

# William & Mary Law Review

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Volume 17 (1975-1976)  
Issue 4

Article 6

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May 1976

## Legal Dimensions of Limited Entry Fishery Management

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*Legal Dimensions of Limited Entry Fishery Management*, 17 Wm. & Mary L. Rev. 757 (1976),  
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# LEGAL DIMENSIONS OF ENTRY FISHERY MANAGEMENT

## INTRODUCTION\*

Limited entry<sup>1</sup> management attempts to regulate fisheries<sup>2</sup> by integrating economic data with biological data to develop programs that avoid both depletion of stocks<sup>3</sup> and economic waste.<sup>4</sup> The dual aim of

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\*Part of this study was done in cooperation with the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, United States Dep't. of Commerce, under Contract Number 03-4-043-358. The assistance of N. Bartlett Theberge, Assistant Professor of Ocean Law, Virginia Institute of Marine Science and Ivar E. Strand, Jr., Marine Resource Economist, Virginia Institute of Marine Science was most helpful in the preparation of this paper. The views expressed within are those of the author alone.

1. Limited entry is a term of art referring to fishery management programs that use economic models to determine, on the basis of biological and economic inputs, how the fishery stocks can be maintained with the optimal level of capital and labor. The purpose is both to reduce exploitation of the fishery stocks and to avoid economic waste in the fishing industry. For analysis of the economic theory, see F. CHRISTY, *ALTERNATIVE ARRANGEMENTS FOR MARINE FISHERIES: AN OVERVIEW* (1973) (prepared for Resources for the Future Program of International Studies of Fishery Arrangements, RFF/PISFA Paper 1) [hereinafter cited as F. CHRISTY, *ALTERNATIVE ARRANGEMENTS*]; Copes, *The Backward-Bending Supply Curve of the Fishing Industry*, 17 SCOT. J. POLIT. ECON. 69 (1970); Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POLIT. ECON. 124 (1954); Scott, *The Fishery: The Objective of Sole Ownership*, 63 J. POLIT. ECON. 116 (1955).

2. This paper will use the term "fishing" to refer to all forms of harvesting of marine species, whether finfish or shellfish. "Fisherman" will be used to represent any participants in a fishing industry. "Fishing industry" will be used to designate the commercial enterprise involved in harvesting fisheries.

3. Extracting at a rate greater than the rate at which stocks replenish themselves results in depletion of the fishery. See HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, *MARINE FISHERIES CONSERVATION ACT OF 1975*, H.R. REP. NO. 94-445, 94th Cong., 1st Sess. 33, 36 (1975) [hereinafter cited as H.R. REP. NO. 94-445]. The report lists marine fishery resources that are depleted, in imminent danger of depletion, or under intensive use. *Id.* at 95-98. See also F. CHRISTY & A. SCOTT, *THE COMMONWEALTH IN OCEAN FISHERIES* 9 (1965).

4. Economic waste results from investing more capital or labor in a fishery than is needed to harvest the amount that is landed. For example, in 1965 the cod fishery in the North Atlantic was so overutilized that the same catch could have been landed with 10% to 20% less fishing effort than was employed, at an estimated saving of 50 to 100 million dollars per year. F. CHRISTY, *ALTERNATIVE ARRANGEMENTS*, *supra* note 1, at 17. A study of the Pacific salmon fisheries in the mid-1960s indicated that the same annual catch and total revenues could have been achieved with about 50 million dollars less capital and labor than was used. J. CRUTCHFIELD & G. PONTECORVO, *THE PACIFIC SALMON FISHERIES: A STUDY OF IRRATIONAL CONSERVATION* 174 (1969).

Economic waste results because entry is free. As new investment is attracted to a

efficiently utilizing both natural resources and the resources of the fishing industry distinguishes limited entry management from traditional fishery management, which has had the single biological goal of maintaining the maximum sustainable yield (MSY).<sup>5</sup>

Exploitation of fisheries and economic waste occur in open access fisheries because there is insufficient incentive for the participants to limit their investment. A common property status exists;<sup>6</sup> no single user of a fishery has exclusive rights, nor can any single user prevent others from entering.<sup>7</sup> Each fisherman knows that if he abstains in the present, his rivals will not, and thus the benefits of his individual abstention will be neutralized. Also, any reduction in future costs as a result of present abstention accrues to everyone, not just the abstainer. This doubly penalizes the abstainer because the apparent result of his inaction is to lower competitors' future costs at some immediate present cost to himself.<sup>8</sup> Even though economic waste and accelerated depletion of the stocks results from open access fishing, the fisherman is compelled by the common property status to invest and reap his profits now, and to postpone consideration of stock depletion and its resultant decline in revenues.<sup>9</sup> Because the common property nature of the fishery is the source of stock depletion and economic waste, limited entry management seeks to restructure the legal nature of fisheries.

Limited entry entails restricting the amount of fishing that may be done in a commons by excluding fishermen or placing restraints on their operations. Enclosure of a commons, however, inevitably raises claims that there exists a denial of equal protection or due process of law, or a

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fishery, greater pressure is put on a limited supply. The returns to capital and labor will decrease and the extra profits, or economic rents that could have been used for other development activities will be dissipated. Limited entry management seeks to avoid economic waste by limiting the number of participants in a fishery to the economically efficient maximum, and to recapture for society the lost economic rents. It is the recapture of the rents that benefits society. See notes 64 & 67 *infra*.

5. W. ROYCE, INTRODUCTION TO THE FISHERY SCIENCES 519 (1972). "MSY" means the maximum yield at which the stocks can be maintained indefinitely. It is, therefore, a ceiling on fishing; the stocks can reproduce themselves at a take less than MSY, but beyond MSY, reduction in stocks begins.

6. Clingan, *A Second Look at United States Fisheries Management*, 9 SAN DIEGO L. REV. 432, 443-44 (1972); Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968); Kratchman, *The Rise and Fall of Natural Resource Systems*, 8 LAND AND WATER L. REV. 429, 431-32 (1973).

7. F. CHRISTY & A. SCOTT, *THE COMMONWEALTH IN OCEAN FISHERIES* 6 (1965).

8. Sweeney, Tollison & Willett, *Market Failure, the Common-Pool Problem, and Ocean Resource Exploitation*, 17 J. LAW & ECON. 179, 183-84 (1974) [hereinafter cited as Sweeney].

9. Sweeney, *supra* note 8, at 183-84.

"taking" prohibited by the fifth amendment of the Constitution.<sup>10</sup> This Note will present a brief overview of these claims and examine in more detail the constitutional implications<sup>11</sup> of three alternative methods of limited entry.<sup>12</sup> Examination of these methods also will entail consideration of whether the legal ramifications of limited entry differ from the widely accepted regulation of other businesses<sup>13</sup> and of natural resources.<sup>14</sup> To place limited entry in context, this discussion must be prefaced by a brief outline of the jurisdictional framework of fishery management.

### JURISDICTION FOR FISHERY MANAGEMENT

Natural resources are controlled by the governing unit, state or federal, for the benefit of its citizens.<sup>15</sup> The power to regulate for the

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10. As one commentator has observed:

Every new enclosure of the commons involves the infringement of somebody's personal liberty. Infringements made in the distant past are accepted because no contemporary complains of a loss. It is the newly proposed infringements that we vigorously oppose; cries of "rights" and "freedom" fill the air. But what does "freedom" mean? When men mutually agreed to pass laws against robbing, mankind became more free, not less so. Individuals locked into the logic of the commons are free only to bring on universal ruin; once they see the necessity of mutual coercion, they become free to pursue other goals. I believe it was Hegel who said, "Freedom is the recognition of necessity."

Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1248 (1968).

11. See also Note, *The Constitutionality of a Program Restricting the Number of Commercial Fishermen in the Coastal Waters of the United States*, 34 LA. L. REV. 801 (1974).

12. It is important to note that all fishing management, including limited entry, must be tailored to specific fisheries and fishing industries. Individual fisheries have different characteristics that make discussion of abstract management proposals difficult and somewhat unsatisfactory. Moreover, particular fisheries may be best regulated by a hybrid utilization of different management programs. Because limited entry legislation must reflect the individualized characteristics of the regulated fishery, a model statute has not been suggested. Rather, this Note examines three alternative methods of limited entry and their constitutional ramifications.

13. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

14. See, e.g., *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422 (1936); *Miller v. McLaughlin*, 281 U.S. 261 (1930); *LaCoste v. Department of Conservation*, 263 U.S. 545 (1924); *Maryland Dep't of Natural Resources v. Amerada Hess Corp.*, 350 F. Supp. 1060 (D. Md. 1972); *Corsa v. Tawes*, 149 F. Supp. 771 (D. Md.), *aff'd*, 355 U.S. 37 (1957). Because limited entry legislation has the dual purposes of conservation of resources and control of an economic enterprise it is necessary to look to precedents in both areas of the law.

15. See, e.g., *Skiriotes v. Florida*, 313 U.S. 69, 75 (1941); *Lawton v. Steele*, 152 U.S. 133, 139 (1894). On jurisdiction generally, see H. KNIGHT & T. JACKSON, *LEGAL IM-*

protection or preservation of resources may be found in the police power to act for the general welfare,<sup>16</sup> or in the concept of the public trust.<sup>17</sup> The authority to restrict access exists in the government with jurisdiction over the fishery, but the jurisdictional framework currently is undergoing changes. The states have jurisdiction over resources found inland and to the three mile limit;<sup>18</sup> the contiguous federal zone, currently from three to twelve miles,<sup>19</sup> will be extended to two hundred miles in March 1977 when the Fishery Conservation and Management Act of 1976<sup>20</sup> takes effect.<sup>21</sup> This extended jurisdiction will enable management of species now fished by international fleets.<sup>22</sup> The statute anticipates the use of limited entry plans for management,<sup>23</sup> but emphasizes conservation of the resource and biological goals over economic analysis.<sup>24</sup>

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PEDIMENTS TO THE USE OF INTERSTATE AGREEMENTS IN COORDINATED FISHERIES MANAGEMENT PROGRAMS: STATES IN THE N.M.F.S. SOUTHEAST REGION, (Louisiana State University, Office of Sea Grant Development, Sea Grant Legal Program 1973) [hereinafter cited as KNIGHT & JACKSON].

16. See, e.g., *McCready v. Virginia*, 94 U.S. 391 (1876); *Sloup v. Town of Islip*, 78 Misc. 2d 366, 356 N.Y.S.2d 742 (Sup. Ct. 1974); *Potomac Sand & Gravel Co. v. Governor of Md.*, 266 Md. 358, 293 A.2d 241 (1972); *Clark v. Todd*, 192 Md. 487, 64 A.2d 547 (1949); *Grossman v. Hotel Astor*, 166 Misc. 80, 1 N.Y.S.2d 307 (Mun. Ct. 1937); *State v. Price*, 71 N.J.L. 249, 58 A. 1015 (1904).

17. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 556, 559 (1970). See also, KNIGHT & JACKSON, *supra* note 15, at 32-34.

18. Submerged Lands Act, 43 U.S.C. §§ 1301-15 (1970).

19. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-43 (1970).

20. Pub. L. No. 94-265 (April 13, 1976), *quoted in* 122 CONG. REC. S4485 (daily ed. March 29, 1976).

21. Pub. L. No. 94-265, § 104, *quoted in* 122 CONG. REC. S4486 (daily ed. March 29, 1976).

22. The share of catch in certain areas reflects the impact of foreign fishing:

		1960 (%)	1972 (%)	1974 (%)
Total U.S. Atlantic coast	U.S.	92.9	49.1	50.0
	Foreign	7.1	50.9	50.0
Georges Bank (Northern New England, Cod, Haddock)	U.S.	88.0	10.4	11.4
	Foreign	12.0	89.6	88.6
Southern New England	U.S.	100.0	11.8	26.4
	Foreign	0	88.2	73.6

H.R. REP. NO. 94-445, 94th Cong., 1st Sess. 34-35 (1975).

23. Pub. L. No. 94-265, §§ 301(a)(1), (4); 303(b)(6); 304(c)(3), *quoted in* 122 CONG. REC. S4489 to S4491 (daily ed. March 29, 1976).

24. Compare Pub. L. No. 94-265, § 3(18), *with id.* § 301(a)(5). Compare *id.* § 301(a)(1), (2), *with id.* § (5), (7). It is unclear precisely what role economic theory will play in the formulation of management plans under the standards enumerated in section 301.

With respect to inland fishing it must be noted that because fish rarely confine themselves to single political jurisdictions<sup>25</sup> the present diffusion of authority is not a political atmosphere conducive to effective management. In an effort to avoid federal preemption, various jurisdictional means, such as interstate compacts<sup>26</sup> and cooperative regional management councils,<sup>27</sup> have been used, but structuring management programs of this nature is difficult and time consuming.<sup>28</sup> Moreover, individual state efforts are often limited by state constitutional constraints<sup>29</sup> as well as by potential challenges under the commerce clause<sup>30</sup> and the privileges and immunities clause<sup>31</sup> of the Constitution.

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25. H.R. REP. NO. 94-445, 94th Cong., 1st Sess. 29 (1975).

26. For example, New Jersey and Delaware have joined in a compact on fishing in the Delaware River and Bay. DEL. CODE ANN., Tit. 7, §§ 902-03 (1974). The Atlantic States Marine Fisheries Compact is composed of most of the Atlantic states. See, e.g., N.J. STAT. ANN. §§ 32:21-1 to 21-11 (1963). On the usefulness of interstate compacts for limited entry fishery management see KNIGHT & JACKSON, *supra* note 15, at 47-63; J. DAVIS, N. THEBERGE, M. STRAND, N. BOCKSTAEL & J. GATES, *ALTERNATIVE MANAGEMENT SCHEMES FOR THE SURF CLAM FISHERY*, (1975) (special report in Applied Marine Science and Ocean Engineering No. 103, Virginia Inst. of Marine Science) [hereinafter cited as *ALTERNATIVE MANAGEMENT SCHEMES FOR SURF CLAMS*].

27. The National Marine Fisheries Service (NMFS), in the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, utilizes regional marine fisheries councils based on geography and encourages fishery management through these organizations. The regional councils are designated: 1. New England 2. Mid-Atlantic 3. Southern Atlantic 4. Caribbean 5. Gulf 6. Pacific 7. North Pacific 8. Western Pacific. See Pub. L. No. 94-265, § 302, H.R. 200, 94th Cong., 2d Sess. (1976), quoted in 122 CONG. REC. S4489 (daily ed. March 29, 1976).

28. See H.R. REP. NO. 94-445, 94th Cong., 1st Sess. 28-30 (1975). The problem is that where a management unit transcends political boundaries to focus on regional problems, it must return to the localities to effect implementation. State legislatures or state management agencies must act to put the program into effect. Because state legislatures are in session at different times, programs cannot be implemented quickly. State fishery agencies also have varying rulemaking and enforcement powers. Any cooperative management plan that relies on state implementation must resolve the problems presented by such diversity in constructing a successful program.

29. See Note 65 *infra*. See, e.g., F. CAMERON, *STATE AND FEDERAL CONSTITUTIONAL IMPEDIMENTS TO STATE LIMITED ENTRY FISHERIES LEGISLATION: STATES FROM MAINE TO VIRGINIA*, (Marine Affairs Program, Univ. R.I., 1973) [hereinafter cited as CAMERON].

30. U.S. CONST. art. I, § 8, cl. 3. See *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887).

31. U.S. CONST. art. IV, § 2, cl. 1. State fisheries management plans that have sought to exclude nonresident fishermen have been struck down as unconstitutional. See, e.g., *Toomer v. Witsell*, 334 U.S. 385 (1948) (invalidating an attempt to regulate the South Carolina shrimp fishery by charging residents a \$25 license fee and non-residents a \$2500 license fee); *Brown v. Anderson*, 202 F. Supp. 96 (D. Alas. 1962) (Alaska closure of fishing areas to nonresidents violated the privileges and immunities clause and impacted on the commerce clause by burdening the movement of nonresident fishermen in interstate commerce).

Although there is ample legal support for federal preemption<sup>32</sup> of state fishery management,<sup>33</sup> centralization is not the best answer to the jurisdictional problem. Because of the varying characteristics of individual fisheries, regulation would be best handled by a local or regional approach,<sup>34</sup> for despite the problems of framing a suitable jurisdictional unit, it is important to retain choices to fit the sundry needs of particular fisheries. Whatever the jurisdiction selected, however, limited entry management must be carefully structured to avoid challenges of constitutional impropriety.

#### CONSTITUTIONAL OBJECTIONS TO THE EXCLUSIONARY THEORY OF LIMITED ENTRY: A BRIEF OVERVIEW

The government clearly can act to protect its natural resources; and conservation by way of prohibition of all taking is an accepted mode of resource protection.<sup>35</sup> The power to enact the total prohibition, however, does not automatically mean that the lesser restriction, limiting the activity, passes constitutional muster. A total prohibition on taking a resource has an equal effect on all, while partial prohibition such as

32. The power for federal preemption is found in the commerce clause of the United States Constitution. *See, e.g.,* *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (regulation of insurance companies); *Thornton v. United States*, 271 U.S. 414 (1926) (quarantine of diseased cattle); *Champion v. Ames*, 188 U.S. 321 (1903) (federal prohibition of transportation in interstate commerce of lottery tickets); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (state law prohibiting vessels licensed by the United States from navigating state waters invalidated); *United States v. Bishop Proc. Co.*, 287 F. Supp. 624 (D. Md. 1968). Under the "affectation doctrine," even intrastate fishery activities would come within commerce clause jurisdiction because of a substantial impact on interstate commerce. *See, e.g.,* *Perez v. United States*, 402 U.S. 146 (1971) (extortionate credit transactions ["loansharking"] subject to federal control); *Wickard v. Filburn*, 317 U.S. 111 (1942) (wheat grown for home consumption affects interstate commerce); *United States v. Darby*, 312 U.S. 100 (1941) (federal minimum wage and maximum hours law upheld).

33. In *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), the court held that even the Submerged Lands Act, 43 U.S.C. §§ 1301-15 (1970), giving the states management jurisdiction to three miles, did not deprive the federal government of its inherent power to manage all United States waters.

34. *See, e.g.,* ALASKA STAT. §§ 16.43.010-.380 (1973); WASH. REV. CODE §§ 75.28.450-.485 (1974).

35. Endangered Species Conservation Act of 1969, 16 U.S.C. §§ 668aa-668cc-6 (1970) (repealed by Pub. L. No. 93-205, § 14, Dec. 28, 1973) (prohibits importation of fish or wildlife which Secretary of Interior has determined to be threatened with worldwide extinction); Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 *et seq.* (prohibits importation of products from certain protected marine mammals); Lacey Act, 18 U.S.C. §§ 42-44 (forbids transportation or sale of any wildlife taken in violation of any foreign, federal or state law or regulation).

limited entry may not affect all equally. The potential for unequal treatment forces a closer examination of potential constitutional challenges.

As noted previously, a limited entry program is subject to at least three constitutional challenges. The equal protection clause challenge would assert that the method by which access to the fishery is allocated unreasonably discriminates among the persons willing to participate.<sup>36</sup> The due process claim would allege that liberty (the right to fish) or property (the fish or fishing gear)<sup>37</sup> was being taken without satisfying due process standards. The takings claim is a variant of due process; the fisherman would assert that the regulatory scheme resulted in a taking of his property for public use without compensation. These theories will be evaluated separately.

### *Equal Protection*

Under the equal protection clause of the fourteenth amendment, a classification will be held constitutional if it is reasonable and rests upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated shall be treated alike.<sup>38</sup> Under this two-tiered "rational basis" test the classification in question is rebuttably presumed to be constitutional;<sup>39</sup> the state is given great latitude in proving reasonableness.<sup>40</sup> Mere reasonableness, however, will not support a suspect classification<sup>41</sup> or one which affects a fundamental interest.<sup>42</sup> Such a classification is subject

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36. The Alaska Limited Entry program discussed *infra*, is currently under challenge on these grounds. See note 72 *infra* & accompanying text.

37. But see *Lawton v. Steele*, 152 U.S. 133 (1894) (seizure and destruction of prohibited nets was held to be valid).

38. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

39. *McGowan v. Maryland*, 366 U.S. 420 (1961); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

40. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911). The two-tiered test remains viable despite recent criticisms. See, e.g., *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 116 (1973) (Marshall, J., dissenting); Gunther, *The Supreme Court 1971 Term, Foreword: In Search of an Evolving Doctrine on a Changing Court: A Model for A Never Equal Protection*, 86 HARV. L. REV. 1, 20-21 (1972).

41. Cases finding or strongly intimating that suspect classifications were under review include: *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Oyama v. California*, 332 U.S. 633 (1948) (national origin).

42. Those interests arguably declared "fundamental" by the Supreme Court include: voting, see *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); marriage, see *Loving v. Virginia*, 388 U.S. 1 (1967) and *Griswold v. Connecticut*, 381 U.S. 479 (1965); procreation, see *Skinner v. Oklahoma*, 316 U.S. 535 (1942); rights in the



to "strict scrutiny"; the state bears a far heavier burden of justification, for it must prove that the classification is "necessary, and not merely related, to the accomplishment of a permissible state policy."<sup>43</sup> The presumption of validity arising under the rational basis test is not applicable.<sup>44</sup>

Limited entry should not involve any suspect class or fundamental rights.<sup>45</sup> Occupational choice, although an important right or privilege, is not so fundamental as to place upon the state the burden of proving that government-imposed access qualifications are more than rationally related to the purposes they are instituted to subserve.<sup>46</sup> Moreover, in cases involving economic regulation or resource management, the courts have shown a great willingness to ratify legislative evaluations of programs designed to serve the public welfare;<sup>47</sup> as a rule, statutory classifications will not be set aside if any facts reasonably may be conceived in justification.<sup>48</sup> Limited entry is a legitimate way of achieving the goal of maintaining fishery resources and an economically sound fishing industry, so that as long as the allocation of access to the fishery is based on reasonable classifications of potential entrants,<sup>49</sup> equal protection should be satisfied.<sup>50</sup>

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criminal process, *see* *Griffin v. Illinois*, 351 U.S. 12 (1956); interstate travel, *see* *Shapiro v. Thompson*, 394 U.S. 618 (1969).

43. *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).

44. *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

45. Limited entry, as an economic and resource control regulation, should not trigger strict scrutiny unless the classifications are clearly arbitrary and unreasonable. Only the tax alternative for limited entry carries a significant potential for strict scrutiny; *see* note 103 *infra* & accompanying text.

46. *See* *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-89 (1955).

47. In *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), the Court stated:

[I]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because [it] "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913).

48. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). *But cf.* Gunther, *The Supreme Court 1971 Term, Forward: In Search of an Evolving Doctrine on a Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

49. *See* note 76 *infra* & accompanying text for a discussion of Alaska limited entry program.

50. In light of the apparent ease with which a statute can pass the equal protection

### *Due Process*

It is unlikely that limited entry would be held violative of the due process clause.<sup>51</sup> Generally, great deference is given to the legislature to formulate programs regulating economic affairs;<sup>52</sup> courts are reluctant to hand down decisions that carry the tinge of "substantive due process."<sup>53</sup> And with respect to occupational licensing, where such regulations have been struck down under the applicable rational basis test, the right to work element often has been less significant than some infringement of a first amendment guarantee.<sup>54</sup>

Legislation with the effect of eliminating a commercial fishery has

test, it is useful to analyze a case in which the Supreme Court used equal protection language to invalidate a fishery management program. In *Puyallup Tribe v. Washington Game Dep't*, 414 U.S. 44 (1973), the Washington game department had prohibited net (commercial) fishing of steelhead trout on the Puyallup River to protect the stocks and the line (sport) fishery in steelhead. Indian net (commercial) fishermen challenged the program, alleging a denial of equal protection because the only net fishermen were Indians; all sport fishermen were non-Indian. In addition, the Indians, pursuant to an 1852 treaty, had reserved off-reservation fishing rights; such rights, they asserted, left them immune from state regulation. The Court held that Indians were subject to state regulation just like other citizens, but stated that when fishing regulations impacted on treaty rights, the state had to show that the regulations were absolutely necessary, that the resource otherwise could not be protected. Because of the treaty rights, stated the Court, the Indians composed a special class, with a greater right to fish than other persons. *Puyallup* is not, therefore, an ordinary equal protection case. In most cases there is no special right that would force the state to meet a greater burden of justifying fishery regulation than the standard rational relationship test.

For a full discussion of the 1852 treaty and the conflict between off-reservation fishing rights and state regulatory powers, see *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), in which Indian tribes, including the Puyallup, successfully enjoined enforcement of Washington fishery regulations (including the steelhead trout regulations) on the basis of their treaty rights.

51. Procedural due process, covering adequate notice, opportunity to be heard, and avenue for review, is not at issue here. It is assumed that any program would include the requisite procedural safeguards. The susceptibility, if any, of limited entry to a due process challenge lies in the legislative motive and justification for the program. See generally, CAMERON, *supra* note 29, at 7-11.

52. *Dandridge v. Williams*, 397 U.S. 471, 484 (1970); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

53. The Court noted in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955): "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

54. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Wulp v. Corcoran*, 454 F.2d 826 (1st Cir. 1972); Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097, 1114 (1973).

withstood due process attack. In *Corsa v. Tawes*,<sup>55</sup> a three-judge federal district court upheld a Maryland statute<sup>56</sup> prohibiting the use of purse nets in the state's tidal waters. Net fishing is the only economical way to catch menhaden, an inedible species used for fish oil and fish meal. The prohibition of nets was justified as a conservation measure and as necessary to the protection of Maryland's sport fisheries, a considerable industry in the state.<sup>57</sup> Although the effect was to eliminate the commercial menhaden industry in Maryland waters, the court found no constitutional impediment to this legislative policy. The state had a legitimate objective, and the means chosen were found to be reasonable;<sup>58</sup> due process required no more.

### *Taking*

A challenge to limited entry under the theory of a taking<sup>59</sup> would be illusory, for fishermen excluded by limited entry have no property right taken from them by the program. They have no property interest in the resource, which belongs to the state,<sup>60</sup> and no legally cognizable interest in the right to fish. Where fishermen have challenged a regulation which has the effect of rendering their equipment valueless, they have not succeeded.<sup>61</sup>

The trend of authority on the taking issue supports resource control legislation on the theory that the public benefit sought to be obtained outweighs private detriment suffered by individuals; this has been the analysis in cases where the property interest of the claimant was a

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55. 149 F. Supp. 771 (D. Md.), *aff'd*, 355 U.S. 37 (1957).

56. MD. ANN. CODE Art. 66C, § 259 (1951).

57. 149 F. Supp. at 772, 776. *Corsa* is distinguishable from *Puyallup Tribe v. Washington Game Dep't*, 414 U.S. 44 (1973), discussed *supra*, at note 50, in that treaty rights were not at issue. Thus, in the absence of special treaty rights, the court held that the Maryland legislature was free to act to preserve sport fishing at the expense of commercial fishing.

58. 149 F. Supp. at 776. The court found that the total prohibition of nets was reasonable because it would be too burdensome to police a regulation that allowed menhaden nets but no other nets.

59. See F. BOSSELMAN & D. CALLIES, *THE TAKINGS ISSUE* 284-301 (1973); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

60. *But cf.* *Dobard v. State*, 233 S.W.2d 435, 439 (Tex. 1950) (state not owner of fish in marginal sea).

61. *Miller v. McLaughlin*, 281 U.S. 261 (1930); *Lawton v. Steele*, 152 U.S. 133 (1894).

traditional ownership interest.<sup>62</sup> In a limited entry situation, a claimant on a taking theory has a dubious property interest being "taken"; it is therefore unlikely that such a theory would succeed.

### LIMITED ENTRY ALTERNATIVES

As illustrated above, the exclusion inherent in limited entry does not face an absolute constitutional prohibition. Using the standards customarily applied when economic or resource regulations are subjected to constitutional challenge, there is no inherent obstacle to the limited entry concept. With convincing documentation of need, careful drafting to avoid discriminatory classifications, and procedurally fair administration, a program constitutionally can restrict access to a fishery.

A limited entry program may be implemented through the use of licenses, stock certificates, or user fees. Two legal considerations underlie implementation of each of these alternatives. First, by closing access to a fishery, limited entry creates a new form of property in the right to fish; the attributes of property which this right will carry must be thoroughly defined. This property, the right to fish, will acquire an independent, quantifiable value.<sup>63</sup> Treatment of this independent value also must be anticipated by the program, although this is largely a policy problem.<sup>64</sup>

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62. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (involving a land owner prohibited from excavating gravel by a regulation forbidding excavation below the water table); *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (involving land owners deprived of use of their land by wetland regulations). In such cases, the plaintiff challengers had an actual, present property interest.

63. For example, in the British Columbia salmon limited entry program, the value of the fishing privilege is \$1,900 per ton of vessel (\$47,500 for a 25-ton vessel). U.S. DEP'T OF COMMERCE, NAT'L OCEANIC AND ATMOSPHERIC ADM'N, NAT'L MARINE FISHERIES SERVICE, A DRAFT OUTLINE FOR THE NATIONAL FISHERIES PLAN 215 (1974) [hereinafter cited as DRAFT NATIONAL MARINE FISHERIES PLAN].

64. The value of the right to fish is called economic rent. It represents a recapture of the economic waste that is dissipated in a common property fishery. See note 4 *supra*. Limited entry enables extraction of this economic value, because when access is limited, market forces dictate that people will pay value for the right to enter. One policy question concerns whether limited entry programs should be designed to allow fishermen to receive part of the economic rent in lieu of the government. It could be argued that fishermen who must buy the right to fish initially should be allowed to sell that right when they want to leave the fishery to recoup their original investment. On the other hand, the fishermen derive a benefit from being in a limited entry program; they are able to harvest the same amount (or more) at lower costs because there are fewer fishermen. Allowing them to profit from any increase in the value of the right to fish gives the fishermen a windfall. The government creates the value by creating the limited entry program. If the government collects all the eco-

The second area of legal concern revolves around allocation and distribution of the newly created property. The benefits of the program must be distributed equitably within the constitutional standards of due process and equal protection.<sup>65</sup> Each of the alternative implementation methods represents a slightly different resolution of the two problems presented by creation of a new form of property in the right to fish.

### *Licenses*

Present fishery management employs licenses in both commercial and sport fisheries. Absent a license, a person generally cannot participate, but, unlike limited entry, the aim of traditional licensing is not control through exclusion. Traditional licensing is a way of financing administration of fisheries laws.<sup>66</sup> Limited entry licensing seeks to control exploitation of the fishery by restricting the amount of fishing effort applied. The theory is simple; if fewer fishing units participate, it is reasonable to expect that fewer fish will be taken.

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conomic rent, it is the equivalent of paying the owner of an item for the privilege of using it; for example, renting land to farm, or buying mineral rights. The money collected could be used in fishery management, aquaculture or mariculture.

Because the right to fish has a value, fishermen wishing to gain access to an entry will have to pay either the government or fishermen who own and are willing to sell such a right. If the government wishes to receive all of this value, several avenues are open. The fee for a license or stock certificate could be set at an amount equal to the full economic rent; a user fee could be set the same way. The licenses or certificates would then be traded only through the management agency, and the full value would be charged at transfer. Alternatively, to lessen initial impact, the rent could be extracted over the lifetime of the license in the form of a property tax. If society decided to allow fishermen to retain part of this value, any tax could be set at less than full economic rent. *See generally* F. CHRISTY, *FISHERMEN QUOTAS: A TENTATIVE SUGGESTION FOR DOMESTIC MANAGEMENT* (Occasional Paper Series No. 19, Law of the Sea Inst., Univ. of R.I. 1973) [hereinafter cited as F. CHRISTY, *FISHERMEN QUOTAS*].

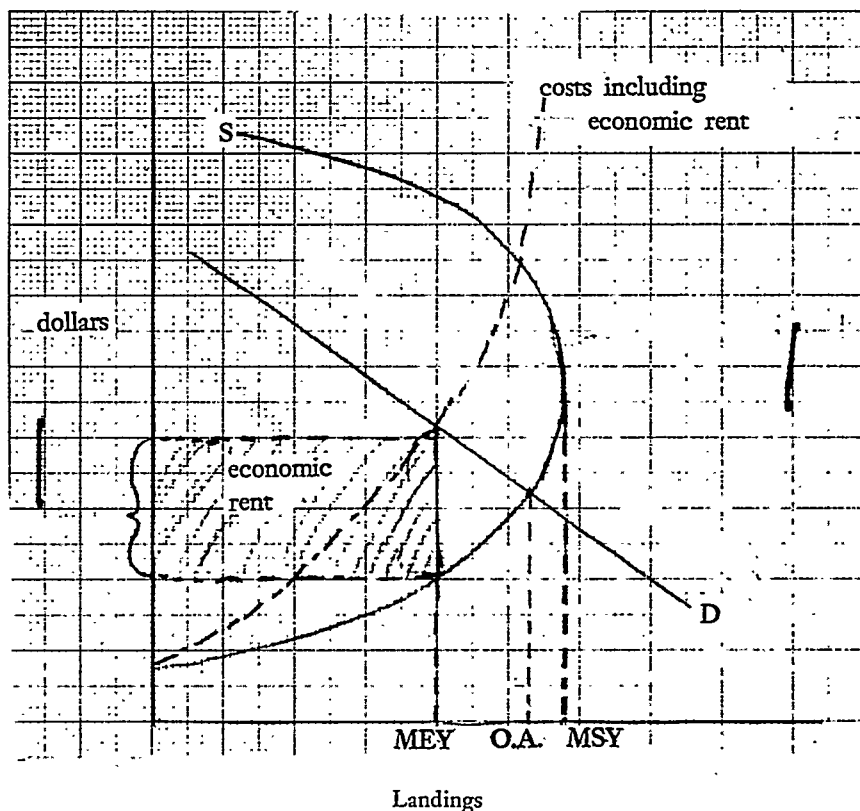
65. A state limited entry plan, in contrast to a federal plan, may be constrained by state constitutional provisions. Limited entry in Alaska, for example, required a constitutional amendment modifying an article that had prohibited exclusive rights in fisheries. ALASKA CONST. art. 8, § 15. Other states constitutionally prohibit monopolies (MD. CONST. Decl. of Rights, art. 41) or special laws granting exclusive rights (VA. CONST. art. 4, § 14 [18]).

66. Present fishery management includes, depending on the fishery, one or more of these categories of regulation: (a) control on size of catch, to ensure recruits for subsequent years; (b) control of locations (area closures), to protect seed beds, or spawning grounds, or for health reasons; (c) limits on seasons (seasonal closures), to limit overall catch, or to protect young or mating seasons; (d) enforced quotas, such as catch limits on some species or total bans on endangered species. If limited entry was implemented, traditional regulations affecting size limits, area closures, or seasons might still be necessary, depending on the fishery. There is no reason why a tradi-

In theory, the management agency would make several determinations. First, the sustainable yield from the resource that would produce the maximum economic rent would be ascertained.<sup>67</sup> Second, an appropriate unit of fishing effort would be isolated. Finally, only the number of units of effort that would harvest the established yield would be

tional management method cannot be used in conjunction with a limited entry program.

67. To be distinguished from the MSY is the Maximum Economic Yield (MEY); MSY focuses on the reproductive capacity of the species, while MEY focuses on the monetary value of the resource. The difference can be illustrated graphically:



O.A. (open access) = level of landings in an unregulated fishery, solely a function of supply and demand.

MSY = point at which supply curve peaks, after which the stocks will begin to decline in size.

MEY = level of landings at which economic rent can be maximized.

See Copes, *The Backward-Bending Supply Curve of the Fishing Industry*, 17 *Scot. J. Polit. Econ.* 69, 77 (1970). To avoid economic waste and to enable recapture of the lost rents, the management agency should use the MEY standard rather than MSY. See generally notes 4, 64 *supra*.

licensed. A serious technical problem, however, would exist in deciding what unit of fishing effort to license. Fishing effort is a function of three factors: the power of the gear (or vessel), number of vessels, and time spent fishing.<sup>68</sup> Thus, for example, if the program licenses only a limited number of vessels, the goal of maintaining the fishery can be undercut by an increase in power of the gear or time spent fishing.<sup>69</sup> Alternatively, if the program licenses only certain kinds of gear to control power, a fishery can become locked into existing inefficiencies, and improvements are discouraged.<sup>70</sup> It is difficult and administratively expensive to attempt a licensing program that successfully integrates all elements of fishing effort to control the catch.<sup>71</sup>

Despite the potential for economic inefficiency, licensing for limited entry has political appeal, as evidenced by programs in Alaska<sup>72</sup> and Washington,<sup>73</sup> perhaps because it does not seem to depart from traditional management. Both Alaska and Washington limit the amount of gear (nets) operating in specified locations.<sup>74</sup> Quite obviously, where excess gear or any other single element of fishing effort can be isolated as a contributing and manageable problem, a licensing program is most likely to be successful.<sup>75</sup>

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68. F. CHRISTY, *ALTERNATIVE ARRANGEMENTS*, *supra* note 1, at 33.

69. Regulations of fishing effort have been called the "leaky bucket" technique.

If there is a village well with a limited flow, there are no problems as long as the water drawn from the well is no greater than the rate of replenishment. But, if the demand for water increases beyond that point, one solution is to punch holes in the bottom of each person's bucket.

*Id.* at 32.

70. Power, *More About Oysters Than You Wanted to Know*, 30 MD. L. REV. 199, 208-09 (1970).

71. U. S. DEP'T OF COMMERCE, NAT'L OCEANIC AND ATMOSPHERIC ADM'N, NAT'L MARINE FISHERIES SERVICE, FINAL DRAFT, NATIONAL PLAN FOR MARINE FISHERIES § 3.2, at 53-54 (1975).

72. ALASKA STAT. §§ 16.43.010-16.43.380 (1973).

73. WASH. REV. CODE §§ 75.28.390-.440, 75.28.450-.485 (1974).

74. ALASKA STAT. § 16.43.100 (1973); WASH. REV. CODE § 75.28.455 (1974). An anadromous specie like salmon spawns inland in rivers and then swims far out in the high seas. They return each year in "runs" to specific spawning grounds. The state of Washington operates hatcheries for salmon in its rivers. As the salmon runs return to spawn, it is possible to evaluate how much of the run should be permitted to swim up the river to spawn and how much can be taken without depleting the stocks. This estimate is made when the salmon are in the bays and mouths of rivers; it is this location that is regulated by limited entry. Salmon are taken only in an amount that permits the proper escapement upriver to spawn. *See United States v. Washington*, 384 F. Supp. 312, 390 (W.D. Wash. 1974).

75. ALASKA, GOVERNOR'S STUDY GROUP ON LIMITED ENTRY, REPORT: A LIMITED ENTRY PROGRAM FOR ALASKA'S FISHERIES 1 (1973) [hereinafter cited as ALASKA, GOVERNOR'S STUDY GROUP].

Having identified the unit to limit, a program must provide for distribution of the licenses. The Alaska program, for example, has a carefully structured allocation system.<sup>76</sup> Initially, maximum permissible gear is determined in a neutral atmosphere; the management agency considers economic and biological data and surveys the fishing industry by localities to determine what levels of gear would be considered reasonable by people in each area.<sup>77</sup> After this analysis, applications for entry permits are taken. By statute, interim entry permits are issued to all applicants who can "establish their present ability to participate actively in the fishery."<sup>78</sup> The standard is applied through the use of a cutoff date, making all those who hold licenses before the cutoff eligible for interim limited entry permits.<sup>79</sup> Since the holders of interim entry permits constitute the class that will qualify for permanent entry licenses, it is essential that there be no unreasonable discrimination in the allocation of interim permits. With any limited entry program, as in Alaska, categories must take effect at some point in time. If the categories are reasonable and relate to the aim of the program, the temporal element should not defeat the program.

Distribution of permanent entry rights must satisfy equal protection. Under the Alaska statute, priority classifications of similarly situated applicants are based upon two factors: the degree of economic dependence upon the fishery and the extent of past participation in the fishery.<sup>80</sup> Such an allocation system is reasonably related to the aim of the statute, that is, protecting the livelihood of fishermen as well as the fish stocks. In application, the program will not treat everyone who wants to fish the

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76. ALASKA STAT. §§ 16.43.150-160 (1973). In Washington, the distribution is left to regulations. WASH. REV. CODE §§ 75.28.420, .455 (1974).

77. ALASKA, GOVERNOR'S STUDY GROUP, *supra* note 75, at 3.

78. ALASKA STAT. § 16.43.210(a) (1973).

79. The statute was amended to provide a cutoff date, ALASKA STAT. § 16.43.260(a) (1974), after which there was a rush of applications for licenses to fish salmon. See *Isakson v. State*, Civ. No. 75-31, at 4 (Sup. Ct. Alas., filed May 5, 1975). The program has been challenged by fishermen who were willing and able to participate but did not hold licenses before the cutoff date. *Isakson v. State*, *supra*. The plaintiffs lost in the lower state court and are appealing to the state supreme court. Their theory on appeal is that use of the cutoff date unreasonably discriminates in violation of equal protection and due process, because it is not related to the statute's aim of preventing hardship in the fishing industry. The cutoff date, they assert, arbitrarily excludes some who otherwise would satisfy the statute, and includes license holders who might not satisfy the statute because they actually had not participated in the fishing although they held licenses. Brief of Appellants at 36-38, *Isakson v. State*, Supreme Court File No. 2550 (filed Sept. 1975).

80. ALASKA STAT. § 16.43.250 (1973).



same, but the classifications of potential entrants that will be made will relate to the aim of aiding Alaska's commercial fisheries.

To satisfy equal protection, an allocation system could detail priority characteristics, as does the Alaska statute. A blind allocation system, such as a lottery,<sup>81</sup> also would treat all potential entrants equally. A lottery may be politically unattractive, however, when a participant's livelihood and substantial investment in gear is made to depend on pure chance. A third allocation system would be a sale or auction. Since the right to fish will acquire value, it is not unreasonable to expect the users to buy that right.<sup>82</sup>

The licensing program must define the boundaries of the property nature of the license. Because the aim of the program is maintenance of fishing industries and stocks, some controls on alienation of the licenses should exist.<sup>83</sup> If they could be exchanged freely like other property, speculation in the resource could result, to the detriment of the fishing industry. In addition, licenses could devolve into the hands of a few fishing units, giving rise to the charge that the program inequitably excludes and also creates a monopoly. Some trading of licenses should be allowed, however, to encourage efficient units to expand and to enable other units to sell out of the fishery. License transfer could be subject to the approval of the management agency,<sup>84</sup> or licenses could be transferred only to and by the agency. In either case, the program should assure that parties with no intent or ability to participate in the fishery do not hold licenses.

The program should contemplate how the license will be treated upon the death of the holder. Alaska, for example, allows the license to be inherited,<sup>85</sup> but it is unclear whether the taker after death must also qualify as a holder under the statute. Allowing unfettered transfer at death might lead to the same difficulties that free alienability during lifetime creates. A better system would include an automatic "buy-back" upon the death of the holder.

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81. Participation in salmon fishing in the mouth of Minter Creek in Washington is determined by a drawing open to any licensed purse seiner who applies. *United States v. Washington*, 384 F. Supp. 312, 390 (W.D. Wash. 1974).

82. See note 64 *supra* and note 92 *infra* & accompanying text.

83. In Washington, they are freely transferrable. WASH. REV. CODE, §§ 75.28.420, .455 (1974).

84. In Alaska, entry permits may be transferred subject to the approval of the management agency, and the transferee must qualify to hold under the statute in his own right. ALASKA STAT. § 16.43.170 (1973). See note 72 *supra*.

85. ALASKA STAT. § 16.43.180(b) (1973). No comparable provision exists in the Washington statute.

Within the same framework of limited alienability, the licenses should be exempt from attachment by creditors and should not be used as security for debts of the holder.<sup>86</sup> Although there is ascertainable and marketable value in the licenses, these controls harmonize with the requirement that any taker of a license qualify as a holder.

In summary, allocation of the licenses must be reasonable to satisfy equal protection. Characterization of the property interest in the license is largely a policy question, but the definitions will impact on the subsequent allocation of the licenses and must be formulated to assure that the operation of the program does not have a discriminatory effect or a result inconsistent with the original aim of the legislation.

### *Stock Certificates*

The stock certificate<sup>87</sup> method of limiting entry focuses on the resource and distributes rights to a portion of the fishery. Fishermen would receive a share (stock certificate) representing a fixed percentage of the allowable catch. The fishing unit could take only its share, but it could use any methods preferred. Innovation and efficiency would be encouraged because the fisherman would know that a set amount of the resource was "reserved" for him.<sup>88</sup>

From an economic standpoint, using stock certificates avoids the inefficiencies of licensing, because there is no attempt to control fishing effort.<sup>89</sup> The legal considerations of a stock certificate program are

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86. E.g., ALASKA STAT. § 16.43.150(g) (1973). No comparable provision exists in the Washington statute.

87. See generally F. CHRISTY, FISHERMAN QUOTAS, *supra* note 64; A. LAING, COMMENT ON OCCASIONAL PAPER No. 19 (Occasional Paper Series, Law of the Sea Inst., Univ. of R.I. 1973). A similar program exists in international fisheries in the form of national quotas; the British also have employed fishermen quotas in deep sea fisheries. A. LAING, COMMENT ON OCCASIONAL PAPER No. 19 (Occasional Paper Series, Law of the Sea Inst., Univ. of R.I. 1973).

88. F. CHRISTY, ALTERNATIVE ARRANGEMENTS, *supra* note 1, at 30-31. Merely setting total quotas can preserve stocks but is economically inefficient for various reasons. Participants will rush to get as much as they can before the quota is filled. The result is over-investment. In addition, the season will shorten. For example, in Pacific halibut the season dropped from seven months to three weeks in one regulatory area, and from nine months to less than two months in other areas. F. CHRISTY & A. SCOTT, THE COMMONWEALTH IN OCEAN FISHERIES 14-15 (1965). Pressure is put on facilities of processors and distributors; the increased supply also can cause a drop in price to the fishermen. F. CHRISTY, ALTERNATIVE ARRANGEMENTS, *supra* note 1, at 31. The aim of giving shares in the total catch is to avoid the adverse economic consequences of simply setting a quota.

89. F. CHRISTY, ALTERNATIVE ARRANGEMENTS, *supra* note 1, at 32.

essentially the same as a license program; the program must observe the same precautions with respect to allocation of the stock certificates, and treatment of the property element in the right to fish similarly must be anticipated.

A stock certificate plan, however, could be utilized to give the fisherman more than a right to take a certain share of the catch. In addition to distributing a right to take, the certificates could represent a property right in the fish before they are taken. Although property law traditionally recognizes no ownership rights in wild animals while free,<sup>90</sup> a limited entry program could assign to a certificate holder any rights which the state had in the free swimming resource. This would give the holder a vested interest in the resource and its conservation. Under such a theory, damage to the resource by pollution or illegal taking would be actionable by the certificate holders as well as by (or instead of) the state.<sup>91</sup> Under current theories of law, fishermen have no interest in fish resources before they are caught; if pollution damages a species, the fishermen have no action. In theory, the state can sue the polluter for injury to its property, but there is a complex problem of measuring damages. The injury to fish may cause the state little measurable damage, although certain industries, like fishing, would have direct and quantifiable losses. Even if the state measured its damages as the loss of a commercial fishing catch, the recovery would not inure to the benefit of the parties actually injured.

Recognizing a property interest in the free swimming resource might encourage private enforcement of resource protection laws. It would also, however, give the fisherman an interest that the state would thereafter be required to respect. The fisherman's right in the resource could not be taken away without due process; under this theory of ownership in the resource, the fisherman would have sufficient interest in the free swimming resource to support a due process or taking claim if the law were changed to deprive him of his share. Of course, this right is largely theoretical, because under the stock certificate plan the holder has rights only in his share of the allowable catch; if no catch is allowed because of purely economic or ecological reasons, no deprivation of property would exist.

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90. *Pierson v. Post*, 3 Caines 175 (Sup. Ct. N.Y. 1805).

91. Precisely characterizing what the certificate would assign is largely a policy matter. The state would probably want to relinquish no more than a leasehold, that is, it would want to retain a substantial reversionary interest in the free swimming resource. The terms for the reverter, violation of regulations, for instance, could be enumerated.

It is unlikely that a stock certificate plan would attempt to create rights in the resource before it is taken because that would be such a radical concept in fishery management. The stock certificate program as a right to take a certain share of the total catch, on the other hand, is a feasible alternative. It is similar to licensing and yet eliminates many of the inefficiencies of a licensing program.

### *User Fees*

Under a user fee program, there is no instrument representing the right to fish. Access is open, but all participants are taxed on their catch. The theory<sup>92</sup> is that this tax, or user fee, will extract the economic rent that is lost in inefficient fisheries by charging participants at a rate that recaptures the economic waste.<sup>93</sup> Inefficient units will be unable to pay the tax and will leave the fishery, and new entry by inefficient units will be discouraged. This will allow the fishery to reach an economically and biologically efficient equilibrium that can be monitored by adjustments in the rate of taxation.

The user fee is a radical approach to fishery management. The technical obstacle lies in computation of a fee that accurately extracts the economic rent. The program faces strong political objections because of a severe impact upon introduction of the tax theory, though the user fee asks the fishing industry to do only what other resource industries do: pay for the use of the resource. If a mechanism could be devised to spread the burden of implementation beyond the first generation of taxpayers,<sup>94</sup> and if the long-term benefits of stability can be demonstrated clearly, the user fee represents a relatively simple management scheme. It would have low administrative costs,<sup>95</sup> would not disrupt the patterns of fishing, and would sustain an atmosphere for initiative and growth of efficient fishing units.

The program represents a tax for a regulatory purpose. As a general rule, such taxes will be upheld as long as a revenue-raising motive,

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92. See F. CHRISTY, *ALTERNATIVE ARRANGEMENTS*, *supra* note 1, at 35-38; Copes, *The Backward-Bending Supply Curve of the Fishing Industry*, 17 SCOT. J. POLIT. ECON. 69, 76 (1970). As illustrated in note 64 *supra*, all or part of the economic rent can be extracted by the user fee.

93. See note 64 *supra*.

94. For example, the program could freeze the fishery at present participation and tax new entrants, or the tax could increase gradually over time to enable participants to adjust and anticipate the increment in cost. F. CHRISTY, *ALTERNATIVE ARRANGEMENTS*, *supra* note 1, at 38.

95. F. CHRISTY, *FISHERMAN QUOTAS*, *supra* note 64, at 5.

though secondary<sup>96</sup> or insubstantial,<sup>97</sup> appears on the face of the statute.<sup>98</sup> Due process attacks on such a tax have been rejected by the Supreme Court, though the effect of the tax may be to eliminate a particular business.<sup>99</sup> The Court has noted, however, that in "rare and special instances" due process may be invoked where the tax is "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property."<sup>100</sup> Although no recent case illustrates this exception, the type of program that might be invalidated was suggested by Justice Powell, concurring in *Pittsburgh v. Alco Parking Corp.*<sup>101</sup>

It is conceivable . . . that punitive taxation of a private industry and direct economic competition through a governmental entity enjoying special competitive advantages would effectively expropriate a private business for public profit. Such a combination of unreasonably burdensome taxation and public competition would be the functional equivalent of a governmental taking of private property for public use and would be subject to the constitutional requirement of just compensation.<sup>102</sup>

The significant factor in Powell's concurrence is the concomitant presence of government competition with a prohibitory tax; such a combination has the effect of taxing to condemn for public use. Absent government participation in the fishing business, limited entry taxation would not fit this category; additionally, limited entry does not anticipate ultimate government ownership of the fishing industry as a result of the tax.

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96. *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).

97. *Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937).

98. *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 373-75 (1974); *United States v. Sanchez*, 340 U.S. 42, 44 (1950); *Magnano Co. v. Hamilton*, 292 U.S. 40, 47 (1934); *Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44, 48-49 (1921); *United States v. Ross*, 458 F.2d 1144, 1145 (5th Cir.), *cert. denied*, 409 U.S. 868 (1972).

99. *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 373-75 (1974); *Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44 (1921); *McCray v. United States*, 195 U.S. 27 (1904).

100. *Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934).

101. 417 U.S. 369 (1974).

102. *Id.* at 379. In *Pittsburgh v. Alco*, the city taxed private off-street parking lots at a rate that had the effect of pricing them out of competition with city meters. The aim was to discourage downtown automobile traffic, and encourage use of other transportation. The facts of the case make it close to the "tax plus public competition" that Justice Powell describes. Yet he concurred in upholding the regulation

In addition to a due process challenge, a limited entry user fee may face challenge under the equal protection clause. The burden of the program would fall on the least efficient fishermen; thus, allocation of the right to fish arguably would be based on the ability to pay.<sup>103</sup> The status of poverty or wealth as a classification under the equal protection clause is unclear.<sup>104</sup> Wealth as a classification has been deemed to be "inherently disfavored",<sup>105</sup> but it is not treated in the same manner as traditionally suspect classifications such as race or religion. Cases in which the Supreme Court has voided statutes on the basis of wealth discrimination have involved criminal protections,<sup>106</sup> or such basic rights as the right to vote<sup>107</sup> and the right to travel.<sup>108</sup> Unlike some state courts,<sup>109</sup> in determining whether a right has been infringed, the Court has not deemed a wealth-based classification a crucial factor contributing to the imposition of a strict scrutiny test.<sup>110</sup> Thus, when examining an alleged deprivation of the right to housing,<sup>111</sup> education,<sup>112</sup> and welfare benefits,<sup>113</sup> the Court refused to apply the test.

An additional obstacle facing a "wealth-based" challenge is the argument that the limited entry fee statute does not in fact utilize a wealth-based classification. It could be argued that because efficiency does not necessarily depend upon capital investment, a mixed group of various

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as a valid exercise of the police power. It is hard to conceive of a fact pattern Justice Powell would condemn under his test.

103. Because the least efficient fishermen would be eliminated from the market and because efficiency is often a function of capital investment it might be argued that allocation of the right to fish under the program was based on a wealth classification. But see text accompanying note 115 *infra*.

104. See Michelman, *The Supreme Court 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Comment, *The Evolution of Equal Protection-Education, Municipal Services, and Wealth*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 103 (1972). The relevant question for limited entry fees is whether such charges would trigger strict scrutiny of the program.

105. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

106. *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

107. *Bullock v. Carter*, 405 U.S. 134 (1972); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

108. *Edwards v. California*, 314 U.S. 160 (1941).

109. See, e.g., *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

110. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973).

111. *Lindsey v. Normet*, 405 U.S. 56, 73-74 (1972).

112. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

113. *Jefferson v. Hackney*, 406 U.S. 535, 549 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970).

business entities<sup>114</sup> with differing capital contributions would be denied access under the program. Such a result would evidence an efficiency-based classification rather than one based on wealth.<sup>115</sup>

Recognizing that the Supreme Court "has never . . . held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny,"<sup>116</sup> it finally could be argued that the limited entry user fee program deprives individuals of a fundamental right: the right to occupational choice. In light of the fact, however, that such rights as the right to education or housing have not been deemed fundamental,<sup>117</sup> and because the Court traditionally has used a rational basis test in examining state restrictions on occupational choice,<sup>118</sup> it is clear that the right to occupational choice is not fundamental.

The user fee could be more than nominally justified as a revenue-raising measure. Aside from coping with the problems of exploitation of fisheries and overinvestment of segments of the fishing industry, funds generated from the program could aid in relocating displaced fishermen

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114. Assuming arguendo that a user fee program *did* classify on the basis of wealth, it nonetheless seems clear that such a mixed group would not be protected by the strict scrutiny test. In the analogous case of *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), the Court declined to find discrimination on the basis of wealth in the financing of public schools through use of a property tax. Addressing the question of whether the state could disburse funds to districts according to their property tax base, the Court stated:

[I]t is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

*Id.* at 28 (footnote omitted). Under this view it is difficult to formulate a class affected by a limited entry user fee that would be recognized.

115. Moreover, it is difficult to proceed on a theory of discriminatory effect in the face of the strong line of precedent under due process that regulatory taxes with exclusionary effects are valid. See notes 96-98 *supra*. In addition, it is especially difficult to impute a discriminatory effect from a pricing policy intended to distribute a scarce resource. Comment, *The Evolution of Equal Protection—Education, Municipal Services, and Wealth*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 103, 138-39. (1972).

116. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973).

117. See notes 111, 112 *supra* & accompanying text.

118. See, e.g., *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955).

and developing new fisheries.<sup>119</sup> And, as illustrated, although the user fee is a new idea in fishery management, similar regulatory taxes and programs for distributing government benefits on the basis of ability to pay have withstood challenge. There is thus no reason, within the present scope of due process and equal protection law, why a user fee in fisheries would not be upheld as well.

### CONCLUSION

Limited entry fishery management offers an opportunity to regulate fishery resources for the benefit of the fishing industry and society in general, as well as to prevent depletion of the stocks. Because it represents a new view of commercial fishing, restricting access to what was previously freely available, it raises the question of whether there are any constitutional objections to restructuring the legal nature of the fishery. Because neither the abstract concept of exclusion nor the particular methods of implementing limited entry differ in any legally significant way from regulations of business and natural resources that have been upheld, it would seem that limited entry fishery management is a viable alternative to open access fishing. The major problems facing limited entry are not legal but rather practical and political; it will be difficult to convince the fishing industry that regulation of this nature is necessary and beneficial.

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119. For example, limited entry proposals for the surf clam fishery, see *ALTERNATIVE MANAGEMENT SCHEMES FOR SURF CLAMS*, *supra* note 22, include suggestions to subsidize the development of an ocean quahog fishery. The effort that is directed away from the overexploited surf clams would be redirected toward ocean quahogs, presently not commercially exploited. While there are over 2,000 species of fish in U. S. coastal waters, only about 170 finfish species and 50 shellfish species are commercially landed. About 50 species of finfish make up over 90 percent of the commercial landings by weight. *DRAFT NATIONAL MARINE FISHERIES PLAN*, *supra* note 63, at 8.