POLITICAL RIVALRIES AMONG THE STATES, INCOMMENSURABILITY, AND THE DORMANT COMMERCE CLAUSE

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INTRODUCTION

Why might the Supreme Court in *National Pork Producers Council v. Ross*[1] be compared to Penelope,[2] Antigone,[3] Abraham,[4] and COVID-19 policymakers?[5] They all weighed choices in which the options could not be placed on any common scale to measure their choice-worthiness. These problems of incommensurability, sometimes likened to comparing apples and oranges, permeate the law. Sometimes, courts recognize some version of this general problem of incommensurability;[6] on other occasions, courts fail to recognize or discuss the problem.[7]

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1. 143 S. Ct. 1142 (2023).

2. *See infra* note 95.

3. *See infra* notes 99–100 and accompanying text.

4. *See infra* note 113.

5. *See infra* notes 114–115 and accompanying text.

6. *See, e.g.*, Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment); Norwegian Cruise Line Holdings Ltd. v. State Surgeon Gen., Fla. Dep't of Health, 50 F.4th 1126, 1153 (11th Cir. 2022); United States v. Cabello, 33 F.4th 281, 293 (5th Cir. 2022); Cutrer v. Tarrant Cnty. Loc. Workforce Dev. Bd., 943 F.3d 265, 270 (5th Cir. 2019).

7. *See* R. George Wright, Counterman v. Colorado: *True Threats, Speech Harms, and Missed Opportunities,* 99 IND. L.J. 27 (2023) (analyzing the recent "true threat" speech case of *Counterman v. Colorado*, 143 S. Ct. 2106, 2114–17 (2023)).

Unsurprisingly, the Court in *Ross* made little progress toward understanding the fundamental problems of incommensurability posed by weighing states' prerogatives against each other.[8] Such problems are, after all, partly philosophical. However, the Court's framing of the dormant commerce clause and (lack of) incommensurability analysis in *Ross* has swung open the door to unattractive future consequences, particularly inflammation in state-level political, moral, and cultural polarization and rivalry. Herein, I seek to explain why, following *Ross*, courts need a more robust paradigm for resolving incommensurability problems. Drawing on prominent examples of incommensurability problems—from the everyday, judicial, and literary realms—I then seek to describe what such a paradigm might look like.

I. THE DORMANT COMMERCE CLAUSE DILEMMA

A. Ross *Limited the Dormant Commerce Clause to Economic Protectionism*

Ross involved a dormant commerce clause challenge by out-of-state pork producers to a California sales rule.[9] The California law in question prohibited the in-state sale, by both out-of-state pork producers and the few in-state pork producers, "of certain pork products derived from breeding pigs confined in stalls so small they cannot lie down, stand up, or turn around."[10] Writing for the Court, Justice Gorsuch first determined that the California rule did not violate the dormant commerce clause principle that "no State may use its laws to discriminate purposefully against out-of-state economic interests."[11] Justice Gorsuch noted that states have long adopted at least some interest in state animal welfare,[12] including concerns for the mobility of pigs.[13] The evidence in *Ross* indicated

8. *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1160 (2023).

9. *See id.* at 1149. The rule resulted from a popular ballot initiative and thus departed from any simple model of legislated, in-state industry protectionism. *Id.* at 1150.

10. *Id.* at 1149.

11. *Id.* at 1150.

12. *Id.*

13. *Id.*

that twenty-eight percent of the industry had "converted to some form of group housing for pregnant pigs" to address some of these mobility concerns.[14] And there was at least some modest amount of California in-state pork producers who would bear compliance costs alongside their out-of-state peers.[15]

Writing for the Court, Justice Gorsuch recognized that the California rule could, at least in theory, be set aside by a legitimate act of congressional preemption under the Supremacy Clause.[16] But in the absence of any claim of congressional preemption, Justice Gorsuch framed the dormant commerce clause as concerned with questions of in-state "economic protectionism—that is, regulatory measures to benefit in-state economic interests by burdening out-of-state competitors." [17]

Thus the Court invoked the dormant commerce clause not to referee the States' conflicting cultural, moral, and political differences in general, but rather to control state-level economic rivalry and fair economic competition within a federal system.[18] The Court left open the possibility that cultural, moral, and political differences could be weighed more holistically when it suggested that the Constitution presumes that "the peoples of the several [S]tates must sink or swim together."[19] But, the Court applied this principle only

14. *See id.* at 1151.

15. *See id.* A related example is the relatively modest burden on in-state truckers to comply with the weight and size requirements at issue in *S.C. State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938). *But cf.* Maine v. Taylor, 477 U.S. 131, 151–152 (1986) (upholding a prohibition on importing baitfish into Maine even in the absence of any meaningful burden on in-state baitfish transactions).

16. *Ross,* 143 S. Ct. at 1152.

17. *Id.* at 1153 (quoting Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008) (internal quotation marks omitted). For an interestingly distinct approach and result, see the Indiana vaping regulation case of *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 827 (7th Cir. 2017).

18. *See Ross,* 143 S. Ct. at 1152–53.

19. *Id.* at 1153 (quoting Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 433 (2005) (alteration in original) (internal quotation marks omitted)).

in the narrow context of selfish state economic protectionism.[20] Indeed, nowhere in the opinion did the Court seem to wrestle with the broader cultural, political, or moral rivalries and conflicts among the states that have interstate commerce forms and effects.

To be fair to the *Ross* Court, the usual dormant commerce clause cases have thus far dealt with economic disputes. The typical situation giving rise to such a case occurs when out-of-state producers sell a qualitatively better (or lower-priced) version of some product offered for sale by in-state producers. One classic case arose from economic competition between North Carolina apple growers and Washington apple growers, given the latter's generally higher reputation for apple production.[21]

But our political culture has evolved since those cases were decided. Moral, cultural, or political rivalry, as distinct from economic product or service competition, do not fit the typical commerce clause paradigm. Yet, over the coming years, competition among states implicating the dormant commerce clause will likely increasingly involve opposed moral, political, and cultural ideas, as the very notion of a culture war suggests.[22] Moral, cultural, and political competition and conflict among the states reflect the corresponding moral, cultural, and political judgments held largely by official state political actors and their key constituencies. The particular ideas at stake may, of course, have been initially developed by private actors, within or outside of the state in question.

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20. *See id.* The Court considered States' prioritizing their in-state producer interests by disadvantaging out-of-state producers. *See id.* Thus the States are to conform to the model of an "interconnected national marketplace." *Id.* at 1156.

21. *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333 (1977).

22. *See generally* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991). *See also* ANDREW HARTMAN, A WAR FOR THE SOUL OF AMERICA: A HISTORY OF THE CULTURE WARS (2d ed. 2019); STEVEN D. SMITH, PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC (2018); JONATHAN ZIMMERMAN, WHOSE AMERICA?: CULTURE WARS IN THE PUBLIC SCHOOLS (2d ed. 2022). *But cf.* Andrew Anthony, *Everything you wanted to know about the culture wars—but were afraid to ask,* GUARDIAN (June 13, 2021), https://www.theguardian.com/world/2021/jun/13/everything-you-wanted-to-know-about-the-culture-wars-but-were-afraid-to-ask [perma.cc/TWU9-ZTFB] (describing a poll in which most British respondents were unclear, at best, on the meaning of the 'culture war' term).

A classic economic dormant commerce clause restriction involves economic retaliation by states to answer marketing restrictions imposed by a commerce-restricting state.[23] To illustrate, imagine that State A taxes the in-state sale of widgets made in State B, and State B then imposes a retaliatory tax on the in-state sale of widgets made in State A. In contrast, moral, political, or cultural competition affecting interstate commerce is more likely to involve state-imposed commerce requirements that are unknown in, or radically opposed by, the governments of some other states.[24] One state may thus seek to change the culture of another state, with the second state then perhaps retaliating by seeking to impose its own contrary values, in one respect or another, on the first state. While our state economic markets are indeed strongly interconnected,[25] so, in substantially different ways, are the more metaphorical state-level 'markets' in culture, morality, and public policy.[26]

In some respects, it may be quite sensible for purely economic dormant commerce clause jurisprudence to allow "'different communities' to live 'with different local standards.'"[27] But we then need some explanation why a similar logic should not, within limits, apply to interstate moral, political, and cultural rules affecting

23. *See Ross,* 143 S. Ct. at 1154–55.

24. *See infra* Parts III–IV. A state might also retaliate by seeking to impose, on an offending state, its own moral policy in a different subject area of greater interest to one or both states.

25. *See Ross,* 143 S. Ct. at 1156.

26. For discussions of the misleading metaphor of a 'marketplace' of ideas, see Morgan N. Weiland, *First Amendment Metaphors: The Death of the "Marketplace of Ideas" and the Rise of the Post-Truth "Free Flow of Information",* 33 YALE J.L. & HUMANS. 366 (2022); David S. Ardia, *Beyond the Marketplace of Ideas: Bridging Theory and Doctrine to Promote Self-Governance,* 16 HARV. L. & POL'Y REV. 275 (2022); Rodney A. Smolla, *The Meaning of the "Marketplace of Ideas" in First Amendment Law,* 24 COMM. L. & POL'Y 437 (2019); Mary-Rose Papandrea, *The Missing Marketplace of Ideas Theory,* 94 NOTRE DAME L. REV. 1725 (2019); Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas,* 90 N.Y.U. L. REV. 1160 (2015); Gregory Brazeal, *How Much Does a Belief Cost?: Revisiting the Marketplace of Ideas,* 21 S. CAL. INTERDISC. L. J. 1 (2011). Classically, *see* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (discussing "free trade in ideas").

27. *Ross,* 143 S. Ct. at 1156 (quoting Sable Commc'ns v. FCC, 492 U.S. 115, 126 (1989)).

interstate commerce.[28] No satisfactory explanation exists. On the contrary, the logic that different communities can have different local standards should apply with equal force to a state's imposing commercial burdens largely, if not entirely, on other states on essentially moral, political, or cultural grounds, rather than for in-state producers' economic advantage.[29]

B. The Dormant Commerce Clause Should Also be Understood as Protecting Against Cultural Protectionism

Properly understood, the underlying dispute in *Ross* was about moral, rather than economic, protectionism. The cognizable economic interests that are affected within the state of California are those of the few local pig producers who are burdened along with out-of-staters.[30] Californians in general do not seek any evident economic or commercial benefit from the police power regulation in question. Instead, the California regulation focuses on the well-being of the animals, in-state or out-of-state. And in this, the regulation is not unique. Analogous concerns about horses,[31] foie gras products,[32] and sharks and shark fins[33] have also been litigated as dormant commerce clause challenges. Crucially, the perceived

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28. The principle of valuing interstate comity, or state-level mutual respect and accommodation, is not confined to economic market transactions. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 (1996); Austin v. New Hampshire, 420 U.S. 656, 660–61 (1975).

29. *See infra* Parts III–IV.

30. *See Ross*, 143 S. Ct. at 1150–52.

31. See especially the illuminating dormant commerce clause case of *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 555 (7th Cir. 2007) (noting that, in contrast to cases such as *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1997), "[n]o local merchant or producer benefits from the ban on slaughter."). *See also* Empacadora de Carnes de Fresnillo v. Curry, 476 F.3d 326, 335 (5th Cir. 2007) ("[N]or does there appear to be any company that merely transports horsemeat through Texas.").

32. *See* Ass'n des Éleveurs de Canards et d'Oies du Québec v. Bonta, 33 F.4th 1107, 1122 (9th Cir. 2022) ("Policymakers' statements about force feeding and foie gras point to the legislature's general intent to prevent complicity in animal cruelty . . . .").

33. *See* Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136, 1147 (9th Cir. 2015) ("The Shark Fin Law does not interfere with activity that is inherently national or that requires a uniform system of regulation. The purpose of the Shark Fin Law is to conserve state resources, prevent animal cruelty, and protect wildlife and public health.").

scope of legitimate state police power interests in health, welfare, safety, and morality, and the aggressiveness of their pursuit, have recently been expanding in many respects. Increasingly intensified political polarization promotes state-level moral, political, and cultural rivalries that have clear dormant commerce clause implications.[34]

Moral, political, and cultural polarization at the state level may at this point be self-reinforcing. That is, "[o]nce a state reaches a certain degree of political uniformity, it tends to repel those who disagree and attract fellow adherents, reinforcing its identity."[35] A state's main initial focus of policy reform may be on the low-hanging fruit within its own borders. But at some point, the costs of further moral, political, and cultural reform within the state begin to exceed the in-state costs of seeking to control the comparable behavior of private firms beyond the state's borders. There may seem to be a greater payoff, in terms of in-state moral, political, and cultural values, in incentivizing changed behavior by out-of-staters than in further pursuing merely in-state reforms.[36]

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34. This problem is recognized by Justice Kavanaugh. *Ross,* 143 S. Ct. at 1172, 1174–76 (Kavanaugh, J., concurring in part and dissenting in part). For a sense of our exceptional political polarization at the state level, see, for example, Ronald Brownstein, *America Is Growing Apart, Possibly For Good,* ATL. (June 24, 2022), https://www.theatlantic.com/politics/archive/2022/06/red-and-blue-state-divide-is-growing-michael-podhorzer-newsletter/661377/ [https://perma.cc/ZUZ3-WCYN] (quoting Michael Podhorzer's argument that "[w]e are more like a federated republic of two nations: Blue Nation and Red Nation. This is not a metaphor; it is a geographic and political reality."). Of course, there are blue enclaves in red states, and vice versa. *See, e.g.*, Monica Potts, *Red States Are Fighting Their Blue Cities,* FIVETHIRTYEIGHT (Mar. 13, 2023, 6:00 AM), https://fivethirtyeight.com/features/how-red-states-are-fighting-their-blue-cities [https://perma.cc/5XEV-CPMX]; John Simpkins, *Blue Havens in Red States,* TEX. OBSERVER (Nov. 16, 2022, 11:34 AM), https://www.texasobserver.org/blue-havens-in-red-states/ [https://perma.cc/6AQH-T3RD].

35. Mark Pulliam, *California and Texas: The Blue and the Red?*, LAW & LIBERTY (Sept. 10, 2021), https://lawliberty.org/book-review/California-and-Texas-the-blue-and-the-red [https://perma.cc/6H9U-3RDC]. *See* BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART 41–47 (2009).

36. Further in-state reforms, however, may have special value as demonstrations of what is possible, above and beyond what may seem feasible elsewhere. And there may be value in being the first state to adopt any particular political or cultural reform.

As political and cultural polarization intensifies,[37] the perceived payoffs for lawmakers in seeking to export in-state values to other states, including through dormant commerce clause-type regulations, may increase. Further attempts at mere persuasive, non-coercive argumentation may seem pointless. Deference to and comity with politically antagonistic states may come to seem morally dubious. Distinctions between taking the cultural initiative and merely playing cultural self-defense may blur. Sheer hostility-based cultural antagonism between states may emerge.[38] Thus, attempts to transplant in-state values through general, non-discriminatory commerce regulations are poised to become increasingly frequent.[39] These increasingly common attempts to transplant state values will create prisoner's dilemma problems for states, which state lawmakers are likely willfully to ignore.[40]

At the moment, the states with the most power to transplant in-state values include California, Texas, and Florida, given their market size, wealth, and relative political homogeneity in our polarized political environment.[41] Florida's dominant official views on man-

37. *See generally* R. George Wright, *A Free Speech-Based Response to Media Polarization*, 18 FIU L. REV. 193, 193–95, 198–200 (2023).

38. *See id.*

39. For one general scenario, see Brynn Tannehill, *Why We're Barreling Toward a Legal War Between the States*, NEW REPUBLIC (March 15, 2023), https://newrepublic.com/article/171138/abortion-legal-war-states [https://perma.cc/DHT7-XU6M].

40. *See generally* Steven Kuhn, *Prisoner's Dilemma*, STAN. ENCYCLOPEDIA PHIL. (Apr. 2, 2019), https://plato.stanford.edu/entries/prisoner-dilemma [https://perma.cc/7RK7-W9GV].

41. *See, e.g.*, Mark Duggan & Sheila Olmstead, *A tale of two states: Contrasting economic policy in California and Texas*, STAN. INST. FOR ECON. POL'Y RSCH. (Sept. 2021), https://siepr.stanford.edu/publications/policy-brief/tale-two-states-contrasting-economic-policy-california-and-texas [https://perma.cc/224B-LC9T]; Noah Bierman, *California vs. Florida: A tale of two Americas*, L.A. TIMES (Jan. 18, 2023, 3:00 AM), https://www.latimes.com/politics/story/2023-01-18/florida-anti-california-newsom-desantis [https://perma.cc/25KF-LK3T]; Noah Bierman, *The divided states of America: Florida, California and the future of political polarization*, L.A. TIMES (Nov. 17, 2022, 7:14 AM), https://www.latimes.com/politics/story/2022-11-17/life-red-states-blue-states-different [https://perma.cc/MKG6-BT38]; Amy Walter, *DeSantis, Newsom and the Red/Blue State*

datory vaccination policies have already been subjected, unsuccessfully, to dormant commerce clause challenges.[42] But animal welfare[43] and vaccination policy[44] are hardly the only obvious subjects for state-level moral rivalries implicating the dormant commerce clause. The substantive subject-matter fields for such cases are doubtless evolving.[45] These contested policy areas have state-level strongholds and can be advanced through non-discriminatory state police power and health, welfare, and safety regulations that are intended to impact both local producers and out-of-state sellers with different priorities.

Moreover, reforms in these policy areas need not conflict with any individual or group-based fundamental constitutional right or other federal right that is currently recognized by the Supreme Court.[46] Thus state police power regulations along any of the above lines may, by intention or not, substantially but non-discriminatorily affect out-of-state enterprises and practices without substantially burdening any recognized constitutional right, or indeed any federal statute.

The hands-off approach taken in *Ross*[47] may seem unproblematic if the dormant commerce clause is thought to be aimed merely at

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Divide, COOK POL. REP. (Jan. 11, 2023), https://www.cookpolitical.com/analysis/national/national-politics/desantis-newsom-and-redblue-state-divide [https://perma.cc/A7UJ-FKHX].

42. *See* Norwegian Cruise Line Holdings, Ltd. v. State Surgeon Gen., Fla. Dep't of Health, 50 F.4th 1126, 1133–35, 1141–54 (11th Cir. 2022).

43. *See supra* notes 31–33 and accompanying text.

44. *See infra* notes 114–115 and accompanying text.

45. For the moment, though, the obvious possibilities include conflicting state values and state policies over oil industry profit caps; gun control; employee health insurance coverage; abortion and abortifacient drug access; health-impairing food and drink sales; fuel efficiency standards; electric vehicle requirements; unionization; pay equity; transgender support; immigration and sanctuary policy; homelessness policy; minimum wages; corporate policy transparency; nuclear power; recycling; responsible investing; and the scope and requirements of workplace diversity, equity, and inclusion. This list will of course evolve over time.

46. This may, however, be true to a lesser degree in the area of gun control than in the area of abortion access. *Compare* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022), *with* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

47. *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023).

local economic and commercial favoritism, protectionism, or rivalries, as distinct from *interstate* moral, political, and cultural rivalries.[48] *Ross* focuses its discussion on economic and commercial interest balancing.[49]

But *Ross* would, unfortunately, allow states to attempt to coerce unreceptive out-of-state entities to adopt otherwise unattractive political and cultural policies, as long as those coercive effects also apply to in-state entities, and do not violate any currently recognized fundamental constitutional or other federal right.[50] This is likely to prove over time to be the most serious deficiency of the *Ross* hands-off approach.

Given our exceptional state-versus-state polarization, cultural rivalry, and values-based animosity, courts should not flinch from such cases, and should adjust the scope of the considerations they take into account in the relevant cases. It is uncontroversial, certainly, that a state's sheer discrimination against out-of-state firms is disruptive of the federal union and constitutionally objectionable.[51] But it is no longer the case, if, after the Civil War, it ever was, that our conjoined fates under a federal system can be confined to the purely economic and commercial interests of the individual states.[52]

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48. *See, e.g.,* Foresight Coal Sales, LLC v. Chandler, 60 F.4th 288, 295 (6th Cir. 2023) (focusing on "economic Balkanization" and quoting South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089 (2018). *See also* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause,* 84 MICH. L. REV. 1091, 1092 (1986) (discussing the Supreme Court's focus on state economic protectionism). Of course, some out-of-state firms may actually welcome being required by a dominant state to adopt a policy they would otherwise be reluctant to embrace.

49. *See Ross,* 143 S. Ct. at 1142.

50. *See id.* Some state attempts to induce out-of-staters to adopt a particular social policy may eventually be held to violate some preemptive federal rule. These cases would involve federal preemption under the Supremacy Clause. *See* U.S. CONST. art. VI., cl. 2; Murphy v. NCAA, 128 S. Ct. 1461, 1479 (2018); Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 108 (1992).

51. *See, e.g., Ross,* 143 S. Ct. at 1153 (discussing constitutional disvalue of sheer economic protectionism).

52. *See id.*

Instead we must, to a substantial degree, "sink or swim together"[53] in a federal system, while appreciating the obvious values of cultural and political diversity, progress, and competition. Sinking or swimming together is increasingly not simply a matter of purely commercial rivalries. We can collectively sink politically and culturally no less than commercially. The courts have, realistically, an indispensable role in avoiding undue interstate friction and the worst, most collectively self-defeating outcomes.[54]

Let us then continue to take for granted a substantial judicial role in discouraging sheer economic and commercial discrimination by particular states.[55] But let us also recognize the judicial role in regulating the increasingly important phenomenon of a state's seeking to coercively impose its own polarizing political values largely on out-of-state firms.

The crucial problem is that intense state rivalries over moral, political, and cultural issues, when aggressively pursued in the realm of interstate commerce, have just as much, if not greater, capacity for harm to the overall national interest than do purely economic and commercial rivalries among the states. The problems of state-level economic and commercial selfish rivalries and competitions were recognized early on.[56] But the judiciary has yet to appreciate the sheer gravity and growing importance of multi-directional state moral, political, and cultural imperialism, at least after the Civil War.

Understandably, there has historically been only limited interest in the problem of states' seeking, through police power regulations,

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53. *Id.* (quoting Am. Trucking Ass'ns., Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 433 (2005)).

54. *See, e.g.*, WILLIAM POUNDSTONE, PRISONER'S DILEMMA: JOHN VON NEUMANN, GAME THEORY, AND THE PUZZLE OF THE BOMB (1992) for the unfortunate but realistic logic of arriving at perverse outcomes that are less desirable for all the actors than otherwise would have been attainable.

55. *See Ross*, 143 S. Ct. at 1153.

56. *See, e.g.*, THE FEDERALIST NO. 7, at 62–63 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (1787) (cited in B-21 Wines, Inc. v. Bauer, 36 F.4th 214, 230 (4th Cir. 2022) (Wilkinson, J., dissenting)).

to impose their own distinctive moral and political values on private entities operating primarily in other states.[57] Commonly, economic and commercial concerns, including rivalries and competitions, trumped cultural and political concerns that did not implicate constitutional rights. Thus, Alexis de Tocqueville argued as of 1835 that:

> [t]he passions that stir the Americans most deeply are commercial and not political ones, or rather they carry a trader's habits over into the business of politics. They like order, without which affairs do not prosper, and they set an especial value on regularity of mores, which are the foundation of a sound business.[58]

'Order' and 'regularity' of morals may not always correspond with whatever we take to be the best substantive moral principles. There is doubtless value in broadly and aggressively promoting, and not merely personally embodying, the highest moral and cultural values. But assuming that all states, including Texas, Florida, and California, can generally identify which substantive moral and cultural values should be aggressively promoted merely wishes away the entire problem of state-level moral and cultural conflict.

Closer to our own time, President Calvin Coolidge echoed de Tocqueville in arguing that "[a]fter all, the chief business of the American people is business. They are profoundly concerned with producing, buying, selling, investing and prospering in the world."[59] Perhaps this description was reasonably accurate a century ago. But it is plainly less than accurate—or at least incomplete—today, under the intensified political polarization on display in our various red-state-versus-blue state conflicts.[60]

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57. Movements for the abolition of slavery and for the emancipation of women of course ran up against not merely the practices of out-of-state private businesses, but also the federal and state constitutional and state statutory requirements.

58. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 285 (George Lawrence trans., Doubleday & Co. 1969) (1835).

59. Ellen Terrell, *When a quote is not (exactly) a quote: The Business of America is Business Edition,* LIBRARY OF CONGRESS BLOGS: INSIDE ADAMS (Jan. 17, 2019), https://blogs.loc.gov/inside_adams/2019/01/when-a-quote-is-not-exactly-a-quote [https://perma.cc/SBM3-JXFB] (quoting President Coolidge's address to the American Society of Newspaper Editors on Jan. 17, 1925).

60. *See supra* note 34.

One way of recognizing the problem is to appreciate that the underlying logic of the commerce clause extends well beyond purely commercial concerns. In a federal system, there are inevitably non-economic costs, as well as benefits, to "unceasing animosities"[61] among and between states. Actions by states that are "destructive of the general harmony"[62] impose costs whether they are motivated by selfish economic rivalries or cultural or moral disputes.

It has been said that the "dormant commerce clause prevents a state from 'project[ing] its legislation' into another state."[63] There is a broader constitutional interest in imposing "restraint on state action in the interests of interstate harmony."[64] Here again, though, this policy logic cannot be confined merely to selfish commercial and economic rivalries, in which states attempt to avoid the economic burdens they would impose on residents of other states. Trade, after all, is not all that deeply matters. Particular states—even those as morally, politically, and culturally divergent as California and Florida –- do not seek to impose requirements on out-of-state entities while themselves avoiding living by the same requirements. It is, for example, not as though California seeks humane living conditions for pigs in other states that may be sold in California, while ideally seeking to exempt the California in-state producers from the same burdens.[65]

In this crucial respect, then, *Ross* directly and inevitably facilitates harms to the most basic values underlying the dormant commerce clause cases, where the regulations do not discriminate against out-of-staters or impair currently recognized constitutional or other federal statutory rights. Such regulations are safe from judicial examination under *Ross* as long as they take the form of collectively

61. *B-21 Wines,* 36 F.4th at 230 (quoting James Madison).

62. *Id.* (quoting James Madison).

63. Online Merchs. Guild v. Cameron, 995 F.3d 540, 559 (6th Cir. 2021) (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935) (alteration in original)).

64. United Bldg. & Const. Trades Council v. City of Camden, 465 U.S. 208, 220 (1984) (referring in particular to the Article IV privileges and immunities clause).

65. *See Ross,* 143 S. Ct. at 1149. Consider also virtually any of the hot-button political issues of the day. Hypocrisy in state regulation is hardly the typical issue in such cases.

destructive culture wars and intense state-level polarization, as distinct from in-state commercial protectionism. The *Ross* Court thus facilitates and encourages further polarization, in numerous important policy contexts, most of which Congress will inevitably not address.[66]

II. THE SOLUTION: SOLVING INCOMMENSURABILITY PROBLEMS

A. The Court Can Still Weigh States' Incommensurable Interests Under the Dormant Commerce Clause

Justice Gorsuch's opinion in *Ross* turned from the question of pure discrimination against out-of-state products to one of interest balancing. In particular, Justice Gorsuch attempted to balance a state regulation's adverse effects on interstate markets against the value of a state's police power interests, as promoted by the regulation in question.[67] This familiar balancing test compares the constitutional weight of a regulation's burden on out-of-staters against the police power value obtained for the enacting state by the regulation of commerce in question.[68] Strikingly, Justice Gorsuch attempted to limit judicial interest balancing, as opposed to aggressive judicial responses to sheer discrimination against out-of-state interests.[69] But as noted by Justice Kavanaugh, "six Justices of this Court affirmatively retain the longstanding *Pike* balancing test for analyzing dormant Commerce Clause challenges to state economic regulations."[70] So dormant commerce clause interest balancing, as

66. For further discussion of our exceptionally intensive, and extensive, political polarization, see, for example, PETER T. COLEMAN, THE WAY OUT: HOW TO OVERCOME TOXIC POLARIZATION (2021); DANIEL F. STONE, UNDUE HATE: A BEHAVIORAL ECONOMIC ANALYSIS OF HOSTILE POLARIZATION IN US POLITICS AND BEYOND (2023); Vyacheslav Fos, Elisabeth Kempf & Margarita Tsoutsoura, *The Political Polarization of Corporate America* (Chi. Booth Research Paper No. 22–14, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4154770 [https://perma.cc/7JGD-ZMTV].

67. *See Ross*, 143 S. Ct. at 1157 (discussing the balancing that is arguably legitimized by, for example, Pike v. Bruce Church, Inc., 397 U.S. 174 (1970)).

68. *See id.*

69. *See id.* at 1157–59.

70. *See id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part).

opposed to rejecting only sheer discrimination in favor of in-state producers, may be alive and well in some contexts.

As *Ross* indicates, a majority of the current Court recognizes, in one way or another, problems of incommensurability in the dormant commerce clause cases.[71] Justice Gorsuch notably invokes Justice Scalia's reference to the supposed futility of attempting to determine "'whether a particular line is longer than a particular rock is heavy.'"[72] In such a case, according to Justice Gorsuch, "the competing goods before us are insusceptible to resolution by reference to any juridical principle."[73] Justice Gorsuch then crucially cited the well-known incommensurability argument of Justice Scalia in *Bendix Autolite*.[74] In his own voice, Justice Gorsuch formulated the basic incommensurability problem in these terms:

> How is a court supposed to compare or weigh economic costs (to some) against noneconomic benefits (to others)? No neutral legal rule guides the way. The competing goods before us are insusceptible to resolution by reference to any juridical principle.[75]

Justice Barrett declared that she "agree[d] with Justice G[orsuch] that the benefits and burdens of Proposition 12 are incommensurable."[76]

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71. *See id.* at 1159–60; *id.* at 1167 (Barrett, J., concurring in part and dissenting in part); *id.* at 1168 (Roberts, C.J., concurring in part and dissenting in part).

72. *Ross,* 143 S. Ct. at 1160 (quoting Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment)).

73. *Id.* at 1159–60

74. *See Bendix Autolite,* 486 U.S. at 897 (Scalia, J, concurring in the judgment). Lower courts have also cited Justice Scalia's language in *Bendix Autolite. See, e.g.,* Norwegian Cruise Line Holdings Ltd. v. State Surgeon Gen., Fla. Dep't of Health, 50 F.4th 1126, 1153 (11th Cir. 2022); United States v. Cabello, 33 F.4th 281, 293 (5th Cir. 2022); Cutrer v. Tarrant Cnty. Loc. Workforce Dev. Bd., 943 F.3d 265, 270 (5th Cir. 2019).

75. *Ross,* 143 S. Ct. at 1159–60. Whether the lack of any "juridical" principle is thought to include any "reasonable" or "nonarbitrary" principle as well is here left unspecified. Not all entirely reasonable principles need also be narrowly "juridical" principles. But it may well be proper for courts to resolve cases through principles that are entirely reasonable, but not narrowly or specially "juridical" in their nature.

76. *Id.* at 1167 (Barrett, J., concurring in part).

Justice Gorsuch's concerns about judicial interest balancing and cost-benefit analysis included institutional decision-making disadvantages of a court; preservation of democratic legitimacy; and, crucially, questions of value incommensurability.[77] It is difficult to separate these concerns: questions of relative institutional competence, and of democratic legitimacy, themselves contribute to questions of incommensurability.[78]

Justice Gorsuch elaborated his theoretical, practical, and institutional competency concerns by explicitly referring to the competing goods in *Ross* as involving a problem of "incommensurability."[79] In any attempt at resolving the conflicting values, Justice Gorsuch declared that "[y]our guess is as good as ours."[80] In fact, given concerns for institutional competency and for democratic legitimacy, "your guess is *better* than ours."[81] That is, such incommensurable value choices are to be made, on whatever grounds, and however apparently arbitrarily, by "the people and their elected representatives."[82] Congress, in particular, is "better equipped than this Court to identify and access all the pertinent economic and political interests at play across the country."[83]

If legislatures are merely better than the Supreme Court in addressing these sorts of dormant commerce clause tradeoffs, being more likely to arrive at a better answer, then actually, the problem is one not of genuine incommensurability but of decision-making difficulty. Two conflicting values are not incommensurable if comparing them is merely difficult for most people. Whether Venus is bigger than Mars is difficult for most people to figure out on their own. But that does not make the planetary sizes incommensurable.

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77. *See id.* at 1159–62.

78. *See id.*

79. *Id.* at 1160.

80. *Id.*

81. *Id.*

82. *Id.* Courts, perhaps more than legislatures, find *Pike i*nterest balancing to be "highly subjective," "very subtle," and difficult. Colon Health Ctrs. v. Hazel, 813 F.3d 145, 155–56 (4th Cir. 2016). *See also* Just Puppies, Inc. v. Frosh, 565 F. Supp. 3d 665, 716–17 (D. Md. 2021) (citing the work of Dean Erwin Chemerinsky).

83. *Ross,* 143 S. Ct. at 1161.

Not every problem that requires gathering large amounts of information is one of incommensurability.

Justice Gorsuch's reluctance to weigh competing interests under the dormant commerce clause provokes, as he recognizes, concern for power inequalities among the states.[84] Evidently, on Justice Gorsuch's view, the courts should not intervene in non-discriminatory dormant commerce cases to prevent interstate coercion. Justice Gorsuch, echoing Justice Kavanaugh, admits that "California's market is so lucrative that almost any in-state measure will influence how out-of-state profit-maximizing firms choose to operate."[85] But the problem of one or more states' seeking to non-discriminatorily leverage a policy change in other state remains unresolved, beyond the relatively rare instances of congressional preemption. Recognizing power inequalities among the states should put additional pressure on any desire to abstain from judicial balancing of competing interests.

Other Justices have also recognized the inevitability of confronting these problems. Chief Justice Roberts, acknowledging the view of Justice Gorsuch's three-member opinion for the Court that "balancing competing interests under *Pike* is simply an impossible judicial task," countered that he "certainly appreciate[d] the concern, . . . but sometimes there is no avoiding the need to weigh seemingly incommensurable values."[86] Justice Sotomayor reasoned that "courts generally are able to weigh disparate burdens and benefits against each other," and "that they . . . do so in other areas of the law with some frequency."[87]

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84. *See id.* at 1163–64.

85. *Id.* at 1164 (citing *id.* at 1173–74 (Kavanaugh, J., concurring in part and dissenting in part).

86. *Id.* at 1168 (Roberts, C.J., concurring in part and dissenting in part).

87. *Id.* at 1166 (Sotomayor, J., concurring in part). In response, Justice Barrett appears to adopt the incommensurability argument, if not fully, then at least in the weak sense that some legislative or popular moral policy judgment is required to overcome the kind of incommensurability in question. *See id.* at 1166–67 (Barrett, J., concurring in part).

At this point, one possible dividing line between cases involving incommensurable values is whether some fundamental constitutional right is involved. If no fundamental constitutional right is implicated, we might imagine that courts should generally defer to the relevant legislature. But if a fundamental constitutional right is indeed at stake, courts should, it might then seem, meaningfully review the legislative decision in question.[88]

Certainly, the initial focus of those Justices who are inclined toward judicially addressing incommensurabilities is on just such fundamental constitutional rights cases.[89] For example, Chief Justice Roberts points to the Court's willingness to somehow balance individual free speech rights against the conflicting public interest in the safety and environmental dimensions of public streets and sidewalks.[90] The point of enshrining a right as constitutionally fundamental is often to protect the underlying interests from unsympathetic legislative majorities, even if those legislative majorities weigh the incommensurable values differently than the courts.[91] Indeed, all of the tiers of scrutiny require weighing a government interest against a liberty infringement.[92]

It might seem, then, that in the absence of any fundamental constitutional rights claim, considerations of incommensurability ought to be left by the courts to the relevant state or federal legislatures. As discussed in this section, some Justices have worried that incommensurability poses substantial problems, at the very least, in the dormant commerce clause area. Such problems may seem to

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88. For a classic exposition, see John Hart Ely, *Toward a Representation-reinforcing Mode of Judicial Review,* 37 MD. L. REV. 451, 451, 453 (1978), later developed in JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

89. *See Ross,* 143 S. Ct. at 1168 (Roberts, C.J., concurring in part and dissenting in part).

90. *See id.* (citing the classic content-neutral speech regulation case of *Schneider v. State*, 308 U.S. 147 (1939)).

91. For a classic, partly critical discussion, see generally ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986). For an inspirational judicial account, see *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that school children could not be required to salute the flag).

92. Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary,* 14 GEO. J.L. & PUB. POL'Y 475 (2016).

have no appropriate judicial resolution or may be somehow bypassed or ignored out of sheer practical necessity.

But taking this deferential course is a mistake; there exists a more structured approach to weighing incommensurable choices, which emerges from both our legal and literary canon.

B. Courts Can Draw on Everyday Experience to Inform a Framework for Solving Incommensurability Problems

1. Judges, Policymakers, and Individuals Must Solve Incommensurability Problems Everyday

Law, life, and literature are replete with incommensurable choices. The stakes in any case of incommensurable choice may range from trivial to immense or incalculable. In fact, the differences among incommensurable choice situations are as important as their commonalities. We might well say that there are, typically, incommensurable differences among incommensurable choice situations. But not all such problems defy reasonable, non-arbitrary, better-and-worse resolution.

As an initial matter, consider the incommensurabilities[93] involved in many ordinary judgments of the relative quality of alternative products, services, and performances that we make daily.[94] Or consider the trade-offs people make when making personal or familial decisions.[95] These problems can pose incommensurable tradeoffs, and yet people deal with them every day.

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93. For possible degrees of incommensurability, see generally Alan Hájek & Wlodek Rabinowicz, *Degrees of commensurability and the repugnant conclusion,* 56 NOÛS 897, 897 (2021).

94. In the musical realm, consider attempting to measure, quantitatively, the ways in which Jascha Heifetz's violin playing exceeds that of Jack Benny.

95. A dramatic illustration of these sorts of incommensurable choices occurs in Homer's *Odyssey,* in which Penelope faces an ongoing, long-term choice between selecting, however incommensurably, from among her numerous marriage suitors, thereby preserving her dwindling estate from further depredations, or else remaining faithful to Odysseus, who has apparently perished at some point on his way home from the Trojan War. *See* HOMER, THE ODYSSEY (Emily Wilson trans., W.W. Norton & Co. 2018) (~700 B.C.).

Policymakers routinely confront, and deal with, these problems as well. For example, policymakers may need to draft optimal child support guidelines that account for special needs, ability to pay, and departures from guideline schedules.[96] Or they may need to resolve value conflicts between national security and respect for sincere or religious personal conscience, to create military draft laws like those at issue in *Gillette v. United States*.[97] There are countless additional incommensurability problems that policymakers might face.[98]

It is unsurprising, then, that fictional heads of state in our literary canon also confront these problems. Consider, by analogy, Antigone.[99] The edict of King Creon requires that Antigone not bury her deceased brother. Antigone faces immediate execution if she defies this decree. But complying with this decree would require Antigone to violate unwritten, and presumably eternal, law and to endure the painful prospect of eventual condemnation for her inaction by her predeceased family in the underworld.[100] Antigone thus faces an incommensurable choice between the death penalty in this life and eternal condemnation in the next.

Incommensurability problems are inherent in questions of legal interpretation. Consider Professor Ronald Dworkin's well-known

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96. *See, e.g.*, E.A. Gjelten, *Calculating Child Support Under California Guidelines,* DIVORCENET, https://www.divorcenet.com/states/california/california_child_support_guidelines [https://perma.cc/BY82-CT76].

97. 401 U.S. 437 (1971).

98. Additional illustrations include: (1) cases of the scope and limits of Good Samaritan laws protecting at least non-reckless rescue attempts by innocent amateurs, blurring intuitive notions of right and wrong—for an example, see ATAC Team, *Good Samaritan Law: Can You Get In Trouble for Performing CPR?,* AM. TRAINING ASS'N FOR CPR (Mar. 14, 2024) https://www.uscpronline.com/blog/can-you-get-in-trouble-for-performing-cpr [https://perma.cc/KS5B-B99N]; and (2) the case of a conscientious abolitionist deciding whether to follow an existing fugitive slave law. *See* Dred Scott v. Sandford, 60 U.S. 393 (1857).

99. SOPHOCLES, ANTIGONE 73 (Reginald Gibbons & Charles Segal trans., Oxford Univ. Press 2003) (~440 BCE).

100. *See id. See generally* Terrance McConnell, *Moral Dilemmas,* STAN. ENCYCLOPEDIA PHIL. (July 25, 2022), https://plato.stanford.edu/entries/moral-dilemmas [https://perma.cc/7S2X-BCJ7].

approach to legal interpretation.[101] Professor Dworkin's 'law as integrity' approach to legal interpretation involves what he thinks of as two separate considerations. On Professor Dworkin's interpretive theory, a judge must respect considerations of 'fit' as well as of 'justification.'[102]

Considerations of 'fit' require some sufficient degree of respect by the judge for how the relevant law has developed to its current state. The judge should respect that story, and not strike off in some entirely different but morally preferred legal direction.[103] On the other hand, law as integrity does not call for maximizing continuity and predictability in the law. The second consideration, that of justification, is at least equally crucial.

What Professor Dworkin calls 'justification' refers to the power of the legal interpretation in question to maintain, if not enhance, the political morality of the law and legal system.[104] The aim of the justification consideration is thus to cast the law, and the legal system, in the best moral light.[105] Professor Dworkin's approach thus requires some sufficient element of 'fit,' along with a more obviously moral element of 'justification.'

It is possible to try to avoid incommensurability problems in this context by claiming that that 'fit' is really just one aspect of 'justification,' and that political morality, as 'justification,' should incorporate the legitimacy that is provided by 'fit.' Even the most dramatic changes in constitutional rules must have some substantial, if previously underappreciated, grounding in the existing law in order to be justified overall. Judicial opinions overturning established constitutional precedents do not consist primarily of non-legal ethical arguments supported by citations to moral or legal philosophers.

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101. See, for example, among other dedicated symposia, the contributions in Symposium, *Justice For Hedgehogs: A Conference on Ronald Dworkin's Forthcoming Book*, 90 B.U. L. REV. 465 (2010).

102. *See* RONALD DWORKIN, LAW'S EMPIRE 139, 239, 250, 255–57 (1986).

103. *See id.*

104. *See id.*

105. *See id.*

But Professor Dworkin's 'fit' versus 'justification' binary can hardly escape problems of incommensurability entirely. Suppose, for example, that a judge believes that the best political morality requires some sort of universal guaranteed minimum income.[106] Perhaps this rule might also pass some minimum required threshold degree of 'fit' with the existing law.[107] But judgments as to any threshold minimum degree of fit will be vague, largely subjective, and perhaps not far from arbitrary.

If we find that a threshold level of fit has indeed been met, we then face problems of commensurability. For example, it is hardly clear that a universally guaranteed minimum income, whatever its justification on moral or political-legal grounds, is also the best fit with existing law, including the current federal and state constitutional case law.[108] This likely conclusion opens the door to problems of incommensurability. If there is some minimum threshold degree of fit with prior law, should we then not care at all about any additional degrees of fit? What if a different judicial rule would gain us much more legitimizing fit, with only a trivial loss in moral justification?

Consider, for example, the possibility that a rule that falls just short of requiring a universal guaranteed minimum income would, according to the court in question, be a much better fit with the established law. In reality, though, no supposedly universal minimum income program is absolutely universal. Limits and exclusions are simply taken for granted, or uncontroversial at the moment. On these assumptions, a minimal loss in moral or politi-

106. *See, e.g., What Is UBI?*, STAN. BASIC INCOME LAB, https://basicincome.stanford.edu/about/what-is-ubi [https://perma.cc/WKY5-NLH5]; Philippe van Parijs, *Why Surfers Should Be Fed: The Liberal Case for an Unconditional Basic Income,* 20 PHIL. & PUB AFFS. 101 (1991). *See also* ANNE ALSTOTT & BRUCE ACKERMAN, THE STAKEHOLDER SOCIETY (2000).

107. For a broader, related discussion, see David Lubin, *Incommensurable Values, Rational Choice, and Moral Absolutes,* 38 CLEV. ST. L. REV. 65, 76 (1990).

108. *See* Dandridge v. Williams, 397 U.S. 471 (1970) (AFDC standard-of-need welfare case involving an equal protection challenge). *See also* William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction,* 69 FORDHAM L. REV. 1821 (2001).

cal-legal justification would buy us a much better fit, enhancing legitimacy, authority, and rule of law values in that respect. The commensurability problems of any such tradeoffs between fit and justification thereby become apparent.[109]

2. People Can Solve Incommensurability Problems Even Without Having All the Relevant Information; Solving Dormant Commerce Clause Problems is no Different

To be sure, some incommensurability problems leave the chooser with insufficient information to decide between the competing outcomes. In such a case, the decision-maker's best course of action is to acquire additional relevant information, as suggested by Judges J. Skelly Wright and Harold Leventhal in *Ethyl Corp. v. EPA*.[110] But even if a chooser runs out of information, or a court "run[s] out" of the law,[111] we should hesitate to conclude, in even the most difficult cases, that the entire jurisdiction of ethics or law has really run out.[112] We, including judges, ought instead to strongly presume that some available choices are better than others.[113]

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109. For a very brief exposition and critique of the underlying ideas of 'fit' and 'justification,' see Professor Lawrence Solum's entry in his very useful series of posts entitled *Legal Theory Lexicon,* in this instance *Legal Theory Lexicon 032: Fit and Justification* (September 19, 2021), https://lsolum.typepad.com/legal_theory_lexicon/2004/04/legal_theory_le_1.html#:~:text=You%20can%20use%20%22fit%20and,Then%20move%20to%20justification [https://perma.cc/6QUZ-QUP9].

110. 541 F.2d 1 (D.C. Cir. 1976) (en banc). In the literary realm, consider, by analogy, Goethe's Faust, who could have benefitted from acquiring further choice-relevant information. *See* J.W. GOETHE, FAUST 183 (Walter Kaufmann trans., Anchor Books 1990) (1808).

111. Regina v. Dudley [1884] QB 273 (Eng.). *See also* Lon L. Fuller, *The Case of the Speluncean Explorers,* 62 HARV. L. REV. 616 (1949) (describing hypothetical trapped cavers seeking timely rescue).

112. *See, e.g.,* Ralph McInerney, *The Teleological Suspension of the Ethical,* 20 THOMIST 295 (1957).

113. In the literary realm, Søren Kierkegaard's discussion of Abraham's response to an apparent divine command to sacrifice his son Isaac falls into this exceptional category. All other issues aside, if there are really cases in which doing the ethically justified thing is not clearly the overall right thing to do, we still need guidance as to when we are in fact facing such a rare case. *See* SØREN KIERKEGAARD, FEAR AND TREMBLING

Consider the information requirements involved in the context of COVID-19 lockdown policy decision making.[114] Based on inevitably minimal knowledge, COVID-19 lockdown policy had to somehow account for numerous, plainly relevant considerations, including: the number, age, and health conditions of those infected, with various degrees of severity; transmissibility questions; policy effects on many dimensions of basic equality and inequality; prevention of future pandemics; economic effects, both short and long term, domestically and globally; interactive effects and the tailoring of policies domestically and globally; policy effects on other forms of mortality and morbidity, including mental health; and recoverable and unrecoverable basic educational losses.[115]

No relevant choice in the COVID-19 lockdown policy context was ever binary. Rather, each choice was subject to gradation, the quick development of alternatives, and questions about reversibility or irreversibility. The various important incommensurabilities involved mutated and proliferated, in practically endless fashion. But few of us would largely give up on the idea of there being better and worse COVID-19 policies.

Incommensurability problems, whether we like to admit it or not, confront individuals, policymakers, and judges daily. Even if perfect knowledge of a solution is inaccessible, we still must resolve these problems.

(Alastair Hannay trans., Penguin Books 1986) (1843). The literature discussing the binding of Isaac is immense. For a very brief contemporary reference, see Clare Carlisle, *Kierkegaard's World, part 3: The story of Abraham and Isaac,* GUARDIAN (Mar. 29, 2010), https://www.theguardian.com/commentisfree/belief/2010/mar/29/kierkegaard-philosophy-abraham-isaac [https://perma.cc/3MLL-RFKB]. As translated above, Kierkegaard himself makes numerous references throughout his work to the idea of commensuration and incommensuration.

114. See, for example, among a massive and accruing literature, Jonas Herby, Lars Jonung & Steve H. Hanke, *A Literature Review and Meta-Analysis of the Effects of Lockdowns on COVID-19 Mortality,* JOHNS HOPKINS STUD. APPLIED ECON., No. 200 (Jan. 2022).

115. For a study of merely some of the relevant considerations, see, for example, Oliver C. Robinson, *COVID-19 Lockdown Policies: An Interdisciplinary Review,* 17 INTEGRAL REV. J. 5, 36 (2021). More abstractly, but crucially, a policy chooser would have to consider issues of immediate and long-term public trust while projecting strong, decisive leadership in a period of great public fear, anxiety, and uncertainty.

What we should sensibly expect of legal reasoning in dormant commerce clause interest balancing cases is not self-evident. The nature of appropriate judicial reasoning in such cases requires thoughtful inquiry. Courts, like the rest of us, may occasionally set their own standards of reasoning too high. As Blaise Pascal enjoined: "Do not try to demonstrate anything which is so clearly self-evident that there is no simpler way to prove it."[116]

More recently, the philosopher Anthony Kenny took up the theoretical problem of satisfactorily proving that the country of Australia really exists.[117] Kenny recognizes that it is possible to construct a cumulative case for a proposition, in which no single item of evidence is especially weighty or convincing.[118] Other persons may indeed come to a belief in Australia through a weighing of the evidence. But for himself, Kenny concludes that "[t]here are no other beliefs which I have which could be used to support the claim that Australia exists, which are better known to me, more firmly established in my noetic structure, than is that proposition itself."[119]

We do not generally regard the existence, or not, of Australia as a close or 'hard' question, as we might a particular dormant commerce clause interest balancing case. But even extreme difficulty or complexity need not imply that no judicial resolution is any more reasonable than any other. Professor Ronald Dworkin appreciates that some persons believe that "if no procedure exists, even in principle, for demonstrating what rights the parties have in hard cases, it follows that they have none."[120]

But to this, Professor Dworkin has a valuable response. Dworkin argues that such a view "presupposes . . . that no proposition can be true unless it can, at least in principle, be demonstrated to be true."[121] Dworkin then argues that "[t]here is no reason to accept

116. Blaise Pascal, *The Art of Persuasion, in* PENSÉES AND OTHER WRITINGS 193, 198 (Anthony Levi ed., Honor Levi trans., Oxford Univ. Press 2008) (1670).

117. *See* ANTHONY KENNY, WHAT IS FAITH?: ESSAYS IN THE PHILOSOPHY OF RELIGION 15–16 (1992).

118. *See id.*

119. *Id.*

120. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1978).

121. *Id.*

that thesis as part of a general theory of truth, and good reason to reject its specific application to propositions about legal rights."[122] In dormant commerce clause cases, no single answer may be demonstrably correct. But relatively detached judicial interest balancing in such cases may lead to a result that is more reasonable than other results and that better acknowledges and addresses state political, moral, and cultural conflicts.

We need not insist that Pascal, Kenny, or Dworkin are all precisely correct and that their insights entirely cover dormant commerce clause balancing. The point is instead that the availability of reasonable and non-arbitrary grounds for adjudicating non-discriminatory dormant commerce clause cases should not be ruled out merely because one or more versions of value incommensurability are involved.

At the level of the underlying theory, the idea of incommensurability comes in various versions and strengths.[123] One mainstream understanding has it that "[t]wo valuable options are incommensurable if . . . neither is better than the other"[124] and they are not equal in value. Incommensurability implies the lack of any common measuring stick for the options in question.[125]

In the absence of commensurability, it is often thought that there will be not merely persistent disagreement over which option to choose,[126] but "a significant element of *arbitrariness* in any particular choice.[127] A significant element of discretion in a choice need not mean, however, that no ultimate choice is any more reasonable than

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122. *Id.*

123. *See, e.g.*, Hájek & Rabinowicz, *supra* note 93, at 897. For a broader overview, see generally Nien-hê Hsieh & Henrik Andersson, *Incommensurable Values,* STAN. ENCYCLOPEDIA PHIL. (July 14, 2021), https://plato.stanford.edu/entries/value-incommensurable/#:~:text=The%20possibility%20of%20incommensurable%20values,practical%20reason%20and%20rational%20choice [https://perma.cc/72LN-KFBF]; Francisco J. Urbina, *Incommensurability and Balancing*, 35 OX. J. LEGAL STUD. 575, 576 (2015).

124. JOSEPH RAZ, THE MORALITY OF FREEDOM 325 (1986).

125. *See, e.g.*, Joseph Boyle, *Free Choice, Incomparably Valuable Options, and Incommensurable Categories of Good,* 47 AM. J. JURIS. 123, 123 (2002).

126. *See* Martijn Boot, *Compromise Between Incommensurable Ethical Values*, COMPROMISES IN DEMOCRACY 121, 130 (S. Baume & S. Novak eds., 2020).

127. *Id.* (emphasis in the original).

the other alternative choices. But it has, admittedly, been prominently claimed to the contrary that "if two options are incommensurate then reason has no judgment to make concerning their relative value."[128]

If incommensurabilities are commonly encountered in the law, and if incommensurability is thought to preclude court judgments that are more reasonable than alternative judgments, we would indeed be left with a remarkably unfortunate state of affairs. Consider, for perspective, the conflict between rewarding effort, or desert, or merit, on the one hand, versus claims of basic need on the other.[129] The philosopher Alasdair MacIntyre holds that "our pluralistic culture possesses no method of weighing, no rational criterion for deciding between claims based on legitimate entitlement against claims based on need,"[130] given the incommensurability of such claims.[131]

As we have seen, though, there are importantly different ways in which one's available options may be incommensurable,[132] in lacking a common cardinal or ordinal measure.[133] Some real incommensurabilities may be benign. Incommensurability may often be compatible with a broader sort of reason-based comparability.[134] Two or more options may be incommensurable, but still meaningfully comparable in some relevant, reasonable, non-arbitrary way that can legitimately be pursued by the courts.[135] Choices by courts among incommensurable values can thus still be distinctly "supported by reason,"[136] in the sense of rational preferability.[137]

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128. RAZ, *supra* note 124, at 324.

129. As discussed classically in JOHN RAWLS, A THEORY OF JUSTICE (1972).

130. *See* ALASDAIR MCINTYRE, AFTER VIRTUE 246 (2d ed. 1984).

131. *Id.*

132. See the familiar cases discussed *supra* Part III. The Solution: Solving Incommensurability Problems.

133. *See id.*

134. *See, e.g.,* Ruth Chang, *Incommensurability (and Incomparability), in* THE INTERNATIONAL ENCYCLOPEDIA OF ETHICS 2591, 2591 (Hugh LaFollette ed., 2013).

135. *See, e.g.,* Virgilio Afonso da Silva, *Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision,* 31 OX. J. LEGAL STUD. 273, 273 (2011).

136. *See id.*

137. Urbina, *supra* note 123, at 576.

Consider first a non-legal case of incommensurable but sensible, more or less reasonably eligible options.[138] Suppose, as in an example presented by Professor Michael Stocker, that one must get across town.[139] One might more or less reasonably walk, attempt to hitchhike, take an Uber or a taxi, drive oneself, take a bus or subway, or ask for a ride from a friend or family member.[140] There are time, weather, cost, and safety constraints, as impossible as it is to be precise about such matters.[141] We can, however, at least make some entirely reasonable judgments as to the tradeoffs among the dimensions we care most about.

Note in particular that when we choose, perhaps, to wait some time for a relatively cheap but crowded bus, we recognize that we may, ultimately, have made a genuinely wrong choice. Or else a good choice, all things considered. And we certainly need not feel that we have just arbitrarily spun the wheel of choice, casting distinctive reason and sensible argument to the wind. No single choice is clearly and indisputably superior to all, or perhaps even any, alternatives. We may think of our circumstances as presenting a complex 'hard' case. But some options may better reflect our basic values, logic, and underlying priorities than others.

In the legal context, courts inevitably face complex, undeniably incommensurable choices. Consider the circumstances of a court that is tasked with the proper tort law compensation of an injured plaintiff. Ideally, the plaintiff would be somehow restored to where they were before the accident, or where they would be indifferent as between being uninjured and being injured but with some financial compensation. There is no real commensuration between the lifelong use of a limb and some specific amount of compensatory

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138. *See id. See also* FRANCISCO J. URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING 39 (2018) (it can be "reasonable to choose one alternative rather than another when the alternatives are incommensurable").

139. *See* MICHAEL STOCKER, PLURALITY AND CONFLICTING VALUES 178–79 (1990).

140. *See id.*

141. *See, e.g.*, Timothy Endicott, *Proportionality and Incommensurability, in* PROPORTIONALITY AND THE LAW 311, 323 (Grant Huscroft, Bradley W. Miller & Gregoire Webber, eds., 2014).

damages. But some compensatory arrangements are plainly and indisputably more reasonable than others. In a given case, a court can reasonably conclude that damages of one dollar, or a hundred dollars, or a thousand dollars, all unreasonably undercompensate the plaintiff.[142] And a court can also reasonably declare, given the facts of the case, that damages of one million dollars, or ten million dollars, would amount to unreasonable overcompensation.[143]

Judgments by courts in cases of incommensurable values will typically not take the form of a narrow or rigid cost-benefit analysis, except where that is required by a statute or the Constitution. In adjudicating among alternatives, costs and benefits should presumably be accounted for in a responsible, creative, thoughtful way in which even symbolism and expressivism may play a role. Cultural myopia, faddism, and the cognitive and emotional biases and fallacies,[144] should of course be avoided. Multiple perspectives, on multiple dimensions, may be considered. The interests of third parties and of future generations may be relevant as well. Sheer inconsistency, obvious or subtle, should plainly be avoided. The epistemic virtues,[145] including that of epistemic humility,[146] should be

142. *See id.* at 323–25.

143. *See id.* There is also no specific dollar amount such that below that threshold dollar amount, the compensation is unreasonably low. Nor is there any specific dollar amount such that above that dollar amount would be unreasonably high compensation. For background on vagueness, see Dominic Hyde & Diana Raffman, *Sorites Paradox,* STAN. ENCYCLOPEDIA PHIL., https://plato.stanford.edu/entries/sorites-paradox (rev. ed. March 26, 2018) (visited June 14 2023). More broadly, see TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW (2001). Nor do courts necessarily abandon themselves to irrationality or lawlessness in criminally sentencing someone who had betrayed a customer, their employer, or their country. Even here, judicial judgments can be more, and less, reasonable.

144. For background, *see, e.g.,* Ben Yagoda, *The Cognitive Biases Tricking Your Brain,* ATL. (September 2018) www.theatlantic.com/magazine/archive/2018/09/cognitive-bias [https://perma.cc/3VGW-XTR6]. For a handy chart, *see* Marcus Lu, *50 Cognitive Biases in the Modern World,* www.visual/capitalist/com/50-cognitive-biases [https://perma.cc/92RM-P3KV] (February 1, 2020) (visited June 14, 2023).

145. *See* ROBERT C. ROBERTS & W. JAY WOOD, INTELLECTUAL VIRTUES: AN ESSAY IN REGULATIVE EPISTEMOLOGY 7(2007); LINDA TRINKAUS ZAGZEBSKI, VIRTUES OF THE MIND (1996).

146. *See, e.g.,* Nancy Nyquist Potter, *The Virtue of Epistemic Humility,* 29 PHIL. PSYCHIATRY & PSYCH. 121 (2022); Erik Angner, Epistemic Humility: Knowing Your Limits in a

borne in mind. The various rule of law values[147] may also be relevant, as will the claims to attention of other cases on the judge's docket.[148]

Given these considerations, we should not be surprised by different outcomes from different courts on apparently similar issues.[149] But conscientiously working through some of the above considerations, in light of incommensurable values, may well contribute more toward the ultimate reasonableness, rather than to the arbitrariness, of a given judicial outcome.

Classically, the Supreme Court has undertaken interest balancing in non-discriminatory dormant commerce clause cases when the logic of that clause so suggests. Thus the Court has recognized that

> [w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . ..[150]

Pandemic, www.behavioralscientist.org/epistemic-humility-coronavirus [https://perma.cc/US3Z-22HA](April 13, 2020) (visited June 14, 2023).

147. *See, e.g.*, Jeremy Waldron, The Rule of Law, STAN. ENCYCLOPEDIA PHIL., https://plato.stanford.edu/entries/rule-of-law [https://perma.cc/HMT9-QEVC](June 22, 2016) (visited June 14, 2023). More elaborately, *see* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004).

148. Rationality also places limits on the resources a court should devote to even the most apparently important single case. Consider, e.g., the classic and intensely elaborated, highly technical air pollution case of *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (en banc).

149. Consider whether, in the case of entrenched circuit splits, at least one set of appellate federal courts must necessarily have engaged in ultimately arbitrary or unreasonable decision making. This hardly seems a necessary conclusion. Different judges may sensibly have different criteria for reducing biases, epistemic vices, and rule of law impairments. For one set of very general background commitments, *see* JOHN FINNIS, FUNDAMENTALS OF ETHICS 90–92 (1983). *See also* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 115 (2d ed. 2011) (even with incommensurable value choices, we can make reasonable, non-cost-benefit analyses that are reasonable, rather than "blind, arbitrary, directionless or indiscriminate").

150. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citation to Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960) omitted).

This process is occasionally, if not often, recognized as involving judicial balancing of interests.[151] On the Court's logic, "[i]f a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[152] Effects on out-of-staters may be entirely non-discriminatory, but also far from unintended or incidental.

A more specific problem is that there is really never a distinct judicial inquiry into whether there are lesser-impact, less burdensome, or more narrowly tailored regulatory alternatives on the one hand followed by a separate and distinct process in which the relevant interests are weighed and balanced against one another. There is nothing sacred and unalterable about any specific formulation or description of any particular state police power, health, welfare, or safety interest.

Inevitably, courts will instead wonder whether, for example, the cited police power interest could be advanced nearly as well by some alternative regulation that promises to be substantially less burdensome on out-of-state interests. Perhaps the state police power interest could be fulfilled eighty percent or ninety percent as well by a restriction that is only twenty percent as burdensome on out-of-staters.[153] In general, any narrow tailoring inquiry swings open the door to an implicit, or even explicit, weighing and balancing and mutual adjustment of the conflicting interests.[154]

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151. *See id.*

152. *Id.* This language is adopted in, for example, *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). *See also* Hunt v. Washington State Apple Advert. Com'n, 432 U.S. 333, 353–54 (1977).

153. As suggested by a variant of the classic Pareto 80-20 rule. *See, e.g.*, Carla Tardi, *The 80-20 Rule (aka Pareto Principle): What It Is, How It Works,* www.investopedia.com/terms/1/80-20-rule.asp [https://perma.cc/Y2C5-ZABX] (March 7, 2023) (visited June 14, 2023).

154. As illustrated, even in incommensurable constitutional and statutory right contexts, in R. George Wright, *The Scope of Compelling Government Interests,* 98 NOTRE DAME L. REV. REFLECTION 146 (2023). Courts often choose to characterize government regulatory interests in unduly narrow terms. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1866, 1881 (2021) ("The question . . . is not whether the City has a compelling interest in

3. A Suggestion for How Courts Might Approach Incommensurability Problems Under the Dormant Commerce Clause

Given the realistic need for courts to address some such cases under the dormant commerce clause, with all the incommensurable value conflicts that inescapably entails, what should the courts take into account in seeking a constitutionally sensible, rights-sensitive, broadly progressive, non-arbitrary, reasonable accommodation of the relevant interests?

First, and uncontroversially, the courts in such cases should determine whether any regulated entities must now comply with mutually incompatible legal requirements if they wish to market nationally. Concretely, for example, does Texas or Florida require something of the regulated entity that California forbids, or vice versa? The inability to comply with mutually inconsistent regulations is already an important consideration in some preemption contexts.[155]

In our cases, some regulated parties would face a choice between selling in one set of states at the cost of being unable to sell in some other set of politically antagonistic states. The realistic inability to comply with conflicting state regulations is, again, a consideration in the dormant commerce clause cases.[156]

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enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS."); Mast v. Fillmore Cty, Minn., 141 S. Ct. 2430, 2432 (2021) (mem.) (Alito, J., concurring in the decision to grant, vacate, and remand). Adverse effects on government interests generally come in degrees of severity. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 322 (1988) (on the government interest in avoiding 'insult' or 'affront' to foreign diplomats). Some courts recognize the inevitability of judicial choice and interest balancing in such cases. *See, e.g.*, Firewalker-Fields v. Lee, 58 F.4th 104, 115 (4th Cir. 2023) (prisoner free exercise of religion claim). But in any event, judicial choice, whether explicit or implicit, is broadly inevitable, and the options will typically be incommensurable in some meaningful way.

155. *See, e.g.*, Gade v. Nat'l Solid Waste Management Ass'n, 505 U.S. 88, 98 (1992) (discussing 'conflict' preemption where "compliance with both federal and state regulations is a physical impossibility").

156. *See, e.g.*, CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 88 (1987); Kassell v. Consolidated Freightways Corp., 450 U.S. 662, 671 (1981) (Powell, J., for the plurality); Southern Pac. Co. v. Arizona, 325 U.S. 761, 774 (1945).

In such cases, the courts should avoid both of two extremes. Courts should not strike down non-discriminatory politically motivated regulations of commerce by, say, blue states because of the mere abstract possibility that red states, in retaliation or otherwise, might conceivably adopt incompatible regulations, thereby putting regulated entities to a difficult choice. Such a judicial policy would suppress the value of important experimentation in health, welfare, and safety regulation with both in and out of state effects.

Equally, though, courts should avoid a policy that artificially advantages 'first movers,' whether they are red or blue states, by striking down any later regulation that creates an actual conflict for the regulated parties in question. Any such first-in-time rule would worsen current hyperpolarization by rewarding the first state to impose any politically controversial and perhaps hastily adopted rule in any respect, on commercial enterprises.[157] We might call this a perverse 'race to the legislature' phenomenon.[158]

Courts have recognized that in purely economic cases, the logic of the dormant commerce clause must discourage so-called 'tit for tat' retaliation by one state against the economic selfishness of another state.[159] More narrowly, one state's economic discrimination does not legitimize counter-discrimination by a targeted state.[160] More broadly, tit for tat retaliation is thought to fall afoul of the notion that two wrongs don't make a right.[161] The idea is again, traditionally, to avoid purely economic or commercial balkanization and mutual isolation.[162]

On our approach, courts should not invariably advantage or disadvantage non-discriminatory state police power regulations that

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157. It is reasonable, though, for courts to point out that the supposed police power value of a new conflict-creating regulation is doubtful, given the experience that has already developed under pre-existing rules with which the new rule would conflict. *See, e.g., Arizona*, 325 U.S. at 771–72. For discussion, see *Bernstein v. Virgin America, Inc.*, 3 F.4th 1127, 1135–36 (9th Cir. 2021).

158. If not even faster by executive or administrative mandate.

159. *See, e.g.,* Foresight Coal Sales, LLC v. Chandler, 60 F.4th 288, 301 (6th Cir. 2023).

160. *See id.*

161. *See id.*

162. *See id.*

are essentially political or cultural, as opposed to economic, in their motivation. We can agree that in our cases, two wrongs do not generally make a right. But courts should first determine on the merits whether the first alleged wrong, as in *Ross* itself, was indeed a dormant commerce clause wrong. And courts should recognize that in some cases, the best way to discourage a first wrong is for another state to credibly threaten some form of retaliation if the first wrong is indeed undertaken.[163] In other cases, judicial intervention against an aggressive first-mover state is clearly appropriate.

All else equal, courts should thus seriously scrutinize a state's attempts to non-discriminatorily coerce firms operating primarily in other states into embracing values they do not share. Such attempts by a first-moving state may well be viewed by their supporters as promoting human rights and fundamental cultural and moral values. But given a hyperpolarized, mutually distrustful, increasingly hostile and antagonistic society,[164] the best judicial response will often require looking at the bigger picture. Courts should not ignore or deny the overall, national-level, mutually destructive costs of our increasing polarization.[165]

The best judicial approach to the escalating moral, political, and cultural conflicts among states under the dormant commerce clause must thus have several dimensions. Recognized constitutional rights will be given effect. Some judicial adjustments of the various

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163. Consider, for example, under the laws of war, an aggressor nation that opts for a policy of false flags of truce, fake surrenders, avoidance of military uniform use, storing munitions at protected cultural sites, holding civilian hostages on bridges, and so forth. While two or more wrongs may not make a right, there is something to be said for the view that waiting for ineffectual post-war redress is also a 'wrong,' in the sense of causing unnecessary harm. For background, see R. George Wright, *Noncombatant Immunity: A Case Study in the Relation between International Law and Morality*, 67 NOTRE DAME L. REV. 335 (1991).

164. See, for background, R. George Wright, *A Free Speech-Based Response to Media Polarization,* 18 FIU L. REV. 193 (2023).

165. *See id.* The power of unconstrained discourse to lead to progress through reasoned persuasion alone is, admittedly, not without its limits. *But cf.* JOHN MILTON, AREOPAGITICA 58 (Cambridge U.P. ed. 1914) (1644) ("Though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do ingloriously . . . to misdoubt her strength. Let her and falsehood grapple, who ever knew truth put to the worse in a free and open encounter?").

conflicting interests would simply be inefficient and unnecessarily costly. The degree of tailoring of police power regulations affecting out of staters is often improvable. Interests can be reasonably reassessed, perhaps from a more detached, broader perspective, by courts. Small losses in some values may be worth incurring for the sake of large gains in other values.

Most fundamentally, though, judges who face commensurability problems should recognize the need for the virtue of practical wisdom. Judges, and their critics, can over time cultivate and reward the relevant sorts of practical wisdom. All parties, including courts, should expand the scope and depth of their relevant knowledge; cultivate the capacity for reflection; enhance their deliberative self-discipline in the relevant respects; avoid undue emotionalism and sentimentalism; avoid cognitive biases and psychological defense mechanisms; understand the emotions and experiences and perspectives of others; deepen their reason-based epistemic humility; enhance their open-mindedness; recognize genuine conflicts among worthy values; be open to creative alternative solutions; and appreciate the difficulties of adapting broad principles to specific contexts.[166] Inevitably, though, no shortcuts to the most reasonable judicial disposition of incommensurable value conflicts will be typically available.

CONCLUSION

Whether they explicitly recognize it or not, the courts are often confronted with problems of basic value incommensurability. Courts should recognize that whatever the nature of the incommensurability in any given case, some case rationales and outcomes will almost invariably be more reasonable, less arbitrary, and more jurisprudentially defensible than others. There are some cases of incommensurability in which the court should stay its hand. But

166. Many of these considerations are adapted from LINDA TRINKAUS ZAGZEBSKI, EXEMPLARIST MORAL THEORY 95 (2017). *See also* Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003). Classically, see ARISTOTLE ON PRACTICAL WISDOM: NICOMACHEAN ETHICS VI (C.D.C. Reeve trans., Harv. Univ. Press 2013) (350 BCE).

there are certainly other cases in which the courts should be more assertive. Prime examples of the latter involve dormant commerce clause cases in which states adopt non-discriminatory rules intended to coerce producers in other states to adopt political, moral and cultural policies favored by the regulating state. If courts do not work their way past the incommensurabilities in such cases, there is a likelihood of, ultimately, broadly unattractive practical consequences.