

SAVING OVERTON PARK: A COMMENT ON  
ENVIRONMENTAL VALUES

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To date, cost-benefit analysis has played only a secondary role in environmental law. Instead, regulations typically give a higher priority to environmental values than to monetary costs.<sup>1</sup> This refusal to count environmental values as fully equivalent to money seems, at first blush at least, inconsistent with economic models of rational choice. Are our environmental laws (and most of our fellow citizens) simply irrational?

This reluctance to trade other values for money goes by the general name of incommensurability. A full treatment of incommensurability in environmental law is beyond the scope of this Comment,<sup>2</sup> which instead will focus on the articles by Jason Johnston<sup>3</sup> and Richard Warner<sup>4</sup> in this Symposium. Both articles provide possible justifications for society's reluctance to treat environmental harm as simply another cost. Warner seeks to broaden our concept of rationality to encompass more than the economic model of consumer choice, while Johnston attempts to show how sophisticated economic models might produce rules like those we see in environmental law. This Comment will explore their efforts, which I find helpful but incomplete (if only because neither theory takes advantage of the insights offered by the other).

To assess these explanations, we need to take a close look at environmental decisionmaking in some reasonably straightforward context. To provide such a concrete context, I have chosen one of the

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<sup>1</sup> See *infra* notes 24-30 and accompanying text.

<sup>2</sup> For some earlier discussions of this topic, see CHRISTOPHER D. STONE, *THE GNAT IS OLDER THAN MAN* (1993), and Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 834-40 (1994). In addition to these works, for a good introduction to the incommensurability debate, see Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 MICH. L. REV. 1520 (1992).

<sup>3</sup> Jason Scott Johnston, *Million-Dollar Mountains: Prices, Sanctions, and the Legal Regulation of Collective Social and Environmental Goods*, 146 U. PA. L. REV. 1327 (1998).

<sup>4</sup> Richard Warner, *Does Incommensurability Matter? Incommensurability and Public Policy*, 146 U. PA. L. REV. 1287 (1998).

leading cases in administrative law, *Citizens to Preserve Overton Park, Inc. v. Volpe*.<sup>5</sup> Apart from its pivotal role in shaping the law of judicial review of administrative action, *Overton Park* is also a revealing example of how tradeoffs are made in environmental law. Part I examines how the standards adopted in *Overton Park* (as well as in many environmental statutes) privilege environmental values in ways that are at odds with cost-benefit analysis and even with some theories of incommensurability. In Part II, I consider Warner's efforts to broaden the concept of reasoned choice. Part III analyzes Johnston's effort to accommodate contemporary environmental law within the rational choice framework.

My goal here is quite limited. I do not attempt to offer a critique of either Warner or Johnston on his own terms, by probing one's philosophy or the other's economics. Nor do I question, for present purposes, that the current regime of environmental law has some claim to respect. It is possible, of course, that in a full-fledged analysis of the subject, conventional cost-benefit analysis would emerge as the victor, both in the academy as against theories like Warner's and Johnston's, and in social desirability as against the current legal regime. But those are larger issues that would take me outside the limitations of this brief Comment.<sup>6</sup>

## I. INCOMMENSURABILITY AND FEDERAL ENVIRONMENTAL LAW

To place the issue in concrete context, we should begin by fleshing out our case study. *Overton Park* arose from a dispute over highway construction in Memphis.<sup>7</sup> The plaintiffs challenged the decision of the Secretary of Transportation to fund the construction of an interstate highway through Overton Park. They invoked federal statutory prohibitions on the use of federal funds for highways through public parks (and certain other areas) "if a 'feasible and prudent' alternative route exists. If no such route is available, the statutes allow [the Secretary] to approve construction through parks only if there has been 'all possible planning to minimize harm' to the park."<sup>8</sup>

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<sup>5</sup> 401 U.S. 402 (1971).

<sup>6</sup> My own views on these broader issues are set forth in DANIEL A. FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* (forthcoming 1999) (manuscript at 33-65, 89-125, on file with the *University of Pennsylvania Law Review*).

<sup>7</sup> See *Overton Park*, 401 U.S. at 404-08.

<sup>8</sup> *Id.* at 405 (footnotes omitted). For further background on the statute, see Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Ac-*

Although the case is best known for its holdings regarding the availability and scope of judicial review,<sup>9</sup> the immediate question before the Court was how to interpret this statutory ban. The government argued that the Secretary had broad discretion, at least as to the "prudence" prong of the statutory standard. It contended that the Secretary "should weigh the detriment resulting from the destruction of parkland against the cost of other routes, safety considerations, and other factors, and determine on the basis of the importance that he attaches to these other factors whether, on balance, alternative feasible routes would be 'prudent.'"<sup>10</sup> But the Court concluded that "no such wide-ranging endeavor was intended":<sup>11</sup>

Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary. But the very existence of the statutes indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes.<sup>12</sup>

Thus, the Court said, "[i]f the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems."<sup>13</sup> On remand, the Secretary disapproved construction of the highway, a decision that was upheld by the lower courts.<sup>14</sup>

*Overton Park* involved a clash between two methods of making environmental decisions. In the government's view, the funding decision was highly discretionary, based on a case-by-case balancing of the reasons for and against the route, seeking the best decision in light of the balance of all reasons. This view is quite consistent with the usual economic models of rational choice. Not surprisingly, the most explicit version of this balancing process in environmental law is cost-

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*tions Affecting the Community*, 39 UCLA L. REV. 1251 (1992) (arguing that the Court miscomprehended congressional intent).

<sup>9</sup> See *Overton Park*, 401 U.S. at 410 (establishing judicial review of administrative actions under the Administrative Procedure Act absent evidence of contrary congressional intent).

<sup>10</sup> *Id.* at 411.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 412-13 (footnotes omitted).

<sup>13</sup> *Id.* at 413.

<sup>14</sup> See *Citizens to Preserve Overton Park, Inc. v. Brinegar*, 494 F.2d 1212, 1216 (6th Cir. 1974).

benefit analysis, in which conflicting values are reduced to a monetary metric.

It would be a mistake, however, to identify this balancing approach entirely with cost-benefit analysis. As recent work by Cass Sunstein shows, balancing need not take the form of quantitative cost-benefit analysis. Sunstein's views will help illuminate the relationship between environmental policy and debates over incommensurability. In particular, as Sunstein's work illustrates, not every version of incommensurability can explain the current regulatory regime.<sup>15</sup> Something more basic than the mere unavailability of a single metric must be assumed to make sense of current law.

In his most recent work, Sunstein has called for a modified form of cost-benefit analysis, which he has formulated in different ways. Sunstein rejects the view that all values can be reduced to a monetary metric. Indeed, he was one of the early legal scholars to embrace some form of incommensurability.<sup>16</sup> Consequently, he does not endorse economic efficiency as the sole basis of regulatory policy. He does, however, call for expanded use of cost-benefit analysis at the expense of more "absolutist"<sup>17</sup> approaches to environmental regulation. In one formulation, officials would engage in a "two-stage decision process. The first stage [w]ould consist of a [quantitative] cost-benefit analysis . . ." The second would introduce "other values, if any are relevant, that [cost-benefit analysis] does not take into account."<sup>18</sup> Another formulation distinguishes between different types of statutes. Some statutes, such as federal pesticide and toxics regulations, are designed to overcome "market failures" such as "an absence of sufficient information on the part of consumers, harms to third parties, or collective action problems of various sorts."<sup>19</sup> For these statutes, Sunstein says, "there is much to be said in favor of [quantitative cost-benefit analysis], though it should be qualified with a recognition that even for 'market failure' statutes, goals other than those rooted in economic efficiency may legitimately bear on the de-

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<sup>15</sup> See generally CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* (1997) [hereinafter *FREE MARKETS*].

<sup>16</sup> See Sunstein, *supra* note 2 (suggesting that an understanding of incommensurability may affect one's understanding of law).

<sup>17</sup> CASS R. SUNSTEIN, *Congress, Constitutional Moments, and the Cost-Benefit State*, in *FREE MARKETS*, *supra* note 15, at 348, 370.

<sup>18</sup> CASS R. SUNSTEIN, *Experts, Economists, and Democrats*, in *FREE MARKETS*, *supra* note 15, at 128, 139 (cowritten with Richard Pildes).

<sup>19</sup> SUNSTEIN, *supra* note 17, at 368.

cision."<sup>20</sup> Other statutes, which currently are considered "absolutist," could be amended to allow balancing.<sup>21</sup> In short:

It is therefore best for Congress to understand costs and benefits in economic terms only for statutes that are designed to overcome market failures. And even here, there is room for qualifying the economic analysis—when, for example, the risk at issue is inequitably distributed, and when political actors believe that it deserves special attention for that reason. When the statute does not involve market failure, Congress should still require cost-benefit balancing as the general background rule; but it should understand the definition of costs and benefits to be sufficiently wide open as to allow administrators to depart from purely economic criteria.<sup>22</sup>

Hence, Sunstein calls for "a general background requirement of cost-benefit balancing," with costs and benefits understood in an "open-ended," not necessarily economic, sense; advocates a mandated "cost-effectiveness" for all regulations; and seeks to require "more technical cost-benefit balancing on a statute-by-statute basis, when there is a considered legislative judgment that the statute is a response to a market failure, economically defined."<sup>23</sup>

In accordance with his view of incommensurability, Sunstein does not suggest that environmental decisionmaking can be reduced to an algorithm-like cost-benefit analysis, in which values are "measured" literally in numerical terms. But he does adopt a "commensurable" type of decisionmaking in the sense of calling for a balancing of reasons in each case. By approaching problems in terms of balancing, whether in terms of cost-benefit analysis or a more intuitive comparison of competing values, Sunstein suggests a stance of presumptive neutrality on the part of the decisionmaker. In one formulation, the decisionmaker actually begins by using the neutral technique of cost-benefit analysis, and only then considers the impact of other values. For statutes addressed to market failures—a category that he does not define, but that seems to include toxics regulation and pollution laws, judging from his examples—Sunstein seems to think that other values will enter the analysis at all only in exceptional cases. For other statutes, they will play a greater role. But in any of the formulations, the decisionmaker clearly begins by open-mindedly assessing the values

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<sup>20</sup> *Id.* at 369.

<sup>21</sup> *See id.* at 369-70.

<sup>22</sup> *Id.* at 371.

<sup>23</sup> *Id.* In connection with these reforms, Congress would set benchmark values of \$3 million to \$10 million per life saved. *See id.*

on each side of the balance, rather than beginning with a bias in either direction.

This type of balancing is at odds with the approach adopted in *Overton Park*, in which the decisionmaker is directed to begin with a strong tilt in favor of preserving parklands. In this respect, *Overton Park* is quite typical of environmental regulation generally. The environmental commitments now embedded in federal law almost uniformly take an environmentalist baseline, with the presumption always being in favor of environmental protection and the burden of proof resting on those arguing in favor of pollution. With notable consistency, Congress has treated environmental risks as presumptively impermissible except when required by considerations of feasibility. Rather than mandating the use of cost-benefit analysis, Congress has adopted an environmental baseline for the control of air and water pollution,<sup>24</sup> for carcinogens in the workplace,<sup>25</sup> and for regulating hazardous waste sites,<sup>26</sup> but it rarely has called for cost-benefit analysis or open-ended balancing.<sup>27</sup> As Mark Sagoff has argued, this consistent statutory pattern bespeaks an implicit societal commitment to environmental values.<sup>28</sup> Since Sagoff wrote, this pattern has continued with the passage of the Clean Air Act Amendments of 1990.<sup>29</sup> The result is to make environmental protection the

<sup>24</sup> See *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976) (holding that the EPA may not consider the economic feasibility of proposed state requirements); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1036 (D.C. Cir. 1978) (holding that costs are relevant under the Clean Water Act only if wholly out of proportion to benefits); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 387 (D.C. Cir. 1973) (rejecting the industry's argument for cost-benefit analysis under the Clean Air Act).

<sup>25</sup> See *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 512-13 (1981) (holding cost-benefit analysis impermissible under a statute regulating workplace exposure to toxic chemicals).

<sup>26</sup> The EPA is required to issue such standards governing waste disposal "as may be necessary to protect human health and the environment." 42 U.S.C. § 6924(a) (1994).

<sup>27</sup> The closest approach to open-ended balancing probably is found in the Federal Insecticide, Fungicide, and Rodenticide Act, the federal pesticide statute. See 7 *id.* § 136a(a) (stating that EPA regulations are "to prevent unreasonable adverse effects on the environment").

<sup>28</sup> See MARK SAGOFF, *THE ECONOMY OF THE EARTH* 179-80, 196-99, 207-08 (1988); Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393 (1981).

<sup>29</sup> 42 U.S.C. §§ 7401-7671. For instance, the 1990 amendments to the Clean Air Act contain extensive provisions relating to hazardous air pollutants. The amended statute sets as a first goal the use of emission standards requiring:

[T]he maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost

presumptive outcome, shifting the burden to those who advocate other values.<sup>30</sup>

Environmental law thus seems to incorporate something like a concept of incommensurability, and in a stronger form than Sunstein's proposed approach to environmental policy. His version of incommensurability does explain one feature of environmental law, the limited role of cost-benefit analysis, but clearly does not explain the "thumb on the scale" in favor of environmental values in so many regulations. Sunstein, of course, is quite aware that his approach varies from current environmental law, and suggests reforms to bring the regulatory regime closer to his model. Sunstein may turn out to be right that the system needs reform, but before we jump to that conclusion, we should consider the possibility that other models of incommensurability might provide a justification. In the remainder of this Comment, I explore whether Johnston's and Warner's theories of incommensurability shed useful light on environmental policy.

## II. INCOMMENSURABILITY AND INDIVIDUAL CHOICE

In his contribution to this Symposium, Richard Warner continues his work on incommensurability. Without pretending to do justice to his full argument, I would like to focus on three theses that he puts forward:

1. Incommensurability exists, and one important form can be characterized by "reason-exclusion"<sup>31</sup>—that is, when this kind of "constitutive" incommensurability<sup>32</sup> exists, certain possible reasons for making a decision are excluded as irrelevant.<sup>33</sup>

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of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable . . .

*Id.* § 7412(d)(2). A second tier of standards are required if the first tier would leave the most exposed individual with a greater than one-in-a-million lifetime risk of cancer. See *id.* § 7412(f)(2)(A); see also *Huge Clean Air Bill's Toxics Title Sets New Tone for Government Regulation*, 21 *Env't Rep.* (BNA) 1357, 1358 (Nov. 16, 1990). As one would expect, this statute is questionable from the point of view of cost-benefit analysis. See Paul R. Portney, *Policy Watch: Economics and the Clean Air Act*, *J. ECON. PERSP.*, Fall 1990, at 173, 177-79 (estimating the benefits of the statute at zero to four billion dollars annually and the costs at six to 10 billion dollars).

<sup>30</sup> For an attempt to work through the policy implications of this commitment, see FARBER, *supra* note 6 (manuscript at 89-185).

<sup>31</sup> Warner, *supra* note 4, at 1297.

<sup>32</sup> See *id.* at 1291-92.

<sup>33</sup> See *id.* at 1295, 1311.

2. Such exclusions are grounded in our commitments, either individually or as a community.<sup>34</sup>

3. Given the existence of social disagreements over what reasons should be excluded, public bodies have a responsibility to explain their choices, not by comparing the strength of the reasons for different options (which may be incommensurable), but in a different sense. They should (a) show that their action rests on "undefeated reasons,"<sup>35</sup> and (b) undertake the "role of interpreters of society's commitments."<sup>36</sup>

How much can these theses help us understand environmental decisions such as *Overton Park*?

As to the first thesis, the notion of "reason exclusion" is an integral part of the Court's decision. One of the government's arguments was that the funding decision was "committed to agency discretion" and hence unreviewable. The Court interpreted the Administrative Procedure Act to preclude review only when "statutes are drawn in such broad terms that in a given case there is no law to apply."<sup>37</sup> The government's claim of open-ended discretion was advanced in support of this argument. By rejecting the argument, the Court held that the agency's discretion indeed was confined because only a restricted category of reasons could justify using parkland under the statute. The Court then remanded for a determination of "whether the Secretary properly construed his authority" and whether he "could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems."<sup>38</sup> The lower court was then to consider whether the decision manifested "a clear error of judgment."<sup>39</sup> Thus, most of the conceivable reasons for the park route were excluded as irrelevant, and the Secretary was required to show that he in fact had made a reasonable decision based on the small range of permissible reasons.

This was clearly a "reason-excluding" decision in the sense of precluding many explanations for the decision: "The park was cheaper," "otherwise, more people would have to move," and so forth. On the other hand, cost and community dislocation were not precluded ab-

<sup>34</sup> See *id.* at 1297-98, 1324.

<sup>35</sup> *Id.* at 1323.

<sup>36</sup> *Id.* at 1324.

<sup>37</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 79-752, at 26 (1945)).

<sup>38</sup> *Id.* at 416.

<sup>39</sup> *Id.*



solutely as considerations, if they could be characterized as extraordinary. Perhaps this falls short of the full scope of what Warner considers to be "reason exclusion," but in any event, the general concept seems to be helpful in understanding the case and the larger body of environmental law that *Overton Park* exemplifies.

Warner's second thesis is that reasons are excluded for purposes having to do with how individuals or communities view their identities. Parks serve obvious functions as public places in the life of local communities, and some consideration of this fact may have been in the background. More notably, the Court clearly was defining the national community as one that valued "green havens"<sup>40</sup> as much as busy highways—or perhaps it would be more precise to say that the Court interpreted the statute as resting on such a community definition. Indeed, it is worth noting, the opening sentence of the opinion reads: "The growing public concern about the quality of our natural environment has prompted Congress in recent years to enact legislation designed to curb the accelerating destruction of our country's natural beauty."<sup>41</sup> Thus, the Court situated its discussion in the context of the community's embrace of environmental values.

It is when we get to Warner's third thesis that his argument, and its relevance to environmental law, becomes more difficult to assess. What could the Court say to someone who questioned the priority given to parks and the consequent exclusion of many reasons for choosing parklands as highway routes?<sup>42</sup> Warner says that the legislative choice is rational if it is backed by "reasons that are not defeated by, or inferior to, any other reasons."<sup>43</sup> Of course, the opposing choice might have been just as rational, based on the same standard. This leaves rather mysterious the process by which such decisions are

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<sup>40</sup> The dissenting judge in the court of appeals put it this way:

[P]ublic parklands are the only remaining weekend sanctuaries for vast numbers of city dwellers from the polluted urban sprawl. A threat to a neighborhood parkland is a threat to the health, happiness, and peace of mind of all the neighborhood people. . . . At the very least, procedural due process means that the people of this country be listened to, and heard, on matters affecting their daily lives as directly as the environment in which they live.

*Citizens to Preserve Overton Park, Inc. v. Volpe*, 432 F.2d 1307, 1318 (6th Cir. 1970) (Celebrezze, J., dissenting), *rev'd*, 401 U.S. 402 (1971).

<sup>41</sup> *Overton Park*, 401 U.S. at 404 (footnote omitted). The accompanying footnote cites the National Environmental Policy Act of 1969 and two less prominent statutes. *See id.* at 404 n.1.

<sup>42</sup> Of course, one thing that the Court could say is that it merely was following the will of Congress, but this only pushes back the question one step to the legislators.

<sup>43</sup> Warner, *supra* note 4, at 1322-23.

to be made or how one is to justify making one choice rather than another.

Perhaps such decisions are irreducibly mysterious. We do not really know what made a large number of people in the late 1960s decide that environmental protection was a pressing priority, whereas previously they had equated social progress with economic welfare and national security. Even in considering the more familiar problem of how judges decide hard cases—for all the talk about coherence, narrative, practical reason, and so forth—we have difficulty saying anything specific about the process of decision. Warner suggests that what is involved is a creative reformation of existing commitments, which is probably correct but still rather vague. Today, in the environmental area, we can point, with some assurance, to an existing societal commitment to environmental quality, and (in my view at least) the reasons adduced for abandoning the commitment are not compelling.<sup>44</sup> So at least, on Warner's view, there is no rational reason for rejecting this commitment. But the question of how this commitment should be interpreted and applied is less easily addressed, let alone the question of how the community should explain itself to dissenters who fail to share the same commitment.

Warner does a considerable service by making the "plea for self-conscious attention to such questions,"<sup>45</sup> and perhaps there is little that can be said in the abstract about these questions. Without a more compelling account of how we make and justify the adoption and reinterpretation of basic commitments, however, advocates of incommensurability probably will be unable to quiet the doubts of "rational choicers" about whether reason can exist without commensurability. At present, the best normative case for incommensurability seems to be the unpalatability of the opposing model, but however inevitable, this is not an entirely satisfactory state of affairs.

### III. INCOMMENSURABILITY AND COLLECTIVE CHOICE

For Warner, the role of incommensurability in social policy flows from its role in individual decisionmaking. Johnston suggests that society might adopt what appears to be a form of incommensurability,

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<sup>44</sup> See FARBER, *supra* note 6 (manuscript at 89-125).

<sup>45</sup> Warner, *supra* note 4, at 1325.

even if individuals all follow the standard economic model of rational choice.<sup>46</sup>

Because of its complexity, it is difficult to reduce Johnston's argument to a set of simple theses that then could be compared with current environmental law. Instead, for purposes of seeing the utility of his approach, we might ask what kind of story Johnston could tell about *Overton Park*. In particular, how can we explain the decision to allow park routes only to avoid extraordinary social costs, rather than balancing the benefits produced by the park against the incremental costs of using a different route?

Some additional details about the park and the highway decision may be helpful in this regard. The plan was to build a six-lane highway through the park, which the court of appeals described as a "342 acre, municipally owned park in midtown Memphis used for a zoo, a 9-hole golf course and other recreational purposes."<sup>47</sup> The alternative routes would have cost significantly more, and would also have destroyed, for example, two schools, three churches, forty-six businesses, and residences occupied by more than 3000 people.<sup>48</sup> The state paid the city (which approved the route) \$2 million for the twenty-six acres of parkland; the city promptly spent half for a 160-acre golf course and held on to most of the rest.<sup>49</sup> As to the impact of the highway on the park, officials in the Department of the Interior indicated that the park's values would be "seriously impaired" and that "there won't be much left in the way of a wooded park left in Overton Park after an interstate Highway is routed through it."<sup>50</sup>

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<sup>46</sup> Perhaps I should begin by saying that this seems a promising route of attack on general grounds. Rational choice theory has a well-developed model for individual decisions, but it is much less clear what it means to behave rationally in group situations. Game theory often provides multiple equilibria, with no clear ground for choosing among them, which means that even knowing all of the relevant resources and constraints, we cannot say with assurance what course of action would be adopted by a group of rational individuals. That in turn seemingly means that the economic definition of rationality, as applied to groups, is incomplete. In some circumstances, at least, it is not implausible that a rational equilibrium might produce behavior that resembles the behaviors we would find if individual values were incommensurable. In particular, as Johnston argues, we might find situations in which sales of some commodities were blocked, regulatory sanctions were used instead of pricing mechanisms, and quantification of benefits was eschewed.

<sup>47</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 432 F.2d 1307, 1309 (6th Cir. 1970), *rev'd*, 401 U.S. 402 (1971).

<sup>48</sup> *See id.* at 1311.

<sup>49</sup> *See id.* at 1312 n.8.

<sup>50</sup> *Id.* at 1317 (Celebrezze, J., dissenting) (quoting letters from the Department of the Interior).

Johnston's analysis suggests that we should focus on the difficulty of measuring the benefits of the park, and the ways in which monetary transactions might undermine the social value of the park. Begin with the former: Why not simply charge admissions and thereby determine how much the public values picnics, frisbee games, and the like? Johnston's theory is complex, but I take it that he would argue along the following lines. First, some uses of the park are relational; prolonged use may be needed before people develop attachments to particular parts of the park and discover activities that they find especially rewarding. These relational benefits are hard to price, and pricing other benefits might in the long run discourage the development of such relational uses.<sup>51</sup> As Johnston puts it:

By forbidding money to be exchanged for any aspect of the collectively held external world (including, importantly, any product of individual interaction with it), we force the same sort of costly search, matching, and barter process that occurs with human friendship and marriage. We obligate individuals to find those collective resources that best suit their own preferences, resources, and capabilities. They must seek those resources that are best able to reciprocate the individuals' own cares and concerns, not in terms of money, but in experience. As in our most treasured human relationships, our relationships with collective environmental goods are where we learn about the complexity of the external environment, and about how to negotiate a cooperative relationship with that environment.<sup>52</sup>

This is not a completely unrealistic description as applied to a park. (One imagines someone discovering a favorite little corner of Central Park.) And perhaps charging for park access would impair such relationships, making the park experience too "recreational" and pushing the park managers toward a Disneyland type of development. Perhaps it is relevant in this regard that when given cash in exchange for the Memphis parkland, the only portion of the money used for any immediate purpose was spent on a golf course. But it is hard to know just how powerful a factor this might be in explaining our refusal to monetize the values produced by parks.

A second factor in Johnston's analysis is the difficulty that the park managers would face in obtaining accurate information about the preferences of park users. It turns out to be difficult, if not impossible, to develop a schedule of prices and resource qualities that

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<sup>51</sup> See Johnston, *supra* note 3, at 1342-43.

<sup>52</sup> *Id.* at 1344.

will lead buyers to reveal accurately their preferences.<sup>53</sup> It may be more feasible to charge a price based on the cost of the individual's activities in terms of interference with the preference of others, but this becomes increasingly difficult, the more varied the preferences and more complex the interactions involved.<sup>54</sup>

Both for users and regulators, the informational costs are compounded by the complexity of the interactions among different users.<sup>55</sup> To learn the mutual compatibility of jogging, picnics, and bongos, we need to have the opportunity for seeing them interact in different settings over significant periods of time. The "social ecology" of the park may be quite complex, and it may be difficult to sort out the relevant relationships.

All of this adds up, in Johnston's view, to an explanation for our use of sanctions rather than prices to control environmental harms:

We regulate use not because we are certain of the collective impact of alternative types and levels of individual interaction with the environment, but rather because we are not. Because of that same uncertainty, we prefer sanctions to pricing due to our certainty that a use should not be permitted only if it is a gross departure from, or completely unlike, those uses that experience has indicated are generally protective of the environment. We use sanctions because environmental regulation is intended to preserve the diversity, variability, and duration, not of the natural environment, but of human relationships with it. We use sanctions, finally, because we do not want to create incentives for our collective agents to derive revenues from increases in the level of harmful activities, but to detect levels and uses that threaten too much harm.<sup>56</sup>

How useful is all of this as an explanation for why we do not try to price park activities? One easily could add a list of other economic factors: the costs of controlling access and monitoring activities for conformity with the admission ticket; the possible positive externalities (people may find the park more fun, as well as feel safer, if there are other people present); and the possible public-choice problems that might lead park officials to misprice activities. There are also noneconomic factors, particularly the importance of parks as expressions of community identity. Still, Johnston's analysis does seem to shed light on some significant factors that might otherwise go unnoticed.

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<sup>53</sup> See *id.* at 1347-50.

<sup>54</sup> See *id.* at 1348-49.

<sup>55</sup> See *id.* at 1351.

<sup>56</sup> *Id.* at 1329.

Johnston's larger point is that information problems may help explain some of the contours of environmental law. In particular, he explores the decision to sanction large deviations from acceptable uses rather than use a pricing mechanism to affect activity levels.<sup>57</sup> Imagine that, instead of virtually banning conversion of parks to highways, Congress had attempted to impose a pricing mechanism, under which states would pay for choosing park routes in terms of lowered grants. (The rationale might be that governments might suffer from a form of fiscal illusion, counting the expense of acquiring private land as a cost of highway development but undervaluing the costs of harm to parks.<sup>58</sup>) One advantage to this system is that it could cover all forms of harm to parks, including the disruptions caused by roadways near (rather than through) parkland. Johnston is probably right that at least one reason we do not do this is the difficulty of properly assessing the relevant costs. Building a highway through part of Overton Park not only eliminates that part of the park but affects the social ecology of the rest of the park, disrupting established use patterns in ways that may be hard to forecast, with impacts on individuals that may be hard to measure. So perhaps, as Johnston says, we impose sanctions on extreme deviations from current use because we presumptively find them harmful, but are unable to assess minor changes.

It seems intuitively clear that Warner's analysis captures aspects of our feelings about parks that are slighted by Johnston. On the other hand, Johnston's analysis does cause us to think in a fresh way about some of the issues, conceptualizing effects on parks in a manner that otherwise might not occur to us. Thus, both analyses have potential, but much more would have to be done to test them. In particular, a more careful examination of the facts surrounding *Overton Park* is required to determine whether either analysis actually succeeds as an account of the federal legislation and its judicial application. To test Warner's theory, we would need a deeper understanding of the normative reasoning underlying the decisions of the various bodies involved, be they legislative, administrative, or judicial. To assess Johnston's theory, we also would need real evidence, rather than the

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<sup>57</sup> See *id.* at 1355-58.

<sup>58</sup> A failure to appreciate fully public benefits also might occur with highways, but presumably would be balanced by the political clout of the highway construction and trucking industries.

speculation I have offered here, about the modalities of park uses and the difficulties of quantifying their interactions and benefits.<sup>59</sup>

If we are to make further progress on understanding incommensurability and its relationship to law, I suspect, we will need some sustained studies of legal decisions, combining theoretical sophistication like Warner's and Johnston's with detailed descriptions of specific cases. Only then will we be in a position to determine the extent to which specific versions of incommensurability actually can shed light on some key features of our legal system. The articles in this Symposium, however, give grounds for hope that the results of that investigation would be illuminating.

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<sup>59</sup> Some advocates of incommensurability might argue that the kind of empirical analysis given by Johnston ultimately would erode our attachment to deeper environmental values, in the same way that cost-benefit analysis sometimes is feared to destroy unquantifiable dimensions of activities and relationships. I do not believe, however, that sensible policymakers can afford to ignore the instrumental effects of their decisions, nor do I think that our values are so fragile as to be destroyed by the taint of such "practical" concerns.

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