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THE CONSTITUTIONALITY OF A PROGRAM RESTRICTING THE NUMBER OF COMMERCIAL FISHERMEN IN THE COASTAL WATERS OF THE UNITED STATES

One basic characteristic of a workable constitution is its susceptibility to varied interpretation in light of changing public needs. Legislation of questioned constitutional validity when enacted may withstand judicial scrutinization under contemporary constitutional standards. This proposition is relevant to the constitutional analysis of a program restricting the number of commercial fishermen in the marine fisheries of the United States.

The Biological and Economic Goals

The United States is a coastal nation with a fair abundance of marine fishery resources. Nevertheless, marine fisheries, a common property natural resource, are not inexhaustible. As protein needs become more demanding, fishing efforts intensify, and depletion of fish stock is the inevitable result. If the depletion rate exceeds the maximum sustainable yield, fish stocks tend toward extinction. Thus, the biological goal is maintenance of maximum sustainable yield, and the means may vary between restricting the fishing area, shortening the season, limiting the total catch, or perhaps regulating fishing efforts.


2. The common property nature of ocean fish derives from the traditional notion of “freedom of the high seas,” and the theory that fish are owned by no one prior to reducing them to possession. See Convention on the High Seas, T.I. A.S. No. 5200, 450 U.N.T.S. 82 (1958). Consideration must also be given to the territorial sea principle which accords coastal nations ownership rights over a portion of the ocean adjacent to its coast. The principle includes the right to exclude others from taking fish within the area. In many instances the exclusive fishery zone extends twelve nautical miles from shore. This is true in the United States zone since Congress enacted the Exclusive Fisheries Zone Act (16 U.S.C. § 1091-94 (1966)). Under our system of government, the coastal states presently maintain territorial control of the sea adjacent to its borders seaward for three nautical miles. The federal government is accorded regulatory control of the remaining nine, although there has been no enabling legislation from Congress to establish fishing regulations within this area. Until Congress decides to act, the individual states may regulate the fishing activities of its own citizens beyond the three mile zone under the principle recognized by the Supreme Court in Skiriotes v. Florida, 313 U.S. 69 (1941).

3. For a concise discussion of the biological and economic objectives relating to fish stocks in the high seas and coastal waters, see G. Knight, International Law of Fisheries (1973) (Louisiana State University Marine Science Teaching Aid).

4. The term “maximum sustainable yield” may be defined as the determination of the most fish that can be harvested from a given stock while still maintaining a level which allows an equivalent harvest from year to year.

the type of gear. A viable management scheme is difficult to construct, owing, in part, to the common property character of the resource, our federal system of government, and the fact fish do not honor artificial boundaries. A shift of emphasis from biological to economic goals causes managerial obstacles to multiply.

A laissez faire approach to marine fisheries management serves to produce lower individual returns, notwithstanding a possible overall increase in fishing profits. Uncontrolled entry into the commercial fishing industry coupled with a fixed fish harvest, (e.g., the maximum sustainable yield), results in a relatively unprofitable commercial fishing industry. Moreover, there are no incentives for fishermen to voluntarily curb fishing efforts in the interest of greater future yields, if they are unable to profit from the sacrifice. If economic efficiency is to be considered a legitimate marine fisheries resource management objective, concern need be directed not only to sustaining maximum physical yield, but also to harvesting it in the most efficient manner. Traditional methods, restricting the use of efficient gear or shortening the season, cannot attain economic efficiency and tend to promote part-time fishing, extreme market fluctuations and storage difficulties.

The goal of economic sustainable yield whereby a minimum number of fishermen are permitted to produce at maximum economic peak can be approached through a program preventing excessive entry. The concept of limited entry is not new. The Japanese have used it in high seas fishing since the 1940's. Canada recently initiated a limited entry scheme in its salmon fishing industry, and this

7. Suppose local menhaden fishermen agree upon a reduction of fishing efforts in order to produce larger future yields. After the time has elapsed, and reduction proves fruitful, other individuals commence entry into the industry to take advantage of the fine harvest. Those who had made the original sacrifice are unable to enjoy any increased return, and are unlikely to make any similar voluntary sacrifice in the future.
9. "Limited entry in fisheries, de jure or de facto, has been with us for many years-decades-centuries, but it is only recently that this label has been widely applied to the concept." Herrington, What Are the Real Objectives of Limited Entry?, PROCEEDINGS FROM OREGON'S 1971 NATIONAL DISCUSSION FORUM, Panel No. 3, 100 (1971).
11. Campbell, Are Canada's Limited Entry Programs in the Salmon & Lobster
year marks the commencement of an elaborate limited entry program in the state of Alaska. Limited entry is simply a means not an end. Abused, it could establish a privileged class, but properly administered it has the potential to provide the individual fisherman an opportunity to obtain a reasonable economic return, obviate present inefficiency, offer the consumer quality products at lower costs, increase governmental revenues, and lighten the burden of agencies responsible for fisheries management and law enforcement.

The Constitutional Problem

Federal Considerations

Owing to our federal system of government, the constitutionality of a limited entry program may depend on which level of government enacts it. For example, implementing a limited entry scheme on a national scale eliminates the necessity of meeting state constitutional requirements. Moreover, as a general rule the Supreme Court tends to take a more tolerant approach to economic regulation of activities than do state courts. A purely state instigated measure may face various obstacles depending upon whether the program owes its ori-

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12. ALAS. GEN. STAT. § 16-43.010-43-300 (1962).

13. Dr. James Crutchfield estimates that in the halibut industry alone “additional savings of something in the neighborhood of $6 to $7 million a year to the American fleet alone could be realized if the fishery could be made into a full-time fishery for a much smaller number of boats.” PROCEEDINGS FROM OREGON'S 1971 NATIONAL DISCUSSION FORUM, at 105 (1971).

14. An increase in individual income for the fisherman as a result of a limited entry measure would place the fishermen in higher income brackets, and thus raise additional state and federal tax revenue. It would not seem that the issuance of fewer fishing permits will mean a necessarily lower revenue to the state, since it is probable that license fees will increase.

15. The Supreme Court has taken a permissive attitude in the police power area. For example, in Berman v. Parker, 348 U.S. 26, 32 (1954), involving the constitutionality of a slum clearance program in the District of Columbia, the Court describes pervasiveness of the police power as “broad and inclusive.” The diverse elements such as “[p]ublic safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power . . . [t]hey merely illustrate the scope of the power and do not delimit it.” Viewed in this light, the concept is simply the recognition that a state has the power to pass any measure provided it does not run afoul of the federal or state constitution. In Sohappy v. Smith, 302 F. Supp. 899, 908 (D.C. Ore. 1969), the court applied this principle to fisheries resources management and concluded “[t]he state may regulate fishing . . . to achieve a wide variety of management or ‘conservation’ objectives. Its selection of regulation to achieve these objectives is limited only by its own organic laws and the standards of reasonableness required by the Fourteenth Amendment.”

16. Compare Day Brite Light., Inc. v. Missouri, 342 U.S. 421 (1952), with
gin primarily to the legislature or a state agency. Separation and delegation of power concepts are often given strict interpretations by state courts, which have a tendency to strike down economic measures beyond the "police powers of the state."17 State constitutional standards may be avoided when a congressionally sanctioned interstate compact agency establishes the program. Article I, Section 10, Clause 3 of the federal constitution provides "[n]o state shall, without the consent of Congress... enter into any agreement or compact with another State..." In Petty v. Tennessee-Missouri Bridge Comm.,18 the Supreme Court, in holding that by entering into an interstate compact a state had waived its immunity against suit under the compact, reaffirmed the view that "[t]he construction of a Compact sanctioned by Congress... presents a federal question... on which this Court has final say... [and] while we show deference to state law in construing a compact, state law as pronounced in prior adjudications and rulings is not binding."19 It is thus possible that the Court will uphold a limitation of the number of fishermen when the program is initiated by an agency created by interstate compact, notwithstanding state judicial interpretation that the action violates its state constitution. West Virginia ex rel. Dyer v. Sims20 lends support to this view. The Court there reversed a state court decision holding the Ohio River Valley Compact void under its state constitution. Especially relevant is the concurrence of Mr. Justice Jackson who concluded that a state entering into an interstate agreement consented to by Congress was estopped from denying the compact's validity. However, express provisions of a state constitution which forbid the restriction of fishing rights would prevent legislative ratification of the compact.


17. Many state constitutions include separation of power and non-delegation of legislative power provisions. See, e.g., Ala. Const. art. III, § 42, 43; Ga. Const. art. I, § 23; S.C. Const. art. I, § 14; La. Const. art. 2, § 2; N.C. Const. art. I, § 6, art. II, § 1. Depending on the attitude of the state court, one might be rightly concerned with court invalidation of a limited entry scheme on an unlawful delegation of power rationale. Judicial history of this sort, if continued, may lead only to an inflexible limited entry measure, since statutory law per se would have to entirely dictate the program. See Banjavich v. Louisiana Lic. Bd. for Mar. Divers, 237 La. 467, 111 So. 2d 505 (1959).

19. Id. at 278 n.4.
Although the individual states have traditionally been accorded regulatory control over fisheries resources within their respective jurisdictions, Congress has the constitutional power to establish a limited entry measure under the commerce clause. An activity need not be commercial for Congress to exert its power to protect instruments of commerce. As the passing of lottery tickets between states, the transporting of women across state lines for objectives unrelated to commercial activity, the flow of polluted air from state to state, and the ranging of cattle across state lines have been held objects of commerce subject to congressional regulation, migratory fish moving across state territorial waters constitute a similar movement of commerce. The commerce power reaches activities affecting commerce, notwithstanding their intrastate character, provided the activities have a substantial impact on interstate commerce. Congress might well conclude that the impact of the commercial fishing industry is of a magnitude sufficient to subject it to federal regulation, and thereby preempt concurrent state regulations. But, since the

21. In United States v. Southeastern Underwriters Assoc., the Supreme Court described commerce as follows: "Not only, then, may transactions be commerce though noncommercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information." 322 U.S. 533, 549-50 (1944). See also Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
26. The "affectation doctrine" has been used by the Supreme Court to sustain federal regulation of wages and hours of intrastate labor, United States v. Darby Lumber, 312 U.S. 100 (1941), to control the amount of wheat that a farmer can grow for his own consumption, Wickard v. Filburn, 317 U.S. 111 (1942), and to prohibit the use of intrastate extortion in collecting intrastate loans, Perez v. United States, 402 U.S. 146 (1971).
27. Considering the amount of capital annually invested in commercial fishing, and that much of the equipment must traverse state lines, not to mention the impact that other phases of the fishing industry such as packaging, processing, retailing and advertising have on commerce, it seems justifiable for Congress to conclude that it has power to regulate the commercial fisheries of the United States.
28. In United States v. Tyndale, 116 F. 820, 822 (1st Cir. 1902), the court concludes that jurisdiction of "sea-coast" matters are "of a mixed nature, as to which the state may act until and except so far as the United States intervenes." Although it might be possible "that state and federal coastal fisheries regulation may coexist," it would appear to be unfeasible, and even counterproductive to a limited entry measure. See H.G. Knight & T.V. Jackson, Legal Impediments to the Use of Interstate Agree-
federal government has not deemed it necessary to regulate the fisheries, establishment of a limited entry program will likely stem from state legislation. This creates the necessity of meeting state as well as federal constitutional standards.

The United States Supreme Court has never decided whether a limited entry measure would offend any provision of the federal constitution, but the likely obstacles would be the due process and equal protection clauses. The less often used privileges and immunities clause merits review due to its judicial application in cases dealing with fisheries. However, as a general rule legislation is afforded a presumption of constitutionality, thereby placing upon the attacker the burden of establishing the constitutional infirmity of the measure.

The due process clause of the fourteenth amendment has experienced a history of chameleon-like construction by the United States Supreme Court. Like its fifth amendment companion, due process of law originally served simply as a procedural check on governmental encroachment upon individual rights. Near the end of the nineteenth century the notion that due process imposed substantive limitations on state and federal legislation found favor with a majority
of the Supreme Court. The concept of “liberty” was extended to include “the right to live and work where [one] willed” and “to earn his livelihood by any lawful calling.” Legislation regulating economic activities was struck down as “meddlesome interferences with the rights of the individual” in violation of due process. Only economic activities deemed “affected with a public interest,” constituted proper subjects of governmental control. The determination as to what activities fell under the label shifted from a legislative to a judicial function. The soi-disant Lochner era of excessive judicial protection of economic activities did not survive the late thirties.

33. Lochner v. New York, 198 U.S. 45, 61 (1905). During this era of judicial over-protection of business, the Supreme Court invalidated on due process grounds laws: (placing a ceiling upon the number of hours that bakers could work), Lochner v. New York, 198 U.S. 45 (1905); (granting minimum wages to women), Adkins v. Children’s Hospital, 261 U.S. 525 (1923) overruled in West Coast Hotel v. Parrish, 300 U.S. 379 (1937); (prohibiting contracts that required abstention from union membership as a quid pro quo for securing a job), Coppage v. Kansas, 236 U.S. 1 (1915), Adair v. United States, 208 U.S. 161 (1908); (limiting the number of ice houses), New State Ice Co. v. Liebmann, 285 U.S. 262 (1932); (theater tickets), Tyson & Bros. v. Banton, 273 U.S. 418 (1927) overruled in Gold v. DiCarlo, 380 U.S. 528 (1965); (fees charged by employment agencies), Ribnik v. McBride, 277 U.S. 350 (1928) overruled in Olsen v. Nebraska, 313 U.S. 236 (1941). Compare the Adkins decision above with Muller v. Oregon, 208 U.S. 412, 421 (1908). In Muller, the Court sustained a ten hour ceiling on working of females on the grounds that a “woman has always been dependent upon man.” See also Holden v. Hardy, 169 U.S. 366 (1898) (state law setting a maximum limit of hours for miners upheld as a valid exercise of police powers owing to the rationale of concern for health and safety).

34. The concept of “affected with a public interest” appears to have been rather insignificant in its organic stage. In Munn v. Illinois, 94 U.S. 113, 126 (1877), the Court used the phrase as a standard for determining economic activity properly subject to regulation by the states. The Court felt that what is affected with a public interest is “primarily a legislative matter.” In upholding the state statute providing for regulation of amounts that could be charged by grain warehousemen, the Court expressed the view that “[f]or the protection against the legislatures the people must resort to the polls, not to the courts.” Id. at 134.

35. In Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 524, 535 (1923), the Court attempted to categorize what businesses are affected with a public interest as follows: “(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers, and public utilities. (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from the earliest times, has survived periods of arbitrary laws by Parliament or colonial legislatures for regulating all trades and callings. (3) Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation.” Meat-packing could not apparently be pigeonholed into one of the categories. Finally, we observe the Court in New State Ice v. Liebmann, 285 U.S. 262 (1932), holding the business of selling ice (before refrigerators were in wide use)
when the Supreme Court began to take a “hands-off” attitude in the area of business regulation. Most of the earlier decisions have been overruled, and the Court appears to have abandoned the notion of “affected with a public interest.” Contemporary judicial language to the effect that “even a legitimate occupation may be restricted or prohibited in the public interest” portrays a strikingly varied approach. Perhaps the present Supreme Court attitude is best exemplified by the language in Williamson v. Lee Optical Co. The majority concludes:

[T]he day is gone when the 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.

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36. See note 33 supra. In Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949), the Court held a provision forbidding denial of employment on the basis of union membership not offensive to due process. The Court declared the “Allgeyer-Lochner-Adair-Coppage constitutional doctrine” was no longer followed, and the judiciary had returned to the “principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition or valid federal law.” Id. at 536.

37. The doctrine of “affected with a public interest” appears to have been discarded in Nebbia v. New York, 291 U.S. 502 (1934). In upholding state regulation of milk prices against due process attack, the Court made it clear that a “state may regulate a business in any of its aspects . . . [and] adopt whatever economic policy . . . reasonably . . . deemed to promote public welfare.” Id. at 537.

38. Breard v. Alexandria, 341 U.S. 622, 632 (1951). In Breard, an ordinance prohibiting door-to-door solicitation was challenged on the grounds, inter alia, that it deprived the individual of his “means of livelihood.” The Court upheld the city ordinance, and cited with approval the dissent of Justice Brandeis in Liebmann.


40. Id. at 488. One commentator concludes that the decision in Lee Optical “places an impossible burden upon the party attacking the law.” Comment, 53 N.W.U.L. Rev. 13, 24 (1958). It is noteworthy that the organ of the Court was Mr. Justice Douglas. Just one year before the decision of Lee Optical, Douglas had heralded “[t]he right to work” as the “most precious liberty that man possesses.” Barksy v. Board of Regents, 347 U.S. 442, 472 (1954).
In a more recent opinion, the Court reversed a lower court invalidation of a law which prohibited engaging in the debt-adjusting business, unless accessory to the practice of law. In overruling an earlier opinion construing due process to prevent state prohibition of "useful business" not found "inherently immoral or dangerous to public welfare," the Court made clear its function was not to "sit as a 'superlegislature to weigh the wisdom of legislation.'"43

The brief excursion into the constitutional history of the due process clause is not intended as an exposition on judicial reaction to a limited entry program in an earlier age, but concerns predictability; does a law restricting the number of fishermen for the purpose of accomplishing economic optimization in the commercial fisheries violate due process of law? The contemporary notion of substantive due process, at least in the zone of economic regulation, is grounded upon judicial unwillingness to undermine legislative determinations as to the more expedient means of securing the practical needs of the public. In applying the test of legitimate purpose and rational means, the means need not be the only course of action open to the legislature for realization of a proper goal,44 nor will the Court attempt to determine whether a particular measure is a wise one.46 Thus, if the need of economic optimization in marine fisheries for the benefit of the general welfare overshadows any restriction of individual liberty that may result from a limited entry measure, the legislation ought to withstand the most rigorous due process attack.48

The decision in Corsa v. Tawes is perhaps indicative of the outcome of a challenge to a limited entry program on due process grounds. The case involved a challenge to a Maryland provision pro-

42. Adams v. Tanner, 244 U.S. 590 (1917).
44. In an earlier time the Supreme Court might well have applied the principle of the "less-restrictive-alternative" to a limited entry measure, and invalidated the provisions on the grounds that a law could be implemented to deal with the problem in a less restrictive way. Fairmont Creamery Co. v. Minnesota, 274 U.S. 1, 8 (1927). However, since Lee Optical and Ferguson it appears unlikely that such a standard would be utilized by the Court.
46. It may be argued that a limited entry law resulting in the denial of a license to individuals presently enjoying a commercial fishing business, and thus, lowering the value of the fishermen's vessel and equipment constitutes a taking of property without due process of law. Assuming the contention has merit, the statute might include a provision authorizing the state to buy back the equipment, thereby satisfying the requirement of just compensation for taking of property by government.
hibiting use of purse nets in taking menhaden. Since this nonedible fish cannot be taken economically without using purse nets, the law effectively eliminated commercial menhaden fishing in the area. Nonresident fishermen attacked the measure on the grounds, inter alia, that it deprived them of liberty and property without due process of law. The state defended the measure as a proper means of protecting edible fish and promoting sport fishing. The lower court sustained the provision which was later affirmed by the Supreme Court without opinion. The decision is especially pivotal owing to its sanctioning of an economic goal in fisheries resource management.

Decision as to whether the State's interest requires a prohibition of all purse netting . . . in order to protect sport fishing . . . is also a legislative prerogative. It is a legitimate objective for the State to sponsor sport fishing and the economic interest dependent upon it. 48

The court's willingness to permit pursuit of economic objectives in fishing laws is a clean break with historical notions which place pseudo-constitutional limits on the power of a state under the thesis that the measure is "beyond the police powers." Corsa illustrates the contemporary position that state legislatures "are entitled to their own standard of the public welfare." 49

A limited entry program necessitates classification of individuals; those permitted to fish commercially and those excluded. The Federal Constitution prohibits state denial of equal protection of the laws to individuals within its jurisdiction. 50 Depending primarily on

48. Id. at 776.
49. Day Brite Light., Inc. v. Missouri, 342 U.S. 421, 423 (1952). In Day Brite the Court sustained a state law providing that employees be given work time off without loss of pay in order to vote. See also the language of the Court in Schmiding v. Chicago, 226 U.S. 578 (1913) to the effect that determination of matters concerning regulation of trades and businesses are for the legislature. But see Puyallup Tribe v. Washington Game Dept., 94 S. Ct. 32 (1973). In Puyallup Tribe the Court, in striking down a regulation that discriminated against Indian fishermen, posited that fishing "right[s] can be controlled by the need to conserve a species." (Emphasis added.) This language could be interpreted to mean that restricting the number of fishermen based solely upon an economic objective will not meet the legitimate purpose test of the present Court. It would seem, however, that the language serves as an illustration of the states' regulatory power in the fisheries area. In light of changing judicial attitudes, the use of limited entry in reaching the economic goals of improved individual returns for fishermen, establishing more efficient fish harvest, and assisting in providing an expedient way to preserve fish stock appears a reasonable way to reach a legitimate objective.
50. U.S. Const. amendment XIV, § 1. No comparable provision exists expressly prohibiting federal denial of equal protection. However, the same protection is afforded
the nature of the classification, the United States Supreme Court applies varied standards in resolving equal protection disputes. Legislative classifications based on race,\textsuperscript{5} nationality or alienage\textsuperscript{2} are considered “suspect criteria” subject to rigid judicial scrutiny. To avoid judicial invalidation of a measure the state must prove the existence of a “compelling state interest.” Similarly restrictions of “fundamental rights” invoke the “compelling state interest” test.\textsuperscript{8}

The standard more often “applied to state legislation restricting the availability of employment opportunities”\textsuperscript{4} is the less rigorous “rational basis” test which requires that a classification be reasonable, possess some rational connection to the measure’s legitimate purpose, and treat all within the class alike. The test affords legislation a presumption of reasonableness,\textsuperscript{5} and any conceivable facts justifying the classification will be judicially accepted as the basis for the classification.\textsuperscript{5} In applying this test, the Court has sustained against equal protection challenges state exclusion of individuals, except relatives and associates of pilots, from entering the river-boat piloting trade,\textsuperscript{7} prohibition of women bartenders other than the spouse or female issue of the proprietor,\textsuperscript{8} and restrictions on the selling of nonprescription eyeglasses except certain ready-to-wear models.\textsuperscript{5} These decisions lend support to the view that a carefully

the individual with respect to federal encroachment by virtue of the due process clause of the fifth amendment. Bolling v. Sharpe, 347 U.S. 497 (1954).

51. Hunter v. Erickson, 393 U.S. 385 (1969). In Hunter, a city ordinance permitting approval of race as a basis in housing by majority vote in a city election was held to offend the equal protection clause. See McLaughlin v. Florida, 379 U.S. 184 (1964).

52. State laws which deny resident aliens admission to practice law, In re Griffiths, 413 U.S. 717 (1973), welfare benefits, Graham v. Richardson, 403 U.S. 365 (1971), and commercial fishing licenses, Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948), have all been invalidated by the Supreme Court on the basis of equal protection.

53. For example, in Shapiro v. Thompson, 394 U.S. 618 (1969), the Court used the equal protection clause to strike down a statute requiring a period of residency prior to eligibility for welfare because it restricted the fundamental right to travel interstate.

54. Dandridge v. Williams, 397 U.S. 471, 485 (1970). In Dandridge the Court applied the rational basis test in upholding a Maryland welfare provision which placed a ceiling on the amount of benefits receivable by any one family against equal protection challenges that it discriminates against families of large numbers. Justice Stewart, speaking for the majority, espoused the view that “[i]n the area of economic and social welfare, a State does not violate the Equal Protection Clause merely because the classification by its laws are imperfect.” Id. at 485.

designed limited entry measure ought to survive equal protection standards.\textsuperscript{60}

In \textit{Reetz v. Bozanich}\textsuperscript{61} the Supreme Court had before it the issue of whether a limited entry scheme violated the equal protection clause. Alaska adopted a provision which restricted the issuance of commercial salmon fishing licenses to those who held licenses in the same area since 1965, or general commercial licenses for three years since 1960. In a declaratory judgment suit brought by nonresident fishermen, the lower court struck down the law as violative of the Federal Constitution and the Alaska constitution’s right to fish provision. The court could “conceive of . . . [no] state of facts which would justify discrimination in favor of salmon fishers who happened to have held commercial licenses in three years since 1965,” and the legislation was invalidated as an improper attempt “to establish monopolistic trade guild[s]” to protect local interests.\textsuperscript{62} The Supreme Court vacated the judgment. Relying upon the doctrine of federal judicial abstention, the Court held the lower tribunal should have stayed its hand and permitted state adjudication of the state constitutional issue, and avoid “possible irritant[s] in the federal-state relationship.”\textsuperscript{63}

One may properly question the appropriateness of federal abstention where the issue concerns an individual’s economic livelihood. Even assuming \textit{arguendo} the measure violated equal protection, a full decision on the merits likely would have presented the

\begin{thebibliography}{63}
\bibitem{60} One of the more obvious limited entry schemes in the area outside of fisheries is the restriction of liquor licenses. Since the twenty-first amendment grants the states broad regulatory powers over liquor traffic within its jurisdiction, it may be that restricting the number of liquor licenses is distinguishable from restricting the number of fishermen. “However, even in the regulation of the sales of liquor, arbitrary or unreasonable licensing procedures are in violation of the due process and equal protection clauses of the fourteenth amendment.” Parks v. Allen, 409 F.2d 210, 211 (5th Cir. 1969). What appears offensive to equal protection is a classification amounting to “invidious discrimination.” Stephens v. Dennis, 293 F. Supp. 389 (N.D. Ala. 1968) (regulation of practice of pharmacy by means of a permit system upheld against attack on grounds it violates equal protection.) “Invidious discrimination” is no more than a legal conclusion that the classification of those subject to the measure has no reasonable relation to the end sought to be accomplished. Moreover, exact equality is not a necessary element in meeting equal protection standards. \textit{Nowell v. Illinois}, 373 U.S. 420 (1963). It would seem that equal protection will not prove a major obstacle to a limited entry program for the marine fisheries, provided the drafters approach the classification in terms of a reasonably thought out and non-arbitrary plan. To be sure, a limited entry scheme will call for discrimination between diverse individuals. However, a provision that lacks the taint of “invidiousness” ought to survive.
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drafter of a subsequent limited entry scheme judicial guidelines, obviating a possible future invalidation.

Even working without explicit judicial standards, it is safe to conclude that certain elements can invalidate a limited entry statute; state exclusion of resident aliens from participating in a limited entry program, discrimination against nonresident fishermen solely because of their status, or granting preferential treatment to wealthy fishermen are all unacceptable criteria in terms of satisfying equal protection. The question is what permissible criteria may be adopted in classifying those who shall be accorded the right to fish. It is reasonable that individuals currently dependent on commercial fishing for a living ought to enjoy a more favorable position than individuals merely considering entry into the fishing trade. The extent of economic dependency, (whether the fisherman is full or part-time), the total investment in the trade, the number of years fished, and one's present ability to fish productively appear suitable standards of classification. To be sure, the public interest is not furthered by a program that adds the majority of fishermen to our welfare rolls. Moreover, restricting the number of catch as opposed to the number of catchers is a less drastic approach. Simply freezing the number of commercial fishermen at current levels may be a possible alternative. Natural attrition and mortality rates would result in an eventual reduction of numbers under this approach. However, freezing fails to provide new entrants with the opportunity to fish. Perhaps, this fault may be diminished by a permit system granting the holder an alienable property interest. To avoid speculative buying, a provision might be included limiting one permit per fisherman. Whatever approach is adopted, it appears essential that the program be a gradual process producing the least disruption of the socio-economic status quo.

Article IV, Section 2 of the Federal Constitution provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The seldom used privileges and

64. The grant of a transferable property right to commercial fishermen would require continued regulation by the particular agency authorized to implement the program. A person might be required, for example, to secure clearance from the agency prior to alienation. Perhaps an option to purchase the permit by the state should qualify a particular issuance.

65. The economist focusing upon fisheries management objectives desires the minimum number of fishermen working at the maximum rate of production. From a sociological perspective this process should most likely be evolutionary. The lawyer takes a balancing of interest approach, and thus desires the least possible effect on the individual rights of commercial fishermen; however, he recognizes that often the public interest may outweigh the policy against restricting individual rights.
immunities clause is no absolute bar to the states' treating nonresidents differently. In an early opinion by Mr. Justice Washington sitting in circuit court, a New Jersey statute prohibiting the harvest of oysters by nonresidents was sustained against attack based on privileges and immunities. More than a century later the Supreme Court invalidated a less restrictive, (at least, less restrictive on its face), commercial fishing provision on privileges and immunities grounds. South Carolina had passed a measure imposing license fees of $2,500 on nonresidents trawling for shrimp in its coastal waters whereas a fee of $25 was imposed on its own citizens. In Toomer v. Witsell, the Supreme Court held the law in violation of the privileges and immunities clause, since it discriminated against individuals solely because of their nonresident status in order to favor resident commercial fishers. The Court rejected the argument that the state necessarily possesses the right to regulate fish within its jurisdiction under the theory of state ownership of wildlife within its borders. State ownership, opined the Court, is a "fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." Thus, the drafter of a measure restricting the number of fishermen ought to steer clear of discriminations based on nonresident status, or chance invalidation on the dual grounds of equal protection and privileges and immunities.

State Considerations

As noted earlier, a state limited entry program must comply with state as well as federal constitutional standards. One clear example is a state constitutional provision granting the right to fish. Fortunately, from a resource management viewpoint, provisions of that nature are rare. Nevertheless, the absence of a specific constitutional limitation on state control of commercial fishing activities does not

66. "Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them." Toomer v. Witsell, 334 U.S. 385, 396 (1948).

68. 334 U.S. 385 (1948).
70. 334 U.S. at 402.
assure a measure's success. Judicial attitude concerning state regulation of business appears especially relevant to the constitutional outcome of a limited entry program. For example, in 1934 the Washington legislature enacted a law prohibiting use of gill nets for taking salmon in designated areas of the state. Owing to the belief that it would be a "grave injustice to deprive them of their livelihood," individuals who held commercial gill net permits in 1932 or 1933 were exempt from the law. In *State ex rel. Bacich v. Huse* 71 the state supreme court invalidated the measure as violative of the state constitution's privileges and immunities clause, and as offensive to the federal equal protection clause. Conceding that a provision seeking to accomplish the objective of fish conservation was legitimate, the court thought the measure under review served to promote the welfare of a few by an arbitrary and unreasonable method.

"Those who were immediately engaged in gill net fishing at the time of the adoption of the initiative measure would not by that fact alone be guaranteed a continued means of livelihood, while those who had been engaged in the same business in 1932, but who had ceased in the meantime, would be entitled to resume." 72

The more recent decision of *Washington Kelpers Association v. State* 73 exemplified a more permissive attitude in the area of fishery resource management regulation by the Washington supreme court. The state enacted legislation prohibiting use of sport gear for commercial salmon fishing in order to improve the overall management of "both the sport and commercial ocean fisheries." In a declaratory judgment suit commenced by commercial salmon anglers, the lower court struck down the law on the basis that it "discriminates within a class and violates both the state and federal constitution," and as beyond the police power of the state. In a well reasoned opinion by Justice Neill, the state supreme court reversed, holding the goal of "making separate and distinct the sport and commercial fisheries" to eliminate the circumvention of commercial fishing laws and improve management of resources is a legitimate end, reasonably accomplished by classification of "all commercial fishermen."

It is for the legislature—not this court—to determine which means of solving a particular problem is most appropriate and consistent with the overall conservation and management scheme for the salmon resource of this state. The concern of the judiciary

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72. Id. at 83, 59 P.2d at 1105.
73. 81 Wash. 2d 410, 502 P.2d 1170 (1972).
is only whether—considering the established presumptions accorded to legislation in this area—the regulations in question have a reasonable and substantial relation to a legitimate object of the police power, and does not violate any direct or positive mandate of the state or federal constitutions.\textsuperscript{74}

As we gain more knowledge of marine fisheries resources, a highly complex resource to manage, it appears the judiciary ought to occupy a less significant role in establishing fishing management policies.

A good illustration of improper use of a limited entry scheme is the 1949 Texas quota system.\textsuperscript{75} The state legislature enacted a measure authorizing the Fish and Game Commission to set limits on the number of commercial fishing vessel permits issued in a given year purportedly based upon a standard of preserving the maximum sustainable yield. Fishermen who held commercial vessel licenses on April 6, 1949 were guaranteed renewal, and no new permits were to be issued unless and until the prior holders had an opportunity to renew. The statute included a provision that granted residential preference in issuing new licenses. On its face the law did not appear to discriminate between residents and nonresidents with respect to renewals. However, since six out of 1450 licenses outstanding on the cut-off date were held by nonresidents, its discriminatory effect was clear. The law may have been an attempt to circumvent the holding of \textit{Toomer} which had been followed by a federal court sitting in Texas to invalidate the state's former licensing system.\textsuperscript{76} In \textit{Dobard v. State},\textsuperscript{77} the Texas supreme court invalidated the measure on the ground it offended the due process clause of the state constitution. The court might well have reached the same result under the privileges and immunities clause rationale of \textit{Toomer} since all but one of the appellants were nonresidents. Instead the court concluded that:

\begin{quote}
[\textit{T}]he serious restriction of individual liberty to earn a livelihood which the present law imposes, together with the vagueness of its connection with its . . . object of conservation, render it inconsistent with due process under our state constitution . . . . It cannot be said with the least certainty that reduction or increase of the number of boats, especially without any provision as to the size or other characteristic of the boats, would reduce or increase the total number of shrimp taken, still less do so to a degree commensurate with proper conservation for a given period. . . .
\end{quote}

\begin{enumerate}
\item Id. at 424, 502 P.2d at 1178.
\item \textsc{Vernon's Ann. Penal Code} art. 934b-2 (1949).
\item 147 Tex. 332, 233 S.W.2d 435 (1950).
\end{enumerate}
If allowed to stand, the statute and action already taken under it are reasonably calculated to perpetuate in effect a monopoly of commercial fishing for the favored class. 78 Favoritism, loose legislative drafting, and conservation objectives unaccompanied by evidence were fatal defects in the Texas law. Thus, Dobard is of little precedential value to the attacker of a limited entry measure under discussion here, and serves only as a reminder of the need for a legitimate objective and a reasonable means of accomplishing the objective.

**Louisiana Considerations**

Notwithstanding traditional civil law theory that fish are res nullius, common things "the ownership of which belongs to nobody in particular," 79 Louisiana statutory law provides "ownership of all fish . . . remains in the state for the purpose of regulating and controlling the use and disposition within its borders." 80 Although the Civil Code recognizes "every man has a right freely to fish," 81 there is no express constitutional right to fish, and thus, legal impediments to limited entry in Louisiana may be merely illusory. Currently, the state constitution only sanctions biological objectives in fisheries management by the Wildlife and Fisheries Commission, 82 but does not specifically preclude legislative implementation of economic goals. In *Alfred Oliver & Co. v. Board of Commissioners,* 83 the state supreme court implicitly recognized the legitimacy of legislative use of economic management criteria. In rejecting the claims of commercial fisher-

78. *Id.* at 339, 233 S.W.2d at 439. In *In re Certificate of Need for Ashton Park Hospital, Inc.*, 193 S.E.2d 729 (N.C. 1973), the North Carolina supreme court invalidated a statute authorizing a state agency to deny permits to build hospital facilities if the agency found that sufficient numbers existed to fulfill present needs. The court concluded that "[t]he right to work . . . is a property right that cannot be taken away except under the police power of the state in the paramount public interest for reasons of health, safety, morals, or public welfare." The court attitude in *Ashton Park* exemplifies the retention by state courts of the notion expressive of the *Lochner* era, now discarded by the United States Supreme Court.


81. *La. Civ. Code* art. 453. See also A. Yiannopoulos, *Civil Law Property* § 38 at 126 (1967): "statutes asserting state ownership of wildlife are the result of an effort at conservation of natural resources in the interest of all . . . concession of exclusive rights to any private person would be hardly conceivable."

82. "The natural resources of the State shall be protected, conserved and replenished [and] [f]or that purpose . . . oysters, fish and other aquatic life, are hereby placed under the . . . Commission." *La. Const.* art. VI, § 1(A).

83. 169 *La.* 438, 125 So. 441 (1929).
men for lost wages allegedly due to state flood control action, the Alfred court pointed out that commercial fishermen have no proprietary interest in the fish they were prevented from catching: "Plaintiff has the privilege, granted by the state . . . but the state had the right to interfere with the exercise of this privilege . . . in the exercise of its police power . . . for any . . . cause that it deemed sufficient." Thus, the jurisprudence regards fishing a privilege subject to broad regulatory control by the state in the exercise of its valid police powers.

In Banjavich v. Louisiana Licensing Bd. for Marine Divers, the state supreme court posited guidelines for state regulation of economic activity:

To justify the State in imposing its authority in behalf of the public, it must initially appear that the interest of the public generally, as distinguished from those of a particular class, require that the business be regulated; the law maker may not, under the guise of exercising its police power, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations.

Although the present court appears more tolerant of state regulation of business, the Banjavich standard remains substantially unaltered. Thus, whether legislation limiting excessive entry in the commercial fisheries can withstand judicial review depends largely on the degree of utility afforded the general public. If it may be assumed that legislation which provides an adequate return to fishermen, reduces inefficiency, and increases the effectiveness of resource management benefits the general public, chances of judicial approval are favorable.

Several cases have held "the pursuit of a legal occupation is a property right" in Louisiana, whereas fishing has been viewed a privilege. However, either entitlement is "subordinate to the

84. Id. at 438, 125 So. at 442. See also Louisiana Oyster & Fish Co. v. Police Jury, 126 La. 522, 52 So. 85 (1910).
85. 237 La. 467, 111 So. 2d 505 (1959).
86. Id. at 493 n. 6, 111 So. 2d at 515 n. 6.
legitimate exercise of the regulatory . . . power of the State."\textsuperscript{89} So long as there exist a legitimate purpose and a rational means of reaching the purpose, the right-privilege distinction is immaterial. Since legislation is presumed constitutional, and "any doubt must be resolved in favor of the validity of solemn expressions of legislative will,"\textsuperscript{90} the challenger to a state program faces a heavy burden.

\textit{T. Victor Jackson}

\textsuperscript{89} Louisiana Bd. of Exam. in Watchmaking v. Morrow, 188 So. 2d 160, 162-63 (La. App. 4th Cir. 1966).

\textsuperscript{90} Seegers v. Parker, 256 La. 1039, 1082, 241 So. 2d 213, 228 (1970).