

ENFORCEMENT DISSONANCE: LOBSTERS, THE  
LEGISLATURE, AND FEDERAL WATERS IN *STATE*  
*V. THOMAS*

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- I. INTRODUCTION
- II. THE LAW
  - A. *International and Federal Law*
  - B. *Maine Law*
- III. THE *THOMAS* CASE
- IV. ANALYSIS
  - A. *The Court's Reasoning*
  - B. *Critique and Impact*
    - 1. *The Law Court's Holding*
    - 2. *Framing the Debate and Suggestions to the Legislature*
- V. CONCLUSION

## ENFORCEMENT DISSONANCE: LOBSTERS, THE LEGISLATURE, AND FEDERAL WATERS IN *STATE V. THOMAS*

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### I. INTRODUCTION

Consider the following: You, a Maine resident, and your friend, a Massachusetts resident, have gone for a weekend trout fishing trip to Acadia National Park in Downeast Maine. The two of you are happily catching trout, and then each of you hook a bass and reel it in. Keeping the bass is illegal under Maine law but not banned by the National Park. Along comes a Maine game warden, who spies the two of you and cites only you with a fine for catching and keeping the bass. The warden says nothing to the Massachusetts resident who continues to fish, catching and keeping trout and bass, unmolested and without having his pockets lightened. A humorous scenario. Yet, an analogous enforcement dissonance is the norm in federal waters off of the coast of Maine with much larger consequences.

The United States has the largest Exclusive Economic Zone (EEZ) in the world with 3.4 million square miles of ocean.<sup>1</sup> This vast swath of ocean helps support a \$24 billion dollar domestic fisheries industry.<sup>2</sup> The American lobster, *Homarus americanus*, is a crustacean found in the Western North Atlantic.<sup>3</sup> This species of lobster ranges along the coast from Labrador, Canada to Virginia, and within the EEZ, out along the outer continental shelf and slope, the lobster ranges from Georges Bank to North Carolina.<sup>4</sup> The lobster has very valuable and delicious meat contained in its tail and claws and is the focus of an economically important fishery in the Northeast United States, including in the EEZ off of Maine.<sup>5</sup>

Yet, in the EEZ, there are some seemingly unfair fishing practices occurring. In the same waters, non-Maine fishermen are allowed to keep and sell lobsters caught as a result of dragging bycatch<sup>6</sup> whereas Maine fishermen are not. This creates an inequitable economic advantage for out of state fishermen, pushes valuable fishery dollars out of Maine, and results in a lack of uniformity in fisheries conservation enforcement. In 2010, in *State v. Thomas*,<sup>7</sup> the Maine Supreme

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1. *Living Marine Resources*, U.S. COAST GUARD, <http://www.uscg.mil/hq/cg5/cg531/lmr.asp> (last modified Aug. 4, 2011).

2. *Id.* The EEZ is a federal zone that lies seaward of each coastal state's territorial sea. 16 U.S.C.A. § 1802(11) (West 1999).

3. NAT'L OCEANIC AND ATMOSPHERIC ADMIN., FISHERY MGMT. REPORT NO. 29 OF THE ATLANTIC STATES MARINE FISHERIES COMM'N, AMENDMENT 3 TO THE INTERSTATE FISHERY MGMT. PLAN FOR AM. LOBSTER 1 (1997).

4. *Id.* at 2.

5. *Id.*

6. Bycatch is the term used to describe the marine life that is accidentally caught while fishing for another species.

7. 2010 ME 116, 8 A.3d 638.

Judicial Court, sitting as the Law Court, correctly adjudged that this issue is one for the legislature and not for the courts. Defendant Thomas was caught in the net of this patchwork fisheries law. This Note will examine the relevant law, discuss the Law Court's decision in *State v. Thomas*, and suggest possible approaches the Maine legislature could take to resolve the issue.

## II. THE LAW

### A. *International and Federal Law*

The United Nations Convention on the Law of the Sea (UNCLOS)<sup>8</sup> delimits international maritime boundaries worldwide. It establishes the exclusive economic zone of a country as extending from the baseline of the shore out two hundred nautical miles.<sup>9</sup> Under UNCLOS, a nation may allow foreign registered vessels to fish in its EEZ.<sup>10</sup> Further, as an exercise of its sovereign rights over the resources in the EEZ, a nation may enforce its fisheries laws in the EEZ off of its coast.<sup>11</sup>

The United States is a signatory to UNCLOS but has not formally ratified it.<sup>12</sup>

However, many of its provisions are incorporated into the corpus of United States law: in 1983, President Reagan proclaimed, consistent with article fifty-seven of UNCLOS, that the United States possesses a two hundred nautical mile EEZ.<sup>13</sup> The 1976 federal Magnuson-Stevens Fisheries Conservation and Management Act (MSFCMA) is the comprehensive federal act that applies in the EEZ. Its goals are to “promote domestic commercial and recreational fishing under sound conservation and management principles” and “to provide for the preparation and implementation . . . of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery.”<sup>14</sup> The MSFCMA governs fishing activities in the EEZ seaward of Maine's territorial sea, which extends from an imaginary baseline drawn across the Maine Coast out three nautical miles.<sup>15</sup>

Relevant to the issue at hand, the MSFCMA allows a state to regulate fishing vessels outside of state boundaries when that vessel is registered in the state and there is no conflict with federal law:

Except as provided in subsection (b) of this section nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries . . . . (3) *A State may regulate a fishing vessel outside the boundaries of the State in the following circumstances: (A) The fishing vessel is registered under the law of that State, and (i) there is no fishery management plan*

8. United Nations Convention on the Law of the Sea, art. 57, Dec. 10, 1982, 1833 U.N.T.S. 396 [hereinafter UNCLOS].

9. *Id.* at 419 (art. 57).

10. *Id.* at 420-22 (art. 61 & 62).

11. *Id.* at 427 (art. 73).

12. Lawrence A. Kogan, *What Goes Around Comes Around: How UNCLOS Ratification Will Herald Europe's Precautionary Principle as U.S. Law*, 7 SANTA CLARA J. INT'L L. 23, 26 (2009).

13. Exclusive Economic Zone of the United States of America, 48 Fed. Reg. 10,605, 10,605 (Mar. 14, 1983).

14. 16 U.S.C.A. § 1801(b)(3)-(4) (West 2010).

15. *State v. Thomas*, 2010 ME 116, ¶ 7, 8 A.3d 638.

*or other applicable Federal fishing regulations for the fishery in which the vessel is operating; or (ii) the State's laws and regulations are consistent with the fishery management plan and applicable Federal fishing regulations for the fishery in which the vessel is operating.*<sup>16</sup>

However, the MSFCMA does not define what constitutes “registered,” but rather leaves it up to the states. Additionally, and at the crux of the *Thomas* case, the Act allows a state to create more restrictive regulations regarding fisheries than are federally enacted.<sup>17</sup> That is, the Act and its resultant regulations are a ceiling rather than a floor for lobster regulation in the EEZ. However, following the plain language of the statute quoted above, these more restrictive state regulations may only be enforced in the EEZ against vessels registered in the enforcing state.

Turning to regulation of the fisheries themselves, the United States Coast Guard enforces federal fisheries law in the EEZ, as tasked by the MSFCMA, with its primary concern being the protection of “the U.S. Exclusive Economic Zone from foreign encroachment.”<sup>18</sup> On the domestic side, the Coast Guard is the enforcement body for Fisheries Management Plans (FMPs), which are developed by regional Fisheries Management Councils (Councils), established pursuant to the MSFCMA.<sup>19</sup> The Councils create “[p]lans and specific management measures (such as fishing seasons, quotas, and closed areas)” for waters seaward of state waters in individual regions.<sup>20</sup> That is, the Councils’ area of concern is the EEZ. The Councils aim to allow participation in the development of FMPs by diverse regional stakeholders in the fisheries industry, including states.<sup>21</sup> The National Marine Fisheries Service (NMFS) implements the plans and measures developed by the Councils, with the Coast Guard enforcing them.<sup>22</sup> One of these councils, the New England Fishery Management Council (NEFMC), is the regional body that develops FMPs for the EEZ off of Maine.<sup>23</sup> The NEFMC implements nine fishery management plans.<sup>24</sup>

16. 16 U.S.C.A. § 1856(a)(3)(A) (emphasis added).

17. *Daley v. Comm’r, Dep’t of Marine Res.*, 1997 ME 183, ¶ 6, 698 A.2d 1053; *See also* 50 C.F.R. § 649.3(b) (1997) (“Nothing in these regulations will supersede more restrictive state management measures for American lobster.”).

18. *Living Marine Resources*, *supra* note 1.

19. *Id.* The Coast Guard’s third, and final, priority in the area of living marine resources is development and enforcement of international fisheries agreements. *Id.*

20. U.S. REG’L FISHERY MGMT. COUNCILS, <http://www.fisherycouncils.org> (last visited Sept. 13, 2011). Maine’s state waters extend out three miles from shore. ME. REV. STAT. tit. 12 § 6001 (48-B) (2011).

21. U.S. REG’L FISHERY MGMT. COUNCILS, *supra* note 20.

22. U.S. REG’L FISHERY MGMT. COUNCILS, OPPORTUNITIES & CHALLENGES 4 (2009), *available at* <http://www.fisherycouncils.org/USFMCsections/USRFMCweb.pdf> (last visited Sept. 13, 2011).

23. It regulates from 3 to 200 nautical miles off the coasts of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut. *Id.* at 19.

24. *Id.* Among the ten national standards for the FMPs:

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

However, since 1996, there has been no NEFMC mandated federal lobster plan for the EEZ; rather, pursuant to the Atlantic Coastal Fisheries Cooperative Management Act, the Atlantic States Marine Fisheries Commission (ASMFC) manages the lobster fishery in the EEZ.<sup>25</sup> The ASMFC is charged with coordinating between the constituent states and federal government to develop a cooperative plan and promulgate federal regulations for the lobster fishery in the EEZ.<sup>26</sup> The removal of the existing federal plan in 1996 and the increase in state cooperation was in response to concerns that the federal management program was not responsive enough to meet the conservation and management objectives of the MSFCMA, especially because only twenty percent of the lobster resource is situated in the EEZ as compared to eighty percent in the territorial seas of the states.<sup>27</sup>

The federal lobster regulation most relevant to the *Thomas* case and this Note states:

it is unlawful for a vessel with any non-trap gear on board capable of catching lobsters, or, that fishes for, takes, catches, or harvests lobster on a fishing trip in or from the EEZ by a method other than traps, to possess, retain on board, or land, in excess of 100 lobsters (or parts thereof), for each lobster day-at-sea or part of a lobster day-at-sea, up to a maximum of 500 lobsters (or parts thereof) for any one trip.<sup>28</sup>

That is, under federal law, a boat that is groundfishing in the EEZ and catches lobsters as a result of incidental bycatch may keep and land one hundred of those lobsters per day, or five hundred per trip.

### B. Maine Law

Turning to Maine law, despite the cooperative nature of the ASMFC, the Maine legislature has chosen to enact stricter regulations as regards lobsters caught as a result of groundfishing bycatch in the EEZ. Unlike any of the other Northeastern states with a lobster fishery,<sup>29</sup> Maine prohibits the keeping and landing of any lobsters caught as a result of incidental groundfishing bycatch: “A person may not fish for or take lobster by any method other than conventional

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16 U.S.C.A. § 1851(a) (West 2010).

25. *Fishery Management Plans: American Lobster*, NAT’L OCEANIC AND ATMOSPHERIC ADMIN. FISHERIES NE. REG’L OFFICE, <http://www.nero.noaa.gov/sfd/lobster> (last updated Feb. 1, 2011). This authority is found at 16 U.S.C.A. § 5103. The Act itself can be found at 16 U.S.C. §§ 5101-5108.

26. Samantha Renée Smith, Note, *The Current Fate of the Lobster Fishery and a Proposal for Change*, 40 NEW ENG. L. REV. 663, 678-80 (2006). The constituent states are Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, and the District of Columbia. 16 U.S.C.A. § 5102(13).

27. Smith, *supra* note 26, at 677-78.

28. 50 C.F.R. § 697.17 (2010). “Land” is a term of art meaning to bring a catch into a port for sale.

29. New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, and New Jersey all allow the keeping and landing of lobster bycatch, pursuant to the federal limits. *Frequently Asked Questions – Lobster*, BETTERLOBSTERLAW.COM, [http://www.pfex.org/betterlobsterlaw/faq/faq\\_lobster.htm#What\\_other\\_states\\_allow\\_lobster\\_to\\_be\\_landed\\_as\\_bycatch](http://www.pfex.org/betterlobsterlaw/faq/faq_lobster.htm#What_other_states_allow_lobster_to_be_landed_as_bycatch) (last visited Sept. 13, 2011).

lobster traps.”<sup>30</sup> If a lobster is accidentally caught, it must be “immediately liberated alive into the coastal waters.”<sup>31</sup>

Following the MSFCMA, Maine may only enforce this regulation against Maine registered vessels, which are defined by a rather broad statute. A Maine registered vessel includes (1) a vessel owned by a person licensed with a particular type of Maine commercial fishing license; (2) a vessel used to bring marine catch into Maine State territorial waters or to the shore; (3) a vessel issued a certain type of Maine certificate; (4) a vessel issued a United States Coast Guard certificate of number that has identified Maine as the state of principal use; or (5) a vessel that has an established base of operations in Maine.<sup>32</sup> Although there is some scholarly debate over whether states may even enforce their own fisheries laws against vessels registered in their state whilst fishing in the EEZ,<sup>33</sup> when the courts have addressed the issue, many, including the courts in Maine, have held against federal preemption.<sup>34</sup> Thus, when fishing in the EEZ off of Maine, Maine registered vessels must comply with both Maine and federal law, whereas out of state vessels do not have to comply with Maine law.<sup>35</sup>

### III. THE THOMAS CASE

On July 12, 2007, John C. Thomas, Sr. was groundfishing on the Maine “registered” boat “F/V Blue Water III” in federal EEZ waters off of the coast of Maine.<sup>36</sup> The Blue Water, which regularly fished in these federal waters, was a trawler that carried a Federal Certificate of Documentation, a Northeast Federal Fishing Permit, and a Maine Commercial Fishing with Crew license.<sup>37</sup> The Blue Water, rigged for groundfishing, was near Matinicus Island when Maine marine

30. ME. REV. STAT. tit.12, § 6432(1) (2011).

31. *Id.* § 6431(5).

32. *Id.* § 6001(36).

33. See, e.g., 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, 239 (2006-2007).

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

*Id.*

34. See *Anderson Seafoods, Inc. v. Graham*, 529 F. Supp. 512 (N.D. Fla. 1982); *State v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984); *People v. Weeren*, 607 P.2d 1279 (Cal. 1980).

35. See *State v. Lauriat*, 561 A.2d 496, 498 (Me. 1989).

36. *State v. Thomas*, 2010 ME 116, ¶¶ 2-3, 8 A.3d 638. The vessel was owned by David Osier of South Bristol, and Thomas was employed as captain. *Id.* ¶ 2 n.4 (citation to both the text of the opinion and the footnote). The trial court found that the Blue Water was a Maine registered vessel under at least three definitions of section 6001(36), outlined above. *Id.* ¶ 8. Thomas unsuccessfully appealed this finding and the Blue Water will be assumed a Maine registered vessel for the purposes of this note. *Id.* ¶ 14.

37. *Id.* ¶ 2.

patrol officers, with whom Thomas was familiar, asked for permission to board.<sup>38</sup>

Thomas initially refused them permission, believing that because he was in federal waters, the Maine officers had no authority to board.<sup>39</sup> However, the officers invoked their federal authority, which authorizes them to exercise federal enforcement power in federal waters, and Thomas complied.<sup>40</sup> Once on board the Blue Water, the Maine officers found that Thomas was in possession of seventy-eight lobsters, twenty-four of which were illegally oversized according to Maine law.<sup>41</sup> Because the Blue Water was rigged for groundfishing, the lobsters were presumed to have been illegally caught as a result of bycatch and not “immediately liberated” as the law commands them to be.<sup>42</sup> Thomas was charged with violating the lobster size limit statute as well as title 12, section 6432(1) of the Maine Revised Statutes, which prohibits taking lobsters by any method other than lobster traps.<sup>43</sup>

Thomas filed a motion to suppress the evidence seized by the marine patrol officers, asserting that their boarding and searching of the Blue Water was illegal because they did not have Thomas’s consent or probable cause.<sup>44</sup> The trial court denied Thomas’s motion because it found that, as a Maine registered vessel, the Blue Water was subject to section 6306 of the Maine Revised Statutes, which requires a person licensed under Maine marine resources law to submit to inspection and search at the request of a marine patrol officer.<sup>45</sup> Thomas was convicted and sentenced to a fine of \$7850 “on the charge of taking lobsters by unconventional means and a \$1125 fine on the charge of possession of oversize lobsters.”<sup>46</sup>

#### IV. ANALYSIS

##### A. *The Court’s Reasoning*

Thomas appealed the conviction to the Maine Supreme Judicial Court and argued that the trial court erred in denying his motion to suppress evidence.<sup>47</sup> Thomas argued that the Blue Water was not actually owned by David Osier, the putative Maine-based owner, and therefore not subject to the implied consent provision of section 6306, but rather that probable cause was necessary under

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38. *Id.* ¶ 3.

39. *Id.*

40. *Id.* See also Mastry, *supra* note 33, at 231 (“Officers from state fish and wildlife agencies are often cross-deputized and work in conjunction with federal agents to enforce the [MSFCMA].”).

41. *Thomas*, 2010 ME 116, ¶ 4, 8 A.3d 638. Maine law on maximum lobster length may be found at 12 M.R.S. § 6431(1) (2011).

42. *Thomas*, 2010 ME 116, ¶¶ 25-28, 8 A.3d 638. Many of the oversized lobsters were banded in totes, indicating that they were not accidental bycatch which were going to be released back into the ocean. *Id.*, ¶ 4. This evidence was essential in defeating Thomas’s defense of “Immediate Liberation” which will not be discussed further in this note. *Id.* ¶ 28.

43. *Id.* ¶ 4.

44. *Id.* ¶ 5.

45. *Id.* ¶ 9.

46. *Id.* ¶ 10.

47. *Id.* ¶ 11. Thomas also argued that he should have been prosecuted under a different statute and that he was entitled to the defense of immediate liberation. *Id.* He lost on both arguments, and they will not be addressed in this note. *Id.* ¶ 30.

section 6025(4) before a search would be constitutional.<sup>48</sup> However, the Law Court dispatched with this argument by reminding Thomas that he had testified to the contrary in the earlier proceeding and that the Court was entitled to accept that earlier testimony.<sup>49</sup>

Thomas also attacked Maine's permissive definition of a "registered vessel," arguing that it was impermissibly broad and should be narrowly construed so as to not include the Blue Water.<sup>50</sup> The Court responded that the states were authorized by the federal MSFCMA to define what a registered vessel is in each state and that Congress "did not enumerate [the] specific requirements for making the exercise of state jurisdiction in the EEZ lawful."<sup>51</sup> Thus, the Court held that Maine was well within federal statutory limits with its definition of registered vessels. Further, the Law Court adjudged the breadth of the registered vessel definition a policy question more properly left to the legislature.<sup>52</sup>

Additionally, Thomas argued that enforcing Maine laws against only Maine registered vessels in the EEZ is a violation of the Equal Protection Clause of the United States Constitution.<sup>53</sup> Thomas contended that enforcement of Maine marine resource laws only against Mainers results in unconstitutional discrimination.<sup>54</sup> Addressing this, the Court noted that Thomas bore a heavy burden on this issue because all acts of the legislature are presumed constitutional.<sup>55</sup> The Law Court then stated that it believed that exercising Maine jurisdiction over Maine vessels in the EEZ amounts to exercising jurisdiction in the outer physical limits of Maine sovereignty, rather than creating a suspect class.<sup>56</sup> Not providing any more reasoning on Thomas's constitutional argument, aside from citing its 1992 decision *State v. Hayes*, the Court reiterated that "the fact that the Maine Legislature has elected to enact strict marine resource protection laws that it can enforce only against Maine-registered vessels in the EEZ is an issue of legislative policy and prerogative, which is beyond the authority of the court to review."<sup>57</sup>

In *State v. Hayes*,<sup>58</sup> the 1992 decision that the Law Court looked to for precedent, Hayes and a number of other defendants were charged with fishing for lobsters in the EEZ off of Maine, using a boat rigged for otter trawling, which is illegal under Maine law.<sup>59</sup> The defendants argued, *inter alia*, that enforcement against only Maine registered vessels in the federal EEZ amounted to an equal protection violation.<sup>60</sup> The Court stated that the MSFCMA granted exclusive authority of EEZ fisheries management to the federal government, with but one

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48. *Id.* ¶ 13.

49. *Id.* ¶ 14.

50. *Id.* ¶ 15.

51. *Id.* ¶ 18.

52. *Id.* ¶ 17.

53. *Id.* ¶ 19.

54. *Id.*

55. *Id.*

56. *Id.* ¶ 20.

57. *Id.*

58. 603 A.2d 869 (Me. 1992).

59. *Id.* at 870.

60. *Id.*



exception: the authority for a state to regulate state-registered vessels in the EEZ.<sup>61</sup> Further, the Court continued, there was no conflict with federal law because the MSFCMA authorized enforcement of more restrictive state law, as long as it was not counter to a fisheries management plan, and the then current lobster plan did not prohibit possession of lobster on a boat rigged for trawling.<sup>62</sup> Thus, the Court reasoned, Maine enforcement of more restrictive Maine law only against Maine fisherman was not only not in conflict with federal law but was expressly authorized by it.<sup>63</sup>

Ultimately, the Law Court stated in *Hayes* that this enforcement did not amount to a Privileges and Immunities Clause violation either as that protection applied only to the citizen of one state when in the territory of another and was not a limit on a state's police power over its own citizens.<sup>64</sup> Further, "the State [did] not deny equal protection to its citizens by enacting a law that [was] unenforceable against nonresidents. The unequal treatment in such a case result[ed] from limitations on sovereignty rather than from the creation of suspect classifications."<sup>65</sup>

Cited a number of times in *Hayes*, *State v. Lauriat*,<sup>66</sup> decided in 1989, was a Law Court case which vacated a conviction on essentially the same facts as *Thomas* and *Hayes*. Defendant Lauriat possessed lobster caught in the EEZ off of Maine while his boat was rigged for otter trawling, in violation of the same section that *Thomas* and *Hayes* violated.<sup>67</sup> The distinguishing factor was that the state failed to properly prove that the defendant's vessel was registered in Maine.<sup>68</sup> This was a mere oversight as "counsel for the State conceded that the vessel was not registered in Maine and neglected to call 12 M.R.S.A. section 6001(36) to" the Law Court's attention.<sup>69</sup> Section 6001(36) includes in its definition of registered vessels those "owned or operated by a [Maine fishing licensee]" and defendant Lauriat clearly held such a license.<sup>70</sup> Thus, due to this prosecutorial mistake, Lauriat, clearly a Mainer, was not punished for fishing for lobsters in the EEZ using an otter trawl, contrary to Maine law, whereas *Hayes* and *Thomas*, also Mainers, were punished.

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61. *Id.* The express language from the MSFCMA is "a State may not directly or indirectly regulate any fishing vessel outside its boundaries, unless the vessel is registered under the law of that State." *Id.* (quoting 16 U.S.C. § 1856(a)(3) (Supp. 1991)).

62. *Id.* at 871. Note that the current plan also does not prohibit possession of lobsters onboard boats rigged for groundfishing, but limits the number that may be kept and landed. 50 C.F.R. § 697.17 (2010).

63. *Hayes*, 603 A.2d at 871. "Nothing in these regulations will supersede more restrictive State or local lobster management measures." *Id.* (quoting 50 C.F.R. § 649.3 (1991)).

64. *Id.*

65. *Id.*

66. 561 A.2d 496 (Me. 1989).

67. *Id.* at 496.

68. *Id.* at 497.

69. *Hayes*, 603 A.2d at 871.

70. *Id.* at 870-71. In *Lauriat*, the Law Court also stated that the regulation in the Lobster Fishery Management Plan that states that all vessel owners or operators who apply for a federal permit to fish in the EEZ, or a state permit so endorsed, must abide by "any applicable state or local requirements" only applies to those vessels fishing in the EEZ that are also registered under the laws of the state. *Lauriat*, 561 A.2d at 498; *see also* 16 U.S.C.A. §§ 1851-52 (West 2011).

### B. Critique and Impact

Thomas's argument, on the heels of *Lauriat* and *Hayes*, was simply the latest judicial iteration of a long-running debate in Maine: whether Maine should follow its Northeastern neighbors and bring its lobster bycatch regulations up to the federal ceiling. Not entering into the fray, the Law Court perfectly characterized its role by saying that the "fact that the Maine Legislature has elected to enact strict marine resource protection laws that it can enforce only against Maine-registered vessels in the EEZ is an issue of legislative policy and prerogative, which is beyond the authority of the court to review."<sup>71</sup> This Note will now turn to examine some of Thomas's legal arguments, characterize the political debate, and then suggest a course of action for the Maine legislature.

#### 1. The Law Court's Holding

Thomas's Equal Protection Clause argument was a legally weak stab at what is obviously, to groundfishermen, a very frustrating regulation. In *Skiriotes v. Florida*,<sup>72</sup> the United States Supreme Court held that "[t]here is nothing novel in the doctrine that a state may exercise its authority over its citizens on the high seas."<sup>73</sup> Further, the language of the MSFCMA providing for state jurisdiction over state registered vessels in the EEZ is a codification of the language in *Skiriotes*.<sup>74</sup> Likewise, the United States Supreme Court has definitively characterized the Privileges and Immunities Clause, which Thomas argued was violated by Maine's regulations, as "designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."<sup>75</sup> This clause would only apply if Maine were enforcing its lobster regulations only against non-Maine registered vessels in the EEZ. Thus, even though the Law Court did not cite any authority for its holding on these constitutional arguments, its decision is quite irrefutable.

Thomas further argued that the Maine definition of a registered vessel is so broad that it would allow "Maine to exercise jurisdiction over almost any vessel fishing in the EEZ off the Maine coast even when such vessels have remote or tenuous connections to the state."<sup>76</sup> This self-serving argument, which did not gain traction with the court, is in fact antipodal to Thomas's Equal Protection Clause argument. If Maine marine patrol officers could consider nearly all vessels as Maine registered, then there would not be much risk of oceanic discrimination. In fact, in *Hayes*, the Law Court readily admitted that *Lauriat* was wrongly decided due to a failure on the part of the state to prove that the defendant's vessel was in

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71. *State v. Thomas*, 2010 ME 116, ¶ 20, 8 A.3d 638.

72. 313 U.S. 69 (1941).

73. *Id.* at 77.

74. Sarah Bittleman, *Toward More Cooperative Fisheries Management: Updating State and Federal Jurisdictional Issues*, 9 TUL. ENVTL. L.J. 349, 361 (1996).

75. *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). *See also* *State v. Cohen*, 133 Me. 293, 299, 177 A. 403, 406 (1935) ("The intent [of the privileges and immunities clause] was that the citizen of one state should not be an alien in another.").

76. *Thomas*, 2010 ME 116, ¶ 17, 8 A.3d 638.

fact “Maine registered,” even though it merely took a *prima facie* reading of the facts and applicable law to so prove.<sup>77</sup>

What *Lauriat*, *Hayes*, and *Thomas* in fact show, contrary to Thomas’s self-serving argument, is that Maine law is unevenly applied when it comes to what a Maine “registered” vessel is, even in clear cut cases. This trilogy of cases, all concerning Mainers, evidences the inequity of Maine’s lobster laws being applied in the EEZ: all boats not fitting the definition of Maine “registration,” and even some that do, may take lobsters in the EEZ off of Maine, contrary to Maine law, while Mainers may not.

## 2. Framing the Debate and Suggestions to the Legislature

The MSFCMA has been interpreted to allow state jurisdiction over non-state registered vessels that dock in the state.<sup>78</sup> Thus, it would be illegal for a New Hampshire vessel to bring lobster caught as a result of bycatch into a Maine port for sale. The current statutory structure encourages non-Mainers to fish in more profitable ways than Mainers are allowed and bring those fish back into their home states for sale and transport. Maine’s suffering is twofold: Maine fishermen cannot use all of the tools and techniques available to their neighbors, and the State does not receive the business from the fish caught by these non-Mainers in Maine’s own EEZ.

Additionally, and even more destructive to the Maine economy, this regulatory scheme encourages Maine fishermen to land their catch out of state when it would be illegal to do so at a Maine port. This entails a Maine vessel groundfishing in the EEZ off of Maine, illegally holding its lobster bycatch, and then steaming to Massachusetts where the bycatch can be legally sold. Title 12, section 6432(1) of the Maine Revised Statutes, which prohibits taking lobsters by any method other than lobster traps, is unique in New England.<sup>79</sup> Other states allow groundfishermen, consistent with the federal ceiling, to land one hundred lobsters per day, or five hundred per trip, that were caught as a result of bycatch.<sup>80</sup> In the past, Maine fishermen would only land their lobster bycatch out of state and then motor to Maine to sell their groundfish.<sup>81</sup> However, increasingly, Maine fishermen are selling their entire catch in Massachusetts “where they can legally sell lobsters caught in their nets and boost revenues at the expense of the Portland Fish Exchange,” the primary buyer and seller of groundfish in Maine.<sup>82</sup> From 2004 to 2005, the number of trips Maine-based trawlers took to Massachusetts to sell

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77. *State v. Hayes*, 603 A.2d 869, 870-71 (Me. 1992).

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

79. Janice M. Plante, *Maine to Revisit Lobsters on Dragnets Ban*, COM. FISHERIES NEWS (Feb. 2007), [http://www.fish-news.com/cfn/editorial/editorial\\_2\\_07/Maine\\_to\\_revisit\\_lobsters\\_on\\_draggers\\_ban.html](http://www.fish-news.com/cfn/editorial/editorial_2_07/Maine_to_revisit_lobsters_on_draggers_ban.html).

80. Clarke Canfield, *More Maine Fishermen Take Catches to Mass.*, BOSTON.COM (Jan. 16, 2007), [http://www.boston.com/news/local/maine/articles/2007/01/16/more\\_maine\\_fishermen\\_take\\_catches\\_to\\_mass](http://www.boston.com/news/local/maine/articles/2007/01/16/more_maine_fishermen_take_catches_to_mass).

81. Douglas A. Moser, *Maine Fishermen Landing Catch in Massachusetts at Maine’s Expense*, GLOUCESTERTIMES.COM (Jan. 19, 2007), <http://www.gloucestertimes.com/local/x645255148/Maine-fishermen-landing-catch-in-Massachusetts-at-Maines-expense>.

82. Canfield, *supra* note 80.

lobsters caught as bycatch jumped from 76 to 160, with the value of the seafood sold skyrocketing from \$1.6 million to \$3.8 million.<sup>83</sup>

However, it is not the lost revenue from the lobsters that hurts Maine's economy; it is the revenue from the fish that is also being sold out of state, even though it was caught in Maine waters or in the EEZ off of Maine. Fishermen are choosing to land their entire catch out of state instead of having to throw all of the lobsters back and land just the groundfish in Maine. "For the sake of these few lobsters, [Maine and the Portland Fish Exchange are] losing whole boatloads of fish."<sup>84</sup> According to the National Oceanic and Atmospheric Administration, solely because of title 12, section 6432(1) of the Maine Revised Statutes, Maine lost \$9.5 million to Massachusetts from 2000 to 2005.<sup>85</sup>

Yet, there is a fierce debate between lobstermen and groundfishermen over whether groundfishermen should be able to sell these bycaught lobsters in Maine ports. As one proponent of allowing Mainers to land and sell lobster bycatch says: "the ability of the groundfish industry to land lobsters in Maine caught by unconventional methods in certain federal waters is of vital economic importance to the industry and the survival of Maine businesses dependant on the groundfish industry."<sup>86</sup> However, this debate has vocal constituents on the other side too. Maine lobstermen fear that if groundfishermen were allowed to land their lobster bycatch in Maine it "would open the door for scores of fishermen to target lobsters by dragging the ocean bottom with their nets."<sup>87</sup> In 2007, there was a proposed change to the law in order to bring it in line with the other New England states and allow groundfishermen to land one hundred offshore-caught lobsters per day, or five hundred per trip.<sup>88</sup> The proposed bill, called "An Act to Permit the Landing of Lobsters Harvested by Methods other than Conventional Traps," would have only allowed the landing of bycatch lobsters in Lobster Conservation Management Area Three, which is entirely within the EEZ.<sup>89</sup> The Maine Lobstermen's Association vehemently opposed the legislative change: "We'd be glad to support groundfishermen in any way we can—other than this."<sup>90</sup> The lobster industry, a force to be reckoned with in Maine, lobbied strongly in opposition of the bill.<sup>91</sup> The Department of Marine Resources also said that they "have concerns about the biological impact of dragging on lobsters."<sup>92</sup> Ultimately, the proposed change was defeated by a unanimous vote of the Marine Resources Committee following a

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83. *Id.*

84. *Id.* (quotation of Tom Valleau, President of the Portland Fish Exchange).

85. *Id.*

86. Plante, *supra* note 79.

87. Canfield, *supra* note 80 (quotation of Pat White, chief executive officer of the Maine Lobstermen's Association).

88. Plante, *supra* note 79. The bill was L.D. 170 (123d Legis. 2007). Note also that 80% of the lobster resource is located within state territorial waters, with only 20% located offshore in the federal EEZ. Smith, *supra* note 26, at 677.

89. Plante, *supra* note 79.

90. Canfield, *supra* note 80.

91. Tom Bell, *Marine Resources Nominee Wins Panel OK*, PORTLAND PRESS HERALD (Jan. 21, 2011), [http://www.pressherald.com/news/marine-resources-nominee-wins-panel-ok\\_2011-01-21.html](http://www.pressherald.com/news/marine-resources-nominee-wins-panel-ok_2011-01-21.html).

92. Plante, *supra* note 79.

public hearing that was held at the Augusta Civic Center in order to accommodate the large crowd of people who opposed the change.<sup>93</sup>

Thus, as the Law Court in *Thomas* said, this is an issue for the legislature, albeit a thorny and contentious one. There are a number of options that the Maine State Legislature could, and should, consider. First, Maine could lean out its definition of what a registered vessel is in the EEZ so as to include only boats that would be heading back to Maine ports. This would protect fishermen like Thomas from getting penalized for the same behavior that a Massachusetts resident does legally. It would also likely not threaten the lobster industry in Maine, at least not as much as allowing the lobster bycatch to be sold in-state. These lobsters are already being caught, and many are illegally kept and sold out of state. Leaning out Maine's definition of "registered vessel" would officially sanction behavior that is already occurring. However, this would not help the Portland Fish Exchange or the Maine groundfish industry generally as the groundfish would still follow the lobsters out of state.

Alternatively, Maine could expand its definition to include all vessels fishing in the EEZ off of Maine's coast. However, this would likely give rise to much litigation to determine whether this was consistent with the MSFCMA and not an overly broad reading of section 1856(a)(3)(A) of that act.<sup>94</sup> Further, it would be very difficult to enforce and would likely result in even more uneven enforcement than is currently occurring, as reflected in the *Lauriat*, *Hayes*, and *Thomas* trilogy of cases. Another option would be for Congress to amend the MSFCMA to allow state marine patrol officers to enforce state laws against any and all vessels fishing off of their coasts, which is not without precedent.<sup>95</sup> The MSFCMA was primarily enacted to combat the threat of foreign fishing in the waters off of the United States, and as a result, little regard was given to the potential jurisdictional conflicts in management and enforcement between federal and state governments.<sup>96</sup> However, with the current byzantine regulatory structure, it would hardly be advantageous to create an exception to the general prohibition of enforcement against out of state vessels.

A fourth option would be for the Maine legislature to make its lobster laws inapplicable in the EEZ or for the courts to interpret them as such. The Supreme Court of Florida has held that Florida fisheries laws are applicable only in the Territorial Sea unless the legislature puts in language expressing its intent that a particular provision shall apply in the EEZ.<sup>97</sup> The Law Court could have interpreted Maine's fisheries laws this way in *Lauriat*, but likely not later on in *Hayes* and *Thomas* after the precedent was set.

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93. Chris Busby, *Maine's Fishing Industry in "Emergency" Mode*, THE BOLLARD, (Mar. 21, 2007), <http://www.thebollard.com/bollard/?p=2577>.

94. The language of that section is "[n]o State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State." 16 U.S.C.A. §1856(a)(3)(A) (West 2011).

95. See *Marble v. Or. Dept. of Fish & Wildlife*, 234 P.3d 1062 (Or. Ct. App. 2010) (Congress passed an act allowing Pacific Northwestern states to enforce their regulations against out of state vessels fishing for Dungeness crab in the EEZ adjacent to the state).

96. Bittleman, *supra* note 74, at 353-54.

97. See *Southeastern Fisheries Ass'n Inc. v. Mosbacher*, 773 F. Supp. 435 (D.D.C. 1991).

Finally, short of outlawing dragging, which many fishermen and conservationists have pushed for, the Maine legislature could and should amend its lobster bycatch rules to bring them up to the federal ceiling and in line with Maine's competitor states. These lobsters are already being caught in groundfishermen's nets, and some fishermen are keeping them and steaming to Massachusetts. It would be impossible and very costly to stop this behavior by enforcing against every single Maine dragger in the EEZ. Further, Maine fishermen are illegally catching these lobsters and likely will not stop doing so, no matter how many fines are handed out. The Maine economy and fish markets are the losers. According to one of its critics, "[i]t's a law of unintended consequences. We look at [12 M.R.S. § 6432(1)] as an economic development opportunity for the commonwealth of Massachusetts."<sup>98</sup> Maine should amend its lobster bycatch law to start favoring Mainers and stop favoring the out of state fish markets, fueling stations, and other dependent industries.

#### V. CONCLUSION

The Law Court in *Thomas* correctly adjudged that Maine's lobster bycatch law, as applicable in the EEZ, is a consideration for the legislature. *Thomas* is just the latest flashpoint in the long running debate between lobstermen and groundfishermen and their respective industries. The current regulatory scheme does not objectively make sense nor does its enforcement appear to be uniform or effective. Further, according to one economist's estimate, Maine lost 355 jobs and missed "out on over \$30 million in economic activity and tax revenue between 2000 and 2005 solely due to the bycatch issue."<sup>99</sup> The courts are relatively powerless to affect change on this issue, as the *Thomas* case proves. The legislature should carefully consider its options and amend Maine's EEZ lobster bycatch rules to bring them up to the federal ceiling. This would stop Maine from discriminating against its own citizens in the EEZ in favor of out of state fishermen and the Massachusetts fish markets.

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98. Plante, *supra* note 79 (quotation of Tom Valleaiu, President of Portland Fish Exchange).

99. Busby, *supra* note 93 (quotation of Dr. Charles Lawton).