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FROM PLASTIC TREES TO ARROW’S THEOREM

Daniel A. Farber*

Put briefly, if the law is “not a brooding omnipresence in the sky,” then it can be only one place: in us. If we are trying to find a substitute final evaluator, it must be one of us, some of us, all of us—but it cannot be anything else.¹

I. INTRODUCTION

Economists and their disciples have largely dominated discussions of law and public policy in the past decade. In law schools, the “law and economics” movement was the dominant intellectual force of the 1970’s, and it remains powerful today despite challenges from the Left. Free market solutions and cost-benefit analysis now have powerful advocates in the White House and throughout the executive branch.

No serious policy analyst could question the usefulness of economics as an analytic tool or the significance of economic welfare as a social goal. Nevertheless, economic analysis has not always carried the day. For example, despite strong arguments by economists, the environmental laws of the past two decades typically favor other values over economic efficiency. Environmental statutes rarely invoke the cost-benefit analysis favored by economists. Instead, they require the maximum feasible commitment to achieving environmental values, without much regard for the costs involved.²

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² Because the author intends this piece as a tentative essay rather than a definitive analysis, footnotes have been kept to a minimum.

1. Leff, Unspakable Ethics, Unnatural Law, 1979 DUKE L.J. 1229, 1233 (citation omitted).
The viewpoint underlying these environmental statutes might be aptly called environmentalism. Advocates of environmentalism espouse a broad range of social views, but they commonly agree on two premises. They believe that environmental values deserve weight in social decisions even apart from any measurable contribution that the environment may make to human well-being. And they believe that the political process, rather than the market-based standard of economic efficiency, should determine how vigorously society pursues environmental values at the expense of other values.

Advocates of economic efficiency, by contrast, offer two much different approaches to government decisionmaking. In the social welfare version of economic analysis, considered in Part II of this essay, they contend that economic efficiency is a substantive value that government should deliberately pursue. Maximizing human welfare should be the only government goal, and economic efficiency should serve as the measure of human welfare. Opponents of this social welfare theory often challenge head-on the usefulness of economic efficiency as a measure of overall welfare. This essay also challenges this theory, but does so less directly by considering one fundamental issue: whether policymakers facing a societal decision can give environmental values greater weight than is justified by their contributions to human welfare. Part II begins by considering and rejecting the standard environmentalist arguments on this issue, before attempting to frame a more cogent case supporting the independent worth of environmental values.

Advocates of economic efficiency also claim that it can be used in a second way: as a means to determine how society should make decisions when members of society hold conflicting values. This "procedural" interpretation views economic efficiency as a type of weighted voting mechanism. By presenting this view, economists claim in essence that the criterion of efficiency should override the normal political approach of majority rule as a decisionmaking method. Part III considers this contention.

To be valid, environmentalism must rebut both the substantive and procedural claims for economic efficiency. Thus, environmentalists must be prepared to defend environmental values as having independent moral significance, aside from their economic contributions, and must defend the political process as a method of social choice, even though the process yields decisions that fail to maximize economic well-being.

II. ENVIRONMENTALISM AND HUMAN VALUES

A. The Plastic Trees Debate

The most sustained discussion in the legal literature about economics and environmental values consists of a series of articles by Laurence Tribe and Mark Sagoff. Their debate was prompted by a suggestion in Science magazine that plastic trees could readily serve the same purposes
as real trees. This plastic trees suggestion took to its extreme the common economic assumption that the environment counts only as a source of human utility. In their debate and their other work, Tribe and Sagoff attempted to provide a philosophical foundation for environmentalism, and thereby to demonstrate why environmental values should be immune from economic analysis. Because both commentators seem to place environmental values on a higher plane than "mere" economic interests, their views provide a useful contrast to the standard economic approach.

Despite the sharp tone of some of their interchanges, the positions of Tribe and Sagoff have important similarities. Tribe argued that environmental values are not "smoothly interchangeable" with economic values; hence, economic analysis is inappropriate in dealing with them. According to Tribe, society is in a state of flux. The world and even human values are constantly changing; only nature can offer a thread of continuity. Sagoff agreed that environmental values differ radically from economic values, although his explanation was somewhat different. He contended that economic interests represent mere personal preferences, while the environment embodies objective moral values. Environmental values are cultural or political rather than merely personal, and they therefore transcend economics.

Thus, both Tribe and Sagoff sought a metaphysical basis for environmental values. Indeed, Tribe seemed at times almost to search for a secular religion:

In a classic reply to Sartre's heroic effort to find authenticity . . ., Heidegger saw in that existentialist stance only the haunting specter of the human will willing itself into the void. . . . So it is that progress becomes a frenzied caricature of itself, and that human nature, itself but a part of the natural order properly subject to human will, becomes subject to alteration without moral constraint as Yeats' vision becomes reality: The center will not hold.

The structure of the Rawlsian argument thus corresponds closely to that of instrumental rationality; ends are exogenous, and . . .


5. Sagoff's aesthetic theory is found in Sagoff, On Preserving, supra note 3, at 249-64.
the exclusive office of thought in the world is to ensure their maximum realization, with nature as raw material to be shaped to individual human purposes . . . . For the premises of secularized transcendence deny the existence of anything sacred in the world . . . .

I would not presume to offer anything like a definitive answer, but I will advance a tentative hypothesis: Just as the disintegration of reason detected by Horkheimer has its roots in a religious transformation, the reintegration of reason and moral perception may be augured by the dawning of environmental awareness in contemporary law and culture. 6

He then noted "a growing sense in contemporary industrialized societies that there is in fact something sacred in the natural . . . ." 7

With their quasi-religious orientations, Tribe and Sagoff attempted to draw clear lines between the profane and the sacred. For both writers, the environment is sacred and deserves refuge from profane economic concerns. Both sought to separate environmentalism from the economic sphere, which contains only private, personal preferences for consumer goods.

For Sagoff, environmentalism makes sense principally because nature contains emblems that possess expressive meaning for people. The reason why society preserves nature is to show its respect for the meanings symbolized by these emblems: to honor the courage embodied in the bald eagle, the independence of the puma, and the grandeur of the mountain. Especially in America, Sagoff said, nature has acquired a deep cultural significance. 8

The cultural traditions that Sagoff describes are surely significant, but they fall short as a complete foundation for environmentalism. Many natural objects lack deep cultural meaning. The snail darter, the subject of the leading judicial opinion under the Endangered Species Act, was a small, unimpressive fish without particular symbolic significance. 9 Furthermore, Sagoff's perspective seems unduly tied to his own time and place. As Tribe pointed out, machines may someday assume the symbolic significance once attached to trees and animals. Sagoff's analysis also relies heavily on the American tradition; it leaves little room, therefore, for environmentalism in Europe, let alone in cultures less related to America.

Tribe's analysis is harder to understand. As noted earlier, he wished to separate the sacred world of nature from the profane world of economics. He feared, however, that calling nature sacred would sanctify

7. Id. at 1337.
9. See Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978). Of course, the Supreme Court's decision may now have endowed the snail darter with symbolic importance.
the status quo, thus freezing forever the constant flux of modern life. He was unwilling to make a permanent commitment to the environment or any other value. He was also unwilling, however, simply to embrace change, for he feared nihilism. In his attempt to escape this dilemma, he took refuge in metaphysics:

To be free, it seems, is to choose what we shall value; to feel coherence over time and community with others while experiencing freedom is to choose in terms of shared commitments to principles outside ourselves; but to make commitments without destroying freedom is to live by principles that are capable of evolution as we change in the process of pursuing them. If transcendence degenerates ultimately into choice without commitment to principle and if immanence ultimately disintegrates into principles incapable of change, what must be sought is a synthesis of immanence with transcendence—of sacred observer with grand manipulator. Such a synthesis requires the sanctification neither of the present nor of progress but of evolving processes of interaction and change—processes of action and choice that are valued for themselves, for the conceptions of being that they embody, at the same time that they are valued as means to the progressive evolution of the conceptions, experiences, and ends that characterize the human community in nature at any given point in its history.10

Despite the obscurity of the prose, a conception of the ideal human life does emerge from this passage. And the conception of human life is a troubling one. For Tribe, the ideal human cares about some things—perhaps nature, a career, friends, or family—but these objects of care are merely contingent, and hence less important than the “sanctification . . . of evolving processes of interaction and change.” For Tribe, apparently, a whole-hearted commitment to love, or truth, or any other value, precludes real freedom. To be free, a person must be willing to jettison these values for the sacred value of process.

Given the opacity of Tribe’s prose, how he got from sanctifying process to saving the whales is a little unclear. Fear of a sort of cultural solipsism, however, seemed to motivate his interest in the environment. Tribe viewed everything except nature as the product of human decision,

10. Tribe, Plastic Trees, supra note 3, at 1338 (emphasis in original). He continues today to maintain that “[i]n truth, to be free is to choose what we shall value.” Tribe, Constitutional Calculus, supra note 4, at 617. As Bernard Williams has pointed out, however:

If ethical conviction is not to be identified with knowledge or certainty, what is it? There are those who reject the account of it as certainty, but replace this account with another that is no more sound and rather less plausible. Believing that besides the intellect there can only be the will, they think that the source of ethical conviction must be a decision, to adopt certain moral principles or to live in one way rather than another. This cannot be right because ethical conviction, like any other form of being convinced, must have some aspect of passivity to it, must in some sense come to you. Some decisions can seem like that, but this is because they are particularly compelling decisions. You could not have an ethical conviction, and be conscious that it was the product of a decision, unless that decision itself appeared inescapable. But then this is what would need to be explained.

even human psychology. Having total control over the physical world
and individual psychology, individuals can modify both at whim. Nature
is society's only chance to confront something outside of itself, something
that is not just its own creation. Society needs nature lest it become a
catatonic victim of its own technological omnipotence.

Perhaps some day society will attain the degree of technological
power envisioned by Tribe. In the meantime, however, the realms of
public policy and science fiction are better kept separate. Although Tribe
may have found a reason for future generations to value nature, the more
immediate problem is how human beings now living should conduct
themselves. Neither Tribe nor Sagoff was successful in finding a meta-
physical answer to that question.

Tied to the transcendentalism of Sagoff and Tribe was a rejection of
the profane world of ordinary life: people working at jobs, having fami-
lies, buying houses, enjoying recreation. Both writers relegated these
various activities to the status of mere preferences, unlike the higher val-
ues that people pursue through politics. This low status for ordinary
things is hardly surprising, for the sacred loses its meaning unless con-
trasted with the profane.

Although Tribe devoted some attention to the point, Sagoff made
the most sustained argument for the existence of a deep split between the
(sacred) realm of politics and the (profane) realm of economics. Sagoff
pointed to several examples of superficial inconsistencies between an indi-
vidual acting as a consumer and the same individual acting as a citizen.
He noted, for example, that a person who is willing to buy a vacation
home might also vote for an ordinance banning them. Although this
example is probably true, it also is consistent with standard economic
theory. An individual decision to purchase a vacation home does little
by itself to invade wilderness, but does provide the individual with a rec-
reational resource. So the economically rational decision is to purchase
the home even if the buyer values wilderness. On the other hand, the
cumulative effect of the recreation homes on wilderness may outweigh
the benefits to the buyers, so it is rational to vote against allowing them.
This example is simply another version of the "Tragedy of the Com-
mons," a classic example of the kind of market failure that leads econo-
mists to recommend governmental intervention.

Sagoff's next argument was that politics, unlike economics, is a
search for correct answers, not just answers society would be willing to
pay to implement. Frank Michelman provides a particularly clear
statement of this position:

It follows from the Rousseauean view that majoritarian politics

11. The theme that law involves grand concerns far beyond ordinary economic interests is the
core of Tribe's recent work, Tribe, Constitutional Calculus, supra note 4.
13. Id. at 1410-16.
cannot be only the individualistically self-serving activity "realistically" portrayed by economics-minded political scientists and theorists. Politics must also be a joint and mutual search for good or right answers to the question of directions for our evolving selves. In other words, to hold to Rousseau’s view we must be able to imagine ourselves voting for the Endangered Species Act—that is, committing ourselves to the principle of sympathy, or solidarity, or immanence, or whatever principle we think is expressed by the Act—although we would not as individuals be willing (or bet that our constituents would be willing) to pay any measurable sums of money for the enactment of that principle; and although no one has offered us anything in exchange for our vote, explicitly or implicitly; and although we know well that we may some day find our own private projects inconvenienced or thwarted by the statute and the principle to which we are now committing ourselves.14

This is a somewhat extraordinary view of politics. The paradigmatic citizen apparently is one who hates nature and refuses to donate money to an environmental group or to help save an endangered species; in the individual’s capacity as a citizen, however, he or she is a staunch supporter of the environment.

Despite its lack of realism, this picture may have idealistic appeal and does contain a grain of truth. Political life does give individuals an opportunity to display those civic virtues that may find less scope in private life. Nevertheless, Michelman’s view of politics divides too sharply between the “individualistically self-serving activity” of the private sphere, and the “joint and mutual search for good or right answers” of public life. Michelman’s explanation of the distinction itself betrays an unusual combination of idealism about politics with cynicism about private life. A comparison of an average family with an average political convention might suggest that private life better exemplified the “joint and mutual search for good or right answers,” while politics was the “individualistically self-serving activity.” In reality, of course, all aspects of human life provide opportunities both for self-serving activity and mutual moral growth.

Similarly, the distinction between what Sagoff called “citizen values” and “consumer values” is extremely blurred. Although Sagoff viewed the goal “that an innocent person not be convicted” as a paradigm citizen value, for instance, he considered security from crime a consumer value that “we pursue as self-seeking individuals.”15 But individuals may fear the conviction of the innocent because they are themselves afraid of being unfairly prosecuted—a self-centered view; and


they may care about security from crime only because they feel solidarity with the victims—a community-centered view. If indeed public and private values are distinguishable, the distinction does not relate to their subject matter.

Much of politics revolves around economic interests, and these interests are not too profane to be worthy of government protection. Nothing is wrong with people voting on the basis of their own fear of unemployment, war, or inflation, or their desire to escape discrimination and poverty. Even consumer decisions can involve important personal values. For instance, books, records, movies, and other art forms can embody serious values. The choice of a house or an apartment may involve values relating to aesthetics and education, norms about how families should live, the balance between career and home, and other serious concerns. Only by focusing on relatively insignificant consumer decisions were Sagoff and Tribe able to trivialize economic interests.

In retrospect, one of the strangest aspects of the Sagoff and Tribe articles was their implicit acceptance of the assumptions made by the advocates of plastic trees. The assumptions underlying the plastic tree proposal were that people’s love of nature is easily manipulable and that manufactured products could easily duplicate the utilitarian benefits of nature. Although neither assumption has any apparent validity, Tribe and Sagoff not only accepted these assumptions for the sake of argument, but actually embraced them. For example, the malleability of human preferences was fundamental to Tribe’s jurisprudence.

To the extent it implied that environmentalism normally does not advance human welfare, the plastic trees debate was fundamentally misguided. The Council on Environmental Quality’s best estimate of costs and benefits indicated that in 1978, for example, the total costs of environmental compliance were twenty-seven billion dollars, while the total identifiable benefits were thirty-three billion dollars. Strong arguments have been made that even the Endangered Species Act, often cited as an example of the nonutilitarianism of environmental law, may further human welfare. Saving endangered species preserves valuable genetic resources, which may later be useful to animal and plant breeders and to genetic engineers. Endangered species may also provide a basis for pure biological research that may later prove useful to humans. Of course, utilitarianism and environmentalism may sometimes conflict, but they more often coincide.

16. Professor Sax observes that various forms of wilderness recreation like fishing and mountain climbing implicate important values. See J. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS 27-46 (1980).


Perhaps Tribe and Sagoff were willing to accept the implausible assumptions of the plastic tree advocates because they wanted to establish some metaphysical justification for valuing the environment, going beyond the desires and needs of actual human beings. Indeed, Sagoff and Tribe were explicit in rejecting human preferences as a basis for public policy. Tribe viewed these desires as meaningless and contingent, while Sagoff believed that pleasure is contemptible and beauty is demeaning. No wonder they found so little worth in economic life, or that they sought abstract, esoteric bases for environmentalism; they based their entire approach on disdain for the ordinary realities of life.

The plastic tree problem appears in an entirely different perspective once we accept, rather than try to transcend, ordinary life. After all, the reason most people value the environment is emotional, not because of some elaborate syllogism. People want to preserve nature because their own experiences, either first hand or through books or television, have shown them something about which they care. Some might say this desire is merely an unjustified emotion, having no significance until logic establishes its validity. But reasons to value something are unnecessary: to value something is simply to care about it. Just as we accept as valid that which we see, we can accept as valid that which we care about. In life, as opposed to philosophy, neither perception nor caring needs any logical foundation.

This approach makes the plastic tree issue seem misguided. The question “Why not replace trees with plastic?” is really the same as the question “Why not replace a spouse, a child, or lover with a robot?” A person who seriously doubts the correct answers needs a therapist rather than a philosopher, because he does not truly care about other people. To care about something is to value it for itself, and not merely as a

19. Part II of Tribe's Plastic Trees article is titled “Beyond Human Wants: A New Rationale for Environmental Policy.” The following passage illustrates Tribe's position:

For once one accepts the Baconian creed that scientific understanding can only mean technological power over nature, one can no longer hope for inspiration from beyond; once reason is no longer perceived as guided by the divine, it can no longer serve as master and must be relegated to the place of slave. It is through this thoroughgoing secularization of transcendence that Hume's dictum—that "reason is, and ought only to be the slave of the passions"—is fully realized; for when God is absent, the "grand manipulator" must move the world not according to values divinely revealed but in accord with ends ultimately private to each person and empty of intrinsic significance because not derived through any dialogue beyond the self.

The only entities that can "count" in a calculus of end-maximimizaton, whether utilitarian or contractarian, are those entities that possess their own systems of ends or at least the capacity to experience pleasure and pain, and nothing outside the private ends and pleasures of such beings can come to the rescue of a philosophy devoted solely to their pursuit.

Tribe, Plastic Trees, supra note 3, at 1334, 1336. The article ends with the following final attack on "instrumental rationality": "What mind can resist despair at such a prospect? Who can fail to admit that the homocentric logic of self-interest leads finally not to human satisfaction but to the loss of humanity?" Id. at 1348.

20. See Sagoff, On Preserving, supra note 3, at 209 ("Beauty . . . is valued because it is a source of pleasure. But pleasure is merely contemptible."); id. at 211 ("Now we are in a position to see the utter brutality in advancing beauty as a reason for preserving an environment. Beauty trivializes nature, as it does women and art . . . .").
source of pleasurable stimuli. The decision to reject plastic trees requires only an understanding of ordinary human life, not an excursion into metaphysics.

**B. Environmental Values and Social Choice**

Ultimately, the plastic-tree philosophers have failed to explain why environmental values should receive any greater weight than is justified by their connection with human welfare. We might highlight this failure, and the underlying ambiguities in the whole issue, by asking a simple question: Does society save the redwoods today solely because some people will be happier if redwoods survive?

We can approach this important question in two ways. We could consider whether redwoods have any inherent value that they would retain even if no human being had ever existed. This line of inquiry would lead to interesting (but probably, in the end, fruitless) philosophical speculation. Alternatively, we could approach the question by considering how an individual might go about ranking the relative desirability of competing social policies. Must an individual rank these policies based solely on the preferences of members of society, or can he also consider some of his own value judgments about the competing options?21

Most rational people would take this latter approach. Economists typically reduce social policy to two values—equity (the distribution of wealth) and efficiency (the optimal satisfaction of individual preferences)22—and

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21. To make the question more concrete, consider the following situation. An individual loves the wilderness and must rank two states of the world. All of the individuals involved are indifferent between the two states; the only difference is that in one state the redwoods survive and in the other state they are extinct. As a nature lover, the individual cares about wilderness. On the other hand, the individual is not one of the individuals who will be involved in either state of the world. (Maybe the individual will die long before either state occurs, and will never even know the final outcome.) Should the individual rank the two states of the worlds as equal, or should that individual favor the one in which the redwoods survive? By failing to rank them as equal, the individual takes the position that the desirability of various states of the world is not just a function of the preferences of the individuals involved. Given the fact that the deciding individual cares about nature, the prima facie answer would rank the “redwoods survive” outcome as preferable.

22. See A. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF (1975). For the argument that only human needs are relevant to an economic analysis of environmental problems, by one of the early advocates of this approach, see W. BAXTER, PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION 5-9 (1974). He summarizes his position as follows:

My criteria are oriented to people, not penguins. Damage to penguins, or sugar pines, or geological marvels is, without more, simply irrelevant. One must go further, by my criteria, and say: Penguins are important because people enjoy seeing them walk about rocks; . . . . In short, my observations about environmental problems will be people-oriented, as are my criteria. I have no interest in preserving penguins for their own sake.

Id. at 5. An economist can, consistent with logic, have a personal interest in preserving nature, unlike Baxter. Economic theory does require, however, that the economist treat this interest as a personal taste to be factored into the efficiency and equity evaluation, rather than as an independent standard for evaluating outcomes. See Sagoff, Economic Theory, supra note 3, at 1417.

The argument in note 21 establishes that environmental values can at least break ties. Arguing from continuity, however, a strong environmental preference should at least overcome a slight disparity in efficiency. The arguments made in this section may apply more generally to any utilitarian moral theory, not just the somewhat unusual form of utilitarianism embodied in economic theory. See B. WILLIAMS, supra note 10, at 108-19.
assume that all decisions should be based solely on these factors. But a rational person who has additional personal values, ones unrelated to equity and efficiency, would insist on using those values when making social decisions.

This line of argument about the independent worth of environmental values does not depend on any special attributes of environmental values. It applies equally to any preference an individual has between two competing policies or courses of action that do not differ in their direct effect on him. A person might well have a preference between two matters only to the extent they affect her in some identifiable way—she may only care about garlic, for example, when it is in her food; whether other people eat garlic is something about which she cares little and has no preference. She might, on the other hand, strongly favor the preservation of redwoods, even though she is personally unaffected by their presence or absence. The question is not, as Tribe and Sagoff imply, whether she has some philosophical foundation for liking garlic or redwoods; the question is simply whether she has preferences about garlic or redwoods even when her own “consumption” of them is not at issue.

At this point, an economist might protest that a rational person would not value the environment except as a means of furthering human welfare. Thus, to place any value on the environment as an end rather than a means is simply irrational. Yet, people do value things, even things that do not affect them. And in many instances, values are hard to justify in any rational way. The act of valuing something is somewhat like caring about a person, and demanding that a person justify his love for another seems decidedly strange. Values are simply not things that normally require rational justifications.

Perhaps for this reason, it is often difficult to respond to a demand that a value be justified. Perhaps the justification for a value rests upon its relationship with a more fundamental value. But that value in turn could encounter the same demand for justification. Perhaps the justification for a value rests upon its connection with irrefutable moral philosophy. (A nice trick, if you can beat Plato, Kant, and company at their own game.) To someone challenging environmentalism, an answer so intellectually ambitious might come as quite a surprise. “Justifying” values, in short, seems as irrelevant to practical decisionmaking as are philosophical attempts to justify other things taken for granted in everyday life.23

Those people who question environmentalism do not really seek to debate the eternal flux of human affairs or the Kantian basis of morality. Instead, they raise the more pointed (and down-to-earth) question whether environmentalists are really crackpots. In return, the environmentalist’s real claim is that the economist (in his professional capacity)

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23. For example, how does a person know that a table is real?
has an impoverished set of values. After all, an economist, 'tis said, is "someone who knows the price of everything but the value of nothing."

Rather than being dismissed as ad hominem attacks, these claims can be taken seriously as contending views about human life. The environmentalist is claiming that a human being who values nature is somehow better than one who does not; the economist disputes this claim. Absent some ultimate philosophical framework, a framework that society lacks today and may never obtain, the choice between these conflicting claims is a difficult one, and only a tentative answer can be given.

In everyday life, decisions like these are most likely to arise when a person is actually in a position to influence someone else's values, and this is most often the case with raising children. So in this situation, intuition is likely to be strongest and most reliable, though of course even here great doubt may exist. Suppose, then, that in raising a child a parent wished to ensure that the child placed no value on nature except as a means toward human welfare. Because this might be hard to accomplish within a family setting, assume that the decisionmaker is the Commissioner of Children and can control the entire society's practices. How can the Commissioner go about eliminating nature as a value?

To eradicate environmentalism, the Commissioner must perform radical surgery. Because nature has enjoyed a central role in our cultural tradition, the Commissioner would need to cordon off much of our literary heritage—not just the higher culture of Faulkner, Wordsworth, and James Fenimore Cooper, but also the popular culture of Davey Crockett and Daniel Boone. The study of modern biology also poses a risk of contagion by environmentalism, not because biologists are necessarily environmentalists, but because biology reveals the intricacy and fascination of the natural world. As Darwin himself said of his theory of evolution:

There is grandeur in this view of life, with its several powers, having been originally breathed into a few forms or into one; and that, whilst this planet has gone cycling on according to the fixed law of gravity, from so simple a beginning endless forms most beautiful and most wonderful have been, and are being, evolved.

The visual arts also pose a risk, because those people who cultivate an aesthetic awareness may find beauty in nature. If they do, they may well favor preserving even natural areas that they do not expect to see, just as someone who plans never to visit Greece could favor preserving the Parthenon.

Thus, if the Commissioner were serious about eradicating any attachment to environmental values, he would be forced to constrict substantially the interests and experiences of young people. Of course, this line of argument cannot prove the validity of environmental values, but it

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24 See, e.g., Sagoff, On Preserving, supra note 3, at 226-44, for an excellent discussion of the role of wilderness in American literature.
25 C. DARWIN, ON THE ORIGIN OF SPECIES 490 (1859).
is at least highly suggestive. A complete insensitivity to environmental values represents a narrowness of spirit that perhaps logic cannot prove incorrect, but that society can reject as an unattractive vision of humanity.

Even from the economist's own perspective, educating the populace to have at least mildly environmentalist values may make sense. Consider the economist's goal of obtaining an optimal level of pollution. If they are economically rational, individuals will not limit themselves to this amount of pollution without external sanctions, which are often unwieldy and involve administrative costs. To take a simple example, the enforcement of a ban on littering in the park can be expensive. It can be cost free—the economically efficient result—if people refrain from littering because of "irrational" environmental beliefs, and not because paid policemen are watching. The economist thus might prefer to inculcate environmentalist values to foster self-policing.

There is yet another difficulty with the economist's narrow view of human motivation. As a practical matter, society can adopt an economist's policy recommendations only if the public does not wholly share her normative system. Economically rational individuals would not vote to impose an optimal pollution level; indeed, they would not vote at all. Voting is time-consuming and a nuisance, hence it is costly. Voting produces no measurable benefit, because any one person's vote is virtually certain to have no effect on the outcome of an election. To obtain economically rational results, then, the public should not be too economically rational. Or to phrase this in a different way, some attachment to environmental values can lead people to behave in ways that are more conducive to social welfare than a more "rational" system of beliefs. The economist, therefore, is left in the somewhat embarrassing position of advocating a normative system that can only be successful if not too many people believe in it.

The point of this argument has been to establish the "weak" version of environmentalism. The "strong" version would require that environmental values receive high priority in the normative system. The weak version requires only that environmental values receive some independent normative weight. Weak environmentalism implies a more attractive vision of human life than the alternative of completely rejecting environmental values. That alternative also suffers from an ironic inner inconsistency, because purely human welfare may advance more effectively in a society in which it is not the exclusive value. To the limited extent to which it makes sense to say a value scheme is "rational," weak environmentalism is a rational value scheme.

III. ECONOMIC EFFICIENCY AS A VOTING MECHANISM

A. Efficiency as a Procedural Value

So far, this essay has considered economic efficiency as an distinct substantive value. It has concluded that efficiency need not be the exclusive goal of social policy; environmental values can also properly be part of a person's judgments about the relative desirability of various courses of action or states of the world. But society consists of many individuals with differing value schemes. Economic efficiency might also be of aid in determining how individuals with varying values can reach a just social decision.

An essay by Charles Meyers, formerly Dean of the Stanford Law School, aptly described this possible use of economic efficiency. Meyers's article begins with a sensitive, insightful analysis of several schools of environmentalist thought. He then turns to his preferred approach, which is neo-classical economics. In the following passage, he explains the fundamental appeal of economic efficiency:

The difference then between the environmental philosopher and the economist is that the environmentalist discerns in all mankind certain universal traits or common characteristics that lead man to construct a hierarchy of values and that require society to adopt a set of policies to implement those values. While the economist also perceives a basic characteristic in all mankind, self-interest, his perception leads him to adopt not a value hierarchy against which to test public policy, but to devise a process for accommodating a great variety of competing human desires. The environmentalist would base public policy on a set of values he holds to be transcendent and absolute, inherent in the nature of man and therefore ineluctable. The economist rejects absolutes: what is good is what the individual prefers; a good society is one that maximizes freedom of choice. The economists' values speak to the question of how society should be organized in order to satisfy individual desires, whatever they may be.27

The "economist's" view that Meyers describes is held by people other than economists. Ronald Dworkin, a well-known liberal philosopher, has argued that government must be strictly neutral among the preferences of its citizens. Government may not impose its own view of the good. In combining preferences, it must consider a citizen's preferences about her own life, but not any altruistic preferences she might...
have regarding other citizens. Given his fundamental agreement with Meyers, Dworkin predictably also endorses the market as the only fair way to make decisions about allocating resources. The only difference between Dworkin and Meyers is that Dworkin is more concerned about the distribution of wealth. He agrees with Meyers, however, that "under the special condition that people differ only in preferences for goods and activities, the market is more egalitarian than any alternative of comparable generality."28 Speaking specifically about environmental issues, Dworkin says:

If he believes that government intervention is necessary to achieve a fair distribution of resources, on the ground that the market does not fairly reflect the preferences of those who want a park against those who want what the coal will produce, then he has a standard, egalitarian reason for supporting intervention. But suppose he does not believe that, but rather believes that those who want the park have a superior conception of what a truly worthwhile life is. A nonliberal may support conservation on that theory; but a liberal may not.29

Thus, Dworkin shares Meyers's basic assumption that social decisions should simply reflect a combination of individual preferences, with the market as the ideal method of doing so.

One response to this argument is that of Sagoff and Tribe, who contend that these disputes can be resolved on the basis of objective values. This response, however, is unpersuasive even if we accept the existence of objective values. Objective values are perceived differently by different people. As the example of religion shows, even when some individuals agree with certitude about the fundamental attributes of the universe, they are not justified in imposing their views on others, or in using the machinery of the state to further their views. Unless certain objective values enjoy unanimous support, society still must decide how to reach societal decisions fairly. Economic efficiency remains a possible decisional tool.

Meyers assumes that the market and its associated norm of economic efficiency satisfy the need for some means of rationally combining individual preferences. The true result, however, is that there simply is no completely rational way of organizing society to combine individual desires into a social decision. As reasonable as Meyers's goal of a value-


29. Id. at 141, reprinted at 202. A deep ambiguity exists in Dworkin's essay. Some passages, including the paragraph following the quotation in the text, suggest that the government must give equal respect to all views of the good. See id. at 141-42, reprinted at 202. Elsewhere, however, he suggests that citizens, not philosophies, deserve equality. See id. at 130-32, reprinted at 196-98. An interpretation of egalitarianism as a requirement of equal treatment for ideas rather than people seems odd.
free method of social choice may seem, Kenneth Arrow proved more than thirty years ago that it is unattainable even in theory.

B. Arrow’s Theorem and Environmental Law

Arrow originally undertook in his research to define precisely the notion of social welfare. What he accomplished was vastly different: he proved that there is and can be no satisfactory way of combining individual preferences.

Arrow’s thesis is best introduced with an example. Consider a society composed of individuals, each of whom has a well-defined set of preferences about the state of the world. These preferences may relate to the individual’s consumption of goods and services, to the consumptive choices of others, to the preservation of the redwoods, or to anything else. Place no restrictions on these preferences because the idea is to derive a preference listing for society as a whole that combines any arbitrary set of individual preferences. Now consider what traits society’s preference listing should have. The following traits seem modest enough:

1. **Formal Rationality.** The social preference should be well-defined and formally rational. For example, if society prefers A over B, and B over C, then society should also prefer A over C. Similarly, if society prefers A over B, it should not also prefer B over A.

2. **Some Form of The Pareto Principle.** The social preference should be consistent with unanimity. For example, if one person prefers A over B, and everyone else is indifferent between the two alternatives, then society should prefer A over B. And if everyone unanimously prefers A over B, so should society.

3. **Independence of Irrelevant Alternatives.** Suppose that given a choice between A and B, society prefers A. Now suppose that the choice is expanded to include A, B, and C. A should still be listed ahead of B, no matter how C compares with the other two choices. In other words, the order of preference between any two options should depend only on individual preferences about those options, and not on preferences about irrelevant options that are outside the agenda.

4. **Non-dictatorship.** The social preference should not simply mirror that of a single individual who imposes his or her will on society.

Obviously, these four traits do not say much about the content of the social preference rule. Yet, as Arrow showed, they really say more than enough. Arrow proved that no social preference rule satisfying all four traits can exist.30

30. There is a large, highly technical literature on Arrow’s Theorem. The most accessible sources are K. Arrow, 1 Collected Papers of Kenneth J. Arrow: Social Choice and Justice (1983); K. Arrow, Social Choice and Individual Values (2d ed. 1963); A. Sen, Choice, Welfare and Measurement (1982); A. Sen, Collective Choice and Social Wel-
Although his proof is too complex to review here, the crux of the problem is obvious by looking at one common method of social choice, that of majority voting. Majority voting actually satisfies almost all of these requirements, with one crucial exception: rationality. Because of shifting coalitions, majority votes for A over B and for B over C are possible despite a majority vote in favor of C over A.31 This result is the paradox of majority voting. Essentially, Arrow proved that no voting scheme can avoid this paradox.

Because of this link with voting, even economists tend to think of Arrow’s theorem purely as a critique of the political process. As Arrow noted, however, the proof applies equally to the market. No more than the political process can the market rationally combine individual preferences.32

The criterion of economic efficiency fares rather poorly as a method of social choice. The explanation, unfortunately, is somewhat technical. As Scitovsky demonstrated, efficiency does not even produce a well-defined ranking of alternatives.33 Although A may be more efficient than B, the test applied in reverse may conclude that B is more efficient than A. The reason is that the efficiency criterion is tied to the distribution of wealth. The wealth distributions in A and B may differ enough to cause inconsistent applications of the criteria.34 As a corollary to the Scitovsky Paradox, efficiency fails the rationality requirement. Social states A, B, and C are possible such that A is more efficient than B, B is more efficient than C, but C is more efficient than A.35 Aside from this violation of the rationality requirement, economic efficiency also violates the assumption of independence of irrelevant alternatives. Under the technical (Kaldor-Hicks) definition of economic efficiency, society’s preference for A over B depends on the social preference between state B and a hypothetical redistribution of wealth from state A.

Since Arrow first wrote, considerable work has been done on the question of how to avoid his impossibility theorem. Several methods can

34. For an extended discussion, see K. Arrow, Social Choice and Individual Values, supra note 30, at 42-45.
35. The trick is to use the two states defined by Scitovsky, and then to find a third state “in between.”
avoid the result by weakening Arrow's assumptions. None of the major proposed solutions, however, helps the cause of economic efficiency.

One promising approach is to limit the degree of variability of preferences. Like the paradox of majority voting, Arrow's proof requires that any arbitrary collection of individual preferences be possible. If society does not contain a wholly arbitrary collection of preferences, but instead contains somewhat coherent patterns of preferences, then society can avoid Arrow's result. Individual preferences need not agree, so long as they reflect similar views about which outcomes are extremes and which are compromises, or about which outcomes are near each other. For example, everyone need not agree about whether they prefer Chief Justice Rehnquist over Justice Brennan, but they must agree that Chief Justice Rehnquist is not a compromise choice between Justice Brennan at one extreme and Justice Marshall at the other. With these somewhat reasonable assumptions about the existence of a societal world-view, Arrow's result does not hold. Given such a pattern of preferences, a consistent method of social choice is possible. Under these circumstances, however, the proper social choice method is not economic efficiency but ordinary majority voting.36

What this means is that economic efficiency does not have a particularly good claim as a rational method of combining individual value judgments to reach a social decision. More simply, economic efficiency is not a rational voting method. Of course, as Arrow's Theorem shows, there is no entirely rational voting method, which means that economic efficiency might be as good as any other voting method. Nevertheless, the argument is significant; majority voting scores as well as efficiency as a rational social decision method. Because the rationality standard provides no basis for selecting between these two methods, other attributes of majority rule versus economic efficiency deserve scrutiny.

C. Economic Efficiency, Majority Rule, and Social Justice

If efficiency scores poorly on the rationality scale, it scores even worse as an equitable voting scheme. Efficiency basically counts votes in accordance with the voter's willingness to pay for a given result. This willingness turns in large part on the voter's wealth, so the wealthy receive a larger share in social decisions than the poor. A few writers such as Judge Posner are willing to argue on behalf of this result,37 but most

36. See K. Arrow, Collected Papers, supra note 30, at 78-87; A. Sen, supra note 27, at 166-72. Other ways to avoid Arrow's result involve making various assumptions about the ability to compare the strengths of individual preferences. One set of assumptions results in classical utilitarianism; another set of mathematical assumptions results in something very much like Rawls's theory of justice. But economic efficiency, which means weighting preferences on the basis of willingness to pay given an initial distribution of wealth, is simply not an available solution. See K. Arrow, Collected Papers, supra note 30, at 147-61.

37. As Judge Posner explains, under his view "people who lack sufficient earning power to support even a minimum decent standard of living are entitled to no say in the allocation of re-
people would reject the premise that the rich are morally worthier than the poor. On the other hand, majority voting counts everyone's votes equally.

There is another, somewhat more attractive but also somewhat novel, interpretation of the efficiency criterion. Efficiency may measure not people's willingness to pay for a social program, but their willingness to sacrifice for it. The underlying moral premise is that a person should not ask others to make greater sacrifices for his values than he himself would be willing to make. This premise would exclude Sagoff and Michelman's ideal voter, who is willing to take tax money from others to support causes on which she is unwilling to spend her own money.

Although this interpretation is a more attractive statement of economic efficiency, it nevertheless seems inadequate. There are several potentially valid reasons why $X$ might find it proper to demand that society spend more than $X$ himself would sacrifice. First, $X$ may simply be poorer than most members of society; he is only asking members to spend what he would spend if he had their wealth. Second, $X$ may have other unusual claims on his income, a sick child perhaps, and is only asking others to sacrifice the amount he would sacrifice in their circumstances. Third, $X$ may be asking others to sacrifice only a small amount each, even though the total is greater than $X$'s income. This request may be just, although $X$ would be wrong to request such a large expenditure from any single individual.

Economic efficiency suffers from a basic flaw as a social-decision criterion. The distribution of wealth reflects a social judgment—or at least social acquiescence—in allocating power to command resources for private consumption. One important reason for this allocation of private power is that it offers powerful incentives to engage in productive economic activity. On the other hand, such an unequal allocation of political power would be intolerable. If efficiency were the sole criterion for making governmental decisions, a different allocation of wealth might be necessary, probably with detrimental effects on economic incentives. Different distributions of voting rights for private consumption and public decisions allow a better combination of economic productivity and social equity than society could obtain with identical distributions of economic and political power.

Essentially, the argument for majority voting is that it is more egalitarian than the market. Ronald Dworkin has argued, however, that given a perfectly equal distribution of wealth, the market would be more egalitarian than majority voting. Under majority voting, a majority can override the preferences of the minority and devote social resources to fulfilling the majority view of the good, while the market would devote sources unless they are part of the utility function of someone who has wealth.” R. POSNER, supra note 2, at 76.
equal resources to satisfying every individual's preferences.\footnote{Dworkin, supra note 28, at 130, reprinted at 196.} Putting aside some technical objections,\footnote{Implementing this proposal may be difficult for public goods.} a liberal conception of justice may not require that society devote equal resources to satisfying every individual's preferences.

Presumably, any liberal view of justice will contain safeguards limiting the power of the majority to impose its moral view on minorities. For example, members of the majority religion clearly may not outlaw minority religious practices. The question, however, is whether safeguarding minorities requires an absolute prohibition against the majority using government to further its own values. The price of such an absolute prohibition is to create a systematic inequality between views of the good, something Dworkin himself deplores.\footnote{Dworkin, supra note 28, at 141-42, reprinted at 202 (suggesting that government may intervene if other institutions threaten to make some vision of the good "unavailable to future generations, and indeed to the future of those who now seem unaware of its appeal"). This passage is one of several passages where Dworkin favors equal respect for moralities rather than equality of treatment for human beings. See supra note 29. Apparently, Dworkin's view of equality forbids the government from implementing any living human being's view of the good, but allows (or requires) government to foster views of the good that are currently in disfavor, or even those views that no one alive favors at all. More recently, Dworkin has suggested that the government might properly subsidize the arts. His rationale is that the arts provide a vocabulary which "multiplies distinct possibilities or opportunities of value," so Americans should "count ourselves trustees for protecting the richness of our culture . . . ." R. DWORKIN, Can a Liberal State Support Art?, in A MATTER OF PRINCIPLE, supra note 28, at 229. The basic idea is to multiply the number of available versions of the good. (On the same theory, should society subsidize religious cults to preserve the "richness of our culture"? How about scientific creationists, astrologers, and Flat Worlders?) For an excellent critique of Dworkin, see Shiffrin, Liberalism, Radicalism, and Legal Scholarship, 30 U.C.L.A. L. Rev. 1103, 1147-74 (1983).} Dworkin's principle favors individualistic views of morality over what he calls moralistic views, which are disadvantaged. For example, those people who believe that animals exist only to benefit human beings find no barrier to implementing their views, while Dworkin's principle precludes those people who oppose torturing animals from enacting laws forbidding cruelty to animals, leaving them without an effective way to implement their moral views. Although purporting to treat all moral views with equal respect, the Dworkinian liberal actually disfavors implementing a wide range of moral views. A more tempered set of safeguards could offer minorities protection against majority abuse without wholly disabling the majority from seeking its view of the good.

Ultimately, the issue involves a choice between two competing visions of society. In one vision, every individual can control an equal share of the GNP. These individuals are free to spend their shares any way they choose. Such a society has essentially no political life. Philosophers like Dworkin, or failing that, the Supreme Court, may definitively resolve all questions of justice while questions of the good are out of the government's domain. The alternate vision involves a society that fosters individuality by giving everyone basic liberties and a fair share of social
wealth, but that also allows society as a whole to implement some vision of the good. To distinguish this vision from Dworkin’s view of liberalism, which essentially has no room for majority rule, call this alternative vision “social democracy.”

This alternate vision has three advantages. First, it allows a broader range of views of the good to compete for implementation. Animal lovers may attain their goals as well as those people with other moral views. In this sense, the democratic vision is more liberal than Dworkin. Second, without romanticizing its virtues, political life itself does have some value. Although political life is not inherently worthier than private life, it does give scope for some human abilities and virtues and some community values that fit less readily into private life. Dworkin’s version of liberalism seeks to abolish politics, and hence to abolish these values. Third, because in reality the distribution of wealth is unequal, Dworkin’s approach seems unhelpful in making actual social decisions. The just allocation of resources is the allocation that would exist if wealth had been evenly distributed. It is unclear, however, why social decisions should maximize preferences that nobody actually has, but that people would have possessed under a different distribution of wealth. At least, a decision-making process that ignores people’s actual preferences hardly deserves the label “liberal.”

In theory majority rule is at least as good a candidate as economic efficiency as a method of social choice. Nevertheless, although democracy may be a valid form of government, the assumption that legislative actions always match the views of the majority of voters would be naive. Like the market, democracy has its imperfections.

The task of determining the public’s true preferences is not easy. Nevertheless, environmental legislation may indeed match the preferences of the electorate. The pattern of environmental legislation is strong. Very few environmental statutes expressly call for cost-benefit analyses. Far more often, the statutes set environmental goals and then require full implementation limited only by the constraints of economic and technological feasibility. Provisions of this type exist in the Clean Air Act, the Clean Water Act, the Endangered Species Act, and the federal statutes dealing with hazardous waste. The media have heavily publicized all this legislation. It is unlikely that Congress would pursue this approach so consistently over a fifteen-year period if it conflicted with public opinion.

More direct evidence of public opinion is available. Opinion polls consistently confirm the strong regard of the public for environmental values and their willingness to make economic sacrifices in pursuit of

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41. Indeed, Dworkin would apparently not allow any social institution to pursue any moral value apart from Dworkinian equality. See Dworkin, supra note 28, at 136, reprinted at 198 (equality is “the only justification on which these other institutions may themselves rely”).

42. See Sagoff, supra note 2, at 1396-98 for citations.
those values. Thus, no direct evidence exists of any divergence between the public and Congress on these issues; the contrary is true. The political events of the last few years also prove how strongly the public favors environmentalism. One of the most popular presidents in history took office with deregulation of the environment as an important priority. He was completely unsuccessful in obtaining legislative change, and Congress has actually strengthened some environmental laws. In the face of all this evidence, a radical divergence between current federal legislation and majority preferences seems unlikely.

IV. CONCLUSION

Unlike earlier work on environmental values, this essay has not attempted to provide those values with a metaphysical basis. Those attempts failed to provide a firm foundation for environmentalism, just as philosophers in general have failed in their attempts to provide an uncontroversial, logical basis for moral values. On the other hand, attempts simply to take values as irrational givens, leaving it to a neutral decisionmaker to maximize the arbitrary preferences of individuals, lead to the dead end of Arrow's Theorem.

This essay has explored another approach to the problem of human values. Rather than looking for logical foundations for values, this essay assumes that their foundation is at least partly experiential and emotional. Perhaps even the demand that a value be justified is not meaningful. Like any other act of caring, devotion to the environment may be its own justification. Nevertheless, disputes over the legitimacy of environmental values can also be recast as conflicting visions of human flourishing. Because environmental values are so closely linked with many other parts of American culture, Americans could excise them only by abandoning much that they consider valuable in human life.

If society cannot reject environmental values as irrational, those people who hold environmental values can properly select among competing options based in part on their relative effects on nature; they need not show how these effects on nature indirectly affect human welfare.

43. For further details, see R. FINDLEY & D. FARBER, ENVIRONMENTAL LAW: CASES AND MATERIALS 702-03 (2d ed. 1985).
45. The reader should not view the discussion of values in the text as making a philosophical claim that morality is inherently nonrational or arbitrary. In rational discourse, one can usefully raise various questions about someone's values: Are they consistent with each other? Do they fit the person's actions? Does the person have the experiences that would be necessary to support attachment to a value? Does he know relevant facts necessary to apply a value? Indeed, precisely the same questions can address emotional attachments. The request that someone justify being in love is silly. Nevertheless, sometimes an observer can say that someone who claims to be in love is being irrational—for instance, a would-be presidential assassin who claims to be motivated by love for a movie star whom he has never met acts irrationally. "Rational" need not mean "justifiable by deduction from true premises."
Thus, environmentalism is a legitimate scheme of individual values.46

Environmentalism also claims that decisions about the environment should be made through the democratic political process, and not by the use of some market-based standard of economic efficiency. Although no purely rational method of making social decisions exists, the democratic political process has at least as strong a claim to rationality as does an economic efficiency process. Furthermore, majority rule has a much stronger equitable appeal than economic efficiency as a procedure for making governmental decisions.

Economic analysis invites us to consider our own values as simply data, to factor with other people’s tastes in determining the best social decision. Ironically, those commentators who have argued against the dogma of economic efficiency have shared its attitude toward personal values. They, too, have asked us to distance ourselves from our strongest values and desires. In the name of philosophical analysis, they have asked us to go beyond ourselves on a metaphysical quest for a foundation to moral life. Yet these commentators try to channel us by counseling us to elevate certain values while rejecting other, equally strong values as material and profane. And like the economists, these critics have sought to escape from the common realities of concrete life into an abstract theoretical world.47

Philosophers may yet discover one day the ultimate foundations of moral and political theory. But their success, if it ever arrives, seems unlikely to come before the last whale is dead and the last redwood is converted to siding. In the meantime, life must go on and decisions must be made. So long as ultimate answers are unavailable, we must act on

46. One of the staple criticisms of liberalism made by critical legal scholars is that liberalism takes values as arbitrary. For example, Thomas Heller observes toward the end of his thoughtful essay on the limitations of legal economics in assessing environmental issues:

To forestall the reemergence of political domination in the name of normative truth, [liberalism] subsequently made a complete conversion to a skeptical or positivist epistemology. This view posited a logical distinction between facts and values founded on the belief that it was possible to conceive of one without the other. Specific facts or values could be arranged in endless combination by different moral actors. The proposition that moral commitments are contingent upon individual decisions has usually entailed theories that they are philosophically arbitrary. All moral judgments in the end were believed to depend upon the set of values which each autonomous individual, for inexplicable reasons, brought to the choice situation. Philosophical critique and cognitive knowledge, however, were restricted to formalized and empirically testable propositions or technical reasoning about means or procedures. Liberal positivism does not allow for objective or ontological speculation which can provide conclusive knowledge about the truth value of any consistent set of normative propositions. The ethical premises of individuals are mysterious but merit equal public consideration.

Heller, The Importance of Normative Decisionmaking: The Limitations of Legal Economics as a Basis for a Liberal Jurisprudence—As Illustrated by the Regulation of Vacation Home Development, 1976 Wis. L. REV. 385, 475 (footnotes omitted). Note that this passage assumes a dichotomy between the “arbitrary” and the objectively knowable. This dichotomy is false, however, because rational discourse need not take the form of justification or proof. See supra note 45. The word “arbitrary” also suggests that values could just as well be otherwise. As with an individual’s strongest emotions, however, core values are not arbitrary accretions to a “self” that exists in isolation, but instead are an essential part of an individual and her view of the world.

47. See Farber, The Case Against Brilliance, 70 MINN. L. REV. 917 (1986).
the basis of our own most deeply held values and most reasonable judgments.

As Holmes said:

That the universe has in it more than we understand, that the private soldiers have not been told the plan of campaign, or even that there is one, rather than some vaster unthinkable to which every predicate is an impertinence, has no bearing upon our conduct. We still shall fight—all of us because we want to live, some, at least, because we want to realize our spontaneity and prove our powers, for the joy of it, and we may leave to the unknown the supposed final valuation of that which in any event has value to us. It is enough for us that the universe has produced us and has within it, as less than it, all that we believe and love.48

48. O. HOLMES, COLLECTED LEGAL PAPERS 315-16 (1920).