STUDENT ARTICLES

EVALUATING NEW FEDERALISM ARGUMENTS IN THE AREA OF THE ENVIRONMENT: THE SEARCH FOR EMPIRICAL MEASURES

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I. INTRODUCTION

The question of how much environmental regulatory authority to concentrate in the federal government has important implications for the balance of federalism and the myriad laws that affect millions of citizens. Befitting its importance, the question has drawn significant academic and political attention with many advocates arguing for a greater federal role and nearly as many advocates supporting a shift of power toward the states. In this

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debate, the issue of relative institutional competence has played a prominent role.[1] Proponents of greater federal involvement have argued that states are not competent environmental decision-makers because they frequently succumb to public choice pathologies and underweigh environmental interests.[2] Those who support a more robust state role have argued that states are at least as receptive to environmental regulation as the federal government and that greater state authority can create opportunities for more environmentally protective outcomes.[3]

This Note seeks to shed light on the controversy by using the League of Conservation Voters (LCV) scorecards, which rate the environmental voting records of state and federal legislators, as an empirical measure of federal and state governments' receptiveness to environmental regulation. The paper begins by surveying and critiquing current theories on the comparative merits of state and federal regulation. The paper then explores whether the LCV scorecards are an appropriate empirical measure of state legislatures' and Congress' environmental records. After concluding that, despite their drawbacks, the scorecards are valid comparative tools, this Note compares the receptiveness of eleven states' lower legislative houses with the receptiveness of the U.S. House of Representatives to environmental regulation. The

[1] This Note will not address the Race-to-the-Bottom theory, an argument for centralized environmental decision-making on the grounds that the competition between states for jobs and industry will lead to an inefficiently low level of environmental regulation. For a discussion on whether the Race-to-the-Bottom theory provides a convincing alternative ground for displacing state regulatory authority with a federal decision-making process, see Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992). For a contrasting view, see Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987). Furthermore, there may be other justifications for federal regulatory authority that lie beyond the scope of this paper. For an additional argument for greater federal environmental authority, see Richard B. Stewart, *Environmental Quality as a National Good in a Federal State*, 1997 U. CHI. LEGAL F. 199, 212 (1997) (arguing in part that environmental quality is a national good that can be effectively addressed by the nation and should be).

[2] Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1213–14 (1977).

[3] Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 562–64 (2001); *see* E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313 (1985).

analysis leads to the conclusion that state governments do not appear to be captured by public choice pathologies and that a system concentrating authority in the states may produce more stringent environmental regulation than a system emphasizing a stronger federal role.

II. SURVEY OF CURRENT ENVIRONMENTAL FEDERALISM THEORIES

For many years, the dominant perspective has been that the federal government is a superior environmental regulator. Public choice theory, an influential mode of analyzing political behavior, has informed predictions that the states will be unable to adequately consider environmental issues.[4] According to public choice theory, "politics can be conceptualized as the process by which conflicting interest group desires are resolved."[5] In its most extreme form, public choice theory assumes that government officials merely enact the legislative compromises agreed upon by competing interest groups.[6] Resource rich groups will generally prevail over resource poor groups but bargaining will lead to some gains for weaker groups.[7]

Mancur Olson's observations in *The Logic of Collective Action*[8] concerning the difficulty of organizing groups form a second piece of the public choice model. Olson argued that legislation is a public good that suffers from collective actions problems such as free-riding, the dynamic that encourages each actor to withhold making a contribution in his personal interest in the hopes that contributions of other similarly situated actors will achieve the same result.[9] Those groups that cannot overcome such collective action problems may not be represented in the political process at all, leading to skewed policy outcomes.[10]

According to Olson, the groups most likely to overcome collective action problems will be small groups whose individual

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[4] *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 47–60 (3d ed. 2001).

[5] *Id.* at 49.

[6] *Id.*

[7] *Id*. at 50.

[8] MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

[9] *Id.*; *see also* ESKDRIDGE ET AL., *supra* note 4, at 51.

[10] ESKDRIDGE ET AL., *supra* note 4, at 51

members each have a great deal at stake in particular legislation. In these cases, the return each member will receive when the desired legislation passes will be large enough to justify participation in the lobbying effort.[11] Furthermore, in smaller groups, it is easier to monitor the contributions of individual members and coerce reluctant members into making contributions.[12] In contrast, interest groups that provide large numbers of people with small benefits would chronically succumb to collective action problems. For members of these groups, the return from the desired legislation will not justify making an initial contribution, and monitoring costs will be higher.[13]

Building on these public choice theories, commentators such as Richard Stewart have argued that a centralized federal process is appropriate in the area of environmental regulation because it minimizes the distorting effects of the collective action problem.[14] According to Stewart, environmental politics often pits well-organized union and industry lobbies with large stakes in particular decisions against individuals whose stake in a particular regulatory decision is small and who face formidable collective action problems.[15] As public choice theory suggests, this situation leads to better representation for unions and industry and a corresponding exaggeration of their influence over the policy-making process.[16] The complex nature of many environmental issues exacerbates the problem because a successful environmental policy argument often requires the aid of expensive technical, scientific and economic analysis that may not be available to resource-poor environmental groups.[17]

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Stewart, *supra* note 2, at 1213–15. For an exploration of the shortcomings of the federal decision-making process, see Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 335–42 (1990).

[15] Stewart, *supra* note 2, at 1213–14; *see also* Joshua D. Sarnoff, *The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225, 285–86 (1997) ("'Diffuse' environmental interests may be more successful than 'concentrated' compliance interests in affecting legislative and bureaucratic policy at the federal level than at the state level. The relative degree of political success results from economies of scale and reduced transaction costs for organizing and lobbying.") (citations omitted).

[16] Stewart, *supra* note 2, at 1213–14.

[17] *Id.*

Stewart concludes that a centralized-process would best minimize collective action issues in the environmental regulatory process.[18] A de-centralized process requiring multiple legislative lobbying efforts in the states would aggravate collective action problems by increasing the resources required to advance a particular policy. Moreover, a de-centralized process would demand more frequent organizational efforts by environmental groups, incurring very high transaction costs.[19] In contrast, a centralized process would only require a single organizational effort and might allow environmental groups to pool their scarce resources and take advantage of certain economies of scale.[20] Although union and industry groups could similarly pool their resources, Stewart hypothesizes that effective representation may be less a function of "comparative resources than of attainment of a critical mass of skills, resources, and experience."[21] Thus, a centralized environmental decision-making process may lead to a rough parity of representational effectiveness that could not exist at the state level, where transactional costs and disparities in resources between pro and anti regulatory forces would lead to chronic under-regulation.

Advocates of greater centralization also argue that national decision-makers will be better insulated from narrow economic interests and, therefore, better able to a fairly measure the national interest. Echoing the arguments enunciated in *Federalist #10*,[22] which asserted that large Congressional constituencies would insulate Members of Congress from local prejudices and enable them to better address national issues, some public choice theorists have argued that Members of Congress will be more resistant to narrow economic factions than their state counterparts who represent much smaller districts. For example, the public choice theory linking legislative outcomes to the amount of money expended by interest groups would predict more balanced outcomes in a large district where the multiplicity of interest

[18] *Id.* at 1213–15.

[19] *Id.*

[20] *Id.*

[21] *Id. See also* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1012–13 (1995).

[22] THE FEDERALIST NO. 9 (James Madison).

groups creates a robust political market.[23] Stewart also supports such theories, suggesting that the attention of the national media encourages members of Congress to resist parochial industrial interests and more readily adopt environmental regulation.[24]

Proponents of a decentralized state-focused approach have challenged this prevailing view of federal superiority by arguing that the states are as receptive to environmental regulation as the federal government. Revesz has criticized the public choice theories predicting that collective action problems inhibit environmental groups at the state level. According to Revesz, collective action problems should, if anything, be more formidable in federal politics.[25] As Revesz points out, the incentive for environmentally inclined citizens to free-ride on the efforts of others would be more severe at the federal level where the large number of citizens making contributions to environmental lobbying efforts increases the likelihood that any one citizen could fail to contribute but still enjoy the benefits of a successful campaign on behalf of his values.[26] Moreover, environmental groups that organize at a national level must bring together citizens with very heterogeneous interests, for example, citizens in Delaware and Colorado may have very different environmental concerns.[27]

Revesz has also argued that the "critical mass" of lobbying hypothesized by Stewart was inconsistent with the public choice assumption that political groups achieve their goals in proportion to the amount of expended resources.[28] As Revesz notes, the standard public choice model directly links legislative success to the amount of resources expended during the lobbying process.[29] In contrast, the idea of a critical mass of lobbying effectiveness

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[23] *See* ESKRIDGE ET AL., *supra* note 4, at 54–60.

[24] Stewart, *supra* note 1, at 202–03; *see also* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 597–98 (1996). (Esty notes that the costs of environmental regulation are generally more concentrated and tangible than the benefits. "Costs are often borne by particular industries or enterprises, and are translated readily into monetary terms. Benefits, however, accrue to the general public in ways that are hard to discern and monetize. . . . [T]hese asymmetries may be more significant at the state and local levels. . . .").

[25] Revesz, *supra* note 3, at 563.

[26] *See id*. at 555–68.

[27] *Id*. at 562–63.

[28] *Id.* at 567–68.

[29] *Id.*

imagines that national environmental groups could achieve a disproportional effectiveness when they achieve a threshold of lobbying resources.[30]

Other commentators have suggested that a strong state role in environmental policy actually favors environmental groups by allowing environmental groups to overcome their collective action problems in a piecemeal manner and exploit regulatory victories in one state to pressure other legislatures to act. Donald Elliott, Bruce Ackerman, and John Millian argue that, contrary to public choice theory's original assertions, environmental legislation is not solely the product of a struggle between environmental groups and industry lobbies.[31] Rather, a variety of conflating factors influence the legislative process. In the case of environmental regulation, the existence of state authority provides pro-regulation forces with a number of strategic tools, including the ability to overcome collective action problems in a piecemeal fashion and the opportunity to use a regulatory victory in one state to pressure other states and the federal government to act.[32] Additionally, the ability of state legislators to externalize some of the costs of environmental regulation onto other states will also encourage greater regulation.[33]

The political process resulting in the national regulation of vehicle emissions exemplifies the structural dynamics of a state-led approach that can lead to greater national environmental protection.[34] In the 1950s and 1960s, a combination of the organizing of environmental groups, a cost-externalization strategy by California legislators, and the ineptitude of the auto-industry had led California, the largest automobile market in the U.S, to impose stringent new requirements on vehicle emissions.[35] The auto-industry, having strong reasons to prefer a uniform regulatory regime that allowed for a standardized production process rather than patchwork regulation, which could possibly cover a large

[30] *Id*.

[31] *See* Elliott et al., *supra* note 3.

[32] *See id.* at 329.

[33] *Id.* The authors explain that the inevitability that some pollution problems in a particular state will be generated by "out-of-staters," creates a "free lunch" for states who can promise tough legislation at the expense of the out of state polluters. *Id.*

[34] *Id*. at 330–31.

[35] *Id*. *See also*, Motor Vehicle Air Pollution Control Act of 1965, Pub. L. No. 89-272, 79 Stat. 992 (1965).

portion of the market, petitioned Congress for preemptive national automobile regulations that environmental groups alone would likely not have been able to push through Congress.[36]

III. CRITIQUE OF CURRENT ENVIRONMENTAL FEDERALISM THEORIES

The development of empirical measures to compare the relative receptiveness to environmental regulation of state and federal governments would enhance the current debate. As the above brief survey of the literature suggests, commentators on both sides have relied heavily on deductive reasoning that builds on hypothesized public choice phenomena and observations about the structural effects of the federal system. This heavy reliance on deductive reasoning, especially in such a controversial area, raises questions about the precision of these theories. Without empirical measurement, it is difficult to gauge the magnitude of the various political dynamics discussed or determine how these dynamics affect each other. A lack of empirical data also leaves open the possibility that a predictive theory has not accounted for all the major factors that affect governments' receptiveness to environmental regulation. For example, public choice theory perceives legislation as the outcome of a struggle between rival interest groups, but there is significant evidence that political parties affect legislators' environmental voting patterns.[37]

The use of case studies and anecdotal evidence cannot fully correct the problem because such evidence is generally not systematic enough to support global statements about governments' relative environmental receptiveness. While the regulation of vehicle emissions was an environmental victory made possible in part by the existence of state authority, it is unclear how much weight to give this one event. There are numerous case studies to support the opposite proposition—that it is federal authority that influences state environmental actions.

[36] Elliott et al., *supra* note 3, at 330–31. Elliott, Ackerman and Millian also argue that the threat of state and local legislation was critical in the passage of the 1967 Air Quality Act, which, for the first time, gave the federal government a strong role in regulating stationary sources of air pollution such as factories and power plants. *Id.* at 331–33.

[37] *See, e.g.*, Sarah McCally Morehouse, *Legislative Party Voting for the Governor's Platform*, 21 LEGIS. STUD. Q. 359, 359–61 (1996); Mark A. Smith, *The Nature of Party Governance: Connecting Conceptualization and Measurement*, 41 AM. J. POL. SCI. 1042 (1997).

For example, Congress has passed numerous important environmental acts, such as the Clean Air Act in 1970[38] and the Clean Water Act in 1972, [39] that forced states to implement stringent regulations that they might not have otherwise. Standing alone, none of these individual regulations prove the superiority of states or the federal government as an environmental decision-maker.

IV. THE LEAGUE OF CONSERVATION SCORECARDS: A POTENTIAL METRIC OF ENVIRONMENTAL REGULATION

The League of Conservation Voters scorecards provide a body of data evaluating state and federal legislators' records on environmental issues. If this body of data can be used as a comparative tool, it would be useful in testing current theories of comparative institutional environmentalism.

The League of Conservation Voters (LCV) is a non-profit environmental advocacy group formed in 1970 when a number of national environmental groups pooled their resources to monitor Congress.[40] The LCV describes itself as the "political voice of the environmental movement" and sets out three main goals: [1] running "tough and effective campaigns to defeat anti-environment candidates, and support[ting] those leaders who stand up for a clean, healthy future for America," [2] using the National Environmental Scorecard and Presidential Report Card to "hold Congress and the Administration accountable for their actions on the environment," and [3] working through regional offices to "build coalitions, promote grassroots power, and train the next generation of environmental leaders."[41]

For each Congressional session, the LCV compiles a National Environmental Scorecard that gives each Member of Congress a percentage rating for his or her environmental voting record.[42]

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[38] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended at 42 U.S.C. §§ 7401–7661 (2000)).

[39] Water Pollution Control (Clean Water) Act, Pub. L. No. 845, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251–1376 (2000)).

[40] PHILIP SHABECOFF, EARTH RISING: AMERICAN ENVIRONMENTALISM IN THE 21ST CENTURY 7 (2000).

[41] League of Conservation Voters, *About LCV*, *at* http://www.lcv.org/About/Aboutmain.cfm (last visited Jan. 31, 2005).

[42] LEAGUE OF CONSERVATION VOTERS, NATIONAL ENVIRONMENTAL SCORECARD 1, 28 (2002), *available at* http://www.lcv.org/images/client/pdfs/scorecard02final.pdf.

Twenty-two "respected environmental and conservation organizations" select a body of votes to be scored[43] with the criteria that each vote presents legislators with a "real choice" on an important environmental issue.[44] To calculate each legislator's rating, the LCV divides the legislator's number of "correct" votes by the total number of votes scored.[45] Twenty-two state LCVs,[46] which are independent groups allied with the national League, issue environmental scorecards for their state legislators under methods that generally parallel those of the national scorecard. In these state LCVs, as in the national LCV, a panel of experts selects votes that provide legislators with a real choice on protecting the environment and then provides a score based on the legislator's position on those votes.[47]

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[43] *Id*. at 1. Among the votes scored in the 2002 National Environmental Scorecard were a vote to limit commercial agricultural licenses in the Klamath River Basin and a vote to cap crop subsidies and transfer the savings to conservation programs. *Id*. at 25–26.

[44] *Id*. at 1.

[45] *Id*. at 28.

[46] The LCV has active state branches in thirty-two states, but not all state LCVs put out scorecards. *See* Federation of State Conservation Voter Leagues, *Federation Members*, *at* http://www.fscvl.org/member-listing.htm (last visited Apr. 29, 2005). Additionally, several state LCVs issued scorecards that were not useful to this study because they used other scoring metrics in place of a percentage grade, or were not available in the period when the statistics for this paper were compiled. The fact that useable LCV scorecards are only available for twenty-two states may introduce another conflating variable into the study. Perhaps, the twenty-two states with scorecards are more receptive to environmental regulation than the other twenty-eight states because the twenty-two states have active state LCVs. Another possibility, there might only be active state LCVs in the twenty-two states because these are the states with the greatest citizen support for environmental regulation. Surveying the twenty-two states with LCV scorecards, this does not appear to be a serious problem as the twenty-two states are widely distributed geographically and represent a wide variety of ideological preferences, for example Texas, Wyoming, Maryland and California are present. Similarly, the states not present in the survey are geographically and ideologically heterogeneous, for example New York, Illinois and North Dakota all do not have state LCV scorecards.

[47] *See, e.g.*, MINNESOTA LEAGUE OF CONSERVATION VOTERS, 2002 ENVIRONMENTAL SCORECARD 1 (2002) ("These votes presented legislators with a real choice on protecting the environment and clearly help distinguish those who are working for—or against—environmental protection."), *available at* http://www.mnlcv.org/vertical/Sites/%7B9DE450A4-C4C7-46B7-85F0-691BA0708524%7D/uploads/%7B133ECA4A-F7D8-4205-8BA0-A88B200A657B%7D.PDF; MARYLAND LEAGUE OF CONSERVATION VOTERS, MARYLAND GENERAL ASSEMBLY SCORECARD 1 (2002) (characterizing votes chosen as presenting a "politically difficult but environmentally clear choices on a range of conservation issues"), *available at* http://www.mdlcv.org/pdf/2001-

The obvious strength of the scorecards is that they have the potential to avoid the evidentiary issues present in the current debate. The ratings aggregate assessments of receptiveness to environmental regulation and evaluate legislators' most visible and powerful statement of preference: their votes on legislation. For example, Connecticut's lower legislative house received a rating of ninety-one percent, indicating that the state has overcome any public choice pathologies that potentially skew the process against environmental interests and is receptive to environmental regulation.[48] In the 107th Congress, the average score for the U.S. House of Representatives was forty-seven percent, a level which, in the words of LCV President Deb Callahan, demonstrated House majority leaders that "did all they could to push proposals to weaken environmental protections and exploit natural resources at any cost."[49]

Using these snapshots of actual legislative environmentalism, commentators can make concrete comparisons between legislatures to resolve some of the outstanding questions in this state-federal debate. A comparison of state legislators and Members of Congress from the same state would test the public choice intuition that state legislators' smaller districts make them more susceptible to local economic pressure and thereby prone to under-regulate. A comparison of the average ratings for the state legislatures and Congress would be helpful in deciding whether states do under-regulate in comparison to the federal government or whether the structural effects outlined by Elliott, Ackerman and Millian mitigate any state anti-regulation bias.[50]

V. DETERMINING WHETHER THE LEAGUE OF CONSERVATION VOTERS SCORECARDS ARE APPROPRIATE COMPARATIVE TOOLS

There are two major issues that must be addressed before using the LCV scorecards as an empirical database. One objection to the use of the scorecards is that the ratings they assign to legislators reflect the League of Conservation Voters' particular political viewpoint. As the discussion of the LCV earlier in this

2002%20Scorecard.pdf.

[48] CONNECTICUT LEAGUE OF CONSERVATION VOTERS, 2002 LEGISLATIVE SCORECARD 9–11 (2002), *available at* http://ctlcv.org/2002scorecard.pdf.

[49] LEAGUE OF CONSERVATION VOTERS, *supra* note 42, at 2.

[50] Elliott et al., *supra* note 3.

Note suggested, the LCV's viewpoint is favorable to a significant amount of environmental regulation.

However, the fact that the LCV scorecards grade legislators based on a specific political viewpoint is not particularly damaging to the scorecards' usefulness as comparative tools. As long as the LCV scorecards are consistently biased in the same direction, they are helpful in determining the extent of public choice pathologies at the state and federal levels. One effect of the under-regulation at the state level hypothesized by public choice theorists would be that groups that want more environmental regulation, like the LCV, would rate the federal government more highly than the state governments. But if the LCV scorecards rate state governments equally or higher than the federal government, than this would suggest that the state governments are not under-regulating. This proposition holds true as long as one accepts that the LCV advocates more than the current amount environmental regulation. This proposition would not be true if the LCV advocated systematically reducing environmental regulation below its current level, but this is not a seriously contested point.

There is a second, more serious question as to whether one can meaningfully compare the scorecard ratings for legislators from different legislatures with one another. The scorecards are extremely useful for comparing legislators within a single legislature, who have all voted on the exact same group of votes. However, when comparing ratings between legislatures, the scorecard ratings will not be based on the same votes. Rather, the ratings for each legislature are based on a unique set of scored votes that may not be comparable to the votes chosen to score other legislatures. For example, the set of votes chosen for the California scorecard will concern laws and issues that are not exactly replicated in any other scorecard.

If the various scorecards' underlying votes are different enough, their ratings will not have a meaningful relationship with one another. A specific concern is that the national scorecard will use votes on issues that are highly environmentalist whereas the state scorecards will score votes that are less environmentally ambitious. If this is the case, low federal scores and high state scores would reflect a difference in the votes scored instead of a difference in actual receptiveness to environmental regulation.

This phenomenon does occur to some degree and has a potentially discrediting effect. For example, the 2002 average for

Idaho's lower state house is sixty-five percent[51] whereas the average for Idaho's two U.S. Representatives is two percent.[52] It seems unlikely that Idaho state legislators are so significantly more receptive to environmental regulation than Idaho's congressmen; some of the difference likely stems from the fact that the Idaho Scorecard used votes less ambitious than those chosen for the national scorecard.[53]

To address this issue, this Note has conducted a substantive evaluation of the votes chosen for the scorecards to determine whether they are comparable in degree of environmentalism. The content of the votes analyzed in each scorecard is measured against the Green Index, a fifty-factor index of pro-environmental policies developed in 1990 as a way to assess states' environmental health.[54] The Index provides a comprehensive environmental agenda that reflects the views of a number of prominent environmental groups such as Environmental Defense and the Environmental Law Institute.[55] This environmental agenda provides a baseline that can serve to evaluate the gravity and weight of environmental content of the LCV scorecards. Votes that would enact or expand policies advocated by the Green Index can be considered roughly equivalent in their environmental rigor because they all relate back to the baseline environmental agenda compiled by the Green Index.

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[51] Voters for Outdoor Idaho, *Voters for Outdoor Idaho's Conservation Counts Scorecard 2002 for the Idaho State House of Representatives* (2002), *at* http://www.voteoutdooridaho.org/scorecard2002rep.html (last visited Apr. 29, 2005).

[52] LEAGUE OF CONSERVATION VOTERS, *supra* note 42, at 32.

[53] For example, many of Idaho's scored votes related to nonenvironmental issues, such as term limits, or are measures of relatively limited impact, such as the creation of special wildlife license plates. Voters for Outdoor Idaho, *Conservation & Wildlife Issues Legislation Used in Compiling Voters for Outdoor Idaho's Conservation Counts Scorecard 2002* (2002), *at* http://www.voteoutdooridaho.org/scorecard/scorecard2002leg.html#H0415 (last visited Apr. 29, 2005).

[54] BOB HALL & MARY L. KERR, 1991–1992 GREEN INDEX: A STATE-BY-STATE GUIDE TO THE NATION'S ENVIRONMENTAL HEALTH 142–45 (1991). Of the fifty factors, eleven pertain to the existence, support and mandatory nature of recycling programs; two factors concern landfills; nine factors relate to the legal regime and management of toxic waste; four factors refer to air quality measures; eight factors pertain to water quality measures; five factors concern sustainable agriculture policies; seven factors refer to energy and transit issues; and the final four factors concern land planning and pollution control. *Id.*

[55] *Id.* at 135–41.

By assigning one point to a scorecard for each scored vote that enacts or expands a policy factor from the Green Index and dividing that sum by the total number of votes scored by the scorecard, one can determine the percentage of environmentally rigorous votes included in each scorecard. This approach discards those votes that merely defend against an environmental rollback or relate to issues not included in the Green Index.[56] Such discarded votes stay in the denominator when a scorecard's percentage of rigorous environmental votes is calculated. Inaccuracies will remain because votes on issues of purely local concern will be discarded whether or not they enact significant environmental regulations. However, this analysis still provides a rough measure of each scorecard's environmental substantive impact. To the extent that the scorecards rate votes on issues advocated by the Green Index, they are generally comparable in their degree of environmentalism.

Table 1[57]: Percentage of Scored Votes that Enact or Advance Measures Contained in the Green Index.[58]

Federal Percentage: 62.5%[59]			
Maryland: 82%[60]	Maine: 55%[61]	Michigan: 37.5%[62]	Vermont: 20%[63]

[56] For example, Wisconsin's state LCV scored a vote on a proposal to amend the state constitution to give residents a right to hunt. WISCONSIN LEAGUE OF CONSERVATION VOTERS, CONSERVATION SCORECARD 5 (2002), *available at* http://www.conservationvoters.org/docs/sc02/2002scorecard.pdf. This vote should be discarded from the following analysis because it is not included on the Green Index.

[57] The majority of these numbers come from the 2002 scorecards. When the 2002 scorecards were unavailable, scores from 2001 or 2003 were substituted.

[58] In order to calculate the following percentages, it is necessary to reference not only the individual state material, but also the Green Index. *See* HALL & KERR, *supra* note 54.

[59] *See* LEAGUE OF CONSERVATION VOTERS, *supra* note 42, at 25–27.

[60] *See* MARYLAND LEAGUE OF CONSERVATION VOTERS, *supra* note 47, at 4.

[61] *See* MAINE LEAGUE OF CONSERVATION VOTERS, 2002 ENVIRONMENTAL SCORECARD 2–3 (2002), *available at* http://www.protectmaine.org/products/2002-Scorecard6.pdf.

[62] *See* MICHIGAN LEAGUE OF CONSERVATION VOTERS, 2002 SCORECARD 2 (2002), *available at* http://www.michiganlcv.org/files/scorecard2002.pdf.

[63] *See* VERMONT ALLIANCE OF CONSERVATION VOTERS, KNOW THE SCORE 2003 VOTES 1–2 (2003), *available at* http://www.vacv.org/scorecard.old.html (last visited Apr. 29, 2005).

Connecticut: 78%[64]	Wisconsin: 50%[65]	Florida: 33%[66]	Pennsylvania: 20%[67]
California: 77%[68]	Colorado: 50%[69]	Wyoming: 33%[70]	Montana: 20%[71]
Minnesota: 75%[72]	Arizona: 50%[73]	Idaho: 31%[74]	Alaska: 19%[75]
N. Carolina:	Washington:	Virginia:	Georgia:

[64] *See* CONNECTICUT LEAGUE OF CONSERVATION VOTERS, *supra* note 48, at 1.

[65] *See* WISCONSIN LEAGUE OF CONSERVATION VOTERS *supra* note 56, at 5.

[66] *See* Florida League Of Conservation Voters, *2002 Scorecard—Featured Votes* (2002), *at* http://www.floridalcv.org/scorecards/2002/featured_votes.htm (last visited Apr. 29, 2005).

[67] *See* PENNSYLVANIA LEAGUE OF CONSERVATION VOTERS, ENVIRONMENTAL SCORECARD FALL '02 at 4 (2002), *available at* http://www.palcv.org/pdf/scorecard2.pdf.

[68] *See* CALIFORNIA LEAGUE OF CONSERVATION VOTERS, CALIFORNIA ENVIRONMENTAL SCORECARD: 29TH ANNUAL GUIDE TO ENVIRONMENTAL LEGISLATION AND VOTES FOR THE 2002 LEGISLATIVE YEAR 20–23 (2002), *available at* http://www.ecovote.org/scorecards/2002/CLCV_scorecard.pdf.

[69] *See* COLORADO CONSERVATION VOTERS, COLORADO LEGISLATIVE ENVIRONMENTAL SCORECARD 9–11 (2002) *available at* http://www.coloradoconservationvoters.org/pdf/scorecards/2002scorecard.pdf.

[70] *See* WYOMING CONSERVATION VOTERS, 2003 LEGISLATIVE SCORECARD 15–21 (2003), *available at* http://www.wyovoters.org/Publications/wcvLegisScorecard2003.pdf.

[71] *See* MONTANA CONSERVATION VOTERS, 2003 STATE LEGISLATIVE SCORECARD 3–7 (2003), *available at* http://www.mtvoters.org/PDFs/2003_scorecard.pdf.

[72] *See* MINNESOTA LEAGUE OF CONSERVATION VOTERS, *supra* note 47, at 10–11.

[73] *See* ARIZONA LEAGUE OF CONSERVATION VOTERS, ARIZONA LEGISLATIVE SCORECARD 2002, at 5–8 (2002), *available at* http://www.azlcv.org/index.php?action=GetDocumentAction&id=351.

[74] *See* Voters for Outdoor Idaho, *supra* note 53.

[75] *See* ALASKA CONSERVATION VOTERS, 2002 LEGISLATIVE SCORECARD 3–5 (2002), *available at* http://www.acvoters.org/scorecards/pdfs/scorecard2002.pdf.

[76] *See* CONSERVATION COUNCIL OF NORTH CAROLINA, 2002 SCORECARD 3 (2002), *available at* http://www.conservationcouncilnc.org/advocacy/Scorecard2002.pdf.

[77] *See* WASHINGTON CONSERVATION VOTERS, 2001–2002 SCORECARD 10–13 (2002), *available at* http://www.wcvoters.org/scorecards/2001to2002_scorecard.pdf.

[78] *See* VIRGINIA LEAGUE OF CONSERVATION VOTERS, 2002 VIRGINIA GENERAL ASSEMBLY SCORECARD 6–8 (2002), *available at* http://www.valcv.org/valcvdocs/VaLCVScorecard2002.pdf.

[79] *See* GEORGIA CONSERVATION VOTERS, LEGISLATIVE SCORECARD 2003, at

67%[76]	46%[77]	29%[78]	18%[79]
Texas: 56%[80]			Oregon: 4%[81]

As Table 1 indicates, there is significant overlap in the types of votes chosen for the various scorecards. All of the scorecards include some votes on measures that would have advanced or enacted elements of the Green Index's generic environmental agenda. At forty-three percent, Washington State has a third fewer Green Index votes than the national scorecard. Maryland, at eighty-three percent, has a quarter more Green Index votes. The eleven states with the highest percentages of Green Index votes appear to be roughly comparable to the national scorecard in their level of environmentalism. This Note will conduct a comparative analysis, looking at state LCV scores for this set of eleven states and the LCV score for the U.S. House of Representatives.

The eleven states with lowest scores seem to differ significantly from the national scorecard. The bottom eleven state scorecards use significantly fewer votes on Green Index issues than the federal scorecard. Unfortunately, it is difficult to decide upon an appropriate discount rate for this second group of states. These states may have low percentages of Green Index votes for a number of reasons. The scorecards may score large numbers of local environmental issues, or may contain many votes on measures to rollback environmental issues. For these reasons, issue variations between the federal scorecard and these state scorecards cannot be resolved by reducing these state legislatures' scores by any particular formula. Therefore, this Note will continue with its analysis by setting aside the scorecards for these states as too vulnerable to alternative public choice explanations.

In short, inter-legislature issue variation does pose a problem to the use of the scorecards as comparative tools. For a number of states, due to the types of issues voted on, inter-legislature

8–9 (2003), *available at* http://www.gavoters.com/downloads/GCV_Scorecard_2003.pdf.

[80] *See* Texas League of Conservation Voters, *Texas League of Conservation Voters Scorecard Summary* (2001), *available at* http://www.tlcv.org/scorecards.html (last visited Apr. 29, 2005).

[81] *See* OREGON LEAGUE OF CONSERVATION VOTERS, 2003 ENVIRONMENTAL SCORECARD FOR THE OREGON LEGISLATURE 6–10 (2003), *available at* http://www.olcv.org/scorecardpages_2003/OLCV.scorecard.2003.pdf.

variation obscures the relationship between state legislator ratings and Congressional ratings. However, for half of the states studied, inter-legislature variations are not fatal to the use of the scorecards. A study of the votes scored shows that the federal scorecard and eleven of the state scorecards select a large percentage of votes that would enact or expand well-regarded environmental policies enumerated by the Green Index. Thus, there is reason to believe that one can meaningfully compare these legislatures despite the fact that they are measured by distinct votes.

VI. A COMPARATIVE ANALYSIS OF STATE LEGISLATORS' AND U.S. REPRESENTATIVES' RECEPTIVENESS TO ENVIRONMENTAL REGULATION

This Note will now conduct two comparative analyses of state legislators' and U.S. Representatives' receptiveness to environmental regulation using data from the LCV scorecards for the most recent legislative session.[82] The first analysis compares state legislators' LCV ratings against the ratings of the U.S. Representatives from those states. The second analysis compares the average LCV ratings for each the eleven state legislatures against the LCV average for the U.S. House of Representatives. The goal of these two analyses is not to systematically prove that either regulatory decentralization or centralization would be universally desirable. Rather, by making these comparisons and examining their implications for the various theories about the environmental regulatory process, this Note seeks to demonstrate the potential value of introducing empirical measures of environmental regulation into the current debate.

A. *State Legislators Compared with State Congressional Delegations*

This Note first compares a state's average rating for its lower legislative house against the average rating for that state's House Congressional delegation. A comparison of legislators who share

[82] For the Federal scorecard, the scores come the 2002 National Scorecard. For the states, the majority of scorecards also come from the 2002 session. For a few states, 2002 scorecards were unavailable, so scorecards from the 2001 or 2003 sessions were used. Additionally, this Note will not analyze the state senate or national senate. Such an analysis may be useful in a more comprehensive study of the state-federal divide in environmental regulation. This Note focuses on U.S. House of Representatives as an example of how empirical inter-legislative comparisons can be useful.

the same constituency (in the aggregate) holds political ideology constant, allowing for the examination of the effect of public choice pathologies on legislators' inclination to implement regulation.

As discussed earlier, advocates of centralized environmental regulation, such as Stewart, who draw heavily on public choice theory and Mancur Olson's collective action theory, would predict that the Congressional Delegation would have higher environmental ratings than their state counterparts. Those who propose greater decentralization, such as Revesz, Elliott, Ackerman and Millian, would predict that the state legislators would be at least as environmental as their congressional counterparts.

Table 2: Congressional Delegation LCV Averages vs. Lower Legislative House LCV Averages

State	Congressional House Delegation (CHD)[83]	Lower Legislative House (LLH)	Difference (CHD-LLH)
Arizona	17	53[84]	-36
N. Carolina	36	66[85]	-30
Texas	32	45[86]	-23
Colorado	41	56[87]	-15
Connecticut	79	91[88]	-12
Wisconsin	68	67[89]	1
Maryland	68	66[90]	2
Washington	59	53[91]	5
California	61	56[92]	5

[83] LEAGUE OF CONSERVATION VOTERS, *supra* note 42, at 11.
[84] ARIZONA LEAGUE OF CONSERVATION VOTERS, *supra* note 73, at 10–11.
[85] CONSERVATION COUNCIL OF NORTH CAROLINA, *supra* note 76, at 2.
[86] TEXAS LEAGUE OF CONSERVATION VOTERS, *supra* note 80, at 1.
[87] COLORADO CONSERVATION VOTERS, *supra* note 69, at 1–3.
[88] CONNECTICUT LEAGUE OF CONSERVATION VOTERS, *supra* note 48, at 1.
[89] WISCONSIN LEAGUE OF CONSERVATION VOTERS, *supra* note 56, at 5–7.
[90] MARYLAND LEAGUE OF CONSERVATION VOTERS, *supra* note 47, at 2.
[91] WASHINGTON CONSERVATION VOTERS, *supra* note 77, at 1–3.
[92] CALIFORNIA LEAGUE OF CONSERVATION VOTERS, *supra* note 68, at 24–26.

Minnesota	65	57[93]	8
Maine	91	54[94]	37

This comparison is generally supportive of those theorists who advocate a decentralization of the regulatory process. In half of the surveyed states, the state legislators are significantly more receptive to environmental regulation than their federal counterparts. In four of the states, Wisconsin, Maryland, Washington and California, the federal delegation receives higher marks, but the state legislators also receive high marks and the difference between the two groups is small. Only in Minnesota and Maine is the federal House delegation substantially more receptive to environmental regulation than their respective state legislators. The states do not appear to be any more captured by public choice pathologies than the federal government. Holding political preferences constant over the two-year range during which the scorecards were compiled, the state legislators in nine of eleven states respond in a similar or more environmental manner than their federal counterparts.

B. *Willingness to Pass Environmental Legislation*

A second point of comparison is states' and Congresses' overall willingness to pass environmental legislation. A comparison of the House of Representative's average rating to the state legislatures' average ratings provides data indicative of relative receptiveness to environmental legislation. In the 107th Congress, the average score for the House of Representatives was forty-seven percent, lower than the average for all eleven state legislatures.[95] The forty-seven percent rating reflects an atmosphere in which very few environmental victories occurred.[96] In contrast, high state ratings reflect the passage of many environmental initiatives at the state level. For example, the Minnesota LCV describes growing "momentum" on environmental issues and[97] the North Carolina LCV heralds the passing of the "landmark" Clean Smokestacks bill.[98]

[93] MINNESOTA LEAGUE OF CONSERVATION VOTERS, *supra* note 47, at 4.
[94] MAINE LEAGUE OF CONSERVATION VOTERS, *supra* note 61, at 4–5, 7.
[95] LEAGUE OF CONSERVATION VOTERS, *supra* note 42, at 8.
[96] *Id.* at 4–6.
[97] MINNESOTA LEAGUE OF CONSERVATION VOTERS, *supra* note 47, at 2.
[98] CONSERVATION COUNCIL OF NORTH CAROLINA, *supra* note 76, at 3.

These findings expand on Revesz's argument that environmental groups are not systematically underrepresented at the state level.[99] Receptiveness to new environmental regulation appears quite widespread among the states. By its own reckoning, the environmental movement is achieving significant breakthroughs in states like Michigan and Connecticut. In the public choice framework, this suggests that environmental groups are finding ways to overcome their organizational difficulties in at least some states. The data suggests that some states are implementing new environmental regulation. If these programs are successful, then environmentalists in other states may use these experiences, to lobby their state to implement similar regulation. Thus, if such an effect occurs, it would lend credence to Elliott, Ackerman and Millian's claim that the existence of regulation at the state level can help the environmental movement by creating a bandwagon effect of environmental victories.[100]

VII. CONCLUSION

League of Conservation Voters scorecards are useful tools for comparing receptivity to environmental regulation across legislatures. The scorecards provide a body of empirical evidence that can supplement and test theories on both sides of the state-federal debate. This Note's comparative analysis, which utilized these scorecards as tools, suggests that as a general matter, the states are not captured by public choice pathologies and may in fact be more hospitable to environmental regulation than Congress. In light of this initial analysis, proponents of further federalization of environmental regulation may want to refine their position to highlight specific areas of regulation where states may be susceptible to public choice problems. A movement in this direction may lead to a more precise argument concerning the relative institutional competence of state and national governments to regulate and manage the environment.

[99] Revesz, *supra* note 3.
[100] Elliott et al., *supra* note 3.