

Protecting Endangered Species in the US and Canada: The Role of Negative Lesson Drawing

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Introduction

The loss of endangered species is a pressing environmental problem in both the United States and Canada, not least because there are 1310 endangered and threatened native species listed in the US and 389 listed species at risk in Canada.¹ Although the US and Canada have similar ecosystems and species, with many of the latter migrating across the US-Canada border, the two countries have taken very different legislative approaches to addressing this biodiversity problem. The US *Endangered Species Act* (ESA) was passed in 1973, while the Canadian *Species at Risk Act* (SARA) did not become law until 2002, almost three decades later. Besides this marked difference in timing, the two statutes differ in three other respects. First, in contrast to the US ESA's exclusive reliance on regulation, Canada's approach to protection of species at risk emphasizes voluntary, subsidized "stewardship" in the first instance, with a promise of compensation to private interests should regulation be needed. Rather than imposing costs of endangered species protection primarily on the private sector as in the US, there is a commitment that a substantial share of the costs will be borne by the state in Canada. Second,

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although both statutes grant their respective executive branches extensive authority to protect species at risk, the US ESA's reliance on non-discretionary language constrains the executive to a much greater degree than the permissive language of the Canadian statute. Finally, the ESA establishes a more activist role for the US federal government, in contrast to SARA, which defers in the first instance to the provinces.

We argue that political institutions can account for many, but not all, of these differences. In particular, the more decentralized approach of the Canadian statute is consistent with the greater authority with respect to natural resources enjoyed by provinces within the Canadian federation. Moreover, the more discretionary approach taken in SARA flows from the fusion of legislative and executive functions in Canada's parliamentary government, in contrast to the institutionalized distrust within the American separation of powers. In those respects, the differences between the ESA and SARA reflect a broader pattern of difference in policy style between US and Canadian environmental statutes (Harrison and Hoberg, 1994). However, institutional variation alone cannot explain why the Canadian government departed from its own past practice and embraced publicly funded, voluntary stewardship as an alternative to regulation.

That difference can be explained by the relative influence of the two main interest groups in the US and Canada. Not surprisingly, environmentalists and their allies in the scientific community advocated for strong legislation in both countries. The key difference lay in the strength of business opposition. While the business and agricultural communities paid remarkably little attention to the passage of the US ESA in 1973, Canadian business and agricultural interests actively opposed any legislative proposals that threatened to impose significant costs on them. Although the outcome—fewer costs imposed on the private sector in Canada than the US—is thus consistent with a pluralist analysis, a focus only on the relative influence of various interests in the two countries raises the question of *why* business opposition was so much stronger in Canada than in the US.

We argue that attention to cross-national lesson drawing is needed to fill that gap. In particular, negative lessons from the US experience led both Canadian business and policy makers to shun the adversarial, regulatory approach of the US ESA in favour of co-operative stewardship. After documenting the influence of negative lesson drawing in the case of SARA, we theorize in the conclusion about the conditions under which negative lesson drawing is likely to occur.

This article focuses on the language and approach of the two statutes. A comparison of the implementation of endangered species policy in the two countries would be premature, given the relatively recent adoption of the Canadian act. There are, however, indications in the US case

Abstract. Although the US and Canada share ecosystems, with many species ranging freely across the border, the two countries have taken very different approaches to protecting endangered species. The US *Endangered Species Act*, adopted in 1973, relies primarily on regulation, thus imposing the costs of protecting biodiversity on the private sector. In contrast, Canada's *Species at Risk Act*, adopted in 2002, relies primarily on public expenditures to support stewardship programs. We argue that this difference is best explained by negative lesson drawing from the US experience. In particular, awareness of the costs of species protection in the US led Canadian business to present stronger opposition to regulation than had their American counterparts decades earlier. We use the case of the Canadian *Species at Risk Act* to theorize about conditions under which negative lesson drawing is likely to be most influential.

Résumé. Bien que les États-Unis et le Canada partagent les mêmes écosystèmes, les deux pays ont adopté des approches très différentes en matière de protection des espèces en péril. La Loi américaine sur les espèces en péril (*US Endangered Species Act*), adoptée en 1973, porte essentiellement sur la régulation, et de ce fait impose les coûts de la protection de la biodiversité au secteur privé. En revanche, la Loi canadienne sur les espèces en péril, adoptée en 2002, fait principalement retomber les coûts des programmes de gestion au secteur public. Nous démontrons que cette différence s'explique principalement par le rôle des leçons négatives apprises de l'expérience des États-Unis. La prise de conscience des coûts liés à la protection des espèces en péril aux États-Unis a notamment amené les milieux d'affaires canadiens à présenter une plus forte opposition à la régulation que leurs homologues américains l'avaient fait des années plus tôt. En s'appuyant sur le cas de la Loi canadienne sur les espèces en péril, nous visons à théoriser les conditions selon lesquelles l'acquisition de connaissance par leçons négatives (« negative lesson drawing ») est susceptible d'être le plus concluant.

study that the differences are likely to be less dramatic in practice than one might expect from the text of the statutes, not least because US officials over the years have sought to take full advantage of any opportunities for discretion, however limited, in the ESA.

Theory

Institutions

Neo-institutionalism suggests that the institutional differences between the US and Canada would lead to policy divergence between the two countries. We focus in particular on two institutional differences: Canada's parliamentary government versus the US presidential system, and the different division of powers within the two federal systems.

As Moe and Caldwell have noted, "pressures for formalization are intensified by the independent roles of president and Congress" within the US separation of powers (1994: 177). Distrustful of the executive branch, Congress tends to write very detailed statutes in order to ensure faithful execution of its will. Since the *Clean Air Act* amendments of 1970, US environmental statutes have invariably employed nondiscretionary language and firm deadlines to control administrative agencies' actions, backed for good measure by "citizen suit" provisions that invite any individual to sue the executive should it fail to fulfill Congressional

mandates. The result has been a highly adversarial process, in which virtually every major action or inaction by the executive is contested in court (Kagan, 2001).

In contrast, Canada's Westminster-style government fuses the legislative and executive functions. Cabinet drafts the vast majority of bills passed by Parliament and is also responsible for their execution. Since Cabinet has no incentive to limit its own discretion, parliamentary government typically yields highly discretionary statutes. Canadian environmental statutes typically authorize, but do not compel, a broad range of actions by the executive. As a result, litigation has been the exception to the rule in Canadian environmental policy. However aggrieved interests may be due to a policy decision, they simply have no basis to sue when the decision is left entirely to Cabinet's discretion.

While both the US and Canada are federal countries, the expansive interpretation of the interstate commerce clause by the US Supreme Court has facilitated a greater degree of centralization in the US federation. Since the 1970s, "the prevailing national pattern for environmental policy was to write strong statutory language that relied on ... an initial pre-emption of State laws, then permit devolution of responsibility back to State and local governments" (Scheberle, 2004: 8). In comparison, the Canadian federation is a model of decentralization. Most important from the perspective of endangered species policy, the constitution grants provincial governments ownership of very extensive Crown resources, with which comes authority to manage species resident on those Crown lands. (In the US, unalienated public lands belong to the federal government.) While the provinces have uncontested authority to conserve their own resources as they see fit, provincial governments' defensiveness concerning their natural resource jurisdiction arguably owes more to their desire to exploit those resources as a source of economic development. In contrast, while the federal government's propriety powers are limited south of the territories, it has clear authority with respect to aquatic species by virtue of its jurisdiction over fisheries, and with respect to migratory birds, which are covered by the *Migratory Birds Convention Act* and thus falls within the federal government's "Empire treaty" power. Broader federal environmental authority may also be found under heads of power such as trade and commerce, criminal law, and the residual power to make laws for the "peace, order, and good government" of Canada (National Environmental Law Section (NELS), 2002). However, in the absence of public demand for federal involvement and in the face of sustained provincial opposition to federal intervention, the federal government historically has not tested the limits of its environmental authority, instead deferring to provincial leadership (Harrison, 1996).

The foregoing discussion of institutions suggests that the Canadian *Species at Risk Act* should be both more discretionary in tone and more

deferential to subnational governments than the US *Endangered Species Act*. As discussed below, institutional theory is borne out on both counts. These two differences are evident in comparing virtually all Canadian and US environmental statutes passed since 1970. Differing institutions have thus directed Canada and the US onto different policy trajectories. However, institutions and path dependence alone cannot explain SARA's emphasis on subsidized, voluntary stewardship as an alternative to regulation. Institutions did not change, yet the policy design did, for reasons to which we now turn.

Interests

Elected politicians would be expected to be responsive to their electoral incentives in both countries. However, while popular opinion is invariably supportive of environmental protection and resource conservation, environmental issues are seldom "top of mind." The exception has been during two "green waves" when environmental issues reached the top of the polls in both countries, in 1969–1970 and again in 1989 (Dunlap, 1989; Harrison, 1996). As one might expect, governments in both Canada and the US passed new environmental laws during these periods of heightened salience. However, environmental issues were not particularly salient either when the United States adopted the ESA in 1973 or when Canada passed SARA in 2002. Therefore, no strong hypothesis flows from public opinion, though one might argue that the surge in public opinion was fresher in US legislators' minds when the ESA was enacted than when SARA was adopted in Canada.

The electorate's inattention to the environment creates greater potential for influence by organized interest groups that *are* paying attention. Pluralist theory suggests that when there is greater mobilization of business opposition relative to the environmental movement a weaker endangered species bill should ensue. As discussed below, that is consistent with the differences between SARA and the ESA. Strong lobbying by the business and agricultural communities in Canada, in comparison to the virtual absence of opposition in the US, helps to explain the Canadian statute's emphasis on voluntary stewardship and financial compensation for business.

Yet *a priori* it is not clear why the Canadian business community would have been more actively engaged than their US counterparts, given their similar interests in the issue. The theory of collective action would suggest that business should be dominant in *both* countries given the concentrated costs to business and the diffuse benefits delivered to the public at large (Olson, 1965). If anything, one might expect stronger influence of environmental groups relative to business *in Canada* since they had almost thirty years to consolidate since the ESA, which passed shortly

after the birth of the modern environmental movement. Therefore, although the relative influence of interest groups clearly provides an important piece of the puzzle, interest group *theory* fails to explain why business more actively opposed endangered species legislation in Canada than the US.

Cross-national lesson drawing

While the foregoing discussion presumes that differences or similarities between jurisdictions' policies reflect the influence of conditions within each jurisdiction, another body of literature considers the possibility that jurisdictions are not in fact independent. Governments seeking better ways to respond to their constituents' preferences may look to the experience of other jurisdictions. Similarly, voters at large or interest groups may look to the example, whether positive or negative, of other jurisdictions when lobbying their own governments. A number of terms have been used to describe this phenomenon, among them emulation, lesson drawing, benchmarking and policy transfer. Much has been written, some of it conflicting, to distinguish among these terms.² We use the relatively broad term "lesson drawing" in this paper simply because it comes closest to what we mean in everyday language: governments and non-governmental actors learning lessons, whether positive or negative, from their own policy history or that of other jurisdictions.³

Many who have written on lesson drawing have allowed for the possibility of negative lessons (Rose, 1991: 4, 14, 19; Hoberg, 1991: 109; Bennett and Howlett, 1992: 291; Dolowitz and Marsh, 1996: 350). However, there has been limited empirical or theoretical attention to this phenomenon. Rose (1993: 88) and Stone (2004: 551–52) offer examples of countries learning negative lessons from their own past mistakes. With respect to cross-national lesson drawing, Bennett (1991b) documents the negative lessons drawn by Britain from the US *Freedom of Information Act*, while Robertson (1991) documents negative lessons from European labour policy drawn by key actors in US policy debates. Robertson argues that positive lesson drawing will tend to dominate as an issue reaches the political agenda, but that activists will compete by employing negative and positive lessons at the policy adoption stage. Our focus in this article is exclusively on the latter, and we confirm that both positive and negative lessons from the US experience in protecting endangered species were offered. In the conclusion we build on this to theorize about conditions under which negative lessons are most likely to prevail.

One would expect the 29 year period between the passage of ESA and SARA to be a source of lessons for Canadian actors. As we argue below, it was in fact an important source of *negative* lessons for Canadian business and, in turn, Canadian legislators, who consciously sought

to avoid the economic consequences and litigiousness that flowed from the nondiscretionary approach of the US ESA. Lesson drawing thus helps to explain what institutions and interests could not. We are not suggesting, however, that all differences between the ESA and SARA are explained by lesson drawing. Indeed, as noted above, the more discretionary nature of SARA can be accounted for by institutions. Moreover, SARA's departure from previous Canadian statutes in embracing public spending as an alternative to regulation is quite consistent with interest group pressures. However, it was lessons drawn from the US experience that alerted Canadian business and agricultural interests to their economic stakes in endangered species policy, prompting stronger opposition in the Canadian case. Such opposition then yielded proposals for voluntary stewardship and regulatory compensation, both of which were embraced by Canadian legislators.

The next two sections present a comparison between the US and Canadian cases. In addition to documentary evidence and secondary literature, we rely on 42 unstructured interviews with 37 individuals (32 in Canada, five in the US), including federal public servants, environmentalists, scientists, and representatives of business and agricultural associations.

History of the US *Endangered Species Act*

The US Congress passed two initial endangered species laws in the late 1960s: the 1966 *Endangered Species Preservation Act* and the 1969 *Endangered Species Conservation Act*. However, the scope of both acts was quite limited. Thereafter, media and public attention to the environment soared, culminating in Earth Day in April 1970. Congress responded with a flurry of environmental statutes, including the *National Environmental Policy Act*, the *Clean Air Act*, and the *Clean Water Act*. The *Endangered Species Act* passed in 1973 toward the end of this period of legislative activity. Although by that time the prominence of the environment in public opinion polls had subsided, endangered species legislation was still popular with the public and thus with legislators as well, not least because, as discussed below, no downside to protection of endangered species was evident at the time.

Proposals to expand the scope of the 1969 *Endangered Species Conservation Act* emerged as early as 1970, but the process did not pick up momentum until 1972, when President Nixon called for a legislative overhaul to pre-empt state authority with respect to species conservation, as the federal government had recently done with respect to air and water pollution. The White House worked with the Department of the Interior's Bureau of Sport Fisheries and Wildlife (BSFW) and the House Subcom-

mittee on Fisheries and Wildlife Conservation to draft the bill that became the basis for the 1973 ESA (Yaffee, 1982: 49–50). Scientists in the BSWF were particularly influential in crafting the bill. Within the BSWF, the nine biologists that comprised the Committee on Rare and Endangered Wildlife Species had drafted the first official federal list of endangered species in advance of federal legislation. The committee members made a decision to base their list exclusively on the science concerning endangered species, without regard to socio-economic considerations, a decision that was relatively easy at the time since the committee's list did not trigger any federal mandates. The committee's purely technical criteria for species listing were then incorporated in the 1966, 1969 and 1973 endangered species statutes, and the decision to list species based only on scientific considerations thus assumed legal force (Yaffee, 1982: 34–36).

The BSWF scientists' influence was reinforced by that of the environmental community, which lobbied for stringent measures to be included in the ESA, including a broad definition of species and a citizen suit provision. Moreover, joined by BSWF experts and House Committee staff, environmentalists stressed that federal agencies should be mandated to comply with the act. Consequently, the words "where practicable" were deleted from the bill, thus compelling all federal agencies to use their authority in furthering the purpose of the ESA regardless of whether it was "practicable" (Yaffee, 1982: 54).

Perhaps the most striking aspect of the ESA's history is the absence of opposition from the private sector. No agricultural or industry groups testified at the House hearings and only "a couple of groups representing the fur industry and state fish and game agencies" appeared before the Senate hearings (Petersen, 2002: 30; see also Yaffee, 1982: 51). Consistent with this, the Department of Agriculture wrote of their strong support for the proposed legislation (Campbell, 1973: 194).

In hindsight many of the act's provisions should have been red flags for the business and agricultural communities, including mandatory prohibitions on harm to listed species. However, at the time it was not obvious that the ESA would be costly for the private sector since, unlike water and air pollution control statutes, it "did not threaten any readily identifiable interests" (Yaffee, 1982: 51). According to Kohm (1991: 15), protection of endangered species "was viewed largely as a symbolic issue with few obvious costs." In the absence of arguments to the contrary, legislators from both parties embraced the *Endangered Species Act*, which passed by voice vote in the Senate and a 355 to 4 vote in the House. President Nixon signed the bill into law on December 28, 1973.

It was not long, however, before tensions between economic development and protection of species habitat became evident, leading to infamous stories of the ESA's negative impacts on the business community and landowners (NESARC, ND). Critics have argued that these "draco-

nian” implications of the ESA create perverse incentives for landowners to silently destroy endangered species or their habitat in order to avoid restrictions on land use, a strategy referred to as “shoot, shovel, and shut up” (see Pombo, ND).

Two of the most prominent controversies serve to illustrate the conflicts that emerged between environmentalists and business, conflicts largely fought in the courts. The first concerned a proposal by the Tennessee Valley Authority (TVA) to build the Tellico Dam. A Tennessee student sued the TVA for violating the *Endangered Species Act* because the dam would have a negative impact on a three-inch fish, the Snail Darter, which had been listed as endangered. The Supreme Court eventually affirmed that the TVA was in violation of the ESA (TVA v. HILL, 1978), prompting Congress to intervene to authorize completion of the dam.

In the early 1990s, in what became known as the “war in the woods,” environmentalists were successful in obtaining an injunction against logging in public old growth forests throughout the Pacific Northwest. The basis for the injunction was the presence of the endangered Northern Spotted Owl, which relies primarily on old growth forests for its habitat. A compromise was eventually reached by way of the Clinton administration’s Northwest Forest Plan, but in the intervening years there were significant job losses in communities dependent on the forest industry. Although the statutes through which environmentalists secured injunctions in that case were *the National Environmental Policy Act* and *the National Forest Management Act*, not the ESA, for many the spotted owl came to symbolize what was wrong with endangered species policy in the United States, including excessive reliance on adversarial litigation and a disregard for socio-economic costs.

Although various incentive programs have been established in an effort to mitigate the impacts of the act (Burgess, 2001: 14–15, 121–127), neither the federal executive nor the private sector is satisfied with the current state of affairs. In May 2003, the Department of the Interior complained that it was spending two-thirds of its budget on court orders and settlement agreements, and that the Fish and Wildlife Service (FWS) had been forced to divert funds from other endangered species programs to cover the costs of litigation (US Department of Interior, 2003). Private landowners argue that, in the absence of compensation, restrictions posed by the ESA on their land use constitute an infringement on their constitutionally guaranteed property rights. The construction of ESA regulatory takings as a property rights issue has been central to the emergence of the wise-use movement (Burgess, 2001: 63–67).

Environmentalists’ assessments of the act are more mixed, however. Environmentalists of all stripes criticize the fact that in practice the ESA is not implemented as stringently as it is written on paper (see Yaffee, 1982: 87). Beyond that, however, Burgess notes a division between pur-

ists, who seek amendments to move from merely guaranteeing species' survival to pursuing recovery of species without regard for impacts on private property, and pragmatists, who also support creation of more incentives for landowners (59).

Congressional efforts to reform the ESA began soon after costs to the private sector became evident. Some amendments adopted over the years have relaxed the original ESA's absolute prohibitions concerning takings. For instance, the 1978 reauthorization of the ESA authorized the Endangered Species Committee, dubbed the "God squad," to exempt federal projects from these restrictions under certain circumstances. However, at the same time the act was amended to make it mandatory to designate critical habitat for all listed species on all lands, albeit allowing for economic factors to be considered. A 1982 amendment to the ESA authorized the Fish and Wildlife Service and National Marine Fisheries Service to grant private landowners permission to incidentally take endangered species under certain circumstances. While these amendments changed administration of the ESA at the margins, efforts to achieve more fundamental reform of the bill's regulatory approach have yet to garner sufficient support. Most notable to date was the September 2005 passage of a House bill that would have required the federal government to compensate property owners for costs incurred in protecting endangered species. However, despite Republican control of both chambers, no comparable bill advanced in the Senate. That seems even less likely since the 2006 midterm elections, which saw the Republicans lose their majorities in both houses, as well as the defeat of Representative Richard Pombo, the leading Congressional champion of ESA reform.

History of the Canadian *Species at Risk Act*

Although several Canadian statutes provided varying degrees of federal authority to protect endangered species before the passage of SARA, this legislative patchwork did not provide a coherent federal approach to protection of species at risk. The federal government thus committed to adopting stand-alone endangered species legislation soon after Canada became the first industrialized country to sign the international Convention on Biological Diversity in 1992. In 1994 the government set up the Task Force on Endangered Species Conservation, which brought together stakeholders to advise the government on new legislation. The government also held public meetings in various cities and consulted separately with the provinces. In October 1996 the federal government and all provinces but Quebec signed the National Accord for the Protection of Species at Risk, in which they committed to protecting species at risk via a seamless web of federal and provincial programs.

That same month the federal government introduced its first attempt at endangered species legislation, the *Canada Endangered Species Protection Act*. Bill C-65 “was attacked by virtually every stakeholder group—industry, landowners, environmentalists, First Nations, and provincial governments” (Amos et al., 2001: 144). The environmental movement was represented by the Canadian Endangered Species Coalition (CESC), which represented over 100 national and regional groups (CESC, nd). Environmentalists were critical that the bill rested on an overly timid interpretation of federal constitutional authority, thus resulting in a commitment to protect all species only on federal lands. They argued that unless “a listed species moves to a post office, airport, military base, coast guard station or national park, neither the species nor its residence will be protected” (Venton and Smallwood, 2002: 24). Although this is something of an overstatement, only aquatic species and migratory birds would have been protected by C-65 on non-federal lands within provincial boundaries. Environmentalists were also critical that the bill’s proposed ban on destruction of a species’ “residence,” defined by the bill as its nest or den, would do little to address loss of habitat, which is viewed by the scientific community as the primary threat to biodiversity.

For its part, the business community was critical that the regulatory approach to protection of endangered species proposed in Bill C-65 would impose excessive costs on the private sector. Business argued for an alternative “shared cost” approach, in which the federal government would compensate private interests for the costs of protecting endangered species. Business and agricultural interests were also concerned about the potential scope of the bill, particularly after the House Standing Committee on Environment and Sustainable Development amended it to *require* protection of species that cross international borders, which by some estimates could account for 90 percent of all listed species in Canada (Amos et al., 2001: 151). Finally, keenly aware of the impact of US environmentalists’ lawsuits concerning the spotted owl, the private sector argued that a proposed citizen suit provision would engender unnecessary conflict by authorizing private citizens to sue the federal government should it fail to perform any nondiscretionary duties in the act.

Although as signatories to the National Accord for the Protection of Species provincial governments had implicitly accepted the need for federal legislation, they were unanimous in their opposition to Bill C-65 (Amos et al., 2001: 155). The provinces echoed the business community’s concerns that the sleeper provision concerning transboundary species would grant the federal government too much authority. Moreover, the provinces were also wary of the proposed civil suit provision since they were still smarting from a series of private lawsuits that had forced the federal government to undertake environmental assessments of provincial government projects. Amid criticism from all quarters, Bill C-65

was allowed to die on the order paper when an election was called in June 1997.

In the wake of Bill C-65's failure, the Canadian Endangered Species Coalition made a checklist of features they wanted in the next bill: 1) application "to the full extent of federal jurisdiction"; 2) the listing of species at risk and their critical habitat based solely on scientific criteria; 3) nondiscretionary critical habitat protection, recovery plans, and prohibitions on takings of listed species; and 4) review of all projects that may adversely affect listed species and their habitats (CESC, 1997). Within the coalition, however, some environmental groups were more open to compromise than others. Consequently, in April 1998 a remarkable alliance of environmental and industry organizations came together to form the Species at Risk Working Group (SARWG). SARWG was the brainchild of Elizabeth May, then executive director of the Sierra Club of Canada, which had been expelled from the Canadian Endangered Species Coalition for publishing an ad during the 1997 election campaign that sought to make endangered species an election issue (Other members of the coalition were concerned that they would risk their charitable tax status if they engaged in partisan politics.) (May, 2005). May approached individuals she felt could work together, and the group that formed included representatives from the Mining Association of Canada, the Canadian Pulp and Paper Association, the Canadian Nature Federation, the Canadian Wildlife Federation and of course the Sierra Club of Canada. SARWG aimed "to develop creative solutions for the protection and recovery of species at risk that would reconcile the need for wildlife conservation and the needs of those whose livelihoods are dependent on natural resources" (SARWG, 2000: ii).

SARWG's success reflected "that the interests of key non-governmental actors were not entirely incompatible ... The bottom line [was] that environmentalists want[ed] a high level of habitat protection for species at risk throughout Canada, and industry and agricultural interests [didn't] want to pay for that. However, if *someone else* was going to pay, the business community could conceivably be willing to concede to at least some of environmentalists' demands" (Amos et al., 2001: 152). That logic was evident in the recommendations SARWG issued in 1998. In keeping with environmentalists' objectives, SARWG recommended that the decision to list species at risk should be based only on scientific advice from the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), that habitat protection should be incorporated into recovery plans, and that interim buffer zones around residences should be established pending approval of a recovery plan. However, in keeping with the interests of its private sector members, SARWG opposed inclusion of a citizen suit provision, and recommended that the federal government provide financial support for voluntary stewardship programs as an

alternative to regulation in the first instance, and commit to compensation of the private sector should regulation eventually be deemed necessary (SARWG, 1998).

In 2000 the government introduced Bill C-33, the *Species at Risk Act*. Like its predecessor, Bill C-33 died on the order paper when the next federal election was called in November 2000. However, virtually the same bill was introduced in the new parliament in 2001 as Bill C-5. The government's approach in these two bills clearly sought middle ground among the various interests aggrieved by C-65. Consistent with the compromise between environmental and business interests recommended by SARWG, the federal government proposed to rely first and foremost on voluntary stewardship, with regulation only as a last resort. In keeping with this, and facilitated by a loosening of purse strings that fortuitously occurred when the federal deficit was eliminated, the federal government's 2000 budget committed \$90 million over three years and \$45 million per year thereafter to programs to protect species at risk. The new approach also allowed for compensation of private interests should regulation to protect habitat be undertaken, though the terms for compensation were yet to be determined. Amos et al. conclude that the federal government in effect "sought to buy off stakeholder opposition with the dollars of inattentive taxpayers" (2001: 160).

The federal government also sought compromise between environmentalists and scientists, on one hand, and the provinces and business, on the other, concerning the breadth of the federal regulatory backstop. Emboldened by a 1997 Supreme Court decision (*R. v. Hydro Quebec*, 1997) that authorized federal reliance on the criminal law power to prevent environmental harm, the federal government asserted authority to protect all species at risk, as well as their residences and "critical habitat," anywhere in Canada. This was a bolder reading of federal jurisdiction than was the case in Bill C-65, which had focused on federal lands and uncontested "federal species." However, in turn, the federal government proposed to invoke that national safety only if it determined that provincial governments were not doing an adequate job.

Not surprisingly, the proposed compromises did not preclude criticism from stakeholders. Industry and agricultural landowners were not sufficiently reassured by the promise of carrots in the form of stewardship funding given the number of regulatory sticks still in the bill. The private sector focused heavily on the issue of regulatory compensation, offering the principled arguments that private interests should not have to bear the costs to achieve societal goals; and that respect for property rights demanded compensation, as well as the pragmatic argument that, in the absence of compensation, landowners would simply "shoot, shovel, and shut up" (Ward, 2001). Some industry and landowners also argued that the bill was "an extreme intrusion into provincial jurisdiction"

(Pope, 2001), and recommended that the federal safety net be removed (Mauch, 2001).

Given the marked similarities between SARWG's recommendations and the new approach, it is not surprising that SARWG applauded SARA's emphasis on voluntary stewardship, its provisions concerning compensation, and the omission of a citizen suit provision. SARWG's reactions to SARA in other respects are again suggestive of compromise between its environmental and business members. On one hand, consistent with environmentalists' position, SARWG was critical that listing was still left to politicians. SARWG proposed a creative alternative, "science-based listing," through which the COSEWIC list would assume the force of law unless vetoed by the minister within 30 days. SARWG also called on the government to make prohibitions on killing listed species or destroying their residences *mandatory* even on provincial lands, and for critical habitat protection to be mandatory for all species on federal lands. On the other hand, consistent with longstanding business positions, the coalition sought stronger guarantees concerning compensation and a greater financial commitment to stewardship. SARWG also asserted that the proposed federal "safety net" rested on "shaky constitutional grounds" and argued that it would detract from the spirit of federal-provincial cooperation (SARWG, 2000).

For their part, other members of the environmental community were critical of the discretionary nature of the proposed statute, particularly on provincial lands, and that the decision to list species would still rest with Cabinet. Some environmental groups were openly critical of positions their environmental colleagues in SARWG had accepted. For instance, a representative of one environmental group felt that SARWG represented "co-option of the environmental movement" by "very well funded industry efforts" (Anon. [environmentalist], 2005).

The Sierra Legal Defence Fund had reservations about SARWG's stance on the federal safety net (Elgie, 2005a; Elgie, 2005b), and criticized the fact that under SARA critical habitat protection is "left unresolved for at least two to three years after listing," a provision that had been recommended by SARWG (Smallwood, 2003).

Also active in the debate over SARA was the Canadian scientific community. With assistance from the Sierra Legal Defence Fund, a new organization called "Scientists for Species" emerged to lobby for strong endangered species legislation. Scientists for Species collected signatures for three letters sent to the prime minister in 1997, 1999 and 2001, with the first letter collecting 300 signatures, the second 642, and the last 1,331. The 1997 letter emphasized the importance of mandatory habitat protection for all species anywhere in Canada (Scientists for Species, 1997). The scientific community also initially recommended that the decision to list species be left to scientists (Scientists for Species,

1999). However, by 2001 the signatories recommended only “science-based” listing (Scientists for Species, 2001), reflecting concerns by some COSEWIC members that scientists would be open to political lobbying if their decisions had legal force.

Provincial governments were less vocal with respect to SARA than they had been with respect to C-65. Some of their concerns were addressed as the equivalency and citizen suit provisions of Bill C-65 had been eliminated and the federal government proposed to defer to provincial efforts to protect endangered species in the first instance. Nevertheless, Alberta and Quebec openly questioned the constitutionality of the broad federal safety net (Amos et al., 2001: 161), while other provinces expressed concerns within the privacy of executive federalism (Anon. [Ontario wildlife official], 2005).

After Bill C-33 died on the order paper, its successor, Bill C-5, was referred to the House Standing Committee on Environment and Sustainable Development. Under the leadership of the notoriously independent Chair, Charles Caccia, the committee reported back over 100 amendments; however, most of the committee’s amendments were subsequently clawed back by government motions (Jaimet, 2002). The government’s high-handedness came at an inopportune moment. At the time, the Liberal party was anxiously awaiting Prime Minister Jean Chretien’s announcement of his retirement. Tensions between the prime minister and his apparent heir, finance minister Paul Martin, had escalated, culminating in Martin’s departure from Cabinet just days before the scheduled final vote on SARA. Sensing a window of opportunity to mobilize disgruntled caucus members, Liberal environmental stalwarts Karen Kraft Sloan and Charles Caccia publicly stated their intention to vote against the government’s bill (Jaimet, 2002). In response, the government made two significant concessions. The bill was amended to give COSEWIC’s listing the force of law unless vetoed within nine months by Cabinet,⁴ and to make critical habitat protection mandatory for all species on federal lands and for federal species elsewhere. SARA passed in the House on June 11, 2002, but died on the order paper yet again when Parliament was prorogued in September 2002. However, under a special parliamentary procedure the bill was reinstated in the Senate, again as Bill C-5, without having to go through the three readings in the House of Commons (Smallwood, 2003: 4–5). SARA received Senate approval on October 9, 2002, and Royal Assent on December 12, 2002.

Policy Comparison

On paper, SARA and the ESA differ in three important respects. First, the costs of species protection under SARA are largely borne by the state

via spending, rather than by the private sector via regulation as under the ESA. This difference in the choice of policy instrument reflects a fundamental difference of philosophy. SARA proposes a co-operative, rather than adversarial, approach to protection of biodiversity. The Canadian federal government explicitly stated that stewardship was to be “the first line of defence to protect critical habitat on private land” based on the belief that “the best way to protect species habitat is through voluntary preventive measures, rather than having to resort to legal restrictions on land use” (Environment Canada, 1999: 8). Concurrent federal budgetary announcements clarified that co-operation is to be achieved largely through reliance on public expenditures. Similarly, should voluntary stewardship efforts fail and regulation to protect habitat be deemed necessary, SARA allows that persons suffering “any extraordinary impact” may be compensated for their losses. In contrast, the ESA is fundamentally a regulatory statute that seeks to achieve its goals through coercion. The costs of protection of endangered species on private land in the US are borne by private firms or individuals, not the state.

The second difference concerns executive discretion. SARA and the ESA both establish that federal authority can go to considerable lengths to protect any species at risk anywhere in their respective territories. However, while the ESA’s reliance on nondiscretionary language offers US agencies relatively little choice but to do that, the discretionary language of SARA gives the Canadian executive significant flexibility to determine which actions to take and where. For instance, with respect to listing, section 4(b) of the ESA states that the Secretary of the Department of the Interior “shall” determine which species should be listed “solely on the basis of the best scientific and commercial data.” SARA, in contrast, allows Cabinet to veto its scientific advisors’ recommendations on socio-economic grounds (Government of Canada, 2006: 1128–1130). Similarly, section 9 of the ESA states that it is unlawful for any person to “take” any listed species within the US. The FWS has in the past interpreted this provision as prohibiting substantial modification of an endangered species’ habitat, an interpretation upheld in *Babbitt v. Sweet Home*, 1995. In the case of SARA, mandatory prohibitions have more limited application. Killing of listed species or destruction of their “residences” is prohibited on federal lands and in federal waters for all listed species, but throughout Canada only in the case of uncontested federal species. Protection of critical habitat is also mandatory on federal lands and for federal species. However, it is left to the discretion of Cabinet whether to invoke comparable habitat protection for other species on provincial and private lands.

This difference in executive discretion has important implications for the court’s role in the ESA and SARA. Nondiscretionary duties for the executive, as found in the ESA, are a necessary precondition for cit-

izens or firms to sue the government. To the extent that the federal cabinet is merely authorized, but not required, to take particular actions, there is no basis for a legal claim that they have not done their job, though litigation can still occur with respect to the limited nondiscretionary duties in SARA (for example, Page, 2005).

A final critical difference between the two acts lies in the degree to which the federal government defers to state or provincial governments. Under the ESA, the primary responsibility for species protection has been claimed by the federal government. The Interior secretary is authorized to enter into agreements with states to allow them to take responsibility for management of resident species within their borders, but only if states first demonstrate that their programs meet federal standards. Thus, while there is an opportunity for state governments to play a central role in endangered species conservation in the US, they must do so on the federal government's terms. In contrast, under SARA the federal government defers to the provinces and territories in the first instance with respect to species other than aquatic species and migratory birds. The onus is therefore placed on the federal government to justify its involvement, rather than on the provinces to justify their adherence to federal standards.

Analysis

Institutions

Two of the three differences in outcomes noted above are consistent with predictions from institutionalist theory. First, the greater degree of federal deference to the provinces in Canada than to the states in the US is consistent with the stronger constitutional position of the provinces with respect to natural resources and the more decentralized nature of Canadian federalism. That said, it is nonetheless noteworthy that SARA represents a new assertion of federal jurisdiction to protect endangered species across Canada, albeit one couched in promises that are unlikely ever to be invoked. Given that the original bill, C-65, represented a weaker assertion of federal jurisdiction, and that the provinces unanimously opposed even that, the broader scope of the federal safety net in SARA raises two questions: why did the federal government assert broader authority in the second bill, and why were provincial reactions relatively subdued? The federal government's assertiveness can be viewed as one part of an effort to strike a delicate balance among the various groups that had objected to Bill C-65. For the business community, there was the promise of stewardship and compensation. For the environmental community, there was the promise of a broader safety net and nondiscretionary language in areas of uncontested federal authority. For pro-

vincial governments, there was a promise of federal deference to the provinces in practice. Critical to the federal government's new assertion of constitutional authority was the Supreme Court's 1997 Hydro Quebec decision—issued after the demise of C-65 but prior to the introduction of C-33—which upheld the Canadian *Environmental Protection Act* as a legitimate exercise of the federal criminal law power. In response, the Department of Justice relied heavily on the criminal law power in drafting SARA (Anon. [lawyer], 2005).

That the federal government was simply in a stronger constitutional position also helps to explain the provinces' relatively muted opposition to SARA. Even Alberta retreated from initial threats of a constitutional challenge because, in the words of an Alberta official, "the potential of winning a constitutional challenge [was] thought to be, after looking more carefully, very low" (Anon. [Alberta wildlife official], 2005). Further, many provinces were persuaded by the federal minister's private reassurances that the federal intent was not to invoke the safety net unless absolutely necessary and if the provinces agreed that it was the best thing to do (Anon. [Ontario wildlife official], 2005). The complexity of the process required to actually invoke the federal safety net also appeased the provinces (Anon. [Alberta wildlife official], 2005; Anon. [Quebec wildlife official], 2004.). SARA's departure from prior statutes in asserting broader federal authority thus reflected both a balancing of institutional and electoral considerations, as well as a small but significant change in the institutional context that occurred over the course of endangered species policymaking in Canada.

The greater degree of discretion afforded the Canadian executive by SARA, in contrast to the nondiscretionary language of the US ESA, is also consistent with the institutional implications of parliamentary government in Canada versus the US separation of powers. However, SARA nonetheless contains nondiscretionary language with respect to federal lands and federal species. The inclusion of nondiscretionary language to prohibit killing of endangered species or destruction of their residences on federal lands arguably reflects the political influence of the environmental community, which sought mandatory provisions throughout the legislative saga. However, since most federal lands within provincial borders consist of national parks, where there is already a high degree of protection for species, this was not a particularly costly compromise. More significant was the last-minute concession to make protection of critical habitat mandatory for all species on federal lands and for federal species on provincial lands. The degree of backbench influence that forced that amendment is in a sense the exception that proves the rule, since it turned on a highly unusual confluence of circumstances: a prime minister at the end of his political career, departure of a popular heir apparent from Cabinet at a key moment in the legislative process, and an unusually inde-

pendent committee chair also approaching the end of his political career with nothing to lose.

While institutions thus go a long way in explaining the patterns of difference between SARA and the ESA, they cannot account for these two statutes' fundamentally different approaches, that is, the former's reliance primarily on voluntary stewardship and inclusion of an unusual compensation provision, in contrast to the latter's coercive regulatory approach. To explain this difference, we turn to the relative influence of organized interests in the two cases.

Interests

As discussed above, one might have expected the environmental movement to be stronger in the Canadian case, both because environmental groups had become institutionalized since the early 1970s and because scientific understanding of the role of habitat loss in species endangerment had greatly expanded since the ESA was passed. The Canadian environmental movement was in fact well organized and effective throughout the policy process. Moreover, the evolution of conservation science was reflected in the unprecedented political mobilization of scientists who worked closely with environmentalists. However, the influence of the environmental lobby was tempered by the countervailing position of the Canadian business community. While policy makers drafting the US ESA in 1973 catered exclusively to environmentalists' and government scientists' demands in the absence of any opposition from industry and landowners, the emergence of such opposition in Canada necessitated a delicate balance between the positions of environmentalists and business.

Interestingly, the Canadian federal government appears not to have anticipated the strength of business opposition. Cabinet's first attempt at endangered species legislation, Bill C-65, followed in the tradition of previous Canadian environmental statutes by offering both deference to the provinces and discretionary mandates. However, in light of the US experience under the ESA, particularly the costs borne by the private sector and restrictions on development, the prospect of discretionary exercise of regulatory mandates did not provide sufficient reassurance to the business community.

The strength of opposition to Bill C-65 from both business and environmentalists prompted two developments. First, key actors within both communities accepted a need to compromise. It is indicative of how balanced environmental and business interests were that the groups that formed SARWG were motivated to come together on their own to seek consensus. Had either side been confident that they could have achieved their objectives directly, it is unlikely they would have been so willing to compromise. A key element of that compromise was an agreement to

support strong mandates to protect species as long as the costs would be borne by taxpayers, rather than the private sector. Second, the federal government also recognized the need to craft a new balance among the relevant non-governmental interests. It is striking the degree to which the federal government's revised approach in SARA corresponds to the compromise environmentalists and industry forged on their own under the auspices of SARWG. In the end, environmentalists won "science-based" (though not "science only") listing, mandatory protection of all species on federal land and federal species elsewhere, and an unusually broad, if not very credible, assertion of a federal safety net across the country. Business, on the other hand, got a promise of subsidized and voluntary stewardship in the first instance, compensation should regulation be deemed necessary, and federal deference to the provinces.

While the contrast between the two legislative outcomes can clearly be traced to the stronger role of business in the Canadian case compared to the US, this difference is not readily explained by theories of interest mobilization. The business and environmental communities both had important interests at stake and also roughly similar resources in the two countries with which to fight for those interests. To explain this anomaly, we turn to the influence of lesson drawing between the cases.

Cross-National Lesson Drawing

With almost three decades of experience to draw on, Canadian environmentalists, business, and policy makers all carefully scrutinized the US example. Table 1 presents our analysis of testimony before the House of Commons Standing Committee on Environment and Sustainable Development concerning bills C-65, C-33, and C-5. We classified each reference to the ESA as either positive or negative and in terms of whether the speaker likened the Canadian bill to the US act or not. We thus distinguished between speakers who offered criticism of the ESA to draw attention to what they saw as equally problematic features of SARA, and other witnesses who applauded the Canadian bill for taking a different approach than the ESA. Similarly, those who spoke positively of the ESA in some cases were pleased that SARA took a similar approach, while others proposed greater emulation of the ESA. It is worth noting that we have adopted a relatively generous definition of "positive," including testimony commenting effectively that the ESA is "not as bad" as its critics maintain. Such comments constitute a significant fraction of the "positive" side of the ledger, since very few witnesses offered unreserved praise for the ESA. In each column, we have identified the fraction of *speakers* who made those arguments. This tends to understate the fraction of *testimony* referring to the US experience since the most engaged witnesses,

TABLE 1

Fraction of Witnesses Citing the US Endangered Species Act before the House of Commons Standing Committee on Environment and Sustainable Development

	Positive view of ESA, no comparison to SARA	Positive view of ESA, SARA seen as similar	Positive view of ESA, SARA should emulate	Negative view of ESA, no comparison to SARA	Negative view of ESA, SARA seen as too similar	Negative view of ESA, SARA is not similar	Neutral or unclear reference to ESA
BILL C65							
Environmentalists	1/30	2/30	3/30	0/30	1/30	2/30	2/30
Environmental scientists	1/10	0/10	0/10	0/10	1/10	0/10	1/10
Business	0/44	0/44	0/44	4/44	17/44	0/44	0/44
Other academics	0/2	0/2	0/2	0/2	0/2	0/2	0/2
Aboriginal reps.	0/19	0/19	0/19	0/19	0/19	0/19	1/19
Other	0/7	0/7	0/7	0/7	0/7	0/7	0/7
BILL C33							
Environmentalists	0/3	0/3	0/3	0/3	0/3	1/3	0/3
Environmental scientists	0/3	0/3	0/3	0/3	0/3	0/3	1/3
Business	0/5	0/5	0/5	0/5	0/5	0/5	0/5
BILL C5							
Environmentalists	3/37	1/37	7/37	2/37	1/37	5/37	2/37
Environmental scientists	0/4	0/4	3/4	0/4	0/4	1/4	2/4
Business	0/40	0/40	0/40	0/40	8/40	0/40	0/40
Other academics	0/3	0/3	1/3	0/3	0/3	1/3	0/3
Aboriginal reps.	0/24	0/24	0/24	1/24	0/24	0/24	0/24
Other	0/6	0/6	1/6	1/6	1/6	1/6	0/6

who appeared several times before the committee in some cases, were the ones most likely to refer to the ESA whether positively or negatively.

In all, a full 27 per cent of witnesses concerning C-65, 18 per cent concerning C-33, and 26 per cent concerning C-5 made reference to the US experience. The US Endangered Species Act cast a large shadow indeed over the Canadian deliberations. We focus on testimony concerning C-65 and C-5, since relatively few hearings were held concerning Bill C-33 before dissolution of Parliament.

Environmentalists were guided by the US experience from the outset. In a 1995 paper for the Sierra Legal Defence Fund, Elgie (1995) highlighted that the US ESA makes important provisions mandatory such as the listing of species using only scientific criteria, the prohibition on harming a listed species or destroying its critical habitat, and the requirement for recovery plans for all listed species. The environmental coalition subsequently sought comparable mandatory provisions in Canada during the prolonged legislative process, though not always with reference to the US ESA. Although they retreated from their original call for a citizen suit provision, environmentalists' demand for the same kind of nondiscretionary provisions found in the ESA, if successful, would have been almost guaranteed to yield litigation in Canada as well. That said, environmentalists and environmental scientists who appeared before the standing committee were roughly evenly divided between negative and positive (or, more often, "not so negative") references to the ESA. Environmentalists tended to argue that the extent of litigation under the ESA was exaggerated, that most disputes in the US are settled co-operatively, that job losses attributed to the spotted owl conflict were exaggerated, and that 99 per cent of projects proceed without interference from the US ESA.

In contrast, those business and agricultural witnesses who referenced the ESA were *unanimously* critical of the US approach and argued that the Canadian bill was too similar, and that SARA would therefore lead to a loss of jobs, decline in land values, and excessive litigation. For instance, a representative of the Industrial, Wood and Allied Workers of Canada stated,

We are particularly cognizant of the impact that flowed from the application of the United States *Endangered Species Act* to the habitat of the northern spotted owl in the Pacific northwest ... some 29,000 workers lost their jobs... These people's lives were disrupted and many were uprooted from communities they and their families had lived in for generations ... we also see in the bill [SARA] elements that would allow similar impacts to affect Canadian forest workers and their communities. (McIntyre, 2001)

Similarly, the President of the Western Stock Growers' Association concluded his testimony as follows:

We believe Bill C-5 is a very command-and-control, top-down, American-style piece of legislation. This has not worked for the folks in the United States for the last 28 years. I've talked to many of them and the lawyers who have defended them, and the kind of heartache they've had down there we should not repeat up here. Hopefully, we can find a Canadian way through co-operation and partnership. (Pope, 2001)

It is noteworthy, however, that the fraction of business witnesses that was critical of the US experience declined by half from C-65 to C-5, with the new emphasis on stewardship and the removal of the citizen suit clause.

Policy makers also looked to the example south of the border and, like the business community, primarily drew negative lessons. While opposition members joined with business in criticizing the government bill as "too American," public servants and Liberal members of the committee took pains to stress that the Canadian bill did *not* repeat the mistakes of the US ESA. In response to a coalition of 60 American environmental groups, who sent a letter to the government demanding that it increase the stringency of SARA, Environment Minister Anderson countered that the US had nothing to teach Canada about species protection (Duffy, 2000). However, Anderson indicated elsewhere that he did indeed draw lessons, negative ones, from the US:

Given that background scenario we were very, very keen to try and avoid some of the flashpoints that had caused the American legislation to fall in disrepute among constituencies that are vital for its success.... You can pass laws, but if they run in the face of public attitudes you don't achieve your objectives except at enormous cost and considerable social friction. We were seeing that develop in the States and so we wished to avoid the ESA concern that had developed. (Anderson, 2004)

Anderson also contrasted the "Canadian, co-operative approach" with the US' confrontational "them versus us" approach (Duffy, 2000). Indeed, negative lesson drawing from the US experience was frequently packaged by both business groups and the government in nationalist language.

The US was not the only jurisdiction cited by members of the policy community. Scientists and environmentalists recommended that legislators emulate the Australian legislation's broad definition of habitat (see Elgie, 1996) and measures to prevent harm to vulnerable species (Baumgartner, 1996), as well as the Mexican law's mandatory protection for cross-border species (see Fulton, 2001). On the other hand, one agriculture representative recommended the Mexican law's more narrow definition of "taking" compared to that of the US ESA (Wilson, 1996). However, references to other jurisdictions were less frequent than references to the US, and when they did arise, it was often in the same sen-

tence as a reference to the US. In the end, it is telling that when asked which factors were most influential in shaping SARA, Environment Minister David Anderson responded that “*the most important factor was the American experience* in front of us ... in terms of shaping the actual drafting of the legislation it was the American experience” (Anderson, 2004, emphasis added).

Conclusion

Despite similar challenges posed by species protection and comparable resources to address those challenges, the US and Canada have adopted quite different legislative approaches.

Namely, the ESA and SARA vary in the extent to which the costs posed by species protection are borne by the state or the private sector, in the extent to which government officials are given discretion, and in the extent to which the federal government asserts leadership over state or provincial governments. Differences with respect to executive discretion and deference to subnational governments conform to patterns of difference between other US and Canadian environmental statutes that are readily explained by institutional factors. However, institutions alone do not explain SARA’s departure from previous Canadian environmental laws in its substitution of publicly funded stewardship for regulation. That approach was a response to the relatively stronger mobilization of business opposition in Canada than the US, which in turn was a result of the negative lessons that Canadian actors and policy makers drew from the US experience.

The case of endangered species policy in the US and Canada thus offers not only a clear example of the impact of negative lesson-drawing, but also suggests the importance of the *interaction* of lesson-drawing, interests, and institutions. In terms of the interaction of lesson drawing and interests, attention to lesson drawing yields insight into the relative influence of different coalitions in the two countries. In terms of lessons and institutions, the negative lessons of the ESA reinforced Canadian politicians’ predisposition, derived from parliamentary institutions, to eschew nondiscretionary language. In other words, the negative lessons of the US *Endangered Species Act* were readily incorporated because they “fit” with the institutional setting and prevailing balance of interests.

In contrast, the US experience since 1973 reveals the challenge of acting on a negative lesson in an inhospitable institutional environment. Despite almost legendary economic and political costs of the *Endangered Species Act*, it is striking that the US has not been able to act on the same lessons from its own experience. Although amendments have been adopted that grant the executive some flexibility to weigh socio-

economic consequences, proposals for more fundamental reforms to the act have been thwarted time and again by the many veto points in the US Congress (Burgess, 2001: 77–102). The foregoing suggests that future research on lesson drawing, whether positive or negative, should focus on the fit between a lesson and the institutional and political context. In particular, it would be valuable to compare the receptiveness of jurisdictions with different political institutions, or of states or provinces with comparable institutions but different political economics, to a similar lesson.

The approach taken by Canada in its *Species at Risk Act* was greatly influenced by Canadians' negative perception of the US experience under the *Endangered Species Act*. The clearest lesson for policy makers was how to avoid antagonizing economic interests, a lesson that yielded a more co-operative approach in the Canadian statute. Only time will tell whether that approach will also yield stronger protection of endangered species.

Notes

- 1 US Fish and Wildlife Service, "Summary of Listed Species." March 30, 2007, http://ecos.fws.gov/tess_public/Boxscore.do; Government of Canada, *Canada Gazette* Part II, 140.18, September 6, 2006.
- 2 The confusion would appear to stem, in part, from various authors' focus on different dimensions of the same phenomenon. For instance, in characterizing "lesson drawing," Rose (1991; 1993) distinguishes among degrees of adaptation. Bennett (1991a) and Hoberg (1991) focus instead on the mechanisms through which convergence occurs. Dolowitz and Marsh (1996) emphasize the degree to which the "policy transfer" is voluntary or coerced.
- 3 Although Dolowitz and Marsh (1996) allow that "policy transfer" may be positive or negative, the everyday use of the term transfer implies a positive lesson. Similarly, despite Hoberg's (1991: 109) allowance for "negative emulation," common usage of the term emulation implies pursuit of a positive exemplar.
- 4 The nine-month timeline has been extended through a legal "loop-hole," in that the clock starts only when the Minister of the Environment gives COSEWIC's list to Cabinet, not when the Minister receives it from COSEWIC (Mooers, 2004).

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