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# Extraterritorial Application of State Fishery Management Regulations under the Magnuson-Stevens Fishery Conservation and Management Act: Have the Courts Missed the Boat?

*Mike Mastry**

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## I.
## INTRODUCTION

Over the past thirty years individual states have routinely attempted to enforce their fisheries regulations beyond their territorial waters. Such extraterritorial application of state regulations falls under the purview of the Magnuson-Stevens Fishery Conservation and Management Act[1] ("Magnuson-Stevens Act"), which is the United States' primary means of governing commercial and recreational fishing activities within federal waters. Under the Magnuson-Stevens Act the United States exerts control over all fishing activities and the fishery re-

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1. 16 U.S.C. §§ 1801 *et seq.*

sources found within its waters.[2] With such a pervasive federal regulatory scheme in place to govern the United States' fishery resources, the question of whether individual states' attempts to extraterritorially regulate such resources have been preempted by the federal government has been a point of contention and the subject of litigation on numerous occasions in the past.

State and federal courts alike have examined the preemption issue as it relates to a state's ability to extraterritorially regulate fishery resources and fishing activities within federal waters. With little variation since the passage of the Magnuson-Stevens Act in 1976, the courts that have addressed this issue have concluded that states are not preempted from such extraterritorial regulation. Unfortunately, it seems that many of these courts have continually relied upon *stare decisis*, even in the wake of amendments to the Act in 1983 that have substantially muddied the extraterritorial jurisdiction waters.

This paper examines whether the courts have come to the wrong conclusion. In addressing this topic, Part II of this paper will present a brief primer on the subject of legislative preemption under the Supremacy Clause of the United States Constitution. An introduction to the Magnuson-Stevens Act and its provisions relating to state jurisdiction in federal waters is taken up in Part III. Part IV will then examine the case law that addresses the issue of extraterritorial regulation of fishery resources under the Act. A brief look at the history of Section 1856 of the Magnuson-Stevens Act, which contains the state jurisdictional provisions, will follow in Part V. Finally, Part VI will argue that courts have come to the wrong conclusion about this issue and present an alternative argument leading to the conclusion that following the 1983 amendments to the Magnuson-Stevens Act, individual states are preempted from extraterritorially enforcing state fishery resource regulations in federal waters.

## II.
## PREEMPTION: A PRIMER

The Supremacy Clause of the United States Constitution, Article VI, Clause 2 reads as follows:[3]

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall

2. *See id.* at § 1811(a).
3. U.S. Const. art. VI, cl. 2.

> be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Supremacy Clause addresses the interplay among state and federal laws and clearly indicates that the Constitution and the federal laws promulgated thereunder "shall be the supreme Law of the Land."[4] State laws shall be of secondary authority, and shall not supersede such federal laws. Furthermore, not only do the Constitution and federal laws supersede state law, but federal regulations duly promulgated by a federal agency have also been interpreted as having greater weight and authority than state laws.[5] No state law, rule, regulation, or otherwise may stand in contradiction to the Constitution, federal laws, or duly promulgated agency regulations (collectively referred to hereinafter as "federal law").

"When considering preemption, courts 'start with the assumption that the historic police powers of the state were not to be superseded by the Federal Act unless that was the clear and manifest purpose of the Congress.'"[6] "There are several ways in which Congress can preempt state regulation in a given area."[7] The Supreme Court has stated that "preemption may be either express or implied."[8] Under the Court's interpretation of the Supremacy Clause, federal law can expressly or impliedly preempt state law in three ways: 1) through an express declaration by Congress that state law shall be preempted;[9] 2) via a clear demonstration by Congress that it intends to completely and entirely occupy a field;[10] or 3) by way of an actual conflict arising among state and federal law where "compliance with both federal and state regulations is a physical impossibility."[11]

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4. *Id.*

5. Hillsborough County, Fla. v. Automated Med. Labs., 471 U.S. 707, 713 (1985).

6. State of Alaska v. Dupier, 118 P.3d 1039 (Alaska 2005) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

7. Southeastern Fisheries Ass'n, Inc. v. Chiles, 979 F.2d 1504, 1509 (11th Cir. 1992).

8. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983) (quoting Fidelity Fed. Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 152-53 (1982)).

9. *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203 (1983) (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

10. *See id.* at 204.

11. *See id.* (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).

In the case of an express declaration by Congress that the states shall have no regulatory authority over a field, preemption will be apparent and easily determined because the express language of the federal law will clearly indicate that Congress intends to preempt state law. In other words, the Supremacy Clause and its doctrine of preemption are applicable in situations where Congress or an administrative agency has specifically included in a law or regulation wording to indicate that state laws shall not apply, or shall be preempted, and the federal government will have complete control and authority over the subject matter. Express preemption is a relatively simple matter; however, in the other two situations where preemption applies it is not always as clear whether the Supremacy Clause is relevant and state regulation therefore preempted.

In determining whether Congress has demonstrated an intent to completely occupy a field (as opposed to expressly stating its intent to do so) courts must consider whether "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[12] "Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[13] If a court determines that the federal law is so "pervasive" or the federal interest is so "dominant" that there is a clear intent to completely occupy a field, then the Supremacy Clause will apply and any state law or rule purporting to regulate the same field or subject matter will be held in violation of the Supremacy Clause and therefore unconstitutional. An example of such a situation is the federal government's pervasive regulation of the workplace under the Occupational Safety and Health Act.[14]

In the third preemptive situation, where an actual conflict among state and federal laws or regulations makes simultaneous compliance with both a physical impossibility, the state law or regulation would again take a backseat to the federal law. The

12. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (citing Pennsylvania R. Co. v. Public Service Comm'n, 250 U.S. 566, 569 (1919); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942)).

13. *Id.* (citing Hines v. Davidowitz, 312 U.S. 52 (1941)).

14. *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n., 505 U.S. 88, 98 (1992) (finding that implied preemption through a comprehensive review of the "structure and purpose of the statute as a whole").

following hypothetical illustration is helpful for understanding this third type of preemption:

> Due to the continued and persistent over-harvesting of the Ezox fish,[15] which lives in a single river system within the state of Verhampshire, its population has dwindled to near extinction. To prevent the demise of the species the federal government has passed a law completely banning the take of Ezox, not allowing even a single fish to be culled. The state of Verhampshire, however, believing that the Ezox is responsible for the disappearance of several other more desirable species of fish within the river system, would like nothing more than to see the Ezox completely eradicated so other more sought-after and economically beneficial fish would again inhabit the river. To accomplish this goal the state passes a regulation requiring that, as a condition to maintaining a state commercial fishing license, the total monthly catch of each Verhampshire commercial fisherman must be comprised of at least 25% Ezox.

In this example it is clear that a commercial fisherman in Verhampshire could not simultaneously comply with the state regulation and the federal law concerning the take of Ezox. If a fisherman were to abide by the state regulation requiring that Ezox make up at least 25% of the total monthly commercial catch, he would clearly be violating the fishery plan set forth by the federal government, which mandates an all-out ban on the take of Ezox. The federal law and the state regulation are in conflict with each other in a way that makes it impossible for Verhampshire state-licensed commercial fishermen to abide by the state regulation and the federal law simultaneously. In such a situation the state regulation is preempted by the federal law on the basis of the Supremacy Clause because it "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."[16]

So there we have it. The federal government preempts state law through the Supremacy Clause of the U.S. Constitution in three different ways. State law is preempted 1) when the federal law or regulation contains explicit language to that effect; 2)

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15. The Ezox is a mythical fish of the Middle Ages said to have lived in the Danube River near Hungary. Legend holds that the fish had no bones, a disproportionately large head, and flesh that tasted "sweet like pork." The Ezox is purported to have grown so large that a cart with four horses could not carry it away, but if the fish was given milk to drink, it could be carried many miles and kept for a short time.

16. Pac. Gas & Elec. Co., 461 U.S. at 204 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

when Congress or a federal agency leaves no room for a state law by demonstrating an intent to completely occupy a field or; 3) when "Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law."[17] If none of these three situations are present, then states are free to regulate in the same area or field as the federal government is simultaneously regulating.

With this primer on preemption in our back pocket, let us now look briefly at a few of the provisions within the Magnuson-Stevens Act that may relate to any of the three preemptive situations.

## III.
## THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT

The Magnuson-Stevens Act was passed by Congress in 1976 to accomplish the goals of conservation, management and development of U.S. fishery resources, and reduction of foreign fishing within 200 miles of the U.S. coastline.[18] Within this 200-mile radius is an area known as the Exclusive Economic Zone[19] ("EEZ"), which "[f]or purposes of applying [the Magnuson-Stevens Act], the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States."[20] Within the EEZ "the United States claims, and will exercise in the manner provided for in this [Act], sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources . . ."[21] The Magnuson-Stevens Act is periodically amended and reauthorized by Congress, and in 1996 was significantly amended to establish "sustainable use" as the main policy for U.S. fisheries.[22]

To achieve its goals the Magnuson-Stevens Act established eight Regional Fishery Management Councils ("FMC").[23] Each FMC must develop and maintain a Fishery Management Plan ("FMP") "for each fishery under its authority that requires con-

17. *Id.* at 204.
18. 16 U.S.C. §§ 1801(b)(1-7) (1996).
19. Proclamation No. 5030, 48 Fed. Reg. 10,605 (March 10, 1983).
20. 16 U.S.C. § 1802(11) (the EEZ generally extends three to nine miles seaward of the state's coastline).
21. *Id.* at § 1811(a).
22. Pub. L. No. 104-297, 3562 (1996).
23. 16 U.S.C. § 1852.

servation and management . . ."[24] Each FMP must contain, among other things, conservation and management measures, a description of the fishery including the number of vessels and the types of fishing gear involved, a description of the species of fish involved and their locations, a description of essential fish habitat, proposed regulations for each species covered under the plan, and individual fishing quotas.[25] From these FMPs individual species regulations are developed, which are then enforceable within the EEZ.

The Magnuson-Stevens Act, Title I, United States Rights And Authority Regarding Fish And Fishery Resources, 16 U.S.C Section 1811 (a), states, in pertinent part, as follows: "[T]he United States claims, and will exercise in the manner provided for in this Act, sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone."[26] The federal enforcement authority of sovereign rights and the exclusive fishery management within the EEZ falls under the purview of the Secretary of the U.S. Department of Commerce and the Secretary of the department in which the Coast Guard is operating (currently the Department of Homeland Security).[27] To carry out their enforcement duties the Secretaries may "utilize the personnel, services, equipment (including aircraft and vessels), and facilities of any other Federal agency, including all elements of the Department of Defense, and of any State agency . . ."[28] Officers authorized by either of the Secretaries to enforce provisions of the Magnuson-Stevens Act have broad authority to carry out their duties. Such authority includes the ability to execute warrants, make arrests, board and search vessels, seize fish and other evidence, and issue citations.[29] Officers from state fish and wildlife agencies are often cross-deputized and work in conjunction with federal agents to enforce the Act.

The Magnuson-Stevens Act also provides for state jurisdiction within the waters of the EEZ in Section 1856 of the Act.[30] For purposes of this paper, Section 1856(a) is the most pertinent section of the Act. With respect to state jurisdiction, that section

24. *Id.* at § 1852(h)(1).
25. *Id.* at 1853.
26. *Id.* at § 1811(a).
27. *Id.* at § 1861.
28. *Id.*
29. *Id.*
30. *Id.* at § 1856.

states, "Except as provided in subsection (b), . . . nothing in this [Act] shall be construed as extending or diminishing the [jurisdiction of any state] within its boundaries."[31] The Act continues at Section 1856(a)(2) to set forth very specific locations where a state is vested with the authority to enforce its own regulations. The following subsection, however, (Section 1856(a)(3)) is where the focus of this paper will lie.

Section 1856(a)(3), which will be taken up in greater detail below, reads in pertinent part:

> (3) A State may regulate a fishing Vessel outside the boundaries of the State in the following circumstances:
>
> (A) The fishing vessel is registered under the law of that State, and (i) there is no fishery management plan or other applicable Federal fishing regulations for the fishery in which the vessel is operating; or (ii) the State's laws and regulations are consistent with the fishery management plan and applicable Federal fishing regulations for the fishery in which the vessel is operating.
>
> (B) The fishery management plan for the fishery in which the fishing vessel is operating delegates management of the fishery to a State and the State's laws and regulations are consistent with such fishery management plan . . . .[32]

Finally, Section 1856(b) sets forth specific exceptions to the state jurisdiction mentioned above that allow for the federal government to regulate a fishery within state boundaries when certain determinations are made by the Secretary. Importantly, Section 1856 is the only section of the Magnuson-Stevens Act that specifically addresses situations where a state may be allowed to reach into the EEZ and exercise its authority to enforce state regulations.

The Magnuson-Stevens Act contains many other sections and provisions of course,[33] including but certainly not limited to those addressing prohibited acts, criminal and civil penalties, and fishery monitoring and research. The Act is the primary source of fishery conservation and management within the federal waters of the United States. There is no more comprehensive and wide-ranging expression of Congress's intent to manage the bountiful

31. *Id.* at § 1856(a)(1).

32. *Id.* at § 1856(3).

33. The Magnuson-Stevens Fishery Conservation and Management Act is more than 100 pages in length, contains four Titles, 33 Sections, and an Appendix.

yet finite fishery resources found within the federal waters adjacent to the nation's coastline.

## IV.
## JUDICIAL HISTORY OF NON-PREEMPTION OF STATE FISHERY REGULATIONS UNDER THE MAGNUSON-STEVENS ACT

Since the passage of the Magnuson-Stevens Act in 1976[34] the courts have generally concluded that the Act does not preempt the extraterritorial application of state fishery resource regulations by individual states. On rare occasions, however, a small number of courts have determined that, through a clear demonstration of Congress's intent, state fishery regulations are preempted in federal waters because the Magnuson-Stevens Act "outlined a fairly complete and pervasive federal scheme [through which] Congress must have intended to occupy the field of fishery management within the EEZ."[35] As the Supreme Court of Alaska noted in *State v. Dupier*, such conclusions have involved "outright bans on landings or landing limits that prevent fishers from landing fish in amounts permitted under federal law."[36]

Far more often though, the state and federal courts that have addressed the issue of preemption under the Magnuson-Stevens Act have concluded that state extraterritorial jurisdiction exists and that the extraterritorial application of state fishery resource regulations is not preempted by the provisions of the Act. The body of case law associated with this topic indicates that there are three primary situations giving rise to a state's ability to extraterritorially enforce its fishery resource regulations in the federal waters of the EEZ. Those situations include instances when: 1) the state law is not in conflict with a federal law or fishery management plan concerning the fishery or fishery resource at issue;[37] 2) a vessel that is not registered in the state attempting to

34. The Act was then known only as the Magnuson Fishery Conservation and Management Act.

35. *Southeastern Fisheries*, 979 F.2d at 1509; *see also* State v. Sterling, 448 A.2d 785 (R.I. 1982); and Vietnamese Fishermen Ass'n of Am. v. California Dept. of Fish and Game, 816 F. Supp. 1468 (N.D. Cal. 1993).

36. State v. Dupier, 118 P.3d 1039 (Alaska 2005).

37. *See* Skiriotes v. Florida, 313 U.S. 69 (1941); Livings v. Davis, 465 So.2d 507 (Fla. 1985); Dupier, 118 P.3d at 1039; Southeastern Fisheries Ass'n Inc. v. Dept. of Natural Res., 453 So.2d 1351 (Fla. 1984); Daley v. Comm'r, Dept. of Marine Res., 698 A.2d 1053 (Me. 1997); Davrod Corp. v. Coates, 971 F.2d 778 (1st Cir. 1992);

exercise jurisdiction nevertheless submits to the state's jurisdiction by docking within its territorial limits;[38] and 3) a vessel is registered in the state as required under the Magnuson-Stevens Act at 16 U.S.C. § 1856(a)(3)(A).[39]

*Skiriotes v. Florida*[40] is often cited for the proposition that state fishery laws are valid where there is no conflict with a federal law or fishery management plan concerning that fishery.[41] In *Skiriotes* the United States Supreme Court considered whether the state of Florida could prosecute one of its citizens for violating a state law concerning the use of prohibited diving gear in connection with the harvest of sponges from the Gulf of Mexico outside of state waters. The Court held that, where no conflict with federal law exists, a state may regulate the conduct of its citizens on the high seas as long as the state has a legitimate interest in the activity being regulated.[42] In so holding the Court recognized that "there is nothing novel in the doctrine that a state may exercise its authority over its citizens on the high seas."[43]

More recently, in *Livings v. Davis*,[44] a case dealing directly with the issue of extraterritorial jurisdiction under the Magnuson-Stevens Act, the Supreme Court of Florida took up the issue of the extraterritorial application of a state fishery regulation when that regulation is not in conflict with a federal law or FMP concerning the same fishery. In this case, Davis, while fishing outside of Florida's nine mile territorial boundary in the Gulf of Mexico, was charged with violating a state law "prohibit[ing] the taking or possession of small shrimp or prawn within or without the waters of the State of Florida."[45] Specifically, the court

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Southeastern Fisheries Ass'n. v. Martinez, 772 F. Supp. 1263 (S.D. Fla. 1991); Bateman v. Gardner, 716 F. Supp. 595 (S.D. Fla. 1989); and F/V Am. Eagle v. State of Alaska, 620 P.2d 657 (Alaska 1980).

38. *See*, Raffield v. State, 565 So.2d 704 (Fla. 1990).

39. *See* People v. Weeren, 607 P.2d 1279 (Cal. 1980); Anderson Seafoods, Inc. v. Graham, 529 F. Supp. 512 (N.D. Fla. 1982); State v. Hayes, 603 A.2d 869 (Me. 1992); State v. Lauriat, 561 A.2d 496 (Me. 1989); and State v. F/V Baranof, 677 P.2d 1245 (Alaska 1984).

40. *Skiriotes*, 313 U.S. at 69.

41. *See Southeastern Fisheries*, 453 So. 2d at 1354; Livings v. Davis, 465 So.2d 507 (Fla. 1985); State v. Raffield, 515 So.2d 283 (Fla. App. 1 Dist. 1987); and Tingley v. Allen, 397 So.2d 1166 (Fla. App. 3 Dist. 1981).

42. *Skiriotes*, 313 U.S. at 77; *see also* United States v. Alaska, 422 U.S. 184, 198-99 (1975).

43. *Skiriotes*, 313 U.S. at 79.

44. Livings, 465 So. 2d at 507.

45. *Id.* (citing section 370.15(2)(a), Florida Statutes (1979)).

considered the issue of "whether enactment of the [Magnuson-Stevens Act] constituted federal preemption"[46] of state fishery regulations within federal waters.

The state argued that it could continue to "regulate the fishing activities of its citizens beyond the state's territorial waters when there is no conflict with a federal regulatory scheme."[47] In contrast to the state's position, Davis argued that "no state extraterritorial fishing regulations survived the enactment of the [Magnuson-Stevens Act]."[48] The court was not persuaded by Davis's argument and found that "nothing in the [Act] would curtail the state's extraterritorial jurisdiction over its registered vessels."[49] The court reasoned that "the [Magnuson-Stevens Act] makes no attempt to preempt the field, but in fact recognizes continued state jurisdiction over vessels registered under the laws of the various states."[50] Ultimately the court held that Florida's statute regulating the taking and possession of shrimp and prawn "did not conflict with any existing federal regulation; therefore, Florida was not precluded from enforcing its penal statute . . . within or without the waters of the state."[51]

The Supreme Court of Florida subsequently took this idea a step further and indicated that state fishery resource regulations that are not in conflict with federal regulations concerning the same fishery resources may be applied extraterritorially if the state regulation contains language indicating that it should be so applied.[52] In *Southeastern Fisheries Ass'n Inc. v. Department of Natural Resources* the court reviewed a district court decision[53] holding that a state fish trap law[54] was "[constitutional and enforceable] by the state in its territorial waters as well as in the extraterritorial waters beyond Florida."[55]

The statute at issue in *Southeastern Fisheries*, Section 370.1105, Florida Statutes (1980 Supp.), "[made] it unlawful to fish for saltwater fish with any traps, or to possess any fish trap other

46. *Id.* at 509.
47. *Id.* at 508.
48. *Id.*
49. *Id.* at 509.
50. *Id.*
51. *Id.*
52. *Southeastern Fisheries.*, 453 So. 2d at 1351.
53. Dept. of Natural Res. v. Southeastern Fisheries Ass'n, 415 So. 2d 1326 (Fla. 1st Dist. Ct. App. 1982).
54. Section 370.1105, Florida Statutes (Supp. 1980).
55. *Southeastern Fisheries*, 453 So. 2d at 1352.

than those traps specifically exempted by the act."[56] The statute neither expressly nor impliedly stated that its provisions were to be applied extraterritorially beyond Florida waters.[57] In reviewing the statute the court addressed the specific certified question of whether "Section 370.1105, Florida Statutes (1980 Supp.), [applies] 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?"[58]

The court answered the certified question in the negative and held that for a state to extraterritorially regulate in federal waters "the [state] legislature should expressly declare that it is its intent that the statute apply in extra-territorial [sic] waters . . ."[59] The court reasoned that "[s]ince 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 that it would be improper to apply this statute to extra-territorial [sic] waters by implication . . . ."[60] Therefore, on the basis of this ruling in Florida, if the state seeks to apply its fishery regulations extraterritorially it may do so as long as the regulation contains an express intent to so regulate.

The courts have also determined that one may submit to the jurisdiction of a state by bringing a catch ashore, even though the catch was legally harvested in federal waters. Such was the situation in the case of *Raffield v. State*.[61] *Raffield* involved red fish that were legally harvested in federal waters using a purse seine net and subsequently brought ashore in Louisiana. The red fish were later sold in Florida where a state statute makes it illegal to "take food fish within or without the waters of the state with a purse seine . . . or [for an individual to] have any food fish so taken in [his or her] possession for sale or shipment."[62] Raffield argued, among other things, that the state statute under which he had been charged was preempted by the Magnuson-Stevens Act.[63]

56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 1355.
60. *Id.*
61. Raffield v. State, 565 So. 2d 704 (Fla. 1990).
62. *Id.* (citing section 370.08(3), Fla. Stat. (1985)).
63. *Id.* at 705.

The court did not find Raffield's argument persuasive and concluded that preemption was not an issue because the state law under consideration merely prohibited the landing or possession of certain fish caught by means of a seine net.[64] In deciding the issue the court held that the state law was "not being applied beyond the territorial limits of the state. Raffield is being charged with illegal possession of certain red drum within Florida. Moreover, even if this statute could be construed as applying beyond the states' territorial limits, the legislature has expressly provided that the statute applies to fish taken 'without the waters of this state with a purse seine.'"[65] Therefore, while the *Raffield* court concluded that preemption was not an issue in this case, it indicated in its holding that Florida could nevertheless have extraterritorially enforced its statute.

Courts have also decided the preemption issue in the past based upon language contained within Section 1856 of the Magnuson-Stevens Act, which indicates that a state may exercise extraterritorial jurisdiction over vessels that are registered in it.[66] One such example came in 1980 when the Supreme Court of California decided the case of *People v. Weeren*.[67] In *Weeren* the respondents were charged with violating a California regulation prohibiting the use of spotter aircraft in conjunction with the taking of broadbill swordfish.[68] The respondents defended their use of the spotter aircraft as lawful when conducted outside of the territorial limits of California and challenged the state's attempts to enforce its regulation extraterritorially as preempted by the Magnuson-Stevens Act.[69] The court held 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."[70] The court concluded 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,

64. *Id.* at 706.
65. *Id.* at 706.
66. 16 U.S.C. § 1856(3)(A).
67. *Weeren*, 607 P.2d at 1279.
68. *See id.* at 1281.
69. *See id.*
70. *Id.* at 1285.

and when the fishing is from vessels which are regulated by it and operated from ports under its authority."[71]

In the years since the *Weeren* decision several other courts have followed in holding that fishery resources may be extraterritorially regulated by the state in which the vessel is registered.[72] Following the 1983 amendments to the Magnuson-Stevens Act these courts' reliance on Section 1856 as authority for coming to this conclusion may, however, be incorrect and, quite simply, an erroneous and inaccurate interpretation of the plain meaning of the terms contained within the Act.

## V.
## A VERY BRIEF LOOK AT THE HISTORY OF SECTION 1856

The federal government, through the Magnuson-Stevens Act, exercises exclusive jurisdiction over all fishery related activities within the EEZ unless otherwise stated within the Act.[73] Stated another way, no state has the authority to regulate a fish or fishery within the EEZ unless it has been given the authority to do so under the Magnuson-Stevens Act. That authority, as Parts III and IV described, is limited and is set forth at 16 U.S.C. § 1856 (State Jurisdiction), which has been amended on three prior occasions.[74]

When the Magnuson-Stevens Act was originally enacted in 1976, Section 1856 and its provisions giving individual states the authority to regulate extraterritorial fishing activities in the EEZ read as follows:

> "(a) . . . nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State."[75]

As we have seen, courts such as the *Weeren* court in California relied upon Section 1856 in arriving at the conclusion that a state is not preempted from extraterritorially enforcing its fishery reg-

71. *Id.* at 1287.

72. *See Anderson Seafoods*, 529 F. Supp. at 512; *F/V Baranof*, 677 P.2d at 1245; *Lauriat*, 561 A.2d at 496; and *Hayes*, 603 A.2d at 869.

73. 16 U.S.C § 1811(a).

74. *See* Pub. L. No. 97-453 (1983); Pub. L. No. 98-623; and Pub. L. No. 104-297 (1996).

75. 16 U.S.C. § 1856(a).

ulations against those whose vessels are registered within it. Remember though, the Magnuson-Stevens Act is periodically amended and reauthorized by Congress.[76] One such amendment took place in 1983 and included an amendment to the language of Section 1856 that affected states' extraterritorial jurisdiction.[77] Congress amended Section 1856(a) to read: ". . . a State may not directly or indirectly regulate any fishing vessel outside its boundaries, unless the vessel is registered under the law of that State."[78] On its face, the change seems to be fairly innocuous, merely deleting the words "fishing which is engaged in." As we will see, however, the change may have been much more significant than most realize. Section 1856 was again amended in 1984.[79] In that year a subsection was added giving the state of Alaska jurisdiction over specified "waters of southeastern Alaska (for the purpose of regulating fishing for other than any species of crab) . . . ."[80] Finally, in 1996 Section 1856 was amended to its current form,[81] which maintains the textual changes of 1983 and 1984 and clearly delineates the circumstances under which "[a] State may regulate a fishing vessel outside the boundaries of the State."[82]

## VI.

### HAVE THE COURTS MISSED THE BOAT?

On the authority of Section 1856 of the Magnuson-Stevens Act, the courts have concluded[83] that states are free to extraterritorially impose their own fishery regulations against individuals whose vessels are registered within those states. Such a view is antiquated and incorrect. States, due to preemption by the Magnuson-Stevens Act as it stands today and has stood since the amendments of 1983, lack the authority to enforce their own fishery regulations against activities taking place wholly within the federal waters of the EEZ.

As previously discussed, the federal government, through Section 1811(a) of the Magnuson-Stevens Act, exercises exclusive

76. *See infra*, Section 3.
77. Pub. L. No. 97-453 (1983).
78. 16 U.S.C. § 1856(a)(3).
79. Pub. L. No. 98-623 (1984).
80. *Id.*; *see also* 16 U.S.C. § 1856(a)(2)(C) (1984).
81. Pub. L. No. 104-297 (1996).
82. *Id.*; *see also* 16 U.S.C. § 1856(a)(3)).
83. *See supra* note 39.

jurisdiction over all fishery-related activities within the EEZ unless otherwise stated within the Act.[84]

Section 1856 outlines the circumstances under which the federal government vests in the individual states the authority to regulate within the EEZ. Pursuant to Section 1856(a), states may regulate: 1) within their own boundaries;[85] 2) within any pocket of waters that is adjacent to the state and is completely within the territorial seas of the United States;[86] and 3) fishing vessels outside of state waters under limited circumstances.[87] Section 1856(b) then provides for exceptions to numbers one and two above, allowing the federal government to regulate wholly within state waters.[88] Despite the past reliance of the courts on Section 1856, none of the aforementioned sections of the Magnuson-Stevens Act provide individual states with the authority to enforce their own fishery laws and regulations within the EEZ.

Sections 1856(a)(1) and (a)(2) need no explanation regarding the states' ability to regulate fishing activities. However, Section 1856(a)(3) is not nearly as clear as Sections 1856(a)(1) and (a)(2) regarding when an individual state may or may not extraterritorially enforce its own fishery regulations. 16 U.S.C. § 1856(a)(3) states, in pertinent part:

> A State may regulate a ***fishing vessel*** outside the boundaries of the State in the following circumstances:
>
> (A) The fishing vessel is registered under the law of that State, and (i) there is no fishery management plan or other applicable Federal fishing regulations for the fishery in which the vessel is operating; or (ii) the State's laws and regulations are consistent with the fishery management plan and applicable Federal fishing regulations for the fishery in which the vessel is operating.
>
> (B) The fishery management plan for the fishery in which the fishing vessel is operating delegates management of the fishery to a State and the State's laws and regulations are consistent with such fishery management plan. If at any time the Secretary determines that a State law or regulation applicable to a fishing vessel under this circumstance is not consistent with the fishery management plan, the Secretary shall promptly notify

84. 16 U.S.C. § 1811 (a).
85. *Id.* at § 1856(a)(1).
86. *Id.* at § 1856(a)(2).
87. *Id.* at § 1856(a)(3).
88. *See id.* at §§ 1856(b)(1)-(3).

> the State and the appropriate Council of such determination and provide an opportunity for the State to correct any inconsistencies identified in the notification. If, after notice and opportunity for corrective action, the State does not correct the inconsistencies identified by the Secretary, the authority granted to the State under this subparagraph shall not apply until the Secretary and the appropriate Council find that the State has corrected the inconsistencies. For a fishery for which there was a fishery management plan in place on August 1, 1996 that did not delegate management of the fishery to a State as of that date, the authority provided by this subparagraph applies only if the Council approves the delegation of management of the fishery to the State by a three-quarters majority vote of the voting members of the Council.[89]

Section 1856(a)(3) clearly indicates that states may regulate a "fishing vessel" outside of its boundaries when the conditions set forth within subsections (A) or (B) are met.

Remember that this section was amended in 1983, and prior to the amendments of that year, an individual state was vested with the authority to regulate "fishing which is engaged in by any fishing vessel outside its boundaries . . . ."[90] Following the 1983 amendments, however, states no longer have the authority to regulate ***fishing***, but now may regulate only the ***fishing vessel***.[91] Congress removed the phrase "fishing which is engaged in"[92] – and with it, the states' authority to regulate such activities from Section 1856, leaving states with only the authority to "regulate a fishing vessel outside the boundaries of the State."[93] The courts that have examined the issue of extraterritorial regulation of state-registered vessels following the 1983 amendments have not recognized this change and have read this section as if the pre-1983 language were still in use.[94] A closer examination of the issue, however, reveals that courts should arrive at a different conclusion in the future.

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89. *Id.* at § 1856(a)(3) (emphasis added).

90. *Id.* at § 1856(a) (1976).

91. *Id.* at § 1856(a)(3) (1996).

92. *Id.* at § 1856(a) (1976).

93. *Id.* at § 1856(a)(3) (1996).

94. *See Lauriat*, 561 A.2d at 496 (indicating that a state may regulate vessels engaged in fishing activities in federal waters if the vessel is registered in the state attempting to exert extraterritorial authority); *Hayes*, 603 A.2d at 869 (indicating same); *F/V Baranof*, 677 P.2d at 1245 (indicating same).

The term "fishing vessel" is a specifically defined term within the definitions section of the Magnuson-Stevens Act.[95] Therefore, we have only to look to the statutory definition to determine precisely what the federal government intended states to regulate pursuant to their grant of jurisdictional authority provided within Section 1856. The term "fishing vessel" is defined in the Act as:

> . . .any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for –
> (A) fishing; or
> (B) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing.[96]

Hence, Section 1856(a)(3)'s use of only the term "fishing vessel" limits extraterritorial state jurisdiction to the regulation of the actual "vessel, boat, ship, or other craft" while it is physically located within the EEZ, and when the conditions of Section 1856(a)(3)(A) or (B) are also met. Individual states are therefore given no authority based upon the foregoing definition for a "fishing vessel" to regulate "fishing which is engaged in" within the EEZ. Had the federal government wished to cede such authority to the states it could have easily done so.

If it were, in fact, the intention of the federal government to provide states with the authority to extraterritorially enforce their rules and regulations and to regulate fishing activities within the EEZ it could have done so by simply leaving the language of Section 1856 as it was prior to the 1983 amendments. But Congress did not choose to do so, and it amended Section 1856 to entail only the regulation of the actual fishing vessel. Congress could have also chosen, if it wished to leave such pre-amendment authority with the individual states, to use any one of a number of other terms that are also defined within the Magnuson-Stevens Act, which would have also given individual states the authority to regulate fishing activities extraterritorially. The government could have continued to use the term "fishing,"[97] or it could have chosen to use "fishery,"[98] "fishery re-

95. 16 U.S.C. §1802 (17).
96. *Id.*
97. 16 U.S.C. § 1802(15). The statute provides that:
The term 'fishing' means – (A) the catching, taking, or harvesting of fish; (B) the attempted catching, taking, or harvesting of fish; (C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or

source,"[99] "commercial fishing,"[100] "recreational fishing,"[101] or merely the term "fish"[102] in place of (or in conjunction with) the term "fishing vessel" within Section 1856(a)(3). Had the government chosen to use any of these terms within Section 1856, authority would have been clearly provided to the states for the regulation of the actual fishing activities taking place outside of their traditional territorial jurisdictions. Congress made use of none of these terms, however, and thereby removed the states' authority to regulate these activities.

The pre-1983 version of Section 1856 made use of the term "fishing" in the same sentence as "fishing vessel," indicating that Congress understood that there is a definitional difference among these terms. The earlier version of the Magnuson-Stevens Act plainly and explicitly provided states with the authority to enforce their individual fishing regulations within the EEZ due to the inclusion of both of these terms in Section 1856, and the courts properly interpreted the Act as providing such authority.[103]

The fact that Congress chose to make a change from one defined term to another is a very strong indication that it was aware of the ramifications of that change and was explicitly removing from the individual states the authority to regulate fishing activities within the EEZ. Hence, pursuant to the amended Section 1856, a state may now regulate only the vessel itself (so long as it meets the requirements set forth under Section 306(a)(3)(A) or (B)). In other words, a state may impose vessel regulations, such

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(D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C). Such term does not include any scientific research activity which is conducted by a scientific research vessel.

*Id.*

98. *Id.* at § 1802(13) ("The term 'fishery' means – (A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and (B) any fishing for such stocks.").

99. *Id.* at § 1802(14) ("The term 'fishery resource' means any fishery, any stock of fish, any species of fish, and any habitat of fish.").

100. *Id.* at § 1802(4) ("The term 'commercial fishing' means fishing in which the fish is harvested, either in whole or in part, and intended to enter commerce or enter commerce through sale, barter or trade.").

101. *Id.* at § 1802(32) ("The term 'recreational fishing' means fishing for sport or pleasure.").

102. *Id.* at § 1802(12) ("The term 'fish' means finfish, mollusk, crustaceans, and all other forms of marine animal and plant life other than marine mammals and birds.").

103. *See Weeren*, 607 P.2d at 1279; *Anderson Seafoods*, 529 F. Supp. at 512.

as equipment "including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing,[104] upon those operating a state-registered vessel within the EEZ. However, an individual state has no authority under the provisions of the Magnuson-Stevens Act to impose its own fishery regulations upon those who choose to avail themselves of the fishing opportunities that await them in the federal waters.

Further bolstering this argument is the age-old judicial canon of statutory construction requiring a court to attribute the plain meaning to the words used by the legislature in the final version of a statute. As early as 1820 the United States Supreme Court stated that "[t]he intention of the legislature is to be collected from the words they employ."[105] The Court went on to clarify this position, stating, "The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of the words . . . in search of an intention the words themselves did not suggest."[106] This method of statutory construction has been followed by the courts on numerous occasions in the nearly two centuries since it was first set forth in *Wiltberger*. The Court is very clear in what it requires in statutory construction: where the words that the legislature has chosen to make use of in the final draft of a statute have a clear meaning, the court must not deviate from the clear meaning of those words; to do so would give the statutory language an effect that the legislature did not intend and would amount to judicial legislation.

In applying this method of determining legislative intent to the extraterritorial jurisdiction granted to the individual states under Section 1856, we need look no further than the definitions section[107] of the Act for the plain meaning to the term "fishing vessel." As stated above, because the term "fishing vessel" is explicitly defined within the Magnuson-Stevens Act, and because that definition does not include fishing or any other defined term that describes the activity of fishing, courts must not "depart[ ] from the plain meaning of the words . . . in search of an intention the words themselves did not suggest,"[108] thereby allowing states to extraterritorially apply their fishery regulations to individuals fishing within the EEZ. Consequently, based upon the plain lan-

104. 16 U.S.C. § 1802(17)(B).
105. United States v. Wiltberger, 18 U.S. 76, 95 (1820).
106. *Id.* at 96.
107. *See* 16 U.S.C § 1802.
108. Wiltberger, 18 U.S. at 96.

guage of the Magnuson-Stevens Act and the clearly defined terms utilized therein, individual states should be forbidden from extraterritorially enforcing state fishing regulations against individuals availing themselves of the fishing opportunities that await them in federal waters. To do otherwise would be contrary to the plain meaning of the words used in the Magnuson-Stevens Act and would give the term "fishing vessel" a meaning that the legislature did not intend.

## VII.
## CONCLUSION

Pursuant to the Magnuson-Stevens Act, the United States claims "sovereign rights and exclusive fishery management authority over all fish, and Continental Shelf fishery resources, within the [EEZ]."[109] States are provided with a limited authority to regulate within the EEZ when the provisions of Section 1856 of the Act are met. As it was originally enacted in 1976, Section 1856 gave states the clear authority to extraterritorially regulate "fishing which is engaged in by any fishing vessel . . . [that] is registered under the laws of such State."[110] Based upon this authority most courts concluded that fishing activities could indeed be extraterritorially regulated by the state in which the vessel is registered and the Magnuson-Stevens Act did not preempt such regulation.[111]

With the full knowledge of how the courts had been interpreting state jurisdiction under the Magnuson-Stevens Act, Congress, in 1983, significantly amended Section 1856 and removed the phrase "fishing which is engaged in" from the state jurisdictional section and left only the authority for states to extraterritorially regulate the fishing vessel. This change to the language of the Act was simple yet significant.

However, in the wake of this change the courts have yet to alter their interpretation of the authority for a state to extraterritorially enforce its fishery resource regulations. Had Congress wished to allow states the continued authority to extraterritorially enforce their individual fisheries regulations it could simply have left the language of Section 1856 unchanged, or it could have chosen to make use of any number of terms that are defined

109. 16 U.S.C. § 1811.
110. 16 U.S.C. § 1856 (a) (1976).
111. *See supra* notes 37-39.

within the Magnuson-Stevens Act that would have also vested such powers in the states. Yet, Congress did not leave the language of Section 1856 unchanged nor did it use any of the alternative terms defined within the Act. The term "fishing vessel," which is also defined within the Act (and in no way encompasses the activity of harvesting fish), is the only term used to describe the authority given to the states to regulate within the EEZ. Hence, the power of an individual state to extraterritorially regulate within the EEZ was limited by Congress in 1983 to the regulation of the "fishing vessel" alone.

This paper has made the argument that the states are limited by the terms of the Magnuson-Stevens Act in their authority to extraterritorially regulate fishing activities that are wholly within the federal waters of the EEZ. This paper has also shown that when Congress chose to amend the Magnuson-Stevens Act in 1983 by removing the term "fishing activity" from the section granting extraterritorial jurisdiction, Congress left the states with nothing more than the ability to regulate the fishing vessel itself. States do not have the same authority under the Magnuson-Stevens Act to extraterritorially regulate fishing activities conducted in the EEZ as they did prior to the 1983 amendments to the Act.

Nevertheless, the courts have yet to conclude that the states' authority to extraterritorially regulate fishing activities is preempted by the federal government and the Magnuson-Stevens Act in the post-1983 era. Even considering the canon of statutory construction requiring a court to attribute the plain meaning to the words used by the legislature, the courts have yet to conclude that the states' authority to extend their fishery resource regulations to fishing activities conducted wholly within the EEZ is preempted by the Magnuson-Stevens Act. Despite the clear indications of the plain language chosen by Congress in amending Section 1856, the courts have failed to recognize the foregoing arguments and have continued to rely upon *stare decisis* in concluding that the Act's provisions do not limit a state's extraterritorial authority to only the regulation of the "fishing vessel" itself. Nor have the courts recognized that the plain language of the amended Act preempts a state's authority to "*regulate any fishing* which is engaged in by any fishing vessel outside its boundaries . . . ."[112]

112. 16 U.S.C. § 1856(a) (1976) (emphasis added).

It remains to be seen whether future judicial rulings on this issue will come down on the side of preemption or on the side of *stare decisis*. Because recreational and commercial fishermen throughout the country feel that state and federal fishery resource regulation is becoming more and more onerous with each passing year and, because the industry as a whole sees itself as over-regulated, this issue will continue to crop up over the years to come. With this rising tide of discontent among the recreational and commercial fishing communities that avail themselves of the natural resource opportunities to be had within the EEZ, the issues presented in this paper are ripe for continued scholarly debate and judicial consideration.