

COMMERCE IN THE BALANCE

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ABSTRACT

In 2018, California passed a law prohibiting the in-state sale of any pork that was raised inhumanely. This law was quickly challenged by the pork industry on the grounds that it unduly burdened interstate commerce under the Supreme Court’s *Pike* balancing test. In a fractured decision that pitted animal welfare concerns against the economic interests of out-of-state pork producers, the Supreme Court upheld California’s animal welfare law. Justice Neil Gorsuch, writing for a plurality of the Court, invoked a common objection to *Pike* balancing: It requires the impossible—the balancing of incommensurable goods (here, animal welfare and economic benefits). As Justice Scalia once quipped, *Pike* balancing is like asking whether a particular line is longer than a particular rock is heavy. But I argue that invoking “incommensurability” as a reason to reject *Pike* says far too much. It implicitly weighs in on a highly contentious debate in moral theory about the incommensurability of different values. And it implies that much state legislation is arbitrary. I argue that there is a better reason to reject *Pike*’s balancing test. The real problem with *Pike* is that it undermines a state’s ability to choose among otherwise constitutionally permitted moral frameworks. Nothing about the Commerce Clause can plausibly be construed as imposing that kind of limit.

* Associate Professor, University of Iowa College of Law. ©2023, Andrew Jordan. I would like to thank Erin Delaney, Mihailis Diamantis, Jill Hasday, Emily Hughes, Stephanie Patridge, Todd Pettys, Anya Prince, John Reitz, Ryan Sakoda, and Sean Sullivan for many helpful comments and conversations over the course of drafting this article.

INTRODUCTION

In 2018, California passed Proposition 12 by ballot initiative. The law prohibited the in-state sale of eggs, pork, and veal products that are raised in a cruel manner.¹ It defined humane standards for raising farm animals and required that goods that could not be shown to comply with those standards not be sold in the state. In the case *National Pork Producers Council v. Ross*, the statute was challenged by industry groups on behalf of out-of-state pork producers. This challenge precipitated one of the most theoretically interesting decisions of the Court's term—one that would potentially have broad implications for state regulations aiming at moral concerns such as animal welfare. At issue was whether Proposition 12 violated what has come to be known as the “Dormant Commerce Clause.” The Dormant Commerce Clause is thought to be a negative implication of the Constitution's grant of power to Congress to regulate commerce.² That grant of power aimed to limit the economic Balkanization that existed under the Articles of Confederation.³ And under Dormant Commerce Clause doctrine, the Court has taken upon itself the task of policing state regulations in furtherance of that aim. Current doctrine has two main components. First, state laws that discriminate against interstate commerce are “virtually per se invalid” and will survive only if they serve a legitimate local purpose that cannot be achieved by reasonable non-discriminatory alternatives.⁴ Second, state laws that merely incidentally affect interstate commerce are subject to what has come to be known as *Pike* balancing. According to *Pike*, where a 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.”⁵ It was the issue of *Pike* balancing that figured most prominently *Ross*.⁶

1. See CAL. HEALTH & SAFETY CODE § 25990 (West 2023).

2. *Dep't of Revenue v. Davis*, 553 U.S. 328, 337 (2008).

3. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018).

4. *Davis*, 553 U.S. at 338.

5. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

6. The pork producers made an additional argument that will not concern us here. They claimed that there is an “almost per se” rule against state laws that have extra-territorial effects. The Court appears to have unanimously rejected that argument on grounds that if accepted it would call into question “laws long

Since *Pike* was decided, its balancing test has been controversial.⁷ As Justice Scalia once quipped, balancing under *Pike* “is . . . like judging whether a particular line is longer than a particular rock is heavy.”⁸ It is thus unsurprising that it is on the question of *Pike* balancing that the Court’s reasoning split. Roughly speaking, the Justices divided over two questions. First was whether balancing is appropriate in cases like *Ross* where there are supposedly “incommensurable” goods on each side of the scale.⁹ On that question Justices Gorsuch, Thomas, and Barrett were in agreement; the goods in question here—moral concerns about animal welfare on one side and concerns about economic burdens on out of state pork producers on the other—are “incommensurable.”¹⁰ Hence, they cannot be the subject of

understood to represent valid exercises of the States’ constitutionally reserved powers.” See *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 371 (2023) (noting that the extraterritoriality argument “falters out of the gate.”); *id.* at 394 (Roberts, C.J., concurring) (“I also agree with the court’s conclusion that our precedent does not support a *per se* rule against state laws with ‘extraterritorial’ effects.”). There is, of course, an interesting question remaining here about where to house the commonplace idea that there are limits on a state’s attempt to regulate extraterritorially.

7. See Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) (arguing that the Supreme Court should not, and contrary to appearances, does not, engage in balancing); Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 453–56 (2008) (recounting some arguments against balancing in the context of the Dormant Commerce Clause); Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 944–45 (1987) (arguing that current “complacency” with balancing tests “blinds us to serious problems in the mechanics of balancing and prevents us from recognizing how balancing has transformed constitutional adjudication and constitutional law”).

8. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988).

9. There is an extensive literature about the propriety of balancing in constitutional adjudication. Most of that literature concerns various balancing tests for rights adjudication. See, e.g., Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 *RATIO JURIS*, 131 (2003) (defending the rationality of a kind of balancing or “proportionality” review used by German courts in rights adjudication against several objections); Virgilio Afonso Da Silva, *Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision*, 31 *OXFORD J. LEGAL STUD.* 273 (2011); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 *HASTINGS L.J.* 711, 712 (1994) (rejecting balancing tests in constitutional rights adjudication and arguing that rights adjudication is best understood as hinging on an assessment of “the kinds of reasons that are impermissible justifications for state action in different spheres”).

10. For reasons that shall become clear shortly, it is probably better to say that they believed the goods to be “incomparable” rather than

balancing. But the other six Justices apparently thought that you could balance economic burdens and animal welfare. The second question was whether the pork producers had pled a substantial burden on interstate commerce. On that question, Justices Gorsuch, Thomas, Sotomayor, and Kagan were in agreement—they hadn't. And so, for those Justices, the pork producers did not even get over a threshold requirement for engaging in *Pike* balancing. But five Justices thought they had. Nevertheless, five Justices thought that California's law should stand even though there was only minority support on each of the *Pike* questions.¹¹

The subject of this Essay is the first of the two *Pike* questions taken up in *National Pork Producers Council v. Ross*. What I want to sort through here is how to think about *Pike*'s balancing test, especially in the face of a worry that it asks the impossible—the balancing of “incommensurable” values. As we will see, *Pike*'s balancing test should be discarded, but not because of some abstract worry about “incommensurability.” In what follows, I argue for the following two claims. First, whether the competing values are comparable, and hence the proper subject of “balancing” is a *highly philosophically contentious* issue on which it would be odd—indeed inappropriate—for the Court to take a stand if it can avoid doing so. The Court is not equipped to weigh in on such contentious issues in moral theory, and under our system of government it is not really the Court's business to do so—at least not under the Commerce Clause. So, on the question of whether, say, animal welfare is comparable with economic burdens, the Court should simply stay silent.

“incommensurable.” For now, a working distinction between the two shall suffice. Two goods are “incommensurable” if there is no common measure of scale (e.g., dollars) to be used in assessing their comparative value. In life very few things can be compared against a common scale. Nevertheless, we appear to “balance” or “weigh” things that are incommensurable in this sense all the time. In contrast, two goods are “incomparable” if there is no fact of the matter about their comparative merits. One cannot say that one is better than, worse than, or equal to the other. I provide a more in-depth account of the distinction in Section II.

11. There are, of course, intriguing questions about a result where a loss plus a loss is a win. This has come to be known as the doctrinal paradox. In short, the paradox arises because sometimes when aggregating votes on a multimember court the votes on specific issues can come apart from the votes on the final outcome of the case. Lewis A. Kornhauser & Lawrence G. Sager, *The Many as One: Integrity and Group Choice in Paradoxical Cases*, 32 PHIL. & PUB. AFF. 249, 250–51 (2004). This is yet another reason why *Ross* is theoretically interesting. But it is not a topic of this Essay.

Second, and relatedly, the Dormant Commerce Clause concerns only the proper structural distribution of decision-making authority between the states, the Court, and the federal government. And, at least for purposes of the Dormant Commerce Clause, moral theoretic issues like whether goods are comparable, or, as we shall see, whether a familiar set of moral motives might underwrite state legislation, are the state's business, not the Court's. In *Ross*, California made the judgment that its citizens were not going to be complicit in immense and avoidable animal cruelty. California is free to reach that conclusion based on any number of different moral-theoretical frameworks, or indeed, no moral-theoretical framework at all. The problem with *Pike* balancing, then, is that it adopts a doctrinal framework that disempowers a state from basing its laws on a wide range of otherwise constitutionally permitted moral frameworks. Thus, the real reason why the Court should reject balancing in the context of the Dormant Commerce Clause is that for the Court to overturn California's law it would have to engage in an inappropriate kind of undermining of the moral basis of state legislation.¹² Overturning the California law on the basis of a balancing test would require the Court to implicitly adopt a view about several deep and contentious questions in moral theory, and fail to take seriously any legislation premised on a competing moral outlook. And the Court should not be adopting a contentious moral theory that it is not independently tasked with adopting and that it lacks the competence to assess.¹³ The reason to reject *Pike* balancing, then, is not, as Justices Gorsuch, Thomas and Barrett would have it, that balancing is an impossible task. That conclusion already says too much. Rather, it is that in the

12. To be clear, I do not mean to suggest that the Court ought not engage in moral deliberation. Indeed, I have argued elsewhere that if its decisions are to be justified, it has to do so, at least at the level of choosing methods of adjudication (which may themselves be otherwise morally neutral in application). See Andrew Jordan, *Constitutional Anti-Theory*, 107 *GEO. L. REV.* 1515, 1522–23 (2019) (arguing that constitutional theories require normative justification). The problem here is that the Court would have to take a stand on foundational moral-theoretic issues that would preclude—and unnecessarily—any kind of overlapping consensus.

13. Compare a rights dispute where the Court is constitutionally bound to decide whether a right has been violated. That judgment requires the Court to assess the scope and content of a right, and that is no doubt a moral question. But it is one that in our system of government is given to the Court. In contrast, there no constitutional requirement that the Court to adopt the consequentialist world view implied by *Pike* balancing.

context of the Dormant Commerce Clause, the Court should have no view at all about the moral-theoretical issues that it would implicitly have to take a stand on when it insists on balancing.¹⁴

I. ROSS'S ARGUMENTS ABOUT THE PROPRIETY OF BALANCING

Let's start by surveying *Ross's* arguments related to *Pike* balancing. A majority of the Court concluded that California's statute did not violate the Dormant Commerce Clause, but the reasoning was fractured.¹⁵ As a reminder, in *Pike* the Court announced the following principle: where a state "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."¹⁶ Thus, the *Pike* standard seems to require a court to balance on one side the local benefit and on the other a burden on interstate commerce. That framework raises the following two issues on which the Justices divided. First—and something about which I will have little to say—is how we ought to determine what counts as a burden on interstate commerce?¹⁷ Four Justices, Gorsuch,

14. This would, of course, leave intact the prohibition on state legislation that discriminates against interstate commerce.

15. The Court unanimously rejected the pork producers' claim that there was a "per se" rule prohibiting statutes that have the "practical effect of controlling commerce outside the State." See *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 371 (2023); *id.* at 394 (Roberts, C.J., concurring). I will have nothing to say about this "extraterritoriality" issue here. This is not because there is not a difficult and interesting issue in the vicinity. There is an outstanding question about how to conceive of the limits on a state's jurisdiction. And that will likely be an important issue in possible forthcoming litigation about state abortion restrictions. See David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 4 (2023) ("Overturning *Roe* and *Casey* will create a complicated world of novel interjurisdictional legal conflicts over abortion.").

16. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

17. The little that I have to say is this: There is a real puzzle here. If we are to balance, we have to assess what goes on the scale. And the puzzle is this—the consequences for other states of California's regulation are almost certainly rather far-reaching. Some of those consequences might actually be good—even economically so. Consider the possible environmental benefits of less dense pig farming. Or more straightforwardly, pork is an elastic good. An increase in its cost is thus likely to increase demand for chicken or beef and hence benefit such producers. And one might worry that there is no non-arbitrary reason to limit the consequences that we put on the scale once we open the door to considering the downstream effects of California's law. But once we admit that, then we

Thomas, Sotomayor and Kagan, found that the pork producers had not pled a burden on interstate commerce. In other words, four Justices thought that half of the scale was, for legal purposes, empty, and so there was nothing to balance. Second—and the main focus of this Essay—was whether *Pike*'s balancing test was appropriate. Three Justices, Gorsuch, Thomas and Barrett, suggested that balancing was inappropriate, at least in part because the values at issue were “incommensurable.”¹⁸

A. ARGUMENTS AGAINST BALANCING

Justice Gorsuch's reasoning is rather murky regarding *why*, exactly, *Pike* balancing was inappropriate in this case. In a span of a couple of pages of his opinion he makes at least six different arguments raising worries about *Pike* balancing.

- (1) “The competing goods are incommensurable” and hence cannot be weighed one against the other.¹⁹ *The Incommensurability Worry*.

really do have a task that is judicially unmanageable. Indeed, this is something that on more than one occasion, the Court has explicitly acknowledged. *See, e.g.*, *Dep't of Revenue v. Davis*, 553 U.S. 328, 355 (2008) (“What is most significant about these cost-benefit questions is not even the difficulty of answering them or the inevitable uncertainty of the predictions that might be made in trying to come up with answers, but the unsuitability of the judicial process and judicial forums for making whatever predictions and reaching whatever answers are possible at all.”); *GMC v. Tracy*, 519 U.S. 278, 281 (1998) (“[T]he Court lacks the expertness and the institutional resources necessary to predict the economic effects of judicial intervention invalidating Ohio's tax scheme on the LDCs' capacity to serve the captive market.”); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 341 (1996) (expressing serious doubts about the propriety of the Court opining on an issue given “the frequently extreme complexity of economic incidence analysis.”). It is worth highlighting the basic structure of the problem. In any balancing inquiry the entire game hinges on *what goes on the scale*. And so, it matters a lot how we characterize “burdens on interstate commerce.” But it is awfully hard to formulate an account of those burdens that is both non-arbitrary and judicially manageable. Indeed, attempts to make things more judicially manageable exacerbate the problem of arbitrariness, and attempts to make things less arbitrary exacerbate the problem of judicial manageability.

18. *Nat'l Pork*, 598 U.S. at 382; *id.* at 393 (Barrett, J., concurring).

19. *Id.* at 382 (“On the one hand, some out-of-state producers who choose to comply with Proposition 12 may incur new costs. On the other hand, the law serves moral and health interests of some (disputable) magnitude for in-state residents. Some might reasonably find one set of concerns more compelling. Others might fairly disagree. How should we settle that dispute? The competing goods are incommensurable. Your guess is as good as ours.”).

- (2) There is no constitutional authorization based in the constitutional text and history for anything like *Pike* balancing.²⁰ *The Authorization Worry*.
- (3) Judges are not institutionally competent to engage in the sort of balancing that *Pike* seems to require.²¹ *The Institutional Competence Worry*.
- (4) There is no available neutral legal rule that could allow a court to “compare or weigh economic costs (to some) against noneconomic benefits (to others).”²² *The Judicially Manageable Principles Worry*.
- (5) Engaging in *Pike* balancing would require the Court to make policy judgments that in a functioning democracy “belong to the people and their elected representatives.”²³ *The Political Authority Worry*.
- (6) The Federal Congress is better equipped to make judgments like this one.²⁴ *The Comparative Institutional Competence Worry*.

It is unclear whether Justice Gorsuch takes these different worries to relate to one another and if so, in what way. But it appears that the other Justices took the incommensurability worry to be central to his argument. Here is what Justice Barrett said in her concurrence:

[T]o weigh benefits and burdens, it is axiomatic that both must be judicially cognizable and comparable . . . I agree with Justice Gorsuch that the benefits and burdens of Proposition 12 are incommensurable. California’s interest in

20. *Id.* at 380 (“[N]othing in the Constitution’s text or history that supports” a project of striking down state laws “based on nothing more than [a court’s] own assessment of the relevant law’s ‘costs’ and ‘benefits’”).

21. *Id.* (“This Court has also recognized that judges often are ‘not institutionally suited to draw reliable conclusions of the kind that would be necessary . . . to satisfy [the] *Pike*’ test as petitioners conceive it.” (citing *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008))).

22. *Id.* at 381 (“No neutral legal rule guides the way. The competing goods before us are insusceptible to resolution by reference to any juridical principle.”).

23. *Id.* at 382 (“In a functioning democracy, policy choices like these usually belong to the people and their elected representatives. They are entitled to weigh the relevant ‘political and economic’ costs and benefits for themselves.”); *id.* at 383 (“[Congress] is certainly better positioned to claim democratic support for any policy choice it may make.”).

24. *Id.* at 383 (noting that Congress has the power to pass legislation providing for uniform animal husbandry rules and “is better equipped than this Court to identify and assess all the pertinent economic and political interests at play across the country”).

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eliminating allegedly inhumane products from its markets cannot be weighed on a scale opposite dollars and cents—at least not without second-guessing the moral judgments of California voters or making the kind of policy decisions reserved for politicians.²⁵

And Justices Sotomayor and Roberts went out of their way to defend the weighing of disparate goods, Justice Gorsuch’s worries about “incommensurability” notwithstanding.

Here is Justice Sotomayor:

Justice Gorsuch, for a plurality, concludes that petitioners’ *Pike* claim fails because courts are incapable of balancing economic burdens against noneconomic benefits . . . I do not join that portion of Justice Gorsuch’s opinion. I acknowledge that the inquiry is difficult and delicate, and federal courts are well advised to approach the matter with caution . . . Yet, I agree with The Chief Justice that courts generally are able to weigh disparate burdens and benefits against each other, and that they are called on to do so in other areas of the law with some frequency . . . The means-ends tailoring analysis that *Pike* incorporates is likewise familiar to courts and does not raise the asserted incommensurability problems that trouble Justice Gorsuch.

And here is Justice Roberts:

Speaking for three Members of the Court, Justice Gorsuch objects that balancing competing interests under *Pike* is simply an impossible judicial task . . . I certainly appreciate the concern . . . but sometimes there is no avoiding the need to weigh seemingly incommensurable values. Here too, a majority of the Court agrees that it is possible to balance benefits and burdens under the approach set forth in *Pike*.

Commentators have also assumed that the central worry for Justice Gorsuch concerned the apparent incomparability of animal welfare and economic burdens.²⁶ So, it makes sense to

25. *Id.* at 394 (Barrett, J., concurring). Of course, it is worth noting that there are two separate arguments here. The first is that the relevant goods are incommensurable, and hence cannot be weighed one against another. The second, is that any such weighing would involve second-guessing the moral judgments of California voters. And it is unclear whether there is any relationship between these two judgments. Are we to infer that if the goods were commensurable, then it would be permissible for the Court to second-guess California’s judgment regarding the relevant weight of each? If we reject that inference, then why is not the prohibition on second-guessing something that stands alone doing all the work by itself?

26. For instance, Michael Dorf notes that “Perhaps the key such reason

proceed as though the “incommensurability” worry was central

[that Gorsuch is skeptical of *Pike* balancing in *Ross*] is that he believes balancing costs and benefits to be an impossible task for the judiciary when the interests to be balanced are incommensurate. He [Gorsuch] favorably quotes Justice Scalia’s memorable statement from *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*[, 486 U.S. 888] (1988): that balancing incommensurables is “like judging whether a particular line is longer than a particular rock is heavy.” Michael Dorf, *Against Commensurability in the Prop 12 Case and Beyond*, DORF ON LAW (May 19, 2023), <https://www.dorfonlaw.org/2023/05/against-incommensurability-in-prop-12.html>. But Dorf has voiced some skepticism of Gorsuch and Scalia’s claim that incommensurables cannot be balanced. And in response to Scalia’s example of the line and the rock, he suggests that a line from the earth to the sun is longer than a pebble is heavy. I am not so sure. While this thought has a certain kind of appeal, it can be made more precise in a way that shows that it is not really a counterexample to the claim that weight and length are incommensurable. What we ought to say about this sort of example is that the line is of a size that is more out of the ordinary than the pebble is, where the ordinary is understood relative to a comparison class—here familiar mid-sized objects. Put another way, the line has a remarkable degree of bigness, while the pebble does not. And thus, we can give sense to the idea that the line *is* of a more unusually large size than the pebble is. But that judgment does not require us to say anything about comparing weight and length. It only requires a common baseline regarding what sorts of objects are familiarly sized and which ones are not.

Dorf goes on to suggest a different reading of Gorsuch’s opinion. “We would better understand Justice Gorsuch to be saying that balancing incommensurables—which is to say pretty much all balancing—is an inappropriate task for judges, presumably because it involves too much judgment and discretion. *That* claim is common among formalists, but it assumes that there are alternative methods of adjudication in the sorts of cases SCOTUS decides and that those alternatives do not equally call for the exercise of judgment and discretion. And while proponents of rules over standards and formalisms like textualism and originalism certainly *claim* that their methods are more determinate than the alternatives on offer, the evidence is pretty strongly to the contrary.” *Id.* From where I sit, I would rather take Justice Gorsuch at his word as raising a special concern about incommensurability, and resist attributing to him a further aim of limiting judicial discretion via an *assertion* about incommensurability. Justice Gorsuch may be wrong about how incommensurability works, but he at least seems to believe that it undermines the ability of judges to make reasonable decisions. That said, given some recent opinions voicing more general concerns about balancing, Dorf’s interpretation is not unreasonable. *See, e.g.*, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 25–26 (2022) (voicing skepticism about the propriety of courts engaging in the “interest balancing” that an intermediate scrutiny analysis would supposedly require). I should add, however, that Dorf is right that rejecting balancing does not obviate the need for the exercise of judicial judgment and discretion. A plausible non-balancing model still requires normative judgments about the proper structural distribution of decision-making authority. *See, e.g.*, Donald J. Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1, 41–42 (2006) (noting that a plausible non-balancing way of thinking about the scope of rights is “unwieldy if you’re looking for a bright-line test or crank-the-handle algorithm. But you shouldn’t be looking for anything like that in this terrain anyway.”).

and ask whether and how that worry might relate to Justice Gorsuch's broader argument.²⁷ Unfortunately, the possible relations between "incommensurability" and the other worries cited by Gorsuch are somewhat opaque. But there is a line of thought on which many of these worries might relate one to another. That line of thought goes something like this:

- (1) Incommensurable (i.e., incomparable) goods cannot be rationally compared so that one can say one is better (or more choice-worthy, preferable, et cetera) than another.
- (2) If there is no rational basis for saying of one good that it is better than another, then any choice between them is evaluatively arbitrary.²⁸
- (3) Courts must be guided by reasoned principles and evaluatively arbitrary choices are not guided by reasoned principles.
- (4) In addition, the evaluatively arbitrary decisions of the political branches have at least a kind of democratic legitimacy that similar decisions by courts lack.
- (5) Hence, because the goods are incommensurable, it is especially inappropriate for a court to choose between them, and any such decisions should be left to the political branches.

This line of argument would forge a connection between the incommensurability worry, the judicially manageable principles worry, and the political authority worry. The two institutional competence arguments are harder to square with this line of argument, however. Insofar as choices between "incommensurable" (i.e., incomparable) goods are evaluatively arbitrary there is no such thing as competence in making such choices.²⁹ One cannot more or less competently make an arbitrary

27. One of the worries—the authorization worry—seems to bear no conceptual relationship to incommensurability. If *Pike* balancing is not authorized, it is not authorized. Incommensurability would have nothing to do with it.

28. In saying that they are evaluatively arbitrary, I mean that there is no basis for choosing between the various options based solely in the comparative value of each. As I will explain shortly, this conclusion is consistent with saying that there may be other non-comparative bases for the choice. For example, the choice might be required by a duty.

29. As we shall see, the choice between incommensurables will be evaluatively arbitrary only on one understanding of incommensurability—an

decision. At least one cannot do so if competence is understood as getting the decision right, or, at least, having good reasons for making it.³⁰ Of course, if that is right, then once Gorsuch admits that the goods in question are “incommensurable” (i.e., incomparable) the institutional competence arguments are *bad arguments*. In any event, there is good reason to think that a worry about incommensurability was the lynchpin of Justice Gorsuch’s reasoning, even if it was not the only argument that he made.

B. ARGUMENTS DEFENDING BALANCING

On the other side of the issue, things were no less murky. Justice Sotomayor’s entire assessment of the incommensurability/balancing issue went as follows: “the [balancing] inquiry is difficult and delicate, and federal courts are well advised to approach the matter with caution . . . Yet, I agree with The Chief Justice that courts generally are able to weigh disparate burdens and benefits against each other, and that they are called on to do so in other areas of the law with some frequency.” This does not help much. And it obscures the issue to some degree. If Justice Gorsuch is right that the goods are incomparable, then the idea that a court could “weigh” the disparate burdens is nonsensical. So, perhaps Justice Sotomayor thinks the goods are “disparate” but not incomparable. In that case, the dispute here is over whether animal welfare and economic benefits are comparable. Or, perhaps more generally, it is a dispute about how many goods, if any, are genuinely incomparable.

Justice Roberts noted that he “appreciated the concern” about balancing “seemingly incommensurable values.”³¹ But he also noted that balancing of this type is commonplace in constitutional law.³² And to this end he cited purported instances

understanding which philosophers typically now refer to with the term “incomparability.” It appears that Gorsuch must have incomparability in mind. Otherwise, his suggestion that one cannot rationally compare incommensurables would not be *correct*. See *supra* note 7 for a working definition of this distinction.

30. The comparative competence point does square with a view in the vicinity, however. Namely, the view that the goods are comparable but that judgments about their comparative value are epistemically difficult in a way that leaves Congress better equipped than a court in sorting out the comparative value of each.

31. Nat’l Pork Producers Council v. Ross, 598 U.S. 356, 396 (2023) (Roberts, C.J., concurring).

32. *Id.* (Roberts, C.J., concurring).

of balancing all drawn from cases involving the adjudication of rights.³³ It is worth commenting that at least one of the cases he cites arguably does not involve balancing.³⁴ But nevertheless, it seems hard to deny that the court at least sometimes *talks* as though it engages in balancing of competing interests and values. So, what to make of Roberts' insistence that balancing is commonplace? If we understand Gorsuch to be saying that the values are genuinely incomparable, then either the two are talking past one another, or Roberts would be saying that the Court is doing something that it does not make sense to do. There are at least two other possible reads on Roberts' reasoning. First, perhaps Roberts is merely sounding a cautionary note about too quickly insisting that various competing goods really are incomparable, and hence definitionally unsuitable for balancing. Second, perhaps he is resisting a different charge against

33. *Id.* (Roberts, C.J., concurring) (citing *Schneider v. State*, 308 U.S. 147 (1939) (assessing whether the First Amendment prohibits laws limiting the distribution of handbills)); *id.* (Roberts, C.J., concurring) (citing *Winston v. Lee*, 470 U.S. 753 (1985) (assessing whether the Fourth Amendment prohibited the state from forcing a defendant in an armed robbery case to undergo surgery to remove a bullet from his chest)); *id.* (Roberts, C.J., concurring) (citing *Addington v. Texas*, 441 U.S. 418 (1979) (assessing the constitutionally required evidentiary standard for a civil commitment proceeding)).

34. *Schneider's* reasoning is a bit ambivalent as to whether the Court is engaged in balancing. The Court noted that a "delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." *Schneider*, 308 U.S. at 161. That suggests balancing. But then the Court cites approvingly what seems like a categorical rule, namely that the government may not "impose[] penalties for the distribution of pamphlets, which had become historical weapons in the defense of liberty, by subjecting such distribution to license and censorship." *Id.* at 162. And it also noted that "the streets are natural and proper places for the dissemination of information and opinion." *Id.* at 163. So, other components of the Court's reasoning look like they hinge on a categorical rule, and not some kind of case-by-case balancing. The rule, in short, is that one cannot justifiably prohibit commonplace modes of communication in the public streets. The view that a concern for litter is insufficient is merely a result of, and not the reason for, the rule. One of the parties challenged a law prohibiting solicitation in the home. There, the courts worry again seemed categorical—the worry was that under the statute the right to speak to others in their homes was subject to discretionary review by an official who might then "say some ideas may, while others may not, be carried to the homes of citizens." *Id.* at 164. Again, that speaks more of a familiar categorical rule prohibiting the kind of discretionary limitations on speech or religious exercise that might facilitate unjustified discrimination. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring) ("A longstanding tenet of our free exercise jurisprudence—one that both pre-dates and survives *Smith*—is that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions.").

balancing premised not on its impossibility but rather on its propriety. There is a line of thought that rejects balancing as judicially improper because balancing requires judges to make controversial normative decisions.³⁵ Against that line of thought we could see Roberts as merely emphasizing that such balancing is commonplace, and by implication not judicially improper.

C. SOME COMMENTS ABOUT THE BALANCING DEBATE

In that vein, it is worth saying a bit about a kind of *generalized* objection to balancing. There is a longstanding debate about whether balancing coherently explains what the Court does (and ought to do) in various contexts of rights adjudication. The most plausible non-balancing view has it that judicial review in this area is really about distinguishing permissible and impermissible reasons for government action.³⁶ That view rejects the idea that the most justifiable account of the doctrine allows for a kind of open-ended balancing. There might be different accounts of what kinds of reasons might be impermissible. For instance, John Hart Ely defends the view that rights should be understood as mechanisms for accommodating failures of equal democratic governance. So, if a political majority is “choking off the channels of political change” or “systematically disadvantaging some minority . . . and denying that minority the protection afforded other groups by a representative system,” then the Court should

35. Justice Scalia most famously adopts this line of thought. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989) (“Since I believe that the establishment of broadly applicable general principles is an essential component of the judicial process, I am inclined to disfavor, without clear congressional command, the acknowledgement of causes of action that do not readily lend themselves to such an approach.”). I must confess finding any *generalized* worry about judges exercising normative judgment rather strange. I can see no view of rights adjudication (or indeed constitutional law) that does not require the exercise of such judgment. Even if it does not require the balancing of competing interests, it still requires normative judgments about the proper distribution of decision-making authority, or about what sorts of reasons are legitimate bases for state action. And anyway, one would have to have normative reasons for picking a constitutional theory, even if the application of that theory did not require yet further normative judgment. The relevant question, then, is not *whether* it is proper for judges to exercise normative judgment, but *when* and *in what way*.

36. Prominent examples of this line of thought include Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); Pildes, *supra* note 9.

find a rights violation.³⁷ Similarly, Richard Pildes defends the view that “constitutional adjudication is often a qualitative process, not a quantitative one.” “Rather than balancing the strength of individual rights against the strength of competing state interests, courts evaluate the different kinds of reasons that are off limits to government in different arenas.”³⁸

Suffice it to say that I think Don Herzog is right when he comments that “courts talk about balancing rather more than they actually try it. . . .”³⁹ But I do not here aim to resolve the ongoing disagreement about whether balancing is required to properly account for various political rights. Even if the most plausible account of certain political rights involves balancing of a sort, that balancing inquiry is in service of another inquiry that courts cannot avoid under our current constitutional system—determining the scope of a political right. And whatever balancing there is in the rights context does not involve an open-ended weighing of the comparative costs and benefits. If it did, then it would be a bad day for the large amount of highly annoying, irritating and offensive speech that we must endure in a liberal society. Rather, the balancing inquiry, if there is one, is aiming at a different kind of question—what sorts of powers do we think it legitimate for the government to exercise.⁴⁰ For present purposes,

37. ELY, *supra* note 36, at 102–03.

38. Pildes, *supra* note 9, at 712.

39. Herzog, *supra* note 26, at 35.

40. And the question of legitimate exercises of power is premised on a conception of the purposes of government that is to some degree autonomous from mere consequentialist interest balancing (though it may be partially constrained by it). This is something that even defenders of balancing have to admit. As Richard Fallon notes with regard to free speech doctrine, mere incidental burdens on speech are not “triggering” rights that prompt the Court to engage in a searching rights-based analysis. RICHARD FALLON, *THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY* 49–50 (2019). And the Court does not (and should not) engage in a consequentialist “balancing” analysis of incidental burdens on speech as against government interests. To use an example that I owe to Don Herzog, the government is permitted to (non-pretextually) shut down a park for the afternoon for the purpose of spraying for mosquitos, even though it interrupts a planned protest. And it is allowed to do so even if the marginal health benefit of spraying is small and the subject of the protest is super-duper important. Fallon defends balancing because he thinks it is necessary to explain how the application of heightened scrutiny, with its “compelling interest” and “narrow tailoring” requirements, must work. *Id.* at 50. So, it appears that on his view balancing does not necessarily enter the inquiry at the level of determining what counts as a “triggering” right—that is, a right that triggers heightened scrutiny. And elsewhere he has been clear that “in American constitutional law, rights

the following two conclusions are enough to help situate Roberts' response to Gorsuch. First, there is a plausible account of how the Court can approach much of rights adjudication that does not require balancing of competing interests. So, any worry that rejecting balancing would have broad unwelcome implications for rights adjudication would need further support. Second, the idea that the Dormant Commerce Clause ought to involve balancing is avoidable in a way that balancing in the rights context may not be if rights are grounded in particularly weighty *interests*.⁴¹ Balancing under *Pike* is merely a judicial artifact. The Dormant Commerce Clause concerns the structural distribution of decision-making authority in our constitutional system. It does not, as rights do on some conceptions, reflect any *individual* interests.⁴² If rights require balancing individual interests against state interests, then because courts have to adjudicate rights, balancing would come along for the ride. I can see no such analogous argument with regard to the Dormant Commerce Clause. I mention this as a way of prefiguring where we will go in Section II. As we shall see, the fight over balancing can obscure a more straightforward legal question; given the role the Dormant Commerce Clause plays in our constitutional scheme, is a balancing test doctrinally proper? I think the answer is no. But this is not because of a debate in moral theory about the possibility of balancing

typically do not operate, as we often assume, as conceptually independent constraints on the powers of government." Richard Fallon, *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 344 (1993).

41. Justice Scalia has made a similar observation, noting that "We sometimes make similar 'balancing' judgments in determining how far the needs of the State can intrude upon the liberties of the individual . . . but that is of the essence of the courts' function as the nonpolitical branch. Weighing the governmental interests of a State against the needs of interstate commerce is, by contrast, a task squarely within the responsibility of Congress." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988).

42. For an example of a possible instance of mistakenly seeing the Dormant Commerce Clause as vindicating individual interests, see Justice Alito's concurrence in *Mallory v. Norfolk Southern R. Co.*, 600 U.S. 122 (2023). He begins by rightly identifying the Dormant Commerce Clause as concerned with structural power relations between the states "the Constitution restricts a State's power to reach out and regulate conduct that has little if any connection with the State's legitimate interests." *Id.* at 154 (Alito, J., concurring). But he then slips into an individual rights-based frame. "[T]he right of an out-of-state corporation to do business in another State is based on the dormant Commerce Clause. . . ." *Id.* at 158–59 (Alito, J., concurring). I mention this here only to highlight a temptation to think of the Dormant Commerce Clause in terms of individual interests that have their constitutional home, if anywhere, in a rights-based analysis. That is a temptation that should be resisted.

“incommensurables.” Indeed, for purposes of the Dormant Commerce Clause, the Court should entirely avoid taking *any* stand on that kind of debate.

II. INCOMMENSURABILITY, INCOMPARABILITY, AND RATIONAL CHOICE

A. CLEARING THE TERRAIN

What does it mean to say that two things are incommensurable, and what might Justice Gorsuch have meant when he invoked that term? One of the problems with invoking “incommensurability” as a reason to resist judicial action is that the philosophical debate over incommensurability is, to say the least, a bit of a quagmire. In this subsection, I run through a few terminological and conceptual points to help situate the relevance of judicial claims about “incommensurability.” Then, in the next subsection, I apply those distinctions to the legal issues at play in *Pike* balancing. The goal here is to: (1) highlight how *controversial and complicated* the debate over incommensurability is; (2) to urge caution about insisting on a particular view about the issue within a judicial opinion; and (3) to highlight how many other deep philosophical issues come up when one takes a stand on the issue of incommensurability.

For starters, there is an important terminological issue regarding the use of the term “incommensurability.” Sometimes that term is used to suggest only that there is no common unit of measure. That is, when comparing two goods, there is no further common value-measure that can be used to assess the relative value of each.⁴³ For instance, we cannot assess the comparative

43. See James Griffin, *Incommensurability: What's the Problem*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 35, 35 (Ruth Chang ed., 1997) (“What nearly all of us, on reflection, mean by the ‘incommensurability’ of values is their ‘incomparability’—that there are values that cannot be got on *any* scale, that they cannot even be compared as to ‘greater,’ ‘less,’ or ‘equal.’ Sometimes, though, we use the word in considerably looser ways. We use it to mean that two values cannot be got on some particular scale, say, a cardinal scale allowing addition.”); Ruth Chang, *Introduction*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra*, at 1, 1 (“[T]here are two main ideas that pass under the ‘incommensurability’ label. One is that incommensurable items cannot be precisely measured by a single ‘scale’ of units of value . . . [o]ther writers have moved away from [this] idea and have focused instead on *incomparability*, the idea that items cannot be compared.”).

value in terms of some measure such as dollars, or degree and intensity of pleasure, or any such other single supposedly quantifiable thing.⁴⁴ Other times, however, the term “incommensurable” is used to mean that there is no positive value-relation between the goods. One is not better than, worse than, or equal to the other, nor do they exhibit some other positive value relation such as being “on a par”—a concept to which I shall return shortly.⁴⁵ To put it another way, on that conception of “incommensurability,” there is no sensible evaluative comparison between the two goods. Some philosophers have started calling the latter sort of phenomenon “incomparability.” And it is important to note that accepting incommensurability in the stipulated sense does not entail incomparability.⁴⁶ That is, two goods might be comparable such that we can say that one good is better or preferable or more choice-worthy, under the circumstances, without there being any common scale or unit of measure which explains why it is reasonable to choose it.

This should not seem controversial to anyone not in the grip of a particular (calculative) theory of rationality. After all, we routinely make apparently rational choices without it being the case that there is some common measure or scale that guides the choice. We say, for instance, that there is more reason to look after an ailing spouse than to grab a beer with a work-colleague, or that there are stronger reasons to spend the afternoon reading than to spend it counting the petunias in the garden, or that all things considered a career as an academic would be better for a

44. I do not mean to insist that degree and quantity of pleasure can be measured on a single scale. That itself is a controversial conclusion, especially if one countenances different kinds of pleasures—e.g., “higher” and “lower” ones. See JOHN STUART MILL, *UTILITARIANISM* 8 (George Sher ed., 2d ed. 2002) (1861) (“It would be absurd that, while in estimating all other things quality is considered as well as quantity, the estimation of pleasure should be supposed to depend on quantity alone.”).

45. The idea that there is a separate value relation of being “on a par” which is distinct from being equal comes from Ruth Chang. Ruth Chang, *The Possibility of Parity*, 112 *ETHICS*, 659, 661 (2002) (“I want to suggest that there is conceptual space in our intuitive notion of evaluative comparability for a fourth value relation of comparability that may hold when ‘better than,’ ‘worse than,’ and ‘equally good’ do not. I call this relation ‘on a par.’”). I will explain the distinction between equality and being “on a par” shortly.

46. For a summary of the reasons why, see Ruth Chang, *Against Constitutive Incommensurability or Buying and Selling Friends*, 11 *PHIL. ISSUES* 33, 51–52 (2001).

particular person than a career in big-law. And in making such decisions, most of us were not pointing to any common unit of measure to explain or justify why the one thing is more choice-worthy than the other. Assuming that these commonplace judgments are not somehow systematically mistaken, then it must be possible for one thing to be rationally preferable to another without there being some common measure that explains why this is so.⁴⁷ For the remainder of this Essay, I will default to using the term “incommensurable” to refer to cases where there is only no common scale that could be used to rank the objects of choice. I will use the term “incomparable” to refer to those cases where there is no positive value relation between the objects of choice.

Second, it is important to clarify how value incomparability might relate to rational decision-making. It might be tempting to assume that if two goods are incomparable, then there is no rational basis for choosing between them. But that is controversial.⁴⁸ Indeed, the assumption will only be sound if the only rational basis for choosing between two goods is their *comparative value*. And there might be other rational bases for choosing one thing over another. For instance, choosing one thing rather than another might be required by a duty.⁴⁹ It might be that the goods associated with providing an educational experience to my child and providing a random stranger with a novel travel experience are incomparable. That is, there is no sense in which one is better than the other, nor are they equal (nor, as we shall see, are they on a par). But if forced to choose between investing in my child’s education and the stranger’s travel, I can rationally choose my child’s education because I have a duty to my child that

47. Indeed, incommensurability, understood in terms of a lack of common measure, is facially so ubiquitous that it seems impossible to deny. As Cass Sunstein has commented, “it is closer to the rule than the exception.” Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 798 (1993).

48. See Ruth Chang, *Comparison and the Justification of Choice*, 146 U. PENN. L. REV. 1569, 1587 (1998) (“Deontologists, for example, hold that the noncomparative fact that x-ing is my duty provides a justifying ground for choosing x. That x-ing is my duty appeals to a norm-based standard, a rule about how one should behave in certain circumstances, not essentially a feature of the alternatives.”).

49. See also Elizabeth Anderson, *Practical Reason and Incommensurable Goods*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 43, at 90, 90 (rejecting the view that “value judgments guide rational choice only through the principle that one must choose a good better than or equal in value to any alternative”).

I do not have to the stranger. It is important to emphasize that in that sort of case, we are not really “balancing” or “weighing” competing values. Rather, the process of reasoning is that we have a duty to do one thing, and no duty to do another, and so we ought to do the one rather than the other.⁵⁰ As Ruth Chang explains, some acts might be justified by “norm-based standards” that is, rules about “how one should act, feel, intend, and so on” a view that she rightly notes is typically associated with deontological forms of ethics.⁵¹ Suffice it to say, however, that if there are such norm-based standards, the decisions they prescribe will not be based on any *weighing* of competing values.

In a similar vein, Elizabeth Anderson has argued that incomparability (she says “incommensurability”) presents no problem for rational choice.⁵² According to Anderson, the

50. This mode of reasoning would, of course, hinge on the idea that there are duties that not themselves grounded in the ways in which acts satisfying those duties comparatively promote or maintain certain values. And of course, we might find analogous concerns to those about comparability in cases where duties conflict, if, indeed, duties can conflict.

51. Chang, *supra* note 48, at 1587. Chang grants that duty-based norms would provide non-comparative grounds for choice, in a sense, but argues that rational choice must still ultimately be comparative in an “indirect” sense. *Id.* at 1587–91. On her view, the ground of a justified choice could be non-comparative—e.g., that doing such and such is my duty—but there is an additional comparative fact that enables that ground to have the justifying “force” that it does—namely, that doing this rather than that is at least as good at satisfying my duty. To motivate this idea, she claims that there can be choice situations where one alternative better satisfies a duty than another. For instance, if I promise a friend to take them out to show them a good time, and the first of two alternatives is more fun than another, then the first alternative better satisfies the duty arising from the promise. *Id.* at 1590. For this sort of argument to work, though, we would have to think that acts can satisfy duties in degree. And it is not clear that they do. In the sort of example Chang mentions, one could say that both alternatives equally satisfy the duty to show the friend a good time. The choice between the two then hinges not on better satisfying a duty, but on a separate criteria that is actually comparative—the degree of fun that each alternative would provide. Thus, one could still preserve the idea that satisfying a duty justifies some choices in a non-comparative manner.

52. Sadly, I am going to give short shrift to her rather nuanced arguments, but my aim is merely to illustrate the general character of the debate to establish what is at stake in claiming that the Court cannot decide because the goods are “incommensurable.” Note that Gorsuch’s rejection of balancing is compatible with an Anderson-type view. He could maintain that there is no evaluative basis for preferring one thing to another, and hence balancing does not make sense. But nevertheless, California could still rationally decide that practical reason dictates not supporting a trade that inflicts avoidable suffering on sentient organisms. But if that is how he is thinking about things, one would have expected a rather different opinion.

prevailing (and she thinks erroneous) account of rational choice has it that to choose rationally between two goods is a matter of first assessing the comparative value of each, and then choosing the one that is more valuable.⁵³ On this view, an account of value is conceptually prior to an account of practical reason; what is reasonable to choose requires first assessing what is valuable. Anderson thinks this sort of view is wrong on two counts. First, value judgments may plausibly guide reason in ways other than merely optimizing value. Second, value judgments are not independent of practical reason—they are generated by it; to be valuable in some respect is dependent on what would be practically rational, and not the other way around.⁵⁴ As Anderson puts the latter point “[a] thing is valuable if it meets a standard we rationally endorse for guiding a favorable attitude [e.g., respect, admiration, honor, affection, pride, benevolence] toward that thing.”⁵⁵ So, on Anderson’s “pragmatist” “expressive” theory of rational choice, the evaluative question regarding the proper way of conceiving the value of different goods depends on *first* answering a normative question about the attitudes that it is proper to take towards those objects. This way of thinking about things allows Anderson to adopt an interesting account of what it means for two goods to be incomparable. On her view we should always ask “what practical attitude or action-guiding function claims of [comparability or incomparability] can serve.”⁵⁶ For Anderson, two goods are incomparable, then, just in case there is no point to comparing them.⁵⁷ And so, almost by definition, incomparability does not present any *problem* for practical rationality; if there is no point in such judgments, not being able to make them is not really a problem. In any event, Anderson’s model, if successful, gives us an account of how rational choice between two goods can be possible without that choice being contingent on a prior comparative weighing of value. Indeed, the whole point of her “pragmatist” approach is to reject the assumption that rational decision-making is a matter of comparatively weighing the value of alternatives. It is worth noting at this juncture that it is something like Anderson’s model that gets overlooked by the Court’s insistence on balancing. And

53. Anderson, *supra* note 49, at 90.

54. *Id.* at 90–93.

55. *Id.* at 94.

56. *Id.* at 98.

57. *Id.* at 99.

it is thus worth asking whether that is a result that we want to endorse under the Commerce Clause. As I explain shortly, I do not think it is.

Third, over a series of papers Ruth Chang has defended the view that there is a fourth positive value relation in addition to better than, worse than, and equal to, namely being “on a par.”⁵⁸ Two things are on a par just in case one is neither better nor worse than the other, and they are not equally good, but, unlike incomparables, they do stand in some positive value relation to each other. One might reasonably wonder why we *need* a fourth positive value relation; why not just say that the goods are incomparable? The argument that there must be some fourth positive value relation comes in two steps. First is what has come to be called the small improvements argument.⁵⁹ It has the following form. Imagine two goods, *A* and *B*, about which one is inclined to say there is no reason for preferring the one over the other—imagine choosing between a modern Volvo station wagon and a well-preserved vintage VW Bus. The former is safer, more fuel efficient, faster, and more reliable. The latter is cool. If the only basis for saying that there is no ground for choosing *A* over *B* or *B* over *A* is that they are equally good, then it would follow that if we dropped the price of the VW by ten dollars, we would have reason to choose it rather than the Volvo. But a common response in such cases is to still be torn regarding the decision. And if that is a rational response,⁶⁰ then it cannot be the case that *A* and *B* were equal in value prior to the price drop.⁶¹ This means, at the very least, that the three value relations—better than, worse than, and equal too, cannot cover the ground.

58. Chang, *supra* note 45, at 661; Ruth Chang, *Parity: An Intuitive Case*, 29 *RATIO*, 395, 396 (2016); Ruth Chang, *Hard Choices*, 3 *J. AM. PHIL. ASS'N*, 1, 2 (2017) [hereinafter Chang, *Hard Choices*].

59. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 328–29 (1986) (providing a version of the small improvements argument).

60. I am not going to argue here that it is a rational response. Suffice it to say that any view of rationality that denies this conclusion would require a radical revision of our prevailing understanding of how rational choice works. That is something we should resist if we can. And, fortunately, we can.

61. This is admittedly somewhat controversial. Some have argued that we can capture Chang’s intuition with the idea of epistemic deficits, or vagueness. John Broom, *Is Incommensurability Vagueness?*, in *INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON*, *supra* note 43, at 67, 67 (arguing that a kind of conceptual vagueness can explain the phenomenon); Chang, *Hard Choices*, *supra* note 58, at 3–5 (considering and rejecting the idea that ignorance alone can explain the phenomenon).

The second step is needed because the small improvements argument is equally compatible with the idea that the goods are incomparable. Indeed, Joseph Raz has offered the small improvements argument as a reason to think that there are incomparable (again, he says “incommensurable”) goods.⁶² Chang offers at least two possible reasons for thinking that there must be a fourth positive value relation in addition to better than, worse than, and equal to (remember, incomparability is the *lack* of any positive value relation between two goods). First, she worries that if the goods are incomparable, then any choice between them is not just arbitrary, but arational. To choose between two options when they are on a par is to make a judgment about their comparative value and to conclude that the two items normatively relate in such a way that one is not better than or worse than the other. To choose between incomparables, in contrast, is to choose on the basis of no judgment about the positive value relation between the objects of choice.⁶³

Second, she provides the following “chaining” argument.⁶⁴ That argument is premised in the idea that if you have two comparable goods, a small improvement of one cannot by itself make the goods incomparable. The argument proceeds as follows. Pick two artists—Michaelangelo and Mozart, say, of which one might be inclined to say that they are incomparable with regard to artistic creativity. One might be inclined to say that because of the vast differences between visual and musical art. Now imagine a third artist, “Talentlessi,” who happens to be a very bad sculptor. Any reasonable person would agree that either Michaelangelo or Mozart is more artistically creative than Talentlessi. But now imagine another sculptor who is incrementally better than Talentlessi with regard to creativity (and hence comparable to him) and repeat this process until you

62. RAZ, *supra* note 59, at 328–29. Raz suggests that as between a cup of tea and a cup of coffee, neither has more value. Warming the tea would make it slightly better, but it would not follow that the warmed tea is now better than the coffee. But he infers from this that the two goods are incomparable. It is better to just admit that, standing alone, the small improvements argument shows that things can be either incomparable or on a par. It does not differentiate between those two possibilities.

63. Chang, *Hard Choices*, *supra* note 58, at 9–10.

64. Chang, *supra* note 45, at 673–74 (2002). I am admittedly giving short shrift to some of the nuance of a complicated argument. But again, my goal here is just to illustrate the contours of the debate so as to highlight just how much is implicated by an assertion of incomparability.

have a range of sculptors from Talentlessi to Michaelangelo, of whom one wants to say that the next is just a bit more creative than the previous one.⁶⁵ Chang's intuition is that it does not make sense to say that some small step along this continuum yields a change from two comparable goods to two incomparable goods. But that means that with regard to creativity, if Mozart is comparable to Talentlessi, then he is comparable to someone just a bit better than Talentlessi. That result iterates. So, it turns out that Mozart is, in fact, comparable to Michaelangelo.⁶⁶ But, Chang says, we still agree that Michaelangelo is not better with regard to creativity than Mozart, or worse, or equal. And so, there must be a fourth positive value relation—being “on a par.”

Taking stock, then, there are at least three different ways in which the choice of one of two options might be rational. First, the options could be commensurable in the sense that there is some common unit of measure that identifies which is better than the other. It might be that profitability is all that matters to the decision and one thing is more profitable than another, for instance.⁶⁷ This sort of commensurability is, I think it is fair to say, relatively rare outside of certain constrained decision-contexts which artificially limit the range of considerations that might matter. Games may present one such context.⁶⁸ Second, the options might be incommensurable but nevertheless comparable such that we can say that one is evaluatively preferable to another even absent some common unit of measure that grounds that result. For instance, one might conclude that it would be better to spend the afternoon reading a novel than watching daytime television. Third, the options might be incomparable in that there is no positive value relation between them. But nevertheless, there might still be some basis for choosing one over another if, for instance, so choosing is what is prescribed by a rule about

65. *Id.*

66. It is worth noting that not everyone accepts the chaining argument. See Henrik Andersson, *Parity and Comparability—a Concern Regarding Chang's Chaining Argument*, 19 *ETHICAL THEORY & MORAL PRAC.* 245 (2016).

67. For the record, I am doubtful that there are *any* choice situations where all that matters is profitability. Everyone has ethical obligations that affect all exercises of practical reasoning.

68. But even that is controversial. One might be tempted to say that in playing monopoly all that matters is the accumulation of monopoly money. But then consider the range of other considerations that might intervene in the right context. If one is playing with a child, for instance, one might try to further the child's enjoyment by not accumulating monopoly money as quickly as possible.

“how one should act, feel, intend, and so on.”⁶⁹ Finally, it is worth noting that goods might be *on a par*, in which case they are comparable, but there is no evaluative basis for choosing one over the other. To be sure, it is controversial whether any particular case (or indeed any case) falls into any one of these categories. The point here is merely to illustrate different *possible* bases for rationalizing a choice. Whether any actual choice situations fit any of these categories is a separate matter.

B. APPLYING THE FOREGOING TO THE ARGUMENTS IN *ROSS*

How does all of this bear on the arguments in *Ross*? First, it is worth noting that Gorsuch’s skepticism about *Pike* balancing requires that the goods are incomparable, and not just incommensurable, or on a par (or equal, for that matter). If the goods are comparable and merely incommensurable, then the idea that the Court cannot make a decision between them is totally unmotivated. Roberts’ view would be obviously correct. Making rational decisions between incommensurable but comparable goods appears to be a ubiquitous feature of human life. And there is little reason to think that “balancing” different kinds of values is somehow distinctly beyond the capacities of a court, or distinctly inappropriate for a court just because the Court must choose between mere incommensurables.⁷⁰

Second, one ought to resist the urge to be too cavalier in insisting that two values are genuinely incomparable. As David Luban has convincingly argued, the idea that two values might be incomparable such that we cannot reasonably choose between some amount of one value and *any* amount of another is rather counterintuitive, as least in a wide range of cases.⁷¹ It would mean,

69. Chang, *supra* note 48, at 1587.

70. Indeed, as Jeremy Waldron has noted, there is a perfectly good colloquial use of “balancing” which refers generally to this process of thinking through the comparative priority of two values, without assuming that this process is done with reference to some kind of common scale. Jeremy Waldron, *Fake Incommensurability: A Response to Professor Schauer*, 45 HASTINGS L.J. 813, 819 (1994).

71. David Luban, *Incommensurable Values, Rational Choice, and Moral Absolutes*, 38 CLEV. ST. L. REV. 65, 75–76 (1990); *see also* Alexy, *supra* note 9, at 136–40 (describing the German Court’s “proportionality review” as hinging on an assessment of whether some supposed infringement of a right was serious or minor, and whether the state’s interest was serious or minor. The Court would find state action “disproportional” when the interest protected by the state was

for instance, that we could not rationally choose a great gain with regard to one basic value over a small gain with regard to another. We cannot say, for instance, that it would be unreasonable for a student athlete with no intention to go pro to train extra, yielding marginal gains in athletic performance at the cost of seriously interrupting her studies.⁷² Or that it would be rational for one to follow one's doctor's orders to get sufficient sleep after a major surgery, instead of staying up all night reading a new journal article. Or to use an example with broader legal resonance, we cannot say that it would be unreasonable to prefer a small gain of security at the cost of a great amount of liberty, by, for instance, imposing a nation-wide curfew at dusk. Yet few would think such a decision made any sense. The point is that we appear to make decisions all the time about choices like these. And not only that, we criticize those who make the wrong choice, as, for instance, insufficiently valuing their education, or as not taking their health seriously enough, or as misunderstanding the value of liberty. There may be reasons to object to a court overturning the judgments of legislatures. But there is little reason to think that such concerns take on a special kind of salience when what is at stake is a contest between merely incommensurable—as opposed to incomparable—goods. So, there is reason for caution in rejecting the application of *Pike's* balancing test on grounds that the goods are incomparable.

Third, it turns out that it is rather hard to argue for the view that two goods are genuinely incomparable. Indeed, Chang has argued that once we have the concept of two goods being on a par, the cases that might motivate a judgment of incomparability are no longer convincing.⁷³ I have rehearsed some of the arguments above, and I do not want to belabor the issue, but it is worth taking

comparatively minor and the burden was substantial. This sort of view preserves a kind of rationality to comparative assessment of plural values without requiring any sort of fine-grained comparison that, arguably, would not be possible).

72. Luban, *supra* note 71, at 75–76.

73. For instance, Raz argues that the test for incommensurability of two goods is the failure of transitivity. RAZ, *supra* note 59, at 325. But, of course, goods that are on a par also exhibit intransitivity, as the small improvement argument demonstrates. See Chang, *supra* note 45, at 665 (“[P]arity deals a potentially fatal blow to many of the existing arguments for incomparability . . . if there are four and not three value relations that span the conceptual space of comparability between two items, then any argument that shows only that the trichotomy fails to hold falls short of establishing incomparability.”).

a brief detour through what are arguably the strongest arguments for incomparability to see why even the best case is still rather contentious.

To that end, consider just the debate about whether it is appropriate to treat friendship as incomparable with money.⁷⁴ The parties to this debate agree that in the mine run of cases, for those who value friendship, friendship wins. But they differ in the analysis. One side argues that friendship and money are “constitutively” incomparable.⁷⁵ For instance, Joseph Raz argues that it is constitutive of friendship that friendship is treated as being incomparable (or in Raz’s terminology, incommensurable) with money.⁷⁶ Does this mean that such persons simply flip a coin in deciding in each case whether to choose friendship or money? No. Because it is also constitutive of friendship that one choose friendship in any case where friendship and money collide.⁷⁷ So, what we are left with is that those who would be friends must choose friendship over money. Why, given that friendship wins over money, is this an incomparabilist view? Well, note the conditional nature of the conclusion here. Raz thinks that there is no rational basis for criticizing someone who chooses money over friendship. Clearly, they are a bad friend, but being good at friendship is rationally optional in the sense that it is one of many lives one might reasonably choose.⁷⁸ And there is no rational basis for insisting that one be a friend rather than money-focused.⁷⁹

74. I note that the discussion here will be unfortunately brief and gestural with regard to a nuanced and complex set of arguments. My aim here is simply to illustrate the (rather complex) nature of the debates and not to resolve them, or even move them forward.

75. RAZ, *supra* note 59, at 352 (“Only those who hold the view that friendship is neither better nor worse than money, but is simply not comparable to money or other commodities are *capable* of having friends.”).

76. *Id.*

77. *Id.* at 353 (“Constitutive incommensurabilities are not merely cases where reasons run out. They mark areas which are out of bounds for anyone interested in the personal relations and the pursuits of which they are constitutive.”).

78. I do not endorse Raz’s conclusion, but to motivate it a bit, consider a different sort of example. People do choose, for instance, to not get married or at least to delay marriage for the sake of furthering their career. They give up something that is good—the friendship associated with marriage, but in exchange for something else that is good—a meaningful and satisfying career. We might reasonably fault someone who *is* married for being a bad spouse when they privilege their career over their marriage. But it is much less clear that we can reasonably fault them if they decide to opt out of marriage. Indeed, given their singular commitment to their career, we might want to say that this choice is all for the good.

79. RAZ, *supra* note 59, at 353 (“Those . . . whose single-minded pursuit of a

The alternative view has it that friendship and money *are* comparable. It is just that friendship (almost always?) wins. As Don Regan notes “I think most of us do regard people who forgo friendship for money as acting wrongly and unreasonably.”⁸⁰ And as Ruth Chang observes, if “one has all the basic necessities of life but no personal relations and . . . one has an equal chance of success in making close friendships as in acquiring mere market goods [then] [i]f one has a choice between pursuing friendship and pursuing the creature comforts of mere market goods, one should choose to pursue friendship. Indeed, anyone who appreciates the intrinsic values of friendship and mere market goods would in these circumstances go for friendship.”⁸¹

For my part, I am somewhat ambivalent about this debate. Where I am sympathetic to Regan and Chang is in my skepticism about too cavalierly insisting that two goods are incomparable, at least when conjoined with the insistence that there can be no rational basis for choosing between incomparable goods. And it is precisely this conjunction of claims that seems to have motivated Justices Gorsuch and Barrett in their rejection of *Pike* balancing. Regan rightly notes that many of the supposed examples of incomparability—the choice of a life of a clarinetist as opposed to the life of a lawyer—are things over which people agonize. And for that agonizing to be rational, it has got to be because the choices are rationally comparable (even if it is hard or practically impossible to rationally pick one over the other because of the lack of clarity involved in weighing such values).⁸² It makes sense to agonize if one thinks there is a right answer—even if it will elude one’s grasp. It does not make sense to agonize if one is convinced that there is no good reason to pick one thing over the other.

With regard to *Ross*, and to the kinds of arguments members of the Court might want to make about “balancing” tests—both in the context of the Dormant Commerce Clause, and elsewhere—I just want to highlight that *all of this* is really rather contentious. It is also largely outside the expertise of the Court.

career led them to put a price on and human association lost the capacity for friendship. They are . . . incapacitated, but they did not, just by doing so, act against reason.”).

80. Donald Regan, *Authority and Value: Reflections on Raz’s Morality of Freedom*, 62 S. CAL. L. REV. 995, 1069 (1989).

81. Chang, *supra* note 46, at 46.

82. Regan, *supra* note 80, at 1059.

Broad proclamations about incommensurability or incomparability may seem like a good idea in the abstract. But, if it can, it is probably better for the Court to avoid having the reasoning of an opinion hinge on highly controversial issues in value theory and rational choice theory.

Fourth, the distinction between goods that are “on a par” and goods that are incomparable may seem like an idle one upon which nothing important hangs. After all, in either case is not the upshot that there is no evaluative basis for picking one good over the other? But Gorsuch’s reasoning in *Ross* demonstrates why the distinction matters. Consider how different his opinion would have to be if the goods were on a par. In that case, he would similarly have to endorse the positive claim that there is no evaluative settlement between the competing goods such that a judge (or anyone else) should prefer one to another. But the path to that conclusion would be different. It would entail that he had already settled what the positive evaluative relation between the competing goods was—they are on a par. And that conclusion is just facially inconsistent with his paean to comparative institutional competence or to proper judicial role, or to the lack of judicially manageable principles.⁸³ To say that the goods are on a par *just is* to make a comparative evaluative assessment of them. And that assessment would entail that under the *Pike* standard there is no basis for overturning the law. Saying that the goods are on a par is not a reason to reject *Pike* balancing; it is just an application of it. If animal welfare is on a par with the economic burdens then by definition it is not the case that the economic burdens outweigh (much less substantially outweigh) the animal welfare benefits. Justice Gorsuch’s claim, then, should not be that he cannot decide, but rather that he has already decided.

Fifth and finally, it is worth pausing to note that the idea that animal welfare and economic concerns are incomparable such that there is no rational evaluative basis for choosing between them is massively counterintuitive. Could it possibly be the case that there is *no* rational basis for choosing to incur even substantial economic costs in order to avoid a substantial degree of animal suffering? Those of us who live with non-human animals would be surprised to hear it, given the vet bills that we have almost certainly paid, often out of a sense of moral necessity, and

83. Nat’l Pork Producers Council v. Ross, 598 U.S. 356, 381–82 (2023).

often with some degree of sacrifice. So, those of us who feel compelled to pay our vet bills are committed to thinking either that the values in question are, in fact, comparable, or that practical rationality is not just a matter of weighing comparative alternatives. In *Ross*, it is easy to formulate many reasons to adopt the California policy despite the economic cost. For instance, failure to do so would be callously indifferent to animal suffering.⁸⁴ Something like that seems to have been the judgment of California voters. So, someone who takes animal welfare seriously could, indeed, almost certainly would, believe that there is a rational basis for choosing animal welfare over economic gain. Of course, there could still be a familiar substantive dispute about the force of the reasons for making a particular decision—to stand up for animal welfare, say. Maybe the California voters are wrong on the merits. But that is a rather different judgment from saying that there *are no merits*, which is what is entailed by the conjunction of the claim that rational choice is comparative and the claim that the goods in question are incomparable. For now, I just want to highlight that Gorsuch’s bald assertion that animal welfare is incomparable with economic benefits is rather counterintuitive and, at least *prima facie*, appears to implicitly be rejected by a great many people in their everyday moral judgments.

III. THE REAL REASON TO REJECT *PIKE* BALANCING

In any event, my aim here is not to *resolve* the debate about comparability. Again, the comments in the preceding section merely aimed to: (1) highlight how *in the weeds* the debate over incomparability is; (2) to sound some cautionary notes about cavalierly insisting on a particular view about the issue within a judicial opinion; and (3) to highlight how many other deep philosophical questions arise when one tries to sort it out.⁸⁵ Put

84. Assuming, of course, that California’s factual assumption about confinement and animal well-being is true, something the pork producers seem to have challenged. *Id.* at 400 (Roberts, C.J., concurring) (noting that the pork industry claimed that “group housing” would produce worse health outcomes for the pigs).

85. Indeed, there is even a meta-debate about whether we *ought* to adopt an attitude of commensurability or incommensurability. For instance, Fred Schauer suggests that claims of incommensurability of value should be understood as *ascriptive*. That is, they are not descriptions of the nature of the values in question but rather, reflect normative conclusions about how to deal

simply, asserting that two goods are incomparable involves some pretty heavy-duty moral theorizing. And drawing the inference that if two goods are incomparable then there is no basis for the Court (or anyone else) to choose between them, requires even more.⁸⁶ That conjunction of claims—that two goods are incomparable and that rational choice between goods requires comparability assumes answers to *at least* the following questions: (1) To what extent does rational choice between alternatives require guidance by comparative evaluative assessments of those alternatives?⁸⁷ (2) What is the comparative priority of practical reasoning and evaluative judgment—that is, is good practical reasoning a matter of reflecting prior evaluative facts, or is it in some sense autonomous from those evaluative judgments.⁸⁸ (3) To what degree are normative judgments, including moral ones, conditional as opposed to categorical? The point here is that for the Supreme Court to weigh in on questions like this is, to say the least, wacky. It is not really their business (or within their competency) to take a stand on foundational questions in moral/normative theory about which trained professionals—philosophers—can and do disagree. And if the Court can avoid it, it should.

So, to the extent that Gorsuch is weighing in, he's doing something that he has good reason not to do, if it can be avoided. But note that the same charge could apply to the proponents of *Pike* balancing. They too are taking a stand on controversial issues in value theory by insisting that competing goods can be balanced.

with those values. And he suggests that we might assess commensurability claims in terms of whether adopting an attitude of treating values as commensurable (or incommensurable) leads to better moral results, whether or not such claims are, strictly speaking, true. Frederick Schauer, *Instrumental Commensurability*, 146 U. PENN. L. REV. 1215, 1221–27 (1998).

86. Again, I do not think that Gorsuch and Barrett *have* to draw this latter inference. But the point I will pursue in this section is that if they do not draw that inference, then their argument against *Pike* balancing would have to be different, and would not in any way hinge on alleged incomparability. That is the kind of argument that I attempt to lay out in this section.

87. Compare Chang, *supra* note 48, 1571–72 (defending the view, against Anderson and others, that “comparative fact[s] about the alternatives determines which alternative one is justified in choosing”), with Raz, *Incommensurability and Agency*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 43, at 110, 110–13 (assessing arguments that the “will” can decide between incomparable goods).

88. See generally Anderson, *supra* note 49, at 90 (arguing that value judgments should be understood depending on an account of practical rationality and not the other way around).

Again, if they can avoid doing that, then they should. That said, for the remainder of this section, I want to focus on a slightly different issue. The real problem with both *Pike* balancing and rejecting balancing on grounds of “incommensurability” emerges when we think about what either commitment means for state legislation. The general thrust of my argument will be that we must take the doctrinal implications of either Justices Gorsuch and Barrett’s incommensurability framework or the dissenting Justices balancing framework seriously. And then we must ask whether those implications can be squared with a proper view about the institutional role of the Court when it is adjudicating a Dormant Commerce Clause dispute. My conclusion is that *Pike* balancing should be jettisoned because it improperly treats the Dormant Commerce Clause as *limiting* the kinds of moral judgments, and moral-theoretic frameworks, that might underwrite state legislation.⁸⁹

A. THE DOCTRINAL PROBLEM WITH ASSERTIONS OF INCOMPARABILITY

Let’s first consider what it would mean to assert: (1) that animal welfare and burdens on commerce are incomparable, and (2) that rational choice between the two would require evaluative comparison. The implication of those two claims is that any choice between animal welfare and avoiding economic burdens would be arbitrary. And that would be true whether it was the Court, the California legislature, or the United States legislature that was making the decision. There would equally be no reason for *a legislature* to choose one of these values over the other. So, if the federal government were to legislate to disallow laws like California’s on the ground that such laws were too disruptive to commercial relations, then that legislation would also be arbitrary. To my mind, the Court should avoid adopting a contentious theoretical framework that makes a wide range of commonplace legislative judgments out to be rationally unmotivated. It is one thing to think that a particular judgement about what sorts of considerations outweigh others—about what benefits justify what costs—is mistaken. That is common in moral debate and deliberation. It is another thing altogether to adopt a

89. This is not to say that there are not limits on the kinds of reasons that might legitimately motivate a state. The anti-protectionist reading of the Commerce Clause that the entire Court seems happy to adopt is one such limit.

framework that means that all such debate and deliberation is confused. Insisting that these goods are incomparable would have the latter result.⁹⁰

Indeed, in constitutional adjudication, leaning too heavily on the idea that there is *widespread* incomparability amongst values would lead to certain further, perhaps unwelcome, results. At least it will do so if is conjoined with a framework of assessment that looks to the comparative weight of various values and not to categorical norms governing the propriety of state action. Consider the occasionally invoked strict scrutiny standard in rights adjudication that requires the state to demonstrate a compelling reason or interest for its policies.⁹¹ If relevant values that would justify the policy are incommensurable with other costs or burdens that the policy imposes, that might suggest that the state can *never* satisfy that standard. At least, it can never satisfy that standard if compellingness is understood in terms of comparative weight. If *A* and *B* are incomparable and any choice between them is just a matter of will and not in any way rationally compulsory, it can hardly be the case that there is a compelling interest in choosing *A* over *B*. Put another way, an interest on the part of the state that is just one of many things the state might arbitrarily decide to pursue given the various incomparable values that are at stake hardly seems like it could be a *compelling* interest. Of course, all of this can be avoided if we adopt a frame for rights-adjudication that adopts a more categorical approach asking not about “the *weight* of the state’s interest, but the *nature* of that interest.”⁹² But that essentially jettisons the “balancing” framework.⁹³

B. THE DOCTRINAL PROBLEM WITH BALANCING

So, the insistence that the values at stake in *Ross* are incomparable and hence there is no rational way to choose between them is potentially insulting to states and to voters who

90. Again, if conjoined with a rejection of a view like Anderson’s.

91. Consider, for instance, the dispute over whether diversity is a “compelling interest” for purposes of the Equal Protection Clause that could justify the use of racial classifications in school admissions. *See Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023).

92. Pildes, *supra* note 9, at 749.

93. As the saying goes, one person’s modus ponens is another’s modus tollens. Some might accept that the values are incommensurable and use that as a good reason to reject the entire framework of strict scrutiny.

might have thought they were rationally making a decision between animal welfare benefits and economic costs. But the implications of the alternative that insists on balancing in the context of the Dormant Commerce Clause is far worse. Explaining why will clarify why I think Gorsuch got to the right result—the Court should not balance in this case—but for the wrong reasons. Indeed, we might go a bit further and say that for purposes of the Dormant Commerce Clause, balancing tests are generally inappropriate as a check on state regulation that truly aims at moral ends.

To see the problem, let's put ourselves in the position of an animal welfare advocate in California who has decided that she wants her state to express a particular moral view: "we will not be complicit in cruelty to animals." Such a voter might have any of a number of different ways of thinking about that decision. Perhaps she thinks that animal welfare is comparable to economic concerns, just lexically higher ranked such that she is inclined to say that no economic benefit would justify the cruel treatment of animals.⁹⁴ Or perhaps she thinks that there is a categorical moral prohibition on treating animals in a cruel manner. Or perhaps she thinks that treating animals as mere commodities whose production is to be maximized fails to express the proper respect due to sentient organisms that are capable of experiencing pain and terror. More likely, she probably does not have any theoretical view about such matters at all, and just thinks that housing pigs in stalls so small that they cannot turn around is just awful, and, perhaps additionally, that she does not want to be complicit in that sort of thing.

It is a commonplace feature of a certain range of moral judgments that there is *no* merely economic benefit that we would accept in exchange for violating our moral convictions. Questions like "how much money would you accept in exchange for torturing your pet" or "how much would I have to pay you to get you to spit in your grandmother's face" will often (rightly) be met with the response—"I will not do things like that for money"⁹⁵ or

94. See Regan, *supra* note 80, at 1058–59 (noting that a person inclined to say that the value of friendship cannot be compared with money might be best interpreted as saying that friendship is more valuable than any amount of money).

95. See Don Herzog, *Externalities and Other Parasites*, 67 U. CHI. L. REV. 895, 899 (2000) (asking us to consider an "agent who acts on the maxim always to treat others with respect. She doesn't maximize her respect for others subject

(perhaps more rightly) a dirty look. Indeed, there is something deeply unseemly about the offer. We can see this sort of thought reflected in Anderson's point that much of moral life is concerned with the kinds of attitudes that our actions appropriately express under the circumstances.⁹⁶ As she puts it, "[t]he practical role of concepts of intrinsic value is generally to assign a *status*, not a weight, to goods. Intrinsic value judgments tell us to treat goods according to the statuses assigned to them: to act with filial love toward family members, out of friendship for friends, with respect for human beings generally."⁹⁷ And we might add, speaking in the voice of a certain kind of animal welfare advocate, to afford to certain non-human animals the kind of respect that is due to an organism that can have experiences, can feel pain, and can be *terrorized and tormented*. That, such an animal welfare advocate might conclude, requires not treating them as mere commodities.

But now, consider what it means to inflict *Pike* balancing on California's decision. Suppose that California's voters make the kind of categorical judgment that is familiar in lots of moral decisions. With *Pike*, the Court says "hold on a second, for us to allow that judgment to proceed, we need to assess two things—the local interest, and the burdens on interstate commerce and by the way we are going to assess them in terms of weight." We can imagine California voters protesting that they were not really thinking about themselves, or *their* interests. Rather, they were thinking about the norms that are appropriate for the treatment of animals, and their sense that they have a moral obligation to avoid supporting the violation of such norms. And it would not help in the least for the Court to point out that it is putting its thumb on the scale in favor of California; it will only overturn its law if the economic burdens *substantially* outweigh California's interests. After all, California's "interests" were not really the point.

Moreover, we can imagine California voters wondering why the issue should be assessed (second guessed?) in terms of some kind of comparative balancing. Insisting on comparative

to any budget constraints; she insists on meeting a threshold. Nor is she willing to trade off expressions of respect for other goods: she will not use or abuse another agent to make \$5, or \$500, or \$5,000,000. Her respect colors all her dealings with others.").

96. Anderson, *supra* note 49, at 90, 102–04.

97. *Id.* at 103–04.

balancing tests implicitly rules out a certain familiar moral motivation that California voters may well have had. Admittedly our voter *might* think something like “we Californians have an interest of a certain weight in not being complicit in animal cruelty, and, of course, out-of-state producers have a competing interest in avoiding limits on their farming practices, but our local interests are more weighty.” That is rather unlikely. But *whether* that is what she thinks is essentially irrelevant. The problem with *Pike* balancing is that it *only* countenances a thought of that kind. That is, the only thing that it countenances is the possibility that there is a *local interest* of a certain *weight*. And thus, it fails to give a different set of familiar moral motives their due, or to take them seriously on their own terms.

Of course, it is true that a court might legitimately rule out legislation because of the reasons for its adoption. But it does so—legitimately—only if there is a constitutional basis for narrowing the range of motives that might be permissible for legislators or voters to act on. Sometimes there is. It is a commonplace of First Amendment speech clause adjudication that the state cannot prohibit speech simply because it disagrees with it, for instance.⁹⁸ But the problem for *Pike* balancing is that there is no basis under the Commerce Clause for saying that characteristically moral motives should be ruled out. Remember that the Dormant Commerce Clause is just an implication of the Constitution granting to the federal government the authority to regulate interstate commerce.⁹⁹ Its constitutional function is *structural*—that is, relating to the distribution of decision-making authority between the various components of the government.¹⁰⁰ And it should be almost too obvious to mention that, subject perhaps to

98. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994) (“Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.”).

99. *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337 (2008) (“The Commerce Clause empowers Congress ‘[t]o regulate Commerce . . . among the several States,’ . . . and although its terms do not expressly restrain ‘the several States’ in any way, we have sensed a negative implication in the provision since the early days.” (quoting U.S. CONST. art. I, § 8)).

100. For an extended discussion of this point, see Regan, *supra* note 7, at 1110–24.

various rights provisions, states have the authority to pass legislation in service of concerns with a familiar moral quality.

What should we say about the remaining limited role for *Pike* balancing that even Justices Gorsuch and Barrett defend? Remember that they thought there could be some role for a balancing test as a mechanism for “smoking out” state protectionism.¹⁰¹ It is possible that there may be a legitimate role for something like *Pike* balancing as a proxy for prohibiting state protectionism. But that role would mean that *Pike* balancing was merely a data point in a broader analysis, and not something that should be applied as a matter of course whenever a local statute has extra-territorial effects. The fact that a law’s “burdens fall incommensurately and *inexplicably* on out-of-state interests” (emphasis added)¹⁰² is a good piece of evidence that protectionism may be at play. But a rote application of *Pike* would not be a reliable proxy for protectionism. Where there are sufficient indicators that there is no protectionist purpose, as there were in *Ross*,¹⁰³ that should settle the matter. In general, when a state has plausibly claimed that it has a moral interest, and the statute in question seems designed to reflect that moral interest, *Pike* balancing will cease to be a reliable proxy for protectionism. So conceived, *Pike* would not be a doctrinal standard, it would just be a limited-use tool, to be deployed, as all tools, only in specific contexts.

To sum up, both the Justices who would avoid *Pike* on grounds of “incommensurability” and the Justices who would apply *Pike* balancing, make a similar mistake. Both groups would assess California’s law on the basis of a substantive set of moral-theoretic commitments that, at least for purposes of the Dormant Commerce Clause, it is not the business of the Court to have, and which California might also implicitly reject. California may well

101. Nat’l Pork Producers Council v. Ross, 598 U.S. 356, 389 n.4 (2023) (“When it comes to *Pike*, a majority agrees that heartland *Pike* cases seek to smoke out purposeful discrimination in state laws. . . .”); *id.* at 393 (Barrett, J., concurring) (“In most cases, *Pike*’s ‘general rule’ reflects a commonsense principle: Where there’s smoke, there’s fire . . . Under our dormant Commerce Clause jurisprudence, one State may not discriminate against another’s producers or consumers. A law whose burdens fall incommensurately and inexplicably on out-of-state interests may be doing just that.”).

102. *Id.* at 393 (Barrett, J., concurring).

103. *Id.* at 370 (“[petitioners] do not allege that California’s law seeks to advantage in-state firms or disadvantage out-of-state rivals. In fact, petitioners *disavow* any discrimination-based claim. . . .”).

have thought that the relevant animal welfare benefits and economic burdens *are* commensurable and that animal welfare simply wins. Or they may have thought there is a categorical moral prohibition on supporting a system that treats non-human animals as mere commodities. That is something that California, and not the Court, gets to decide. Or at least, the power granted to Congress to regulate commerce does not—absent contrary congressional action—remove California’s ability to make that decision. To put the point another way, for constitutional purposes it is California’s business, and perhaps Congress’s, but not the Court’s, to decide what sort of moral theoretic framework it wants to adopt in passing its legislation.

Thus, we could just as easily turn Justice Gorsuch’s arguments against his claim of incomparability. That is, asserting that two values are incomparable is just as much contrary to proper deference to democratic authority, just as much beyond the competence of judges to assess, just as much beyond the reach of manageable judicial principles, and just as much something that in our political system is better left to the political branches. To insist that the goods are incomparable is to insist that there is no positive value relation between them. One is neither better nor worse than the other, nor are they equal, nor are they on a par. But maybe California thinks otherwise. And for those who care about democratic authority, manageable judicial principles, and deference to the political branches, claims of incomparability raise analogous problems to those affecting Roberts’ insistence that the goods are comparable and must survive some balancing test.

IV. CONCLUSION

In closing, I want to draw out an important feature of the preceding arguments. There can be a tendency to resist balancing tests because of a generalized allergy to the Court exercising a kind of normative discretion.¹⁰⁴ That generalized allergy is misguided. Normative judgment is unavoidable for judges in performing their task, at least if we think that the decisions of judges are to be justified.¹⁰⁵ The point of the preceding line of

104. Scalia, *supra* note 35, at 1185.

105. See Andrew Jordan, *Constitutional Anti-Theory*, 107 *GEO. L. REV.* 1515, 1522–23 (2019) (arguing that the choice of constitutional theory requires the exercise of normative judgment, and hence that there is no way for a judge to

argument is only that exercises of normative discretion have to be justified in relation to the institutional role of the Court and the kinds of legal decisions the Court has to make. With regard to the Commerce Clause, a kind of normative balancing just does not make any sense. Again, this is not because of a generalized worry about balancing. It is just that if we are to balance, we should have good reason to do so. And with the Dormant Commerce Clause, there is no good reason to balance, and, frankly, lots of good reasons not to. We can put this point another way. Broad abstract debates about the virtues and vices of formalism and anti-formalism in legal decision-making make a mistake. The mistake is that they try to do too much—to conquer all areas of law in one fell swoop. The more appropriate approach is to look at the specific legal question and *ask* should we balance, or should we have more formal categorical rules. That is, we must ask what balancing entails in this context—what kinds of judgments would it require a court to make, and what would it mean for legislation. And we should then ask whether we are satisfied that those entailments are fitting given the legal issue at stake. General misgivings about a court “acting like a legislature”—where that is understood as a complaint about the *form* of reasoning in which the court is engaged are misplaced.¹⁰⁶ Of course, there is all the reason in the world to object to a court making a specific decision where that decision-making authority really belongs to the legislature. But any worry in this vicinity should not be a generalized one about *how* a court reasons, but rather a specific one about *who* is doing that kind of reasoning, and whether it is their business to do it. Perhaps it will turn out that a court should never engage in balancing. But that is a conclusion that needs to be earned piecemeal, and not all at once. And it needs to be earned based on a familiarly doctrinal assessment of the legal issues at stake in a particular context.¹⁰⁷

avoid such judgments).

106. See, e.g., Aleinikoff, *supra* note 7, at 984 (“A common objection to balancing as a method of constitutional adjudication is that it appears to replicate the job that a democratic society demands of its legislature.”).

107. Despite being generally skeptical of balancing, Aleinikoff makes a related point. *Id.* at 1003 (“There may not always be a preferable alternative to balancing. One must approach cases and constitutional provisions one at a time. One must ask at each point whether there are other ways of describing and analyzing this constitutional question that do not raise the problems occasioned by balancing and that do not pose the additional troubling problems that balancing avoids.”).

Thus, there is no blanket rule to be had regarding the propriety of balancing. The upshot of the preceding arguments is merely that balancing has no place in Dormant Commerce Clause doctrine. But that is primarily a fact about the Commerce Clause, not a fact about balancing. And in reaching any conclusion about the propriety of balancing, the Court should be asking questions about what sorts of consideration are properly the business of the Court given the constitutional issue at stake. The Dormant Commerce Clause is a structural feature of the constitution. It is, therefore, neutral with regard to the moral-theoretic issues at play in the incommensurability debate. And it should thus not be read to undermine the moral judgments—including moral theoretic judgments—of the states based on the judiciary’s partially formed opinions about such matters. But perhaps other components of our constitutional system work differently. Balancing most commonly comes up in the context of rights adjudication. Whether balancing is appropriate in that context depends on how we can best think about the political rights that our political order protects. Perhaps the best account of rights would not require balancing. But that is a conclusion that can only be reached based on a serious engagement with constitutional doctrine in a specific constitutional context. It is not a conclusion that one should reach because of a generalized allergy to balancing based on such contentious claims as that the various values we might care about in our constitutional system are incommensurable.