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Fisheries without Courts: How Fishery Management Reveals our Dynamic Separation of Powers

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FISHERIES WITHOUT COURTS: HOW FISHERY MANAGEMENT REVEALS OUR DYNAMIC SEPARATION OF POWERS

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I. INTRODUCTION

This essay adds a perspective from fisheries governance to the broader inquiry into the respective roles of judicial, legislative, and executive decision-making in modern environmental law. It comments on Robin Craig and Catherine Danley's quantitative assessment of litigation under the federal Fishery Conservation and Management Act (FCMA),[1] which concludes, among other things, that the FCMA has generally prompted less judicial intervention than other environmental laws.[2] Craig and Danley have contributed

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1. Magnuson-Stevens Fishery Conservation and Management Act, Pub. L. 94-265, 90 Stat. 331 (1976), and Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. 109-479, 120 Stat. 3575 (2007) [hereinafter collectively FCMA] (each codified in scattered sections of 16 U.S.C.).

2. Robin K. Craig & Catherine Danley, *Federal Fisheries Management: A Quantitative Assessment of Federal Fisheries Litigation Since 1978*, 32 J. OF LAND USE & ENVTL. L. 381 (2017). While fisheries management has not always been viewed within the ambit of environmental law, Congress has increasingly required it to contend with issues of scarcity, sustainability, biodiversity, and habitat protection that are conventionally associated with environmental regulation.

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a valuable data set about federal fisheries litigation, one that invites further analysis of their findings and the implications of these findings for the horizontal separation of powers in environmental law.

This essay takes up that invitation to consider three key questions raised by their research: (1) Why is the judicial role in fisheries management small in comparison to the executive role? (2) When litigation is brought, why are fishery management plans the most frequent targets of litigation? And finally, (3) why is it that even with so many fisheries in decline, members of the fishing industry bring litigation more often than environmentalists?

I begin with a quick foray into fisheries science and economics to establish the fundamental paradox of fisheries management, in which fishery managers strive to set a sustainable yield of extraction that accounts for the various ways that extraction can itself alter the resource, requiring successively recursive rounds of regulatory adjustment. This analysis reveals why fisheries management is ideally suited to the features of administrative governance, in contrast to the comparative advantages of legislative or judicial oversight, because executive branch actors can generally respond more rapidly and adaptively to a fluid stream of highly technical data.

Nevertheless, when FCMA litigation does arise, fishery management plans become the most frequent targets of suit because the legislature has statutorily deferred unresolved policy clashes to the executive branch—presumably because executive actors are best positioned to resolve them in distinctive regional fisheries, and in consultation with relevant local stakeholders. When this litigation does arise, public choice theory helps explain why professional fishers[3] routinely outpace environmentalists to the courtroom, even though long-term conservation interests are often more imperiled than the short-term economic interests usually championed by industry participants.

Despite these predictable problems, I conclude that administrative fisheries management is probably still our best bet, even if certain aspects of the FCMA could bear improvement, including improved stakeholder representation for conservation interests.[4]

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3. In this piece, I use the term "fishers" to advance the goal of using gender-neutral language in academic literature whenever possible. But I also acknowledge the complexity of the choice, knowing that many female captains prefer to be called "fishermen," which they see as a gender-neutral term.

4. Scholars and advocates have suggested alternative configurations of administrative fisheries management, some of which warrant consideration. *See, e.g.,* Josh Eagle & Amanda Kuker, *Public Fisheries*, 15(1) ECOLOGY & SOCETY 10 (2010) [hereinafter Eagle & Kuker, *Public Fisheries*] (proposing a move away from the "neo-Pinchotian" approach taken by the FCMA and toward a new model of public ownership); Josh Eagle, James N. Sanchirico & Barton H. Thompson Jr., *Ocean Zoning and Spatial Access Privileges: Rewriting the Tragedy of the Regulated Ocean*, 17 N.Y.U. ENVTL. L.J. 646 (2008) [hereinafter Eagle, Sanchirico &

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Indeed, Craig and Danley's research reveals changing litigation trends after the Sustainable Fisheries Act of 1996[5] and the Magnuson-Stevens Reauthorization Act of 2006[6] that demonstrate the dynamic interplay between all three branches of government in fisheries management. Hopefully, this pattern of engagement will remain vital in fisheries management—and ideally, wider environmental law—appropriately erring on the side of administrative process while maintaining a healthy horizontal balance of power.

II. WHY IS FISHERIES MANAGEMENT SO ADMINISTRATIVE?

I begin with the broadest question at issue: why is it that fisheries management is so heavily administrative in nature? As Craig and Danley describe it, U.S. fishery governance has been structured to operate primarily through executive oversight, with broad legislative commands and minimal judicial intervention.[7] The principal U.S. law governing fisheries, the Magnuson-Stevens Fishery Conservation and Management Act (FCMA),[8] has been characterized by its own administrators as "designed to encourage user-group self-regulation within legislatively prescribed scientific and policy-based parameters."[9] Craig and Danley's research confirms that most of the work takes place in neither the halls of Congress nor the courtroom, but within the complex machinery of the administrative state. Yet why is this so?

A. The Paradox of Fisheries Management

To demonstrate why fisheries management is uncommonly suited for executive oversight, a brief overview of fisheries science may help.[10] Our exposition begins with a critical baseline assumption that fishery managers use in doing their job: the "carrying

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Thompson, *Ocean Zoning*] (advocating an "ocean zoning" model of fisheries management more akin to public lands management).

5. Sustainable Fisheries Act, Pub. L. 104-297, 110 Stat. 3559 (1996) (codified at 16 U.S.C. §§ 1803, 1861, 1881–1883, 5107a, 5107b (2012)).

6. Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. 109-479, 120 Stat. 3575 (2007).

7. Craig & Danley, *supra* note 1, at 381 ("Unlike many federal environmental and natural resources laws, Congress actually designed federal fisheries management under the Magnuson-Stevens Fisheries Conservation and Management Act[] to operate as environmental law without the courts.").

8. *Supra* note 2.

9. Craig & Danley, *supra* note 1, at 382 (quoting Marian Macpherson & Mariam McCall, *Judicial Remedies in Fisheries Litigation: Pros, Cons, and Prestidigitation?*, 9 OCEAN & COASTAL L.J. 1, 4 (2003)).

10. *See* JAMES RASBAND, JAMES SALZMAN & MARK SQUILLACE, NATURAL RESOURCES LAW AND POLICY, 457–61 (2d ed. 2009) (providing an excellent primer on fisheries science, from which the present description is partially based).

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capacity" of a fishery habitat, which describes the natural equilibrium level of a species within a habitat.[11] Whenever key environmental factors are kept constant in a given habitat, that habitat will support a constant biomass of a given fish population.[12]

While this premise works in theory, it can be hard to show in practice, because key environmental factors are almost never constant—especially in this age of climate instability.[13] Nevertheless, the carrying capacity concept is important because it reveals a curious paradox in the task of fisheries management, dealing with how fishing itself changes the fishery resource in ways that require management consideration.

It is probably obvious why too much fishing can damage the resource. By depleting a population of fish at a rate that exceeds that species' ability to reproduce, overfishing can cause the entire fishery to collapse.[14] However, at least from the perspective of the fishing industry, a certain level of fishing can actually make the resource even more useful.[15] In contrast to other natural resources, where extraction only depletes the resource (such as mining), it turns out that fish extraction can actually improve the fishery, at least from an economic perspective.[16] The reason has to do with the different rates at which distinctive fish population structures are able to replenish to their carrying capacity within the constraints of a given habitat.

In an environment where there is no fishing (and absent other natural disturbances), a fish population will be characterized as a low productivity system in which large adults outcompete smaller juveniles for scarce food and habitat resources.[17] Older fish grow more slowly, and though they can produce more eggs than younger

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11. K. Blackhart, D.G. Stanton & A.M. Shimada, Nat'l Marine Fisheries Serv., *NOAA Technical Memorandum NMFS-F/SPO-69*, NOAA FISHERIES GLOSSARY 5 (rev. ed. June 2006), https://www.st.nmfs.noaa.gov/st4/documents/FishGlossary.pdf [hereinafter NMFS-F/SPO-69] (defining "carrying capacity" as "[t]he maximum population of a species that an area or specific ecosystem can support indefinitely without deterioration of the character and quality of the resource" and "[t]he level of use, at a given level of management, at which a natural or man-made resource can sustain itself over a long period of time.").

12. *See id.*

13. Sarah M. Kutil, *Scientific Certainty Thresholds in Fisheries Management: A Response to Changing Climate*, 41 ENVTL. L. 233, 265–66 (2011); Diana L. Stram & Diana C.K. Evans, *Fishery Management Response to Climate Change in the North Pacific*, 66 J. OF MARINE SCI. 1633, 1636–37 (2009) (on climate change and fishery impacts).

14. PAMELA B. BAKER, FELIX G. COX & PETER M. EMERSON, MANAGING THE GULF OF MEXICO COMMERCIAL RED SNAPPER FISHERY (1998).

15. *Id.*

16. From an ecological perspective, extraction simply removes otherwise available biomass from the food web.

17. THEODORE PANAYOTOU, FOOD & AGRIC. ORG. OF THE U.N., MANAGEMENT CONCEPTS FOR SMALL-SCALE FISHERIES: ECONOMIC AND SOCIAL ASPECTS, FAO Fisheries Tech. Paper No. 228, FIPP/T228 (En), § 2 (1982).

fish,[18] their use of existing resources limits the ability of juvenile fish to grow and reach reproductive age. Yet when fishing is introduced into the system, many of those large adults will be harvested. The removal of those large adults creates space for more juveniles to thrive, and all else equal, those juveniles will survive and grow more quickly than the older fish removed from the fishery.

In this way, fishing alters the average age and size structure of the population to create a more dynamic, high productivity system yielding greater economic returns for fishers.[19] The fished system will have the same carrying capacity as the un-fished system—the same total biomass of fish in each environment—but the population that is being fished can replenish itself to carrying capacity faster, because its members are growing more quickly. That means that, at least in theory (and accounting for egg production rates among larger and smaller fish), you can take a steadier stream of fish out of the ecosystem and into the marketplace without spiraling the entire system into overfishing decline. (Good fishery management must also ensure that fishing technology and other aspects of the fishing activity does not itself damage the ecosystem—a separate but equally important concern.[20])

All of this leads to the great puzzle for fisheries management. Too much fishing is clearly a bad thing, as it prevents the renewal of the resource by interfering with reproduction. But perhaps surprisingly, too little fishing can actually leave "value on the table" economically, by facilitating the establishment of an economically suboptimal equilibrium. For this reason, a primary goal of fisheries management is to identify something of a sweet spot—the Goldilocks Level that allows neither too much nor too little fishing. Fishery managers call this magical sweet spot the "maximum sustainable yield," or "MSY."[21]

The MSY represents the ideal level of extraction in a fishery—the point at which managers are not allowing the kind of overfishing that causes populations to plummet toward fishery collapse, but neither are they leaving economic value on the table, by maintaining just enough fishing to enable the industry to reap the rewards

18. Mark A. Hixon, Darren W. Johnson & Susan M. Sogard, *BOFFFFs: On the Importance of Conserving Old-Growth Age Structure in Fishery Populations,* 71 J. OF MARINE SCI. 2171, 2172 (2014) (newer fisheries management science recognizes this reason to protect some of the largest adults).

19. *Id.*; *See also* RASBAND, SALZMAN & SQUILLACE, *supra* note 10, at 458.

20. *See, e.g.,* Simon Jennings & Michael .J. Kaiser, *The Effects of Fishing on Marine Ecosystems,* 34 ADVANCES IN MARINE BIO. 201 (1988).

21. NMFS-F/SPO-69, *supra* note 11, at 28.

of a high productivity system.[22] It is the maximum amount of fish that can be taken out of the fishery without sacrificing either the biological sustainability or the economic efficiency of the system.[23]

The challenge, of course, is that managers need a lot of information to plot this curve accurately, and that information is not always easily forthcoming. To set an accurate MSY, one needs to know a fair amount about both the targeted species of fish and the nature of the fishing operation. For example, to be able to forecast the rates of growth and reproduction of the target species, you need to know that species growth rate, fecundity, age at first spawning, ratio of males to females, growth rate, migratory habits, natural mortality, and so on.[24] You also need to know how much of these fish are being caught by fishers and how much effort it took to catch them, the ratio of males to females in the catch, the value of different size fish in the marketplace, and so on.[25] Some of this information is available from scientific research, but fishery managers also rely heavily on landings data, based on the catch that fishers bring back to shore.[26]

This raises yet another problem for fisheries management—the dilemma of properly sequencing data and decision-making in time—which James Rasband, James Salzman, and Mark Squillace have explained in their useful treatment of fisheries management.[27] In a representative graph (see Figure 1) of fish stock versus fish catch over time, the Y-axis plots biomass and the X-axis plots time going forward. Read from the left, the first line is a population curve, representing the number of fish (in an overfished population) that are actually in the sea over the given span of time. The second curve describes catch biomass, as reported in landings data.

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22. The MSY describes an ideal level of extraction within the traditional school of fisheries management, but this school has been critiqued for failing to account for all connections between a given fish population and the ocean ecosystem within which it is embedded. Important harms to the marine environment can be caused by fishing even when a fishery is perfectly managed for MSY. *See* Jennings & Kaiser, *supra* note 20.

23. From the economic perspective, it is worth noting that the MSY describes a productivity maximum, and not necessarily the economically optimal extraction point for any particular fishing interest. That would require additional information about the costs of the fishing activity itself, and it might represent a different point on the yield curve.

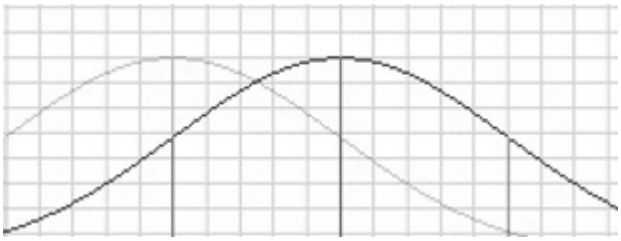
24. Richard K. Wallace & Kristen M. Fletcher, *Understanding Fisheries Management* 6–7 (2d ed. 2001). *See also* RASBAND, SALZMAN & SQUILLACE, *supra* note 10, at 460.

25. *See* RASBAND, SALZMAN & SQUILLACE, *supra* note 10, at 458.

26. *See*, *e.g.*, *Commercial Fisheries Statistics*, NAT'L MARINE FISHERIES SERV., https://www.st.nmfs.noaa.gov/commercial-fisheries/index ("Commercial Landings" section; last visited Apr. 2, 2017).

27. *See* RASBAND, SALZMAN & SQUILLACE, *supra* note 10, at 462.

Figure 1: Fish Stock vs. Fish Catch Over Time



As these authors have explained, the two lines reveal parallel curves, but curves that are displaced in time—because, at least for a period of time, fishers chasing a declining catch can sustain and even increase their yield with more powerful fishing technology. Eventually, the catch will reveal the declining population, but not necessarily in time for management decisions to adapt to the crisis. There may be an interim, depicted here as the space between the first two vertical markers, in which fishers are able to continue harvesting more fish with more effective fishing gear (gear that improves the ratio of catch to each unit of expended effort by the fisher), even after the initial decline in overall population begins.[28]

Nevertheless, even better fishing technology cannot conjure more actual fish, and so the decline in population will eventually be reflected in a reduced catch. Shown here to the right of the second vertical marker, landings data will ultimately reflect the decline beneath the waves, but substantially after that decline first begins, and well into the downward spiral of the population. As the graph reveals, when a fishery begins to collapse, there may be a devastating period during which landings data will falsely suggest that fish stocks are increasing, even as they are actually decreasing.[29] Which means that, once a fishery is in collapse, we often do not even find out about it until the decline is fairly serious. And by then, fishery managers have to respond very quickly to have any hope of meaningful impact.

B. Fisheries and the Administrative State

This brings us squarely back to the question with which we began, revealing why fisheries management is overwhelmingly the work of the administrative state. Fisheries management is largely the province of the executive branch because—as the foregoing

28. *Id.*
29. *Id.*

discussion of fisheries science and economics demonstrates—it is an exquisitely technical, data-driven, fluid, and adaptive project, often requiring fast action and changes in course.

Indeed, day-to-day fishery management presents the paragon example of the kind of science-based, wonky administrative governance that is appropriately delegated to subject matter experts, and to operate with minimal judicial intervention. It is hard enough that the resource continually shifts as key environmental factors in the habitat change the carrying capacity. In addition, the fishing activity itself changes the resource, and management choices can dramatically change the resource as well, in ways that can occasionally confound expectations. While many natural resources respond to management recursively this way, few do so as quickly as fisheries can, as unforgivingly, or in ways that are as patently difficult to measure.

Good fishery management must therefore adapt continually along multiple dimensions of variability and self-referential change, ideally on an ongoing basis. It is the fluidity and adaptive qualities of fisheries management that makes the minutiae so ill-suited for decision making by, for example, the judiciary—which, among other problems, simply takes too long. The critical data for decision-making will often be stale by the time a court can even get to it. To be sure, judges help interpret important statutory directives with big-picture implications for fisheries management—for example, what Congress meant by "overfishing" when it directed agencies to prevent it in on U.S. waters.[30] However, the more tedious decisions required by fishery management tend not to raise the questions of linguistic interpretation, legislative intent, and retrospective fact-finding that the judiciary is best equipped to answer. Moreover, the feedback loop that arises between management choices, changes to the resource, and resulting new management choices does not make for a great legal precedent.

The same features make day-to-day fishery management a bad candidate for the legislative process, which can take even longer than the judiciary.[31] Most legislators are not in a strong position to

30. 16 U.S.C. § 1851(a)(1) (as amended; effective Jan. 12, 2007). Of note, interpretation of words like "overfishing" drive the outcome of most FCMA litigation, but the *Chevron* doctrine of administrative law (directing courts to defer to reasonable agency interpretations) poses an important disincentive for would-be judicial challenges to fishery management choices. *See* JOSH EAGLE, SARAH NEWKIRK & BARTON H. THOMPSON JR., TAKING STOCK OF THE REGIONAL FISHERY MANAGEMENT COUNCILS (Pew Charitable Trusts, 2003) (noting that judicial deference is a major deterrent to litigation, because courts are reluctant to overturn agency decisions of a technical nature, such as the suitable definition of "overfished").

31. *But see* Eagle, Sanchirico & Thompson, *Ocean Zoning*, *supra* note 4 (proposing congressional fisheries management by legislative ocean zoning, following a land use planning model, in which regional councils set the MSY for more limited areas while other

evaluate the sophisticated scientific and economic data that inform fishery management decisions at the front end, and they usually lack the necessary time or resources to manage the ongoing data inputs and stakeholder correspondence required for fishery management decisions going forward. By sheer economy of scale, legislatures are outmatched by the continuous and intricate demands of good fisheries management.[32]

In contrast, administrative agencies can be designed and staffed to accommodate scientific complexity and ongoing stakeholder input. Administrative collaboration with stakeholders is important, not only as good agents of accountable governance, but because stakeholders have access to much of the critical landings data that fisheries management needs to work well.

Moreover, agency process can facilitate the kinds of cross-jurisdictional decision-making that fisheries management demands, because water resources, and the marine life within them, are notoriously bad at respecting arbitrary political boundaries.[33] The complexities of fisheries management often exceed the jurisdiction of a single state, let alone a single national entity.[34]

Executive agencies are also well-positioned to coordinate across the vertical separation of powers, facilitating the kinds of interjurisdictional management efforts that are often necessary within our federal system of government. Too many spill-over impacts often prevent resource management on a purely local level, but too many local factors go into setting the MSY—from local ecosystem factors to local market dynamics—for uniform decision-making at the national level.[35] And while Congress's ability to negotiate with state agencies in pursuit of federal policies is constitutionally constrained,[36] federal agencies have a wider array of tools and

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ocean zones are designated for other management strategies, such as recreation and conservation).

32. Of interest, the California legislature performed the task of setting fishing quotas through the 1950s, but legislative management responsibility was eventually ceded to the administrative state there as well. *See generally* ARTHUR MCEVOY, THE FISHERMAN'S PROBLEM: ECOLOGY AND THE LAW IN CALIFORNIA, 1850-1980 (1990).

33. ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN, 151–53 (2012) [hereinafter RYAN, TUG OF WAR WITHIN] (discussing the jurisdictional challenge of managing water resources).

34. The international dimensions of this problem are addressed by the U.N. Convention on the Law of the Sea, Part V (detailing the rights of nations to fish within designated Exclusive Economic Zones) and Part VII (setting rights to fish in the High Seas).

35. *Cf.* RYAN, TUG OF WAR WITHIN, *supra* note 33 (discussing the general challenges of regulating within the inter-jurisdictional gray area).

36. *See* Erin Ryan, *The Spending Power and Environmental Law After Sebelius*, 85 COLO. L. REV. 1003 (2014) [hereinafter Ryan, *Spending Power*] (discussing spending power bargaining as Congress's primary means of negotiating with states for access to policymaking influence beyond enumerated federal powers); *see also* Erin Ryan, *Environmental Federalism's Tug of War Within, in* THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A

methods for conducting interagency negotiations and cross-jurisdictional collaboration in pursuit of shared sustainability objectives.[37]

For these reasons, fisheries management provides a classic example of the highly technical brand of policy implementation that lawmakers delegate, within broad policy outlines (and usually with great relief), to the care of the experts in the appropriate agency. Accordingly, Congress has delegated fisheries management to the executive branch through the FCMA, which provides broad guidance for agency decision-making while preserving generous space for executive improvisation in the pursuit of sustainable fisheries.[38]

III. WHY ARE FISHERY MANAGEMENT PLANS THE MOST FREQUENT TARGETS OF SUIT?

Congress thus sets overarching goals and basic procedures for fishery management in the FCMA, but the Act gives wide latitude to administrative agencies to craft management plans that will protect individual fisheries, and to cope with the ongoing decisions and stake-holder engagement required to keep these fisheries healthy. The statute divides U.S. waters into eight regional fisheries and requires the development of an individual Fishery Management Plan (FMP) for each one.[39] It entrusts design of the FMPs and annual specifications to eight regional Fishery Management Councils, statutorily required to include representatives from all sectors of the fishing industry, various state and federal agencies with interests in fisheries, and other state-appointed officials with expertise in fishery resources and fishing communities.[40]

Which leads us to the second part of our inquiry: when fishery management does end up in court, why are these carefully-crafted, locally-driven, stakeholder-informed management plans the most frequent target of suit? It is a legitimate question, because most of the stakeholders that litigate them are, by statutory design, part of the drafting process. One might assume that the final output would reflect their interests—and at least ideally, those interests should

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COMPARATIVE ANALYSIS (Kalyani Robbins, ed., 2015) [hereinafter Ryan, *Environmental Federalism*] (discussing the different mechanisms of cooperative environmental federalism).

37. Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV 1, 102–35 (2011) [hereinafter Ryan, *Negotiating Federalism*] (discussing the advantages of executive process in the negotiation of cross-jurisdictional policy-making and implementation).

38. FCMA § 301, 16 U.S.C. § 1851 (2012). As described below in Part III, the FCMA requires the agency to appoint regional councils to assist them in decision making, and these councils are composed of many members who are not employees of the executive branch agency. *Id.* § 302(b), 16 U.S.C. § 1852(b). In this regard, the FCMA process departs from the usual model of executive branch administration. However, agency officials participate on the regional councils and must approve their proposals to give them the force of law.

39. *Id.* § 302(a), 16 U.S.C. § 1852(a).

40. *Id.* § 302(b), 16 U.S.C. § 1852(b).

align well with the goals of the FCMA, because the interests of fishers, fishing communities, and conservationists are all served by a sustainable fishery, and all are undermined by fishery collapse.

Tragic examples of fishery collapse put pressure on this assumption, and stakeholder policy positions often diverge.[41] But if everyone shares the same ultimate goal, why do FMPs end up in court?[42] And if FMPs consistently provoke legal challenge, does this signify a failure in the underlying statute? Does it signify a failure of administrative fisheries governance?

A. The FCMA National Standards

To understand why fishery management plans become the most frequent subject of litigation, we must consider the role they play within the overall statutory system, beginning with underlying policy guidance in the statute. As noted, Congress delegates the day-to-day management of fishery resources to the regional councils through the FCMA, which sets forth the structures and procedures for agency decision-making while allowing generous latitude to agency discretion in making these decisions. The statute essentially commits the details of the management plans to agency discretion,[43] but it does require that all plans advance a series of overarching policy goals, set forth as the ten "National [S]tandards."[44]

As Craig and Danley's article describes, seven of these were introduced in the original statute in 1976, and then the 1996 Sustainable Fisheries Act amendments added three more, designed to address growing concerns about ongoing overfishing in spite of the original FCMA's constraints.[45] Each standard states a discrete policy goal for fisheries management, and all management plans must be consistent with each of them. At first blush, this would not seem to pose a problem, because each of the National Standards sets forth an eminently reasonable, seemingly uncontroversial goal:

> (1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the

41. Donna R. Christie, *Living Marine Resources Management: A Proposal for Integration of United States Management Regimes,* 34 ENVTL. L. 107, 153 (2004) (noting that while these interests should align, fishers' choices to avoid short-term economic pain often prevails over long-term choices that would sustain fishery over time).

42. For an interesting take on why stakeholders are always and inevitably unhappy with fisheries management, *see* Eagle & Kuker, *Public Fisheries*, *supra* note 4.

43. FCMA § 301, 16 U.S.C. § 1851 (2012).

44. *Id.* (requiring that all FMPs be consistent with these conservation and management measures).

45. Craig & Danley, *supra* note 1, at 381.

optimum yield from each fishery for the United States fishing industry.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

(8) Conservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2), in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

(9) Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

(10) Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea. [46]

46. 16 U.S.C. § 1851(a)(1)–(10) (as amended; effective Jan. 12, 2007).

The 1996 amendments further required that FMPs rebuild overfished stocks, identify essential fish habitat, minimize the adverse effects on fish habitat by the fishing activity, and otherwise encourage habitat conservation.[47] For the first time, they required that FMPs specify objective and measurable criteria for identifying fisheries approaching "overfished" status and standardized reporting methodology for assessing bycatch and conservation measures.[48] Any harvest restrictions were required to be allocated equitably among all sectors of the fishing industry.[49] Finally, the Secretary of the Department of Commerce was required to keep track of whether fish sticks are overfished, and to assume control over management decisions from any of the regional councils if the council did not address the problem within specified time limits.[50]

Grossly oversimplified, then, FMPs should do the following things: first and foremost, they should prevent overfishing. Also, they should be based on good scientific information. They should manage stocks as a unit, allocate fishing privileges fairly, and consider efficiency. They should take account of variations, seek to minimize costs, and minimize adverse economic impacts wherever possible. They should also minimize bycatch, and they should promote the safety of life at sea. They should protect fish habitat and distribute the economic benefits and burdens of management choices equitably among the fishing industry. A management plan that honors each concern should pass statutory muster, and one that does not will fall short.

To be sure, each of these goals, on its own, seems like an excellent idea—but as with most multifactor mandates, honoring them all simultaneously can create challenges in execution, due to some unavoidably mixed messages among them.[51] For example, consider the potential conflicts between National Standard 1, which requires managers to prevent overfishing while achieving the optimum yield,[52] and National Standard 8, which requires them to avoid causing economic harm to fishing communities.[53] In the long term, of course, there should be no conflict, because fishing communities will not do well economically after the local fishery collapses.

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47. Sustainable Fisheries Act, Pub. L. 104-297, at §§ 106(b), 108(a)(1), 108(a)(3), 110 Stat. 3559 (1996) (codified at 16 U.S.C. §§ 1803, 1861, 1881–1883, 5107a, 5107b (2012)).

48. *Id.* § 108(a)(7).

49. *Id.*

50. *Id.* § 109(e).

51. *See* Josh Eagle, *Domestic Fishery Management*, *in* OCEAN & COASTAL LAW DESK BOOK (Don Baur et al. eds. 2008) ("While the language of particular provisions is clear, the statute as a whole delivers a mixed message.")

52. 16 U.S.C. § 1851(a)(1) (2012).

53. *Id.* § 1851(a)(8).

However, in the short run, limiting catch in the moment to protect fish stocks in the future can create deep tension among stakeholders—tension that can provoke litigation—especially among fishers facing a mortgage deadline next month.

In fact, FMPs have been challenged on this very point, as advocates on each side of the issue claim that the standards support their own preferred balancing point.[54] The Sustainable Fisheries Amendments of 1996[55] strongly suggest that the conservation mandate at the heart of National Standard 1 should not be overcome by other factors, and the courts have generally followed this lead—but managers, litigants, and judges continue to struggle with the proper balance between them.[56]

The important point here is that Congress did not really answer these questions. Congress accurately identified some important policy trade-offs that would eventually have to be made, but it stopped short of doing so in the statute. Instead, Congress punted the issue to the regional councils. Through the FCMA, Congress has essentially handed over the big, unresolved policy questions about

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54. *Compare* N.C. Fisheries Ass'n v. Daley, 16 F. Supp. 2d 647, 654 (E.D. Va. 1997) (rejecting a management plan for failing to give due credence to the goals of National Standard 8) *with* Lovgren v. Locke, 701 F.3d 5, 35 (1st Cir. 2012) ("The plain language of [National Standard] 8 and its advisory guidelines make clear that these obligations are subordinate to the MSA's overarching conservation goals."); *see also* N.C. Fisheries Ass'n v. Daley, 27 F Supp. 2d 650, 662 (E.D. Va. 1998) (finding that the agency had "abdicated [its] responsibilities" with regard to National Standard 8 in service of competing conservation interests); S. Offshore Fishing Assn. v. Daley, 995 F. Supp. 2d 1411 (M.D. Fla. 1998) (holding that the agency's inadequate economic impact analysis violated National Standard 8); *but see* Nat. Res. Def. Council, Inc.v. Daley, 209 F.3d 747, 753 (D.C. Cir. 2000) (holding that conservation interests must prevail over economic interests).

55. Sustainable Fisheries Act, Pub. L. 104-297, 110 Stat. 3559 (1996) (codified at 16 U.S.C. §§ 1803, 1861, 1881–1883, 5107a, 5107b (2012)).

56. Compare the decision of the district court in Nat. Res. Def. Council, Inc. v. Daley, 62 F. Supp. 2d 102 (D.D.C. 1999) (upholding the agency's decision to prioritize the economic interests protected by National Standard 8 over the conservation interests protected by National Standard 1) with the Circuit Court's decision overturning it, NRDC v. Daley, 209 F.3d 747 (D.C. Cir. 2000). In the latter decision, the court emphasized that conservation trumps:

> [W]e reject the District Court's suggestion that there is a conflict between the Fishery Act's expressed commitments to conservation and to mitigating adverse economic impacts. . . . The Government concedes, and we agree, that, under the Fishery Act, the Service must give priority to conservation measures. It is only when two different plans achieve similar conservation measures that the Service takes into consideration adverse economic consequences. This is confirmed both by the statute's plain language and the regulations issued pursuant to the statute. *See* [16 U.S.C. § 1851(a)(8) (1994)] (requiring fishery management plans, "*consistent with the conservation requirements* of this chapter," to take into account the effect of management plans on fishing communities) (emphasis added); 50 C.F.R. § 600.345(b)(1) (1999) ("*[W]here two alternatives achieve similar conservation goals*, the alternative that . . . minimizes the adverse impacts on [fishing] communities would be the preferred alternative.") (emphasis added).

Nat. Res. Def. Council, Inc. v. Daley, 209 F.3d at 753.

how to balance the conflicting goals of fisheries management to administrative oversight, by incorporating a long list of idealistic management goals with patently unresolved conflicts among them. By giving the agency a long list of important but incommensurable targets, Congress asks the Executive to become responsible for the core policy choices involved in sorting them out in each instance[57]—not unlike many other legislative delegations to the administrative state.

B. Fishery Management Plans as Litigation Bait?

Which brings us back to our second inquiry: why are fishery management plans so frequently the target of FCMA litigation? And the answer, perhaps unsurprisingly, is exactly this reason: it is because Congress has punted the big, unresolved policy questions for administrative resolution in each individual management plan.

We have already discussed the tension between avoiding environmental and economic harm raised by National Standards 1 and 8, but the list reveals other conflicts as well. National Standard 7 requires that management plans minimize costs,[58] but National Standard 9 requires plans to also minimize bycatch.[59] Like National Standards 1 and 8, these are both laudable goals independently, but they can point in opposite directions, as confirmed by subsequent litigation.[60] Indeed, the problem was even recognized by the House Committee on Natural Resources when it proposed the Sustainable Fisheries Act amendments, introducing new National Standard 9 with oblique reference to the inevitable conflicts it would trigger with other management goals. Acknowledging that it would be difficult to fully eliminate bycatch in a commercially viable fishery, the Committee explained that:

> The issue of bycatch reduction and the reduction of discard mortality have been identified by the Committee as one of the most important challenges facing fisheries managers today. There has been a dramatic reduction in population levels of stocks of fish worldwide. One identifiable cause in the U.S. fisheries has been bycatch and the needless waste

57. Because the regional councils are predominantly composed of industry participants, some argue that Congress didn't even truly punt the values conflict to the agency—it handed the conflict directly to the industry. *See, e.g.*, EAGLE, NEWKIRK & THOMPSON, *supra* note 30.

58. 16 U.S.C. § 1851(7) (2012).

59. *Id.* § 1851(9).

60. *See, e.g.*, Nat. Res. Def. Council, Inc. v. Daley, 209 F.3d 747 (D.C. Cir. 2000); Oceana, Inc. v. Evans, 384 F. Supp. 2d 203 (D.D.C. 2005).

> of commercially harvestable fish and the disposal of juvenile and other fish.
>
> The Committee intends that reduction of bycatch should be a goal of all Fishery Management Plans. It is unlikely, however, that any fishery—recreational or commercial—can occur without some bycatch being taken. The amendment contained in this section thus requires that bycatch be minimized to the maximum extent practicable, not eliminated. While the Committee recognizes that it will be very difficult to eliminate all bycatch, it is clear that Councils and fishermen should continually look for innovative ways to make significant reductions in bycatch and in the mortality of discards.[61]

Yet the issue goes beyond conflicts between conservation and economic interests; questions about how to balance interests arise even from within the extraction community—allocating catch among commercial, recreational, and subsistence fishers.[62]

Like many legal rules that create balancing tests, the National Standards are like a big delicious salad bowl of conflicting values. In the analogous context of property law, they are like the three factors of the regulatory takings balancing test, which have been critiqued as unmanageable because they represent incommensurate factors that can point in completely different directions.[63] They are like the five good governance values underlying constitutional federalism, which I have described in previous work.[64] Except here, the problem is compounded because there are ten separate factors, setting the stage for even more potential conflicts!

Of course, the ten National Standards are not all in conflict, and many can be incorporated harmoniously much of the time. But there is the potential for conflict, and because a stakeholder can always argue that one standard is getting short shrift, these potential conflicts become fodder for potential litigation. Even so, it is very hard to prove which one should take priority as a matter of law—which

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61. H.R. REP. NO. 104-171 at 27 (1995).

62. *See* Ray Hilborn, *Defining Success in Fisheries and Conflicts in Objectives,* 31 MARINE POL'Y 153 (2007) (discussing fairness and equity in issuing catch limit rules); *see also* Van Valin v. Locke, 671 F. Supp.2d 1 (D.D.C. 2009).

63. For an overview of the "veritable cottage industry [that] has developed among scholars and commentators, who regularly attempt to invest the decision's gauzy rhetoric with meaning[,]" *see* R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central*,* 38 ECOL. L.Q. 731, 732 (2011).

64. *See* RYAN, TUG OF WAR WITHIN, *supra* note 33, at 34–67 (2012) (discussing checks and balances, transparency and accountability, localism values, and the problem-solving value implied by subsidiarity); Ryan, *Environmental Federalism*, *supra* note 36, at 362–64 (adding explicit consideration of how centralized power counterbalances localism values).

means that it is also very hard to win this kind of litigation.[65] Craig and Danley's work confirms this point, showing that the agency prevails against challenges from the conservation and industry sides well over half the time, and as much as 75 percent of the time when the suit is brought by the fishing community.[66]

IV. WHY DOES INDUSTRY BRING LITIGATION MORE OFTEN THAN ENVIRONMENTALISTS?

This last observation leads naturally to our third and final question: if they lose almost 75 percent of the time, why is it that members of the fishing industry sue more often than conservation interests? This is actually a surprising point, as one might reasonably expect the opposite. After all, the FCMA has often been criticized by those observing that conservation interests are the only stakeholders in the fisheries context that do not get a guaranteed vote on the regional fishery management councils.[67] Why would fishers sue more often than conservationists, when they are guaranteed voting representation in the process of fishery management planning, and conservationists are not?

Indeed, the regional councils are primarily composed of fishing interests. The statute mandates that each council include the principal state official with responsibility for marine fisheries management responsibility of each regional state, and the regional director of the National Marine Fisheries Service for the relevant geographic area, but it leaves the rest of membership appointment decisions to the agency, in consultation with the relevant state governors.[68] And while the statute explicitly requires balance on the councils between commercial and recreational fishing interests,

65. Craig & Danley, *supra* note 1, at 411.

66. *Id.*

67. 16 U.S.C. § 1852(a)–(c) (2012) (setting out requirements of members, appointed by U.S. Secretary of Commerce, of Regional Fishery Management Councils under FCMA and distinguishing between voting and nonvoting members thereof). For an example of criticism thereof, *see* Thomas E. Okey, *Membership of the Eight Regional Fishery Management Councils in the United States: Are Special Interests Over-Represented?,* 27 MARINE POL'Y 193 (2003). For a survey of litigation over catch shares, *see* Suzanne Iudicello & Sherry Bosse Lueders, *A Survey of Litigation over Catch Shares and Groundfish Management in the Pacific Coast and Northeast Multispecies Fisheries*, 46 ENVTL. L. 157 (2016).

68. 16 U.S.C. § 1852(a)–(c) (2012).

there is no equivalent balance mandated balance between extraction and conservation interests.[69] The U.S. Fish and Wildlife Service gets a member on each council, but only in a non-voting capacity.[70]

This means that conservation interests are not guaranteed the same access to management decision-making that fishing industry members get—so you might reasonably assume that they would be more likely to end up unhappy with the results of that process, and to sue when they find themselves unhappy. Yet according to Craig and Danley's data, that has not been happening.[71] Why so?

While I can only speculate here, the answer may be surprisingly straightforward. Public choice theory, an economic model of political behavior, might account for the unexpectedly low ratio of environmentalist to fisher lawsuits. In fact, fishery governance and litigation may provide a classic example of the dynamics predicted by public choice theory.[72]

A. Public Choice Theory and Fishing Litigation.

Public choice theory predicts that stakeholders with concentrated interests in a certain result will invest more in obtaining that result than will the diffuse members of a larger group who would prefer otherwise. Even though the aggregate interests of the larger group may outweigh that of the concentrated stakeholders, the members of the larger group experience their interests only as disaggregated individuals, none of whom cares enough on their own to out-lobby the concentrated interest group.[73] As a result, the public choice model predicts that concentrated "special interests," or

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69. The statute details:

> The Secretary, in making appointments under this section, shall, to the extent practicable, ensure a fair and balanced apportionment, on a rotating or other basis, of the active participants (or their representatives) in the commercial and recreational fisheries under the jurisdiction of the Council. On January 31, 1991, and each year thereafter, the Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a report on the actions taken by the Secretary to ensure that such fair and balanced apportionment is achieved.

Id. § 1852(b)(2)(B)

70. *Id.* § 1852(C)(1)(a).

71. Craig & Danley, *supra* note 1, at 411–18.

72. *See generally* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis,* 115 HARV. L. REV. 553 (2001). For discussions of public choice theory in the context of environmental policy, see William W. Buzbee, *Clean Air Act Dynamism and Disappointments: Lessons for Climate Change Legislation to Prompt Innovation and Discourage Inertia,* 32 WASH U. J.L. & POL'Y 33 (2010); *see also* William W. Buzbee, *Interactions' Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons,* 57 EMORY L.J. 145 (2007).

73. *Id.*

single-issue voters, will always outmaneuver the general public in the political process that will determine the ultimate policy outcome.[74]

In the fisheries context, fishers are likely to be single-issue stakeholders. As a group, their interests coalesce around one primary goal: staying in business on their local fisheries, and being able to continue fishing for the single or select group of fish that creates their livelihood. There may be equivalent single-issue conservation groups that also care only about one or two species of fish in an individual fishery, but most non-governmental organizations with an interest in fisheries management have a wider repertoire of concerns, over a broader geographic area, and perhaps including other wildlife—or other ocean or waterway issues, or even wider environmental issues that have nothing to do with fisheries or waterways.[75] On balance, they are probably less likely to invest in fighting an individual FMP than a fisher whose entire livelihood hinges on the rules in that management plan.

Moreover, as noted in Part III, suing over the content of FMPs is a highly uncertain endeavor, because the National Standards confer so much agency discretion that reviewing courts are hard-pressed to find fault with the substantive content of all but the most egregious management decisions.[76] Yet it is this very same fact may reveal why fishers are still going to court, and by and large, conservationists are not.

All else being equal, single-issue actors may be more likely to sue under conditions of deep uncertainty about the result of their litigation, because they have everything to gain from litigating a management decision they do not like, and everything to lose if they do not. With everything at stake, they are more likely to leave it all on the field in their effort to undo an undesirable FMP. By contrast, conservationists with more varied agendas may think hard about whether they have a chance of winning before they invest scarce resources in litigating a FMP. If you have scarce resources and

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74. *Id.*

75. For example, the Sea Turtle Conservancy, headquartered in Florida, is devoted to the conservation of sea turtles. *See About the Sea Turtle Conservancy*, SEA TURTLE CONSERVANCY, https://conserveturtles.org/sea-turtle-conservancy/ (last visited Apr. 2, 2017). However, the organization focuses on sea turtle preservation in the Atlantic, Pacific, and Caribbean oceans and addresses various threats to turtles, ranging from fishing impacts to habitat loss and beach-front lighting. *Id.* These factors diffuse the interests of the Sea Turtle Conservancy in any one fishery management plan decision, at least relative to the interests of the local fishers who will be singularly and directly affected by that decision.

76. *See supra* note 69 and accompanying text. *But see* Nat. Res. Def. Council, Inc. v. Daley, 209 F.3d 747, 753 (D.C. Cir. 2000) (rejecting the agency's promulgation of a FMP on *Chevron* Step 2, for unreasonably interpreting the ambiguity Congress left it in failing to provide for significant conservation measures in a summer flounder fishing quota).

multiple objectives, you're going to think very carefully about whether it's even worth getting into such an uncertain game.[77]

Notably, this hypothesis draws some support from Craig and Danley's data, which suggest that even though environmentalist sue less often, they win a bit more when they do litigate.[78] It may be that environmentalists make more careful decisions about when to sue, investing scarce resources only in those lawsuits they believe they can win. Further support is provided by Craig and Danley's findings that litigation by conservationists increased after the enactment of the 1996 Sustainable Fisheries Act.[79] The 1996 Sustainable Fisheries Act amendments put a heavier thumb on the scale towards conservation priorities within the conflicting National Standards, giving conservationists a reason to think that they could sue more successfully—and they did.

V. CONCLUSION: FISHERIES AND OUR DYNAMIC SEPARATION OF POWERS

While these comments yield no groundbreaking conclusions, I offer some closing thoughts, generally affirming the administrative structure of fisheries governance, flawed though it remains, as the best of the available alternatives—at least in this Panglossian, best-of-all-possible political contexts.[80] The FCMA has yet to succeed at its task, as too many U.S. fisheries remain overfished and over-capitalized, with too much bycatch and damage to marine habitats.[81] Scholarly recommendations for improving fisheries management include ambitious proposals for adapting urban planning models to zone the ocean for different uses, reducing the influence of industry-dominated regional councils and diffusing decision-making authority through a variety of different agency actors, with differing degrees of legislative constraints.[82] These proposals

77. Comparatively scare resources limit the likelihood that conservationists will bring litigation for additional reasons. As one former conservation lobbyist explains, "In order to develop the understanding of issues in a particular fishery, you must send a person to most council meetings, go to panel and subcommittee meetings (which are spread around the entire council region), read all of the stock assessments in consultation with a fisheries scientist, etc. I was paid to do this for Audubon, and I could only monitor one or two fisheries. While [conservationists] probably monitor most major fisheries this way today, the industry monitors every single one." Josh Eagle, email correspondence of April 21, 2017 (on file with author).

78. Craig & Danley, *supra* note 1, at 415–18.

79. *Id*.

80. VOLTAIRE, CANDIDE (1759) (in which Professor Pangloss concludes that because ours is the only possible world, thus it must be "the best of all possible worlds," no matter how deeply flawed it may be).

81. *See, e.g.,* Eagle, Sanchirico & Thompson, *Ocean Zoning*, *supra* note 4, at 648–49.

82. *Id.*

warrant our consideration as we continue to improve our stewardship of fishery resources and the ecosystems of which they are part. Nevertheless, even under the existing FCMA model, steady improvements in fisheries management over time demonstrates the vitality of our horizontal and vertical separation of powers—even in a context as heavily administrative as this one.

For the purposes that the FCMA sets out to achieve, the administrative state outperforms the other branches in most contexts. The FCMA delegates to administrative actors the very tasks we need an administrative state to be able to accomplish—quick responses in an ongoing process of highly technical, data-driven, fluid, consultative, and adaptive decision-making. Fisheries management provides a good example of the complex decisions that must be made on the basis of scientific evidence—but in the face of incommensurable values conflicts whose resolution is not immediately obvious, and may differ from one context to another. These are the kinds of decisions that are best reached through ongoing processes of negotiation among locally diverse stakeholders, and thus suited for administrative process.[83]

Of course, this process hinges on adequate representation of all stakeholders, and conservationists have long argued that their limited access to the regulatory process has been a fatal flaw for balanced management choices, based on a statutory design flaw in the make-up of the regional councils. Later FCMA amendments have enhanced the voice of conservationists at the table by including new conservation directives among statutory requirements, but without voting roles on the regional councils, their representatives continue to feel excluded from core management decisions.[84] In a separate account of negotiated governance in the face of incommensurable values conflicts, I highlighted the importance of faithful and adequate representation as one of three key principles needed to confer legitimacy on a consensus-based outcome,[85] a lesson that could be better heeded in the FCMA context.

As configured under the FCMA, management activity is subject to judicial intervention when litigants challenge the agency's resolution of core policy conflicts that have been deferred to it by the legislature. Accordingly, we see proportionately more litigation about the content of the fishery management plans than any

83. *See generally* Ryan, *Negotiating Federalism*, *supra* note 37.

84. Josh Eagle, email correspondence of April 21, 2017 (on file with author) ("Environmental groups attend council meetings, but the only reason councils ever listen to them is because they are afraid of being sued. I went to dozens of council meetings as an environmental lobbyist and I can say with absolute certainty that I was never part of the drafting process.")

85. *See* RYAN, TUG OF WAR WITHIN, *supra* note 33, at 342–47; Ryan, *Negotiating Federalism*, *supra* note 37, at 108–09.

other feature—and most often brought by members of the fishing industry, the single-issue stakeholders who are motivated to sue whenever their interests are threatened by agency choices. Yet the deference the statute confers on the process also means that most litigation is unsuccessful, because the courts defer to reasonable agency decision-making under the ordinary principles of administrative law.[86] When the values conflict commands no nationally uniform consensus, and the agency has come to a legitimate conclusion on the basis of a diligent consultative process with all relevant stakeholders, then the court appropriately defers because the administrative process itself becomes the best and perhaps only means of prioritizing incommensurable values in individual contexts.[87] (Once again, however, a legitimate conclusion can only be negotiated among all relevant stakeholders.[88])

Even so, Congress should never give a blank-check for executive hegemony, and when FMPs were failing the primary goal of fishery management—to sustainably shepherd the resource—Congress appropriately amended the statute, disrupting the status quo of administrative fisheries management. In the 1996 Sustainable Fisheries Act amendments, Congress added new National Standards that, on balance, redirected agency decision-making toward conservationist goals. The amendments also provided a new hook for judicial review, presenting the courts with crisp new statutory mandates for interpretation and altering the public choice factors that had previously induced litigation primarily to expand fishing rights.

The new standards encouraged conservation interests to invoke judicial oversight more often, with more reason to believe that their litigation would succeed. By articulating new standards that empowered conservation-side litigation, Congress may even have created the opportunity for public participation by the statutorily disfavored conservation stakeholders. The increased threat of litigation from conservationists likely induced regional management councils to better heed their concerns in FMP design, even though the statute does not guarantee them a vote.[89] The Magnuson-Stevens Reauthorization Act of 2006 further bolstered conservation interests, amending the Act to direct that the United States advance international fisheries management efforts toward greater marine

86. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

87. *C.f.* RYAN, TUG OF WAR WITHIN, *supra* note 33, at 347–56; Ryan, *Negotiating Federalism*, *supra* note 37, at 110–120 (discussing the significance of procedural constraints when substantive constraints are unable to resolve incommensurable values conflicts).

88. *Id.* (discussing the importance of stakeholder representation).

89. *See supra* note 84.

resource protection.[90] And so the dialectic of inter-branch power dynamics continues apace in fisheries management.

Indeed, the history of the FCMA and its amendments shows that the balance of horizontal power in our constitutional system is never fixed, even in a regulatory context as heavily administrative as fisheries management. Congress can always intervene to constrain agency discretion, and to empower judicial oversight against agency expertise, by providing more clearly defined statutory guidance. This is precisely what Congress did when it enacted the 1996 and 2006 amendments—constituting additional iterations in the familiar pattern of engagement among branches of government, alternating between moments in which they compete for power and others in which they yield.

In this way, the FCMA, the Sustainable Fisheries Act, the Reauthorization Act, and their impacts on fishing litigation showcase the effective deployment of our constitutional structure to horizontally reallocate management authority across the three branches in response to a new policy consensus—here, the need for stricter fishery conservation. These successive moments in regulatory history highlight the possibility for ongoing renegotiation of regulatory authority among the branches of government, and it demonstrates that entrusting fisheries to the administrative state—or indeed, entrusting it with any substantive realm of governance—is never the end of the line. Even fishery governance retains the vitality characteristic of our dynamic system of horizontally and vertically separated powers.[91]

As crazy as that system can look from the outside, I conclude with the overall assessment that the balance of legislative, judicial, and administrative power in fisheries management is (at least roughly) as it should be. Congress could certainly improve the FCMA—at a minimum, correcting the balance of representation on the regional councils, or perhaps even diffusing council authority with other forms of agency oversight in differently purposed marine areas[92]—but as a model for fishery management, it rightly sets forth overarching policy goals and confers agency discretion to realize them in individual contexts. Most day-to-day decisions are not suited for the interpretive distinctions that courts draw, or the broadly sweeping rules that legislators can provide. Only the agencies possess the necessary governing capacity—the time,

90. Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. 109-479, 120 Stat. 3575 (2007).

91. Erin Ryan, *Negotiating Federalism and the Structural Constitution: Navigating the Separation of Powers both Vertically and Horizontally (A Response to Aziz Huq),* 115 COLUM. L. R. SIDEBAR 4 (2015).

92. *See* Eagle, Sanchirico & Thompson, *Ocean Zoning*, *supra* note 4.

expertise, and regulatory flexibility—to work out the details of fishery management on a day to day basis.

Fisheries management thus reveals the importance of the administrative state, working together with its co-equal branches, in moving us toward meaningful regulatory solutions. It is not exactly environmental law without courts, nor should it be—but a healthy dialectic should allow executive branch decision-making to lead in contexts where the best governance is negotiated among scientists, stakeholders, and citizens through the administrative process. So long as all stakeholders, including the public, are adequately represented, and so long as Congress and the courts remain a meaningful check against egregious choices, procedural abuses, and evolving policy consensus, then much of the governance capacity required by the task is best provided by the administrative state.