

ESSAY QUESTION NO. 2

Answer this question in booklet No. 2

Dungytown, Alaska is known worldwide as the Dungeness crab capital of the world. Years ago, the Dungytown Crabber's Co-op (the Co-op) began to aggressively market its members' crab, creating a certain international mystique around Dungytown crab and Dungytown crabbers. But recently, the market price for Dungytown crab has crashed, forcing many of the Co-op's members out of the fishery. The price decline has resulted in an over-harvest of the crab by the remaining crabbers. The Dungytown crab stock is precipitously declining.

Due to the fame of its crab, Dungytown has become a tourist and cruise ship destination. The Co-op realized that out-of-state tourists would pay hundreds of dollars for the opportunity to go charter fishing (crabbing) on a real Dungytown crab boat with a real Dungytown crabber (albeit one with a charter captain's license). Since they would be sportfishing, the tourists could keep the Dungytown crab that they caught up to the sport harvest limit of 20 crabs per day.

But there is a hitch to this idea. The Alaska Department of Fish and Game, citing the declining crab population, has declared that only Alaska residents may sport harvest Dungeness crab in the Dungytown area. All of the waters in which the Co-op wants to charter crab are within the regulatory jurisdiction of the State of Alaska. Since virtually none of the Dungytown tourists are Alaska residents, this regulation essentially precludes the Co-op from engaging in their charter crabbing idea. The Co-op wants to challenge the "resident only" regulation on the grounds that it violates both the United States and the Alaska Constitutions.

1. Assuming the Co-op has standing to sue, please discuss the potential constitutional claims that it could raise to invalidate the regulation.

GRADER'S GUIDE

*** QUESTION NO. 2 ***

SUBJECT: CONSTITUTIONAL LAW

Applicants are expected to argue that the Dungeness crab regulation violates the federal Commerce Clause, the federal Privileges and Immunities Clause and the federal and Alaska Equal Protection Clauses. It is not expected that applicants know the seminal Alaska case that discusses both the federal and State Constitutional ramifications of “resident only” fish and game harvest regulations is Shepherd v. State, 897 P.2d 33 (Alaska 1995). But, Shepherd provides a useful template from which to analyze the Dungeness question.

In Shepherd, hunting guides, who themselves were Alaska residents, but who principally catered to non-resident hunters, challenged the “resident only” hunting regulations that had been enacted in specific Game Management Units. The state excluded nonresidents from hunting in these particular Game Management Units reasoning that the game population in these areas could not be sustained if both residents and nonresidents were permitted to hunt.

1. State Ownership of Fish and Game (15 pts.)

A. Federal Authority creating state ownership (5 pts.)

Intertwined into all of the potential federal and state constitutional claims is the following question: who owns the fish and game resources found in Alaska? Put another way: Does the state of Alaska have the authority to preclude non-residents from sport crabbing in Dungeness? The bottom line is probably yes.

The Supreme Court held in Baldwin v. Fish and Game Comm'n, 436 U.S. 371 (1978) that states owned or held in trust for their own citizens naturally occurring fish and wildlife and were not required to allow nonresidents to share in their harvest. Id. at 384-85.

B. Specific Articles of the Alaska Constitution that relate to Fish and Game Resources (10 pts.)

So, under federal law the State of Alaska can prefer resident crabbers over non-resident crabbers. The resident preference will probably pass muster under Alaska law and the Alaska Constitution also.

The Alaska Supreme Court has rejected the notion that fish and game resources are held in a per se “public trust”, but rather has “used the analogy

of a public trust to describe the nature of the state's duties with respect to wildlife and other natural resources meant for common use." Brooks v. Wright, 971 P.3d 1025, 1933 (Alaska 1999).

The foundation for this "trust like" relationship is found in Article VIII (Natural Resources) of the Alaska Constitution, specifically Sections 2-4, which state:

Section 2. General Authority. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Section 3. Common Use. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Section 4. Sustained Yield. Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

Citing these three sections of Article VIII, the Shepherd court: stated:

The State of Alaska devotes substantial resources to the protection and management of fish and wildlife. As the trustee of those resources for the people of the state, the state is required to maximize for state residents the benefits of state resources. In cases of scarcity, this can often reasonably be accomplished by excluding or limiting the participation of nonresidents. In such circumstances, the state may, and arguably is required to, prefer state residents to nonresidents, except when such preferences are in conflict with paramount federal interests. Shepherd at 41-42.

Some applicants might argue that allowing charter crabbing will maximize for state residents the benefits of state resources because the Co-op members and their community will be enriched by the proceeds from expensive crab charters.

2. Federal Constitutional Issues (“paramount federal interests”) (60 pts.)

A. Commerce Clause (20 pts.)

Applicants will argue that the preclusion of nonresidents from crabbing in Dungeness town violates the Commerce Clause of the federal Constitution. The Commerce Clause (Article I, § 8) states that the Congress “shall have power . . . [t]o regulate commerce with foreign nations, and among the several states and with the Indian Tribes.”

Analysis should start with the question of whether the right to sport crab is an article of interstate commerce. If “potential crab” are an article of interstate commerce, then the State of Alaska bears the very high burden “proving that the [regulation] serves a legitimate local purpose and that this purpose could not be served as well by available non-discriminatory means.” Carlson v. State Commercial Fisheries Entry Commission, 919 P.2d 1337, 1339 n. 6 (Alaska 1996) (internal citations and quotations omitted).

Arguably, the state, by seeking to protect a stressed resource, has a legitimate purpose in regulating the harvesting of Dungeness town crab. On the other hand, applicants could argue that lowering the daily limit of crab from 20 to perhaps 10 or 5 would allow both residents and non-residents to enjoy the scarce resource.

However, the Shepherd Court unequivocally held that “unharvested game is not an article of interstate commerce.” Shepherd at 41. The Shepherd court further noted that the U.S. Supreme Court has repeatedly held that fish and game do not enter into the stream of commerce until they are caught. Id.

B. Privileges and Immunities Clause (20 pts.)

Applicants will also likely argue that the Dungeness town crab regulation violates Article IV, sec. 2, of the federal Constitution, the Privileges and Immunities Clause, which states in relevant part: “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”

The United States Supreme Court has held that the Privileges and Immunities Clause is not absolute and a claim of violation of the clause must go through a two-step inquiry. Carlson at 1341 (internal citations omitted).

First, the activity from which nonresidents are precluded must be sufficiently basic to the livelihood of the nation as to fall within the purview of the Privileges and Immunities Clause. Id. (internal citations omitted).

Second, even if the regulation denies nonresidents a protected privilege, the regulation will be not be invalidated unless it is shown that the restriction is

not closely related to the advancement of a substantial state interest. Id. (internal citations omitted).

It will be difficult to successfully argue that nonresident charter crabbing is sufficiently basic to the livelihood of the nation as to be protected by the Privileges and Immunities Clause. Indeed, as the Shepherd Court noted, “recreational hunting is not an activity protected under the Privileges and Immunities Clause of the federal Constitution.” Shepherd at 41. Likewise, one could conclude that recreational crabbing is not a protected activity.

C. Federal Equal Protection (20 pts.)

Applicants will likely also evaluate the Dungeness crab regulation under the Fourteenth Amendment of the United States Constitution that states in relevant part: “No state shall deny to any person within its jurisdiction the equal protection of the laws.” The modern analysis under the federal Equal Protection Clause is divided into three parts. First, the United States Supreme Court has reserved its most searching review --strict scrutiny-- for legal classifications that burden suspect classes of individuals or that burden a fundamental right. Only classifications based on race, alienage, and national origin merit strict scrutiny. Strict scrutiny requires that the government show that its law is narrowly tailored to the achievement of a compelling government interest. City of Richmond v. J.A. Croson, 488 U.S. 469 493-94 (1989).

A strict scrutiny analysis clearly does not apply to the Dungeness crab regulation as the regulation does not implicate race, alienage or national origin.

Second, the Supreme Court applies a less searching form of review--intermediate scrutiny--to legal classifications that burden quasi-suspect classes. Thus far, the Supreme Court has applied intermediate scrutiny to classifications based on gender and illegitimacy. See, e.g., Mills v. Habluetzel 456 U.S. 91, 99 (1982) (illegitimacy); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (gender). Under intermediate scrutiny, the government must show that its law bears a substantial relationship to an important government interest. Hogan at 724.

In the Dungeness matter since neither gender nor legitimacy are in play, then the crab regulation would not be subject to intermediate scrutiny.

Finally, then Supreme Court reviews all other legal classifications under its most deferential standard of review --rational basis. Under rational basis review, the government only need show that the challenged law rationally furthers a legitimate state interest. Zobel v. Williams, 457 U.S. 55, 60 (1982).

The Dungeness crab regulation will probably survive rational basis scrutiny. Protecting crab populations is certainly a legitimate governmental interest and the ban on non-resident crabbers is rationally related to the attainment of this legitimate state interest.

This was the approach adopted by the Shepherd court which applied rational basis scrutiny and upheld the state regulation banning non-resident moose hunters from certain Game Management Units.

3. Alaska Constitutional Issues: Equal Protection (25 pts.)

Article I, section 1, of the Alaska Constitution provides that all persons are “entitled to equal rights, opportunities, and protection under the law.” This clause requires equal treatment only for those who are similarly situated. Shepherd at 44.

Applicants can certainly argue that the Dungeness crab regulation violates Alaska’s Equal Protection Clause because it treats non-resident crabbers differently from resident crabbers and that, but for their residency status, the crabbers are similarly situated. This framing of classes was rejected out of hand by the Shepherd court, which held: “Resident and nonresident recreational users of Alaska fish and game are not similarly situated. ... [T]he state owns these resources and is required to manage them as trustee for the benefit of its citizens. The preference for Alaska residents with respect to natural resources is explicit in the state constitution and serves to differentiate resident from nonresident user groups.” Id.

Applicants should discuss that, unlike the three levels of scrutiny in the federal equal protection analysis, Alaska applies a flexible, three-step sliding-scale approach to equal protection analysis. Under this approach, the court initially establishes the nature of the right allegedly infringed by state action, increasing the state's burden to justify the action as the right it affects grows more fundamental: at the low end of the sliding-scale the state needs only to show that it has a legitimate purpose, but at the high end--when its action directly infringes a fundamental right--the state must prove a compelling governmental interest. State v. Planned Parenthood, 35 P.3d 30, 42 (Alaska 2001).

Next the court examines the importance of the state purpose served by the challenged action in order to determine whether it meets the requisite standard. Id. The court last considers the particular means that the state selects to further its purpose. A showing of substantial relationship between means and ends will suffice at the low end of the scale. At the high end, the state must demonstrate that no less restrictive alternative exists to accomplish its purpose. Id.

Because sport crabbing is not likely a fundamental right, or even an important right, it seems that all the state must show here is that: (1) there exists a legitimate reason for treating resident crabbers differently from non-resident crabbers (here protecting crab stocks); and (2) if banning nonresidents from crabbing bears a fair and substantial relationship to protecting crab stocks. It is likely that the nonresident ban would pass this low level of scrutiny.

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1. The Co-op in all likelihood has standing to bring this claim. The Federal elements of standing is that the claimant must have suffered injury + that there be redressability. The AK state requirement is more lenient in requiring there be interest in the ~~pending~~ possible litigation.

Co-op has a interest in this litigation.

The ~~litig~~ regulation completely depletes any value in their charter license since a majority of its business is from out of state tourists.

2. The Coop could bring a number of claims.

Coop could bring a taking claim in violation of 5th amendment + AK Const against taking w/o just compensation. It could bring a procedural due process claim + a right to travel claim ~~under the~~ + a claim under the P+I clause of the U.S. Constitution.

- Taking clause

Both the U.S. Const + the AK constitution recognized that no property, life or liberty shall be taken w/ out ~~due process of law~~ just compensation. AK includes damages ^{takings,} in P+I clause

The test for whether there has been

is whether there is a property right at issue.

The Co-op could argue that their charter captains licenses are property. The next

step is to determine if there has been a ~~per se~~ taking, a) physical occupation or b) complete diminution in economic value,

the state could argue that neither applies.

Noteworthy, a taking can be physical occupation or

regulatory which is the case here. There is no physical taking + no complete economic taking.

Then ^{the} court would then ask (1) what ~~is~~ the ^{government's} interest is (2) What ^{is} the economic ~~are the~~ ~~deprivative~~ impact on the private interest + ^(?) what is the investment ~~effects of not adding safeguards to protect the interest +~~ backed expectations.

(3) ~~burden on the government if safeguards imposed~~ including cost of regulatory + administrative duties.

Here the ^{government} ~~private~~ interest is ~~to protect~~ ^{to protect} the crabs population, ~~license + the livelihood for a company.~~ The regulation doesn't completely drain all value from the licenses, though the facts do not indicate other fishing sources, ^{are available} they still may be able to make a little from fishing for other fish. The investment backed expectation is low since they are not buying equipment as an investment in this venture; preexisting. The government interest is an important interest in protecting the crabs population. But could they ^{may} be less restrictive and meet the same goals + if applying additional safeguards such as hiring to monitor limits ~~to~~ etc. the burden doesn't seem as great as depleting most of the value from Co-ops licenses.

There is ^{not} a valid ~~argument~~ argument that ~~there is a taking~~ for a taking Gov. interest outweighs.
 - Privileges + Immunities clause

The U.S. Constitution states that the residents of the several states are entitled to not be discriminated against on account of residency.

In order for a regulation to survive ~~that~~

discriminating against non-residents it

must be an important gov. interest + a

substantial nexus to the particular "evil"

supposed to be represented by non-residents.
 must exist.

Noteworthy is that AK has recognized that

it's o.k. to charge more for a hunting licence

if non-resident than a resident.

Here the regulation strictly prohibits

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allows non-residents from ~~filibustering~~ ~~put~~ ~~always~~ residents. The interest is important but the disparate treatment between residents + non-residents will not survive the heightened scrutiny + ~~the court may void the state~~ ~~to avoid~~ the regulation may be struck down as violating the Privileges + Immunities Clause.

- The U.S. Coast + AK also recognizes the Right to travel. This is recognized as a fundamental Right + would have to survive ~~strict~~ scrutiny meaning the State would have to have a compelling interest. The test for whether a regulation

Violates the right is if

1. It facially impedes travel
2. It impliedly impedes
3. it penalizes.

the Coop could argue that the regulation discourages tourist from traveling to Pungy town

but this claim would most likely be dismissed

since tourist are still free to travel there

but not fish.

Procedural Due Process.

When a right liberty or property is taken by a regulation individual are entitled to due process of law i.e., notice, right to be heard + hearing before a fair tribunal.

How much due process depends on the ⁽¹⁾ private interest affected (2) the effect of deprivation from the existing gov. Action (3) the burden to the gov. to use additional safeguards to protect the private interest.

d/9

- (1) The Private interest:
 - a. ~~is the charter license = property~~
right to make a living
- (2) The deprivation of the right ~~to the~~ by the regulation is ^{almost} complete.
- (3) additional safeguards - burden.
Since the state always ~~residents~~ to crab arguable the cost to allow a small limit for non-residents would not be a heavy burden on the state since safe guard would be already in place to monitor limits of residents.

~~Co-op may succeed on a due process~~ Co-op is entitled to some due process + should be allow to state grievance + present other alternative ways to preserve the crab populations.

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2)

We are given that there is standing to sue, and thus there is not an issue of lack of ripeness, and it is not clear whether the coop can sue for the out-of-staters rather than just for themselves, since they do not have a business in being, or a plan currently working, and without the Co-op itself being made up of out-of-staters.

Coop could argue equal protection clause, commerce clause, privileges and immunities.

Privileges and immunities clause of the XIVth Amendment: Applies against the states. Citizens may not be denied the rights of other citizens of the United States. Cases regarding the State taking action to deny to non-residents certain privileges and immunities that state residents have made a distinction between livelihood fishing and recreational use. Specifically, it has been held impermissible to require \$2,000 for a commercial fishing license to an out of stater when residents paid far less (\$25), and it has been held constitutional to charge out-of-staters higher fees for a Sport license. Here and only should like to assert a Constitutional violation of their prospective contracts, however the Constitutional provision deals with contracts already in existence. Rational basis scrutiny would require the State only to show that it was permissibly exercising its police power to preserve resources of the State, for a legitimate interest. The police power is a pretty strong argument for the state, and the State would probably win on this, except that this appears to be strongly designed to discriminate against out-of-staters without any pretense. Such De Jure denial of rights would subject this statute to strict scrutiny, with the State bearing the burden to show it was necessary for a compelling purpose. (See discussion in right of travel, below.)

Citizens of the United States are granted equal protection under the laws of the United States

under the Constitution, and the Co-op would want to assert that the out-of-staters are being impermissibly discriminated against. Non-residents are not a suspect class, the coop is not in a protected class, it is not being denied first amendment rights, it is not being denied privacy. Thus the plaintiffs under that analysis will have to prove under a rational basis scrutiny that it had a legitimate purpose. The State will assert that it is using its police power to regulate the health and welfare of the State and its resources. Normally that is a pretty strong argument for the state.

However, if the fundamental right of Right to Travel is asserted, stating that barring such fishing interferes with this right to travel between the States, and this does interfere with that, then the burden would switch to the State under strict scrutiny to show it was necessary to enact this law to achieve a compelling purpose. (Strict scrutiny analysis occurs when there is state action having adverse impact on suspect class--which non-residents are not in, first amendment rights, or fundamanetal rights, including the right to travel.) The State could have restricted Sport --again, not livelihood--fishing to all, either making small limits with a shorter season, or barring all sportfishing, etc. Since they did not have to structure this law to completely bar out-of-staters, and the standard of review is so high, the State should lose if the Coop is allowed to bring forth this argument, stating that they are properly representative of these others. The State could try and dismiss stating that while the Coop had standing for some suit, it was not the proper party to bring this particular action as they were not being themselves burdened under this. The coop would assert they are properly raising these interests, although they are not the ones whose right to travel has been implicated.

The Commerce Clause argument would be that the Constitution has reserved to the federal government the regulation of interstate commerce, that this law impermissibly interferes

with the free flow of goods between the state (specifically, crab), and that the law is clearly illegal. While States have been allowed to regulate sportfishing against non-residents in a manner different from that of residents, and different from their regulation of commercial fishing, here there is a total bar. It could be asserted that it is severely adversely impacting the tourist business and having a detrimental impact in restraint of interstate commerce. A very broad, although interpretation has been placed on the commerce clause and its reach. If the court accepted the argument, the law would be struck down as an unlawful state regulation usurping power reserved to the federal Government, and not to the States. Precedent is that the State's power to regulate its own recreational endeavors with its police power will win.

Alaska Constitution will have courts perform a balancing, as to whether the law is reasonably necessary given the intended purpose, and is the least restrictive means to accomplish it. It is a higher standard than the federal rational basis scrutiny. The State would not win on this with its police power argument, given there would be other ways non-discriminatory to out-of-staters to accomplish the purpose.

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① United States Constitution

Does the crab Regulation violate

the Equal Protection clause of

the United States Constitution and

Amendments 7 The Federal government

has established a 3 step or

3 tier approach to evaluating

equal protection. The highest level

is "strict scrutiny" where the government

has the burden of proof and must

show the law is necessary for a

compelling purpose. The mid-level

is "intermediate scrutiny" where

the government has the burden of

proof and must show the law is legitimate

and important for government purpose,

finally, the lowest level is

"Rational Basis" where the burden

of proof is on the plaintiff to

prove there is no Rational Basis

for the law. when a regulation

creates a class of people, the

~~the~~ class determines which level

of analysis is to be used.

strict scrutiny is used for Race,

Alienage ~~and~~ and Fundamental Rights.

Intermediate scrutiny is used for

gender and non marital children.

Everything else is Rational Basis.

One of our Fundamental Rights includes the Right to Travel, and to not have a Foreign State treat a Resident of another State differently. There are some exceptions, ie in-state-tuition, 30 day residency to vote, This crab regulation distinguishes between Resident and Non Resident citizens. The court would apply strict scrutiny to determine if the law is necessary for a compelling purpose, and the AK Dept of Fish and Game would have the burden

of proof. Usually the government fails to meet the burden of proof in strict scrutiny cases. In this case the crab regulation is too broad and overinclusive. They could reduce the number of crabs per person and include all us. citizens, out-of-staters and in-staters.

~~Therefore~~ Therefore the court would probably find the regulation is not necessary and compelling and fails to meet the burden of strict scrutiny.

Does the crab Regulation violate
the Privileges and Immunity clause
of the United States Constitution?

Each state must give another states
citizen equal privileges as their
own state. A test has been
established using the P and I
clause and the Dormant Commerce
clause. The first question to
ask is the Regulation discriminatory
on its face. In this case yes,
the Regulation clearly distinguishes
between in-staters and out-of-staters.
The second question to Address is

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if it is discriminatory on its face, what is the purpose, intent, and impact on the parties involved.

In this case the ~~purpose~~^{impact} is to allow in states to obtain crabs while not allowing out-of-state to obtain crabs, while the purpose and intent may not be discriminatory the impact is discriminatory. Therefore in this case, the crab regulation will probably be deemed unconstitutional by the United States Federal courts.

see page #1 Attached

see page #2 Attached

② Alaska state constitution

Does the crab Regulation violate

the Equal Protection clause of

the Alaska state constitution?

whereas the united states constitution

and courts have established the

distinct 3 step or 3 tier Approach,

the Alaska state constitution

has adopted a sliding scale

continuum. while the whole continuum

is shifted to a higher degree than

the u.s. constitution, it does provide

more protection for residents. This

sliding scale continuum requires

analysis, comparison and balancing

of 2 main questions. First, what is the nature of the interest involved and second, what is the purpose of the law. In this case the nature of the interest involved is economic for the Alaska businesses as well as providing sustenance for Alaska citizens. The purpose of the law is to re-supply the crab stock and prevent ~~the~~ endangerment of the species. The Alaska state court applying the Alaska state constitution will probably

Find the crab regulation constitutional.
Therefore the co-op will probably
have a better chance challenging
the crab regulation through the
U.S. constitution rather than
the ~~the~~ Alaska state constitution.

§ 1

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#1

In Addition to the P + I clause,
if the issue is economics, the
courts will consider whether the
Dormant commerce clause must
come into play. The Federal government
may Regulate any commerce
among and between the states.
IF the state ~~is~~ impinges on
the Federal governments authority
to Regulate commerce, the Dormant
~~is~~ commerce clause will prevent
the state from interfering with
substantial economics. In this case
money is involved so the court

11
11

will determine if the crab
regulation substantially interferes
with interstate commerce. Because
of the substantial number of
tourist and potential income
to Alaska business the court
will probably ~~§~~ find the crab
regulation does interfere substantially
with interstate commerce, the
dormant commerce clause, and
the Federal governments sole
authority to regulate interstate
commerce.

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Right to Travel - The right to travel is ~~an~~ a fundamental right under the U.S. constitution. It is not specifically enumerated, but it is derived from the Privileges & Immunities clause & Equal Protection clause. The right is that citizens can freely travel between the states.

CO-OP can argue that this right is violated when tourists from out of state are not able to travel to Dancy town to work. This is probably not a good argument.

The right to travel usually is violated when a person from another state is denied benefits that a resident is ~~not~~ entitled to based on the amount of time lived in the new state. In Alaska the Zobel case declared a graduated PFD system unconstitutional because it violated the right to travel.

Here, the state will likely be able to demonstrate many compelling reasons for the regulation such as the sustained use of the crab.

However, lo-op will argue that

the state could achieve their objective of sustained use of crab in a less-disruptive way to one that doesn't ~~interfere~~^{erode} on a fundamental right.

Equal Protection

LO-op has an equal protection argument because classes of people are being treated differently by the state. ~~Now~~ Charter fishers are being treated differently than commercial or in-state sport fishers.

- Federal Analysis - 3 tests.

- Rational-basis - the plaintiff must demonstrate that the law is not

rationality related to a legitimate
govt. interest. Applies to social
and economic laws

- Intermediate scrutiny - the state must
demonstrate that the law is substantially
related to a important govt. interest
Applies to gender & illegitimacy.

- Strict scrutiny - the state must
prove the law is necessary to
achieve compelling govt interests
Applies where fundamental right
or suspect classification is involved.

The state will argue that
the rational basis test applies
here because there is only an economic
interest involved. Under this argument
the state will likely win because the
law is rationally related to a legitimate
state interest in managing natural resources.

The CO-op will argue the the fundamental right of the right to travel is involved, thus triggering strict scrutiny. Under this argument the CO-op will likely win because the state will probably not be able to demonstrate that a law that ~~violates~~ violates the right to travel is necessary to achieve a compelling govt. interests. There are many less discriminatory ways to regulate crabs.

State EP test - Alaska uses a sliding scale equal protection analysis. First the court will consider the nature of the interest impaired by the law. This determines the govt's burden. Next the court will consider the purpose

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of the law. The court then balances the interest with the purpose. At a minimum there must be a fair & substantial relation between the means & the purpose. ~~The~~ The lowest level of scrutiny in Alaska is higher than the rational basis test.

Under the AK EP analysis the decision will again likely rest on whether the interest is purely economic or whether the interest is the fundamental right to travel. The results will be similar to the analysis under federal law in the *PUB* case.

Privileges & Immunities Clause (P&I)

~~Under~~ Under the U.S. constitution, Alaska must afford citizens of other states the privileges & immunities it affords its own residents. The Co-ops strongest argument is that the govt action violates the P&I clause.

This situation is similar to the ^{US} case in Montana, where the court held that Montana could charge a different amount for a non-resident hunter, but that the amount must be justified.

by compelling state interests or it is a violation of the P&D clause. If the state could not justify the difference in costs for hunting licenses, then the law violates the P&D clause.

This case is similar because Alaska allows ~~in~~ in-state sportfishers to harvest 20 crabs & out-of-state sport fishers can't harvest any. This case is also similar to the AK case that held that the state couldn't charge out-of-state commercial fishers substantially more

for commercial fishing permits w/
compelling interests.

Here, the state clearly has an
interest in managing natural resources.

In fact, the crabs have been over-
harvested so the state has a

significant interest in getting
crab populations up. However, if the

state is going to infringe on the P&I

of non-residents, there must be

compelling reasons to allow 20 crabs vs.

10 crabs. The state would have a

difficult time justifying this disparity.

The state could likely justify a ~~slight~~ slight

difference in taking based on the administrative costs of licensing non-residents.

Natural Resources in AK

In Alaska, the state can manage fisheries for the benefit of the uses of residents so that their yield is sustainable.

This clearly gives the state the authority to regulate crab in state waters. However, the state can make regulations based on uses, not who is using the resources. This law arguably regulates users instead of uses, which may violate the AK constitution.

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#1 Potential Constitutional Claims of Co-op

State Action

Before a constitutional analysis begins, it is necessary to state that the AKDF&G is a state agency and therefore this is state action.

Commerce Clause

The commerce clause of the US constitution grants congress plenary control over interstate commerce. This means that they can make just about any law that has an effect on interstate commerce. Also the dormant commerce clause prevents states from unduly burdening interstate commerce by their own regulation. This is the case whether the law intends to regulate interstate commerce, or if it simply has that effect. The supremacy clause operates to invalidate state laws that conflict with congresses plenary commerce clause power.

In this situation Co-op could make a valid commerce clause argument. The tourist and cruise ship business brings people from out of state to see Dungy Town. This could easily be seen as interstate commerce because the people come from other states to see the place and also payments go back and forth between the residents of other states and the Dungytown tour boat crabbers. By initiating this restriction on harvesting the crab, the AKF&G has basically

eliminated the industry of out of state tourism in Dungytown. The cruise ships will quit coming and so will the tourists. Also, the regulation will effect the price of the crab which is exported. This regulation may be seen to be unduly burdening interstate commerce and be invalidated.

However, the state may argue that even though the crabbing restriction burdens interstate commerce, they have a valid and compelling state interest and that the burden is not direct nor undue. While this argument could potentially could have merit, the state would still have a problem. Their interest is in preserving the crab stock in and around Dungytown. The Co-op would then argue that this valid and important state interest could be satisfied with a more tightly drawn regulation. By limiting the harvest in all categories the stock could be preserved, and the burden on interstate commerce would be lessened. As such, the regulation would likely be invalidated by the commerce clause of the US constitution.

Equal Protection

The equal protection clause is brought into play, both federally and with the state, when different groups of people are treated differently under the law. The federal equal protection provisions scrutinize laws under three standards, depending on the type of discrimination. If the group being discriminated against is a suspect class (race, religion, etc.) then the law will be scrutinized under strict scrutiny, meaning the law will be invalidated unless there is a compelling state interest. The next group is semi suspect classification (sex, age, etc) and the law will be invalidated absent a showing of being substantially related to an important state interest. The final classification is for

all other groups of people and the law will only be invalidated if the group can show that the law is not rationally related to any legitimate state interest.

It is clear that the out of town people are being treated different than in state residents. Thus we have two disparate groups receiving different treatment, and an equal protection analysis is warranted. Classification based on residency is not a suspect or quasi suspect class, and thus the analysis will be under the rational relationship test. It would be difficult for the out of state residents to show that the law against their sport fishing does not have a rational relationship to the legitimate state interest of preserving crab stock. It may not be the best methodology for it, but it does bear a rational relationship. The less people that harvest, the more stock there will be. Thus the law would likely not be struck down based on federal equal protection law.

Alaska equal protection law is slightly different than federal law. The state has a three part test for determining if equal protection under the state constitution is violated. Step one is to determine the interest that is being interfered with. The second step is to identify the state interest furthered by the law. And finally, the third step is to determine if the state interest justifies the means that infringe on a groups interest and if the regulation is tightly drawn to further that purpose. It is a sliding scale test. The more important the interest infringed, the more tightly drawn the law must be. As the state interest increases, then there is more latitude for the means.

The interest in fishing in Alaska is not a fundamental interest. The law does not prohibit free movement. It is likely that the non resident interest in crab fishing will not be viewed as being all

that important. ON the other hand, the state interest in protecting the crab harvest, and an entire industry, would be seen as quite important. As such, the courts will not require, under equal protection analysis, the law to be tightly drawn and will give the AKDF&G some leeway in making this regulation. It is important to remember that the lowest level of scrutiny by the state is still slightly higher than the lowest level of scrutiny by the federal government. Still I think this regulation will pass equal protection.

Substantive Due Process

Substantive due process is the same for both Alaska and the Federal government. If the law infringes on fundamental rights, then the state interest must be compelling, i.e. a strict scrutiny standard. However, if it is not a fundamental right, then the law must only bear a rational relationship to a legitimate state interest. Fundamental rights include the right to travel, vote, marry, etc.

Most likely the right of non residents to crab in Alaska will not be viewed as a fundamental right. Therefore, the law would be upheld absent a showing that the law is not rationally related to a legitimate state interest. Again, the interest in protecting the crab harvest is a legitimate state interest at the very least. The limitations on harvesting will protect to some degree the harvest. Thus the law is rationally related to a legitimate state interest and should not be invalidated on these grounds.

Procedural Due Process

The due process clause (for both the federal government and the state) requires notice and a hearing before the taking of life, liberty, or property. Those terms are broadly interpreted and would include a particular livelihood. Also the notice requirement means that enough notice of the law must be given so that a person of ordinary intelligence would know what the law is. This protects against unwitting law breaking and arbitrary law enforcement.

It seems as if the notice element is satisfied. Those embarking in natural resource harvesting should be apprised of AKDF&G rulings and notices. The regulation is fairly easy to interpret, provided that "resident" is clearly defined. However the law has taken away the Co-op's member's right to give guided sport fishing tours. This would properly be within the gambit of life, liberty, or property, and thus a hearing would be required. The facts do not establish whether such a hearing was held or offered. If it was not, then the Co-op could argue that their procedural due process rights were denied by the failure to be given a hearing. This would be examined in the light of the states interest in procedural guidelines and the interest of government efficiency. Still I think that absent a hearing, the law would be invalidated.

Privileges and Immunities

The privileges and immunities clause of the constitution and as applied by the 14th amendment may be another issue. Generally a state cannot treat non residents differently than residents

absent a compelling reason. The courts have invalidated laws that charge 3 times a fee for non residents as residents.

Clearly there is disparate treatment between the residents of Alaska and those of other states. The state would argue that the different treatment is to protect a substantial state interest, the preservation of a natural resources. They would argue that the cruise ships and massive influx of non residents would threaten the stock. It is certain that the preservation of natural resources is a very important state interest. They may also say that the law is narrowly drawn to protect a specific species and that other sportsman type activities are still available. However, the Co-op could argue, most likely sufficiently to prevail, that the stock could be protected by simple harvest restrictions on quantity and that the law is so poorly drawn to meet the end of preserving the crabs that it cannot infringe on the rights of non residents to be treated on a fairly equal basis. Also the fact that courts have invalidate 3 to 1 differences in sporting tags between non residents and residents, points strongly to the conclusion that the entire prohibition on nonresident crabbing would be unreasonable and invalidated as violative of the privileges and immunities clause.

Natural Resource Use Restrictions

In Alaska, the courts have used a simple guideline to determine if a use restriction of a natural resource is valid. The main distinction they draw between laws is whether they prohibit uses or users. The law can prohibit uses of an entire area or limitations on an area or methodology, but

the court will strike down prohibitions or limitations based on users.

In this situation the distinction is fairly clear. The AKDF&G has clearly drawn a distinction between users and non-users. An entire category of people have been excluded from crabbing for the dungeness. This is certainly a regulation based on users and non-users. The Co-op should argue that the state could only validly limit the quantity harvested or perhaps close an area to all harvesting, but to draw a distinction based on residency is invalid.