Section 3. FISHERIES MANAGEMENT

A. STATE FISHERIES MANAGEMENT

Prior to 1977, states were the primary managers of the country's fisheries. By virtue of the police power, the states regulated fisheries in inland waters and the territorial seas. The landmark case of Skiriotes v. Florida, 313 U.S. 69 (1941), recognized the right of a state to regulate its citizens outside territorial waters. In holding that state regulations on the taking of sponges would apply to a Florida resident even if he were not in territorial waters, the Supreme Court stated:

If the United States may control the conduct of its citizens upon 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 where there is no conflict with acts of Congress....

A primary means of enforcement of state fisheries laws has been the use of landing laws or the prohibition of the possession of certain gear. In addition to regulating state citizens and other fishermen within the territorial sea, these kinds of laws can have significant impacts on noncitizen fishermen fishing outside the territorial sea. In spite of the extraterritorial impacts, the Supreme Court has, prior to 1977, upheld landing laws when they are necessary for enforcement of fishery management legislation.

The following excerpt provides an overview of state fisheries regulation prior to 1977:


A. State Jurisdiction Over Fisheries Within Territorial Waters

In analyzing the law of fisheries management one initially must determine the sources and extent of state jurisdiction and control over marine fisheries. States historically have asserted claims of control over fisheries located both within and without territorial waters. Prior to 1900, the United States Supreme Court recognized that the states, as sovereign representatives of the people, possessed an ownership interest in fish and wildlife located within their territories.1/ Subsequently, in Missouri v. Holland the Court limited the state ownership doctrine to include only wildlife reduced to actual possession by skillful capture,
noting that the claim to title in migratory creatures rested upon a "slender reed."

In 1948 the Supreme Court discarded the concept of "ownership" and described the doctrine as a "fiction," which was utilized to express the states' power to preserve and regulate the exploitation of their natural resources. This power to regulate fishes in territorial waters, the Court stated, was always subject to paramount powers retained by the federal government. The theory of state ownership resurfaced in 1953, however, with the passage of the Submerged Lands Act, which vested in the states "title to and ownership of . . . natural resources" within their navigable waters and the lands beneath them. Included in this statutory grant was the "right and power to manage, administer, lease, develop and use" the natural resources, which were defined to include fish, shrimp, oysters, and other marine animal and plant life. Subject to the paramount powers of the federal government, the Submerged Lands Act confirmed the ownership interest of the states in the marine resources found within their territorial waters.

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B. Extraterritorial State Jurisdiction

In addition to the ownership theory empowering states to manage fisheries within their territorial waters, two legal doctrines establishing the authority of coastal states to regulate and manage marine fisheries located beyond their territorial waters have been recognized. The first doctrine arose from state regulations collectively known as "landing laws."² Under such regulations, states may exercise control

1. (10) See, e.g., Geer v. Connecticut, 161 U.S. 519, 528-29 (1896) (the state, as the sovereign representative of its people, has the right to control and regulate, to the maximum extent possible, the common ownership of wildlife); Manchester v. Massachusetts, 139 U.S. 240, 259-60 (1891) (states have an ownership interest in territorial waters and the fish within those waters); Martin v. Waddell, 41 U.S. (16 Pet.) 367, 414 (1842) (the common ownership interest of New Jersey in marine fisheries within navigable waters was paramount to right of private ownership traceable to a grant by royal charter to the Duke of York).

2. (24) Generally, landing laws prohibit the possession, sale, or transportation of fish, or game within a state if such possession, sale, or transportation violates state law. The prohibition extends to all fish because it is impossible to distinguish between fish caught within or without state territorial waters, and any limitation on the prohibition would render its enforcement ineffective.

204
over fish caught beyond the three mile limit that subsequently are brought within their territorial waters. In the principal case of Bayefde Fish Co. v. Gentry the Supreme Court upheld as a valid exercise of the state's police power a California landing law, regulating the processing of sardines, that applied equally to all of those fish regardless of where they were caught. The purpose of the regulation was to prevent a depletion of the local fish supply, and jurisdiction to control the sardines brought into the state was necessary to prevent evasion of this local policy. Because any impact on commerce was incidental and beyond the purposes of the legislation, the Court rejected the argument that the landing law placed an improper burden on interstate commerce. Consequently, justified by conservation enforcement considerations, the states could prohibit possession of fish taken outside their territorial waters and require a permit for any fishing vessel operating within state waters even though its catch may have come from operations conducted wholly outside the state.

The second basis for extraterritorial regulation of marine fisheries is derived from the right of a state to control the conduct of its citizens on the high seas. The Supreme Court relied on this rationale in Skiriotes v. Florida to affirm the conviction of a Florida resident who had used gear prohibited under Florida law to harvest sponges outside the territorial limit of the state's police power over one of its citizens, which was permissible in the absence of any conflict with federal law.

Recently, a series of cases arising in Alaska explored a new basis for state extraterritorial jurisdiction over marine fisheries. The controversies involved regulations to control crab fishing in the Bering Sea Shellfish Area, which extends hundreds of miles west of Alaska's shoreline. The regulations provided for the closing of the crab fishing area each year after 23,000,000 pounds of crab had been taken and made it unlawful to possess, transport, buy, or sell additional crabs "taken in any waters seaward of the officially designated as the territorial waters of Alaska." In Hjelle v. Brooks crab fishermen from the state of Washington obtained a preliminary injunction in the United States District Court for the District of Alaska against the enforcement of these regulations on the ground that they unconstitutionally burdened interstate commerce. Because the state purported to exercise direct control over crabs in the entire Bering Sea Shellfish Area, the court rejected Alaska's contention that the regulations were necessary to conserve crab fishing within the state. Although the landing law cases permit a state to regulate extraterritorial conduct to facilitate conservation of a resource clearly within the state, the court distinguished Hjelle from those cases on its facts. Because of the direct extraterritorial effect of the regulations and the absence of a showing that their purpose was to facilitate conservation enforcement within state waters, the court concluded that the plaintiffs were likely to prevail on the merits and issued the preliminary injunction.

Following the Hjelle decision the Alaska Board of Fish and Game repealed the objectionable regulations and issued emergency measures. These provisions established a series of crab fishing
closures for designated "statistical areas," each of which consisted of a "registration" area of waters within state jurisdiction and an adjacent seaward "biological influence zone." In State v. Bundrant the Alaska Supreme Court reviewed the convictions of several crab fishermen charged with violating these new regulations. The defendants were of two categories: those charged with illegal possession within the three mile limit of crabs taken on the high seas and those charged with prohibited extraterritorial activities within closed areas located sixteen to sixty miles off the Alaskan coast. Only one of the defendants was an Alaskan resident.

In holding that both categories of defendants were properly charged and subject to state regulation, the Alaska Supreme Court repudiated the analysis of Hjelle and departed from the well-established limits on state power to exercise extraterritorial jurisdiction. The court refused to adopt a restrictive interpretation of the landing law cases, which would have required the demonstration of an enforcement problem within state territorial waters as a prerequisite for expanded state jurisdiction; instead, the court stated that the test was whether the regulations bore a "reasonable relationship to the purpose sought to be achieved." Thus the issue was whether extraterritorial control was necessary on ecological grounds for the conservation of fishery resources that existed partially within state waters. Applying this doctrine, the court concluded that because crabs are migratory creatures, moving beyond the state's territorial boundaries at various times during the year, Alaska's regulation of activity on the high seas was necessary to conserve the crabs existing within its waters and thus clearly within the state's police power.

The court in Bundrant also extended the Skiriotes concept of the power of a state to regulate the conduct of its citizens on the high seas. Citing precedents from domestic and international law, the court broadened this principle into a general concept of "objective territorial" jurisdiction whereby a state may control the activities of noncitizens outside its jurisdiction when those activities have detrimental effects on a fishery within state waters. The impact of this concept is to allow direct state enforcement against noncitizens on the high seas.

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C. Limits on State Jurisdiction

Even within the three mile limit, the Constitution and applicable federal law restrict state control over marine fisheries. In Toomer v. Witsell the Supreme Court held that a South Carolina statute requiring nonresidents to pay a $2,500 license fee and residents only $25 was a violation of the privileges and immunities clause of the Constitution. Interpreting the clause as a guarantee of the right of nonresidents to engage in commercial fishing within a state on an equal basis with citizens of that state, the Court stated that a disparity in the treatment of nonresidents is justifiable only when a substantial reason exists for the discrimination beyond the mere fact that the nonresidents are citizens of another
state; furthermore, if such reason exists, the degree of
discrimination must bear a close relation to the state's
purpose.3/ The court rejected as unsubstantiated by the record
arguments that the discriminatory fees were necessary to maintain
conservation and to recover costs of enforcement.

Toofer also overturned a South Carolina statute that
required all owners of shrimp boats fishing within the state's
territorial waters to unload their catch at a South Carolina
port. Because the statute's purpose was to divert business to
South Carolina that otherwise would have gone to other states, it
created a burden on interstate commerce, which contravened the
commerce clause of the United States Constitution.

The equal protection clause of the fourteenth amendment also
has been used as the basis for declaring state fisheries
regulation unconstitutional. In Takahashi v. Fish and Game
Commission the Supreme Court held that a California statute
barring the issuance of commercial fishing licenses to "persons
ineligible for citizenship" was directed towards resident
Japanese aliens and therefore created an impermissible
classification. The concept of equal protection guarantees
resident aliens the same right to earn a livelihood as is enjoyed
by all citizens.

In the recent Douglas decision, the Supreme Court announced
another limitation on state regulation of marine fisheries.

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3. (68) The Court also rejected the state ownership theory as a
justification for discrimination against nonresidents, and
distinguished McCreary v. Virginia, 94 U.S. 391 (1876), which
upheld a Virginia statute prohibiting nonresidents from planting
oysters in the tidal waters of the Ware River. The Court
restricted McCreary to inland waters and non-free swimming fish.
334 U.S. at 401.

Douglas, Commissioner, Virginia Marine
Resources Commission v. Seacoast Products, Inc.
431 U.S. 265 (1977)

Mr. Justice MARSHALL delivered the opinion of the Court.

The issue in this case is the validity of two Virginia
statutes that limit the right of nonresidents and aliens to catch
fish in the territorial waters of the Commonwealth.
I.

Persons or corporations wishing to fish commercially in Virginia must obtain licenses. Section 28.1-81.1 of the Virginia Code (Sec. 81.1) (Supp. 1976), enacted in 1976, limits the issuance of commercial fishing licenses to United States citizens. Under this law, participants in any licensed partnership, firm, or association must be citizens. A fishing business organized in corporate form may be licensed only if it is chartered in this country; American citizens own and control at least 75% of its stock; and its president, board chairman, and controlling board majority are citizens. Section 28.1-60 of the Virginia Code (Sec. 60) (Supp. 1976) governs licensing of nonresidents of Virginia to fish for menhaden an ineligible but commercially valuable species of fin fish. Section 60 allows nonresidents who meet the citizenship requirements of Section 81.1 to obtain licenses to fish for menhaden in the three-mile-wide belt of Virginia's territorial sea off the Commonwealth's eastern coastline. At the same time, however, Section 60 prohibits nonresidents from catching menhaden in the Virginia portion of Chesapeake Bay.

Appellee Seacoast Products, Inc., is one of three companies that dominate the menhaden industry. The other two firms, unlike Seacoast, have fish-processing plants in Virginia and are owned by American citizens. Hence, they are not affected by either of the restrictions challenged in this case. Seacoast was founded in New Jersey in 1911 and maintains its principal offices in that State; it is incorporated in Delaware and qualified to do business in Virginia. The other appellees are subsidiaries of Seacoast; they are incorporated and maintain plants and offices in States other than Virginia. In 1973, the family of Seacoast's founder sold the business to Hanson Trust, Ltd., a United Kingdom company almost entirely owned by alien stockholders. Seacoast continued its operations unchanged after the sale. All of its officers, directors, boat captains, and crews are American citizens, as are over 95% of its plant employees.

At the time of its sale, Seacoast's fishing vessels were enrolled and licensed American-flag ships. See infra, at 272–274. Under 46 U.S.C. Section 808, 835, the transfer of these vessels to a foreign-controlled corporation required the approval of the Department of Commerce. This was granted unconditionally over the opposition of Seacoast's competitors after a full public hearing that considered the effect of the transfer on fish conservation and management, on American workers and consumers, and on competition and other social and economic concerns. Following this approval, appellees' fishing vessels were re-encumbered and relicensed pursuant to 46 U.S.C. Section 251–252, 263. They remain subject to all United States laws governing maritime commerce.
In past decades, although not recently, Seacoast had operated processing plants in Virginia and was thereby entitled to fish in Chesapeake Bay as a resident. More recently, Seacoast obtained nonresident menhaden licenses as restricted by Section 60 to waters outside Chesapeake Bay. In 1976, however, Section 81.1 was passed by the Virginia Legislature, c. 338, 1976 Va. Acts, and appellant James E. Douglas, Jr., the Commissioner of Marine Resources for Virginia, denied appellees' license applications on the basis of the new law. Seacoast and its subsidiaries were thereby completely excluded from the Virginia menhaden fishery.

Appellees accordingly filed a complaint in the District Court for the Eastern District of Virginia, seeking to have sections 60 and 81.1 declared unconstitutional and their enforcement enjoined. A three-judge court was convened and it struck down both statutes. It held that the citizenship requirement of section 81.1 was pre-empted by the Bartlett Act, 16 U.S.C. 1081 et seq., and that the residency restriction of section 60 violated the Equal Protection Clause of the Fourteenth Amendment. We noted probable jurisdiction of the Commissioner's appeal, 425 U.S. 949 (1976), and we affirm.

II

Seacoast advances a number of theories to support affirmance of the judgment below. See Fusari v. Steinerberg, 419 U.S. 379, 387 n. 13 (1975); Dandridge v. Williams, 397 U.S. 471, 475 n. 6 (1970). Among these is the claim that the Virginia statutes are pre-empted by federal enrollment and licensing laws for fishing vessels. The United States has filed a brief as amicus curiae supporting this contention. Although the claim is basically constitutional in nature, deriving its force from the operation of the Supremacy Clause, Art. VI, cl. 2, it is treated as "statutory" for purposes of our practice of deciding statutory claims first to avoid unnecessary constitutional adjudications. See Haggans v. Lavine, 415 U.S. 528, 549 (1974). Since we decide the case on this ground, we do not reach the constitutional issues raised by the parties.

The well-known principles of pre-emption have been rehearsed only recently in our decisions. See, e.g., Jones v. Rath Packing Co., 430 U.S. 519, 525-526 (1977); De Canas v. Bica, 424 U.S. 351 (1976). No purpose would be served by repeating them here. It is enough to note that we deal in this case with federal legislation arguably superseding state law in a "field which ... has been traditionally occupied by the States." Jones v. Rath Packing Co., supra, at 525. Pre-emption accordingly will be found only if "that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)." Ibid. We turn our focus, then, to the congressional intent embodied in the enrollment and licensing laws.

209
The basic form for the comprehensive federal regulation of trading and fishing vessels was established in the earliest days of the Nation and has changed little since. Ships engaged in trade with foreign lands are "registered," a documentation procedure set up by the Second Congress in the Act of Dec. 31, 1792, 1 Stat. 287, and now codified in 46 U.S.C., c. 2. "The purpose of a register is to declare the nationality of a vessel . . . and to enable her to assert that nationality wherever found." The Mohawk, 3 Wall. 566, 571 (1866); Anderson v. Pacific Coast S.S. Co., 225 U.S. 187, 199 (1912). Vessels engaged in domestic or coastwise trade or used for fishing are "enrolled" under procedures established by the Enrollment and Licensing Act of Feb. 18, 1793, 1 Stat. 305, codified in 46 U.S.C., c. 12. "The purpose of an enrollment is to evidence the national character of a vessel . . . and to enable such vessel to procure a . . . license." The Mohawk, supra; Anderson v. Pacific Coast S.S. Co., supra.

A "license," in turn, regulates the use to which a vessel may be put and is intended to prevent fraud on the revenue of the United States. See 46 U.S.C. 262, 263, 319, 325; 46 CFR 67.01-13 (1976). The form of a license is statutorily mandated: "license is hereby granted for the . . . [vessel] to be employed in carrying on the . . . "coasting trade," "whale fishery," "mackerel fishery," or "cod fishery," as the case may be), for one year from the date hereof, and no longer." 46 U.S.C. 263. The law also provides that properly enrolled and licensed vessels "and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries." Section 251. Appellees' vessels were granted licenses for the "mackerel fishery" after their transfer was approved by the Department of Commerce.

The requirements for enrollment and registration are the same. 46 U.S.C. 252; The Mohawk, supra, at 571-572. Insofar as pertinent here, enrolled and registered vessels must meet identification, measurement, and safety standards, generally must be built in the United States, and must be owned by citizens. An exception to the latter rule permits a corporation having alien stockholders to register or enroll ships if it is organized and chartered under the laws of the United States or of any State, if its president or chief executive officer and the chairman of its board of directors are American citizens, and if no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens. 46 U.S.C. 11; 46 CFR 67.03-5 (a) (1976). The Shipping Act, 1916, further limits foreign ownership of American vessels by requiring the Secretary of Commerce to approve any transfer of an American-owned vessel to noncitizens. 46 U.S.C. 808.

210
Deciphering the intent of Congress is often a difficult task, and to do so with a law the vintage of the Enrollment and Licensing Act verges on the impossible. There is virtually no surviving legislative history for the Act. What we do have, however, is the historic decision of Mr. Chief Justice John Marshall in Gibbons v. Ogden, 9 Wheat. 1 (1824), rendered only three decades after passage of the Act. Gibbons invalidated a discriminatory state regulation of shipping as applied to vessels federally licensed to engage in the coasting trade. Although its historic importance lies in its general discussion of the commerce power, Gibbons also provides substantial illumination on the narrower question of the intended meaning of the Licensing Act.

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Although Gibbons is written in broad language which might suggest that the sweep of the Enrollment and Licensing Act ousted all state regulatory power over federally licensed vessels, neither the facts before the Court nor later interpretations extended that far. Gibbons did not involve an absolute ban on steamboats in New York waters. Rather, the monopoly law allowed some steam vessels to ply their trade while excluding others that were federally licensed. The case struck down this discriminatory treatment. Subsequent decisions spelled out the negative implication of Gibbons: that States may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power.

For example, in Smith v. Maryland, 18 How. 71 (1855), the Court upheld a conversation law which limited the fishing implements that could be used by a federally licensed vessel to take oysters from state waters. The Court held that an "enrollment and license confer no immunity from the operation of valid laws of a State," id., at 74, and that the law was valid because the State "may forbid all such acts as would render the public right [of fishery] less valuable, or destroy it altogether," id., at 75. At the same time the Court explicitly reserved the question of the validity of a statute discriminating against nonresidents. Ibid. To the same effect is the holding in Manchester v. Massachusetts, 139 U.S. 240 (1891). There, state law prohibited the use by any person of certain types of fishing tackle in specified areas. Though Manchester was a Rhode Island resident basing a claim on his federal fisheries license, the Court held that the statute

"was evidently passed for the preservation of the fish, and makes no discrimination in favor of citizens of Massachusetts and against citizens of other States. . . . [T]he statute may well be considered as an impartial and reasonable regulation . . . and the subject is one which a State may well be
permitted to regulate within its territory, in the absence of any regulation by the United States. The preservation of fish . . . is for the common benefit; and we are of opinion that the statute is not repugnant to the Constitution and the laws of the United States." Id., at 265.

More recently, the same principle was applied in Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960), where we held that the city's Smoke Abatement Code was properly applicable to licensed vessels. Relying on earlier cases, we noted that "[t]he mere possession of a federal license . . . does not immunize a ship from the operation of the normal incidents of local police power." Id., at 447. As an "[e]venhanded local regulation to effectuate a legitimate local public interest," id., at 443, the ordinance was valid.

Although it is true that the Court's view in Gibbons of the intent of the Second Congress in passing the Enrollment and Licensing Act is considered incorrect by commentators, its provisions have been repeatedly re-enacted in substantially the same form. We can safely assume that Congress was aware of the holding, as well as the criticism, of a case so renowned as Gibbons. We have no doubt that Congress has ratified the statutory interpretation of Gibbons and its progeny. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n. 8 (1975); Snyder v. Harris, 394 U.S. 332, 339 (1969); Francis v. Southern Pacific Co., 333 U.S. 445, 449-450 (1948). We consider, then, its impact on the Virginia statutes challenged in this case.

C

The federal licenses granted to Seacoast are, as noted above, identical in pertinent part to Gibbons' licenses except that they cover the "mackerel fishery" rather than the "coasting trade." Appellant contends that because of the difference this case is distinguishable from Gibbons. He argues that Gibbons upheld only the right of the federal licensee, as an American-flag vessel, to navigate freely in state territorial waters. He urges that Congress could not have intended to grant an additional right to take fish from the waters of an unconsenting State. Appellant points out that the challenged statutes in no way interfere with the navigation of Seacoast's fishing boats. They are free to cross the State's waters in search of fish in jurisdictions where they may lawfully catch them, and they may transport fish through the State's waters with equal impunity.

Appellant's reading of Gibbons is too narrow. Gibbons emphatically rejects the argument that the license merely establishes the nationality of the vessel. That function is performed by the enrollment. 9 Wheat., at 214. Rather, the license "implies, unequivocally, an authority to licensed vessels to carry on the activity for which they are licensed." Id., at 212. In Gibbons, the "authority . . . to carry on" the licensed activity included not only the right to navigate in, or to travel across, state waters, but also the right to land passengers in

212
New York and thereby provide an economically valuable service. The right to perform that additional act of landing cargo in the State -- which gave the license its real value -- was part of the grant of the right to engage in the "coasting trade." See Harman v. Chicago, 147 U.S. 396, 405 (1893).

The same analysis applies to a license to engage in the mackerel fishery. Concededly, it implies a grant of the right to navigate in state waters. But, like the trading license, it must give something more. It must grant "authority . . . to carry on" the "mackerel fishery." And just as Gibbons and its progeny found a grant of the right to trade in a State without discrimination, we conclude that appellants have been granted the right to fish in Virginia waters on the same terms as Virginia residents.

Moreover, 46 U.S.C. 251 states that properly documented vessels "and no others" are "entitled to the privileges of vessels employed in the coasting trade or fisheries." Referring to this section, Gibbons held: "[T]hese privileges . . . cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege . . . convey[s] the right [to carry on the licensed activity] to which the privilege is attached." 9 Wheat., at 213. Thus, under section 251 federal licensees are "entitled" to the same "privileges" of fishery access as a State affords to its residents or citizens.

Finally, our interpretation of the license is reaffirmed by the specific discussion in Gibbons of the section granting the license, now 46 U.S.C. 263. The Court pointed out that "a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license." 9 Wheat., at 213-214. Gibbons recognized that the "grantor" was Congress. Id., at 213. Thus Gibbons expressly holds that the words used by Congress in the vessel license transfer to the licensee "all the right" which Congress has the power to convey. While appellant may be correct in arguing that at earlier times in our history there was some doubt whether Congress had power under the Commerce Clause to regulate the taking of fish in state waters, there can be no question today that such power exists where there is some effect on interstate commerce. Perez v. United States, 402 U.S. 166 (1971); Heart of Atlanta Hotel v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942). The movement of vessels from one State to another in search of fish, and back again to processing plants, is certainly activity which Congress could conclude affects interstate commerce. Cf. Sipes v. United States, 346 F.2d 385 (2d Cir. 1965). Accordingly, we hold that, at least, when Congress re-enacted the license form in 1936, using language which, according to Gibbons, gave licensees "all the right which the grantor can transfer," it necessarily extended the license to cover the taking of fish in state waters, subject to valid state conservation regulations.
Application of the foregoing principles to the present case is straightforward. Section 60 prohibits federally licensed vessels owned by nonresidents of Virginia from fishing in the Chesapeake Bay. Licensed ships owned by noncitizens are prevented by section 81.1 from catching fish anywhere in the Commonwealth. On the other hand, Virginia residents are permitted to fish commercially for menhaden subject only to seasonal and other conservation restrictions not at issue here. The challenged statutes thus deny appellees their federally granted right to engage in fishing activities on the same terms as Virginia residents. They violate the "indisputable" precept that "no State may completely exclude federally licensed commerce." Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963). They must fall under the Supremacy Clause.

Appellant seeks to escape this conclusion by arguing that the Submerged Lands Act, 67 Stat. 29, U.S.C. 1301-1315, and a number of this Court's decisions recognize that the States have a title or ownership interest in the fish swimming in their territorial waters. It is argued that because the States "own" the fish, they can exclude federal licensees. The contention is of no avail.

The Submerged Lands Act does give the States "title," "ownership," and "the right and power to manage, administer, lease, develop, and use" the lands beneath the oceans and natural resources in the waters within state territorial jurisdiction. 43 U.S.C. 1311(a). But when Congress made this grant pursuant to the Property Clause of the Constitution, see Alabama v. Texas, 349 U.S. 131 (1954), it expressly retained for the United States "all constitutional powers of regulation and control" over these lands and waters "for purposes of commerce, navigation, national defense, and international affairs." United States v. Louisiana, 363 U.S. 1, 10 (1960); see 43 U.S.C. 1314(a). Since the grant of the fisheries license is made pursuant to the commerce power, see supra, at 281-282; Wiggins Ferry Co. v. East St. Louis, 107 U.S. 365, 377 (1883), the Submerged Lands Act did not alter its pre-emptive effect. Certainly Congress did not repeal by implication, in the broad language of the Submerged Lands Act, the Licensing Act requirement of equal treatment for federal licensees.

In any event, "[t]o put the claim of the State upon title is," in Mr. Justice Holmes' words, "to lean upon a slender reed." Missouri v. Holland, 252 U.S. 416, 434 (1920). A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. Ibid.; Geer v. Connecticut, 161 U.S. 519, 539-540 (1896) (Field, J. dissenting). The "ownership" language of
cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." Toomer v. Witzell, 334 U.S., at 402; see also Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420-421 (1948). Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution. As we have demonstrated above, Virginia has failed to do so here.

III

Our decision is very much in keeping with sound policy considerations of federalism. The business of commercial fishing must be conducted by peripatetic entrepreneurs moving, like their quarry, without regard for state boundary lines. Menhaden that spawn in the open ocean or in coastal waters of a Southern State may swim into Chesapeake Bay and live there for their first summer, migrate south for the following winter, and appear off the shores of New York or Massachusetts in succeeding years. A number of coastal States have discriminatory fisheries laws, and with all natural resources becoming increasingly scarce and more valuable, more such restrictions would be a likely prospect, as both protective and retaliatory measures. Each State's fishermen eventually might be effectively limited to working in the territorial waters of their residence, or in the federally controlled fishery beyond the three-mile limit. Such proliferation of residency requirements for commercial fishermen would create precisely the sort of Balkanization of interstate commercial activity that the Constitution was intended to prevent. We cannot find that Congress intended to allow any such result given the well-known construction of federal vessel licenses in Gibbons.

For these reasons, we conclude that sections 60 and 81.1 are pre-empted by the federal Enrollment and Licensing Act. Insofar as these state laws subject federally licensed vessels owned by nonresidents or aliens to restrictions different from those applicable to Virginia residents and American citizens, they must fall under the Supremacy Clause. As we have noted above, however, reasonable and evenhanded conservation measures, so essential to the preservation of our vital marine sources of food supply, stand unaffected by our decision.

The judgment of the District Court is

Affirmed.

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215
B. FEDERAL FISHERIES MANAGEMENT

In 1976, Congress enacted the Fishery Conservation and Management Act of 1976 (later entitled the Magnuson Fishery Conservation and Management Act) [hereinafter MFMC or Magnuson Act], 16 U.S.C. 1801-1882, which extended exclusive United States management authority over fisheries to 200 miles. The following excerpt describes the basic provisions of the MFMC:


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A. GENERAL STRUCTURE OF THE ACT

The Magnuson Act corrected three deficiencies in federal laws for the conservation and management of fisheries. First, it had long been apparent that the contiguous zone created by the Bartlett Act did not establish an appropriate area for managing coastal fisheries. Second, United States international agreements were ineffective to ensure conservation and management of fishery stocks on the high seas, and valuable fisheries were being depleted. Third, conflicts arose among state governments in managing high seas fisheries since migrating fish disregarded boundaries separating the territorial and high seas.

The Magnuson Act expanded the federal fisheries management authority from a twelve mile zone to a two hundred mile zone, thereby increasing its legal jurisdiction from an area of approximately 345,000 square nautical mile (nm) to over 2.2 million square nm. Approximately twenty percent of the world’s fisheries were thus brought under United States control. To promote management and conservation, the Act vested broad authority in the newly created [regional] Councils and the Secretary of Commerce to regulate both foreign and domestic fishing. The heart of the Magnuson Act is the creation of federal authority to prepare and implement, in accordance with national standards, plans that will achieve and maintain the "optimum yield" of fishery resources subject to management. The Act establishes eight regional Councils responsible for the

1. (97) The Act defines "optimum yield" as:
the amount of fish--
(A) which will provide the greatest overall benefit to the
Nation, with particular reference to food production and
recreational opportunities; and
(B) which is prescribed as such on the basis of the maximum
sustainable yield from such fishery, as modified by any relevant
economic, social, or ecological factor. 16 U.S.C. 1802(18)(1976).
2. (98) The Councils represent the following regions: (1) New
preparation of Fishery Management Plans (FMP's) for fisheries within their geographical regions of responsibility. These FMP's must be submitted to the Secretary of Commerce for his approval. Furthermore, the Councils may prepare, and submit to the Secretary, proposed regulations they deem necessary for FMP implementation.

The voting members of the Councils include the state government officials principally responsible for marine fishery management, the regional directors of the National Marine Fisheries Service (NMFS), and other individuals appointed by the Secretary from lists of "qualified" persons submitted by the governors of states represented on the Councils. The Council's authority is constrained by the Secretary's power to approve or disapprove proposed FMP's and by the Secretary's rulemaking and enforcement authority. Although this relationship has at times resulted in jurisdictional conflict between Council and Secretary, the allocation of authority generally appears to work.

All FMP's and their implementing regulations must be consistent with the seven National Standards for fishery conservation and management set forth by Congress in title III of the Act.3 In addition, the Secretary must establish guidelines based on these national standards to assist Councils in the

3. (106) Magnuson Act section 301(a)(1)-(7), 16 U.S.C. 1851(a)(1)-(7)(1976). These standards are:

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield of each fishery.
(2) Conservation and management measures shall be based upon the best scientific evidence available.
(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.
(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.
(5) Conservation and management measures shall, where practicable, promote 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 variation among, and contingencies in, fisheries, fishery resources, and catches.
(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.
development of FMP's. The National Oceanic and Atmospheric Administration (NOAA) published such guidelines in 1977 and is now in the midst of a substantial review which will lead to revisions in the guidelines.

Any FMP prepared by a Council must contain conservation and management measures applicable to foreign and domestic vessels that are consistent with both national standards and other applicable law. Each FMP must describe the fishery and include information concerning vessels, gear, management costs, actual and potential revenues, the extent of foreign and American Indian fishing, and other relevant matters. The FMP must also assess and specify the fishery's condition and the fishery's maximum sustainable yield/ and optimum yield; supporting material for such specifications must also be included. The FMP must further specify the capacity of domestic fishermen to harvest the optimum yield, whether any portion is available for foreign fishing, and the extent of American fish processing capacity. Finally, the Councils must specify the data to be submitted to the Secretary concerning the fishery.5/

After a Council prepares an FMP, the plan is submitted to the Secretary of Commerce, who then has sixty days to approve, fully disapprove, or partially disapprove the proposal. The Secretary coordinates his review with the Secretary of State with regard to foreign fishing, and with the Coast Guard with regard to enforcement at sea. If the Secretary approves the FMP, he is then required to publish proposed implementing regulations. Following public review and comment, the Secretary issues final regulations and is then responsible for their implementation.

4. (112) Maximum sustainable yield, a traditional fisheries biology concept, is simply a tool by which the level of harvest of a given stock of fish can be determined. It is in essence, the surplus production of the fishery; the safe upper limit of the harvest which can be taken consistently year after year without diminishing the stock so that the stock is truly inexhaustible and perpetually renewable.

5. (116) In addition, there are a number of provisions the Councils may consider in a discretionary manner. These include the subjecting of domestic vessels to permit and fee requirements; the designating of zones where vessel and gear restrictions apply; the limiting of catches based on number, size, or other criteria; and the limiting of the number of vessels in the fishery. Of particular relevance for purposes of this article is the provision that permits an FMP to "incorporate (consistent with the national standards, the other provisions of the Act, and any other applicable law) the relevant fishery conservation and management measures of the coastal States nearest to the fishery." Section 303(c)(5), 16 U.S.C. 1853(b)(5).
NOTES

1. Florida belongs to two regional fishery management councils—the Gulf of Mexico and the South Atlantic. Is federal jurisdiction under the MFCMA the same in the Gulf of Mexico and the Atlantic Ocean? See 16 U.S.C. 1811.


C. STATE FISHERIES MANAGEMENT AFTER THE MFCMA

The fisheries jurisdiction retained by the states after enactment of the MFCMA is addressed in section 306. Note that a limited Skidinotes-type jurisdiction over state-registered boats is retained by the states. The harder question is determining to what extent Congress intended to displace the previous body of fishery management law. Read section 306 and evaluate the Florida cases on the issue of federal preemption of state fisheries law.

Section 306. State Jurisdiction.

(a) In General. Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishin9 the jurisdiction or authority of any State within its boundaries. For purposes of this Act, except as provided in subsection (b), the jurisdiction and authority of a State shall extend (1) 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 or any successor convention to which the United States is a party and (2) with respect to the body of water commonly known as Nantucket Sound, to the pocket of water west of the seventieth meridian west of Greenwich. No State may directly or indirectly regulate any fishing which is engaged in by any vessel outside its boundaries, unless such vessel is registered under the laws of such State.

(b) Exception. (1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of Title 5, that—

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the fishery conservation zone and beyond such zone; and

219
(B) any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan;

the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

* * *

SOUTHEASTERN FISHERIES ASSOCIATION
v.
DEPT. OF NATURAL RESOURCES
(453 So. 2d 1351) (Fla. 1984).

OVERTON, J.

This is a petition to review a decision of the First District Court of Appeal reported as State, Department of Natural Resources v. Southeastern Fisheries Ass'n, 415 So. 2d 1326 (Fla. 1st DCA 1982). The district court found Florida's fish trap law, section 370.1105, Florida Statutes (Supp. 1980), to be constitutional and concluded that the law is enforceable by the state in its territorial waters as well as in the extra-territorial waters beyond Florida. The district court certified the following question to be one of great public importance:

Does Section 370.1105, Florida Statutes (1980 Supp.), apply to waters outside the territorial boundaries of the State of Florida, notwithstanding the absence of a provision expressing the intention that its provisions are to be given extraterritorial effect?

* * *

The petitioner, Southeastern Fisheries, has asserted (1) that the statute is void for vagueness and overbreadth and (2) that the statute cannot now be enforced in the extra-territorial waters beyond Florida, particularly in view of the asserted federal preemption.

The statute in question, section 370.1105, Florida Statutes (Supp. 1980), makes it unlawful to fish for saltwater finfish with any traps, or to possess any fish trap other than those traps specifically exempted by the act. The act, however, does not expressly state that its provisions apply in the extra-territorial waters beyond Florida.
***

On the first point, we agree with the district court that the statute is neither overbroad nor vague.

***

The certified question concerns the application of section 370.1105 beyond state waters when evidence of that intent is not expressed in the statute. If we find there was an intent that this statute was to apply in extra-territorial waters beyond Florida, we must then determine whether the federal government has preempted the regulation of the use of fish traps in these extra-territorial waters.

At the outset we recognize that the state can regulate and control the operation of vessels and the acts of its citizens in waters outside Florida's territorial limits, provided, however, that the federal government has not preempted state regulation. See Skiriotes v. Florida, 313 U.S. 69 (1941). The Florida Legislature has expressly done so in other instances. For example, section 370.15(2)(a), Florida Statutes (1979), makes it "unlawful for any person, firm or corporation to catch, kill, or destroy shrimp or prawn within or without the waters of this state." (Emphasis added.) See State v. Millington, 377 So. 2d 685 (Fla. 1979). In section 370.15(2)(a) the legislature clearly stated its intent that the statute apply within or without the waters of Florida. No such terminology is contained in section 370.1105, the statute in issue here.

In Bethell v. Florida, the United States District Court for the Southern District of Florida expressly held that "Section 370.1105, Florida Statutes (1981) is declared unconstitutional to the extent that it attempts to exercise the authority of the State of Florida over the area which is beyond the territorial seas of the State of Florida . . . ." Slip op. at 1 (Summary Final Judgment). In so holding, the United States District Court recognized Skiriotes v. Florida, but determined that the Fishery Conservation and Management Act, 16 U.S.C. 1801(b) (1976), applied. The court found that under that act the State of Florida participated as a member of the South Atlantic Fishery Management Council and in June 1982 accepted a fishery management plan which allowed the limited use of fish traps to catch saltwater finfish. The court expressly found that "whether there exists a conflict with federal law in this area of regulation is no longer open to question" and concluded that "section 370.1105 Florida Statutes has been preempted by 16 U.S.C. 1801 et seq." Bethell v. Florida, slip op. at 3 (Order Granting Plaintiff's Motion for Summary Judgment). The court cited the Florida Third District Court of Appeal's decisions in Tingley v. Allen, 397 So. 2d 1166 (Fla. 3d DCA 1981), and Living v. Davis, 422 So. 2d 364 (Fla. 3d DCA 1982), as being consistent with its decision.
Finally, the court held that enforcement of section 370.1105 would violate the commerce and equal protection clauses of the United States Constitution.

The attorney general of Florida takes issue with the United States District Court’s decision, noting that he is challenging that decision, and he requests that we hold this case in abeyance pending federal court resolution of his appeal. We decline to do so. The issue is whether or not Florida should be allowed to regulate the use of fish traps in extra-territorial waters pursuant to section 370.1105. The state’s authority to regulate in those 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 the federal government, then the legislature should expressly declare that it is its intent that the statute apply in extra-territorial waters, as it did in section 370.15(2)(a) concerning shrimp. Since there is no clear expression by the legislature that it is unlawful “to set, lay, place or otherwise attempt to fish for saltwater finfish with any trap” outside the territorial waters of Florida, we find it would be improper to apply this statute to extra-territorial waters by implication and confront the federal government with its asserted validity.

Having so found, we must accept the petitioners’ argument that the unlawful possession of these fish traps in the territory of the state or in its territorial waters has the effect of unconstitutionally restricting the lawful use of these traps in extra-territorial waters. We hold that the statute is valid to prohibit the use and possession of fish traps within the state and its territorial water, but that the state, in order to prosecute for unlawful possession of fish traps, must prove, as an element of possession, the intent to unlawfully use the fish traps in the territorial waters of Florida.

PEOPLE v. WEEREN
607 P.2d 1279 (Cal. 1980)

RICHARDSON, Justice.

Defendants Hans H.H. Weeren and Steven C. Jennings appeal from the judgments of conviction of the misdemeanor violation of Fish and Game Code section 2000, which generally and in relevant part provides: “It is unlawful to take any . . . fish . . . except as provided in this code or regulations made pursuant thereto.” The convictions are based on trial court findings that defendants with the use of a spotter aircraft took broadbill swordfish contrary to the regulations of the Fish and Game
Department (Cal.Admin.Code, tit. 14, sec. 107, subd. (g)(2). This regulation specifically mandates that "Broadbill swordfish may not be taken for commercial purposes except by the holder of a revocable permit issued by the department, and as herein provided . . . (g) Methods of Take. . . . (2) Aircraft may not be used to directly assist a permittee or any person in the taking of any species of fish while operating under the swordfish permit."

Both of the defendants are citizens and residents of California holding commercial fishing licenses by the State of California. Their 19-ton vessel, the Comanche, and the accompanying spotter aircraft, were both based in Oxnard, Ventura County, on California's southern coastline. The Comanche was licensed for commercial fishing for swordfish under Fish and Game Code sections 7830-7890. It carried an appropriate "certificate of boat registration" and boat registration number required by those statutes. However, because it also was enrolled with a "United States document number," it did not bear the California identification number contemplated by Vehicle Code sections 9840-9860.

On September 28, 1977, California Fish and Game officials boarded the Comanche at a point 10 miles south-southeast of Anacapa Island in waters of the Santa Barbara Channel, situated more than 3 nautical miles from the shore of either the mainland or of any California coastal islands. The officials determined that two swordfish seized on the Comanche had been caught at that location by defendants, with the help of radio communication and directions from a spotter aircraft. The officials remained aboard while the Comanche sailed under their direction to Channel Island Harbor in Ventura County.

We will affirm defendants' convictions on the ground that California, in the protection of its legitimate interests may exercise penal control over its citizens extraterritorially.

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1. California's Territorial Waters

Defendants assert that because the precise location of the Comanche when she was boarded was beyond California's boundaries their convictions must fail.

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Here, consistent with the high court's conclusion in California II, we determine only that Santa Barbara Channel is outside California's boundaries for purposes of federal law, and that California's boundaries are those which are established under the Act as interpreted in California II. The channel is thereby excluded from California's boundaries. It follows that when defendants committed the acts for which they were convicted, they were not within California's inland waters.
2. Extraterritorial Regulation Under Federal Law

We agree with the People's assertion that federal law does not prohibit California's assertion of penal jurisdiction over defendants even though at the time of their commission of the charged offenses they acted outside of California's territorial limits as defined for federal purposes.

The United States Supreme Court has held that in matters affecting its legitimate interests a state may regulate the conduct of its citizens upon the high seas where no conflict with federal law is presented. (Skiriotes v. Florida (1941) 313 U.S. 69, 77, 61 S.Ct. 924, 929, 85 L.Ed. 1193.) More specifically, the court recognized that a state's interests in preserving nearby fisheries is sufficiently strong to permit such extraterritorial enforcement of its laws enacted for that purpose. (Skiriotes, supra, at p. 75, 61 S.Ct. at p. 928; Felton v. Hodges (5th Cir. 1967) 374 F.2d 337, 339; State v. Bundrant (Alaska 1976) 546 P.2d 530, 550-554; see United States v. Alaska (1975) 422 U.S. 184, 198-199, 95 S.Ct. 2240, 2251, 45 L.Ed.2d 109.)

It seems obvious that by adoption and enforcement of its control regulations California seeks to prevent the depletion of a very valuable natural resource. Fish swim. By their very nature they move freely across these arbitrary boundaries which are enacted by governmental entities for official purposes. The commercial and recreational value of California's fisheries are self-evident and are developed, both quantitatively and in their financial aspects, in the record before us. We have no difficulty in discerning in the preservation of its valuable fish population the requisite state interest for extraterritorial enforcement. Furthermore, the state laws here at issue present no conflict with federal swordfish policies because federal rules in that field have as yet been promulgated under the FCMA.

The record in this case is favorable to the penal reach of California law. Consistent with the Skiriotes rationale we observe that defendants are California citizens and residents. Both the Comanche and the spotter aircraft were based in California. California facilities were intended for use in both the landing and selling of their catch. California's interest in defendants' activities was both real and continuing.

Defendants assert, however, that their convictions are invalid because the FCMA expressly forbids extraterritorial fishing regulation by a state, except in cases where the fishing vessel is "registered under the laws of such State." (16 U.S.C.A. § 1856(a).) Was the Comanche so "registered"?

Both federal and state governments provide various means of identifying and classifying those craft which move in the nation's navigable waters. Under federal law all domestic vessels over five net tons are subject to federal classification. "Registration" is an ancient term of art under the federal scheme, reserved solely for ships which are engaged in foreign trade. (46 U.S.C.A. 11 et seq.) Those vessels which are engaged
in commercial fishing from United States ports, on the other hand, must be "licensed" if over five net tons, and both "licensed" and "enrolled" if over twenty net tons. (Id., 251-263; 46 C.F.R. 67.01-5, 67.01-11, 67.01-13, 67-07-13.) All boats so "documented" are assigned an official number. (Id., 67.11-1.)

The term "enrollment" evidences the national character of the vessel enabling it to procure a license. The "license," in turn, limits the commercial use to which the craft may be put in order to prevent evasion of federal revenue laws. Possession of a federal fishing license, however, does not preclude the nondiscriminatory state regulation of the licensed vessel's fishing activities.

California provides two means of vessel classification and numbering; an identification number (CP number), and a "certificate of boat registration" with "registration plates." (sections 7880, 7887.) Such "registration," renewable annually upon payment of a fee (section 7890), constitutes a state license to use the boat for commercial fishing of a specified kind.

Defendants urge that because the Comanche carried United States documentation, and therefore bore no CP number, it cannot be deemed "registered" in California for purposes of the FCMA. We disagree. In our view, the Comanche's California "registration" for commercial swordfishing purposes permitted California to regulate such activities on the high seas. In our view, a contrary interpretation would render FCMA's express recognition of state extraterritorial jurisdiction (16 U.S.C.A. 1856(a)) virtually meaningless, limiting such jurisdiction to pleasure boats and those few commercial fishing vessels lighter than five net tons.

We also find significance in the fact that, because the federal government has developed no swordfish regulations, the exclusion of any such state regulation would create the danger of wholly unregulated exploitation of that species in coastal waters and on the high seas, thus resulting in the possibilities of substantial or, indeed, total depletion of an important natural resource. Had Congress intended by its successive enactments such a drastic curtailment of the states' extraterritorial jurisdiction, it would have said so. On the contrary, though undoubtedly aware of various state fishing "registration" schemes such as California's, Congress avoided all reference to the long established terms of art in the federal documentation laws, and premised continued state jurisdiction on the undefined and generic concept of local "registration."

As previously noted, the Comanche was licensed for commercial swordfishing. We think our broader interpretation of the term "registration" in [the] FCMA prevents the anomalous result which would follow if the state's extraterritorial jurisdiction over commercial fishing was preserved as to those boats in which the state had asserted only a limited identification and recordkeeping interest, but was precluded as to vessels like the Comanche which it has specifically licensed to engage in the activity of swordfishing.
From the foregoing we conclude that section 1856(a), fairly read, is intended to permit a state to regulate and control the fishing of its citizens in adjacent waters, when not in conflict with federal law, when there exists a legitimate and demonstrable state interest served by the regulation, and when the fishing is from vessels which are regulated by it and operated from ports under its authority. (See Fidelis, Enforcement of the Fishery Conservation and Management Act of 1976: The Policeman’s Lot (1977) 52 Wash.L.Rev. 513, 592-597, and fn. 467; cf., Northwest Trollers Ass’n v. Moore (1977) 89 Wash.2d 1, 568 P.2d 793, 795.)

We conclude that federal law does not preclude application of California’s fishing laws to defendant’s activities.

ANDERSON SEAFOODS, INC. v. GRAHAM
529 F. Supp. 512 (N.D. Fla. 1982)

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

HIGBY, District Judge.

The State of Florida prohibits taking food fish "without the waters of" the state with a purse seine and possessing food fish taken with a purse seine. Sec. 370.08(3), Fla.Stat. (1979). Violating the prohibition is a first degree misdemeanor. Id. Fish gathered by purse seines and equipment used, including the seines and vessels used, may be seized upon a violator’s arrest and forfeited to the state upon conviction. Sec. 370.061, Fla.Stat. (1979). Anderson Seafoods, Inc., seeks a preliminary injunction forbidding Florida from enforcing section 370.08(3) in [the] United States Fishery Conservation zone. It argues regulation of all fishing in the zone has been preempted by federal legislation and Florida consequently does not have authority to prohibit the use of purse seines in the zone.

Preliminary injunctions are not granted unless necessary to protect a party from irreparable injury and to preserve the court's power to make a meaningful decision on the merits. Canal Authority of the State of Florida v. Callaway, 489 F.2d 567 (5th Cir. 1974). As always the hoary four prerequisites must be considered. They are:

(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest.

Canal Authority of the State of Florida v. Callaway, 489 F.2d 567 at 572 (5th Cir. 1974).
The likelihood the plaintiff will prevail on the merits of its preemption claim is not substantial. Federal law on a subject is superior to all state law on the subject of Congress expressed its intent to establish such superiority. See, McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 4 L.Ed. 579 (1819). Congressional authority to legislate in an area is the first question to address in a preemption analysis. Jones v. Rath Packing Co., 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). Congress's authority to regulate offshore fishing is unquestioned here. Preemption may be express or implied from a pervasive congressional scheme of regulation, a dominant federal interest in the subject matter, or a purpose of the congressional regulation which requires unitary regulation.

Congress expressed its intent to preempt regulation of fishing in the country's coastal waters. By statute it created a fishery conservation zone.

The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.


The statute indicates congressional intent to preempt regulation of a subject. "The United States shall exercise exclusive fishery management authority, in the manner provided for in this chapter, over... (1) All fish within the fishery conservation zone. [and other specified fish species and fishery resources beyond the zone]." 16 U.S.C. 1812.

Section 1801 also states a strong federal interest in fish management and that fish management requires unitary regulation. Congress, however, while prohibiting states from regulating fishing outside their boundaries, also provided for state regulation of fishing in the fishery conservation zone. "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." 16 U.S.C. 1856(a) (emphasis supplied). Anderson's vessels are registered under the laws of Florida.

Congress's reservation of state authority to regulate fishing indicates it did not intend complete preemption. See, People v. Heeren, 26 Cal.3d 654, 163 Cal.Rptr. 255, 607 P.2d 1279 (Cal.1980), cert. denied, 449 U.S. 839, 101 S.Ct. 115, 66 L.Ed.2d 45 (1980). This conclusion is buttressed by the fact that Florida's laws regulating fishing outside its boundaries have been on the books since 1953. Congress must be presumed to have been aware of existing state regulation. Yet its law
contemplates continued state regulation rather than completely forbidding it.

_Tingley v. Allen_, 397 So.2d 1166 (Fla. 3d D.C.A. 1981),
holds federal law has preempted state regulation of fishing in the fishery conservation zone. Its decision is based upon an interpretation of Title 15, United States Code, Section 185(a), not upon Florida law. I simply do not agree with that court's decision, and since the question is one of federal law not state, I am not bound by it.

There is not a substantial likelihood Anderson's will prevail upon the merits. It has, however, proven the remaining three prerequisites to obtaining a preliminary injunction.

The second prerequisite, substantial threat of irreparable injury to the plaintiff if an injunction is not granted, exists. Anderson's is a seafood business. Anderson's has been using purse seines to catch mullet since June, 1981, and wants to continue. Its conversion of three boats to purse seines was a substantial investment. Purse seines are the most efficient way to catch mullet offshore. Letting its purse seine boats and its processing equipment sit idle substantially reduces Anderson's income while they continue to cause it to incur costs of doing business. Idleness the remaining weeks of January will cause a $180,000.00 loss.

Fishing off the Hillsborough County coast, in the fishery conservation zone, Anderson's employees were told by a Marine Patrol Officer the Patrol would enforce section 370.08(3) and seize fish taken in violation of it as well as the equipment used to take them. Anderson's problem is immediate because it is trying to harvest a peculiar delicacy, mullet roe. Roe is available only during a certain time during the mullet spawning season. It will not be available after approximately the third week of this month. Thus Anderson's faces the irreparable harm of being prohibited from gathering a fish product available for only a short limited time and quite important to its seafood sales business.

A preliminary injunction's third prerequisite has been established. The threatened injury to Anderson's outweighs the possible harm to Florida. Florida has a legitimate interest in protecting mullet, which spend their lives in Florida's territorial waters. But Anderson's three boats are not going to decimate the mullet population. A significant part of Anderson's business will be injured. Florida will also suffer the always significant impairment of its right to enforce its law. This is certainly a serious harm to a sovereign but equaled by the immediate injury to Anderson.

The observations made about the third prerequisite apply equally to the fourth. In this case the public's interest in denying the preliminary injunction and the defendant injunction and the defendants are the same.

For the reasons set forth in this order Anderson's motion for preliminary injunction is denied.
Consider the conclusions drawn on the preemption issue by Greenberg and Shapiro, Federalism in the Fishery Conservation Zone: A New Role for the States in an Era of Federal Regulatory Reform, supra.

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Thus, the Magnuson Act allows the exercise of state police power over FCZ fishing where:

1. The state regulation is not in conflict with any applicable federal fishery regulation, i.e.,
   a. There are no federal fishery regulations for the subject fishery and there is no affirmative decision by the federal government that any regulation in such fishery would be inappropriate; or
   b. Compliance with both federal and state regulation is possible; or
   c. Enforcement of the state regulation would not interfere with the fulfillment of the objectives of the applicable federal regulations; and

2. The vessel from which the fishing took place is "registered" under state law; and

3. The state's legitimate interest in the fishery justifies the direct or indirect effect of its regulation of fishing in the FCZ; and

4. The regulation neither discriminates against vessels from other states nor constitutes an undue burden on interstate commerce nor violates any other federal right or authority.

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NOTES

1. The Third District Court of Appeal case of Livings v. Davis, 422 So.2d 364 (Fla. 3d DCA 1982), is currently on appeal to the Florida Supreme Court. In the case, the court found that extraterritorial application of a Florida law prohibiting the taking of small shrimp or prawn was unconstitutional based on the Supremacy Clause.
2. If a state can regulate its fishermen beyond the territorial sea, how can regulations be enforced? Are landing laws still viable after the MFCMA prohibition on indirect regulation of noncitizens? Are there any problems of "equal protection"?

3. What is the relationship between the MFCMA and the Coastal Zone Management Act, infra? The territorial sea is part of a state's coastal zone, and fisheries regulation is part of a state's coastal zone planning. The Coastal Zone Management Act requires federal activities that affect the coastal zone to be consistent with the state's coastal zone management plan. What is the effect if the state prohibits a certain kind of gear for conservation reasons, but the federal fishery management plan for the fishery allows the gear? See, *Florida v. Baldridge* discussed infra in the section on Federal Consistency. For a complete discussion of the issue, see *Taylor & Reiser, Federal Fisheries and State Coastal Zone Management Consistency*, 3 Territorial Sea No. 1 (May 1983).

4. Prior to 1983, Florida had few general laws, but more than two hundred special local laws relating to marine fisheries. Local acts were often conflicting and rarely had resource conservation or management as a primary goal. Conflicts between recreational and commercial fishermen, and among commercial fishermen, and the overfishing of many species required comprehensive fishery management for Florida's territorial waters.

1983 legislation created the Marine Fisheries Commission within the Department of Natural Resources. The Commission is composed of 11 persons representing recreational and commercial fishing interests, environmental organizations and the public. The Commission has rulemaking authority for saltwater fisheries pursuant to a state policy and standards. Former special local acts are transformed into rules of the Commission over a three year period, and subject to Commission review, revision or appeal.

In order to aid in comprehensive management, the legislation also provides for a marine fisheries information system. Licenses are also required for all commercial fishermen. All persons who sell saltwater products, which include marine plants, sand dollars and sponges, as well as finfish, shellfish, shrimp, crab and lobsters, must have as Saltwater Products License. The fee schedule for the license is $25 per year for Florida residents, $100 per year for nonresidents, and $150 per year for aliens. Can these fees be justified? Are they constitutional?