

COMPARING RECENT FEDERAL AND STATE ATTEMPTS AT LEGISLATION PROMOTING SHARK CONSERVATION: A FAILURE OF COOPERATIVE FEDERALISM?

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Sharks aren't gods and they're not devils. I regard them as true lords of time. They've survived multiple extinction episodes when most marine animals have disappeared. They've had the strength and adaptations to come back time and time again, and they've been around probably longer than most animals with backbones – nearly half a billion years! But now humans, the super-predator, threaten to undo the half-billion-year reign of sharks. And the sad fact is that we're killing them off to make soup out of their fins!¹

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1. Save Our Seas Foundation, *Project Leader: Samuel H. Gruber*, www.saveourseas.com/project-leader/sam-gruber (last visited Feb. 18, 2020).

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I. INTRODUCTION

We are in the midst of the sixth mass extinction.² Indeed, a forthcoming report by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services found that around one million plants and animals are threatened with extinction.³ Human overexploitation of organisms is the second leading driver of extinction.⁴ Illegal wildlife trade fuels the overexploitation of many species, and urgent action is necessary to prevent further “biological annihilation” of the world’s biodiversity.⁵

Sharks are a particularly maligned and threatened group. Overfishing is largely responsible for shark population declines in recent decades.⁶ Many sharks are caught as bycatch, while some fisheries directly target certain sharks for meat.⁷ Perhaps the most notorious and abhorrent fisheries practice is shark finning. Finning sharks involves removing the fins of an individual and discarding the body back into the water.⁸ Often still alive but unable to move, the animals either drown, bleed to death, or are eaten by other predators.⁹ Shark fins are frequently harvested from threatened or

2. Anthony Barnosky et al., *Has Earth’s Sixth Mass Extinction Already Arrived?*, 471 NATURE 51, 51 (2011) (characterizing mass extinctions as “times when the Earth loses more than three-quarters of its species in a geologically short interval.” Five previous mass extinctions are documented in the fossil record, and research indicates that current extinction rates are headed towards those levels previously observed).

3. UNITED NATIONS SUSTAINABLE DEV. GOALS, *UN Report: Nature’s Dangerous ‘Unprecedented’; Species Extinction Rates ‘Accelerating’* (May 6, 2019), <https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/>.

4. *Id.*

5. Gerardo Ceballos et al., *Biological Annihilation via the Ongoing Sixth Mass Extinction Signaled by Vertebrate Population Losses and Declines*, 114 PROCEEDINGS NAT’L ACAD. SCI. U.S. 7731, E6089, E6095 (2017).

6. Julia K. Baum et al., *Collapse and Conservation of Shark Populations in the Northwest Atlantic*, 299 SCI. 389, 390 (2003).

7. *Id.* at 389.

8. PATRICK MUSTAIN ET AL., SHARK FIN TRADE: WHY IT SHOULD BE BANNED IN THE UNITED STATES 1 (2016).

9. *Id.*

endangered species, such as great hammerheads (*Sphyrna mokarran*), among others.¹⁰

Public opposition to shark finning led to the implementation of several federal and state laws in the United States promoting shark conservation. This article examines how effective those laws have been and assesses recent efforts to improve legal protections for sharks. Part II provides a brief background on shark ecology and conservation, and the history and significance of shark finning. Part III discusses domestic management of shark fisheries. Part IV describes some of the problems with current laws. Part V analyzes and compares potential solutions to the problems with current laws. Part VI considers the merits and implications of shark fin bans. Part VII concludes that the present combination of federal and state law is insufficient to protect these animals, and that stronger federal law is necessary to create comprehensive and unified prohibitions on trade in shark products.

II. BACKGROUND

There are over 500 shark species found throughout the world's oceans.¹¹ They range in various life-history characteristics, from 20-centimeter-long dwarf lanternsharks (*Etmopterus perryi*) to colossal 20-meter-long whale sharks (*Rhincodon typus*).¹² Generally, sharks are relatively slow to mature and are long-lived; some species may even live for over 400 years.¹³ Many sharks are also apex predators (i.e., top predators) in their food webs.¹⁴ Apex predators often exert top-down control of mesopredators (i.e., intermediate predators) and herbivores in ecosystems.¹⁵ Consequently, removing apex predators such as sharks from ecosystems causes a myriad of effects on other taxa.¹⁶

10. Shelley C. Clarke et al., *Identification of Shark Species Composition and Proportion in the Hong Kong Shark Fin Market Based on Molecular Genetics and Trade Records*, 20 CONSERVATION BIOLOGY 201, 209 (2006).

11. *Sharks FAQ*, FLA. MUSEUM OF NAT. HISTORY, <https://www.floridamuseum.ufl.edu/discover-fish/sharks/faq/> (last visited Mar. 23, 2020).

12. *Id.*

13. Julius Nielsen et al., *Eye Lens Radiocarbon Reveals Centuries of Longevity in the Greenland Shark (*Somniosus Microcephalus*)*, 353 SCI. 702, 702 (2016).

14. *Id.*

15. Benjamin Feit et al., *Apex Predators Decouple Population Dynamics Between Mesopredators and Their Prey*, 22 ECOSYSTEMS 1606, 1607 (2019).

16. Ransom A. Myers et al., *Cascading Effects of the Loss of Apex Predatory Sharks from a Coastal Ocean*, 315 SCI. 1846, 1846–47 (2007); Timothy Morris & Mike Letnic, *Removal of an Apex Predator Initiates a Trophic Cascade That Extends From Herbivores to Vegetation and the Soil Nutrient Pool*, 284 PROC. ROYAL SOC'Y BIOLOGICAL SCI. 1, 1 (2017).

Overfishing and shark finning are by no means the only threats facing sharks. Like most other species, sharks are threatened by habitat loss and climate change. For example, coastal development can destroy shark nursery habitat,¹⁷ and ocean acidification affects reef ecosystems.¹⁸ Along with many apex predators, sharks also face senseless persecution.¹⁹ Habitat loss and climate change are complex threats involving many species, ecosystems, and stakeholders.²⁰ Compared to habitat loss and climate change, shark finning is arguably the most straightforward of these threats to address through legislation.

A growing body of evidence suggests fish are able to experience pain.²¹ Further, sharks are intelligent animals capable of learning,²² and some species display complex social behaviors more commonly associated with other vertebrates.²³ Cutting the fins off these animals before discarding them back into the water alive is an undeniably cruel practice. Recent documentaries such as *Sharkwater*,²⁴ *Racing Extinction*,²⁵ and even Gordon Ramsay's *Shark Bait*,²⁶ brought this gruesome activity to audiences around the world. Consequently, public outcry over the methods used to obtain shark fins galvanized momentum towards strengthening existing shark conservation laws.

The international demand for shark fins primarily is for shark fin soup. Fins from up to 73 million sharks are used in soup every year.²⁷ Shark fin soup traditionally was a delicacy in China and remained popular with

17. See generally David Jennings et al., *Effects of Large-Scale Anthropogenic Development on Juvenile Lemon Shark (*Negaprion brevirostris*) Populations of Bimini, Bahamas*, 83 ENVTL. BIOLOGY OF FISHES 369 (2008) (discussing effect of development on juvenile lemon sharks).

18. Andrew Chin et al., *An Integrated Risk Assessment for Climate Change: Analysing the Vulnerability of Sharks and Rays on Australia's Great Barrier Reef*, 16 GLOBAL CHANGE BIOLOGY 1936, 1942 (2010).

19. Nicholas K. Dulvy et al., *Extinction Risk and Conservation of the World's Sharks and Rays*, ELIFE, Jan. 21, 2014, at 1, <https://elifesciences.org/articles/00590>.

20. J.M.J. Travis, *Climate Change and Habitat Deconstruction: A Deadly Anthropogenic Cocktail*, 270 PROC. ROYAL SOC'Y BIOLOGICAL SCI. 467, 467 (2003).

21. Lynne U. Sneddon et al., *Ample Evidence for Fish Sentience and Pain*, 162 ANIMAL SENTIENCE 1, 3 (2018); Culum Brown, *Fish Intelligence, Sentience and Ethics*, 18 ANIMAL COGNITION 1, 16 (2015).

22. Tristan L. Guttridge et al., *The Role of Learning in Shark Behavior*, 10 FISH & FISHERIES 450, 452 (2009).

23. Tristan L. Guttridge et al., *Social Preferences of Juvenile Lemon Sharks*, 78 ANIMAL BEHAVIOR 543, 543–44 (2009).

24. SHARKWATER (Freestyle Releasing 2006).

25. See *We are Racing Extinction, and We Cannot Afford to Lose*, OCEANIC PRES. SOC'Y, <https://www.opsociety.org/our-work/films/racing-extinction/> (last visited Feb. 6, 2020) ("Racing Extinction exposes the trafficking in wildlife and other crimes against nature in a race to protect all life from mass extinction.").

26. GORDON RAMSAY: SHARK BAIT (One Potato Two Potato 2011).

27. CHRISTINA VALLIANOS ET AL., SHARKS IN CRISIS: EVIDENCE OF POSITIVE BEHAVIORAL CHANGE IN CHINA AS NEW THREATS EMERGE 4 (2018).

Chinese Americans in the United States.²⁸ Apparently its use as a luxury dish began during the Song dynasty (960–1279 AD),²⁹ before its prestige grew further, after becoming incorporated into imperial banquets during the Ming Dynasty (1368–1644 AD).³⁰ Shark fin soup's popularity grew rapidly again in the 1990s as it gained notoriety as a luxury food item.³¹ At the same time, many scientific studies began documenting declines in shark populations, suggesting that these declines may be related to increased demand for shark fins.³²

Shark meat alone has relatively little value, and fins remain the most prized parts of sharks.³³ Although shark meat increasingly is consumed in certain markets, the demand for shark fins drives most shark fisheries.³⁴ A pound of dried shark fin can cost around \$400,³⁵ though the price usually depends upon the species.³⁶ Restaurants then sell bowls of shark fin soup for between \$50 and \$200.³⁷ Thus, there is a lucrative market for shark fins in the U.S. and worldwide, which provides a strong incentive for fishermen to continue the practice.

There are legitimate conservation concerns over shark finning in addition to the purely ethical objections to the practice. For instance, 15.9% of sharks are listed in one of the International Union for Conservation of Nature's (IUCN) Red List threatened categories (i.e., critically endangered, endangered, or vulnerable).³⁸ Additionally, the Convention on International Trade in Endangered Flora and Fauna (CITES) lists 12 shark species.³⁹ Closer to home, two of these CITES-listed species (scalloped hammerheads,

28. Juliet Eilperin, *California Adopts Shark Fin Ban* (Sept. 7, 2011), https://www.washingtonpost.com/national/health-science/california-adopts-shark-fin-ban/2011/09/06/gIQACgsD9J_story.html.

29. Michael Fabinyi, *Historical, Cultural and Social Perspectives on Luxury Seafood Consumption in China*, 39 ENVTL. CONSERVATION 83, 87 (2011).

30. Shelley Clarke et al., *Social, Economic, and Regulatory Drivers of the Shark Fin Trade*, 22 MAR. RES. ECON. 305, 307 (2007).

31. *Id.* at 308.

32. See Carl Safina, *Where Have All the Fishes Gone?*, 10 ISSUES SCI. & TECH. 37, 39 (1994) (describing a 20-year monitoring study by the Virginia Institute of Marine Sciences).

33. Mustain, *supra* note 8, at 4.

34. *Id.* at 3.

35. Rachel Fobar, *Shark Fin is Banned in 12 U.S. States—But It's Still on the Menu* (Jan. 16, 2019), <https://www.nationalgeographic.com/animals/2019/01/restaurants-sell-shark-fin-soup-despite-state-bans/>.

36. Clarke et al., *supra* note 30, at 313.

37. Fobar, *supra* note 35.

38. Nearly half (45%) are listed as Data Deficient, meaning that the number of threatened species likely is a very conservative estimate. Dulvy et al., *supra* note 18, at 5.

39. *Sharks and Manta Rays*, <https://www.cites.org/eng/prog/shark/more.php> (last visited Mar. 16, 2020) (“As of October 2016, twelve species of sharks . . . are included in Appendix II, and none in Appendix I.”).

Sphyrna lewini,⁴⁰ and Argentine angelshark, *Squatina argentina*⁴¹) are also listed under the U.S. Endangered Species Act (ESA). Population assessments for many species involved in the shark fin trade are either non-existent or outdated.⁴² For example, blue sharks (*Prionace glauca*) are the species most commonly caught for their fins.⁴³ Blue shark populations have declined in many areas, but the IUCN last assessed them in 2005.⁴⁴ Further, 91.3% of fins in the global shark fin trade come from unsustainable sources.⁴⁵ Thus, shark finning is likely having a considerable impact on shark populations.

III. DOMESTIC MANAGEMENT OF SHARK FISHERIES

A. Federal laws

Current federal laws provide sharks with limited protections. Although not specific to sharks, the Magnuson-Stevens Fishery Conservation and Management Act (MSA) requires that fishery management plans first prevent overfishing and rebuild stocks.⁴⁶ Initial efforts to specifically conserve sharks and prohibit finning derived from the MSA.⁴⁷

Congress enacted the Shark Finning Prohibition Act of 2000 in response to concerns over shark population declines and finning in the 1990s. The stated purpose of this Act was “to eliminate shark-finning by addressing the problem comprehensively at both the national and international levels.”⁴⁸ Specifically, it amended the MSA to make it unlawful to: “1) remove any of the fins of a shark (including the tail) and discard the carcass of the shark at sea; 2) have control or possession of such a fin aboard a fishing vessel without the corresponding carcass; or 3) land any such fin without the corresponding carcass.”⁴⁹ Additionally, the Act added a rebuttable

40. Endangered and Threatened Wildlife and Plants; Threatened and Endangered Status for Distinct Population Segments of Scalloped Hammerheads Sharks, 79 Fed. Reg. 38214, 38240–42 (to be codified at 50 C.F.R. pts. 223–224).

41. Endangered and Threatened Wildlife and Plants; Final Rule to List 6 Foreign Species of Elasmobranchs Under the Endangered Species Act, 82 Fed. Reg. 21722, 21740 (to be codified at 50 C.F.R. pts. 223–224).

42. *Id.*

43. Andrew Fields et al., *Species Composition of the International Shark Fin Trade Assessed Through a Retail-Market Survey in Hong Kong*, 32 CONSERVATION BIOLOGY 376, 386–87 (2017).

44. VALLIANOS ET AL., *supra* note 27.

45. Colin A. Simpfendorfer & Nicholas K. Dulvy, *Bright Spots of Sustainable Shark Fishing*, 27 CURRENT BIOLOGY MAG. R97, R98 (2017).

46. *A.M.L. Int’l, Inc. v. Daley*, 107 F. Supp. 2d 90, 93 (D. Mass 2000).

47. Magnuson-Stevens Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801–1884 (2018).

48. Shark Finning Prohibition Act of 2000, Pub. L. No. 106-557, § 1822, 114 Stat. 2772.

49. *Id.*

presumption that a violation occurs if the weight of the fins landed or on board exceeds 5% of the total weight of shark carcasses.⁵⁰ Although Congress intended this legislation to ban shark finning in U.S. waters, loopholes reduced its efficacy at preventing this practice.⁵¹

One of these loopholes enabled shark fins to be transferred between vessels at sea. In *U.S. v. Approximately 64,695 Pounds of Shark Fins*, the U.S. Coast Guard boarded the *King Diamond II*, a U.S.-flagged vessel, 250 miles off the Guatemalan coast.⁵² The *King Diamond II* had been chartered by Tai Loong Hong Marine Products, Ltd. to procure shark fins from foreign vessels at sea and bring them to Guatemala.⁵³ The Coast Guard found the shark fins on board and presumed they were obtained through prohibited finning.⁵⁴ Consequently, the Coast Guard held the *King Diamond II* and brought it to San Diego.⁵⁵ The U.S. government then filed a complaint alleging that the fins should be forfeited under the MSA.⁵⁶

Tai Loong Hong argued that the *King Diamond II* was not a fishing vessel under the MSA.⁵⁷ The Ninth Circuit agreed, holding that the statutory language did not give Tai Loong Hong fair notice that it would be considered a fishing vessel under the MSA.⁵⁸

Another loophole in the Shark Finning Prohibition Act concerned the “fin-to-carcass” ratio method. This method is problematic because it potentially allows fishermen to mix and match shark parts and carcasses between those with valuable fins and those with more valuable meat.⁵⁹ The loophole in this method was exposed in *Etheridge v. Pritzker*.⁶⁰ There, the National Oceanic and Atmospheric Administration (NOAA) issued a notice of violation and assessment and a notice of permit sanction to fishermen after they admitted, on 18 occasions, that they possessed or landed shark fins in excess of 5% of the total weight of shark landed.⁶¹ The fishermen argued they could rebut the finning presumption for various credible reasons, and the

50. *Id.*

51. 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 ENVTL. L. & POL’Y J. 231, 242 (2012).

52. *United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 979 (9th Cir. 2008).

53. *Id.* at 977.

54. *Id.* at 979.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 980.

59. Mustain, *supra* note 8, at 8.

60. *Etheridge v. Pritzker*, No. 2:12-CV-79-BO, 2013 WL 6178575 at *1 (E.D.N.C. Nov. 25, 2013).

61. *Id.*

Administrative Law Judge agreed with them on five of the occasions.⁶² However, the Eastern District of North Carolina reversed the decision, disagreeing with NOAA's interpretation of the rebuttable presumption. The court held that the fishermen need only show good reason for exceeding the 5% fin-to-carcass ratio and provide "reliable, credible, and probative" evidence in support.⁶³ Therefore, the standard for rebutting the finning presumption became much easier to satisfy.

The Shark Conservation Act of 2010 was Congress's response to the loopholes in the Shark Finning Prohibition Act. Indeed, the legislative history indicates that the Act's intent is to prevent U.S. flagged vessels from purchasing shark fins from fishermen on the high seas and returning them to the country.⁶⁴ This Act also replaced the fin-to-carcass ratio with a provision that fins remain naturally attached to carcasses.⁶⁵ However, the Shark Conservation Act still permits the import of shark fins into the U.S., and therefore inadvertently perpetuates shark finning elsewhere.

B. State laws

States began enacting their own prohibitions on shark fins in response to the lack of effective federal legislation. Existing federal laws ban the practice of shark finning in U.S. waters and attempt to curb the shark fin trade. Conversely, state laws have much more explicitly targeted the trade in shark fins. At the time of writing, twelve states and three U.S. territories control the sale and possession of shark fins.⁶⁶

Hawaii was the first state to prohibit possession of shark fins.⁶⁷ In 2010, Hawaii prohibited the "possession, sale, and distribution of shark fins."⁶⁸

62. *Id.* at *6.

63. *Id.* at *7.

64. Jacqueline Baker, *Plight of an Ocean Predator: The Shark Conservation Act of 2010 and the Future of Shark Conservation Legislation in the United States*, 38 ENVIRONS ENVTL. L. & POL'Y J. 67, 93 (2014).

65. 16 U.S.C. § 1857 (1)(P)(iii) (2018).

66. See generally *Shark Finning Legislation*, ANIMAL WELFARE INST., <https://awionline.org/content/shark-finning-legislation> (last visited Feb. 6, 2020) (stating that the thirteen states and three territories (by date of enactment) are: Hawaii (2010), Commonwealth of the Northern Mariana Islands (2011), Guam (2011), American Samoa (2012), Washington (2012), Oregon (2012), California (2013), Maryland (2013), Illinois (2013), Delaware (2014), New York (2014), Massachusetts (2014), Texas (2016), Rhode Island (2017), and Nevada (2018). New Jersey will become the thirteenth state in 2021).

67. Rebecca Tatum, *Chapter 524: The Ecology and Controversy of Shark-Fin Soup*, 43 MCGEORGE L. REV. 667, 673 (2012).

68. HAW. REV. STAT. ANN. § 188-40.7 (West 2020).

Penalties include fines of \$5,000–\$15,000 for a first offense, and fines of \$35,000–\$50,000, along with up to one year in prison for a third offense.⁶⁹

In 2013, California enacted its own Shark Fin Law controlling possession of shark fins.⁷⁰ California's penalties include up to six months in prison and fines up to \$1,000.⁷¹ The first conviction came in 2015.⁷² This law was challenged in *Chinatown Neighborhood Association v. Harris*.⁷³ In *Chinatown*, the Neighborhood Association argued that the Shark Fin Law was preempted by the MSA because it would affect federal management of fisheries within the rest of the Exclusive Economic Zone. Specifically, the Neighborhood Association contended that the law “affect[ed] the ability of commercial fishers to reap the optimal yields prescribed in [Fisheries Management Plans] for shark harvests.”⁷⁴ However, the Ninth Circuit held in favor of California, finding that the primary goal of the MSA is conservation.⁷⁵ Consequently, legislation promoting shark conservation is permissible under the MSA, and the Shark Fin Law is consistent with this goal.

Several other states appear poised to enact similar legislation in the near future. For instance, Connecticut is on the verge of passing H.B. No. 5251.⁷⁶ This bill prohibits the sale, trade, or distribution of shark fins in the state.⁷⁷ Violators could be fined up to \$500, imprisoned for up to three months, or both.⁷⁸ While states have been relatively slow to adopt shark finning legislation, their combined efforts indicate growing bipartisan support for a national ban on the sale and possession of shark fins.

IV. PROBLEMS WITH CURRENT LAWS

Ideally, the state and federal laws presented above would provide an example of cooperative federalism; where the federal laws are insufficient, states are free to address the deficiencies. State laws prohibiting the sale and possession of shark fins certainly are commendable in the absence of more stringent federal law. However, data increasingly suggest that the assortment

69. *Id.*

70. CAL. FISH & GAME CODE § 2021 (West 2020).

71. *Shark Finning Legislation*, *supra* note 66.

72. Dan Noyes, *I-Team: San Francisco Man Convicted of Selling Shark Fins* (May 8, 2015), <https://abc7news.com/business/i-team-san-francisco-man-convicted-of-selling-shark-fins/708114/>.

73. *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1142 (9th Cir. 2015).

74. *Id.* at 1144.

75. *Id.* at 1143.

76. THE ASSOCIATED PRESS, *Bill Banning Sales of Shark Fins Awaits Senate Vote* (May 26, 2019), <https://www.wtnh.com/news/politics/bill-banning-sales-of-shark-fins-awaits-senate-vote/2029153613/>.

77. *Id.*

78. *Id.*

of state laws actually has the perverse effect of shifting trade to other states without legislation. Or, as put by marine scientist Mariah Pflieger, these assorted state laws can create a “whack-a-mole situation” for the shark fin trade.⁷⁹

For example, California and New York banned shark fin imports in 2013 and 2014, respectively. At that time, California represented the largest U.S. market for shark fin consumption.⁸⁰ The shark fin trade grew by 240% in Texas after the passage of bans in other states.⁸¹ After Texas made it illegal to buy, sell, or transport shark fins, significant trade shifted to Georgia.⁸² Since 2015, Miami, Florida has been the leading port for shark fins.⁸³

Challenges with cooperative federalism within the illegal wildlife trade are not unique to shark finning. A similar pattern emerges with ivory bans. For instance, after California and New York banned trade in ivory, the trade shifted to Washington D.C., Nevada, and Florida.⁸⁴ Similar comparisons can be made between the wildlife trade and other restricted trades, such as the gun trade. Despite Chicago’s high levels of gun violence, it has some of the strictest gun laws in the country.⁸⁵ Meanwhile, the neighboring states of Indiana and Wisconsin do not.⁸⁶ Consequently, 60% of guns used in crimes come from outside of Illinois, with Indiana and Wisconsin being significant sources of those weapons.⁸⁷

State shark fin bans may even have failed to eliminate the trade within their borders. Some restaurants in as many as ten of the twelve states with bans continue to serve shark fin soup.⁸⁸ Moreover, significant amounts of shark fins still enter the U.S. through the Port of Los Angeles every year.⁸⁹

79. Jenny Staletovich, *Miami Now Nation’s Top Importer of Shark Fins. Many States Have Banned the Product* (May 2, 2018), <https://www.miamiherald.com/news/local/environment/article210157954.html>.

80. Eilperin, *supra* note 28.

81. Press Release, Oceana, Texas Becomes 10th State to Ban Trade of Shark Fins (June 22, 2015), <https://usa.oceana.org/press-releases/texas-becomes-10th-state-ban-trade-shark-fins>.

82. Saeed Kamali Dehghan, *Marine ‘Gold Rush’: Demand for Shark Fin Soup Drives Decimation of Fish* (June 4, 2019), <https://www.theguardian.com/environment/2019/jun/04/marine-gold-rush-demand-shark-fin-soup>.

83. Staletovich, *supra* note 79.

84. Jen Fifield, *Proposed Bans on Ivory Sales Halted by Interest Groups* (Jan. 10, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/01/10/proposed-bans-on-ivory-sales-halted-by-interest-groups>.

85. Jeff Asher & Mai Nguyen, *Gun Laws Stop at State Lines, But Guns Don’t* (Oct. 26, 2017), <https://fivethirtyeight.com/features/gun-laws-stop-at-state-lines-but-guns-dont>.

86. *Id.*

87. *Id.*

88. Fobar, *supra* note 35.

89. Brittany Martin, *Shark Fins Were Banned in California in 2013. So Why are 60 Tons Still Entering the Port of L.A. Each Year?* (Mar. 8, 2017), <https://www.timeout.com/los-angeles/blog/shark-fins-were-banned-in-california-in-2013-so-why-are-60-tons-still-entering-the-port-of-l-a-each-year-030817>.

Thus, additional protections from states have not been able to extinguish the shark fin trade within the U.S.

V. SOLUTIONS

Since the Shark Conservation Act of 2010, Congress has made several attempts at enacting additional legislation protecting sharks and their relatives. The two most recent bills are H.R. 737, the Shark Fin Sales Elimination Act of 2019, and H.R. 788, the Sustainable Shark Fisheries and Trade Act of 2019.⁹⁰

A. The Shark Fin Sales Elimination Act of 2019

On January 23, 2019, the Shark Fin Sales Elimination Act of 2019 was introduced in the House of Representatives. The stated purpose of this bill is to “prohibit the sale of shark fins.”⁹¹ This bill provides that “no person shall possess, offer for sale, sell, or purchase any shark fin or product containing any shark fin.”⁹² There are two exemptions to this prohibition. The first exemption is for traditional fisheries, education, and science.⁹³ The second is for dogfish fisheries.⁹⁴

The first exemption for traditional fisheries, education, and science demands that “the shark fin is separated from the shark in a manner consistent with the license or permit” and satisfies one of four requirements.⁹⁵ First, the fin may be either be “destroyed or discarded upon separation.”⁹⁶ Second, the fin may be “used for noncommercial subsistence purposes in accordance with State or territorial law.”⁹⁷ Third, the fin may be “used solely for display or research purposes by a museum, college, or university, or by any other person under a State or Federal permit to conduct noncommercial scientific research.”⁹⁸ Or fourth, the fin may be “retained by the license or permit holder for a noncommercial purpose.”⁹⁹

The second exemption provides that it “shall not be a violation . . . for any person to possess, offer for sale, sell, or purchase any fresh or frozen raw fin or tail from any stock of the species *Mustelus canis* (smooth dogfish) or

90. H.R. 737, 116th Cong. (2019); H.R. 788, 116th Cong. § 2 (2019).

91. *Id.*

92. *Id.* § 2.

93. *Id.* § 3.

94. *Id.* § 4.

95. *Id.* § 3.

96. *Id.* § 3(1).

97. *Id.* § 3(2).

98. *Id.* § 3(3).

99. *Id.* § 3(4).

Squalus acanthias (spiny dogfish).”¹⁰⁰ As with the Shark Conservation Act, the second exemption aims to support sustainable dogfish fisheries in the Atlantic. The continuation of this exemption will be evaluated by January 1, 2027.¹⁰¹

The Shark Fins Sales Elimination Act attempts to create an outright prohibition on shark fin products within the U.S., with two exemptions. The first exemption for traditional fisheries, education, and science is relatively minor. Traditional fisheries are relatively small, and it seems unlikely that egregious abuse of the education and science exemptions would be permitted. However, as explained below, the second exemption for smooth or spiny dogfish fins is more significant, and potentially problematic. At the time of writing, the Shark Fin Sales Elimination Act passed in the House of Representatives.

B. The Sustainable Shark Fisheries and Trade Act of 2019

On February 7, 2019, Rep. Daniel Webster introduced the Sustainable Shark Fisheries and Trade Act of 2019 into the House of Representatives. The stated purpose of the Act is to

establish a certification process to ensure that foreign nations engaging in shark trade into or through the United States conserve and manage populations of sharks in a manner that is comparable to regulatory programs in the United States and that effectively prohibits the practice of removing shark fins and discarding the carcass at sea.¹⁰²

The bill provides six criteria required for other nations’ regulatory programs to become certified.¹⁰³ First, the programs must be consistent with the national standards for fishery conservation provided in the MSA.¹⁰⁴ Second, programs must regularly update management plans and use scientifically established catch limits and bycatch assessments and minimizations.¹⁰⁵ Third, programs must include a program to prevent overfishing and rebuild overfished stocks.¹⁰⁶ Fourth, programs must require reporting and data

100. *Id.* § 4(a).

101. *Id.* § 4(b).

102. H.R. 788, 116th Cong. § 2 (2019).

103. *Id.* § 3(5)(C).

104. *Id.* § 3(5)(C)(i).

105. *Id.* § 3(5)(C)(ii).

106. *Id.* § 3(5)(C)(iii).

collection.¹⁰⁷ Fifth, programs must be consistent with the International Plan of Action for Conservation and Management of Sharks of the United Nations Food and Agriculture Organization.¹⁰⁸ Sixth, programs must include a mechanism to ensure that, if the nation allows landings of sharks by foreign vessels that are not subject to such programs of such nation, only shark products that comply with such programs are exported to the U.S.¹⁰⁹

This bill also proposes to amend the High Seas Driftnet Fishing Moratorium Protection Act. Specifically, it adds “to adopt shark conservation and management measures and measures to prevent shark finning, which are consistent with the International Plan of Action for Conservation and Management of Sharks of the Food and Agriculture Organization of the United Nations.”¹¹⁰

This bill aims to promote sustainable shark, skate, and ray fisheries around the world by holding imports to the same standards as domestic fisheries. Consequently, the bill would promote shark conservation while also recognizing and rewarding the efforts of U.S. fisheries in reducing overexploitation. At the time of writing, the Sustainable Shark Fisheries and Trade Act is yet to pass the House of Representatives.

C. Comparative Analysis of Proposed Legislation

Considerable differences of opinion over these competing bills exist within the scientific and conservation communities.¹¹¹ For example, over 150 scientists wrote a letter to Congress in support of an earlier version of the Shark Fin Trade Elimination Act.¹¹² Meanwhile, other scientists helped to draft the Sustainable Shark Fisheries and Trade Act,¹¹³ and 62 scientists signed a letter of support for the bill.¹¹⁴ Reasonable scientific minds can

107. *Id.* § 3(5)(C)(iv).

108. *Id.* § 3(5)(C)(v).

109. *Id.* § 3(5)(C)(vi).

110. *Id.* § 4.

111. See Fobar, *supra* note 35 (discussing competing views among scientists over shark conservation); compare *Support Sustainable Shark Trade*, WILDLIFE CONSERVATION SOC’Y, <https://secure.wcs.org/campaign/support-sustainable-shark-trade> (last visited Feb. 2, 2020) (arguing for sustainable shark finning), with *Tell your Senators: Ban the Trade of Shark Fins in the U.S.*, <https://act.oceana.org/page/40413/action/1?locale=en-US> (last visited Feb. 7, 2020) (arguing for stopping shark finning).

112. Press Release, Oceana, Over 150 Scientists Call on Congress to Pass National Shark Fin Trade Ban (May 9, 2017), <https://oceana.org/press-center/press-releases/over-150-scientists-call-congress-pass-national-shark-fin-trade-ban>.

113. Fobar, *supra* note 35.

114. Robert E. Heuter & David S. Shiffman, *Rebuttal to “Response to ‘A United States Shark Fin Ban Would Undermine Sustainable Shark Fisheries’ I.F. Porcher et al., Marine Policy 104 (2019) 85-89,”* 110 MARINE POL’Y. 1, 3 (2019).

differ on the best approach to an issue, so ultimately neither letter alone provides compelling justification for why Congress should support one bill over the other.

The main purpose of each bill ostensibly is shark conservation, though they take different approaches towards this goal. For example, the definitions of “shark” in each bill differ. In the Shark Fin Sales Elimination Act, “shark” encompasses “any species of the orders Pristiophoriformes, Squatiniformes, Squaliformes, Hexanchiformes, Lamniformes, Carcharhiniformes, Orectolobiformes, and Heterodontiformes.”¹¹⁵ In the Sustainable Shark Fisheries and Trade Act, “shark” refers to “any species of the subclass Elasmobranchii.”¹¹⁶ This distinction is important; the first definition includes only sharks, while the second is broader and also includes skates and rays. In this regard, the Sustainable Shark Fisheries and Trade Act may benefit even more threatened species.¹¹⁷

The exemptions in the Shark Fin Sales Elimination Act are also potentially problematic. For instance, the exemption for traditional fisheries, education, and science undoubtedly is well-intended. Yet, similar exemptions in the context of whaling have proven to be extremely controversial.¹¹⁸ Thorough reviews of these exemptions are necessary to avoid a repeat of those types of issues. However, the main issue with this bill is the exemption for dogfish fisheries. This exemption is troubling for two reasons. First, providing an exemption for two species that are purportedly sustainably fished in U.S. waters sends a mixed message. Dogfish populations fluctuate considerably, which calls into question the sustainability of the fishery.¹¹⁹ Even assuming that dogfish fisheries are sustainable, it raises the question as to why other sustainable shark fisheries are not exempt. Second, allowing some shark fins to be possessed, sold, and ultimately consumed, creates confusion for consumers, the restaurant industry, and enforcement officers. Visual species identification of some shark fins is possible,¹²⁰ though it remains to be seen how effective it is in

115. H.R. 737, 116th Cong. § 6(1) (2019).

116. H.R. 788, 116th Cong. § 9(A) (2019).

117. Dulvy et al., *supra* note 19, at 5 (noting that 19.9% of skates and rays are threatened, and 47.5% are listed as data deficient.)

118. See generally Vassili Papastavrou & Patrick Ramage, *Commercial Whaling by Another Name. The Illegality of Japan’s Scientific Whaling: Response to Dan Goodman*, 13 J. INT’L WILDLIFE L. & POL’Y 183 (2010) (arguing inadequacies of International Convention for the Regulation of Whaling).

119. See generally Ila France Porcher et al., *Response to “A United States Shark Fin Ban Would Undermine Sustainable Shark Fisheries”* D.S. Shiffman & R.E. Hueter, *Marine Pol’y* 85 (2017) 138–140, 85 MARINE POL’Y 104 (2019) (using the fluxes in dogfish populations to illustrate concerns with a shark fin fishery).

120. See generally DEBRA L. ABERCROMBIE ET AL., NAT’L OCEANIC & ATMOSPHERIC ADMIN., VISUAL IDENTIFICATION OF FINS FROM COMMON ELASMOBRANCHS IN THE NORTHWEST ATLANTIC OCEAN (2013) (discussing visual identification of shark fins).

practice. Generally, the only way to identify species once fins have been dried is through DNA testing.¹²¹ DNA testing can be time consuming and expensive,¹²² although recent developments may increase the accuracy and portability of these tests.¹²³ Nonetheless, the average individual consumer will have no way of knowing whether the fins they are purchasing come from sustainable or unsustainable sources.

The Sustainable Shark Fisheries and Trade Act of 2019 is not without its own issues. Promoting sustainable shark fisheries around the world certainly is a worthwhile goal. Yet this Act has a clear anthropocentric approach (i.e., primarily intended to benefit humans) compared with the more biocentric approach of the Sharks Fin Sales Elimination Act. Additionally, with the U.S. market for shark fins remaining relatively small, it is unclear what effect this bill would actually have on international fisheries. If most of the demand for shark fins remains in Asia, there appears to be little incentive for other nations to actively ensure their fisheries comply with this particular U.S. law. Further, permitting any trade in shark fins still enables the practice of shark finning to continue. For instance, shark finning is banned in the United Kingdom (and throughout the European Union), yet shark fins are still found in restaurants there.¹²⁴

The Sustainable Shark Fisheries and Trade Act also relies on the process of certifying nations that have “adopted and effectively enforce[] regulatory programs to provide for the conservation and management of sharks, and measures to prohibit shark finning, that are comparable to those of the United States.”¹²⁵ Certification is a laudable goal, but history shows that the idea of certification does not always accord with conservation. First, certification is extremely susceptible to political whims, because it relies on the discretion of various departments of government before ultimately leaving the final decision to the President. Second, certification permits other diplomatic concerns to be prioritized above conservation goals. For example, the Pelly Amendment to the Fishermen’s Protective Act of 1967 required the Secretary of Commerce to certify foreign countries that were acting to diminish the effectiveness of international fishery conservation programs.¹²⁶ However, in

121. *Id.* at 2.

122. *Id.* at 2.

123. See generally Shalili Johri et al., *Genome Skimming With the MinION Hand-held Sequencer Identifies CITES-listed Shark Species in India’s Exports Market*, 9 SCI. REP. 1 (2019) (describing the accuracy of a portable DNA-sequencing device).

124. Dehghan, *supra* note 82.

125. H.R. 788, 116th Cong. § 3(2)(A) (2019).

126. Fishermen’s Protective Act of 1967, 22 U.S.C. §§ 1971–1979, amended by Pub. L. No. 92-219, 85 Stat. 786 (1971) (amending the Act to enhance the effectiveness of international fishery conservation programs).

the first five instances of certification, the President declined to apply any sanctions.¹²⁷ More recently, even with clear findings that Iceland's whaling industry had diminished the effectiveness of the Convention on International Trade in Endangered Species, the U.S. declined to apply sanctions.¹²⁸ Although certification under the Pelly Amendment differs from the provisions in the Sustainable Shark Fisheries and Trade Act, these examples highlight the inherent challenges with certification and international diplomacy. Finally, given the range of countries involved in harvesting and processing shark fins, deciding which nations to deny certification to would be extremely challenging.

D. Potential Alternatives to Proposed Legislation

Congress may yet decide to pass one of the two shark conservation bills before them, and either of these bills would improve the status quo. Ideally, however, the U.S. should lead by example and ban shark fin sales, echoing its response to the marine mammal crisis of the 1960s and 1970s.¹²⁹ The circumstances leading to the enactment of the Marine Mammal Protection Act of 1972 (MMPA) are analogous to the current situation with sharks.¹³⁰ In the 1960s and 1970s there was growing domestic and international outcry over marine mammal declines resulting from overexploitation and bycatch.¹³¹ Additionally, the MMPA's legislative history indicates concern amongst representatives over the effects of inconsistent state laws.¹³²

The MMPA generally prohibits the "take"¹³³ of any marine mammals in U.S. waters and by U.S. citizens on the high seas, with limited exceptions for Alaska natives, scientific research, public display, educational purposes, and

127. *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 225 (1986).

128. The White House Office of the Press Secretary, *Message to the Congress – Iceland and the Fisherman's Protective Act* (Apr. 1, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/04/01/message-congress-iceland-and-fisherman-s-protective-act>.

129. *See generally Marine Animals and the Marine Mammal Protection Act*, <https://www.marinemammalcenter.org/what-we-do/rescue/marine-mammal-protection-act.html> (last visited Mar. 17, 2020) (explaining the role of the Marine Mammal Protection Act post-enactment); *see also* NAT. RES. DEF. COUNCIL, *NET LOSS: THE KILLING OF MARINE MAMMALS IN FOREIGN FISHERIES* 9–13 (2014) (describing U.S. efforts to reduce marine mammal bycatch in response to global fisheries crisis).

130. *Marine Mammal Protection Act of 1972*, 16 U.S.C. §§ 1361–1423h (2018); *Marine Mammals and Fish*, NAT'L. ANTI-VIVISECTION SOC'Y, <https://www.navs.org/what-we-do/keep-you-informed/legal-arena/wildlife/marine-mammals/#.XnEq8C2ZMRY> (last visited Mar. 17, 2020).

131. *Marine Animals and the Marine Mammal Protection Act*, *supra* note 129; *see generally* Wade et al., *Killer Whale and Marine Mammal Trends*, 23 *MARINE MAMMAL SCI.* 766 (2007) (examining the effect of sequential megafauna collapse of whale catches in the late 1960s and harbor and fur seals in the 1970s).

132. H.R. REP. NO. 92-707, as reprinted in 1972 U.S.C.A.N. 4144, 4149.

133. Under the MMPA, "take" is defined as to "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(13) (2018).

other provisions applying to specimens taken or agreements entered into prior to 1972.¹³⁴ Thus, the MMPA allows little room for compromise for the direct take of marine mammals—there are no provisions allowing the selective harvest of different marine mammal body parts. To further ensure the conservation of marine mammals, the MMPA also requires NOAA and the U.S. Fish and Wildlife Service to conduct annual stock assessments of species covered under the act.¹³⁵

The U.S. has since used the MMPA to further international conservation of marine mammals, even though there is little demand for marine mammal products in the United States. Clearly, some issues remain with international marine mammal conservation, but the MMPA undoubtedly has been successful at restoring and conserving populations of imperiled marine mammals.¹³⁶ The MMPA even received wide support from both Democrats and Republicans at the time of its passage.¹³⁷ Bipartisan support for environmental legislation may be more difficult to achieve in the current political climate, so an MMPA equivalent for sharks is unlikely. However, at the time of writing, the Shark Fin Sales Elimination Act has 287 co-sponsors (219 Democrats and 68 Republicans), a far greater number than the Sustainable Shark Fisheries and Trade Act.¹³⁸

Sharks and marine mammals also have obvious differences in their biology and ecology. Sharks and other elasmobranchs are far more diverse than marine mammals.¹³⁹ Many also have much more cryptic life-histories than marine mammals,¹⁴⁰ making it more challenging to conduct accurate population assessments.¹⁴¹ Nonetheless, some of the fundamental MMPA provisions could still be adapted to protect elasmobranchs.

134. *Id.* § 1374(c) (exempting taking of marine mammals for scientific research, education, and other purposes); *id.* § 1388(c) (discussing the MMPA's effect on jurisdiction over fish and wildlife resources for Alaska Natives); *id.* § 1372(e) (discussing the MMPA's retroactive effect).

135. *Id.* § 1386.

136. See generally Joe Roman et al., *The Marine Mammal Protection Act at 40: Status, Recovery, and Future of U.S. Marine Mammals*, 1286 ANNALS N.Y. ACAD. SCI. 29, 29 (2013) (discussing the MMPA's effectiveness in meeting its purposes).

137. H.R. Rep. No. 92-707 (House Vote No. 362 in 1972 and Senate Vote No. 716 in 1972).

138. H.R. 788, 116th Cong. (1st Sess. 2019); H.R. 737, 116th Cong. (1st Sess. 2019).

139. Compare Sandra Pompa, et al., *Global Distribution and Conservation Marine Mammals*, 108 PROC. NAT'L ACAD. SCI. U.S. 13600, 13600, 13601 (2011) (stating there are 129 marine mammal species), with *Chondrichthyes—Rays, Sharks, Skates, Chimaeras*, WILDLIFE J. JUNIOR, <https://nhpbs.org/wild/chondrichthyes.asp> (stating there are over 1,000 species of elasmobranchii).

140. See generally Oliver J. D. Jewell et al., *Cryptic Habitat Use of White Sharks in Kelp Forest Revealed by Animal-Borne Video*, BIOLOGY LETTERS, Apr. 2019 (discussing newly observed cryptic behavior of white sharks in kelp forests).

141. See generally Douglas J. McCauley et al., *Evaluating the Performance of Methods for Estimating the Abundance of Rapidly Declining Coastal Shark Populations*, 22 ECOLOGICAL APPLICATIONS 385 (2012) (evaluating the effectiveness of survey tools and the difficulty of obtaining accurate population surveys).

VI. SHARK FIN BANS

A. *Counterarguments*

Here, I address common counterarguments to banning the possession and sale of shark fins, given that many state, and some federal, laws target this trade. Few argue against the ethical reasons for banning the shark fin trade, but three prominent counterarguments have been put forth. First, there are fears over the potentially negative effects on sustainable fisheries. Second, some argue that the bans are culturally biased. Third, there are concerns that a U.S. ban will have little effect on shark conservation given the relative insignificance of the U.S. shark fin market.

1. Negative effects on sustainable fisheries

Perhaps the biggest criticism of an outright U.S. ban on possession of shark fins is that it would harm purportedly sustainable domestic fisheries. Shark finning is already banned in U.S. waters, and not all shark fins are sourced from finned animals.¹⁴² In many instances, whole animals are caught and landed, with the fins removed after death.¹⁴³

Shark fisheries in the U.S. generally are managed more sustainably than many countries thanks to legislation, such as the MSA. For example, of some 16 stocks reported to be sustainably managed, nine involve U.S. fishermen.¹⁴⁴ Further, different consumer seafood guides identify several U.S. shark fisheries as sustainable.¹⁴⁵ A complete ban would remove that management model from the market, possibly removing incentives for other nations to adopt that model.¹⁴⁶ Notably, however, stocks of blue sharks (the species most commonly caught for their fins) in the North Atlantic are not sustainably managed.¹⁴⁷

142. See *Understanding Atlantic Shark Fishing* (June 18, 2019), <https://www.fisheries.noaa.gov/insight/understanding-atlantic-shark-fishing> (discussing shark fishing industry).

143. See *id.* (noting that sharks must be landed with fins attached).

144. D.S. Shiffman & R.E. Hueter, *A United States Shark Fin Ban Would Undermine Sustainable Shark Fisheries*, 85 *MARINE POL'Y* 138, 138 (2017).

145. *Id.* at 139. Of the ten shark stocks (from six species) included in the study, five were rated as sustainable by two of NOAA FishWatch, the Marine Stewardship Council, or Seafood Watch. However, none were rated as sustainable by all three consumer seafood guides.

146. *Id.*

147. Simpfendorfer & Dulvy, *supra* note 45, at R98.

Aside from fins, the other main component of sustainable shark fisheries is shark meat.¹⁴⁸ The largest producers of shark meat are Spain and Taiwan, with Korea, Italy, and Brazil also making the list of major importers of the product.¹⁴⁹ The U.S. is the eighth largest exporter of shark meat, producing an average of 3,861 metric tons per year between 2000 and 2011.¹⁵⁰ Consequently, a U.S. shark fin ban may also harm law-abiding fishermen by reducing the value of sharks initially landed for meat.¹⁵¹

The growing demand for shark meat is likely related to the increased application of “fin-attached” regulations around the world.¹⁵² It also further highlights how the demand for the more valuable shark fins drives shark fisheries. Thus, the Shark Fin Sales Elimination Act may ultimately be more beneficial for sustainable fisheries by providing firm leadership and guidelines in the shark conservation crisis.¹⁵³ Moreover, there is no direct evidence to suggest that an outright ban would harm sustainable fisheries.¹⁵⁴ Identifying what levels of fishing are sustainable is also challenging because of the massive data deficiencies existing for many shark populations.¹⁵⁵ Given the high levels of mercury found in shark meat,¹⁵⁶ it is also unclear how much demand will continue to increase as detrimental health effects become more apparent. Therefore, a U.S. ban on possessing shark fins may not actually negatively affect purportedly sustainable fisheries.

2. Perceived cultural bias

Arguably the most controversial aspect of shark fin bans is that some perceive them as being biased against Asian Americans, particularly those with Chinese heritage. One of the initial challenges to California’s Shark Fin Law claimed that it violated the Equal Protection Clause by preventing Chinese Californians from practicing cultural traditions.¹⁵⁷ The Northern District of California examined the legislative history of the law, finding that sharks are important for ecosystem health; shark finning causes millions of

148. VALLIANOS ET AL., *supra* note 27, at 16.

149. Felix Dent & Shelley Clarke, *State of the Global Market for Shark Products*, 93–96, U.N. Food & Agric. Org. Fisheries & Aquaculture Technical Paper No. 590 (2015).

150. *Id.* at 93.

151. *Id.* at 138; *Shark Fin Sale Bans Would Hurt U.S. Fisherman Without Improving Shark Conservation*, <https://www.fisheries.noaa.gov/leadership-message/shark-fin-sale-bans-would-hurt-us-fishermen-without-improving-shark-conservation> (last visited Mar. 18, 2020).

152. VALLIANOS ET AL., *supra* note 27, at 16.

153. Porcher, *supra* note 119.

154. *Id.*

155. *Id.*

156. Elevated levels of mercury and other toxins have also been found in shark fins. VALLIANOS ET AL., *supra* note 27, at 18.

157. *Chinatown Neighborhood Ass’n v. Harris*, 33 F.Supp.3d 1085, 1090 (N.D. Cal. 2014).

sharks to die each year; and the market for shark fins in California contributes to the declines in shark populations.¹⁵⁸ That court was not convinced by the Equal Protection claim, holding that the law was facially neutral and finding that there were no facts showing the law was enacted for the purpose of discriminating against Chinese Californians.¹⁵⁹

Given the history of shark fin soup consumption, many of those most affected by the ban would indeed be Chinese Americans. Notably, however, the California law had the support of several Chinese American politicians and the Asian Pacific American Ocean Harmony Alliance group.¹⁶⁰ Similarly, conservation groups have sought to involve groups of affected citizens in campaigns to raise awareness of the impacts of the shark fin trade on worldwide populations of these animals. For instance, WildAid has recruited several Chinese celebrities to serve as ambassadors for its shark fin campaigns in China.¹⁶¹

The shark fin trade truly is global.¹⁶² Spanish and Indonesian fishing vessels are heavily involved in catching sharks throughout the world's oceans.¹⁶³ Fins and carcasses are then processed in countries such as China and Japan.¹⁶⁴ Outside of China, many fins are exported for consumption in Singapore, Malaysia, and Vietnam.¹⁶⁵ Thus, a nationwide shark fin ban may indirectly affect numerous other countries rather than targeting one specific community in the United States. The issues with shark fin bans in California and elsewhere also highlight the importance of developing legislation with the communities most affected by them.

3. Relative insignificance of the U.S. shark fin market

Some argue that eliminating the U.S. as a market for shark fins would have a negligible effect on shark conservation worldwide. Certainly, the U.S. is a relatively minor importer of shark fins,¹⁶⁶ and the market for shark fins is greatest in Asia.¹⁶⁷ However, the U.S. shark fin exports are moderately

158. *Id.* at 1091.

159. *Id.* at 1095; *see also* *Chinatown Neighborhood Ass'n v. Brown*, 539 Fed. App'x 761, 762 (9th Cir. 2013) (reviewing Chinatown's other claims of error, finding none).

160. Eilperin, *supra* note 28.

161. *Sharks*, <https://wildaid.org/programs/sharks/> (last visited Feb. 7, 2020).

162. Dent & Clarke, *supra* note 149, at 2.

163. *Id.* at 3.

164. *Id.*

165. *Id.*

166. *Id.* at 85.

167. *Id.* at 3.

more significant.¹⁶⁸ Most of these exports are destined for Hong Kong and mainland China.¹⁶⁹

Recent evidence suggests that the market for shark fins in China may be declining, perhaps resulting from shark finning awareness campaigns organized by conservation groups.¹⁷⁰ For instance, one estimate suggests that shark fin soup consumption in China fell by over 80% in the past decade.¹⁷¹ However, global demand for shark fins remains fairly consistent.¹⁷² As the market declines on the Chinese mainland, it is expanding in Hong Kong, Macau, and Thailand.¹⁷³ Thus, even with a reduction in demand for shark fins in China, the U.S. market for them will likely remain relatively minor.

Clearly, removing the U.S. as an importer or exporter of shark fins will have relatively little direct impact on the global market.¹⁷⁴ Nonetheless, the indirect effects could be substantial. A number of other countries and jurisdictions have already banned commercial shark fishing and the sale or trade of shark products.¹⁷⁵ If the U.S. enacted an outright ban on shark fin products, it would send a powerful message throughout the world, regardless of the relatively small direct effect the ban may have on international markets. A nationwide shark fin ban would further stigmatize shark finning, which should help to reduce demand. As with other animal products such as ivory, reducing demand is the key for long-term conservation.

B. Implications for International Trade

A federal ban on the import and export of shark fins could encounter issues with World Trade Organization (WTO) policies or principles the WTO incorporated from the General Agreement on Tariffs and Trade (GATT).¹⁷⁶ The general rule under the GATT is that nations cannot discriminate against other nations in trading goods.¹⁷⁷ The WTO Appellate Body resolves disputes arising under the GATT, and established a two-tiered analysis for whether a particular domestic law that violates the GATT fits within an

168. *Id.* at 85.

169. *Id.*

170. In 2013 the Chinese government commendably banned the use of shark fins in dishes served at official banquets. VALLIANOS ET AL., *supra* note 27, at 4.

171. *Id.* at 7.

172. Dent & Clarke, *supra* note 149, at 19.

173. VALLIANOS ET AL., *supra* note 27, at 7–15.

174. The U.S. shark fin export market is responsible for around one percent of global volume by weight. Dent & Clarke, *supra* note 149, at 85.

175. *International Shark Finning Bans and Policies*, ANIMAL WELFARE INST., <https://awionline.org/content/international-shark-finning-bans-and-policies> (last visited June 15, 2019).

176. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

177. *Id.* at art. I.

exception.¹⁷⁸ The first step determines if the measure can be justified under the alphabetized exceptions in GATT Article XX.¹⁷⁹ These exceptions provide for, *inter alia*, measures “necessary to protect public morals,” “necessary to protect human, animal or plant life or health,” and “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”¹⁸⁰ The second step determines whether the measure constitutes a means of “arbitrary or unjustifiable discrimination between countries where the same conditions prevail”, or is “a disguised restriction on international trade.”¹⁸¹

Relevant environmental cases heard before the WTO Appellate Body include DS-21 (“*Tuna/Dolphin*”), DS-58 (“*Shrimp/Turtle*”), and DS-400 and 401 (“*EC/Seal Products*”). *Tuna/Dolphin* considered labeling of tuna products in the U.S. based on the requirements of the Dolphin Protection Consumer Information Act.¹⁸² Tuna caught using proper methods could be labelled as “Dolphin Safe.”¹⁸³ Mexico challenged this regulation,¹⁸⁴ however, and it has been extensively litigated since the early 1990s.¹⁸⁵ The first WTO Appellate Body report focused on interpreting the meaning of “necessary” in the Article XX exceptions, and determined that it required a nation to “exhaust[] all options possibly available to it” in pursuit of an objective under one of those exceptions.¹⁸⁶

Shrimp/Turtle involved a dispute between the U.S. and India, Malaysia, Pakistan, and Thailand over restrictions on shrimp imports into the U.S.¹⁸⁷ The U.S. imposed regulations requiring shrimp fisheries to use turtle-excluder devices,¹⁸⁸ which the complainants claimed was discriminatory.¹⁸⁹ The WTO Appellate Body agreed with the complainants and found that the U.S. measure arbitrarily and unjustifiably discriminated between WTO

178. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 22, WTO Doc. WT/DS2/AB/R (adopted Apr. 29, 1996).

179. GATT, *supra* note 176, at art. XX.

180. GATT, *supra* note 176, at art. XX(a), (b), & (g).

181. Appellate Body Report, *supra* note 178, at 13.

182. Panel Report, *United States—Restrictions on Imports of Tuna*, DS21/R - 39S/155 (adopted Sept. 3, 1991).

183. *Id.* at 5.

184. *Id.* at 40.

185. Colin Dwyer, *U.S. Gets a Big Win in its Long Fight with Mexico Over ‘Dolphin Safe’ Labels* (Dec. 14, 2018), <https://www.npr.org/2018/12/14/676760611/u-s-gets-a-big-win-in-its-long-fight-with-mexico-over-dolphin-safe-labels>.

186. Panel Report, *supra* note 182, at 37.

187. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998).

188. *Id.* at 2–4.

189. *Id.* at 1.

Members, violating the Article XX chapeau.¹⁹⁰ Importantly, however, the WTO Appellate Body did at least find that the regulation satisfied the Article XX(g) exception for being related to the conservation of exhaustible natural resources.¹⁹¹

Most recently, in DS-400 and DS-401 (“*EC/Seal Products*”), the European Union (EU) sought to prohibit the import and sale of processed and unprocessed seal products, with exceptions for indigenous communities and seal products harvested during the course of marine resource management.¹⁹² Norway and Canada challenged the EU’s regulation.¹⁹³ There, the WTO Appellate Body determined that the measure satisfied the Article XX(a) exception for being necessary to protect public morals.¹⁹⁴ However, it found that the EU failed to justify the indigenous communities’ exception under the Article XX chapeau.¹⁹⁵ Together, these cases have implications for both shark conservation bills before Congress.

Issues relating to general shark fin bans and the WTO/GATT have been thoroughly analyzed before.¹⁹⁶ Consequently, here I specifically assess potential WTO/GATT implications for both shark conservation bills currently before Congress. There is no explicit reference to the import or export of shark fins in the Shark Fin Sales Elimination Act. Thus, the general prohibition that “no person shall possess, offer for sale, sell, or purchase any shark fin or product containing any shark fin,”¹⁹⁷ is unlikely to be challenged under the GATT. However, although the smooth and spiny dogfish exemption does not explicitly mention U.S. fisheries, it is implicitly permitting trade in shark fins from predominantly U.S. fisheries. Therefore, the WTO Appellate Body may find that this provision constitutes a “disguised restriction on international trade.”¹⁹⁸ Similarly, the WTO Appellate Body may take issue with the exemption for “noncommercial subsistence purposes,” given the similarity with the indigenous communities’ exemption it found problematic in *EC/Seal Products*. The federal government’s best defense here may be to argue that the Article XX(b) and (g) exceptions apply.¹⁹⁹ Or, alternatively, the exemptions should simply be

190. *Id.* at 75.

191. *Id.* at 75.

192. Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Docs. WT/DS400/AB/R & WT/DS401/AB/R (adopted May 22, 2014).

193. *Id.* at 13.

194. *Id.* at 146–50.

195. *Id.* at 132–46.

196. See Elizabeth Neville, *Shark Finning: A Ban to Change the Tide of Extinction*, 25 COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. 387, 404–15 (2014) (concluding that a nationwide ban on shark fins would minimize potential WTO violations).

197. H.R. 737, 116th Cong. § 2(a) (2019).

198. Appellate Body Report, *supra* note 178, at 13.

199. In other words, that the shark fin ban would be necessary to protect public morals, and that sharks are an exhaustible natural resource.

removed from the Shark Fin Sales Elimination Act. Overall, the risk to this shark fin ban from litigation under the GATT is low.

The Sustainable Shark Fisheries and Trade Act could also be challenged under the GATT for being discriminatory and unduly burdensome on other nations, as it seeks to ensure they adopt shark fishing regulatory schemes similar to those in the United States. In fact, this bill would be more likely to violate the GATT because of its explicit reference to the import of shark products. These provisions may violate the “most favoured nation” treatment under Article I of the GATT, and therefore the Sustainable Shark Fisheries and Trade Act is a relatively riskier bill.

VII. CONCLUSIONS

Cooperative federalism has failed to sufficiently protect shark populations. The current assortment of state laws provides exactly the kind of “whack-a-mole” effect conservationists tried to avoid. Stronger, unified federal law is necessary to protect shark populations in the U.S. and internationally. Current state laws banning the shark fin trade serve only to shift the trade to other states lacking protections. Additionally, even in those states where shark fin prohibitions exist, much of the shark fin trade appears to have gone underground.²⁰⁰ For example, evidence suggests that shark fin soup is still available at restaurants in ten of the twelve states with bans.²⁰¹ By enacting a shark fin ban at the federal level, greater resources likely would be available for authorities to enforce the law. A federal ban would also be easier to enforce than continuously checking imported fins to ensure that they are from sustainable sources.

Of the two bills currently before Congress, the Shark Fin Sales Elimination Act of 2019 represents the more effective option for long-term shark protection. An outright prohibition on shark fin possession would be the cleanest and most effective way to prevent cruelty and promote conservation. The dogfish fisheries exemption in the Shark Fin Sales Elimination Act remains problematic but could be improved by reevaluating the fisheries before 2027. The ideal legislation would be similar to the MMPA and involve a prohibition on the taking of sharks, unless the population or species is certified as sustainable by NOAA. Several countries and jurisdictions already have enacted similar laws.²⁰²

Most recently, Canada enacted its own ban on the import and export of shark fins. In so doing, Canada became the first G7 and G20 country to ban

200. Fobar, *supra* note 35.

201. *Id.*

202. *International Shark Finning Bans and Policies*, *supra* note 175.

shark fins.²⁰³ Canada has banned the act of shark finning in Canadian waters since the early 1990s. However, Canada remained one of the most significant importers of shark fins outside of Asia.²⁰⁴ Canadian efforts to ban shark fins were spearheaded by Asian-Canadians, yet efforts still encountered criticism over their alleged cultural discrimination.²⁰⁵ These concerns led to a shark fin ban enacted by the city of Toronto being struck down in court in 2012.²⁰⁶ Undeterred, lawmakers and advocates persisted with their campaign to ban the import and export of shark fins in Canada, and bill C-68 was passed in June 2019.²⁰⁷ Canada's example is one that the U.S. can and should follow. Although the direct effect of a U.S. ban on sharks caught for finning would be minor, the indirect effects of another G7 and G20 nation banning shark fins would be substantial.

An extensive discussion of international laws covering sharks and their relatives is beyond the scope of this note. A shark fin ban will not solve the conservation crisis threatening these animals. Plenty of other challenges, such as addressing bycatch issues worldwide, will remain.²⁰⁸ Shark fin markets in Asia are largely out of U.S. control, and ultimately for such widespread and often high migratory animals, improved international law is crucial. Without international cooperation, we will likely witness the same domestic "whack-a-mole" situation except on a larger scale.²⁰⁹ Eventually, significant international cooperation will be required to address finning, bycatch, and habitat loss given that many sharks are highly migratory species.²¹⁰ Nonetheless, a U.S. ban will represent a significant step towards more effective shark conservation and will send a clear message to the rest of the world. A ban would also address the ethical problems with the procurement of many shark fins.

203. Leyland Cecco, *Canada Becomes First G7 Country to Ban Shark Fin Imports* (June 21, 2019), <https://www.theguardian.com/world/2019/jun/21/canada-bans-shark-fin-imports-sale>.

204. Dent & Clarke, *supra* note 149, at 21.

205. Cecco, *supra* note 203.

206. Micah Luxen, *Toronto Councillors Outraged After Shark Fin Ban Struck Down* (Dec. 2, 2012), https://www.thestar.com/news/gta/2012/12/02/toronto_councillors_outraged_after_shark_fin_ban_struck_down.html.

207. An Act to Amend the Fisheries Act and Other Acts in Consequence, S.C. 2019, c 14 (Can.).

208. Simpfendorfer & Dulvy, *supra* note 45, at R98.

209. Boris Worm et al., *Global Catches, Exploitation Rates, and Rebuilding Options for Sharks*, 40 MARINE POL'Y 194, 201 (2013).

210. See Crystal Green, *An International SOS (Save Our Sharks): How the International Legal Framework Should Be Used to Save Our Sharks*, 27 PACE INT'L L. REV. 701, 711 (2015) (discussing special considerations, including sharks' migratory nature, needing consideration); James Kraska & Lindsay Gaskins, *Can Sharks Be Saved? A Global Plan of Action for Shark Conservation in the Regime of the Convention on Migratory Species*, 5 SEATTLE J. ENVTL. L. 415, 417 (2015) (discussing importance of sharks' migratory nature).

Some authors claim that the Shark Fin Sales Elimination Act is misguided, and paint supporters of a U.S. shark fin ban as having been convinced by “simplified global overviews.”²¹¹ However, a comparatively simple measure does not indicate a lack of understanding about the complexities of the problem. A federal shark fin ban is merely one step towards alleviating the extinction crisis facing sharks. This will reaffirm Congressional intent to recognize the inherent value of sharks to ecosystems and ensure their long-term conservation. These same authors also underestimate the value of legislative history compared to peer review when criticizing arguments in support of the Shark Fin Sales Elimination Act.²¹² There is no reason to think that a few anonymous reviews by scientific colleagues is a more rigorous process than documented Congressional hearings on an issue. Indeed, courts can use legislative history as an important tool of statutory construction.²¹³

The advantages stemming from a shark fin ban transcend cultural and geographic borders. Shark ecotourism is a rapidly growing industry,²¹⁴ and there are considerable ecosystem benefits from more abundant shark populations.²¹⁵ Unfortunately, we live in an age of almost endless challenges in both the ethical treatment of animals and wildlife conservation. There are numerous examples of societies opposing animal cruelty and promoting wildlife conservation despite the sometimes-negative effects on certain communities and cultures.²¹⁶ Societal progress on these types of issues ultimately requires all of us to make certain sacrifices.

Sharks have existed for close to half a billion years. At current rates of overexploitation, many sharks do not have another half a billion years to wait for the federal government to enact effective legislation protecting them. Shark finning and other threats mean that some species could become extinct within a few decades. Addressing these challenges requires the U.S. Congress to be bold and to once again take the lead on conservation of threatened marine species.

211. Heuter & Shiffman, *supra* note 114, at 13601.

212. *See generally id.* (relying on peer review rather than legislative history).

213. *See generally, e.g.*, *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) (considering legislative history in defining statutory term); *Train v. Colo. Pub. Interest Research Grp., Inc.*, 426 U.S. 1 (1976) (holding that it was error for lower court to exclude reference to legislative history in determining meaning of statute); *Blanchard v. Bergeron*, 489 U.S. 87 (1989) (using legislative history in statutory interpretation).

214. Mustain, *supra* note 8, at 6.

215. *Id.* at 5.

216. A few examples include opposition to the cruel treatment of chickens, cows, and pigs in factory farms; bullfighting; fox hunting; the destruction of orangutan habitat for palm oil plantations; and the slaughter of elephants and rhinoceros for ivory.