# STATE ACTIVISM IN THE MOVEMENT TO CONSERVE SHARKS: THE NINTH CIRCUIT'S GUIDANCE ON PREEMPTION AND THE MAGNUSON-STEVENS ACT IN *CHINATOWN NEIGHBORHOOD ASS'N V. HARRIS*

BY

RYAN ICHINAGA*

*In recent years, both the states and the federal government have enacted laws to prevent the rapid decline of shark populations. States can regulate fisheries within state waters, but beyond those waters, the Magnuson-Stevens Act puts fishery regulation in the hands of the federal government. In* Chinatown Neighborhood Ass'n v. Harris*, the United States Court of Appeals for the Ninth Circuit was unwilling to hold that the Magnuson-Stevens Act preempted California's state shark fin ban. This Chapter examines the history of state and federal fishery management, shedding light on the purposes of the Magnuson-Stevens Act. This Chapter also demonstrates the unique difficulties of shark regulation and tracks state and federal efforts to conserve sharks. Finally, this Chapter examines the Ninth Circuit's preemption analysis, concluding that the Ninth Circuit's decision is consistent with the purposes of the Magnuson-Stevens Act and is a progressive step forward in shark and fishery conservation.*



* Notes & Comments Editor, *Environmental Law* (2016–2017); J.D. Candidate, Lewis & Clark Law School (expected 2017); B.A., University of California, Davis (2012). The author would like to thank Professor Daniel Rohlf for his help and guidance in the preparation of this Chapter.

## I. INTRODUCTION

With their monstrous appearance and ferocious reputation, sharks are hardly thought of as animals that need protection. The media often portrays sharks as violent creatures to be feared. In the movie *Jaws*,[1] the mayor of a town terrorized by a great white shark aptly characterizes this irrational fear of sharks. He says, "it's all psychological. You yell 'barracuda,' everybody says 'Huh? What?' You yell 'shark,' we've got a panic on our hands on the Fourth of July."[2] While there certainly was reason to fear the great white in *Jaws*, it is actually sharks that should fear people. Because of an irrational fear of sharks, people can easily ignore the fact that sharks represent a fishery in urgent need of conservation. In reality, sharks are not impervious, but vulnerable to overfishing. Indeed, approximately one-quarter of sharks and their relatives are threatened worldwide.[3] Overfishing threatens the survival of sharks, and without adequate protections, many shark species will continue to face rapid declines.

In a very short period of time, shark populations have plummeted.[4] This decline is largely driven by a growing demand for shark fins used as the

1 JAWS (Universal Pictures 1975).

2 *Id.*

3 Nicholas K. Dulvy et al., *Extinction Risk and Conservation of the World's Sharks and Rays*, ELIFE Jan. 2014, at 3, *available at* http://elifesciences.org/content/elife/3/e00590.full.pdf.

4 Paula Walker, *Oceans in the Balance: As the Sharks Go, So Go We*, 17 ANIMAL L. 97, 107 (2010).

signature ingredient in the Chinese delicacy shark fin soup.[5] Shark fin soup is a dish signifying affluence and prestige, and for that it commands a high price.[6] The high selling price of shark fins combined with the limited cargo space on fishing vessels have led to the cruel practice of "shark finning." Shark finning is the practice of catching a live shark, removing its fins and casting the body of the shark back to the ocean.[7] The shark is left to die as it can no longer swim or breathe.[8] Shark finning has accelerated the decline of shark populations.[9]

The falling shark population is troubling because sharks play an important role in ocean ecosystems. Their health often reflects a healthy ocean environment, while their absence can have devastating effects. For example, in areas where sharks were overfished along the Atlantic coast, entire fisheries have collapsed.[10] In other locations where sharks have been depleted, smaller predators have decimated their herbivore prey, leading to macroalgae overgrowth that can be fatal to coral reefs.[11] Ultimately, when sharks are removed from ocean ecosystems, the lack of diversity leads to an imbalance that can have untold consequences for fisheries, state and national economies, and the environment.[12]

Recognizing both the dire consequences of the declining shark population and the inhumane practice of shark finning, Congress and many state legislatures enacted laws prohibiting shark finning on fishing vessels.[13] However, in spite of these laws, tens of millions of sharks continued to die each year for their fins.[14] In response to these findings, several states decided to take a more proactive approach, enacting statewide bans on the possession and sale of shark fins.[15] California's ban was perhaps the most notable and controversial because California has the largest Chinese-American population of any state, and represented approximately 85% of shark fin consumption in the United States.[16] California's law (Shark Fin

5 *Id.* at 107–08.

6 *Id.*

7 *Id.* at 99 ("[T]he thrashing predator . . . is winched aboard at the invitation of a machete-wielding crew who cut off its fins and perhaps also its tail—without any attempt to kill or stun it first—and then toss the still living creature back into the ocean to drown.").

8 *Id.*

9 *See* Jacqueline Baker, *Plight of an Ocean Predator: The Shark Conservation Act of 2010 and the Future of Shark Conservation Legislation in the United States*, 38 ENVIRONS ENVTL. L. & POL'Y J. 67, 77 (2014).

10 Walker, *supra* note 4, at 100–01.

11 *Id.* at 101.

12 *See id.* at 102–04 (explaining the number of ways that nations depend on marine diversity to maintain healthy coral habitats that contribute to economic welfare and the balance needed for a livable atmosphere).

13 *E.g.*, Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(P)(i) (2012) (prohibiting the removing of shark fins and tails); CAL. FISH & GAME CODE § 7704(c) (West 2013); OR. REV. STAT. § 509.160 (2015).

14 Act of Oct. 7, 2011, ch. 524, sec. 1, 2011 Cal. Stat. 4788, 4788.

15 Baker, *supra* note 9, at 108–09 (discussing the approach states have taken to shark conservation).

16 Migration Policy Inst., *Chinese Immigrants in the United States*, http://www.migrationpolicy.org/article/chinese-immigrants-united-states/ (last visited July 16, 2016); Betty Hallock,

Law) made it a misdemeanor to possess, sell, trade, or distribute detached shark fins in California.[17]

In August 2012, several associations with members who previously engaged in commerce involving shark fins made several unsuccessful attempts to enjoin the enforcement of California's Shark Fin Law.[18] In December 2013, the plaintiffs (the Neighborhood Association) filed an amended complaint.[19] However, the district court granted the defendants' motion to dismiss with prejudice, and denied the Neighborhood Association leave to amend.[20] The Neighborhood Association appealed the district court's grant of motion to dismiss and denial of leave to amend. In *Chinatown Neighborhood Ass'n v. Harris* (*Chinatown*), the United States Court of Appeals for the Ninth Circuit reviewed the district court's decision.[21]

The Neighborhood Association contended that the Shark Fin Law conflicted with the Magnuson-Stevens Fishery Conservation and Management Act (MSA)[22], which governs fishery regulation at the federal level.[23] The MSA grants the federal government "sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone" (EEZ),[24] which spans from the seaward boundary of each coastal state to 200 miles offshore.[25] However, the MSA preserves jurisdiction of the states over fishery management within their boundaries.[26] In California, that boundary is three miles offshore.[27] Therefore, beyond this three-mile distance, the EEZ extends for another 197 miles; that area is subject solely to federal regulation. The Neighborhood Association argued that because the Shark Fin Law affected federal management in the EEZ, the law impermissibly conflicted with the federal government's authority under the MSA.[28] Thus, the central question in *Chinatown* was whether the MSA preempted the Shark Fin Law.

The Ninth Circuit held that the MSA did not preempt the Shark Fin Law.[29] This has important implications for not only the states within the

*Gov. Jerry Brown Signs Shark Fin Ban, Sparks Protest*, L.A. TIMES: DAILY DISH (Oct. 10, 2011, 1:16 PM), http://latimesblogs.latimes.com/dailydish/2011/10/shark-fin-ban.html.

17 Sec. 2, § 2021(b), 2011 Cal. Stat. at 4789 (codified at CAL. FISH & GAME CODE § 2021(b) (West 2013)).

18 Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136, 1140 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2448 (2016).

19 *Id.* at 1141.

20 *Id.*

21 *Id.*

22 MSA, 16 U.S.C. §§ 1801–1891d (2012).

23 *Chinatown*, 794 F.3d. at 1140.

24 16 U.S.C. § 1811(a) (2012).

25 *Id.* § 1802(11) (incorporating by reference Proclamation No. 5030, 3 C.F.R. 22 (1984)).

26 *See id.* § 1856(a)(1).

27 Vietnamese Fishermen Ass'n of Am. v. Cal. Dep't of Fish & Game, 816 F. Supp. 1468, 1470 (N.D. Cal. 1993).

28 *Chinatown*, 794 F.3d at 1140.

29 *See id.* at 1145, 1147 (affirming the district court's dismissal of the Neighborhood Association's amended complaint with prejudice).

Ninth Circuit, but also for the United States as a whole. The Ninth Circuit's decision makes it abundantly clear that the primary goal of the MSA is conservation,[30] as opposed to other values of the MSA.[31] By upholding the Shark Fin Law, *Chinatown* stands for the proposition that a state law may prioritize one value of the MSA over another, especially if the state law promotes conservation. Because the Shark Fin Law promoted conservation, the Ninth Circuit was unwilling to set aside the law absent a showing of clear intent in the MSA to preempt state law.[32]

This Chapter examines the Ninth Circuit's preemption analysis and the court's emphasis on the MSA's goal of conservation of fisheries in *Chinatown*. Part II provides background on the evolution of federal and state control over fisheries and the development of the MSA. Part III demonstrates the importance of sharks and the shortcomings of previous state and federal laws to prevent their decline. Part IV examines the doctrine of preemption and the Ninth Circuit's preemption analysis as it pertains to the MSA. Part V asserts that the Ninth Circuit's decision is a significant step towards conservation of sharks and other fisheries. I argue that *Chinatown* empowers states by recognizing their ability to use laws regulating conduct on land to conserve fisheries. This recognition affords states the flexibility to take stronger conservation measures to control fisheries. This Chapter concludes that the Ninth Circuit's decision is consistent with the MSA and is promising for shark populations.

## II. HISTORY OF THE MAGNUSON-STEVENS ACT

Federal regulation of the United States' fisheries is a relatively recent phenomenon. Traditionally, states controlled ocean fisheries for about three miles away from their shores as part of their police powers[33] without the need for federal government intervention.[34] However, in the years following World War II, state management proved to be inadequate to deal with fishery developments in the United States.[35] Foreign fishing fleets grew and the

30 *Id.* at 1143.

31 *See, e.g.*, 16 U.S.C. § 1801(b) (2012) (listing "conserv[ing] and manag[ing] the fishery resources found off the coasts of the United States," "promot[ing] domestic commercial and recreational fishing under sound conservation and management principles," and "encourag[ing] the development of the United States fishing industry of fisheries which are currently underutilized or not utilized . . . in a non-wasteful manner" as objectives of the MSA).

32 *Chinatown*, 794 F.3d at 1142.

33 *See* Skiriotes v. Florida, 313 U.S. 69, 75 (1941) (holding that within its police powers, Florida had the authority to regulate and control activity within its territorial waters, at least in the absence of conflicting federal legislation); *see also* Manchester v. Massachusetts, 139 U.S. 240, 266 (1891) (holding that if Congress does not assert by affirmative legislation its right or will to assume the control of fisheries in bays, inlets, rivers, harbors, and ports of the United States, then the right to control such fisheries must remain with the States).

34 THE PEW CHARITABLE TRS. & OCEAN CONSERVANCY, THE LAW THAT'S SAVING AMERICAN FISHERIES: THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT 4 (2013), *available at* http://www.oceanconservancy.org/our-work/fisheries/ff-msa-report-2013.pdf.

35 Donna R. Christie, *Living Marine Resources Management: A Proposal for Integration of United States Management Regimes*, 34 ENVTL. L. 107, 112 (2004).

relatively small domestic fleets struggled to compete with their foreign counterparts.[36] Thus, fishery regulation at the federal level became imperative.

In 1973, the United Nations convened the Third Conference on the Law of the Sea (UNCLOS III) to settle questions of coastal state jurisdiction and fish stock conservation.[37] UNCLOS III established EEZs in which coastal nations had "sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources, whether living or non-living."[38] The EEZs extended from a country's seaward boundary to 200 miles offshore.[39] The establishment of EEZs granted these countries exclusive control over their fisheries in areas that were previously part of the international commons.[40]

However, multilateral treaties and regional fisheries organizations were largely unsuccessful in slowing the depletion of fish stocks.[41] Congress feared that multilateral negotiations were not moving along fast enough to prevent the decimation of offshore fisheries and the U.S. fishing industry.[42] As a result, in 1976 Congress passed the Fishery Conservation and Management Act,[43] now named the MSA. The MSA "was enacted to establish a federal-regional partnership to manage fishery resources."[44] The MSA's policies and purposes not only include the conservation, development, and management of fishery resources, but also address the development of domestic commercial and recreational fishing.[45] As amended in 1996, the MSA lists ten "national standards" to exemplify these policies and purposes, and provides overarching guidelines for the entire fisheries management process.[46]

The MSA provides the federal government with "sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the [EEZ]."[47] However, the MSA explicitly preserves state jurisdiction over fishery management within their

36 *Id.*

37 *Id.*

38 United Nations Convention on the Law of the Sea, art. 56(1)(a), Dec. 10, 1982, 1833 U.N.T.S. 397.

39 Rebecca Bratspies, *Finessing King Neptune: Fisheries Management and the Limits of International Law*, 25 HARV. ENVTL. L. REV. 213, 217 (2001).

40 *Id.* at 225–26.

41 Christie, *supra* note 35, at 112.

42 *Id.* at 113.

43 Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C §§ 1801–1891d (2012)).

44 Nat. Res. Def. Council, Inc. v. Daley, 209 F.3d 747, 749 (D.C. Cir. 2000).

45 MSA, 16 U.S.C. § 1801(b)(1), (3), (6) (2012); Christie, *supra* note 35, at 113.

46 Sustainable Fisheries Act, Pub. L. No. 104-297, § 106, 110 Stat. 3559, 3570 (1996) (codified as amended at 16 U.S.C. § 1851(a) (2012)) (adding three additional national standards to the seven previously listed in the MSA).

47 *Id.* § 1811(a).

boundaries.[48] This means that states retain jurisdiction over the three-mile distance from state shores traditionally regulated by states, while the federal government exclusively regulates the distance beyond those three miles within the EEZ.

To manage fishing in the EEZ, the MSA established eight regional fishery management councils to develop Fishery Management Plans (FMPs).[49] With the cooperation of "the States, the fishing industry, consumer and environmental organizations, and other interested persons," the National Marine Fisheries Service (NMFS)[50] and fishery management councils develop and promulgate FMPs to achieve the "optimum yield"—the "greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems."[51] Regulations issued by the Secretary of the United States Department of Commerce implement the FMPs.[52]

In 1996, the MSA had been in effect for twenty years, and, with little improvement toward sustainable fisheries, its management principles needed serious reconsideration.[53] The 1996 reauthorization of the MSA, also known as the Sustainable Fisheries Act (SFA),[54] made important changes and included many new concepts and requirements for the MSA.[55] These additions included major modifications and new elements in the fishery management process, emphasized the preservation of fish habitat, and incorporated international developments in resource management principles.[56] These changes signified an intent to increase efforts to conserve fisheries and fish habitat. The evolution of the MSA "[made] the primacy of conservation unambiguous,"[57] and was crucial to the Ninth Circuit's decision in *Chinatown*.

48 *See id.* § 1856(a)(1) ("Except as provided in subsection (b) of this section, nothing in this [Act] shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.").

49 *Id.* § 1852(a)(1), (g).

50 NMFS is part of the National Oceanic and Atmospheric Administration (NOAA) and is also known as NOAA Fisheries. Nat'l Oceanic & Atmospheric Admin. Fisheries, *About Us*, http://www.nmfs.noaa.gov/aboutus/aboutus.html (last visited July 16, 2016).

51 16 U.S.C. §§ 1801(b)(4), 1802(33) (2012).

52 *See id.* §§ 1853(c), 1854(a)–(b).

53 Christie, *supra* note 35, at 114.

54 Pub. L. No. 104-297, 110 Stat. 3559 (1996).

55 Christie, *supra* note 35, at 114.

56 *Compare* §§ 101, 105, 110 Stat. at 3560–61, 3564 (including purposes to maintain marine habitat health and reduce overfishing, and mandating efforts to reach international bycatch reduction agreements), *with* 16 U.S.C. § 1801(a)(2), (6), (c)(3) (1976) (lacking such purposes and mandates). *See also* Christie, *supra* note 35, at 114 (noting such changes).

57 *Chinatown*, 794 F.3d 1136, 1143 (9th Cir. 2015).

## III. SHARK FINNING AND *CHINATOWN NEIGHBORHOOD ASS'N V. HARRIS*

### *A. Shark Finning and the Shortcomings of Previous State and Federal Laws*

Sharks are of the class *Chondrichthyes*.[58] Chondrichthyans are one of the oldest and most ecologically diverse vertebrate lineages, and have existed for at least 420 million years.[59] Today, most sharks are apex predators, meaning that there are few, if any, other animals that are above them on the food chain.[60] As apex predators, sharks play an important role in controlling the oceanic and coastal ecosystems. For example, sharks help to balance the marine ecosystem by removing weaker members of other species.[61] Sharks also help to regulate their ecosystem by inhibiting potential monopolization of resources by any single species.[62] Sharks maintain a healthy level of biodiversity and their removal can have devastating repercussions.[63]

The chondrichthyan population has declined sharply in recent years.[64] This decline coincides with the rising demand for shark fins, primarily used as the signature ingredient in the Chinese delicacy shark fin soup.[65] Shark fin soup, once reserved for emperors and nobles alone, is often served on special occasions as a symbol of prestige.[66] Communist Chairman Mao Tse Tung denounced the dish as an elitist practice, but after his death in 1976, shark fin soup regained popularity.[67] By the 1980s, the rise of a flourishing middle and upper class in China put this coveted symbol of prestige and status within the reach of a larger crowd.[68] As a result, the demand for shark fins greatly increased, and shark populations plummeted.[69]

The shark fin market is extremely lucrative. A pound of dried fins can sell for $300 to $500.[70] The fins of approximately 26 to 73 million chondrichthyans, with a value of $400 to 550 million, are traded annually.[71] However, there is a significant disparity between the value of shark fins and the rest of the shark.[72] Keeping the shark's body means giving up precious

58 Dulvy et al., *supra* note 3, at 2.

59 *Id.* at 3.

60 Baker, *supra* note 9, at 72–73.

61 See *id.* at 73.

62 *Id.*

63 *Id.*; *see also* Walker, *supra* note 4, at 101–03 (discussing the integral role that sharks play in regulating their ecosystem).

64 Walker, *supra* note 4, at 107.

65 *Id.* at 107–08.

66 *Id.*

67 Baker, *supra* note 9, at 76.

68 Walker, *supra* note 4, at 108.

69 *Id.*; *see also* Dulvy et al., *supra* note 3, at 4 (finding that approximately half of the shark and ray species that enter the shark fin trade are threatened).

70 *See, e.g.*, Lisa Ling, *Shark Fin Soup Alters an Ecosystem*, CNN, Dec. 15, 2008, http://www.cnn.com/2008/WORLD/asiapcf/12/10/pip.shark.finning/index.html (last visited July 16, 2016) (reporting that fins can sell for as much as $500 USD per pound).

71 Dulvy et al., *supra* note 3, at 3.

72 Walker, *supra* note 4, at 112.

cargo space that could go to a more marketable and valuable catch.[73] Because shark fins are considerably more valuable than the rest of the shark, shark finning became common.[74]

The depleting shark population is particularly concerning because, unlike other fish, sharks are apex predators and are not biologically fit to be prey.[75] Sharks reproduce slowly compared to other fish and are ill-suited to survive when harvested in large numbers.[76] As a result, shark populations have fallen by 80–90% globally in a very short period of time.[77] Biologists estimate that one-quarter of chondrichthyans are threatened worldwide.[78] Concern over the practice of shark finning and the declining shark population led to federal and state laws prohibiting shark finning.[79]

Even before the California Shark Fin Law at issue in *Chinatown*, both federal and California state law prohibited shark finning in the waters off the California coast. In 1995, the California state legislature made it "unlawful to sell, purchase, deliver for commercial purposes, or possess on any commercial fishing vessel . . . any shark fin or shark tail or portion thereof that has been removed from the carcass."[80] At the federal level, Congress added shark finning prohibitions—known as the Shark Conservation Act (SCA)[81]—to the MSA, which, as amended in 2011, made it unlawful to remove the fins from a shark at sea, possess detached fins aboard fishing vessels, transfer them from one vessel to another, and land them onshore.[82] With these laws in place, fishermen would have to bring sharks onshore before they could legally detach their fins. However, these laws did not prohibit shark fin importation, exportation, or consumption.[83]

In 2011, the California legislature found that in spite of federal and state laws already in place, shark finning nonetheless continued to "cause[] tens of millions of sharks to die each year."[84] In addition, California continued to contribute to the decline of shark populations, representing approximately 85% of the shark fin market in the United States.[85] In response, California—like several other states—attempted to target the root of the problem by

73 *Id.*

74 *See id.* (noting that the "prized fin" does not take a lot of space on the vessel and brings hefty returns).

75 *Id.* at 113.

76 Dulvy et al., *supra* note 3, at 3 ("Sharks and their relatives include some of the latest maturing and slowest reproducing of all vertebrates, exhibiting the longest gestation periods and some of the highest levels of maternal investment in the animal kingdom.").

77 Walker, *supra* note 4, at 107.

78 Dulvy et al., *supra* note 3, at 3.

79 *See supra* notes 13–17 and accompanying text.

80 Act of Aug. 4, 1995, ch. 371 sec. 1, § 7704(c), 1995 Cal. Stat. 1923, 1924 (codified as amended at CAL. FISH & GAME CODE § 7704 (West 2013)).

81 Shark Conservation Act of 2010, Pub. L. No. 111-348, § 103, 124 Stat. 3668, 3670 (2011) (codified as amended at 16 U.S.C. § 1857(1) (2012)).

82 *Id.*

83 *See* MSA, 16 U.S.C. § 1857(1)(G), (Q) (2012) (prohibiting import and export of shark fins only if taken in violation of the statute or other foreign laws or regulations).

84 Act of Oct. 7, 2011, ch. 524, sec. 1, 2011 Cal. Stat. 4788, 4788.

85 Hallock, *supra* note 16.

eliminating the demand for shark fins in-state.[86] The California legislature passed the Shark Fin Law, which made it a misdemeanor to possess, sell, trade, or distribute detached shark fins in California.[87]

The Shark Fin Law is an example of a state landing law—a law that makes it unlawful to land, transport, or possess fish.[88] Historically, states used landing laws to obtain personal jurisdiction over fishermen operating on the high seas.[89] These laws provided a practical solution to enforcement difficulties of coastal states. Without landing laws, fishermen could illegally harvest fish in state waters, but claim that the fish were caught legally outside of state jurisdictions.[90] In a similar vein, enforcement problems in regulating shark fins arose in states.[91] People could possess and sell shark fins and claim that the fins were obtained out of state or out of the country. Thus, the Shark Fin Law was a significant step from previous state and federal law because rather than simply prohibiting shark finning on fishing vessels, the Shark Fin Law also put an end to the shark fin trade on land in California.

### *B.* Chinatown Neighborhood Ass'n v. Harris

In *Chinatown*, the Neighborhood Association claimed the MSA preempted the California Shark Fin Law because the Shark Fin Law interferes with federal management of shark fishing in the EEZ.[92] The Neighborhood Association argued that Congress intended to balance the MSA's competing purposes, and that the Shark Fin Law impermissibly promoted the objective of conservation over other stated objectives.[93] The Ninth Circuit rejected the Neighborhood Association's contentions.[94] Parts IV

86 *See, e.g.*, Press Release, Oceana, Texas Becomes 10th State to Ban Trade of Shark Fins, (Jun. 22, 2015), http://usa.oceana.org/press-releases/texas-becomes-10th-state-ban-trade-shark-fins (last visited July 16, 2016) (applauding Texas for being the tenth state to pass a state ban on the trade of shark fins).

87 Sec. 2, § 2021(b), 2011 Cal. Stat. at 4789 (codified at CAL. FISH & GAME CODE § 2021(b) (West 2013)).

88 Eldon V.C. Greenberg & Michael E. Shapiro, *Federalism in the Fishery Conservation Zone: A New Role for the States in an Era of Federal Regulatory Reform*, 55 S. CAL. L. REV. 641, 652 (1982).

89 *See* Frach v. Schoettler, 280 P.2d 1038, 1041 (Wash. 1955) (finding that regulation of possession and sale of salmon fell within the state's police power to regulate its natural resources).

90 *See* Greenberg & Shapiro, *supra* note 88, at 652 (stating that landing laws were used to secure jurisdiction over fishermen to solve the enforcement problems faced by states that had limited resources to patrol the vast territorial sea).

91 *See Chinatown*, 794 F.3d 1136, 1140 (9th Cir. 2015) (noting that despite state and federal shark finning regulation, the California Legislature found that finning still caused tens of millions of sharks to die each year).

92 *Id.*

93 *Id.* at 1142.

94 *Id.* at 1143. The Neighborhood Association also claimed the Shark Fin Law violated the dormant commerce clause by interfering with commerce in shark fins between California and other states, and by curbing the flow of shark fins through California into the rest of the country. *Id.* at 1140. The Neighborhood Association claimed below that the Shark Fin Law

and V of this Chapter discuss the reasoning and significance of the Ninth Circuit's decision in *Chinatown*.

## IV. THE NINTH CIRCUIT'S HOLDING THAT THE MAGNUSON-STEVENS ACT DOES NOT PREEMPT STATES FROM REGULATING FISHING RELATED ACTIVITIES WITHIN THEIR BOUNDARIES IN *CHINATOWN*

### *A. The Doctrine of Preemption*

The concept of preemption derives from the Supremacy Clause of the United States Constitution, Article VI, clause 2 provides:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall 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, anything in the Constitution or laws of any State to the contrary notwithstanding.[95]

In short, no state law, rule, regulation, or otherwise can contradict the Constitution, federal laws, or duly promulgated agency regulations.[96] However, there is a general presumption against preemption that is especially strong when the federal government acts in a field historically regulated by the states.[97] "When considering preemption, courts 'start with the assumption that the historic police powers of the state were not superseded by the Federal Act unless that was the clear and manifest purpose of the Congress.'"[98] With this presumption against preemption in mind, courts determine whether state law violates the Supremacy Clause.[99]

Federal law can expressly or impliedly preempt state law in one of three ways.[100] The first way occurs when Congress expressly declares that a state law is to be preempted.[101] This type of preemption is known as "express preemption."[102] Express preemption is usually very straightforward, as the federal law in question will explicitly and clearly indicate that Congress intends to preempt state law.[103]

---

violates the Equal Protection Clause, but they abandoned this claim at oral argument. *Id.* at 1140 n.3. For purposes of this Chapter, only the preemption issue will be addressed.

95 U.S. CONST. art. VI, cl. 2.

96 Mike Mastry, *Extraterritorial Application of State Fishery Management Regulations Under the Magnuson-Stevens Fishery Conservation and Management Act: Have the Courts Missed the Boat?*, 25 UCLA J. ENVTL. L. & POL'Y 225, 227 (2006–2007).

97 McDaniel v. Wells Fargo Invs. LLC, 717 F.3d 668, 674 (9th Cir. 2013).

98 State v. Dupier, 118 P.3d 1039, 1049 (Alaska 2005) (quoting Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991)).

99 *E.g.*, *Chinatown*, 794 F.3d at 1141 (discussing the presumption against preemption when addressing plaintiffs' claim that California's Shark Law violated the Supremacy Clause).

100 Mastry, *supra* note 96, at 227.

101 *Id.* at 228.

102 *Id.*

103 *Id.*

Second, federal law can preempt a state law if the laws conflict such that "compliance with both federal and state regulations is a physical impossibility."[104] This type of preemption is known as "conflict preemption."[105] In these instances, it is impossible to comply with both federal and state laws, and in such situations, the state law will be set aside.[106]

The third way a federal law can preempt state law is when Congress clearly demonstrates that it intends to completely and entirely occupy a field.[107] This final type of preemption is known as "field preemption."[108] To show field preemption, courts must consider whether "[t]he scheme of federal regulations [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,"[109] 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."[110]

The Neighborhood Association in *Chinatown* asserted that even though the Shark Fin Law regulates in-state conduct, the MSA nevertheless preempts the state law.[111] However, because the MSA has no express preemption provision with respect to state regulation of fisheries, an express preemption argument would have been unavailing.[112] Instead, the Neighborhood Association argued the Shark Fin Law should be set aside under conflict and field preemption.[113] However, in *Chinatown*, there was no actual conflict arising among state and federal law where "compliance with both federal and state regulations is a physical impossibility,"[114] and the Neighborhood Association abandoned any claim of field preemption.[115] Therefore, the Ninth Circuit concluded that the MSA did not preempt the Shark Fin Law.[116]

104 Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

105 *See* Benjamin D. Galloway, Case Note, *The Beginning of the End:* United States v. Alabama *and the Doctrine of Self-Deportation*, 64 MERCER L. REV. 1093, 1098 (2012) (describing the rule established in *Fla. Lime & Avocado Growers*, 373 U.S. at 142–43, as "conflict preemption").

106 Mastry, *supra* note 96, at 228.

107 *Id.* at 227.

108 Galloway, *supra* note 105, at 1097–98.

109 Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

110 *Id.*

111 *Chinatown*, 794 F.3d 1136, 1140 (9th Cir. 2015).

112 *Id.* at 1141 (noting that the MSA lacks an express preemption provision relating to state regulation of fisheries).

113 *Id.* at 1140–42.

114 *Id.* at 1141 (quoting *Fla. Lime & Avocado Growers*, 373 U.S. 132, 142–43 (1963)).

115 *Id.* at 1141 n.5.

116 *Id.* at 1145.

### *B. Express Preemption*

In *Chinatown*, the Ninth Circuit first noted that there is no explicit preemption provision in the MSA.[117] This is important because courts have preempted state laws similar to the Shark Fin Law when federal statutes contained explicit preemption provisions. For example, in *National Meat Ass'n v. Harris*[118]—a case the Neighborhood Association relied upon in its petition for certiorari to the Supreme Court[119]—California enacted a law strengthening a statute governing the treatment of nonambulatory animals, and applied the statute to slaughterhouses regulated under the Federal Meat Inspection Act (FMIA).[120] In *Harris*, California attempted to regulate treatment of animals, but the Supreme Court held the federal law preempted the state law.[121] However, there is a fundamental distinction between the FMIA and the MSA. The FMIA contains an explicit preemption provision, and therefore it unequivocally preempts state law.[122] Additionally, the FMIA's preemption provision covers not only conflicting, but also different and additional state requirements.[123] In contrast, the MSA does not have a similar preemption provision,[124] and as a result, *Chinatown* is clearly distinguishable from *Harris* and other express preemption cases. This distinction explains why *Chinatown* had a different outcome than the factually similar *Harris* case.

### *C. Conflict Preemption*

#### *1. The Ninth Circuit Held That of the Many Purposes of the Magnuson-Stevens Act, Conservation is Paramount, and States Are Not Required to Give Equal Weight to the Other Purposes of the Act.*

While the MSA does not have an express preemption provision, federal statute can still have preemptive effect if it conflicts with state law. Conflict preemption occurs when "compliance with both federal and state regulations is a physical impossibility,"[125] or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and

117 *Id.* at 1141.

118 132 S. Ct. 965 (2012).

119 Petition for a Writ of Certiorari at 15, 17, Chinatown Neighborhood Ass'n v. Harris, 136 S. Ct. 2448 (2016).

120 21 U.S.C. §§ 601–695 (2012); *Nat'l Meat Ass'n*, 132 S. Ct. at 969–70 (discussing California's application of state law to slaughterhouses regulated under the FMIA).

121 *Nat'l Meat Ass'n*, 132 S. Ct. at 975.

122 *See* 21 U.S.C. § 678 (2012) ("Requirements within the scope of [the FMIA] with respect to premises, facilities and operations of any establishment at which inspection is provided under [the FMIA], which are in addition to, or different than those made under this chapter may not be imposed by any State . . . .").

123 *Id.*

124 *See* MSA, 16 U.S.C. §§ 1801–1891d (2012) (containing no preemption provisions covering conflicting, different or additional State requirements).

125 *Fla. Lime & Avocado Growers*, 373 U.S. 132, 142–43 (1963).

objectives of Congress."[126] Even if state and federal purposes are consistent, a conflict in the method of achieving those purposes can be a reason to preempt a state law.[127]

The Neighborhood Association attempted to analogize *Chinatown* to *Arizona v. United States*.[128] In *Arizona*, the Supreme Court held that a state provision was preempted because it upset the balance struck by the Immigration Reform and Control Act of 1986 (IRCA).[129] IRCA is a comprehensive federal law that governs immigration reform.[130] The state provision at issue in *Arizona* imposed criminal penalties on undocumented immigrants who sought to engage in unauthorized employment.[131] Writing for the majority, Justice Kennedy referred to the legislative background of IRCA to indicate that Congress made a *deliberate* choice not to impose such penalties because they were unnecessary and unworkable.[132] Thus, while the Arizona state law promoted one value—the deterrence of unlawful employment—of IRCA, it conflicted with another—Congress's deliberate choice not to impose criminal penalties on undocumented immigrants seeking to obtain unauthorized employment.[133] The Supreme Court in *Arizona* held that by interfering with Congress's careful balance of objectives, the state of Arizona violated the Supremacy Clause.[134]

The Neighborhood Association argued that, like IRCA in *Arizona*, there is a balancing of competing objectives in the MSA.[135] For example, some of the listed purposes of the MSA include "conserv[ing] and manag[ing] the fishery resources off the coasts of the United States," "promot[ing] domestic commercial and recreational fishing under sound conservation and management principles," and "encourag[ing] the development by the United States fishing industries of fisheries which are currently underutilized or not utilized . . .in a non-wasteful manner."[136] The Neighborhood Association contended Congress intended to balance these purposes and prevent states from promoting one objective over others.[137] The Neighborhood Association therefore argued that California's Shark Fin Law wrongfully placed the value of conservation over other objectives of the MSA.[138] They argued that this

126 Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (quoting Hines v. Davidowitz 312 U.S. 52, 67 (1941)).

127 *Id.* at 2505 ("[C]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy." (quoting Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge, 403 U.S. 274, 287 (1971))).

128 *Chinatown*, 794 F.3d 1136, 1142 (9th Cir. 2015).

129 *Arizona*, 132 S. Ct. at 2505; Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 1, 100 Stat. 3359, 3359 (codified as amended in scattered sections of 8 U.S.C. (2012)).

130 *Arizona*, 132 S. Ct. at 2504.

131 *Id.* at 2503.

132 *Id.* at 2504.

133 *Id.* at 2505.

134 *Id.*

135 *Chinatown*, 794 F.3d 1136, 1142 (9th Cir. 2015).

136 MSA, 16 U.S.C. § 1801(b) (2012).

137 *Chinatown*, 794 F.3d at 1142.

138 *Id.*

interfered with the method laid out by the MSA, and therefore an actual conflict existed between federal and state law.[139]

The Ninth Circuit rejected the Neighborhood Association's reasoning and made an important distinction between *Chinatown* and *Arizona*.[140] Unlike IRCA in *Arizona*, there is no *deliberate* intent to strike a "careful balance" between competing objectives under the MSA.[141] While the Ninth Circuit recognized the various competing values within the MSA, the court concluded that among the values, conservation is paramount.[142] Because of the clear emphasis on conservation in the MSA, the Ninth Circuit determined that the purpose of the MSA is not to give equal weight to all competing interests, but to promote the interest of conservation while recognizing other objectives.[143] The court held that a state law emphasizing conservation over other objectives of the MSA presented no conflict with the MSA.[144] Thus, the court concluded that the Shark Fin Law is compatible with the MSA because it is consistent with the federal law's primary goal of conservation.[145]

The Ninth Circuit also noted that the general presumption against preemption is especially strong when, as was the case in *Chinatown*, "Congress has legislated in a field which the states have traditionally occupied."[146] States have historically regulated fisheries in state waters,[147] and therefore there is a strong presumption against preemption with respect to the MSA. Under these circumstances—no express preemption provision and no actual conflict of law, combined with the presumption against preemption—the Ninth Circuit reasoned that state police powers should not be superseded.[148] The Ninth Circuit found in *Chinatown* that the Neighborhood Association pointed to no "clear and manifest" intent of Congress to preempt regulation like the Shark Fin Law.[149] Instead of showing "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[150] the Neighborhood Association had merely pointed to a prospect of a "'modest impediment' to general federal purposes."[151]

139 *Id.*

140 *Id.* at 1143.

141 *Id.* "This is, accordingly, not the rare circumstance in which a state law interferes with a 'deliberate effort to steer a middle path,' or to 'strike a careful balance.'" *Id.* (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 378 (2000), and *Arizona*, 132 S. Ct. 2492, 2505 (2012)).

142 *Id.* (citing Nat. Res. Def. Council, Inc. v. Nat'l Marine Fisheries Serv., 421 F.3d 872, 879 (9th Cir. 2005), and *Daley*, 209 F.3d, 747, 753 (D.C. Cir. 2000)).

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.* at 1141 (quoting *McDaniel*, 717 F.3d 668, 674 (9th Cir. 2013)).

147 *See* Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 426 (1936) (explaining the historic control of states over fish in state waters); N.Y. State Trawlers Ass'n v. Jorling, 16 F.3d 1303, 1309–10 (2d Cir. 1994) ("The interest of a state in regulating the taking of its fish and wildlife resources has been long established.").

148 *Chinatown*, 794 F.3d at 1141–43.

149 *Id.* at 1142.

150 *Id.* at 1141 (citing *Arizona*, 132 S. Ct. 2492, 2501 (2012)).

151 *Id.* at 1142 (quoting Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 667 (2003)).

Furthermore, because there was no "clear and manifest" purpose to preempt state regulation like the Shark Fin Law, the Neighborhood Association could not overcome the presumption against preemption.[152]

### *2. The Ninth Circuit Held That the Magnuson-Stevens Act Does Not Preempt State Law Simply When a State Law Impedes the Attainment of Optimum Yields.*

The Ninth Circuit also analyzed the district court's denial of the Neighborhood Association's leave to amend.[153] The Neighborhood Association asked the Ninth Circuit to find that the district court abused its discretion in failing to grant leave sua sponte.[154] The Neighborhood Association contended that, if permitted to plead additional facts to support its preemption claim, it could have alleged an actual conflict between the California statute and the MSA.[155] The Neighborhood Association argued the Shark Fin Law affected the ability of commercial fishers to reap the optimum yields[156] prescribed in FMPs[157] for shark harvests under the MSA.[158] The Neighborhood Association asserted this hindrance on optimum yields presented an actual conflict with the MSA.[159]

The Ninth Circuit rejected the Neighborhood Association's argument and held that the MSA does not preempt a state law simply because the state law could potentially affect the realization of optimum yields.[160] The court reasoned that the MSA does not mandate a certain harvest quantity of sharks from the EEZ.[161] Thus, the court saw the optimum yields prescribed in FMPs as a target rather than a guarantee; the fact a law affected the likelihood of reaching a target did not mean that there was a conflict between federal and state law.[162] The court reasoned even if the optimum yields were mandated, there were still commercially viable uses for sharks besides their fins.[163] Thus, even with the ban in place, it was still possible to realize the optimum yields for shark harvests without needing to detach shark fins.[164]

---

152 *Id.* at 1442. *See* Sprietsma v. Mercury Marine, 537 U.S. 51, 67 (2002) (finding no preemption without an "authoritative message" from Congress); P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 501 (1988) (same); *Fla. Lime & Avocado Growers*, 373 U.S. 132, 146–52 (1963) (same).

153 *Chinatown*, 794 F.3d at 1141.

154 *Id.* at 1145.

155 *Id.*

156 *Id.*

157 *See, e.g.*, PAC. FISHERY MGMT. COUNCIL, FISHERY MANAGEMENT PLAN FOR U.S. WEST COAST FISHERIES FOR HIGHLY MIGRATORY SPECIES: AS AMENDED THROUGH AMENDMENT 2, at 61 (2011), *available at* http://www.pcouncil.org/wp-content/uploads/HMS-FMP-Jul11.pdf ("This FMP establishes harvest guidelines for selected shark species and authorizes establishment or modification of quotas or harvest guidelines under framework provisions.").

158 *Chinatown*, 794 F.3d at 1144.

159 *Id.*

160 *Id.*

161 *Id.* at 1145.

162 *Id.*

163 *Id.*

164 *Id.*

Moreover, the Ninth Circuit noted that the MSA expressly preserves state control over commerce in fish products within state borders.[165] Such state control would be severely undermined, if not pointless, if a state law could be preempted simply because it affects the realization of optimum yields. Under the Neighborhood Association's reasoning, the MSA could preempt many other state laws from taxes to labor laws because almost any state law controlling commerce of fish products will inevitably affect the realization of optimum yields.[166] Such a result seemed unreasonable, and the court determined that Congress could not have intended to preclude states from merely affecting the realization of optimum yields.[167]

The Ninth Circuit's holding is significant because the partnership the MSA seeks to establish between states and the federal government would be no partnership at all if states were not allowed to regulate activities within their own borders. If laws that incidentally affected optimum yields were unconstitutional, the federal government could disable many state laws, preempting them no matter how tenuous their impact on fishery management in the EEZ. The Ninth Circuit concluded that simply because the Shark Fin Law affects the realization of optimum yields does not mean it creates a direct conflict with the MSA.[168] Thus, the Neighborhood Association's amendment would not have changed the outcome in the case, and granting leave to amend would have been futile.

### *D. Field Preemption*

The Neighborhood Association also argued in *Chinatown* that Congress did not intend to allow states to regulate on-land activities pertaining to fishing—as opposed to activities on fishing vessels.[169] The Neighborhood Association asserted that because Congress was silent with respect to on-land activities related to fishing, Congress intended to leave such activities unregulated.[170] Essentially, this was a field preemption argument alleging that Congress clearly demonstrated its intent to completely and entirely occupy a field—in this case, on-land regulation relating to fishing. In analyzing field preemption, 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."[171]

The Ninth Circuit flatly rejected the Neighborhood Association's argument.[172] Although the MSA is silent with regard to on-land activities,[173]

165 *Id.* (citing MSA, 16 U.S.C. § 1856(a)(1) (2012)).

166 *Id.* at 1144.

167 *Id.* at 1144–45.

168 *Id.*

169 *Id.* at 1143.

170 *Id.* at 1143–44.

171 *Rice*, 331 U.S. 218, 230 (1947).

172 *Chinatown*, 794 F.3d at 1143–44.

173 *See id.* at 1143 (noting that the MSA, 16 U.S.C. § 1857(1)(P) (2012), references activities at sea, aboard fishing vessels, and during landing, but is silent with regards to on-land activities).

like those regulated by the Shark Fin Law, the Ninth Circuit could not reasonably infer that Congress left no room for the states to supplement the MSA.[174] On the contrary, the MSA reserves the right of states to control activities within their boundaries.[175] Indeed, the MSA is intended as a partnership between federal and state government.[176] Moreover, the Ninth Circuit noted that Congress's silence does not indicate preemption of state law.[177] "[A] clear and manifest purpose is always required."[178] This is especially true in light of the presumption against preemption. Ultimately, without showing a "clear and manifest purpose" that Congress intended to leave no room for state laws regulating on-land activities, the Neighborhood Association could not overcome the presumption against preemption.[179]

### *E. The Ninth Circuit's Decision*

In sum, the Ninth Circuit held that the MSA did not preempt the Shark Fin Law because Congress expressed no clear and manifest intent to regulate in-state fishery management.[180] The court also held that simply because the Shark Fin Law may affect the realization of optimum yields does not mean that the law conflicts with the MSA.[181] The court concluded the Shark Fin Law was consistent and cooperative with the MSA.[182] For these reasons, the Ninth Circuit affirmed the district court's judgment.[183]

### *F. Judge Reinhardt's Dissent*

Circuit Judge Reinhardt dissented in part, agreeing with the majority that the Neighborhood Association's complaint failed to "identify any actual conflict between the Shark Fin Law and the federal government's authority under the [MSA] to manage shark fishing in the [EEZ]."[184] He noted the Neighborhood Association's complaint included nothing more than mere conclusory statements that the Shark Fin Law conflicts with the MSA and the FMPs.[185]

However, unlike the majority, Judge Reinhardt contended the district court should have granted the Neighborhood Association leave to amend the complaint for its preemption claim because an amendment arguably could have cured the defects in the Neighborhood Association's complaint.[186]

174 *Id.*
175 16 U.S.C. § 1856(a)(1).
176 *Daley*, 209 F.3d 747, 749 (D.C. Cir. 2000).
177 *Chinatown*, 794 F.3d at 1143.
178 *Id.* (quoting *Isla Petroleum*, 485 U.S. 495, 503 (1988)).
179 *Id.* at 1143, 1145.
180 *Id.* at 1145.
181 *Id.* at 1144–45.
182 *Id.* at 1142–43.
183 *Id.* at 1147.
184 *Id.* at 1148 (Reinhardt, J., dissenting) (internal quotation marks omitted).
185 *Id.*
186 *Id.* at 1147.

Because the federal government has the authority to maximize productivity within the EEZ, Judge Reinhardt believed the Shark Fin Law could potentially pose an obstacle to legal shark fishing.[187] Judge Reinhardt believed that if the ban caused fishermen to cease catching sharks in the EEZ, then the ban could unconstitutionally impair the federal objective of achieving optimum yields.[188]

However, Judge Reinhardt's dissent was in large part a procedural one. He did not state an opinion on whether the Neighborhood Association's argument should prevail on the merits, but merely believed that the Neighborhood Association should have at least been granted leave to amend its complaint.[189] Judge Reinhardt felt leave to amend should be freely given and that the Neighborhood Association should have had the opportunity to adequately plead its claim.[190]

## V. IMPLICATIONS OF *CHINATOWN*

*Chinatown* is important for several key reasons. First, the Ninth Circuit reinvigorated the presumption against preemption and recognized the long-standing police power of states to regulate fisheries.[191] Additionally, the court determined the MSA's principal goal is conservation, and did not discern a deliberate intent to balance the other purposes of the MSA.[192] Most importantly, *Chinatown* upheld the Shark Fin Law—a state statute that arguably had incidental effects on the EEZ—after finding that it was consistent with the MSA.[193] Thus, *Chinatown* sets the precedent for interpreting state laws that regulate in-state actions but have potential incidental effects on the EEZ. By recognizing the ability of states to use landing laws, the Ninth Circuit empowered states to take stronger measures to conserve sharks and other fisheries.[194]

### *A. The Ninth Circuit Properly Relied on the Presumption Against Preemption*

The federal government wields much power with its ability to preempt state law. Though the federal government is one of limited powers, those powers are often broadly construed. For example, under the Commerce Clause, Congress has far-reaching authority to regulate commerce.[195] Congress's regulatory powers under the Commerce Clause include

187 *Id.* at 1149–50.

188 *Id.* at 1150.

189 *Id.* ("While I express no opinion on the likelihood that such a claim would ultimately succeed on the merits, the command that 'leave to amend shall be freely given' requires that the plaintiffs at least be given a chance to adequately plead their claim.").

190 *Id.*

191 *Id.* at 1141–1142, 1144 (majority opinion).

192 *Id.* at 1142–43.

193 *Id.* at 1142.

194 *Id.* at 1143–44.

195 U.S. CONST. art. I, § 8, cl. 3.

everything from the power to prohibit the transportation of goods[196] to the power to regulate a commodity meant for home consumption.[197] Congress can reach nearly any field of law through the Commerce Clause, and it can therefore preempt almost any state law if it expresses the intent to do so.[198] Through preemption, Congress can even displace nondiscriminatory state laws that are otherwise constitutional under the dormant commerce clause.[199]

Congress's power to preempt state law is limited perhaps only by the courts' interpretation of legislative intent.[200] If courts narrowly interpret the intent of an act of Congress, the act is less likely to have preemptive effect. On the other hand, if courts broadly interpret the intent of an act of Congress, courts can preempt state laws that marginally interfere with this perceived intent.[201] In between these extremes there is much room for courts to exercise their own judgment. As the Ninth Circuit did in *Chinatown*, courts should use the presumption against preemption to find a showing of Congress's clear intent to preempt before preempting state laws.[202]

In recent decades, courts have preempted state laws with greater frequency.[203] Federal courts often interpret vague provisions of federal statutes and use preemption to negate many state laws.[204] This trend is apparent even in the Supreme Court.[205] For example, in the 1999 and 2000 terms, the Court decided seven preemption cases.[206] In all seven cases, the Court determined that federal law preempted state law.[207] The increased use of preemption has been inexplicable, except perhaps by judges' policy preferences.[208] In fact, empirical studies indicate that judges' policy preferences and politics partly, if not entirely, determine the outcomes in

196 *See, e.g.*, Champion v. Ames (Lottery Case), 188 U.S. 321, 363–64 (1903) (holding that the prohibition of carrying lottery tickets from one state to another falls within Congress's plenary powers).

197 *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (holding that regulation of wheat meant for home consumption falls within Congress's power to regulate prices of commodities under the Commerce Clause).

198 *See supra* notes 196–97 and accompanying text.

199 Carter H. Strickland, Jr., *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations*, 34 ECOLOGY L. Q. 1147, 1151 (2007).

200 *See id.* (discussing Congress' ability to preempt is likely only limited by its intent).

201 *See, e.g.*, *Filburn*, 317 U.S. at 131–33 (holding that regulation of wheat meant for home consumption falls within Congress's power to regulate prices of commodities under the Commerce Clause).

202 *Chinatown*, 794 F.3d 1136, 1141 (9th Cir. 2015).

203 Strickland, *supra* note 199, at 1152.

204 *Id.*

205 Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 307 (2011) (noting that many scholars have shown the Supreme Court's inconsistency in applying the presumption against preemption and that the 2010 term was no exception to this tendency).

206 Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 463 n.222 (2002).

207 *Id.* at 462–63 & 463 n.222.

208 Strickland, *supra* note 199, at 1153.

preemption cases.[209] In the Roberts Court, the conservative justices—with the exception of Justice Thomas—have favored preemption of state law, while the court's liberal justices have tended to favor limiting preemption.[210] Federal preemption often sets aside state regulatory requirements that burden businesses, which is a welcome circumstance for conservatives.[211] Moreover, courts have increasingly used preemption as a tool to undermine state environmental laws.[212] By interpreting the purposes of federal laws in their broadest sense, courts have preempted state laws without faithfully applying the presumption against preemption.[213]

In short, courts have underemployed the presumption against preemption in recent years.[214] With this recent history as a background, it is significant that the Ninth Circuit relied on the presumption against preemption in *Chinatown*. Indeed, the presumption was key to the Ninth Circuit's decision.[215] The Ninth Circuit correctly recognized the states' police powers to regulate their fisheries and correctly applied the presumption against preemption in *Chinatown*.

The presumption against preemption should apply generally, but is especially strong when dealing with an area traditionally governed by the states.[216] It is important to remember that prior to the MSA's enactment, state fishery regulation was the rule, not the exception, and was considered to be among the states' police powers.[217] Thus, the Ninth Circuit's decision did not grant a new power to states to regulate fisheries, but simply recognized a preexisting police power.

Police powers are by no means immune to preemption, but federal law must be clear in its intent to have preemptive effect.[218] Thus, when there is ambiguity in determining whether to preempt state police powers, the traditional rule of construction is to favor state law.[219] The idea behind this rule is that Congress should speak transparently on significant federalism issues.[220] Courts should not have to guess to determine a federal law's scope or meaning, and Congress may always respond to court decisions with legislation. That policy remains as pertinent today as it was in the past.

---

209 *Id.*; David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125 *passim* (1999).

210 Young, *supra* note 205, at 341.

211 Fallon, *supra* note 206, at 471.

212 Strickland, *supra* note 199, at 1153.

213 *See id.* at 1154.

214 *See id.*

215 *Chinatown*, 794 F.3d 1136, 1141 (9th Cir 2015).

216 *Id.* (citing *McDaniel*, 717 F.3d 668, 674 (9th Cir. 2013)).

217 John Winn, Comment, Alaska v. F/V Baranof: *State Regulation Beyond the Territorial Sea After the Magnuson Act*, 13 B.C. ENVTL. AFF. L. REV. 281, 285 (1986).

218 Strickland, *supra* note 199, at 1186.

219 *Id.*

220 *Id.*

### *B. Consequences of a Contrary Holding*

If the Ninth Circuit held the MSA preempted the police power to regulate in-state fisheries, serious consequences would follow. For example, if the MSA preempted the Shark Fin Law, states would be deterred if not completely barred from taking effective measures to conserve sharks and other fisheries. Such an outcome surely would not promote the MSA's purpose of conservation.[221] Additionally, as the Ninth Circuit noted, there are many state laws that incidentally affect the optimum yields prescribed by FMPs.[222] The status of these laws would also be uncertain if the Ninth Circuit held that the MSA preempted the Shark Fin Law.

As mentioned previously, the MSA establishes a partnership between the state and federal government.[223] The MSA encourages federal and state cooperation and such cooperation is desired and needed for the conservation of sharks and other fisheries.[224] Likewise, the decision in *Chinatown* appropriately encourages cooperation between the state and federal government for the common goal of conservation.[225]

Simply put, if conservation is truly the primary purpose of the MSA, then—absent a clear intent by Congress to preempt state law—the MSA should not preempt a state law that furthers this purpose. If states cannot regulate possession and sale of shark fins, they will encounter the same difficulties they faced in the past.[226] Sharks will continue to die in large numbers, and states would be powerless to temper their own contributions to the problem.[227]

### *C. The Ninth Circuit's Decision Signals its Approval of State Landing Laws*

It can be difficult for states to regulate fisheries without the ability to enact laws that may incidentally affect the EEZ.[228] This is especially true when dealing with migratory fish like sharks.[229] Before the Shark Fin Law, laws against shark finning were inadequate because they only prevented shark finning on fishing vessels and did nothing to curb the shark fin importation, exportation, and consumption on land.[230] Therefore,

221 MSA, 16 U.S.C. § 1801(b)(1) (2012).

222 *Chinatown*, 794 F.3d 1136, 1144–45 (9th Cir 2015).

223 *Daley*, 209 F.3d 747, 749 (D.C. Cir. 2000).

224 *See* 16 U.S.C. § 1852 (2012) (establishing regional fishery management councils, comprised of state officials or appointees, to develop fishery management plans).

225 *See Chinatown*, 794 F.3d at 1147.

226 *See supra* note 84 and accompanying text.

227 *See supra* notes 84–85 and accompanying text.

228 *See* Christie, *supra* note 35, at 166 n.428 ("Although [state laws that prohibit landings of fish which can be legally harvested in the EEZ] operate indirectly to regulate vessels beyond state jurisdictions, courts have long held them to be both necessary for enforcement and constitutional.").

229 *See* Walker, *supra* note 4, at 127 (noting "regional, inter-regional, and inter-state cooperation, management, and planning are essential to developing effective management plans" that address the needs of "highly migratory species" like sharks).

230 *Supra* notes 80–83 and accompanying text.

Californians could import shark fins from other states and countries, and could continue to drive the demand for shark fins.[231] Thus, even if shark finning had been criminalized in California waters and in the EEZ, the practice would continue elsewhere and Californians could continue to demand and consume shark fins. In other words, prior to the Shark Fin Law, shark finning laws were easily circumvented and did little to mitigate the rapid decline of shark populations. Californians saw shark finning as a serious problem, but were powerless to stem the state's appetite for shark fins.[232] The apparent solution to this problem was to ban the possession and sale of shark fins altogether.[233] Thus, California, as well as several other states decided to take action to reduce the demand for shark fins.[234]

The Ninth Circuit's holding in *Chinatown* essentially authorizes state landing laws and equips states with a powerful means to effectively conserve fisheries. The benefit of landing laws is that they do not distinguish between fish caught within state waters and fish caught extraterritorially.[235] This makes landing laws extremely useful because they avoid many enforcement difficulties that arise when state laws vary from laws in other states or from laws regulating fisheries in the EEZ.[236] By authorizing state landing laws like the Shark Fin Law, the Ninth Circuit enables states to take a more active role in fishery conservation.

Landing laws also provide a practical means of regulating migratory fish that move freely between state waters and the EEZ. At the same time, landing laws merely regulate conduct in-state. With landing laws, it does not matter where the fish originated; rather, what matters is that he fish are subject to state management once they "land" in a state's jurisdiction.[237] After *Chinatown*, the Ninth Circuit essentially resolved any question as to the constitutionality of state landing laws by upholding the Shark Fin Law.

### *D. What Lies Ahead: States Are Putting the Concerns from NMFS to Rest*

In its opinion in *Chinatown*, the Ninth Circuit failed to mention the concerns of NMFS that state shark fin prohibitions could potentially interfere with the MSA.[238] In May 2013, NMFS issued a notice in the Federal

231 *See* Zusha Elinson, *Shark-Fin Bans Hard to Police: Officials Must Contend with a Growing List of Laws to Enforce*, WALL STREET J., Feb. 24, 2014, http://on.wsj.com/1zCxgNU (last visisted July 16, 2016) (explaining that while United States restrictions on shark finning are increasing, the importations have not decreased).

232 *See Chinatown*, 794 F.3d 1136, 1140 (9th Cir. 2015) (explaining that despite previous legislative efforts in the 1990s, massive amounts of sharks continued to be killed per year, and California's large shark fin market was a big player driving the demand).

233 *See* CAL. FISH & GAME CODE § 7704(c) (West 2013).

234 *See* Elinson, *supra* note 231.

235 Winn, *supra* note 217, at 290.

236 *See id.* at 289–90 (explaining that since landing laws do not distinguish between fish caught within the state or fish caught on the high seas, the laws expand the state's jurisdiction and "represent[] a practical solution to the enforcement problems of coastal states.").

237 *See id.* at 290–91 (discussing how landing laws are important tools in the enhancement and conservation of migratory fish and what it means for fish to land).

238 *Chinatown*, 794 F.3d 1136 (9th Cir. 2015) (containing no reference to NMFS's concerns).

Register proposing a new rule that expressed intent to preempt almost all shark fin bans.[239] According to the proposed rule, "[s]tate prohibitions on possession, landing, transfer, or sale of sharks or shark fins" hinder uniformity in the regulation of the practice of shark finning.[240] Therefore, the rule would preempt any state laws that are inconsistent with the SCA, the MSA, or any other related regulations.[241] While this is only a proposed rule, if the proposed rule became a final rule and contained such express preemption language, then the rule could obviate the Ninth Circuit's analysis in *Chinatown*. However, because a final rule has not been promulgated, there remains no clear intent in the MSA to preempt state law.

NMFS expressed concerns that the Shark Fin Law may present an obstacle with federal management of fisheries under the MSA. Under the SCA, fishermen can legally harvest sharks with their fins attached in the EEZ and legally detach the fins upon landing.[242] With California's ban, the same fishermen landing sharks in California would be deprived of the shark fins—the most valuable part of the catch.[243] For this reason, NMFS determined that state laws that prohibit possession and sale of shark fins impermissibly interfere with the achievement of MSA purposes and objectives.[244]

However, states have largely assuaged NMFS's concerns about state shark fin bans.[245] For example, in California, the California Department of Fish and Wildlife consulted with NMFS regarding the Shark Fin Law's effect on the fishermen in the EEZ.[246] The California Department of Fish and Wildlife noted that properly licensed fishermen are exempted from the ban on possession.[247] Therefore, because fishermen who fish in federal waters

239 *See* Magnuson-Stevens Act Provisions; Implementation of the Shark Conservation Act of 2010, 78 Fed. Reg. 25,685, 25,687 (proposed May 2, 2013) (to be codified at 50 C.F.R. pt. 600).

240 *Id.* at 25,686.

241 *Id.* at 25,687.

242 SCA, Pub. L. No. 111-348, § 103, 124 Stat. 3668, 3670 (2011) (codified as amended at 16 U.S.C. § 1857(1) (2012)).

243 *See* CAL. FISH & GAME CODE § 7704(c) (West 2013).

244 78 Fed. Reg. at 25,687 ("If sharks are lawfully caught in federal waters, state laws that prohibit the possession and landing of those sharks with fins naturally attached or that prohibit the sale, transfer or possession of fins from those sharks unduly interfere with achievement of Magnuson-Stevens Act purposes and objectives.").

245 *See* NOAA Fisheries, *Shark Conservation in the United States and Abroad*, http://www.nmfs.noaa.gov/stories/2013/07/7_15_13shark_conservation_us_and_abroad.html (last visited July 16, 2016) (declaring in "Recent Updates" that "[r]ecent letters document NOAA's view that California, the Commonwealth of the Northern Mariana Islands, Delaware, Hawaii, Maryland, Massachusetts, New York, Oregon, and Washington state laws do not conflict with the purpose and objectives of the MSA" and that "NOAA Fisheries continues to engage with other states on this issue.").

246 *See* Letter from Charlton H. Bonham, Dir., Cal. Dep't of Fish & Wildlife, to Eileen Sobeck, Assistant Adm'r for Fisheries, Nat'l Oceanic and Atmospheric Admin. (Feb. 3, 2014), *available at* http://www.nmfs.noaa.gov/stories/2014/02/docs/california.pdf (memorializing the discussion between California's Department of Fish and Wildlife and NMFS); *see also* Letter from Eileen Sobeck, Assistant Adm'r for Fisheries, Nat'l Oceanic and Atmospheric Admin., to Charlton Bonham, Dir., California Dep't of Fish and & Wildlife (Feb. 3, 2014), *available at* http://www.nmfs.noaa.gov/stories/2014/02/docs/california.pdf. (same).

247 Bonham, *supra* note 246, at 1–2.

with federal licenses are also required to hold state licenses, these fishermen would be exempted from the ban on shark fin possession.[248] Furthermore, the California Department of Fish and Wildlife found that relatively few sharks are actually caught in federal waters and landed in California.[249] NMFS agreed with these determinations, and also found that reported revenue from the sale of sharks harvested in the EEZ derives mostly from the sale of meat of the shark, not from the sale of fins sold after the shark.[250] Therefore, the Shark Fin Law's prohibition on possession and sale of shark fins would only have a trivial impact on fishermen in the EEZ.[251] Thus, California resolved NMFS's concerns by interpreting the Shark Fin Law so that it exempts federally licensed fishermen from the state ban.[252] Under this interpretation, NMFS confirmed that the Shark Fin Law does not create an obstacle to the MSA.[253] Nearly all other states with state shark fin bans have similarly interpreted their laws so that the state laws will not be preempted.[254] This seems to be the compromise that state and federal governments are likely to make going forward.

Under these circumstances, states are free to enact laws prohibiting possession and sale of shark fins, so long as they make an exception for federally licensed fishermen. However, fishermen in the EEZ generally did not drive the shark fin trade in the first place.[255] Because shark fishing in the EEZ for shark fins has been minimized if not eliminated thanks to the SCA, exempting federally licensed fishermen from state shark fin bans is an easy compromise for states to make.[256] By doing so, states can ensure that their shark fin bans will not be preempted and can target and prohibit in-state importation, exportation, and consumption of shark fins. Thus, even with the language of NMFS's proposed rule, statewide shark fin bans will still be effective and are unlikely to be preempted.

The Ninth Circuit's decision in *Chinatown* is especially important because the Ninth Circuit has jurisdiction over the entire West Coast.[257] Therefore, the Ninth Circuit essentially upheld the shark fin laws of every state along the Pacific Ocean. Furthermore, the Ninth Circuit controls a plurality of states with shark fin bans, with four of the ten such states under

248 *Id.*

249 *Id.*

250 Sobeck, *supra* note 246, at 1.

251 *Id.*

252 Bonham, *supra* note 246, at 1–2.

253 Sobeck, *supra* note 246, at 1.

254 *See* Baker, *supra* note 9, at 111–13 (describing California, Maryland, and Washington's successful efforts at avoiding federal preemption in this regard).

255 *See* Bonham, *supra* note 246, at 2.

256 *See* NAT'L MARINE FISHERIES SERV., 2014 SHARK FINNING REPORT TO CONGRESS app. at 7, 9 (2014) (showing decreasing number of annual commercial shark landings for EEZs in California, Oregon, and Washington).

257 U.S. Courts for the Ninth Circuit, *Map of the Ninth Circuit*, http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000135 (last visited July 16, 2016).

its jurisdiction.[258] Thus, *Chinatown* will have tremendous influence in the field of shark and fishery conservation.

While *Chinatown* marks a great victory for shark and fishery conservation, its holding could have a greater impact. The Ninth Circuit's holding gives the green light for similar state laws to regulate other fisheries that may also need protection.[259] For example, in addition to sharks, the shark fin trade also targets rays, and some rays are not only threatened, but also endangered.[260] While the California Shark Fin Law also applies to rays,[261] other state shark fin laws do not.[262] Under the Ninth Circuit's decision in *Chinatown*, states may enact laws similar to the Shark Fin Law to protect other fisheries, like rays.

The decision in *Chinatown* affords much discretion to states to control their fisheries and ocean ecosystems.[263] Under the Ninth Circuit's decision in *Chinatown*, states can take a more active role in regulating fisheries and no longer have to be spectators as fisheries are depleted. The Ninth Circuit's decision grants states the authority to control in-state conduct even when such regulation may incidentally affect activities in the EEZ.[264]

## VI. CONCLUSION

Before *Chinatown*, the extent to which states could enact landing laws that incidentally affected fishery management in the EEZ was unclear. Fortunately, the Ninth Circuit provided guidance in *Chinatown*, setting a clear precedent for interpreting future state laws that may affect the EEZ. By reinvigorating the presumption against preemption, the Ninth Circuit properly placed the burden on the federal government to unambiguously define state government limits in the field of fishery management.

Additionally, the Ninth Circuit concluded that conservation is the primary purpose of the MSA. To achieve this purpose, the state and federal government must work in tandem. While the federal government has exclusive control over fishery management in the EEZ, states have a certain degree of autonomy within their boundaries. The Ninth Circuit correctly

258 *See* Oceana, *supra* note 86 (listing Hawaii, California, Oregon, and Washington as states with shark fin bans).

259 *See Chinatown*, 794 F.3d 1136, 1147 (9th Cir. 2015).

260 *See* Baker, *supra* note 9, at 98 (footnotes omitted) ("Skates and rays are close relatives of the shark and face many of the same threats, including value as part of the market for shark fin soup. . . . [I]n 2003, NMFS designated the U.S. Stock of smalltooth sawfish as a distinct population segment and listed the group as endangered under the Endangered Species Act."); *see also* Dulvy et al., *supra* note 3, at 4 ("Shark-like rays, especially sawfishes, wedgefishes and guitarfishes, have some of the most valuable fins and are highly threatened.").

261 *See* CAL. FISH & GAME CODE § 2021(a) (West 2013) ("As used in this section 'shark fin' means the raw, dried, or otherwise processed detached fin, or the raw, dried, or otherwise processed detached tail, of an elasmobranch."); *see also* Baker, *supra* note 9, at 108 ("California is unique in that the language of its statute specifies the 'fin or tail of an elasmobranch.' This seemingly expands the term to include skates and rays.").

262 *See* Baker, *supra* note 9, at 108.

263 *See Chinatown*, 794 F.3d at 1147.

264 *Id.* at 1142.

held in *Chinatown* that the Shark Fin Law is consistent with the MSA. Therefore, absent a clear showing of federal intent to preempt state law, the MSA does not preempt state landing laws that promote conservation.

The Ninth Circuit's decision in *Chinatown* is a tremendous step forward for fishery conservation. The decision benefits not only sharks, but other fisheries as well by giving states the ability to utilize landing laws like the Shark Fin Law, so long as such laws are otherwise consistent with the MSA. Though prohibiting shark fins at the state level will not halt shark mortality, it is a good place to start.[265] The Ninth Circuit made a progressive decision in *Chinatown* that will greatly promote the primary purpose of the MSA that is conservation.

265 State efforts to conserve sharks have been recently mirrored by the federal government. On June 23, 2016, several Senators introduced a bipartisan bill to prohibit the sale of shark fins in the United States. Shark Fin Trade Elimination Act of 2016, S. 3095, 114th Cong. (2016).