ABSTRACTS

Carol Rose, *Commons, Cognition, and Climate Change*, 32 J. LAND USE & ENVTL. L. 297 (2017).

Coping with climate disruption is often characterized as a commons or collective action problem. In this essay I argue that certain major cognitive blockages are inherent in the structure of commons or collective problems—especially such large scale collective problems as climate disruption. The essay identifies those baked-in cognitive impediments as distrust, ignorance, and insouciance, and it describes how they emerge from the structure of collective action. The essay then discusses some potential antidotes to collective action cognitive blockages, including motivated belief, commitment, and what I call interestingness and fun. Since these antidotes would appear to be rather weak in the face of a collective action problem so vast as climate disruption, the essay turns to types of action that potentially reduce the collective character of climate issues; here I discuss adaptation, geoengineering, and market measures. The essay concludes that market measures would appear to be the most promising, insofar as they can turn climate-related collective action into decision-making based on small-group or individual interest.

Robert V. Percival, *The "Greening" of the Global Judiciary*, 32 J. LAND USE & ENVTL. L. 333 (2017).

Throughout history the judiciary has played a key role in the development and implementation of principles of environmental law. Courageous, far-sighted judges have intervened at critical stages in history to articulate and apply key principles of law, particularly when other branches of government ignored festering environmental problems. Judges around the world are now becoming more sophisticated in handling environmental matters and countries are establishing and expanding specialized environmental courts.

This article begins by describing the history of judicial involvement in environmental cases, starting with the common law the U.S. inherited from Britain and continuing through the rapid growth of environmental legislation in the final decades of the twentieth century. It then discusses the more recent growth of global environmental law and the role courts are playing in this development. The article reviews the growth of specialized

environmental courts, how the judiciary is responding to climate change and efforts to increase the capacity of the global judiciary to handle environmental cases. The article concludes by examining the emergence of widely held principles of environmental law.

Robin Kundis Craig & Catherine Danley, *Federal Fisheries Management: A Quantitative Assessment of Federal Fisheries Litigation Since 1976*, 32 J. LAND USE & ENVTL. L. 381 (2017).

When Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act in 1976, it intended the Act to operate largely without the courts. Indeed, since the statute's enactment, the National Oceanic and Atmospheric Administration (NOAA) and the regional Fisheries Management Councils have published over 1,700 regulatory actions in the Federal Register, but cases challenging fisheries management have been relatively limited.

Given how much fisheries management "flies under the courts' radar," so to speak, it is worth asking what kinds of cases do end up in the courts. This article presents an initial quantitative assessment of federal fisheries litigation since 1976 to begin to assess the role of the courts in federal fisheries management. It concludes first that the 1996 and 2006 amendments to the Magnuson-Stevens Act, each of which added enforceable ecological requirements, each increased the amount of environmentally-minded litigation brought under that statute. Nevertheless, contrary to many perceptions, fishermen always have been the Act's primary litigants, arguably confounding Congress's original intent for fisheries management.

Erin Ryan, *Fisheries Without Courts: How Fishery Management Reveals Our Dynamic Separation of Powers*, 32 J. LAND USE & ENVTL. L. 431 (2017).

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), and considers 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?

The essay begins with a quick foray into fisheries science and economics to establish the fundamental paradox of fisheries management, in which managers strive to set a sustainable yield of extraction that accounts for the various ways in which extraction can itself alter the resource, requiring successively recursive rounds of regulatory adjustment. This analysis indicates why fisheries management is ideally suited to the features of administrative governance, in contrast to the comparative advantages of legislative or judicial oversight, because bureaucratic experts can usually 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 will be better 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 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. Indeed, Craig and Danley's research reveals changing litigation trends after the Sustainable Fisheries Act of 1996 and the Magnuson-Stevens Reauthorization Act of 2006 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.

Robert L. Glicksman & Emily Hammond, *Agency Behavior and Discretion on Remand*, 32 J. LAND USE & ENVTL. L. 483 (2017).

Despite the prevailing focus of administrative law on judicial review of agency discretion, scholars are increasingly asking what we can

learn about agency discretion in the absence of judicial review. Indeed, such work prompts a reexamination of administrative law and our assumptions about agencies' legitimacy. When a court invalidates an agency action, the agency's response on remand is often left open to the agency's discretion. Agencies frequently have significant latitude in whether, how, and when (if ever) to remedy the initial flaw.

What is the extent of agency discretion following a remand, and how do agencies use that discretion? In this Essay, we sketch the interplay of four variables to form some preliminary hypotheses and lay a foundation for future empirical work. These variables are the nature of the judicial remedy that accompanies the remand, the timing of the required agency response, the valence of the agency action (its alignment with the interests of the group winning the remand and with the then-current presidential administration), and the timing of the presidential administration, paying particular attention to changes that occur or are anticipated to occur during the agency's formulation of a response on remand.

We suspect that, barring a specific and enforceable judicial directive, agencies have almost as much discretionas they would in the first instance, when deciding whether and how to respond to a judicial remand. We also suggest that whether agencies act with haste or stall is at least somewhat dependent on the alignment of the agency's policy position with the incumbent President and any anticipated uncertainty regarding a future President. The vigilance of the original litigants, budgetary constraints, newly created statutory deadlines, and other factors also will influence what happens on remand. But we hope that this initial exploration will yield a useful set of testable hypotheses that can inform more detailed future work.

Christopher J. Walker, *Lawmaking Within Federal Agencies and Without Judicial Review*, 32 J. LAND USE & ENVTL. L. 551 (2017).

As part of the Florida State University College of Law's Environmental Law Without Courts Conference, this Essay examines two ways administrative law operates with little, if any, judicial oversight: Federal agencies play a substantial role in drafting the legislation that empowers them to regulate, and agencies then typically have broad discretion within that congressionally delegated authority to choose how to regulate. The former legislative-drafting activity fully escapes judicial review, and the agency choices made in the latter rulemaking activity are

usually only reviewed by courts for reasonableness. In other words, a vast amount of agency lawmaking escapes judicial review, which suggests that it is all the more important to understand the key players within the agency that engage in these legislative and regulatory activities.

Part I of this Essay briefly outlines these two types of agency lawmaking activity and how they are insulated from judicial review. Part II explores how agency design may matter in both lawmaking activities — with a particular emphasis on the agency general counsel office — by discussing the various agency organizational models identified in the author's prior study for the Administrative Conference of the United States. In particular, the combined legislation and regulation legal office has the virtue of ensuring that those agency lawyers who help draft the legislation can fully leverage the agency's experience and expertise in implementing the legislation, and vice versa. This Part also flags a number of best practices for agency general counsel offices to consider short of consolidating legislative and regulatory counsel in one office. This Essay is by no means a comprehensive take on how agency design choices can affect agency lawmaking. Instead, the objective here is to call attention to the topic and sketch out potential avenues for further research and discussion. Such further exploration is particularly important with respect to agency lawmaking that is insulated from judicial review.

Mark Seidenfeld, *The Long Shadow of Judicial Review*, 32 J. LAND USE & ENVTL. L. 579 (2017).

This comment posits that judicial review casts a shadow over all that administrative agencies do, even while admitting, at least for the sake of argument, that such review does not apply to various agency activities, some of which are identified by the principal papers in the Land Use and Environmental Law Journal symposium: "Environmental Law Without Courts." The aspects of the shadow of judicial review that this paper explicitly discusses, but which do not exhaust the totality of that shadow, involve three different effects of such review. First, even if agencies are free from meaningful review in choice of procedures beyond those specified by statute or required by the Constitution, this comment contends that substantive review over the ultimate agency action can significantly impact the agency choice of procedure to increase agency accountability for such choice. Second, in those cases where courts have remanded an agency action while failing to provide any explicit instruction whether the

agency should continue to pursue the action, the threat of further substantive review is one of the most important factors in the agency decision whether to do so. Finally, even for an action clearly not subject to any direct judicial review—in particular, agency participation in drafting statutes authorizing or defining the scope of agency action— judicial review affects the administrative-legislative interaction by influencing the way that agencies staff their regulatory teams. The thesis of this comment is thus broad but easy to state: judicial review of agency action casts a long shadow over all that agencies do, and one cannot meaningfully talk of Environmental Law (or any regulatory law) in the absence of courts.