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Beyone Conservation: Excessive Legislative Regulation Of Commercial Fishing In Cherenzia v. Lynch

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BEYOND CONSERVATION: EXCESSIVE LEGISLATIVE REGULATION OF COMMERCIAL FISHING IN *CHERENZIA V. LYNCH*

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I. INTRODUCTION

In *Cherenzia v. Lynch*,[1] several commercial fishermen filed suit to challenge the constitutionality of a Rhode Island statute that prohibits the use of a self-contained underwater breathing apparatus (SCUBA) to harvest shellfish at four coastal ponds in the state.[2] On cross motions for summary judgment, the trial court granted the plaintiffs' motion and the State[3] filed a timely appeal to the Supreme Court of Rhode Island.[4] The supreme court was asked to address whether the fishermen's equal protection and due process rights were infringed upon by the statute;[5] it found in the negative and reversed the decision of the trial court.[6]

The appeal, however, provided the supreme court with a critical opportunity to control the Rhode Island General Assembly's regulation of "rights of fishery."[7] The supreme court's decision deferred to the General Assembly, interpreting the "rights of fishery"[8] to be for the "benefit of the

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1. 847 A.2d 818 (R.I. 2004).

2. R.I. GEN. LAWS § 20-6-30 (2004).

3. Patrick Lynch, as Attorney General of the State of Rhode Island.

4. Cherenzia v. Lynch, 847 A.2d at 821.

5. "The equal protection inquiry generally asks whether there is a rational basis for a statutory classification, while the substantive due process test is whether 'the government action is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" KENNETH A. MANASTER & DANIEL P. SELMI, STATE ENVIRONMENTAL LAW § 5.15, ¶ 1 (2004) (quoting La. Seafood Mgmt. Council v. Wildlife and Fisheries Comm'n, 719 So. 2d 119 (La. App. 1998)).

6. Cherenzia v. Lynch, 847 A.2d at 820.

7. R.I. CONST. art. I, § 17.

8. The right of fishery is defined as "the right of persons to fish in public waters, subject to federal and state restrictions and regulations, such as fishing seasons, licensing, and catch limits." BLACK'S LAW DICTIONARY 668 (8th ed. 2004).

people of the state and not merely for the profit and emolument of the fisherman engaged in the business."[9] Therefore, the decision cemented the public policy that fishery resources are to be shared equally between commercial fishermen and recreational fishermen. The question now becomes: should the court be less deferential to the legislature when fishery regulations lack a solid conservation basis and have the potential to negatively impact the livelihood of commercial fishermen?

This Note considers whether state legislatures should statutorily alter the methods which commercial fishermen can employ, especially when significant environmental concerns are absent. In addition to reviewing the history of deference given to states in regulating their respective fishing industries, this Note suggests there is a developing rift between citizens who fish for recreation and sport, and citizens who fish for a living. Moreover, this Note will demonstrate that other states besides Rhode Island are leaning towards a tendency of tight control over commercial fishing in the name of resource allocation. After weighing these considerations, the Note concludes that the decision in *Cherenzia v. Lynch* will open the door for the Rhode Island General Assembly and other state legislatures to unfairly regulate their fisheries, resulting in a drastic cut in the prosperity of commercial fishermen.

II. DEVELOPMENT OF LEGISLATIVE CONTROL OVER FISHING RIGHTS

Generally, states are able to regulate the fisheries in their respective jurisdictions.[10] In 1891, the United States Supreme Court declared that "a state can define its boundaries on the sea" subject to the approval of Congress.[11] In 1877, the Supreme Court had declared that each state controlled the beds of all tide-waters within its borders, as well as the fish

9. Cherenzia v. Lynch, 847 A.2d at 824 (quoting *Opinion to the Senate*, 137 A.2d 525, 526 (R.I. 1958)).

10. 35A AM. JUR. 2D *Fish, Game, and Wildlife Conservation* § 35 (2004), *construing* State v. Mallory, 83 S.W. 955 (Ark. 1904); Sheehan v. All Persons, 234 P. 1113 (Cal. 1925); Commonwealth v. Sisson, 75 N.E. 619 (Mass. 1905); Winous Point Shooting Club v. Slaughterbeck, 117 N.E. 162 (Ohio 1917); State v. Savage, 184 P. 567 (Or. 1919); State v. Kofines, 80 A. 432 (R.I. 1911); Tuttle v. Wood, 35 S.W.2d 1061 (Tex. Civ. App. 1930); State v. Southern Coal & Transp. Co., 76 S.E. 970 (W. Va. 1912).

11. Manchester v. Commonwealth, 139 U.S. 240, 264 (1891) (upholding the conviction of a fisherman for use of a purse seine while fishing in Massachusetts Bay in violation of state law and basing the decision on precedent that allowed the state to regulate fisheries close to its shores in the absence of conflicting federal congressional action).

in them.[12] Today, the state boundary is typically set three miles off of the shoreline.[13]

The great power given to the state today in the broad regulation of natural resources exhibits residual concepts of this nineteenth century policy, where legally the state was the "owner of animals ferae naturae, in trust for its people, and had more or less complete authority to regulate fish and game as it saw fit."[14] The more recent use of the term "ownership" by the state is not in the traditional sense, but geared towards the state's responsibility to conserve fisheries and prevent their depletion.[15]

Rhode Island in particular has a long history of relatively unbridled legislative regulation. An argument that the legislature cannot restrict citizens' access to state fisheries has been flatly denied by the Rhode Island

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12. McCready v. Virginia, 94 U.S. 391, 394-395 (1877) (upholding the conviction of a non-resident for planting oysters in a Virginia river and reaching its decision on the established premise that the state owns such property and has the right to regulate that property as it wishes).

13. Cunard S.S. Co. v. Mellon, 262 U.S. 100, 122 (1923). *See also* Skiriotes v. Florida, 313 U.S. 69 (1923).

14. Annotation, *Constitutionality of State Laws Which Discriminate Against Non-residents or Aliens as to Fishing and Hunting Rights*, 52 L. ED. 2D 824, § 2 (2004). This view was espoused by the Court in McCready v. Virginia, 94 U.S. 391 (1877).

15. Annotation, *supra* note 14, § 2. In addition, a large majority of state legislation is aimed at aliens and/or non-residents. *Id.* The courts have recently struck down many statutes restricting out-of-state fishermen on the basis of state "ownership" theories. *See* Toomer v. Witsell, 334 U.S. 385 (1948):

> The State is not without power, for example, to restrict the type of equipment used in its fisheries, to graduate license fees according to the size of the boats, or even to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay. We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them.

Id. at 398-399 (citations omitted); Takahashi v. Fish & Game Comm'n., 334 U.S. 410, 421 (1948) ("we think that 'ownership' is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so."); Mullaney v. Anderson, 342 U.S. 415, 417-419 (1952) ("something more is required than bald assertion" in imposing higher fees on non-resident fishermen); Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 283-285 (1977) (invalidating a statute restricting the fishing of menhaden by people from out of state under a justification of conservation, while making no efforts to control the fishing by state residents).

Supreme Court.[16] Case precedent from 1910 describes plenary legislative power:

> It is for the Legislature to make such laws, regulating and governing [fisheries], as they deem expedient . . . . They may withhold from the public use such natural oyster beds, clam beds, scallop beds, or other fish beds as they may deem desirable . . . . We find no limitation, in the Constitution, of the power of the General Assembly to legislate in this regard, and they may delegate the administration of their regulations to such officers or boards as they may see fit.[17]

The notion that the individual citizen's right to fish is under unfettered regulation by the legislature was not a new one. Since at least the mid-nineteenth century, the Rhode Island Supreme Court has upheld regulation under the stated goal of "[reserving] to the public the greatest benefit."[18]

Many of the coastal states have also opened up a door for increased regulation of fishing by declaring it is not a fundamental right of its citizens. Texas and Florida are two of these states.[19] California has also rejected the notion that the "right to fish" as mentioned in its state constitution is a fundamental right.[20] Alaska has specifically declared commercial fishing is not a fundamental right.[21] A federal court has even held that the pursuit of a livelihood is not a fundamental right.[22] The overwhelming result in most states, then, is that fishing regulations must pass only rational basis scrutiny by courts in order to be sustained.

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16. Windsor v. Coggeshall, 169 A. 326, 327 (R.I. 1933) (upholding interlocutory decree requiring non-licensed fishermen to remove fish traps from certain territorial limits and affirming that the state has the ability to regulate fisheries as it deems fit).

17. Payne & Butler v. Providence Gas Co., 77 A. 145, 158 (R.I. 1910) (requiring negligent defendant to pay judgment given to a shellfish cultivator in lower court for damages to his beds after an oil spill, despite claim that the cultivator was illegally on the river beds).

18. *See* State v. Cozzens, 2 R.I. 561, 561 (1850) (upholding conviction of defendant for stealing oysters from a private oyster bed in disobedience of a legislative restriction on oyster harvesting during certain dates).

19. *See* Sisk v. Tex. Parks & Wildlife Dept., 644 F.2d 1056 (5th Cir. 1981). The Texas court's holding in *Sisk* (fishing is not a fundamental right) was adopted by Florida state courts in 1990. Lane v. Chiles, 698 So. 2d 260 (Fla. 1990).

20. California Gillnetters Ass'n v. Dept. of Fish and Game, 39 Cal. App. 4th 1145, 1153-1154 (1996).

21. Commercial Fisheries Entry Comm'n v. Apokedak, 606 P.2d 1255, 1262 (Alaska 1980).

22. LaBauve v. La. Wildlife & Fisheries Comm'n, 444 F. Supp. 1370, 1382 (E.D. La. 1978).

Likewise, fishermen have been deemed by federal courts as a non-suspect class for the purposes of entertaining an equal protection challenge to fishery regulation.[23] Such a classification also results in use of rational basis scrutiny by the courts.

The California Supreme Court has held that "the legislature, for the purpose of conserving and protecting fish, may pass such laws as to it seem wise, and the question what measures are best adapted to that end are for its determination."[24] Environmentally speaking, the states do have a duty to conserve fish and wildlife and prevent them from extermination or undue depletion.[25] This duty relates back to the state's "ownership" of the fisheries[26] and its necessary prerogative to regulate for the "common benefit of all its people," that is, to protect natural resources so that all of the state's citizens have access to them.[27]

The state thus enjoys great deference if regulating based on environmental grounds; unless the statutes violate a constitutional provision, the courts generally will not question the means of such legislation.[28] Courts will often construct laws in a manner reasonably suitable to fit their intended purposes.[29] Probably for this very reason, legislative regulation of state fisheries has often dealt with commercial fishing, rather than with sport fishing that normally results in a smaller catch.[30] Finally, in *Skiriotes*

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23. *See* Sisk v. Tex. Parks & Wildlife Dep't, 644 F.2d at 1058 (strict scrutiny test not required to review the state's incongruent treatment of commercial fishermen, because this group does not constitute a suspect class); *see also* Jensen v. United States, 743 F. Supp. 1091, 1114 (D. N.J. 1990) (full-time fishermen likewise not subject to strict scrutiny protection under the law).

24. People v. Monterey Fish Products Co., 195 Cal. 548, 563 (1925) (citations omitted).

25. *See* Lacoste v. Dep't of Conservation of State of La., 263 U.S. 545 (1924) (affirming state legislation that imposed a severance tax on wild animals and their skins and classifying the legislation as a valid exercise of state police power to preserve and protect wildlife for the common benefit).

26. *See supra* note 14 and accompanying text.

27. Lacoste v. Dep't of Conservation of State of La., 263 U.S. at 549. Also, the federal government, with the passage of the Endangered Species Act in 1978, has taken a proactive step towards the protection of animal species listed as endangered. Because of the inherent conservation concerns, the Act imposes legal consequences for the taking of any listed species. Federal agencies were thus ordered to look after the conservation of these species, regardless of the cost. *See* Hanna Sanders, *State of Maine v. Norton: Assessing the Role of Judicial Notice*, 9 OCEAN & COASTAL L.J. 125, 126-127 (2003).

28. *See e.g.*, the research collected in AM. JUR.2D, *supra* note 10 (collecting cases); State v. Philips, 70 So. 367 (Fla. 1925); State v. McCullagh, 153 P. 557 (Kan. 1915); People v. Clair, 116 N.E. 868 (N.Y. 1917); State v. Hanlon, 82 N.E. 662 (Ohio 1907).

29. People v. Clair, 116 N.E. 868 (N.Y. 1917).

30. *People v. Hamm* suggests the reason for the disparity: commercial fishing is profit-driven, and also has the technological capability to remove large numbers of fish. 595 N.E.2d 540, 544 (1992).

v. Florida,[31] the United States Supreme Court held that a Florida statute that prohibited the use of diving gear by sponge harvesters withstood constitutional scrutiny. Thus, state restrictions of certain types of fishing gear have been sustained as a reasonable way to promote conservation interests since at least the 1940s.[32]

This deference to legislative fishery regulations has led to a national rift between commercial fishermen and conservationists coupled with recreational fishermen. While the latter group argues that many of the methods of commercial fishing severely deplete the nation's fisheries and kill an excess of marine life, the former argue that the real issue is simply one of resource allocation—an attempt to push over more resources to recreational fishermen.[33]

III. THE *CHERENZIA* DECISION

In *Cherenzia v. Lynch*, several commercial fishermen brought an action in Rhode Island to challenge the constitutionality of legislation prohibiting the use of SCUBA gear in four coastal ponds in the state.[34] In particular, the fishermen argued that the statute violated their rights of equal protection and due process.[35] After a superior court motion justice granted the plaintiffs' motion for summary judgment,[36] the defendant appealed to the Rhode Island Supreme Court, which reversed the judgment, leaving the statute to "sink or swim on its own merits as a legislated public policy."[37]

The plaintiffs advanced a number of arguments on appeal. They generally submitted that the statute violated their "rights of fishery," as written in the Rhode Island Constitution.[38] They specifically argued that

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31. 313 U.S. 69 (1941).

32. Marlene K. Stern, *Judicial Activism in Enforcement of Florida's Net Ban*, 15 J. LAND USE & ENVTL. LAW 55, 88 (1999).

33. *See, e.g.*, John Alton Duff & William C. Harrison, *The Law, Policy, and Politics of Gillnet Restrictions in State Waters of the Gulf of Mexico*, 9 ST. THOMAS LAW REVIEW 389, 389-390 (1997). A law banning the use of gillnets in the Gulf of Mexico has been a particularly controversial subject recently. This article explores the environmental concerns leading to the creation of such legislation and the particular gillnet restrictions for each state on the Gulf of Mexico. The article also discusses the ramifications of such legislation and proposes suggestions for states to take into account when legislating regarding fishery rights.

34. 847 A.2d 818 (R.I. 2004).

35. *Id.* at 822.

36. *Id.* at 820. On cross-motions for summary judgment, "the motion justice ruled that the General Assembly did not have a rational basis for 'depriving [SCUBA-diving fishermen] of their occupation' and that the statute was thus unconstitutional." *Id.* at 821.

37. *Id.* at 820.

38. The text of the Rhode Island Constitution provides:

their constitutional rights to equal protection and due process were violated.[39] They challenged the statute on the basis that it "arbitrarily discriminates against a single class of fishermen—those using SCUBA."[40] Furthermore, they argued that there is no legitimate state interest tied to the statute because "such fishing does not implicate resource sustainability or public-health concerns."[41] Particularly, because all commercial fishermen are bound to a catch-quota that limits the size of a daily harvest, they contended that the General Assembly "lacked a justifiable resource-sustainability goal in enacting" the statute.[42] As a result, they offered that the statute is "an arbitrary and unreasonable exercise of legislative power."[43]

The State advanced a number of arguments revolving around the plenary power given to states to regulate fishing. It contended that it was the duty of the General Assembly to forge a compromise between the commercial fishermen and the recreational fishermen.[44] Furthermore, the state argued that "the statute enjoys a presumption of validity" and that the plaintiffs did not meet the burden of proving the statute unconstitutional beyond a reasonable doubt.[45] Finally, the State refuted the allegation that the statute violated equal protection or due process rights because no fundamental right was infringed and the statute could pass a minimal-scrutiny test.[46]

> The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including . . . fishing from the shore . . . and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.

R.I. CONST. art. I, § 17.

39. Cherenzia v. Lynch, 847 A.2d at 822.

40. *Id.* at 820. The fishermen further relied on the *Opinion to the Senate* where the justices noted that a legislative act would be discriminatory if it "'permit[ted] one class of citizens to take these fish while prohibiting entirely the taking thereof by another class of citizens, as for example those who resort to fishery for commercial purposes . . . .'" *Id.* at 824-825 (quoting Opinion to the Senate (Re: Resolution S-401), 137 A.2d 525, 526 (1958)).

41. *Id.* at 822.

42. *Id.* at 825.

43. *Id.* at 822.

44. Cherenzia v. Lynch, 847 A.2d at 821.

45. *Id.* at 822.

46. *Id.* The State classified the measure as "economic and environmental-protection

Focusing heavily on the plaintiffs' equal protection challenge, the *Cherenzia* court began its analysis by citing *Kennedy v. State*[47] and *Boucher v. Sayeed*[48] to demonstrate that "not all legislative classifications, however, are impermissible"[49] and that the legislature "enjoys a wide scope of discretion in enacting laws that affect some classes of citizens differently from others."[50] The court opined that because the statute prohibits any person from the use of SCUBA, rather than just commercial fishermen, the legislation was not aimed at only one class of citizens and thus was far from a "sweeping prohibition."[51] The court also declared that the provisions of the statute do not violate any fundamental constitutional right.[52] Specifically, the court stated that there is no fundamental constitutional right to harvest shellfish by using any specific method.[53] The court also emphasized the limited nature of the measure in its regulation of only four coastal ponds, therefore not depriving fishermen of their ability to make a living or infringing on any constitutional rights of fishery.[54] Using the opportunity to define the rights of fishery, the court relied on Rhode Island precedent and declared that the scope of the right protected in the Rhode Island constitution is that all people of the state, residents and commercial fishermen alike, share fishery resources in equal access.[55]

Without dissent, the court found that the provisions of the statute passed a subsequent minimum-scrutiny test.[56] The court suggested that such a measure may prevent future depletion, as well as promote an equitable distribution of the resource among citizens,[57] and that restricting the most efficient means of fishing would help to do so.[58] Finally, the court

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legislation." *Id.* at 821.

47. Kennedy v. State, 654 A.2d 708 (R.I. 1995).

48. Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983).

49. Cherenzia v. Lynch, 847 A.2d at 823 (quoting Kennedy v. State, 654 A.2d at 712).

50. *Id.* (quoting Boucher v. Sayeed, 459 A.2d at 91).

51. *Id.* at 825.

52. *Id.* at 823.

53. *Id.* at 824. *See supra* notes 16-18 and accompanying text.

54. *Id.*

55. Cherenzia v. Lynch, 847 A.2d at 824 (quoting *Opinion to the Senate*, 137 A.2d 525, 525-526 (R.I. 1958)). The court also interpreted the Rhode Island constitution as anticipating legislative regulation to regulate the fisheries, as the right to fishery is not an unqualified right. *Id.*

56. *Id.* at 826.

57. *Id.* at 825.

58. *Id.* at 826. The court discounted the existing daily catch limits in place in the name of the legislative duty to "preserve the state fishery resources for all the inhabitants of the state, even those who seek, for example, merely to harvest shellfish for their own personal recreation and consumption." *Id.*

noted that the regulation would prevent the possibility of boating accidents and personal injury to divers.[59]

The court then quickly dismissed the plaintiffs' substantive due process claim by reiterating the lack of an implicated fundamental right of the fishermen, and the reasonable safety concerns that the General Assembly possessed in passing the measure.[60]

IV. ASSESSING REGULATIONS ON COMMERCIAL FISHING

The decision in *Cherenzia v. Lynch* is one example of the uphill battle that commercial fisherman face when challenging the constitutionality of fishery regulations. Because a fundamental right to fish will rarely be found, state legislation must only bear a rational relationship to a legitimate state interest.[61] The primary shortcoming of the *Cherenzia* decision, however, is the extent to which the court allowed the General Assembly to focus on the policy of resource allocation in a measure only marginally related to conservation. In allowing such a restriction on commercial fishermen, the court created the possibility that other hasty legislation may be passed in the future which could negatively impact commercial fishermen.

The court noted that the Legislature is charged with "the [constitutional] 'duty' to conserve and protect the state's fishery resources",[62] however, a threat to the shellfish population was noticeably absent in the facts of the case. The Rhode Island Department of Environmental Management's Fish and Wildlife Division had set quantity limits for shellfish catches at the ponds in question.[63] Furthermore, according to the plaintiffs' expert witness, "certain shellfish in this area spawn prolifically, and harvesting poses no danger to their population—as long as those who are fishing there observe the size and catch limitations."[64] The State's contention that the General Assembly must "preserve the state fishery resources for all the inhabitants of the state"[65] made little sense considering that the shellfish in the area appeared to be in no danger, present or future.

Although Rhode Island's constitution charges the legislature to provide "adequate resource planning for the control and regulation of the use of the

59. *Id.* at 825.
60. *Id.* at 826.
61. *See supra* notes 18-21 and accompanying text.
62. Cherenzia v. Lynch, 847 A.2d at 825 (citing R.I. CONST. art. I, § 17).
63. *Id.* at 820.
64. *Id.* at 821.
65. *Id.* at 826.

natural resources of the state *and* [to provide] for the preservation, regeneration and restoration of the natural environment,"[66] the former consideration appears to have trumped the latter. Without any concrete scientific evidence, the General Assembly created a compromise between the commercial fishermen using SCUBA, and the residents who complained of depleted shellfish stocks and interference with their recreational boating. Rather than supporting the long-standing Rhode Island policy of providing equal benefit of the fisheries to the public,[67] this measure sounds remarkably like an attempt to appease Rhode Island recreational fishermen by stifling their competition. With plenty of other options to adequately allocate fishery resources and protect public safety (restrict hours of boating, restrict hours of SCUBA fishing, etc.), this measure borders on arbitrary.

Only a few decades ago, the United States Supreme Court held that a state could not prohibit out-of-state persons from accessing the state's fisheries by merely citing resource conservation as its basis for denying access.[68] The Court opined:

> a statute that leaves a State's residents free to destroy a natural resource while excluding aliens or nonresidents is not a conservation law at all. It bears repeating that a "state may not use its admitted power to protect the health and safety of its people as a basis for suppressing competition." A State cannot escape this principle by cloaking objectionable legislation in the currently fashionable garb of environmental protection.[69]

The *Cherenzia* decision seemed to be engaging in the same discrimination—competition regulation "cloaked" in the garb of resource sustainability and police power. Only this time, it pitted state residents against state residents.

Furthermore, the court used flawed logic in determining that the Rhode Island statute was free of a suspect classification. The court justified the measure in that "this statute prohibits any person—not just commercial fishermen—from using only one type of available means from harvesting shellfish (namely, SCUBA) and from doing so in four named coastal ponds."[70] How many residential citizens, however, use SCUBA gear? The

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66. R.I. CONST. art. I, § 17 (emphasis added).

67. *See, e.g.*, State v. Cozzens, 2 R.I. 561 (1850).

68. Douglas v. Seacoast Products, Inc., 431 U.S. 265, 285 (1977) (quoting H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538 (1949)).

69. *Id.*

70. Cherenzia v. Lynch, 847 A.2d at 825.

statute unfairly targets the methods used almost exclusively by commercial fishermen.

Ultimately, the Rhode Island Supreme Court admittedly took away the most economically feasible way for commercial fishermen to harvest shellfish from these four significant coastal ponds. Ironically, with catch limits in effect, a ban of SCUBA gear seemed quite unnecessary. Other states have promulgated legislation restricting the gear commercial fishermen can use, effectively driving them out of business. When the Washington Supreme Court banned commercial salmon fishermen from using sports gear, the State admitted that "the effect of this statute will be to reduce the number of commercial fishermen."[71] In addition, only one state, Florida, has chosen to set an example of compensating fisherman who experience economic loss from such restrictions.[72] The State created retroactive unemployment coverage for fishermen after a constitutional gill net ban drove them out of business.[73] Undoubtedly, the Rhode Island statute will lead to at least a few unemployed commercial fishermen, and broader future regulation could decimate their livelihood.

Fisheries are indeed limited resources, and the state no doubt has a legitimate purpose to conserve its resources. The *Cherenzia* court, however, erred by supporting legislative fishery regulation based only marginally on conservation concerns. By affirming a legislative policy that covertly acts to decrease competition for recreational fishermen, the court gave carte blanche for further measures that could be much more drastic than those presented in this case. The court should have affirmed the decision of the lower court, sending a message to the Legislature that their policy affects the livelihood of the state's commercial fishermen, and leaves these men and women of the Ocean State feeling disenfranchised and underrepresented.

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71. Wash. Kelpers Ass'n v. Washington, 502 P.2d 1170, 1180 (Wash. 1972) (Hunter, J., dissenting).

72. Jonathan M. Streisfeld, Note and Comment, *Compensation for Commercial Fishermen in the Wake of the 1994 Constitutional Amendment Limiting Marine Net Fishing*, 20 NOVA L. REV. 559, 583 (Fall, 1995).

73. *Id.*