

# **CUTTING THE FINS OFF OF FEDERAL SHARK LAWS: A Cooperative Federalism Approach to Shark Finning Legislation**

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This Comment examines the relationship between the National Oceanic and Atmospheric Administration's (NOAA) newly proposed shark finning rule and existing state shark finning legislation. Specifically, the analysis concludes that the NOAA rule should not be adopted as proposed because it would effectively weaken existing state laws, which are essential to protect the environment as well as sharks. In the alternative, this Comment maintains that cooperative federalism should be employed, as it has been for environmental laws in the past, to allow for a coexistence of federal and state law.

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## I. INTRODUCTION

Imagine spending up to one hundred-fifty dollars on a single bowl of soup.<sup>1</sup> While this idea may sound far-fetched, it has been common practice for Chinese elite to spend a pretty penny on this delicacy for thousands of years.<sup>2</sup> One ingredient is responsible for making a bowl of broth so expensive—shark fin.<sup>3</sup> Over the past decade, the practice of shark finning—i.e., catching sharks, cutting off their fins, and returning the sharks to the ocean<sup>4</sup>—has become increasingly popular in order to meet the high demand for this unusual ingredient.<sup>5</sup> Shark fin soup is a regular staple at important Chinese functions such as weddings<sup>6</sup> and corporate dinners.<sup>7</sup> The culinary standard at such events symbolizes wealth and prestige.<sup>8</sup> Recent estimates value the shark fin industry at upwards of one billion dollars.<sup>9</sup> However, not everyone is on board with the commercial use of shark fin and the practice of shark finning. The practice of shark finning has become such a hotly debated topic that the NOAA has proposed legislation to address the issue.<sup>10</sup>

The NOAA is a federal scientific agency within the United States Department of Commerce.<sup>11</sup> The National Marine Fisheries Service (NMFS) is the division of the NOAA responsible for conserving and managing coastal

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1. Mark D. Evans, *Shark Conservation: The Need for Increased Efforts to Protect Shark Populations in the Twenty-First Century*, 10 PENN ST. ENVTL. L. REV. 13, 20 (2001).

2. See Jessica Spiegel, Note, *Even Jaws Deserves to Keep His Fins: Outlawing Shark Finning Throughout Global Waters*, 24 B.C. INT'L & COMP. L. REV. 409, 411 (2001).

3. “Shark fin soup is made from the ceratohchrichia, or fin needles. These are the slender fibers that lie between the cartilage in the shark fin.” Andrew Nowell Porter, *Unraveling the Ocean From the Apex Down: The Role of the United States in Overcoming Obstacles to An International Shark Finning Moratorium*, 35 ENVIRONS ENVTL. L. & POL'Y J. 231, 235 (2012).

4. See, e.g., Evans, *supra* note 1, at 19; Spiegel, *supra* note 2, at 410; Rebecca Tatum, *Chapter 524: The Ecology and Controversy of Shark-Fin Soup*, 43 MCGEORGE L. REV. 667, 688 (2012).

5. See Ingrid M. Gronstal Anderson, Note, *Jaws of Life: Developing International Shark Finning Regulations Through Lessons Learned From the International Whaling Commission*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 511, 512 (2011).

6. In 2009, only five percent of married couples in Hong Kong chose to offer completely shark-free menus at their weddings. Bettina Wassener, *Environmental Cost of Shark Finning Is Getting Attention in Hong Kong*, N.Y. TIMES (June 20, 2010), [http://www.nytimes.com/2010/06/21/business/global/21iht-green.html?\\_r=0](http://www.nytimes.com/2010/06/21/business/global/21iht-green.html?_r=0).

7. *Id.*

8. *Id.*

9. Stijn van Osch, Note, *Save Our Sharks: Using International Fisheries Law Within Regional Fisheries Management Organizations to Improve Shark Conservation*, 33 MICH. J. INT'L L. 383, 390 (2012).

10. See *infra* Part IV.

11. *About NOAA*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <http://www.noaa.gov/about-noaa.html> (last visited Oct. 23, 2014).

and marine ecosystems and resources within the United States.<sup>12</sup> Partly in response to the global attention shed on the practice of shark finning, in May 2013 the NMFS proposed a rule designed to implement provisions of the 2010 Shark Conservation Act, which made it illegal to possess, transfer, or land with shark fins not naturally attached to the corresponding carcass.<sup>13</sup> This proposed rule is inconsistent with, and arguably less stringent than, many existing state and territorial laws. Further, the rule contains a preemption clause that could render these state laws unavailing.<sup>14</sup>

Congress should not adopt the NOAA's rule as proposed because it will effectively weaken existing state laws, which are essential to protect sharks. Further, the rule, if adopted, would lead to adverse environmental outcomes. Should the NOAA rule be adopted as proposed, this Comment maintains that state laws will not be preempted, notwithstanding the rule's preemption clause. In the alternative, this Comment advocates a cooperative federalism approach that would allow the NOAA rule to coexist with, rather than preempt, existing state laws.

Part II examines the shark finning industry and the resulting environmental impacts. Part III continues by discussing existing federal, state, and international legislation enacted to address shark finning. Part IV outlines the NOAA's recently proposed rule. Finally, Part V analyzes the effects of the proposed rule and offers a solution: the proposed rule should be amended to explicitly state that existing state laws will not be preempted, and a cooperative federalism approach should be adopted to allow federal and state legislative efforts to coexist.

## II. THE SHARK FINNING INDUSTRY

This Part explores the history and effects of shark finning. Examining the shark finning industry and the environmental consequences thereof allows us to clearly understand why legislation was enacted to address the issue in the first place, as well as why further legislation is needed. Shark finning has been around for thousands of years, originating as a staple of Chinese culture.<sup>15</sup> The practice has gained notoriety more recently however, as

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12. *About National Marine Fisheries Service*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. FISHERIES, <http://www.nmfs.noaa.gov/aboutus/aboutus.html> (last visited Oct. 23, 2014).

13. Shark Conservation Act of 2010, Pub. L. No. 111-348, sec. 103, § 1(P)(i-iv), 124 Stat. 3668 (2010) (codified as amended at 16 U.S.C. § 1857 (2011)).

14. 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).

15. *See infra* Part II.A.

environmental impacts of shark finning have come to light.<sup>16</sup> Sharks play an important role in the ecosystem and possess unique characteristics that put them in danger when practices like finning are left unchecked.<sup>17</sup> This makes the environmental impacts of the practice potentially devastating

A. *History of the Shark Finning Industry*

The practice of shark finning began more than 2200 years ago when the Chinese started acquiring fins for use in shark fin soup.<sup>18</sup> The demand for shark fin exploded in the 1980s with the expansion of the Chinese middle class, as more and more people could afford the soup that was once only enjoyed by the elite.<sup>19</sup> For the Chinese, enjoying shark fin soup has become a celebratory ritual, the equivalent of popping open a bottle of champagne.<sup>20</sup> Currently, as many as seventy-three million sharks are killed worldwide every year just for their fins.<sup>21</sup>

Shark fins are acquired through “finning,” which is the process of catching a shark, pulling it aboard the boat, cutting off its fins, and tossing the shark back into the ocean.<sup>22</sup> While shark meat can be consumed, the market for fins alone is far more lucrative, selling for an average of over sixty dollars per kilogram and reaching up to hundreds of dollars per fin.<sup>23</sup> Shark *meat*, by contrast, is only worth a fraction of that price, at about two dollars per kilogram.<sup>24</sup> For this reason, fishermen prefer to reserve capacity on their vessels for the fins, rather than filling up profitable space with bulky carcasses.<sup>25</sup> Once the finless shark is thrown back into the ocean, it often sinks to the bottom, unable to swim, and dies from lack of oxygenated water flowing over its gills or from blood loss.<sup>26</sup>

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16. See *infra* Part II.B.

17. See *id.*

18. See Spiegel, *supra* note 2, at 411.

19. *Id.*

20. Krista Mahr, *Shark-Fin Soup and the Conservation Challenge*, TIME (Aug. 09, 2010), <http://content.time.com/time/magazine/article/0,9171,2021071,00.html>.

21. E.g., Tatum, *supra* note 4, at 674; Wassener, *supra* note 6; Letter from Ten Senators to Dr. Kathryn Sullivan, Acting Adm’r, Nat’l Oceanic & Atmospheric Admin. (July 31, 2013) available at <http://www.cantwell.senate.gov/public/index.cfm/press-releases?ID=c16fdebb-9a92-4624-a72b-898b902199d7>.

22. See, e.g., Evans, *supra* note 1, at 19; Porter, *supra* note 3, at 233; Tatum, *supra* note 21, at 668.

23. Porter, *supra* note 3, at 237.

24. *Id.* at 237–38.

25. See, e.g., Paula Walker, *Oceans in the Balance: As Sharks Go, So Go We*, 17 ANIMAL L. 97, 99 (2010); Lisa Ling, *Shark fin soup alters an ecosystem*, CNN (Dec. 15, 2008), <http://www.cnn.com/2008/WORLD/asiapcf/12/10/pip.shark.finning/>.

26. Anderson, *supra* note 5, at 513.

Though China and Hong Kong are the undeniable leaders in consumption of shark fin soup,<sup>27</sup> the dish can be found on menus elsewhere, including the United States.<sup>28</sup> While advocates of shark finning cite to the long history and cultural importance of the practice, scientists have claimed that the industry is not sustainable and have pointed to potentially devastating environmental effects.<sup>29</sup> Richard Thomas, communications director at Traffic, an organization which monitors wildlife trade, has predicted that “[i]f sharks continue to be overfished at the current rate, it’s only a matter of a few years before the targeted species are extinct.”<sup>30</sup> With the disappearance of sharks a possibility on the horizon, many people, from environmentalists to politicians, have started to focus on the specific environmental impacts of the shark finning industry.

### B. *Environmental Impacts of the Shark Finning Industry*

Sharks have been swimming the Earth’s oceans for almost 450 million years.<sup>31</sup> An adaptive and versatile creature, sharks have survived five mass extinctions, including an event 250 million years ago in which 95% of living species were rendered extinct.<sup>32</sup> Yet with no global catastrophic event to speak of today, sharks—one of the most historically resilient creatures—suddenly find themselves in the midst of a considerably dramatic population decline. As many as one third of shark species are on the verge of extinction.<sup>33</sup> Researchers agree that the rapidly increasing demand for fins to use in shark fin soup is driving this downward population trend.<sup>34</sup>

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27. Matthew Kassel, *Here’s What Happens When You Order A \$65 Bowl of Shark Fin Soup*, BUS. INSIDER (Mar. 19, 2012), <http://www.businessinsider.com/new-york-could-ban-shark-fin-trade-2012-3>. The city of Hong Kong alone is responsible for the consumption of roughly 6.6 million pounds of shark per year. Spiegel, *supra* note 2, at 411.

28. See *Restaurants Currently Offering Shark Fin*, ANIMAL WELFARE INST., <https://awionline.org/content/restaurants-currently-offering-shark-fin-soup#Top> (last visited Oct. 24, 2014).

29. See, e.g., Kassel, *supra* note 27 (stating that scientists identify the shark fin trade as an unsustainable practice, causing the collapse of shark populations around the world).

30. Spiegel, *supra* note 2, at 413 (“Sharks preferred for shark-fin soup are the sandbar, bull, hammerhead, blacktip, porbeagle, mako, thresher, and blue.”); Wassener, *supra* note 6.

31. *450 Million Years of Sharks*, SHARK SAVERS, <https://www.sharksavers.org/en/education/biology/450-million-years-of-sharks1/> (last visited Oct. 24, 2014).

32. *Id.*

33. E.g., Tatum, *supra* note 4, at 668; *Sharks: Background*, WILDAID, <http://wildaid.org/sharks> (last visited Oct. 24, 2014).

34. Tatum, *supra* note 12, at 668; see also, Ling, *supra* note 25 (“By contrast, humans kill around 100 million sharks every year—a number that has ballooned in recent years because of the enormous demand for shark fins to make shark fin soup.”). It should be noted that shark

Unlike many fish species, sharks possess a unique biology that makes it more difficult for populations to replenish after overfishing.<sup>35</sup> First, sharks tend to reach reproductive maturity later in life, and are often not able to reproduce until they are ten years or older.<sup>36</sup> Additionally, sharks are similar to humans in that a female shark will produce relatively few offspring.<sup>37</sup> While other fish species produce hundreds of eggs with the hope that environmental factors will allow a good number to survive, sharks have a much smaller mother-to-young ratio.<sup>38</sup> Finally, sharks have a longer gestation period than even humans do, with a mother carrying her young for up to two years before giving birth.<sup>39</sup> This unique biology combined with the fact that many sharks are apex predators, and thus are scarce to begin with,<sup>40</sup> renders them especially susceptible to irreversible population depletions. When an animal at the top of the food chain finds itself in this position, the ecosystem operating below this predator can suffer detrimental effects.<sup>41</sup>

Despite the vastness of the ocean, the creatures that inhabit it are interconnected, meaning that changes in ecology at one level have reverberations several steps removed.<sup>42</sup> Most sharks are apex predators,

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finning is not the only practice that puts sharks in danger, but “it is the least sustainable fishing practice, and is the largest threat for species extinction from commercial shark fishing.” Anderson, *supra* note 5, at 513. Shark products are also used for things other than shark fin soup. *See* Spiegel, *supra* note 2, at 413–14 (explaining that sharks are valuable not only for use in soup, but also to make artificial skin for burn victims, to make high quality leather, etc.).

35. *See, e.g.*, Evans, *supra* note 1, at 15; Tatum, *supra* note 4, at 674–75; Mahr, *supra* note 20.

36. *Sharks*, BIRCH AQUARIUM AT SCRIPPS INST. OF OCEANOGRAPHY, [http://aquarium.ucsd.edu/Education/Learning\\_Resources/Creature\\_Features/Sharks/](http://aquarium.ucsd.edu/Education/Learning_Resources/Creature_Features/Sharks/) (last visited Oct. 24, 2014).

37. *Id.*

38. Evans, *supra* note 1, at 15.

39. *E.g.*, Tatum, *supra* note 21, at 675.

40. *E.g.*, Evans, *supra* note 1, at 15. Explaining why apex predators are rare is complicated and involves, in part, the second law of thermodynamics. This law commands that the harvesting of solar energy cannot be 100% efficient. In fact, plants are less than 10% efficient at converting solar energy, with 90% lost as heat. This pattern is repeated as the energy is transferred from plants to herbivores and again from herbivores to carnivores. “Of the 1000 calories of solar energy captured by a plant, 100 calories are available for a deer, and 1 calorie is available to a wolf, to grow, reproduce, and have enough strength and energy to hunt again. For this simple reason alone, predators generally can never number more than 10% of their prey.” Joe Scott, *Predators and their prey—why we need them both*, CONSERVATION NW., <http://www.conservationnw.org/what-we-do/predators-and-prey/carnivores-predators-and-their-prey> (last visited Oct. 24, 2014).

41. *See, e.g.*, Tatum, *supra* note 21, at 675.

42. *See Overfishing Large Sharks Impacts Entire Marine Ecosystem, Shrinks Shellfish Supply*, SCI. DAILY (Mar. 29, 2007), <http://www.sciencedaily.com/releases/2007/03/070329145922.htm> (quoting Charles Peterson, a professor of marine sciences biology and ecology at the University of North Carolina at Chapel Hill).

meaning that they control populations of the species they prey on.<sup>43</sup> This means that when an apex predator's population severely declines or is wiped out the population of its prey species increases dramatically, such that there is not enough of the prey species' food source to go around.<sup>44</sup> Such unchecked population growth of prey species can lead to population crashes and out-of-balance ecology.<sup>45</sup> In fact, researchers have blamed the collapse of entire fisheries on the absence of sharks.<sup>46</sup> North Carolina's century-old bay scallop fishery along the Atlantic Coast of the United States provides an example of a fishery adversely affected by the decline in shark populations.<sup>47</sup> In 2007, a team of ecologists led by Professor Charles Peterson published the first field experiment showing how over-fishing of predator sharks along the Atlantic Coast resulted in serious damage to food fisheries such as scallops.<sup>48</sup> In 2004, the population of cownose rays, a usual prey species of Atlantic sharks, got so out of control that the rays were consuming too many scallops, causing a shortage that shut down the scallop fishery, which had thrived in North Carolina for over one hundred years.<sup>49</sup> Examples like this have led to concern for the fate of other commercially essential fisheries worldwide.<sup>50</sup> As a result of the important role that sharks play in the larger ecosystem, legislation to protect them has already been enacted at the state and federal level and continues to be proposed to address these issues.

### III. EXISTING LEGISLATION

The history of shark finning legislation illustrates the evolving efforts to balance commercial and recreational fishing with conservation. The surge in demand for shark fin over the past few decades and corresponding declines in shark populations led conservationists to push for remedial legislation.<sup>51</sup> Over time, laws of varying strengths have been imposed at the federal, state, and international levels and most recently a handful of states have implemented the most stringent shark finning laws to date.

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43. Tatum, *supra* note 4, at 675.

44. *Id.*

45. *Id.*

46. Walker, *supra* note 25, at 100.

47. Census of Marine Life, *Effects of Shark Decline*, MARINE LIFE DISCOVERIES, [http://www.coml.org/discoveries/discoveries/future\\_trends/shark\\_decline.htm](http://www.coml.org/discoveries/discoveries/future_trends/shark_decline.htm) (last visited Oct. 24, 2014).

48. *Overfishing Large Sharks*, *supra* note 42.

49. Census of Marine Life, *supra* note 47.

50. *Id.*

51. *See* Spiegel, *supra* note 2, at 419.

*A. Existing Federal Legislation*

In 1976, the United States Congress enacted the primary law governing fishing and fisheries in federal waters and called it the Magnuson-Stevens Fishery Conservation and Management Act<sup>52</sup> (Magnuson-Stevens Act). The Magnuson-Stevens Act created a fishery conservation zone over which the United States would have exclusive management.<sup>53</sup> One enumerated purpose of the Magnuson-Stevens Act is “to promote domestic commercial and recreational fishing under sound conservation and management principles.”<sup>54</sup> Another purpose is to provide for the creation of Regional Fishery Management Councils that will, from time-to-time, revise fishery management plans to address the social and economic needs of the States.<sup>55</sup>

In 2000, Congress amended the Magnuson-Stevens Act by enacting the Shark Finning Prohibition Act (SFPA).<sup>56</sup> The SFPA was first proposed in the House of Representatives with the purpose of “eliminat[ing] the wasteful and unsportsmanlike practice of shark finning.”<sup>57</sup> The SFPA added to the Magnuson-Stevens Act’s prohibited acts list by specifying that it will be unlawful for any person “to remove any of the fins of a shark (including the tail) and discard the carcass of the shark at sea.”<sup>58</sup> The SFPA allows for fishermen to have shark fins aboard their vessel and to land with shark fins, so long as the corresponding carcass for each fin is also present.<sup>59</sup> The SFPA also provides that if the shark fins aboard a vessel comprise more than 5% of the total weight of the carcasses present, there is a presumption that the fins were taken in violation of the SFPA.<sup>60</sup>

In 2010, Congress again amended the Magnuson-Stevens Act when it passed the Shark Conservation Act (SCA).<sup>61</sup> The SCA sought to further protect sharks by making it illegal to transfer shark fins from one vessel to another at sea and to receive shark fins in such a transfer, without the fin

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52. *See id.* at 414.

53. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, sec. 101, 90 Stat. 331, 336 (1976) (codified at 16 U.S.C. §§ 1801–82).

54. *Id.* at sec. 2, § (b)(3).

55. *Id.* at § 2(b)(5)(B).

56. Shark Finning Prohibition Act, Pub. L. No. 106-557, 114 Stat. 2772, 2772 (2000) (codified at 16 U.S.C. § 1822).

57. Shark Finning Prohibition Act, H.R. 5461, 106th Cong. (2000) (enacted).

58. Shark Finning Prohibition Act, Pub. L. No. 106-557, sec. 3, § 307(1)(3)(P)(i), 114 Stat. 2772, 2772 (2000) (codified at 16 U.S.C. § 1822(1) (2012)).

59. *Id.* at sec. 3, § 307(1)(3)(P)(ii),.

60. *Id.* at § 307(1).

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

naturally attached to the corresponding carcass.<sup>62</sup> The SCA effectively closed a loophole in federal shark finning laws because prior to its enactment fishermen could just catch and fin a shark on one boat and then transfer the fins to another boat, meaning that enforcement was essentially impossible unless a fisherman was caught in the act of finning.<sup>63</sup> The SCA applies to “any person subject to the jurisdiction of the U.S., including persons on board U.S. and foreign vessels” who engages in activities made unlawful by the statute.<sup>64</sup> The SCA however, does not directly address the trade in detached shark fins within the United States after the fins have left a vessel. Theoretically, fishermen could bring shark carcasses ashore in compliance with the SCA, fin the shark, and then dump the body back into the ocean. Thus, while the SCA closed one loophole, it created another. Existing federal legislation may not be airtight, but many states and territories have enacted even stricter legislation to deal with the problem of shark finning.

### B. Existing State and International Legislation

In 2010, Hawaii became the first government in the world to ban the sale, possession, trade, and distribution of shark fins.<sup>65</sup> The law imposes a strict penalty, with even first time offenders being subject to a fine of up to \$15,000.<sup>66</sup> Essentially, Hawaii’s law expanded efforts to regulate shark finning by making it illegal for fishing vessels to land in Hawaiian ports with shark fins.<sup>67</sup> The law took shark fin regulation one step further by regulating possession and sale of shark fins by anyone *in the state* as opposed to only

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62. *Id.* at sec. 103, § (1)(P)(iii). “For the purpose of the SCA and these regulations, ‘naturally attached,’ with respect to a shark fin, means to be attached to the corresponding shark carcass through some portion of the uncut skin.” Magnuson-Stevens Act Provisions; Implementation of the Shark Conservation Act of 2010, 78 Fed. Reg. 25,685, 25,686 (proposed May 2, 2013) (to be codified at 50 C.F.R. pt. 600).

63. Tatum, *supra* note 4, at 673.

64. Magnuson-Stevens Act Provisions; Implementation of the Shark Conservation Act of 2010, *supra* note 62, at 25,687.

65. Tim Sakahara, *Shark fin proposal divides federal and state government in Hawaii*, HAWAII NEWS NOW (last updated June 27, 2013, 11:10 PM), <http://www.hawaiinewsnow.com/story/22709601/shark-fin-proposal-divides-federal-and-state-government-in-hawaii>. It should be noted that Hawaii’s ban on shark fins does not apply to everyone. Subsection (b) of the law clarifies that those in possession of state-issued licenses or permits to conduct research and those who have shark fins for educational purposes will not be penalized under the law. HAW. REV. STAT. § 188-40.7(b) (2014).

66. *Id.* § 188-40.7(d)(1).

67. Audrey McAvoy, *Hawaii to make eating shark fins illegal*, NBC NEWS (last updated May 29, 2010, 5:58:52 PM), [http://www.nbcnews.com/id/37416078/ns/us\\_news-environment/t/hawaii-make-eating-shark-fins-illegal/](http://www.nbcnews.com/id/37416078/ns/us_news-environment/t/hawaii-make-eating-shark-fins-illegal/).

fishermen in the business of finning sharks.<sup>68</sup> The law “close[d] an enforcement loophole which ha[d] allowed Hawaii to be the Pacific hub for the shark fin trade in Asia and beyond.”<sup>69</sup> Since Hawaii’s ban was implemented, many other states and territories have followed suit.<sup>70</sup> The problems associated with the practice of shark finning are not exclusive to the United States, however, and international legislation has become increasingly prohibitive as well.<sup>71</sup>

In the last nine years, at least sixty nations have banned shark finning.<sup>72</sup> For example, the United Kingdom has imposed national shark finning regulations similar to the federal laws seen in the United States.<sup>73</sup> In 2009, Britain made it illegal to fin sharks aboard British licensed fishing vessels.<sup>74</sup> Both Britain and Scotland stopped issuing shark-finning permits and as a result, any fishing boat registered in the United Kingdom is barred from having a finless shark aboard.<sup>75</sup> In Canada, shark finning within territorial waters is already illegal and recently there has been a push in the country’s Parliament to go further and ban the importation of shark fins as well.<sup>76</sup> While shark finning regulations have been developing abroad, the United States has continued to refine domestic legislation.

#### IV. THE NOAA’S NEWLY PROPOSED LEGISLATION

In early May 2013, the National Marine Fisheries Service (NMFS) proposed a rule designed to implement provisions of 2010’s SCA into the NMFS’s own regulations.<sup>77</sup> This Part will introduce the NMFS in greater detail and examine its newly proposed rule and the problems associated with it.

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68. *Id.*

69. *No More Shark Fin Soup: Hawaii’s Shark Fin Ban Takes Effect*, ENV’T NEWS SERV. (June 30, 2010), <http://www.ens-newswire.com/ens/jun2010/2010-06-30-093.html>.

70. Washington, California, Oregon, Illinois, Maryland, Delaware, American Samoa, Guam, and the Northern Mariana Islands are examples of other governments that have followed Hawaii’s lead and enacted strict shark possession statutes. *See* Letter from Ten Senators to Dr. Kathryn Sullivan, *supra* note 21.

71. *See* Tatum, *supra* note 4, at 672.

72. *Id.*

73. Anderson, *supra* note 5, at 527.

74. *Id.*

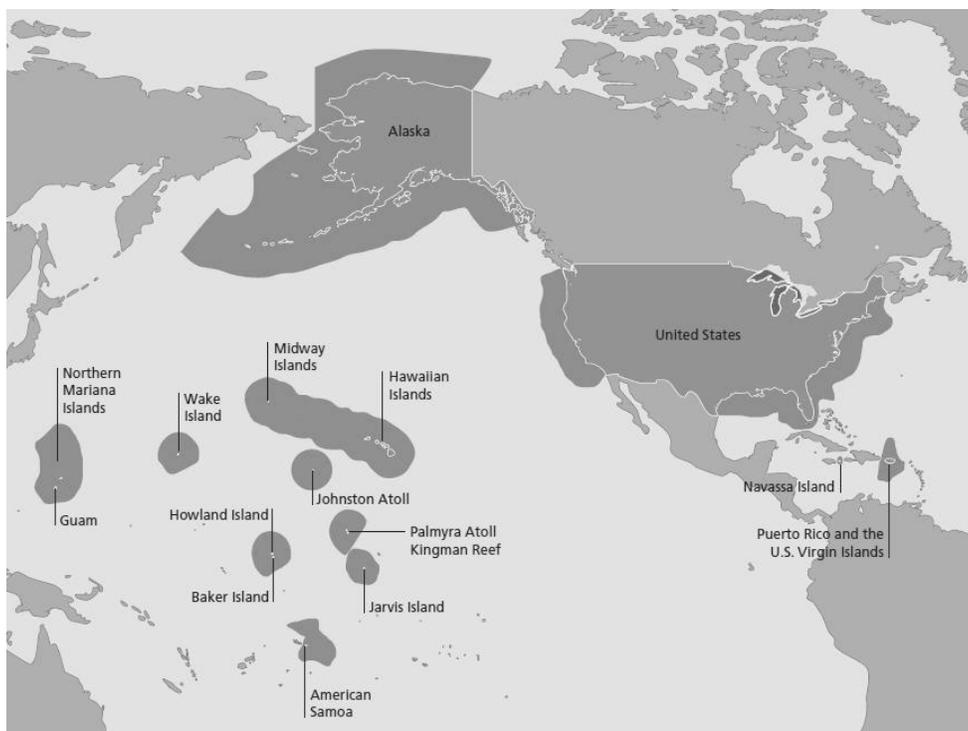
75. *Id.*

76. *Private Member’s Bill Pushing Shark Fin Import Ban Fails*, CBC NEWS (Mar. 28, 2013, 8:47 AM), <http://www.cbc.ca/news/canada/ottawa/private-member-s-bill-pushing-shark-fin-import-ban-fails-1.1324003>.

77. Magnuson-Stevens Act Provisions; Implementation of the Shark Conservation Act of 2010, 78 Fed. Reg. 25,685, 25,686 (May 2, 2013) (to be codified at 50 C.F.R. pt. 600).

A. *The National Marine Fisheries Service*

The NMFS is a United States governmental division of the federal Department of Commerce responsible for managing the country's Exclusive Economic Zone (EEZ).<sup>78</sup> The EEZ is a conservation zone between 3 and 200 miles offshore, which was created by the Magnuson-Stevens Act of 1976.<sup>79</sup> Below is a map of the EEZ.<sup>80</sup>



In addition to governing the EEZ, which is depicted in dark gray above, the NMFS plays a “supportive and advisory role” in managing coastal areas that are under the jurisdiction of the states.<sup>81</sup> According to the NMFS mission

78. See *About National Marine Fisheries Service*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. FISHERIES, <http://www.nmfs.noaa.gov/aboutus/aboutus.html> (last visited Oct. 24, 2014).

79. See *Fishery Conservation and Management Act of 1976*, Pub. L. No. 94-265, § 101, 90 Stat. 331 (1976).

80. *USA Exclusive Economic Zone*, NAT’L GEOGRAPHIC, <http://newswatch.nationalgeographic.com/2011/03/30/overfishing-101-a-beginners-guide-to-understanding-u-s-fishery-management/usa-exclusive-economic-zone-map> (last visited Oct. 24, 2014).

81. *Mission*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. FISHERIES, [http://www.nmfs.noaa.gov/aboutus/our\\_mission.html](http://www.nmfs.noaa.gov/aboutus/our_mission.html) (last visited Oct. 24, 2014). Generally, states have authority over fishing within the boundaries of the state, encompassing about three

statement, the agency has an obligation to conserve, protect, and manage living marine resources in a way that ensures their continuation as functioning components of marine ecosystems, affords economic opportunities, and enhances the quality of life for the American public.<sup>82</sup>

In order to fulfill this obligation, the Magnuson-Stevens Act authorizes the NMFS to create federal plans for fishery management, as long as the plans are consistent with ten enumerated standards.<sup>83</sup> The first such standard is “prevent[ing] overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.”<sup>84</sup> Citing this authority granted by the Magnuson-Stevens Act, the NMFS proposed a new federal rule in early 2013.<sup>85</sup>

### B. *The Proposed Rule*

NMFS’s 2013 proposed rule (“Rule”) would

prohibit any person from removing any of the fins of a shark at sea, possessing shark fins on board a fishing vessel unless they are naturally attached to the corresponding carcass, transferring or receiving fins from one vessel to another at sea unless the fins are naturally attached to the corresponding carcass, landing shark fins unless they are naturally attached to the corresponding carcass, or landing shark carcasses without their fins naturally attached.<sup>86</sup>

The Rule’s stated purpose is to amend existing NMFS regulations to reconcile them with the SCA.<sup>87</sup> In discussing how it would realize this objective, the NMFS specifically addresses the relationship that the Rule would have with current state laws.<sup>88</sup> Particularly, the Rule states that state laws “have the potential to undermine significantly conservation and management of federal shark fisheries”<sup>89</sup> and goes on to expressly preempt such state legislation if it is inconsistent with the SCA or federal fishery

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nautical miles from the coast line seaward. Motion of the United States to File an Amicus Curiae Brief Out of Time at 4, *Chinatown Neighborhood Ass’n. v. Brown*, 539 Fed. Appx. 761 (9th Cir. 2013) (No. 13-15188) 2013 WL 3914118.

82. *Mission*, *supra* note 81.

83. Magnuson-Stevens Act Provisions; Implementation of the Shark Conservation Act of 2010, 78 Fed. Reg. 25,685, 25,686 (May 2, 2013) (to be codified at 50 C.F.R. pt. 600).

84. *Id.* (internal quotation marks omitted). This is the only standard that the NMFS cited when it proposed the new rule. The other nine standards are therefore not a focus of this Comment.

85. *Id.*

86. *Id.* at 25,685.

87. *Id.* at 25,686.

88. *Id.*

89. *Id.*

management regulations.<sup>90</sup> On the other hand, the Rule notes that a state shall still have the right to regulate the activities occurring in its waters, which extend to only about three nautical miles from the shoreline.<sup>91</sup> Further, the Rule states that if the state or territorial law “is interpreted not to apply to sharks legally harvested in federal waters, the law would not be preempted.”<sup>92</sup>

The Rule states that the Magnuson-Stevens Act gives the NMFS authority to promote fishing activities through “sound conservation and management principles,” defined as “including measures which are designed to assure that . . . a supply of food and other products may be taken, and that recreational benefits may be obtained, on a continuing basis.”<sup>93</sup> The Rule expresses concern that existing state laws prohibit fishery participants from making use of sharks caught outside of state boundaries.<sup>94</sup> Further, the Rule states that neither the SFPA nor the SCA indicate a Congressional intent to outlaw possessing or selling shark fins because the lawmakers chose to only prohibit discarding carcasses at sea.<sup>95</sup>

Many senators, representatives, conservationists, and activists have already spoken out against the Rule.<sup>96</sup> Shortly after the Rule was proposed by the NOAA, a group of United States senators, led by Washington State’s Maria Cantwell, penned a concerned letter to Dr. Kathryn Sullivan, the NOAA’s Acting Administrator.<sup>97</sup> Cantwell, along with nine of her colleagues,<sup>98</sup> pleaded with Sullivan to reconsider the Rule’s preemption provision.<sup>99</sup> The letter argues that the SCA was not enacted to “directly address the trade in detached and processed shark fins within the United States” and that the existing state laws are currently the only way to do so, being a “much-needed tool to protect and recover dwindling shark

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90. *Id.* Federal preemption is the displacement of a U.S. state law by a U.S. Federal law. See discussion *infra* Part V.A.1.

91. See *supra* text accompanying note 81.

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

93. *Id.* at 25,686–87 (internal quotation marks omitted).

94. *Id.* at 25,686.

95. *Id.*

96. *E.g.*, Letter from Ten Senators to Dr. Kathryn Sullivan, *supra* note 21 (detailing opposition from senators as well as from Phil Anderson, Director of Washington Department of Fish & Wildlife); Sakahara, *supra* note 65 (“Today members from various Pacific governments unanimously urged the federal government not to supersede Hawaii’s law. Many state lawmakers and advocates are also asking to let Hawaii’s law stand.”).

97. Letter from Ten Senators to Dr. Kathryn Sullivan, *supra* note 21.

98. Dianne Feinstein (CA), Barbara Boxer (CA), Brian Schatz (HI), Patty Murray (WA), Mazie Hirono (HI), Jeff Merkley (OR), Ron Wyden (OR), Mark Begich (AK), and Ben Cardin (MD) joined Cantwell. *Id.*

99. *Id.*

populations.”<sup>100</sup> In addition, numerous conservation groups have urged people to sign petitions<sup>101</sup> or write letters to the NOAA<sup>102</sup> speaking out against the Rule as proposed.

## V. PROVIDING A SOLUTION

### A. *The NOAA Rule Should Not be Implemented with the Preemption Clause in Place*

Though the NOAA Rule contains language that seemingly preempts existing state laws, this may not be so. This section begins by analyzing preemption before making an argument that state laws would not be preempted by the NOAA Rule. Next, this section examines possible adverse impacts of adopting the Rule as proposed.

#### 1. The NOAA Rule May Expressly Preempt Existing State Laws

Article VI, Section 1, Clause 2 of the United States Constitution states that “[t]he Laws of the United States . . . shall be the supreme Law of the Land . . . .”<sup>103</sup> Under The Supremacy Clause, if there is a conflict between state and federal law, federal law controls and the state law is invalid.<sup>104</sup> Preemption can be express, where the federal law explicitly preempts state law, or implied, where preemption is suggested by clear congressional intent.<sup>105</sup> There are three ways in which federal preemption may be implied. The first is field preemption, where the scheme of a federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.<sup>106</sup> The second is conflicts preemption, where compliance

100. *Id.*

101. *E.g.*, Chris Hartzell, *NOAA and NMFS: Remove language from the Shark Conservation Act proposed rule*, CHANGE.ORG, <http://www.change.org/petitions/noaa-and-nmfs-remove-language-from-the-shark-conservation-act-proposed-rule> (last visited Oct. 24, 2014).

102. *E.g.*, *Stop the Federal Government from Undermining State Shark Fin Bans!*, SEA TURTLE RESTORATION PROJECT, [http://action.seaturtles.org/p/dia/action3/common/public/?action\\_KEY=13839](http://action.seaturtles.org/p/dia/action3/common/public/?action_KEY=13839) (last visited Oct. 24, 2014); *Action Alert: Stop the US Federal Government from Interfering with State Shark Fin Bans*, SHARK SAVERS (June 17, 2013), <https://www.sharksavers.org/en/blogs-news/shark-savers-blog/action-alert-stop-the-us-federal-government-from-interfering-with-state-shark-fin-bans/>.

103. U.S. CONST. art. VI, § 1, cl. 2.

104. ERWIN CHEREMINSKY, CONSTITUTIONAL LAW 434 (Vicki Been et al. eds., 3d ed. 2009).

105. *Id.*

106. *Id.* at 448. An example of field preemption is immigration. *Arizona v. United States*, 132 S. Ct. 2492, 2503 (2012) (concluding that Arizona’s attempt to regulate the field of

with both federal and state regulations is a physical impossibility.<sup>107</sup> The third is impeding preemption, where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.<sup>108</sup> If express or implied preemption exists, federal law trumps the conflicting state law.<sup>109</sup>

It is clear from the wording of the Rule's preemption provision that the drafters intended the Rule to expressly preempt existing state and territorial laws. In the section titled "Relationship of Regulations With Current State Rules", the Rule states that the Magnuson-Stevens Act "preempts state regulation of fisheries in waters outside the boundaries of a state, except according to the narrow opportunities for state regulation specified at 16 U.S.C. 1856(a)(3)."<sup>110</sup> These exceptions essentially provide for state regulation when: (a) the fishing boat is registered by the state and there are no federal regulations governing the fishery or the state's regulations are consistent with the existing federal regulation governing the fishery; or (b) the existing federal regulation for the fishery assigns management to the state and the state's regulations are consistent with the federal regulation.<sup>111</sup>

In fact, the Rule provides that state laws made applicable to fisheries within state waters are not preempted.<sup>112</sup> This indicates that the Rule *does* preempt, and therefore does not delegate management to, state laws applicable to fisheries outside of state waters. Further, it could be argued that exception (a) does not apply, even for boats registered to a state, because that exception requires that there also be no existing federal regulation unless the regulation is consistent with the state regulation.<sup>113</sup> The Rule creates such a federal regulation, and as proposed, the argument could be made that the regulation is inconsistent with existing state and territorial laws because it is less stringent. While a superficial reading of the NOAA Rule may sound conservation-friendly, the Rule seemingly leaves room for fishermen to land

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immigration with respect to the subject of alien registration was preempted by federal law, reasoning that "Congress intended to preclude States from 'complement[ing] the federal law, or enforce[ing] additional or auxiliary regulations'").

107. CHEMERINSKY, *supra* note 104, at 443. For an example of conflicts preemption, see Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143 (1963) (stating that there would be conflicts preemption if the federal law in question "forbade the picking and marketing of any avocado testing more than 7% oil, which the California test excluded from the State any avocado measuring less than 8% oil content").

108. CHEMERINSKY, *supra* note 104, at 444.

109. *Id.* at 434.

110. 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).

111. Magnuson-Stevens Act, 16 U.S.C. § 1856 (a)(3)(A-B) (2012).

112. *Id.*

113. *Id.*

with the whole shark, *then* cut the fins off and ship them out. This is one of the reasons that the Rule is seen as less stringent than many existing state laws.

Though the aforementioned argument is not without teeth, this Comment maintains that the NOAA Rule does not preempt existing state laws because state laws are not interpreted to apply to sharks legally harvested in federal waters. When Hawaii's shark fin law was being proposed in front of Hawaii's House Committee on Water, Land, & Ocean Resources, Robert D. Harris, Director of the Sierra Club's Hawaii chapter, spoke out in support of the law and suggested an amendment.<sup>114</sup> Harris recommended that the exceptions to the shark fin ban be clarified.<sup>115</sup> Specifically, Harris suggested including an exception to the law for sharks harvested in waters where shark finning is legally permitted.<sup>116</sup> Though this suggestion was not formally adopted and written into the bill, the Sierra Club's proposal is only one example of how Hawaiians interpret the shark fin ban to apply only to sharks harvested in state waters. Additionally, on February 4, 2014 the NOAA announced that it had come to an agreement with three states, finding that California, Washington, and Maryland's shark fin laws are consistent with the Magnuson-Stevens Act and thus would not be preempted by the NOAA Rule.<sup>117</sup> Thus, the NOAA Rule does not preempt existing state laws. Assuming for the sake of analysis that at least some existing state laws *would* be preempted by the Rule, there are potential adverse impacts that must be examined.

## 2. Adverse Effects of Adopting the Rule as Proposed

There are significant potential negative effects of adopting the Rule as proposed. First, the Rule could lead to increased litigation. Second, there is a possibility that the federal law will create loopholes for those in compliance with federal law to damage the environment.

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114. *Testimony in Support of SB 2169 (SD2, HD1) With a Proposed Amendment: Hearing Before the H. Comm. On Water, Land, & Ocean Resources, 25th Leg., Reg. Sess. (Haw. 2010)* (statement of Robert D. Harris, Director, Hawaii Chapter of the Sierra Club), *available at* [http://www.capitol.hawaii.gov/session2010/Testimony/SB2169\\_HD1\\_TESTIMONY\\_WLO\\_03-15-10\\_.pdf](http://www.capitol.hawaii.gov/session2010/Testimony/SB2169_HD1_TESTIMONY_WLO_03-15-10_.pdf).

115. *Id.*

116. *Id.*

117. *Media Statement: NOAA Fisheries and states of California, Maryland and Washington determine that their shark fin laws are consistent*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. FISHERIES (Feb. 4, 2014), [http://www.nmfs.noaa.gov/mediacenter/2014/02/04\\_02\\_sca\\_state\\_fed\\_consistent.html](http://www.nmfs.noaa.gov/mediacenter/2014/02/04_02_sca_state_fed_consistent.html).

Passing the Rule with the preemption clause could lead to a flood of litigation. For example, someone who is charged under state law for being in possession of a shark fin may argue that he complied with federal law because he landed with the fins attached to the carcass or bought the fin from someone who obtained it legally. The lack of harmony between existing state laws and the NOAA Rule may leave many citizens confused about which law governs their behavior, and an excess of litigation will be used in an attempt to resolve the question. Of course, it can be argued that there will be increased litigation even if the Rule is passed without the preemption clause. An argument could be made that people will see the federal law and comply with it but then be charged under state law, leading to them challenging the state law on preemption grounds. However, this argument is moot if the Rule is passed, as this Comment suggests, with a provision expressly stating that the federal law does *not* preempt existing state laws.

In addition to increased litigation, just as the Shark Conservation Act left open a loophole for fishermen to catch sharks and fin them once ashore,<sup>118</sup> the NOAA Rule would do the same. After all, the Rule simply implements provisions of the SCA into the National Marine Fisheries Service's own regulations.<sup>119</sup> For example, a fisherman could catch a shark, bring it ashore with its fins naturally attached in compliance with the NOAA Rule, and then fin the shark. If states are left with no recourse in such situations, damaging finning practices will continue, and the cycle of irreversibly harming the environment will persist.

### B. *Suggested Solution*

In order to avoid increased litigation and detrimental effects on the environment, the Rule should be amended to explicitly state that the federal law does not preempt existing laws, at least where those state laws are more stringent than federal law. Existing state laws fulfill the purpose of the Magnuson-Stevens Act and state governments have a legitimate interest in governing what products are brought into the state. In the event that the Rule is passed as written with the preemption clause in place, cooperative federalism should be employed, as it has been for environmental laws in the past, to allow for a coexistence of federal and state law.<sup>120</sup>

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118. See discussion *supra* Part III.A.

119. See discussion *supra* Part IV.B.

120. The term cooperative federalism refers to state and federal governments working together to share responsibility for the governance of the people. *Cooperative Federalism Law & Legal Definition*, USLEGAL.COM, <http://definitions.uslegal.com/c/cooperative-federalism/>, (last visited Sept. 8, 2014).

One enumerated purpose of the Magnuson-Stevens Act is “to promote domestic commercial and recreational fishing under sound conservation and management principles.”<sup>121</sup> While state laws restrict the sale, possession, trade, and distribution of shark fins, they do not otherwise impede upon commercial and recreational shark fishing. Fins may be the most valuable portion of the shark, but there is also a market, albeit less lucrative, for shark meat.<sup>122</sup> Because the drastic decline in shark populations worldwide has largely been attributed to the practice of finning,<sup>123</sup> it is clear that current federal regulations, the Magnuson-Stevens Act included, are not promoting sound conservation.

Though the Rule notes that a state shall still have the right to regulate the activities occurring in its waters, this allowance does not mean much when applied to shark finning activities. Because of the transitory nature of fishing activities it would be too difficult for a state to determine where, within the vast waters surrounding the state, a shark was caught. As stated by Senator Cantwell in her letter to the NOAA:

It is almost impossible to tell, further down the chain of consumer demand, whether a shark fin or shark fin product came from a federally managed legal fishery, or was imported from a country with little or no regulations on shark finning. While sustainable domestic fisheries, like the spiny dogfish fishery in New England, should continue to be supported by NOAA, states must have the ability to regulate other illegal shark finning activity in their jurisdictions.<sup>124</sup>

It would be unreasonably burdensome, and almost impossible for states to be required to police the presence of shark fins within their boundaries by figuring out, with respect to each individual fin, where it was obtained (whether in federal- or state-controlled waters). Further, the Magnuson-Stevens Act, which the Rule would amend, expresses concern for the interests of the several states.<sup>125</sup> In fact, one stated purpose of the Magnuson-Stevens Act is to create Fishery Management Councils that create plans designed to address the needs of the individual states.<sup>126</sup> Additionally, a policy underlying the Magnuson-Stevens Act is ensuring that national programs are “responsive

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121. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, sec. 2, § , 90 Stat. 331, 332 (1976) (codified as amended at 16 U.S.C. § 1801(b)(3) (2012)).

122. See Porter, *supra* note 3, at 237.

123. See Tatum, *supra* note 4, at 668.

124. Letter from Ten Senators to Dr. Kathryn Sullivan, *supra* note 21.

125. Fishery Conservation and Management Act of 1976 § 2, 16 U.S.C. § 1801(b)(5)(B) (2012).

126. *Id.*

to the needs of, interested and affected States and citizens.”<sup>127</sup> Requiring states to carry the burden of implementing measures to regulate *only* those fins that were obtained within state boundaries in order to avoid preemption demonstrates a lack of respect for the economic and social needs of the state. This is contrary to the policy and purpose of the Magnuson-Stevens Act.

Further, federal rules have allowed rigorous state rules in a variety of environmental legislation in the past, with California’s waiver of preemption under the Clean Air Act being the most notable. This is an example of cooperative federalism, a concept in which the federal and state governments work together to exercise governmental authority.<sup>128</sup> Though the Clean Air Act preempted states from adopting their own emission standards for new motor vehicles, section 209(b) provided a way for states to apply for a waiver of preemption.<sup>129</sup> California applied for such a waiver, and on December 27, 2012 it was granted, allowing California to set its own emission standards through its Advanced Clean Cars Program.<sup>130</sup> Other states are allowed to adopt California’s emission standards so long as they adopt them exactly.<sup>131</sup> The policies underlying California’s Clean Air Act exemption would favor allowing a similar type of cooperative federalism for shark ban laws as well.

The Clean Air Act provided that California’s waiver would be granted unless California’s standards would not be at least as protective as applicable federal standards, were unnecessary to meet compelling conditions, or were not consistent with the Clean Air Act. A waiver of preemption could similarly be granted to states with shark fin bans because state laws are just as protective as applicable federal standards. In fact, state laws are actually seen as more stringent and protective. In addition, state laws are needed to meet compelling conditions. For example, it has been reported that in Hawaii only 10% of shark fins that enter the state are actually used there.<sup>132</sup> Instead, Hawaii has served as a hub for the exportation of shark fin, feeding the global

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127. *Id.* at § 1801(c)(3).

128. *Cooperative Federalism Law & Legal Definition*, USLEGAL.COM, <http://definitions.uslegal.com/c/cooperative-federalism/> (last visited Oct. 24, 2014).

129. Andrew Childers, *EPA Grants California Clean Air Act Waiver to Implement Clean Car Emissions Rules*, BLOOMBERG BNA (Dec. 31, 2012), <http://www.bna.com/epa-grants-california-n17179871622/>.

130. *Id.*

131. Office of Transp. & Air Quality, *California Waivers and Authorizations*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/otaq/cafr.htm#wavier> (last visited Jan. 16, 2014).

132. *Testimony Submitted to the H. Comm. on Water, Land and Ocean Resources*, 25th Leg., Reg. Sess. (Haw. 2010) (statement of Marjorie Ziegler, Executive Director, Conservation Council for Hawai’i), available at [http://www.capitol.hawaii.gov/session2010/Testimony/SB2169\\_HD1\\_TESTIMONY\\_WLO\\_03-15-10\\_.pdf](http://www.capitol.hawaii.gov/session2010/Testimony/SB2169_HD1_TESTIMONY_WLO_03-15-10_.pdf).

shark fin trade. Finally, state laws fulfill the conservation and management purpose of the Magnuson-Stevens Act.<sup>133</sup>

The United States Supreme Court's decision in *New State Ice Co. v. Liebmann*<sup>134</sup> further supports implementing a cooperative federalism approach in the context of shark finning legislation. In *Liebmann*, the Court acknowledged that “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>135</sup> The Court further explained that suspending such state experimentation may have negative consequences for the country as a whole.<sup>136</sup> In the context of shark finning legislation, this so-called laboratories of democracy approach makes particular sense. Many “courageous” coastal states have, through its citizens, chosen to enact stringent legislation. Shark finning is occurring in the waters of coastal states, and these states have decided that a new approach must be taken. If existing state shark finning laws are preempted before they are given a chance to run the course, the country as a whole will suffer a loss from the lack of experimentation.

Notwithstanding the aforementioned solutions presented, there is a possibility that the NOAA Rule will be passed in its current form. If this is the case, states with existing shark finning laws will have to tread lightly in order to avoid conflict with federal law as much as possible.

If the NOAA Rule is enacted with the preemption clause in place, only those state laws that are interpreted to apply to sharks legally harvested in federal waters will be preempted.<sup>137</sup> States should amend their laws to provide that they apply only to those sharks caught within the boundaries of the state, and should adopt a mechanism for enforcing the laws which allows states to determine where the shark was caught. One example of such a mechanism would be setting up checkpoints for boats returning to state waters with sharks. At these checkpoints sharks legally harvested in federal waters, and thus not subject to the state ban, could be tagged. That way, when fishermen land with their catch, any sharks or shark fins that are not tagged will be evident, and the state law may be enforced. A problem with this solution however, is that such an enforcement mechanism would be administratively inefficient and expensive. Of course, states might decide that such an

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133. See discussion *supra* Part V.B.

134. 285 U.S. 262, 262 (1932).

135. *Id.* at 311.

136. *Id.*

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

enforcement mechanism, expensive or not, is worthwhile in order to prevent shark finning.

Similarly, in addition to amending existing state laws, states and territories that do not yet have anti-shark fin laws and wish to adopt them in the future need to be careful about how they write the law, so as to avoid conflict with the NOAA Rule. It would be wise for such a state to define which waters are “state-controlled” and which waters are not before expressly providing that the shark finning law applies only to those sharks caught within the boundaries of the state. While it may seem that only coastal states have an interest in preventing the practice of shark finning, because such states are where fins “land” after the shark is caught, all states should consider adopting anti-shark fin laws. It may be true that coastal states are more closely linked to the shark finning action, but once a fin is removed from a shark it can easily be transported across state lines. Thus, interior or non-coastal states may become places of refuge for illegally obtained fins.

Finally, state attorneys should litigate matters dealing with existing state laws so that the laws are interpreted in accordance with the purposes of the NOAA rule. This would include advising states to have a mechanism in place for determining where sharks are caught as well as for documenting each shark brought into the state.

## VI. CONCLUSION

The NOAA’s rule should not be adopted as proposed because it will effectively weaken existing state laws, which are essential to protect sharks, and because it will lead to adverse environmental outcomes. Sharks, as apex predators, are essential components of a well-balanced marine ecosystem.<sup>138</sup> Though sharks have successfully filled their role by controlling the populations of species lower on the food chain for the last 450 million years,<sup>139</sup> they are currently facing catastrophic population declines.<sup>140</sup> Scientists agree that the driving force behind this downward trend is the high demand for shark-fin.<sup>141</sup>

The NMFS’s proposed rule, on its face, seemingly aims to address this issue by implementing provisions of the Shark Conservation Act into its own regulations. However, there are significant potential negative effects of adopting the Rule as proposed, with the preemption provision in place. First, the Rule could lead to increased litigation. Second, there is a possibility that

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138. *See supra* Part II.A.

139. *Id.*

140. *Id.*

141. *Id.*

the federal law will leave open loopholes for those in compliance with federal law to damage the environment. Instead, the Rule should be amended to provide that state laws are not preempted, at least when the state laws are more stringent than federal law. Existing state laws fulfill the purpose of the Magnuson-Stevens Act and state governments have a legitimate interest in governing what products are brought into the state. Alternatively, if the Rule is adopted as proposed, cooperative federalism should be employed, as it has been in the past, to allow for a coexistence of state and federal environmental law.

Clearly, existing federal law has not solved the very real problem of declining shark populations. As a result, states and territories have begun to enact legislation to address the issue head on. Rather than using preemption as a way to curtail stringent shark finning legislation at the state level, the NOAA should amend its rule so that the federal and state laws can coexist.