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VIETNAMESE FISHERMEN ASS'N V.
CALIFORNIA DEPARTMENT OF FISH AND GAME:
SHOULD REGIONAL FISHERY COUNCILS
DETERMINE EEZ PREEMPTION
OF STATE LAWS?

Teresa M. Cloutier*

[There is an] old adage about the two greatest lies ever
told. The first one is 'The check is in the mail,' and the
second one is 'I'm from the Federal Government and I'm
here to help you.'

I. INTRODUCTION

In 1976, Congress enacted the Magnuson Fishery Management
Conservation and Management Act (MFCMA), creating a national
program for the conservation and management of U.S. fishery resources.
The Act established regional management councils to manage all fisheries
located in waters beyond the states’ marine boundaries. Under the
MFCMA, state authority in federal waters is limited to the regulation of
state-registered vessels. Since the passage of the Magnuson Act, several
states have attempted to exercise this authority and regulate fishing
activity outside of their territorial waters. These attempts have raised
fundamental questions concerning the limits of permissible state authority
under the Magnuson Act.

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1. West Coast Fishery Management, Hearings on H.R. 2351 Before the Subcomm.
on Fisheries and Wildlife Conservation and the Environment of the House Comm. on
Breaux).
1882 (1988) (prior to 1980, this Act was known as the Fishery Conservation and
Management Act [hereinafter MFCMA]).
In its decision in *Vietnamese Fishermen Ass'n of America v. California Department of Fish & Game*, the United States District Court for the Northern District of California joined a line of decisions narrowly interpreting the extent of state authority over fisheries in federal waters. The court held that extra-territorial enforcement of a California ban on gillnetting for rockfish was preempted by federal groundfish regulations allowing such gillnetting in those waters. This casenote will argue that there are two problems with the decision. The first problem lies in the court's reduction of the role of state fisheries management by finding an actual conflict by implication at a time when all management agencies should be working together to protect fish stocks. The second problem arises from the decision of the court to give deference to an unappealable consistency determination by a body containing inherent conflicts of interest. These problems reflect the court's failure to properly balance its analysis under the Supremacy Clause with fundamental concerns stemming from the concepts of federalism and due process. As a result, the court unjustifiably prevented a state from protecting a fishery in which it had a legitimate interest.

II. STATE EXTRA-TERRITORIAL JURISDICTION OVER FISHERIES

A. Pre-Magnuson Act

Prior to 1976, fishery management was carried out largely by the states. The federal government, although claiming control over fisheries up to twelve nautical miles from its coast by 1966, and possessing broad powers to regulate fisheries under the Constitution, limited its role in offshore fisheries management. Due to this federal inaction, the states,

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4. See infra notes 10-11.
6. Greenberg & Shapiro, supra note 5, at 645 (citing federal power to regulate interstate and international commerce under U.S. CONST. art. I, § 8, cl. 3 as well as the power to make treaties under U.S. CONST. art. II, § 2, cl. 2.).
7. As noted by one commentator:
The federal role in offshore fisheries management, in the face of uncertainty about state or local jurisdiction, was largely limited to a few domestic
acting under their police powers, "were the only governmental units with comprehensive fishery management programs" covering offshore waters.8

The passivity of the federal government in questions of fishery management was reflected by the fact that state regulation often extended beyond the state's territorial three-mile limit.9 In extending their regulations to cover activities in federal waters, however, states had to meet certain standards to survive judicial scrutiny. For such an extension to be constitutionally valid, a state needed to meet three basic requirements. First, a state regulating fisheries in the high seas needed to show its legitimate state interest in such extra-territorial regulation.10 Second, a state also had to assert sufficient personal jurisdiction over individuals operating beyond the territorial sea.11 Third, the state initiatives, the negotiation and implementation of international fisheries agreements, including occasional enforcement-related inspections under such agreements; data gathering; and enforcement against foreign fishermen encroaching on the areas under exclusive United States control. Greenberg & Shapiro, supra note 5, at 641-642. "Until enactment of the FCMA in 1976, the Federal Government did no more than act as a passive partner or custodian of the [nine-mile] contiguous zone beyond the state's territorial three-mile limit." Arthur J. Tassi, Fishery Conservation and Management Act of 1976: An Accommodation of State, Federal, and International Interests, 10 CASE W. RES. J. INT'L L. 703, 705 n.5 (1978).

8. Tassi, supra note 7, at 704 n.5.

9. Id. As states began to regulate fishing outside their territorial waters: "[T]he 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." John Winn, Alaska v. F/V Baranof: State Regulation Beyond the Territorial Sea After the Magnuson Act, 13 B. C. ENVTL. AFF. L. REV. 281, 283 (1986).

10. Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 430 (1936) (holding enforcement to be a legitimate state interest); Felton v. Hodges, 374 F.2d 337, 339 (5th Cir. 1967) (holding conservation to be a legitimate state interest).

11. Three bases were found to be sufficient to support such jurisdiction: state citizenship, see Skiriotes v. Fla., 313 U.S. 69, 75 (1971) (State properly regulated behavior of Florida sponge fisherman on the high seas as state had legitimate interest in fisheries management and there was no conflicting federal legislation); landing laws, see Bayside Fish Flour Co. v. Gentry, 297 U.S. at 422, 426 (landing of fish sufficient contact with the state for the state to rely on in securing jurisdiction over fishermen); and, minimum contacts between a nonresident and the forum state, see State v. Bundrant, 546 P.2d 530, 552 (Alaska 1976) (having Alaska commercial fishing licenses or state vessel and gear registrations, using Alaska warehouses to process their catch, or receiving fuel, repairs, or other assistance in Alaska sufficient contacts to justify the assertion of state jurisdiction over noncitizens outside state waters). See also Greenberg & Shapiro, supra note 5, at 652.
regulation had to overcome constitutional restrictions as imposed by the Commerce Clause, the Privileges and Immunities Clause, and the Supremacy Clause. Notwithstanding these constitutional hurdles, before the passage of the Magnuson Act, "state fisheries management was the rule, not the exception," and "the activities of domestic fishermen operating on both the territorial and high seas were subject primarily to state scrutiny."

B. Magnuson Fishery Conservation and Management Act

In 1976, the U.S. Congress enacted the Magnuson Fishery Conservation and Management Act out of concern for the "rape" of American fisheries by foreign fishing fleets. Diplomatic efforts had not succeeded in preventing the depletion of the stocks off the coast of the United States. Enforcement of those international agreements that did exist was lacking. Congress also realized that a twelve-mile zone was inadequate if it wanted to protect its most valuable species from overfishing. Conflicts between state governments, as they attempted to manage the fish stocks migrating across their boundaries, provided another impetus for the Act.

Presidential Proclamation created a two hundred nautical mile zone of federal authority by establishing the Exclusive Economic Zone

12. U.S. CONST. art. 1, § 8, cl. 3.
14. U.S. CONST. art. 6, cl. 2. Supremacy Clause challenges before the Magnuson Act usually pitted federal "rights" granted through vessel licenses against state management regulations. See, e.g., Douglas v. Seacoast Products, 431 U.S. 265 (1977). For a more thorough discussion of the constitutional restrictions on state extra-territorial jurisdiction before the Magnuson Act, see Winn, supra note 9, at 293-297 and Greenberg & Shapiro, supra note 5, at 654-657.
15. Greenberg & Shapiro, supra note 5, at 649.
16. Winn, supra note 9, at 283.
19. Winn, supra note 9, at 297 (citing H.R. REP. No. 445, 94th Cong., 2d Sess. 1, 42 (1976)).
20. Id. at 297.
21. Id. at 298.
22. Greenberg & Shapiro, supra note 5, at 658.
The EEZ extends two hundred nautical miles from the baseline from which the territorial sea is measured. All fish in this zone are subject to the exclusive fishery management authority of the United States. The MFCMA also established eight regional fishery management councils to prepare fishery management plans (FMPs) for each species of fish within their regions according to seven national standards. These plans are to be reviewed by the Secretary of Commerce before implementation.

The voting membership of the regional councils consists of the principal state official with marine fishery management responsibility within each affected state, the regional director of the National Marine Fisheries Service for the geographic area concerned, and individuals appointed by the Secretary of Commerce from a list provided by the Governors of each affected state. The state representation provided for by this scheme, coupled with the fact that councils may "incorporate ... relevant fishery conservation and management measures of the coastal states nearest to the fishery" in creating FMPs, indicate "congressional intent that the federal planning process, and not local planning efforts, would primarily respond to local needs."

25. Id. This assertion of jurisdiction brought approximately twenty percent of the world's fisheries within the control of the United States. Greenberg & Shapiro, supra note 5, at 658 (citing U.S. DEP'T OF COMMERCE, U.S. OCEAN POLICY IN THE 1970'S: STATUS AND ISSUES, pt. III, at 18 (1978)).
27. 16 U.S.C. § 1851 (1988). These standards require: 1) the prevention of overfishing and the achievement of continuous optimum yields, 2) the use of the best scientific information available, 3) the management of stocks as a unit, throughout their range, 4) that conservation and management measures not discriminate between residents of different states and that allocation is fair and equitable to all fishermen, reasonably calculated to promote conservation, and carried out in a manner that no one receives an excessive share of the resource, 5) that conservation and management measures promote efficiency yet not have economic allocation as its sole purpose, 6) that variations among and contingencies in fisheries and catches be taken into account, and 7) that costs be minimized and unnecessary duplication be avoided. Id.
29. 16 U.S.C. § 1852(b) (1988) (other nonvoting members are listed in subsec. c).
31. Greenberg & Shapiro, supra note 5, at 668.
The Magnuson Act recognizes state fisheries management jurisdiction over the waters from zero to three miles offshore\textsuperscript{32} as well as over Nantucket Sound\textsuperscript{33} and certain waters off southeastern Alaska.\textsuperscript{34} A state may regulate fishing beyond its three-mile zone only when the vessel involved is registered under its laws.\textsuperscript{35} Notwithstanding this provision, several state attempts to regulate state-registered vessels in the EEZ have failed the constitutional tests traditionally applied to extra-territorial regulation.\textsuperscript{36}

The most difficult obstacle to state regulation of EEZ fishing activities has been the argument that the MFCMA has preempted the possibility of such regulation. Courts have defined the extent of such federal preemption in two ways. One interpretation, developed by the eleventh circuit in \textit{Southeastern Fisheries Ass'n v. Chiles},\textsuperscript{37} is that whenever state extra-territorial jurisdiction is not explicitly preempted by the MFCMA, it is nevertheless implicitly preempted. The \textit{Chiles} court held that Congress intended to occupy the field of fishery management in the EEZ. The court pointed out that the MFCMA created a zone within which the federal government has sovereign rights over fishery resources, provided the states with a management role through the

\textsuperscript{32} "[T]he jurisdiction and authority of a State shall extend—(A) to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States pursuant to the Geneva Convention on the Territorial Sea and Contiguous Zone..." 16 U.S.C. § 1856 (a)(2)(A) (1988).

\textsuperscript{33} 16 U.S.C. § 1856(a)(2)(B) (1988). Vineyard Sound was held to be part of the jurisdiction contained in this subsection. Davrod Corp. v. Coates, 971 F.2d 778, 787 (1st Cir. 1992).

\textsuperscript{34} 16 U.S.C. § 1856(a)(2)(c) (1988). This jurisdiction extends only "for the purpose of regulating fishing for other than any species of crab." \textit{Id}.

\textsuperscript{35} 16. U.S.C. § 1856(a)(3) (1988). This section substantially restricts pre-MFCMA extra-territorial jurisdiction allowed to the states. It does not allow either direct regulation or indirect regulation (e.g., landing laws). Regardless of any legitimate state interest in the fish in question or the state citizenship/minimum contacts of the alleged offenders, states may not regulate fishing extra-territorially unless the vessel involved is registered under their laws. \textit{See supra} notes 9-16 and accompanying text.

\textsuperscript{36} \textit{See, e.g.}, Southeastern Fisheries Ass'n v. Chiles, 979 F.2d 1504 (11th Cir. 1992); Bateman v. Gardiner, 716 F. Supp. 595 (S.D. Fla. 1989); Raffield v. State, 565 So. 2d 704 (Fla. 1990). These cases were Commerce Clause and Equal Protection Clause challenges to extra-territorial regulation of fishing activities by the states. Successful post-Magnuson Act challenges, however, have not tended to include arguments based on the Privileges and Immunities Clause. This casenote will be discussing only those challenges based on the Supremacy Clause.

\textsuperscript{37} 979 F.2d 1504 (11th Cir. 1992).
councils, and placed the ultimate responsibility for the management of the resources on the Secretary of Commerce.\textsuperscript{38} Therefore, the court concluded, Congress left nothing pertaining to the EEZ for the states to regulate.\textsuperscript{39} The reasoning of the \textit{Chiles} court, that section 1856(a) of the MFCMA only allows "state regulation of vessels ... fishing in state territorial waters" because Congress did not intend to "leave the door open for state regulation in the EEZ," is somewhat anomalous.\textsuperscript{40}

More typically, courts have followed a second approach and refused to hold that all state extra-territorial regulation is preempted by the MFCMA. In most instances, states have been allowed to regulate fisheries in the EEZ when no federal regulations covering the fisheries have been promulgated.\textsuperscript{41} In cases where the MFCMA has been held to preempt state regulation, courts have relied on findings that the state law actually conflicts with an existing FMP\textsuperscript{42} because first, it is impossible

\textsuperscript{38} \textit{Id.} at 1509.

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} The court in \textit{Tingley v. Allen} held that all state authority outside the three-mile limit was preempted by the MFCMA, regardless of where the vessel in question is registered. 397 So. 2d 1166, 1168 (Fla. Ct. App. 1981). This holding was overruled. Livings v. Davis, 465 So. 2d 507 (Fla. 1985) (holding that a state can regulate fishing activities of its citizens beyond its territorial waters when there is no conflict with a federal regulatory scheme; that the FCMA recognizes continued state jurisdiction over vessels registered under their laws; and that language to the contrary in \textit{Tingley} is disapproved).

\textsuperscript{41} \textit{See Anderson Seafoods, Inc. v. Graham}, 529 F. Supp. 512 (N.D. Fla. 1982) (upholding state statute prohibiting use of purse seine within or without the waters of the state as applied to fishermen with vessel registered in state operating beyond state territorial boundary); \textit{State v. F/V Baranof}, 677 P.2d 1245 (Alaska 1984) (allowing state regulation of king crab harvesting in the EEZ when no federal plan had been promulgated concerning king crab); \textit{People v. Weeren}, 607 P.2d 1279 (Cal. 1980), cert. denied, 449 U.S. 839 (1980) (upholding state assertion of penal jurisdiction when defendant used a state-licensed vessel to take swordfish in EEZ in violation of state regulations and no federal regulatory plan for swordfish had been implemented); \textit{State of Fla. Dep't of Natural Resources v. Southeastern Fisheries Ass'n}, 415 So. 2d 1326 (Fla. Ct. App 1982) (where there is no federal plan covering the use of fish traps, state statute banning the use of traps or possession of fish caught by traps not preempted by MFCMA when applied extra-territorially).

\textsuperscript{42} Preemption does not have to be based upon an actual conflict between federal and state regulations. Preemption may be based upon an explicit expression by Congress of its intent to preempt state law. \textit{Jones v. Rath Packing Co.}, 430 U.S. 519 (1976). Congress may also implicitly preempt state law by indicating an intent to preempt all law in a particular field. \textit{Hillsborough County v. Automated Medical Lab., Inc.}, 471 U.S. 707, 713 (1985).
to comply with both regulations,\textsuperscript{43} and/or second, the state regulation frustrates the underlying policies behind the MFCMA.\textsuperscript{44} No case has rested solely on the first ground.\textsuperscript{45} The substance of these cases seems to be that state regulation of fisheries governed by an FMP thwarts Congress' intent to regulate fisheries consistently, under national standards.\textsuperscript{46}

III. \textit{VIETNAMESE FISHERMEN ASS‘N OF AMERICA V. CALIFORNIA DEPARTMENT OF FISH AND GAME}\textsuperscript{47}

\textbf{A. Background}

In 1990, fifty six percent of California's voting population approved Proposition 132,\textsuperscript{48} a constitutional amendment designed to phase out gill net fishing in state waters off Southern California.\textsuperscript{49} Gill nets are

\begin{itemize}
\item \textsuperscript{43} Bateman v. Gardiner, 716 F. Supp. 595 (S.D. Fla. 1989) (where federal regulation allows plaintiff to take shrimp in the disputed area and state regulation does not, it is impossible to comply with both regulations; therefore state law is preempted).
\item \textsuperscript{45} See cases cited infra note 46. The First Circuit, in a case not involving the MFCMA, treated a similar "impossibility" argument as mere semantics. The court held that it is not impossible to comply with federal and state regulations of a fishery unless it is physically impossible to do so. Then, the court focused its preemption analysis on the extent to which the state regulation conflicted with underlying federal policy. Tart v. Mass., 949 F.2d 490 (1st Cir. 1991).
\item \textsuperscript{46} These cases all invalidate state laws setting \textit{stricter} standards than the federal plan. Southeastern Fisheries Ass'n v. Mosbacher, 773 F. Supp. at 435 (holding that state landing law limiting number of fish landed to a quantity below the allowable federal catch interfered with FCMA's goal of effective fishery conservation and management under national standards); Bateman v. Gardiner, 716 F. Supp. at 595 (finding Florida prohibition of shrimping to frustrate purpose of FCMA in promoting domestic commercial fishing); State v. Sterling, 448 A.2d at 785 (state landing law conflicts with federal yellowtail flounder policies where federal regulations governing the fishing of yellowtail flounder were in effect).
\item \textsuperscript{47} 816 F. Supp. 1468 (N.D. Cal. 1993).
\item \textsuperscript{48} CAL. CONST. art. X-B, §§ 1-16 (1994) (Marine Resources Protection Act of 1990).
\item \textsuperscript{49} Proposition 132 banned the use of gill nets within three miles of the California coast by 1994. Marine Resources Protection Act of 1990, CAL. CONST. art. X-B, § 3. See also Fishermen Sue State Over Ban on Gill Netting, SAN DIEGO UNION-TRIB., Mar. 31, 1993, at A5.
\end{itemize}
monofilament nets which fish are unable to see and avoid. Proponents of Proposition 132 see them as indiscriminate, trapping seals, dolphins and diving birds as well as the fish which they are designed to capture.\(^{50}\) Proposition 132 placed an immediate prohibition on the use of gill and trammel nets to take rockfish in state waters from zero to three miles offshore. The possession and receipt of rockfish were also prohibited. Beginning on March 1, 1991, the California Department of Fish and Game sought to enforce this ban in federal waters up to two hundred miles offshore.\(^{51}\)

Fishery management plans for federal waters off the coast of California are implemented by the Pacific Fishery Management Council. Prior to the passage of Proposition 132, the Pacific Council promulgated a plan dealing with rockfish in the EEZ.\(^{52}\) The Pacific Coast Groundfish Plan (Plan) allows the taking of rockfish with gill and trammel nets in the EEZ, except in areas north of thirty eight degrees north latitude.\(^{53}\) It also provides a review procedure whereby a state may petition the Pacific Council for a determination that a state regulation is consistent with the Plan, thereby enabling the state to enforce that regulation in the EEZ.\(^{54}\)

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50. Tony Perry, *Suit to Overturn Gill Net Ban Dismissed; Judge Rejects Fishing Industry's Claims that Proposition 132 is Unconstitutional Because the Public Was Misled About the Danger to Porpoises*, L.A. TIMES, Mar. 12, 1994, at A22. Gill nets are described as "killing machines" that have trapped thousands of porpoises, dolphins, sea lions, sea otters and sea birds. *Id.* The indiscriminate nature of gillnetting is not only opposed by environmentalists, but also by local sportfishermen. "Imagine some hunters stringing up a 1½-mile-long net in the forest and taking everything that walked into it.... Imagine the public outcry over that. This is the same thing, but it's in the ocean." Ed Zieralski, *Gill-net Lawsuit Divides Fishermen*, SAN DIEGO UNION-TRIB., Apr. 2, 1993, at D4 (statement by Michael Von Quilich, past President of the San Diego Rod and Reel Club). There is dispute over this characterization of gill nets. For example, a Los Angeles Times article reported:

The gill netters say the environmentalists have confused [gillnetters] with the tuna seiners whose huge nets surround a school of surface-swimming tuna and sometimes catch other creatures. Gill nets are generally allowed to settle near the bottom of the ocean in pursuit of halibut, white sea bass, barracuda, yellowtail and other species.

Perry, *supra*.

51. *Vietnamese Fishermen Ass'n of Am. v. Cal. Dep't of Fish & Game*, 816 F. Supp. at 1469.


53. *Id*.

54. *Id*.
According to an early opinion by the California Attorney General, there was substantial doubt concerning the enforceability of the gill net ban in federal waters.\textsuperscript{55} The Chief Legal Advisor for the California Department of Fish and Game (CDFG) was in agreement, and pursuant to his advice, the Department of Fish and Game petitioned the Pacific Council for a determination concerning Proposition 132's consistency with federal rockfish regulations.\textsuperscript{56} A subsequent letter was sent to the Council stating that the Attorney General's Office had reconsidered the matter and determined that the ban did extend to the EEZ.\textsuperscript{57} On the strength of the Attorney General's new legal opinion, the CDFG informed gill and trammel net permittees that the provisions of Proposition 132 would be enforced in the EEZ.\textsuperscript{58} At a public meeting, the Pacific Council stated that it did not have enough information to determine whether Proposition 132 was consistent with the Groundfish Plan.\textsuperscript{59} The issue was scheduled for reconsideration at the Council's next meeting.\textsuperscript{60}

The Vietnamese Fishermen's Association, "a group of boat owners, pilots and/or crewmen from the greater San Francisco and Monterey Bay areas,"\textsuperscript{61} challenged the validity of the CDFG's enforcement actions in federal waters in the District Court for the Northern District of California. These fishermen use gill nets to take only rockfish. As the Vietnamese community in the area was the principal group taking rockfish, the ban hit them especially hard.\textsuperscript{62}

On March 18, 1991, the court granted plaintiffs' motion for a temporary restraining order enjoining the Department of Fish and Game from enforcing Proposition 132, with respect to its rockfish provisions, in federal waters.\textsuperscript{63} On April 1, 1991, the court granted plaintiffs'
motion for a preliminary injunction against enforcement of the ban in federal waters. The parties agreed that the matter in dispute depended on a consistency determination by the Pacific Council. The preliminary injunction was to remain in effect until further notice by the court.64

After holding two hearings and several meetings on the issue and hearing from plaintiffs, intervenors and the CDFG, the Pacific Council voted that the disputed provisions of Proposition 132 were inconsistent with its FMP. The CDFG and the intervenors attempted to appeal this decision but discovered that there were no mechanisms for such an appeal to the regional council or the Secretary of Commerce. An attempt by the CDFG's Director to have the Pacific Council vote to repeal their decision failed.

B. The Court's Opinion

After the Pacific Council's decision, the Vietnamese Fishermen Association moved for summary judgment, seeking a permanent injunction against enforcement of the ban on gillnetting for rockfish by the CDFG.65 In support of their motion, plaintiffs argued that the Pacific Council's consistency determination should have res judicata effect in the present action. Defendants countered with the claim that the opinion of the regional council was merely advisory and not binding on the district court. The court did not resolve this issue and proceeded to the merits of the case.66

Plaintiffs' argument on the merits was that a state gill net ban in the EEZ conflicts with, and is therefore preempted by, the Pacific Council's

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64. For the reaction of both sides of the Proposition 132 debate, as related to this case, see Ken Castle, Judge Blocks Part of New Gillnet Law: Injunction Against Enforcement of Ban in Federal Waters, SAN FRANCISCO CHRON., Apr. 3, 1991, at A6.

65. In discussing the standard of review on motions for summary judgment, the court states that "[t]he mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient." The question to be asked, according to the court, is "Whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Vietnamese Fishermen Ass'n v. Cal. Dep't of Fish & Game, 816 F. Supp. at 1473 (quoting Anderson v. Liberty Lobby, Inc., 479 U.S. 242, 251-252 (1986)).

66. Judge Jenson, writing for the court, does state that, "a persuasive argument can be articulated in favor of preclusion," even though, "the court will not rest its decision on a finding of res judicata." Id. at 1474.
Groundfish Plan. Agreeing with plaintiffs, the court saw Southeastern Fisheries Ass'n v. Martinez, Bateman v. Gardner, and State v. Sterling as providing the relevant rule of law. These cases were cited approvingly in support of the proposition that, under the Magnuson Act, state regulation is only allowed in federal waters when the state law does not actually conflict with federal law. In examining the facts before it, the court found such an actual conflict. The court reasoned that because the federal plan expressly prohibits gill nets north of thirty eight degrees north latitude, it implicitly authorizes the use of gill nets elsewhere. Therefore, the court concluded that fishermen have a federal right to use gill nets in federal waters south of thirty eight degrees north latitude. In order for plaintiffs to comply with Proposition 132, they would have to forgo that federal right.

67. The court discusses three ways in which federal law may preempt state law: First, Congress may expressly define the extent to which it intends to preempt state law. Second, Congress may indicate an intent to preempt all state law in a particular field of regulation. Third, federal law may preempt state law to the extent that state law directly conflicts with federal law. Id. (citations omitted). Plaintiffs claimed that both the first and third types of preemption applied to Proposition 132. Judge Jenson says that the court need only look to the conflict between the two laws (i.e. the third type of preemption) to make its decision. The opinion, however, does mention the fact that the federal Plan expressly provides for state regulations to be enforced in federal waters only if consistent with the Plan. Id. at 1474-1475.

68. Southeastern Fisheries Ass'n v. Martinez, 772 F. Supp. 1263 (S.D. Fla. 1991) (state law attempted to limit the taking of mackerel in federal waters to an amount below the federal quota. Court found state law preempted due to direct conflict with federal law). This case was appealed and affirmed. See Southeastern Fisheries Ass'n v. Chiles, 979 F.2d 1504 (11th Cir. 1992).


70. State v. Sterling, 448 A.2d at 785 (conflicting state provision imposing a landing-possession limit on flounder preempted).

71. Vietnamese Fishermen Ass'n of Am. v. Cal. Dep't of Fish & Game, 816 F. Supp. at 1474-1475.

72. The court rejects the argument that because compliance with the state requirement is not actually a violation of the more lenient federal requirement, it is possible to be in compliance with both. In its view, Martinez, Sterling and Bateman recognize that "the possibility to comply with a more stringent state standard does not resolve the conflict between state and federal law. In those cases, the more severe state statutes were all stricken and federal law ruled federal waters." Id. at 1475.
Intervenors\textsuperscript{73} argued that the cases relied upon by the court and the plaintiffs all involved a conflict between express federal language and express state language. Here, they argued, the state has promulgated an express rule, but the federal government has not. The federal statute, according to intervenors, "may be interpreted as leaving to the sound discretion of the state the decision of whether to allow gill nets south of thirty eight degrees north latitude."\textsuperscript{74} The court rejected this interpretation as "miss[ing] the mark" and responded by merely reiterating its former analysis, stating that "[d]espite the lengthy arguments and the accompanying rhetoric, state law prohibits gill nets and federal law permits gill nets south of thirty eight degrees north latitude in federal waters. This conflict justifies preemption."\textsuperscript{75}

Intervenors also attempted to argue that Proposition 132 is consistent with the purposes behind the Magnuson Act. The court responded by stating that preemption may be based on either a state statute's direct conflict with a federal law or the obstruction of federal goals and policies by such a state law. Both need not be shown.\textsuperscript{76} The court also rejected the intervenors’ argument that it must apply a presumption in favor of finding the state law valid because it is doing a preemption analysis in an area of traditional state regulation. The court stated that such a presumption did not apply here because offshore waters from three to two hundred miles off state coastlines are considered areas of traditional federal regulation.\textsuperscript{77}

The court noted that its finding was consistent with that of the Pacific Council. This body, vested with the authority to determine whether a conflict between federal and state law exists, had determined that Proposition 132 was inconsistent with the federal plan. The court held that the Council’s decision did not have res judicata effect but was entitled to deference because of the Council’s careful deliberation.\textsuperscript{78} On the basis of the court’s preemption analysis as bolstered by the regional council’s decision, summary judgment was then granted to the plaintiffs.

\textsuperscript{73} See supra note 63.
\textsuperscript{74} Id.
\textsuperscript{75} Vietnamese Fishermen Ass'n of Am. v. Cal. Dep't of Fish & Game, 816 F. Supp. at 1475.
\textsuperscript{76} Id.
\textsuperscript{77} The court further dismisses this argument by stating that, were it to apply such a presumption, the state law in this case would still be preempted due to the "clear language evident in the federal scheme." Id. at 1475 n.6.
\textsuperscript{78} Id. at 1476.
IV. DISCUSSION

The latest in a line of cases with similar analyses, the court in *Vietnamese Fishermen Ass'n of America v. California Department of Fish & Game* prohibited the application of a strict state fishing regulation in the EEZ. The court, seeing itself constrained by the preemption doctrine, felt compelled to allow the federal plan to prevail. There are two problems with the decision. First, by finding a conflict between Proposition 132 and the MFCMA by implication, the court reduced the role of state management in offshore fisheries unnecessarily. Second, the court gave an unwarranted amount of authority to the regional council, a decision-making body whose members may have serious conflicts of interest, to define the scope of state offshore authority.

According to the U.S. Supreme Court, in cases cited by the *Vietnamese Fishermen Ass'n of America* court, an actual conflict between state and federal law arises when "'compliance with both federal and state regulations is a physical impossibility' ... or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" When either of these two things happen, both regulations cannot be enforced "without impairing the federal superintendence of the field." In *Vietnamese Fishermen Ass'n of America*, the district court found such an actual conflict between Proposition 132's enforcement in federal waters and the Pacific Council's FMP. However, that finding did not firmly rest on either of the two bases for conflict as set out above by the U.S. Supreme Court.

The district court expressly denied that it was basing its finding of preemption on the obstruction of the goals and policies of federal law by the state law. It relied on the "direct conflict" between the state and federal laws as the basis for preemption, refusing to address the argument that Proposition 132 did not frustrate the "goals and policies" of the MFCMA. As stated above, the authority cited for the proposi-

79. See supra note 46 and accompanying text.
80. 816 F. Supp. at 1474-1475.
83. 816 F. Supp. at 1476.
84. Id. at 1475. "[I]ntervenors claim that the intent behind the Magnuson Act is consistent with Proposition 132. However, preemption may be based either on direct conflict or the obstruction of the goals and policies of federal law ... Plaintiffs need not
tion that a direct, non-policy based conflict is enough for preemption defines "direct conflict" as physical impossibility. Yet, the court in *Vietnamese Fishermen Ass’n of America* did not rest its finding of preemption on physical impossibility. It failed to explicitly analyze how the conflict in the case "impair[ed] the federal superintendence of the field," given that neither "physical impossibility" to comply with both regulations nor incongruence between federal and state policies were involved in the conflict.

Given that the court did not make explicit its reasoning in enlarging the concept of an "actual conflict," the decision itself seems somewhat cryptic. Yet, in finding a "direct conflict," the court relied on cases that explicitly rested their preemption analyses on the conflict between federal fishing policies and state policies. In each case, restrictive state policies demonstrate both." *Id.* (citing Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. at 141-142 and Southeastern Fisheries Ass’n v. Martinez 772 F. Supp. at 1267).

85. *Vietnamese Fishermen Ass’n of Am. v. Cal. Dep’t of Fish & Game*, 816 F. Supp. at 1475 (citing Southeastern Fisheries Ass’n v. Martinez, 772 F. Supp. at 1267).

The court could be redefining "physical impossibility." However, such an attempt would not follow the very law cited as authority for the court’s decision. In *Florida Lime & Avocado Growers*, the U.S. Supreme Court held that, if it is possible to comply with a less restrictive state statute, the conflict between that statute and a more restrictive federal one does not rise to the level of physical impossibility:

A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility.... No such impossibility of dual compliance is presented on this record.... As to those Florida avocados ... which were actually rejected by the California test, ... the Florida growers might have avoided such rejections by leaving the fruit on the trees beyond the earliest picking date permitted by the federal regulations.... [T]he present record demonstrates no inevitable collision between the two schemes of regulation, despite the dissimilarity of the standards.


86. 816 F. Supp. at 1475.

87. *Id.*

88. Southeastern Fisheries Ass’n v. Martinez, 772 F. Supp. at 1267-1268 ("[t]he Florida regulation inhibits a primary purpose behind the promulgation of the Magnuson Act, ‘to promote domestic commercial fishing’") (quoting Bateman v. Gardner, 716 F. Supp. at 598); Bateman v. Gardiner, 716 F. Supp. at 598 ("[o]ne purpose behind the promulgation of federal Magnuson regulation was to promote domestic commercial fishing.... The Florida statute stands as an obstacle to the accomplishment of this purpose by precluding Florida fishermen from participating in commercial shrimp fishing in the disputed area"); State v. Sterling, 448 A.2d at 787 ("Although the state contends that the [state] regulation does not present a conflict with federal yellowtail flounder
were preempted by the federal government's goal to promote domestic commercial fishing. The Vietnamese Fishermen Ass'n of America court seems to be joining these other courts in holding that state regulations which are more restrictive than existing federal management plans will always be preempted because they upset the balance between management and commercial fishing as struck by federal regulatory bodies whose regulations are supreme under the Constitution.

However, unlike previous cases, the court in Vietnamese Fishermen Ass'n of America found a conflict, not between express state regulation and express federal language creating a balance of interests, but between express state language and an implied federal balance. When confronted with the argument that a conflict by implication is an inadequate basis for preemption, the court replied that it is not, without providing further analysis. The court simply stated that the implied conflict in the case was adequate to preempt the state statute. In a footnote, the court refused to presume that the state law was valid and stated that the conflict in the case was adequate to overcome such a presumption, even if applied.

The doctrine of preemption has not developed in a vacuum. Constitutional concerns under the Supremacy Clause have been historically balanced with other constitutional concerns, especially those regarding federalism. The court in this case rejected a presumption that was created by the U.S. Supreme Court to assure that the federal-state policies, it is apparent that such a conflict does exist.

These decisions did not rest solely on policy-based grounds. In Bateman v. Gardner, the court held that the Florida statute in question conflicted with a federal fishery management plan and that, moreover, compliance with the state law would frustrate the purposes of the Magnuson Act. To support the argument that the two regulatory measures conflicted in a way that was separate from their policy differences, the court cited State v. Sterling. Yet, the only ground for the Sterling court's decision was that the state management would thwart federal yellowtail flounder policies. The policy analysis done by the Sterling court seems to be the true rationale behind the Bateman decision, just as it is the true basis for the Vietnamese Fishermen Ass'n decision. The Martinez court quoted the Bateman analysis verbatim. Southeastern Fisheries Ass'n v. Martinez, 772 F. Supp. at 1267-1268.

89. This analysis of the court's preemption discussion assumes the court's reliance on the regional council's consistency determination. That factor in the decision will be discussed below. See infra notes 98-101 and accompanying text.

90. Vietnamese Fishermen Ass'n of Am. v. Cal. Dep't of Fish & Game, 816 F. Supp. at 1475.

91. Id. at 1475 n.6.
balance would not be disturbed "unintentionally by Congress or unnecessarily by the courts."

Where ... the field which Congress is said to have pre-empted has been traditionally occupied by the States ... we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.92

The court in *Vietnamese Fishermen Ass'n of America* held that this presumption is inapplicable because waters from three to two hundred miles offshore are areas of traditional federal management. However, this argument is unconvincing, given the history of fisheries management. States have traditionally managed these waters, exercising "broad residual regulatory power under the Tenth Amendment to promote the health and welfare of the public."93 While Congress could have preempted state authority at any time, it did not. Judicially-applied preemption in this area, traditionally governed by the states, clearly raises those concerns regarding the proper balance of federal-state power behind the presumption articulated above.

The *Vietnamese Fishermen Ass'n of America* court also justified its decision in favor of federal preemption by stating that the conflict in the case, based on federal silence, would overcome the above presumption, even if applied. This argument is also unconvincing given that the purpose of the presumption is to ensure that state laws in traditionally state-managed fields are only preempted when federal intent to do so is clear. In this case, the regional council's plan did not explicitly allow the gear that California sought to ban. By finding preemption on the strength of an implied conflict, the court unnecessarily discounted the existence of state checks on federal power in areas traditionally regulated by the states. This choice, in effect, severely restricted the authority of an important actor in the management of the nation's fisheries at a time when checks on an inadequate federal system are extremely important.

Many see the regional fishery management system as valuable, but flawed. The MFCMA has been successful in "Americanizing the fisheries off the U.S. coasts." As reported to Congress by the Assistant Secretary of Commerce for Oceans and Atmosphere in 1993, the foreign

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catch in the EEZ for 1991 was insignificant and, in 1992, there were no foreign operations in the EEZ. For domestic fisheries, the MFCMA regime produced thirty-three management plans by 1993 and, as the Assistant Secretary testified, "[m]ost of the commercially and recreationally important species are, or soon will be, under management." Yet, despite the existence of federal plans, "some important and valuable stocks are crumbling. Of the one hundred fifty-six species or species groups which have been assessed, forty-three percent of the total are classified as 'overutilized' and thirty-nine percent are 'fully utilized.'" Problems with the present program of federal regulation prompted much Congressional testimony in 1993-1994. Common complaints focused on the make-up of the councils, potential conflicts of interest within the councils, the fact that the councils make both long-term planning decisions as well as allocation decisions, and the difficulty getting prompt regulatory decisions given the present, multi-tiered decision-making structure. There were also questions concerning the management practices used by the councils. The "open access" system presently employed was seen as leading to the overcapitalization of the fishing industry. It was also alleged that the MFCMA's assumption

95. Id.
96. Id.
97. See, e.g., id.
99. See, e.g., 1993 House Hearings, supra note 98, at 52 (statement of W.F. "Zeke" Grader, Jr., Executive Director, Pacific Coast Federation of Fishermen's Associations).
100. See, e.g., 1993 Senate Hearings, supra note 94, at 46 (statement of Dr. Ray Hilborn, Professor, School of Fisheries, University of Washington) and id. at 76 (statement of Louis M. MacKeil, Jr., President, Cape Cod Salty's Sport Fishing Club).
101. Id.
102. Id. at 11 (statement of Douglas K. Hall, Asst. Secretary of Commerce for Oceans and Atmosphere, NOAA).
that biologists can determine the optimum yield of a fishery\textsuperscript{103} will inevitably lead to overexploitation.\textsuperscript{104} Others point to the insufficiency of the data used in council decisions\textsuperscript{105} and the need of the MFCMA mandate to conserve fishery habitat.\textsuperscript{106}

These complaints embody the reasons that the council system has failed to prevent the overuse of U.S. fish stocks. They demonstrate why federalism concerns should be heavily weighed by courts when the federal government has taken on the regulation of areas in which states have legitimate interests. They illustrate the need for legislative reform of the council system as well as the need for Congressional clarification of state authority under section 306(a) of the MFCMA. These complaints also illustrate the possibility that the \textit{Vietnamese Fishermen Ass'n of America} court struck the wrong balance between the Supremacy Clause and the federal system by eliminating state authority to check the regional councils on the strength on an implicit conflict.

Of course, the court did not make its decision based solely on the implied conflict. Its decision was strongly bolstered by the fact that the Pacific Council had determined Proposition 132 to be inconsistent with its fishery management plan. However, the regional councils are inherently interested bodies because they represent various sectors interested in the fisheries which they manage.\textsuperscript{107} The perception that council members have conflicts of interest is widespread.\textsuperscript{108} Further, there is no mechanism for Secretarial review of the consistency determination process.\textsuperscript{109} Yet, the court gave the Pacific Council's consistency determination a high level of deference. It did this considering neither the decision-making process involved nor the concerns normally associated with giving an administrative body's

\begin{itemize}
\item \textsuperscript{103} 16 U.S.C. § 1851(a)(1) (1988).
\item \textsuperscript{104} See, e.g., \textit{1993 Senate Hearings}, supra note 94, at 44 (prepared statement of Dr. Ray Hilborn, Professor, School of Fisheries, University of Washington).
\item \textsuperscript{105} \textit{Id.} at 62 (prepared statement of Mr. William S. "Corky" Pernet, Asst. Secretary, Office of Fisheries, Louisiana Department of Wildlife and Fisheries).
\item \textsuperscript{106} \textit{Id.} at 64.
\item \textsuperscript{107} \textit{Id.} at 141 (prepared statement of Joseph Bracaleone, Chairman, New England Fishery Management Council).
\item \textsuperscript{108} \textit{Id.}.
\item \textsuperscript{109} \textit{Vietnamese Fishermen Ass’n of Am. v. Cal. Dept. of Fish & Game}, 816 F. Supp. at 1473.
\end{itemize}
determination preclusive effect.\textsuperscript{110} Had these things been considered, it would have been clear that any factual determination by the Pacific Council, as it currently exists, should be carefully examined by a reviewing court.

Few calls for reform of the MFCMA have requested the abolishment of the regional councils. Most ask that checks on council decisions which might reflect conflicts of interest be carefully maintained. Currently, there are two bills before the 104th Congress which seek to correct the deficiencies in the current council system.\textsuperscript{111} Both of these bills attempt to put such checks in place and to make the decision-making process of the councils more fair. For example, the House bill addresses the fact that participation in the council process can only take place if the public has notice of the meeting.\textsuperscript{112} It requires that the public be given notice "sufficiently in advance of the meeting to allow meaningful public participation."\textsuperscript{113} The bill also provides other procedural safeguards,\textsuperscript{114} including the postponement of any vote until the General Counsel of the National Oceanic and Atmospheric Administration resolves questions regarding whether any member of the council must be recused due to a financial interest in the vote.\textsuperscript{115} In addition to dealing with concerns regarding conflicts on the councils, both the Senate and House bills

\textsuperscript{110} These concerns include whether or not the administrative agency was acting in a judicial capacity, complying with standards of "procedural and substantive due process that attend a valid judgment by a court." Vietnamese Fishermen Ass'n of Am. v. Cal. Dep't of Fish & Game, 816 F. Supp. at 1474 (quoting Paramount Transp. Sy. v. Local 150, 436 F.2d 1064, 1066 (9th Cir. 1971). See also United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966). These standards have been held to require certain elements in a proceeding such as cross-examination, the right to subpoena witnesses, and testimony under oath. Vietnamese Fishermen Ass'n v. Cal. Dep't of Fish & Game, 816 F. Supp. at 1474.


\textsuperscript{112} H.R. 39, supra note 111, at § 8.

\textsuperscript{113} Id.

\textsuperscript{114} These safeguards include a provision requiring the minutes of each council meeting to be kept accurately and requiring those minutes to be made available to any court of competent jurisdiction. \textit{Id}. This requirement would provide courts with a record with which to examine determinations made by the council in cases such as Vietnamese Fishermen Ass'n of Am. v. Cal. Dept. of Fish & Game. H.R. 39 would also require disclosures of financial interest by members of the council to be kept on file for the Secretary of Commerce's use in reviewing council actions. \textit{Id}.

\textsuperscript{115} \textit{Id}.
redefine the factors to be considered by the councils, adding the considerations of overfishing,\(^{116}\) destruction of fishery habitat,\(^{117}\) and reduction of bycatch,\(^{118}\) to the regional council's decision-making calculus. These bills, designed to improve the determinations made by the councils, should be seriously considered in light of recent judicial developments giving the councils paramount authority to regulate the nation's offshore fisheries.

V. CONCLUSION

The decision of the court in *Vietnamese Fishermen Ass'n of America v. California Department of Fish & Game* unnecessarily eliminated the authority of an important actor—the state—in the regulation of the nation's fisheries. In doing so, it gave an inordinate amount of deference to the Pacific Council's determination that this authority should be so eliminated. In the absence of legislative reform placing checks on the regional councils, improving their decision-making process, and clarifying state authority in the EEZ, court decisions such as this risk striking an improper balance between constitutional concerns under the Supremacy Clause and the constitutional concerns of federalism and due process.


\(^{117}\) *See, e.g.*, H.R. 39, *supra* note 111, at §§ 3, 9; S. 39, *supra* note 111, at § 111.

\(^{118}\) *See, e.g.*, H.R. 39, *supra* note 111, at §§ 3, 7; S. 39, *supra* note 111, at § 111.