Overcoming the Political Tragedy of the Commons: Lessons Learned from the Reauthorization of the Magnuson Act

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http://dx.doi.org/https://doi.org/10.15779/Z38RN84
Overcoming the Political Tragedy of the Commons: Lessons Learned from the Reauthorization of the Magnuson Act

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INTRODUCTION

The standard account of the "tragedy of the commons" involves the overexploitation of a common resource such as a forest or an ocean. To maximize the value of a resource, the members of a community should practice conservation by limiting the total amount of the resource harvested at any given time. However, forbearance on the part of some members of the community might allow other mem-

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* Associate Professor of Law, Boston University School of Law. I would like to thank my co-panelists at the ELQ Symposium Session On Fisheries, Alison Reiser, James Wilen and Shi-Ling Hsu, for their helpful comments.
bers of the community to "cheat" and exploit the common resource more intensively. As a result, forbearing members of the community might be worse off in the shortterm since their share of the current harvest would be less than it might otherwise have been, and no better off in the longterm since the resources still would be depleted. To avoid this result, all members join in a destructive race to exploit the resource. That is the "tragedy" in the tragedy of the commons. The tragedy of the commons is essentially a story about a stateless society. One might think that the introduction of a government apparatus to regulate the commons would solve the tragedy of the commons. The tragedy, after all, results from the inability of resource harvesters, operating individually, to monitor and limit one another's harvesting efforts. The government, in the form of a legal and regulatory system backed by coercive power, should be able to assume this function of monitoring and limiting harvest.

Public choice theory, however, predicts that individuals and entities currently engaged in a race to exploit a commons may dominate political institutions designed to combat overexploitation. Because a substantial number of those individuals and entities rationally may favor continued overexploitation over conservation, the government may fail to implement effective conservation regulation. The government apparatus that is supposed to solve overexploitation, in other words, may be captured by those with a vested interest in continuing overexploitation. That is the "tragedy" in what I term "the political tragedy of the commons." Regulation of American offshore fisheries under the Magnuson Fisheries Conservation and Management Act (FCMA) illustrates this political tragedy of the commons.

Because the political tragedy of the commons reflects the political influence of resource harvesters on the regulatory process, any solution to that tragedy must entail providing regulatory decisionmakers some insulation from those political pressures. That insulation might be achieved, at least in part, by vesting regulatory authority with technically-oriented bureaucrats in Washington, D.C., instead of more "responsive" local officials. Highly centralized, technocratic government regulation is, to be sure, often a clumsy means of addressing societal problems; indeed, in environmental and natural resources law, many reform initiatives now call for substantial transfers of decisionmaking

1. For a thorough exposition of the tragedy of the commons, see Garrett Hardin, The Tragedy of the Commons, 162 SCIENCE 1243 (1968). For an interesting analysis of environmental regulation as a response to commons problems, see Carol Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. CHI. L. REV. 711 (1986).
authority from the center to the periphery. But in the context of the political tragedy of the commons, centralized regulation may be the best possible solution. In reauthorizing the FCMA in legislation through the Sustainable Fisheries Act (SFA), Congress seems to have partially recognized as much: as discussed below, the SFA strengthens somewhat centralized regulatory authority over America’s offshore fisheries.

I
THE POLITICAL TRAGEDY OF THE COMMONS

A. Why Resource Harvesters May Dominate Regulatory Politics

In an American open access fishery, such as the New England fishery, commercial fishermen are one of the principal groups interested in the regulation of the commons. For any given fishery, the number of active commercial fishermen is likely to be relatively small, and each individual fishing enterprise is likely to perceive its stakes in the content and implementation of regulation as enormous. The yearly quota for haddock or gear specifications, for example, may mean the difference between a small fishing enterprise flourishing or going bankrupt. As a small group whose members have large individual stakes in government treatment of the group, commercial fishermen qualify as what a public choice theorist might label a “concentrated minority.”

The general public, of course, also has an interest in fisheries management. As consumers or potential consumers of fish, members of the general public have an interest in ensuring availability of and a reasonable price for fish. This interest is so small or minor for most individuals, however, that it is not generally even mentioned in public debates about fisheries regulation. Many members of the public also may have an interest as environmentalists or at least as ecologically-minded citizens, in the preservation of offshore species and ecosystems. Ecologically-minded citizens are, as compared to active commercial fishermen, probably quite a large and widely-dispersed group—indeed, they may constitute a numerical majority of the population. The individual members of this group, however, have fairly


4. See, e.g., Peter Shelley et al., The New England Fisheries Crisis: What Have We Learned?, 9 TUFTS ENVTL. L.J. 221, 238 (1996) (noting that “consumer groups. . . have been by-and-large invisible in the management process.”).
small personal stakes in environmentally sound management of fisheries. Ecologically-minded citizens are, in public choice terminology, a "diffuse majority."

The key insight of public choice theory is that concentrated minorities, such as commercial fishermen, often prevail in politics over diffuse majorities, such as ecologically-minded citizens. Two factors explain the surprising success of concentrated minorities. First, concentrated minorities are less expensive to organize: it is simply easier to maintain communications among a few fishing companies located in a particular port than among, say, ecologically-minded citizens living apart from one another in many different states. Second, concentrated minorities are less susceptible to "free-riding"—that is, members shirking their group responsibilities and relying on other members to work to obtain favorable treatment of the group in the political process. Because of the importance of fishing regulation to their livelihood, local fishermen are likely to show up at meetings about regulation rather than rely on fellow fishermen to represent and safeguard their interests. By contrast, many ecologically-minded citizens may decide that they are simply too busy to attend public meetings and too financially strapped to contribute to environmental interest groups' lobbying efforts regarding fisheries conservation. Instead, self-identified environmentalists may free-ride: they may simply hope that others like them will participate and contribute in sufficient force to ensure what they perceive to be desirable regulatory outcomes.

Moreover, in a democracy where voting rights are based on residency, fishermen's geographic concentration affords them the special benefit of being an indispensable constituency to at least some local, state, and federal officials. The mayor of a fishing town such as New Bedford, Massachusetts—or for that matter a state representative or Congressman whose district includes New Bedford—really has no choice but to advocate strongly and persistently for commercial fishermen's interests. It is no surprise that Congressional oversight of federal fishing regulation has for many years been controlled by representatives from districts or states that include fishing ports. By contrast, there are no elected representatives who need worry that

6. See id. at 53-54 (explaining why larger groups will fall short in their efforts to provide "an optimal amount of public good").
7. See Suzanne Iudecicello et al., Putting Conservation into the Fishery Conservation and Management Act: The Public Interest in Magnuson Reauthorization, 9 Tul. Envtl. L.J. 339, 347 (1996) ("For too long Congress has acquiesced in the 'business as usual' of leaving national fishery policy to the few coastal members whose constituents make their living
their failure to support fisheries conservation will cost them an election. Even in districts where there are a number of voters who support fisheries conservation, those voters are likely to consider fisheries conservation only one of the many bases—and quite probably one of the least important bases—upon which they evaluate their representatives.

This analysis would suggest that, as between commercial fishermen’s interests and ecologically-minded citizens’ interests, commercial fishermen’s interests consistently will win out in democratic politics. One caveat to this analysis, of course, is that, in addition to commercial fishermen, there are sometimes other concentrated minorities with an interest in fisheries regulation, the most notable of which are recreational or sports fishermen. Sports fishermen sometimes seem to fare better in regulatory politics than commercial fishermen. Another caveat is that the politics of fisheries often involves bitter conflicts among commercial fishermen themselves, including fishermen based in different ports, using different gears, or harvesting different stocks. Accordingly, there may be no single but rather a number of competing claims as to what constitutes the position of any fishery’s commercial fishing industry.

from the sea. That practice has resulted in special treatment, exclusive programs, and ad hoc policy.

Prior to 1995, the House Merchant Marine and Fisheries Committee, a committee dominated by representatives from fishing districts, exercised jurisdiction over fisheries legislation. As part of the Republican “Contract with America” reforms, the House Republican Leadership abolished the Fisheries Committee. It is possible that this institutional change limited the influence of commercial fishermen and thus made inclusion of some conservation requirements in the SFA possible. See Kenneth J. Cooper, GOP Plans Shake-up of House Committees, WASH. POST, December 3, 1994, at A1 (discussing the possibility that the abolition of specialized Committees such as the Fisheries Committee will lessen interest group influence).

8. See Curtis W. Bostick, Does the Council System Work?, in CONSERVING AMERICA’S FISHERIES 232 (Richard H. Stroud ed., 1994) [hereinafter CONSERVING AMERICA’S FISHERIES] (discussing commercial fishermen’s complaints that recreational fishermen’s interests, particularly in the South, are too heavily weighted by management councils); Gary D. Libecap, Comments on Anthony D. Scott’s “Conceptual Origins of Rights Based Fishing,” in RIGHTS BASED FISHING 39, 43 (Philip A. Neher et al. eds. 1989) [hereinafter RIGHTS BASED FISHING] (noting that “large groups of sports fishermen may be more effective politically than commercial fishermen in determining the path of regulatory change.”).

9. See Anthony D. Scott, Conceptual Origins of Rights Based Fishing, in RIGHTS BASED FISHING, supra note 8, at 31 (“Regulators in the course of stock management have rationed access so as to create secure catches for several types of gear and for vessels from different ports. The negotiation of these arrangements has led to rivalry among the gear types and ports, and coalesces them into quarreling interest groups. These endlessly debate their respective rights to fish in their own ways. . . .”).
B. Why Resource Harvers May Not Support Conservation Regulation

Much of the academic literature regarding fisheries regulation addresses the question of how fisheries overexploitation might best be prevented. Some commentators believe that the most effective—perhaps the only effective—means of preventing overexploitation of a commons is to privatize the commons. Economic theory suggests that once fishermen have long-term property rights in the catch in a fishery, they will have a greater interest in protecting the long-term viability of the relevant fish populations.10 Consistent with this theoretical prediction, fish populations do seem to have recovered in fisheries that have abandoned open access and divided fishery catch among existing fishermen by means of property right instruments known as individual transferable quotas or ITQs.11 Other commentators, stressing the difficulties of implementing and enforcing ITQ regimes as well as some of the possible adverse social and environmental consequences of such regimes, argue that direct government regulation of fisheries practices—command and control regulation, if you will—is an unavoidable component of any effort to maintain sustainable fisheries.12

While commentators have focused on the relative merits of ITQ and non-ITQ responses to fisheries overexploitation, commercial fishermen in some fisheries have opposed all meaningful efforts to abate overexploitation. It is not hard to understand why fishermen engaged in a race to exploit a fishery as fast as possible might oppose efforts to prevent depletion through either ITQ reforms or effective command-and-control regulation. Where a race to deplete the commons has been underway for some time, fishermen who are bad at racing will tend to have dropped out of the fishery; fishermen who are good at

10. See, e.g., Carrie A. Tipton, Note, Protecting Tomorrow's Harvest: Developing a National System of Individual Transferable Quotas to Conserve Ocean Resources, 14 VA. EnvTL. L.J. 381, 397 (1995) (“By assigning each participant a predetermined amount of fish . . . each fishermen[sic] has an additional incentive to protect the continued availability of the resource. . . .”).

11. For discussions of the apparent success of ITQs, see Bonnie J. McCay, ITQ Case Study: Atlantic Surf Clam and Ocean Quahog Fishery, in LIMITING ACCESS TO MARINE FISHERIES: KEEPING THE FOCUS ON CONSERVATION 75, 79 (Karyn L. Gimbel ed., 1994) [hereinafter LIMITING ACCESS]; Ian N. Clark et al., The Development and Implementation of New Zealand's ITQ Management System, in RIGHTS BASED FISHING, supra note 8, at 117.

12. See, e.g., Grant Monk & Grant Hewison, A Brief Criticism of the New Zealand Quota Management System, in LIMITING ACCESS, supra note 11, at 107; Statement of Greenpeace at the Hearing on H.R. 39, A Bill to Reauthorize the Magnuson Fishery and Conservation Act of 1976 Before the Subcomm. on Fisheries and Oceans of the Resources Comm. of the U.S. House of Representatives, Feb. 23, 1995; James W. Fullilove, Moving Toward Restricted Access: Let's Be Sure We Know What We're Doing, in CONSERVING AMERICA'S FISHERIES, supra note 8, at 197.
racing will have stayed in or even established a bigger presence. Fishermen who have adapted to racing may rationally fear that they will not fare so well under either an ITQ or effective command-and-control regime.\textsuperscript{13}

Moreover, fishermen may apply an extremely high discount rate to gains from possible increased future catch resulting from the adoption of ITQs or effective command-and-control conservation regulation. Individual fishermen or small fishing companies operating under heavy mortgages may conclude that they simply cannot afford to take any reduction in current income as a tradeoff against future expected gains—or at least smaller losses—in income.\textsuperscript{14} Perhaps for this reason, political resistance to conservation reforms has been more intense in fisheries dominated by small fishing companies than in fisheries dominated by a few large companies with diversified business investments.\textsuperscript{15}

Of course, those who think they might gain under a property rights regime or an effective command-and-control conservation regime—for example, fishermen who could operate cost-effectively or more generally ecologically-oriented members of the public—could buy off fishermen who have come to dominate the fishery under racing conditions. For the reasons stated above, however, ecologically-

\textsuperscript{13} See Daniel D. Huppert, Comments on R. Bruce Rettig's "Is Fishery Management at a Turning Point? Reflections on the Evolution of Rights Based Fishing," in RIGHTS BASED FISHING, supra note 8, at 65, 66 ("The fisherman who excels in an open access fishery has special characteristics that may be less useful and less successful in a more efficient and business-like ITQ fishery."). Fish processing companies also rationally may oppose reforms to the extent that they have invested capital adapting to the very short, frantic fishing seasons that characterize open access regimes (for example, by locating large freezing and processing capacities right next to fish docks). \textit{See id.}

In addition to rational economic self-interest, cultural beliefs and predispositions may prevent fishermen from embracing meaningful reform. New England fishermen, for example, have long conceived of themselves as rugged individualists entitled to reap what they can from the sea; traditionally these fishermen are deeply distrustful of any government claims of expertise or decisionmaking. \textit{See Richard B. Roe, The New England Multispecies Groundfishery, in CONSERVING AMERICA'S FISHERIES, supra note 8, at 83, 88 ("The New England fisherman, fiercely independent, wary of federal intervention, and strongly opposed to limited entry ... stands astride the path of progress."). See also Shelley, supra note 4, at 241 ("In New England, in particular, the development of an organized, pro-active fishermen's constituency for improved management cuts against a long history of independence and anti-government sentiment.").}

\textsuperscript{14} As Wilen and Hsu point out, the absence of effective command-and-control regulation of ITQs has led "racing" fishermen to build ever "bigger, faster vessels." Shi-Ling Hsu & James E. Wilen, Ecosystem Management and the 1996 Sustainable Fisheries Act, 24 ECOLOGY L.Q. __ (1997) (this issue). These larger boats often mean larger debt for individual fishermen and companies. This increased debt, in turn, makes it more difficult for the fishermen to "tolerate" regulatory reform and the attendant short-term harvest reductions, and thus feeds the vicious cycle leading to massive resource depletion.

\textsuperscript{15} \textit{See Scott, supra note 9, at 31} (willingness to accept ITQ is strongest in fisheries with an "initial concentration of political and economic power not of owners or crews on shares but of oligopnostic, multi-gear, multi-port corporations.").
oriented citizens are unlikely to organize well enough to engage in such bargaining. By contrast, in some fisheries, there are identifiable and reasonably well-organized groups of fishing companies that believe that they might reap greater long-term returns under an ITQ regime than under an open access regime. But deals between such pro-ITQ fishermen and anti-ITQ fishermen would require the parties to overcome substantial organizational and bargaining obstacles. As Gary Libecap has observed, while "it is possible in principle to envision a system of side payments to compensate those negatively affected by the proposed arrangement and to buy off influential parties . . . in practice, effective side payment schemes to reduce distributional concerns are unlikely outcomes of the political process." 16 Particularly in highly heterogenous fisheries, it may be simply too difficult to resolve the questions of how much each fishing interest should pay or receive. 17

C. The Magnuson Act as Political Tragedy

The Fishery Conservation and Management Act of 1976, widely known as the Magnuson Act, had two stated goals. The first goal was to effect the exclusion of foreign fishermen from America's coastal waters and build American-run fishing fleets. The second goal was to prevent fishery depletion in America's coastal waters. By all accounts, the first goal has been achieved. 18 The second goal, however, has not been achieved. Indeed, since the passage of the Act, depletion of offshore fishery populations has worsened. Most notably, the New England offshore fishery has "become a metaphor for management failure." 19

To understand why this has been the case, it is helpful to consider briefly the types of institutional arrangements that might be expected to check the tendency of anti-conservation commercial fishermen to dominate fishery politics. First, as between institutional arrangements that vest authority in local or decentralized regulators and those that vest authority in federal or centralized regulators, one might expect

16. See Libecap, supra note 8, at 43.
17. Similar bargaining obstacles have undermined efforts to negotiate the unitization of oil fields in the United States. See Steven N. Wiggins & Gary D. Libecap, Oil Field Unitization: Contractual Failure in the Presence of Imperfect Information, 75 AM. ECON. REV. 368, 368 (1985) (arguing that even though oil field unitization offers aggregate gains, unitization negotiations typically fail because of "imperfect and asymmetric information that prevents agreement on lease values and hold-out strategies of firms to increase their share of unit rents.").
19. Shelley, supra note 4, at 222. See also Decker, supra note 18, at 323 (noting that many of the fisheries managed under the Magnuson Act have been "severely overfished").
centralized regulatory authority to be less susceptible to domination by commercial fishermen. Because organizations representing diffuse public concerns such as conservation or ecological preservation suffer from free-riding, they may be much less equipped than industry to fight a myriad of local battles. The centralization of regulatory authority may mitigate somewhat the free-riding disadvantages of diffuse majorities such as ecologically-minded citizens.

Second, as between statutory provisions that afford regulators discretion in pursuing conservation goals and those that impose specific nondiscretionary requirements, the latter are more likely to limit or prevent industry dominance of regulatory institutions. Specific nondiscretionary requirements for conservation are important because such requirements are judicially enforceable: an environmental group, at least in theory, could bring a successful suit under the Administrative Procedure Act when such requirements are ignored. The prospect of such suits empowers regulators who wish to effectively combat overfishing vis-a-vis those commercial fishermen who oppose any current yield limitations. Such regulators can rebut fishermen's complaints by explaining that they are legally required to prevent overfishing and that, if they do not do so, the result most likely would be a lawsuit and even tougher court-ordered conservation measures. Fishermen presumably would understand that even more than centralized regulators, federal judges are insulated from industry


21. The Conservation Law Foundation (CLF), a Boston-based group, has brought the only environmentalist suit to date under the Magnuson Act. See generally Shelley, supra note 4, at 222, 228-29 (discussing the suit and settlement reached between CLF and the United States). During the long debate over Magnuson Act reauthorization, CLF consistently advocated for new statutory language that would facilitate lawsuits (or threats of such) by environmental plaintiffs. See Eleanor M. Dorsey, *The 602 Guidelines on Overfishing: A Perspective from New England*, in *Conserving America's Fisheries*, supra note 8, at 181, 187 (advocating statutory changes to clarify that the Secretary of Commerce has nondiscretionary obligations to prevent and remediate overfishing).

22. Fishing interests may complain directly to federal regulators or, as they have done, use Congressional representatives from fishing districts or high Executive Branch contacts to press their case. See, e.g., Bostick, supra note 8, at 232 (noting how the swordfish industry overruled a management council by appealing directly to Congress and the President). Nondiscretionary statutory requirements provide federal regulators with political "cover" vis-a-vis angry Congressmen or White House officials spurred on by angry representatives of the fishing industry. Precisely because nondiscretionary statutory requirements thus limit the ability of Congressmen to intervene with and control bureaucrats on a case-by-case basis, Congress may maximize its political influence by enacting statutes that broadly delegate discretion to bureaucrats to pursue "public interest" objectives and then intervening whenever those bureaucrats alarm business groups whose interests are in tension with
pressure. And, of course if regulators actually are opposed to instituting conservation measures or still find themselves politically incapable of instituting effective conservation measures, nondiscretionary statutory requirements might lead to effective conservation regulation by means of court order.

The Magnuson Act, however, did not vest substantial regulatory authority in a centralized regulatory body or subject regulators to nondiscretionary conservation requirements. On the contrary, the Act employed a model of decentralized, discretionary industry self-regulation. The Act created and placed primary jurisdiction over fishery management in eight regional fishery management councils.23 By statute, the Secretary of the Department of Commerce selected members of the councils from lists of nominees submitted by the Governor of each applicable constituent State.24 The Act required that all such nominees "be individuals who, by reason of their occupational or other experience," are knowledgeable regarding fishery conservation and management.25 In addition, a Governor could make nominations only after consultation with representatives of the commercial and recreational fishing interests.26 The practical effect of these requirements—and the absence of any explicit requirement that Councils reflect a diversity or balance of relevant interests, including the interests of ecologically-minded citizens—is that a number of the fishery councils have consisted almost exclusively of commercial fishermen.27 Not surprisingly, some fishery management councils have resisted taking effective measures to prevent or cure overfishing.28

The Magnuson Act did grant the Secretary of Commerce (acting through the National Marine Fisheries Service (NMFS), a subsidiary of the Department of Commerce’s National Oceanic and Atmospheric Administration) the authority and responsibility to review and adopt or reject the management plans proposed by fisheries management councils.29 In theory, the NMFS could have used that authority

the stated public interest objectives of the statutes. See Aranson et al., A Theory of Legislative Delegation, 68 CORNELL L. REV. 1, 55-63 (1982).
27. See Shelley, supra note 4, at 237 (explaining that the New England Council includes only “token” representation of interest other than commercial fishing); Robert G. Hayes, Original Intent of the Magnuson Act Framers, in CONSERVING AMERICA’S FISHERIES, supra note 8, at 39, 44 (noting the much-criticized dominance of commercial fishermen on the management councils and arguing that Congress intended this result because commercial fishermen “were the most involved in getting [the Magnuson Act] passed.”).
28. Again, New England offers the clearest example. See Shelley, supra note 4, at 233-34 (discussing New England Councils’ refusal to take action to stop “systematic overfishing and long term decline”).
to force management councils to deal effectively with overfishing. The Act, however, did not prescribe specific actions NMFS must take by specific dates or times in response to management council plans that failed to prevent or remediate overfishing. The Act thus did not provide NMFS with a legal justification—or legal cover—to take tough measures opposed by commercial fishing interests. Perhaps as a result, NMFS has often "rubber stamped" fisheries council plans.\(^3\) In one widely publicized case in which the NMFS seriously threatened to modify a New England fisheries plan that included inadequate conservation measures, the NMFS backed down in response to pressure from the New England Congressional delegation.\(^3\) This incident, as well as the NMFS's advocacy for stricter conservation requirements during the Magnuson Act reauthorization process,\(^3\) suggests that the agency would like to take a more aggressive stance toward conservation, but simply has found it politically impossible to do so.

II


A. The Sustainable Fisheries Act

On October 14, 1996, President Clinton signed the reauthorized Magnuson Act, known as the Sustainable Fisheries Act (SFA). The SFA modestly alters the institutional arrangements for governance of fisheries commons so that, perhaps, there is now a better prospect that the political tragedy of the commons will be overcome. In effect, the SFA strengthens the institutional role of the NMFS vis-a-vis the regional management councils and commercial fishermen by imposing on the NMFS specific nondiscretionary duties to ensure that management plans grapple with the problem of overfishing. In other words, the SFA, unlike the original Magnuson Act, provides the NMFS some legal cover for politically unpopular action.\(^3\)

30. See William N. Myhre, *The Law of Unintended Consequences: Putting Theory into Practice*, in *Conserving America's Fisheries*, supra note 8, at 47, 54 (noting that the Secretary of Commerce "more often than not rubber stamped" Council decisions).

31. See Shelley, supra note 4, at 227.

32. See Testimony of Rolland A. Schmitten, Assistant Adm'r for Fisheries, Nat'l Marine Fisheries Serv., Nat'l Oceanic and Atmosphere Admin., U.S. Dep't of Commerce Before the Subcomm. on Fisheries, Wildlife and Oceans, Comm. on Resources, U.S. House of Representatives, Feb. 23, 1995 (advocating amendments to the Magnuson Act to curb "current practices permitted under the Magnuson Act where stocks are legally allowed to be fished down to, and managed at, the point where overfishing occurs."). Of course, the NMFS's attitude toward conservation will depend, at least in part, on the ideology of the Administration in office at any given time.

33. The SFA does not redress all of the weaknesses of the original Magnuson Act. For example, the SFA does not require broader-based membership on fisheries councils, with the limited exception that the Pacific Council now must include an Indian tribal repre-
Sections 108 and 109 of the SFA contain the key provisions regarding overfishing. Section 108 amends the original Magnuson act to require each fishery management council to "describe and identify essential fish habitat for the fishery" and "minimize to the extent practicable adverse effects on such habitat caused by fishing." Fishery management councils also are now required to "specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished."

Section 109 imposes a series of new requirements upon the NMFS. The NMFS now must report annually to Congress and the Councils regarding any fishery that is overfished or will become overfished within the next two years. In the case of any overfished fishery, the NMFS must direct the relevant management council to prepare a plan to end overfishing and rebuild affected stocks such that stocks will return to normal levels within "as short [a time period] as possible." If a Council fails to produce such a plan within one year, the NMFS must step in: at that point, the NMFS has nine months in which to "prepare a fishery management plan or plan amendment and any accompanying regulations to stop overfishing and rebuild affected stocks."

Given the political power of commercial fishermen as a historical matter and their traditional resistance to conservation regulation, one might wonder how even these reasonably modest conservation protections managed to be enacted into law. Part of the answer may be that depletion of fisheries is now so obvious and dramatic that even commercial fishermen acknowledge the inevitability and perhaps even the necessity of further regulatory controls. Moreover, as discussed above, diffuse majorities generally are at a lesser disadvantage at the national level than at the local level and, indeed, environmental groups representing general public sentiment were extremely active in the Magnuson Act reauthorization process. Finally, environmental groups found a powerful ally in sports fishermen, a concentrated and

sentative. See Sustainable Fisheries Act, Pub. L. No. 104-297, § 107(b)(3), 110 Stat. 3559 (1996). However, the SFA does provide that advisory committees to the councils must include a range of interests. See § 107(e)(4) (committees must "be balanced in [their] representation of commercial, recreation, and other interests"). The original Magnuson Act provided only for the representation of commercial fishing interests on advisory committees. See 16 USC § 1852 (g)(3)(B) (1997).

34. Sustainable Fisheries Act § 108(a)(3).
35. § 108(a)(7).
36. See § 109(e)(1).
37. § 109(e)(4)(A)(i).
38. § 109(e)(5).
well-organized group that generally favors measures to ensure the long-term sustainability of fish populations. 39

B. Two Caveats Regarding Centralization as a Means of Overcoming the Political Tragedy of the Commons

1. Centralized Review Can Favor "Racing" Interests

While it may be true that greater centralized review—and hence less autonomy for regional regulators—generally increases the prospects for preventing commons depletion, the reauthorization of the Magnuson Act also illustrates that sometimes regional autonomy is preferable. In a regime with complete regional autonomy, there is no political recourse for fishermen who wish to engage in racing behavior but who find themselves in a fishery in which the dominant faction has decided to support an ITQ or effective command-and-control conservation regime. In a regime with significant centralized review of regional regulation, however, pro-racing fishermen can seek to overturn regional ITQ or command-and-control conservation reforms or prevent anticipated future reforms by appealing to their political allies in Washington, DC. In the course of the reauthorization of the Magnuson Act, a fleet of Alaskan fishermen did just that, with unfortunate results for the substance of the SFA.

Alaskan commercial fishermen who opposed the adoption of ITQs in Pacific fisheries found a powerful ally in Alaska Senator Ted Stevens, a member of the Senate Committee with jurisdiction over Magnuson Act reauthorization and a co-sponsor of the reauthorization legislation. The Alaskan fishermen apparently feared that the adoption of ITQs would place them at a disadvantage with respect to a larger offshore trawler fleet based in Washington. 40 Senator Stevens reportedly used his political clout—including his ability to hold up reauthorization of the Magnuson Act—to add to the SFA a moratorium on the adoption by any fishery council of any new ITQ pro-


One could well imagine that, even after the moratorium is lifted in the year 2000, the NMFS might find itself pressured by Alaskan fishermen and their political allies in Congress and the Executive Branch to second guess management plans adopting ITQs in Pacific fisheries.

2. Centralization of Regulatory Authority is a Means, Not an End

Once meaningful regulatory reforms have ended the dominance of "racing" fishermen in a fishery, regulatory decentralization and indeed deregulation may be desirable. For example, where ITQ regimes have been successfully implemented, the commercial fishermen who remain and prosper in the fisheries seem to be willing to join with government officials and each other to truly take care of the fisheries they in some sense now partly "own"; local government regulatory institutions and self-regulatory institutions may flourish once the racing dynamic is broken. But, again, the vesting of authority in politically insulated government decisionmakers may be necessary to break the racing dynamic in the first place.

CONCLUSION

The SFA alters somewhat the political institutions governing the regulation of one of the most important remaining commons in the American economy. Institutional arrangements are important because, absent some buffer against the influence of those who have adapted to and have a stake in a racing regime, government regulation may fail to prevent massive and ecologically disastrous overfishing. Government regulation has the potential to solve the tragedy of the commons or—as the New England fishery experience arguably demonstrates—simply function as a mere political manifestation of it.

41. See id. (describing the moratorium as a compromise between Stevens and the Senators from Washington). See also Sustainable Fisheries Act § 108(d)(1)(A) ("A Council may not submit and the Secretary may not approve or implement before October 1, 2000 . . . a new individual fishing quota program.").

42. See, e.g., McCay, supra note 11, at 90 (noting that after the implementation of an ITQ regime, industry members may feel "it is much more important and worthwhile to engage in governance activities" and reporting that in Canadian fisheries using ITQs industry groups have "experimented with improved methods of representation" and expanded decisionmaking "to critical issues such as catch-monitoring, lifting caps on ownership, and making transfers permanent.").