the Magnuson Act by hampering enforcement. In his brief, the Attorney General noted that typically king crab harvesting violations occur hundreds of miles from the nearest federal court in Anchorage, even though three state courts are located convenient to these major fishing grounds.[289] The *Baranof*[290] court also noted that it is state courts that have developed

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[279] Gully v. First Nat'l Bank, 299 U.S. 109, 113 (1936).

[280] *Franchise Tax Board*, at 9–10.

[281] Federal question jurisdiction is defined by the United States Constitution: "The judicial power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority . . . . " U.S. CONST. art. III, sec. 2, cl. 1.

[282] Lawton v. Steele, 152 U.S. 133 (1894); Manchester v. Massachusetts, 139 U.S. 240 (1891).

[283] Appellant's Brief at 20, *Baranof* (citing Puerto Rico v. Russell & Co., 288 U.S. 476, 483 (1932)).

[284] Louisville & Nashville R.R. v. Motely, 211 U.S. 149, 152 (1908).

[285] Smith v. Kansas City Title Co., 255 U.S. 180, 199 (1921).

[286] 677 P.2d at 1253.

[287] *Id.*

[288] Appellant's Brief at 21, *Baranof.*

[289] *Id.*

[290] 677 P.2d at 1253.

a familiarity with state fishery management laws and procedures, and that Congress surely recognized this when it allowed continued state authority under the Magnuson Act.

D. Preemption: The Impact Of The Magnuson Act Upon State Fishery Management Beyond The Territorial Sea

In drafting the Magnuson Act, it is clear that Congress narrowed state fishery management authority beyond the territorial sea. But the *Baranof*[291] court dismissed the claim that the Magnuson Act either implicitly or explicitly preempts state regulation of federal waters. The application of Alaska regulations to a vessel operating in the FCZ was upheld for three primary reasons. First, the court found that nowhere in the language of the Magnuson Act does Congress explicitly claim to occupy the entire field of fishery management.[292] To the contrary, section 1856(a) explicitly permits Alaska to regulate any vessels operating beyond its boundaries as long as they are registered with the state.[293]

Second, the court found it significant that the North Pacific Fishery Management Council had not promulgated any FMP concerning the management of king crabs.[294] The court placed considerable weight on the *amicus* brief filed by the Secretary of Commerce asserting that the Magnuson Act evidences a congressional decision to assert federal jurisdiction in the FCZ without fully occupying the field.[295] In the absence of any federal supervision of the king crab fishery, the *Baranof*[296] court held that the state's extraterritorial application of its regulations was proper.

Third, since the Alaska regulatory regime places conservation and management as its primary goals, the purposes of the Magnuson Act were met when state king crab regulations were applied in the FCZ.[297] A holding that the Magnuson Act preempts all state regulation beyond the three-mile limit (even in the absence of a conflicting

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[291] 677 P.2d at 1250.

[292] *Baranof*, 677 P.2d at 1249–50. The court ignored section 1812 of the Magnuson Act which declares: "The United States shall exercise exclusive fishery management authority in a manner provided for in this chapter, over the following: 1) All fish within the Fishery Conservation Zone . . . ." One explanation is that the *Baranof* court made it clear that the legislative history of the MFCMA concerning the provisions declaring exclusivity means exclusive in reference to other nations, not in the federal-state sense.

[293] 16 U.S.C. § 1856(a) (1982).

[294] *Baranof*, 677 P.2d at 1249.

[295] *Id.* at 1251.

[296] *Id.*

[297] *Id.*

FMP) would frustrate the primary congressional objectives of conservation and management.[298] The *Baranof*[299] court held that the Magnuson Act calls for proper management and conservation of fisheries in the FCZ, but not exclusive management in this area. The court found that Alaska can fill any gaps in the federal regime concerning domestic exploitation of the king crab fishery.[300]

Preemption analysis begins with Article VI, the Supremacy Clause of the U.S. Constitution, which establishes federal law as the supreme law of the land and prohibits a state from enacting laws that would frustrate the enforcement of federal laws.[301] Despite this proviso, courts have held that a state exercise of the police power will not be superseded unless there is a clear and manifest intent on the part of Congress to occupy the field.[302] Moreover, if Congress does not expressly prohibit state involvement in an area, preemption will not be lightly inferred.[303]

The *Baranof*[304] court analyzed the impact of the Magnuson Act upon state extraterritorial fishery management in two ways. First, the court searched the provisions of the Magnuson Act for explicit preemption of state regulations.[305] The court found that from the language of the Magnuson Act, Congress failed to declare that federal authority was exclusive over the FCZ.[306] Second, the *Baranof*[307] court decided that the structure and purpose of the Magnuson Act does not reveal an implicit congressional intent to occupy the entire field of fishery management in the FCZ. There are three ways that Congress impliedly preempts a state statute under the Supremacy Clause. First, the federal regulatory scheme may be so complete or pervasive that courts conclude Congress intended to regulate the field exclusively.[308] Second, the federal interest may be so dominant that it does not admit concurrent state regulation.[309] Finally, even where Congress has not completely foreclosed state legislation in a

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[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] U.S. CONST. art. VI, cl. 2.

[302] *Baranof*, 677 P.2d at 1249 (quoting Philadelphia v. New Jersey, 437 U.S. 617, 621, n.4 (1978)); *see also* Webster v. Bechtel, 621 P.2d 890, 898 (Alaska 1980).

[303] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1946).

[304] 677 P.2d 1245 (Alaska 1984).

[305] *Id.* at 1249–50.

[306] *Id.*

[307] *Id.* at 1250–51.

[308] Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973).

[309] Northern States Power v. Minnesota, 477 F.2d 1143, 1146 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972).

particular field, a state statute may still be preempted to the extent that it actually conflicts with a federal statute or regulation.[310]

1. Explicit Preemption

The *Baranof*[311] court found that nowhere in the language of the Magnuson Act does Congress explicitly claim to preempt the entire field of fishery management. The state's brief noted that when Congress intends to occupy an area, it usually does so directly and explicitly.[312] For example, the Employee Retirement Income Security Program clearly provides:

> This chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title.[313]

The Magnuson Act contains no similar express preemption section. In fact, the court found that the Magnuson Act is devoid of language that can be construed as evidence of congressional intent to occupy the entire field of fishery management beyond the territorial sea.[314] As noted previously,[315] the sections of the Magnuson Act declaring exclusive federal management authority in the FCZ are intended to mean exclusive in regard to foreign nations, but not the individual states.[316] Nowhere in the provisions of the Magnuson Act are the phrases, "shall supersede any and all state laws,"[317] or "no state shall enact or enforce any law."[318]

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[310] Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978); Jones v. Rath Packing Co., 430 U.S. 519, 525–26 (1977).

[311] 677 P.2d at 1250.

[312] Respondent's Brief In Opposition to Writ of Certiorari at 10, *Baranof*.

[313] *Id.* at 11 (citing the Employment Retirement Income Security Act, 29 U.S.C. § 1144(a) (1982)).

[314] *Baranof*, 677 P.2d at 1250. However, two Florida courts have found this preemptive effect. Tingley v. Allen, 397 So. 2d 1166 (Fla. 1981); Livings v. Davis, 422 So. 2d 364 (Fla. 1982).

In *Tingley*, the court invalidated a Florida statute purporting to regulate shrimp fishing outside territorial waters. The court rested its holding solely on the grounds that, in its view, " . . . the Magnuson Act specifically prohibits state regulation beyond its territorial waters."

[315] *See supra* notes 181–84. *See also* H.R. REP. No. 445, *supra* note 2, at 42.

[316] Respondent's Brief at 16, *Baranof*.

[317] *Id.* at 11. Other examples of federal statutes that explicitly preempt state regulation: 1) Federal Aviation Administration Act, 49 U.S.C. § 1305(A)(1) (1982) — "No state or subdivision thereof and no interstate agency of two or more states shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to costs, routes, or resource of any carrier having authority under subchapter IV of this chapter to provide interstate transportation;" 2) The Marine Mammal Protection Act of 1972, 16 U.S.C.

To the contrary, section 1856(a) of the Magnuson Act specifically permits Alaskan regulation of vessels in federal waters so long as the vessels are registered with the state.[319] The Alaska Supreme Court found this provision to evidence a congressional decision to assert federal jurisdiction in the FCZ without foreclosing state management authority.[320] The Magnuson Act limited state authority by allowing the exercise of extraterritorial state jurisdiction based upon the registration requirement, rather than the citizenship or minimum contacts tests. However, the language of the Act failed to expressly declare that state management authority beyond the territorial sea was preempted.[321]

The rationale utilized in *Baranof*[322] derived from two decisions made outside the State of Alaska. In *People v. Weeren*,[323] the California Supreme Court upheld the state's assertion of regulatory jurisdiction where the defendant's vessel, licensed with the state, was used to take swordfish in the FCZ in violation of state regulation. As was the case in *Baranof*,[324] the regional council governing California had not promulgated an FMP governing swordfish. Under similar analysis, in *Anderson Seafood, Inc. v. Graham*,[325] a federal district court upheld a state statute prohibiting the use of a purse siene[326] within or without the waters of Florida as applied to state registered vessels operating beyond the three-mile limit. The *Baranof*[327] court relied on the reasoning of these decisions to con-

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§ 1379(a)(1) (1982) — "No state may enforce any state law or regulation relating to the taking of any species . . . unless the Secretary has transferred authority for the conservation and management of that species . . . to the state under subsection (b)(1) of this section."

[318] Appellant's Brief at 11, *Baranof*. 16 U.S.C. § 1856(a) (1982) provides: "Nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any state within its boundaries. No state may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such state."

[319] 16 U.S.C. § 1856(a) (1982).

[320] *Baranof*, 677 P.2d at 1250.

[321] *Id.*

[322] *Id.*

[323] *Id.* (quoting People v. Weeren, 26 Cal. 3d 654, 607 P.2d 1279 (1980), *cert. denied*, 449 U.S. 839 (1980)).

[324] *Id.*

[325] *Baranof*, 677 P.2d at 1250 (quoting Anderson Seafoods Inc. v. Graham, 529 F.Supp 512 (N.D. Fla. 1982)).

[326] A purse seine is a large net designed to be set by two boats around a school of fish. It is arranged so that after the ends are brought together the bottom can be closed. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1847 (1982).

[327] *Baranof*, 677 P.2d at 1250. Two recent Florida decisions have added another requirement

clude that the Magnuson Act does not expressly preempt state regulation of vessels harvesting king crab beyond the territorial sea.

2. Implicit Preemption

Neither could the *Baranof*[328] court conclude that the structure and nature of the Magnuson Act implicitly preempts all state regulation in federal waters. As a general rule, when Congress does not expressly preempt state law, courts determine whether there is an implied intent to preempt.[329] However, this congressional intent is not lightly inferred.[330] For several reasons, the Alaska Supreme Court found that the structure and nature of the Magnuson Act fails to reveal an implicit preemption of state fishery management in the FCZ.

First, the court noted that section 1856(a) specifically permits extraterritorial jurisdiction over vessels registered with the state.[331] Due to this provision, there was never a complete delegation of regulatory power from Congress to the Secretary of Commerce over fishery management in the FCZ.[332] As a result, petitioner's argument, that cases holding that the very delegation of regulatory power to an administrative agency supersedes state regulations, was

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to valid state enforcement of its fishing regulations beyond the territorial sea. The Florida Supreme Court in Southeastern Fisheries v. Department of Natural Resources, 435 So. 2d 1351 (Fla. 1984) requires a specific declaration within a state statute of extraterritorial application before it will be upheld in Florida courts. The Eleventh Circuit Court of Appeals went along with this rationale in Bethell v. Florida, 741 F.2d 1341 (11th Cir. 1984). The crucial language in *Southeastern Fisheries* reads as follows:

> The state's authority to regulate in these waters is only by the consent and acquiescence of the federal government. We find that if there is to be a confrontation between the state and federal government, then the legislature should expressly declare an intent to apply outside state waters . . . . Since there is no clear expression by the legislature . . . we find it would be improper to apply this statute in extraterritorial waters by implication and confront the federal government with its asserted validity.

Southeastern Fisheries, 435 So. 2d at 1355 (Fla. 1984).

[328] *Baranof*, 677 P.2d at 1250–51.

[329] Webster v. Bechtel, 621 P.2d 890, 898 (Alaska 1980); Ray v. Atlantic Richfield Co., 435 U.S. 151, 157–58 (1978).

[330] Alaska Board of Fish & Game v. Thomas, 635 P.2d 1191, 1193 (Alaska 1981); Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963), *reh'g denied*, 374 U.S. 858 (1963). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 6–25 at 384.

[331] *Baranof*, 677 P.2d at 1250.

[332] *Id.*

not applicable.[333] In those cases, Congress had delegated to the federal agency exclusive jurisdiction over a regulatory area.[334]

The interpretation of the Magnuson Act asserted by the Secretary of Commerce also persuaded the *Baranof*[335] court to conclude that the Magnuson Act does not implicitly preempt state regulation of extraterritorial fisheries. As the federal official charged with implementing the Magnuson Act, the Secretary of Commerce filed a brief *amicus curiae* to argue for the enforcement of state king crab regulations in federal waters.[336] The Secretary recognized that, in this instance, the absence of a cooperative state and federal management scheme would have a crippling effect on the major objectives of the Magnuson Act.[337] While the interpretation of a statute by the agency responsible for its administration is not controlling, the *Baranof*[338] court accorded considerable weight to the Secretary's arguments.

Third, the State's brief noted that the legislative history of the Magnuson Act does not manifest any intent to preempt state authority beyond the three-mile limit.[339] During consideration of the Magnuson Act, there was substantial congressional attention given to the inadequacies of international treaties intended to protect domestic resources from foreign overfishing. The legislative history reveals a determination that the proposed Magnuson Act should contain a provision whereby foreign violators would be subject to the jurisdiction of United States courts.[340] As a result, the concept of exclusive jurisdiction meant exclusive in the sense that no other nation had authority or jurisdiction over fishing operations within the FCZ.[341] In sum, the legislative history of the Magnuson Act reveals that federal jurisdiction was to apply to the heretofore unreachable foreign vessels; Congress did not intend to preempt legitimate state fishery management programs directed at domestic fishermen.[342]

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[333] Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1947).

[334] *Id.*

[335] 677 P.2d at 1251.

[336] Brief of the Secretary of Commerce as Amicus Curiae at 10–11, *Baranof*, 677 P.2d 1245 (Alaska), *cert. denied*, 105 S. Ct. 98 (1984).

[337] *Id.* at 15.

[338] 677 P.2d at 1251.

[339] Appellant's Brief at 16, *Baranof.*

[340] *Id.* at 18–19.

[341] *Id.*

[342] *Id.*

Finally, the *Baranof*[343] court noted that federal preemption will not be implied where the Alaska statutes at issue are consistent with the stated purpose of the Magnuson Act. At the time of the *Baranof*[344] decision, the North Pacific Fishery Management Council had yet to promulgate an FMP concerning the management of the king crab fishery. The court found that, since the basic purposes of the Magnuson Act and the state king crab regulations are harmonious, a finding of federal preemption would not only jeopardize the fishery, but also frustrate Congress' stated goals of conservation and management.[345] The state argued that the findings, purpose, and policy of the Magnuson Act focus on the very same conservation and management objectives found in the Alaska Constitution and the state's Fish and Game Code.[346] The Alaskan king crab regulations, according to the state, implement all the conservation and management objectives in the Bering Sea that would be required by the Magnuson Act.[347] The *Baranof*[348] court accepted this argument and noted that the North Pacific Fishery Management Council was in the process of drafting an FMP for the king crab fishery that wholly incorporates the Alaskan regulations. For these reasons, it was

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[343] 677 P.2d at 1251.

[344] *Id.* at 1249.

[345] *Id.* at 1251.

[346] Appellant's Brief at 14–15, *Baranof.*

> The purposes, findings, and policies of the MFCMA at section 1801 focus on the same conservation and development objectives found in the Alaska Constitution and Fish & Game Code. Alaska Constitution, Article VIII, §§ 1,2,4; ALASKA STAT. §§ 16.05.010, 16.05.020, 16.05.221.
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> In particular, the state must provide for "the utilization, development, and conservation" of fisheries resources. Alaska Constitution, Article VIII, § 2. The MFCMA has similar objectives at §§ 1801(a)(5),(6),(7); 1801(b)(1),(2),(3),(6); 1801(c)(1),(2),(3),(5); and 1851(a)(1),(2),(4),(5),(6),(7).
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> Alaska's management program must also conform to the sustained yield principle. Alaska Constitution Article VIII, § 4. Similarly, the Magnuson Act calls for an optimum yield on a continuing basis. §§ 1801(b)(4), 1851(a)(1).
>
> Alaska's fishery resources are reserved to the people for common use. Alaska Constitution, Article VIII, § 3, and all laws governing the use of natural resources in the state must apply "equally to all persons similarly situated." Alaska Constitution, Article VIII, § 17. Similarly the federal goals require that management measures not discriminate between residents of different states and be fair and equitable to all fishermen. MFCMA § 1851(a)(4).
>
> Alaska king crab regulations implement all of the MFCMA's conservation and development purposes in the Bering Sea by establishing fishing areas, fishing seasons, and size limits.
>
> For these reasons the purposes of the state regulations complement, rather than frustrate the purposes of the Magnuson Act.

[347] Appellant's Brief at 14–16 (citing ALASKA ADMIN. CODE tit. 5, §§ 34.800, 34.810, 34.825).

[348] 677 P.2d at 1251.

established that the purpose of the state's regulations assure, rather than frustrate, the purposes of the Magnuson Act.

V. IMPLICATIONS OF *ALASKA V. F/V BARANOF*

The most significant aspect of the *Baranof*[349] decision is the finding that a vessel does not have to be home-ported in a state to be considered registered in that state for the purposes of section 1856(a). The *Baranof*[350] court properly interpreted the registration requirement to include any vessel authorized by the forum state to pursue commercial fishing operations. This approach grants a much broader scope of state management authority in federal waters than commentators originally anticipated. There are provisions in the fish and game codes of many states that require the registration of nonresident vessels and operators who harvest fish for commercial purposes in and beyond the territorial sea of the coastal state.[351] Like Alaska, most coastal states have provisions granting authority over nonresident commercial fishermen who operate in or adjacent to state waters.[352] The *Baranof*[353] court's interpretation of the registration requirement thus allows for virtually the same extraterritorial jurisdiction over nonresidents that was provided by landing laws and minimum contacts analysis in the pre-Magnuson Act era.

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[349] 677 P.2d 1245 (Alaska 1984), *cert. denied*, 105 S. Ct. 98 (1984).

[350] *Id.*

[351] *See, e.g.*, FLA. STAT. ANN. § 370.06(2) (West 1980) ("Aliens and nonresidents shall pay annual license tax of $25 before taking saltwater fish from the waters of this state."); ME. REV. STAT. ANN. tit. 12, § 6501 (1982) ("It shall be unlawful for any person to engage in the activities authorized . . . without a current commercial fishing license."); OR. REV. STAT. § 508.265 (1984) ("The licensing of any boat pursuant to this chapter to take food fish for commercial purposes from the waters of this state or land food fish from the waters of the Pacific Ocean at any point in this state shall constitute registration for such vessels under the laws of this state for the purposes of section 306(a) or 1856(a) of the Fishery Conservation and Management Act of 1976."); R.I. GEN. LAWS § 20–4–1 (1981) ("No person shall engage in the taking for sale, by any manner, method, or contrivance, of any marine finfish, shellfish, crustacean, or other invertebrates and no vessel, boat, trap, seine, or other fishing gear shall be used in the taking for sale of any marine finfish, shellfish, crustacean, or other invertebrate unless a license thereof has been obtained as provided in this title."); WASH. REV. CODE ANN. § 75.28.130 (1984) ("It shall be unlawful for any person to engage in the activities authorized by this license under this section without a current license. It shall be unlawful for any person to engage in any phase of the commercial fishing industry or to operate any fishing gear known as or classified as commercial fishing gear . . . without having first obtained and having in possession such licenses or delivery permits herein specified."). *See also* R.I. GEN. LAWS §§ 20–4–5, 20–6–4, 20–6–6 (1981).

[352] ALASKA STAT. § 16.05.480 (1984) (Nonresident Commercial Fishing License).

[353] 677 P.2d 1245 (Alaska 1984), *cert. denied*, 105 S. Ct. 98 (1984).

The *Baranof*[354] court's resolution of the preemption issue is not as significant since there was no direct conflict between the federal and state regulations governing the king crab fishery. The North Pacific Regional Fishery Management Council had yet to promulgate an FMP concerning the king crab fishery.[355] Therefore, it was not remarkable that the Alaska court would validate state regulation of this important resource in the absence of any federal regulations covering the FCZ. As a result, *Baranof*[356] merely stands for the proposition that state regulation of an extraterritorial fishery is valid in the absence of federal involvement. However, it is undoubted that in light of the decision in *Baranof*,[357] a properly promulgated FMP will supersede conflicting state regulation of fishing operations in the FCZ.

Due to this threat of federal preemption, the Department of Commerce has urged the regional councils to adopt a cooperative relationship with state authorities when formulating FMP's.[358] The motivating factor for the Department is that the divergence of federal regulations for the FCZ, from the state regulations in the adjacent territorial sea, will complicate the compliance efforts of each jurisdiction by adding an additional element of proof to enforcement actions.[359] For example, if a particular size of cod may be taken legally in the FCZ pursuant to federal regulations, but the same size cod is illegal if taken within the territorial sea, it will be necessary for the state to prove where the cod was taken in order to enforce its regulations successfully.[360] If the federal size limit were smaller then the state size limit, then federal enforcement officers would be required to prove the cod was taken in the FCZ.[361] This was probably the motivating factor in the North Pacific Fishery Management Council's decision to adopt the State of Alaska's entire king crab regulatory scheme for federal waters.

The Western Pacific Fishery Management Council followed the same approach. The Hawaiian Spiny Lobster FMP formulated by

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[354] *Id.*

[355] *Id.* at 1251.

[356] *Id.*

[357] *Id.*

[358] Memorandum from Terry Leitzell to Jay Johnson. Assistant General Counsel for Fisheries, National Oceanic and Atmospheric Administration, Suppression and Jurisdictional Operations Under § 306 of the Magnuson Act, 16 U.S.C. § 1856(a) (1982) [hereinafter cited as Memorandum from Terry Leitzell].

[359] *Id.* at 15.

[360] *Id.*

[361] *Id.* at 15–16.

the Western Pacific Council appears to have served as a vehicle for achieving a cooperative management scheme between the two governments.[362] The spiny lobster fishery off the Hawaiian Islands has been the subject of dispute between state and federal officials for some time.[363] A compromise was worked out between the State of Hawaii and the Western Pacific Council whereby the minimum size limits are identical in both state and federal waters.[364] The Council decided to adopt state measures, and thereby successfully avoided the cumbersome legal and enforcement battles that had burdened the State of Alaska and the North Pacific Council.

By negotiating this compromise, Hawaii now has a consistent minimum standard in both the state and federal waters surrounding the Islands.[365] This makes dockside enforcement much easier, since neither government is required to prove that the illegal fish were taken within their sphere of authority.[366] This type of compromise is necessary to achieve an essential goal of the Magnuson Act: consistent management authority throughout the range of a regulated fishery.

The decisions of the Western Pacific and North Pacific Regional Councils, to adopt state regulations for federal waters, are evidence of a growing cooperative relationship between state and federal authorities. These two councils have followed the suggestion of the Department of Commerce, which has argued the incorporation of state regulations into FMP's to avoid the inconsistency problems noted earlier.[367] The Department has also suggested a careful examination of existing state law to determine whether an FMP governing domestic fishing operations is even required.[368] The Department of Commerce has come to realize that a cooperative relationship between state and federal authorities is the key to comprehensive

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[362] Comment, *Spiny Lobster Consistency Compromise*, TERRITORIAL SEA, Vol. IV, No. 1, at 11 (1984).

[363] *Id.*

[364] *Id.*

[365] *Id.*

[366] *Id.*

[367] Memorandum from Terry Leitzell, *supra* note 358, at 15–16.

[368] *Id.* However, the Department of Commerce does recognize that there will be situations where a regional council will reject the approach taken by adjacent states and will impose regulations which better suit the purposes of the Magnuson Act. In addition, in areas like New England, where a single fishery is often regulated by three states, it will be impossible for the regional council to avoid the inconsistency problem. In such situations, uniformity in the regulation of the FCZ and the territorial sea may be preserved by a state effort to conform their management schemes to the FMP covering a common fishery. If not, both governments will face difficulty in enforcing their regulatory schemes for the common fishery.

and effective fishery management from the shoreline to the two-hundred mile limit.

VI. Conclusion

The Alaska Supreme Court in *Baranof*[369] recognized that a system of state extraterritorial enforcement is a valuable complement to the federal involvement mandated by the Magnuson Act. The court in *Baranof*[370] held that the Magnuson Act explicitly permits the extension of Alaskan regulatory authority over vessels registered with the state. And since the state regulation followed the Magnuson Act's basic goals of conservation and management, not only were the state regulations upheld, but the North Pacific Regional Council later adopted the entire state management scheme.

In summary, the *Baranof*[371] court validated the state king crab regulations with respect to petitioner's three challenges. First, the court held that a vessel home-ported outside Alaska can be considered registered with the state under section 1856(a) of the Magnuson Act. A vessel is registered with Alaska under section 1856(a) if it is registered or licensed with the state for the purpose of commercial fishing. In so holding, the *Baranof*[372] court extended state jurisdiction under section 1856(a) to nonresidents who are regulated by Alaskan commercial fishing statutes.

Second, the court found that the Magnuson Act grants to the federal courts exclusive jurisdiction over cases arising under the provisions of the Magnuson Act. However, the Alaska court correctly found that the petitioner's claim did not arise under the provisions of the Act. The Baranof was charged with the violation of state fishing regulations, not any provision promulgated by the federal government or the North Pacific Regional Council. In essence, the court in *Baranof*[373] held that state courts have the authority to enforce their fishing regulations even when the violation occurs outside the territorial sea.

Third, the *Baranof*[374] court found that the Magnuson Act neither explicitly, nor implicitly, preempts state regulation of high seas fisheries. Local regulations are only invalidated where there is a direct

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[369] 677 P.2d 1245 (Alaska), *cert. denied*, 105 S. Ct. 98 (1984).
[370] *Id.*
[371] *Id.*
[372] *Id.*
[373] *Id.*
[374] *Id.*

conflict between an FMP and a state fishery scheme. Since enforcement problems result when the state and federal schemes conflict, the Secretary of Commerce successfully persuaded the North Pacific Regional Council to accept a uniform plan for the management of the king crab fishery in state and federal waters.

This article's examination of the Magnuson Act supports the conclusion that fishery management on the high seas, far from being an exclusive federal function, may be best carried out through a cooperative allocation of responsibilities between the states and the federal government. Reliance on state authority is thus proper when federal management of domestic fishing is not necessary. As long as the regional councils act in accordance with the standards and principles of the Magnuson Act, and as long as deference to state authority is accompanied by adequate communication and oversight, then the objectives of the Magnuson Act will be fulfilled. The primary benefit of this cooperative relationship will be that federal resources can be allocated to the primary source of the overfishing problem — foreign operations within the FCZ.