

Ocean and Coastal Law Journal

Volume 18 | Number 1

Article 13

2012

Tradition Versus Economics: An Exploration Of The Controversy Surrounding Maine's Ban On The Landing Of Bycaught Lobster

Tristan Birkenmeier

University of Maine School of Law

Follow this and additional works at: <http://digitalcommons.maine.law.maine.edu/oclj>

Recommended Citation

Tristan Birkenmeier, *Tradition Versus Economics: An Exploration Of The Controversy Surrounding Maine's Ban On The Landing Of Bycaught Lobster*, 18 *Ocean & Coastal L.J.* (2012).

Available at: <http://digitalcommons.maine.law.maine.edu/oclj/vol18/iss1/13>

This Comment is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in *Ocean and Coastal Law Journal* by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

TRADITION VERSUS ECONOMICS: AN
EXPLORATION OF THE CONTROVERSY
SURROUNDING MAINE'S BAN ON THE LANDING
OF BYCAUGHT LOBSTER

*Tristan Birkenmeier**

"Wherever we want to go, we'll go. That's what a ship is, you know. It's not just a keel and a hull and a deck and sails, that's what a ship needs; but what a ship is... what [a ship] really is... is freedom"

-Captain Jack Sparrow, *Pirates of the Caribbean:
The Curse of the Black Pearl*

I. INTRODUCTION

On July 20, 2011 the Commissioner of the Maine Department of Marine Resources (DMR), Norman Olsen, submitted his letter of resignation to Governor Paul LePage.¹ Olsen then went on to release a public statement,² claiming that the "[LePage] administration is more interested in pacifying special interest groups than in responsibly managing Maine's marine resources for the benefit of the entire state."³ To what "special interests" was the Commissioner referring? And what exactly was the catalyst for his abrupt and decidedly public split from the Governor who, only months earlier, nominated him to a prestigious and important position in state government?⁴ The answer, it seems, related to

* JD Candidate, University of Maine School of Law, Class of 2013.

1. Rebeckah Metzler, *Marine Resources Chief Quits*, PORTLAND PRESS HERALD (July 21, 2011), http://www.pressherald.com/news/marine-resources-chief-quits_2011-07-21.html.

2. *Olsen Releases Statement on Resignation*, KENNEBEC JOURNAL (July 21, 2011), <http://www.kjonline.com/news/Olsen-releases-statement-on-resignation.html>.

3. *Id.*

4. Olsen was Appointed Commissioner of the Department of Marine Resources in January, 2011, and at the time, seemed to be a perfect fit for the role in the minds of

Olsen's vocal support for new regulations permitting lobster bycatch in Maine.⁵

Bycatch, put simply, occurs when living creatures (in this case, lobsters) are caught unintentionally by fishing gear designed to catch a completely different form of marine life.⁶ The occurrence is largely unavoidable, and is a problem particularly prevalent among groundfishing vessels that trawl the bottom of the ocean with large nets.⁷ Usually, bycatch is discarded (thrown back into the sea), either because the fishing vessel has no use for it, or, as is the case in Maine, because discarding is required.⁸ In Maine, the prospect of allowing lobster bycatch to be kept and sold within state lines, even subject to tight regulation, is fervently opposed by the lobster industry.⁹ When Commissioner Olsen laid out a proposal to allow lobster bycatch to be kept by fishermen without lobster licenses in limited circumstances, he was met with immediate opposition. "[Olsen's plan to allow lobster bycatch] caused a terrible uproar" according to Downeast Lobstermen's Association (DELA) Executive Director Sheila Dassat. DELA "fought . . . the issue . . . adamantly."¹⁰

Shortly after Olsen's resignation, it became clear to many political analysts that the primary reason for Olsen's abrupt departure and vocal split from the LePage Administration had a lot to do with his support for regulations allowing lobster bycatch to be kept and sold by

many people; he had just finished a decorated twenty-five year tenure in the U.S. Foreign Service, was raised by a fishing family, and spent years as a lobster fisherman himself. See Sandra Dinsmore, *The Olsen Controversy Back Story*, FISHERMAN'S VOICE (Sept. 2011), <http://www.fishermensvoice.com/0911TheOlsenControversyBackStory.html>.

5. *Id.*

6. Kathleen Castro, *Bycatch*, RHODE ISLAND SEA GRANT FACT SHEET, <http://gso.uri.edu/factsheets/Bycatch.com> (last visited Feb. 23, 2012).

7. *Id.*

8. ME. REV. STAT. ANN. tit. 12, § 6432 (West 2006).

9. *Id.*

10. This was the DELA Executive Director's response to Commissioner Olsen's speech at the Maine Fisherman's Forum in Rockport in March of 2011. In his speech, Olsen laid out his support for allowing lobster bycatch to be kept and sold by groundfishermen in limited circumstances. In an email statement on August 3, 2011, Olsen reiterated the limited conditions that would apply to the proposed rule, stating that:

"The issue has always been limited to incidental bycatch of lobsters caught more than 50 miles offshore, by boats operating the federal vessel monitoring system, which allows minute-to-minute monitoring of vessel location, abiding by the federal count limit on numbers per day and per trip, and abiding by Maine size limits, and landing them only at the Portland Fish Pier."

Dinsmore, *supra* note 4.

groundfishermen in Maine.¹¹ Indeed, it seems fairly obvious that the “special interests” Olsen referred to in his post-resignation statement were in fact one of the most powerful interest groups in Maine: lobstermen.¹²

The story of Norm Olsen’s resignation crystallizes what is, and has been, a divisive issue in Maine for quite some time: Should lobster bycatch be sold by Maine groundfishermen under any circumstances whatsoever? This Comment will purposefully explore that question. Part I will provide a brief history of the lobster industry in Maine, from its origins dating back before the industrial revolution to its current form. This is a necessary first step in the analysis of the above question, because only by understanding the history can one fully understand the deeply held, and historically based, belief of Maine’s lobstermen that they should have the *exclusive* right to land lobsters at Maine ports. To help illustrate this point, this Comment will provide an overview of some notable recent events involving lobstermen in Maine fighting with one another (often violently) over territory. Part of this analysis is drawn from James Acheson’s now famous book, *The Lobster Gangs of Maine*,¹³ which explores the culture of lobstermen in Maine and sheds light on the deeply rooted belief of many lobstermen that their right to lobster in a certain area is handed down to them based on tradition and the fact that their family has fished a certain territory for generations.¹⁴ Part I of this Comment will also explore the current regulatory regime regarding lobster licensing and lobster fishing in Maine. This analysis will illustrate the point that the history and culture of Maine’s lobster industry has created a proverbial family heirloom: a right passed down from one generation to the next, creating a culture hostile to any outside competition and interference. This information is essential to provide a context to how and why the current Maine lobster industry is so vehemently opposed to allowing lobster bycatch.

Part II of this Comment will first explore the arguments put forth by those in favor of allowing lobster bycatch under limited circumstances in Maine, and then discuss the reasoning of those who say allowing limited lobster bycatch in Maine is an economic necessity. Additionally, this section will explore the fact that limited lobster bycatch has been

11. Collin Woodard, *Why Did Norm Olsen Lose The DMR Post?*, THE WORKING WATERFRONT (Feb. 8, 2012), <http://www.workingwaterfront.com/columns/Why-Did-Norm-Olsen-lose-the-DMR-post/14721/>.

12. *Id.*

13. JAMES ACHESON, *THE LOBSTER GANGS OF MAINE* (1988).

14. *Id.* at 2.

implemented in other jurisdictions (in particular, Massachusetts).¹⁵ This analysis will focus not only how the allowance of limited lobster bycatch has affected the lobster and groundfishing industries in those jurisdictions, but also how it has directly affected the same industries here in Maine.

Finally, this Comment will aim to synthesize all of this information into a proposal for slowly and properly introducing regulations that allow for the sale of lobster bycatch in Maine under limited circumstances. This proposal will take into account the history and tradition of the Maine lobster industry, but will also acknowledge the need for Maine to keep up with the modern trend in other jurisdictions, especially in today's increasingly globalized and interconnected economy.

II. A BRIEF HISTORY OF THE MAINE LOBSTER INDUSTRY

Even the earliest settlers to arrive in what is now the State of Maine could not help but note the sheer abundance of lobsters found throughout the coastal region.¹⁶ In fact, there are records of early lobsters reaching five feet in length.¹⁷ In addition, a fairly well known tale in Maine is that lobsters were once considered "poverty food" fit to be served only to prisoners and indentured servants who had traded a term of servitude for passage to the new world.¹⁸ In Massachusetts, many servants rebelled, beginning a trend where clauses were inserted into their contracts stating that they could not be forced to eat lobsters more than three times a week.¹⁹ In the early 1800s, lobstering was primarily done by hand, with men and women walking the rocky coast picking lobsters out of the tidal pools.²⁰ In the 1830s, the wooden "lath trap" was developed.²¹ It could be left overnight on the sea floor and would remain the dominant trap

15. Proponents of allowing a similar law in Maine emphasize the fact that Massachusetts permits groundfishermen to sell lobster bycatch to processors within its state lines. There is evidence that many Maine flagged groundfishing vessels are offloading their entire catch in Massachusetts due to the fact that they are allowed to sell the lobster bycatch as well. *See infra* Part II.

16. Acheson, *supra* note 13, at 4.

17. *Id.*

18. *Lobstering History*, GULF OF MAINE RESEARCH INSTITUTE, <http://www.gma.org/lobsters/allaboutlobsters/lobsterhistory.html> (last visited Sept. 2, 2012).

19. *Id.*

20. *Id.*

21. *Id.*

design for nearly 150 years.²² It was not until the 1980s that the modern day trap made of steel and wire mesh was first introduced.²³

In Maine, lobstering as a trap-based industry came into real existence in the 1850s.²⁴ Today, Maine is the largest lobster producing state in the nation.²⁵ In 2005, 7261 Maine lobstermen, using 3.269 million traps, landed 29,117 metric tons of lobster.²⁶ This catch led to a producer income for the industry of \$296.4 million.²⁷ A key development for the lobster industry was the ability to transfer lobsters live, which first came in the form of wooden sail boats designed with inboard water tanks to safely carry precious cargo.²⁸ This development was crucial because lobsters, in their dead or uncooked state, produce certain toxins that can lead to illness, or even death, to the person who consumes them.²⁹ The introduction of these “smacks” as they were called, allowed for the inexpensive transport of lobsters from the Maine coast to the larger markets of Boston and New York City.³⁰

Another key development in the lobster industry was the creation of the lobster pound. It is believed that the first Maine lobster pound appeared in Vinalhaven in 1875.³¹ Lobster pounds utilized the same general technology as the smack boats, a key feature being the tanks of salt water through which new doses of water were routinely circulated, maintaining a healthy environment for the lobsters inside.³² The introduction of the lobster pound granted lobstermen greater flexibility in how they stored and disposed of their catch. Using the lobster pounds as a repository of sorts, they could hold lobsters until the price went up, or allow time for a new molted “soft-shell” lobster to harden its shell.³³ A final key development in the 1800s was the lobster cannery.³⁴ These

22. Samantha R. Smith, Note, *The Current Fate of the Lobster Fishery and a Proposal for Change*, 40 NEW ENG. L. REV. 663, 666 (2006).

23. *Id.* at 666-67.

24. *Lobstering History*, *supra* note 18.

25. Leslie M. MacRae, *It's Time for the Lobster Monopoly to End: Maine Needs to Grow Up Like its Lobsters*, 18 J. NAT. RESOURCES & ENVTL. L. 171 (2004).

26. DEPARTMENT OF MARINE RESOURCES, STATE OF MAINE, HISTORICAL SUMMARY OF MAINE LOBSTER FISHERY, available at <http://www.maine.gov/dmr/rm/lobster/lobdata.htm> [hereinafter HISTORICAL SUMMARY OF MAINE LOBSTER FISHERY].

27. *Id.*

28. *Lobstering History*, *supra* note 18.

29. Acheson, *supra* note 13, at 4.

30. *Id.*

31. *Lobstering History*, *supra* note 18.

32. *Id.*

33. *Id.*

34. *Id.*

early canneries are the forbearers of the modern day lobster industrial complex in Maine and throughout New England, where live lobsters can be taken and processed into many different, non-perishable forms.³⁵ Indeed, the ability of these early canneries to make lobster shipping easier and safer led to the price of canned lobster outpacing that of live lobster.³⁶ The processing methods pioneered by these early canneries heralded the arrival of the lobster as a true industrial commodity, capable of supporting not only the lobstermen who caught them, but an entire industrial and commercial economy all on their own.

During the two decades spanning 1950-1969 the national demand for lobsters truly came into its own, as American per capita consumption of lobster grew from .585 pounds (live weight) to .999 pounds.³⁷ This increase in demand led to a corresponding increase in the amount of money the lobster industry in Maine produced.³⁸ To put this demand increase in perspective, consider the following statistics: throughout 1950, Maine lobstermen landed 8324 metric tons of lobster, leading to a producer income of \$6.4 million.³⁹ In 1969, Maine lobstermen landed a similar, though slightly larger catch of 8997 metric tons.⁴⁰ However, this catch in 1969 yielded a producer income of sixteen million dollars.⁴¹ Even accounting for inflation, the increase in the value of lobster can only be explained by the skyrocketing demand for lobster across the country.

With this increase in demand came greater profits for lobstermen, encouraging many to join the industry.⁴² As the industry became more advanced and complex, a need for uniform regulations developed, as well as a need to ensure that state and federal regulations regarding lobster harvesting complemented one another. To address these issues, the Atlantic States Marine Fisheries Commission (ASMFC) was established.⁴³ The ASFMC manages the fisheries of twenty-two coastal states, from Maine to North Carolina.⁴⁴ Each state has a delegation that

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. HISTORICAL SUMMARY OF MAINE LOBSTER FISHERY, *supra* note 26.

40. *Id.*

41. *Id.*

42. *Lobstering History*, *supra* note 18.

43. Seth Macinko & Sarah Schumann, *The Process of "Property": Stasis and Change in Lobster Management in Southern New England*, 33 VT. L. REV. 73, 78 (2009).

44. *Id.*

deals with the Commission's Lobster Management Board.⁴⁵ This delegation consists usually of a legislative appointee, a governor's appointee, and the director of the state's fisheries-management agency.⁴⁶ Also part of the commission are representatives from the National Marine Fisheries Service (NMFS), who attend the commission's meetings, but do not vote.⁴⁷ Instead, the NMFS representatives are present to relate to the board any concerns regarding the implementation of federal regulations regarding the American lobster.⁴⁸ Through the ASMFC, uniform regulations were promulgated both on the state and federal level, limiting the size of lobsters that were allowed to be kept and sold.⁴⁹ These coordinated regulations set the minimum legal size for all states at 3.25 inches, meaning the length from a lobster's eye socket to the beginning of its tail.⁵⁰

However, despite the modernization of the lobster industry both nationally and locally, the culture of Maine lobstermen remains very similar to that of its earliest beginnings. For example, many of the small fishing communities that dot the Maine coast have what local lobstermen consider their own "territory."⁵¹ Very often, there is an informal agreement among the lobstermen of a community regarding who can fish for lobsters and when they can do so.⁵² Examples of this culture come in the form of recognized rules for how traps are laid, often North to South at certain times, and East to West at others, to minimize the possibility of tangled lines.⁵³ These individual cultures are often hostile to outside lobstermen entering their territory and those who do venture to set traps in a territory will often return to find that their gear has been moved or that a hitch knot has been tied into their line, making it much more difficult to pull up their catch.⁵⁴ If these lesser measures do not get the intended message across, in some cases, the line connecting the traps to the surface are cut, costing the outsider substantial time and money.⁵⁵

An example of this sort of culture is the community of Monhegan Island, the waters around which have been designated the "Monhegan

45. *Id.*

46. *Id.*

47. *Id.* at 78-79.

48. *Id.* at 79.

49. *Lobstering History*, *supra* note 18.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

Lobster Conservation Zone.”⁵⁶ This zone, granted to the Island by the Maine State Legislature, is an area where only residents of Mohegan Island are permitted to set traps.⁵⁷ On Monhegan Island, and in many communities like it, the right to catch lobster in the surrounding waters is considered by most lobstermen to be a birthright, and something that is passed on from one generation to the next through apprenticeships between fathers and sons.⁵⁸ This informal culture of passing licenses exclusively from one generation to the next has found its way into proposed state regulations.⁵⁹

It was this culture that Commissioner Olsen clashed with directly. For example, he argued against allowing the decidedly scarce lobster licenses to be handed from one generation to the next.⁶⁰ These positions by Commissioner Olsen drew the ire of the DELA who, through Executive Director Sheila Dassat, argued that the proposals allowing lobstering families special consideration were similar to “a family farm, where when the patriarch of the family retires, it gets passed on to the sons, who helped him with harvesting.”⁶¹ She went on to say that “Olsen was very strongly against [licensing by birthright] and didn’t always agree with how much of the lobster industry felt.”⁶² This clash between the DELA and Commissioner Olsen provides a window into the cultural disparity that exists between the current Maine lobster industry and those on the outside who are often seen by lobstermen as trying to interfere in, what is for them, an intensely personal enterprise.⁶³ Only by acknowledging this culture can one begin to understand the basis for the lobster industry’s fervent opposition to the notion of allowing

56. ME. REV. STAT. ANN. tit. 12, § 6471 (West 2006).

57. ME. REV. STAT. ANN. tit. 12, § 6474 (2005).

58. *Lobstering History*, *supra* note 18.

59. The Maine Legislature drafted and considered a bill permitting lobstermen over the age of sixty-five to pass their lobster license on to their child so long as the child had actively lobstered in Maine for at least five years, had met the state’s residency requirement for at least ten years, and had completed an apprenticeship program. However, the bill never passed. *See generally* L.D. 307, An Act to Encourage Lobstering Traditions and Facilitate Retirement From Lobstering (125th Legis. 2011), *available at* http://www.mainelegislature.org/legis/bills/bills_125th/billtexts/HP024901.asp.

60. Olsen asserted that children of lobstermen should have no special dibs on obtaining extremely scarce lobster licenses. He stated, “[t]he lobsters are a public resource, so how is it that a select group of people gets to get their kids into a program that slides them right in and everyone else has to wait for someone to die? It’s a system that’s become hereditary.” Woodard, *supra* note 11.

61. *Id.*

62. *Id.*

63. *See generally id.*

groundfishing vessels, with no lobster licenses, no years of apprenticeship, and no family history in the industry, to be involved in the catching and selling of Maine lobsters.⁶⁴

This culture on the part of the lobster industry is not only fueled by local tradition, but also by the state regulations Maine has enacted to govern the catching of lobsters.⁶⁵ The Maine statutes regulating the lobster industry (codified in ME. REV. STAT. ANN. tit. 12, §§ 6421-6477), in particular, the regulations prohibiting all but Maine residents from obtaining a license to lobster in Maine, are considered protectionist according to some scholars, and in some instances, unconstitutional.⁶⁶ While Maine's basic commercial fishing license is available to out of state residents,⁶⁷ this is not the case with respect to lobster licenses.⁶⁸ The dichotomy between the requirements for obtaining these two licenses is interesting, and lends credence to the argument that the Maine lobster industry has succeeded in lobbying for a regulatory framework favorable to the industry's monopoly on the catching and selling of lobsters in this state. While there are systems set up to allow new lobstermen into the industry, the requirements for apprenticeship and residency are strict.⁶⁹ Furthermore, as discussed above, the state has created certain zones where only members of a particular community are allowed to lobster,⁷⁰ further engraining into the industry a belief that access to the lobster fishery is theirs by right.

The tradition of lobstering culture is also a centerpiece of the organizations that lobby for the lobster industry in Maine.⁷¹ The Maine Lobstermen's Association (MLA), for example, states as one of its core values, "Tradition: We take great pride in the long-standing traditions that have laid a solid foundation for our industry. We believe that it is important to honor and understand our history of multi-generational lobstering families, hard work and stewardship as the foundation for the

64. See generally *Lobstering History*, *supra* note 18.

65. See *e.g.*, ME. REV. STAT. ANN. tit. 12, § 6421 *et. seq.*

66. For a detailed analysis of Maine's lobster laws and their tendency towards protectionism in the context of the Privileges and Immunities clause of the Constitution, See MacRae, *supra* note 25.

67. ME. REV. STAT. ANN. tit. 12, § 6501 (2005).

68. ME. REV. STAT. ANN. tit. 12, § 6601 (2006).

69. See ME. REV. STAT. ANN. tit. 12, §6422 (2006); see also MacRae, *supra* note 25, at 173.

70. ME. REV. STAT. ANN. tit. 12, § 6474 (2005).

71. See Maine Lobstermen's Association, *Mission Statement*, available at <http://www.maine lobstermen.org/about.asp?page=1> (last visited Sept. 2, 2012).

future.⁷² The lobster industry in Maine is unique in its tradition and culture. Families have fished the same waters for decades, if not centuries. With such tradition comes a genuine belief that the industry should be controlled by those who are a part of it. Furthermore, laws such as those allowing families to pass down lobster licenses to their children serve at least two laudable goals. First, they ensure that those permitted to harvest lobsters have a vested interest in the sustainability of the resource not just for the current generation, but for the next generation as well. Second, they allow for current lobstermen to have confidence that, when they train their children from a young age on the ins and outs of making a living in the lobster industry, those children will be assured a place in the industry when their parents retire.

The industry, however, must recognize that it cannot hide from the pressures of the twenty-first century and the increasingly globalized economy that defines our modern age. Maine's lobster industry, and the traditions that have been its foundation, are now inescapably part of a much broader and more complex national and international economy.⁷³ Among the consequences of this is the fact that no one industry can operate in a vacuum. Regulations which are favorable for the lobster industry can and often do have negative impacts on other industries.⁷⁴ As will be discussed in the next section of this Comment, these impacts can be surprising and must be given due consideration in any attempt to craft a comprehensive regulatory framework regarding Maine's coastal economy.

III. ARGUMENTS AND PROPOSALS FOR ALLOWING LOBSTER BYCATCH TO BE SOLD IN MAINE IN LIMITED CIRCUMSTANCES

Maine is currently the only state in the Northeast which does not allow, to at least some degree, groundfishermen to sell their lobster bycatch within state lines.⁷⁵ Indeed, the fact that Maine is such a notable outlier in terms of its regulations on this issue forms the basis for most

72. *Id.*

73. See generally Marina Primorac, *The Global Village: Connected World Drives Economic Shift*, available at <http://www.imf.org/external/pubs/ft/survey/so/2012/NEW083012A.htm> (last visited Sept. 2, 2012).

74. *Id.*

75. Indeed, all of Maine's neighbor states allow for the sale of lobster bycatch pursuant to federal regulations. These states include: New Hampshire, Massachusetts, Rhode Island, Connecticut, New York and New Jersey. *Frequently Asked Questions—Lobster*, *Betterlobsterlaw.com*, http://www.pfex.org/betterlobsterlaw/faq/faq_lobster.htm (last visited Feb. 23, 2012).

arguments advocating for lobster bycatch to be sold in Maine.⁷⁶ Not surprisingly, the arguments for allowing lobster bycatch to be sold in Maine take on a decidedly economic tone. Proponents argue that Maine is stuck in the past, and now finds itself in a position where it is surrounded by jurisdictions allowing lobster bycatch.⁷⁷ Some argue this position has come about because Maine's leaders continue to be disproportionately influenced by the lobster industry.⁷⁸ Supporters of allowing lobster bycatch to be sold in Maine argue that the state's catering to the demands of the lobster industry has allowed another important Maine industry, namely groundfishing, to suffer real and far reaching economic consequences⁷⁹ which in turn has cost the state tax revenues, business development opportunities and, most importantly, jobs for its residents. This section will explore the arguments for how Maine's ban on the selling of lobster bycatch within state lines has negatively affected the state's economy. It will also explore the argument that allowing lobster bycatch to be sold under limited circumstances would not have any material effect on the lobster fishery or the current state of the lobster industry in Maine.

A. The Industry Most Affected by Maine's Lobster Bycatch Ban

As mentioned previously in this Comment, the group which most vocally supports a lifting of Maine's ban on the landing of bycaught lobsters within state lines is groundfishermen.⁸⁰ A key reason for this is fairly simple: the very nature of their work leads to a lot of bycaught lobster. Groundfishing vessels fish for species that dwell at or near the bottom of the ocean.⁸¹ The industry traces its origins in North America back more than 400 years.⁸² Today, groundfishing vessels utilize nets, which are dragged along at or very near the ocean floor, often for miles on end.⁸³ Today, this technique is extremely effective at collecting

76. *Id.*

77. *Id.*

78. See generally MacRae, *supra* note 25.

79. *Id.*

80. Rebekah Metzler, *Revival of Fishing Boils Down to Lobsters*, PORTLAND PRESS HERALD (July 11, 2011), http://www.pressherald.com/news/revival-of-fishing-boils-down-to-lobsters_2011-07-31.html.

81. Steven A. Mucawski, *Brief History of the Groundfishing Industry of New England*, <http://www.nefsc.noaa.gov/history/stories/groundfish/grndfsh1.html> (last visited March 7, 2012).

82. *Id.*

83. *Id.*

anything (whether it is a form of marine life or an inanimate object) at or near the sea floor, which happens to be within the range of the deployed net.⁸⁴ Given this method of fishing, it is not hard to fathom why groundfishermen find themselves with a lot of bycatch. Moreover, they utilize an extraordinarily imprecise technique to land their intended catch, which is often cod, haddock, flounder, redfish, and ocean perch.⁸⁵

Homarus americanus, more commonly known as the American Lobster, is “a bottom dwelling crustacean that has a shrimp like body and ten legs, two of which are used for crushing and gripping food items.”⁸⁶ Lobsters off the coast of Maine spend the vast majority of their lives on the ocean floor, scavenging mostly for dead or dying marine life that finds its way to the bottom.⁸⁷ In effect, lobsters are the ocean floor’s cleaning crew.⁸⁸ While capable of utilizing their flipper like tail to propel them backwards for short distances at high speeds (most commonly as a last ditch effort to escape danger), American Lobsters generally plod along slowly on the sea floor using their eight small legs.⁸⁹ They are, for all practical purposes, the perfect candidate to be unintentionally caught by the large nets utilized by groundfishing vessels.

While a common problem concerning most bycatch is that the marine life unintentionally caught is often damaged or killed either in the course of being pulled aboard the fishing vessel, or before it is returned safely to the ocean,⁹⁰ studies have shown that lobsters are quite often able

84. *Id.*

85. *Id.*

86. *American Lobster*, FISH & WILDLIFE SERV. BIOL. REP., April, 1985, available at <http://www.nwrc.usgs.gov/wdb/pub/0155/pdf> (providing a detailed description of the American Lobster, its range, feeding habits, and physical characteristics).

87. *Id.*

88. *Id.*

89. *Id.*

90. Indeed, the unintended destruction of marine life—in particular threatened or endangered species such as sea turtles—was key to bycatch being labeled by many environmental groups (and also the National Marine Fisheries Service) as “the [marine fishery’s] problem of the 1990’s.” Sea Grant Rhode Island, *Rhode Island Sea Grant Fact Sheet*, available at <http://seagrant.gso.uri.edu/factsheets/bycatch.html>. As discussed previously, the groundfishing industry was front and center in the controversy, not only because of the fact it is the largest and most important form of fishing in the northeast, but also because the methods used by groundfishermen are inherently the most dangerous to bycatch. *Id.* For example, the nets used for groundfishing are, by definition, dragged along the ocean bottom and then brought rapidly to the surface with the catch. This quick ascent can be harmful to many species that dwell exclusively on the ocean bottom. Also, once the net is brought to the surface it takes quite some time for the crew of the groundfishing vessel to sort through the harvest and separate potential bycatch to be

to survive after being caught in groundfishing nets.⁹¹ This is partly due to their relatively strong shell, which serves to protect them from contact with the groundfishing net, and also their ability to survive longer out of the water than many other forms of marine life, especially fish such as haddock or flounder.⁹² Finally, lobsters have a relatively strong constitution, including the ability to regrow damaged or lost appendages (including their front crusher and pincher claws).⁹³ Such relatively unique attributes make lobsters more likely to survive the physical stresses of being caught in groundfishing nets at the time of harvest and also enhances their ability to withstand any trauma inflicted upon them.⁹⁴ As a result, lobsters are often still viable when returned to the ocean or when sold as bycatch in jurisdictions where permitted.⁹⁵

An important final consideration about the groundfish industry in the Northeast is the fact that, according to many studies and specific examples, it is an industry that has seen better days, and may be on the brink of collapse.⁹⁶ In light of this, it is important to note that the

returned to the sea. It is often during this time that much of the bycatch dies before it can be returned to the water. *Id.*

91. See *Frequently Asked Questions—Lobster*, *supra* note 75.

92. While it is difficult to define a precise amount of time lobsters can live out of water, it is generally understood that they can survive (if properly refrigerated) for thirty-six to forty-eight hours, a relatively substantial amount of time compared to many other forms of marine life. See generally *American Lobster*, *supra* note 86.

93. *Id.*

94. See generally *American Lobster*, *supra* note 86.

95. *Id.*

96. As with any analysis that must take into account a broad industry that spans across a vast area including many different fisheries, consensus regarding the precise health of the groundfishing industry is hard, if not impossible to come across. What is clear, however, is that today, the industry is landing far less fish than it has in the past, and the numbers are declining. Nils E. Stolpe, *Chronic Underfishing—The Real New England Groundfish Crisis*, available at http://www.fishnet-usa.com/chronic_underfishing.htm. However, what is surprising—and not generally understood by the general public—is that the reduction in the amount of groundfish landings has not come absolutely because of regulations limiting the amounts that vessels are allowed to catch. *Id.* On the contrary, groundfishing fleets are, the vast majority of the time, unable to meet the total allowable catch (or TAC, usually expressed in metric tons, which represents the total amount of a particular species that can be sustainably caught in a given year). In fact, during the year 2008, the New England groundfishing fleet caught forty-three thousand metric tons of the twelve groundfish species. *Id.* While this number may sound substantial at first glance, the TAC for 2008 was approximately 170,000 metric tons. *Id.* That means the total amount of landings in 2008 was less than twenty-five percent of the amount that could have been sustainably harvested. For some historical perspective, total groundfish landings peaked at 250,000 metric tons in 1950, and remained above 100,000 metric tons every year until 1987 (the only exceptions being 1975-1977, when the total landings were

groundfishing industry is not simply the boats that go out and harvest the resource. Instead, the industry also includes the large on shore support networks responsible for offloading, processing, and transporting the catch, as well as those who provide maintenance and supplies for the fishing fleet.⁹⁷

Now that we have a contextual understanding of the history of groundfishing in New England, the current state of the industry, as well as how and why a relatively substantial number of lobsters are caught unintentionally by groundfishing vessels, let us turn to an analysis of the arguments put forth for allowing groundfishing vessels to land their bycaught lobsters within Maine state lines.

B. The Economic Impact of Maine's Ban on Bycaught Lobster as an Argument for Its Allowance in Limited Circumstances

In this day and age, almost everyone has probably heard the classic saying "it's the economy, stupid." While this saying first came about with reference to the economy being the paramount issue in political campaigns,⁹⁸ it is also notably applicable to the arguments put forth by those who propose Maine allow bycaught lobsters to be landed and sold in the state. The following section will analyze studies of the economic impact of Maine's bycaught lobster ban, and how these studies are used by proponents of a change to the existing law. A central study will be one that was conducted by Planning Decisions Inc. for the Portland Fish

just slightly below 100,000 metric tons. However, the harvest rebounded substantially in 1978 and reached a subsequent peak of 168,000 metric tons in 1979). *Id.*

97. Entire communities are often built around the groundfishing fleet, from the shipyards which house and maintain the vessels when they are not fishing to the onshore processing facilities which offload the catch, to many family owned stores that make a living off buying and reselling the harvest. Planning Decisions Inc., *Project Report – An Analysis of the Economic Impact on Maine of Allowing Lobster Landings by Maine Based Groundfishing Vessels* 3 (2007), available at http://www.pfex.org/betterlobsterlaw/news/Lobster_Bycatch_Impact.pdf [hereinafter Planning Decisions].

98. The phrase was first widely used by Bill Clinton's 1992 presidential campaign (James Carville in particular), and was a reference to the fact that even though the incumbent, George H.W. Bush had strong credentials (and notable successes such as his handling of the First Gulf War) when it came to foreign policy, the fact that the country had entered a recession late in his first term left him vulnerable to attacks regarding what would become the key issue for the entire campaign. Wikipedia.com, *It's The Economy, Stupid*, http://en.wikipedia.org/wiki/It's_the_economy_stupid (last updated Aug. 14, 2012).

Exchange, which explores in great detail the effect of groundfishing's decline on the economy of Maine.⁹⁹

As discussed previously, the economic impact of an industry such as groundfishing, especially in a state such as Maine (where the industry has a deeply entrenched historical background), goes far beyond the fishing vessels themselves or the crews who man them. Instead, the network of related and dependent businesses and the livelihoods it supports are broad and far-reaching. Over the course of the past decade or so, the most popular term for this phenomenon within economic development circles has been "cluster."¹⁰⁰ The idea is that an economy, as a whole, is rarely significantly affected by the success or failure of a single business (or even industry) taken in isolation. Instead, the economy is affected by the "cluster" of related businesses which, when taken together, form the essential foundation for an environment of economic growth.¹⁰¹ Along with lobstering, groundfishing is the foundation for one of Maine's oldest economic clusters.¹⁰² Since groundfishing first took root in this region, generations of men and women have formed an intricate network of interrelated and dependent businesses, including "vessel supply and repair shops, gear and net suppliers, fuel and ice dealers, truckers, wholesalers, food processors, restaurants and scores of insurance, finance, advertising and legal service providers as well as University-based research scientists."¹⁰³

Considering the extent and diversity of the businesses that make up the groundfishing economic cluster, it should not be surprising that out of every dollar worth of landed groundfish in Maine, "62 cents flows through to downstream vendors—the fuel, ice, bait suppliers and the vessel supply and repair services" noted in the previous paragraph.¹⁰⁴ In comparison, just 37 cents of every dollar goes to the fishermen in the form of income (including boat owners, employees, or independent contract workers).¹⁰⁵ Approximately one cent flows to the government through taxes.¹⁰⁶ The fact that the groundfishing industry is the basis for

99. Planning Decisions Inc., *supra* note 97.

100. *Id.* at 3.

101. *Id.*

102. *Id.* The economic cluster that is the key focus for purposes of this Comment is the Portland Fish Exchange, which is the nation's only publicly owned, non-profit sea food auction. It provides an open auction market for buyers and sellers of seafood, and approximately 90 percent of Maine's groundfish catch is sold on the exchange. *Id.* at 1.

103. *Id.* at 3.

104. *Id.*

105. *Id.*

106. *Id.*

such a broad economic cluster is the essential starting point for the economic arguments put forth by proponents for a change in Maine's ban on the landing of lobster bycatch. Moreover, many argue that not only fishermen are hurt by the ban, but the entire economic cluster is harmed as well. Furthermore, proponents argue that instead of permitting the ban to stymie growth of the economic cluster, the State should be doing everything it can to promote the growth of new economic clusters to replace those lost due to the dramatic increase in global competition.¹⁰⁷

As the industry that forms the basis of an economic cluster declines, the financial integrity of the myriad of businesses surrounding that cluster decline as well.¹⁰⁸ Furthermore, with respect to the groundfishing industry, the effect of the decline in the surrounding businesses is more pronounced.¹⁰⁹ This is due to the fact that a majority of the industry's income flows not to the fishermen themselves, but to the economic cluster for which they are the foundation.¹¹⁰

As discussed previously, the overall metric tonnage of groundfish landed in New England has seen a relatively steady decline since the late 1950s. It is helpful for the purposes of this Comment, however, to focus on how the catch landed at the Portland Fish Exchange, which represents 90 percent of the groundfish landings Maine, has fared. The simple fact is that both the number of fishing vessels landing at the Portland Fish Exchange, as well as the volume of fish landed has decreased dramatically in the past decade.¹¹¹ From the peak of 237 in 2001, the number of vessels landing at the Portland Fish Exchange fell for five consecutive years, culminating in a total decline of more than 50 percent to 111 vessels landing in 2006.¹¹² Furthermore, the corresponding decline in the volume of fish landed at the Portland Fish Exchange has been even more drastic, falling from 24.6 million pounds in 2001 to 9.5 million pounds in 2006, a decline of more than 60 percent.¹¹³

Based on our previous discussion on how the decline of the foundational industry affects an extensive network of surrounding businesses within an economic cluster, it should come as no surprise that there have been notable correlative effects upon a diverse array of other businesses connected to the groundfishing industry in Maine. Consider the following examples: the number of facilities supplying ice to

107. *Id.*

108. *Id.* at 4.

109. *Id.*

110. *Id.* at 3.

111. *Id.* at 1.

112. *Id.* at 5.

113. *Id.*

Maine's fishing fleet has declined from three to one;¹¹⁴ the number of groundfish processors in Maine has dropped from 46 to 32;¹¹⁵ the number of firms in Maine selling fishing gear to the fleet has dropped from four to zero;¹¹⁶ and finally, between the years of 2000 and 2004, studies show that the number of Maine jobs in the fish processing and wholesaling industries fell from 2953 to 1755; a loss of nearly 1200 jobs.¹¹⁷ These numbers serve as support for the premise that the effects of a declining groundfish industry on Maine's economy reach far beyond the fishermen themselves, and indeed affect an extensive and diverse array of other industries.

The counterargument remains, however, that the decline in the amount of groundfish landings in Maine has much more to do with the inherent unsustainability of industry than any sort of external regulation, including Maine's ban on bycaught lobsters.¹¹⁸ The proponents of a reform for Maine's groundfish industry flatly reject this argument. Indeed, many groups, including Project Decisions Inc. and the Portland Fish Exchange itself, point to evidence demonstrating that the health of the groundfish fishery is potentially very good, and the resource itself and the economic cluster it supports have the possibility for a "bright future" despite allegations of unsustainable fishing practices.¹¹⁹ In support of this assertion, proponents of reform argue that the newly enacted federal regulations for the groundfish industry provide the very real possibility that populations of groundfish will double by 2017, allowing for annual groundfish sales to rise as high as \$300 million annually, compared to \$70 million in 2006.¹²⁰ Given this potential for growth in the resource, some argue the real reason Maine has seen such a sizable decrease in groundfish landings has more to do with state regulations (the lobster bycatch ban in particular), which serve to put Maine at a competitive disadvantage compared to other New England states (all of whom permit lobster bycatch to be landed by groundfishing vessels pursuant to federal regulations).¹²¹

For many years, state elected officials have attempted to address the decline of the groundfish industry in Maine.¹²² As far back as 2003, the

114. *Id.*

115. *Id.*

116. *Id.* at 6.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 6, 8-9.

122. *Id.* at 7.

Maine Government established a task force on the groundfish industry with a mission to devise strategies that would preserve Maine's existing fleet and infrastructure and develop recommendations for a long-term plan to position Maine's fleet for future prosperity.¹²³

Furthermore, the Maine State Legislature has considered a number of proposals for reforming the current regulations which prohibit the landing of bycaught lobsters within state lines.¹²⁴ Notably, a bill was sponsored in 2007 by State Representative Anne Haskell (Democrat of Portland).¹²⁵ The bill's primary objective was to remedy what was being called a full-blown crisis for Maine's groundfish industry.¹²⁶

In March 2007, the Marine Resources Committee of the Maine State Legislature held a public hearing on the proposed bill and invited experts as well as members of the community to participate.¹²⁷ Among those who gave testimony in favor of the proposed bill was Maggie Raymond of the Associated Fisheries of Maine, a "trade organization of fishing and fishing dependent businesses."¹²⁸ Membership in the Association represents a wide variety of industries, many of which can be considered part of the "economic cluster" founded upon the groundfishing industry in Maine.¹²⁹ Included among these industries are: processors, fuel, ice, and gear dealers; marine insurers and lenders; as well as many other joint and individual enterprises which are connected to, and dependent upon, the success of commercial groundfishing in Maine.¹³⁰ A key point of Ms. Raymond's testimony before the Committee was her assertion that the commercial fishing industry in Maine is not inherently unsustainable or currently "in trouble."¹³¹ Ms. Raymond took aim at the "disparaging rhetoric" used by so many when describing Maine's commercial fishing industry.¹³² In so doing, she primarily takes issue with the perception

123. *Id.*

124. The bill was officially titled LD 170: An Act to Permit the Landing of Lobsters Harvested by Methods other than Conventional Traps. L.D. 170 (123d Legis. 2007).

125. Chris Busby, *Maine's Fishing Industry in "Emergency Mode,"* THE BOLLARD (March 21, 2007), <http://www.thebollard.com/bollard/?p=2577>.

126. *Id.*

127. *Id.*

128. *An Act to Permit the Landing of Lobsters Harvested By Methods Other than Conventional Traps: Hearing on LD170 Before the Marine Resource Comm. of the Maine Leg.* (Me. 2007), available at http://www.pfex.org/betterlobsterlaw/news/testimony/AFM_testimony.pdf [hereinafter *Hearing*] (testimony of Maggie Raymond of the Associated Fisheries of Maine).

129. *Id.* at 1.

130. *Id.*

131. *Id.*

132. *Id.*

that Maine's commercial fishermen do not take pride in the sustainability of the resource, or that they are not interested in conservation.¹³³ She argues, "[g]roundfishermen, like lobstermen, are genuinely committed to sustainable management practices for all marine resources."¹³⁴

It is telling that this was one of the first points raised by Ms. Raymond during her testimony before the Committee. It demonstrates the fact that, whether deserved or not, the groundfishing industry has a reputation among many, both within State Government and the public at large, as being overly zealous in its harvesting practices and callous or indifferent when it comes to the need for sustainability and conservation of marine resources. While one's perception of an industry such as groundfishing is often a matter of personal opinion, it is difficult to locate any reliable source or study that provides quantifiable support for the idea that the groundfishing industry is deserving of its reputation for indifference to sustainability. Nevertheless, the fact that the reputation itself does exist is clearly evidenced by Ms. Raymond's perceived need to open her testimony with a defense of the industry.

Another issue that Ms. Raymond addressed early in her testimony was her assertion that the marine fishery which serves as the resource for commercial harvesting is currently healthy *and growing healthier*.¹³⁵ She testified that studies point to a likely *three-fold* increase in the amount of groundfishing landings over the course of the next fifteen to twenty years, leading to projected annual groundfish landings of 300 million pounds.¹³⁶ Ms. Raymond warned the Marine Resources Committee that current regulations risk causing Maine to miss out partially or even entirely on an industry that has a real growth potential.¹³⁷

Indeed, Ms. Raymond's testimony to the Marine Resources Committee expressed many of the same themes previously explored in this Comment. Particularly, her defense of the inherent sustainability of the industry and the fishery from which it harvests, and how Maine's current regulatory regime (especially the prohibition of landing bycaught lobster within state lines) is costing Maine the ability to capitalize on an otherwise healthy industry with real possibilities for growth.¹³⁸ The idea that regulations, and not weakness within the fishery itself, are causing

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 2.

138. *Id.* at 1-2.

the decline in Maine's groundfishing industry is a key part of both Ms. Raymond's testimony and the broader argument in favor of reforming Maine's current regulations regarding lobster bycatch. Ms. Raymond testified that in 2004, New England groundfishermen caught only two-thirds the amount of fish that scientists and conservationists have agreed can be caught without any danger to the resource.¹³⁹ As discussed previously, this point is supported by substantial evidence. The fishery harvested by groundfishermen is healthy, and getting healthier, but the amount of fish actually landed by groundfishermen in New England has been shrinking, the effects of which have been clear and quantifiable, particularly here in Maine.¹⁴⁰ Finally, Ms. Raymond pointed out that Maine fishermen are at a particular disadvantage (even compared to all of the New England groundfishing industry, which has been in decline) because Maine fishermen are the only ones who are not allowed to land bycaught lobsters in their home state, as they are permitted by the Federal Lobster Management Program.¹⁴¹

This is a key point of Ms. Raymond's testimony, and the broader argument for reform of Maine's prohibition on lobster bycatch—it is already allowed under federal regulations.¹⁴² The question is not whether Maine groundfishermen can or cannot catch lobster unintentionally, but whether or not they can bring a certain amount of such lobsters back to their home port for sale and processing.¹⁴³ As Ms. Raymond testified, L.D. 170 does not authorize the taking of lobsters by non-trap fishing gear; the federal lobster management plan already does that.¹⁴⁴ L.D. 170 simply permits the landing of lobsters in the State of Maine that are now being landed in Massachusetts.¹⁴⁵ The argument is that under current Maine regulations, groundfishermen are far too often *choosing* to land their catch in Massachusetts because “the fish, lobster bycatch, fuel, ice, and fishing gear purchases, and the valuable jobs generated by this activity are welcomed.”¹⁴⁶ It is safe to say that the “valuable jobs” created by groundfishing (and the economic cluster it supports) are most likely “welcomed” here in Maine just as much as they are in Massachusetts. The one thing that is not welcomed in Maine, however,

139. *Id.* The testimony syncs nicely with the findings reported by Stolpe, *supra* note 96.

140. *Id.*

141. *Hearing, supra* note 128, at 2.

142. *Planning Decisions Inc., supra* note 97, at 18.

143. *Id.*

144. *Id.* at 2.

145. *Id.*

146. *Id.*

are the groundfishermen's unintentionally caught lobsters, and that is the alleged reason why an increasing number of groundfishermen are landing their catch in Massachusetts, even when their home port is in Maine.¹⁴⁷ Proponents of a change in Maine's policy towards bycaught lobsters have even come up with a name for the phenomenon of Maine flagged vessels choosing to offload their catch in Massachusetts: "trip diversion."¹⁴⁸

C. *The True Problem: Trip Diversion*

To truly appreciate the reasoning of those in favor of allowing bycaught lobster to be landed in Maine, one must understand and accept the premise of trip diversion and its negative effects on Maine's economy. Put simply, trip diversion is when groundfishing vessels, that are flagged in Maine and based in Maine ports, take the vast majority of their harvest from the coast of Maine and choose to divert their trip in order to land their catch in another state, such as Massachusetts.¹⁴⁹ In order to begin to assess the real implications of trip diversion in Maine, the National Marine Fisheries Service (NMFS) examined the logbooks of Maine based fishing vessels, which held groundfishing permits.¹⁵⁰ The examination yielded some notable results. First, the number of Maine based vessels that landed their catch (including bycaught lobster) outside of Maine rose from eighteen in the year 2000 to twenty-nine in 2005.¹⁵¹ Furthermore, the number of trips by Maine based vessels which led to the landing of lobster (and therefore, by necessity the landing of the vessels' catch outside the state of Maine) increased from 46 in 2000 to 160 in 2005, a jump of more than 300 percent.¹⁵² Finally, the number of trips made by fishing vessels, which are landing their catch outside of Maine, more than doubled from 2.6 trips per vessel in 2000 to 5.5 trips per vessel in 2005.¹⁵³

The reason for the increase in trip diversions comes down to simple economics. The primary costs for fishing vessels are compensation for labor, and fuel.¹⁵⁴ Together, they account for slightly more than fifty

147. Planning Decisions Inc., *supra* note 97, at 8-9.

148. *Id.*

149. *See id.*

150. *Id.*

151. *Id.* at 8.

152. *Id.* at 9.

153. *Id.*

154. *Id.*

cents out of every dollar of revenue brought in by the vessel.¹⁵⁵ Due to the fact that most vessels determine their compensation based on their total landing revenue, there is a very strong incentive for fishermen to add the revenue from lobster bycatch whenever possible.¹⁵⁶ For a Maine based fishing vessel, there is only one way to add lobster bycatch to your total landing revenue, and that is to land your entire catch (including the bycaught lobster) out of state.¹⁵⁷

Given that there has been an increase in the number of Maine based fishing vessels landing their catch outside of Maine,¹⁵⁸ what, if any, is the quantifiable economic effect for the people of Maine? In order to estimate the loss to Maine's economy from trip diversion, the NMFS study calculated the value of the non-lobster landings of Maine based vessels that landed outside of Maine.¹⁵⁹ In other words, the NMFS took the total amount of revenue taken in by Maine flagged vessels that landed outside of Maine and subtracted any revenues that were added because of lobster bycatch in order to estimate the total value of the groundfish harvest currently being diverted to other states.¹⁶⁰ The revenue lost to trip diversion varied from a low of \$1.1 million in 2001 to \$3.6 million in 2005.¹⁶¹ Given these numbers, the cumulative loss in value of fish landed in Maine due to trip diversion was almost \$10 million.¹⁶² It is noteworthy that as the value of fish landings outside of Maine increased, the number of landings at the Portland Fish Exchange decreased dramatically.¹⁶³ Landings at the Exchange fell from slightly more than 23 million pounds in 2000 to 9.5 million pounds in 2006.¹⁶⁴ As noted above, some would argue that this decline is due in part to the lack of sustainability of the industry as a whole and the resource it relies upon.¹⁶⁵ There is, however, evidence to suggest that it is not a lack of the resource causing the decline (particularly in Maine) but rather the cumulative effect of over regulation, the quintessential example being Maine's ban on the selling of bycaught lobster.¹⁶⁶

155. *Id.*

156. *Id.*

157. *See id.* at 8-9.

158. *See id.*

159. *Id.* at 10.

160. *Id.*

161. *Id.* at 11.

162. *Id.*

163. *Id.* at 3.

164. *Id.* at 11.

165. *Hearing, supra* note 128.

166. *See id.* at 3-7.

Finally, the study by the NMFS explores the relationship between the number of groundfish landings in Portland, Maine at the Portland Fish Exchange and at a similar port in Gloucester, Massachusetts.¹⁶⁷ The study found that while both ports had seen a relative decline in the value of the groundfish landings, the decline in Portland was significantly more drastic.¹⁶⁸ From 2001 to 2004 the value of landings in Portland (measured in constant 1999 dollars) declined 25 percent, from \$15.8 million to \$11.8 million.¹⁶⁹ Over the course of the same time period, the value of fish landed in Gloucester dropped just 15 percent, from \$16.9 million to \$14.3 million.¹⁷⁰ Finally, during this time period employment in the fish processing industry in Maine declined by 40 percent from 1439 jobs to 813 jobs.¹⁷¹ The decrease contrasts with employment in the same industry in Massachusetts, which in fact *rose* 2 percent from 2247 to 2302 jobs during the same period.¹⁷² This data serves as evidence for the proposition that although groundfishing has seen a decline throughout New England, it has seen a notably more significant decline in Maine, primarily due to trip diversion spurred by Maine's iconoclastic prohibition on the landing of bycaught lobsters.

Given the fact that the Maine government used clear terms to express its desire to strengthen and build the groundfishing industry in the state, it is surprising that Maine still clings to the lobster bycatch ban. The numbers speak for themselves. Maine's groundfishing industry is facing very difficult times and is perhaps near collapse. What is also clear is that the decline in the groundfishing industry affects much more than just the boats and crews who catch the fish. The true consequence of the decline is seen in the aggregate loss of employment throughout many different industries, all of which are tied to the groundfishing fleet.

While some argue that the groundfishing industry is inherently unsustainable, this assertion is not borne out by the facts. As discussed above, the groundfishing fleet vastly under catches the amount of fish that could be sustainably harvested. In other words, the federal regulations which determine the maximum amount of fish the industry can sustainably catch do not even come into play because the industry cannot come close to catching that amount. What is most startling to proponents of reform is that the state government has ignored the fact

167. *Id.*

168. *See id.* at 12.

169. *Id.*

170. *Id.*

171. *Id.* at 14.

172. *Id.*

that the Maine groundfishing industry is much harder hit than neighboring jurisdictions, even in the face of mounting empirical evidence.

IV. CONCLUSION

The goal of this Comment is to provide an overview of the key issues in the debate over Maine's ban on the sale of bycaught lobster within state lines. If anything should be clear after reading this, it is that the issue is complicated, and for better or worse, elicits an emotional response from many people. The reason for this response likely stems from the fact that the two industries principally involved are steeped in tradition. This is especially true of the lobster industry, as was explored in the first part of this Comment.

For many men and women, their work as lobstermen goes far beyond a simple "job," or even a career for that matter. For most, it is what their parents did, and likely their grandparents before that. Quite often, a family has lobstered from the decks of the same boat for generations. It is a way of life. Having been born and raised on the coast of Maine, such a way of life is something I understand and respect, despite the fact I have never worked on a lobster or fishing vessel. From this respect for the coastal way of life comes my firm belief that any proposal for reform of the regulations governing the harvest of lobster *must* take into consideration the history and tradition of the industry. This is not to say that reform is impossible, or that history and tradition should trump the need for reform in the face of changing times; rather, it is an acknowledgment that any proposal for reform must, at the very least, take into account that the lobster industry in Maine is much more than just boats, traps, and buoys. To channel Captain Jack Sparrow from this comment's introductory quotation: boats, traps, and buoys are what the industry *needs*. What the industry *is*, however, is a culmination of several generations worth of hard work and tradition, passed down from parent to child for hundreds of years.

As discussed previously in this Comment, many of Maine's regulations can be seen as overly favorable to the lobster industry. The residency requirement for lobster licenses¹⁷³ in particular, causes many to claim the state is protectionist, and perhaps even violating the Constitution.¹⁷⁴ Furthermore, the lobster industry's push to allow for otherwise scarce licenses to be passed down from parent to child has

173. ME. REV. STAT. ANN. tit. 12, § 6601 (2005).

174. See generally MacRae, *supra* note 25.

raised the ire of many, including Norman Olsen,¹⁷⁵ who argued that it is turning a public resource into a hereditary right for some at the expense of others.¹⁷⁶ Far too often however, critics of current lobster policy in Maine (particularly those from out of state) gloss over or simply disregard the history of the lobster industry here, and the deep-rooted traditions and family values that define it. Any proposal for reform must take this history into account, and far too few do so. That is why this Comment opened with an exploration of the history of Maine's lobster industry, in order to provide context for the industry's opposition to lifting the bycaught lobster ban in Maine.

As noted, the prospect of lifting Maine's bycaught lobster ban angers lobstermen for quite a few reasons, not the least of which is the fear on their part that the lifting of the ban is just the first step down a "slippery slope" of allowing more and more people to harvest lobsters in Maine.¹⁷⁷ There is also the fear that allowing groundfishing vessels to sell lobster will cause boats to make trips just for the sake of catching lobster, adding unsustainable competition to the industry.¹⁷⁸ This point can be answered with empirical evidence showing how limited the amount of lobsters allowed to be landed by groundfishermen would be relative to Maine's total landing of lobster.¹⁷⁹ However, it must be remembered that the lobster industry's opposition is based more on tradition and principle than it is on numbers from studies. If one really wants to change the way the lobster harvest is regulated in Maine, a dialogue must occur between proponents of reform and members of the lobster industry itself. Simply trying to railroad reform over top of the lobster industry without due appreciation for their objections is going to be difficult, if not impossible. Furthermore, such railroading is unnecessary because a little bit of respect for the traditions of the lobster industry can go a long way towards earning their cooperation in reforming Maine's regulations.

The fact remains that Maine's groundfishing industry is in deep trouble. Furthermore, it is in substantially more trouble than the groundfishing industry in nearby states. The numbers showcasing the decline not just in the amount of fish landed in Maine, but also the

175. Woodard, *supra* note 11.

176. *Id.*

177. Planning Decisions Inc., *supra* note 97, at 16.

178. *Id.*

179. In the year 2000, for example, groundfishing vessels flagged in Maine landed approximately 21,000 pounds of lobster outside of the state. In that same year, lobstermen in Maine landed 57 million pounds of lobster. Had the bycatch landed outside the state been landed in Maine, it would have amounted to about *four one hundredths of one percent* of the volume of conventional trap landings. *Id.* at 15.

correlating job losses here¹⁸⁰ cannot be ignored. While the history and tradition of the lobster industry should be given consideration, the industry's fierce objection to lifting the lobster bycatch ban comes across as misguided. The economic landscape has changed so drastically since the ban was enacted that upon close scrutiny it appears more like an anachronism than a piece of worthwhile regulation. Every state that is part of the ASFMC allows for bycaught lobster to be sold within state lines, except Maine.¹⁸¹ The amount of bycaught lobster potentially being sold in Maine would likely make up less than a hundredth of a percent of the total amount of lobster caught here.¹⁸² The insignificance of this number must be weighed against the numbers that showcase the decline of the groundfishing industry in this state, and the economic cluster it supports.¹⁸³

It is simple economics. If the groundfishing vessels cannot land their bycaught lobster here in Maine, they have a strong incentive to land their entire catch in another state, and they do. Perhaps the most telling data is that which shows a 40 percent decline in groundfish processing jobs in Maine from 2000 to 2004, contrasted with a 2 percent increase for those jobs in Massachusetts during the same time frame.¹⁸⁴ The lobster bycatch ban is accelerating the destruction of Maine's groundfish industry, and is doing so without providing any quantifiable benefit for the state, or the lobster fishery itself. As noted previously, lifting the ban will not make it so groundfishermen are allowed to unintentionally catch lobster; *they already do so*. All it would do is make it so Maine flagged groundfishing vessels can land their bycaught lobster here at home, rather than divert to other jurisdictions. In today's fiercely competitive and interconnected economy, every advantage or disadvantage matters, and Maine's iconoclastic ban on bycaught lobsters is a self-inflicted economic disadvantage that is costing the state hundreds of jobs, and for very little reason.

While the argument that lifting the ban on lobster bycatch in Maine would lead to a "slippery slope" of allowing more and more actors into the already highly competitive lobster fishery is well taken, that point alone cannot justify the maintenance of the current status quo with respect to bycaught lobsters in Maine. The lobster industry will still have room to ensure that no further reforms take place without their input

180. *Id.* at 14-16.

181. *Frequently Asked Questions—Lobster*, *supra* note 75.

182. Planning Decisions Inc., *supra* note 97, at 15.

183. *See generally id.*

184. *Id.* at 14.

and consent. In other words, the lobster industry should pick and choose its battles, and realize that the one over lobster bycatch is not really worth the fight.