Biodiversity Protection and Executive Power in Australia and Canada: Delegation of Authority under Parliamentary Systems

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Abstract: How does regime type affect delegation of authority? In the existing literature, most authors have assumed that legislators in parliamentary systems tend to enact vague, non-specific statutes, which delegate most decision-making powers to executive agencies. However, as I argue in this paper, this relationship may not be as strong as suggested. Rather, legislators can and do use restrictions on executive authority as a part of their drafting strategies, no matter the background system of government.

To illustrate this claim, I conduct a close examination of two policymaking episodes: specifically, development and implementation of biodiversity statutes in Australia and Canada. In both cases, discretionary restrictions formed a central part of the drafting process, as legislators sought to constrain executive authority on biodiversity protection. In practice, these restrictions have not been at all well-enforced; however, legislators still viewed these restrictions as a viable and useful part of their drafting strategies. Based on these cases, then, scholars should be cautious about making blanket characterizations about policymaking modes based solely on regime type. Instead, authors should focus on lower-level features like bicameralism and electoral systems, and the influence these features exert on the political balance of power.

What factors cause legislators to delegate policymaking powers? When constructing a new policy program, one of the first decisions drafters must make is how much authority to allocate to the executive branch. By giving bureaucrats wide decision-making latitude, legislators can often improve administrative performance, removing cumbersome procedural requirements and inflexible policy targets. Left unchecked, though, discretionary executive authority can create major problems for democratic accountability. These kinds of concerns are not restricted to academic circles; for example, in American debates over the Affordable Care Act, conservative commentators often worried about the role of unelected, unaccountable "death panels," which could potentially restrict access to life-saving treatments. Legitimate or not, these concerns reflected a basic uneasiness about unchecked discretionary authority, and its impacts on administrative performance and downstream policy outcomes.

Scholars have studied delegation dynamics extensively in the American setting. Thus far, however, few authors have expanded the delegation framework to the comparative context. When considered at all, discretionary restrictions are usually viewed as an American phenomenon, occurring relatively rarely outside of the United States. Compared with their counterparts in the US, scholars have argued, parliamentary legislators possess neither the incentives nor the capacity to impose heavy restrictions on executive authority. As I argue in this paper, though, these factors are probably less influential than scholars have previously assumed. Though institutional context can affect affect drafting tendencies, legislators in all systems of government can and do use discretionary restrictions as part of their drafting strategies.

To illustrate these claims, I conduct a close examination of two case studies: specifically, development and implementation of biodiversity in Australia and Canada. In both countries, the major biodiversity statutes impose strong restrictions on executive authority, with comparable

provisions to those found in American biodiversity law. As predicted in the existing literature, the restrictive provisions contained in these statutes were not at all well-enforced. Nevertheless, because of intense inter- and intra-party conflicts, legislators in both Australia and Canada were willing to risk significant political capital to draft and pass restrictive statutes.

The remainder of this paper will be divided into three sections. First, I describe the existing literature on comparative delegation dynamics, and contrast it with more recent scholarship from the literature on comparative legal systems. Second, I lay out my two case studies, describing both the implementation and drafting processes for both statutes I examine. Though these cases are by no means conclusive, they illustrate potential causal processes underlying legislative drafting in the comparative context, suggesting important and exciting new directions for future research.

Delegation in Parliamentary and Presidential Systems

Explicitly or not, delegation studies often start with a basic puzzle: why would a legislator ever want to restrict an agency's discretionary authority? Almost by definition, bureaucrats possess greater domain-specific knowledge and expertise than elected representatives. As a result, discretionary restrictions – for example, deadlines, evidentiary requirements or citizen-suit provisions – often inhibit agency performance, reducing administrative flexibility and forcing bureaucrats to fulfill cumbersome legal requirements (Kagan 2001). Worse, discretionary requirements are also costly for legislators to create and enforce (Moe 1990). On the drafting side, creating discretionary restrictions requires significant legislative capacity, forcing legislators to develop detailed policy prescriptions and incentive structures (Huber, Shipan, and Pfahler 2001; Huber and Shipan 2002). And, on the

implementation side, most discretionary restrictions involve active, long-term oversight, requiring proponents to investigate and punish agency malfeasance (Epstein and O'Halloran 1999). Some restrictions are easier to enforce than others; for example, "fire alarm"-type regulations usually require a smaller time investment than "police patrols" (McCubbins and Schwartz 1984), since most of the monitoring costs can be handed off to outside interest groups. Even in these situations, though, legislators are not likely to pass discretionary restrictions without some strong outside motivation.

Conflict between the executive and the legislature usually provides the answer. Sometimes referred to as the "ally principle," this explanation suggests that delegation should manifest as a principal-agent game, where the probability of legislative delegation decreases as probability of executive malfeasance rises (McCubbins 1985). Almost by definition, statutory restrictions on executive activity give legislators greater control over policy implementation, allowing elected representatives (or their preferred interest groups) to identify and punish instances of agency malfeasance. By setting reporting requirements, imposing deadlines and evidentiary standards, and encouraging citizen-initiated lawsuits, legislators can "[lower] the costs of monitoring and [sharpen] sanctions […] [producing] an equilibrium in which compliance is greater than it otherwise would be" (McCubbins, Noll, and Weingast 1987, 273).

Subsequent studies have complicated this story somewhat, but the basic principles have remained consistent. In both the American and the comparative contexts, scholars have observed a consistently negative relationship between executive-legislative conflict and delegation of authority (e.g. Epstein and O'Halloran 1999; Franchino 2004; 2007; Oosterwaal, Payne, and Torenvlied 2011; Saalfeld 2005). As mentioned earlier, restricting executive discretion is generally a costly strategy; as a result, some authors have found that lower-capacity legislatures

are also less likely to impose discretionary restrictions (Huber and Shipan 2002). Other writers have observed a similar negative relationship between issue complexity and delegation (Epstein and O'Halloran 1999).

These findings are well-established in the American setting, but few writers have attempted to generalize them to the comparative context. In one of the only major cross-national studies on delegation of authority, Huber and Shipan (2002) do compare delegation patterns across a number of parliamentary governments; however, they generally exclude institutional features from their analyses, focusing instead on political variables like coalition and minority governments. Of those scholars who have considered the relationship between system of government and delegation of authority, most have assumed that restrictions on executive authority should be more common in in presidential systems than in parliamentary ones. Existing studies have offered at least two primary reasons for this prediction:

1. *Legislative-executive separation*. Throughout the literature on regime classification, direct election of the chief executive forms a core distinguishing feature between presidentialism and parliamentarism (see, e.g., Cheibub, Elkins, and Ginsburg 2013; Elgie 1998). In presidential systems, legislators and executive leaders answer to different constituencies and face different reelection time horizons (Moe and Wilson 1994). As a result, the separation-of-powers system institutionalizes a relatively high level of executive-legislative conflict, encouraging broad restrictions on delegated authority. By contrast, in parliamentary systems, legislators appoint the chief executive, ensuring a certain level of accordance between legislative and executive leaders and reducing opportunities for executive-legislative conflict (Ibid).[1]

1 Moe and Caldwell (1994) and Shapiro (2002) also argue that legislation in presidential systems ought to be more durable than in parliamentary ones, allowing legislators to "insulate" their preferred programs against executive interference. As Tsebelis (1995) notes, however, not all presidential governments possess as many veto players as the United States, creating substantial variation in the likely level of status quo bias within these systems.

2. *Legislative capacity.* Legislators operating in separation-of-powers systems possess a relatively large capacity to oversee and enforce discretionary restrictions. Again, different governments do display substantial variation in their respective legislative capacities, which affects their willingness to restrict executive authority (Huber and Shipan 2002). However, even in lower-capacity contexts, legislators in separation-of-powers countries can often rely on "fire-alarm" type systems, passing oversight authority off to friendly interest groups and to the courts (McCubbins and Schwartz 1984; Kagan 2001; Stewart 1975). By contrast, parliamentary legislatures usually lack the capacity to oversee and maintain statutory constraints on executive power (Strøm 2000, 272–275). Rather, parliamentary backbenchers exert the most policymaking influence ex ante, usually through the screening and selection processes for parliamentary ministers (Ibid).

Put together, these arguments produce a clear set of predictions. Compared with presidential systems, parliamentary countries generally provide fewer institutionalized opportunities for executive-legislative conflict, disincentivizing legislators from imposing discretionary restrictions. Certainly, legislators and executive-branch officials in parliamentary systems can and do experience preference conflicts; for example, as Huber and Shipan demonstrate (2002), parliamentary legislators operating under coalition and minority governments tend to enact more discretionary restrictions than their counterparts in majority governments. Compared with their counterparts in presidential systems, though, parliamentary legislators should still use discretionary restrictions relatively rarely. Generally speaking, legislators in parliamentary countries have fewer opportunities to conflict with executive branch leaders, and do not possess sufficient capacity to oversee and enforce statutory constraints on executive authority. As a result, parliamentary leaders are more likely to try to influence policymaking through ex ante

screening measures and other informal mechanisms.

Appealing as these theories might seem, their predictions do not always play out in practice. In the literature on comparative legal systems, various authors have argued that legal systems around the world are becoming increasingly "Americanized," with more appeals to higher law and a larger role for judicial review (Shapiro 2002, 195–197; Stone Sweet 2003).[2] In Japan and Europe, for example, many governments have increasingly adopted a more detailed and more inflexible style of regulation, complete with stronger-form judicial review provisions and a more adversarial mode of policymaking (Kelemen 2011; Kelemen and Sibbitt 2004). Kelemen and Sibbitt (Ibid) attribute this shift to two basic factors: economic liberalization, and political fragmentation (see also Dobbin, Simmons, and Garrett 2007, 457–460). Liberalization and fragmentation, they argue, have "[undermined] traditional, informal, opaque approaches to regulation," forcing lawmakers to adopt more legalized policy implementation and enforcement procedures (Kelemen and Sibbitt 2004, 102). Other scholars have been more skeptical; Robert Kagan, for example, argues that negative perceptions of the American legal system are likely to discourage full adoption of an American-style regulatory system (Kagan 1997, 179–183). Overall, though, countries besides the United States do seem to be moving towards a more detailed, more transparent, and more adversarial mode of regulation.

If these observations are accurate, existing theories about comparative statutory design may not adequately capture the relationship between system of government and delegation of authority. Rather than expecting sharp differences between statutes passed under different systems of government, the explanations offered by Kelemen, Kagan, and others would lead us to expect legislators in all countries to enact substantial restrictions on executive authority, no

2 As Shapiro (2002) notes, American and international governments may even be converging on a kind of a middle ground, with American governments moving towards greater delegation and international governments delegating less.

matter the system of government. Political balance of power is still likely to influence delegation tendencies; however, by this logic, background institutional context should be much less important.

Biodiversity Law in Australia and Canada

As a first step towards testing the existing delegation theories in the comparative context, I conduct a close examination of two major policymaking episodes: specifically, development and implementation of biodiversity legislation in Australia and Canada. Compared with countries like the United States, both Canada and Australia use relatively unified systems of government, with relatively low executive-legislative separation and minimal parliamentary oversight of executive activities. Based on existing theory, then, we should expect legislators in both countries to impose relatively few constraints on executive authority. As I argue, though, legislators in both countries went significantly beyond these expectations, expending significant political capital to insert major restrictions on executive authority into their respective laws. As predicted by existing theory, these restrictions have not been at all well-enforced; however, legislators in both countries do not seem to have been dissuaded. Instead, the restrictions contained in both biodiversity statutes appear to result from short-term political conflicts between legislative and executive actors, rather than long-term policy concerns.

Case Selection

As case studies in agency design, Australia and Canada offer useful variation in terms of their systems of government. Along the executive-legislative dimension, Canada uses a relatively pure Westminster system, with single-member plurality elections, few coalition governments,

and strong Cabinet control of Parliament (Studlar and Christensen 2006).[3] Australia, on the other hand, uses a hybrid "Washminster" system, with a Westminster-style lower house and Prime Minister and an independent upper house elected via proportional representation (Thompson 1980). Compared with countries like Canada, the Australian Senate gives Australia somewhat more legislative-executive separation, and somewhat greater capacity to oversee and enforce discretionary restrictions (Bach 2003). Based on existing theory, then, Australia ought to occupy a middle ground in terms of its delegation tendencies, with more restrictions on executive discretion than Canada, but fewer than in the United States.

Biodiversity policy also offers a number of useful features as a hypothesis-testing environment. In the literature on comparative legal systems, environmental law is often cited as a prominent area in which non-US countries are increasingly adopting discretionary restrictions (e.g. Kelemen 2004; 2006; Jordan et al. 2003; Rittberger and Richardson 2003).[4] As I document in the next section of this paper, the major biodiversity statutes in Australia and Canada follow this general trend, with each imposing substantial restrictions on executive authority. Compared with predictions from the existing literature, these cases provide a useful opportunity for Lijphart's (1971, 692–693) "deviant case analysis," allowing scholars to refine existing theoretical paradigms and suggesting directions for future empirical analyses.

Statutory Design and Executive Delegation in Biodiversity Statutes

As an issue area, biodiversity did not become prominent in Australia or Canada until the

3 In other areas, Canada deviates substantially from the Westminster model. Most prominently, Canada maintains a strong federal system and, at least in recent years, a strong judiciary with broad review powers (Studlar and Christensen 2006). These features complicate attempts to categorize Canada's system of government; however, for the purposes of this paper, the Canadian government retains most of the relevant traits of the Westminster model.
4 Echoing Shapiro (2002), Jordan et al. (2003) and Rittberger and Richardson (2003) both note that EU regulatory patterns may be moving towards a "softer" form of regulation, with greater emphasis on economic incentives and other, more indirect policy instruments. However, these instruments have generally supplemented stricter command-and-control regulatory forms, rather than replacing them entirely.

early 1990s. In Canada, efforts to enact a national biodiversity protection program began in 1992, after Canada signed the Convention on Biological Diversity. As I describe later in this paper, negotiations over Canadian biodiversity legislation were unusually prolonged; however, in 2002, the Canadian Parliament finally enacted the Species at Risk Act (SARA),[5] which created a comprehensive federal biodiversity protection program. Australia, by contrast, did possess some limited biodiversity protection measures before the 1990s; however, in response to pressure from both environmentalists and business groups, in 1996 the Australian government began a major overhaul of the country's entire environmental protection regime. These efforts culminated with passage of the Environment Protection and Biodiversity Conservation Act (EPBC Act) in 1999, which combined environmental assessments, biodiversity protection, and heritage site management into a single statute.[6]

From a procedural standpoint, both SARA and the EPBC Act follow a basically similar framework. Under both laws, government officials, private citizens, and interest groups can all nominate species for legal protection.[7] These nominations, which are usually referred to as "listing proposals," are then forwarded to an independent group of scientific experts, who review the relevant scientific evidence and provide recommendations to the government. The government must then decide whether to "list" the nominated species for legal protections. Species can be protected at various levels; however, citizens and government agencies are generally barred from capturing, killing, or otherwise harming members of protected groups. In addition, both SARA and the EPBC Act impose some positive duties on their respective governments, requiring environmental agencies to develop recovery plans for listed wildlife.

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5 Species at Risk Act, S.C. 2002, c. 29, http://laws-lois.justice.gc.ca/eng/acts/S-15.3/ (accessed 5 April 2014)
6 *Environment Protection and Biodiversity Conservation Act (Cth) 1999*, http://www.comlaw.gov.au/Details/C2014C00140 (accessed 5 April 2014)
7 Australia also allows citizens to nominate ecological communities, heritage sites, and other so-called "matters of national envrionmental significance" for legal protection.

Both the Australian and the Canadian biodiversity laws also impose significant restrictions on executive authority at virtually all stages of this process. In environmental law scholarship, the American biodiversity protection system – most of which is outlined in the Endangered Species Act (ESA) – is generally viewed as one of the most powerful and restrictive environmental regimes anywhere in the world (Doremus 1991; Nagle 2008).[8] However, as Table 1 shows, in most areas the Australian and Canadian biodiversity statutes actually contain similar restrictions to those found in the ESA. During the listing stage, all three countries prioritize scientific and biological evidence over socioeconomic factors (though to varying degrees), and impose strict deadlines and procedural requirements throughout the listing period. Significantly, Canada and Australia also provide for an independent scientific review board, which is not present under the American biodiversity protection system. Canada, in particular, gives its review board a central role in the listing process; under SARA, if the Minister of the Environment fails to meet the relevant listing deadlines, the species in question is automatically listed according to the independent reviewer's recommendations.

Compared with Australia and Canada, the US does provide more opportunities for judicial review of agency decisions, and imposes stronger substantive requirements on agency actions. Generally speaking, the ESA gives private citizens more opportunities to challenge government decisions in court than either Australia or Canada, though Australia's citizen-suit provisions are still close to the US model. However, in both countries, extra-statutory factors (such as fee-shifting rules for public interest litigation) have discouraged activists from using the courts as extensively as their American counterparts. In addition, the ESA requires agency

8 This view is at least partly attributable to the US Supreme Court's rulings on the ESA. In *TVA v. Hill*, the Court noted that "the Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation […] the legislative history undergirding § 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species." *Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978).

officials officials to reach their decisions solely on the basis of biological information, without considering economic or political factors. By contrast, Canada and Australia allow officials to consider socioeconomic concerns, especially during the management stage of the process.

In practice, though, these substantive constraints are less meaningful than they might appear. In regulatory situations, scientific evidence is rarely clear and straightforward, especially when dealing with the kinds of long-term projections required for policy areas like biodiversity management. As a result, many "scientific" listing and management decisions depend as much on risk assessments and subjective value judgments as on raw scientific data (Waples et al. 2013, 729). Worse, substantive restrictions are also extremely difficult to enforce in court. Because of the uncertainty involved in most scientific judgments, American courts are generally reluctant to overturn agency judgments on substantive grounds, despite the strong substantive language contained in laws like the ESA.[9] As such, though US courts are much more involved in environmental policy than their counterparts in Australia and Canada (Opalka and Myszka 2009),[10] judicial involvement in substantive agency decision-making remains quite limited. By contrast, the widespread use of deadlines and reporting requirements in all three countries is more noteworthy; as Carpenter et al. (2012) note, the choice of *when* to issue a decision or promulgate a regulation can be as significant as the content of that regulation itself, making deadlines an especially relevant restriction type.

9 See, e.g., *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 13 ELR 20544 (1983).

10 For an overview of Australian court involvement in biodiversity policy, see, e.g. Allan Hawke, 99 *The Australian Environmental Act—Report of the Independent Review of the Environmental Protection and Biodiversity Conservation Act 1999*, Commonwealth of Australia (Oct. 30, 2009), http://www.environment.gov.au/epbc/review/publications/pubs/final-report.pdf

Table 1: Discretionary Restrictions in Australian, Canadian, and American Biodiversity Statutes				
	Substantive Restrictions	Procedural Requirements	Regulatory Independence	Judicial Review
Canada (Species at Risk Act, 2001)	**Listing:** scientific board's advice based on science[11] regulators must "take into account" biology[12] **Management***:* no constraints	**Listing:** strict deadlines;[13] species automatically listed if deadline missed[14] **Management:** recovery plan deadlines	**Listing:** Assessment conducted by independent scientific board;[15] final decision left to ministers **Management:** no constraints	Judicial review available, but rarely used
Australia (Environment Protection and Biodiversity Conservation Act, 1999)	**Listing:** only consider species welfare[16] **Management:** decisions should promote "economically sustainable development"[17]	**Listing:** deadlines for advice and final decision (extensions available)[18] **Management:** recovery plan/conservation advice deadlines, requirements[19]	**Listing:** Assessment conducted by independent scientific board; final decision left to political officials[20] **Management:** no constraints	Judicial review available for procedural complaints; limited opportunities for substantive review
United States (Endangered Species Act, 1973)	**Listing and Management:** most decisions made exclusively on basis of biological information[21]	**Listing:** listing and assessment deadlines (though extensions sometimes available)[22] **Management:** recovery plans,[23] critical habitat, [24]inter-agency consultation[25]	No provisions for independent agency	Judicial review available for procedural complaints; limited opportunities for substantive review

11 Species at Risk Act, S.C. 2002, c. 29, §15(2).
12 S.C. 2002, c. 29, §27(2).
13.C. 2002, c. 29, §27(3), 32-33, 58.
14 S.C. 2002, c. 29, §27(3).
15 S.C. 2002, c. 29, §21-22
16 Environment Protection and Biodiversity Conservation Act 1999 (Cth), s186
17 EPBC Act 1999 (Cth), s3A
18 EPBC Act 1999 (Cth), s194, 251(2), 251(3)
19 EPBC Act 1999 (Cth), s266B
20 EPBC Act 1999 (Cth), s194A-T
21 For example, government officials must reach all listing decisions (16 U.S.C. §1533(b)) and consultations with other agencies regarding project impacts (16 U.S.C. §1536(c)) on the basis of the "best scientific and commercial data available." Not all decisions under the ESA are subject to this restriction; when assigning critical habitat, for

Discretionary Restrictions in Practice

As noted earlier, the existing literature on policy delegation cannot easily account for the discretionary restrictions contained in the Canadian and Australian statutes. Generally speaking, we would expect parliamentary legislatures to lack the capacity to needed oversee and enforce the kinds of discretionary restrictions contained in laws like SARA and the EPBC Act. Legislators in parliamentary countries also cannot usually expect the same levels of support from interest groups and independent courts as their counterparts in countries like the US. As such, one possible explanation for the observed convergence on discretionary restrictions is that environmental legislation represents an exception to these general rules. Restrictions contained in environmental statutes, in other words, may be easier to monitor and enforce than similar provisions in other laws, making discretionary restrictions a more attractive option than they otherwise might be.

Surprisingly, though, implementation data do not support this hypothesis. Using the Canadian government's online endangered species database,[26] I wrote a Python script to scrape assessment, response, and listing dates for all species successfully listed under SARA from 2002-2014, as well as species currently navigating the law's listing processes. Under SARA, the Minister of the Environment is required to respond to COSEWIC listing recommendations

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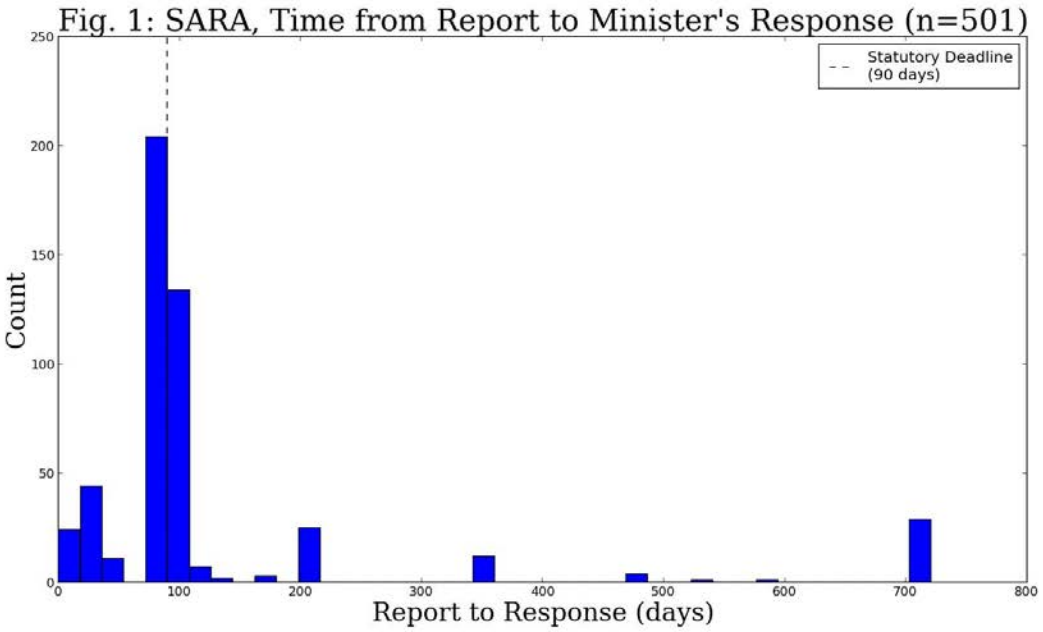
example, agencies required to balance biological requirements with socioeconomic factors critical habitat findings, which require the agencies to balance economic considerations with biological ones (16 U.S.C. §1533(b)(2)).
22 Specifically, officials must respond to public listing petitions within 90 days after submission, (16 U.S.C. §1533(b)), decide whether the listing is "warranted" within 12 months after submission (16 U.S. C. §4(b)3(B)), and reach a final decision after an additional year-long notice and comment period (16 U.S.C. §1533(b)). At the middle stage, regulators can categorize listing proposals as "warranted," "not warranted," or "warranted but precluded." The "warranted but precluded" category was intended for cases in which listing action was scientifically justifiable, but precluded by more pressing listing actions. In recent years, though, the "warranted but precluded" category has become something of a loophole in the ESA's listing procedures, allowing recalcitrant agencies to avoid listing undesirable species (Schwartz 2008).
23 16 U.S.C. §1533(a)
24 16 U.S.C. §1533(f)
25 16 U.S.C. §1536(b), 1536(c)
26 Canadian Government, "Species at Risk Act Public Registry," available athttp://www.sararegistry.gc.ca/default_e.cfm (last accessed 7 April 2014). All data also on file with the author.

within 90 days of the report's publication, and to reach a final decision on those recommendations within 9 months. If the Minister fails to meet these deadlines, the species in question is supposed to be automatically listed according to COSEWIC's recommendations. However, as Fig. 1 and Fig. 2 show, government officials have simply ignored these restrictions. On average, the Canadian government has taken 135 days to respond to COSEWIC assessments, and 620 days to reach a final decision (compared with 90 and approximately 270 as required under the statute). In total, from 2002-2013 some 43% of all species missed the 90-day deadline, and all but two (99%) missed the 9-month deadline!

Despite these seemingly clear violations, the Canadian government has avoided triggering SARA's automatic listing provisions through some questionable statutory reinterpretation. Under SARA, the government's 9-month deadline starts as soon as the Minister “receives” COSEWIC's listing recommendations. Seizing on this language, the Canadian government has interpreted this provision to mean that the 9-month deadline begins as soon as the government publishes an official notice “acknowledging receipt” of COSEWIC's recommendations, regardless of when those recommendations are made public (Waples et al. 2013). As I document later in this paper, SARA's listing deadlines and automatic listing provisions were key concessions won by pro-environment MPs, who wanted to place tight administrative restrictions on ministerial discretion under the law. As a result, it seems unlikely that these MPs intended for SARA's listing provisions to be so flexible. Nevertheless, the Canadian government has been able to maintain this favorable interpretation without consequences.



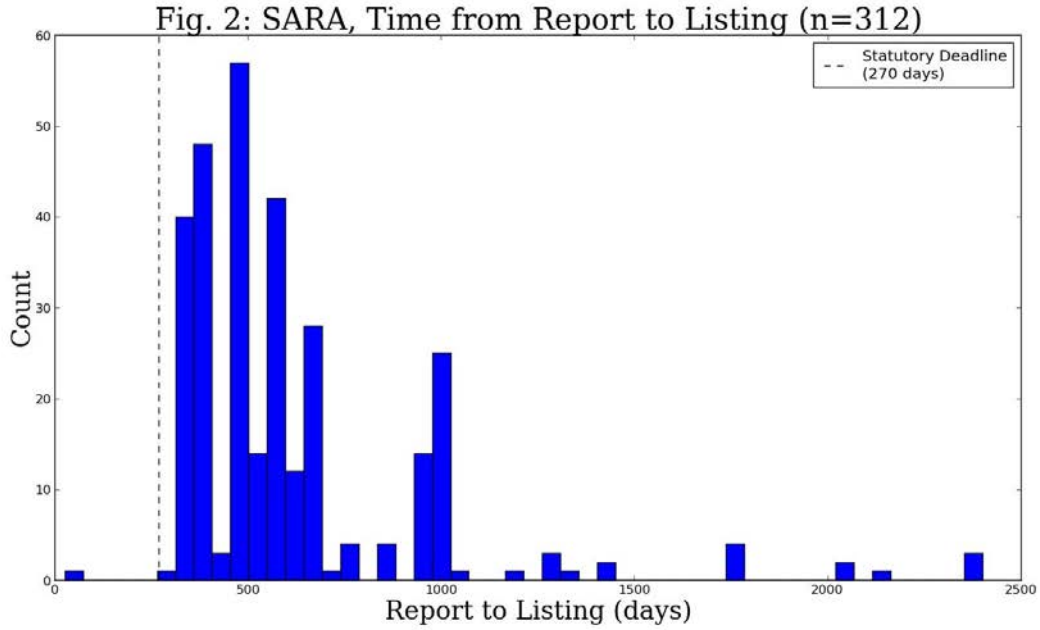


Fig. 1 and Fig. 2:
Time from COSEWIC report to minister's response (fig. 1) and final listing (fig. 2). Dashed lines indicate statutory deadline; so, all cases that fall to the right of the dashed line were cases that failed to meet statutory requirements. In both cases, species were only counted if they actually reached the relevant deadline; so, cases that were still in progress at time of writing were not counted.

In Australia, the overall picture is similar. As mentioned above, the EPBC Act imposes a variety of deadlines throughout both the listing and the project assessment processes, which set out a clear timeframe for both listing and project approval activities. During assessment, the three primary deadlines occur at the "controlled action" step, the "assessment approach" step, and the "approval decision" step.[27] On the listing and species protection side, the main deadlines are the "scientific finding" deadline, the final listing decision ("Minister's finding"), and the deadline for publishing a scientific "conservation advice" documenting the primary threats and concerns facing a given listed species. Using the Australian government's annual reports on the EPBC Act,[28] I gathered data on adherence to all six of these deadlines, which are summarized in Table 2. Generally speaking, the Australian government has been fairly successful at meeting project assessment deadlines, with compliance rates ranging from approximately 70-80%. On listing, though, compliance is much weaker; as shown in Table 2, the Minister has generally met the deadline for reaching a final listing decision, but both of the scientific deadlines show dramatically worse compliance rates than any of the other deadlines imposed by the EPBC Act. Since these deadlines track different kinds of actions, compliance rates are somewhat difficult to compare directly; however, at the very least, the dramatic differences in compliance rates between species protection and project approval deadlines suggests that the Australian government can choose to follow certain deadlines more closely than others, limiting the restrictive power of these provisions.

27 The "controlled action" step involves a determination as to whether a given action may have a significant impact on a listed species, ecological community, or other "matter of national environmental significance." If an action is found to be a "controlled action," the government then decides which of several available approaches is best suited to assess that action. Finally, the government decides whether to approve the action, to conditionally approve it, or to disapprove it. For more information, see Department of the Environment and Heritage, "Environment Assessment Process," Australian Government, http://www.environment.gov.au/system/files/resources/38fc57cd-c744-4727-8fa0-51ecbd6e879b/files/flow-chart.pdf (accessed 6 April 2014)

28 Australian Government, "EPBC Act Publications," http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/epbc-act-0 (accessed 8 April 2014). All reports and data also on file with the author.

Table 2: EPBC Act Deadline Adherence			
Assessment Deadlines	Compliance	Listing Deadlines	Compliance
Controlled Action *(n = 4083)*	0.834	Scientific Finding *(2000-06, n = 248)*	0.452
Assessment Approach *(n = 779)*	0.701	Minister's Finding *(n = 531)*	0.853
Approval Decision *(n = 494)*	0.696	Scientific Advice *(07-11, n = 183)*	0.169

Deadlines, of course, represent only one type of restriction on ministerial discretion. As a result, other restrictions contained in SARA and the EPBC Act may be better-enforced than the deadline provisions described here. Intuitively, though, deadlines should be one of the easiest restriction types to enforce; after all, it is relatively easy to tell when a government official has failed to meet a deadline, compared with determining when an official has failed to meet a substantive scientific standard. So, if deadline enforcement is universally poor, we should probably expect enforcement of other restriction types to be similarly limited. And, as Carpenter et al. (2012), there are actually strong substantive reasons to focus on deadlines over other kinds of procedural restrictions. In many situations, the timing of a regulatory decision is nearly as important as that regulation's actual content. By limiting a minister's ability to control timing, deadlines thus eliminate a key part of the bureaucratic arsenal, imposing major restrictions on administrative authority.

Outside of the procedural domain, other discretionary restrictions contained in SARA and the EPBC Act also possess poor enforcement track records. In Canada, various authors have chronicled failures by the Canadian government to meet scientific standards imposed during SARA's listing processes, especially with high-profile species like polar bears and Pacific

salmon (e.g. Shaffer 2013; VanderZwaag, Engler-Palma, and Hutchings 2011). Australian scholars have made similar claims, arguing that regulators have ignored the EPBC Act's scientific requirements during the listing process in favor of economic and political considerations (Macintosh and Wilkinson 2005; Macintosh 2009).

At least in Australia, biodiversity legislation does give courts some ability to ease these kinds of enforcement dilemmas, providing private citizens with a way to challenge government decisions in an independent venue. As with the statute's deadline provisions, though, Australia's citizen suit track record is mixed at best. As Godden and Peel (2007) note, the Australian federal courts have produced some important judgments on matters relating to the EPBC Act, especially on the project assessment and impact side. Key judgments like *Booth v. Boswell*[29] and the *Nathan Dam Case*[30] have expanded the law's prohibitions to cover indirect and cumulative impacts, exposing new activities to the Act's regulatory mechanisms (McGrath 2008). However, outside of these major cases, litigation under the EPBC Act has generally been quite rare; as of mid-2013, there have been some 50 cases brought under the EPBC Act to federal appeals court, representing approximately 3-4 cases per year.[31] Moreover, amendments passed in 2006 to the EPBC Act made it more difficult for interest groups to obtain costs security in EPBC Act litigation, discouraging environmental groups from pursuing litigation-oriented policy strategies.

Put together, then, these findings suggest a relatively poor enforcement track record. Though the analyses presented here provide only a partial picture of the discretionary restrictions contained in SARA and the EPBC Act, based on these data neither of the two laws seem particularly well-enforced. Importantly, this finding is precisely the outcome that the comparative agency design literature would predict; as noted earlier, parliamentary legislators

29 Booth v. Boswell (2001) 114 FCR 39
30 Nathan Dam Case (2004) 139 FCR 24
31 Chris McGrath, in conversation with author, 28 June 2013. A full list of all cases brought under the EPBC Act as of June, 2013 is on file with the author.

tend to posses lower capacity to oversee and punish executive malfeasance, making restrictions on executive authority more difficult to enforce. However, if discretionary restrictions are truly so poorly enforced, then why would legislators insert them into important statutes in the first place? In the next two sections of this paper, I attempt to answer this question through an in-depth examination of the drafting processes for both statutes.

Canadian Biodiversity Protection: Intra-Party Struggles and Internal Conflict

In Canada, efforts to pass a national biodiversity protection statute began in 1992, after the Canadian Government signed the Convention on Biological Diversity (CBD). According to the CBD, all signatories had a positive duty to "develop necessary legislation […] for the protection of threatened species," which neither Canada nor its provinces then possessed.[32] In 1996, members of Liberal Party government introduced Bill C-65, the Canadian Endangered Species Protection Act (CESPA). As originally written, CESPA was quite limited. In the initial proposal, the federal government had full control over listing decisions and habitat protection, with virtually no non-discretionary duties or evidentiary requirements. In addition, the bill's provisions only applied on federal lands, providing no protection on provincial or private property.[33] Liberal MPs strengthened the bill somewhat in committee, requiring the federal government to protect transnational species; however, these changes only engendered further criticism from the business community. As a result, in 1997 then-Prime Minister Jean Chrétien allowed the bill to die on order paper.[34]

After a successful election, the reelected Liberals went back to the drawing board,

32Stewart Elgie, "The Politics of Extinction: The Birth of Canada's Species At Risk Act ", in Debora VanNijnatten and Robert Boardman, eds., *Canadian Environmental Policy: Context and Cases, 3rd ed*, (Oxford: Oxford University Press, 2008), 199.
33*Ibid*, 203.
34*Ibid*, 205

producing a new bill – the Species at Risk Act (SARA) – in early 2000. However, like CESPA, SARA ran afoul of another early election in late 2000, killing the bill in committee. After winning reelection, though, the Liberals reintroduced the bill in early 2001 as Bill C-5, and allowed debate to begin in earnest. In the government's introductory speech, Environment Minister David Anderson highlighted a number of important features contained within the new bill, many of which were touted as improvements over the much-maligned CESPA. Though SARA left habitat protection optional, the bill did make recovery strategies and action plans "a mandatory requirement" for listed species, providing some small restrictions on government discretion.[35] Additionally, SARA gave the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) – the government's scientific advisory board on biodiversity matters – "legal status" under the new law, requiring ministers to at least consider COSEWIC's recommendations.[36] Finally, in certain situations, SARA also provided some protections to species located within state and private landholdings. According to the bill, if a province did not adequately protect federally-listed species found within its borders, the government could issue a so-called "safety net" order, extending SARA's protections onto non-federal land for the species in question.[37]

Like CESPA, though, SARA immediately ran into opposition. During the long wait between the 1992 treaty and the 2001 Parliamentary debates, many MPs had lost faith in the Liberal Party's commitment to environmental issues, and were suspicious of SARA's more discretionary elements. At least in part, this suspicion was rooted in lobbying efforts from the Species at Risk Working Group (SARWG), a consortium of environmental advocacy groups and

35David Anderson, "Species at Risk Act," Canada, House of Commons, *Legislative Debates (Hansard)*, 37th Parl. 1st Sess. (Feb 19 2001). Available at http://www.parl.gc.ca/housechamberbusiness/ChamberSittings.aspx?Key=2001&View=H&Language=E&Mode=1&Parl=37&Ses=1
36*Ibid*
37*Ibid*

business organizations formed in 1998. Throughout the debate over SARA, SARWG generally attempted to locate a middle ground between environmental and business concerns, guaranteeing protection for key interests of both stakeholder groups. Generally speaking, these advocacy efforts manifested themselves as restrictions on ministerial discretion; for example, SARWG called for mandatory landowner compensation, mandatory prohibitions on killing or harassing listed species on both provincial and federal land, and a "science-based" listing process, whereby COSEWIC's listing recommendations would be automatically accepted unless vetoed by the environment minister (Illical and Harrison 2007, 380). For the most part, these concerns were based on concerns over excessive ministerial discretion. Business groups, for their part, worried that environmental measures would impose unmanageable costs on affected industries, while environmental groups suspected that the government would not fully enforce SARA's prohibitions. As a result, both sides of the political spectrum had a strong interest in constraining ministerial authority in their favored issue areas.

Debates in the Canadian Parliament echoed this overall sentiment. Throughout the discussion over SARA left- and right-wing MPs alike attacked the discretionary provisions contained within the bill, arguing that the government's draft left far too much freedom to the executive. From the left, members of the National Democratic Party (NDP) argued that COSEWIC, not the Minister of the Environment, ought to make final listing decisions, basing the listing process on a "purely scientific methodology."[38] Right-wingers agreed; in one speech, for example, a Canadian Alliance (CA) MP asserted that "I do not want the cabinet deciding on [listings] […] I want socio-economic impact studies and I want to hear from scientists. I trust them a lot more."[39] Another conservative, this time from the Progressive-Conservative (PC)

38Joe Comartin, "Species at Risk Act," Canada, House of Commons, *Legislative Debates (Hansard)*, 37th Parl. 1st Sess. (Feb 28 2001).
39Bob Deer, "Species at Risk Act," Canada, House of Commons, *Legislative Debates (Hansard)*, 37th Parl. 1st Sess. (Feb 21 2001).

Party, noted that "those provinces that have permitted a political listing regime as opposed to a scientific listing regime just do not add new species to their endangered species lists. Species do not get listed."[40] Based on those experiences, the PC member argued, SARA needed a non-discretionary listing procedure to provide effective protections to threatened species.

Some Liberal MPs were also skeptical of the flexibility SARA provided. Charles Caccia, a former cabinet member and then-Chair of the Standing Committee on the Environment and Sustainable Development, warned that

> as to the [bill]'s discretionary powers, make no mistake […] federal discretionary powers have not been used. Why rely on their use for providing effective protection of endangered species if in reality there is no record of the use of such powers?[41]

Karen Kraft Sloan, Vice-Chair of the same committee, made similar claims. In a speech later that day, she argued that "discretionary authorities to act may be political deal makers but they risk becoming convenient barriers to action in the hands of those who do not recognize a duty to protect the common."[42] In particular, Sloan singled out SARA's "safety net" provision, noting that the bill imposed "no duty [on] the federal government […] even if a province [failed] to protect endangered species."[43] If these discretionary elements were not eliminated, Sloan argued, SARA was probably doomed to failure.

In other areas, as well, the government's bill was deeply controversial. MPs from the Bloc Québécois (BQ) – a pro-Quebec party dedicated to a nationalist agenda for Quebec – argued that the bill's "safety net" provision duplicated state-level endangered species laws, intruding on Quebec's rightful jurisdiction.[44] Conservatives, for their part, repeatedly brought up

40John Herron, "Species at Risk Act," Canada, House of Commons, *Legislative Debates (Hansard)*, 37th Parl. 1st Sess. (Feb 28 2001).
41Charles Caccia, "Species at Risk Act," Canada, House of Commons, *Legislative Debates (Hansard)*, 37th Parl. 1st Sess. (Feb 28 2001).
42Karen Kraft Sloan, "Species at Risk Act," Canada, House of Commons, *Legislative Debates (Hansard)*, 37th Parl. 1st Sess. (Feb 28 2001).
43*Ibid*.
44Benoît Sauvageau, "Species at Risk Act," Canada, House of Commons, *Legislative Debates (Hansard)*, 37th Parl. 1st Sess. (Feb 28 2001).

the issue of landowner compensation; in one speech, a CA member noted that the Minister of the Environment "may, in accordance with the regulations, provide compensation to any person for losses [incurred during the course of conservation efforts] […] the operative word here is 'may.' It is not that he shall compensate; it is that he may compensate."[45] In addition, the MP continued, the government's bill did not provide any guidance regarding the level of compensation required under the statute, leaving the specifics up to the Minister to determine.[46] Even in these areas, then, BQ members and conservatives alike had little faith in the government to satisfactorily execute SARA's provisions, and wanted to further limit the discretionary measures contained under the bill.

After hashing out these issues for a month, the Liberal leadership referred SARA to the Standing Committee on the Environment for revisions. Between March and December of 2001, committee members from all the major parties heard testimony and debated an array of issues, eventually passing over 100 amendments to the bill. Generally speaking, the Committee's amendments reduced executive discretion substantially, making habitat protection mandatory on federal land, making "safety net" orders mandatory if state laws were found to be inadequate, and requiring compensation for landowners affected by the bill (S. Elgie 2008, 199) In addition, the bill required the government to make a final listing decision within 9 months of receiving a COSEWIC report, and required the government to give reasons if it rejected COSEWIC's recommendations.[47] These amendments, which enjoyed both Liberal and opposition support, were intended to address the concerns brought up during the first round of debate, constraining the executive somewhat while still leaving agencies with enough freedom to implement the bill effectively.

45Werner Schmidt, "Species at Risk Act," Canada, House of Commons, *Legislative Debates (Hansard)*, 37th Parl. 1st Sess. (Mar 16 2001).
46 *Ibid*.
47*Ibid*.

For the Liberal leadership, though, these amendments were too much. After the Committee reported its revised bill, the Minister of the Environment immediately proposed amendments reversing nearly all of the Committee's changes, including those proposed by Liberal committee members. Liberal backbenchers were furious; Karen Kraft Sloan, a key contributor to the Committee's amendments, argued that the government had

> [swung] a scythe through all of the negotiations, all of the promises, all of the time and the energy that went into the development […] of the committee report. Perhaps more importantly, the [government] motions [destroyed] whatever trust had been so carefully developed over the many months of consultation with the parties in question. That trust is not something to be taken lightly, yet it appears that it has been.[48]

In another pointed set of remarks, another Liberal MP proclaimed that SARA "really […] is a hollow little book. There is not much in it except for discretion and it is discretion from A to Z. It is sad."[49] Though not all of the Liberal representatives were so critical,[50] as many as 37 Liberal MPs (out of 172 total) were reportedly willing to vote against the government's amendments (S. Elgie 2008, 207), enough to tip the balance in favor of the opposition.

As a result, debate on the bill deadlocked. Over the next several months, the Liberal leadership repeatedly delayed critical votes on SARA and its amendments, hoping to come to an agreement with the holdouts within their own party. However, events elsewhere in the Canadian Parliament complicated matters considerably; just after the Government submitted amendments reversing the committee's decisions, the conflict to succeed then-Prime Minister Jean Chrétien reached a critical stage, as heir-apparent Paul Martin resigned from Chrétien's cabinet. In the days leading up to the transition, tensions between Chrétien, Martin, and their supporters were

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48Karen Kraft Sloan, "Species at Risk Act," Canada, House of Commons, *Legislative Debates (Hansard)*, 37th Parl. 1st Sess. (Mar 21 2002).
49Clifford Lincoln, "Species at Risk Act," Canada, House of Commons, *Legislative Debates (Hansard)*, 37th Parl. 1st Sess. (Feb 18 2002).
50See, e.g., Karen Redman, "Species at Risk Act," Canada, House of Commons, *Legislative Debates (Hansard)*, 37th Parl. 1st Sess. (Feb 21 2002); Andy Savoy Karen Redman, "Species at Risk Act," Canada, House of Commons, *Legislative Debates (Hansard)*, 37th Parl. 1st Sess. (Feb 21 2002).

high, making it particularly difficult for the Government to rally recalcitrant backbenchers (Illical and Harrison 2007). Facing these and other challenges, in May of 2002 the Liberal leadership caved. Under intense pressure from all sides, Chrétien's government agreed to restore most of the committee's amendments, including the mandatory critical habitat protections, mandatory safety net provisions, and the "constrained discretion" approach to listing procedure.[51] As Sloan noted, the final bill was still "profoundly discretionary […] I have to say this makes me very uncomfortable."[52] However, both Sloan and Environment Committee Chair Charles Caccia – the *de facto* heads of the backbencher revolt – supported the final version of the bill, which passed in June of 2002.[53]

Australian Biodiversity Management: Bicameralism in Parliamentary Politics

As in Canada, the Australian federal government did not become heavily involved in biodiversity management until the 1990s. Prompted by domestic campaigns and by the Convention on Biological Diversity, Australia passed its first biodiversity statute in 1992, known as the Endangered Species Protection Act (ESPA). From a procedural standpoint, ESPA contained many similarities with the current Australian biodiversity protection regimes, with a similar two-step listing process and similar procedures for listing and project approvals (Meyers and Temby 1994; Woinarski and Fisher 1999). From environmentalists' perspective, however, ESPA contained some serious shortcomings. Most importantly, ESPA's protections only applied on federal property, limiting its protections to marine areas and to some 1% of Australia's total land area (Ibid). Impact assessments were also problematic; under ESPA and its sister statute,

51*Ibid*, 208.
52Karen Kraft Sloan, "Species at Risk Act," Canada, House of Commons, *Legislative Debates (Hansard)*, 37th Parl. 1st Sess. (June 11 2002).
53*Ibid*; Charles Caccia, "Species at Risk Act," Canada, House of Commons, *Legislative Debates (Hansard)*, 37th Parl. 1st Sess. (June 11 2002).

the Environment Protection (Impact of Proposals) Act (EPIP), projects likely to affect a listed species or community were required to undergo a complicated cabinet consultation process, introducing major delays and procedural headaches for business groups and environmentalists alike (Godden and Peel 2007). As a result, the ESPA essentially represented "an unsatisfactory compromise," inconveniencing businesses while guaranteeing few benefits for threatened and endangered species.[54]

Prompted by these concerns, starting in the late 1990s the Australian government began to work on a second round of environmental legislation. After a lengthy negotiation process with the Australian state governments, in 1998 newly-elected Prime Minister John Howard introduced the Environment Protection and Biodiversity Conservation Act (EPBC Act). Unlike ESPA, the EPBC Act was intended as a complete overhaul of Australia's environmental protection regime, repealing and replacing an array of existing environmental protection statutes and regimes.[55] Most prominently, the EPBC Act established new listing procedures for endangered species and other "matters of national environmental significance,"[56] and streamlined Australia's project assessment processes (Godden and Peel 2007). In line with state-level negotiations, the EPBC Act also allowed the Minister of the Environment to enter "bilateral agreements" and "regional forest agreements" with state governments, which would certify state assessment procedures as meeting federal standards.[57] This proposal was highly controversial; environmentalists, in

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54Gary D. Meyers and Shaun Temby, "Biodiversity and the Law: A Review of the Commonwealth Endangered Species Protection Act of 1992," *Griffith Law Review* 3, no.1 (1994): 40-93, 87.

55 For further explanation of the EPBC Act's relationship with Australia's existing environmental statutes, see Senator Robert Hill, "Environment Protection and Biodiversity Conservation Bill 1998 (Explanatory Memorandum)," Australian Legal Information Institute, http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/cth/digest/epabcb1998598/epabcb1998598.html (accessed 5 April 2014).

56 Council of Australian Governments, "Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment," Department of the Environment, http://www.environment.gov.au/resource/heads-agreement-commonwealth-and-state-roles-and-responsibilities-environment (accessed 5 April 2014).

57 *EPBC Act (Cth) 1999*, s29(1), s38.

particular, feared that these procedures would be used to delegate most policymaking authority back to the states, circumventing federal protections (Ibid).

These criticisms notwithstanding, the Howard-led Coalition government[58] remained essentially supportive of the EPBC Act throughout parliamentary debate. Since the Coalition controlled an outright majority in the Australian House of Representatives, the EPBC Act was expected pass easily through the lower house. The Senate, however, was more problematic. As mentioned earlier, Senators in Australia are elected via proportional representation, rather than single-member districts. As a result, the party with a majority in the Australian lower house rarely controls an outright majority in the Senate. The 1998-1999 period was no exception; at the time, the Coalition held 37 Senate seats, with 39 required for an outright majority. Of the remainder, Labor – the official opposition – held 28, with the rest split between the centrist Australian Democrats (7), the Australian Greens (2), and 2 independents, Brian Harradine and Malcolm Colston. To pass legislation through the Senate, then, the Coalition needed two votes from some combination of these groups. None, however, were natural allies on environmental legislation. Harradine, for his part, generally voted in a socially conservative fashion, and was unlikely to support any expansions to the environmental protection regime. The Democrats and the Greens, on the other hand, were both strongly pro-environmental regulation, and were likely to demand significant concessions in exchange for their support.

Debates in the Senate followed these basic party lines. Predictably, Senators from Labor, the Greens, and the Australian Democrats all wanted to strengthen the EPBC Act's protective measures and limit the government's discretionary powers. Following a series of Senate committee hearings and consultations on the EPBC Act, in April of 1999 Lyn Allison

58 In Australian, the Coalition refers to a formal alliance of center-right parties (specifically, the Liberal Party, the National Party, the Liberal-National Party of Queensland, and the Country Party). However, due to its cohesiveness and durability, The Coalition is usually treated as a single party.

(Democrats) provided a good summary of the main issues:

> We have three fundamental objections [to the EPBC Act]. Broadly speaking, these are inadequate definition and use of ESD [ecologically sustainable development] principles, especially with respect to the importance of public involvement, the limited view as to the Commonwealth's responsibility, for example, the very vital matters of national environment significance and using the bilateral agreements to delegate Commonwealth decision making to the states and also the very large scope for ministerial discretion and the range of exemptions from the bill.[59]

Statements by Labor and the Greens essentially echoed these concerns, though with a special focus on the EPBC Act's bilateral agreement provisions. Dee Margetts (WA Greens), for example, noted that "I and other members of the community are very worried about the very real prospect of the Commonwealth getting the states to take over much of the Commonwealth's responsibilities," and characterized the EPBC Act as a "fundamental abrogation of the Commonwealth's environmental responsibilities."[60] While these claims were likely somewhat overstated, they reflected a basic concern about the discretionary powers provided by the EPBC Act, and the regulatory shortcomings those provisions might create.

Following the initial round of statements, debate on the EPBC Act was sidelined for several months. At the time, the Coalition government was scrambling to pass a number of other major legislative initiatives before the Senate term expired in July of 1999. The most notable of these proposals was a goods and services tax (GST), a central and highly controversial part of Howard's 1998 reelection platform. Initially, Coalition representatives had hoped to negotiate a deal over GST legislation with Harradine and Colston, the two Senate independents; however, negotiations with Harradine collapsed in early 1999. As a result, the Howard government switched its attention to the Australian Democrats. The Democrats were closely divided on the issue, but after a contentious negotiating period, the party's leadership and 5 out of the party's 7

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59 Commonwealth of Australia, 27 April 1999, *Parliamentary Debates: Senate: official Hansard*, pp. 4339.
60 *Ibid*, pp. 4340.

senators agreed to support a modified version of the GST bill (Gauja 2005).

Shortly after the GST deal was announced, the Democrats and the Howard Government suddenly announced a separate agreement on the EPBC Act. The agreement, which emerged just prior to the end of the 1999 Senate term, modified virtually every major section of the statute. In line with the Democrats' original demands, these amendments were generally intended to increase transparency and reporting requirements and impose limits on ministerial discretion. In the law's biodiversity sections, key amendments included tighter listing deadlines and mandatory recovery plan requirements for threatened and endangered species.[61] Other amendments added additional deadlines and public consultation periods to the project assessment process, as well as requiring the government to publish documentation relating to project assessments online.[62] Finally, the Democrats also expanded the law's enforcement mechanisms, imposing stronger penalties for violating the law's prohibitions.[63] In summarizing her party's amendments, Lyn Allison (Australian Democrats) was triumphal: “We said when it [the EPBC Act] first emerged that it needed major surgery. It was full of loopholes. There was too much discretion for the minister and too high a risk of devolving decision making to the states […] more than 400 amendments later, that surgery is complete.”[64]

Labor and Green Party Senators were less sanguine. As various representatives noted, the Democrats' centrist position on the GST legislation gave them a powerful negotiating position in Parliament. As a result, Labor and Green Party Senators argued that the Democrats could have extracted substantially more from the Coalition, especially on state-level bilateral agreements.[65] Accurate or not, these criticisms were short-lived; with Democratic support, the amended EPBC

61 *Ibid*, pp. 6056-6084, 6162-6189.
62 *Ibid*
63 *Ibid*.
64 *Ibid*, pp. 5945
65 See, e.g., Sen. Dee Margetts (WA Greens), *Ibid*, pp. 5903-5906; Sen. Christopher Schact (ALP), *Ibid*, pp. 5952-5955; Sen. Shayne Murphy (ALP), *Ibid*, pp. 5956-5959;

Act passed comfortably in both the Senate and the House, shortly before the end of the 1999 Senate term.

Conclusions

Based on the Canadian and Australian case studies, at least three basic conclusions seem apparent. First, even in parliamentary systems, legislators can and do experience substantial disagreements with executive leaders during the legislative drafting process, which encourage them to pass restrictions on agency discretion. Traditionally, scholars have argued that parliamentary backbenchers exert most of their policymaking influence ex ante, especially through the ministerial selection process (Strøm 2000). Compared with countries like the United States, these authors argue, legislation passed in parliamentary systems should be vague and highly discretionary. However, as the Australian and Canadian cases display, legislators can and do experience sharp conflicts with executive leaders, which can drive legislative leaders to enact more restrictive statutes.

To a certain extent, of course, this finding should not be surprising. As Huber and Shipan (2002) demonstrate, legislators operating under coalition and minority governments tend to pass more restrictive statutes than their counterparts in majority government, suggesting that legislators do respond to intense executive-legislative conflict by restricting executive authority. Interestingly, though, in the biodiversity protection cases both Canada and Australia were operating under majority governments as the primary statutes were being negotiated. In Australia, the primary source of executive-legislative conflict was the Australian Senate, which has usually operated under a minority government-like situation. In Canada, by contrast, a group of recalcitrant MPs within the majority party effectively staged a backbench revolt, and refused

to support the government's biodiversity legislation unless substantial restrictions on executive authority were inserted into the law. As both cases demonstrate, though, executive-legislative conflict can arise in a diverse array of institutional and political situations, which go beyond the basic characterizations suggested elsewhere in the literature.

Second, legislators do not seem to consider their own enforcement capacity when establishing discretionary restrictions. In both Australia and Canada, the discretionary restrictions contained in the main biodiversity statutes have been remarkably poorly enforced, with executive officials frequently ignoring deadlines, management requirements, and substantive restrictions. However, contrary to the existing literature, limitations on legislative capacity do not seem to have prevented legislators in Australia and Canada from inserting restrictive provisions into their statutes. Rather, the restrictions contained in these laws appear to result from *political* disagreements, rather than any concerns about downstream policy content or implementation.

Third, restrictive provisions are probably much more common in parliamentary systems than the existing literature would suggest. Based on the biodiversity cases, discretionary restrictions seem to form a prominent and important part of the drafting strategies in many parliamentary legislatures. Far from being reluctant to enact discretionary restrictions, legislators in both Australia and Canada seem to view discretionary restrictions as an appropriate and useful response to perceived executive malfeasance. Again, restrictions passed in these countries may not be at all well-implemented; however, that possibility does not seem to have dissuaded legislators from using discretionary restrictions as a legal tool.

Case studies, of course, can only provide us with limited information about broader social phenomena. As such, the evidence presented in this paper should be taken as suggestive rather than conclusive. At the very least, though, the Australian and Canadian biodiversity cases do

suggest that delegation dynamics under different systems of government may be more complicated than previously suggested. Simple institutional characterizations based on features like presidentialism and parliamentarism cannot fully explain variation in delegation of authority across different systems of government. As a result, scholars should make greater efforts to broaden the delegation literature into the comparative context. In particular, scholars should focus on lower-level institutional features like bicameralism and electoral systems, and the relationship between these features and short-term political conflicts By doing so, we may be able to gain a better understanding of delegation patterns under different systems of government, suggesting exciting new directions for the literature on comparative policy design.

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