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## Mayday, Mayday: Maine's Lobstermen Need Exemption From Federal Antitrust Laws

Michael L. O'Brien

*University of Maine School of Law*

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MAYDAY, MAYDAY:  
MAINE'S LOBSTERMEN NEED EXEMPTION  
FROM FEDERAL ANTITRUST LAWS

*Michael L. O'Brien\**

I. INTRODUCTION

In Portland, Maine, the summer of 2012 was one for the ages. The weather was spectacular, Mumford & Sons graced the scenic Eastern Promenade with a legendary outdoor concert,<sup>1</sup> and soft-shell lobster was available at downtown wharfs for historically low prices. Everything was seemingly perfect—“the way life should be.”

But along Maine's rocky coast another storyline was unfolding: the immense and crippling financial struggles of Maine's lobstermen.<sup>2</sup> Despite waking up before dawn, performing intense manual labor and braving the high seas day after day, many Maine lobstermen returned to the docks to sell their catch at the end of the day with little hope of making a legitimate profit.<sup>3</sup> On certain days, some lobstermen were unable to cover even their basic fuel and bait costs.<sup>4</sup> And the worst part of it all? There was seemingly nothing lobstermen could do to better their circumstances due to a decades-old consent decree that has been in effect since before many of the current lobstermen were even born.

This Comment will examine the alternatives available to Maine lobstermen as they attempt to execute their right to earn an honest living. Part II will discuss the history of the Maine lobster industry, with a focus on the dramatic events that unfolded in the 1950s, and reveal how history appears to be repeating itself. Part III will identify the relevant federal

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\* J.D. Candidate, University of Maine School of Law, Class of 2014.

1. See Patrick Doyle, *Mumford & Sons Stomp through Maine at Summer Festival Kickoff*, ROLLING STONE, Aug. 5, 2012, at 43.

2. See Katharine Q. Seelye, *In Maine, More Lobsters Than They Know What to Do With*, N.Y. TIMES, July 29, 2012, at A15.

3. *Cf. id.*

4. *See id.*

antitrust laws and explain how their application to the Maine lobstermen effectuates an absurd result. Finally, Part IV will analyze the options available to Maine lobstermen to remedy this situation—including invalidation of the consent decree, avenues for exemption from federal antitrust violations (namely, the agricultural exemption), along with additional strategies that could be implemented for relief. The vitality of Maine’s lobster industry is critically important to Maine’s economy, image, and lifestyle. Therefore, governmental actors in Maine should answer this distress signal.

## II. THE MAINE LOBSTER INDUSTRY

### *A. Early Historical Development*

Maine has an enduring lobstering tradition that has evolved over time due to inevitable changes in technology and demand.<sup>5</sup> Throughout the 18th century, “lobstering was done by gathering [lobsters] by hand along the shoreline. Lobstering as a trap fishery came into existence in Maine around 1850. Today, Maine is the largest lobster-producing state in the nation.”<sup>6</sup> Lobster demand greatly increased when other markets around the country, particularly New York and Boston, began gaining interest in the crustacean.<sup>7</sup> By the 1930s, the modern-day lobster industry had started to develop.<sup>8</sup> As the Gulf of Maine Research Institute explains:

Local, land-based buyers [emerged] who served as the link between the harvesters and the public. The buyer purchased lobsters from a harvester who in turn bought fuel, bait, and other gear from the buyer. The local buyer then either sold the

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5. However, despite these advancements, the operation of hauling traps has remained relatively constant over the last few generations. See *History of Lobster in Maine*, MAINE LOBSTER COUNCIL, <http://www.lobsterfrommaine.com/maine-lobster-history.aspx> (last visited March 13, 2013) (“Modern lobster harvesters operate much like their predecessors did—hauling lobsters by hand in traps. And, just as it was when the industry was in its infancy, lobstering in Maine is often a family affair—techniques and territories are passed from one generation to the next. It’s a close-knit community of harvesters who take care of and watch out for each other.”)

6. LOBSTERS: LOBSTERING HISTORY, GULF OF MAINE RESEARCH INSTITUTE, <http://www.gma.org/lobsters/allaboutlobsters/lobsterhistory.html> (last visited April 22, 2013).

7. *Id.*

8. *See id.*

lobsters to people who came down to the docks or turned them over to a regional dealer who sent the lobsters out of state.<sup>9</sup>

As the relationship between lobstermen and dealers solidified, a multi-tiered distribution system developed that remains firmly in place today.

### *B. The Great Lobster War of the 1950s*

Following World War II, the lobster industry boomed as “the cost of lobster outpaced inflation, increasing profits for lobstermen and thereby encouraging more people to join the industry.”<sup>10</sup> With greater profits at stake, competition grew fierce up and down the Maine coast. Lobstermen began noticing a change in the market in the early 1950s, as the lobster supply grew larger, and prices subsequently dropped in the late summer months.<sup>11</sup> In the summer of 1954, during a season containing back-to-back hurricanes, prices eventually dropped to an all-time low.<sup>12</sup> The lobster fishermen were extremely unhappy with the low prices and felt that middlemen were unfairly manipulating the market by communicating with one another about prices and wielding their advantageous bargaining position.<sup>13</sup>

During this difficult financial era, a group of Maine lobstermen, led by Leslie H. Dyer of Vinalhaven, spearheaded the formation of a new statewide organization—the Maine Lobstermen’s Association (MLA).<sup>14</sup> Following its inception, the MLA issued a statement in the Portland Press Herald, announcing its purpose: “halt[ing] price-fixing by dealers so that lobster fishermen could make a livable income.”<sup>15</sup> The MLA then held its first meeting to discuss collective opposition to the perceived unfair anticompetitive collusion by lobster dealers.<sup>16</sup> Dyer was named the first MLA president by unanimous decision.<sup>17</sup> Following his election, he summed up his view of Maine lobstermen, saying, “[w]e fishermen in Maine are as independent as a hog on ice, and just as

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9. *Id.*

10. *Id.*

11. Philip Conkling, *The Great Maine Lobster War*, THE WORKING WATERFRONT (1993).

12. *Id.*

13. *See id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

helpless. We're more or less sot in our ways and we don't like being dictated to."<sup>18</sup>

When prices fell again in the summer of 1955 (this time to 25-cents-per-pound for soft-shell lobster), the MLA issued a press statement, directed at lobstermen, with a simple message: please abstain from hauling traps until prices rise to 30-cents-per-pound.<sup>19</sup> This was the first public call for unified action. The following year, in response to continued difficulties between lobstermen and dealers, the MLA established a minimum acceptable price for lobster: 35-cents-per-pound for soft-shell and 50-cents-per-pound for hard-shell.<sup>20</sup> The organization declared this to be the minimum price that lobstermen could accept in order to continue making a living in the industry.<sup>21</sup> Holding true to this conviction, when prices fell to 30-cents-per-pound in July 1956, lobstermen fishing out of Portland declared a strike until prices rose to the newly-established minimum price.<sup>22</sup> Prices then fell along the entire Maine coast, and Dyer called for the first ever collective statewide strike in Maine's lobstering history.<sup>23</sup> After six long days off the water, prices returned to 35-cents-per-pound and the unified tie-up ended in success for the lobstermen.<sup>24</sup>

In the summer of 1957, prices again sagged to 30-cents-per pound and Dyer issued yet another plea for a statewide strike, asking lobstermen to "stick together as we did [last summer] . . . [because we] are not unreasonable when we ask a small profit on our product."<sup>25</sup> This time around, however, the strike failed to gain the support of certain lobstermen who had been seeing success in their respective territories.<sup>26</sup> Dealers also became increasingly frustrated with the MLA's tactics and began challenging the legitimacy of collective strikes.<sup>27</sup> In response to this opposition, the MLA's attorney informed the public that membership in the organization was voluntary and that requests to strike, even among

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18. *Id.*

19. *Id.* at 57.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* ("For the first time in the history of lobster fishing, Dyer had achieved an astonishing show of cooperation among a large group of fishermen who then, like today, celebrate themselves as an archetype of the last American individualists.").

24. *Id.*

25. *Id.*

26. *Id.*

27. *See id.*

members, were indeed optional.<sup>28</sup> Following unsuccessful efforts to garner support for a statewide strike in the summer of 1957, prices again dipped to 30-cents-per-pound, and tensions continued to rise within the industry.<sup>29</sup> After taking notice of the tense circumstances, Maine's Governor, Edmund Muskie, offered to mediate an agreement between the two sides.<sup>30</sup> Hearing this, Dyer predicted to his fellow lobstermen that the Governor "will see to it that you boys get justice."<sup>31</sup> However, meetings between the two parties never came to fruition, and a noticeable divide formed between those lobstermen who continued to fish and those who tied up.<sup>32</sup>

Eventually, most lobstermen returned to the water to haul out of "economic necessity," according to Dyer.<sup>33</sup> During this time, boiling tensions and financial pressures eventually led to the first act of violence—with shots fired in Tenants Harbor, Maine, at a pastor who also lobstered part-time.<sup>34</sup> This outburst of violence changed the entire dynamic of the conflict.

### *C. Federal Authorities Take Notice*

In 1957, as a result of the above-mentioned activity, federal authorities ordered a federal grand jury investigation into the price war that had been occurring along the Maine coast.<sup>35</sup> Justice Department antitrust attorneys teamed with FBI agents for the investigation,<sup>36</sup> and "[t]wo months later the grand jury, to the astonishment of everyone, returned price-fixing indictments not only against seven lobster dealers, but also against the [MLA] and its president Leslie Dyer."<sup>37</sup> Lobstermen were stunned by this announcement because, in their eyes, all they had been doing was attempting to make an honest living—and engaging in precisely the same practices that agricultural actors were legally

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28. *Id.*

29. *Id.*

30. *Id.* at 58.

31. *Id.*

32. *See id.* (During this time, a lobsterman who continued to haul despite the proposed strike "warned that if any of his gear or boat were harmed, he'd 'go through the Association and there wouldn't be a buoy left in the whole ocean.'").

33. *Id.*

34. *Id.*

35. *Id.* at 59.

36. *Id.*

37. *Id.*

engaging in under seemingly identical circumstances.<sup>38</sup> A few Maine lawyers volunteered to represent Dyer and the MLA pro bono and began preparation for the trial that was set for May 1958 at the federal courthouse in downtown Portland.<sup>39</sup>

The trial was a circus from the very beginning, with five lobstermen subpoenaed to testify against Dyer in an attempt to expose that they had been coerced into striking.<sup>40</sup> These witnesses were incredibly uncooperative.<sup>41</sup> At least one witness indicated on the stand that government lawyers had attempted to “brainwash” him during pre-trial preparations.<sup>42</sup> Everyone who was forced to testify was adamant that no coercion had occurred.<sup>43</sup> During his closing statement, the attorney for the MLA and Dyer argued that the Sherman Antitrust Act was being improperly applied to Maine lobstermen and “told the jurors that he could have paraded every one of the MLA’s 2600 members before them to look jurors in the eye and say, ‘As God is my witness, I have done no wrong.’”<sup>44</sup> Despite the predominant feeling among those in attendance and those following the trial, the MLA and Dyer were found guilty of violating the Sherman Antitrust Act<sup>45</sup> and ultimately received suspended penalties, after agreeing to sign a consent decree.<sup>46</sup>

#### *D. Consent Decree*

Dyer and the MLA agreed to sign a consent decree in order to avoid harsh punishments; and the decree announced a binding formal agreement among lobstermen to never again discuss price fixing or attempt a collective strike.<sup>47</sup> Taking effect in August 1958, the consent

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38. *Id.* (An editorial that was written and printed in the BANGOR DAILY NEWS stated “Maine lobstermen . . . are only seeking to keep pace with the high cost of living. The latter in turn is caused in no small part by the government support of farm prices – the same government that is prosecuting the lobstermen. Confused? So are we.”).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 60. (“In all, the Government called 29 witnesses for the prosecution . . . [and] they were all in agreement on the fundamental point that neither Dyer nor anyone else had told them what to do during the strike.”).

44. *Id.*

45. *U.S. v. Me. Lobsterman’s Ass’n*, 160 F. Supp. 115 (D. Me. 1957).

46. Eric Russell, *Are Lobstermen Keeping Their Traps Shut?*, PORTLAND PRESS HERALD, July 14, 2012, at A4.

47. See Nicholas Walsh, *The End of the Lobster Consent Decree?*, FISHERMEN’S VOICE, Aug., 2012, available at <http://fishermensvoice.com/archives/201208NicholasWalsh.html>.

decree applied to every Maine lobsterman who had notice of the judgment (effectively every Maine lobsterman).<sup>48</sup> The unprecedented charges instituted by the federal government during the 1950s have instilled fear in many Maine lobstermen, and caution them to discuss their displeasure over current prices.<sup>49</sup> Over fifty years later, the decree resurfaces during economically challenging times.<sup>50</sup>

#### *E. Current Conditions for Maine Lobstermen*

History appears to be repeating itself. The price of lobster has decreased significantly over recent years and frustrations are reaching a boiling point. Many experts attribute the glut of lobsters to the warming of coastal waters.<sup>51</sup> Marine biologists have documented rapidly rising temperatures in the gulf of Maine over the last dozen years, which directly affects when lobsters shed their shells and mate.<sup>52</sup> Lobsters have been emerging earlier in the season in record numbers, thereby flooding the market and driving down prices during the late summer months.<sup>53</sup> Once again, it has become difficult to make a living in the lobster industry.

As mentioned above, this difficulty does not stem from a lack of lobsters. In 1987, Maine lobstermen hauled in less than 20 million pounds of product.<sup>54</sup> This number has increased relatively steadily and culminated in a record 104 million pounds of lobster caught in 2011.<sup>55</sup> This record catch “brought the state \$334 million, a coastal income second only to the tourism industry that lobsters help create.”<sup>56</sup> As these figures suggest, the importance of the lobster industry to Maine’s economy cannot be understated.<sup>57</sup> And although fisheries are struggling

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48. *Id.*

49. *See id.*

50. *See* Russell, *supra* note 46.

51. Joanne Omang, *In Maine, a Crustacean Calamity*, THE WASHINGTON POST, July 20, 2012, at A12.

52. *Id.*

53. *Id.*

54. Russell, *supra* note 46.

55. *Id.*

56. Omang, *supra* note 51.

57. *See* STATE OF MAINE, DEPT. OF MARINE RESOURCES: PRELIMINARY 2012 LOBSTER LANDINGS SHOW AN INCREASE OF 18 PERCENT OVER 2011 WHILE VALUE DECLINES BY \$3.7 MILLION, <http://www.maine.gov/dmr/news/2013/2012LobsterLandings.htm> (last visited April 11, 2013). Commissioner Patrick Celia of the Maine Department of Marine Resources recently stated, “[w]e will be seeking input into the development of

all around the country, “Maine, which produces 80 percent of the nation’s lobster catch and depends more on fishing than most states, is especially hard hit.”<sup>58</sup>

Over the past few years, prices have adapted to this dramatic increase in supply.<sup>59</sup> Prices paid to lobstermen for their catch peaked at over \$4.60 per pound in 2005.<sup>60</sup> In 2012, many parts of the state saw prices fall to a forty-year low, plummeting below \$1.50 per pound.<sup>61</sup> Increasing frustrations stem, in part, from the fact that, although lower prices are being paid to lobstermen on the wharfs, restaurants continue to price gouge because of an expectation that lobster is, or should be, expensive.<sup>62</sup> For instance, a 2 1/2 pound steamed lobster (which a lobsterman likely sold off the boat for approximately \$5.00) still fetched a whopping \$49.00 in Portland’s Old Port district restaurants in 2012.<sup>63</sup>

Lobstermen routinely place blame on the dealers for price gouging, and many lobstermen continuously remind dealers of their rising expenses. Sound familiar? “Gone are the days when a lobsterman worried about catching lobsters. Enter the era of worrying if you will be paid enough to make ends meet.”<sup>64</sup> Fuel prices have also risen substantially, nearly quadrupling over the past ten years.<sup>65</sup> With the rising cost of fuel and the steady cost of bait, boat payments, and employing a sternman, making a profit is no guarantee.<sup>66</sup> And with the consent decree still binding those with notice, modern-day lobstermen appear to be trapped in a dying industry.

In the summer of 2012, desperate for relief, “several lobstermen’s associations asked the state Department of Marine Resources to

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management measures that respond to abundant supply and its adverse impact statewide on boat price, particularly in the summer months.” *Id.*

58. Abby Goodnough, *In Maine, Tensions Over Ailing Lobster Industry*, N.Y. TIMES, Aug. 23, 2009, at A16.

59. Russell, *supra* note 46.

60. *Id.*

61. Patrick Doyle, *Why Are Restaurant Lobsters Still So Expensive?*, BOSTON MAGAZINE, Aug. 22, 2012.

62. *See id.*

63. DiMillo’s on the Water: Dinner Menu, available at <http://www.dimillos.com/restaurant/dinner.html>.

64. Patrice McCarron, *Steaming Ahead: August 2012*, MLA NEWSLETTER, Aug. 2, 2012, available at <http://mlcalliance.org/2012/08/02/steaming-ahead-august-2012/>.

65. *See* Richard H. Thaler, *Why Gas Prices Are Out of Any President’s Control*, N.Y. TIMES, Apr. 1, 2012, at BU3 (“In February 2001, just after Mr. Bush took office, the average price of regular gasoline was \$1.45 a gallon. By June 2008, that price had risen to \$4.05”).

66. Omang, *supra* note 51.

temporarily close the fishery until rising demand brings back reasonable prices,” but this request for help was promptly refused.<sup>67</sup> Patrick Keliher, the Commissioner for the Maine Department of Marine Resources, issued the following statement about low boat prices:<sup>68</sup>

The Department will not be closing the lobster fishery. Based on the concerns that have been raised by the industry, I have reviewed our statutory authorities and they do not allow us to shut down the fishery for economic reasons. We have heard that fisherman are seeking to impose a de facto shutdown of the fishery and coercing others into complying by threatening to cut off their gear. The State will not tolerate any trap molestation, and any such actions will be met with targeted and swift enforcement or other appropriate action. Harvesters should also be aware that such actions may be in violation of federal antitrust laws.<sup>69</sup>

Clearly, the “great lobster war” is still fresh in the minds of state officials.<sup>70</sup> Despite the lack of help from state-level authorities, many local leaders of fishing communities are terribly concerned for the lobstermen and the uncertain future of the industry.<sup>71</sup> Given the nature of the Maine lobstermen, it is unlikely that they will continue to suffer without taking some form of action. Whether we are on the brink of the next “great lobster war,” however, remains to be seen.

After explaining the history of the Maine lobster industry, the circumstances leading to the issuance of the 1958 consent decree, and the financial woes currently crippling the industry (along with the eerie feeling that history is repeating itself), this Comment will now analyze the biggest obstacle to relief for struggling Maine lobstermen: the federal antitrust laws.

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67. *Id.*

68. The term “boat prices” refers to the prices lobstermen receive for their catch.

69. Jessica Brophy, *Lobster Prices Still Depressed*, PENOBSCOT BAY PRESS (July 12, 2012), <https://penobscotbaypress.com/news/2012/july/12/lobster-prices-still-depressed/#.Ujx7BCgui9Y> (quoting Press Release Patrick Keliher, Comm’r Me. Dept. of Marine Res. (July 9, 2012) (on file with author)).

70. *See id.*

71. *See id.*

## III. THE SHERMAN ANTITRUST ACT OF 1890

*A. General Language and Applicability*

Federal law currently prohibits Maine lobstermen from speaking to one another about collectively tying up their boats (choosing, as a group, to abstain from hauling traps due to low prices) because doing so would constitute a concerted effort, which has been deemed a violation of federal antitrust laws.<sup>72</sup> Therefore, absent reinterpretation of this now well-established principle, orchestrating a unified tie-up among Maine lobstermen (with all else constant) is not a viable option. In relevant part, the Sherman Antitrust Act of 1890 (Sherman Act) states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.<sup>73</sup>

However, questions loom as to whether the Sherman Act was designed to prevent the type of behavior that led to the issuance of the 1958 consent decree. “Unfortunately this same law that was used so successfully against robber barons of past centuries also applies to those who catch lobsters.”<sup>74</sup> Under current interpretation of the Sherman Act, “[b]ecause each Maine lobsterman is an individual business, if a group of lobstermen act collectively and cease fishing for lobsters in order to force an increase in boat price, they can be accused of collusion and restraint of trade under the Act.”<sup>75</sup> Even the Department of Justice has recognized a change in the Act’s scope over time.<sup>76</sup> But should its scope include Maine lobstermen?

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72. Russell, *supra* note 46.

73. 15 U.S.C. §§ 1-7 (2004).

74. Melissa Waterman, *Tie-Ups and Anti-Trust Law: U.S. and Canadian Perspectives* MLA NEWSLETTER June 2012, at 5.

75. *Id.*

76. Philip J. Weiser, Deputy Assistant Att’y Gen. Antitrust Div., Dept. of Justice, Address at the Organization for Competitive Markets 11th Annual Conference: Toward a

*B. Application Leads to an “Absurd Result”*

The Sherman Act was enacted as a response to the emergence of powerful trusts, such as John D. Rockefeller’s Standard Oil trust, which had monopolized entire industries across the nation by implementing vertical integration tactics.<sup>77</sup> A primary objective of the Act was to prevent abuse by powerful entities that were engaging in unfair business practices, thereby resulting in poor conditions for those with less power.<sup>78</sup> Endorsing the passage of the Sherman Act, U.S. Representative Ezra B. Taylor spoke on the House floor about the powerful beef trust:

The beef trust fixes arbitrarily the daily market price of cattle, from which there is no appeal, for there is no other market. The farmers get from one-third to half of the former value of their cattle and yet beef is as costly as ever. . . . This monster robs the farmer on the one hand and the consumer on the other.<sup>79</sup>

Therefore, the conditions that prompted demand for protection under the Sherman Act, it seems, are now being flipped to punish and restrict the very type of individuals that the legislation initially set out to protect. Lobstermen are receiving historically low prices at the docks, but lobster is as expensive as ever at the restaurants in town. Middlemen are engaging in precisely the same type of behavior condemned by Representative Taylor during the legislative debates leading to the Sherman Act’s passage.

As further evidence that middlemen, like those currently buying low and selling high at the wharfs in Maine, have historically been disfavored under the law, the U.S. Supreme Court discussed the content of Lord Hale’s treatise, *De Portibus Maris*, recalling:

A man, for his own private advantage, may, in a port of town, set up a wharf or crane, and may take what rates he and his

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Competition Policy Agenda for Agriculture Markets (Aug. 7, 2009) (stating that “[c]onsequently, the law first created to address the trusts of the late 1800s now addresses effectively both traditional markets and the challenges to competition in our modern, high technology economy.”).

77. *Id.*

78. See Gregory Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707, 714-15 (2007) (noting that “[i]n both houses of Congress, participants in debates often singled out the beef trust for condemnation, and they condemned it for reducing the prices paid to cattle farmers more than for raising prices to consumers”).

79. Weiser, *supra* note 76.

customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. . . . [However], there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage . . . neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate . . . . For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest.<sup>80</sup>

The Supreme Court, after calling into question these unreasonable rates, justified interference in the business affairs of wharf owners and the like, explaining that “[i]f they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns.”<sup>81</sup> Today, there is undoubtedly a public interest in the lobster industry’s success.<sup>82</sup> Because lobstermen are forced to deal with these middlemen, the industry must be regulated to benefit the public interest, in a way that prevents unreasonable rates from being set by lobster dealers and middlemen. The Sherman Act’s legislative record and the Supreme Court’s traditional approach to wharfing regulations justify asking whether the federal antitrust laws were intended to restrict Maine lobstermen the way they currently are.

Applying the Sherman Act to Maine lobstermen leads to an absurd result. Indeed, as the U.S. Supreme Court has proclaimed: “[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”<sup>83</sup> All laws should be construed “as not to lead to injustice, oppression, or an absurd consequence.”<sup>84</sup> Furthermore, the Court explains that “another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.”<sup>85</sup> The Sherman Act was not initially intended to limit the bargaining power of Maine lobstermen. Analyzing the evil that the legislature intended to remedy

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80. *Munn v. Illinois*, 94 U.S. 113, 150 (1876) (alteration in original) (citations omitted).

81. *Id.* at 133.

82. *See, e.g. Omang, supra* note 51.

83. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

84. *Id.* at 461.

85. *Id.* at 463.

helps to illuminate logical exclusions from the Act's penalties.<sup>86</sup> Because the legislation was intended to target those who unfairly dominated entire industries, including middlemen who set unreasonable prices, lobstermen (who fall victim to unreasonable price demands) seem to be a logical exception. The question thus posed by the Court in *Church of the Holy Trinity v. United States*, applied to this set of facts, would be: whether, if those voting on the Sherman Act had known that the legislation would actually bolster the power of certain middlemen, thereby leading to the near collapse of the Maine lobster industry, "[c]an it be believed that it would have received a minute of approving thought or a single vote?"<sup>87</sup>

Although not all judges agree that legislative history is an appropriate gauge of a statute's meaning, the Court has explained that certain unique circumstances require the examination of congressional intent and purpose.<sup>88</sup> Additionally, despite judicial preference for predictability and consistency, changing circumstances make the doctrine of *stare decisis* particularly vulnerable in the area of federal antitrust law.<sup>89</sup> Indeed,

in the area of antitrust law, there is a competing interest, well represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience. Thus, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.'<sup>90</sup>

Therefore, despite Maine lobstermen being deemed in violation of the Sherman Act in the 1950s, the U.S. Supreme Court "has reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question."<sup>91</sup> The

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86. *Id.* at 464.

87. *Id.* at 472.

88. See *United Steelworkers of America v. Weber*, 443 U.S. 193, 204 (1979) ("Given this legislative history . . . [i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice . . . constituted the first legislative prohibition of . . . efforts to abolish traditional patterns of racial segregation and hierarchy.") (citation omitted).

89. See *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

90. *Id.*

91. *Id.* at 21.

time has come to reconsider the Sherman Act as applied to Maine lobstermen.

Although applying the Sherman Act to Maine lobstermen leads to an absurd result, the remainder of this Comment analyzes whether relief is available within the current legal framework, absent a court's reinterpretation of existing law. Typically,

[e]conomics dictate that when the price for lobster goes too low, individuals stop fishing. [But] [t]he reality is that Maine has a large and diverse group of individual lobstermen who have different economic breaking points. The result has been deepening tensions between those who chose not to fish and those who continued with business as usual.<sup>92</sup>

These are the same circumstances that led to the "great lobster war." With the 1958 consent decree still looming, the industry is at a clear crossroads.

#### IV. CAN MAINE LOBSTERMEN REMEDY THEIR DISMAL ECONOMIC SITUATION WITHOUT VIOLATING THE SHERMAN ACT?

"In the United States it is generally illegal for businesses to collude in setting prices, or setting sales territories, or otherwise making arrangements to limit competition."<sup>93</sup> However, certain actors and industries are exempt from antitrust laws altogether.<sup>94</sup> Additionally, some business entities have organized their affairs in a manner that exempts them from the normal reach of the laws.<sup>95</sup> In addition, Canadian lobstermen, just north of the Maine border, are not faring as poorly as Maine lobstermen, even though the two markets are closely connected.<sup>96</sup> So, what actions can be taken?

There have been rumblings that "a lawyer acting for the [MLA] intends to file a motion to set aside the consent decree."<sup>97</sup> It remains unclear whether this is the best approach to help lobster prices rebound, as the motion will likely be dismissed. Furthermore, a provision in the consent decree "prohibits the [MLA] from engaging in any sort of

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92. McCarron, *supra* note 64.

93. Walsh, *supra* note 47.

94. *See infra* Part IV.A-B.

95. *See infra* Part IV.C.

96. *See infra* Part IV.D.

97. Walsh, *supra* note 47.

activity or advocacy that might affect the supply of live lobsters.”<sup>98</sup> Despite the rumor, it remains to be seen whether “the Maine lobster fishery, which surely has as much political clout as the dairy industry when it comes to getting laws on the books, [is] maneuvering for some sort of protection from the Sherman Act.”<sup>99</sup>

The remainder of this Comment will explore the legal options potentially available to Maine lobstermen who wish to enhance their dismal financial prospects. Throughout this exploratory process, Maine lobstermen must be willing to untie their moorings and enter uncharted waters. The following options are not mutually exclusive, but instead provide a collection of avenues, which could work best if pursued in unison.

#### *A. State Action Exception*

Although the Sherman Act restrains individual actors from engaging or conspiring to engage in anticompetitive behavior, the U.S. Supreme Court, in *Parker v. Brown*, “established the principle that the [Sherman Act] did not restrain state action or official action directed by the state.”<sup>100</sup> In this decision, the Court upheld the California Agricultural Prorate Act, which effectively limited competition and stabilized prices in order to support the economic health of the agricultural industry.<sup>101</sup> Vital to the Court’s decision was that California was acting independently in passing such legislation and was not a real party in interest to the new arrangement.<sup>102</sup> The Court explained that “where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out,”<sup>103</sup> thus recognizing that state governments may engage in competition restriction when doing so will benefit the public.<sup>104</sup>

Based on this case law, the Maine legislature could take action to support the economic health of the lobster industry, while avoiding the

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98. Bill Trotter, *Maine Lobsterman’s Association Says 54-year-old Consent Decree Doesn’t Work Anymore*, BANGOR DAILY NEWS (Mar. 20, 2012), <http://www.bangordailynews.com/2012/03/20/business/maine-lobstermens-association-says-54-year-old-consent-decree-doesnt-work-anymore/>.

99. Walsh, *supra* note 47.

100. FED. CONTROL OF BUS. § 33, “State action; Lobbying” (July 2012) [hereinafter § 33].

101. *Id.*

102. *Id.*

103. *Id.*

104. *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1076 (1st Cir. 1993).

penalties that threaten individual fishermen.<sup>105</sup> Such a move would address the concerns of citizens who hold a crucial role in Maine's economy.<sup>106</sup> State action is a legally sound mechanism available to ensure that an industry, the success of which is an important public interest, does not collapse. Additionally, in *Asheville Tobacco Board of Trade, Inc. v. Federal Trade Commission*, despite declaring state action inapplicable, the Fourth Circuit Court of Appeals held that

[w]hen a state has a public policy against free competition in an industry important to it, the state may regulate that industry in order to control or, in a proper case, to eliminate competition therein. It may even permit persons subject to such control to participate in the regulation, provided independent state officials adequately supervise their activities.<sup>107</sup>

Accordingly, the Maine legislature may presumably act to protect the lobster industry by passing legislation that grants lobstermen an exemption from federal antitrust laws.<sup>108</sup> State officials would then be required to monitor subsequent activities, or delegate this oversight power to local communities and municipalities.<sup>109</sup>

Furthermore, the language in the consent decree that "prohibits the [MLA] from engaging in any sort of activity or advocacy that might affect the supply of live lobsters,"<sup>110</sup> raises serious constitutional concerns by unduly restricting lobstermen's core First Amendment right to petition the government in order to redress their grievances.<sup>111</sup> Because restrictions on political speech are historically subjected to the strictest form of scrutiny, the consent decree may be facially unconstitutional.<sup>112</sup> Lobsterman may therefore be able to lawfully

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105. However, despite this clear language, certain courts have held that the exemption of states from federal antitrust law is "not as broad as the language would suggest." *Id.* (quoting *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)).

106. *See Omang, supra* note 51.

107. *Asheville Tobacco Bd. of Trade v. Fed. Trade Comm'n*, 263 F.2d 502, 509 (4th Cir. 1959).

108. *See infra* Part IV.B.

109. *See Tri-State Rubbish*, 998 F.2d at 1079 ("[M]unicipal supervision of private actors is adequate where authorized by or implicit in the state legislation.").

110. Trotter, *supra* note 98.

111. *See E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961).

112. *See U.S. CONST. amend. I; see also Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

influence the state legislature to act on their behalf. This constitutional right was reaffirmed in *United Mine Workers v. Pennington*, when the Court stated:

[Prior case law] shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.<sup>113</sup>

Based on this language, collective lobbying efforts should not violate the Sherman Act.

*Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*,<sup>114</sup> however, established a “sham exception,” which declared anticompetitive lobbying efforts conducted in bad faith to be in violation of federal antitrust laws.<sup>115</sup> Therefore, despite the legitimacy of their economic concerns and their constitutional right to redress grievances, Maine lobstermen must be careful when crafting their lobbying efforts to ensure that they are not deemed to fall within this “sham exception.” When facing the harsh punishments prescribed by the federal antitrust laws, there is no room for a trial and error approach.<sup>116</sup> Thankfully (and unfortunately, as well), their grievances are no sham. Despite the continued development of case law involving state-sponsored anticompetitive behavior,<sup>117</sup> the state action immunity exemption has been firmly established in Maine, with courts explaining the existence of a doctrine under which state “government action may be anticompetitive . . . [or] unfair without being illegal.”<sup>118</sup> Therefore, it seems that any

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113. *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965).

114. 365 U.S. 127 (1961).

115. *Id.*

116. *See* 15 U.S.C. § 1 (2004) (describing the penalties for violating the antitrust laws).

117. *See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790-91 (1975) (“The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. . . . It is not enough that . . . anticompetitive conduct is ‘prompted’ by state action . . . .”); *see also Fisherman’s Best, Inc. v. Recreational Fishing Alliance*, 310 F.3d 183, 191 (4th Cir. 2002) (“The scope of this [*Noerr* Doctrine] immunity [which provides immunity to those who petition the government for redress], depends on the source, context, and nature of the anticompetitive restraint at issue.”).

118. *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1082 (1st Cir. 1993); *see also Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138, 1139, 1143-44, 1147-48 (1st Cir. 1993).

potential legal claims by restaurants or middlemen resting on allegations of unfair governmental intrusion and the promotion of anticompetitive behavior would be moot.

Although for nearly sixty years the consent decree has led lobstermen to believe that they are unable to take formal action to remedy their financial condition, legitimate lobbying of the state legislature remains a viable and constitutionally protected option. Of course, the next logical question arises: for what exactly should Maine lobstermen be lobbying?

The Maine legislature currently recognizes that the industry needs assistance, but seems misguided in its timid attempts to help.<sup>119</sup> Legislative efforts that fall short of utilizing state action to exempt lobstermen from antitrust violations have done nothing more than provide false hope. During a legislative attempt to raise licensing fees, in order to generate revenue for marketing schemes, which would theoretically drive prices upward, “[the] co-chairman of the legislature’s Marine Resources Committee [said] ‘Maine’s blueberry, potato and dairy industries spend a far larger percentage of their revenues on marketing than lobster does.’”<sup>120</sup> This language indicates that the Maine lobster industry lacks adequate marketing resources and, more importantly, implicitly suggests that Maine lobstermen are considered agricultural players. Indeed, the state legislature appears to view the lobster fishermen as farmers, equating them to other agricultural actors.<sup>121</sup> The similarities between Maine farmers and Maine lobstermen are too glaring to ignore. Because comparisons between farmers and lobstermen are logical and easily supported, this analogy provides the best evidence that may be used to convince the legislature to grant an agricultural exemption to the lobster industry.

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119. See Clarke Canfield, *After Summer Glut, Maine Mulls Helping Lobster Biz*, AP: THE BIG STORY (Feb. 28, 2013), <http://bigstory.ap.org/article/maine-bills-aim-boost-lobster-industry>.

120. *Id.*

121. *See id.*

*B. Agricultural Exemption*

## 1. Historical Backdrop

Not every industry is bound by the same antitrust laws that currently plague Maine lobstermen.<sup>122</sup> Beginning in the last decade of the nineteenth century, members of the agricultural industry convinced state legislatures that an exemption from federal antitrust laws was necessary because of vulnerability stemming from decreased bargaining power resulting from the highly perishable nature of the industry's product, the difficulty in storing and transporting products in an efficient manner, and the subsequent reliance on a limited number of dealers, processors, and other middlemen.<sup>123</sup> Because middlemen could threaten to avoid purchasing the product altogether, thereby leaving the farmer with a spoiled (and therefore valueless) product, producers in the agricultural industry were operating from a severely handicapped bargaining position.<sup>124</sup> The buyers, in turn, often abused their bargaining position to drive down prices.<sup>125</sup> Despite this, agricultural producers, namely rural farmers, were often unable to legally organize to remedy this situation due to the existing antitrust laws.<sup>126</sup> In response, state legislatures began passing laws to help equal the playing field.<sup>127</sup> Many of these new laws, however, were challenged as violations of the Fourteenth Amendment's Equal Protection guarantees and were ultimately declared unconstitutional.<sup>128</sup>

## 2. Acts of United States Congress

Congress responded to the injustice that led many state legislatures to shield farmers from antitrust violations by passing Section 6 of the Clayton Act,<sup>129</sup> thereby excluding certain farmers from antitrust

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122. See David L. Baumer et al., *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture*, 31 VILL. L. REV. 183, 185-86 (1986).

123. *Id.* at 186-88.

124. *Id.* at 187.

125. *Id.*

126. *Id.* at 188.

127. *Id.*

128. See, e.g., *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902); *In re Grice*, 79 F. 627 (N.D. Tex. 1897); *Georgia Fruit Exchange v. Turnipseed*, 9 Ala. App. 123 (1913); *Ford v. Chicago Milk Shippers' Ass'n*, 155 Ill. 166 (1895); *Reeves v. Decorah Farmer's Cooperative Soc'y*, 160 Iowa 194 (1913).

129. 15 U.S.C. §§ 12-27 (1982).

prosecution and “free[ing them] from some of the limitations imposed by antitrust laws.”<sup>130</sup> In response to criticism that these early efforts to provide relief to farmers were too vague and difficult to navigate, Congress passed the Capper-Volstead Act,<sup>131</sup> officially carving out an agricultural exemption to the existing laws.<sup>132</sup> The relevant portion of the Capper-Volstead Act provides:

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to affect such purposes . . .<sup>133</sup>

Additional legislative action has since been taken to ensure that agricultural actors are protected from their inherent vulnerabilities. For instance, “[t]he Agricultural Fair Practices laws enacted on both the state and federal levels provide inducements for producers to gain market strength through group action.”<sup>134</sup>

To be sure, Maine lobstermen consider themselves farmers under the definition that has been adopted by federal courts.<sup>135</sup> Lobstermen cultivate the sea, and not simply in the metaphorical sense. In Maine, each trap is filled with bait for all lobsters to feed, while laws permit only a select few lobsters to be kept and sold.<sup>136</sup> For instance, current laws mandate that young lobsters, female egg-bearing lobsters, and large male

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130. William E. Peters, *Agricultural Cooperatives and the Antitrust Laws*, 43 NEB. L. REV. 73, 74 (1963).

131. 7 U.S.C. §§ 291-292 (1958).

132. Peters, *supra* note 130, at 77.

133. 7 U.S.C. §§ 291 (1958).

134. Donald A. Frederick, *Legal Rights of Producers to Collectively Negotiate*, 19 WM. MITCHELL L. REV. 433, 436 (1993).

135. “A farmer is defined as one ‘engaged in agricultural pursuits as a livelihood or business.’” *Id.*, at 434 n. 2 (quoting *Skinner v. Dingwell*, 134 F.2d 391, 393 (8th Cir. 1943)).

136. *See, e.g.*, Bill Trotter, *After Five Years, Maine Lobster Fishery Nears Sustainability Certification*, BANGOR DAILY NEWS, Jan. 12, 2013 (“Unlike neighboring states and Canadian provinces, Maine long has maintained minimum and maximum catch sizes. For generations, Maine lobstermen also have cut small V-notch marks in the tails of egg-producing females and returned them to the water to ensure a future supply.”).

lobsters that have been successful breeders must immediately be released back into the wild.<sup>137</sup> Through these practices, lobstermen are nurturing future harvests. Importantly, these laws are not an attempt to appear “agricultural,” as the first statutes banning the possession of egg-bearing female lobsters and regulating the minimum size of an acceptable catch were codified in 1872 and 1874, respectively, and these practices were already widely embraced by many Maine lobstermen at the time of their enactment.<sup>138</sup>

Given these sustainability practices, lobstermen should be able to receive the same protection as other agricultural actors. As further proof that the Maine lobstermen are actually harvesting their supply and “farming” the sea, as opposed to depleting marine resources, the Maine lobster industry was certified as sustainable in 2013, a distinctive badge of honor, by the Marine Stewardship Council, an international organization.<sup>139</sup> Following the announcement of this honor, Maine’s Governor, Paul LePage, commented on the unique nature of the Maine lobster industry, explaining that “[t]his certification recognizes our longstanding practices of good stewardship and ensures that every lobster caught in Maine waters can be marketed not only as delicious, healthy food, but also as a resource that meets the most stringent international environmental standard for seafood sustainability.”<sup>140</sup>

### 3. Exemption Merely Levels the Playing Field

Exemption from federal antitrust laws does not grant an industry permission to abuse its newly enhanced bargaining position. Illustrative of this, a U.S. Supreme Court case, *Maryland & Virginia Milk Producers Ass’n v. United States*, involved an “antitrust action . . . against an agricultural co-operative [marketing association composed of about] 2,000 dairy farmers of Maryland and Virginia that supplies approximately eighty-six percent of the milk purchased by all milk

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137. Clarke Canfield, *Maine Lobster Fishery Certified as Sustainable*, ABC NEWS, Mar. 10, 2013, <http://abcnews.go.com/US/wireStory/maine-lobster-fishery-certified-sustainable-18697249>.

138. See Lobster Institute, *Lobstering Basics – History*, UNIV. OF ME., <http://umaine.edu/lobsterinstitute/education/lobstering-basics/history/> (last visited Apr. 21, 2013).

139. Canfield, *supra* note 137.

140. Jessica Hall, *Maine Lobster Gets ‘Seal of Approval,’* PORTLAND PRESS HERALD, Mar. 11, 2013, [www.pressherald.com/news/maine-lobster-gets-seal-of-approval\\_2013-03-11.html](http://www.pressherald.com/news/maine-lobster-gets-seal-of-approval_2013-03-11.html).

dealers in the Washington, D. C., metropolitan area.”<sup>141</sup> The Court held that “[t]he privilege the Capper-Volstead Act grants producers to conduct their affairs collectively does not include a privilege to combine with competitors so as to use a monopoly position as a lever further to suppress competition by and among independent producers and processors.”<sup>142</sup>

To avoid this potential issue, exempted industries need to be careful about how they set prices. For example, the “[Maine Milk] Commission establishes minimum milk prices, monthly, for milk sold in gallons,” which is “based on the Market Administrator’s price announcements; however, the Commission has the authority to add special premiums to the price based on market conditions in southern New England.”<sup>143</sup> If exempted, the Maine lobstermen could establish a similar commission to mandate minimum lobster prices, much like the MLA did in the 1950s. Permitting the establishment of a commission designed to set minimum prices for live lobster sales in Maine, based on the model provided by the dairy farmers and the Maine Milk Commission, would likely save the industry.<sup>144</sup>

#### 4. Vulnerability of Farmers Widely Recognized

The federal laws that granted an agricultural exemption “were preceded by many state laws with similar content and objectives—namely to authorize the existence of agricultural cooperatives and to exempt them from antitrust liability.”<sup>145</sup> Farmers have been considered particularly vulnerable, because

the generally high perishability of agricultural products, the technological inability to store them for very long, and the

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141. *Md. & Va. Milk Producers Ass’n v. United States*, 362 U.S. 458, 460 (1960).

142. *Id.* at 472.

143. *How Prices are Established*, MAINE.GOV, [http://www.maine.gov/dacf/about/boards/milk\\_commission/established.shtml](http://www.maine.gov/dacf/about/boards/milk_commission/established.shtml) (last visited Apr. 18, 2013); *see also* 7 M.R.S.A. § 2954(1), (2) (2012).

144. Typically, “[w]hen horizontal price-fixing causes buyers to pay more . . . than the price that would prevail in a market free of the unlawful trade restraint, antitrust injury occurs.” *Ice Cream Liquidation, Inc. v. Land O’Lakes, Inc.*, 253 F. Supp. 2d 262, 272 (2003) (quoting *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000)). An exemption, however, provides an avenue to set prices in a lawful manner.

145. Arie Reiche, *The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation*, 42 TEX. INT’L L.J. 843, 846 (2006) (citing A. Ladru Jensen, *The Bill of Rights of U.S. Cooperative Agriculture*, 20 ROCKY MTN. MIN. L. INST. 181, 191 n.29 (1948)).

absence of efficient transportation left many individual farmers dependent on one or a few handlers (processors and distributors). On many occasions, the middlemen abused this power. In an effort to force down prices, the middlemen could simple (sic.) threaten not to buy; the prospect of rotten vegetables or spoiled milk was often enough to make the farmer capitulate. In the dairy industry, where individual farmers were dependent on handlers for weighing milk to specify its volume and for testing its butterfat content, short-changing was a common practice.<sup>146</sup>

Given the glaring similarities between the struggles that led to the creation of an agricultural exemption and the current conditions facing Maine's lobstermen, especially given the internationally-recognized sustainability practices mandated by law and the important role the industry plays in Maine's overall economic health, it is unclear why Maine lobstermen would not be granted the same protection given to other agricultural actors. The circumstances initially leading to the agricultural exemption are markedly similar to the conditions currently facing the lobster industry and, therefore, should be legally recognized as such.<sup>147</sup>

### *C. Formation of Cooperatives*

Participation in cooperatives is another avenue towards avoiding liability under the Sherman Act because the Fisheries Cooperative & Management Act of 1934<sup>148</sup> "gives anti-trust immunity to harvesters organized as a cooperative . . . [as it] treats a cooperative of individual harvesters as a single entity."<sup>149</sup> However, "if two or more cooperatives . . . were to join forces to push the price of lobster up, such action would contravene Section 1 of the Act, which prohibits such restraints of trade."<sup>150</sup> Cooperative members are only immune from price fixing within and amongst its membership.<sup>151</sup> This, of course, is not true if a broad agricultural exemption has been granted.<sup>152</sup>

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146. *Id.* (quoting Baumer, *supra* note 122, at 187).

147. *See* Baumer, *supra* note 122, at 186-187.

148. 15 U.S.C. § 521 (1934).

149. Waterman, *supra* note 74, at 5.

150. *Id.*

151. Reiche, *supra* note 145, at 846; *see, e.g.*, *Ford v. Chi. Milk Shippers' Ass'n*, 39 N.E. 651 (Ill. 1895); *Reeves v. Decorah Farmers' Coop. Soc'y*, 140 N.W. 844 (Iowa 1913).

152. *See supra* Part IV.B.

The U.S. Supreme Court has limited the scope of the exemption granted pursuant to the Capper-Volstead Act to “the formation of cooperatives and did not extend it to their anticompetitive activities, such as combining with competitors that are not exempt cooperatives or using their dominant position to suppress competition with independent producers and processors.”<sup>153</sup> Again, this exemption does not signify unfettered freedom to conduct business in any manner that a cooperative chooses. The Capper-Volstead Act

charge[s] the Secretary of Agriculture with the responsibility of taking action if he believe[s] that any such association “monopolizes or restrains trade . . . to such an extent that the price of any agricultural product is unduly enhanced.” In such cases, a decree can be issued against the association that requires it to cease and desist from such acts.<sup>154</sup>

This potential for liability can be remedied through mergers and the formation of larger entities.<sup>155</sup> For instance, the dairy industry was able to unify on a very large scale, with “literally hundreds of cooperative mergers in the [1960s] and [1970s] yield[ing] several large regional cooperatives.”<sup>156</sup> The lobster industry is already beginning to follow this model—with cooperatives forming in certain regional areas.<sup>157</sup> Each individual lobsterman, under current law, represents an independent business entity; therefore, unless situated as a member of a cooperative, lobstermen are prohibited by the Sherman Act from price coordination.<sup>158</sup> “Members of a [cooperative] are exempt from [antitrust] laws, which means they are allowed to talk about coordinating actions with other co-op fishermen.”<sup>159</sup> Thus, formation of large-scale cooperatives may be a logical starting point.

Under “Section 1 of the Capper-Volstead Act . . . any person who thus qualified as a ‘farmer’ would be immune from the antitrust laws only to the extent that his activities stemmed from his farming operation and were conducted under the auspices of a qualified cooperative.”<sup>160</sup> This principle is now well established, and federal judges have

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153. Reiche, *supra* note 145, at 848 (quoting *Md. & Va. Milk Producers Ass’n v. United States*, 362 U.S. 458, 464 n.7 (1960)).

154. *Id.* (referencing the Capper-Volstead Act).

155. Baumer, *supra* note 122, at 220.

156. *Id.*

157. Brophy, *supra* note 69.

158. *Id.*

159. *Id.*

160. Peters, *supra* note 130, at 97.

consequently dismissed challenges to it in “terse one-page opinion[s].”<sup>161</sup> “Relying upon Section 6 of the Clayton Act [a federal judge stated], ‘[i]t seems to me when Congress said that cooperatives were not to be punished, even though . . . monopolistic, it would be as ill-considered for me to hold to the contrary as were some of the early labor decisions.’”<sup>162</sup> But how realistic is it for the entire Maine lobster fishery to combine under the umbrella of a few cooperatives? Given the territorial, independent and occasionally hostile nature of certain individuals within the industry, is such cooperation even possible?<sup>163</sup>

In order to preserve the industry and better their financial outlook, lobstermen may have no choice but to unite. However, the extent to which cooperatives are necessary in the long-term depends largely on whether or not a blanket agricultural exemption can be attained.

#### D. Canadian Approach

The above-mentioned options do not represent an exhaustive list of the different alternatives available to remedy this situation. Other nations have found different ways to address similar circumstances. For instance, despite the similarities between American and Canadian antitrust doctrine, Canadian authorities have never targeted fish harvesters, as the harvesters are viewed as an unusual kind of a hybrid

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161. *Id.* at 99.

162. *Id.* (quoting *United States v. Dairy Co-op. Ass’n*, 49 F. Supp. 475, 475 (D. Ore. 1943)).

163. For a detailed illustration of the animosity existing among Maine lobstermen, see Clarke Canfield, *Lobster Wars Turn Violent in Maine*, THE HUFFINGTON POST (Sept. 4, 2009), [http://www.huffingtonpost.com/2009/09/04/lobster-wars-turn-violent\\_n\\_277748.html](http://www.huffingtonpost.com/2009/09/04/lobster-wars-turn-violent_n_277748.html) (“Lobster fishermen have feuded for generations over who can set traps, and where. To protect their fishing grounds, the lobstermen here have been known to cut trap lines, circle their boats menacingly around unwelcome vessels and fire warning blasts from shotguns. With lobster prices down, the animosity has been particularly shrill this summer.”). See also AP, *Barrage of Sabotage Hits Maine Lobstermen*, CBS NEWS (May 11, 2012), [http://www.cbsnews.com/8301-201\\_162-57432430/barrage-of-sabotage-hits-maine-lobstermen/](http://www.cbsnews.com/8301-201_162-57432430/barrage-of-sabotage-hits-maine-lobstermen/) (“Two lobster boats were recently sunk by vandals in Friendship. The dispute among tight-lipped lobstermen points to the unwritten laws of the sea: fishermen mete out justice themselves, sometimes with violent results.”); Goodnough, *supra* note 58 (“[U]nofficially, each harbor has its own boundaries, determined by local lobstermen over the decades. Newcomers often find their buoys snatched or their trap lines cut. The lobstermen who live on Maine’s rugged islands are especially territorial and known for practicing frontier justice; in one notorious case in 2000, two lobstermen fought over turf with a pitchfork and a fish gaff.”).

business entity.<sup>164</sup> Canadian lobstermen have never been subjected to punishment for price-fixing, remaining outside of federal prosecutors' crosshairs.<sup>165</sup> Additionally, in Prince Edward Island, the government has actually agreed to buy all of the surplus canners (lobsters less than one pound, which are illegal to keep in Maine due to the sustainability practices mandating strict minimum and maximum length requirements). The Canadian government also funds a four million dollar marketing campaign to help promote the fisheries, while providing other benefits such as enhanced employment insurance for lobstermen.<sup>166</sup>

In addition to a hands-off prosecutorial approach and active government subsidization, Canada is home to many lobster processing plants, which Maine lacks. Canadian plants process more than half of Maine's annual lobster catch. Maine has only three processing plants, while Canada has thirty-two.<sup>167</sup> Maine's lobster industry would benefit from having its product processed locally.<sup>168</sup> The lack of in-state processing plants increases the need for transportation and further exacerbates the reliance on the middlemen who have access to the necessary storage facilities. Building local processing plants would reduce the reliance on dealers and middlemen, thereby helping the local economy and taking advantage of interest in local food movements.

If the legal changes discussed above cannot ultimately be realized, these alternative practical steps can be taken to help the industry revive itself. Gaining domestic independence over the processing of Maine lobsters and improving the marketing scheme to better advertise the local, wild-caught, sustainable character of this unique fishery would be a step in the right direction.

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164. Waterman, *supra* note 74.

165. *Id.*

166. *P.E.I. to Buy Lobster in 5-Point Plan for Industry*, CBC NEWS (May 14, 2009), <http://www.cbc.ca/news/canada/prince-edward-island/p-e-i-to-buy-lobster-in-5-point-plan-for-industry-1.832268>.

167. Ramona Du Houx, *Canadian Lobster Price Protests Highlight a "Serious Economic Flaw" in State's Economy*, MAINE INSIGHTS (Aug. 16, 2012), <http://www.maineinsights.com/perma/canadian-lobster-price-protests-highlight-a-serious-economic-flaw-in-states-economy>.

168. See Antonio Bussone, *Lobster Processing Is Missing Link for Maine*, BANGOR DAILY NEWS (Jan. 13, 2012), <http://bangordailynews.com/2012/01/13/opinion/contributors/lobster-processing-is-missing-link-for-maine> ("Despite record catches, Maine's lobster industry is in danger because it lacks an essential element of a strong natural resources economy — the local processing of the product and the financial benefit to the local economy.").

## V. CONCLUSION

Given the Maine lobster industry's importance to the state's tourism industry and overall economic vitality, state action should be taken to ensure that lobstering in the Gulf of Maine remains economically feasible. Nearly sixty years after the "great lobster war" of the 1950s, history appears to be repeating itself. Frustrations over unfair prices are causing tension and foreshadowing a *de facto* shut down. However, a unified tie-up would be viewed as a violation of the consent decree and would likely be met with harsh antitrust penalties, unless the state legislature grants protection.

The legislative record leading to enactment of the Sherman Act and to the creation of an agricultural exemption applies precisely to the difficulties faced by Maine lobstermen, who currently operate at the mercy of powerful middlemen. It seems absurd that these statutes, which were designed to protect individuals suffering from an unequal bargaining position and to provide relief in the form of fair prices for farmers and consumers, while limiting the unnatural stranglehold that middlemen have on a given market, are now being used against those who desperately need their protection.

What is the solution? First and foremost, the consent decree, which on its face raises serious First Amendment concerns, must be invalidated, so that an open discussion can take place in the capitol without fear of repercussion. The state should then employ its state action exemption power to act on behalf of the industry, granting immunity to those simply looking to earn an honest living. Expansion of the agricultural exemption to Maine lobstermen is not a strained and tenuous exercise. Recent designation as a certified sustainable fishery turns the analogy between lobstermen and farmers into a reality. In order to organize and effectively communicate, Maine lobstermen would be wise to join cooperatives, which could then ultimately merge into a larger umbrella organization. This structure would provide additional protection from potential antitrust violations during the formative phases of the industry's transformation. Finally, even if an exemption is granted and reorganization into cooperatives is achieved, the Maine lobster industry would be wise to build local processing plants and increase its marketing efforts, instead of remaining dependent on Canada for these services.

A tangible injustice is currently occurring at Maine's docks and wharfs, and the time has come for meaningful change. Up and down the Maine coast, individuals within the industry are struggling to stay afloat and earn an honest living. The lobster industry is again at a crossroads

and the state should take swift action to ensure that the iconic images of Maine's coastline do not become a relic of yonder years.