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Limited Entry: Is Louisiana Ready?

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Introduction

The world commercial catch in ocean fisheries has dropped dramatically since 1990.[1] At present, 13 of the world's 17 major fish species are depleted or are in serious decline.[2] Fishermen are experiencing diminished catch, increased competition, and falling profit expectations. Each year, fishermen are catching and selling too many of the fish that should be reproducing and renewing stocks for the next harvest. The threat of overfishing, which spurred fishing regulation such as the United States Magnuson Fisheries Conservation and Management Act (MFMCA), and the Exclusive Economic Zone provisions of the 1982 Law of the Sea Treaty, has become reality worldwide.[3] So far the overfishing issues focus on commercial fishing although recreational catch may be a problem in some areas.

To prevent economic decimation of fish stocks and the jobs that depend on them, the U.S. and state governments are considering options to ensure that fish stocks are allowed to renew and to sustain themselves. This article discusses limited entry, one such option being considered by state and federal regulatory authorities.

In 1989, the National Marine Fisheries Service announced that anyone entering the commercial reef fish fishery in the federal waters of the Gulf of Mexico was not guaranteed future access if a limited entry management program were instituted. Since then, there have been amendments to the Reef Fish Fishery Management Plan, established under the MFMCA, which set a bag limit for red snapper in 1990 and set the total allowable catch for red snapper in 1991, 1992, and 1993. A moratorium on the issuance of new reef fish permits was established in 1992, and red snapper endorsements were created in conjunction with the permits.[4] Endorsements are like permits, but allow a fisherman to catch only a certain number of pounds of a particular species, in this case, red snapper. Endorsements are used in conjunction with the general reef fish permit. The red snapper endorsements were at first only allowed to be transferred between vessels owned by the endorsement holder. Later amendments allowed transfer of the endorsement to any person upon the death or disability of the endorsement holder.[5]

Under the MFMCA, Regional Fishery Management Councils have been established to develop fishery management plans (FMP) for species of fish requiring conservation and management. The regulations promulgated under the MFCMA define overfishing as "a level or rate of fishing mortality that jeopardizes the long term capacity of a stock or stock complex to produce MSY (maximum sustainable yield) on a continuing basis."[6] Proposed amendments to the MFCMA contained in pending legislation reauthorizing the MFCMA place the definition of overfishing in the MFCMA itself and define it as "a level or rate of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis."[7] The proposed definition drops the phrase "long term" in referring to the capacity of a fishery to produce MSY on a continuing basis. This change may be significant because fishermen have been allowed to exceed total allowable catch limits in the past based on biological analysis that the one time overrun would not prevent a stock from recovering within the prescribed period.[8] Recovery periods are often extended to prevent the necessity of setting very low allowable catch limits or, in worse cases, closing a fishery and thereby placing severe economic burdens on fishermen. The proposed amendment looks like an attempt to restrict catch overruns and shorten recovery periods.

In 1995 the Gulf of Mexico Fishery Management Council approved the use of individual transferable quotas (ITQs) as a means of limiting entry into the commercial red snapper sector of the reef fish fishery in the Gulf of Mexico.[9] The implementation of the ITQ system for red snapper or any other fishery is in doubt because of other proposal amendments to the MFCMA contained in S. 39. These amendments authorize "individual fishing quotas" (IFQ) and remove references to ITQs. IFQs would

not be transferrable. These changes were made to answer critics who charge that ITQs (authorized in the original S. 39) amount to privatizing a public resource.[10] We will discuss this issue more fully below. Our discussion here will be based on current law.

The Gulf Council has requested all involved states to adopt compatible state regulations to prevent undermining of the federal ITQ system from overfishing in state waters. The commercial quota includes red snapper harvested from both federal and state waters. Federal jurisdiction normally does not extend either to vessels that do not have federal reef fish vessel permits and that fish only in state waters, or to dealers who do not have federal dealer permits and who purchase only reef fish harvested in state waters. However, the MFMCA provides that when a fishery is conducted primarily in federal waters and beyond, and a federal fishery management plan for that fishery is adversely affected by a state's action or inaction, the federal government can regulate that fishery within that state's boundaries.[11] We will discuss federal preemption in more detail below. Because the Gulf Council's management plan proposes that 100 percent of the commercial quota for red snapper be under the ITQ system, its success depends on state regulations complying with the federal plan.[12]

Louisiana's strategy to comply with a preemptive federal fishery management plan is still undetermined. Louisiana could, of course merely prohibit anyone without a federal reef fish permit and ITQ coupons from landing red snapper in Louisiana. This would amount to a defacto Louisiana ITQ system since by deferring to the federal system, any red snapper caught in state waters would be counted toward the federal ITQs. Louisiana does require all commercial fishermen who possess red snapper in state waters to have a federal reef fish permit to possess up to 200 pounds of fish and a federal red snapper endorsement to possess up to 2,000 pounds. So, in effect, Louisiana has deferred to the Gulf of Mexico Fishery Management Council and the National Marine Fisheries Service in managing red snapper in state waters. Approximately 10 percent of red snapper landed in Louisiana come from state waters.[13] However, by failing to be an active participant in the fishery management plan for red snapper, Louisiana might be violating its public trust responsibilities. In essence, the federal government would be determining which Louisiana fishermen could harvest red snapper in state as well as in federal waters. If the Gulf States initiated their own ITQ systems, then the Gulf Council could allot a certain amount of the total allowable catch to each state based on historical catch levels for each state. Fishermen could land fish caught in either federal or state waters with a valid federal reef fish permit and the requisite state permits and ITQ coupons. Whatever strategy the Gulf states adopt, it is time to discuss limited entry options for Louisiana.

Louisiana has previously considered implementing a limited entry program in state waters. The legislature considered a limited entry bill in 1990 but failed to pass one.[14]

This article focuses on the Gulf of Mexico and the proposed ITQ program for red snapper. It examines why a limited entry program for state waters should now be considered and how such a scheme could be implemented. It also addresses legal challenges that a limited entry plan might encounter on both the federal and the state levels. Finally, this article offers drafting suggestions that might prevent legal obstructions.

History

Limited entry hits squarely at the intersection of two vital issues: individual autonomy and centralized management of resources. A limited entry management program must strike a balance between these two competing interests. A fisherman's right to fish must be balanced against the state's public trust obligation to protect the fishery resources.

Limited entry in the forms we recognize today began in the 1970s. In 1976, Congress passed the Magnuson Fishery Management and Conservation Act to prevent overfishing in federal waters. Alaska used license limitations in some of its waters in 1972. In the 1980s, in spite of the MFMCA, the federal government did not adequately protect fishery resources from overfishing. Arguably, the federal government subsidized overfishing in its effort to promote development of U.S. fishing fleets and to counter foreign fishing fleet competition by guaranteeing federal loans to encourage the growth of the industry.[15] Government, consumers, and fishermen have begun to realize the danger of overfishing. Since 1990, Regional Fishery Management Councils have established several limited entry programs (for example, the North Pacific Management Council (sablefish), the Mid-Atlantic Fisheries Council (surf clam and ocean quahog), and the Pacific Fishery Management Council (salmon)).[16]

The right to fish has been recognized since ancient times.[17] The sea, as an open resource, was unique and mysterious, yet almost always generous to an industrious fisherman. No one had absolute rights to the sea just as no one had such a right to the air or the sky. The occupation of fisherman, sometimes tedious, sometimes fickle, sometimes dangerous, was always free. But human nature is such that normally no one fisherman acts for the good of the collective. If a fisherman limits his catch to allow stocks to renew themselves, any fish that he does not catch will likely be caught by a competitor. And as each fisherman increases his catch to increase his profit, the fish stocks in certain cases begin to drop dramatically.[18] Overfishing has created a need for effective conservation, including limited entry. And although limited entry "portends an end to much of the uniqueness of fishing: the competition for fish, the uncertainty, even the romance of the fishing lifestyle...it offers new hope for sustainable development of ocean fisheries."[19]

More recently, limited entry plans have been successful in stabilizing fishery stocks and reducing overcapitalization in other fisheries such as the South Atlantic wreckfish fishery, Maryland's blue crab fishery, Florida's spiny lobster fishery, and the Mid-Atlantic surf clam fishery.[20]

Limited Entry Defined

"Limited entry" is a catch phrase that describes how government attempts to reduce the catches in diminished fishery stocks. The idea behind limited entry is quite simple. Either the number of commercial fishermen can be limited by issuing only a certain number of licenses and/or the amount of fish that can be harvested is limited with general quotas, individual fishing quotas or individual transferable quotas.

Government resorts to limiting entry in a fishery when overfishing has significantly reduced fish stocks or when the survival of the fishery is threatened. Limited entry has two main foci: conservation and economics.[21] It tries to promote the most efficient use of human, technological, and financial resources, and to stabilize and maintain fishery stocks.

In setting up a limited entry scheme, the maximum sustainable yield (MSY) must be calculated. The maximum sustainable yield is the largest average annual catch that can be taken over a significant period of time under prevailing ecological and environmental conditions.[22] In other words, the stock will support a certain catch level for certain periods of time without being overfished. Another parameter, optimum yield (OY), is calculated based on the maximum sustainable yield. Optimum yield is the amount of fish that will provide the greatest overall benefit to the nation in food production and recreation.[23] To obtain the optimum yield, the maximum sustainable yield is adjusted according to ecological, social, and economic factors.[24] These factors include domestic fishing promotion, consumer need, costs of operating vessels, enjoyment gained from recreational fishing, preservation of the fishermen's way of life, consumer nutritional needs, dependence of marine mammals on fishery stock, and effects of pollutants.[25] Under current law and regulations, optimum yield can exceed maximum sustainable yield when, for example, MSY-based total allowable catch levels are exceeded, to prevent social and economic hardships. Such an overrun was allowed by the Gulf Council in 1992 in the red snapper fishery.[26] Pending MCMFA reauthorization legislation, S. 39 changes the definition of optimum yield to "take into account protection of marine ecosystems" and "to provide for the rebuilding of an overfished fishery to a level consistent with producing the maximum sustainable yield."[27] Along with the amended definition of overfishing already discussed, these changes will make it more difficult for the regional fishery management councils and the Secretary of Commerce to justify overruns of biologically determined total allowable catch limits. This legislation is still changing so it is quite possible that when and if the MCMFA reauthorization is passed, the amendments to the definition of overfishing and optimum yield will be different from those currently proposed.

Process of Allocation

The difficulty with accepting limited entry lies in the allocation. First, there is the problem of deciding who should be allowed in the fishery when there are too many fishermen who want access. Second, fishermen no longer determine what is the proper amount of fish to catch based on their own economic circumstances. Limited entry is often seen as a restriction on the freedom of entry into an occupation known for its independence.[28] All those involved in the fishery, including vessel builders, canners, processors, and consumers are affected. National Standard 4 of the MFMCA and accompanying regulations requires in part that allocations of fishing privileges shall be "reasonably calculated to promote conservation" and "carried out in such a manner that no particular individual corporation or other entity acquires an excessive share of such privileges."[29]

Limited entry programs can be implemented in a number of ways. The two most popular options used thus far have been license limitations and individual fishing or transferable quotas. Federal regulations promulgated under the Manguson Act require management regimes to be implemented to achieve but not exceed optimum yield by a substantial amount. Optimum yield is not an automatic quota or ceiling but is a target or goal that cannot be exceeded on a continuing basis but may be exceeded in some circumstances.[30] Thus the councils can soften the short term effect of drastic catch restrictions but must prevent overfishing in the long term.

A. License limitations

The public most often associates limited entry with license limitation. In a license limitation scheme, a set number of licenses are issued and these licenses may be transferable. This means that a fisherman can sell his license to someone else and leave the fishery. Of course, the government policy for a particular fishery may not provide for free transferability. When a fisherman wants to leave the fishery, the government could prohibit him from selling his license to anyone but the government. This way the government could issue the license to someone else unless it wanted to further limit the number of fishermen by not reissuing that license. Requiring fishermen to turn in or sell back their licenses to the government when they no longer want to fish could counter challenges that freely transferable licenses are an illegal donation of public resources to private parties.

Freely transferrable licenses, however, would probably be more acceptable to both fishermen and the government. Fishermen could choose to get out of the fishery and rely on the market to compensate them rather than having the government decide when and at

what price to buy back licenses. With both free transferability and government buy-back systems, the government would have a measure of control in determining whether the number of fishermen should be further limited by buying back licenses. Revenue generated from fees and licenses could be set aside and be used to buy back licenses. However, if the open market price of a license increases too much, the government may not be able to buy back enough licenses to further limit entry. For example, in Alaska, most limited entry fishing licenses were valued at more than $100,000 in 1990, with some valued as high as $500,000.[31] Another problem in a license limitation system is that the licensed fishermen may still have the capabilities and technology to exceed the total allowable catch, which is the total number or pounds of fish allowed to be caught in a season based on MSY and OY. It would still be necessary to closely monitor landing to determine when the total allowable catch was reached and when to shut down the fishery. Because of the difficulty in monitoring landings, license limitation systems are now rare.

B. Individual Transferable Quotas (ITQ) and Individual Fishing Quotas (IFQ)

Individual transferable quotas are another option for limiting catches. In an ITQ or IFQ system, the optimum yield is calculated and that amount is divided among all the fishermen in the fishery based on criteria set by the government agency. Each fisherman will either get an equal share of the optimum yield or it will be proportioned in accordance with a point system. Each fisherman's ITQ or IFQ represents a percentage of the total allowable landing weight or of the number of fish that can be caught. If the government wanted to reduce the poundage or the number of fish harvested, it would reduce the total allowable catch. Each fisherman's percentage of that total allowable catch would remain the same, but would be a smaller amount. The government would simply make the total allowable catch smaller.

An ITQ or IFQ system provides incentive to comply with the regulations. If a fisherman believes he has an ownership stake in a quota, he will be motivated to protect the fishery and make sure that other fishermen don't cheat. The difference between an ITQ and IFQ system is transferability. IFQs are not transferable while ITQs are freely transferable. Since more legal challenges will likely be brought against ITQs than IFQs we will focus our discussion here on ITQs.

An ITQ system provides the free transferability that fishermen prefer. It would allow each fisherman to tailor his quota to fit his abilities and needs. If one fisherman's quota was too large for his harvest capabilities, he could sell part of his catch rights to another fisherman looking to increase his quota. ITQs would also allow fishermen to choose the technology they wish to use in the absence of other reasons for gear restrictions.

In a license limitation system, the use of technology to improve efficiency may work against conservation goals. If fishermen can harvest more efficiently, the overall harvest may increase unless there is a quota. Even if there is a quota, it could be exceeded if fishing efficiency increases due to a lag between the time the quota is determined to have been reached and the close of the fishery. Therefore, conservation could be undermined by technological advances. But with ITQs, fishermen can use whatever technology they want, as long as they stay within their quotas. Fishermen can use their time and effort more efficiently. Since the number of fish harvested theoretically will not increase, conservation is not undermined. And the fishermen can space fishing time over a longer period, use equipment in other commercial or recreational fisheries, or stabilize profit by setting personal quotas for daily, weekly, or monthly catch. This is different from a license limitation system where fishing is a free-for-all until the optimum yield is reached.

Enforcement and Data

A license limitation system and an ITQ system could be enforced by boarding vessels to check licenses or by checking licenses at the dock. ITQs could also be enforced when the fish are sold to a dealer. Accurate records are an absolute requirement for an ITQ system. An ITQ system depends on accurate data in calculating the total fishery quota, the allocation of individual quotas, and the adjustment of the system from year to year.

One problem with the ITQ system based on the number of fish caught is that it encourages fishermen to keep only the largest fish and discard the smaller ones. Because the quotas would be monitored by inspecting the catch when a vessel lands, this practice, called "high-grading," would be a temptation. Using a weight limit, rather than a numerical limit, could alleviate the problem.[32] The Gulf Council's proposed ITQ system uses a weight limit so high-grading would less tempting.[33] However, in a fishery where larger fish are more valuable because more meat can be obtained with less processing effort than from small fish the problem could persist.

The Gulf Council and Its Red Snapper ITQ System

A. Background

Congress passed The Magnuson Fisheries Management and Conservation Act (MFMCA) in 1976 to set guidelines for programs to meet federal fishery conservation goals. The act, named after Senator Warren Magnuson, established standards, procedures, and governing boards to manage fisheries in the federal Exclusive Economic Zone.[34] The U.S. EEZ extends outward 188 miles beyond the United States' 12 mile territorial sea which makes its outer limit 200 miles from the coastline of the United States.[35] In this 200-mile stretch of water, the United States has control over all resources with concurrent state

jurisdiction in the first three miles from the coast.[36] The overlapping jurisdiction with the coastal states from the coast out to three miles is because most states have a three mile territorial sea which is actually within the boundaries of the state.[37] In other words, it is state territory. The act created regional councils to work together in implementing programs. The states bordering on the Gulf of Mexico make up one of the regional councils. Council members are administrators, lawyers, fishermen, economists, and scientists.

The councils provide a broad-based background for discussion and implementation of management programs and have broad power to set up management programs, including limiting entry to particular fisheries.[38] The councils are required to consider ecological, economic, and social factors in setting up a management program.[39]

In 1995, the Gulf Council approved the use of ITQs for the commercial red snapper fishery in federal waters of the Gulf of Mexico. The ITQ system was thought to be necessary because the commercial sector of that fishery always reached its quota very quickly, resulting in the closure of the fishery for the rest of the year.[40]

In 1993, the National Marine Fisheries Service (NMFS) implemented a red snapper endorsement system. Under this system, owners and operators of licensed vessels that had historical red snapper catches of at least 5,000 pounds in two of the three years 1990, 1991, and 1992 were allowed to harvest red snapper under trip limits of 2,000 pounds. All other licensed vessels were allowed to harvest red snapper under trip limits of 200 pounds. While no limit was placed on the number of trips, the fishery was shut down when the total allowable catch quota was reached. In spite of the endorsements, fishermen continued to reach the quota in increasingly shorter periods of time.[41] The existing endorsement system expired on December 31, 1995. After this date, the red snapper fishery would have reverted to an open access system unless a long-term comprehensive management system is implemented.[42]

The Gulf Council passed an amendment (Amendment 8) to the Fishery Management Plan for the Reef Fish Fishery of the Gulf of Mexico which established an ITQ system for the commercial red snapper sector of the fishery. Amendment 8 appeared as a proposed rule in the Federal Register on August 29, 1995 and as a final rule on November 29, 1995.[43] The ITQ system was to have become effective April 1, 1996.[44] On January 2, 1996, NMFS issued an emergency rule at the request of the Gulf Council which effectively established a two month season for the commercial red snapper fishery from February 1 to March 31, 1996 under the existing endorsement regime with a commercial quota of one million pounds.[45] This was done on the basis of testimony from fishermen who said they needed the income from the harvest of red snapper during the lenten season.[46] On February 29, 1996, the National Marine Fisheries Service (NMFS) issued another emergency interim rule in the Federal Register suspending implementation of the commercial red snapper ITQ system for the Gulf of Mexico.[47] The reasons NMFS gave for delaying the ITQ system were that: (1) the government shutdown in December 1995 and January 1996 had delayed processing of appeals of NMFS' initial determinations of eligibility to enter the red snapper fishery under the ITQ system, and (2) the pending federal legislation reauthorizing the Magnuson Act contains a moratorium on approval or implementation of any ITQ systems approved by the Secretary of Commerce after January 4, 1995.[48] Other legislation prohibited NOAA from using any funds to develop any new FMPs, amendments to FMPs, or regulations containing ITQs, or to implement any such plans, amendments, or regulations that had been approved by the Secretary of Commerce after January 4, 1995, until expressly authorized under the Magnuson Act.[49]

As an alternative to the ITQ system, the Gulf Council extended the red snapper endorsement system through May 29, 1996, with a strong possibility that it would be extended another 90 days if the commercial quota for red snapper of 3.06 million pounds was not caught in the initial 90 days and the ITQ system had not been implemented. The commercial quota was overrun by approximately 4 percent on about April 4, 1996, and the season was closed.[50] A regulatory amendment to allow another 1.59 million pounds of red snapper to be caught commercially, starting in September 1996, is currently being proposed.[51] Even if the additional quota is approved, the ITQ system seems to have no chance of being implemented in 1996.

Though the commercial red snapper ITQ system will not be implemented in 1996, and probably not for at least two more years under current proposed moratoriums in the Magnuson Act reauthorization legislation, we think an ITQ system for red snapper and other species is inevitable. Pressures on fisheries stocks will continue to increase, and regulators will be forced to take drastic steps to protect those stocks. The Gulf of Mexico Fishery Management Council has already expressed its willingness to establish an ITQ system. Public opinion will probably come to favor the Gulf Council's position and influence Congress and state legislatures. Therefore, we believe a serious discussion of the legal issues in limited entry systems is warranted.

B. Duration

Originally, the ITQ system was to last for four years beginning April 1, 1996. In that time, the Gulf Council and NMFS would have evaluated it. Based on the evaluation, the ITQ system would be extended, modified, or terminated.[52]

C. Initial eligibility for ITQ shares

In anticipation of a limited entry system, NMFS collected data on landing records from 1990 through 1992 to determine initial eligibility to be included in the red snapper fishery and to determine initial ITQ shares. NMFS also collected data to determine which

fishermen qualified as "historical captains."[53]

If and when the ITQ system is implemented owners or operators of a vessel with a valid license as of August 29, 1995 will be initial shareholders, provided that the owner or operator had the required landings of red snapper during the period 1990 through 1992. If the earned income of the operator of the vessel is used to qualify for the license, then the operator, and not the owner, will be the initial shareholder. A historical captain could also be an initial shareholder. "A historical captain means an operator who: 1) from November 6, 1989 through 1993, fished solely under verbal or written share agreements with an owner and such agreements provided that the operator be responsible for hiring the crew, who was paid out of the share under his or her control; 2) landed from that vessel at least 5,000 lbs. of red snapper per year in two of the three years 1990, 1991, and 1992; 3) derived more than 50 percent of his income from the sale of the catch in each of the years 1989 through 1993, and; 4) landed red snapper prior to November 7, 1989."[54]

D. Apportionment of the initial ITQ shares

Initial shares are to be apportioned based on each shareholder's average of the top two year's landings in 1990, 1991, and 1992. No initial shareholder gets an initial share of less than 100 lbs. whole weight. Landing records associated with a historical captain are apportioned between the historical captain and the owner in accordance with the share agreement in effect at the time of the landings.[55]

E. Landing records, Transferability

Landing records associated solely with an owner could be transferred to another vessel under the following circumstances: (1) an owner of a vessel with a valid reef fish license on August 29, 1995, who transferred a vessel permit to another vessel owned by him, retains the landing records for the first vessel and thus retains his ITQ share; (2) he also retains the landing records if there were a change in ownership of the vessel without a substantive change in control of the vessel; or (3) an owner of a vessel retains landing records before his ownership of the vessel only if there were a legally binding agreement to transfer the landing records.[56]

Limited Entry and the Law

A. The Magnuson Act and state regulation

The Magnuson Act established the Fishery Conservation Zone within which the federal government has exclusive jurisdiction to regulate fishing. Later amendments declare that the U.S. has exclusive fisheries jurisdiction in the Exclusive Economic Zone (EEZ). The Fishery Conservation Zone begins three miles from the baseline from which the territorial sea is measured (which approximately follows the coastline) and extends 197 miles to the outward boundary of the EEZ at 200 miles from the coastline.[57] As already mentioned, under the MFMCA the federal government generally does not have jurisdiction to impose regulations in the state's three mile territorial sea. However, the federal government can impose regulations on a fishery within the state's territorial sea whenever state regulations, or a state's failure to impose regulations, "substantially and adversely affect the carrying out" of a federal fishery management plan for that fishery.[58]

When state and federal law conflict, federal law prevails. Federal preemption of state law may be express or implied. It is express when a federal statute states in plain language that federal law preempts state law. Federal preemption is implied when federal regulation is so pervasive that there is no room left for state regulation on the subject. Implied preemption can also exist when federal interest in imposing regulations dominates state interest. Finally, federal preemption occurs when federal law relies on unitary (single system) regulation for its effectiveness.[59]

In most instances, however, the regional councils will try to cooperate with state governments whenever possible. The councils are hesitant to preempt state law whenever state law and federal law can coexist. In *Southeastern Fisheries Association, Inc. v. Mosbacher*, associations of commercial fishermen brought suit against the Secretary of Commerce alleging that the secretary had abused his discretion in approving a fishery management plan in which the secretary expressly decided not to preempt state law. The plan, which was developed by the Gulf Council, provided for a 100,000-pound quota for the indirect red drum fishery—red drum caught unintentionally by fishermen targeting another type of fish. However, it also required commercial fishermen landing red drum from the indirect red drum fishery to comply with state landing and possession laws. Because some of the Gulf states prohibited or restricted landing, possession, or sale of red drum, state laws conflicted with the federal quota. In effect, the federal fishery management plan for red drum told fishermen that they could catch redfish in the EEZ but that they could not land them. The court noted that the federal government's unwillingness to preempt state law reflected a desirable policy of cooperation between the states and the federal government but said that this cooperation was only permissible when state and federal law do not conflict and undermine the objectives of the federal law. The court held that the federal law preempted state law. Therefore, the fishermen were allowed to land incidental catches of red drum, demonstrating how federal fishery management plans can preempt state fisheries laws.

Arguably, the federal ITQ system would preempt state regulation of the red snapper fishery in state waters. Under the federal management plan 100 percent of the commercial quota includes any red snapper that would be

caught in state waters, thus the purpose of the federal ITQ program would be undermined without compatible state regulations especially if there are significant numbers of red snapper taken in state waters. In such a case, a state's failure to regulate the red snapper fishery in its territorial waters would probably undermine the federal ITQ plan, and the federal government is authorized under the Magnuson Act to impose its own regulations on the state.

If a state does not want to be preempted in its waters, what options does it have? Under the current federal ITQ system, it seems the simplest alternative the Gulf Coast states have for complying with the federal ITQ system is merely to enforce the federal plan for state and federal waters. States could enforce the federal regulations by allowing only fishermen with federal ITQ coupons to land and sell red snapper caught in state or federal waters.[60] This is the strategy Louisiana is currently using to comply with the federal endorsement system. But, as discussed earlier, there may be some unpalatable aspects of that strategy since the federal government would be determining which Louisiana residents could fish in state waters for red snapper. Another option would be for the states to develop their own ITQ systems that would meet federal goals. A state could not develop its own ITQ system, and, at the same time, be compatible with the federal plan without federal/state coordination. With independent state and federal systems, once federal ITQ shares have been allocated to those who qualify for them under the federal regulations, there would be nothing left for a state to allocate. One-hundred percent of the total allowable catch would have been allocated. The only way for a state to award ITQ shares based on criteria that differ from those detailed in the federal plan is for the Gulf Council to set aside a portion of the total commercial quota to be allocated by the state as it sees fit. The present federal plan does not include such a provision but congressional scrutiny of limited entry in the MFMCA reauthorization process could cause changes in the current federal system.

B. Federal and State Legal Analysis

Since the Magnuson Act gives the federal government limited authority to impose its regulations in state territorial waters, it matters little whether the legislatures and courts of the Gulf states are precluded by state constitutional, statutory law, or case law from imposing the federal regulations in such instances. While the federal government may, and usually does, ask the states to implement the federal ITQ system, it can always force compliance. The federal ITQ plan is required only to conform to the requirements of the United States Constitution. However, should Louisiana decide to implement its own ITQ system for red snapper or other species, it will be necessary to analyze compatibility of the state ITQ system with the U.S. Constitution, the Louisiana Constitution and Louisiana statutes.

1. Statutory Law

a. Right to Fish

Some fishermen may argue that an ITQ system would interfere with the right to fish. Louisiana law specifically recognizes a right of all citizens of the state to fish in marine waters.[61] However, the state, as trustee of the public fish and wildlife resources within its borders, has sweeping authority to protect and conserve fisheries. The right to fish only extends to fishermen who comply with current licensing requirements and a limited entry scheme would simply be a licensing requirement with which fishermen would have to comply. It is true that those fishermen who are not granted entry into a particular fishery are denied the right to fish for that species. However, the right to fish law does not specify rights to any particular fishery or any type of gear but recognizes only "continued public access to fishing opportunities in marine waters."[62] In addition, the statute expressly states that it conveys no property rights in fishery resources.[63] Recently, a state district court held that the right to fish statute, before it was amended in 1995, did convey a property right to fish commercially.[64] (This case is discussed in the section of this article that deals with taking of private property.) The constitutional public trust responsibility to manage the marine fishery resources would seem to override a statutory right to fish for a particular species of fish. The state could completely close a fishery if it were deemed necessary to protect the fishery for the future benefit of all its citizens. The Louisiana closure of the commercial red drum fishery is a good example of this sweeping power. Logically then, the state should be able to take a less drastic measure and restrict the red snapper fishery with an ITQ system.

b. Louisiana and federal anti-trust law

Some observers have voiced concern that ITQ shares will become consolidated in the hands of a few wealthy individuals or corporations and thus lead to monopolies and price fixing.[65] The Magnuson Act requires that allocation or assignment of "fishing privileges among various United States fishermen" be "carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges."[66] The Gulf Council addressed the issue of monopoly on the red snapper ITQ system in their deliberations of Amendment 8 to the reef fish fishery FMP for the Gulf of Mexico. Several alternatives were considered including no limitation and limiting the percentage of red snapper licenses owned by single entity to five percent. The Gulf Council decided to place no restrictions on the percentage of ITQ shares that could be owned by one entity. The reasoning behind this decision was that one of the goals of the ITQ system was to promote some consolidation, thereby increasing

efficiency in the fishery and restrictions on transferability and ownership would thwart that goal.[67] The Gulf Council noted that most boats that fish for red snapper are owner-operated which would make it more difficult for consolidation to occur.[68] The Gulf Council also decided that the use of shell corporations would make it difficult to determine if one entity had gained a monopoly and that referring cases to the U.S. Department of Justice for investigation into federal anti-trust law violations was a better solution.[69]

In *Sea Watch International v. Mosbacher*, the plaintiffs charged that the ITQ system for the ocean quahog (a species of clam) fishery violated National Standard 4 of the Magnuson Act[70] because two fishermen had acquired forty percent of the annual catch quota for the fishery.[71] The court stated that although a forty percent control was cause for concern, "the Act contains no definition of 'excessive shares' and the Secretary's judgement of what is excessive in this context deserves weight, especially where the regulations can be changed without permission of the ITQ holders."[72] The court went on to say that the Mid-Atlantic fishery Management Council and the Secretary of Commerce had addressed the problem of monopolies by "providing for an annual review of industry concentration with the possibility of referral to the Department of Justice.[73]

The federal antitrust statutes, the Sherman Antitrust Act[74], the Clayton Act[75], and the Federal Trade Commission Act[76] were enacted to protect consumers from price fixing and other unfair, anti-competitive practices. Since federal antitrust statutes were enacted over one hundred years ago, a huge body of case law has developed which is well beyond the scope of this article. The application of federal antitrust laws to ITQs has been examined by some legal scholars but has not yet been considered by a court.[77] It is clear that ITQs have the potential for allowing violations of federal antitrust laws. However, some courts have not found forbidden monopolies in other industries, even with market shares of 77 percent, absent some other factors suggesting unfair pricing.[78] Price fixing, per se, is illegal. Price fixing would be found, for example, if fishermen agreed to only sell for a certain price. Other prohibited actions such as vertical integration (control of other corporations in other phases or levels of the same industry) which lessens competition or creates monopolies are possible with or without ITQs but probably easier to accomplish under an ITQ system. ITQ systems can be structured to prevent or lessen the chances of antitrust violations. The Mid-Atlantic and Gulf of Mexico Fishery Management Councils both considered maximum ownership provisions but decided not to implement them. Such limitations are still within the power of the Councils if needed.

The Louisiana antitrust law is very similar to federal antitrust laws.[79] It prohibits restraint of trade, monopolies, price fixing, and substantially lessening competition.[80] The number of cases decided under the Louisiana antitrust statutes is small compared to the federal statutes, but the potential exists for state challenges to monopolies and price fixing that might arise under an ITQ system. State restrictions on state ITQ ownership could be implemented to prevent violation of state antitrust laws, but the state could also follow the Gulf Council's lead and enact a system of freely transferable ITQs that would be closely monitored for violations of state antitrust laws.

2. State and federal constitutional law

a. Louisiana's public trust doctrine

The public trust doctrine requires the state to manage marine fishery resources for the benefit of all citizens.[81] This can be interpreted to mean that marine fishery resources must be managed in order to produce the maximum social and economic benefits. To produce these benefits, the state may place restrictions on the fishing industry.[82] Some have argued that a Louisiana ITQ system with freely transferable shares could violate the state's public trust doctrine by allowing private entities to reap any increased value ITQ shares may acquire. In other words, if a fisherman sells an ITQ share for more money than he paid the state, should that profit accrue to the fisherman or to the state? This issue is also linked to the Louisiana Constitutional prohibition against donating public property to private parties.[83] Certainly an ITQ takes on some attributes of a property right, but that in itself does not make it a privatization of public trust resources. Indeed, there are precedents for such a system. There is the oyster leasing scheme for state owned water bottoms. Louisiana law controlling such leases states "All leases, all applications of deceased persons for leases, and all property rights or interests acquired pursuant to such leases, made in conformity with the provisions of this subpart are heritable and transferable. They are subject to mortgage, pledge or hypothecations, and to seizure and sale for debt as any other property rights and credits in this state."[84] Thus the state assigns oyster leases on state owned waterbottoms many attributes of a property right.

In the area of mineral leasing the state allows transfer of leases on state owned mineral rights with approval of the State Mineral Board. There is no provision prohibiting a leaseholder from selling the lease for more than he paid the state for it. Thus oyster and mineral leaseholders can make a profit by selling leases to another private party. These leasing systems both involve public trust resources. While the Louisiana Supreme Court has not yet visited the issue, the constitutionality of the oyster leasing system was challenged in *Jurisich v. Hopson Marine Service Co. Inc.*,[85] which involved damage to an oyster bed leased to a private party by the state. The defendant claimed that the leases amounted to "disguised sales of navigable waterbottoms," and were therefore prohibited by Article IX §3 of the Louisiana Constitution.[86] The Court disagreed, noting that the rights of trans-

ferability and heritability were not unique to full ownership, but applied to leases in general under Louisiana law.[87] The Court noted that the fifteen year lease term was "not so long as to be tantamount to full ownership," and that renewal was at the discretion of the Department of Wildlife and Fisheries.[88] Freely transferrable ITQ's appear to be analogous to oyster and mineral leases. Indeed if a state ITQ system were established similar to the federal system it would be even less like a property right than oyster leases and mineral leases. The federal ITQ system would last for an initial period of four years after which the efficacy of the ITQ system would be reevaluated. In a similar state system, an ITQ shareholder would know from he start that he or she would not have a perpetual right and the state would be able to take advantage of increases in ITQ share value after the initial period. The state could, of course, provide for a shorter initial duration as long as it renewed the ITQ system for the duration of the federal ITQ system.

b. Prohibited Donations

Article VII §14 of the Louisiana Constitution prohibits the donation of "property or things of value" of the state to "any person, association, or corporation public or private."[89] Since free swimming fish belong to the state, some have argued that ITQs amount to a donation of public property to private parties.[90] While there are attributes of private ownership in an ITQ system, at least one federal court decision dismissed the idea that federal ITQs are privatization of a public resource.[91] In *Sea Watch International*, the plaintiff argued that the federal ITQ system for surf clam and quahog amounted to a privatization of those resources.[92] The court held that the ITQ's were not "full scale ownership."[93] The court said that the ITQ's did not become "permanent possessions" and "remained subject to the control of the federal government" which could "alter and revise" the ITQ systems.[94] The court went on to say that, "An arrangement of this kind is not such a drastic departure from ordinary regulation nor is it akin to the sale of government property."[95]

A Louisiana ITQ system could be devised to avoid being a prohibited donation under Article VII §14. As we discussed above the oyster leasing system in Louisiana has several attributes of a property including being heritable and transferrable but the court in *Jurisch v. Hopson Marine Service Co. Inc.* found the leases were not full ownership and did not to violate Article VII §14 [96,97] The defendants in *Jurisich* argued that the dollar per year per acre rental that was being charged at the time was so low that it amounted to a disguised donation.[98] The Court dismissed the argument by saying that statutory obligations incorporated into the leases (requiring leaseholders to maintain the leases and recultivate oysters) were additional sufficient consideration such that leases were not donations.[99] Thus a Louisiana ITQ system should require sufficient consideration in the form of license fees to avoid being a prohibited donation. The Louisiana Supreme Court has yet to decide this issue. However, based on the *Jurisich* decision license fees for an ITQ system would not have to be very high to comply with Article VII §14.

c. Due process

The Fifth Amendment to the United States Constitution states that no one can be deprived of life, liberty, or property without due process of law. The Fifth Amendment applies to the federal government and also to state governments through 14th Amendment to the U.S. Constitution. Louisiana's state constitution also contains its own Due Process Clause in Article I § 2.

There are two types of due process—procedural and substantive. Procedural due process clauses in the U.S. and state constitutions require government to follow certain procedures when depriving anyone of life, liberty, or property. Examples of such procedures are notification and hearings. Substantive due process requires that there be some minimal rational connection between a government act or regulation and the goal it seeks to achieve under its police power. The police power of the state and local governments is conferred upon them by the 10th Amendment and gives them the authority to place restraints on personal freedom and property rights of individuals for the purpose of protecting public safety, order, health, welfare, and general prosperity. Louisiana's constitution, including public trust provisions, its statutes, including wildlife and fisheries laws, and regulations are all components of its police power.[100] Courts have defined police power as virtually any health, safety, or general welfare goal. Substantive due process would protect against the deprivation of rights by the government when there is no valid reason for the deprivation.

The Magnuson Act attempts to satisfy procedural due process requirements by granting administrative review of decisions.[101] The Gulf Council's proposed ITQ system provides additional administrative safeguards. Before a commercial fisherman could be denied status as an initial shareholder, he is allowed the opportunity to show that he has been erroneously deprived of ITQ shares.[102] The Gulf Council will appoint a special advisory panel that will function as an appeals board which will review written petitions from fishermen who contest their denial of status as initial shareholders.[103] The board can only review disputed calculations of landing records based on documentation submitted to NMFS during the period 1990 through 1992. The panel (board) can consider other documentation if it finds justification for the late application and documentation. The panel is not allowed to consider the petition of anyone who believes that he should be accorded ITQ shares because of hardship or for any other reason.[104] A state ITQ system that used the criteria and procedures established by Amendment 8 to the Reef Fish Fishery FMP for admitting fishermen into a limited entry system would in all likelihood satisfy the state and federal constitutional requirements.

Under the Fifth Amendment of the U.S. Constitution, substantive due process questions would be based on the deprivation of the right to fish commercially, an economic right. In the area of economic regulation, courts defer to legislative will if there is a minimum rational connection between the regulation and some valid governmental objective—usually public health, safety, or welfare.[105] In *Burns Harbor Fish Company v. Ralston*,[106] Indiana commercial fishermen sued the state because it had banned gill nets in certain Indiana waters. The Court said that regulating the harvesting of wildlife was a legitimate exercise of the state's police powers and found that there was a rational connection between the state's use of its police power and a legitimate state purpose. The court further said that the state should be able to completely ban the harvesting of wildlife to meet conservation goals, and that the state could act preemptively to protect its wildlife resources and prevent a future crisis.[107]

The Louisiana Constitution's due process clause reads: "No person shall be deprived to life, liberty, or property, except by due process of law."[108] This clause is almost identical to the United States' Constitution Amendment V and was certainly patterned after it. The framers of the Louisiana constitution intended the due process clause, has to encompass the protections that the U.S. Supreme Court had developed under the U.S. Constitution's due process clause.[109] The Louisiana Supreme Court, interpreting the state's due process clause, has found greater protection of individuals from government regulation than that found by the U.S. Supreme Court interpreting the U.S. Constitution.[110] In subsequent cases, however, Louisiana courts have, for the most part fallen back into following U.S. Supreme Court lead, using federal due process analysis in deciding cases under the Louisiana Constitution's due process clause.[111] Under that analysis, the regulation would have to be based on and related to the state's duty to protect the prosperity and welfare of its citizens by protecting a valuable resource. A limited entry system has been determined by scientists and economists to be a reasonable method to accomplish this goal given the ineffectiveness of other types of fishing regulation. Thus it would appear that a state limited entry system would satisfy state and federal constitutional substantive due process requirements.

d. Equal protection

The Fourteenth Amendment of the United States Constitution prohibits the states from denying anyone equal protection of the laws. Generally, this clause requires that laws should treat everyone the same way unless there is a valid reason for treating them differently. As with substantive due process, there must be a rational relationship between the law and the law's purported objective. Concerns that ITQ systems violate federal and state equal protection provisions stem from the fact that some fishermen will be allowed to participate in the fishery while others will be excluded. In other words, the law will treat fishermen differently, in this case based on historical catch records, and/or status as historical captains.

The U.S. Supreme Court applies different standards of scrutiny when determining whether a state violates the equal protection clause. If the group or class of people that are denied a right by the statute are considered a "suspect" class, or the right being derived is a "fundamental right" then the courts will give strict scrutiny to the challenged statue and uphold it only if it is necessary and narrowly tailored to serve a compelling governmental interest. An example of discrimination against a suspect class would be discrimination based on race.[112] An example of a fundamental right for the purposes for equal protection would be the right to vote.[113] If the class discriminated against is not suspect and the right impaired is not fundamental the courts will uphold the statute if it merely bears a rational relationship to a legitimate governmental interest, which almost every classification can satisfy. Any state or federal classification system rationally formulated to reach valid objectives will be upheld.[114]

Louisiana's equal protection provision is found in Article 1 §3 of the state constitution. It has been interpreted much like the United States Constitution's Equal Protection Clause except where discrimination based on race, religion, or other enumerated category of Article 1 §3 is involved.[115] Under the Louisiana Constitution, a licensing requirement is valid if it applies indiscriminately to all people, even if the result seems discriminatory.[116] The state can use its police powers to regulate businesses if the regulation applies to all similarly situated people in that business.[117]

In *Pierre v. Administrator, Louisiana Office of Employment Security*,[118] the court stated that the standard Louisiana courts are to apply where there is no fundamental right or suspect classification involved is essentially the same as the federal rational basis standard. In this case the court struck down a statute that required unemployment compensation claimants to file a claim even when they were not eligible for benefits if the claimant wanted to qualify for benefits when they lost a subsequent job. If a claimant were fired from job #1 and was not eligible for benefits, that claimant still would have to file for benefits. If that claimant did not file for benefits after losing job #1, then the claimant would not be eligible for benefits after losing job #2, even though the claimant would otherwise qualify for benefits. The court held that there was no rational reason for treating those who had filed a prior claim from those who had not. The only state interest asserted was reducing the tax burden on the first employer. The court concluded that the prior claim requirement did not ease the tax burden on the first employer.

In *State v. Chisesi*,[119] the Louisiana Supreme Court struck down a law that required wholesale dealers of farm produce to obtain a license from the com-

missioner of agriculture and to post a $2,000 bond with the commissioner. The court held that the statute violated equal protection for two reasons. First, there was no rational reason to single out wholesale dealers of farm produce from wholesale dealers of other types of merchandise. The stated purpose of the law was to protect farmers from fraud on the part of wholesale dealers. But the statute could not serve this purpose because wholesale dealers did not buy produce directly from the farmers. The farmers sold the produce to middlemen who, in turn, sold the produce to the wholesale dealers. For this reason, the law had no reasonable relationship to protection of the public welfare. Second, the statute invested the commissioner with unfettered discretion in determining who should and should not be given a license. The statute provided no fixed standard for the commissioner to use in making the decisions.

A Louisiana ITQ system based on the Gulf Council's program would not seem to violate equal protection either under the United States Constitution or the state constitution. Federal courts have not determined the right to pursue an occupation to be a fundamental right for equal protection purposes and fishermen are not a suspect class. Nor do fishermen fall within any category of persons entitled to increased protection under the Louisiana Constitution's Article I § 3. The ITQ scheme is reasonably related to conservation and economic goals and provides standards to be applied in determining the allocation of ITQ shares. ITQ shares are to be allocated to those who had valid permits on August 29, 1995 and who had the required catch records for the period 1990 through 1992. Historical captains are also eligible for ITQ shares.[120]

e. Privileges and immunities

The United States Constitution protects privileges and immunities of citizens by stating that the "citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states." [121] Courts have interpreted this provision to mean that no state can abridge a citizen's privileges and immunities — that a state should afford noncitizens the same privileges and immunities afforded to citizens of the state or the privileges and immunities given to all citizens by the federal government.[122] These provisions are most often used to challenge state regulations that discriminate against out-of-state residents. Louisiana's constitution does not have such a provision because the Privileges and Immunities Clause is a prohibition placed on states by the federal government.

When a state gives its citizens privileges and denies those same privileges to out-of-state residents, the Privileges and Immunities Clause comes into play. Two criteria must be met before an out-of-state resident can seek protection of the Privileges and Immunities Clause. First, the out-of-state resident must have been denied a fundamental right. Second, there must be no justification for treating out-of-state residents differently from state residents.

In the U.S. Supreme Court case of *Baldwin v. Montana Fish and Game Commission*, a Montana law which denied hunting licenses to out-of-state residents was challenged.[123] In rejecting the privileges and immunities claim, the United States Supreme Court held that recreational elk hunting was not a fundamental right. Thus the right to hunt elk was not protected by the Privileges and Immunities Clause.

Limited entry, in our scenario, regulates commercial, not recreational, fishing. And the right to pursue an occupation is a fundamental right for privileges and immunities purposes.[124] In *Hicklin v. Orbeck*, the Court struck down a law that gave Alaskan residents a preference over nonresidents for jobs on the Alaska oil pipeline. The court held that the preference could only be valid if it were proven that nonresidents were a particular cause of Alaska's high unemployment rate. The court noted that most of Alaska's unemployment problem stemmed from the fact that too many residents lacked proper training or lived too far from job opportunities. Nonresidents seeking jobs were only a small part of the problem.[125]

The Gulf Council's ITQ scheme does not violate the Privileges and Immunities Clause. It is federal law that applies to all commercial fishermen in the Gulf of Mexico red snapper fishery regardless of residence or domicile. The MFCMA regulations explicitly prohibit an FMP from differentiating among U.S. citizens, nationals or resident aliens on the basis of state residence.[126] Louisiana could require all commercial fishermen, regardless of state citizenship, who fish in state waters to comply with the federal ITQ regulations. Out-of-state residents would not be treated any differently from Louisiana citizens.

Any state ITQ system that denied ITQ shares to nonresidents as a per se rule would almost certainly violate the Privileges and Immunities Clause. Allocation of ITQ shares in a state system not enacted pursuant to the federal system would have to be based on some neutral criteria such as historical catch records.

f. Commerce

The Commerce Clause of the United States Constitution was designed to facilitate commercial unity among the states. It was created to allow uninhibited movement of commercial products among the states.[127] State constitutions do not have commerce clauses.

The power to regulate interstate commerce belongs to Congress.[128] Once Congress has enacted such a regulation, any state law that conflicts with it is nullified.[129] But even when Congress has not acted, states are still restrained by the Dormant Commerce Clause. Under the Dormant Commerce Clause, states may not pass any laws that affect interstate commerce and that discriminate against businesses in other states. In short, a state cannot pass laws that amount to economic protectionism for in-state businesses.[130] Even when a state law is not discriminatory on its face, it is unconstitutional if the burden on interstate commerce outweighs the

benefits the state derives from the law.[131] States can, however, discriminate against out-of-state businesses if they can prove that the discrimination is necessary to protect the health and welfare of its citizens.[132] But even when a state has a valid reason for discriminating against out-of-state businesses, it must use the least discriminatory measures that will allow it to achieve its objective.[133] Courts are skeptical of any state regulations that discriminates against nonresidents and will impose a tough standard of review on such laws.

The Gulf Council's proposed ITQ system would not violate the Commerce Clause because it has been developed pursuant to federal authority granted by Congress under the Magnuson Fishery Management and Conservation Act. If the state were to enforce the ITQ system in state waters, the state's action would be merely carrying out the federal scheme. Therefore, there would be no violation of the Commerce Clause.

However, a state ITQ system that is not enacted as part of the federal plan may violate the Commerce Clause if the state discriminates against nonresidents in the allocation of ITQ shares. The analysis for determining if discrimination against nonresidents violates the Commerce Clause is closely related to the analysis for determining if the state has violated the Privileges and Immunities Clause.

In *Hughes v. Oklahoma* , the Court struck down a law that banned the export for sale of any minnows taken from state waters.[134] Even though the state had a valid interest in conserving its natural resources, it failed to show that nondiscriminatory alternatives were not sufficient to preserve the state interest. For example, the state could have placed limits on the number of minnows that could be taken by any dealer rather than completely banning exports. In *Pennsylvania v. West Virginia*, the court struck down a law that required all domestic needs for natural gas be met before any gas could be transported outside the state.[135] The court stated that gas, when reduced to possession, is a commodity and it belongs to the owner of the land when reduced to possession. Therefore, it is the landowner's property and he can sell it and transport out of the state if he wishes.

Excluding nonresidents from the ITQ system is not, on its face, an attempt by a state to restrict the transportation of products out of the state. Denying nonresidents ITQ shares would not directly obstruct the movement of fish out of the state as long as holders of ITQ shares were not prohibited from exporting their catch. However, discrimination against nonresidents that indirectly restrains the shipment of fish out of state could be found to violate the Commerce Clause. In *C & A Carbone, Inc. v. Clarkstown*, the Court invalidated a law that required garbage dumped in the city of Clarkstown to be processed locally.[136] The Court reasoned that the ordinance discriminated against out-of-state processors by denying them an opportunity to do the processing. Just as a city may not require garbage to be processed locally, a state may not be able to require that fish only be caught by residents. The United States Supreme Court has been extremely liberal in its interpretation of the Commerce Clause.[137] A state ITQ system that discriminates against nonresident fishermen would probably violate either the Commerce Clause or the Privileges and Immunities Clause absent some strong reason for the discrimination that is no more discriminatory than necessary to achieve the state's objective.

g. Takings

The Fifth Amendment to the United States Constitution prohibits the government from taking private property for a public purpose without due process. If the government does take private property, it must compensate the owner. Due process requires that the government show that it is necessary to take the property in order to accomplish some public purpose. There must be a rational relationship between the taking and the public purpose the taking is designed to accomplish.[138] Once due process is satisfied, the government can take the property but must compensate the owner.

There are two types of takings. The first is a permanent physical occupation. A physical occupation occurs when the government appropriates private property for its own use. The second is a regulatory taking. A regulatory taking occurs when the government places restrictions on the owner's right to use his property such that he is denied all economically viable uses of the property.[139]

Article I §4 of the Louisiana constitution is broader than the U.S. Constitution's Takings Clause in that it prohibits the state from taking or damaging private property except for public purposes and with just compensation to the full extent of the owner's loss. The article further provides that the owner has the right to a jury trial to determine the amount of compensation due, unlike the U.S. Constitution. Louisiana's Takings Clause grants the owner of property that has been taken by the government consequential damages[140], including business-related losses.[141] Unlike the U.S. Constitution's Takings Clause, the extent of the property owner's recovery is not limited to the fair market value of the property or to the reduction of the value of the property. Also, the standard for determining when a taking has occurred may be different than federal law. In *Layne v. City of Mandeville*, the court held that a regulatory taking occurs when a major portion of the property value has been destroyed.[142] Whether a taking has occurred is factual question that turns upon the facts of each case.[143]

To determine if a property interest exists, the interest must have monetary value and must be transferable. Because ITQ shares have monetary value and are transferable, they may be considered property. This would create a problem if a government wanted to terminate an ITQ system. Termination of an ITQ system arguably would be a taking of property for which ITQ shareholders would be owed just compensation. Limited entry schemes have not

thus far been considered a taking of fishermen's property under the theory that fishermen do not own fish until they catch them. Ownership of free-swimming fish is vested in the state.[144] Therefore, fishermen who are denied ITQ shares cannot claim that the state has taken their fish because free-swimming fish already belong to the state. Theoretically, ITQ shares would no more vest the shareholder with a property right in free-swimming fish than an ordinary fishing license would. The property interest vested to ITQ shareholders would not be a right to free-swimming fish themselves, but would more properly be considered a right to fish.[145] Shareholders do not own the fish, but the right to fish for them and catch them up to the limit of their assigned quotas. Neither could fishermen complain that they have been denied all economically viable uses of their fishing equipment as long as they are free to use their equipment in other commercial fisheries not subject to the ITQs.

The Gulf Council's ITQ system attempts to avoid any takings problem that might arise with its termination. The proposed plan would remain in effect for four years. After four years, the plan will be evaluated and terminated if necessary.[146] Since shareholders take the ITQ shares with the understanding that the ITQ shares can be revoked in four years, termination of the ITQ plan cannot result in a taking. A taking occurs only when a property owner is deprived of a reasonable, investment-backed expectation.[147] Since shareholders are put on notice beforehand that the ITQ shares can be revoked after four years, they cannot reasonably believe that they are entitled to hold for ITQ shares any longer than that. A state ITQ system could also avoid a takings problems with a plan of limited duration.

As we discussed previously in *Jurisich v. Hopson Marine Service Co., Inc.* the court held that the state oyster leasing system was not a donation of public property because a lease transfers less than full ownership. Likewise, the right to fish transfers something less than full ownership in free-swimming fish. Of course, a distinction might be drawn between conveying public property and conveying a right in public property. The reasoning used to validate the oyster leasing system would not necessarily be fully applicable to a takings claim since the Louisiana Constitution's Takings Clause protects property rights that are less than full ownership.[148]

Even if ITQ shares would not vest recipients with a property right in free-swimming fish, those fishermen who are denied ITQ shares might claim that the fishing licenses they previously held were property rights that can only be taken with due process.[149] State law determines whether there is a property right to fish.[150] Under Louisiana law, there is no right to fish commercially in state waters.[151] Of course, it is conceivable that a court would find that the state had conferred a property right to fish commercially even though the state chose not to call it a property right. There are cases that serve as authority for the argument that there is a property right in a commercial fishing license.[152] It should be noted that property for due process purposes under the Fifth Amendment is not quite the same as property for takings purposes. Property rights that are legislatively created may be rescinded with minimal due process that does not include compensation for the property right that has been revoked. For example, the Court has held that the right to receive welfare, once conferred, is a property right for due process purposes that can only be revoked after a hearing. However, in such a case, the government would not have to pay compensation for this legislatively created property right.[152.1]

Recently a state district court declared parts of a ban on the use of gill nets in Louisiana's saltwater areas[153] unconstitutional and held that former La. R.S. 56:640.3[154] granted a property right to fish commercially.[155] The court held that Act 1316 failed to adequately compensate commercial fishermen adversely affected by the gill net ban. The court, in determining that the property right to fish commercially had been taken, stated that "...commercial fishermen lost most, if not all, of their business. No longer were they able to meet the demands for the fish they had been catching."[156] The court held that the Louisiana Takings Clause is broader than the Fifth Amendment's Takings Clause in that it requires compensation to be paid even when the state revokes a property right that has been legislatively conferred upon a class of citizens.

The Louisiana Supreme Court has not yet reviewed the case, but there are obvious distinctions between the gill net ban and an ITQ system. The gill net ban prohibited fishermen from using a method of catching fish. It affected the ability of commercial fishermen to catch fish in large quantities, regardless of the target species. An ITQ system would only restrict the taking of one species. Therefore, the hardship endured by fishermen would be less than that imposed by the gill net ban because fishermen would still be able to use their equipment to fish for other species in state waters. Presumably, an ITQ system would restrict the right to fish for one species. A gill net ban restricts the right to fish in general. Therefore, an ITQ system is probably less likely to be considered a taking of the right to fish, if it is indeed a property right. But the determination of whether there has been a taking is a factual question to be determined on the facts of each particular case. Recent takings legislation[157] and the court decisions discussed above[158] may indicate a change in Louisiana takings law but these changes are too new to make reasoned predictions.

Conclusion

The Gulf Council's proposed ITQ system for red snapper complies with federal constitutional law. Though its implementation may be delayed or prohibited by changes in federal law, the reason for its development remains. Overfishing problems will continue to worsen as growing world populations and economic factors exert more pres-

sure on fish stocks. Limited entry is a sound, though not perfect solution to overfishing. Some Louisiana fish stocks have been overfished in the past and it will be necessary for the state to continue to guard against overfishing. Some of Louisiana's fish stocks may need to be protected by state limited entry systems such as an ITQ system. Louisiana constitutional and statutory law may present more obstacles to a state ITQ system than federal law. With careful drafting Louisiana should be able to devise ITQ systems for its fish stocks that satisfy both federal and state law.

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[1]"The Tragedy of the Oceans," *The Economist*, Vol. 330.7853-55 March 19-25, 1994 pp. 21-24. See also Michael Parfit, "Exploiting the Ocean's Bounty: Diminishing Returns," *National Geographic*, Vol. 188, No. 5, November 1995, p. 2.

[2] "Seafood Trade and the Environment: Balancing a Shrinking Resource" *Maryland Marine Notes*, Vol. 12, No. 3, Maryland Sea Grant, April 1994, pp. 3.

[3] Michael Parfit, "Exploiting the Ocean's Bounty: Diminishing Returns," *National Geographic*, Vol. 188, No. 5, November 1995, p. 2.

[4] Amendment 9 to the Reef Fish Fishery Management Plan for the Reef Fish Resources in the Gulf of Mexico; March 31, 1994 p. 5.

[5] *Id.*

[6] 50 C.F.R. §602.11(c) (1995).

[7] S. 39, 104th Session of Congress (1995).

[8] Amendment 9 to the Reef Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico, March 31, 1994 pp. 3-4.

[9] 60 Fed.Reg. 44825 (1995) (to be codified at 50 C.F.R. §641).

[10] Environmental and Energy Study Institute Weekly Bulletin, Volume 1996, Issue 12, April 15, 1996.

[11] 16 USC §1856(b).

[12] 60 Fed.Reg. 44825, 44828 (1995) (to be codified at 50 C.F.R. §641).

[13] Personal communication with Harry Blanchet, acting Finfish Program Manager, Marine Fisheries Division, Louisiana Department of Wildlife and Fisheries, May 30, 1996. Notes on file at the offices of the Sea Grant Legal Program. LA. Admin. Code tit. 76, §335 (1993).

[14] H.B. 1648, Reg. Sess., La. (1990).

[15] 50 C.F.R. §255.

[16] 50 C.F.R. §652.20, (1995).

[17] Pearse, "Open Access to Private Property," 23 Ocean Development and International Law 72.

[18] See supra note 1.

[19] See supra note 17, at 82.

[20] Kathy Hart, "Limited Entry: A Fisheries Management Option," *Marine Advisory News*, North Carolina Sea Grant.

[21] 50 C.F.R. §602.15(c)(1) (1995).

[22] 50 C.F.R. §602.11(d) (1995).

[23] 50 C.F.R. §602.11(f) (1995).

[24] 16 U.S.C.A. §1802(21) (West 1985 & Supp. 1995); 50 C.F.R. §602.11(f).

[25] 50 C.F.R. §602.11(f)(3) (1995).

[26] 16 U.S.C.A. §1802(21)(West 1985 & Supp. 1995); Amendment 9 to the Reef Fish Fishery Management plan for the Reef Fish Resources of the Gulf of Mexico March 31, 1994.

[27] S. 39, Sec 103(7), 104th Session of Congress (1995).

[28] Biliana Cicin-Sain, "Evaluative Criteria for Making Limited Entry Decisions: An Overview," *Management Tool*, p. 230.

[29] 50 C.F.R. §602.14(a) (1995). 16 U.S.C.A. §1851(4) (West 1985 & Supp. 1995).

[30] 50 C.F.R. 602.11(g).

[31] Jon David Weiss, "A Taxing Issue: Are Limited Entry Fishing Permits Property?" 9:1 Alaska L. Rev. 93, 106 (1992).

[32] Matthew Landsford and Laura S. Howorth, "Legal Impediments to Limited Entry Fishing Regulation in the Gulf States," *Natural Resources Journal*, (1994) Vol. 34 p. 411 (pinpoint citation not available).

[33] 60 Fed.Reg. 44825, 44827 (to be codified at C.F.R. 50 § 641).

[34] 16 U.S.C.A. §1801 et seq. (West 1985 & Supp. 1995).

[35] Presidential Proclamation 5030, March 10, 1983.

[36] *Coastal States and the Exclusive Economic Zone*, Coastal States Organization, Washington, D.C., April 1987.

[37] Texas and Florida have a nine mile wide territorial sea on the Gulf Coast.

[38] 50 C.F.R. §601.33 (1995).

[39] 50 C.F.R. §602.10(b)(1) (1995).

[40] 60 Fed.Reg. 44825 (1995) (to be codified at 50 C.F.R. §641).

[41] *Id.*

[42] *Id.*

[43] 60 Fed. Reg. 44485, 61200 (1995) (to be codified at 50 C.F.R. §641).

[44] 60 Fed. Reg. 61200 (1995) (to be codified at 50 C.F.R. §641).

[45] 61 Fed. Reg. 18 (1996) (to be codified at 50 C.F.R. §641).

[46] *Id.*

[47] 61 Fed. Reg. 7751 (1996) (to be codified at 50 CFR §641).

[48] *Id.*

[49] HR 3019 §210, 104th Congress, 2nd Session, (1996).

[50] Personal communication with Wayne Swingle, Executive Director, Gulf of Mexico Fishery Management Council, 5-1-96. Notes on file at the offices of the Sea Grant Legal Program.

[51] *Id.*

[52] 50 C.F.R. §641.10 (1995).

[53] 60 Fed. Reg. 44825, 44827 (1995) (to be codified at 50 C.F. R. §641).

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] 16 U.S.C.A. §1811 (West 1985 & Supp. 1995).

[58] 16 U.S.C.A. §1856 (West 1985 & Supp. 1995).

[59] *Southeastern Fisheries Association, Inc. v. Mosbacher*, 773 F.Supp. 435 (D.C. Cir., 1991).

[60] See text accompanying Supra note 14.

[61] La. Rev.Stat. 56:640.3(B) (West 1977 & Supp 1996).

[62] *Id.*

[63] *Id.*

[64] *Louisiana Seafood Management Council v. Louisiana Wildlife and Fisheries Commission*, No. 419,467-Division D (Dist. La. May 22, 1996).

[65] Amendment 8 and Environmental Assessment (Effort Management Amendment) To The Reef Fish Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico, pp. 26-7, June 1995.

[66] 16 U.S.C.A. §1851(a)4 (West 1995).

[67] Personal communication with Wayne Swingle, Executive Director, Gulf of Mexico Fishery Management Council, 5-9-96. Notes on file at the office of the Sea Grant Legal Program.

[68] *Id.*

[69] *Id.*

[70] 16 U.S.C.A. §1851(a)4 (West 1995).

[71] *Sea Watch International v. Morbacher*, 762 F. Supp. 370, 380 (D.C. Cir. 1991).

[72] *Id.*

[73] *Id.*

[74] 15 U.S.C.A. §1-11 (West 1985 & Supp. 1995).

[75] 15 U.S.C.A. §12-27 (West 1985 & Supp. 1995).

[76] 15 U.S.C.A. §41-58 (West 1985 & Supp. 1995).

[77] William J. Milliken, "Individual Transferrable Fishing Quotas and Antitrust Law," 1 Ocean and Coastal Law Journal 35 (1994).

[78] *Id.* at 47.

[79] La. Rev.Stat. 51 §§121 - 139 (1982) known as

the "liitle Sherman Act" actually offers more protection against restraint of trade than the federal laws. See: Joseph E. Conley, Antitrust Law 43 LA. L. Rev. 283.

[80]La. Rev.Stat. 51 §122-124 (West 1977 & Supp. 1996).

[81] La. Const. of 1974, art IX, §1 and La. Rev.Stat. 640.3(A) (West 1977 & Supp. 1995).

[82]La. Rev.Stat. 56:640.3(c) (1995 West).

[83] La. Const. of 1974 art. VII §14.

[84]La. Rev. Stat. 56:423(E) (1995 West).

[85]*Jurisich v. Hopson Marine Service Co, Inc.*, 619 So. 2d 29 1111 (4th Cir. 1993).

[86]*Id.* at 1114.

[87]*Id.*

[88] *Id.*

[89]La. Const. of 1974, art VII, §14 (1996).

[90]Louisiana Department of Wildlife and Fisheries memo dated 10-11-95 on file at the offices of the Sea Grant Legal Program.

[91]*Sea Watch International v. Mosbacher*, 762 F. Supp. 370 (D.C. Cir, 1991).

[92]*Id.* at 375.

[93]*Id.* at 376.

[94]*Id.*

[95]*Id.*

[96]619 So. 2d 1111 (4th Cir. 1993).

[97]*Id.* at 1114.

[98]*Id.* at 1115.

[99]*Id.*

[100]Even without the constitutional and statutory provisions implementing Louisiana's Public Trust doctrine, the state has the authority to protect public trust resources including living resources, on the basis that the State is regulating and managing its own property which is held in trust for the citizens of the state. This is the general premise of the Public Trust Doctrine. See: "Putting the Public Trust Doctrine to Work," Coastal States Organization, (1990)xxiii and James G. Wilkins and Michael Wascom, "The Public Trust Doctrine in Louisiana", 52 LA. L. Rev. 861 (1992).

[101]16 U.S.C.A. §1854 (West 1985 & Supp. 1995).

[102]60 Fed.Reg. 61209 (1995) (to be codified at 50 C.F.R. §641).

[103]*Id.*

[104]*Id.*

[105] *General Motors Corp. v. Romein*, 112 S.Ct. 1105 (1992). *Duke Power Co. v. Carolina Environmental Study Group Inc.* 438 U.S. 59 (1978).

[106] *Burns Harbor Fish Company v. Ralston*, 800 F.Supp. 722 (1992).

[107] Id.

[108]LA. Const. of 1974, Art. I , §2 (1977).

[109]Records of the Louisiana Constitution Convention of 1973: Convention Transcripts 1001; Hargrave, Declaration of Rights of the Louisiana Constitution of 1974, 35 La. L. Rev. 1, 4 (1974).

[110]*State in Interest of Dino*, 359 So.2d 586 (La. 1978), *Wilson V. City of New Orleans*, 479 So2d 891 (La 1985), and *In re-adoption of BGS* 556 So2d 545 (La 1990). See Richard P. Bullock, "The Declaration of Rights of the Louisiana Constitution of 1974: The Louisiana Supreme Court and Civil Liberties," 51 La. L.Rev. 787, (1991).

[111]*State v. Brown*, 648 So2d 872, 877 (La 1995). There the court states that "It is well settled that the substantive guarantee of due process in the federal and state constitutions requires only that the legislation have a rational relationship to a legitimate state interest." *State v. Brown* is a criminal case but the same type of analysis has been used by Louisiana Supreme Court in civil cases as well. In *Crier v. Whitecloud*, 496 So.2d 305, 309 (La 1986), the court found limitation on medical malpractice liability to be "rationally related to the state's interest in reasonable medical costs and readily available healthcare." In *Theriot v. Terrebonne Parish Police Jury*, 436 So.2d 515, 520 (La 1983), the court in analyzing the constitutionality of a parish statute limiting bingo or keno games, said: "The substantive guarantee of due process in the federal and state constitution requires only that the legislation have a rational relationship to a legitimate state interest." "An ordinance will be upheld if there exists a reasonable relationship between the law and the public good." In *Babineaux v. Judiciary Commission*, 341 So.2d 396, 400 (La. 1977), the court said: "The essence of substantive due process is protection from arbitrary and unreasonable action." Some Louisiana lower court decisions also seem to blur the distinction between federal and state constitutional due process protections. See *West Central Louisiana Entertainment Inc. v. City of Leesville* 594 So2d 973, 976 (La. App Cir 1992), and *Louisiana Horticulture Commission v., Kuharcik*, 335 So.2d 56, 57 (La.App. 4th Cir, 1976).

[112]*Korematsu v. U.S.*, 323 U.S. 214 (1944).

[113]*Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

[114]*Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

[115]*Louisiana Associated General Contractors, Inc. v. State*, 95-2105 (La. 3/8/96), 669 So.2d 1185. See also *Sibley v. Board of Supervisors of Louisiana State University*, 477 So.2d 1094 (La. 1985). Article 1, Section 3 of the Louisiana Constitution states: "No person shall be denied the equal protection of the laws. No law shall discriminate a person because of race or religious beliefs, ideas, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime." This provision has been interpreted to mean that, where none of the enumerated categories are involved, a law will be upheld if it bears a rational relationship to a valid state objective.

[116]*State v. Chisesi*, 175 So. 453 (1937).

[117]*City of Alexandria v. Breard* , 47 So.2d 553 (1950), aff'd. , 341 U.S. 622, reh. denied, 342 U.S. 843.

[118] 553 So.2d 442 (La. 1989). See also *The Flagship Center, Inc. v. The City of New Orleans*, 587 So.2d 154 (La. App. 4 Cir. 1991).

[119]175 So. 453 (La. 1937). Although this case was decide before the 1974 State Constitution was enacted, is still a valid illustration of the rational basis standard of review.

[120]60 Fed.Reg. 44825 (1995) (to be codified at 50 CFR §641).

[121]U.S. Const. art. IV, §2 and Amend. XIV. The 14th Amendment contains a Privileges or Immunities Clause. However, the United States Supreme Court's interpretation of this provision in *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 1873, rendered it inapplicable to situations in which states discriminate.

[122]*Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978). Note also that the Fourteenth Amendment contains a Privileges or Immunities Clause but its interpretation in *The Slaughterhouse Cases* , 83 U.S. (16 Wall.) 36 (1873), the United States Supreme Court's interpretation of that clause rendered it inapplicable to most instances where states discriminate.

[123]*Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371 (1978).

[124]Foutz, Thomas Keasler, "Constitutional Law—Privileges and Immunities Clause, Article IV § 2—Nonresidents Are Not Guaranteed Equal Access to a State's Recreational Resources," 53 Tul. L. Rev. 1531 (1979).

[125]437 U.S. 518 (1978).

[126]50 C.F.R. 602.14(a) (1995).

[127]Berry F.Laws III, "Constitutional Law—Montana's Discriminatory Licensing Structure for Nonresidents: Commerce Clause Analysis. *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978)" *XIV Land and Water L. Rev. 303, 304 (1979).*

[128]U.S. Const. Art. 1, §8. *Gibbons v. Ogden*, 9 (Wheat 1) 1824.

[129]*Id.*

[130]*Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

[131]*Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

[132]*Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

[133]*Id.*

[134]441 U.S. 322 (1979).

[135]262 U.S. 553 (1923).

[136]114 S.Ct. 1677 (1994).

[137]In *Wickard v. Filburn*, 317 U.S. 111 (1942), the court held that the Agricultural Adjustment Act of 1938 allowed the government to set quotas for wheat production, not only for wheat that would be sold intrastate or interstate, but also on wheat raised solely for consumption on the very farm on which it was grown. The court reasoned that growing wheat for consumption only still affected the interstate market for wheat because growing wheat for consumption decreased the

amount of wheat that the farmer would have to buy in the interstate market. In *Katzenbach v. McClung* , 379 U.S. 294 (1964), the court held that an Alabama restaurant violated the Commerce Clause when it refused to serve blacks. The court reasoned that race discrimination affected interstate commerce because it could conceivably alter the interstate travel plans of blacks. They would not travel through those areas that would not provide them with accommodations.

[138]*Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994).

[139]*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, (1992). We think that the U.S. Supreme Court's opinion in this case stood only for the proposition that, as a per se rule, whenever a property owner has been deprived of all economically viable uses of his property, there has been a taking. The court probably did not mean to say that a property owner must be deprived of 100 percent of all economically viable uses before a valid takings claim arises. It is likely that if a property owner, for example, were deprived of 80 percent of the economically viable use of his property, the court might still find that a taking had occurred.

[140]*State Department of Transportation and Development v. Chambers Investment Company, Inc.*, 595 So.2d 598 (La. 1992).

[141]*Layne v. City of Mandeville*, 633 So.2d 608 (La. App. 1 Cir. 1993).

[142]633 So.2d 608 (La. App. 1 Cir. 1993). Also, the state legislature has determined in Act 302 of the 1995 Regular Session (HB 2199) that the owners of private agricultural property and forest land can bring a takings claim against the state if the state causes a 20 percent reduction in the value of the property or a loss of 20 percent of the economically viable uses of the property. While this law applies only to forest land and agricultural land, it demonstrates that even a 20 percent reduction in value or loss of economically viable uses is sufficient to constitute a taking.

[143]*Id.*

[144]*LeClair v. Swift*, 76 F.Supp. 729 (D. Wis. 1948), La. Rev.Stat. 56:3, La. Rev.Stat. 56:340.3, La. C.C. Art. 3413.

[145]Christopher L. Koch, "A Constitutional Analysis of Limited Entry," pp. 251-268, p. 265.

[146]60 Fed.Reg. 44825 (1995) (to be codified at 50 CFR §641).

[147]*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

[148]*State Dept. of Transportation and Development v. Chambers Investment Company, Inc.*, 595 So.2d 598 (La. 1992).

[149]*LaBauve v. Louisiana Wildlife and Fisheries Commission*, 444 F. Supp. 1370 (E.D. La. 1978). Note that denying a fisherman the right to use his equipment may also be grounds for a takings claim. Whether this would be a taking would turn on whether denying some uses of fishing equipment was itself a taking or a business-related loss of the denial of the right to fish. If it is merely a consequence of the denial of the right to fish, and denial of the right to fish is not a taking, then there may be no recovery for loss of use of the equipment.

[150]*LaBauve v. Louisiana Wildlife and Fisheries Commission*, 444 F.Supp. 1370 (E.D. La. 1978).

[151]*Id.*

[152]*Id.*

[152.1]*Goldberg v. Kelly*, 397 U.S. 254 (1970).

[153]La. Rev. Stat. 56:320.1.

[154]In 1995 the legislature amended La. R.S. 56:640.3 and specifically stated that the right to fish does not convey any property right or ownership in the fishery resource. The former version of the statute did not contain this statement. There is a strong argument that this change is merely an interpretive revision that clarifies what the law had always been. Cases such as *LaBauve v. Louisiana Wildlife and Fisheries Commission*, 444 F.Supp. 1370 (E.D. La. 1978), held that there is right to fish commercially in state waters. Thus, the revision that states that there is no property right is not necessarily an indication that the previous version of the statute conferred a property right.

[155]*Louisiana Seafood Management Council v. Louisiana Wildlife and Fisheries Commission* , No. 419,467-Division D (D. La. May 22, 1996).

[156]*Id.* at 4.

[157]La. Rev. Stat. 3:3610, 3:3623, (West 1977 & Supp. 1996).

[158]See supra note 155.

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