

PRESIDENTS, PARLIAMENTS, AND LEGAL CHANGE:  
QUANTIFYING THE EFFECT OF POLITICAL SYSTEMS IN  
COMPARATIVE ENVIRONMENTAL LAW

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Recent frustration with the scope and pace of environmental legislative reform in the United States has prompted suggestions that the federal government incorporate parliamentary methods, like those used in Canada, to decrease the number and scale of veto points and more readily pass environmental protections. This Article argues that the United States should be extremely cautious about adopting such reforms. While the Canadian approach to legislating in this field may be more certain and efficient than that of the United States, that approach can just as easily be used to diminish environmental protections as to enhance them. Advocacy for such reforms assumes that the central characteristics of environmental legislation in the United States—specific legislative commands, limits on executive power, and agency accountability—are a product of cultural norms resulting from political distrust and will therefore remain stable influences in legislative drafting. The authors argue that it would be more accurate to attribute these central characteristics to endogenous factors related to the U.S. presidential system, rather than political culture. Using both a quantitative and qualitative comparative assessment of Canadian and U.S. legislation, the authors conclude that while both countries use similar types of statutes to ensure environmental protections, their unique political systems structure their content and use differently.

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## I. INTRODUCTION

For decades, political scientists in the United States have called for fundamental changes in constitutional structure, in part to address claims that the legislative process is dysfunctional because of the multiple veto-points or roadblocks that prevent the enactment of major legislative changes.<sup>1</sup> According to these arguments, the increase in party discipline

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<sup>1</sup> See, e.g., SANFORD V. LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 7 (2008) (summarizing and endorsing the critiques); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2326 (2006) (noting the long history of the critiques in political science); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 328–29 (2011) (same). More recently critiques have centered on the dramatic increase in the use of the filibuster in the Senate, essentially imposing a supermajority requirement of sixty votes out of a hundred Senators for most

at the federal level in the United States over the past three decades has made the multiple veto-points in the U.S. system of governance even harder to surmount.<sup>2</sup> Many of these critics have called for reforms that would reduce the number or scale of veto points in the legislative process such as elimination of the Senate filibuster.<sup>3</sup> Advocates of these proposals point towards incorporating parliamentary systems of government like Canada's as a model for improving environmental lawmaking.<sup>4</sup> In the context of environmental law, some commentators have argued that legislative dysfunction in the United States is particularly problematic because it has prevented the United States from enacting comprehensive federal legislation addressing climate change.<sup>5</sup> These commentators have therefore embraced the reform proposals as a way to improve environmental law.<sup>6</sup>

Echoing this concern are critiques by political science and legal scholars that the United States produces mediocre environmental outcomes at higher costs relative to comparable environmental regulatory schemes in European countries, many of which have parliamentary systems of government.<sup>7</sup> These critics argue that the fragmented nature

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legislation. See, e.g., MIMI MARZIANI, *FILIBUSTER ABUSE* (Brennan Center for Justice, 2010) (documenting the rise of the use of the filibuster and calling for its elimination).

<sup>2</sup> See, e.g., Matthew Yglesias, *American Democracy Doomed*, VOX (Oct. 8 2015), <http://www.vox.com/2015/3/2/8120063/american-democracy-doomed>.

<sup>3</sup> See LEVINSON, *supra* note 1; Yglesias, *supra* note 2. Solutions that have been proposed include changing the Senate rules to reduce or eliminate the filibuster, or constitutional changes to reduce the power of small states in the Senate, create a unicameral legislature, create a parliamentary system of governance, or allow for national referendums. See, e.g., LEVINSON, *supra* note 1.

<sup>4</sup> An early example of such proposals is Woodrow Wilson's call for the United States to switch to a parliamentary system. WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* (Johns Hopkins Univ. Press 1981) (1885). A thorough survey of the range of proposals, including calls for a switch to a parliamentary system is included in JAMES L. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* (1985).

<sup>5</sup> See David Roberts, *How 7.4% of Americans Can Block Humanity's Efforts to Save Itself*, GRIST, Nov. 12, 2009, <http://www.grist.org/article/2009-11-12-how-7.4-of-americans-can-block-humanitys-efforts-to-save-itself> [hereinafter Roberts, *7.4% of Americans*]; David Roberts, *The Real Reason the Climate Bill is Going to Suck*, GRIST, Nov. 3, 2009, <http://grist.org/article/2009-11-02-the-real-reason-the-climate-bill-is-going-to-suck/> [hereinafter Roberts, *Real Reason*]; Ben Adler, *Filibuster Demolition Could Clear the Air for Greener Rulings*, GRIST, Nov. 22, 2013, <http://grist.org/politics/filibuster-demolition-could-clear-the-air-for-greener-rulings/>.

<sup>6</sup> See Roberts, *7.4% of Americans*, *supra* note 5; Roberts, *Real Reason*, *supra* note 5; Greg Wannier, *Filibuster Reform: A Faint Light for United States Climate Legislation*, COLUMBIA L. SCH. (Oct. 5 2010), <http://blogs.law.columbia.edu/climatechange/2010/10/05/filibuster-reform-a-faint-light-for-united-states-climate-legislation/>.

<sup>7</sup> See e.g., ROBERT A. KAGAN, *PATTERNS OF PORT DEVELOPMENT: GOVERNMENT, INTERMODAL TRANSPORTATION, AND INNOVATION IN THE UNITED STATES, CHINA, AND HONG KONG*, Part III (1990) [hereinafter KAGAN, *PATTERNS OF PORT DEVELOPMENT*]; ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 239–43 (2001) [hereinafter

of U.S. government, with its many veto points, leads to reliance on inefficient tools such as litigation to develop and implement environmental policy. Implicit in these critiques is an argument that movement away from the U.S. system, if possible, might produce better outcomes.

Among the various parliamentary systems of government that might be a model for the kind of changes suggested, it makes sense for the United States to look first to how Canada enacts environmental laws. As we discuss below, there are strong similarities between the two countries in terms of political structure, culture, and economic development. Both countries have organized environmental movements, which, through widespread citizen support, have spurred significant environmental legislation. And, while the United States began the legislative process earlier than Canada, both countries enacted substantial statutory systems aimed at identifying, preventing, and remedying environmental harm during the 1960s, 1970s and 1980s.<sup>8</sup> Since then, federal governments in both the United States and Canada have used legislation to mandate comprehensive, national regulatory programs to control air and water pollution,<sup>9</sup> hazardous waste and toxic substances.<sup>10</sup> They also both use legislation to make parties liable for the costs of cleaning up environmental contamination as well as protecting particular species.<sup>11</sup>

But there are important questions about whether parliamentary systems might indeed be a good model for improving environmental lawmaking in the United States. The introduction in 2002 of the Species

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KAGAN, ADVERSARIAL LEGALISM]. These claims are partly based on political structure, and partly based on claims about political culture.

<sup>8</sup> For an overview of the history of American environmental law, see Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75 (2000). For an overview of the history of Canadian environmental law, see Stepan Wood et al., *What Ever Happened to Canadian Environmental Law?*, 37 ECOLOGY L.Q. 981 (2010); Bruce Parry, *In Search of the Holy Grail of Environmental Law: A Rule to Solve the Problem*, 1 MCGILL INT'L J. SUSTAINABLE DEV. L. & POL'Y 29 (2005).

<sup>9</sup> In the United States, the Clean Air Act, 42 U.S.C. § 7401 *et seq.* (1990), and the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1977). In Canada, the Canadian Environmental Protection Act ("CEPA"), S.C. 1999, c. 33, the Fisheries Act, R.S.C. 1985, c. F-14 (Can.), and the Navigable Waters Protection Act, R.S.C. 1985, c. N-22 (Can.).

<sup>10</sup> In the United States, the Resource Conservation and Recovery Act, 42 U.S.C. § 3251 *et seq.* (1976), the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.* (1992). In Canada, CEPA, S.C. 1999, c. 33, and the Transportation of Dangerous Goods Act, S.C. 1992, c. 34 (Can.).

<sup>11</sup> In the United States, the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* (1986), and the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (1982). In Canada, compensation is addressed through several acts but is also governed by the Environmental Violations Administrative Monetary Penalties Act, S.C. 2009, c.14, §.126 (Can.). Protection of particular species is achieved through the Species at Risk Act, S.C. 2002, c. 29 (Can.).

at Risk Act (“SARA”)<sup>12</sup> in Canada certainly signaled that parliamentary governments can overcome industry pressures and enact controversial environmental legislation. However, what is often overlooked is that governments in some parliamentary countries have reshaped environmental statutes in ways that might lessen the ability of citizens and government to ensure environmental protection. Working with political processes that have few veto points and strict party discipline, legislatures in parliamentary systems have responded to industry complaints regarding environmental controls with law reforms that streamline regulatory approvals and diminish oversight. The ease of legislative change under these circumstances is illustrated by Canada’s extensive reforms to the Canadian Environmental Assessment Act, 2012 (“CEAA”),<sup>13</sup> the Fisheries Act,<sup>14</sup> and the Navigable Waters Protection Act through an omnibus budget bill in 2012.<sup>15</sup> These examples demonstrate that while parliamentary systems may be institutionally capable of introducing stringent measures<sup>16</sup> the countervailing risk is that past environmental gains can be quickly reversed in parliamentary systems without the checks and balances of the U.S. system.

More fundamentally, calls for change in environmental lawmaking in the United States seem to assume that the salient characteristics of U.S. environmental legislation will remain consistent irrespective of systemic change. But the nature of U.S. and Canadian environmental law might well depend on the political structures as much as the political culture that produces it. By political structure we mean the arrangement or ordering of the institutions within which individuals and groups generate environmental law. This study therefore examines legislatures and the executive. However, we use the term structure not just to reference a collection of political institutions, but also to describe how those institutions interact, in particular the ways in which those interactions produce a separation of power among the executive, judicial, and legislative branches.<sup>17</sup> In contrast, the concept of political culture refers

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<sup>12</sup> SARA, S.C. 2002, c. 29 (Can.).

<sup>13</sup> Canadian Environmental Assessment Act, S.C. 2012, c. 19, §52.

<sup>14</sup> The Fisheries Act, R.S.C. 1985, c. F-14 (Can.).

<sup>15</sup> Navigable Waters Protection Act, R.S.C. 1985, c. N-22 (Can.).

<sup>16</sup> It is noteworthy that review efforts to again reform the Canadian environmental assessment regime are currently underway by the Liberal government. GOVERNMENT OF CANADA, *Environmental Assessment Processes*, <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes.html>. It is possible that this revision will implement more stringent standards. For discussion, see Jason MacLean et al., *Polyjurial and Polycentric Sustainability Assessment: Once-in-a-Generation Law Reform Opportunity*, 30 J. ENVTL. L. & PRAC. 36 (2016).

<sup>17</sup> KENNETH N. WALTZ, *POLITICAL STRUCTURES IN THEORY OF INTERNATIONAL POLITICS* 79–128 (McGraw-Hill Higher Education, 1979).

to a set of attitudes, beliefs and sentiments which provide the underlying assumptions and rules that govern behavior in the political system,<sup>18</sup> and which is used in political science to explain and predict political behavior.

Our goal is to help identify in what circumstances and ways political structures might affect the style and function of environmental statutes. For instance, because of the way political structures, Canadian and U.S. legislation might differ substantially in the use of specific legislative commands, limits on executive power, and tools included to ensure agency accountability. Our question is whether these substantive characteristics of environmental legislation would remain constant in the U.S. context if structural characteristics of the lawmaking system were altered. Based on this aim, our first question is simply a descriptive one asking whether important characteristics of environmental law substantially vary between Canada and the United States. If there is substantial variation, that raises important questions about the implications of changing the underlying political structure in U.S. environmental law.

Of course, one could explain any such differences as a product of political culture. For example, the differential use of public interest litigation as a check on agency power has partly been attributed to the two countries' different cultural attitudes towards both litigation and the government.<sup>19</sup> Studies have depicted Canadians as having more trust in government than Americans and deferring to elite decision-makers.<sup>20</sup> Similarly, the extensive constraints on agency discretion in the United States as compared to Canada have been attributed to the latter's weaker environmental movement and lower levels of support for its non-governmental organizations. It follows that a weak environmental movement is less able to affect the drafting of environmental legislation

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<sup>18</sup> See Thomson Gale, *Political Culture*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES (2008). For discussion in relation to the Americanization of Canadian constitutional culture, see DAVID SCHNEIDERMAN, RED, WHITE AND KIND OF BLUE? THE CONSERVATIVES AND THE AMERICANIZATION OF CANADIAN CONSTITUTIONAL CULTURE (University of Toronto Press, 2015).

<sup>19</sup> Andrew J. Roman & Mark Pikkov, *Public Interest Litigation in Canada*, in INTO THE FUTURE: ENVIRONMENTAL LAW AND POLICY FOR THE 1990'S 165-86 (Donna Tingley ed., 1990). See also SEYMOUR MARTIN LIPSET, CONTINENTAL DIVIDE: THE VALUES AND INSTITUTIONS OF THE UNITED STATES AND CANADA xii, 3 (1990); Robert A. Kagan, *Fragmented Political Structures and Fragmented Law*, *Jus Politicum*, 4 REVUE INT'L DROIT POLITIQUE 1 (2010) (arguing that differences in culture and staffing of civil service can partially explain differences in legal complexity and detail).

<sup>20</sup> R. G. LANDES, THE CANADIAN POLITY: A COMPARATIVE INTRODUCTION (1998); The Gandalf Group, *Public Perceptions of the Ethics of Political Leadership*, RYERSON U. (November 5, 2014), [http://www.ryerson.ca/content/dam/trlc/pdf/EPL\\_Survey.pdf](http://www.ryerson.ca/content/dam/trlc/pdf/EPL_Survey.pdf); LIPSET, *supra* note 19, at xvi, 93-94, 140, 142.

and less able to enact statutory provisions that constrain agency discretion.<sup>21</sup>

Reliance on political culture alone to explain governmental difference is problematic when reforms to political structures are being proposed.<sup>22</sup> At the very least, reformers should consider whether differences in political structure might explain any differences in environmental law between the two countries, and the possibility that changes in political structure might then result in undesirable changes to current environmental law.<sup>23</sup> Moreover, even if political culture is an important determinant of any differences, political culture may itself be at least partially determined or shaped by political structure.<sup>24</sup>

In order to explore the second question concerning the role of political structure versus political culture in shaping U.S. and Canadian environmental law, we develop hypotheses about how political structure would shape environmental law in the two countries, and test whether any differences in environmental law are consistent with those hypotheses.

To answer both sets of questions—what are the differences between U.S. and Canadian environmental law, and are those differences potentially related to political structure—we quantitatively and qualitatively compare Canadian and U.S. environmental law to examine whether and how political systems might consistently shape the development of environmental law. We begin in Part II with an overview of the relevant political science and comparative law literature to identify what factors are important in political structures for determining the content of legal systems; we also provide specific context about the U.S. and Canadian political systems to explain why we believe a comparison between the two countries is fruitful. In Part III we develop an account of how environmental law might differ across parliamentary versus presidential systems. Specifically, we hypothesize that legislatures in presidential systems are more likely to impose detailed constraints on administrative agencies implementing environmental law because of the

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<sup>21</sup> See, e.g., Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 842 (1988) (arguing that U.S. environmental law has more statutory detail in part because of the political strength of U.S. environmental groups).

<sup>22</sup> Indeed, Canada and the United States are “quite similar to each other when compared to European or other nations.” LIPSET, *supra* note 19, at 225.

<sup>23</sup> We also note the possibility that Canadian political culture may have become more similar to the United States in embracing litigation, in part as a result of the adoption of a Charter of Rights and Freedoms that is similar to the U.S. Bill of Rights. See *id.* at 3, 101–102, 217 (noting this possibility).

<sup>24</sup> See *id.* at 50.

incentives created by the structural separation of powers between the different branches of government.

Drawing on qualitative and quantitative evidence, we confirm that environmental law in the United States is more likely to incorporate detailed and specific constraints on agency implementation of environmental law and also to use public participation and citizen suits to enforce those constraints against agencies. This evidence is consistent with our hypotheses that environmental law in both countries is significantly shaped by the political structures that ensure the separation of powers between the executive and the legislature and correlates the use of veto points with high levels of specificity and oversight. We conclude by developing the implications of those differences for environmental law for the United States, Canada, and other countries.

## II. A THEORETICAL FRAMEWORK FOR UNDERSTANDING HOW POLITICAL SYSTEMS MAY SHAPE THE DEVELOPMENT OF ENVIRONMENTAL LAW

### *A. The Theory of How Political Systems Shape Incentives to Structure Law*

Differences between presidential and parliamentary political systems are fodder for significant scholarship in political science. One set of questions this scholarship has examined is the extent to which political structure may shape the development of law and policy. For instance, political scientists Kent Weaver and Bert Rockman have directly compared presidential and parliamentary systems with respect to government capability to enact and implement policy.<sup>25</sup> Other political scientists have developed a range of categories of political structures, such as ‘decision points,’<sup>26</sup> or ‘veto points,’<sup>27</sup> to explain how law and policy develop. While statutory comparisons of environmental law in Canada and the United States are sparse, those that have undertaken the task have also examined the impact of institutional differences. For example, Kathryn Harrison and George Hoberg have compared the statutory limits on discretion in regulating toxic substances in Canada and the United States, focusing on structural explanations for differences in legislative substance, timing, and procedures.<sup>28</sup> Applying the same

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<sup>25</sup> R. KENT WEAVER, DO INSTITUTIONS MATTER? GOVERNMENT CAPABILITIES IN THE UNITED STATES AND ABROAD (R. Kent Weaver & Bert A. Rockman eds., 1993).

<sup>26</sup> Ellen M. Immergut, *Institutions, Veto Points, and Policy Results: A Comparative Analysis of Health Care*, 10 J. PUB. POL’Y 391 (1990).

<sup>27</sup> GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK (2002).

<sup>28</sup> KATHRYN HARRISON & GEORGE HOBERG, RISK, SCIENCE, AND POLITICS: REGULATING TOXIC SUBSTANCES IN CANADA AND THE UNITED STATES (1994).



comparative framework, what Guy Peters and Jon Pierre have called empirical institutionalism, we focus on identifying how the method by which the head of government is elected, as well as the relationship between the head and other members of the legislature, effects the structure of environmental law.

In parliamentary systems, election of the legislature determines control of the executive as well as the head of government. The head of government is an elected member of the legislature as well as the leader of the party with the greatest proportion of votes.<sup>29</sup> In Canada, legislative powers are split between elected members of the House of Commons and the appointed members of the Senate. However, if an elected party holds a majority of the seats in the House, the head of government will, as a general rule, exercise unified control of the executive and legislative branches of government. Thus, through the executive, the head of government will exercise a very prominent role in the legislative process as well as in the administration of government.<sup>30</sup>

In presidential systems, the executive and legislative branches are elected separately, as in the United States where citizens vote separately for a presidential candidate and for representatives in Congress. Powers are supposed to be separated between the two branches according to their function, though this can be harder to do in practice than in theory. And in any case, the branches are usually given important roles in the others' business. For example, the executive usually has some role in the legislative process; in the United States, the President can veto any legislation, and Congress can override that veto with a two-thirds supermajority. Likewise, the legislature often has some specific say in executive matters such as appointments; in the United States, the Senate must confirm all senior executive appointees.

In both parliamentary and presidential states, the scope and complexity of modern government action necessitates the creation of large bureaucracies, composed of administrative agencies that develop, implement, and enforce the relevant law. However, legislatures that

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<sup>29</sup> In a presidential system, generally speaking the head of state is unified with the head of government. In contrast, in a parliamentary system, such as in Canada, the head of state is a different post from the head of government. In Canada, the head of state is largely a ceremonial post held by the Queen.

<sup>30</sup> Our description of parliamentary systems focuses on those that generally have a single-party majority government, rather than a minority government or a multi-party coalition. We focus in this way because Canada has generally had single-party majority governments. Minority or multi-party governments may function somewhat more like presidential systems when it comes to supervision of executive power by the legislature. Christian B. Jensen & Robert J. McGrath, *Making Rules about Rulemaking: A Comparison of Presidential and Parliamentary Systems*, 64 POL. RES. Q. 656 (2011). Where appropriate, we note where these distinctions might be important for the broader generalization of our analysis.

create administrative agencies to implement laws have to address the principal-agent problem inherent in this delegation. One of the central democratic problems with the use of administrative agencies to affect the will of the legislature is that agencies tend to suffer from “bureaucratic drift.”<sup>31</sup> Even though the administrative agency is meant to be an agent of the principal (the legislature), the agency may not faithfully follow the commands of the legislature as articulated in the statute. Agencies may, for example, shirk their duties after becoming captured by particular interest groups, or have different political preferences than the legislature.

Legislatures might address the problem of drift by supervising the performance of the agency over time through *ex post* oversight. Agency budgets can be modified; agency personnel can be called to testify in hearings; legislative investigations may produce reports that produce media coverage and public pressure; and in extreme situations, the legislature may modify the underlying law.<sup>32</sup> However, all of these *ex post* solutions raise a second problem for the legislature: any failure by agencies to follow the statutory commands of the current legislature will necessarily occur in the future. Thus, any efforts by the legislature to correct those present failures will be undertaken by a future version of the legislature. And that future version of the legislature may be very different in political composition than the legislature that passed the initial law. The different political composition of the future legislature may lead it to different policy preferences—it may even endorse the agency’s application of the law, or if it rejects it, it may impose a very different policy solution than the original legislature intended. The current legislature is therefore also faced with the problem of what political scientists have called “coalitional drift.”<sup>33</sup> If a current legislature wishes to ensure that its law is faithfully implemented over time, it needs to solve the problems of both “bureaucratic drift” and “coalitional drift.”<sup>34</sup>

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<sup>31</sup> See CHARLES R. SHIPAN, *DESIGNING JUDICIAL REVIEW: INTEREST GROUPS, CONGRESS, AND COMMUNICATIONS POLICY* 51 (1997).

<sup>32</sup> In the context of a multi-party, coalitional parliamentary system, another form of *ex post* enforcement is the withdrawal of support for the coalition by a party if it is unhappy with implementation or enforcement of the law by another party in the coalition. Such withdrawal may force the collapse of the government and new elections, a powerful enforcement tool. Jensen & McGrath, *supra* note 30. In a parliamentary system with a majority, one-party government, such an *ex post* remedy is not available of course.

<sup>33</sup> See SHIPAN, *supra* note 31, at 8, 33, 51 (stating that a legislature may be concerned about changes in political power in the future, and wish to lock-in policy today to insulate against that possibility).

<sup>34</sup> Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 438–39 (1989) [hereinafter McCubbins et al., *Structure and Process*]. Legislators may also want to save resources by minimizing the need for costly *ex post* review through the use of effective *ex ante* tools that constrain agency decisionmaking without legislative intervention. Matthew D. McCubbins et al.,

If, instead of *ex post* methods, the current legislature is able to impose constraints on the agency within the initial law that it enacts, it may be able to shape or restrict the agency's decision-making over time in ways that reduce the risk of "bureaucratic drift"<sup>35</sup> as well as "coalitional drift."<sup>36</sup> Where strict constraints are imposed on the agency through legislation, the government as well as unelected actors or institutions can enforce those statutory constraints. Public or private parties could bring lawsuits challenging administrative agency decisions as contrary to the original law, and courts could use those lawsuits to enforce the statutory constraints against unfaithful agencies.<sup>37</sup>

Legislatures might attempt to constrain agencies through legislation in two separate ways. First, they can directly establish substantive standards or requirements in the legislation that ensure outcomes the legislature wishes to achieve—e.g., the legislature might set a strict standard for pollution releases from hazardous waste facilities. This method, by using specific language to set strict standards, minimizes the risk of evasion by regulated parties or the implementing agencies. Second, the legislature might impose procedural or other constraints on agency decision-making in ways that the legislature believes will make it more likely that the agencies will achieve the desired substantive goals—e.g., a requirement that the agency issue a regulation covering pollution releases from hazardous waste facilities by a certain deadline. Both of these might be

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*Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 250 (1987) [hereinafter McCubbins et al., *Administrative Procedures*].

<sup>35</sup> These constraints might be either restrictions on the substantive outcomes an agency can reach, or procedural or structural constraints on the agency. McCubbins et al., *Administrative Procedures*, *supra* note 34, at 246.

<sup>36</sup> See, e.g., Matthew Potoski, *Managing Uncertainty through Bureaucratic Design: Administrative Procedures and State Air Pollution Control Agencies*, 9 J. PUB. ADMIN. RES. & THEORY 623 (1999); JOHN D. HUBER & CHARLES R. SHIPAN, DELIBERATE DISCRETION? THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY 153 (2002) (noting this hypothesis); Craig Volden, *Delegating Power to Bureaucracies: Evidence from the States*, 18 J.L. ECON. & ORG. 187 (2002); Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213, 228, 234–35 (1990); Terry M. Moe & Michael Caldwell, *The Institutional Foundations of Democratic Governance: A Comparison of Presidential and Parliamentary Systems*, 150 J. INSTITUTIONAL & THEORETICAL ECON. 171, 174 (1994); McCubbins et al., *Structure and Process*, *supra* note 34, at 440; Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 98 (1992); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1, 6 (1994); KAGAN, ADVERSARIAL LEGALISM, *supra* note 7, at 49; Jeffrey S. Hill & James E. Brazier, *Constraining Administrative Decisions: A Critical Examination of the Structure and Process Hypothesis*, 7 J.L. ECON. & ORG. 373 (1991); Robert D. Cooter & Tom Ginsburg, *Comparative Judicial Discretion: An Empirical Test of Economic Models*, 16 INT'L REV. L. & ECON. 295, 305 (1996).

<sup>37</sup> See SHIPAN, *supra* note 31, at 54–56, 140 (stating that courts are tools that legislatures can use to control future policy implementation and constrain bureaucratic drift).

enforced by third parties. For instance, an environmental group might use a citizen suit provision to enforce the substantive standard directly against polluting facilities, and the regulatory deadline directly against the agency.

Thus, both substantive and procedural statutory constraints have appeal to legislatures in terms of effective *ex ante* control of outcomes from a regulatory or administrative program. The advantages are, however, not without their shortcomings. For example, in the case of substantive standards, while the legislature can directly control outcomes through setting the relevant standard, it may be concerned that either because of a lack of expertise, foresight, or capacity it has not fully specified all the conditions needed for achieving these outcomes. Whereas under the procedural approach, the legislature can lean more on the agency's expertise and capacity but at the risk that the agency sets a standard below the desired outcome. Of course, a legislature might choose to use both tools in combination.<sup>38</sup>

For purposes of our analysis, we consider both possibilities: the use of more detailed substantive standards to control agency discretion and outcomes, and the use of procedural constraints and directives for agency decision-making. Studies of political systems to date inform us that legislative decisions to use these *ex ante* tools of either detailed statutory language or specific statutory directives, in combination with outside enforcement to constrain agency performance in the future, differ according to political structure. Specifically, the choice and effect of those methods depends upon the political system in place and how the institutional tools of that system, such as veto points, are implemented.<sup>39</sup>

Political scientists and legal scholars have highlighted the role that veto points—the number of actors or institutions who have the ability to prevent the enactment of legislation—play in shaping the detail and specificity of legal instructions for administrative agencies and the types of actors used to enforce them. In general, increasing the number of veto points should increase the likelihood of political actors (i.e., the legislature) using detailed statutory language and procedural mechanisms to constrain and shape administrative agencies. This is because, where legislation is more difficult to enact (as it is when there are more veto points) it is more resilient over time, and more resistant to efforts by future legislatures to change it. It is therefore more worthwhile to spend significant amounts of time crafting detailed legislation to constrain

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<sup>38</sup> See McCubbins et al., *Administrative Procedures*, *supra* note 34, at 248–255.

<sup>39</sup> Immergut, *supra* note 26; TSEBELIS, *supra* note 27; George Hobert, Pipelines and the Politics of Structure: A Case Study of the Trans Mountain Pipeline (Paper for delivery at the Annual Meeting of the Canadian Political Science Association May 31–June 2, 2016, Calgary, AB).

administrative agencies because, if the legislation passes, it will be relatively durable.

Likewise, there is a general agreement that increasing the number of veto points will increase the likelihood that a legislature will rely on other actors or institutions to monitor and constrain implementation of statutes by administrative agencies.<sup>40</sup> The most common mechanism here is judicial review of administrative agency decision-making at the behest of private parties (who may either be subject to or benefit from regulation). Again, increasing the number of veto points makes it harder for the legislature to modify or alter legislation in the future. That has two effects. First, as above, if it is difficult for future legislatures to alter the underlying substantive statute, those future legislatures cannot respond to future court decisions (or actions by other, third parties) to enforce the law by amending the underlying law.<sup>41</sup> Second, it will also make it harder for future legislatures to use statutory changes to directly alter or modify the behavior of courts (or other actors) enforcing the law.<sup>42</sup>

In general, presidential systems have more veto points than parliamentary systems.<sup>43</sup> We would therefore expect that presidential systems—like the United States—would have environmental laws with more statutory detail, more procedural restrictions on administrative agencies, and greater reliance on citizen suits and judicial review than parliamentary systems, especially one like Canada's that is relatively close to the Westminster ideal of a parliamentary system.<sup>44</sup> Enactment of

<sup>40</sup> See SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 5 (2010).

<sup>41</sup> See *id.* at 38 (making this point in the context of discussing private enforcement of law against other private actors); Sean Farhang, *Public Regulation and Private Lawsuits in the American Separate of Powers System*, 52 AM. J. POL. SCI. 821 (2008) (same).

<sup>42</sup> See TSEBELIS, *supra* note 27, at 2–3 (increasing the number of veto points increases policy stability in a country, which in turn increases independence of courts); SHIPAN, *supra* note 31, at 18–19; FARHANG, *supra* note 40, at 16; THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 173–75 (2002) (stating that the difficulty of repealing laws makes the use of court systems to set policy more appealing in the United States because they are resilient to other forms of political pressure short of changing the law); KAGAN, *ADVERSARIAL LEGALISM*, *supra* note 7, at 15, 42–48 (2001) (same); Cooter & Ginsburg, *supra* note 36, at 305–07 (separation of powers systems make it more difficult for a legislature to constrain judicial interpretation of statutes).

<sup>43</sup> See Moe, *supra* note 36, at 240–41 (1990); Moe & Caldwell, *supra* note 36, at 177–78. Presidential and parliamentary systems are not clearly separable categories; some political systems may be hard to sort into one of the two categories. That is, in part, because there are many different ways political systems can be structured, including different ways veto points can be created in a political system. Even so, systems that are more like the ideal presidential system have, on average, more veto points than systems that are more like the ideal parliamentary system. Kent Eaton, *Parliamentarism versus Presidentialism in the Policy Arena*, 32 COMP. POL. 355 (2000).

<sup>44</sup> Moe & Caldwell, *supra* note 36, at 178 (“[W]e would expect a parliamentary system to give rise to: (1) public agencies that are less encumbered by externally imposed rules, regulations,

detailed and specific statutes to constrain agencies and avoid intervention by future legislatures will be less effective in a parliamentary system given the relative ease of enacting legislation. Moreover, future legislatures in a political system with few veto points will find it easier to use *ex post* tools to control agencies because of the ease of amending the relevant law.<sup>45</sup>

Some kinds of political systems may also be more likely to produce greater bureaucratic drift than others. In a political system where the executive branch is elected independently from the legislative branch (a separation of powers or presidential system), the administrative agency responds to an official (the President) with a different electoral base and term than the legislature.<sup>46</sup> That means the political incentives and policy preferences of the President and the legislature will often be quite different.<sup>47</sup> Because the President usually has significant abilities to control administrative agencies that are independent of the legislature (through tools such as hiring or firing officials, allocating budgets among various offices, etc.),<sup>48</sup> the administrative agencies will be responsive to the President. Political scientists and legal scholars generally agree that this will increase the possibility for conflict in policy preferences—“bureaucratic drift”—between the administrative agency and the legislature. Legislatures might respond to this possibility by reducing delegation entirely,<sup>49</sup> delegating to administrative agencies that are more independent from the President,<sup>50</sup> or imposing stricter statutory constraints on the agency to reduce the President’s ability to shape policy outcomes.<sup>51</sup>

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timetables, and other trappings of protective bureaucracy that might hobble effective performance and undermine democratic accountability; and (2) a bureaucratic system that is centrally controlled by political leaders and, taken as a whole, more closely resembles a simple, coherent, rationally designed hierarchy of administration.”); Cooter & Ginsburg, *supra* note 36, at 305–07.

<sup>45</sup> See TSEBELIS, *supra* note 27, at 236. See also SHIPAN, *supra* note 31, at 7.

<sup>46</sup> See TSEBELIS, *supra* note 27, at 70 (interdependence of executive and legislative branches defines parliamentary systems in comparison to presidential systems).

<sup>47</sup> See FARHANG, *supra* note 40, at 35.

<sup>48</sup> *Id.* at 35; Moe, *supra* note 36, at 237; Moe & Caldwell, *supra* note 36, at 175–76; Moe & Wilson, *supra* note 36, at 22.

<sup>49</sup> See DAVID EPSTEIN & SHARYN O’HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 11, 75, 77–78, 131–33 (1999) (finding less delegation during periods of divided government in the United States).

<sup>50</sup> See *id.* at 81, 153–58; Volden, *supra* note 36, at 187.

<sup>51</sup> See HUBER & SHIPAN, *supra* note 36, at 16; EPSTEIN & O’HALLORAN, *supra* note 49, at 78–79 (model concluding that increasing divergence of politician preferences from bureaucratic preferences means less delegation and less discretion); Moe & Wilson, *supra* note 36, at 39–41 (arguing that in the United States environmental groups responded to President Reagan’s efforts to limit environmental regulation by getting Congress to impose strict statutory requirements on EPA). If the President has veto power over legislation, this can make it more difficult for the legislature to try and reduce agency discretion compared to a political structure where the President

On the other hand, in a parliamentary system, the head of the executive (e.g., a prime minister) is determined by the elections for the legislature or parliament. There is therefore a close political relationship between the head of the executive and the majority party in a parliament.<sup>52</sup> Thus, at least in many circumstances, the possibility for “bureaucratic drift” is much lower in a parliamentary system than a presidential one.<sup>53</sup> This is particularly true for parliamentary systems that have generally had single-party majority governments, rather than minority or coalition governments.<sup>54</sup>

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is independently elected but has no veto. As noted above, the President will have an institutional incentive to retain discretion. Craig Volden, *A Formal Model of the Politics of Delegation in a Separation of Powers System*, 46 AM. J. POL. SCI. 111 (2002); HUBER & SHIPAN, *supra* note 36, at 103. However, the President might be willing to trade off some discretion in return for more favorable substantive policy outcomes. Volden, *supra* note 36. In addition, there may be occasions where both the President and the legislature have an incentive to reduce agency discretion to control against future “coalitional drift.”

In comparing a Westminster-style parliamentary system like Canada with a presidential system where the President has a legislative veto, like the United States, there are two countervailing factors. The separate election of the President in the United States creates more possibility for “bureaucratic drift” and therefore more incentive for the legislature to restrict agency discretion; the existence of the presidential veto in the United States makes it harder for the legislature to enact statutes restricting discretion (note, however, that the presidential veto adds another veto point, making legislation that much more durable.).

<sup>52</sup> In general, the literature indicates that the prime minister or cabinet is the dominant player in the relationship between the head of the executive and the majority in parliament. TSEBELIS, *supra* note 27, at 93–94; Daniel Diermeier & Razvan Vlaicu, *Executive Control and Legislative Success*, 78 REV. ECON. STUD. 846 (2011). This is because the government can make votes on legislation a vote of confidence on the government; if the legislation fails, then the government falls; this creates a powerful incentive for the majority in parliament to vote for the government’s bill. TSEBELIS, *supra* note 27, at 107; Daniel Diermeier & Timothy J. Feddersen, *Cohesion in Legislatures and the Vote of Confidence Procedure*, 92 AM. POL. SCI. REV. 611 (1998).

<sup>53</sup> See Moe, *supra* note 36, at 241; Moe & Caldwell, *supra* note 36, at 177–78. The main exceptions to this generalization are coalition governments—where different parties may control different ministries, allowing for some drift between the policy preferences of a ministry controlled by one party and the preferences of the overall coalition—and minority governments. See TSEBELIS, *supra* note 27, at 78–79 (single-party parliamentary government has one veto player; coalition governments in parliaments have more than one veto player); HUBER & SHIPAN, *supra* note 36, at 16 (finding more detailed legislation for minority governments in parliamentary systems); EPSTEIN & O’HALLORAN, *supra* note 49, at 185 (stating that there will be more policy conflict between the legislature and agencies in coalition or minority parliamentary governments).

<sup>54</sup> In the context of coalition, multi-party governments in parliamentary systems, there is the possibility that implementation or enforcement of the law by a ministry led by one party will diverge significantly from the preferences of the coalition as a whole, or of other parties in the coalition. However, coalition, multi-party governments have a number of other tools that they can use to address this kind of bureaucratic drift besides enactment of statutes that significantly constrain agency discretion. One option is to place members of other parties in senior positions within an individual ministry as a check on the leadership. Another option is the threat of withdrawal from the coalition government by parties that are unhappy with implementation; this *ex post* oversight tool can be very effective. Indeed, a comparative study of administrative procedures across parliamentary and presidential systems found that few parliamentary systems imposed

The possibility that the executive may have different policy preferences than the legislature also means the legislature is more likely to recruit third parties—e.g., courts and private litigants—to monitor and enforce agency performance without the risk of executive interference.<sup>55</sup> Thus, in presidential systems we would expect that on average legislatures have a greater ability to impose lasting specific statutory constraints—because of more veto points—and a greater desire to do so—because of the possibility of bureaucratic drift.<sup>56</sup>

There are a few caveats to these general features. More veto points will generally mean that any legislation is more durable, but also that there will generally be less legislation passed. Thus, the implications of veto points for a particular policy area will depend in part on a balance between whether longer-lasting, more durable, more specific, and fewer statutes are “better” than shorter-duration, more general, and more frequently enacted statutes. Specific and detailed statutes likely require more resources and capacity on the part of legislatures, meaning that part-time or poorly informed legislatures are more likely, on average, to provide broad delegations to agencies despite the problem of bureaucratic drift.<sup>57</sup> Likewise, legislatures are more likely to delegate broad powers to an agency if the issue is complicated or difficult to predict because the costs of information acquisition are high.<sup>58</sup> Because, however, we are comparing laws within the same policy area, this issue is not relevant for our study.

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significant procedural constraints on rulemaking by agencies, even where those systems had a history of multi-party coalitional governments. Jensen & McGrath, *supra* note 30, at 656.

<sup>55</sup> See Tom Ginsburg & Robert A. Kagan, *Institutionalist Approaches to Courts as Political Actors*, in *INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES* (Tom Ginsburg & Robert A. Kagan eds., 2005); FARHANG, *supra* note 40, at 16, 19 (legislature-executive conflicts also drive the use of private enforcement because legislature is suspicious of executive implementation). See also *id.* at 36 (arguing that Congress used private enforcement of law against other private actors because of desire to avoid executive branch interference); Farhang, *supra* note 41, at 821 (same).

<sup>56</sup> Moe, *supra* note 36, at 241; Moe & Caldwell, *supra* note 36, at 177–78. Bicameral legislatures increase the number of veto points, and therefore make any legislation more durable. However, this will also often reduce the amount of legislation. TSEBELIS, *supra* note 27, at 149.

<sup>57</sup> See HUBER & SHIPAN, *supra* note 36, at 100, 157 (finding from study of U.S. state laws that legislative capacity is an important factor and that a minimum amount for conflict over policy between politicians and bureaucrats is needed to produce reduced discretion). Lack of legislative capacity may explain why many presidential political systems in Latin America do not have detailed legislative statutes. Eaton, *supra* note 43.

<sup>58</sup> See EPSTEIN & O'HALLORAN, *supra* note 49, at 75, 85, 230; Potoski, *supra* note 36, at 623 (study of delegation by U.S. state legislatures to state air pollution control agencies finds that increased issue complexity means decreased use of procedures to constrain agency implementation); Lucy Drotning & Lawrence S. Rothenberg, *Predicting Bureaucratic Control: Evidence from the 1990 Clean Air Act Amendments*, 21 L. & POL'Y 1 (1999); HUBER & SHIPAN, *supra* note 36, at 37–38, 78–79 (noting this hypothesis and finding that increased complexity leads to increased discretion in state legislation in United States).



Additionally, legislatures are more likely to enact specific and detailed statutes if they are concerned that courts will be creative in their interpretation of those statutes. For instance, there is some evidence that in common law countries, where courts have more power or desire to impose a broad range of interpretations on statutes, legislatures use more restrictive statutory language to constrain courts.<sup>59</sup> Finally, the nature of the party system will also affect legislation. Since federal systems tend to have more veto points<sup>60</sup> and more potential for policy conflicts among various governmental units, disciplined parties may have more desire and ability to enact specific and detailed statutes.<sup>61</sup>

### *B. Comparing the United States and Canada*

A case study comparing federal environmental law in Canada and the United States is particularly helpful for understanding how presidential versus parliamentary systems impact environmental lawmaking. These institutional differences can be distinguished from the many characteristics shared by the two countries: both countries promulgate environmental law within strong federal systems, with significant and enforceable constraints on federal-level power, and with major powers reserved for the state or provincial level of governance. Both have first-past-the-post electoral systems, written constitutions, and relatively independent judicial systems that can provide significant review of executive and legislative actions. Both are rich democracies, with national legislatures that have significant capacity.<sup>62</sup> Both have organized environmental movements.<sup>63</sup> Both drew heavily from their British colonial background for their common law systems and for their cultural and political contexts. Lastly, both have a predominantly capitalist economic system.

Despite these similarities, there are structural differences in Canada and the United States, namely the division of legislative power in the environmental context between the federal government and state or provincial governments. Understanding those differences is essential to

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<sup>59</sup> HUBER & SHIPAN, *supra* note 36, at 193–94, 200–02.

<sup>60</sup> See TSEBELIS, *supra* note 27, at 136.

<sup>61</sup> See EPSTEIN & O'HALLORAN, *supra* note 49, at 83 (finding that more disciplined majority parties delegate less authority to agencies in U.S.).

<sup>62</sup> There are some claims that parliamentary systems may, on average, have more legislative capacity than presidential systems because in parliamentary systems it is cabinet ministers who generally draft legislation and they have lots of resources and information. See HUBER & SHIPAN, *supra* note 36, at 72, 187–88. This might offset the fact that Canada is a much smaller country than the United States.

<sup>63</sup> We explore possible distinctions between the U.S. and Canadian environmental movements, and the implications of those distinctions for our analysis, below.

effectively comparing environmental legislation at the federal level between the two countries.

Canada, like the United States, confers jurisdiction to legislate in relation to the environment onto both the federal and provincial/state governments. However, in Canada, jurisdiction to legislate on the environment is constrained to the areas over which the federal or provincial government may legislate pursuant to the *Constitution Act*, 1867. Legally, the provinces have clearer jurisdiction to address environmental matters, owing to their jurisdiction over property and civil rights and the fact that the provinces own most of the natural resources. The federal government can only promulgate environmental laws in relation to its functional powers such as, Navigation and Shipping; or in relation to its conceptual powers, such as Criminal Law or Trade and Commerce.<sup>64</sup> This constitutional arrangement has the effect, as described by leading Canadian commentators, of creating a patchwork of federal powers superimposed on a carpet of provincial powers.<sup>65</sup> Reluctance by the federal government to broadly interpret this jurisdiction has meant that Parliament has not used its powers to play as strong a role as the U.S. federal government has in providing national standards or in implementing international treaty commitments.<sup>66</sup> However, the Canadian federal government's jurisdiction to make decisions based on the integration of social, economic, and environmental considerations is far broader than commonly understood or currently exercised.<sup>67</sup>

In contrast, the federal government in the United States has imposed broader and more far-reaching environmental standards, primarily relying on the constitutional grant of power for the U.S. Congress to legislate with respect to interstate commerce and navigable waters. In addition, the federal government owns about one-third of the land in the United States, and it has near plenary legislative power with respect to those lands (and the natural resources on them) pursuant to the Property Clause.<sup>68</sup>

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<sup>64</sup> Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), reprinted in R.S.C. 1985, app II, no 5 (Can.). This distinction between conceptual and functional powers is made by Paul Emond, *The Case for a Greater Federal Role in the Environmental Protection Field: An Examination of the Pollution Problem and the Constitution*, 10 OSGOODE HALL L.J. 647 (1972); and referred to in the landmark decision, *Friends of the Oldman River Society v. Canada (Minister of Transport)* [1992] 1 S.C.R. 3 (Can.).

<sup>65</sup> MEINHAD DOELLE & CHRIS TOLLEFSON, ENVIRONMENTAL LAW: CASES AND MATERIALS (2nd ed. 2013).

<sup>66</sup> KATHRYN HARRISON, PASSING THE BUCK, FEDERALISM AND CANADIAN ENVIRONMENTAL POLICY (1996).

<sup>67</sup> MacLean et al., *supra* note 16.

<sup>68</sup> U.S. CONST. art. IV, § 3, cl. 2. See *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (stating that federal power over public lands is "without limitations").

Because U.S. federal environmental law generally has a broader scope than Canadian federal environmental law, we focus our comparison in this study on the areas where the countries are most congruent in their relative coverage. Within those areas, the differences in political structure might lead to substantial differences in legal content and frameworks. After all, within the areas where the Canadian Parliament does have the relevant powers, Parliament retains the option to (for instance) create detailed legislation that binds the executive, as long as it pertains to its head of constitutional power. In order to conduct this comparison, we provide some background information regarding both the Canadian and U.S. political systems so we can precisely identify the similarities and differences of the two political systems and develop our hypotheses.

In the United States, the executive branch is elected separately from the legislative branch; the President and Cabinet secretaries cannot be members of Congress.<sup>69</sup> Cabinet secretaries do not report to Congress; the secretaries answer only to the President and the President directly answers only to the American electorate.<sup>70</sup> This separation of powers means that each branch must often negotiate with an independent, co-equal branch in order to accomplish major action, whereas a parliamentary system is run by one body. For example, in a presidential system the executive must work with independent power centers in Congress to gain passage of the budget that funds the executive; without enactment of a budget, the executive branch (except for emergency functions) has to shut down. Congress frequently revises presidential budget proposals substantially, both upwards and downwards. Traditionally, Congress has also “earmarked” budgetary expenditures for particular purposes or locations, often over the executive’s objection. Furthermore, presidential proposals for major legislation rarely are enacted without substantial revision by Congress. In fact, Congress often initiates proposals for legislation that run counter to the agenda or priorities of the executive. Indeed, even when Congress and the White House are controlled by the same party, it is quite common for

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<sup>69</sup> U.S. CONST. art. I, § 6, cl. 2.

<sup>70</sup> Presidential appointees to high level government positions, including cabinet positions, do require confirmation by the Senate. U.S. CONST. art. II, § 2, cl. 2. High-level government appointees, including the President, can be removed from office through impeachment proceedings by the Congress; this requires a majority-vote in the House of Representatives and a two-thirds vote in the Senate. Impeachment is exceedingly uncommon and rarely is an effective tool for Congress to constrain executive action. Some American administrative agencies are relatively insulated from presidential control by vesting control in a multi-member board that requires a minimum number of members from opposing political parties, and/or by restricting the President’s ability to remove members or heads of agencies except for cause. *See* JERRY MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 25–28 (6th ed. 2009).

congressional leaders to use the President as a political foil, questioning his priorities and asserting their institutional prerogatives.

On the other hand, separation of powers can also mean that one branch can sometimes pursue unilateral action even without another branch's support. The President often has leeway to take administrative action even when a majority of Congress might otherwise disapprove. Within the realm of foreign affairs, for example, courts have held that the President has substantial freedom to make major decisions without congressional approval or judicial review. Congressional efforts to constrain presidential foreign affairs powers (such as through the War Powers Act) have generally had limited effect. Even for domestic affairs, independent presidential power is significant. American courts have generally held that, absent specific statutory language constraining an agency's discretion, the executive has broad leeway to interpret and apply the law. And, as noted above, because the agency heads are (in general) solely responsible to the President, they will more often implement the orders of the President, not Congress.<sup>71</sup> Congress, of course, can attempt to constrain agency discretion but this requires the passage of legislation subject to presidential veto. Thus, it is difficult for Congress to force the executive to do something the executive does not wish to do, absent rare supermajority action in Congress or the ability of Congress to constrain the executive's discretion as part of an overall package deal.<sup>72</sup>

In Canada, by contrast, the executive branch does not have to negotiate with the legislature when its party holds a majority of the seats in Parliament. It exercises almost complete control over the promulgation of new legislation and has extensive authority over administrative decision-making. As discussed in more detail in the following paragraphs, this broad authority stems largely from the manner by which Canada's constitutional conventions vest power in the Queen's Privy Council, the manner in which the prime minister is elected as the leader of the party in power, and also extreme party discipline. The effect of this system is that the election of the legislature determines the control of the executive but, once elected as a majority party, the executive then controls the legislative process.<sup>73</sup> Thus, these forces have fostered a

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<sup>71</sup> Again, independent agencies (may) be an exception to this general statement.

<sup>72</sup> Such as, for example, the passage of an appropriations bill in which the executive accepts constraints on agency discretion in return for congressional approval of the executive's budget.

<sup>73</sup> The Canadian system of government comprises three parts: the Crown (the Queen and the Governor General her representative in Canada), Parliament (including the Crown, the House of Commons and the Senate), and the Judiciary. The relationship between these three parts is determined by the Canadian constitution, which itself consists of two parts: (i) written constitutional law; and (ii) constitutional convention (or unwritten rules and principles).

system in which the executive and legislative branches of government are unified.

The Canadian structure is largely determined by the written constitution, the *Constitution Act, 1867*, which vests executive powers in the Queen.<sup>74</sup> The Queen's authority is then exercised by the Governor General on the advice of the Queen's Privy Council for Canada.<sup>75</sup> The *Constitution Act, 1867* also provides for a Parliament of Canada, consisting of the Queen, the Senate (also known as the upper chamber or upper house) and the House of Commons. The House of Commons is the body that is elected by the citizens whereas Senate members are appointed. The written constitution proscribes the legislative powers of the federal and provincial governments and outlines the power of the Queen to appoint the prime minister and ministers, who operate as the active committee of the Queen's Privy Council for Canada and are commonly referred to as the "government," or "Cabinet."<sup>76</sup> However, the written constitution of Canada does not provide a full picture of the rules that govern the formation and running of government. Many of the rules that govern how ministers exercise responsible government power derive from constitutional conventions, which are unwritten.<sup>77</sup>

Pursuant to Canada's unwritten conventions, the prime minister and Cabinet ministers are expected to be elected members of the House of Commons and are elected in the same way as any other member of Parliament. Citizens cast an individual vote for a candidate who is most often identified with a particular political party, each of which has a designated party leader. Members of the political party ("MPs") elect the party leader, who, once elected, becomes the prime minister. The prime minister and government are responsible to the House of Commons for the exercise of the powers of government and govern only as long as they have the confidence of a majority of elected MPs.<sup>78</sup> The government,

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<sup>74</sup> Constitution Act, 1867, 30 & 31 Vict., c. 3, § 9 (U.K.), reprinted in R.S.C. 1985, app II, no 44 (Can.) ("The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.").

<sup>75</sup> Constitution Act, 1867, 30 & 31 Vict., c. 3 § 11 (U.K.), reprinted in R.S.C. 1985, app II, no 44 (Can.) ("There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor General.").

<sup>76</sup> *Id.*

<sup>77</sup> ANDREW HEARD, CANADIAN CONSTITUTIONAL CONVENTIONS: THE MARRIAGE OF LAW AND POLITICS (2d ed. 2014).

<sup>78</sup> Whether a government has the confidence of the majority can come into question in several ways. "Confidence" can be determined by the government declaring a vote in the House to be an issue of confidence; by the Opposition moving a motion of non-confidence in the government; and by the status of legislation that comes before the House, since certain votes, for instance on items such as the Budget, are always deemed to be votes of confidence. If the government loses a vote of

including the prime minister, generally must call an election if it loses that confidence.

One might think that the shared impact of elections on the executive and legislature would enable MP's to influence the prime minister on policy and legislation. However, the requirement to maintain the confidence of the majority works in combination with several other conventions to centralize the prime minister's control of the government, ensure party discipline and thereby unify executive and legislative power.<sup>79</sup> For these reasons, explored in more detail in the following paragraphs, political parties in Canada have historically been more disciplined than those in the United States.<sup>80</sup>

First, unwritten conventions dictate that the prime minister has the power to declare elections, dissolve Parliament, choose Cabinet ministers, and award a wide range of political appointments. Accordingly, ministers owe their allegiance to the prime minister, who can promote or demote them, ask for their resignation, and, if necessary, dismiss them from Cabinet altogether. Those MP's that assume independent policy positions from the prime minister also risk being excluded from participating in any active service aside from voting in the legislature. Short terms in office and regular changes in elected representatives means that the continual stream of new MPs elected to the House have little experience in the ways of the House, minimal knowledge of government and its operations, and are therefore prone to be subservient to their parliamentary party leaders.<sup>81</sup> These powers give the prime minister significant leverage to control the promulgation of legislation when he or she has a majority.

Second, the prime minister is also independent from the party caucus, the members of a party who hold a seat in Parliament or Senate. Since the prime minister is chosen and can only be removed as head by the party association, which comprises all members of the party, whether or not elected, he is not directly accountable to the elected members in the

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confidence, the Prime Minister must either resign, which entails the resignation of the entire ministry, so that a new government can be formed, or hold a new general election. If a new general election is held, the government does not resign but stays in office pending the outcome of the election.

<sup>79</sup> For analysis of the shift in control to the Prime Minister, see DONALD SAVOIE, *GOVERNING FROM THE CENTRE* (1999) and COURT GOVERNMENT AND THE COLLAPSE OF ACCOUNTABILITY IN CANADA AND THE UNITED KINGDOM (2008) [hereinafter SAVOIE, *COURT GOVERNMENT*].

<sup>80</sup> Parliamentary systems generally may have more disciplined parties because the success of legislation can be tied, through the use of votes of confidence, to the continuation of the government. Diermeier & Feddersen, *supra* note 52.

<sup>81</sup> Peter Aucoin et al., *Responsible Government: Clarifying Essentials, Dispelling Myths and Exploring Change*, (Canadian Centre for Management Development, 2004) at 33.

legislature. As long as the party association supports the prime minister, the opinions of the other elected members have little persuasive impact.

Third, by exercising control over the voting patterns of party members, the prime minister acts as head of a governing party with a working majority that can pass most legislation, at least through the House of Commons, and block any motions of non-confidence that may be raised by the opposition. The opposition does have a significant opportunity for input on government bills being considered in legislative committees and throughout the question period. These committees can hold extensive hearings on a bill and can recommend amendments. However, the composition of the committees follows the composition of the House, which means that a governing party has a majority on each committee and likely chairs the committee.<sup>82</sup> Because government practice is generally to require party discipline by committee members, this usually means that governmental control over committees will often mirror its control in Parliament.<sup>83</sup>

Moreover, the prime minister also exercises control over the policymaking and regulatory powers of the ministers in Cabinet. While ministers are responsible to the House of Commons the prime minister alone has the constitutional authority to dismiss a minister. The House of Commons can call for a minister's resignation, even censure a minister, but has no constitutional powers either to force a minister to resign or to require the prime minister to dismiss a minister. Nor can the House impeach a minister. While the inherent value of consistency and regional representation might dissuade a prime minister from exercising this authority, a prime minister can exercise significant influence over Cabinet ministers by virtue of this power.<sup>84</sup>

Lastly, while neither the prime minister nor the dominant political party has any direct means of influencing the voting patterns of Senate members, the Senate has traditionally voted in line with partisan affiliation. Criticized since inception,<sup>85</sup> the Senate is regularly labeled as

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<sup>82</sup> Except for the Public Accounts Committee, which is chaired by a member from the official opposition.

<sup>83</sup> Aucoin et al., *supra* note 81.

<sup>84</sup> Paul G. Thomas, *The Influence of Standing Committees of Parliament on Government Legislation*, 3 LEGIS. STUD. Q. 683, 686 (1978) ("It is generally recognized that for a variety of reasons the prime minister and the cabinet tend to dominate the formal, parliamentary portions of the policy process. A virtual monopoly of the relevant information, access to outside interests, the capacity to manipulate caucus, and control over the legislative agenda all seem to imply decisive power for the cabinet and appear to justify the charge that the House of Commons is merely a "rubber stamp" for government proposals.").

<sup>85</sup> CLAIRE HOY, NICE WORK: THE CONTINUING SCANDAL OF CANADA'S SENATE 34 (Toronto: M&S, 1999).

ineffective, unaccountable, and lacking in legitimacy.<sup>86</sup> Appointments based on partisanship, patronage, and the capacity to raise money for the party, combined with close party control and onerous obligations to constituencies, have undermined the Senate's role.<sup>87</sup> Furthermore, the fact that senators are unelected and meant to represent the interests of the political parties that appointed them rather than the regions from which they are appointed means that they rarely check power in law-making based on direct representation. As a result, the upper house in Canada is widely identified as weaker than the upper house in the United States.<sup>88</sup>

In contrast with Canada, it is more difficult to maintain a high level of party discipline between the President and Congress in the United States, precisely because the President and members of Congress are elected on different ballots, by different electorates, and often at different times. Because of these differences, the President and members of Congress necessarily face different political incentives that will pull them apart, even when they are members of the same party. That is not to say that other factors may result in significant party discipline even between the White House and Congress at times, but simply that the structure of the U.S. presidential system makes party discipline more difficult to maintain.<sup>89</sup>

Consistent with the theoretical political science and comparative law literature, a key difference between the United States and Canadian system is a difference in veto points. In Canada, constitutional structure and party discipline ensures that the leader of the winning electoral party has the ability to both control implementation of statutes (executive authority) and control the proposal and enactment of legislation (legislative authority). In the United States, neither the winner of elections for President nor of those for Congress obtain the same kind of unilateral control. Both legislation and executive actions require some level of agreement between both parties, though the President probably has more unilateral power in the context of executive action (with the exception of budgeting). Moreover, the different electoral pressures that the members of the executive and legislature face make maintenance of significant party discipline much more difficult.

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<sup>86</sup> C.E.S. Franks, *The Senate and Its Reform*, 12 QUEEN'S L.J. 454, 464 (1987).

<sup>87</sup> For discussion and comparison between Canada, Australia, the U.K. and the United States, see RESTRAINING ELECTIVE DICTATORSHIP: THE UPPER HOUSE SOLUTION? (Nicholas Aroney et al. eds., 2000).

<sup>88</sup> Recent introduction of elections for Senate membership in Australia provide contrasting evidence of institutional arrangements. *Id.*

<sup>89</sup> *Id.*



Consistent with this is the fact that, in Canada, the unification of legislative and executive authority in a parliamentary system ensures that any gap in policy preferences between members of Parliament and the leadership of the executive must necessarily be small, or at least will not be expressed in legislation. This is because prime ministerial control of the proposal and enactment of legislation through party discipline prevents the passage of any legislation that would be repugnant to the executive.<sup>90</sup> Otherwise, if a difference in opinion on policy matters between a majority of members of Parliament and the prime minister becomes large enough, a vote of confidence would be called that would force a new election.<sup>91</sup> A recent example of such a vote arose in Canada where members of Parliament declared a lack of confidence in the minority government led by Stephen Harper in 2011, thereby forcing an election.

In contrast, in a presidential system like the United States, major gaps between the policy preferences of the executive and the legislature are likely to influence legislation and will not, indeed cannot, result in the fall of the executive (short of the rarely used tool of impeachment). Under this system, “divided government” in which one party controls the legislature and another the executive is possible, while it is generally impossible in a parliamentary system like Canada.<sup>92</sup> Furthermore, because the President has little institutional control over the legislative process in Congress, and because of the relative lack of party discipline between the President and Congress, even without “divided government,” the gap in policy preferences that can exist between the executive and a majority of the legislature can be much larger in a presidential system than a parliamentary system.

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<sup>90</sup> SAVOIE, *COURT GOVERNMENT*, *supra* note 79. Exceptions to this general rule would be in those rare cases of a minority government, where the Prime Minister’s party only controls a narrow plurality of seats in the House.

<sup>91</sup> Votes of conscience, while extremely rare in Canada, represent another possible circumstance in which the policy preferences of the executive and the legislature might diverge. The use of votes of conscience has largely been restricted to matters where lack of support for the bill will not be interpreted as undermining the support of the majority of the Members of the House of Commons for the party. HOUSE OF COMMONS, *PROCEDURE AND PRACTICE* (Robert Maleau & Camille Montpetit eds., 2d ed. 2009).

<sup>92</sup> The closest possible scenario in Canada is that of a minority government, where the elected government controls the executive but not the legislature.

### III. TESTING HYPOTHESES ABOUT HOW ENVIRONMENTAL LAW MIGHT DIFFER ACROSS POLITICAL SYSTEMS

#### *A. Developing Hypotheses*

Based on the theoretical literature and the differences we have elaborated above between the United States and Canada, we can develop a range of testable hypotheses about how environmental law should differ between the two countries. First, we would expect Canada's parliamentary system to legislatively impose on the current executive fewer detailed substantive standards and fewer constraints on agency decision-making and procedures. With unified control of the executive and the legislature and strong party discipline, policy preferences between the executive and legislature will be closely aligned. Accordingly, there is less reason for the legislature to try to control the executive through legislation (assuming the executive would even allow it in an executive-dominated parliamentary system like Canada's).

Second, we would expect Canada's parliamentary system to provide fewer restrictions on future executives through legislation, again either through detailed substantive standards or procedural constraints on agency decision-making and procedures. That is not because there is likely to be a close policy alignment between a current legislature and future executives, but instead because of the relative difficulty of imposing such future constraints. Parliamentary systems generally make the passage of legislation much easier than presidential systems because there are fewer veto points. Thus, if legislation is perceived to obstruct the policy goals of a future executive, it should be relatively easier to enact changes to eliminate those obstacles.<sup>93</sup>

Finally, for the same reasons, Canada's legislature will be less likely to use citizen suits or public participation to constrain executive action. Again, the legislature will have little reason to constrain a current executive because their policy preferences will generally be aligned. As for future executives, any citizen suit or public participation requirement

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<sup>93</sup> This is because the policy preferences of the future executive and future legislature are generally aligned. Of course, in an executive-dominated parliamentary system like Canada's, it will be that much easier for the executive to change the law to eliminate obstacles. While it is a common statement that "one Congress cannot bind a future Congress," in fact legislatures in presidential systems are more able to bind future legislatures than legislatures in parliamentary systems. Because of the multiple veto points in a presidential system, it is much more difficult to enact legislation. That means that even if a future legislature strongly disagrees with legislation passed by a current legislature, it will be more difficult for that future legislature to enact changes to the legislation. In contrast, in a parliamentary system it is relatively easy for a future legislature to enact changes to legislation it disagrees with.

that becomes a significant obstacle to the executive can be easily eliminated through legislative changes.

### *B. Testing Hypotheses*

While there has been some effort to test whether legislation in presidential systems is more detailed, more likely to constrain executive agencies, and more reliant on public participation or judicial review, those efforts have been relatively limited.<sup>94</sup> Moreover, they have generally not focused on the particular area of environmental law.<sup>95</sup> We therefore seek to provide a systematic review of how environmental law might differ across two countries that—other than their political systems—share many common attributes. Our review will help inform the debate as to whether and how political systems shape the structure of law in the environmental law context.<sup>96</sup> We first provide a qualitative overview of the general characteristics of U.S. and Canadian environmental law. Where appropriate, we also provide some sense of the broader legal context in both countries to help understand the comparisons we are making. We then do a quantitative comparison of specific environmental statutes in both countries.

#### *1. Canadian Environmental Law: Vague and Authorizing*

Because the environment touches on many federal and provincial areas of jurisdiction, and statutes enacted by the two levels of government cannot conflict, the scope and application of federal legislative authority

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<sup>94</sup> See Robert A. Kagan, *Fragmented Political Structures and Fragmented Law*, *JUS POLITICUM: REVUE INTERNATIONALE DE DROIT POLITIQUE* no. 4 (2010) (describing the current quantitative evidence as “meager”). Some projects have focused primarily on U.S. laws, with limited comparative perspectives. See, e.g., EPSTEIN & O’HALLORAN, *supra* note 49; FARHANG, *supra* note 40. Other projects have done comparative studies, but they have been fairly limited in the number of statutes that they have examined, in examining only parliamentary systems of government, and/or in the number of characteristics of those statutes that they have examined, most frequently looking simply at total length or word count of the statutes. See, e.g., Cooter & Ginsburg, *supra* note 36, at 11–13 (comparing lengths of statutes across a number of areas of law, including some pollution control statutes, for the United States, U.K., and Japan); HUBER & SHIPAN, *supra* note 36, at 173–76 (doing comparisons of the length of labor laws across nineteen countries with parliamentary systems, with limited close analysis of select provisions in those statutes); William Dale, *Statutory Reform: The Draftsman and the Judge*, 30 *INT’L & COMP. L.Q.* 141 (1981) (comparing copyright law length across the U.K., France, Sweden and Germany). For a summary of the qualitative evidence that has been developed, see KAGAN, *supra* note 7.

<sup>95</sup> The primary exception is Cooter and Ginsburg who examined pollution control statutes as part of their overall analysis of multiple areas of law, but as noted above, they only looked at statutory length. Cooter & Ginsburg, *supra* note 36. They did also examine the length of the associated regulations implementing the statutes.

<sup>96</sup> There are potentially broader implications of our analysis as well. It is plausible that the patterns we observe in the environmental law context might also apply in other areas of law.

is complex. The federal government in Canada exercises its authority through several key statutes, including the CEAA<sup>97</sup> and the Fisheries Act,<sup>98</sup> and the regulations enacted to support them. However, Canadian environmental law is generally characterized by the great deal of discretion granted to the federal ministries charged with implementing legislation. Laws governing environmental harm consequently take the form of “enabling” statutes, allowing the Governor in Council or the relevant minister to establish the regulatory requirements of environmental regimes.<sup>99</sup> For instance, pursuant to § 43(1) of the Fisheries Act,<sup>100</sup> the Governor in Council is authorized, but not required, to make regulations carrying out the purpose and provisions of the Act. While the Act details matters over which regulations may be made, the authority is broad and lawfully limited only by the purpose of the Act. Where statutes do not confer a blanket authority to regulate in furtherance of an act’s goals, it will specify for which sections or issues regulations may be drafted. For instance, the Governor in Council may regulate the use of any substance on the List of Toxic Substances registered pursuant to the Canadian Environmental Protection Act of 1999 (“CEPA”)<sup>101</sup> or make regulations prescribing the type and quantity of waste that may be deposited pursuant to the Arctic Waters Pollution Prevention Act.<sup>102</sup>

As expected, regulations made pursuant to these kinds of authorizing statutes provide the detail necessary to implement the purposes of the statutes that enable them. To this end, the regulations will establish permissible behavior, such as setting emission levels, establishing methods for testing, and creating criteria for permits or approvals.<sup>103</sup> However, while these types of criteria implicitly constrain the cases in which the ministries can act, the regulations do not expressly mandate government action, as is often the case in the United States. With some

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<sup>97</sup> CEAA, S.C. 2012, c. 19 (Can.).

<sup>98</sup> Fisheries Act, R.S.C. 1985, c F-14 (Can.).

<sup>99</sup> The authority to make regulations under any Canadian legislation is necessarily subject to various procedures required for the promulgation of law. For a brief overview of the process, see Paul Salembier, *Understanding the Regulation Process*, 25 CANADIAN PARLIAMENTARY REV. 13 (2002).

<sup>100</sup> The Fisheries Act is the principal federal statute that manages Canadian fisheries resources. The Act is mainly aimed at regulating fishing but also protects fish habitat through the protection of waters that affect fish and habitat. Fisheries Act, R.S.C. 1985, c. F-14 (Can.).

<sup>101</sup> CEPA, S.C. 1999, c. 33 (Can.). The goal of CEPA is to regulate pollution prevention for the purposes of protecting the environment, human life, and health. It achieves this through the regulation of toxic substances and hazardous waste.

<sup>102</sup> Arctic Waters Pollution Prevention Act, R.S.C. 1985, c. A-12.

<sup>103</sup> For example, the Metal Mining Effluent Regulations, SOR/2002-222 (Can.) passed pursuant to § 36(5) of the Fisheries Act, which set allowable limits for various deleterious substances (e.g., cyanide, copper) and also set a schedule of waters that may be used as tailings impoundment areas, as amended from time to time.

limited exceptions, environmental regulations in Canada do not create deadlines or dates by which governmental decisions must be made, standards imposed, or permits issued.<sup>104</sup> Finally, because they are regulations, they can be amended by the person designated in the relevant statute, most often the Governor in Council, the Minister or an administrative agency in accordance with the Statutory Instruments Act.<sup>105</sup>

For example, the CEAA<sup>106</sup> states that the minister may make regulations for a list of enumerated purposes. These powers include but are not limited to defining designated projects subject to assessment, designating a physical activity or class of activities, prescribing information that must be contained in a description of a project and anything respecting the registry (a website in which records related to assessments are posted).<sup>107</sup> The CEAA references only three related regulations. Those are related to costs, the designation of physical activities, and informational requirements of proponents.<sup>108</sup> To the degree that the designation of physical activities limits those activities that would trigger an assessment, they arguably limit the regulator's discretion. However, the regulation does not provide more detailed factors that must be met by the regulatory authority in structuring project review as well as final project approval than those already outlined in the statute. In this sense, the regulations set standards but do not generally do the work of detailed statutes like those in the United States that seek to constrain regulatory authority through mandatory language and deadlines.

Moreover, Canadian environmental law generally confers sole discretion in the minister to authorize through regulations what would

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<sup>104</sup> Exceptions to this general trend exist in the enabling statutes. One notable exception is CEAA, S.C. 2012, c. 19 (Can.), which attempted to address industry frustration with the pace of assessment by setting the number of days within which the agency must post information, *id.* at § 9, undertake screenings, *id.* at §10, and assessments, and the minister must make final decisions, *id.* at § 27(2). A second exception is SARA, S.C. 2002, c. 29 (Can.), which establishes a number of days by which governmental action must be undertaken. The related regulations, however, do not establish similar responsibilities for the government.

<sup>105</sup> Statutory Instruments Act, R.S.C. 1985, c. S-22 (Can.). For an excellent plain language overview, see *Guide to Making Federal Acts and Regulations: Part 3 Making Regulations*, PRIVY COUNCIL OFFICE, <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=legislation/part3-eng.htm>.

<sup>106</sup> CEAA, S.C. 2012, c. 19 (Can.). The CEAA and its regulations establish the legislative basis for the federal practice of environmental assessment in Canada.

<sup>107</sup> *Id.* § 84

<sup>108</sup> Cost Recovery Regulations, SOR/2012-146 (Can.); Regulations Designating Physical Activities, SOR/2012-147 (Can.); Prescribed Information for the Description of a Designated Project Regulations, SOR/2012-148 (Can.).

otherwise be considered polluting activities.<sup>109</sup> Thus, the statutes generally set out a series of prohibited activities and establish the procedural requirement to obtain an exemption from a Cabinet minister. For example, until very recently, 2013, the Minister of Fisheries and Oceans had a virtually unfettered discretion to authorize impacts to fish habitat pursuant to § 35 of the Fisheries Act. Amendments to the Act in 2012 added a few factors to be considered, but these are relatively open-ended and arguably retain significant discretion to the minister.<sup>110</sup>

The scope of this power has been considered by the courts and, while ministerial discretion is not totally unfettered, it will not be challenged if a minister stays within the framework of the Act and applies the principles of administrative law in making his decisions with respect to licensing.<sup>111</sup> In the case of the Fisheries Act, numerous regulations set out the conditions under which licenses and permits will be issued. However, they rarely mandate specific executive actions that require the issuance or denial of a permit.<sup>112</sup> Instead, ministerial requirements will be restricted by other laws already in effect, a series of considerations that should be accounted for, or guidelines and other non-binding policy documents like the Canadian Water Quality Guidelines for the Protection of Aquatic Life.<sup>113</sup> Taken together, Canadian environmental law is drafted in vague

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<sup>109</sup> For discussion of recent past changes to the law, see Wood et al., *supra* note 8.

<sup>110</sup> Fisheries Act, R.S.C 1985, c. F-14, § 35 (Can.). Section 6 stipulates the following factors be considered: “(a) the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries; (b) fisheries management objectives; (c) whether there are measures and standards to avoid, mitigate or offset serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or that support such a fishery; and (d) the public interest.” For judicial opinion on the discretion exercised by the Minister pursuant to the Fisheries Act, see *David Suzuki Found. v. Canada* (Fisheries and Oceans), 2010 F.C. 1233, para. 287 (Can. Ott.) (comparing SARA protections with § 35 of the Fisheries Act) [hereinafter *David Suzuki*]. For extensive analysis of § 35 in relation to fish habitat protection, see Martin Olszynski, *From ‘Badly Wrong’ to Worse: An Empirical Analysis of Canada’s New Approach to Fish Habitat Protection Laws*, 28.1 J. Env’tl. L. & Prac. 1 (2015).

<sup>111</sup> *Delisle v. Canada* (Minister of Fisheries and Oceans) (1991), 27 A.C.W.S. (3d) 708 (Can. F.C.T.D.); *David Suzuki*, *supra* note 110.

<sup>112</sup> Ted Schrecker, *Of Invisible Beasts and the Public Interest: Environmental Policy, in ECOSYSTEMS, POLITICS, AND PROCESS* 88–89 (1992); Rainer Knopff & J. E. Glenn, *Courts, Tribunals, and the Environment in Canada, in FEDERALISM AND THE ENVIRONMENT: ENVIRONMENTAL POLICY MAKING IN AUSTRALIA, CANADA, AND THE UNITED STATES* 185, 192 (Kenneth M. Holland et al. eds., 1996). For example, using a standard of reasonableness, the courts have found that as long as responsible authorities follow the statutory process, the Court must defer to their substantive determinations. *Inverhuron (T.D.) & District Ratepayers Ass. v. Canada* (Minister of The Environment) (2001), 273 N.R. 62 (Can. Ott.) (citing *Bow Valley* (1999) 175 F.T.R 122, *aff’d* [2001] F.C. 461 (Can.)). The effect has been to provide broad discretion to elected officials to decide the appropriate scope for assessment. Andrew Green, *Discretion, Judicial Review and the Canadian Environmental Assessment Act*, 27 QUEEN’S L.J. 785 (2001).

<sup>113</sup> See, e.g., Regulations Establishing Conditions for Making Regulations Under Subsection 36(5.2) of the Fisheries Act, SOR/2014-91 § 4(b)(i) (Can.).

terms that leaves the application of legislation to ministerial discretion that is difficult to challenge in the courts.<sup>114</sup> The laws provide what one scholar has called a “maximum flexibility and minimum of mandatory duties.”<sup>115</sup>

## 2. U.S. Environmental Law: Detailed and Constraining

Environmental statutes in the United States differ radically from those in Canada. While Canadian environmental laws enable but do not require the government to take action, the environmental laws of the United States often require mandatory government action. Federal environmental statutes in the United States are characterized by numerous specific, action-forcing requirements that detail how federal agencies and states are to implement them.<sup>116</sup> Major federal environmental statutes such as the Clean Air Act (“CAA”),<sup>117</sup> Clean Water Act (“CWA”),<sup>118</sup> the Resource Conservation and Recovery Act (“RCRA”),<sup>119</sup> the Safe Drinking Water Act (“SDWA”),<sup>120</sup> the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”),<sup>121</sup> the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”),<sup>122</sup> and the Endangered Species Act (“ESA”) <sup>123</sup> have literally dozens or hundreds of specific deadlines mandating that the United States Environmental Protection Agency (“EPA”) or other agencies make certain decisions, impose specific regulations, or issue permits by a set date. Those statutes also impose dozens or hundreds of mandatory duties on agencies requiring them to take action when certain findings are made, ranging from the granting of permits to produce emissions, to delegating permitting programs to state environmental agencies, to listing species for protection under the ESA. In short,

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<sup>114</sup> For further discussion, see Andrew Green, *An Enormous Systemic Problem: Delegation, Responsibility and Federal Environmental Law* 28 J. ENVTL. L. & PRAC. 155 (2016); Bruce Parady, *In Search of the Holy Grail of Environmental Law: A Rule to Solve the Problem*, MCGILL INT’L J. SUSTAINABLE DEV. L. & POL’Y 1, 29 (2005). For similar reflections on Australian environmental legislation, see GERRY BATES, ENVIRONMENTAL LAW IN AUSTRALIA 22 (Butterworths 3d ed. 1993).

<sup>115</sup> DAVID R. BOYD, UNNATURAL LAW, RETHINKING CANADIAN ENVIRONMENTAL LAW AND POLICY 263 (2011).

<sup>116</sup> McCubbins et al., *Administrative Procedures*, *supra* note 34, at 263; FEDERALISM AND THE ENVIRONMENT: ENVIRONMENTAL POLICY MAKING IN AUSTRALIA, CANADA AND THE UNITED STATES 159–84 (Holland et al. eds., 1996).

<sup>117</sup> 42 U.S.C. § 7401 *et seq.* (2012).

<sup>118</sup> 33 U.S.C. § 1251 *et seq.* (2012).

<sup>119</sup> 42 U.S.C. § 6901 *et seq.* (2012).

<sup>120</sup> 42 U.S.C. § 300f *et seq.* (2012).

<sup>121</sup> 7 U.S.C. § 136 *et seq.* (2012).

<sup>122</sup> 42 U.S.C. § 9601 *et seq.* (2012).

<sup>123</sup> 16 U.S.C. § 1531 *et seq.* (2012).

environmental statutes in the United States run hundreds of pages in length in the U.S. Code with detailed specificity that closely constrains executive discretion.<sup>124</sup>

An extreme example is provided in the Federal Insecticide Fungicide and Rodenticide Act (“FIFRA”),<sup>125</sup> the statute that sets the overall framework for regulation of pesticide production, sale, and use in the United States. Section 33(b)(3) of FIFRA includes a table that identifies timeframes by which the EPA is required to complete various actions with respect to pesticide regulation (e.g., processing of an application to register a new active ingredient in a pesticide for crops that will be used for human consumption). This table contains 187 entries—in other words, 187 different mandatory timeframes for actions that EPA must take.<sup>126</sup>

FIFRA is hardly unique in imposing mandates on agencies (though it is exceptional in terms of the quantity of mandates it imposes in a single statutory provision). For instance, the Magnuson-Stevens Act, a federal statute that regulates ocean fisheries outside of state jurisdiction, also imposes strict requirements.<sup>127</sup> While § 303A of the Act sets up a structure for the creation of tradable fishing permits, § 303A imposes four separate requirements of timeframes within which the implementing agency (the National Oceanic and Atmospheric Administration) must make decisions about tradable fishing permit systems.

Statutory provisions often explicate in excruciating detail how agencies must implement their regulatory powers. For instance, § 112 of the Clean Air Act establishes a program for regulating the emissions of hazardous air pollutants from industrial sources.<sup>128</sup> Within § 112 is then a list of 190 different compounds or substances that form the “initial list” that EPA is supposed to regulate.<sup>129</sup>

### *3. Comparing Public Participation and Judicial Review Provisions in the United States and Canada*

Understanding how U.S. environmental law uses more widespread public participation and more searching judicial review requires not just an examination of specific statutory language, but also a more general consideration of administrative law and judicial review in the two

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<sup>124</sup> R. Daniel Kelemen, *Regulatory Federalism: EU Environmental Regulation*, 20 COMP. PERSP. J. PUB. POL’Y 133 (2000).

<sup>125</sup> 7 U.S.C. §136 *et seq.*

<sup>126</sup> 7 U.S.C. § 136w-8.

<sup>127</sup> 16 U.S.C. § 1801 *et seq.* (2012).

<sup>128</sup> 42 U.S.C. § 7412.

<sup>129</sup> *See* 42 U.S.C. § 7412(b)(1).



countries. For instance, if courts are reluctant to overturn agency decisions, even clear statutory mandates that authorize judicial review may not produce effective constraints on agencies. Alternatively, if there are general, broadly applicable public participation provisions in Canadian or U.S. administrative law, then specific provisions in environmental statutes are unnecessary.

One way scholars have categorized environmental regulation in Canada and the United States since the late 1970s is through a spectrum of openness and legalism.<sup>130</sup> At one end of the spectrum is regulatory policy of closed and informal decision-making, marked by confidential bargaining between government and industry over the enactment of standards and their application. At the other end is regulatory policy premised on more legalistic or formal requirements that seek to constrain the exercise of executive discretion through set administrative procedures that ensure public participation as well as the possibility of rigorous judicial review.

Both the United States and Canada have moved from closed and informal decision-making by incorporating more legalism into their decision-making processes. However, while both countries have extensive procedures for the review of administrative decision-making, U.S. environmental statutes tend to invoke outside parties to enforce executive obligations more than they do in Canada. In the United States, reliance on the public for ensuring governmental compliance with the legislation combines with detailed mandatory schemes to generate formal requirements that can be enforced by the courts. While citizens in Canada have comparable procedural rights, broad discretionary regimes have left few specific obligations against which legislative objectives can be measured by the public or in review. Ultimately, that divergence in the legalism of environmental statutes has shaped the level of oversight by citizens and the courts, thereby reinforcing the use of highly discretionary approaches to administrative decision-making in Canada compared to the United States.

Widespread demands for increased public participation arose in both Canada and the United States in the early 1970s. The United States responded by expanding on the types of citizen participation tools already

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<sup>130</sup> A general trend in Canada has been to develop environmental policy in closed bargaining between government and business interests over the enactment of standards. Michael Howlett, *The Judicialization of Canadian Environmental Policy, 1980-1990: A Test of the Canadian United States Convergence Thesis*, 27 CANADIAN J. POL. SCI. 99, 106 (1994); Ted Schrecker, *The Mobilization of Bias in Closed Systems: Environmental Regulation in Canada*, 15 J. BUS. ADMIN. 43 (1985); KERNAGHAN WEBB, L. REFORM COMMISSION OF CAN., POLLUTION CONTROL IN CANADA: THE REGULATORY APPROACH IN THE 1980'S (1988).

available. For instance, the Administrative Procedure Act (“APA”) of 1946 had already created procedures for involvement at many stages of policy planning and implementation by requiring agencies to provide notice to the public of proposed rules, take public comment on those proposed rules, and respond to any substantive comments in finalizing those rules.<sup>131</sup> The APA also established a general principle of judicial review of administrative agency decision-making at the federal level, though with some significant exceptions.<sup>132</sup> Moreover, the introduction of the National Environmental Policy Act (“NEPA”) in 1969 specified a range of participatory rights in relation to environmental decision-making, including informational requirements to issue environmental impact statements and alternatives to proposed actions, a requirement for public comment on draft statements, and response to those comments in final statements.<sup>133</sup>

Based on this statutory regime, U.S. courts in the 1970s began to aggressively expand the scope and rigor of judicial review under the APA. First of all, they expanded the range of interests that could provide standing to sue to include environmental interests, not just business interests.<sup>134</sup> They also began to closely scrutinize agency compliance with statutory mandates, including NEPA environmental review requirements, using what has been called “hard look” review.<sup>135</sup> Courts also leveraged the APA’s procedural requirements for public notice and comment for informal rulemaking to mandate that agencies provide a thorough explanation of the reasons for their decision-making and a rebuttal to substantial criticisms raised in the comments.<sup>136</sup> As a result, the analytical requirements imposed on agencies to promulgate rules expanded substantially. By the 1980s, there was some retrenchment, as both courts and scholars questioned the negative impacts of expansive judicial review on agency decision-making.<sup>137</sup> Nonetheless, judicial review of agency

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<sup>131</sup> See 5 U.S.C. § 553(c) (2012) (notice and comment requirements); For case law requiring agencies to respond to comments in finalizing rules, see, e.g., *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968).

<sup>132</sup> See 5 U.S.C. § 706 (2012).

<sup>133</sup> See 42 U.S.C. § 4332(c) (2012) (requiring environmental impact statements and public circulation of the statements); 40 C.F.R. § 1503.1 (2017) (duty to solicit public comments); 40 C.F.R. § 1502.9(b) (2017) (duty to respond to comments in final documents); 40 C.F.R. § 1503.4 (2017) (same).

<sup>134</sup> See *Sierra Club v. Morton*, 405 U.S. 727 (1972).

<sup>135</sup> See, e.g., *Motor Vehicle Mfrs Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1984); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

<sup>136</sup> See, e.g., *Auto. Parts & Accessories Ass’n*, 407 F.2d.

<sup>137</sup> See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519 (1978) (holding that courts cannot impose additional procedural requirements on agencies that are not mandated by the APA); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984) (requiring deference by courts to reasonable agency interpretations of statutes); Thomas McGarity,

decision-making in the United States today is much more searching than it was before the 1970s, and imposes a significant burden on administrative agencies.

Canada was significantly slower than the United States to adopt provisions that would open up closed decision-making processes to the public.<sup>138</sup> U.S. style legalism challenged the closed, informal, cooperative style that traditionally dominated Canada in favor of an open, formal, adversarial style.<sup>139</sup> And, while Canada was quick to introduce a host of new regulations aimed at environmental protection in this era and use bureaucratic institutions to enforce them, there was little expansion of participatory rights in Canada until the 1980s.<sup>140</sup> Instead, where participatory rights were created in these early regimes, they were generally discretionary or optional for adjudicative bodies.<sup>141</sup> Current policy practices of the Cabinet, such as publication of regulatory analysis impact statements, stakeholder consultation, and publication of regulatory proposals in the Canada Gazette to solicit comments, mimic the “notice and comment” rulemaking model enshrined in the APA. However, because Canadian regulatory procedures are still far more flexible and informal than those in the United States<sup>142</sup> it remains difficult to hold the government accountable for who is consulted and what evidence is relied upon in creating regulatory standards.

The basic entitlements to judicial review of a decision of a federal board, commission or other tribunal are defined in the Federal Court Act and the Federal Court Rules, which set out the various grounds upon which an application for judicial review can be brought.<sup>143</sup> Those with

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*Some Thoughts on ‘Deossifying’ the Rulemaking Process*, 41 DUKE L.J. 1385 (1992) (criticizing courts for imposing onerous burdens on agencies to promulgate rules, and arguing that these burdens are counterproductive).

<sup>138</sup> Debora L. VanNijnatten, *Participation and the Environmental Policy in Canada and the United States: Trends Over Time*, 27 POL’Y STUD. J. 267, 272 (1999).

<sup>139</sup> George Hoberg, *Representation and Governance in Canadian Environmental Policy*, in ANNUAL MEETING OF THE CANADIAN POL. SCI. ASS’N 24, 25 (1991).

<sup>140</sup> George Hoberg, *Governing the Environment: Comparing Canada and the United States*, in DEGREES OF FREEDOM: CANADA AND THE UNITED STATES IN A CHANGING WORLD 341, 351 (1997). Examples of new environmental statutes included The Canadian Clean Air Act, Clean Air Act, S.C.1970-71-72, c. 47, *repealed by* Canadian Environmental Protection Act of 1988, R.S.C. 1985, c. 16 (supp. 4), and the U.S. Clean Water Act, 1972, Public Law 92-500, Oct. 18, 1972, 86 Stat. 816.

<sup>141</sup> *See* Environmental Assessment and Review Process Guidelines (1973) (Can.). For example, the Environmental Assessment and Review Process Guidelines, established in 1973, required public hearings but provided only limited opportunities for review, permitted only at the discretion of the federal officials.

<sup>142</sup> KATHRYN HARRISON & GEORGE HOBERG, RISK, SCIENCE AND POLITICS: REGULATING TOXIC SUBSTANCES IN CANADA AND THE UNITED STATES 12 (1994).

<sup>143</sup> Federal Court Act, R.S.C. 1985, c. F-7187, § 18.1(4) (Can.); Federal Court Rules, SOR/98-106. (Can.).

standing can request judicial review of a decision for reasons that the decision maker exceeded jurisdiction, failed to observe a principle of natural justice, procedural unfairness, or breach of procedure required by law, made an error of law, made an erroneous finding of fact, or acted in any way contrary to law.<sup>144</sup> However, it is noteworthy that, until recently, the courts have narrowly construed public interest standing for review preferring applicants who have a personal interest in the matter and thereby limiting the range of litigants.<sup>145</sup>

Ultimately, it has been the Canadian courts that have created the procedural protections that citizens can use to enforce executive action. Starting in 1979, with *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*,<sup>146</sup> Canadian courts imposed a minimum duty of fairness (what is called due process in the United States) for administrative as well as quasi-judicial decisions. In this and subsequent decisions, the Supreme Court of Canada clarified that where a duty exists, claimants are entitled to those participatory rights commensurate with the duty, including pre-hearing rights related to notice, disclosure, discovery and delay, as well as hearing rights, related to the form of hearing, counsel, examinations and reasons for judgment.<sup>147</sup> Moreover, it has been Canadian courts that have developed constitutional protections for indigenous peoples that require the executive to justify infringements of rights and provide evidence that it has met its constitutional duty to consult.<sup>148</sup> These requirements have generated judicial review of ministerial decision-makers, tribunals, boards and agencies, where consultation is at issue.<sup>149</sup>

Though these basic procedural rights have been developing in the Canadian common law for over thirty years, they are still not consolidated in one federal statute as they are under the APA in the United States. With

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<sup>144</sup> Federal Court Act, R.S.C. 1985, c. F-7187, § 18.1(4) (Can.); Federal Court Rules, SOR/98-106. (Can.).

<sup>145</sup> Attorney Gen. of Can. v. Downtown Eastside Sex Workers United Against Violence in Society & Sheryl Kiselbach, 2012 S.C.C. 45 (public interest standing). For historical overview, see *Standing in Environmental Matters*, ENVIRONMENTAL LAW CENTRE, (Dec. 2014), <http://elc.ab.ca/media/98894/Report-on-standing-Final.pdf>.

<sup>146</sup> [1979] 1 S.C.R. 311 (Can.).

<sup>147</sup> See, e.g., *Baker v. Canada*, [1999] 2 S.C.R. 817 (Can.); *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982 (Can.). Substantiation of administrative rights that go beyond procedural protections also emerged a result of the constitutional litigation over the individual right to fundamental justice newly established in § 7 of the Canadian Charter of Rights and Freedoms. Canadian Charter of Rights and Freedoms § 7. For discussion, see *Reference Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (Can.). Regarding the right to a fair hearing, see § 2(e) of the Canadian Bill of Rights.

<sup>148</sup> For a procedural account of the duty, see Janna Promislow & Lorne Sossin, *In Search of Aboriginal Administrative Law*, in ADMINISTRATIVE LAW IN CONTEXT 501 (2013).

<sup>149</sup> For elaboration on administrative practice, see Sari Graben, *Tribunal Administration and the Duty to Consult: A Study of the National Energy Board* 65 U. TORONTO L.J., 382 (2015); Sari Graben, *Resourceful Impacts: Harm and Valuation of the Sacred*, 64 U. TORONTO L.J. 64 (2014).

the exception of Alberta, Quebec, and Ontario, provincial legislatures have also refrained from codifying uniform procedural entitlements. Instead, both levels of government have preferred to incorporate procedural rights in the substantive statutes or have vested authority in the agency or tribunal to promulgate rules or guidelines specific to their tasks. In these cases, each statute that governs decision-making on that topic contains specific procedural requirements and provides citizens with varying rights. This has created a patchwork of entitlement that can undermine effective public participation. For this reason, scholars have argued for enshrining public engagement rights and processes in legislation, and recommend enacting a public engagement bill of rights that would set clear rules for public involvement.<sup>150</sup>

Since its discretionary based approach was first implemented in the 1970s, Canada's environmental assessment process arguably increased transparency.<sup>151</sup> Nevertheless, in 2012 pressure to reduce the role of environmental assessment in decision-making led to substantial changes to participation rights.<sup>152</sup> As Meinhard Doelle has argued, changes to the CEAA appear carefully crafted to limit styles of public participation, influence of independent panels, the scope of federal environmental assessments, and the power of panels to make recommendations, thereby reducing the influence of the public on federal decision-making.<sup>153</sup>

For example, CEAA 2012 fundamentally changed what projects are subject to public scrutiny and who can participate in proceedings.<sup>154</sup>

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<sup>150</sup> MacLean et al., *supra* note 16, at 98. See also A. John Sinclair & Meinhard Doelle, *Using Law as a Tool to Ensure Meaningful Public Participation in Environmental Assessment*, 12 J. ENVTL. L. & PRAC. 27 (2003).

<sup>151</sup> The original CEAA was actually praised by American scholars. See, e.g., Bradley C Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance* (2002) 102 COLUM. L. REV. 903, 912 (2002).

<sup>152</sup> Implemented through an omnibus budget bill, which became the Jobs and Growth Act (2012) (Can.), the bill introduced changes to the Canadian Environmental Assessment Act, the Fisheries Act, and the Navigable Waters Protection Act. Canadian Environmental Assessment Act, S.C. 2012, c. 19, § 52. For a critique, see Meinhard Doelle, *CEAA 2012: The End of Federal EA As We Know it?* 24 J. ENVTL. L. & PRAC. 1 (2012).

<sup>153</sup> MacLean et al., *supra* note 16, at 98; Shaun Fluker & Nitin Srivastava, *Public Participation in Federal Environmental Assessment under the Canadian Environmental Assessment Act 2012: Assessing the Impact of "directly affected"*, 29 J. ENVTL. L. & PRAC. 65 (2016).

<sup>154</sup> See, Canadian Environmental Assessment Act, S.C. 2012, c. 19, §§ 9, 52 (comments on project description prior to screening), §19(1)(c) (comments from the public as factor to be considered in screening), § 24 (public provided opportunity to participate in environmental assessment), § 25 (notice and comment on draft report), § 28 (participation of interested parties in environmental assessment), § 43(1) (interested party participate in hearings), § 45(3) (hearings by review panel to be public), § 45 (make report of environmental assessment available to public). In addition to statutory entitlements, the constitutional rights of Aboriginal peoples create a duty of the executive branch of the government (the Crown) to consult with Aboriginal peoples should a

Under the current model, only a designated list of large industrial projects (i.e., oil, gas, and mineral extraction and transportation) will trigger environmental assessment while retaining discretionary powers to assess projects not on the list. Moreover, the Act limits the robustness of participatory rights depending upon the style of assessment and narrowly limits participation in hearings to those directly affected by the proposal. As is common in environmental assessment, the bulk of projects are assessed within the Agency (as screenings and environmental assessments). However, these only require the opportunity for public comment and incorporation of those comments into reports.<sup>155</sup> It is generally recognized that “any participation beyond the submission of written comments now seems to be more of a privilege than a right.”<sup>156</sup> Where an assessment is to be undertaken by a Review Panel, the National Energy Board or the Nuclear Safety Board, the public is limited to the submission of written comments, unless they are identified as an “interested party” that is directly affected by proposal.<sup>157</sup> Only those designated as “interested parties” by the tribunal will be permitted to make oral statements at hearings. There are therefore significant contrasts between this revised CEAA procedure and NEPA. NEPA not only applies to all federal actions but the implementing regulations also allow anyone to participate in a public hearing (though, like the CEAA, only some NEPA review processes will incorporate a public hearing).<sup>158</sup>

Examples of differing rights to public participation in other Canadian environmental statutes illustrate how they vary depending upon the statutory scheme. There are, for example, substantial rights accorded to the public in CEPA, which seeks to capitalize on citizen knowledge. This statute authorizes residents to apply to the minister for an investigation of any offense under the Act,<sup>159</sup> or to bring their own environmental protection action if the minister fails to investigate or issues an unreasonable response to the investigation.<sup>160</sup> Residents can also request expedited consideration of chemical substances,<sup>161</sup> comment on measures proposed by the minister and the scientific considerations on which those

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right be infringed. In addition, § 105(g) of the Act establishes the objects of the Agency to engage in consultation with Aboriginal peoples on policy issues related to the Act.

<sup>155</sup> *Id.*

<sup>156</sup> S. Fluher & N.K. Srivastava, *A Study of Public Participation under the Canadian Environmental Assessment Act*, Presentation at the 5th Journal of Environmental Law and Practice Conference (2015).

<sup>157</sup> CEAA § 28 (Can.).

<sup>158</sup> Federal Court Act § 4332(2)(C).

<sup>159</sup> CEPA §17(1) (Can.).

<sup>160</sup> *Id.* at § 22(1).

<sup>161</sup> *Id.* at § 76(3).

measures are based.<sup>162</sup> Similarly, the SARA permits anyone to apply for an assessment of the status of a wildlife species; to request that a threat to a species be assessed on an emergency basis; to provide the minister with written comments on a proposed recovery strategy, action plan or management plan posted on the public registry; or to ask the competent minister to investigate whether a SARA offence has been committed.<sup>163</sup> These provisions are similar to provisions in U.S. environmental law that, for example, allow petitions to list species for protection under the U.S. Endangered Species Act,<sup>164</sup> and allow petitions to identify chemicals as potentially toxic under the Toxic Substances Control Act.<sup>165</sup>

While there are formal rights to participate and seek judicial review of agency decision-making in both jurisdictions, a comparison of Canadian and U.S. environmental statutes reveals that there are more systematic, well-defined, and broader provisions in the United States. Moreover, scholars have argued that there is a lower incidence of administrative or judicial review of executive action in Canada than in the United States.<sup>166</sup> Judicial review in the United States will more often lead to court orders directed at the executive, whereas courts in Canada have generally deferred to the executive in matters of environmental policy.<sup>167</sup> Thus, not only does U.S. law provide broader and clearer procedural rights, and more action-forcing statutory mandates, but courts in the United States are also far more frequently called upon to enforce those standards, either by requiring the initiation of administrative action or by reviewing it once it is completed.<sup>168</sup>

However, there is increasing acknowledgement that these differences are due to different uses of mandatory and non-discretionary language in statutes and not a culture of judicial deference.<sup>169</sup> Such language provides the necessary benchmarks or legal tests by which courts can affect oversight. This divergence in statutory style explains why Andrew Green has noted that, in the context of the CEAA, the vagueness of Canadian environmental law has had the effect of limiting judicial review.<sup>170</sup> As Green points out, neither the public nor proponents can effectively challenge decisions where all the responsible authority has to do is

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<sup>162</sup> *Id.* at § 77(5).

<sup>163</sup> SARA §§ 22(1), 28(1), 43(1), 50(2), 68(3), 93(1) (Can.).

<sup>164</sup> 16 U.S.C. § 1533(b)(3).

<sup>165</sup> 15 U.S.C. § 2620.

<sup>166</sup> Howlett, *supra* note 130, at 108.

<sup>167</sup> Kelemen, *supra* note 124, at 148.

<sup>168</sup> Howlett, *supra* note 130, at 108.

<sup>169</sup> Nigel Bankes et al., *Can Environmental Laws Fulfill their Promise? Stories from Canada*, 6 J. SUSTAINABILITY 6024 (2014).

<sup>170</sup> Green, *supra* note 112.

consider the issue and where the court has no legislative factors or detailed requirements against which those decisions can be measured.<sup>171</sup> The courts have generally been reluctant to overturn decisions unless there is an error of law (meaning jurisdiction) or the decision is unreasonable. And, while procedural arguments can sometimes act as a proxy for larger substantive issues, the courts have required only minimal procedural requirements.<sup>172</sup>

Perhaps just as importantly, the executive in Canada is well placed to advance legislation to override judicial decisions, thereby precluding the use of judicial review as an effective mechanism of control.<sup>173</sup> The parliamentary fusion of executive and legislative branches, combined with strong political parties and hierarchical responsibility for administration, reflect an institutional propensity to consolidate rather than fetter, ministerial discretion.<sup>174</sup> The impact of these path dependencies may be to deter litigants from using judicial review to obtain substantive review of legislative and administrative performance and, as such, limit its role in constraining executive power in Canada compared to the United States.<sup>175</sup>

#### 4. Private Enforcement Tools

Another way in which legislatures might constrain government agencies is by authorizing private enforcement of environmental laws against private entities. This reduces the ability of agencies to use discretion in enforcement to alter how a law is implemented.

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<sup>171</sup> *Id.* at 799. See also *Ontario Power Generation Inc. v. Greenpeace Canada et al.*, 2015 F.C.A. 186, para. 130 (Can.).

<sup>172</sup> BOYD, *supra* note 115, at 269.

<sup>173</sup> Howlett, *supra* note 130; ELIZABETH SWANSON & ELAINE LOIS HUGHES, PRICE OF POLLUTION: ENVIRONMENTAL LITIGATION IN CANADA (1990); Kelemen, *supra* note 124.

<sup>174</sup> VanNijnatten, *supra* note 138, at 270.

<sup>175</sup> There have been a number of notable cases in which a Canadian court has rejected executive interpretations of discretion under several environmental statutes. For instance, recent judicial reviews of the CEAA have rejected governmental efforts to use discretion to divert a project from more onerous environmental review by separately construing multiple components of a larger project. *Mining Watch Canada v. Canada (Fisheries and Oceans)*, 2010 S.C.C. 2 (Can.); *Morton v. British Columbia (Agriculture and Lands)* [2009] B.C.S.C. 136 (Can.); *Alberta Wilderness Ass'n v. Canada (Environment)* [2009] F.C. 710 (Can.); *Environmental Defense Canada v. Canada (Fisheries and Oceans)* [2009] F.C. 878 (Can.). In a recent case under the SARA, the Federal Court of Appeal has similarly rejected government interpretations that the Minister may rely on discretionary regimes to meet its mandatory obligations to protect the critical habitat of endangered species. *Minister of Fisheries and Oceans v. David Suzuki Found.*, 2012 F.C.A. 40 (Can.) (The court ruled that regulatory schemes that provide the responsible minister with unrestricted authority to alter the provisions that are being relied upon for habitat protection (e.g., allowing the destruction of fish habitat under the Fisheries Act) will not be a lawful alternative to a protection order, which contains non-discretionary legally enforceable measures.).



Consequently, it can be an important way for a current legislature to “lock in” policy with respect to future legislatures or executives.<sup>176</sup> So-called “citizen suits” that authorize private enforcement of the law against private entities are generally described as being a fundamental feature of U.S. environmental law. Statutes such as the Endangered Species Act generally authorize any person to file suit to enjoin violations of the law by any other person. These provisions have been controversial: supporters emphasize the role that they can play in constraining capture of agency enforcement activities by regulated parties, while critics argue that broad citizen suits might lead to over enforcement that is not socially optimal.

Citizens in Canada have the power in common law and pursuant to statute to bring private prosecutions against a person or a corporation that breaks the law, subject to the supervision of the provincial attorney general. The attorney general may elect to allow it to proceed or may elect to take over the prosecution, after which she or he can proceed with the case or drop the charges.<sup>177</sup> This practice has led to varying success in the use of private prosecutions as a tool for environmental enforcement. David Boyd reports that while the Ontario government has permitted private prosecutions to proceed with successful outcomes for the prosecutors, Alberta, British Columbia, and Newfoundland have used the powers of the attorney general to stonewall suits.<sup>178</sup> Boyd reports that attorney generals in each of these jurisdictions have taken over every single suit brought by private citizens and dropped all charges before the case went to trial. Because courts are reluctant to review the reasons why the attorney general has taken charge of a file and dropped all charges, the use of private prosecutions remains of limited use.<sup>179</sup>

In addition to private criminal prosecutions, several recently enacted environmental laws contain citizen suit provisions for enforcement against private entities. For instance, provisions of CEPA explicitly recognize the right of citizens to sue for an order against a person who has committed an offense and to require action if the minister either fails to conduct an investigation or the minister’s response to the investigation was unreasonable.<sup>180</sup> However, these provisions have hardly been used and there is considerable lobbying against their future use.<sup>181</sup> For instance,

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<sup>176</sup> See Farhang, *supra* note 41, at 16, 19, 35–36, 42.

<sup>177</sup> BOYD, *supra* note 115, at 246. For example, in Ontario, the procedure for commencing a private prosecution is governed by § 23(1) of the Provincial Offences Act.

<sup>178</sup> *Id.* at 247.

<sup>179</sup> *Id.*

<sup>180</sup> CEPA, § 22(1) (Can.).

<sup>181</sup> BOYD, *supra* note 115, at 248.

Boyd notes that when the federal government proposed including citizen suit provisions in its endangered species legislation, the Canadian Pulp and Paper Association warned of a flood of lawsuits and rampant second-guessing of federal ministers.<sup>182</sup> As a result, citizen suit provisions were dropped from the SARA.<sup>183</sup>

### 5. Quantitative Comparisons

The comparisons of U.S. and Canadian environmental law have, to date, been qualitative in nature.<sup>184</sup> But a quantitative analysis of the differences would allow for a more precise understanding of the nature and scope of the differences between the two legal systems, allowing us to better understand how each political system might affect the legal framework.

To that end, we examined several major environmental laws in Canada and the United States, focusing on those statutes that are relatively similar in terms of their scope. With respect to procedural or other constraints on agency decision-making, we coded the extent to which the statutes imposed major constraints on agency discretion. We drew on prior literature that has done quantitative assessments of statutory constraints on agency discretion in the United States to develop our measures.<sup>185</sup> With respect to the extent to which the legislature relied on third-party enforcement of the law against the agency or private parties, we coded for the presence of citizen suit provisions, or provisions for attorneys' fees for successful citizen suit plaintiffs.

Tests of the level of substantive detail in statutes are trickier to develop. We decided to rely on a basic measure—the word count of the

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<sup>182</sup> *Id.* at 247.

<sup>183</sup> Marcia Valiante, *Welcomed Participants or Environmental Vigilantes - The CEPA Environmental Protection Action and the Role of Citizen Suits in Federal Environmental Law*, 25 DALHOUSIE L.J. 81 (2002).

<sup>184</sup> Robin Waples et al., *A Tale of Two Acts: Endangered Species Listing Practices in Canada and the United States*, 63 BIOSCIENCE 723 (2013); Noah D. Hall, *The Evolving Role of Citizens in United States-Canadian International Environmental Law Compliance*, 24 PACE ENVTL. L. REV. 131 (2007); Barry Rabe & William Lowry, *Comparative Analyses of Canadian and American Environmental Policy: An Introduction to the Symposium*, 27 POL'Y STUD. J. 263 (2005); John Martin Gillroy, *American and Canadian Environmental Federalism: A Game Theoretic Analysis*, 27 POL'Y STUD. J. 360 (1999); Andrew Green, *Public Participation, Federalism and Environmental Law*, 6 BUFF. ENVTL. L.J. 169 (1999); Howlett, *supra* note 130; Robert A. Kagan, *Trying to Have It Both Ways: Local Discretion, Central Control and Adversarial Legalism in American Environmental Regulation*, 25 ECOLOGY L.Q. 718 (1999); Kelemen, *supra* note 124; William A. Tilleman, *Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community*, 33 COLUM. J. TRANSNAT'L L. 337 (1995).

<sup>185</sup> EPSTEIN & O'HALLORAN, *supra* note 49, at 11, 75, 77–78, 131–33; FARHANG, *supra* note 49; Cooter & Ginsburg, *supra* note 36, at 305.

statute. Word counts have the advantage of being simple and objective measures—we were concerned that efforts to assess the extent to which individual statutory provisions in fact imposed significant, detailed, and substantive constraints on outcomes would be both extremely time-consuming and subject to significant reliability problems. Our use of word counts as a proxy for the substantive complexity and detail is consistent with other researchers' methods. We recognize that word counts might measure a range of factors besides simple complexity or detail in a statute. For instance, a longer statute may simply cover more subject matter than a shorter one, even though complexity or detail in both statutes is roughly the same. We attempt to control for this by comparing statutes in the United States and Canada that cover roughly the same scope of environmental issues. Alternatively, length in a statute might also reflect efforts to constrain the decision-making procedures of an agency rather than substantive complexity. For instance, one statute might be longer than another not because of greater complexity or detail in substantive standards, but simply because it contains greater constraints on agency decision-making procedures. Similarly, statutory length might be the result of the creation of new administrative bodies or forms. However, any such differences would be picked up by our separate counts of constraints on agency decision-making procedures. Finally, statutory length might also be the result of language that enables or empowers agency decision-making. In other words, a longer statute might in fact reflect increased agency discretion. Here, we rely on our own knowledge of the content of most environmental laws in the United States and Canada, and are comfortable stating that, in general, these statutes are not long because they are empowering agencies to act in broad ways.

Table 1 lists the categories we coded, along with the sources that we drew upon in creating the categories. In general, we looked for specific, mandatory duties imposed on the agency through the statute (e.g., specific deadlines or timeframes to accomplish specific tasks), structural or procedural requirements that the agency consult with or seek approval from outside bodies before making decisions, and statutory citizen-suit provisions.<sup>186</sup> Based on both the theoretical literature and on our general

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<sup>186</sup> Some of the categories we discuss (e.g., the possibility of attorneys' fees against the government for successful plaintiffs, or the creation of internal auditing agencies for government action) are present for a wide range of government actions or agencies, not just environmental law. For instance, both Canada and the United States have internal auditing/investigatory bodies. *See Auditor General Act*, R.S.C. 1985, c. A-17 (Can.); *Inspector General Act*, 5 U.S.C. App. §§ 1–13 (1978). Likewise, in the United States the Equal Access to Justice Act provides a generic process by which parties opposed to the United States in litigation may recoup attorneys' fees. 28 U.S.C. § 2412. However, we focus here on statutes that were imposed in the particular context of particular

understanding of the qualitative comparisons between Canadian and U.S. environmental law, we hypothesized that environmental legislation in a parliamentary system would on average contain fewer deadlines, fewer mandatory obligations imposed on the executive, broader delegation of regulatory authority, and much greater discretion for administrative agencies than in a presidential system.

One issue in comparing U.S. and Canadian environmental law is that, as noted above, while the two systems in general cover roughly the same material, there are some differences in (a) the allocation of regulatory authority between federal and sub-federal units (i.e., states or provinces); and (b) the allocation of regulatory authority across federal statutes. As an example of the first category, regulation of natural resource development on public lands in Canada is generally undertaken at the provincial level, while in the United States this regulation is generally done at the federal level. As an example of the second category, the Canadian Environmental Protection Act, 1999 has a very broad sweep for regulation, including air pollution, toxics, and hazardous waste regulation, topics that in the United States are divided among multiple statutes (the Clean Air Act, TSCA, and RCRA).

Of course, if there are major differences in regulatory coverage, it will affect the level of statutory control of agency discretion. For instance, if a particular topic is covered primarily at the federal level in the United States, but at the provincial level in Canada, an analysis of federal statutes alone would suggest that the United States has substantial controls on agency discretion while Canada does not. However, those differences would not be the product of different efforts by the legislature to control agency discretion, but instead simply a product of different levels of regulation in a federal system. Even where the federal governments have similar regulatory roles in both countries, comparisons are best made within the same subject areas. As noted earlier, the level of detail in a statute may be, in part, a product of the complexity of a particular policy area.

Table 2 provides an overview of the various policy areas in environmental law covered by our study and explains which statutes in the United States and Canada cover those policy areas. In general, the U.S. federal government has exercised broader environmental regulatory authority than its Canadian counterpart. However, there are areas where the scope of federal regulation in both the United States and Canada is

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environmental laws—these highly specific provisions provide evidence of close legislative supervision of executive branch implementation, on top of any requirements developed through the generic provisions.

fairly congruent. This is especially true of marine fisheries regulation, which is primarily regulated at the federal level in both Canada and the United States. It is also true of toxic substances, endangered wildlife, and air pollution, which are regulated at the federal levels as well as provincial/state levels. Coding was conducted either by us, or by research assistants who are law students focusing on environmental law. To measure reliability, a subset of the statutes were re-coded either by us or by our research assistants, depending on who did the initial coding.<sup>187</sup>

Tables 3 and 4 provide totals for our coding for each of the important statutes that we assessed for the United States and Canada, respectively.<sup>188</sup> We broke our results down by statute rather than by substantive area. We chose this approach because there are a significant number of provisions that are important for our analysis that are present at the statutory level—for instance, generic provisions about agency decision-making procedures, judicial review, or citizen suits. If we had instead divided the statutes by substantive coverage, that would leave a significant challenge to decide how to allocate these procedural or judicial review provisions.

We provide our results both in absolute counts, and scaled on a per-thousand-word basis (except for word count). We provide the scaled counts because—to the extent that increased statute length might reflect the broader scope or ambition of a statute, and thus the greater opportunities or need for the legislature to constrain agency decision-making—the scaled counts allow us to account for that broader scope or ambition.

Our results make clear that there are significant differences between U.S. and Canadian statutes in terms of the level of discretion that the legislature leaves to the agency. In general, U.S. statutes provide significantly less discretion to administering agencies than Canadian statutes. U.S. statutes are also substantially longer than Canadian statutes, indicating greater use of detailed substantive standards to dictate outcomes. With respect to constraints on agency decision-making, using the weighted average for each category in which we coded,<sup>189</sup> we find that

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<sup>187</sup> For U.S. statutes, we double-checked our coding for RCRA, CERCLA, FIFRA, TSCA, and Magnuson Stevens.

<sup>188</sup> Spreadsheets with specific coding data for each statute are available on request. Those spreadsheets list the specific statutory sections that were counted for each category, plus a brief description of the substance of each relevant section. We coded the text of the statutes as of January 1, 2013.

<sup>189</sup> The weighted average takes the total number of observations in the coded category across all statutes, and divides it by the total number of words in all of the statutes. This allows us to combine observations across statutes of different lengths, taking into account that statutes that are longer will likely have more observations. This is in part important because U.S. statutes are, on average, significantly longer than the Canadian statutes.

in all but one of the sixteen categories U.S. statutes have more restrictions on discretion.<sup>190</sup> Some of the differences are quite large—for instance, U.S. statutes have (on a per-thousand-word basis) eight times as many specific time frames, three times as many shall commands, one-hundred times as many expenditure limits, seven times as many legislative reporting requirements, and eight times as many consultation requirements. And, while U.S. statutes had a substantial number of specific deadlines (0.22 per-thousand-words), Canadian statutes had none.

These differences remain even if we focus on the U.S. and Canadian statutes that are the most similar, or the statutes that focus on environmental assessment (NEPA and CEAA), fisheries (Magnuson-Stevens and the Canadian Fisheries Act), and endangered species (ESA and SARA).<sup>191</sup> Still, U.S. statutes have three times as many specific time frames, over twice as many shall commands, twenty times as many expenditure limits, seven times as many reporting requirements, and three times as many consultation requirements.<sup>192</sup> And, again, U.S. statutes have substantial deadlines (0.19 per-thousand-words), while Canadian statutes have none.

One other pattern emerges from our data. Table 5 indicates both the year of the initial enactment of a statute, and also the years in which significant revisions to the statute occurred. It is notable that statutes enacted or substantially amended more recently impose greater restrictions on agency discretion. This is true in both Canada and the United States. U.S. scholars have noted this trend in qualitative descriptions of American environmental law,<sup>193</sup> but their explanations have primarily focused on particular aspects of American law and

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<sup>190</sup> The only exception was that Canadian statutes were more likely to sunset administrative powers than U.S. statutes. This was a very rare occurrence in both the Canadian and U.S. statutes, with only eight examples in the Canadian statutes and twelve examples in the U.S. statutes.

<sup>191</sup> The U.S. ESA does have a broader scope than the Canadian SARA, in that the ESA covers activities on private and state lands, while SARA only covers activities by federal agencies or on federal lands.

<sup>192</sup> The Canadian Fisheries Act includes substantial water pollution control elements, a policy area covered by the Clean Water Act in the United States. However, the Clean Water Act in general has more constraints on administrative discretion than the three U.S. statutes in our focal group, so excluding the Clean Water Act from our focal comparison does not undermine our results.

<sup>193</sup> See Robert L. Fischman, *The Problem of Statutory Detail in National Park Establishment Legislation and Its Relationship to Pollution Control Law*, 74 DENV. U.L. REV. 779, 787–96 (1997); Howard Latin, *Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 ENVTL. L. 1647, 1651 (1991); Shapiro & Glicksman, *supra* note 21, at 819–845; Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 L. & CONTEMP. PROBS. 311, 329–30, 340–41 (1991). See also Miranda Yaver, *When Do Agencies Have Agency? The Limits of Compliance in the EPA*, at 36 (March 29, 2015) (Ph.D. thesis, Columbia University).

politics.<sup>194</sup> Our data indicates instead that this is a broader, cross-national pattern perhaps reflecting more fundamental trends in how environmental law (or law more generally) is changing over time.

We also find that U.S. environmental law is more likely to use private party enforcement, either against the agency or against third parties violating the law. Six out of the nine U.S. environmental law statutes we examined have a citizen suit provision allowing for lawsuits to be brought against agencies for failing to perform a mandatory duty. The same six statutes also have citizen suit provisions allowing for lawsuits against third parties alleged to be violating the law. In contrast, none of the four Canadian statutes have a citizen suit provision allowing for lawsuits against agencies and only one of the four has a citizen suit provision allowing for lawsuits against third parties.<sup>195</sup> While the common law right to enforce agency action still exists in Canada and is regularly exercised before the courts, the absence of statutory rights requires the courts to interpret the preconditions and standards for review. Finally, U.S. statutes are much more likely to require agencies to consult with other agencies, interest groups, or the general public when making decisions compared to Canadian statutes.

Thus, we can say that U.S. environmental statutes do constrain agency discretion in a much more significant way than Canadian environmental statutes do. Furthermore, U.S. environmental statutes facilitate judicial review as well as public participation. We next turn to the implications of our findings.

#### IV. DISCUSSION

Our results provide strong support for the hypothesis that political systems influence the structure of environmental law. The data is also consistent with prior studies that find greater length and complexity of statutes in the United States compared to other countries.<sup>196</sup> However,

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<sup>194</sup> See Fischman, *supra* note 143, at 797–804 (noting different causes for the trend, including a Democratic Congressional response in 1980s to increasing control over bureaucracy by a Republican President and a legislative response agency failure to successfully implement environmental laws because of declining budgets); Shapiro & Glicksman, *supra* note 21 (noting strength of U.S. environmental groups, public support for environmental protection in United States and legislative distrust of EPA as possible causes); Lazarus, *supra* note 193, at 340–42 (1991) (statutory detail as response to agency failures in United States to implement environmental laws). See also Yaver, *supra* note 193, at 25–28 (finding that Congress is more likely to attempt to constrain agency discretion when there is a greater ideological distance between Congress and the President); Yaver, *supra* note 143, at 25–28 (finding that Congress is more likely to attempt to constrain agency discretion when there is a greater ideological distance between Congress and the President).

<sup>195</sup> *Supra* note 177.

<sup>196</sup> See Cooter & Ginsburg, *supra* note 36.

before we examine the implications of our results, we first explore some alternative explanations for the differences we have identified.

### *A. Alternate Explanations for Differences*

One possible explanation for the difference is that the U.S. environmental movement is stronger than the Canadian environmental movement, and that it is able to get more laws passed in the first place.<sup>197</sup> More legislation leads to the possibility of increased constraint on agency discretion and enhanced judicial review.

There are two reasons, however, that we find this explanation unconvincing. First, we have reported results that are scaled for the length of the statutes (number of observations per-thousand-words) meaning that, even if Canada enacts fewer environmental law than the United States, it is less likely to impose constraints on agencies in the environmental law that it does pass. Second, there are areas of Canadian environmental policy that historically have been very politically important—fisheries, for instance. But even in these areas, we find that the U.S. statutes still constrain agency discretion more than Canadian law.

A related explanation is that a weaker Canadian environmental movement is less able to affect environmental legislation.<sup>198</sup> Alternatively stated, Canadians on average are less interested than Americans in protecting the environment, in part because their economy is more dependent on resource extraction,<sup>199</sup> leading to fewer statutory provisions that constrain agency discretion.<sup>200</sup>

However, the problem with this explanation is that it assumes that statutory constraints and judicial review are necessarily beneficial to environmental groups, when there is no reason to believe this is the case. A legislature can constrain an agency from reaching a result that is more

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<sup>197</sup> See LIPSET, *supra* note 19, at 131 (noting this possibility).

<sup>198</sup> Although both the United States and Canada have seen notable increases in environmental group membership over the past few decades, the United States' gains have been far greater. From 1981 to 1999, self-reported membership in environmental groups more than tripled in the United States from 5.1 percent to 15.9 percent but less than doubled in Canada from 4.9 percent to 8.1 percent. Russell J. Dalton, *The Greening of the Globe? Cross-national Levels of Environmental Group Membership*, 14 ENVTL POL. 441, 444 (2005).

<sup>199</sup> For comparative polling data, see, Erick Lachapelle et al., *2013 Canada-US Comparative Climate Opinion Survey*, CANADA 2020.CA (March 3, 2014), <http://canada2020.ca/wp-content/uploads/2014/03/Canada-2020-Background-Paper-Climate-Poll-Key-Findings-March-3-2014.pdf>.

<sup>200</sup> See, e.g., Shapiro & Glicksman, *supra* note 21 (arguing that U.S. environmental law has more statutory detail in part because of the political strength of U.S. environmental groups); LIPSET, *supra* note 19, at 132 (arguing that the greater discretion in Canadian environmental law means that it is weaker than its U.S. counterpart).



protective of the environment just as much as it can constrain an agency from reaching a result that is less protective of the environment. For instance, the United States Supreme Court has held that the broad citizen suit provisions of the Endangered Species Act were intended, in part, to allow for litigation to challenge overly protective and expensive applications of the ESA.<sup>201</sup> Another provision of the ESA requires the agency to consider economic impacts in designating critical habitat necessary to protect the species, a consideration that would, on average, lead to designating fewer lands as critical habitat.<sup>202</sup> Finally, multiple American environmental laws have provisions requiring the EPA to monitor the employment impacts of the regulations it issues, including a formal hearing process if requested.<sup>203</sup> Economic considerations have played a similar role in rationalizing limits to protection in Canada, albeit less explicitly. For example, federal prohibitions against adding deleterious substances to waters in Canada have recently been amended to only apply to fish that are part of a commercial, recreational or Aboriginal fishery.<sup>204</sup>

Finally, another possible explanation is that, as noted above, the distribution of powers between federal and state or provincial governments in the United States and Canada is different. Since the U.S. federal government has exercised greater regulatory authority over environmental protection than the Canadian federal government, we should therefore not be surprised to see more constraints of agency discretion in the United States. But, again, we reported a scaled measurement of constraints of agency discretion based on the number of constraints per-thousand-words—even if Canada does have less federal environmental law, it is still imposing constraints at a lower rate. Also notable is that, even in areas where federal power in the United States and Canada is very similar (e.g., fisheries), the United States has substantially higher levels of constraint on agency discretion.

A final possible explanation is differences in legislative capacity between Canada and the United States. The U.S. Congress does not have term limits and high re-election rates,<sup>205</sup> and has a substantial number of

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<sup>201</sup> *Bennett v. Spear*, 520 U.S. 154 (1997).

<sup>202</sup> *See* 16 U.S.C. § 1533(b)(2).

<sup>203</sup> *See* RCRA § 7001(e); CAA § 7621; TSCA § 2623; CWA § 507(e). All of the provisions specify that the employment impacts findings do not create a mandatory duty to amend or repeal regulations.

<sup>204</sup> Fisheries Act, § 35(1) (Can.).

<sup>205</sup> *See* Chris Cillizza, *People Hate Congress. But Most Incumbents Get Re-Elected. What Gives?* THE WASH POST, May 9, 2013, <https://www.washingtonpost.com/news/the-fix/wp/2013/05/09/people-hate-congress-but-most-incumbents-get-re-elected-what->

permanent legislative staff.<sup>206</sup> In contrast, the Canadian Parliament often has substantial turnover in membership,<sup>207</sup> and a relatively small staff.<sup>208</sup> Less legislative capacity, as noted above, might lead to more delegation by the legislature to the executive. However, in many parliamentary systems, Cabinet staff and the bureaucracy provide substantial support to the legislature in drafting legislation<sup>209</sup>—something that makes sense in a system in which legislative and executive control is unified. This would cut against any substantial differences in legislative capacity between the United States and Canada.

### *B. Implications*

In answer to the two questions we raised in the introduction—does environmental law vary across political systems, and if so, in what way—our results provide significant evidence that presidential versus parliamentary political systems do have implications for the ways in which environmental law develops. In particular, we found support for the hypothesis that, in a presidential system, legislatures take steps to constrain agency implementation both through direct commands to the agencies and through enabling outside enforcement against agencies and regulated parties. In the language of the relevant political science literature, legislatures in presidential systems are indeed using *ex ante* tools to control bureaucratic drift and restrict the ability of the independently elected executive to shape policy. These *ex ante* tools are also less vulnerable to future coalitional drift. In contrast, we found much less use of these *ex ante* tools (whether direct commands to agencies or outside enforcement) by the legislature in the Canadian parliamentary system. Thus, our analysis provides an important caution to advocates of changing political structures in the United States to facilitate the development of more stringent environmental laws. Such shifts in political structure may also allow for changes that undermine environmental laws that are currently enacted in the United States.

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gives/?utm\_term=.c32cbe8352c8 (noting re-election rates in Congress that generally exceed 90 percent).

<sup>206</sup> See Vital Statistics on Congress, Table 5-1, BROOKINGS INSTITUTE, <https://www.brookings.edu/multi-chapter-report/vital-statistics-on-congress/#datatables> (counting staff size between about 27,000 in the 1980s and 19,000 in the 2010s).

<sup>207</sup> See Aucoin, *supra* note 81.

<sup>208</sup> There are about 1,700 staff in the House of Commons. See HOUSE OF COMMONS, *Report to Canadians* (2006), [http://www.ourcommons.ca/About/ReportToCanadians/2006/Rtc2006\\_07-e.html](http://www.ourcommons.ca/About/ReportToCanadians/2006/Rtc2006_07-e.html).

<sup>209</sup> For a detailed description of the role of the Canadian public service in legislative drafting, see *The Guide to Making Federal Acts and Regulations: Cabinet Directive on Law Making* (2<sup>nd</sup> ed.) (Department of Justice, 2001) and specifically § 2.3.

One significant limitation to this conclusion is that we cannot separate out political culture from political structure. In this way, our conclusions are necessarily limited. Nevertheless, we still think they are important. Political culture may often be shaped or determined in part by political structure. At the very least, our results raise important questions about the implications of changing U.S. political structure for U.S. environmental law.

Two kinds of additional analysis could help illuminate the relative contributions of political structure and political cultural to the differences we identify. One analysis would be to compare constraints on agencies across time within both the United States and Canada to see if they vary with different political structural conditions. For instance, in Canada it is possible that more constraints of executive action will arise when there is a minority government (where the prime minister's party does not have a majority in the House of Commons) and thus where there are larger divergences in preferences between the legislature and the executive. Reciprocally, we might expect to see more constraints on executive action in the United States when there is a divided government. Another analysis encompassing more countries might also help develop the extent to which political culture, as opposed to political structure, produces the differences we observed. For instance, if these patterns are consistent across a range of countries with very different political cultures, then that would suggest that limits on agency discretion and third party enforcement are the results of political structure, not culture.

More broadly, our analysis provides some important insights to discussions about whether and how to revamp current U.S. political structures. It is plausible that the implications that we have discovered in environmental law—a connection between political structure and the particular characteristics of U.S. environmental law—might apply in other areas of law. If that is the case, then proposals to change the U.S. political and constitutional structure to reduce legislative dysfunction may have a series of follow-on consequences for the nature and structure of U.S. law across the board. In particular, we might see a shift away from relatively tight constraints on agency decision-making by the legislature towards a much looser approach in which Congress gives agencies much more discretion to act.

A separate important question is whether a greater use of *ex ante* tools to restrict agency discretion and facilitate outside enforcement and supervision is preferable from the perspective of improving environmental outcomes. We limit our discussion in this paper to noting the main arguments in either direction, and noting the need for further research to inform this debate.

There is a strong strand in the literature that is critical of the use of these kinds of *ex ante* tools to restrict agency discretion and to facilitate outside enforcement and supervision. Proponents of this view argue that agencies have greater expertise than the legislature, the third party group bringing suits, and the courts that hear them. Thus, they conclude, direct and specific commands from the legislature or efforts by outside groups to use litigation to control agency decision-making will be counterproductive, focusing regulatory efforts on less important issues.<sup>210</sup>

Related are arguments that these kinds of rigid restrictions on agency discretion interfere with the agency's ability to adapt in a flexible manner to changed circumstances. This argument is often made within the context of climate change. Scholars and critics have asserted that greater legal flexibility for agencies is essential to facilitate adaptive management that is (arguably) necessary for climate change adaptation.<sup>211</sup>

Another set of arguments claim that the litigation inherent in much of the *ex ante* restrictions imposed by legislatures—particularly the use of litigation by outside groups to enforce specific legislative commands to agencies—is costly, time-consuming, and erodes trust among stakeholders.<sup>212</sup> Some critics point to regulatory systems in other developed countries that operate in a more consensual manner, with greater leeway for agency discretion, and argue that comparable results are obtained with fewer litigation and transaction costs and less distrust

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<sup>210</sup> See, e.g., Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55, 68 (1989); Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 51 (2001); Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 383 (1990); R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 246 (1992).

<sup>211</sup> See, e.g., Sandra Zellmer & Lance Gunderson, *Why Resilience May Not Always Be a Good Thing: Lessons in Ecosystem Restoration from Glen Canyon and the Everglades*, 87 NEB. L. REV. 893, 946–47 (2009); Robin Kundis Craig, *Stationarity is Dead - Long Live Transformation: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENVTL. L. REV. 9, 66 (2010); Mary Jane Angelo, *Stumbling Toward Success: A Story of Adaptive Law and Ecological Resilience*, 87 NEB. L. REV. 950, 1001–02 (2009); Alejandro E. Camacho, *Transforming the Means and Ends of Natural Resources Management*, 89 N.C. L. REV. 1405, 1414 (2011); J.B. Ruhl, *General Design Principles for Resilience and Adaptive Capacity in Legal Systems—With Applications to Climate Change Adaptation*, 89 N.C. L. REV. 1373, 1392–93 (2011); Robin Kundis Craig & J.B. Ruhl, *Designing Administrative Law for Adaptive Management*, 67 VAND. L. REV. 1, 42 (2014); Craig R. Allen et al., *Adaptive Management for a Turbulent Future*, 92 J. ENVTL. MGMT. 1339, 1343 (2011). For a critical assessment of adaptive management implementation in Canada, see Marin Olszynski, *Environmental Monitoring and Ecosystem Management in the Oil Sands: Spaceship Earth or Escort Tugboat?*, 10 MCGILL INT'L J. SUSTAINABLE DEV. L. & POL'Y 2 (2014).

<sup>212</sup> See, e.g., KAGAN, PATTERNS OF PORT DEVELOPMENT, *supra* note 7; KAGAN, ADVERSARIAL LEGALISM, *supra* note 7, at 239–43; Alden Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171, 187 (1987); Lazarus, *supra* note 193.

among important social actors.<sup>213</sup> A similar criticism applies to the use of outside enforcement of environmental laws against regulated parties.<sup>214</sup>

Additionally, some argue that the use of specific constraints on agency discretion—especially deadlines and mandatory timeframes for decisions—enables Congress to claim that it is forcing progress on environmental issues. Yet, at the same time, Congress does not provide the resources to agencies to make or implement decisions by the deadlines or mandatory decisions. As a result, agencies regularly fall short of statutory objectives and lose lawsuits to outside groups. The criticism is that the combination of inadequate funding plus mandatory deadlines or timeframes for decisions allows Congress to appear that it is advancing environmental policy, even as it fails to prioritize environmental policy in the decisions that count: those regarding appropriations.<sup>215</sup>

On the other side, there are a range of arguments about how mandatory commands to agencies and the possibility of outside enforcement can improve environmental outcomes. Perhaps the most frequent argument is that mandatory commands to agencies and outside enforcement help reduce the risk that agencies will become captured by the parties they regulate. Indeed, these rationales were specifically drawn upon in the United States when citizen suit provisions were added to environmental laws.<sup>216</sup>

Second, facilitating outside participation or enforcement in environmental laws may help draw important information into the regulatory process. Agencies may, in fact, not have more expertise or information than outside parties, and citizen suits and public participation requirements may provide key insight, and actually improve regulatory outcomes as a result.<sup>217</sup>

Finally, as noted above, the hypothesis we tested is that in a presidential political system, legislatures restrict agency discretion and facilitate outside enforcement in order to “lock-in” the policy outcomes

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<sup>213</sup> See, e.g., KAGAN, *ADVERSARIAL LEGALISM*, *supra* note 7, at 239–43.

<sup>214</sup> *Id.* at 212–14, 224–25.

<sup>215</sup> See, e.g., R. Shep Melnick, *Deadlines, Common Sense, and Cynicism*, 2 *BROOKINGS REV.* 21 (1983); Abbott, *supra* note 157, at 181–83; Lazarus, *supra* note 193, at 323–30, 349–55.

<sup>216</sup> See, e.g., David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System*, 54 *MD. L. REV.* 1552 (1995); Lazarus, *supra* note 193, at 316–17, 334; Matthew Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 *VA. L. REV.* 93, 110–12 (2005); JOSEPH SAX, *DEFENDING THE ENVIRONMENT* (1971); Richard Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1667 (1975); Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 *STAN. ENVTL. L.J.* 81, 126–31 (2002).

<sup>217</sup> See Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 *UCLA L. REV.* 321 (2010).

enshrined in the legislation they have enacted. These *ex ante* tools reduce the risk of both bureaucratic and legislative drift and can, therefore, be seen as a pre-commitment device. Environmental legal scholars have noted the importance of pre-commitment devices in developing effective environmental outcomes. This is because many environmental problems are the result of harms that are dispersed widely in space and time. An extreme example is climate change, where the harms of greenhouse gases are spread across the planet and will have impacts for decades and centuries to come. However, though the benefits of environmental regulation may be diffuse in space and time, policymakers are myopically focused on the short-term costs or impacts on their constituents.<sup>218</sup> Pre-commitment devices can therefore prevent regulatory decisions from prioritizing short-term gains over long-term benefits by restricting the types of outcomes that an agency can choose (or by allowing outside enforcement to restrict agency decisions or enforce rules against regulated parties).<sup>219</sup>

Understanding how these different factors play out in environmental law will require a detailed and thoughtful comparative analysis of environmental outcomes, with a nuanced and contextual understanding of how outcomes might vary across issue areas and across countries. For instance, one country may have better outcomes than another in air pollution, but worse in fisheries management. Likewise, there may be substantial variation even within a country across statutes in terms of the level of legislative constraint of agency decision-making or facilitation of outside enforcement. For instance, both within the United States and Canada, some statutes have lower levels of agency discretion compared to others; FIFRA for its part has almost four times as many mandatory timeframes for decisions per-thousand-words than TSCA or ESA.

We do not minimize the challenges of compiling the necessary data—whether for environmental outcomes, statutory provisions, or other important variables—or of conducting the relevant analysis given the substantial number of other variables that shape environmental law and

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<sup>218</sup> See Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1174–75 (2009) [hereinafter Lazarus, *Super Wicked Problems*]; RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 223 (2004) [hereinafter LAZARUS, MAKING OF ENVIRONMENTAL LAW]; Eric Biber, *Which Science? Whose Science? How Scientific Disciplines Can Shape Environmental Law*, 79 U. CHICAGO L. REV. 471, 516 (2012); Cass R. Sunstein, *Endogenous Preferences*, *Environmental Law*, 22 J. LEGAL STUD. 217, 239 (1993); Chrisoula Andreou, *Environmental Preservation and Second-Order Procrastination*, 35 PHIL. & PUB. AFF. 233, 240 (2007).

<sup>219</sup> See Lazarus, *Super Wicked Problems*, *supra* note 218, at 1156, 1173–75; LAZARUS, MAKING OF ENVIRONMENTAL LAW, *supra* note 218, at 41; Biber, *supra* note 218, at 514–21; Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 63, 72–73 (1992).

policy. However, we do think that this kind of careful and nuanced analysis is what is required to address the long-standing debates over what kinds of political structures best advance environmental law.

*Table 1: Coding Categories for Constraining Agency Discretion*

Concept	Metric	Method	Citation
Legislative imposition of deadlines on administrative agencies	Specific deadlines	Count number of specific deadlines (i.e., specific calendar dates) by which agency must complete a particular, specific activity	
	Specific timeframes	Count number of specific timeframes (i.e., specific number of calendar dates triggered by a specific event) by which agency must complete a particular, specific activity	
Detail of legislative commands towards administrative agencies	Number of words or pages	Count number of words or pages in text of relevant statute	Ginsburg and Cooter (1996)
Mandatory nature of legislative commands towards administrative agencies	Mandatory commands	Count number of “shall” or “must” or “will” commands directed towards administrative agency	
Authorization of citizen enforcement	Citizen suit against agency	Code whether statute explicitly grants citizens the authority to sue agency to comply with mandatory statutory obligations	Epstein and O’Halloran (1999); Farhang (2010)
	Citizen suit against violators	Code whether statute explicitly grants citizens the authority to sue other private parties for failure to comply with act	Epstein and O’Halloran (1999); Farhang (2010)

	Fee shifting provisions against agency	Code whether statute explicitly authorizes attorneys fees for citizen suits against government (provides for recovery of attorneys fees in lawsuit against government to “prevailing party” or “any party” or plaintiff)	Farhang (2010)
	Fee shifting provisions against violators	Code whether statute explicitly authorizes attorneys fees for citizen suits against violators (provides for recovery of attorneys fees in lawsuit against violators to “prevailing party” or “any party” or plaintiff)	Farhang (2010)
Constraint on executive appointment	Limitation on appointment of executive officials	Code whether statute explicitly constrains who can be appointed to an agency position (e.g., party membership requirements, expertise or educational requirements)	Epstein and O’Halloran (1999)
Limitation on decision-making power	Time Limits	Code whether statute states that administrative power expires after a set period. Statute explicitly sunsets power of agency to act after a certain time frame.	Epstein and O’Halloran (1999)
	Spending Limits	Code whether statute sets explicit limits on amount or proportion of funds that can be expended on a particular activity.	Epstein and O’Halloran (1999)
	Legislative confirmation required	Code whether statutes states that agency action can only be implemented if legislature affirmatively	Epstein and O’Halloran (1999)



		approves of agency decision.	
	Legislative veto	Code whether statute states that agency action can be overturned if legislature affirmatively rejects agency decision.	Epstein and O'Halloran (1999)
	Executive confirmation required	Code whether statute states that action by one agency cannot be implemented unless confirmed by another agency or by high level executive.	Epstein and O'Halloran (1999)
Informational and Consultation Requirements	Reporting requirements	Code whether statute explicitly requires agency to provide reports to legislature about its activities.	Epstein and O'Halloran (1999)
	Consultation requirements	Code whether statute explicitly requires agency to consult with other agencies, public, states/provinces before taking a specific action.	Epstein and O'Halloran (1999)
	Oversight requirements	Code whether statute explicitly requires an audit or investigation of agency decision-making by another agency (including Inspectors General in U.S. system)	Epstein and O'Halloran (1999)

*Table 2: U.S. and Canadian Environmental Statutes by Subject Matter*

Substantive Area	Canada	United States
Fisheries	Fisheries Act	Magnuson-Stevens Act
Environmental Review	Canadian Environmental Assessment Act (CEAA)	National Environmental Policy Act (NEPA)

Endangered Species	Species At Risk Act (SARA)	Endangered Species Act (ESA)
Toxic Substances/Pollution	Canadian Environmental Protection Act (CEPA)	Toxic Substances Control Act (TSCA)
Water Pollution	Fisheries Act	Clean Water Act
Hazardous Waste Disposal	CEPA	Resource Conservation and Recovery Act (RCRA)
Hazardous Waste Liability	CEPA	Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
Air Pollution	CEPA	Clean Air Act
Pesticides	CEPA, Pest Control Products Act (PCPA)	Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)

Table 3: Results for U.S. Statutes<sup>220</sup>

Statute:	NEPA	RCRA	CERCLA	FIFRA	TSCA
<b>Specific Deadlines</b>	<b>1</b> <i>0.40</i>	<b>14</b> <i>0.17</i>	<b>6</b> <i>0.07</i>	<b>7</b> <i>0.11</i>	<b>14</b> <i>0.27</i>
<b>Specific Timeframes</b>	<b>1</b> <i>0.40</i>	<b>133</b> <i>1.64</i>	<b>72</b> <i>0.89</i>	<b>252</b> <i>4.12</i>	<b>67</b> <i>1.30</i>
<b># of Words</b>	2507	80298	81201	61202	51736
<b>Shall, must or will</b>	<b>8</b> <i>3.19</i>	<b>397</b> <i>4.19</i>	<b>239</b> <i>3.24</i>	<b>269</b> <i>4.40</i>	<b>231</b> <i>4.46</i>
<b>Citizen Suit vs Agency</b>	<b>0</b> <i>0.00</i>	<b>1</b> <i>0.01</i>	<b>1</b> <i>0.01</i>	<b>0</b> <i>0.00</i>	<b>2</b> <i>0.04</i>
<b>Citizen Suit vs Private Parties</b>	<b>0</b> <i>0.00</i>	<b>1</b> <i>0.01</i>	<b>1</b> <i>0.01</i>	<b>0</b> <i>0.00</i>	<b>1</b> <i>0.02</i>

<sup>220</sup> Raw totals are listed in bold-type, and scaled counts per-thousand-words are listed in italics. Focus areas are: NEPA, ESA, and the Magnuson-Stevens Act.

<b>Attorney Fees vs. Agency</b>	<b>0</b> 0.00	<b>1</b> <i>0.01</i>	<b>1</b> <i>0.01</i>	<b>0</b> 0.00	<b>2</b> <i>0.04</i>
<b>Attorney Fees vs Private Parties</b>	<b>0</b> 0.00	<b>1</b> <i>0.01</i>	<b>1</b> <i>0.01</i>	<b>0</b> 0.00	<b>1</b> <i>0.02</i>
<b>Appointment Requirements</b>	<b>1</b> <i>0.40</i>	<b>1</b> <i>0.01</i>	<b>1</b> <i>0.01</i>	<b>3</b> <i>0.05</i>	<b>2</b> <i>0.04</i>
<b>Sunset Admin Powers</b>	<b>0</b> 0.00	<b>4</b> <i>0.05</i>	<b>0</b> 0.00	<b>2</b> <i>0.03</i>	<b>1</b> <i>0.02</i>
<b>Expenditure Limits</b>	<b>0</b> 0.00	<b>18</b> <i>0.22</i>	<b>28</b> <i>0.34</i>	<b>5</b> <i>0.08</i>	<b>7</b> <i>0.14</i>
<b>Legislative Rejection Power</b>	<b>0</b> 0.00	<b>0</b> 0.00	<b>1</b> <i>0.01</i>	<b>0</b> 0.00	<b>0</b> 0.00
<b>Confirmation by Other Agency</b>	<b>0</b> 0.00	<b>2</b> <i>0.02</i>	<b>3</b> <i>0.04</i>	<b>3</b> <i>0.05</i>	<b>0</b> 0.00
<b>Legislative Reporting Req</b>	<b>1</b> <i>0.40</i>	<b>30</b> <i>0.37</i>	<b>22</b> <i>0.27</i>	<b>10</b> <i>0.16</i>	<b>17</b> <i>0.33</i>
<b>Consultation with Agencies or Public</b>	<b>2</b> <i>0.80</i>	<b>76</b> <i>0.94</i>	<b>55</b> <i>0.68</i>	<b>59</b> <i>0.96</i>	<b>59</b> <i>1.14</i>
<b>Audit or Investigation Req</b>	<b>0</b> 0.00	<b>1</b> <i>0.01</i>	<b>3</b> <i>0.04</i>	<b>2</b> <i>0.03</i>	<b>1</b> <i>0.02</i>

Table 3: Results for U.S. Statutes (continued)<sup>221</sup>

<b>Statute:</b>	<b>ESA</b>	<b>CAA</b>	<b>CWA</b>	<b>MSA</b>
<b>Specific Deadlines</b>	<b>2</b> <i>0.09</i>	<b>42</b> <i>0.21</i>	<b>51</b> <i>0.42</i>	<b>14</b> <i>0.22</i>
<b>Specific Timeframes</b>	<b>29</b> <i>1.28</i>	<b>337</b> <i>1.66</i>	<b>177</b> <i>1.47</i>	<b>76</b> <i>1.21</i>
<b># of Words</b>	22672	203025	120303	62643
<b>Shall, must or will</b>	<b>72</b> <i>3.18</i>	<b>1087</b> <i>5.35</i>	<b>643</b> <i>5.34</i>	<b>357</b> <i>5.70</i>
<b>Citizen Suit vs Agency</b>	<b>1</b> <i>0.04</i>	<b>2</b> <i>0.01</i>	<b>1</b> <i>0.01</i>	<b>0</b> 0.00
<b>Citizen Suit vs Private Parties</b>	<b>1</b> <i>0.04</i>	<b>2</b> <i>0.01</i>	<b>1</b> <i>0.01</i>	<b>0</b> 0.00
<b>Attorney Fees vs. Agency</b>	<b>1</b>	<b>1</b>	<b>1</b>	<b>0</b>

<sup>221</sup> Raw totals are listed in bold-type, and scaled counts per-thousand-words are listed in italics. Focus areas are: NEPA, ESA, and the Magnuson-Stevens Act.

	0.04	<0.01	0.01	0.00
<b>Attorney Fees vs Private Parties</b>	<b>1</b> 0.04	<b>1</b> <0.01	<b>1</b> 0.01	<b>0</b> 0.00
<b>Appointment Requirements</b>	<b>0</b> 0.00	<b>5</b> 0.02	<b>3</b> 0.02	<b>9</b> 0.14
<b>Sunset Admin Powers</b>	<b>0</b> 0.00	<b>0</b> 0.00	<b>5</b> 0.04	<b>0</b> 0.00
<b>Expenditure Limits</b>	<b>0</b> 0.00	<b>11</b> 0.05	<b>94</b> 0.78	<b>14</b> 0.22
<b>Legislative Rejection Power</b>	<b>0</b> 0.00	<b>0</b> 0.00	<b>0</b> 0.00	<b>2</b> 0.03
<b>Confirmation by Other Agency</b>	<b>5</b> 0.22	<b>8</b> 0.04	<b>5</b> 0.04	<b>12</b> 0.19
<b>Legislative Reporting Req</b>	<b>5</b> 0.22	<b>57</b> 0.28	<b>43</b> 0.36	<b>22</b> 0.35
<b>Consultation with Agencies or Public</b>	<b>21</b> 0.93	<b>199</b> 0.98	<b>144</b> 1.20	<b>113</b> 1.80
<b>Audit or Investigation Req</b>	<b>0</b> 0.00	<b>0</b> 0.00	<b>1</b> 0.01	<b>0</b> 0.00

Table 3: Results for U.S. Statutes (continued)

	<b>Weighted Average</b>	<b>Focus</b>
<b>Specific Deadlines</b>	0.22	0.19
<b>Specific Timeframes</b>	1.67	1.21
<b># of Words</b>		
<b>Shall, must or will</b>	4.85	4.9
<b>Citizen Suit vs Agency</b>	0.01	0.01
<b>Citizen Suit vs Private Parties</b>	0.01	0.01
<b>Attorney Fees vs. Agency</b>	0.01	0.01
<b>Attorney Fees vs Private Parties</b>	0.01	0.01
<b>Appointment Requirements</b>	0.04	0.11
<b>Sunset Admin Powers</b>	0.02	0.00
<b>Expenditure Limits</b>	0.26	0.16
<b>Legislative Rejection Power</b>	<0.01	0.02
<b>Confirmation by Other Agency</b>	0.06	0.19

<b>Legislative Reporting Req</b>	0.30	0.32
<b>Consultation with Agencies or Public</b>	1.06	1.55
<b>Audit or Investigation Req</b>	0.01	0.00

Table 4: Result for Canadian Statutes<sup>222</sup>

<b>Statute:</b>	<b>Fisheries</b>	<b>SARA</b>	<b>CEPA</b>	<b>CEAA</b>	<b>PCPA</b>
<b>Specific Deadlines</b>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>2</b> <i>0.05</i>
<b>Specific Timeframes</b>	<b>5</b> <i>0.26</i>	<b>33</b> <i>0.57</i>	<b>36</b> <i>0.22</i>	<b>13</b> <i>0.29</i>	<b>6</b> <i>0.15</i>
<b># of Words</b>	19376	58817	167033	44838	40267
<b>Shall, must or will</b>	<b>23</b> <i>1.19</i>	<b>130</b> <i>2.21</i>	<b>165</b> <i>0.99</i>	<b>118</b> <i>2.63</i>	<b>77</b> <i>1.91</i>
<b>Citizen Suit vs Agency</b>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>
<b>Citizen Suit vs Private Parties</b>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>2</b> <i>0.01</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>
<b>Attorney Fees vs. Agency</b>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>
<b>Attorney Fees vs Private Parties</b>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>1</b> <i>0.01</i>	<b>2</b> <i>0.04</i>	<b>0</b> <i>0.00</i>
<b>Appointment Requirements</b>	<b>0</b> <i>0.00</i>	<b>3</b> <i>0.02</i>	<b>3</b> <i>0.02</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>
<b>Sunset Admin Powers</b>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>8</b> <i>0.05</i>	<b>0</b> <i>0.00</i>	<b>1</b> <i>0.02</i>
<b>Expenditure Limits</b>	<b>1</b> <i>0.05</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>
<b>Legislative Approval Requirements</b>	<b>1</b> <i>0.05</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>
<b>Legislative Rejection Power</b>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>
<b>Confirmation by Other Agency</b>	<b>1</b> <i>0.05</i>	<b>0</b> <i>0.00</i>	<b>11</b> <i>0.07</i>	<b>2</b> <i>0.04</i>	<b>2</b> <i>0.04</i>

<sup>222</sup> Raw totals are listed in bold-type, and scaled counts per-thousand-words are listed in italics. Focus areas are the Fisheries Act, SARA, and CEPA.

<b>Legislative Reporting Requirements</b>	<b>2</b> <i>0.10</i>	<b>2</b> <i>0.03</i>	<b>8</b> <i>0.05</i>	<b>2</b> <i>0.04</i>	<b>2</b> <i>0.04</i>
<b>Consultation with Agencies or Public</b>	<b>3</b> <i>0.15</i>	<b>50</b> <i>0.85</i>	<b>26</b> <i>0.16</i>	<b>4</b> <i>0.09</i>	<b>4</b> <i>0.09</i>
<b>Audit or Investigation Requirements</b>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>	<b>0</b> <i>0.00</i>

Table 4: Results for Canadian Statutes (continued)

	<b>Weighted Average</b>	<b>Focus</b>
<b>Specific Deadlines</b>	0.01	0
<b>Specific Timeframes</b>	0.28	0.4
<b># of Words</b>		
<b>Shall, must or will</b>	1.55	2.20
<b>Citizen Suit vs Agency</b>	0	0
<b>Citizen Suit vs Private Parties</b>	0.01	0
<b>Attorney Fees vs. Agency</b>	0	0
<b>Attorney Fees vs Private Parties</b>	<0.01	0
<b>Appointment Requirements</b>	0.02	0.03
<b>Sunset Admin Powers</b>	0.03	0
<b>Expenditure Limits</b>	<0.01	0.01
<b>Legislative Approval Requirements</b>	<0.01	0.01
<b>Legislative Rejection Power</b>	0	0
<b>Confirmation by Other Agency</b>	0.05	0.02
<b>Legislative Reporting Requirements</b>	0.05	0.05
<b>Consultation with Agencies or Public</b>	0.26	0.46
<b>Audit or Investigation Requirements</b>	0	0

Table 5: Years of Enactment or Significant Amendment for Statutes

<b>Statute</b>	<b>Year Enacted</b>	<b>Years of Significant Amendments</b>
<b>United States</b>		
<b>NEPA</b>	1970	
<b>RCRA</b>	1976	1980, 1984, 1986, 1992, 1996, 2005

<b>CERCLA</b>	1980	1986, 1996, 2002
<b>FIFRA</b>	1972	1988, 1991, 1996, 2004, 2007, 2008, 2012
<b>TSCA</b>	1976	2010
<b>ESA</b>	1973	1978, 1979, 1982, 1988
<b>Clean Air Act</b>	1970	1977, 1990
<b>Clean Water Act</b>	1972	1980, 1981, 1987, 1990, 1998, 2000, 2002, 2004
<b>Magnuson-Stevens Act</b>	1976	1978, 1980, 1986, 1990, 1992, 1996, 2007
<b>Canada</b>		
<b>Fisheries</b>	1868	1977, 1986, 2013
<b>SARA</b>	2002	
<b>CEPA</b>	1988	1999
<b>CEAA</b>	1992	2012
<b>PCPA</b>	2002	2006, 2016