

COMPARISON EXCLUDING COMMITMENTS: INCOMMENSURABILITY, ADJUDICATION, AND THE UNNOTICED EXAMPLE OF TRADE DISPUTES

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I. INTRODUCTION

One of the cardinal complexities of public policymaking is the need to make a singular choice among plausible alternatives. It may seem obvious that one should choose based on a comparison of all relevant reasons.¹ Many embrace this as an ideal, however difficult it may be to realize in practice. We disagree. More precisely, we disagree with a claim that is often asserted along with the ideal: namely, that all relevant reasons are *always* comparable on a common scale as better, worse, or equally good.² We make three claims. First, there are important cases of incommensurability, cases in which it is not possible to compare reasons. Second, courts should recognize and respond appropriately to incommensurability. Third, unfortunately, adjudicators all too often overlook incommensurability by taking for granted that comparison is possible. Trade disputes, both domestic and international, offer excellent—and practically important—examples of all three claims. Such disputes often involve clashes of cultural values that, properly understood, raise incommensurability questions. The trade dispute literature notes this fact,³ but the philosophical and jurisprudential literature does not. One of our goals is to close this gap.⁴

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¹ Or *one* of the strongest, since two or more reasons of equal strength may each be stronger than the rest.

² See, e.g., AMARTYA SEN, ON ETHICS AND ECONOMICS 61 (1987).

³ See, e.g., Piet Eeckhout, *The Scales of Trade: Reflections on the Growth and Functions of the WTO Adjudicative Branch*, 13 J. INT. ECON. LAW 3 (2010); but see Joel Trachtman, *Trade and ... Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EUR. J. INT. LAW 32, 20–25 (1998) (opposing the incommensurability thesis, in the form of an economic cost-benefit test); Patrick Capps, *Incommensurability, Purposivity and International Law*, EUR. J. INT. LAW (2000), <http://www.ejil.org/pdfs/11/3/547.pdf> (defending commensurability).

⁴ For discussions focused on domestic law, see Margaret Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Richard Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democracy*, 90 COLUM. L. REV. 2121 (1990); John Finnis,

We are by no means the first to contend that when adjudicators ignore incommensurability, they fail to confront considerations that should play a key role in their decisions. Incommensurability's advocates, however, have failed to sway the courts, which for the most part continue to assume commensurability.⁵ Those advocates overlook the fact that there are two types of incommensurability.⁶ The first – incompleteness incommensurability – consists of the lack of an appropriate metric for making the comparison. We argue that this type of incommensurability, as challenging as it may be in practice, is consistent with any realistic conception of adjudication. It is not uncommon for courts to be called on to construct appropriate metrics when the metrics are lacking. The second – comparison-excluding incommensurability – consists of a commitment that is inconsistent with comparison on a common scale, even when such a scale exists. Comparison is not impossible *tout court*, but impossible *consistently with the commitment*. Incommensurability of this sort has not been widely acknowledged and does raise deep problems for judicial decision-making.⁷

Comparison-excluding incommensurability plays a key constitutive role in the construction of both individual and collective identities. So,

Natural Law and Legal Reasoning, 38 CLEVELAND ST. L. REV. 1 (1990); Donald R. Korobkin, *Value and Rationality in Bankruptcy Decisionmaking*, 33 WM. AND MARY L. REV. 333, 341-42, 352-53 (1992); Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562 (1992); Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994); Richard Warner, *Excluding Reasons: Impossible Comparisons and the Law*, 15 OXFORD JOURNAL OF LEGAL STUDIES 431 (1995) [hereinafter Warner, *Excluding Reasons*]; Richard Warner, *Impossible Comparisons and Rational Choice Theory*, 68 S. CAL. L. REV. 1705 (1995) [hereinafter Warner, *Impossible Comparisons*]; Richard Warner, *Does Incommensurability Matter?*, 146 U. PA. L. REV. 1287 (1998) [hereinafter Warner, *Does Incommensurability Matter?*]; Dennis Thompson, *Public Reason and Precluded Reasons*, 72 FORDHAM L. REV. 2073 (2004).

⁵ See, e.g., *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 346 (2007). In *United Haulers*, the Court explained their decision to uphold the statute at hand: "After years of discovery, both the Magistrate Judge and the District Court could not detect any disparate impact on out-of-state as opposed to in-state businesses. The Second Circuit alluded to, but did not endorse, a "rather abstract harm" that may exist because "the Counties' flow control ordinances have removed the waste generated in Oneida and Herkimer Counties from the national marketplace for waste processing services." 438 F.3d, at 160. We find it unnecessary to decide whether the ordinances impose any incidental burden on interstate commerce because any arguable burden does not exceed the public benefits of the ordinances." (emphasis added). For a decision employing the commensurability thesis to the opposite effect, see *Granholt v. Heald*, 544 U.S. 460 (2004), in which the Court held that different licensing standards for non-Michigan wines did not serve any greater public interest in health than an even-handed licensing scheme. For more case law and courts adopting the commensurability thesis, see, e.g., *Sandlands C&D, LLC v. County of Horry*, 737 F.3d 45 (4th Cir. 2013) (an ordinance prohibiting the disposal of waste at any site other than a publicly-owned landfill does not violate the dormant commerce clause); *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013) (California Low Carbon Fuel Standard regulations do not violate the dormant commerce clause); *Grant's Dairy v. Commissioner of Maine Dept. of Agriculture*, 232 F.3d 8 (1st Cir. 2000) (scheme imposing minimum prices on milk dealers does not violate dormant commerce clause); *Cloverland-Green Spring Dairies, Inc. v. Penn. Milk Marketing Bd.*, 462 F.3d 249 (3rd Cir. 2006) (minimum milk pricing standards do not violate the dormant commerce clause); *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2nd Cir. 2003) (law prohibiting sellers from shipping cigarettes directly to consumers does not violate the dormant commerce clause).

⁶ See, e.g., Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

⁷ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 339 (1986) (distinguishing the two types of incommensurability).

when adjudicators ignore comparison-excluding incommensurability, they run the risk of eliminating individuals and societies from the very process that is supposed to adjudicate their conflicting concerns.⁸ How then should judicial practice change? Fortunately, the emerging practice itself already suggests an answer. An examination of international and domestic trade cases shows that courts do, recently and increasingly, replace the comparison of reasons on a common scale with a procedurally adequate investigation of the relevant regulations.⁹ We suggest that this may be a viable approach to adjudicating comparison-excluding commitments.

This article unfolds in the following sequence. Part I rejects the notion of a common scale as too vague for our purposes and introduces what we call “value-probability reasoning” as the basis of an alternative explanation of incommensurability. Part II characterizes incompleteness and comparison-excluding incommensurability in terms of value-probability reasoning. Part III then introduces trade disputes as examples of comparison-excluding incommensurability. Part IV discusses how courts should address comparison-excluding incommensurability. This article concludes that comparison-exclusion is inextricably linked to individual and social identities.

II. WHAT KIND OF COMPARISON?

We appealed to the concept of a “common scale” to characterize both commensurability and the varieties of incommensurability. That appeal is problematic. The concept is so vague that there is a plausible argument that *whenever* a person decides between alternatives there is always some relevant common scale on which the reasons for the alternatives may be compared. If this were true, it would follow that neither type of incommensurability existed. To illustrate the problem, we consider the sort of example proponents of incommensurability typically offer as a clear case of the lack of a relevant common scale. We then appeal to the problem to motivate our examination of comparison-excluding incommensurability.

A. TYPICAL EXAMPLE

Imagine you are trying to choose between two actions: attending law school in order to become a lawyer, and retiring to the woods in an attempt to write your first novel.¹⁰ You have good reason to believe that it is equally likely that you will succeed in each endeavor. You have values—the “lawyer values”—that favor the lawyer life. You value stability in personal and financial matters, the role lawyers play in the legal system, and various

⁸ Daniel K. Tarullo, *Logic, Myth and the International Economic Order*, 26 HARV. INT. L. J. 533, 550 (1985) (defining the myth of “normalcy” as “conscious efforts to resolve disagreements whether through legal principles or otherwise, resolve around efforts to produce images of sameness where they do not already exist.”). Tarullo warned that such myth “countenances, even demands, the eradication of communities of difference”.

⁹ See *infra* Section IV for our discussion of what counts as an adequate explanation.

¹⁰ JOSEPH RAZ, *ENGAGING REASON: ON THE THEORY OF VALUE AND ACTION* (2002).

other aspects of what you envision as your life as a lawyer. But you also have values—the “novelist values”—that favor being a novelist. You value creative expression in novels, an art for which you have a deep love, freedom from the 9 to 5 world, and a variety of other aspects of the life you envision as a novelist. From the perspective of the lawyer values, being a lawyer is a better option than being a novelist, and vice versa from the perspective of the novelist values. Your problem is that you lack any *third* perspective from which to adjudicate between the competing evaluations. You lack a perspective that provides a common scale on which to rank the competing reasons as better, worse, or equally good. This is not to say it is impossible to have such a perspective. Suppose you valued political power more highly than artistic creation and believed that being a lawyer would serve you better in achieving such power than being a novelist would. If you valued political power highly enough, it could serve as a perspective from which to adjudicate the lawyer values and novelist values conflict in favor of the former. But it is also possible to lack a perspective that provides a common scale on which to rank the options.¹¹

Suppose that is the case. How do you decide what to do? You could of course adopt an arbitrary decision procedure like flipping a coin, but you do not want to decide the direction of your life that way. You want to decide for reasons.¹² And you can. Imagine that you think about what to do seriously and carefully for a considerable amount of time. As your soul-searching progresses, you find yourself increasingly favoring being a lawyer. Eventually, still without deciding whether to be a lawyer or a novelist, you apply to law school to “keep the lawyer option open.” When the time comes to decide whether to show up for the first day of class, you go to “give the lawyer life a try.” If someone were to ask you why, you would give the reasons provided by the lawyer values, and you would

11 The problem would be solved if “(a) human beings had some single, well-defined goal or function (a ‘dominant end’), or (b) the differing goals which men in fact pursue has some common factor, such as ‘satisfaction of desire.’” JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980). But, as Finnis notes, “neither of these conditions obtains. Only an inhumane fanatic thinks that man is made to flourish in only one way or for only one purpose.” *Id.*

12 Deciding for reasons does *not* require a common scale on which to compare the lawyer-value reasons and the novelist-value reasons. As Raz points out, “Rational action is action for (what the agent takes to be) an undefeated reason. It is not necessarily action for a reason which defeats all others.” RAZ, *supra* note 7, at 339. Raz emphasizes that choices in cases of incommensurability “may be based on a reason. Though the reason is incommensurate with the reason for the alternative it shows the value of that option and when that option is chosen it is chosen because of its value.” *Id.* at 338. John Finnis makes essentially the same argument against Luban. John Finnis, *Concluding Reflections*, 38 CLEV. ST. L. REV. 231, 236 (1990). Finnis argues that “[c]hoice between incommensurable options is often rational in two ways: (a) inasmuch as it opts for the chosen option for the reason which make that option rationally appealing (even though those grounds do not make that option unqualifiedly more appealing than alternative options; and (b) inasmuch as it conforms to all the requirements of practical reasonableness which we call moral, e. g., fairness, consistency, exclusion of any choice to destroy, damage, or impede any basic human good, etc. Both (a) and (b) provide rich grounds for rational criticism of choices.” *Id.* at 23738. Sunstein is another who overlooks this point when he argues that incommensurability makes rational choice impossible. He assumes (apparently) that qualitative comparison is essential to rational choice, but this is simply not true if we distinguish between having reasons for choosing an option and having reasons that show that option to be better than other alternatives. Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 808 (1994).

explain that a long process of soul searching led you to finally favoring those reasons. Those reasons and the process are what shows that your decision is not like arbitrary like flipping a coin.

In such cases, a person may still decide to act on one of the sets of reasons instead of the others, and, a person will be able to explain why he or she ended up favoring those reasons by describing the soul-searching process.¹³ The problem is that the kind of process we have just described looks like it produces a relevant common scale. When, for example, you finally decide in favor of the lawyer life, you do so *because your soul searching leads you to favor the lawyer reasons over the novelist reasons*. So there is a common scale after all: namely, “reasons favored over others after serious reflection.” Proponents of incommensurability may well respond that our “reasons favored” scale is not what they mean by a “common scale.”¹⁴ The proponents of incommensurability owe an explanation of what they mean, and while they may be able to provide one, we will put that issue aside. Instead, we will identify a particular type of reasoning that plays a central role in the judicial decisions. We argue, in Section II, that decision-makers cannot always compare relevant options using that type of reasoning. This narrow incommensurability claim is sufficient for our purposes.

B. VALUE-PROBABILITY REASONING

The common scale that concerns us is created through what we will call *Value-Probability* reasoning (VP-reasoning).¹⁵ To illustrate VP-reasoning, we return to the lawyer/novelist example, in which you are trying to choose between being a novelist and a lawyer. You value being a novelist much more than being a lawyer. As we will say, you rank being a novelist higher in the outcome ranking than being a lawyer. A VP-reasoning outcome ranking is not just an ordering of outcomes above or below each other. It also represents *how far* above or below each other they are. It is a cardinal, not an ordinal ranking. The reason is that you get an action ranking by combining probability estimates with the estimates of *how far* one outcome outranks another.¹⁶ People can make rough “how far” comparisons. Suppose, for example, that Smith decides to go into debt to finance his daughter’s college education. When Smith’s friend says, “But

¹³ “Able to explain” means able after adequate reflection. In our lawyer/novelist example, we imagined you engaging in explicit soul searching and explicitly explaining that process. In other cases, no such explicit process may occur. The person may, however, be able—assuming adequate reflection—to provide a convincing narrative that explains how he or she ended up favoring the reasons in question.

¹⁴ Raz, as we understand him, would interpret the choice as an act of will in the face of options that are incommensurable (in our sense of incompleteness incommensurability). See RAZ, ENGAGING REASON, *supra* note 10.

¹⁵ See Warner, *Does Incommensurability Matter?*, *supra* note 4, at 1309; Warner, *Impossible Comparisons*, *supra* note 4, at 1712.

¹⁶ Rational choice theory represents process of combining the estimates by multiplication. The numerical representation of probability is multiplied by the numerical representation of an outcome’s rank. See KEN BINMORE, RATIONAL DECISIONS (2011).

you will be in debt for five years,” Smith replies, “It would be worth ten years of debt.”

Even though being a novelist outranks being a lawyer in the outcome ranking, you still choose to go to law school. Why? Because you do not just consider how much you value an outcome, but also the *probability* that the associated action will achieve that outcome. You go to law school because you think your chances of writing a novel are just about nil, while you think it highly likely that you will do well in law school. So, as we will say, going to law school ranks higher in your action ranking than retiring to the woods. The example illustrates the general fact that people often end up not pursuing what they value most highly.

In general, VP-reasoning consists of constructing an action ranking out of an outcome ranking by finding an appropriate compromise between how much you value an outcome and the probability of realizing that outcome by the actions available to you. The process need not be conscious, and need not be readily articulable when it is. Our talk of probability calls for two comments. First, while it is natural to think of probabilities in terms of numbers, there is no need to do so. Everyday reasoning about probabilities can, and often does, proceed in terms of “a small (significant, big) chance,” and the like. In general, estimates of probability can be and typically are rough and ready approximate estimates of the chance of something happening. The estimates need not be conscious, and, if conscious, need not be precisely articulated. In general, we do not have any *mathematical* model in mind.¹⁷ So understood, we take it for granted that people sometimes engage in such reasoning, and that it is indeed a common feature of daily life. We make no claims about *how* people combine their probability estimates and the outcome rankings—with the exception of the following condition: an increase or decrease in either the ranking of an outcome or the probability of its realizing an associated action moves that action *proportionately* up or down in the action ranking. We will call this the *Interdependence Condition*.

VP-reasoning involves two common scales. One is the scale on which it ranks the relative value of the various outcomes a person is concerned with—in our example, becoming a lawyer and writing a novel. VP-reasoning creates a second common scale out of the first scale by combining the outcome rankings with a person’s views about probability to produce a ranking of actions. We will call this the *expected value ranking*.¹⁸

C. A NARROWER CONCEPTION OF COMMENSURABILITY

We can now formulate the narrower version of commensurability with which we are concerned, *VP-Reasoning Commensurability*: All reasons for and against an action are, in principle, comparable through VP-reasoning.

¹⁷ To those familiar with rational choice theory, our VP-reasoning may look like a disguised description of that theory. That has things backwards. Rational choice theory is a mathematical *model* of human decision making. What underlying reality does it model? Our answer is VP-reasoning.

¹⁸ We borrow the term from rational choice theory. BINMORE, *supra* note 16.

In the next section, we reformulate the two types of incommensurability accordingly and illustrate each.

III. TWO TYPES OF INCOMMENSURABILITY

There are two types of incommensurability. The first—incompleteness incommensurability—consists of the lack of any relevant way to construct the outcome ranking VP-reasoning requires. The second type—comparison-exclusion incommensurability—consists of a commitment that is inconsistent with deciding by VP-reasoning, even in those cases in which such reasoning is possible.

A. INCOMPLETENESS INCOMMENSURABILITY

The source of incompleteness incommensurability is a gap in values. Values are not complete maps. They may leave areas, even large areas, partially filled in, or not filled in at all.¹⁹ The incompleteness can prevent you from constructing the outcome rankings required for VP-reasoning. The lawyer/novelist example is a case in point. The problem is that you cannot construct the outcome ranking you need. What you need is a relevant evaluative perspective distinct from the lawyer values and novelist values that will take both those perspectives into account and produce a cardinal ranking of the outcomes of being a lawyer and being a novelist. You clearly do not have this perspective when you initially confront the decision and begin the soul-searching process. But what about the end result of that process? We argued earlier that the process does yield a ranking of one outcome over the other. There are two replies. The first is that such rankings do not exist *prior* to your decision and so cannot be the basis on which you decide. This reply is sufficient, so we will not pursue the second reply, which is that the ranking is not a cardinal one.²⁰

Current debates over privacy provide plausible examples of incompleteness incommensurability. Privacy raises complex balancing questions, and, as James Rule notes, “we cannot hope to answer [such questions] until we have a way of ascribing weights to the things being balanced. And that is exactly where parties to privacy debates are most dramatically at odds.”²¹ The problem is plausibly like the lawyer/novelist example. Different perspectives yield reasonably clear answers that yield outcome rankings, but people cannot agree on an overall perspective that gives due weight to the competing perspectives of privacy advocates, defenders of government surveillance, and proponents of private data collection.

How should courts and regulators respond to incompleteness incommensurability? We think that constructing such rankings even when

¹⁹ See RAZ, *supra* note 7, at 344.

²⁰ The idea is that the ranking is just a ranking of one option over another and does not provide any basis for measuring how much one option outranks another.

²¹ JAMES B. RULE, *PRIVACY IN PERIL* 183 (2007).

they do not initially exist is one important function of courts in responding to novel moral and political questions arising from social, economic, and technological change. This claim is hardly uncontroversial. Some may insist that, at least in some cases, it is impossible to construct relevant and acceptable rankings where none exist initially, and, even when it is, some may argue that constructing rankings is not a task courts may legitimately undertake. We put these issues aside. Our concern is primarily with comparison-excluding commitments. In pursuing this concern, we are not denying the existence of incompleteness incommensurability, nor are we claiming that it cannot explain the phenomena we explain by appeal to comparison-excluding incommensurability. We make two more modest claims. First, there are clear cases of comparison-excluding incommensurability. Second, that kind of incommensurability evidently provides an illuminating explanation of some otherwise puzzling judicial decisions. Devotees of incompleteness incommensurability may dispute the second claim, but that is precisely the dispute we hope to initiate. Our goal is a hearing for comparison-exclusion.

B. COMPARISON-EXCLUDING COMMITMENTS

We begin with two non-legal examples, and then discuss a legal example at length.

1. *Non-Legal Examples*

Consider promising. Suppose you promise to accompany your friend to the doctor on Tuesday; he is merely going for a routine check-up, but for him visiting the doctor is an ordeal of fear and anxiety, and his plea for emotional support moved you to promise. Shortly after you make the promise, a colleague who has suddenly fallen sick asks you to teach her class. If you had not promised to accompany your friend to the doctor, you would agree, and your reason would be your colleague's need, but you refuse because your promise has *already committed* you to accompanying your friend. The "already committed" is the essential point. The commitment to future action created by promising is a commitment to stand by a prior decision and not to reopen the question for resolution by VP-reasoning that takes into account current facts. There are limits, of course. Imagine that, when Tuesday arrives, you learn that your five year-old son is lost in a city park. You do—and certainly should—decide to go look for your son by VP-reasoning that compares your friend's need for support against your son's welfare.

In general, by comparison-excluding commitments, we mean commitments defined by the refusal, within limits,²² to decide certain

22 "The reason-excluding commitments one makes in one's personal life need not prohibit those household economies in which one trades goods such as health and safety off against a variety of other goals. Similarly, societal commitments can exclude reasons in some contexts and not others. The lines are often quite indeterminate, and this indeterminateness does not matter. Rapid economic and technological change along with globalization and the cultural conflicts it brings often pit reason-

questions by engaging in VP-reasoning. There are many examples of such commitments, for instance parental love. As Joseph Raz notes,

“[f]or many, having children does not have a money price because exchanging them for money, whether buying or selling, is inconsistent with a proper appreciation of the value of parenthood [B]oth their rejection of the idea that having children has a price and their refusal even to contemplate such exchanges are part of their respect for parenthood, and of the very high value they place on having children.”²³

Put aside cases in which dire need *might* make selling a child something one would consider—e. g., your daughter will die if she does not receive treatment you cannot afford but which the stranger who offers to buy her will immediately provide. We take it to be clear that there are a range of cases in which parents have a commitment to their children which is defined in part by the refusal to engage in VP-reasoning to decide whether to exchange them for a certain sum of money.

2. The “Very Great Value” Objection

Many will object that there is a simple explanation of such commitments that does not appeal to comparison-exclusion.²⁴ Why not simply say, in the promising case, for example, that your commitment is, within broad limits, to rank keeping your promise above all other competing outcomes? Then as long as you are sufficiently certain you will succeed when you try to keep your promise, keeping it will come out on top in the action ranking. Looking at it this way, you do compare reasons; it is just that your promise always wins.

In reply, consider more complex outcomes, and, as an aid to the imagination, change the commitment from promising to parental love. Suppose a stranger offers you the following lottery.²⁵ If you enter the lottery, you have a 50 percent chance of getting one million dollars and keeping your daughter, and a 50 percent chance of getting one million dollars in exchange for giving you daughter to the stranger to raise. Suppose that neither you nor your daughter have any dire need for the money. For example, you daughter will not die for lack of medical treatment unless you have one million dollars. You indignantly refuse, saying, “Daughters are not poker chips. You don’t gamble with them for money!” Your attitude is the one Raz characterizes, “[f]or many, having children does not have a money price because exchanging them for money, whether buying or selling, is inconsistent with a proper appreciation of the

excluding commitments against demands for greater economic efficiency and less constrained market competition. We think the task is not just to decide whether to abandon or maintain a commitment, but, as a necessary prelude to any such decision, to define the boundaries of the commitment with far more precision than in the past.” Warner, *Does Incommensurability Matter?*, *supra* note 4.

²³ RAZ, *supra* note 7, at 348.

²⁴ This argument is adapted from Warner, *Impossible Comparisons*, *supra* note 4.

²⁵ See Warner, *Impossible Comparisons*, *supra* note 4, at 1720-23.

value of parenthood.”²⁶ To be clear, we are not saying one *must* have such a commitment to one’s children—just that one could, and indeed many do. Now, imagine the stranger responds with improved odds. He offers a 70 percent/30 percent deal: a 70 percent chance of getting one million dollars and keeping your daughter, and a 30 percent chance of getting one million dollars in exchange for her. You again refuse, and the stranger again improves the odds, and you again refuse. No matter how good the odds, you will always refuse—as long as you continue with your commitment to your daughter.

The problem for VP-reasoning is that it predicts the opposite—no matter how much keeping your daughter outranks all other outcomes.²⁷ This is easiest to see if we use dollar amounts to represent the place an outcome has in the outcome ranking. The relevant outcomes are keeping your daughter, not keeping her, and getting one million dollars. We assume, for the moment, that we can assign numbers to represent how much you value the options relative to each other. This is the beginning of a small bit of mathematical precision that is a useful and harmless idealization. It is useful because allows us to derive results easily and clearly. It is harmless because the results remain valid for the un-idealized reality. The numbers we use don’t matter at all; just the relative difference in value matters. In this case we will use dollars. So assign ten million dollars to keeping your daughter, and \$0 to not keeping her. Now consider the lottery in which you have a 99 percent chance of keeping your daughter and getting the million, and 1 percent chance of having to give her up and getting the million. Will you enter the lottery?

VP-reasoning predicts you will. That result is guaranteed by the Interdependence Condition: an increase or decrease in either the ranking of an outcome or the probability of its realizing the associated action moves that action proportionately up or down in the action ranking. This is easiest way to see this is to continue our bit of mathematization and use multiplication to represent the way the outcome ranking combines with probabilities to produce the action ranking. Then you get the expected value of entering the lottery by adding the expected value of its two possible outcomes: keeping your daughter and getting ten million dollars or one million dollars, and losing your daughter and getting one million dollars. The expected value of the first outcome is: The rank of the action of entering the lottery in the action ranking is given by $0.99 \times (\$10 \text{ million [= keep daughter]} + \$1 \text{ million}) = \$10,890,000$. The expected value of losing your daughter is $0.1 \times (\$0 [= lose daughter] + \$1 \text{ million}) = \$100,000$. So the expected value of entering the lottery is $\$10,990,000$. You only value your daughter at $\$10,000,000$, so you will enter the lottery.

The problem disappears if you assign an *infinite* value to your daughter. Then no value that can be measured finitely (using money or finite

²⁶ RAZ, *supra* note 7, at 348.

²⁷ We hope the use of numbers in this example is not misleading. The numbers represent relative rankings, and their use is for convenience.

numbers generally) will induce you to sell her. But this will not do here. To see the problem, ask, “What does it mean to say you value your daughter infinitely?” There may appear to be an easy explanation: namely, that you will not exchange her for any finite gain in value.²⁸ But that fact is what the appeal to infinite value is supposed to explain. So that explanation is not available, and there does not appear to be any other.

3. A Legal Example

*Moore v. The Regents of the University of California*²⁹ is a good legal example. As part of Moore's treatment for leukemia, a UCLA medical center doctor removed Moore's spleen.³⁰ The spleen contained commercially valuable anomalous genetic material, and the doctor and medical center claimed ownership and sold the material.³¹ Moore claimed the genetic material was his property and sued for conversion.³² The majority compared the reasons to recognize the doctor's and hospital's ownership claim to the reasons to recognize a property right for Moore.³³ They decided against Moore on the ground that recognizing the right would have the profound negative effect on research and consequently on overall health and would result in an overall increase in health care expenditures.³⁴ While the majority does not of course express itself in terms of outcome rankings and action rankings, we can nonetheless describe its decision in that way: it ranks the outcome of no negative effects on research and health over the outcome in which Moore possesses the property right in question. Since the majority evidently takes the probability of the negative effects to be quite high, denying Moore the right ends up at the top of the action ranking.

Justice Mosk dissents, claiming that:

[O]ur society acknowledges a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona. One manifestation. . . is the prohibition against indirect abuse of the body by its economic exploitation for the sole benefit of another person The *dignity* and *sanctity* with which we regard the human whole . . . are absent when we allow researchers to further their own interests without the patient's participation by using a patient's cells as the basis for a marketable product.³⁵

²⁸ See Warner, *Impossible Comparisons*, *supra* note 4, at 1720-23.

²⁹ *Moore v. the Regents of the University of California*, 51 Cal. 3rd 120 (1990).

³⁰ *Id.* at 126.

³¹ The private company that bought the material gave \$1,000,000 over a three year period to the doctor and UCLA, and the doctor received 75,000 shares of stock and became a paid consultant for the company. *Id.* at 183.

³² *Id.* at 156-57, 169-70, 173-74.

³³ *See id.*

³⁴ *See id.* at 145-46.

³⁵ *Id.* *supra* note 29 at 182-84 (Mosk, J. dissenting) (quoting Mary T. X, Cells, Sales, & Royalties: The Patient's Right to a Portion of the Profit, 6 YALE L. & POL'Y REV., 179, 190 (1990)) (emphasis added).

On its face, this is puzzling. Is Mosk claiming that the majority ranked outcomes incorrectly, and that the dignity-respecting outcome in which Moore has the right should outrank the outcome in which research and health are not impeded by such property rights?³⁶ The problem is that Mosk makes no attempt whatsoever to show that this is true,³⁷ and one can hardly expect to cut much judicial ice with the *completely unsupported* claim that the majority ranked wrongly. One way to avoid this difficulty is to see Mosk as making the *incompleteness* incommensurability claim that there is no way to rank the dignity and health outcomes. However, this is hardly plausible. It is routine to rank dignity against health considerations in deciding, for example, on health care budgets.

A *comparison-excluding* incommensurability claim is a plausible alternative. We suggest Mosk is asserting that society has a commitment to respecting the dignity and sanctity of the human whole which is *defined* in part by the refusal to engage in VP-reasoning that ranks the impact on health care against violate Moore's dignity. The commitment makes the decision easy. As long as Mosk remains faithful to it, he decides in favor of granting Moore the right. Our claim is not that Mosk is right to recognize such a commitment. Our point is that his position, right or wrong, illustrates a *comparison-excluding commitment*.

Why give comparison-excluding commitments such a central role? Our answer is that we do so because such commitments figure prominently in our defining *who we are*, as one of us has argued elsewhere. We are defined both by what we are willing to do and by what we are not willing to do—by the possibilities we regard as closed off. The “closing off” plays a central role in our definition of our identities, which are shaped as much by what we *cannot* do as by what we can. For example, suppose someone suggests to you that you should lie on your resume. They point out that no one would ever discover the lie. You respond with outrage, “I cannot do that. What *sort of person* do you think I am?” Not every identity-defining commitment is a comparison-excluding commitment, but the comparison-excluding ones play an important identity-defining role.³⁸ This is not to say that every such commitment does. You can be committed to maintaining your health in a way that blocks VP-reasoning involving financial considerations as reasons to forego needed treatment, but the commitment need not play a major role in defining your identity.

36 Mosk describes his approach as a straightforward balancing of reasons: “in my view whatever merit the majority’s single policy consideration may have is outweighed by two contrary considerations.” *Id.* at 182 (emphasis added). For reasons that follow, we think Mosk misinterprets his own position.

37 *Id.* at 164–65 (Arabian, J., concurring). Justice Arabian wants to know how to balance the dignity reasons against the scientific research reasons. He asks, “Does it uplift or degrade the unique human persona to treat human tissue as a fungible article of commerce? Would it advance or impede the human condition, spiritually or scientifically, by delivering the majestic force of the law behind the plaintiff’s claim?” He despairs of answering these questions. “I do not know the answers to these troubling questions, nor am I willing—like Justice Mosk—to treat them . . . as issues . . . susceptible of judicial resolution.” Justice Arabian in his dissent emphasizes this problem. He contends that Mosk’s “eloquent paean to the human spirit illuminates the problem, but not the solution.”

38 Warner, *Excluding Reasons*, *supra* note 4, at 443.

IV. TRADE DISPUTE EXAMPLES

In trade disputes, courts traditionally engage in “synthesizing and maximizing complex preferences”³⁹ in ways that assume commensurability. We offer three examples. We first illustrate the assumption of commensurability and then argue that in all three cases either the parties or the court is best seen as implicitly advancing a comparison-exclusion claim.

A. THE ASSUMPTION OF COMMENSURABILITY

This assumption is built into the various tests the courts use in trade disputes, such as the necessity (least trade restrictive) test and the balancing test.⁴⁰ The differences are more in name than in substance, and the tests assume commensurability in essentially the same way.

Take the necessity test first. The court often faces a case in which a government measure allegedly interferes with free international commerce. To evaluate a trade-restrictive measure, the court decides whether the restrictions are truly “necessary” to achieve putative regulatory goals. To do so, the court articulates a hypothetical less restrictive alternative, and, if it finds the reasons for adopting the hypothetical policy to be at least as good as the reasons offered for adopting the more restrictive alternative, court concludes that the government *should have* adopted the hypothetical policy. In arriving at this conclusion, the court assumes (often implicitly) that the two alternatives are equally effective, or that, if the hypothetical alternative is less effective, its lower burden on trade more than compensates for that. To proceed in this way is to assume that the reasons for the measure at issue and the reasons favoring the hypothetical alternative are comparable through VP-reasoning. The items in the outcome ranking are states of affairs in which the regulatory goal is achieved with greater or lesser impact on trade. Those with lesser impact rank higher. The action ranking results from considering the probability that a particular measure will realize the associated outcome. A measure is “necessary” if it is at the top of the action ranking.

A case in point is the General Agreement on Tariffs and Trade (GATT)⁴¹ dispute between the United States and Thailand over cigarette imports.⁴² In the late 1980s, Thailand banned the importation of foreign cigarettes on the ground that certain flavors or additives made them both more addictive and more appealing to female and young smokers than harsh tasting domestic cigarettes made of indigenous tobacco leaves. A

39 Trachtman, *supra* note 3 at 34.

40 *Id.* at 35–36; Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 415 (2003) (observing that the least trade restrictive test in the WTO is a “crude cost-benefit analysis” accompanied by no sophisticated quantitative analysis). See also Donald H. Regan, *The Meaning of ‘Necessary’ in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, 6 World Trade Rev. 347–69 (2007).

41 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A5, 55 U.N.T.S. 188.

42 Panel Report, *Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes*, WTO Doc. DS10/R; 37S/200 (Nov. 7, 1990) [hereinafter *Thai Cigarettes*].

GATT panel struck down the Thai ban as unnecessary. The panel compared the less trade-restrictive policy of labeling and disclosure regulations to Thailand's complete ban, and found that there was a better reason for Thailand to adopt the former policy. The panel noted that

[O]ther countries had introduced strict, non-discriminatory labeling and ingredient disclosure regulations which allowed governments to control, and the public to be informed of, the content of cigarettes. A non-discriminatory regulation implemented on a national treatment basis in accordance with Article III:4 requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an *alternative* consistent with the General Agreement. The Panel considered that Thailand could reasonably be expected to take such measures to address the quality-related policy objectives it now pursues through an import ban on all cigarettes whatever their ingredients.⁴³

What is the relevance of *other* countries adopting labeling and disclosure regulations instead of a complete ban? It is evidence that, in VP-reasoning terms, achieving public health regulatory goals through such measures ranks at the top of the action ranking. This is why "Thailand could reasonably be expected to take such measures."⁴⁴

More recently, the WTO's High Court, the Appellate Body (AB), embraced the "weighing and balancing" test. This new test is an extension of the traditional least-trade restrictive test in that it spells out detailed criteria to be used in comparing ("weighing and balancing") reasons. Such explicit criteria were largely missing in the least-trade restrictive test. *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korean Beef)* illustrates the test, and its assumption of commensurability. Korea maintained a dual retail system, which required domestic beef retailers to maintain strictly separate physical points of sale for domestic beef (*Hanwoo*) and imported beef.⁴⁵ The goal was to prevent consumer confusion and fraud. In adjudicating this case, the AB devised a general test to determine the justifiability (necessity) of domestic regulations:

In sum, determination of whether a measure ... may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.⁴⁶

43 *Id.* ¶ 77 (emphasis added).

44 *Id.*

45 Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc. WT/DS161/AB/R; WT/DS169/AB/R (Dec. 11, 2000) [hereinafter *Korean Beef*].

46 *Id.* at ¶ 164; *but see* Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R; WT/DS48/AB/R (Jan. 16, 1998) (denying the commensurability between naturally occurring hormones in foods and artificially administered

The relevant alternative to the dual retail system was the use of “inspections, investigations and prosecutions,” methods Korea did indeed use to regulate imports of pork and seafood.⁴⁷ The weighing and balancing test criteria are criteria for constructing the outcome ranking consisting of combinations of regulatory goals and burdens on trade. The AB found that:

Korea failed to demonstrate that the WTO-consistent alternatives shown by the complaining parties to be available were inadequate to secure compliance with the *Unfair Competition Act* with regard to imported beef. The Panel found that Korea employed traditional and WTO-consistent means, such as inspections, investigations and prosecutions, to enforce the *Unfair Competition Act* with respect to other imported food products. The Panel regarded this as evidence that Korea could eliminate any fraud involving beef with the same measures.⁴⁸

The “evidence that Korea could eliminate any fraud involving beef with the same measures” is evidence that “inspections, investigations and prosecutions” would be sufficiently likely to achieve Korea’s regulatory goals to put those methods at the top of the relevant action ranking.

Our third and final example is another “inspection alternative preferred” case, the United States domestic trade case, *Dean Milk Co. v. City of Madison*.⁴⁹ An Illinois milk distributor challenged a City of Madison, Wisconsin ordinance that prohibited the sale of “any milk as pasteurized unless it has been processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of Madison.”⁵⁰ In such cases, a court may condemn a state regulation as a violation of the free trade constitution when it finds that the state should have adopted a less trade-restrictive alternative. Justice Clark, writing on behalf of the majority, condemns Madison’s ordinance on precisely those grounds.⁵¹ The Court acknowledges that there may be a public health reason for the city to favor local milk production, but it thinks there is a less trade restrictive alternative that would be sufficiently effective in achieving Madison’s regulatory goals.⁵² As Justice Clark contends:

It appears that reasonable and adequate alternatives are available. If the City of Madison prefers to rely upon its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for it

hormones for the growth promotion purpose considering the EU’s zero-tolerance policy on hormone risks in foods); in addition, see Panel Report, *United States — Measures Affecting Alcoholic and Malt Beverages*, WTO Doc. DS23/R; 39S/206 (June 19, 1992) (denying the commensurability between the U.S.’ low alcohol content beer and Canada’s high alcohol content beer based on the former’s historically unique legislative background involving the Temperance Movement).

⁴⁷ *Korean Beef*, *supra* note 44, ¶ 55.

⁴⁸ *Id.*

⁴⁹ *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

⁵⁰ *Id.* at 350.

⁵¹ *Id.* at 354.

⁵² *Id.*

could charge the actual and reasonable cost of such inspection to the importing producers and processors.⁵³

B. IMPLICIT COMPARISON-EXCLUSION CLAIMS

Trade dispute cases exhibit the same pattern we noted in Mosk's dissent. The pattern has two parts. The first is a claim that appears to require empirical support but has none (Mosk's claim that dignity considerations should predominate over the impact on research). The second is the plausible recognition of a comparison-excluding commitment that obviates the need for empirical support.

We begin with *Thai Cigarettes*. The Thai government contended that:

[C]onsumption of cigarettes had continued to rise in Thailand, in spite of the efforts by the government with the support of non-governmental organizations, because such campaigns took a long time to produce effects, as had been seen in the United States where consumption had continued to rise until 1981, even though the first anti-smoking campaign had been initiated in 1965 . . . Health considerations overrode any other policy objectives of the government. Thus, the Ministry of Finance had estimated that the importation of cigarettes would yield an extra revenue of baht 800 million (about US\$30 million) per year which was a substantial sum for a developing country. However, the government had decided to forego this sum in deference to public health considerations.⁵⁴

What did the Thai government do when it decided to forego the economic gain "in deference to health considerations"? Did it engage in VP-reasoning? Doing so would mean comparing two measures: protecting health through an outright ban on foreign cigarette imports, and protecting health through labeling and disclosures requirements. The problem is that the comparison most likely comes out against the ban, as the Thai government almost certainly realized. It was well aware that issuing import licenses to foreign tobacco companies would have generated enormous revenues and perhaps increased economic growth. A more plausible view is that the Thai government had a comparison-excluding commitment to public health that was inconsistent with trading public health against (certain types of) economic gain in VP-reasoning.

Korean Beef is similar. The Korean government argued that:

[T]he "specialized store" system for imported beef was established in order to protect consumers from widespread deceptive practices of selling imported beef as domestic products. The majority of beef stores in Korea are operated in the form of small-scale butcher shops where all meat is stored in one huge freezer and sold in slices. It is extremely difficult for consumers to distinguish domestic beef from imported beef at sight, nor is

⁵³ *Id.* at 354-55.

⁵⁴ *Thai Cigarettes*, *supra* note 42, ¶ 33.

there any practical technique developed for easy distinction between the two. Under such circumstances, the considerable price difference between the imported and the domestic beef would easily raise the incentives for the owners of the butcher shops to engage in fraudulent practices, which the Korean Government found were extremely difficult to detect and sanction. Thus, the system of separate sales outlets was introduced as the only practical solution to effectively deal with the problem of widespread fraudulent sales practices.⁵⁵

How can the “system of separate sales outlets [be] the only practical solution to effectively deal with the problem of widespread fraudulent sales practices”? AB’s objection would seem decisive that “inspections, investigations and prosecutions” would be effective enough to accomplish Korea’s regulatory goals—especially given that Korea found those procedures acceptable to regulate pork and seafood imports. However, *Hanwoo* claims a special cultural place in the diet of Koreans,⁵⁶ a special enough place that it is plausible that Korea based its ban on a comparison-excluding commitment. This commitment was inconsistent with VP-reasoning that would potentially favor reducing burdens on international trade over preserving position of Hanwoo beef in Korean culture.

Dean Milk is also similar. The Court struck down Madison’s ban on out-of-state milk in favor of a less trade-restrictive alternative of on-site inspections.⁵⁷ In dissent, Justice Black contended that:

Characterization of [the ban] as a “discriminatory burden” on interstate commerce is merely a statement of the Court’s result, which I think incorrect. The section does prohibit the sale of milk in Madison by interstate and intrastate producers who prefer to pasteurize over five miles distant from the city. But both state courts below found that [the ban] represents a good-faith attempt to safeguard public health by making adequate sanitation inspections possible . . .

This health regulation should not be invalidated merely because the Court believes that *alternative* milk-inspection methods *might* insure the cleanliness and healthfulness of Dean’s Illinois milk . . .

From what this record shows, and from what it fails to show, I do not think that either of the alternatives suggested by the Court would assure the people of Madison as pure a supply of milk as they receive under their own ordinance. On this record I would uphold the Madison law.⁵⁸

How can this be an answer to the majority? Black objects that on-site inspections would not “assure the people of Madison as pure a supply of milk as they receive under their own ordinance.” The majority’s position is

55 *Korean Beef*, *supra* note 44, ¶ 237 (emphasis added).

56 *Id.* ¶ 55.

57 *Dean Milk Co.*, 340 U.S. at 346.

58 *Id.* at 357-58 (emphasis added).

that inspections would be *sufficiently* effective, not that they would be equally effective, and that any loss in effectiveness would be offset by the lesser burden on trade. These problems disappear if we interpret Black's claim that Madison's concern to "safeguard public health" involves a commitment that blocks deciding through VP-reasoning as the majority does.

Three decades later, the Court reaffirmed Justice Black's dissent in *Maine v. Taylor*, which concerned the constitutionality of a Maine statute prohibiting the importation of live baitfish (golden shiners).⁵⁹ The rationale was that "Maine's population of wild fish—including its own indigenous golden shiners—would be placed at risk by three types of parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine. Second, nonnative species inadvertently included in shipments of live baitfish could disturb Maine's aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species, or by disrupting the environment in more subtle ways."⁶⁰ Taylor, who ran a bait business in Maine, was found to violate the statute when he imported 158,000 live golden shiners from outside of Maine.⁶¹ The Court of Appeals endorsed Taylor's claim that a less trade-restrictive alternative, such as sampling and inspection procedures, rather than the outright ban at issue "could be easily developed" considering the existing techniques.⁶² However, the Supreme Court disagreed. Justice Blackmun wrote on behalf of the majority that:

[W]e agree with the District Court that the "abstract possibility" of developing acceptable testing procedures, particularly when there is no assurance as to their effectiveness, does not make those procedures an "[a]vailabl[e] . . . nondiscriminatory alternativ[e]" for purpose of the Commerce Clause. A State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost . . .

[W]e agree with the District Court that Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible. "[The] constitutional principles underlying the Commerce Clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences."⁶³

59 *Maine v. Taylor*, 477 U.S. 131 (1986).

60 *Id.* at 141.

61 *Id.* at 132.

62 *Id.* at 147.

63 *Id.* at 147-48 (citations omitted).

How can it be true that the “‘abstract possibility’ of developing acceptable testing procedures . . . does not make those procedures an ‘[a]vailabl[e] . . . nondiscriminatory alternativ[e]’ for purpose of the Commerce Clause?” Taylor’s claim is that developing testing procedures is better justified than the current ban. Justice Blackmun’s position is that the procedures are *not* an “‘[a]vailabl[e] . . . nondiscriminatory alternativ[e].” That means the Court may simply ignore the testing procedures in adjudicating the case. The reason is that the procedures are an “abstract possibility” with “no assurance as to their effectiveness.”

On its face, this is quite puzzling. At first glance, there appear to be just two possibilities, both unsatisfactory. One is that the Court is making the empirical claim on the effectiveness of the testing procedures. The appeals court disagreed with the district court on precisely this point.⁶⁴ The Court provides no more empirical evidence to resolve the dispute, so this interpretation would mean that it just arbitrarily sided with the district court. The other possibility is that the Court is saying that the mere fact that the testing procedures are an “abstract possibility” means that the Court may ignore them. But how can that be an answer to Taylor’s argument? This is tantamount to the Court saying, “We will not reply.” There is, however, a third possibility: an appeal to a comparison-excluding commitment to protecting the environment. That would explain Blackmun’s attitude as long as the commitment blocks weighing environmental concerns against economic gains from trade.

European Court of Justice (ECJ) cases offer similar examples. The *Omega* decision is particularly instructive. In Bonn, Germany, Omega operated a “laserdrome” offering games in which players fired “sub-machine-gun-type laser targeting devices at sensory tags installed either in corridors where the firing took place or on jackets worn by other players.”⁶⁵

The community protested, and the Bonn police prohibited Omega’s operation. The rationale for the prohibition was that the games “constituted a danger to public order, since the acts of simulated homicide and the trivialization of violence thereby engendered were contrary to fundamental values prevailing in public opinion.”⁶⁶ Omega challenged the prohibition as a violation of its freedom to provide services under the law of the European Union (Article 49 EC).⁶⁷ The German Federal Administrative Court (*Bundesverwaltungsgericht*) referred the case to the ECJ for a preliminary ruling.

⁶⁴ United States v. Taylor, 752 F.2d 757, 762 (1st Cir. 1985).

⁶⁵ Court of Justice of the European Communities Press Release, No 82/04, Community Law Does Not Preclude the Prohibition Imposed in Germany on the Commercial Exploitation of Games Simulating Homicidal Acts (Oct. 14, 2004).

⁶⁶ Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, Court of Justice of the European Communities ¶ 7 (Oct. 14, 2004) [hereinafter *Omega*].

⁶⁷ *Id.* at ¶ 9.

The ECJ upheld the prohibition. It noted that both national constitutions of Member States of the European Union (EU) and the EU law solemnly protect fundamental rights, such as human dignity:

Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services.⁶⁸

The ECJ noted that the German community's view is that those "playing at killing" in Omega's games "infringed a fundamental value enshrined in the national constitution, namely *human dignity*."⁶⁹

The question is whether the court should decide in favor of the freedom to provide services or in favor of Germany's concerns about human dignity. The ECJ described itself as deciding this question by applying the proportionality test.⁷⁰ Typically, the three parts of the test can be summarized as follows: first, whether the measure was an effective means to achieve a legitimate goal; second, whether the measure was the least restrictive means of achieving the goal; third, whether the measure affected the applicant's interests in an excessive manner.⁷¹ Here is the ECJ's application of the test:

[T]he prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany. It should also be noted that, by prohibiting only the variant of the laser game the object of which is to fire on human targets and thus 'play at killing' people, the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities.⁷²

It is difficult to see how "prohibiting only the variant of the laser game the object of which is to fire on human targets" does not "go beyond what is necessary in order to attain the objective." On its face, the prohibition excludes a variant of the childhood game of tag in which players use laser pointing devices which do not look like guns, and in which the goal is simply to tag as many other players as possible (a tagged player is eliminated from the game). The ECJ evidently equates even that game with playing at killing people when it describes the Omega game as a "laser game the object of which is to fire on human targets *and thus 'play at killing' people*." But surely the assertion of that equivalence requires

68 *Id.* at ¶ 35.

69 *Id.* at ¶ 32 (emphasis added).

70 As required under its case law. *Id.* at ¶ 36.

71 Gráinne de Búrca, *The Principle of Proportionality and Its Application in the EC Law*, 13 YB EUR. L. 105, 113 (1993).

72 *Omega*, *supra* note 66, ¶ 39.

support. support the ECJ does not provide. The ECJ may have left such a gaping hole in its decision, but it is implausible that skilled and experienced judges did so.

An appeal to comparison-excluding commitments offers an alternate explanation that avoids attributing this error to the court. Suppose the court saw the German community as embracing a commitment to human dignity similar to the one we attributed earlier to Justice Mosk. Suppose further that that court understood that commitment to be inconsistent with Germany permitting Omega to offer any game in which players aim laser devices at human beings in order to eliminate them from the game. The commitment classifies any such game as playing at killing. There is, indeed, only one way for Germany to act consistently with that commitment: ban all such games. There is no less restrictive alternative.

This is a possible interpretation, but is it what the court had in mind? Or should have had in mind? The answer to the first question calls for a more thorough examination of the ECJ's decisions, and a thorough sociological study that would provide background about the relevant views of both the German public and the court. The second question calls for a normative proposal about the role of comparison-excluding commitments in ECJ decisions. Pursuing these questions is well beyond the scope of this paper. Our goal has been simply to raise them.

V. ADJUDICATING COMPARISON-EXCLUSION CLAIMS

Our examples leave a critical question unanswered. When a party (or the court on behalf of a party) bases a claim on a comparison-excluding commitment, how do courts weigh the pros and cons of deciding for or against a comparison-excluding commitment? Any decision procedure must meet a requirement of political legitimacy: a legitimate governmental decision-maker "accepts the responsibility, among others, to explain, particularly to those adversely affected, why different treatment of others in other circumstances is not capricious or arbitrary or discriminatory."⁷³ It would violate this requirement if a court, without adequate explanation of why it was doing so, used VP-reasoning to reject the comparison-excluding commitment by comparing the policy it supports to an alternative policy when the commitment is inconsistent with such comparison. So how do courts evaluate comparison-excluding commitments in ways that allow them to provide the kind of explanation legitimacy requires?

This question lies well beyond the scope of this article, but we note one suggestive development in recent domestic and international trade cases: roughly, courts will uphold significantly trade-restrictive regulations without any serious balancing of alternatives if they are convinced the regulation was adopted after a procedurally adequate consideration of all

⁷³ Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in *PRAGMATISM IN LAW AND SOCIETY* 359, 373-74 (Michael Brint & William Weaver eds., 1991).

relevant factors.⁷⁴ As Donald Kommers and Michel Waelbroeck aptly observe:

In the newer cases *what* is regulated is less important than *how* it is regulated. The practical operation of a regulatory scheme is more important than whether it affects intrastate or interstate commerce directly or incidentally.⁷⁵

WTO cases exhibit a similar pattern. Consider *Gasoline*, the very first decision under the (WTO) dispute settlement system.⁷⁶ In 1995, the U.S. Environmental Protection Agency (EPA) issued the “Gasoline Rule” in an effort to prevent the air quality from deteriorating below the 1990 level.⁷⁷ The rule imposed baseline standards for emission on gasoline refiners, but it imposed more burdensome standards on foreign refiners and importers than on domestic ones.⁷⁸

A WTO panel rejected the rule as a discriminatory measure not “primarily aimed at” protecting the environment.⁷⁹ The WTO Appellate Body (AB) disagreed with the panel’s ruling.⁸⁰ It found the existence of a “substantial relationship” between the rule and the environmental goal that it pursued. However, the AB still rejected the rule on the grounds that it violated a GATT requirement that regulatory measures shall “not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination.”⁸¹ The AB interpreted this to require “good faith.”⁸² To the AB, keeping good faith in this interdependent global trading community means that regulating countries (here the U.S.) should “take

⁷⁴ See Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1153 (1986) (arguing that the Supreme Court did not actually conduct “balancing” in a genuine sense); Richard H. Fallon, Jr., *Forward: Implementing the Constitution*, 111 HARV. L. REV. 56, 77–79 (1997) (distinguishing between “balancing in the shaping of doctrinal tests” and “balancing within constitutional doctrine as shaped by the Supreme Court”); Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 493 (2008) (observing that “a majority of the Court has not struck down a state or local law using *Pike* balancing in over twenty-five years”); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1063 (3d ed. 2000). This interpretive leniency or sympathy toward evenhanded state regulations might be also influenced by the vulnerability of the balancing test to the criticism of judicial legislation.

⁷⁵ See Donald P. Kommers & Michel Waelbroeck, *Legal Integration and the Free Movement of Goods: The American and European Experience in FORCES AND POTENTIAL FOR A EUROPEAN IDENTITY* (BOOK 3), *METHODS, TOOLS AND INSTITUTIONS* (VOLUME 1), *INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE* 165, 174 (Mauro Cappelletti et al. eds. 1986).

⁷⁶ Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/2 (April 29, 1996) [hereinafter *Gasoline*].

⁷⁷ 40 C.F.R. § 80, 59 Fed. Reg. 7716 (16 February 1994).

⁷⁸ *Gasoline*, *supra* note 75, at 7.

⁷⁹ *Id.* at 10.

⁸⁰ *Id.* at 19.

⁸¹ *Id.* at 26–28. The requirement is in the preambular language of the General Exception clause (*chapeau*).

⁸² *Id.* at 17; see also Appellate Body Report, *United States — Measures Affecting Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) (finding that the U.S. ban on online gambling was applied in a manner contrary to the good faith principle under the *chapeau* of GATT Article XX, although its policy reasons, such as protection of public morals, would remain precluded from comparison); but see Panel Report, *United States — Measures Affecting Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, (Nov. 10, 2004) (refusing to compare fraud and money-laundering risks from non-remote gambling with those from online gambling).

into account” the interests of trading partners, such as exporters (here Brazil and Venezuela), and make serious efforts to consult with the latter for a possible cooperative arrangement.⁸³ In this case, the U.S. failed to do so.⁸⁴

How many of the “good faith/procedurally adequate consideration” cases actually involve comparison-excluding commitments? And, when they do, what reason is there to think that the decisions comply with the requirements of political legitimacy? These questions, as interesting and important as they are, lie beyond the scope of what we can consider here. We conclude by noting that it is essential to find some way for courts to address comparison-excluding commitments. Laws governing crucial concerns in people’s lives should be informed by a proper appreciation of what those concerns are, and those concerns include comparison-excluding commitments. They do because such commitments lie at the heart of people’s—and societies’—identities. We touched on this point when discussing Justice Mosk’s dissent in *Moore*. We conclude with a brief return to the same theme.

VI. CONCLUSION: ADJUDICATING IDENTITY

We begin with individuals. William James captures the relevant concept of the self. “I am,” James writes,

[O]ften confronted by the necessity of standing by one of my . . . selves and relinquishing the rest. Not that I would not, if I could, be both handsome and fat and well dressed, and a great athlete, and make a million a year, be a wit, a *bon vivant*, and a lady killer, as well as a philosopher, and a philanthropist, statesman, warrior, and African explorer, as well as a ‘tone poet’ and saint. But the thing is simply impossible . . . Such characters may at the outset of life be alike *possible* to a man. But to make anyone of them actual, the rest must be more or less suppressed. So the seeker of his truest, strongest, deepest self must review the list carefully, and pick out the one on which to stake his salvation.⁸⁵

The essential point is that you make yourself who you are by what you “stand by,” by the commitments you strive to realize. James suggests (in this passage at least) that one central commitment defines who you are, but

⁸³ *Gasoline*, *supra* note 75, at 34.

⁸⁴ See Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (Apr. 4, 2012) (holding that comparison of any negative trade impacts caused by a technical regulation between imported and domestic products can be avoided as long as the regulation is applied in an evenhanded manner). Regarding the same view expressed by the Appellate Body, see Appellate Body Report, *United States — Certain Country of Origin Labelling Requirements*, WT/DS386/AB/R (Jun. 29, 2012); Appellate Body Report, *United States — Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (May 16, 2012); but see Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001) (ruling that chrysotile asbestos fibres imported from Canada and their substitutes, such as PCG fibres, marketed in France were not commensurable in view of France’s zero-tolerance policy toward carcinogenic asbestos products).

⁸⁵ WILLIAM JAMES, 1 THE PRINCIPLES OF PSYCHOLOGY 309-10 (1890).

that is incorrect. Selves consist of commitments to multiple, different, and sometimes incompatible roles. The self you seek to realize is a multifaceted self.

The commitments that lie at the center of one's self-definition are often comparison-excluding commitments—commitments to children, friends, ideals, for example. The same is true of society. Societies often exhibit widely shared comparison-excluding commitments. *Thai Cigarettes* illustrates this point. Thailand answered “no” to the question of whether it was the sort of nation that sacrifices public health to permit the importation of cigarettes and thereby realize many advantages. The “no” answer was an expression of societal identity. Similarly, Justice Mosk in *Moore* asks whether the State of California is the sort of community that will sacrifice human dignity for advances in health care research. As the trade dispute cases show, courts sometimes have to adjudicate such questions of societal identity when they confront comparison-excluding commitments. It is essential to find an appropriate way to do so.