

**FEDERAL ADMINISTRATION OF CONSERVATION IN  
AUSTRALIA: COOPERATIVE INTENT  
AND POLITICAL REALITY**

LUCAS L. BURNS\*

1. INTRODUCTION

Arising in the midst of distinctive political and ecological climates at different times during the last century, national conservation regimes in Australia, Germany, and the United States were nevertheless prompted by the same uniquely modern concern about the status of threatened wildlife. Despite their common objective to address this concern, the iterations of national conservation regimes following the U.S. Endangered Species Act of 1973 (“ESA”)<sup>1</sup> are characterized by a diversity of means, even among countries sharing a common law legal system. Although other national legislatures enacted a variety of statutes with similar objectives over the past few decades, the ESA still stands out as an exceptional model among common and civil law countries alike, utilizing a highly centralized regime to directly protect threatened species.

While the counterpart provisions for species protection in an Australian statute—the Environment Protection and Biodiversity Conservation Act of 1999 (“EPBC Act”)—are substantially different from the ESA in their reach and in their inclusion of state decisionmaking, perhaps unexpectedly, many provisions in the comparable German statute are similar to the EPBC Act. These similarities call to mind the often-dubious distinctions between

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\* Articles Editor, University of Pennsylvania Journal of International Law, Vol. 32; J.D., 2011, University of Pennsylvania Law School.

<sup>1</sup> See Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006) (“It is . . . declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of [these] purposes . . .”).

civil law and common law countries, particularly on the level of specific areas of law. At least within the limited scope of the conservation regimes examined here, variations between the means employed in two common law countries—the United States and Australia—are often greater than those between a common law and civil law country—Australia and Germany. As this Comment will show, the reason for this divergence is political: although the statute establishing the Australian regime was enacted by a legislature with near-plenary constitutional authority over environmental matters, its state-centric provisions were inspired primarily by the political context in which it was enacted.

Nevertheless, the facially divergent Australian and American statutory regimes have faced similar criticisms after several years of implementation. Both regimes have been criticized as slow-to-react and either plagued by under-enforcement or unpredictable enforcement. The similar criticisms of the Australian regime may be explained by its implementation. The greater cooperative mechanisms that distinguished the Australian from the American regime have been underutilized in practice, and as a result enforcement is burdened by a lessened degree of responsiveness and is subject to the vacillations of political expediency on a federal level. These inefficiencies are also characteristic of a highly centralized conservation regime, which is exemplified by the ESA. In both cases, the mechanisms for state cooperation are inadequate or lay dormant, leaving unrealized the potential efficacy of either regime.

Following more than ten years of implementation of the Australian statute, this Comment will recount the origins of the new cooperative conservation provisions, how the failures of its implementation relate to underutilization of these provisions, and what can be learned from the failings and successes of the EPBC Act—one of the most recently enacted federal environmental statutes.

First, by explaining the constitutional power available to national legislatures in the environmental arena and the political considerations prevailing at the time of enactment, the latter will be shown to have been the primary factor affecting the divergence of the Australian statute from the mechanisms of the ESA. Second, the provisions of the three statutes will be compared in order to highlight the similarities between the Australian and German regimes and the differences between Australian and American regimes, with particular focus on the mechanisms for cooperative

efforts involving the states. Third, this Comment will survey how the Australian statute as implemented has been subject to criticism similar to that directed toward the ESA. Finally, this Comment will contend that the failure of the federal Australian legislators to utilize the substantial cooperative mechanisms in the new EPBC Act demonstrates that the cooperative mechanisms in a federal conservation statute must be accompanied by a robust method for ensuring their utilization.

## 2. THE ECOLOGICAL CONTEXT

As an initial matter, an undeniable aspect of the context in which national biodiversity legislation arises is, of course, the presence of biota of particular concern that will be affected by policy. If the prominence of threatened species varied significantly between the examined countries, it is conceivable that this alone might account for the differences between the regimes. This is not the case.

Threatened endemic species are readily identifiable in the isolated continent of Australia<sup>2</sup> and within the vast range of wilderness in North America. Australia is home to 7.8% of the world's species, most of which are endemic.<sup>3</sup> Since the time of European settlement, the persistence of native populations has been in steady decline.<sup>4</sup> By these indices the importance of an effective conservation regime is clear.

However, the protection of wildlife from the harmful encroachment of civilization may intuitively seem an unlikely concern in long-settled Central Europe. To be sure, little or no *true*

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<sup>2</sup> See BEN BOER & GRAEME WIFFEN, *HERITAGE LAW IN AUSTRALIA* 142 (2006) (estimating that approximately 85% of flowering plants, 84% of mammals, 45% of birds, and 89% "of inshore, temperate-zone fish are endemic . . . [to] Australia.").

<sup>3</sup> See ARTHUR D. CHAPMAN, *AUSTL. GOV'T DEP'T OF THE ENV'T, WATER, HERITAGE & THE ARTS, NUMBERS OF LIVING SPECIES IN AUSTRALIA AND THE WORLD* 7 (2d ed. 2009), available at <http://www.environment.gov.au/biodiversity/abrs/publications/other/species-numbers/2009/pubs/nlsaw-2nd-complete.pdf> ("For example, 41.3% of the chordates are endemic (including 87% of mammals, 45% of birds, 93% of reptiles, 94% of frogs) and some 92% of the vascular plants. . . . [T]he number of Australian species under threat are 246 chordates . . . 1260 vascular plants . . . ,[and] 32 invertebrates . . ."). See also *id.* at 11 tbl. 2.

<sup>4</sup> See A Delahunt et al., *The National Estate, Forests and Fauna*, in *CONSERVATION OF AUSTRALIA'S FOREST FAUNA* 245 (Daniel Lunney ed., 1991) (discussing the potential decline of National Estate areas in Australia).

virgin forestland remains in Central Europe,<sup>5</sup> including Germany. However, there are populations of species endemic to Germany presently in decline. About 3,000 ferns and flowering plants are endemic to Germany, and almost a third are at least *at risk* of extinction.<sup>6</sup> According to an influential “Red List” published by the International Union for Conservation of Nature (“IUCN”), in Germany seventy-five species of flora and fauna are designated as threatened.<sup>7</sup>

In contrast, 849 species in Australia and 1157 species in the United States<sup>8</sup> are considered threatened. However, considering the much smaller total area of Germany, the proportion of threatened species to the total size of the country is higher than in the United States, although this does not speak to the density or specific threat level of populations.<sup>9</sup> By these indices, species

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<sup>5</sup> See, e.g., G. Frank & F. Müller, *Voluntary Approaches in Protection of Forests in Austria*, 6 ENVTL. SCI. & POL'Y 261, 262 (2003) (“Except in the Alps and the inaccessible mountains of the Carpathians and the Balkan range, no true virgin forests have remained in Central Europe.”) (references omitted).

<sup>6</sup> See FED. MINISTRY FOR THE ENV'T, NATURE CONSERVATION & NUCLEAR SAFETY, NATIONAL STRATEGY ON BIOLOGICAL DIVERSITY 17 (Jonna Küchler-Krischun & Alfred Maria Walter eds., 2007) [hereinafter NATIONAL STRATEGY ON BIOLOGICAL DIVERSITY] [http://www.bmu.de/files/english/pdf/application/pdf/broschuere\\_biológ\\_vielfalt\\_strategie\\_en\\_bf.pdf](http://www.bmu.de/files/english/pdf/application/pdf/broschuere_biológ_vielfalt_strategie_en_bf.pdf) (specifying that the Red List estimates that 26.8% of endemic plant species and 36% of endemic animal species are currently at risk of extinction); see also FED. MINISTRY FOR THE ENV'T, NATURE CONSERVATION & NUCLEAR SAFETY, REPORT ON THE STATE OF NATURE BY THE GERMAN FEDERAL GOVERNMENT FOR THE 16TH ELECTORAL TERM 17 (Ingelore Gödeke & Alexandra Liebing eds., 2009), available at [http://www.bmu.de/files/english/pdf/application/pdf/bericht\\_lage\\_natur\\_lp\\_16\\_en\\_bf.pdf](http://www.bmu.de/files/english/pdf/application/pdf/bericht_lage_natur_lp_16_en_bf.pdf) (estimating that due to the effects of global warming “about 20 to 30% of all species which have been assessed . . . will face a higher risk of extinction”).

<sup>7</sup> See *Biodiversity and Protected Areas—Germany*, EARTHTRENDS, 1–2 (2003), [http://earthtrends.wri.org/pdf\\_library/country\\_profiles/bio\\_cou\\_276.pdf](http://earthtrends.wri.org/pdf_library/country_profiles/bio_cou_276.pdf) (listing twelve higher plants, eleven mammals, five breeding birds, and six fishes as being designated as threatened in Germany).

<sup>8</sup> See INT'L UNION FOR CONSERVATION OF NATURE, TABLE 5: THREATENED SPECIES IN EACH COUNTRY (TOTALS BY TAXONOMIC GROUP) 4 (2011), available at [http://www.iucnredlist.org/documents/summarystatistics/2011\\_2\\_RL\\_Stats\\_Table5.pdf](http://www.iucnredlist.org/documents/summarystatistics/2011_2_RL_Stats_Table5.pdf) (reporting that 67 plants, 55 mammals, 52 birds, 43 reptiles, 47 amphibians, 103 fishes, 168 molluscs, and 314 other invertebrates are recognized as threatened in Australia; 243 plants, 37 mammals, 76 birds, 36 reptiles, 56 amphibians, 183 fish, 268 molluscs, and 258 other invertebrates are recognized as threatened in the United States).

<sup>9</sup> See VALUATION AND CONSERVATION OF BIODIVERSITY: INTERDISCIPLINARY PERSPECTIVES ON THE CONVENTION ON BIOLOGICAL DIVERSITY 111 (Michael Markussen et al. eds., 2005) (“The patchy landscape of Central Europe abounds

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protection is a justifiable priority not only in these common law countries but in German environmental policy as well.

### 3. CONSTITUTIONAL CONTEXT: ESTABLISHMENT AND STRENGTHENING OF FEDERAL AUTHORITY OVER THE ENVIRONMENT

When the legislatures of each of the examined countries enacted comprehensive legislation on a national level, in each case it was certain that the enactment abided by the constitutional allocation of legislative power. However, in Australia the recognition of this power in the environmental area was recent, and in Germany the constraints imposed by constitutional law significantly limited the enactment of a comprehensive environmental statute.

An examination of constitutional jurisprudence in Germany, the United States, and Australia reveals that although all three states are federal polities, the distribution of environmental lawmaking power between their respective federal and state level governments varies significantly. The distribution of power in the Australian and American federal systems is similar, though the concurrent powers in Australia are much broader; both models are very different from the cooperative model of federalism in Germany, which provides for a complex interdependent paradigm of decisionmaking.

Power is much more concentrated in Germany than in the United States because of the partial fusion of powers of the federal council that represents the *Länder* (states), known as the *Bundesrat* (second chamber), and the executive.<sup>10</sup> But environmental legislation has remained largely fragmented. The German legislative process, unlike the American and Australian, serves as an impediment to comprehensive reform since the *Länder* are restrained by the necessity of broad agreement before new environmental policy is enacted.<sup>11</sup> This has been an obstacle to

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with small, often fragmented populations . . . . Additionally, Germany is very poor in endemic species, and there are no hot spots of species diversity . . . .”).

<sup>10</sup> See R. DANIEL KELEMEN, *THE RULES OF FEDERALISM: INSTITUTIONS AND REGULATORY POLITICS IN THE EU AND BEYOND* 79 (2004) (explaining how the structure of the German government leads to more concentrated power than in the United States or other EU countries).

<sup>11</sup> See Helmut Wiesenthal, *German Unification and 'Model Germany': An Adventure in Institutional Conservatism*, in *GERMANY: BEYOND THE STABLE STATE* 37,

long-sought reforms in the environmental area. The power of the *Bundesrat* in Germany generally causes an even higher degree of fragmentation of power at the federal level than the Australian model and a lower degree of discretion exercised by the states in implementing federal policy.<sup>12</sup> However, in the area of species protection, the autonomy the *Länder* exercise in implementing federal law more closely resembles the autonomy the Australian states exercise in this area than the American states.

Regarding specific lawmaking power, the U.S. Constitution, like the Constitution of Australia, does not allocate the competency to regulate nature conservation. In either case, the concept of “environmental conservation” was simply not a part of the contemporary lexicon. As previously mentioned, in both countries this area of regulation was traditionally within the competency of state governments, and remained so because of the residual nature of state power. Only after judicial interpretation of constitutional provisions broadened the authority of the federal government to legislate did it become clear that constitutional challenge did not threaten the ESA and the EPBC Act.

In the United States, the broad expansion of congressional authority to legislate occurred long before the enactment of the ESA. However, the Supreme Court did not clarify specific authority to enact wildlife regulation under the Commerce Clause until the 1970s. Even so, at the time of the ESA’s enactment, the Court had not struck down legislation as an unconstitutional exercise of the Commerce Clause since the New Deal.<sup>13</sup> Thus, it did not appear that the ESA was in danger of serious constitutional scrutiny. In 1977, the Court indicated that Congress had broad power to regulate wildlife under the Commerce Clause in a

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52–53 (Herbert Kitschelt & Wolfgang Streeck eds., 2004) (describing Germany’s system of cooperative federalism as limiting autonomy for “bold initiatives” and thus favorable to the status quo).

<sup>12</sup> See KELEMEN, *supra* note 10, at 20–21 (noting that because “Germany combines parliamentary government with the existence of a powerful upper chamber” it provides for less discretion compared to the Australian government).

<sup>13</sup> See *id.* at 59 (explaining that the Supreme Court has interpreted the Commerce Clause broadly and as such has “not struck down a single federal regulation claiming to promote interstate commerce since the New Deal”).

decision that upheld the regulation of fish in state waters.<sup>14</sup> Two further decisions in 1979 reified this holding.<sup>15</sup>

A somewhat recent constitutional challenge to a regulation promulgated pursuant to the ESA made clear that Congress has authority to regulate wildlife pursuant to this power even after the *Lopez* decision.<sup>16</sup> In *Gibbs v. Babbitt*, private landowners challenged a regulation that forbade the “taking” of endangered wolves on private land.<sup>17</sup> The Fourth Circuit concluded that the regulation was constitutional, since “[t]he taking of red wolves implicates a variety of commercial activities,” and killing of red wolves *in the aggregate* affects interstate commerce.<sup>18</sup> This decision confirmed Congress’ ability to regulate “takings,” even on privately owned land.

The broadening of federal legislative authority in the environmental arena was comparatively recent in Australian jurisprudence. Although matters of land management are vested in the states, the Constitution of Australia does not explicitly address the power to enact environmental legislation.<sup>19</sup>

Like the enumerated powers of Congress in Article 1 of the U.S. Constitution, Section 51 of the Australian Constitution lists the “heads of power” originally ceded by the Australian colonies to the

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<sup>14</sup> See *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 286–87 (1977) (holding that the Federal Enrollment and Licensing Act preempted Virginia state law, and upholding that Act as constitutional); see also MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 23 (3d ed. 1997) (noting that while the fish in *Douglas v. Seacoast Products, Inc.* were migratory, the basis for finding federal authority was grounded in the vessels’ interstate movement when searching for fish and transporting the catches back to processing plants).

<sup>15</sup> See *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979) (holding the definition of commerce equally extends to federal restrictions on state legislation as well as congressional action); *Andrus v. Allard*, 444 U.S. 51, 63–64 (1979) (holding that the Eagle Protection Act and the Migratory Bird Treaty Act were valid).

<sup>16</sup> See *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding that while Congress had broad lawmaking authority under the Commerce Clause, the power was limited, and did not extend so far from “commerce” as to authorize the regulation of the carrying of handguns, especially when there was no evidence that carrying guns affected the economy on a massive scale).

<sup>17</sup> See *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000).

<sup>18</sup> *Id.* at 492–93 (explaining that there is a valid federal scheme for protecting and conserving “valuable wildlife resources important to the welfare of [the] country”).

<sup>19</sup> See AUSTRALIAN CONSTITUTION s 51 (enumerating the powers of the Parliament).

Commonwealth Parliament.<sup>20</sup> These matters fall within the “concurrent power” of the Commonwealth. Pursuant to Section 107, state parliaments may legislate in the areas of concurrent jurisdiction.<sup>21</sup> For the most part, since legislative authority in Australia is held concurrently, unlike the United States there is high probability of conflict between a valid state law and a valid federal law,<sup>22</sup> in which case inconsistent state legislation is “invalid.”<sup>23</sup> As the environment was not mentioned within the original “heads of power,” legislation related to environmental matters was considered within a residual power left to the states.

After the Federation was formed, the Australian Commonwealth relied on its “trade and commerce” power to enact a few pieces of species protection legislation, including the regulation of international trade in endangered birds.<sup>24</sup> The very limited nature of the Environment Protection (Impact of Proposals) Act of 1974, which applied only to decisions involving the Commonwealth, reflected a narrow interpretation of Commonwealth that was undisturbed until as recently as the 1980s. The anemic trade and commerce power still lacks the expansive capability of its American counterpart, the Commerce Clause.<sup>25</sup>

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<sup>20</sup> See SURI RATNAPALA, *AUSTRALIAN CONSTITUTIONAL LAW: FOUNDATIONS AND THEORY* 204–07 (2d ed. 2007) (describing the Australian scheme of distributing power into various exclusive and shared competencies).

<sup>21</sup> *Id.* at 206 (“The provision implies that in the absence of exclusive vesting, State Parliaments may also legislate on subjects within the Commonwealth’s jurisdiction.”).

<sup>22</sup> *Id.* at 208 (explaining that the Constitution’s response is to give precedence to federal law through Section 109, which “is activated only when a valid federal law is in conflict with a valid State law”).

<sup>23</sup> See AUSTRALIAN CONSTITUTION S 109 (“When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”).

<sup>24</sup> See ALLAN HAWKE, *AUSTL. GOV’T DEP’T OF THE ENV’T, WATER, HERITAGE & THE ARTS, INDEPENDENT REVIEW OF THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999: INTERIM REPORT* 8 [¶ 2.1] [hereinafter HAWKE INTERIM REPORT], available at <http://www.environment.gov.au/epbc/review/publications/pubs/interim-report.pdf> (discussing the Commonwealth’s prohibition on the importation of specific bird species in 1908 and 1909).

<sup>25</sup> See Cheryl Saunders, *The Constitutional Division of Powers with Respect to the Environment in Australia*, in *FEDERALISM AND THE ENVIRONMENT: ENVIRONMENTAL POLICYMAKING IN AUSTRALIA, CANADA, AND THE UNITED STATES* 55, 64 (Kenneth M. Holland et al. eds., 1996) (noting a lack of an Australian equivalent to the

Compared to the United States, the Australian High Court only recently began to expand the constitutional role of the Commonwealth in the environmental arena. The *Franklin Dam Case* in 1983 opened the doors to new environmental legislation pursuant to the “external affairs” power, deciding that the Commonwealth could act to block a state-approved dam in an area on the World Heritage List pursuant to the Convention on Biological Diversity (“CBD”).<sup>26</sup> The High Court made it clear that the Commonwealth could act to implement any obligations under an international treaty, an expansive recognition of power that has not been nearly realized in the environmental area to this day. The legislation upheld in the *Franklin Dam Case* was also constitutional pursuant to the “corporations” head of power.<sup>27</sup> Since this case, the Court’s interpretation of the breadth of Commonwealth power has continued to grow.<sup>28</sup>

Turning to the division of constitutional lawmaking power in Germany, although authority to legislate in the area of nature conservation was not addressed in the original Basic Law for the Federal Republic of Germany (“Basic Law”) of 1949, an amendment to the German constitution in 1969 allowed the federal government to issue “framework” legislation in this area.<sup>29</sup>

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expansive commingling doctrine found in the United States); see also Greg Taylor, *The Commerce Clause—Commonwealth Comparisons*, 24 B.C. INT’L & COMP. L. REV. 235, 246–48 (2001) (explaining the rejection of the doctrine of commingling and comparing the American interpretation of the Commerce Clause generally).

<sup>26</sup> See *Commonwealth v Tasmania* (1983) 158 CLR 1, 5 (Austl.) (holding that the federal legislation was constitutional under Section 51 (xxix)).

<sup>27</sup> See AUSTRALIAN CONSTITUTION s 51(xx) (detailing that Parliament may legislate with respect to “[f]oreign corporations, and trading or financial corporations formed within the limits of the Commonwealth”).

<sup>28</sup> But see GRAEME APLIN, AUSTRALIANS AND THEIR ENVIRONMENT 168 (1998) (“The Federal Government’s environmental role is limited to areas involving its external or foreign affairs responsibilities, its own property and activities, and matters delegated to it by the states.”).

<sup>29</sup> See Gesetz zur Änderung des Grundgesetzes [Law Amending Basic Law], May 12, 1969, BGBl. I at 363 (Ger.), amending GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 75 § 3 (Ger.) (granting a federal competency over “das Jagdwesen, den Naturschutz und die Landschaftspflege” [hunting, protection of nature and care of the countryside]); see also KELEMEN, *supra* note 10, at 82 (2004) (explaining that under the amendment the federal government “could issue legislation establishing general principles and goals, but could not issue detailed regulations”).

According to Articles 83–87 of the Basic Law, the *Länder* are generally responsible for the *execution* of federal legislation.<sup>30</sup> Framework legislation promulgated guidelines on a federal level that called for the enactment of more specific legislation by the *Länder*.<sup>31</sup>

This feature distinguishes environmental legislation in Germany from its American and Australian counterparts, as there is a comparative lack of ability to control the administration beyond the guidelines set out in regulations and framework law. However, as a part of the response to a perceived encroachment on the authority of the *Länder*, the provision for framework legislation in the Basic Law was deleted as part of federalism reform in 2006.<sup>32</sup>

Nevertheless, the German Federal Nature Conservation Act (“the German Act”), the primary conservation statute in Germany, was enacted as framework legislation.<sup>33</sup> This, therefore, gave the *Länder* responsibility to concretize its framework in a way that would be considered an unconstitutional commandeering of state

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<sup>30</sup> See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], MAY 23, 1949, BGBL. I, art. 83–90 (describing the specifics of execution by the *Länder* in light of federal oversight and commission, and as pertaining to particular domains such as defense, nuclear energy, air and rail transport, and posts and telecommunications).

<sup>31</sup> See KELEMEN, *supra* note 10, at 82–83 (“[A] 1972 amendment added waste disposal, air pollution control, and noise abatement as areas of concurrent federal-state legislative competence.”).

<sup>32</sup> See Gesetz zur Änderung des Grundgesetzes [Law Amending Basic Law], Aug. 28, 2006, BGBL. I at 2034, art. 1, § 8 (Ger.) (“Die Artikel 74a und 75 werden aufgehoben” [“Articles 74a and 75 are hereby repealed”].); see also Arthur Gunlicks, *German Federalism Reform: Part One*, 8 GER. L.J. 111, 122–23 (2007) (considering the repeal of Article 75 to be a natural result of the Federal Constitutional Court decisions that placed significant limits on the federal government’s power to regulate education under the Article).

<sup>33</sup> Gesetz über Naturschutz und Landschaftspflege, Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act], Mar. 25, 2002, BGBL. I at 1193, § 71 (Ger.) [hereinafter German Federal Nature Conservation Act] (“Die Verpflichtung der Länder gemäß Artikel 75 Abs. 3 des Grundgesetzes . . . im Übrigen innerhalb von drei Jahren nach dem Inkrafttreten dieses Gesetzes zu erfüllen” [“The obligation of the federal states according to Art. 75(3) of the Constitution must be fulfilled . . . within three years after the entry into force of this Act”].), reprinted in and translated in GERMAN ENVIRONMENTAL LAW FOR PRACTITIONERS 683 (Horst Schlemminger & Claus-Peter Martens eds., Jane Martens trans., 2d ed. 2004).

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authority in the United States.<sup>34</sup> In fact, the only way that Congress could enact a similar program compelling states to enact biodiversity legislation would be through conditional spending or conditional preemption.<sup>35</sup>

#### 4. THE PREVAILING POLITICAL CONTEXT AT ENACTMENT

The concerns that gave rise to the examined regimes are of recent vintage relative to the history of wildlife law generally. The entire legal history of “wildlife law,” loosely defined, may be characterized as a global development that begins with basic ideas about the “ownership” of wildlife that evolve into modern concerns about conservation of biodiversity.<sup>36</sup> The twentieth century terms “biodiversity” and “conservation” that now permeate species protection in the regimes compared here originated recently, relative to the whole evolution of this area of policy.

Importantly, the incorporation of these terms into floor debates and statutes reflected a sea change in the popular conception of man’s relationship to wildlife. This change led to the emergence of two legal developments: an expansion of the scope of wildlife law from management to conservation and strengthened authority over wildlife on a national level.

Despite plenary constitutional authority over environmental legislation on a federal level, prevailing political concerns ultimately restrained the mechanisms employed by the Australian regime. As a result, although the environmental conservation statutes of Australia, Germany, and the United States have parallel origins in the movement toward centralized authority over conservation, the text of the Australian statute is shaped by a heightened concern for state involvement, while the statutory text

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<sup>34</sup> See *Printz v. United States*, 521 U.S. 898, 933 (1997) (“The Federal Government may not compel the States to enact or administer a federal regulatory program.”) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)).

<sup>35</sup> See Dale D. Goble, *The Property Clause: As If Biodiversity Mattered*, 75 U. COLO. L. REV. 1195, 1233 (2004) (explaining that these two cooperative federalism tactics are constitutional because states have the right not to participate).

<sup>36</sup> Anthropocentric concerns about ownership and control dominated wildlife law until the twentieth century. See Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U. L. REV. 703, 705–06 (1976) (recounting the history of American wildlife law, beginning with hunting laws based on the free taking principle, which were considered necessary for human survival in the American wilderness).

of the ESA remains an artifact of the 1970s fervor for centralized environmental policy.

*4.1. The Twentieth Century: Conservation Objective and Shift from State to National Law*

Prior to the twentieth century, the U.S. federal government did little through legislation to directly protect species,<sup>37</sup> and early efforts to protect wildlife were carried out by the states. This was also true of Australia and Germany, despite the fact that there were early efforts in these countries to form national policy to protect fauna.<sup>38</sup>

State legislatures in the United States and abroad were first to enact substantial policy for the protection of species for reasons other than their value as game. The pioneering nature of these laws was the concern their provisions evidenced with the persistence of populations of flora and fauna in the wild, instead of the rules regarding capture of wildlife. This marked an important change in the popular conception of man's relationship to nature: man was no longer primarily a hunter partaking of nature's unlimited stores, but instead a steward with the power to eradicate or preserve entire species. This change led to new developments in the mechanisms by which wildlife law achieved its objectives, and new concerns about the proper level of government to administer environmental policy.

When states began to innovate in conservation policy, the designation of protected areas was an early conservation tool. National parks were a federal invention in the United States, but in

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<sup>37</sup> A few federal laws were enacted, such as an 1868 Act prohibiting killing of certain animals in the Alaskan territory, and the indirect protection afforded by the Forest Reserve Act of 1891, which set aside land to be designated as forest reserves. See Shannon Petersen, Comment, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 467-68 (1999) (noting that the federal government focused on natural resources outside of state jurisdiction rather than concentrating efforts on wildlife management).

<sup>38</sup> For instance, the ornithologists' efforts to protect native birds in Australia proved futile primarily due to a lack of consensus among the states, and the receptiveness of a few individual state governments to legislation protecting fauna led the environmental lobby to strategically focus its efforts on state and territory governments. See DREW HUTTON & LIBBY CONNORS, *A HISTORY OF THE AUSTRALIAN ENVIRONMENT MOVEMENT* 40-43 (1999) (adding that a concurrent response by the environmentalist movement was to "improve public education strategies").

Germany and Australia the states were pioneers in establishing these areas. National parks in Australia predate the Federation, and most of the national parks in Australia are still administered by state authorities.<sup>39</sup> Similarly, in Germany, Bavaria enacted progressive legislation designating Germany's first national forest, the Bavarian Forest National Park.<sup>40</sup>

The German system ensures that the administration of all national parks is the exclusive responsibility of the *Länder*. This particular designation has become more popular in recent years, leading to the designation of the Kellerwald-Edersee National Park in the western part of North Hessen.<sup>41</sup> Although a hybrid system could have arisen in the United States in which the federal government was considered a landowner subject to the several states' laws, this conception has been consistently rejected. The federal government owns, and administers the protection of, national parks.<sup>42</sup>

Once legislators in Australia began to perceive the necessity of increased government intervention in conservation, states utilized their ability to quickly adopt progressive policies. For example, the state of Victoria enacted one of the progenitors of comprehensive conservation legislation in the Federation, again demonstrating the pioneering nature of state-level legislation.<sup>43</sup> The Victoria Flora and Fauna Guarantee Act of 1988 was explicitly set up with an eye toward the *economic* objections associated with listing an endangered species, and its provisions responded to these

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<sup>39</sup> See BOER & WIFFEN, *supra* note 2, at 227 (noting that the Australian Government administers only a few parks in the Territories).

<sup>40</sup> Jens Brüggemann, *National Parks and Protected Area Management in Costa Rica and Germany: A Comparative Analysis*, in SOCIAL CHANGE & CONSERVATION 71, 80 (Krishna B. Ghimire & Michel P. Pimbert eds., reprint 2000) (1997) (presenting a brief history of the park).

<sup>41</sup> See Tobias Hellenbroich, *The Designation of National Parks in German Nature Conservation Law*, in VALUATION AND CONSERVATION OF BIODIVERSITY: INTERDISCIPLINARY PERSPECTIVES ON THE CONVENTION ON BIOLOGICAL DIVERSITY 133, 134 (Michael Markussen et al. eds., 2005) (noting that "other areas in Germany are being recommended national park status") (citing FÖNAD 1997, 285ff).

<sup>42</sup> See Goble, *supra* note 35, at 1202-03 (referring to congressional and judicial affirmations of the Federal Government's dominion over public land).

<sup>43</sup> See KRISTIN M. JAKOBSSON & ANDREW K. DRAGUN, *CONTINGENT VALUATION AND ENDANGERED SPECIES: METHODOLOGICAL ISSUES AND APPLICATIONS* 11 (1996) (crediting the Act with creating a process for individuals and groups to nominate an ecological entity or community for protection).

concerns. Action statements and management plans explicitly took into account social and economic considerations.<sup>44</sup>

The state's willingness to make a concession—incorporating considerations favored by development interests, although producing a statute less attractive to environmental interests, allowed the state to enact progressive conservation legislation long before similar viable national legislation was enacted.

The establishment of state agencies in Australia to oversee the implementation of comprehensive policy also predated equivalent national agencies. Since the 1960s all territory and state governments in Australia have established agencies charged with the administration of environmental matters, with varying names and functions.<sup>45</sup> However, this is not true of the state-centric German system. There, the *Länder* have generally not established special authorities for the administration of nature protection, and have instead integrated this function in existing authorities responsible for inner administration.<sup>46</sup>

Until the 1960s and 1970s, state legislation in these three countries was primarily relied upon for the enactment of conservation policy, and the national legislatures lacked an impetus to consolidate in the federal government the power to legislate on conservation matters. This changed, beginning with comprehensive federal environmental policy in the United States. Environmental legislation entered a new era during the 1960s and 1970s, as evidenced by several *federal* comprehensive statutes in the United States and abroad.<sup>47</sup> This may be viewed as an inevitable outgrowth of the expanding conservation consciousness as well, since federal usurpation of legislative authority in this area is an

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<sup>44</sup> Those listings are recommended by a government-independent statutory body, which reduces delays for economic concerns. *See id.*

<sup>45</sup> *See* APLIN, *supra* note 28, at 167–68 (remarking however that governments retain the power to overrule the decisions and actions of such agencies).

<sup>46</sup> *See* SCHLEMMINGER & MARTENS, *supra* note 33, at 142 (discussing the authorities in Germany).

<sup>47</sup> In Europe, the prominence of environmental concerns was recognized when the Council of Europe declared 1970 the “European Year of Nature Conservation.” *See* ALEXANDRE KISS & DINAH SHELTON, *MANUAL OF EUROPEAN ENVIRONMENTAL LAW* 182–83 (2d ed. 1997) (discussing a variety of measures that European countries have taken to protect the environment on the federal level, such as Austria’s federal restrictions on the animal and plant trade).

obvious way to attempt to achieve one of the most prominent desiderata of any conservation regime: uniformity.

The beginning of the movement to centralization was the enactment of the ESA, designated by the Supreme Court as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”<sup>48</sup> One historian has justifiably called it the “Magna Carta of the environmental movement.”<sup>49</sup> Although not the first piece of legislation to focus on the direct protection of specific species, at the time of enactment, the ESA was certainly the most extensive legislation to focus on the persistence of threatened species of wildlife. Further, the ESA and similar national comprehensive efforts to preserve and restore biodiversity reflected the modern concern for the existential value of biodiversity for the sake of biodiversity.<sup>50</sup> This concern is a distinguishing feature of the modern era of nature conservation that is shared by all of the subsequent national regimes.

Following the enactment of the ESA in the United States, in Germany the Federal Nature Conservation Act was one of several pieces of legislation that formed a suite of environmental protection regime in the 1970s. At the time of its passage, members of a new reform-oriented coalition government recognized the successes of United States environmental initiatives on a federal level.<sup>51</sup> The original Federal Nature Conservation Act was enacted on December 20, 1976, and has been amended four times.

#### *4.2. The EPBC Act: Federalism Concerns Shape the National Conservation Statute in Australia*

For several decades following the enactment of federal conservation regimes abroad, Australia did not follow suit. This position was sustained in part by unique concerns about the

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<sup>48</sup> See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (reaffirming that the U.S. Congress intended for the Endangered Species Act of 1973 to direct *all* Federal agencies to act in the consideration of protecting endangered animals).

<sup>49</sup> Interview by Lisa McRae with Kevin Starr, Cal. State Librarian Emeritus, in Sacramento, Cal., in *WATER ON THE EDGE* (Water Education Foundation 2005).

<sup>50</sup> See HUTTON & CONNORS, *supra* note 38, at 196 (explaining that for conservationists, biodiversity became “almost an absolute value in itself”).

<sup>51</sup> See KELEMEN, *supra* note 10, at 82 (2004) (attributing a series of ecological crises and the popular responses to them as another factor in the coalition government’s initiatives).

exercise of federal power. To the frustration of the states and territories, the Australian Commonwealth government acted upon its newly clarified powers in the environmental arena during the 1980s with vigor, halting various activities within states through coercive means.<sup>52</sup>

The suddenness of the federal government's appearance within the concurrent legislative sphere of the states, along with the unilateral nature of its actions, generated political resistance from the state governments that was not seen in either Germany or the United States. Tension arose after the Queensland government refused to halt logging activity in one such newly designated World Heritage Site, which it was ordered to do in accordance with a Commonwealth ban approved by the High Court.<sup>53</sup> Subsequently, the states opposed similar actions taken by the Commonwealth pursuant to its constitutional authority.<sup>54</sup>

These instances of conflict were factors influencing a decision by the Hawke Government to undertake efforts to improve intergovernmental cooperation, which would influence future legislation.<sup>55</sup> The states also began to recognize the concurrent (as opposed to coordinate) nature of environmental policy, evidenced by statements of state-level Premiers calling for cooperation.<sup>56</sup> After a series of conferences beginning in 1990, representatives

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<sup>52</sup> An example would be threatening to nominate an area as a World Heritage Site.

<sup>53</sup> See KELEMEN, *supra* note 10, at 111-12 (mentioning the statements by the Queensland government that the Commonwealth government would have to enforce the measures with national military and police forces).

<sup>54</sup> These included conflicts over the tropical rainforest in North Queensland, efforts to prevent woodchipping in Tasmanian forests, and the Kakadu National Park in the Northern Territory. See Aynsley Kellow, *Thinking Globally and Acting Federally: Intergovernmental Relations and Environmental Protection in Australia, in FEDERALISM AND THE ENVIRONMENT: ENVIRONMENTAL POLICYMAKING IN AUSTRALIA, CANADA, AND THE UNITED STATES* 135, 146 (Kenneth M. Holland et al. eds., 1996) (recording that in all these cases of State and Territory opposition, a useful model for environmental management in the Australian Federal system failed to emerge).

<sup>55</sup> See KELEMEN, *supra* note 10, at 114 (blaming the lack of federal infrastructure required for quotidian "implementation and enforcement" of environmental policy).

<sup>56</sup> Premier Nick Greiner of New South Wales gave a speech in 1990 calling for a more cooperative approach with the Commonwealth. See Kellow, *supra* note 54, at 149 (considering Greiner's call for cooperation to be the most influential due to his position as a leader in the Liberal party).

from all nine governments signed an Intergovernmental Agreement on the Environment ("IGAE") in 1992, which set out environmental areas of responsibility in order to avoid duplication of decisionmaking.<sup>57</sup> As an example of the effect of this agreement, pursuant to the IGAE, the Commonwealth is now *obligated* to consult with the State before proposing an area for listing.<sup>58</sup>

The development of national policy on conservation culminated in the enactment of the EPBC Act on July 17, 2000. The final bill received ardent criticism from some members of the Australian Greens ("the Greens Party"), an environment-focused political party formed in 1992 with its roots in state-level greens parties,<sup>59</sup> due to a perceived "disempower[ment of] the federal government,"<sup>60</sup> as well as opposition from the Australian Labor Party ("ALP"). A majority held by a center-right political party nevertheless was able to claim the triumph of passing the most comprehensive national environmental assessment regime to date.<sup>61</sup>

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<sup>57</sup> See APLIN, *supra* note 28, at 170 (specifying the avoidance of redundant State and Federal decisionmaking as a primary concern); see also BOER & WIFFEN, *supra* note 2, at 93 (noting the more uniform acceptance of which areas of heritage protection fall within Federal and within State and Territory jurisdiction following the passage of the IGAE).

<sup>58</sup> See G. M. BATES, ENVIRONMENTAL LAW IN AUSTRALIA 340 (4th ed. 1995) (referring to the previous tension between the Commonwealth's ability to propose areas for protection despite State objections and the Commonwealth's capacity to enforce protective measures).

<sup>59</sup> See IAN THOMAS, ENVIRONMENTAL POLICY: AUSTRALIAN PRACTICE IN THE CONTEXT OF THEORY 38 (2007) (discussing the reasons for the formation of the Australia Green Party).

<sup>60</sup> See Cth, Parliamentary Debates, Senate, 29 April 1999 (Bob Brown, Senator, Tas) (Austl.) (indicting State governments as retarding Australia's efforts to develop the economy and fight global warming, in a speech given during the Second Reading on the Environment Protection and Biodiversity Conservation Bill 1998 [1999]). Senator Bob Brown of Tasmania provided perfervid criticism of the bill and the proceedings generally. See also Cth, Parliamentary Debates, Senate, 22 June 1999 (Robert Hill, Senator, SA and Min. for the Env't & Heritage) (Austl.) ("I would have thought that the Australian Greens would be in here demanding contemporary environment laws for this country. But of course they are not interested in the structure of government; they are not interested in the cooperative models. All they are interested in is confrontation . . .").

<sup>61</sup> See *id.* ("[F]or the first time we also included a bill for biological conservation in this country to protect our biodiversity. Its time had come. Regrettably the Australian Labor Party, although it had entered into the international convention on biodiversity and the national strategy, had not got around to upgrading Commonwealth law in this regard.").

This landmark environmental legislation replaced its predecessors in the area of national species protection<sup>62</sup> with a regime that incorporates extensive enforcement and listing mechanisms, which are detailed in the next Section. The EPBC Act's explicit objectives in the area of biodiversity are very similar to those of the ESA, though the EPBC Act employs different means to reach those objectives.

5. THE RESULTING PROVISIONS: DECENTRALIZED AUSTRALIAN AND GERMAN REGIMES AND A CENTRALIZED AMERICAN REGIME

The resulting federal statutes share similar objectives, but the ESA stands out as a singularly centralized system, owing its strength to less prevailing political suspicion, at the time of its enactment, about the encroachment of a powerful federal government on state interests related to the environment. Further, in Australia and Germany, state-level cooperation is particularly important, as the effects of one state's dissent are not diffused by the cooperation of forty-nine other states. The small number of states makes intergovernmental politics a prominent feature of the statutory provisions,<sup>63</sup> and the restrained federal power is manifested in provisions that take a more indirect route to species protection than the ESA.

As regimes born from the same general concerns for the existential value of biodiversity, their explicit objectives in the area of biodiversity share many similarities. A central textual objective of the ESA was to "conserve," which encompasses both protection and recovery, and is a concept that resonates throughout its counterparts abroad. Section 3(1)(c) of the EPBC Act requires the promotion of the conservation of biodiversity, which, when viewed in light of 3(2)(e)(i), includes not only preservation but also the recovery of endangered species. Article 1 of the general provisions of the German Act begins: "In view of their own value . . . nature and landscape both inside and outside the areas of human settlement shall be conserved, managed, developed and,

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<sup>62</sup> The EPBC Act replaced the Endangered Species Protection Act 1993 and the Australian Wildlife Protection Act 1998. See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (Austl.).

<sup>63</sup> See Kellow, *supra* note 54, at 139 (discussing intergovernmental relationships in Australia).

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where necessary, restored in order to safeguard on a lasting basis . . . fauna and flora . . . .” The common objective of conserving biodiversity is what distinguishes the compared provisions from other environmental policy.

An important distinction is the similar omnibus nature of the provisions of the EPBC Act and the German Act when compared to the ESA. Where the ESA is concerned exclusively with the protection of species, nature protection generally is the goal of the other statutes, including the conservation of biodiversity. Even beyond “nature” the German Act is concerned also with the general protection of “landscapes” (*Landschaftspflege*).<sup>64</sup>

The ESA’s eighteen sections are simple to navigate compared to the maze of cross-references between the general provisions of the German Act and the substantive provisions. However, the German Act is outdone in this regard by the exceptionally complex EPBC Act, which repealed more than a half a dozen pieces of Commonwealth environment legislation and incorporated their areas of concern.<sup>65</sup> The EPBC Act incorporates language and concepts from the CBD and a multi-layered approach to species protection, recognizing the value of genetic diversity, species diversity, and ecosystem diversity.<sup>66</sup>

The German and Australian regimes, because of the international obligations in which they arose, take a broader approach to biodiversity conservation that also includes the designation of protected areas other than critical habitat. These designations are the true source of their power to protect biodiversity. The EPBC Act is primarily thought of as a national scheme for Environmental Impact Assessments (“EIAs”),<sup>67</sup> which in the United States were accomplished through the National Environmental Policy Act. The conservation power of the EPBC

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<sup>64</sup> German Federal Nature Conservation Act, *supra* note 33, art. 13(1).

<sup>65</sup> See BOER & WIFFEN, *supra* note 2, at 142 (discussing the impact of the EPBC Act).

<sup>66</sup> See *id.* (discussing the EPBC Act).

<sup>67</sup> See ALLAN HAWKE, AUSTRALIAN GOV’T DEP’T OF THE ENV’T, WATER, HERITAGE & THE ARTS, THE AUSTRALIAN ENVIRONMENT ACT: REPORT OF THE INDEPENDENT REVIEW OF THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999, at 18 [¶¶ 119, 120] (2009) [hereinafter HAWKE FINAL REPORT], available at <http://www.environment.gov.au/epbc/review/publications/pubs/final-report.pdf> (recommending a national environmental management system to aid in efficiencies of the environmental impact assessment).

Act originates from these assessments. Unlike the U.S. version, assessments are required for even non-federal actions, and contain substantive requirements.

The procedure for assessment in the EPBC Act specifies seven “matter[s] of national environmental significance,” which are each in some way supported by the heads of power, as well as two exceptions. The exceptions allow for greater cooperation with the state governments; the assessment or approval of any project that falls under state “bilateral agreements” may be delegated to the state authorities.<sup>68</sup>

By way of these assessments, limitations on the federal power to directly protect species through listing and “takings” provisions did not preclude the Australian government from enacting a form of legislation that may prove to be the most effective method of halting development to preserve biodiversity. Where takings of non-federal land were considered a constitutional exercise of Congress’ power in *Gibbs*,<sup>69</sup> the Australian courts have not yet recognized such expansive Federal authority. As a result, under Section 196(1)(d), a necessary element of liability is “the member [of a species or ecological community] is in or on a Commonwealth area.”

However, the EPBC Act indirectly accomplishes a similar result by designating nationally listed threatened species and ecological communities as one of the “matter[s] of national environmental significance” that may require approval from the Federal Minister. Under the EPBC Act, consultation is required if an “action has, will have, or is likely to have, a significant impact on a matter of national environmental significance.” But unlike Section 9 of the ESA, “significant impact” does not contemplate the taking of a single plant or animal, but rather contemplates actions that, for

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<sup>68</sup> See *Lansen v Minister for Env't & Heritage* (2008) 174 FCR 14, 22 (Austl.) (“[T]o achieve its objects, the EPBC Act strengthens intergovernmental cooperation, and minimises duplication, through bilateral agreements (s 3(2)(b)) and provides for the intergovernmental accreditation of environmental assessment and approval processes (s 3(2)(c)). However, in terms of process, timeliness is important in the overall scheme of the EPBC Act.”).

<sup>69</sup> See *Gibbs v. Babbitt*, 214 F.3d 483, 483 (4th Cir. 2000) (affirming the constitutionality of regulations limiting takings).

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example, will possibly “lead to a long-term decrease in the size of a population.”<sup>70</sup>

In Germany, protected areas similarly figure prominently in the conservation regime, although designation is generally the responsibility of the *Länder*. The categories of protected areas, such as nature reserves and national parks, are laid down in Sections 12 through 19 of the German Act. Some critics might suspect that the state-level authority to designate national parks would be affected by parochial decisionmaking. However, this system has yielded enviable results,<sup>71</sup> though often fragmented by political boundaries. A substantial portion of protected areas in Germany are national parks.

A common feature of all three regimes is the listing of threatened species on both a state and federal level, although the listing process and content varies. The lists maintained by the *Länder*, and to a greater degree the Australian states, are generally more comprehensive than national lists in both countries. Although state agencies in the United States also maintain lists of threatened species, these lists generally include few state-specific species.

In Germany, listing decisions on a national level are in part encumbered by procedure. Where listing decisions under the ESA must undergo a notice and comment procedure but do not require further approval, species given “special protection” under Article 52 may be designated “with the consent of the Bundesrat provided that the species concerned are native species whose survival in Germany is endangered due to human acts or activities,” if they

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<sup>70</sup> AUSTRAL. GOV'T DEP'T OF THE ENV'T, WATER, HERITAGE & THE ARTS, MATTERS OF NATIONAL ENVIRONMENTAL SIGNIFICANCE: SIGNIFICANT IMPACT GUIDELINES 1.1, at 10 (2009), available at <http://www.environment.gov.au/epbc/publications/pubs/nis-guidelines.pdf>.

<sup>71</sup> With regard to IUCN Management Protected Areas, which are specifically “dedicated to the protection and maintenance of biological diversity” as of 2003, 31.7% of the total land area of Germany is designated as a protected area, compared to 7.5% of Australia or 15.8% of the U.S. Compare *Biodiversity and Protected Areas – Germany*, *supra* note 7, at 1, with *Biodiversity and Protected Areas – Australia*, EARTHTRENDS, 1 (2003), [http://earthtrends.wri.org/pdf\\_library/country\\_profiles/bio\\_cou\\_036.pdf](http://earthtrends.wri.org/pdf_library/country_profiles/bio_cou_036.pdf), and *Biodiversity and Protected Areas – United States*, EARTHTRENDS, 1 (2003), [http://earthtrends.wri.org/pdf\\_library/country\\_profiles/bio\\_cou\\_840.pdf](http://earthtrends.wri.org/pdf_library/country_profiles/bio_cou_840.pdf).

are not already listed under an applicable Directive.<sup>72</sup> These restrictions on listing provide less flexibility for the Federal Minister in listing decisions.

Like the ESA, the regulations passed pursuant to the German Act provide for only two levels of protection: “special protection” and “strict protection.”<sup>73</sup> A national Red List is issued from the federal government by the Ministry for the Environment (*Bundesministerium für Umwelt* or BMU), but the *Länder* maintain extensive Red Lists as well, which serve as a “data source for national red lists.”<sup>74</sup> This results in considerable fragmentation, as the land lists are much longer than the national lists and provide differing designations for different species. The limited number of status designations established in the German Act contrasts with the broad spectrum of designations available under the EPBC Act. The existence of this spectrum may be less important in Germany where considerable conservation resources provided by the Federal Agency for Nature Conservation (*Bundesamt für Naturschutz* or BfN) and state level ministries may be directed toward a comparatively manageable number of species.

The concern for restraining the Australian Commonwealth’s power produced yet another variation on listing decisions. Listing in Australia is a fragmented and complicated system. There are inconsistencies between state-level regimes, where the majority of species are listed.<sup>75</sup> Not only are threatened species divided into degrees, but “ecological communities” and “key threatening

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<sup>72</sup> German Federal Nature Conservation Act, *supra* note 33, art. 52. Species listed in Council Directive 92/43/EEC of 21 May 1992 are incorporated through Art. 10(2)(10). See Council Directive 92/43, art. 10, 1992 O.J. (L 206) (EC).

<sup>73</sup> See *WISIA Online – An Overview*, WISIA, § 2, <http://mail.azl-inc.com/Einleitung.en.html> (last updated July 1, 2008) (providing explanation regarding status of protection).

<sup>74</sup> For example, of about forty thousand animal and plant species of Lower Saxony ten thousand species are listed as threatened. See *Rote Listen*, NLWKN, [http://www.nlwkn.niedersachsen.de/master/C6645300\\_N5512577\\_L20\\_D0\\_I521158.html](http://www.nlwkn.niedersachsen.de/master/C6645300_N5512577_L20_D0_I521158.html) (last visited Apr. 14, 2012) (translated).

<sup>75</sup> See *Species Information Partnerships: Sharing Knowledge on Threatened Species*, AUSTRAL. GOV'T DEP'T ENV'T & HERITAGE, (2006), <http://www.environment.gov.au/soe/2006/publications/emerging/species-listing/pubs/species-listing.pdf> (last visited Apr. 14, 2012) (explaining that because “different jurisdictions manage threatened species according to different laws . . . it is difficult to compare threatened species lists across jurisdictions”).

processes<sup>76</sup> are to be maintained by the Minister. Particular listing decisions are generally within the sole discretion of the Minister,<sup>77</sup> and six categories of threatened species are recognized for listing.

The prominence of state governments in Australia, as in Germany, naturally leads to the need for cooperation in order to accomplish conservation goals. In Australia, this takes the form of bilateral agreements between the states and the federal government, which are an integral part of the EPBC Act.<sup>78</sup> State accreditation pursuant to the bilateral process has been implemented to reduce duplication.<sup>79</sup>

The Minister is granted the power to enter into a bilateral agreement on behalf of the Commonwealth in Section 45(1). As part of the accreditation process, a copy of the agreement must be “laid before” each House of Parliament,<sup>80</sup> and the agreement will fail if either House passes a resolution disallowing the agreement within fifteen sitting days after notice.<sup>81</sup>

As an example, a bilateral agreement between the Queensland government and the Commonwealth allowed the state to *assess* the controversial Traveston Dam project, which had the potential to adversely impact a matter of national significance—the nationally listed Australian lungfish. However, the final *decision* was not delegated to the state authorities. On December 2, 2009 the Federal Minister denied approval of the project to the chagrin of state officials.<sup>82</sup>

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<sup>76</sup> See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 188(3) (Austl.) (“A process is a threatening process if it threatens, or may threaten, the survival, abundance or evolutionary development of a native species or ecological community.”).

<sup>77</sup> This does not include “ecological communities” recognized as threatened in State or Territory lists pursuant to Section 185, which “are to be added.” *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 185 (Austl.).

<sup>78</sup> Bilateral agreements are set out in Sections 44–65. *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 44–66 (Austl.).

<sup>79</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(2)(b) (Austl.) (“[To achieve its objects, the Act] strengthens intergovernmental cooperation, and minimizes duplication, through bilateral agreements.”).

<sup>80</sup> *Id.* at s 46(4).

<sup>81</sup> *Id.* at s 46(6).

<sup>82</sup> See Press Release, Minister for the Env't, Heritage & the Arts, Traveston Dam Gets Final No (Dec. 2, 2009), available at <http://www.environment.gov.au/minister/archive/env/2009/pubs/mr20091202a.pdf> (describing the Federal

In Germany, since implementation is in the hands of the *Länder*, provisions that specifically mandate interstate cooperation in part alleviate concern about fragmentation in the designation of protected areas. Importantly, Article 17 of the German Act calls for cooperation among the *Länder* in developing the required "landscape plans," which fulfill international obligations<sup>83</sup> and provide for the protection of wild flora and fauna.<sup>84</sup> In implementing measures to "monitor" important ecosystems, the Federal Government and the *Länder* "shall provide mutual support to one another."<sup>85</sup> This cooperation among the *Länder* in planning will likely be essential to a new national focus to establish a "Green Belt" of protected area occupying the region that once bordered either side of the former Iron Curtain.<sup>86</sup>

Turning finally to the United States, although there was much concern over the intrusion of federal authority into state prerogatives in the debate over the passage of the ESA, the provisions for state involvement were half-hearted.<sup>87</sup> The Act includes a weak mandate that "Secretary shall cooperate to the maximum extent practicable with the States," and Section 6 does provide for the formation of broad "cooperative agreements." The content of these agreements, however, is unclear and the Section as a whole is confusing.<sup>88</sup> The impact of these agreements on

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Environment Minister's concern that going forward with the dam project would threaten the conservation of biodiversity).

<sup>83</sup> See German Federal Nature Conservation Act, *supra* note 33, art. 32 ("Articles 32 to 38 serve the establishment and protection of the European ecological network 'Natura 2000' . . . . The federal states shall meet their obligations under Council Directives 92/43/EEC and 79/409/EEC . . . .").

<sup>84</sup> See *id.* art. 14(1)(4)(b)-(c) (providing for the protection of wild flora and fauna).

<sup>85</sup> *Id.* at art. 12(3).

<sup>86</sup> See NATIONAL STRATEGY ON BIOLOGICAL DIVERSITY, *supra* note 6, at 112 (detailing plans to conserve and protect the "Green Belt" along the former Iron Curtain as part of the country's natural heritage and also as a historical monument).

<sup>87</sup> Legislators like Representative Dingell, a key sponsor of the final bill, assured detractors that the ESA would not preempt the states from enacting their own biodiversity legislation. See Petersen, *supra* note 37, at 474.

<sup>88</sup> See MICHAEL ALLEN WOLF, STRATEGIES FOR ENVIRONMENTAL SUCCESS IN AN UNCERTAIN JUDICIAL CLIMATE 332 (2005) (pointing out that although Section 6(g) appears to conceivably allow less-restrictive state "take" provisions, Section 6(f) appears to conflict with this by preempting such provisions).

conservation is minimal. This is in part due to Congress' neglectful appropriation for the purpose of the federal fund established by Section 6(i),<sup>89</sup> but is also certainly a reflection on the weakness of state influence combined with plenary congressional power.

6. IMPLEMENTATION: HOW THE AUSTRALIAN STATES RETAINED AND THEN LOST THEIR AUTHORITY OVER SPECIES PROTECTION

The species protection provisions of the EPBC Act have generally received scathing criticism after the first decade of implementation.<sup>90</sup> As a result of excessive administrative discretion and broad interpretation of matters that fall within the assessment authority of the Commonwealth, critics claim that the regime has been implemented in an unpredictable and ineffectual manner. Some of the most prominent criticisms of the regime include: lack of political will for effectual enforcement, unpredictable enforcement, inefficient amendment to lists, and politically-motivated decisions regarding listing and final project approvals. These shortfalls are linked to the underutilization of state accreditation processes, which legislators included to carry out the cooperative intent of the EPBC Act.

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<sup>89</sup> See 1 DALE D. GOBLE ET AL., *THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE* 8 (2005) (discussing the purpose of the section).

<sup>90</sup> See Andrew Macintosh & Debra Wilkinson, *Environment Protection and Biodiversity Conservation Act: A Five Year Assessment*, at vii (Austl. Inst., Discussion Paper No. 81, 2005) [hereinafter Macintosh & Wilkinson, *A Five Year Assessment*], available at [https://www.tai.org.au/file.php?file=discussion\\_papers/DP81.pdf](https://www.tai.org.au/file.php?file=discussion_papers/DP81.pdf) ("In almost all areas, the regime has failed to produce any noticeable improvements in environmental outcomes."); Andrew Macintosh, *Environment Protection and Biodiversity Conservation Act: An Ongoing Failure 2* (Austl. Inst., 2006) [hereinafter Macintosh, *An Ongoing Failure*], <https://www.tai.org.au/documents/downloads/WP91.pdf> (finding no evidence of significant improvement in the operation of the EAA regime); Andrew Macintosh & Debra Wilkinson, *EPBC Act – The Case for Reform*, 10 AUSTRALASIAN J. NAT. RESOURCES L. & POL'Y 139 (2005) (criticizing the species protection provisions of the EAA regime and recommending a switch to landscape assessments by way of reform); Stephen Keim, *The EPBC Act Ten Years On: the Gunns Method of Assessment Case as a Key Indicator: notes for a QELA Seminar held on Monday 29 June 2009*, at 12, available at [http://cmsdata.iucn.org/downloads/qela\\_epbc\\_complete\\_21\\_06\\_09.pdf](http://cmsdata.iucn.org/downloads/qela_epbc_complete_21_06_09.pdf) ("The EPBC Act looked green and shiny, ten years ago. With the wisdom of experience, in the words of the post punk music movement, it may be time 'to rip it up and start again.'").

### 6.1. Commonwealth Implementation of the Assessment Regime

The notion that assessment decisions are more strictly applied when left to federal decisionmakers may be called into question by the history of the EPBC Act's implementation. The common refrain, in the United States and abroad, is that states should not be trusted because they are "pro-development."<sup>91</sup> However, in Australia, the Commonwealth's political will to enforce the assessment provisions of the EPBC Act has also been questioned.<sup>92</sup> The susceptibility of enforcement to vacillations in political will arises in part due to the broad discretion of the Australian Environment Minister in the assessment process.

Although the Minister receives a large number of referrals, the Minister has only found a few to be controlled actions,<sup>93</sup> and the vast majority are eventually approved.<sup>94</sup> Although the low number of actions considered "controlled" is consistent with the

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<sup>91</sup> This was a refrain from the opposition during the Senate debates over bilateral agreements. Senator Margaret Reynolds, a Labor member from Queensland, candidly expressed her distrust of state decisionmaking. See Cth, Parliamentary Debates, Senate, 22 June 1999, 5959 (Margaret Reynolds, Senator, Qld) (Austl.) ("Commonwealth environment powers are far too narrowly defined. I have no problem with saying, 'I don't trust the states.' I do not trust state governments. They are smaller, they are more parochial and are far more likely to act in a self-interested way.").

<sup>92</sup> See KAREN BUBNA-LITIC ET AL., BIODIVERSITY, CONSERVATION, LAW & LIVELIHOODS: BRIDGING THE NORTH-SOUTH DIVIDE 294-95 (2008) (since only two of the fourteen reported cases brought before the courts under the EPBC Act were commenced by the federal government, "a question about the political will to enforce the EPBC Act arises"); Macintosh, *An Ongoing Failure*, *supra* note 90, at 3 (noting that the EPBC has rarely been enforced and that it has instead been used for political purposes); Humane Soc'y Int'l, Submission to the Review of the Commonwealth Environment Protection and Biodiversity Conservation Act, 1999, at 19 (2008) [hereinafter Humane Soc'y Int'l Submission to the EPBC Act Review], available at <http://www.environment.gov.au/epbc/review/submissions/pubs/182-humane-society-international.pdf> (listing efforts "thwarted by a lack of political will and a lack of resources . . . and in several cases in the past overt political interference.").

<sup>93</sup> See Macintosh & Wilkinson, *A Five Year Assessment*, *supra* note 90, at 8 [§ 3.2] (finding that a relatively low proportion of referrals are declared to be controlled actions).

<sup>94</sup> See *id.* at 12-14 [§ 3.4] (recommending amendments to the EPBC Act, partly to lessen administrative discretion in enforcing the Act, greater enforcement of its existing provisions, and increasing funding to further the Act's environmental policies); 2 DEP'T OF THE ENV'T, WATER, HERITAGE & THE ARTS, ANNUAL REPORT 2007-08, Appendix A (2008) (providing detailed statistics on historical referrals and approvals).

cooperative purposes of the EPBC Act because this may simply leave these decisions to the states, the conspicuously low number of denials may also be seen as an indictment of the potency of the regime. Poor enforcement due to a lack of political will is exacerbated by a lack of financial resources. Facing a problem familiar to critics of the ESA, the relevant Australian Commonwealth department is underfunded.<sup>95</sup>

Intermittent enforcement has also contributed to the perception that the Commonwealth implementation of the EPBC Act is ineffective and tainted by political motivation. This perception was apparent in the content of submissions to the 2009 statutorily mandated *Independent Review of the Environment Protection and Biodiversity Conservation Act* (the “*Independent Review*”).<sup>96</sup> For example, the Western Australian Government’s submission was critical of enforcement under the EPBC Act, since it is uncoordinated and seems to “react in response to public complaints.”<sup>97</sup>

With regard to the assessment mechanism, despite active litigation, it appears that the EPBC Act has at best created an unpredictable layer of approval above state processes. To date, there have been few successful prosecutions under the assessment provisions of the EPBC Act.<sup>98</sup> Since the meaning of “significant

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<sup>95</sup> See Lee Godden & Jacqueline Peel, *The Environment Protection and Biodiversity Conservation Act 1999 (CTH): Dark Sides of Virtue*, 31 MELB. U. L. REV. 106, 136 (2007) (identifying chronic underfunding as a continuing obstacle to effective administration of the environmental impact assessment in a 2006 Senate inquiry which considered amendments to the EPBC Act); Humane Soc’y Int’l Submission to the EPBC Act Review, *supra* note 92, at 22–23 (arguing that funds to the Act’s relevant section should be significantly increased).

<sup>96</sup> See HAWKE INTERIM REPORT, *supra* note 24, at 27 [¶ 2.108] (highlighting a public sentiment that significant political interference exists and that the Commonwealth Government should assume a more substantial role to ensure that environmental standards are not compromised by political considerations).

<sup>97</sup> Submission of Peter Conran, Dir. Gen., Gov’t of W. Austl. Dep’t of the Premier & Cabinet, to Allan Hawke, EPBC Act Review Secretariat, Dep’t of the Env’t, Water, Heritage & the Arts, ch. 21, para. 2 (Sept. 23, 2009) [hereinafter *W. Austl. Response to the HAWKE INTERIM REPORT*], available at <http://www.environment.gov.au/epbc/review/comments/pubs/117-wa-government.pdf>.

<sup>98</sup> See Andrew Macintosh, *Australia’s National Environmental Legislation: A Response to Early*, 12 J. INT’L WILDLIFE L. & POL’Y 166, 174 (2009) (noting that *Greentree* has been the only successful case thus far under the Act’s assessments provisions).

impact” remains ambiguous,<sup>99</sup> and the courts have demonstrated willingness to impose burdensome penalties for unapproved actions that are later found to be “controlled.” Commonwealth environmental assessment referrals are now part of almost every significant project’s due diligence efforts. Attempts by the Minister to work with state governments to create exemptions to triggering have been rebuffed by the courts.<sup>100</sup> These triggers can result in steep penalties for the farming and fishing industry<sup>101</sup> and have yet to be overturned in federal court.<sup>102</sup>

Many of the Environment Minister’s project approvals appear to have been influenced by considerations of political expediency, which calls to attention a danger of allowing too much discretion in any environmental assessment regime. The so-called “Bald Hills Debacle” is a ready example of a national decisionmaker yielding to political pressure instead of making decisions based on prescribed factors. After several years of routine approval of wind farm proposals under the EPBC Act assessment process, Environment Minister Ian Campbell denied approval of the Bald Hills wind farm project in Victoria because of its likely effects on the critically endangered orange-bellied parrot. This was despite the fact that the most accurate calculation at the time arrived at the conclusion that the wind farm would result in “one dead parrot

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<sup>99</sup> The first case under the EPBC Act was *Booth v Bosworth*, (2011) 114 FCR 39 (“The Flying Fox Case”). Booth involved the electrocution of flying foxes on a lychee farm—foxes had destroyed 50% of previous year’s crop. A substantial fine was levied against the farmer successfully prosecuted under the EPBC Act. *Id.* The outcome of this case resulted in anxiety among farmers about the threat of nuisance litigation. *Open Letter to Farmers: Act Designed to Protect*, HERBERT RIVER EXPRESS (Austl.), Nov. 8, 2001, at 9.

<sup>100</sup> See *Humane Soc’y Int’l v Minister for Env’t and Heritage* (2003) 126 FCR 205 (holding that Ministerial Guidelines, purporting to offer various exemptions from EPBC Act review for state permit-holders, exceeded statutory authority).

<sup>101</sup> See, e.g., *Minister for Env’t & Heritage v Warne* [2007] FCA 599 (holding that a fine of AUD 25,000 imposed on a fishing operation was within the permissible range of appropriate penalties); *Greentree v Minister for Env’t & Heritage* (2005) 144 FCR 388 (holding a fine of AUD 450,000 imposed on a farming operation was well below the maximum allowable and properly reflected the deliberate nature of the contravention).

<sup>102</sup> See *Minister for Env’t Heritage & the Arts v Rocky Lamattina & Sons Pty Ltd* (2009) 167 LGERA 753 (doubling the penalty on appeal from the original and agreed-upon AUD 110,000 to AUD 220,000).

every thousand years.”<sup>103</sup> In fact, the state assessment process had been accredited on a one-time basis to assess the impact of the wind farm and its report concluded that the adverse effects were negligible. This state-level assessment was eventually vindicated when, facing public outrage, the Minister was allowed to reassess the project and reversed his decision.<sup>104</sup>

Admittedly, counter-examples do exist. In contrast to the Bald Hills Debacle, the Minister recently blocked a state-approved project with truly foreseeable impacts on threatened species. Reminiscent of the “Snail Darter case” in the United States in terms of financial impact,<sup>105</sup> former Environment Minister Peter Garrett utilized the assessment provisions of the EPBC Act to block the approval of a major project: a AUD 1.8 billion dam in Queensland.<sup>106</sup> The Queensland government approved the “Traveston Crossing Dam” proposal after extensive assessment subject to 1,200 conditions,<sup>107</sup> but Garrett ultimately rejected the controversial project.<sup>108</sup> Garrett based his decision on the potential adverse impacts on threatened species, including the vulnerable Queensland Lungfish.

Unlike the Bald Hills Debacle, the loss of habitat from inundation, although theoretically mitigated by the agreed-upon conditions, was a concern within the realm of reasonable

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<sup>103</sup> James Prest, *The Bald Hills Wind Farm Debacle*, in CLIMATE LAW IN AUSTRALIA 230, 242 (Tim Bonyhady & Peter Christoff eds., 2007).

<sup>104</sup> See *Wind Farm Decision Welcomed*, AUSTRALIAN, Dec. 21, 2006, <http://www.theaustralian.com.au/news/breaking-news/wind-farm-decision-welcomed/story-fn3dxiwe-111112723860> (noting that Victoria’s Planning Minister Justin Madden has welcomed federal Environment Minister Ian Campbell’s belated approval of the project after the Minister’s early opposition, which Mr. Madden described as politically motivated and “more about appeasing opponents to the wind farm in the marginal federal seat of McMillan than about the migrating parrots”).

<sup>105</sup> See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 158–62 (1978) (involving the use of Section 7 of the ESA to block the construction of a dam threatening a species of fish called Snail Darters).

<sup>106</sup> See Jessica Marszalek, *Traveston Dam Receives State Approval*, THE AGE, Oct. 6, 2009, <http://news.theage.com.au/breaking-news-national/traveston-dam-receives-state-approval-20091006-gl23.html> (detailing the state’s approval of the dam).

<sup>107</sup> *Id.*

<sup>108</sup> See Press Release, *supra* note 82 (explaining that Minister Garrett denied approval because the impact on threatened species would be excessive).

probabilities.<sup>109</sup> In other words, this was arguably an example of an action that would in fact have a “significant impact” on a “matter of national environmental significance”—threatened species. Political motivations also appear less likely given that the Minister’s decision denied the pleas of a fellow Australian Labor Party member, the Queensland Premier.<sup>110</sup> This denial reveals that, at least when political motivations do not figure prominently into the decisionmaking, the EPBC Act may be used as an effective barrier against matters legitimately classified as “matters of national environmental significance.”

Although shifting control over environmental decisions from state to national governments has often been justified by accusations of parochial decisionmaking at the state level and bias in favor of industry, Commonwealth decisions under the EPBC Act have not been immune from these influences. Not only do economic considerations explicitly figure into decisionmaking, but the recent amendments to the EPBC Act are also intended to benefit “development interests,”<sup>111</sup> and the Commonwealth government has been accused of “pro-development bias.”<sup>112</sup> There are even accusations that the Ministers have “abused” the process to benefit commercial interests.<sup>113</sup> Political motivations

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<sup>109</sup> See Submission of Stuart E. Bunn, Director, Austl. Rivers Inst., Griffith Univ., *Traveston Crossing Dam, Mary River, SE Qld: QWI Response to Reviewers Report III: Reply*, to Dep’t of the Env’t, Water, Heritage & the Arts, at 3 (2009), available at <http://www.environment.gov.au/epbc/notices/assessments/2006/3150/pubs/traveston-dam-further-advice-prof-bunn.pdf> (expressing concerns about the suitability of the proposed inundated area of the dam as aquatic habitat).

<sup>110</sup> See Rosemary Odgers, *Bligh Warns No Traveston Dam Means Higher Water Prices*, COURIERMAIL.COM.AU, Nov. 11, 2009, <http://www.couriermail.com.au/news/queensland/bligh-warns-no-traveston-dam-means-higher-water-prices/story-e6freoof-1225796433876> (“[Queensland Premier] Bligh has told State Parliament that the dam was ‘absolutely critical’ to the region’s future water security.”).

<sup>111</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) § 122 (Austl.).

<sup>112</sup> See Godden & Peel, *supra* note 95, at 138 (commenting that bringing an action under the EPBC Act in Australia’s Federal Court exacts high litigation costs on pro-environmentalist plaintiffs, thereby discouraging federal judicial enforcement of the Act); see also Macintosh & Wilkinson, *A Five Year Assessment*, *supra* note 90, at 11 (2005) (explaining that “lack of political will” has contributed to a low refusal rate).

<sup>113</sup> See Humane Soc’y Int’l Submission to the EPBC Act Review, *supra* note 92, at 19 (arguing that there has been an “overt political interference and abuse of

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dramatically affect enforcement due to the broad discretion accorded the Environment Minister, and contribute to Commonwealth enforcement that is inconsistent with statutory purposes.<sup>114</sup>

### 6.2. Listing Decisions Under the EPBC Act

Listing in Australia since passage of the EPBC Act remains divided between seven governments. There are inconsistencies between state and territory regimes, where the majority of species are listed,<sup>115</sup> which has been a source of criticism. However, this fragmentation was the intended result, even following the passage of comprehensive national legislation, in order to benefit from the flexibility of separate state listing decisions and to accommodate the limits on protection against “takings.” Since direct takings under the EPBC Act remain proscribed exclusively within Commonwealth land, lists maintained in each state and territory provide needed protection on state land.

The primacy of the states in listing has in many ways benefited the responsiveness of threatened species lists. Commonwealth threatened species lists have been slowly populated and less inclusive. On the national level, 444 fauna, 1342 flora, and 53 communities are listed.<sup>116</sup> As of the date of the *Independent Review*, since the enactment of the EPBC Act absorbed the previous list, under the new regime the Commonwealth added “238 species, 12

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process”, and noting that the 2006 amendments “legitimized the delays and specifically enabled opportunities for politicization of the process”).

<sup>114</sup> See David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1805 (2008) (noting “[m]ost scholars agree that political processes tend to generate suboptimally lax environmental regulation” because of the lobbying power of commercial interests); William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 114 (2006) (“Every environmental law, regulation, implementation and enforcement decision is influenced by the political incentives of regulatory stakeholders.”).

<sup>115</sup> See AUSTL. GOV'T DEP'T OF THE ENV'T & HERITAGE, *supra* note 75, at para. 1 (noting that the Australian and State and Territory Governments each maintain lists of threatened species).

<sup>116</sup> See *Species Profile and Threats Database*, AUSTL. GOV'T DEP'T SUSTAINABILITY, ENV'T, WATER, POPULATION AND COMMUNITIES, <http://www.environment.gov.au/cgi-bin/sprat/public/sprat.pl> (last visited Apr. 14, 2012) (providing information about species and ecological communities listed under the EPBC Act).

[key threatening processes] and 25 ecological communities . . . .”<sup>117</sup> These figures may be compared with those of a single state, New South Wales, where a list for a regime limited to the state’s boundaries includes 295 fauna, 637 flora, 36 key threatening processes, and 102 communities.<sup>118</sup> Notably, the more listings on the Commonwealth level, the closer the regime approaches the geographic reach of ESA Section 9 takings, since listings are “matters of national environmental significance,” and “triggers” for these matters have been broadly interpreted. For this reason, although the sluggish Commonwealth pace indicates that listing should not be consolidated, given the broad interpretation of “triggers,” slower Commonwealth listing is paradoxically a benefit to reduced duplication and efficiency.

The response to the *Independent Review* submitted by the Western Australia Government notes that species listed by the Commonwealth have generally tracked the state and territory listings of threatened species.<sup>119</sup> Some state or territory statutes, like the Threatened Species Conservation Act of 1995 in New South Wales, likewise provide for immediate consideration of listing species already listed through the EPBC Act.<sup>120</sup> This reciprocity is a benefit of multiple listing processes. A state or the Commonwealth may be able to immediately protect a species within the ambit of its jurisdiction, while other government entities with less pressing needs to protect the same species may consider categorizing the species under a different priority level.

Notably, the experience of environmental groups with states and territories in listing decisions has anecdotally been favorable, especially when compared with submissions to the

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<sup>117</sup> HAWKE FINAL REPORT, *supra* note 67, at 73 [¶ 2.81].

<sup>118</sup> See *Species, Populations & Ecological Communities of NSW*, THREATENED SPECIES, <http://www.threatenedspecies.environment.nsw.gov.au/index.aspx> (last visited Feb. 27, 2012).

<sup>119</sup> See W. Austl. Response to the HAWKE INTERIM REPORT, *supra* note 97, at ch. 23 (“The concern about the operation of bilateral assessment agreements in circumstances where the proponent was closely linked with the State or Territory government and there could be a perceived bias or conflict of interest is acknowledged.”).

<sup>120</sup> See *Threatened Species Conservation Act 1995* (NSW) s 9 (Austl.), available at <http://www.legislation.nsw.gov.au/fullhtml/inforce/act+101+1995+FIRST+0+#pt.2-div.1-sec.9> (explaining the “listing of nationally threatened species and ecological communities”).

Commonwealth.<sup>121</sup> The attitude toward Commonwealth submissions for listing has been described as “infuriating.”<sup>122</sup> The existence of multiple lists is important to accommodating the pro-environmental benefits of environmental groups’ familiarity with and favorable opinion of state processes.

It appears that the Commonwealth listing process, like other aspects of the EPBC Act, has not avoided the taint of politically expedient decisionmaking.<sup>123</sup> Decisions favorable to interest groups and the Environment Minister’s veto over listing assessment have resulted in a meager few listings.<sup>124</sup> The design of some state regimes resists these pressures. Where the Commonwealth Minister plays a dominant role in listing approval, in New South Wales the Minister may only delay the final decision of the Scientific Committee.<sup>125</sup> The resulting efficiencies in state listing provide some justification for relying in part on state lists, despite the resulting fragmentation.

Listing primarily at a state level, though inherently creating fragmentation, has resulted in a flexible national regime in which states are able to quickly list and de-list species, ecological communities, and key threatening processes. The *Independent Review* notes that changes to state and territory listings “outstrip[] the capacity of the Commonwealth to keep up.”<sup>126</sup> Perhaps the most prominent example of a disparity between state and Commonwealth lists is the ongoing battle over the listing of the

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<sup>121</sup> See Humane Soc’y Int’l Submission to the Senate Inquiry into the Operation of the *Environment Protection and Biodiversity Conservation Act 1999*, at 6, (Sept. 22, 2008), available at [http://www.hsi.org.au/editor/assets/admin/HSI\\_EPBC\\_Senate\\_Submission\\_Sept08.pdf](http://www.hsi.org.au/editor/assets/admin/HSI_EPBC_Senate_Submission_Sept08.pdf) (“[P]rocesses to list threatened ecological communities and threatened species under the NSW . . . and the Victorian . . . [Acts] run comparatively smoothly and efficiently.”).

<sup>122</sup> *Id.* at 12; see also Macintosh & Wilkinson, *A Five Year Assessment*, *supra* note 90, at 16–19 [§ 3.6] (suggesting that the listing process is ineffectual and exploited for political reasons).

<sup>123</sup> See Macintosh, *supra* note 98, at 175–78 (explaining why listing processes are political by design).

<sup>124</sup> See *id.* at 175 (describing the “reasonably robust listing process”).

<sup>125</sup> *Threatened Species Conservation Act 1995* (NSW) s 23A (Austl.), available at <http://www.legislation.nsw.gov.au/fullhtml/inforce/act+101+1995+FIRST+0+#pt.2-div.3-sec.23a> (last visited Apr. 14, 2012).

<sup>126</sup> HAWKE FINAL REPORT, *supra* note 67, at 74 [¶ 2.83].

koala,<sup>127</sup> which is listed as vulnerable in New South Wales and Queensland, but is not yet listed under the national EPBC Act list. An agile state-centric listing process conserves resources by facilitating swift protection tailored for the unique populations in each state, and easier de-listing when a population is no longer threatened in a certain state.

#### 7. CREATURES OF THE STATES: THE CONCEPTUAL REASONS FOR STATE INVOLVEMENT

The consensus is that the American and Australian species protection regimes have produced sub-optimal results. Criticisms are tied directly to a central deficiency of these regimes as implemented: the alienation of the states from meaningful involvement in the administration of conservation policy. The history of the Australian conservation regime provides examples of both the advantages of state involvement and disadvantages of a centralized conservation regime.

##### *7.1. Advantages of State Primacy in Administration of Conservation Policy*

The enactment of progressive or at least cutting edge state conservation policy is an advantage of incentivizing state participation in developing species protection policy. Where the ingenuity of state processes has been harnessed, cutting edge policy has been enacted before passage on a national level is attainable.

For example, a prominent criticism of the Commonwealth's operation of the EPBC Act has been legislators' resistance to use its potential to implement climate change policy.<sup>128</sup> Although this Comment does not purport to evaluate the wisdom of any policy

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<sup>127</sup> See *Koala Decision Postponed*, CANBERRA TIMES, Oct. 31, 2011, <http://www.canberratimes.com.au/environment/conservation/koala-decision-postponed-20111031-1mrw1.html> (describing the controversy over the listing of the koala).

<sup>128</sup> See, HAWKE FINAL REPORT, *supra* note 67, at 10 [¶ 65] (explaining that some submissions included managing the threat to biodiversity through regulation of climate change); see also Keim, *supra* note 90 ("It is ironic that, in an age of concern about climate change, Australia's national environment impact assessment statute has nothing to say and nothing to do concerning the impact of new developments in contributing to climate change.").

addressing climate change, it is a ready example of a cutting edge conservation policy that remains difficult to enact on a national level in any form. However, the flexible state legislatures in Australia began to implement climate change policy through conservation provisions many years ago.<sup>129</sup> Although the piecemeal adoption of this legislation may be unsatisfying to proponents of climate change laws, the states have been much quicker to adopt these contentious policies than the national legislature. In New South Wales, where the name of the former Department of Water and Energy was appended to include “Climate Change” in 2009,<sup>130</sup> anthropogenic climate change was listed as a key threatening process as early as 2000.<sup>131</sup>

Even aside from these developments, in many ways the *state* governments have generally pressured the national government to develop stricter and more cutting edge legislation. This cross-pollination is an example of the “learning function” of overlapping environmental statutes.<sup>132</sup> These developments are particularly interesting since the reverse was predicted in a study referring to conservation policy in the United States.<sup>133</sup> In the submissions and responses to the *Independent Review*, several submissions suggested that the Commonwealth adopt stricter or more progressive state policies.

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<sup>129</sup> See Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL’Y REV. 33, 42 (2009) (state activity in area of climate change may “prod the federal government into action”).

<sup>130</sup> *NSW Government Reform*, N.S.W. GOV’T, DEP’T PRIMARY INDUSTRIES, OFF. WATER, <http://www.water.nsw.gov.au/Department-of-Water-and-Energy/dwe/default.aspx> (established effective 1 July 2009).

<sup>131</sup> See *Anthropogenic Climate Change – Key Threatening Process Listing*, N.S.W. GOV’T OFF. ENV’T & HERITAGE, <http://www.environment.nsw.gov.au/threatenedspecies/HumanClimateChangeKTPListing.htm> (explaining the findings of the New South Wales Scientific Committee and its rationale for adding Anthropogenic Climate Change as a key threatening process to the Threatened Species Conservation Act); see also HAWKE FINAL REPORT, *supra* note 67, at 111–18 [¶¶ 4.81–4.145] (discussing climate change under the EPBC Act).

<sup>132</sup> See William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 122–23 (2005) (“Similar, but often slightly varied legal regimes, allow for some experimentation in implementation and enforcement, as well as mimicking of successes.”).

<sup>133</sup> See A. Dan Tarlock, *Biodiversity Federalism*, 54 MD. L. REV. 1315, 1319 (1995) (“Innovative state and local attempts to promote biodiversity are driven by the need to comply with federal mandates, primarily the Endangered Species Act.”).

For example, in its *Response to the Interim Report*, the Government of Western Australia suggested that the Commonwealth could respond to climate change by following the state's example and adding it to the list of key threatening processes.<sup>134</sup> With regard to listing, the New South Wales Government suggested a decoupling of the assessment of risk and the prioritization to mirror the operation of the listing process under New South Wales legislation.<sup>135</sup> This way, the process would include scientific concerns while excluding management concerns.<sup>136</sup> The national legislature has yet to follow these recommendations.

Although the Commonwealth likely does have some influence on state policy, the Australian example demonstrates that states may be the vanguards of progressive or cutting edge policy, at least where environmental concerns are prominent in the public consciousness and state-level regimes are well-developed. Aside from the suggested implementation of climate change policy through a new matter of national environmental significance—which would have the undesirable effect of removing sole state authority over an even broader range of actions—the Commonwealth regime will likely benefit from state innovations through future amendments.

### 7.2. *Proper Role of Federal Administration and Ensuring State Involvement*

In the face of Commonwealth encroachment, the Australian states have demonstrated a need for allowing greater state control

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<sup>134</sup> See W. Austl. Response to the HAWKE INTERIM REPORT, *supra* note 97, at ch. 8 (explaining the impact climate change has on biodiversity and things that can be done to counter those effects).

<sup>135</sup> See Response Submission of John Lee, Dir. Gen., N.S.W. Gov't, Dep't of Premier & Cabinet, NSW Gov't Response to the Interim Report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*, to Allan Hawke 5 (Sept. 18, 2009) [N.S.W. Gov't Response to HAWKE INTERIM REPORT], available at <http://www.environment.gov.au/epbc/review/comments/pubs/116-nsw-government.pdf>; but see HAWKE FINAL REPORT, *supra* note 67, at 122-23 [¶¶ 5.5-5.10] (this idea was rejected by Hawke).

<sup>136</sup> See N.S.W. Gov't Response to HAWKE INTERIM REPORT, *supra* note 135 ("This review aims to examine the way the agencies interact . . . in order to streamline assessment and decision-making while ensuring strong environmental outcomes.").

of species protection policy. States have been at the forefront of progressive environmental policy since Federation and have agilely listed and de-listed species. As a slow-moving federal behemoth, it is easy to scorn the Australian regime. However, the benefits of the regime recommend it as a second, limited level of species protection above state processes. The Australian model has not demonstrated the shortcomings of a truly cooperative species protection regime, but has rather exhibited the failings of a lukewarm, quasi-centralized regime.

Concessions for state control are unattractive to those coveting legislative jurisdiction as broad as the effects of environmental impacts can be imagined. But a regime that ensures state processes remain above an acceptable standard should assuage the concerns of all but the most dogmatic advocate of centralized regulation.<sup>137</sup> In a truly cooperative system, the inefficiencies associated with fragmentation are theoretically offset by the cross-pollination “learning” synergies mentioned above, as well as other benefits.<sup>138</sup>

Due to judicial interpretation, the Australian and U.S. Constitutions no longer provide for state administration of conservation policy. The history of implementation in Australia demonstrates that mechanisms for state involvement in a conservation statute may remain dormant because of discretion over their utilization. In order for conservation regimes to fully harness the benefits of state involvement, either statutes must make state participation discretionary and follow through by fully utilizing these provisions, or legislators must design robust provisions, *ex ante*, mandating meaningful state involvement.

A conservation regime may, of course, simply compel states to comply with minimum federal requirements. But where state governments in Australia have been empowered to enact and administer conservation policy independently, state legislators have surpassed national standards and pressured the national legislature to enact cutting edge policies. In Australia, this empowerment arose out of recognition, on the part of legislators and various constituencies, that states have had and should continue to have a significant role in species protection.

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<sup>137</sup> See *supra* note 60 (noting criticism by Senator Brown of Tasmania).

<sup>138</sup> See *supra* Section 4.2 (describing environmental advocates’ positive experiences with state and territory listing processes).

## 8. CONCLUSION

In its formative years, the EPBC Act, originally shaped by political pressures into a cooperative model, was partially divested of its restraints on the Commonwealth government through judicial interpretation of its assessment mechanisms and underutilization of cooperative provisions. Whether or not Australian legislators decide to cabin the scope of Commonwealth authority under the EPBC Act, a decade of implementation demonstrates some of the detrimental effects of federal encroachment upon well-developed state conservation regimes. However, "cross-pollination" synergies and other benefits arising out of the Australian model indicate the potential of a truly cooperative species protection regime. In the debate concerning the proper allocation of authority over conservation, the benefits of ensuring independent state involvement deserve recognition.