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COMPARATIVE AND NONCOMPARATIVE JUSTICE: SOME GUIDELINES FOR CONSTITUTIONAL ADJUDICATION

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INTRODUCTION

In this article, we propose to shed new light on the appropriate resolution of a wide variety of constitutional claims by examining and evaluating them using a framework built with the Principles of Comparative and Noncomparative Justice and their logical derivatives. The Principle of Comparative Justice mandates that relevantly-similar cases be treated similarly and that relevantly-dissimilar cases be treated differently; the Principle of Noncomparative Justice decrees that each person be treated precisely as she deserves or merits without regard to the way in which anyone else is treated.[1] These principles are most familiar in the contexts of Equal Protection and Substantive Due Process claims, respectively.[2] We think it illuminating, however, to examine other constitutional provisions to determine whether

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[1] We define these principles more fully in Part I, *infra*. *See also, e.g.*, JOEL FEINBERG, SOCIAL PHILOSOPHY 98 (1973) [hereinafter FEINBERG] (describing the two principles). *But cf.* Phillip Montague, *Comparative and Non-Comparative Justice*, 30 PHIL. Q. 131, 132–37 (1980) (critiquing Feinberg's account of comparative and noncomparative justice); Joshua Hoffman, *A New Theory of Comparative and Noncomparative Justice*, 70 PHIL. STUD. 165 (1993) (same).

[2] *See* Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387, 472–78 (1985) (noting that, generally, rational basis Equal Protection claims are comparative justice claims, while rational basis Substantive Due Process claims are often, but not always, noncomparative justice claims).

they, too, can be described as giving rise to comparative arguments (those that essentially claim that the treatment of one is unfair compared to the treatment of another) and/or noncomparative justice arguments (those that essentially claim that one has an intrinsic right to particular treatment, regardless of how others are treated).[3]

Our examination points to a mismatch between the arguments that the United States Supreme Court *should* use to analyze claims arising under the constitutional provisions at stake and the arguments that it *does* use. We believe, for a variety of reasons that we explain in depth in this article, that it is critical that all courts correctly identify the comparative and noncomparative arguments that litigants can and do make, and that the courts then use the proper corresponding analysis to evaluate those arguments.

This article is novel in its theoretical and practical treatment of the logical relationships between the Principles of Comparative and Noncomparative Justice and their consequences in a range of constitutional contexts. In detailing these consequences, we have formulated a set of practical and flexible maxims that courts, lawyers, and scholars can use in making and evaluating constitutional arguments, so that they do not continue to make the kinds of mistakes that we identify here.

In Part I, we describe the Principles of Comparative and Noncomparative Justice and their corresponding arguments. We then elaborate the distinction between the two types of arguments by examining a number of contexts in which both are available. We sharpen the distinction by focusing on the relationship between comparative justice and underinclusive-burden arguments, on the one hand, and the relationship between noncomparative justice and overinclusive-burden arguments, on the other. Underinclusive-burden arguments essentially claim that not all of the people who cause the harm that a law seeks to prevent are subject to that law. Overinclusive-burden arguments essentially claim that not all of the people who are subject to a law cause the harm that the law seeks to prevent. As we explain in Part I.E, generally, the Supreme Court and lower courts accurately characterize under-inclusive-burden arguments as comparative justice arguments. However, while those courts generally characterize overinclusive-burden arguments as noncomparative justice arguments, sometimes that characterization is inaccurate. While the courts tend to treat overinclusive-burden arguments as noncomparative justice arguments, the two categories are not co-extensive; as we establish, some overinclusive-burden arguments are actually comparative justice arguments.

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[3] As other scholars have recognized, many of the provisions in the United States Constitution can be characterized as protecting comparative justice rights, noncomparative justice rights, or both. *Cf., e.g., id.* at 447, 468–69 (characterizing the Free Speech Clause, Free Exercise Clause, and the Search and Seizure Clause, inter alia, as sources of noncomparative rights, and the Cruel and Unusual Punishments Clause, the Free Speech Clause, the Establishment Clause, the Commerce Clause, and the Privileges and Immunities Clause, inter alia, as sources of comparative rights).

Having set out the parameters that courts should use to determine whether an argument is genuinely a comparative or noncomparative justice argument, we describe the relationship between the principles that such arguments invoke. We first identify the logical relationship between the Principles of Comparative and Noncomparative Justice and, derivatively, the logical relationship between arguments that invoke each. We determine that the Principle of Noncomparative Justice entails the Principle of Comparative Justice. By that, we mean that if the first is satisfied, the second must be as well, and conversely, that if the second is violated, the first must be as well. Thus, a noncomparatively just action must be comparatively just, and a comparatively unjust action must be noncomparatively unjust. However, a comparatively just action may or may not be noncomparatively unjust.

One might infer from the foregoing that the Principle of Comparative Justice is unnecessary. We conclude, though, that given the risks of misjudgment, bad faith, and inefficiency inherent in a justice system concerned only with noncomparative justice, the Principle of Comparative Justice is a necessary guard against those risks. Application of the Principle of Noncomparative Justice requires that each person be treated in precise accord with her merits, exactly as she deserves. In real life, however, it is impractical and inefficient to require a perfect understanding of each person's merit. Application of the Principle of Comparative Justice allows us to double-check the fairness of the treatment we mete out to any individual by comparing it to the treatment that others are accorded.

As we explain in Part II, the Supreme Court has often misunderstood the relationships between the principles, with results that range from the confusing to the disastrous. In this section, we consider cases in which litigants raised a variety of constitutional claims that conceivably might be characterized as claims of comparative injustice, noncomparative injustice, or both. Such claims include allegations that governmental action violated the Equal Protection, Due Process, Establishment, Free Exercise, Free Speech, or Cruel and Unusual Punishments Clauses, or violated an unenumerated constitutional right, such as the right to travel. Using the framework we describe in Part I, we examine both the claims at issue and the arguments that the Supreme Court used to resolve those claims. To help others avoid the errors that the Supreme Court has made, we offer several practical guidelines that we believe courts, lawyers, and scholars can follow when they evaluate constitutional claims that can be characterized as asserting underlying arguments of comparative or noncomparative injustice, or both.

We begin in Part II.A by analyzing some cases in which the Supreme Court mischaracterized its own arguments, describing a comparative justice argument as a noncomparative justice argument or vice versa, and we explain how such mischaracterizations lead to undesirable consequences. In Part II.B, we discuss cases in which the Court misapplied its own arguments, using a comparative justice analysis to resolve a noncomparative justice claim or vice versa, when the Court's

own stated reasoning seems to indicate that the unused analysis would have been the appropriate one.

We proceed in Part II.C to assess cases in which litigants argued that governmental action was noncomparatively unjust, and the Court responded with arguments that the action was comparatively just. In these cases, we argue, the Court mistakenly treated claims of noncomparative and comparative injustice as functionally equivalent. Under the entailment relationship that we have described, however, a determination that governmental action is comparatively just does not answer the claim that it is noncomparatively unjust. Such action may be simultaneously both comparatively just and noncomparatively unjust.

In Part II.D, we identify another error that the Court has made: In some cases, it has unnecessarily weakened constitutional norms by construing them as giving rise only to comparative justice claims. We argue that it is inappropriate to narrow constitutional norms in that fashion when courts can reach the same result — a determination that the challenged governmental action did not violate the Constitution — by finding that the action was noncomparatively just. In Part II.E, we discuss a related mistake: At times, the Court has resolved the apparent conflict between two constitutional norms by construing both as giving rise to comparative justice claims alone. As we explain, courts need not resort to weakening both constitutional norms in that manner to resolve a conflict between them. Such conflicts can be resolved by construing just one of the two norms as giving rise to comparative justice claims alone.

Part II.F proposes that when a constitutional norm seems to be expressed in noncomparative justice language, a court should not evaluate claims under that norm using comparative justice arguments, and vice versa, without articulating what the court believes to be a compelling justification for overriding the semantic boundaries of the text — again, a maxim that the Supreme Court often fails to follow. Finally, Part II.G details the consequences for constitutional adjudication of our conclusions about the logical and practical relationships between the Principle of Comparative Justice and the Principle of Noncomparative Justice. We have found that, while the Principle of Noncomparative Justice entails the Principle of Comparative Justice, application of the Principle of Comparative Justice is nonetheless critical for an adequately just social order because of the difficulty of ensuring that someone is, indeed, being treated in a manner that is noncomparatively just. If we are correct, a court that determines that an action is noncomparatively unjust need not determine whether the action is comparatively just. But if the court is not convinced that the action is noncomparatively unjust, the court should go on to consider whether it is comparatively unjust as a necessary guard against action that appears to be, but is not truly, noncomparatively just. As we explain in Part II.G, the Supreme Court seems to have done just the opposite in recent cases: it has decreed that courts should turn to comparative justice principles to double-check a

conclusion that governmental action is noncomparatively unjust but that courts need not resort to comparative justice principles if they are not convinced that the action is noncomparatively unjust.

The errors we describe are not unique to the Supreme Court, of course. By highlighting those errors and by providing flexible guidelines that can be used to identify and correctly analyze constitutional arguments that make underlying claims of comparative injustice, noncomparative injustice, or both, we hope to help other courts, as well as lawyers and scholars, avoid making the same kinds of mistakes.

I. PRINCIPLES OF COMPARATIVE AND NONCOMPARATIVE JUSTICE

A. The Basic Distinction Between Comparative and Noncomparative Justice Arguments

The characteristic feature of a comparative justice argument[4] is that its proponent[5] first draws either a comparison or a contrast between the way in which some actor has treated two or more other persons, and then goes on to argue that this particular comparison or contrast exhibits fundamental injustice of some kind. For an argument to be a comparative justice argument, its proponent must articulate

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[4] By an "argument," we mean what people generally mean: a set of one or more propositions (or "premises") marshaled in an effort to provide epistemological support for another proposition (a "conclusion"), where "provide epistemological support for" means "provide a reason to believe in." Arguments can be divided into those whose conclusions are normative propositions and those whose conclusions are non-normative propositions. While the distinction between normative and non-normative propositions is often a subject of heated debate among ethical philosophers, we mean to draw a distinction here between descriptive arguments — those that try to capture "the way it is" — and prescriptive arguments — those that try to capture "the way it should be." In the simplest formulation, normative arguments are "ought" arguments, and non-normative are "is" arguments. *See, e.g.*, Richard Fumerton & Ken Kress, *Causation and the Law: Preemption, Lawful Sufficiency, and Causal Sufficiency*, 64 LAW & CONTEMP. PROBS. 83, 85 (2001) (stating that whatever position one takes in the ethical philosophy debate, "there is a contrast, in Hume's terms, between 'is' statements and 'ought' statements.").

Within the class of normative arguments are arguments that invoke considerations of justice or fairness, or "normative arguments from justice," and those that do not. The sub-class of normative arguments from justice may, in turn, be divided into arguments invoking considerations of comparative justice and arguments invoking considerations of noncomparative justice. We refer to the former as "comparative justice arguments" and to the latter as "noncomparative justice arguments."

For a helpful discussion of the distinction between comparative and noncomparative justice arguments, see Joel Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 297 (1974), and FEINBERG, *supra* note 1, at 98–119.

[5] We refer to someone who makes an argument as a "proponent" of that argument and to someone who responds to that argument as a "respondent."

some comparison or contrast between the way in which actor *A* treats person *B* and at least one other person, *C*, and then proceed to argue that the treatment that actor *A* imposes on either *B* or *C* is unfair in light of the treatment that actor *A* imposes on the other.

In contrast, a noncomparative justice argument does not articulate any such comparison or contrast with the way in which some actor treats two or more other persons. Rather, it asserts that there is something intrinsically unjust about the way in which an actor *A* treats some other person *B*, considered independently of the ways in which *A* treats anyone else. Of course, it may well be that *A* treats others in the same way that *A* treats *B*. However, simply because *A* treats all members of some class of persons in the same way does not necessarily insulate *A* from challenges based on noncomparative justice arguments. The key question then will be, "Could a proponent challenging *A*'s actions intelligibly and appropriately maintain that *A* is treating *each* member of the class in an intrinsically unjust manner, considered independently of the way or ways in which *A* is treating any other member of that class?" If the answer is affirmative, then noncomparative justice arguments would be normatively appropriate and relevant in that context.

B. The Principle of Comparative Justice and Its Normative Precepts

Comparative justice arguments presuppose the "Principle of Comparative Justice," which, as has often been observed,[6] can be formulated as the conjunction of two normative precepts: (1) Treat relevantly similar cases in the same way, and (2) Treat relevantly dissimilar cases in different ways.[7] The normative rights that persons possess in virtue of the Principle of Comparative Justice are comparative rights, that is, rights which are ascertainable only by comparing persons and their situations.[8] Hence, the function of comparative justice arguments is to protect comparative rights.

The term "relevantly" in each of the two precepts of comparative justice points to the need to specify the relevant similarities or dissimilarities in any particular instance of the precept's application.[9] There is a sense in which the two precepts are formal precepts of justice whose application in any particular context presupposes a material principle of justice whose function is to specify the "relevant" similarities or dissimilarities for that context.[10]

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[6] *See, e.g.*, FEINBERG, *supra* note 1, at 100.

[7] *Id.* at 99–100.

[8] *See id.* at 100.

[9] *Id.*

[10] *See, e.g., id.* For an elaborate discussion of this distinction between formal and material principles of comparative fairness, see CH. PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT 1–78 (John Petrie trans., 1963). In his introduction to Perelman's book, H.L.A. Hart succinctly expresses the distinction in the following terms:

The first precept, "Treat relevantly similar cases in the same way," is properly applied only to situations in which an actor is treating two or more persons in different ways. In such contexts, it is appropriate for some proponent to call attention to the differing modes of treatment and to argue that the differentiation violates the Principle of Comparative Justice on the ground that there are no normatively relevant dissimilarities between the two people or classes of people. In such contexts, the proponent argues that the actor is treating people differently in a situation in which they should be treated in the same way.

> For [Perelman], as for Aristotle, justice is a concept of complex structure within which we should distinguish a constant formal element and a varying material element. This distinction might be presented in terms used in recent English moral philosophy as one between the constant *definition* of justice and the varying *criteria* for its application in different situations or to different subject matters. The constant formal or defining element is the principle that "like persons be treated alike." This by itself cannot be used to characterise any arrangements just or unjust, since all human beings are alike in some respects and different in others. It must therefore be supplemented by a variable material criterion determining what resemblances or differences between human beings are to be regarded as relevant.

H.L.A. Hart, *Introduction* to CH. PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT i, viii–ix (John Petrie trans., 1963).

In a well-known article, Professor Westen argued that the precept that "relevantly similar cases should be treated similarly" requires a decision as to which similarities are "relevant," which in turn requires referring to some external set of rights, and thus that the comparative justice argument that two persons should be treated similarly can always be reduced to the argument that each has a fundamental (noncomparative) right to certain treatment. *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). While many commentators have defended the concept of equality, Professor Simons's response is particularly relevant here. *See* Simons, *supra* note 2. As Professor Simons does, we disagree that comparative justice arguments can always be reduced to noncomparative justice arguments and thus that there is no need for the former. *See* Part I.F, *infra*.

One simple example that supports our position is the following, modified from an example that Professor Simons gives: Suppose that parent *P* tells his children, sisters *A* and *B*, "I'll give both of you candy if I give either of you candy." Suppose further that both want the candy but that neither girl deserves (has a fundamental, noncomparative right to) it. If *P* gives *A* but not *B* candy, *B* can argue that *P*'s treatment of the sisters is comparatively unfair. It is true, as we explain in Part I.F, *infra*, that *B* can also argue that *A*'s treatment is noncomparatively unfair, since *A* has gotten a benefit that *A* does not deserve. But presumably, *B*'s real complaint is *not* that *A* does not deserve and should not get any candy; *B*'s real complaint is genuinely comparative. While *B* would have to concede that the parents could treat the sisters fairly by denying candy to both, *B* would not argue that because *A* does not deserve the candy, the denial to both is the only correct and desirable outcome. Rather, *B* would prefer that the parents treat the sisters fairly by giving *both* candy — a solution that would not be available if giving *A* candy was truly noncomparatively unjust.

Consider an example of a comparative justice argument that relies on the first precept, "Treat relevantly similar cases in the same way." Imagine a state that permits gambling on both horse races and dog races but bars gambling in any other form. Suppose that the legislature becomes concerned about social, economic, and legal problems causally associated with gambling, such as organized crime activities, personal bankruptcies, dysfunctional family situations, theft and embezzlement by obsessive gamblers seeking to support their habits, and so on. A legislator proposes a bill prohibiting gambling on both horse and dog races, but lobbying pressure from the horse racing industry leads to the bill's defeat. The legislature compromises by enacting a statute that prohibits only gambling on dog races.

It is easy to imagine the comparative justice argument that would be made by supporters of gambling on dog races: "We temporarily concede, *arguendo*, that it could be noncomparatively just to prohibit gambling on dog races. However, the legislature's decision to prohibit gambling on dog races only — when it is obvious that gambling on horse races causes the very same problems — violates the Principle of Comparative Justice because it violates the normative precept, 'Treat relevantly similar cases in similar ways.' Gambling on dog races is relevantly similar to gambling on horse races, so both forms of gambling should be treated in the same way. The legislature should either prohibit both or permit both. If it chooses to permit gambling on horse races, it must also permit gambling on dog races."

The dog race proponent's argument is a paradigmatic comparative justice argument. It draws a comparison between two classes of people: those who gamble on dog races and those who gamble on horse races. (Of course, there may be people who belong to both classes.) It goes on to argue that because the activities engaged in by the members of both classes are relevantly similar with respect to causing the same problems, the legislature is obligated to regulate both activities in the same way.

In contrast, the second precept, "Treat relevantly dissimilar cases in different ways," is appropriately applied only to situations in which an actor is treating two or more persons in the same way. In such contexts, it is at least normatively relevant for some proponent to call attention to the relevant dissimilarities between the two and to argue that the uniform treatment violates the Principle of Comparative Justice because the actor is treating persons in the same way in a situation in which they should be treated differently.

For example, imagine a class of industrial activities generating air and water pollution in varying amounts. Suppose that a state legislature imposes a uniform pollution tax on these activities. Suppose further that the activities of industry X cause substantially less pollution than those of industry Y. One would naturally expect a proponent for X to make the following comparative justice argument: "I temporarily concede, *arguendo*, that it may be noncomparatively just to impose a pollution tax on X's activities. However, if the legislature chooses to do so, the Principle of Comparative Justice obligates it to impose a smaller tax on X's activities than on industrial activities that generate more pollution, such as Y's." This is also

a paradigmatic comparative justice argument. The proponent for *X* first observes that the legislature is treating *X* in the same way in which it is treating at least one other industry, *Y*. She goes on to identify a normatively relevant dissimilarity between *X*'s and *Y*'s activities. She concludes by asserting that the legislature is obligated to treat *X* and *Y* differently, thus invoking the second precept of the Principle of Comparative Justice, "Treat relevantly dissimilar cases differently."

Both these examples of comparative justice arguments involve the imposition of burdens, but comparative justice arguments are also sometimes appropriate in contexts involving the conferral of benefits. Suppose that there are two local independent book dealers that are similar in all relevant respects, such as size, type of clientele, types of books sold, etc. Suppose that, despite these relevant similarities, the city council gives a financial subsidy to one of the book dealers but not to the other. The dealer not given a subsidy could appropriately make a comparative justice argument based on the contrast between the ways in which the council has treated the two businesses.

One normative presupposition of the Principle of Comparative Justice is that people possess equal degrees of intrinsic worth simply by virtue of their status as members of the human species and should be treated in ways that are consistent with that metaphysical status. Of course, this presupposition does not mean that it is per se unjustifiable to treat people in different ways. As we have argued, the Principle of Comparative Justice permits different modes of treatment for different persons if their respective situations are relevantly dissimilar; however, such permission is granted only to the extent that such differing modes of treatment do not violate the assumption of equal intrinsic worth.

C. The Principle of Noncomparative Justice and Its Normative Precept

Noncomparative justice arguments presuppose the "Principle of Noncomparative Justice," a principle that can be formulated in terms of the normative precept, "Treat each person as she deserves or merits," where it is taken for granted that the degree of merit or desert of any particular person in any particular context is ascertainable independently of the degree of any other person's merit. The Principle of Noncomparative Justice presupposes that every person possesses intrinsic value and that actors are obligated to respect that intrinsic value by treating that person as she truly deserves. Because the normative rights that people possess in virtue of the Principle are noncomparative rights, the function of noncomparative justice arguments is to protect noncomparative rights.

Consider this example: Suppose that a police department systematically and brutally tortures suspects to coerce confessions. Suppose further that one suspect's lawyer argues as follows: "It is intrinsically unjust to treat my client in this way, even if he is guilty, regardless of how you treat anyone else." Notice that the argument draws no comparison or contrast between the way in which the police

have treated this suspect and the way in which they have treated any other suspect. Consequently, it could not be classified correctly as a comparative justice argument. Rather, the argument relies solely on the claim that there is something intrinsically unjust in the way in which this particular suspect has been treated, regardless of how anyone else has been treated. In short, the proponent argues that the treatment imposed on her client violates the Principle of Noncomparative Justice.

The torture example involves the imposition of a burden that, presumably, should not be inflicted on anyone. Such cases are often characterized as involving the standard of "baseline" fairness, a standard that purports to specify a minimum level of morally justifiable treatment to which all are entitled. But it is important to note that the Principle of Noncomparative Justice is not limited to such "baseline" situations. It extends to situations in which, although *some* person may justifiably be treated in the way in which person *A* is being treated, it is nonetheless intrinsically unfair — noncomparatively unjust — to treat *A* in that particular way, as *A* does not deserve to be treated in that manner. For example, suppose that *A* is imprisoned for a crime that *A* did not commit. That treatment would violate the Principle of Noncomparative Justice, even though one might believe that it is morally permissible to imprison others for the crimes that they actually committed.

While the torture and imprisonment examples involve the imposition of burdens, noncomparative justice arguments, like comparative justice arguments, may appropriately be offered in at least some situations involving the conferral of benefits. Suppose that a city council awards $10,000 to the city treasurer, *T*, for "being the most effective, conscientious, and public-spirited governmental official of the year," when *T* actually has not been an effective, conscientious, or public-spirited citizen at all but rather a grasping, self-obsessed, incompetent accountant who embezzled one million dollars from the city during the previous year. At least one of the arguments available to critics of the award would be a noncomparative justice argument whose thrust would be that *T* does not deserve the award. The argument would be noncomparative because it would not rely on any comparison or contrast between the way the city council treats *T* and the way it treats anyone else. Rather, the argument would focus exclusively on the question of whether *T*, *qua* an individual, deserves the award in *T*'s own right.

D. Contexts in Which Both Comparative and Noncomparative Justice Arguments Are Appropriate

Some contexts can be normatively analyzed in terms of both comparative and noncomparative justice arguments. Recall our earlier discussion of the hypothetical about horse and dog race gambling, in which we articulated the general form of the comparative justice argument that an advocate of dog race gambling could appropriately offer. It would also be appropriate for such a proponent to offer a noncomparative justice argument, which would not rely on any comparison or

contrast between the way the legislature treats dog race gambling and the way it treats horse race gambling. Rather, the proponent would maintain that there is simply something intrinsically unfair in prohibiting gambling on dog races. For example, she might invoke the privacy principle, claiming that those interests that are "close to the core" of at least some human personalities are entitled to special protection against the democratic majoritarian processes.[11] But whatever the particular rationale, this argument would invoke the Principle of Noncomparative Justice, not the Principle of Comparative Justice.

The facts in *Skinner v. Oklahoma*[12] present another example of the availability of arguments from both comparative and noncomparative justice perspectives. There, a statute authorized the compulsory sterilization of persons convicted three times of crimes of moral turpitude.[13] It specified grand larceny, but not embezzlement, as a crime of moral turpitude.[14] In this context, a typical comparative justice argument would take the following form: "It violates the Comparative Justice precept 'Treat relevantly similar cases in the same way' to sterilize thrice-convicted grand larcenists, while exempting thrice-convicted embezzlers, as there are no significant moral differences between the two crimes." In contrast, a typical noncomparative justice argument would take this form: "It violates the Principle of Noncomparative Justice to sterilize a person thrice-convicted of grand larceny because the punishment is disproportionate to the crime. The capacity for procreation is one of the most fundamental liberty interests human beings have and should not be destroyed by the state for such relatively trivial disturbances of the public order."

The availability of one type of argument does not necessarily dispense with the need for the other. As we discuss in Part I.F, although the Principle of Noncomparative Justice entails the Principle of Comparative Justice, both types of arguments are needed to achieve an adequately just social order. If litigants can make both arguments, then courts should not dismiss one solely on the ground that the other is unpersuasive.[15]

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[11] *See, e.g.*, Charles Fried, *Privacy*, 77 YALE L.J. 475, 477 (1968) (contending that "our very integrity as persons" depends on our privacy); Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 637 (1991) ("Some rights [such as the right to privacy] are entrenched because of a belief that they are in some sense pre- or extra-political, that is, because individuals ought to be allowed to exercise them regardless of what majorities might think.").

[12] 316 U.S. 535 (1942).

[13] *Id.* at 536.

[14] *Id.* at 538–39.

[15] In general, this article deliberately focuses on the types of arguments described above, alleging the violation, rather than the satisfaction, of the Principles of Comparative and Noncomparative Justice. Of course, the classes of both comparative and noncomparative justice arguments could be defined to include both those arguments whose conclusions assert that some particular course of action satisfies the constraints of the principle at issue as well

E. A Closer Look at the Distinction Between Comparative and Noncomparative Justice: Underinclusive and Overinclusive Burdens

We can sharpen our initial broad-brush sketch of the distinction between comparative and noncomparative justice arguments by focusing on it in the context of the familiar legal concepts of underinclusive and overinclusive burdens. Although Professors Tussman and tenBroek famously elaborated those concepts in terms of the Equal Protection Clause,[16] it is illuminating to extend them to any constitutional context in which the distinction between comparative and noncomparative justice arguments is normatively relevant.

In the terminology that Tussman and tenBroek developed,[17] any particular law may be understood as aiming either at the elimination (or at least the frustration) of one or another public harm, or at the achievement (or at least the promotion) of one or another public good.[18] We focus here on the first case: the elimination (or at least the frustration) of a public harm. In this context, a law's "trait" is the set of characteristics that an individual must possess for the law to apply to that individual.[19] A law's associated "mischief" is the evil that the law seeks to eliminate (or at least frustrate).[20]

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as those that assert that some particular course of action fails to satisfy those constraints. However, there is a sense in which arguments whose conclusions assert violation of a principle of justice are primary, whereas arguments whose conclusions assert satisfaction of a principle of justice are derivative. The latter are typically offered by respondents to rebut allegations of violations of a principle of justice. For example, consider the context of constitutional litigation — the context with which we are concerned here. In that context, a litigant generally argues that some governmental action violates some constitutional norm and thereby violates the Principle of Comparative Justice, the Principle of Noncomparative Justice, or both. Naturally, the opposing litigant will respond by arguing that the constraints of those principles have been satisfied. But those responses are derivative in the sense that they presuppose the prior arguments, which assert violations of the principles. If a label is needed for such derivative arguments, an adjective such as "responsive" will suffice. Thus, whereas one could define (as we have) a comparative justice argument as one whose conclusion asserts a *violation* of the Principle of Comparative Justice, one could go on to define a *responsive* comparative justice argument as one whose conclusion asserts a *satisfaction* of the Principle of Comparative Justice.

[16] *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949); *see also* Russell Pannier, *Substantive Due Process and Equal Protection Arguments: An Analysis of the Tussman and tenBroek Distinction*, 15 WM. MITCHELL L. REV. 535 (1989). In several respects, this article expands on Professor Pannier's earlier work, creating a more comprehensive theoretical and practical framework than the one presented in that piece, and applying that framework to a wide variety of constitutional claims.

[17] Tussman & tenBroek, *supra* note 16, at 346–53.

[18] *Id.* at 346.

[19] *See id.* at 347.

[20] *See id.*

Thus, a law's trait is a function of the classificatory terms of the law itself. Imagine a municipal ordinance requiring that all local sellers of alcoholic beverages be licensed. The law's trait is the characteristic of "being a local seller of alcoholic beverages." Similarly, imagine a statute requiring all motor vehicle drivers operating on public highways to comply with posted speed limits. That law's trait is the characteristic of "being a motor vehicle driver operating on a public highway." A law's trait may thus be defined in non-normative, descriptive terms.[21]

In contrast, a law's mischief is a function of the law's purpose or objective, in the sense that in order to identify the statute's associated mischief, one must somehow ascertain what the lawmakers were trying to accomplish. In this sense, the law's mischief is defined in normative terms, in that the mischief is the harm that the lawmakers believed ought not occur.[22] The objective may or may not be explicitly expressed in the statute itself. Typically, it is not. In cases of the latter kind, identification of the legislative purpose is often difficult and controversial. For example, consider H.L.A. Hart's well-known hypothetical of an ordinance that prohibits vehicles in city parks.[23] Suppose that the ordinance does not identify its own purpose. As Hart observes, the judicial identification of the legislative objective is bound to be controversial, as there are indefinitely many candidates: to ensure a relatively quiet environment, to protect pedestrians against the risk of being struck by motor vehicles, and so on.[24]

Any law's associated trait and mischief serve to generate two classes, the "trait class" and the "mischief class."[25] The trait class is the class of individuals possessing the trait.[26] In contrast, the mischief class is the class of individuals possessing the mischief.[27] For example, imagine a federal statute requiring that all persons boarding an airplane submit to weapons searches. Suppose that in enacting the statute, Congress intended to prevent, or at least make more difficult, the destruction of lives and property. The statute's associated trait class is the class of persons boarding airplanes, whereas its associated mischief class is the class of persons boarding planes with the intention of destroying lives and property.

Given any particular law's trait class and mischief class, there are five possible relationships between the two classes.[28] First, the two classes might be identical in the sense that each contains the same members.[29] In this case, all members of the

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[21] *See supra* note 4.

[22] *Id.*

[23] H.L.A. HART, THE CONCEPT OF LAW 128–29 (2d ed. 1994).

[24] *See* Tussman & tenBroek, *supra* note 16, at 347.

[25] *See id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

trait class would be members of the mischief class and vice versa.[30] For example, suppose that a legislature intends to protect citizens from the dangers of smoking tobacco and, for that purpose, enacts a law banning the smoking of any tobacco product. Both the trait and the mischief class consist of people, and only of people, who smoke tobacco.

Second, the two classes might be totally distinct.[31] In this case, no members of the trait class would be members of the mischief class.[32] Suppose, for example, that all people carry either gene 1 or gene 2. Studies definitively establish that only people who carry gene 1 ever commit a particular heinous crime, *C*, and that people who carry gene 2 never commit crime *C*. Imagine that to prevent the commission of crime *C*, the legislature passes a law mandating the incarceration of everyone who carries gene 2. The law's trait class and its mischief class do not overlap at all; no member of the trait class (those who carry gene 2) is tainted with the mischief that the law seeks to prevent (commission of crime *C*). Such a law is as unlikely as it is unreasonable and need not further concern us.

Third, the trait class might be a proper subset of the mischief class.[33] Here, all members of the trait class would be members of the mischief class, but some members of the mischief class would not belong to the trait class.[34] This would be a case of an "underinclusive" burden, a state of affairs in which the legislative classification promotes the legislative purpose only partially.[35] Thus, for example, suppose that a state supreme court promulgated a rule that barred lawyers who were residents of other states from admission to that state's bar. Suppose further that the law's purpose was to prevent lawyers from practicing law in the state if those lawyers were unlikely to maintain an active practice in the state and were thus unlikely to become and remain familiar with local rules and procedures. One could deem the law underinclusive because lawyers who were admitted to the bar when they were state residents but then moved out of state could maintain their bar memberships, even though such lawyers might be no more likely to maintain an active practice in the state than were lawyers who had never lived there.[36] Assuming *arguendo* that all members of the trait class (lawyers who are not state residents when they seek admission) possess the mischief at which the law is aimed (being unlikely to maintain an active practice in the state and thus being unlikely to become and remain familiar with the state's local rules and procedures), there are others who are tainted with the mischief — and thus are members of the mischief class — who

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[30] *See id.* at 348.

[31] *Id.* at 347.

[32] *Id.* at 348.

[33] *Id.* at 347.

[34] *Id.* at 348.

[35] *See id.*

[36] *E.g.*, Supreme Court of N.H. v. Piper, 470 U.S. 274, 285 n.19 (1985).

are *not* members of the trait class (e.g., lawyers who resided in state when they sought admission, but who have since moved out of state).

Fourth, the mischief class might be a proper subset of the trait class.[37] In that case, all members of the mischief class would belong to the trait class, but some members of the trait class would not belong to the mischief class.[38] In other words, everyone who causes the mischief has the trait, but not everyone who has the trait causes the mischief. Consider again the example above in which all people carry either gene 1 or gene 2. Only people who carry gene 1 ever commit crime *C*; people who carry gene 2 never commit crime *C*. Suppose further that while all people who commit crime *C* carry gene 1, some gene 1 carriers never commit crime *C*. If, to prevent crime *C*, the legislature passes a law mandating the imprisonment of gene 1 carriers, the law would be overinclusive: All members of the mischief class (those who commit crime *C*) are members of the trait class (since only gene 1 carriers commit crime *C*), but there are members of the trait class who are not tainted with the mischief, since not all gene 1 carriers commit crime *C*. This would be a case of an "overinclusive" burden, a state of affairs in which the legislative classification burdens some who are not characterized by the mischief at which the law is directed.[39]

Fifth, a law's trait class might contain some who do not belong to the mischief class, while its mischief class might contain some who do not belong to the trait class.[40] Such a law would be simultaneously over- and underinclusive, in that it would both burden some who do *not* threaten the mischief and fail to burden all who *do* threaten the mischief.[41] Tussman and tenBroek give the example from *Hirabayashi v. United States*[42] of a World War II-era curfew imposed on Japanese American citizens in an attempt to prevent or at least reduce the possibility of acts of espionage and sabotage.[43] Obviously, not all members of the trait class (Japanese American citizens) were members of the mischief class (those who would engage in acts of espionage or sabotage); no one could honestly claim that all Japanese Americans were disloyal to the United States in World War II. Thus, the law was overinclusive. It was simultaneously underinclusive, since there were members of the mischief class (those who would engage in acts of espionage or sabotage) who were not included in the trait class — non-Japanese American citizens loyal to the United States' enemies.[44]

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[37] Tussman & tenBroek, *supra* note 16, at 347.

[38] *See id.* at 351.

[39] *Id.* at 351.

[40] *Id.* at 347.

[41] *Id.* at 351.

[42] 320 U.S. 81 (1943).

[43] *See* Tussman & tenBroek, *supra* note 16, at 352–53.

[44] As Tussman and tenBroek observe, these five relationships do not exhaust all comparative justice issues, even with respect to the Equal Protection Clause alone. For

In general, underinclusive-burden arguments are paradigmatic comparative justice arguments.[45] The essence of an underinclusive-burden argument is its drawing a contrast between the way in which an actor treats members of the trait class on the one hand, and members of the mischief class who do not belong to the trait class on the other. In such cases, the proponent essentially argues: "I concede, *arguendo*, that the government may justifiably burden me in this particular way, considered solely as a matter of noncomparative justice. But if it chooses to burden me in this particular way, then it ought to burden all those others whose activities cause the same public harm my activities cause, that is, all those who are similarly situated to me." Notice that the argument makes an essential reference to the treatment accorded someone else and *contrasts* that treatment with the proponent's.

Consider the case of *Railway Express Agency v. New York*,[46] in which an ordinance prohibited motor vehicles from carrying advertisements but exempted vehicles carrying advertisements for products that the vehicle's owner sold.[47] The legislative objective was to reduce motorists' visual distractions.[48] The proponent argued that while it might be noncomparatively fair to prohibit motor vehicles from carrying advertisements, it was comparatively unfair to allow some motor vehicles to carry ads and to bar others from doing so when the exempted vehicles presented the very same risk of visual distraction as the included vehicles.[49] This claim is a clear instance of a comparative justice argument. It essentially relies on (1) drawing a contrast between the differing ways in which the government treats two classes of vehicles and (2) arguing that this differential mode of treatment violates the Comparative Justice precept, "Treat similar cases in the same way."

While it thus appears that underinclusive-burden arguments are essentially comparative justice arguments, the situation is not as clear with respect to overinclusive-burden arguments. For example, consider *Hirabayashi*[50] and the other *Japanese Evacuation Cases*.[51] Again, United States military officials believed that at least some Japanese Americans living on the West Coast were internal security threats.[52]

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example, the law's trait and mischief classes may be identical, but the law may be unconstitutional because its purpose is illegitimate. *Id.* at 353.

[45] Of course, both comparative and noncomparative justice arguments could be appropriate in an underinclusive-burden situation. But the noncomparative justice argument would not make anything of the fact that the burden was underinclusive — that there were other people who posed the same threat of the targeted mischief who were not burdened. Rather, it would focus instead on the nature of the burden itself as imposed on a particular person or persons, considered independently of how others were being treated.

[46] 336 U.S. 106 (1949).

[47] *Id.* at 107–08.

[48] *Id.* at 109.

[49] *Id.* at 109–10.

[50] Hirabayashi v. United States, 320 U.S. 81 (1943).

[51] Korematsu v. United States, 323 U.S. 214 (1944); *Ex parte* Endo, 323 U.S. 283 (1944).

[52] *Korematsu*, 323 U.S. at 217; *see also Endo*, 323 U.S. at 300–01; *Hirabayashi*, 320 U.S. at 86.

Pursuant to presidential authorization, General DeWitt ordered Japanese Americans living in Pacific Coast states to leave their homes and relocate to detention camps further inland.[53] Those challenging the orders made an argument that relied on the overinclusive burden that the orders imposed: that many Japanese Americans who lived in the affected areas were not security threats at all but were loyal to the American cause.[54] Although the argument alleged an overinclusive burden, its essential thrust invoked the Principle of Noncomparative Justice. Thus, it was a noncomparative, rather than a comparative, justice argument, as we can see by considering how the argument *could* have been presented: "The military's objective in issuing the exclusion orders is to prevent acts of sabotage. But regardless of whether any other people might present the threat of sabotage and regardless of whether it might be appropriate to detain anyone who does present such a threat, we present no such threat. Detaining us cannot promote the military's objective at all, and thus it violates the Principle of Noncomparative Justice to detain us because we don't deserve to be detained." Notice that the argument does not rely on any assertion about the way the military treats anyone else. Rather, the argument purports to show that the way that the military treats the challengers is unjust on its own terms, considered independently of the treatment of any others.

While it is thus clear that at least some overinclusive-burden arguments are noncomparative, rather than comparative, justice arguments, some overinclusive-burden arguments are genuinely comparative justice arguments. Consider the earlier example of a pollution tax. Suppose again that *X*'s and *Y*'s industrial activities both cause pollution, but, though *Y* generates three times the pollution that *X* generates, the government taxes both at the same rate. *X* could appropriately argue: "I concede, *arguendo*, that it would be noncomparatively fair to burden me with a pollution tax because my activities pollute the environment and that the actual level of taxation imposed on me complies with the demands of the Principle of Noncomparative Justice. However, it is comparatively unfair to burden me with the same rate of tax you impose on *Y* because *Y* causes three times more of the public harm you are trying to reduce than I do. Hence, if you choose to burden me with a pollution tax, then you must burden me with a tax that is only one-third of the tax you impose on *Y*." This is a genuine comparative justice argument. Its essential point is that the overinclusive tax burden violates the second precept of the Principle of Comparative Justice — "Treat dissimilar cases in different ways." The argument asserts a comparative injustice — an injustice that can be recognized *only* by comparing *X*'s treatment to *Y*'s.

In summation, one cannot determine whether an argument is a comparative or noncomparative justice argument solely by determining whether it alleges an underinclusive or overinclusive burden. While arguments alleging underinclusive

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[53] *Endo*, 323 U.S. at 285–87; *Hirabayashi*, 320 U.S. at 86.

[54] *See Endo*, 323 U.S. at 302.

burdens are typically comparative justice arguments, arguments alleging overinclusive burdens may or may not be noncomparative justice arguments.[55] Although many are noncomparative in nature, some are genuinely comparative. Thus, the distinction between comparative and noncomparative justice arguments does not precisely mirror the distinction between underinclusive- and overinclusive-burden arguments; one cannot safely use the latter distinction as a criterion for identifying cases falling on one or the other side of the former distinction. The best way to determine whether an argument is a comparative or noncomparative justice argument is to examine the content of the argument itself. If the argument essentially relies on drawing a comparison or contrast between the ways in which two or more persons are treated and maintains that the injustice can be identified and recognized only by focusing on that comparison or contrast, then the argument is comparative in nature. On the other hand, if the argument does not essentially rely on any such comparison or contrast, but instead maintains that the injustice at issue can be identified and recognized simply by examining the treatment accorded to a single individual (or group of individuals), *qua* an individual (or *qua* individuals), then the argument is noncomparative in nature.

F. Are Both Comparative and Noncomparative Principles of Justice and Their Corresponding Arguments Really Necessary?

Perhaps it is not the case that both principles are needed and that just one would suffice for an adequately just social order. If so, then presumably there would be use for only one type of justice argument, depending on which principle of justice would be by itself a sufficient condition for an adequately just social order. In order to answer the question, we must first identify the logical relationship between the Principle of Comparative Justice and the Principle of Noncomparative Justice and, derivatively, the logical relationship between comparative justice arguments and noncomparative justice arguments.

It seems that there are at least three possibilities relevant here. First, one of the two principles might entail the other — meaning, for purposes of this article, that if the first is satisfied, then the second must be as well.[56] Second, each might entail the

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[55] Strictly speaking, one might prefer to replace the phrase "arguments alleging overinclusive burdens may or may not be noncomparative justice arguments" with the phrase "overinclusive burden situations may be such that both comparative and noncomparative justice arguments would be appropriate." Compare note 45, *supra*, for an analogous observation about underinclusive burden situations.

[56] In fact, this standard formulation of the entailment relation is controversial, as is evidenced by the controversy between the proponents of *relevance* logic and the proponents of *classical* post-Fregean logic. We do not think that the issues raised by that debate are relevant to the particular constitutional context we are investigating here. Hence, we find it convenient to work with the standard formulation. For helpful discussions of the debate over

other, so that if either is satisfied, the other must be, also. Third, neither principle might entail the other — that is, either could be satisfied without the other also being satisfied.[57]

To determine whether the Principle of Noncomparative Justice entails the Principle of Comparative Justice, we must ask, "Is it possible for there to be a situation in which the Principle of Noncomparative Justice is satisfied but the Principle of Comparative Justice is not?" That formulation presupposes a definition of the entailment relation according to which a proposition P entails a proposition Q if and only if it is not possible for P to be true and Q false.

Given that definition, one possible argument for the claim that the Principle of Noncomparative Justice entails the Principle of Comparative Justice is the following. Imagine a society made up of, say, ten persons. Suppose that the government treats each of the ten in perfect conformity with the Principle of Noncomparative Justice — that is, it treats each one in perfect accord with that person's degree of desert or merit. Then it seems that the Principle of Comparative Justice would necessarily be satisfied by the government's practices. For example, suppose that the government treats two of its citizens, *A* and *B*, in the same way. Then, according to our hypothesis, the justification for the similar treatment is the fact that their respective modes of treatment perfectly conform with their respective degrees of merit or desert. Hence, there could not possibly be any violation of the second precept of the Principle of Comparative Justice, "Treat unlike cases in different ways." On the other hand, suppose that the government treats *A* and *B* in different ways. Then, again according to our hypothesis, the justification for the dissimilar treatment is the fact that their respective modes of treatment perfectly conform with their respective degrees of merit or desert. Again, there could not possibly be any violation of the first precept of the Principle of Comparative Justice, "Treat similar cases in the same ways." Given our definition of the entailment relation, this argument seems to establish that the Principle of Noncomparative Justice entails the Principle of Comparative Justice.

It seems, however, that the Principle of Comparative Justice does *not* entail the Principle of Noncomparative Justice. That is because it seems possible for a government to treat everyone in the same way but to treat each person in a way that violates the Principle of Noncomparative Justice. Consider, for example, the famous comment that tackle Henry Jordan made about his football coach, Vincent

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relevance logic, see RICHARD ROUTLEY ET AL., RELEVANT LOGICS AND THEIR RIVALS (1982), and STEPHEN READ, RELEVANT LOGIC (1988).

[57] Obviously, there are other relationships between the two that are also logically possible. For example, they could be mutually contradictory. However, because our focus is on the proper disposition of constitutional arguments raising comparative or noncomparative justice arguments or both, our concern is with whether a court that finds that one principle is satisfied — that is, that it has not been violated — should go on to determine whether the other is satisfied, or whether a determination that one principle has been satisfied necessarily means that the other also has been satisfied.

Lombardi: "He treated us all the same. Like dogs."[58] Analogously, suppose that our hypothetical government brutally tortures and murders all of its citizens, even though none is guilty of any offense that could possibly merit such inhumane treatment. Assume further that each citizen possesses exactly the same degree of merit. Then it would seem that the first precept of the Principle of Comparative Justice, "Treat similar cases in the same ways," would necessarily be satisfied. Nevertheless, it seems obvious that the Principle of Noncomparative Justice would not be satisfied, since no citizen would be treated in a manner that accords with her degree of merit or desert.[59] In general, then, it seems that the existence of such possibilities demonstrates that the Principle of Comparative Justice does not entail the Principle of Noncomparative Justice.

If it is true that the Principle of Noncomparative Justice entails the Principle of Comparative Justice, then it should also be true that an action that violates the Principle of Comparative Justice violates the Principle of Noncomparative Justice. Again, this seems to be the case. Posit, for example, two similarly-situated citizens, *A* and *B*, who possess precisely the same degree of merit. Imagine that the government confers a benefit on *A* that it denies to *B*. Imagine further that neither *A* nor *B* merits the benefit. *B* could claim a violation of the Principle of Comparative Justice, since the government is violating the precept, "Treat similar cases in the same ways." However, *B* could also claim a violation of the Principle of Noncomparative Justice, since *A* is treated in a way that *A* does not merit. The Principle of Noncomparative Justice, remember, calls for each citizen to be treated precisely as she merits — no worse *and* no better.

Pursuant to the entailment relationship we have described, we can deduce the following. First, if an action is noncomparatively just, it must also be comparatively just: If each person is treated precisely as she deserves, then all relevantly similar cases will by definition be treated in the same way, and all relevantly dissimilar cases in different ways. Second, an action that is noncomparatively unjust is not necessarily comparatively unjust, and an action that is comparatively just is not necessarily noncomparatively just, since all similarly-situated people could be treated in a way that is equally bad. Finally, if an action is comparatively unjust, it must also be noncomparatively unjust (as is demonstrated by the situation in which the undeserving *A* gets a benefit that the similarly-situated and equally-undeserving *B* does not).

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[58] This example is cited in FEINBERG, *supra* note 1, at 98.

[59] Note that although the Principle of Noncomparative Justice is violated if everyone is treated equally badly — if all are treated "like dogs" and thus worse than they deserve — the equally bad treatment is sufficient, but not necessary, to establish such a violation. That is, even if some people are treated precisely as well or as badly as they deserve to be treated, an individual who is treated in a manner that is other than what she merits would have a viable noncomparative justice claim.

Thus, when it comes to assertions of injustice, it seems that a court's determination that an action is comparatively just should not end the inquiry; the action could still be noncomparatively unjust. A court's determination that an action is noncomparatively just might seem sufficient to resolve the claim, however, since the action could not be both noncomparatively just and comparatively unjust. Therefore, one might believe that if we are indeed correct in maintaining that the Principle of Noncomparative Justice entails the Principle of Comparative Justice, there is no need for the Principle of Comparative Justice. As we explain below, however, both are necessary.

The argument to the contrary might go like this: Equity principles argue against the application of general rules that dictate "equal" treatment for any person falling within the rules' classificatory scope. Such general rules should never be applied because applying them inevitably involves treating in the same way two people who actually differ in degrees of merit. Instead, each person should be treated as she truly deserves in each particular case.[60]

We disagree; we think that the Principle of Comparative Justice *is* necessary for at least three reasons. First, there are many situations in which it would be simply impossible, in a practical sense, for anyone to measure correctly the precise quantity of merit or desert due an arbitrarily-selected individual in an arbitrarily-selected circumstance. For example, consider a judge who must sentence a convicted defendant. Presumably, legislatures promulgate sentencing guidelines because judges are, in practice, incapable of ascertaining with perfect accuracy the degree of punishment that any particular defendant genuinely deserves. Of course, such guidelines do not compel strict equality of treatment for all those who commit a given crime, but they do constitute a substantial step in the direction of equal treatment for what are stipulated to be equal crimes. In general, the Principle of Comparative Justice is a useful, indeed necessary, tool for promoting justice because of our human lack of omniscience about what any particular one of us truly merits.

Second, even in those instances in which it might actually be possible to measure individual merit accurately, it would usually be grossly inefficient to spend the time and resources necessary to make such measurements. Consider, for example, a highway curve on which is posted a speed limit sign of twenty-five miles per hour. Presumably, many motorists are sufficiently skilled to safely navigate that

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[60] In contrast, Aristotle argued that equitable considerations should govern when it would be unjust to mechanically apply a general rule: "When the law speaks universally . . . and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission — to say what the legislator himself would have said had he been present, and would have put into his law if he had known." ARISTOTLE, THE NICHOMACHEAN ETHICS, bk. V, ch. 10, 1137b, 19–24, *reprinted in* 2 WORKS OF ARISTOTLE 386 (W.D. Ross trans., Encyclopaedia Britannica 1952). Thus, Aristotle apparently thought that bringing in equitable considerations should be the exception rather than the rule.

curve at speeds exceeding twenty-five miles per hour. But because it is impractical to regulate motor vehicle speeds on public highways on a case-by-case basis, legal systems choose simply to treat every motorist in the same way, regardless of their varying degrees of individual driving merit.

Third, enforcing the Principle of Comparative Justice protects against the risk of bad-faith evaluations of degrees of individual merit or desert. It guards against the possibility that governmental agents may maliciously mistreat individuals under the guise of giving each the treatment she truly deserves.

In conclusion, then, we believe that enforcing the Principle of Comparative Justice is a necessary condition for maintaining an adequately just social order. Perhaps it is true that, assuming omniscience, unswerving good faith, and a total absence of any need to worry about wasting time and resources, society could adequately and fairly operate by applying solely the Principle of Noncomparative Justice. However, given our obvious lack of omniscience and unswerving good faith, together with our need to take social efficiency into account, it seems that the Principle of Comparative Justice is not only a useful but a critical prophylaxis against the everyday human risks of misjudgment, bad faith, and inefficiency. And if the application of both the Principle of Comparative Justice and the Principle of Noncomparative Justice is a necessary condition for an adequately just social order, then so is the availability of arguments invoking those principles.

II. GUIDELINES FOR ADJUDICATING COMPARATIVE AND NONCOMPARATIVE JUSTICE ARGUMENTS IN CONSTITUTIONAL CONTEXTS

Given the distinction between comparative and noncomparative justice arguments, it seems natural to ask whether there are any practical maxims or guidelines for identifying those contexts in which comparative justice arguments are more appropriate and those in which noncomparative justice arguments are more appropriate. Formulating such practical maxims would be a difficult task even for the general case of any arbitrarily selected individual, *qua* an individual. But what about the task of formulating them for *courts*? That project seems to present an even greater degree of difficulty. Of course, like everyone else, courts are compelled to make and evaluate both comparative and noncomparative justice arguments. However, unlike everyone else, at least when it comes to constitutional contexts, courts are constrained by the very nature of their role in our legal system to make and evaluate comparative and noncomparative arguments in terms of constitutional norms, that is, norms that are either semantically tied to a specific provision in the Constitution itself, or at least deemed by the courts to be presupposed by the document as a whole.[61] That constraint introduces an additional dimension of

[61] The right to travel interstate is one example of such a presupposed, "unenumerated" right. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 630 (1969) ("We have no occasion to

complexity, a dimension that goes well beyond the level of complexity that each of us has to confront when we make and evaluate comparative and noncomparative justice arguments.

In this section, we shall propose several practical maxims to guide courts in making and evaluating comparative and noncomparative justice arguments in constitutional contexts. In accordance with what we have said about the legal necessity for courts to tie their arguments to specific constitutional provisions or to the text as a whole, all of our proposals will presuppose references to specific constitutional norms.

A. Courts Should Not Make a Comparative Justice Argument While Characterizing It as a Noncomparative Justice Argument, and Should Not Make a Noncomparative Justice Argument While Characterizing It as a Comparative Justice Argument

Moore v. City of East Cleveland[62] is an example of a violation of our first guideline — that courts should not make arguments of one kind but characterize them as arguments of the other kind. In *Moore*, a plurality of the Supreme Court used a substantive due process analysis in invalidating a municipal ordinance limiting occupancy of residential units to members of a single family.[63] In doing so, the Court made a comparative justice argument that it characterized as a noncomparative justice argument.

Before we delve into the content of the Court's analysis, it may be helpful to make a general point about the relationship between substantive due process and noncomparative justice arguments, on the one hand, and the relationship between equal protection and comparative justice arguments, on the other. One naturally supposes that substantive due process arguments (i.e., arguments invoking the "substantive dimensions" of the Due Process Clause of either the Fifth or Fourteenth Amendment) should be noncomparative justice arguments, given the noncomparative connotations of the language of those clauses. Likewise, one naturally supposes that equal protection arguments (i.e., arguments invoking the Equal Protection Clause of the Fourteenth Amendment) should be comparative justice arguments. On occasion, the Court has agreed with that common-sensical assumption. For example, in *Ross v. Moffitt*,[64] the Court said, "'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals

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ascribe the source of this right to travel interstate to a particular constitutional provision." (footnote omitted)).

[62] 431 U.S. 494 (1977).

[63] *Id.*

[64] 417 U.S. 600 (1974).

in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."[65]

Thus, it seems that in invoking the Due Process Clause of the Fourteenth Amendment, the *Moore* Court was committed, both in terms of logical considerations and of its own precedents, to resolving the case exclusively in terms of noncomparative arguments. But the Court failed to carry through on that commitment.

The ordinance's definition of a "family" excluded a housing arrangement in which an adult lived with a son and two of the adult's grandsons, where the two grandsons were first cousins.[66] The city argued that the ordinance was justifiable as a means of preventing overcrowding in homes, reducing traffic and parking congestion, and easing the financial burden on the school system.[67] In response, the Court said:

> Although these are legitimate goals, the ordinance before us serves them marginally, at best. For example, the ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family contains a half dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation.[68]

The argument based on a hypothetical family of an adult brother and sister is a genuine noncomparative justice argument: Its essential point is that this hypothetical family would be included in the trait class, despite the fact that it fails to possess the mischief at which the ordinance is directed. Hence, given the city's own legislative objective, it would be noncomparatively unjust for the city to burden that family at all. Notice that this injustice can be ascertained without having to compare or contrast that particular hypothetical family's situation with that of any other family.

In contrast, the argument based on the hypothetical family of six licensed drivers is a comparative justice argument. Its essential point is that, given the legislative objective of burdening persons who causally contribute to traffic and parking congestion, the trait class fails to contain all those who possess that particular mischief characteristic. The hypothetical family with six licensed drivers possesses

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[65] *Id.* at 609. It is interesting that, in this passage, the Court seems to tie equal protection arguments to underinclusive-burden arguments, thereby apparently tying the Equal Protection Clause to just one of the two Comparative Justice Precepts: Treat similar cases in the same way.

[66] *Moore*, 431 U.S. at 495–96 (referring to EAST CLEVELAND, OHIO, HOUSING CODE § 1341.08 (1966)).

[67] *Id.* at 499–500.

[68] *Id.* at 500 (footnote omitted).

the mischief but falls outside the trait class. As an argument alleging an underinclusive burden, then, the argument is a paradigmatic case of a comparative justice argument. Thus, we see here an example of a court offering a comparative justice argument in the guise of a noncomparative justice argument.

Zablocki v. Redhail[69] illustrates the reverse situation: a court offering a noncomparative justice argument in the guise of a comparative justice argument. There, the Court invoked the Equal Protection Clause as a means of striking down a Wisconsin statute that prohibited members of a particular class of residents from marrying, unless they first obtained a court order permitting that marriage.[70] The statute identified this class as including "any 'Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment.'"[71] The statute also provided that a court could authorize the marriage of a class member only if he proved that he was complying with his child support obligation and that the children protected by that obligation were not then, nor were likely ever to become, public charges.[72] Wisconsin articulated two legislative objectives. First, the mandatory court proceeding provided an opportunity to counsel applicants about the need to comply with their child support obligations.[73] Second, the law promoted the welfare of out-of-custody children.[74]

Regarding the second objective, the Court said:

> [W]ith respect to individuals who are unable to meet the statutory requirements, the statute merely prevents the applicant from getting married, without delivering any money at all into the hands of the applicant's prior children. More importantly, regardless of the applicant's ability or willingness to meet the statutory requirements, the State already has numerous other means for exacting compliance with support obligations, means that are at least as effective as the instant statute's and yet do not impinge upon the right to marry."[75]

Both of these arguments are noncomparative justice arguments, despite the Court's ostensible use of the Equal Protection Clause to resolve the issue. The point of both arguments is that, given the second legislative objective of promoting the welfare of out-of-custody children, it would be noncomparatively unjust to burden

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[69] 434 U.S. 374 (1978).

[70] *See id.* at 383–91.

[71] *Id.* at 375 (quoting WIS. STAT. § 245.10(1) (1993) (repealed 1977)).

[72] *Id.* at 375 n.1 (quoting WIS. STAT. § 245.10(1) (1993) (repealed 1977)).

[73] *Id.* at 388.

[74] *Id.*

[75] *Id.* at 389.

those hypothetical marriage applicants. Although it might be noncomparatively just to prohibit *some* persons from marrying, it would be noncomparatively unjust to burden *these particular* hypothetical persons because, as applied to *their* particular situation, the marriage prohibition would simply fail to promote the legislative objective at all.

Note that these arguments do not rely on any comparison or contrast between the legislative treatment of these particular hypothetical marriage applicants and the treatment of any other particular class of persons. Rather, they maintain that the alleged injustice can be identified and recognized by simply focusing on the treatment imposed on the hypothetical applicants, considered in their own right. Thus, in *Zablocki*, we have two examples of a court presenting a noncomparative justice argument as a comparative justice argument.

In response to the state's argument that the statute protected the welfare of out-of-custody children, insofar as it prevented marriage applicants from incurring new child-support obligations, the Court said:

> [T]he challenged provisions . . . are grossly underinclusive with respect to this purpose, since they do not limit in any way new financial commitments by the applicant other than those arising out of the contemplated marriage. The statutory classification is substantially overinclusive as well: Given the possibility that the new spouse will actually better the applicant's financial situation, by contributing income from a job or otherwise, the statute in many cases may prevent affected individuals from improving their ability to satisfy their prior support obligations.[76]

The Court's underinclusive-burden argument is a genuine instance of a comparative justice argument, but its second argument belongs in that set of arguments that we earlier identified as those that allege an overinclusive burden as a way to make a point about noncomparative justice. Its essential premise is that, given the legislative objective, it is noncomparatively unjust to burden those marriage applicants who are not characterized by the mischief the state seeks to prevent. Thus, the argument does not rely in any way on drawing any comparison or contrast between the class of hypothetical applicants and any other class of applicants. Again, we witness an example of a court offering a noncomparative justice argument in the guise of a comparative justice argument.

Why is it important for courts to observe our proposed norm — of correctly identifying noncomparative arguments as noncomparative and comparative arguments as comparative — so long as courts arrive at the "correct" results? The answer is that when courts mischaracterize the way in which they resolve legal

[76] *Id.* at 390.

disputes, there is an important sense in which they are *not* really arriving at the "correct" results, at least if, by "result," one intends to refer to something more than the judgment itself. If "result" includes not only the judgment itself, but also the mode of analysis and method of resolution, then it is important that courts accurately describe those modes and methods. Resolving a constitutional dispute in the name of comparative justice, when it is actually resolved in terms of noncomparative justice, or vice versa, misleads courts themselves as well as the public, who might well eventually become disillusioned and cynical about both the judicial system's competency and its forthrightness.

B. Courts Should Not Resolve Constitutional Issues With Comparative Justice Arguments When They Really Believe That the Heart of the Matter Is a Violation of Noncomparative Justice

Consider the class of constitutional issues arising out of situations involving underinclusive burdens. As we have suggested, proponents in such situations will typically offer both comparative and noncomparative arguments for strategic purposes. For example, recall again the situation giving rise to *Skinner v. Oklahoma*.[77] The challenged statute provided for the compulsory sterilization of persons previously convicted two or more times of crimes of moral turpitude,[78] and specified grand larceny, but not embezzlement, as a crime of moral turpitude.[79] This statute arguably raises an issue of an underinclusive burden because it fails to burden all those who might justifiably be described as having committed crimes of moral turpitude. A competent proponent for a thrice-convicted grand larcenist would naturally challenge the statute on both comparative and noncomparative justice grounds. The essence of her comparative justice argument would be articulated in terms such as these: "If the government chooses to sterilize thrice-convicted grand larcenists, then it is constitutionally obligated to sterilize thrice-convicted embezzlers. Hence, unless it chooses to sterilize thrice-convicted embezzlers, it has no right to sterilize thrice-convicted grand larcenists." In contrast, the essence of the proponent's noncomparative justice argument would be something like this: "It is a violation of the Principle of Noncomparative Justice to sterilize thrice-convicted grand larcenists. The severe penalty of sterilization is grossly disproportionate to the crime of grand larceny. The capacity for procreation is one of the most deeply-embedded liberty interests humans have and must not be destroyed by government for relatively trivial offenses such as grand larceny."

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[77] 316 U.S. 535 (1942).

[78] *See id.* at 536 (citing Habitual Criminal Sterilization Act, OKLA. STAT. ANN. tit. 57 §§ 171–95 (1935)).

[79] *See id.* at 537–39 (citing Habitual Criminal Sterilization Act, OKLA. STAT. ANN. tit. 57 §§ 171–95 (1935) and OKLA. STAT. ANN. tit. 21 §§ 5, 1462, 1704, 1705 (1941)).

Thus, in constitutional contexts involving underinclusive burdens, proponents challenging such burdens will typically attack with both comparative and noncomparative justice arguments. The question we now raise is this: How should courts that are asked to resolve such challenges respond, assuming they agree with the challengers that the government's action has violated the Constitution in *some* respect? In particular, should they reach a finding of a constitutional violation by means of a comparative, or a noncomparative, justice argument?

We propose the following criterion for answering the question of which argument is the proper one in such circumstances. Suppose that *A* is a person who possesses the mischief the legislature is concerned to suppress and who belongs to the trait class. Suppose further that *B* is a person who also possesses the mischief but who does not belong to the trait class. *A* is burdened by the law, but *B* is not, even though both present the same risk of public harm. Then our proposed criterion can be formulated in terms of the following question: Given the fact that the government treats *A* differently than it treats *B*, would it be equally permissible (in terms of constitutional norms) to treat *both A* and *B* either in the way in which *A* is treated or in the way in which *B* is treated? If a court believes that the answer is "Yes" — that both *A* and *B* could, consistent with the Constitution, be treated either in the way that *A* is treated *or* in the way that *B* is treated — then it should choose a comparative justice analysis. On the other hand, if it believes that the answer is "No" — that both *A* and *B* could *not*, consistent with the Constitution, be treated either in the way that *A* is treated *or* in the way that *B* is treated — then it should choose a noncomparative justice analysis.

Our rationale for this suggested criterion is the following. Suppose again that the government imposes a burden on *A* but imposes no burden on *B* in circumstances in which *A* and *B* are similarly situated. Suppose further that a court believes that the government's imposition of the burden on *A* violates the Constitution. If the constitutional violation is really *only* a violation of the Principle of Comparative Justice, then it ought to be equally permissible for the government to respond to a judicial finding of such a constitutional violation in either of two ways: (1) remove the burden from *A*, so that neither *A* nor *B* is burdened, or (2) impose the same burden on *B* as on *A* so that both *A* and *B* are burdened in the same way. In that way, the government would conform with the precept of the Principle of Comparative Justice that dictates that similar cases should be treated similarly. On the other hand, if the second response strikes the court as constitutionally impermissible — if the court believes that it would be unconstitutional to burden *B* in the way that *A* is burdened — then it should not use a comparative justice analysis, but rather a noncomparative justice analysis.[80]

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[80] Note that our initial premise is that *A*'s and *B*'s cases are relevantly similar. If *A*'s and *B*'s cases are not relevantly similar, then the court might believe that it is unconstitutional to burden *B* in the way that *A* is burdened because people like *B* do not merit such treatment,

With this proposed criterion in hand, consider again the situation presented in *Skinner*. The *Skinner* Court struck down the sterilization statute under the Equal Protection Clause of the Fourteenth Amendment,[81] thereby committing itself to a comparative justice analysis, but the Court also made some statements tending to show that, under its own reasoning, it should have invalidated the statute with a noncomparative justice argument under the Due Process Clause. In that regard, the Court noted:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. . . . There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty."[82]

Given that view, how should the Court have resolved the issue of whether to use a comparative, or a noncomparative, justice argument? It seems obvious that it should have used a noncomparative justice argument, considering what the Court's response would have been to our proposed question: Seemingly, the Court would *not* have agreed that Oklahoma could respond to the Court's invalidation of the statute in either of two equally permissible ways: (1) amend the statute to provide for the sterilization of thrice-convicted embezzlers, or (2) repeal the statute altogether so that even thrice-convicted grand larcenists would not be subject to sterilization. Rather, the Court would appear to find the first option untenable. The problem with the first alternative is that the fundamental violation of the Principle of Noncomparative Justice would not have been remedied. If it is a violation of the Principle of Noncomparative Justice to sterilize people for committing relatively trivial crimes, then it is a violation of that principle to sterilize persons for committing the crime of grand larceny, and that point can be grasped without comparing or contrasting the crime of grand larceny with any other crime.

Thus, on the Court's own explicitly expressed view about the fundamental importance of the capacity for procreation, it should have chosen to invalidate the statute with a noncomparative, rather than a comparative, justice analysis. If the Oklahoma Legislature had responded to the result of *Skinner v. Oklahoma* by

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while people like *A* do — and thus that *A* has no claim of noncomparative injustice. If *A*'s and *B*'s cases are relevantly similar, however, the court can draw no such distinction between *A* and *B*.

[81] *Skinner*, 316 U.S. at 538.

[82] *Id.* at 541.

extending the penalty of sterilization to thrice-convicted embezzlers, the Court presumably would have been compelled to invalidate the amendment with a non-comparative justice argument, at considerable embarrassment to itself.

Another example of this sort of mistake is presented by the Court's application of the Equal Protection Clause to protect the "right to travel." For example, the Court in *Shapiro v. Thompson*[83] invoked the Equal Protection Clause to invalidate state statutes denying welfare benefits to residents who had not lived in the regulating state for at least one year prior to applying for benefits.[84] The Court relied on the fundamental right to travel across state lines: "[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."[85] Apply our suggested criterion: If the constitutional defect of such statutes is really just a matter of comparative justice, then it should be equally permissible for a state either to *remove* the one-year waiting burden from all residents, or to *impose* the one-year waiting burden on all residents, regardless of their recent interstate travel status. It seems that, given the Court's strong non-comparative justice language about the fundamental liberty interest in migrating from state to state, the second alternative is not constitutionally available, since given the Court's own rationale for its decision, the second alternative would *still* impose a burden on the constitutional interest in migrating from one state to another.

C. Courts Should Not Respond to Claims That Governmental Action Is Non-Comparatively Unjust With Arguments That the Action Is Comparatively Just

Because a governmental action may be, at the same time, comparatively just and noncomparatively unjust, as where all citizens are treated equally badly, it is inappropriate for courts to dismiss claims of noncomparative injustice with responsive arguments that point to the comparative justice of the action at issue. Some of the Supreme Court's recent jurisprudence on the Religion Clauses violates this maxim. In Part II.B, we argued that courts sometimes mistakenly use comparative justice arguments to invalidate governmental actions when the courts' own reasoning shows that the courts actually believe that the actions are noncomparatively unjust. Here, the problem is a different one: In the cases we discuss in this section, the courts responded to proponents' noncomparative justice arguments by finding that the governmental actions at issue were comparatively just.

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[83] 394 U.S. 618 (1969).

[84] *Id.* at 638.

[85] *Id.* at 629.

On its face, the Establishment Clause[86] appears to propose a noncomparative norm. The mandate that "Congress shall make no law respecting the establishment of religion"[87] can be read to imply that any time a law "respect[s] the establishment of religion," any affected individual has a viable claim without regard to how others are treated. Similarly, the traditional interpretation of the Clause was that it required separation of church and state,[88] a noncomparative justice norm. That is, an affected individual could claim a violation of the Establishment Clause if church and state were excessively entangled, regardless of whether all similarly-situated individuals were similarly affected.[89]

Over the past few decades, however, the Court has tended to read into the Clause a comparative justice dimension — an equality component — finding that a (or the) purpose of the Clause is to ensure that religious minorities achieve political equality.[90] Indeed, some scholars claim that the comparative justice dimension of the Establishment Clause, the so-called "neutrality" principle, has overtaken the noncomparative justice dimension, the so-called "separation" principle.[91] One of the effects of the Court's embrace of the neutrality principle and the corresponding comparative justice arguments has been to discount, or even ignore, proponents' noncomparative arguments that rely on the separation principle.

The Court's Establishment Clause analysis in *Zelman v. Simmons-Harris*[92] is an example of its embrace of comparative justice arguments and corresponding rejection of noncomparative justice arguments. The *Zelman* plaintiffs alleged that Ohio's school voucher program violated the Establishment Clause.[93] Under the program, Cleveland students could receive up to $2,250 in tuition, transferable to the school of their choice — public or private, secular or religious.[94] The *Zelman* majority determined that the program did not violate the Establishment Clause because, the Court said, it was a program of "true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals," as opposed to a program that

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[86] U.S. CONST. amend. I.

[87] *Id.*

[88] *See, e.g.*, Bd. of Educ. v. Allen, 392 U.S. 236, 266 (1968) (Douglas, J., dissenting).

[89] *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (holding that statutes under which government paid all or a portion of the salaries of teachers at private schools, including parochial schools, violated the Establishment Clause because they fostered "excessive entanglement between government and religion").

[90] *See, e.g.*, Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002).

[91] *See, e.g.*, Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 491 (2004).

[92] 536 U.S. 639 (2002) (citations omitted).

[93] *Id.* at 648.

[94] *Id.* at 645 (relying on OHIO REV. CODE ANN. §§ 3313.975(B), (C)(1), 3313.976(A)(3) (Anderson 1999 & Supp. 2000)).

"provide[s] aid directly to religious schools."[95] Where a government aid program is neutral with respect to religion, the Court said, and aid goes to private citizens who direct it to religious or secular schools based on their private choices, the program "is not readily subject to challenge under the Establishment Clause."[96]

In the Court's view, then, neutrality — comparative justice — was critical. The claim that the voucher program did not violate the Establishment Clause because it was neutral, since it treated all schools in the same way, answered one set of the plaintiffs' arguments: The plaintiffs had claimed that the law was not, in fact, neutral, as program recipients could not spend vouchers at traditional public schools. If they chose a public school, they received nothing, but if they chose a private school, they received a tuition reduction, which, the plaintiffs said, created a financial incentive to choose a private school — and particularly, a private sectarian school, which is generally less expensive than a private secular school. That argument was a comparative justice argument; it claimed that relevantly similar cases were not being treated similarly. A responsive argument framed in comparative justice terms was thus appropriate.[97]

But the Court also dismissed a second set of the plaintiffs' arguments, a set that relied not on allegations of non-neutral or unequal treatment, but on the ground that the noncomparative separation principle had been violated. In those arguments, the plaintiffs essentially claimed that, no matter how other private or public schools were treated, "'[n]o tax . . . can be levied to support any religious activities or institutions, . . . whatever form they may adopt to teach or practice religion,'"[98] at least if the aid to the religious institution constitutes a substantial amount. As Justice Stevens opined in his dissent, "a law that authorizes the use of public funds to pay for the indoctrination of thousands of grammar school children in particular religious faiths" is a "'law respecting an establishment of religion,'" no matter how willingly any family

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[95] *Id.* at 649.

[96] *Id.* at 652.

[97] The Court also rejected the proposition that the Establishment Clause required not only neutrality, but the appearance of neutrality. If there is actual neutrality, the Court found, there can be no appearance of non-neutrality: "[N]o reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." *Id.* at 655. That reasoning raises a question about the scope of the Principle of Comparative Justice that is beyond the purview of this article: To what extent does the precept that similar cases are to be treated similarly require not only the actuality but the appearance of neutral, equal treatment? Certainly, in other contexts, the Court has suggested that a rule that creates a public perception of inequality may itself violate comparative justice principles. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

[98] *Zelman*, 536 U.S. at 687 (Souter, J., dissenting) (citation omitted).

chooses to send its children to a religious school.[99] In his view, the Establishment Clause is animated by the separation principle, and "[w]henever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."[100]

One need not determine whether neutrality (comparative justice) or separation (noncomparative justice) is the animating principle of the Establishment Clause to understand that an argument that governmental action is comparatively just does not respond adequately to an argument that the action is noncomparatively unjust. And yet that is what the *Zelman* majority did when it said that the plaintiffs' noncomparative justice argument — that the Establishment Clause forbade the use of any significant amount of public monies to support religious schools — was adequately answered by a comparative justice argument — that the Establishment Clause was satisfied because all schools, religious and secular, were treated in the same manner.

Again, in order to find the Court's analysis troubling, one need not believe that the Establishment Clause contains a noncomparative justice component. The problem to which we point here was not that the Court read out of the Establishment Clause a noncomparative justice norm, but that it would not acknowledge that it had done so. If the Court truly believes that the Establishment Clause contains a noncomparative dimension, then it is inappropriate to answer the argument that government action is noncomparatively unjust because it violates the separation principle with an argument that it is comparatively just because it satisfies the neutrality principle. In the interest of transparency, a more appropriate answer would be that, at least in the kind of situation at issue in *Zelman*, the Establishment Clause requires only that governmental action be comparatively just — a conclusion implied by the Court's decision, but one it refused to endorse.

D. Courts Should Not Construe Constitutional Norms as Giving Rise Only to Comparative Justice Claims When the Desired Outcome Could Be Achieved Using a Noncomparative Justice Analysis

The Court's decision in *Employment Division v. Smith*,[101] a case arising under the Free Exercise Clause, is another example of a decision in which the Court responded to an argument that governmental action was noncomparatively unjust with an argument that the action was comparatively just. In *Smith*, unlike in *Zelman*, the Court explicitly acknowledged that it was doing so.[102] However, while *Smith* does not pose the transparency problem that *Zelman* poses, it presents a

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[99] *Id.* at 684–85 (Stevens, J., dissenting).

[100] *Id.* at 686 (Stevens, J., dissenting).

[101] 494 U.S. 872 (1990).

[102] *See infra* text accompanying note 109.

different problem: It violates the maxim that a court should not weaken a constitutional norm by construing it as protecting only comparative justice claims when the court could reach the same end result — that is, a decision in favor of the government — by applying a noncomparative justice analysis and finding that the government's action is noncomparatively just.

Like the Establishment Clause, the Free Exercise Clause, barring any law "prohibiting the free exercise"[103] of religion, would not appear, on its face, to contain a comparative justice dimension. The Clause seems to imply that any time a law "prohibit[s] the free exercise" of religion, any affected individual has a viable claim, without regard to how others are treated. But, as in its Establishment Clause cases, the Court has begun to read out of the Free Exercise Clause principles of noncomparative justice, and to resolve the constitutional issues with comparative justice arguments alone.

The *Smith* plaintiffs were fired from their jobs for using the drug peyote, a hallucinogen, during Native American Church religious ceremonies and were denied unemployment compensation because their peyote use was a crime under Oregon law and therefore constituted work-related "misconduct."[104] The plaintiffs argued that the Free Exercise Clause barred Oregon from denying their benefits on the ground that their peyote use was a crime.[105] The Free Exercise Clause, they said, barred the state from including religiously inspired peyote use in its laws criminalizing the use of illicit drugs.[106]

The plaintiffs' claim was that the Free Exercise Clause gave them a right to use peyote for religious purposes and that criminalizing their use of peyote — and thus taking away that religious right — was unjust because, in their case, the government did not have a good enough reason for doing so. Viewed in that light, their argument was a straightforward noncomparative justice claim: They had a fundamental right to use peyote in their religious rituals, and the government could not take away that right without a compelling need to do so, whether it took away the right only from them or from others as well.

Some might argue that the plaintiffs' claim is more accurately characterized as a comparative justice claim. In that view, the plaintiffs were arguing that some or all non-Native American Church members were allowed freely to exercise their religious beliefs, and, therefore, it was comparatively unjust to restrict Native American Church members from doing so, at least without a compelling need for such a restriction. However, that characterization ignores an essential difference between comparative and noncomparative justice claims. If one views the plaintiffs' inability to exercise their religious beliefs freely as an impermissible "burden"

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[103] U.S. CONST. amend. I.

[104] *Smith*, 494 U.S. at 874.

[105] *Id.* at 874–77.

[106] *Id.*

imposed on them but not on similarly-situated people, then under a comparative justice analysis, the state could respond *either* by imposing the same burden on all similarly-situated persons, *or* by withdrawing the burden. Under a noncomparative justice analysis, the state could respond only by withdrawing the burden. Clearly, the latter was what the plaintiffs had in mind.[107]

In rejecting the plaintiffs' claim, the Court decided that the Native American Church members could not establish a violation of the Free Exercise claim because they had no comparative justice claim. The majority held that because Oregon's prohibition against peyote use was a generally-applicable, neutral law — a law that applied equally to everyone and was not motivated by a desire to interfere with religion[108] — the Native Americans' Free Exercise claim was without merit. Thus, the Court essentially decided that where everyone is treated the same way and no discriminatory motives prompt the treatment, there can be no Free Exercise claim — and thus read out of the Free Exercise Clause any noncomparative justice dimension.

Unlike the *Zelman* Court, the *Smith* Court acknowledged that it was answering a noncomparative justice argument with a comparative justice analysis. The Court explained:

> They [the plaintiffs] contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). *As a textual matter, we do not think the words must be given that meaning.*[109]

In other words, the plaintiffs argued that regardless of whether other people's peyote use could be criminalized, it was fundamentally unjust to criminalize *their* peyote use because they had an absolute religious right to use peyote. The Court responded by explicitly rejecting the claim that the Free Exercise Clause required a noncomparative justice analysis, holding instead that a comparative justice analysis was all that the Clause required under the circumstances at issue.

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[107] Note that the plaintiffs' claim was *not* that it was noncomparatively unjust to criminalize *any* use of peyote. The plaintiffs conceded that some peyote uses could be criminalized. *Id.* at 878. Their argument was that, regardless of whether some uses of peyote could be criminalized, penalizing *their* use of peyote was noncomparatively unjust.

[108] *Id.* at 878–82.

[109] *Id.* at 878 (emphasis added).

While the transparency of the opinion may be laudable, we think that it was a mistake for the *Smith* Court to decide that the Free Exercise Clause did not give rise to noncomparative as well as comparative justice claims. The Court could have decided instead that, even assuming, *arguendo*, that the Free Exercise Clause protects noncomparative justice claims, the government's action was noncomparatively just. Construing the Free Exercise Clause as requiring only equal treatment, and thus interpreting it as a constitutional norm that protects only comparative justice rights, was not necessary to reach the result that the Court chose to reach. The majority could have reached the same result by using the standard strict scrutiny analysis that the Court uses for other noncomparative justice claims: The justices could have decided that the governmental interest in barring the use of hallucinogenic substances was compelling and that the means chosen to achieve that interest — a statutory scheme that criminalized such use — was narrowly tailored to achieve that interest.[110] Construing a constitutional norm to raise only comparative justice claims when the same result could be achieved under a noncomparative justice analysis violates the generally accepted judicial maxim that courts should "not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground."[111]

Compare, for example, the Court's earlier decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[112] a Free Exercise case in which the Court used a noncomparative justice analysis to reject a noncomparative justice claim made under the Free Exercise Clause. The Native American plaintiffs in *Lyng* claimed that the federal government's plan to build a paved road through a critical, sacred ceremonial site would "'virtually destroy [their] ability to practice their religion.'"[113] The plaintiffs' argument thus was grounded in noncomparative justice claims: Even if the government treated everyone equally, even if all people's ability to practice their religion were destroyed, the Free Exercise Clause would be violated; equal treatment would not suffice to satisfy the Free Exercise Clause. The Native Americans claimed that any time government action significantly interfered with a litigant's ability to practice her religion, the Free Exercise Clause required that the government action be strictly scrutinized to ensure that the government had a

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[110] *See, e.g., id.* at 904–06 (O'Connor, J., concurring) (applying the traditional strict scrutiny test and concluding that while Oregon's prohibition of peyote use placed a severe burden on Native American Church members' ability to practice their religion, Oregon's interest in barring controlled substance use to promote the health, safety, and welfare of its citizenry was compelling, and uniform application of the prohibition — with no exception for religious use — was necessary to accomplish the state's purpose).

[111] Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 184 (1999).

[112] 485 U.S. 439 (1988).

[113] *Id.* at 451 (quoting Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 693 (9th Cir. 1986)).

compelling need to engage in the action taken and that the action was narrowly tailored to meet that need.

The Court responded with a noncomparative justice analysis. Unlike the *Smith* Court, which responded to a noncomparative justice claim with a comparative justice analysis, the *Lyng* Court focused on whether the government treatment of the plaintiffs was just in and of itself, without regard to how others were treated: The Court determined the only cognizable claim under the Free Exercise Clause is one that asserts that a challenged government action coerces an individual into acting inconsistently with her religious beliefs or penalizes her for acting consistently with them. A claim that government action makes it more difficult (or even impossible) to practice a particular religion is, the Court said, insufficient.[114] In other words, noncomparative justice claims that "governmental actions . . . compel affirmative conduct inconsistent with religious belief"[115] are cognizable under the Free Exercise Clause, but noncomparative justice claims that "governmental actions . . . prevent conduct consistent with religious belief"[116] are not.

In one view, then, the Court could be said to have used a comparative analysis: Claimants who are forced by government action into conduct inconsistent with their religious beliefs are differently situated and thus can justly be treated differently than claimants whose ability to practice their religion is significantly impaired by government action. But the underlying analysis is actually noncomparative: Regardless of how anyone else is treated, the Court said, there is simply nothing unconstitutionally unjust about interfering with an individual's ability to practice her religion, so long as the government does not actually compel religiously inconsistent conduct.

Unlike the claim in *Smith*, the claim in *Lyng* apparently could not have been rejected with a standard strict scrutiny review. As Justice Brennan emphasized in his dissent, "the Court [did] not for a moment suggest that the interests served by [building the] road [were] in any way compelling . . . ."[117] The problem with *Lyng* — to the extent that the decision may be troubling to some — lies not in any confusion between comparative and noncomparative justice claims, but in the Court's rejection of an entire class of noncomparative justice claims.The crux of the disagreement between the majority and the dissenters is whether particular government action may be said to be unconstitutionally (and noncomparatively) unjust as a violation of the Free Exercise Clause. The dissenters said the action was noncomparatively unjust; the majority said it was not. Viewed in that way, *Lyng* was, at least, more transparent than *Zelman* and, unlike *Smith*, no farther-reaching than it needed to be.

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[114] *Lyng*, 485 U.S. at 450–51.

[115] *Id.* at 468 (Brennan, J., dissenting).

[116] *Id.*

[117] *Id.* at 465.

E. When Constitutional Norms Apparently Conflict, Courts Can Resolve the Conflict Without Construing Both as Giving Rise to Comparative Justice Claims Alone

When a court is faced with two apparently conflicting constitutional norms, the resolution of the competing claims will often be determined by whether the court views both norms as giving rise to noncomparative justice claims, views both as giving rise to comparative justice claims, or views one as giving rise to comparative justice claims and the other as giving rise to noncomparative justice claims. The first possibility poses the greatest resolution difficulty, requiring that the court resolve the conflict by turning to some principle other than those of comparative and noncomparative justice.[118]

Consider the familiar example of a potential conflict between the Establishment and Free Exercise Clauses: Such a conflict might be posed by the government's spending federal funds to provide chaplains at military establishments for members of the armed forces.[119] On the one hand, the provision may be thought necessary to secure to the military members the rights guaranteed by the Free Exercise Clause.[120] On the other, the provision may be said to violate the Establishment Clause, since it would necessitate citizen tax support of religion.[121]

If both Clauses are viewed as giving rise to noncomparative justice claims, the conflict would appear impossible to resolve using the Principle of Noncomparative Justice alone. If the Establishment Clause proponents have a noncomparative injustice claim, it can be resolved only by barring the federal funding of chaplains; if the Free Exercise proponents have a noncomparative injustice claim, it can be resolved only by mandating the federal funding of chaplains.[122] One might say that the Establishment Clause claim could be overcome by the government's compelling

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[118] For example, the court might determine that though both rights are constitutional, one right is primary and the other subordinate, and thus that the subordinate right must yield to the primary right. *Cf., e.g.*, Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049 (1996) (arguing that the right to substantive equality is the primary constitutional value, and thus that the right to religious freedom must yield to it when they conflict).

[119] *See, e.g.*, Sch. Dist. v. Schempp, 374 U.S. 203, 296–99 (1963) (Brennan, J., concurring); *id.* at 309 (Stewart, J., dissenting).

[120] Professor Erwin Chemerinsky, for instance, takes this view. *See, e.g.*, Symposium, *Reflecting on Justice Antonin Scalia's Religion Clause Jurisprudence*, 22 U. HAW. L. REV. 501, 535 (2000).

[121] Dean Choper, for example, so believes. *See, e.g.*, JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 123 (1995) ("[T]he Establishment Clause makes it the financial responsibility of the church and not the state to attend to its members' religious needs.").

[122] As we have explained, however, the Supreme Court's recent cases would suggest that neither claim is viable.

need to comply with the Free Exercise Clause, which it can do only by providing military chaplains. But the same would be true of the Free Exercise claim: *It* could be overcome by the government's compelling need to comply with the Establishment Clause, which it can do only by refusing to use tax monies to pay for military chaplains. In either case, the court faces an irresolvable dilemma unless it turns for resolution to some principle outside those of comparative and noncomparative justice.

On the other hand, if both Clauses are viewed as giving rise to comparative justice claims alone, the conflict becomes far easier to resolve. If the Free Exercise Clause mandates only that similar cases be treated similarly, then the government could comply either by making chaplains of all faiths available to all military members or by declining to pay for chaplains of any faith. Similarly, if the Establishment Clause mandates only that similar cases be treated similarly, the government could comply in either of the same two ways. One could argue that even under a purely comparative justice framework, the Establishment Clause mandates that religion and non-religion be treated similarly and that the option of providing chaplains to all members of all faiths would provide equal treatment among all religious individuals, but not between religious and non-religious individuals. In that case, both Clauses would be satisfied by a decision to decline to pay for chaplains of any faith.

A court need not go so far as to construe both constitutional norms as comparative, however, in order to resolve an apparent conflict between them without resorting to principles beyond those of comparative and noncomparative justice. Rather, the court can resolve the conflict within the confines of the principles of comparative and noncomparative justice if just *one* of the norms is construed as protecting comparative rights alone. Consider the apparent conflict at issue in *Good News Club v. Milford Central School*,[123] for example. The *Good News* case concerned a school board's policy of allowing the general community to use school facilities after hours for instructional sessions, entertainment events, or social, civic or recreational meetings, but not for religious purposes.[124] The Good News Club was a private Christian club for elementary school children that requested permission to hold its weekly after-school meetings in a local school cafeteria.[125] At each club meeting, children learned and recited Bible verses, listened to Bible stories, were challenged to accept Jesus Christ as their savior, and prayed.[126] The school board rejected the Good News Club's request on the ground that its use of school facilities was for forbidden religious purposes.[127] The Club claimed that its free speech rights were

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[123] 533 U.S. 98 (2001).

[124] *Id.* at 102–03.

[125] *Id.* at 103.

[126] *Id.* at 103; *id.* at 137–38 (Souter, J., dissenting); *see also id.* at 112 n.4 ("Justice Souter's recitation of the Club's activities is accurate.").

[127] *Id.* at 103–04.

violated by the exclusion, while the school board claimed that were it to allow the Club's use, it would violate the Establishment Clause.[128] Thus, the Court was faced with two apparently conflicting constitutional norms.

Viewing the conflict through a comparative and noncomparative justice lens, there are four ways to characterize the apparently-competing norms at issue in *Good News*. First, both the free speech and establishment rights at issue could be viewed as noncomparative. For the reasons described above, the apparent conflict between them could be resolved only by reference to principles other than those of comparative and noncomparative justice.

Second, both the free speech and establishment rights could be viewed as comparative. In that case, the conflict could be resolved in either of two ways. If all community members were denied use of the facilities, then all speakers would be treated equally, and neither the Free Speech Clause nor the Establishment Clause would be violated. Similarly, if all community members were permitted use of the facilities, neither Clause would be violated because, again, all speakers would be treated equally. The problem with that approach, of course, is that comparative justice claims are not especially powerful — neither the Free Speech Clause nor the Establishment Clause has much bite if, in a situation like this one, both Clauses are deemed satisfied if everyone is shut out.

Under the third option, the Free Speech Clause could be viewed as protecting noncomparative rights and the Establishment Clause as protecting comparative rights, and under the fourth option, the Free Speech Clause could be viewed as protecting comparative rights and the Establishment Clause as protecting non-comparative rights. As with the second option, both the third and fourth options allow a court to resolve the apparent conflict between the two constitutional norms without needing to turn to principles other than those of comparative and non-comparative justice. These options offer the added benefit of allowing resolution of the conflict without the need to weaken *both* norms by construing them to protect only comparative rights.

As we explain in detail below, the *Good News* Court chose the second option, construing both constitutional provisions to protect comparative rights alone, under the circumstances at issue in the case. Our point is simply that it did not need to do so in order to resolve the apparent conflict between the constitutional provisions. The Court found that under the circumstances, the Free Speech Clause protected the Club's comparative right to be treated as other speakers were treated, and that the Club was not being treated in the same way as similarly situated speakers. Under that analysis, the school board could have remedied the comparative injustice to the Club wrought by its exclusion *either* by allowing the Club to use the after-school facilities along with the other speakers *or* by deciding to close the forum altogether. Because both of those alternatives were available under the Free Speech Clause, the

[128] *Id.* at 102.

Court did not *have* to construe the Establishment Clause as protecting only comparative rights under the circumstances in order to resolve the apparent conflict between the two constitutional provisions. Under a comparative justice view of the Establishment Clause, no conflict would be posed because the same two alternatives would be available: Let everyone or no one speak. Under a noncomparative justice view, it is true that one of the alternatives would be foreclosed, as the school would no longer be able to remedy the comparatively unjust treatment of the Club's speech rights by choosing to let everyone, including the Club, speak. But the other alternative — choosing to let no one speak — would be a solution that would satisfy both Clauses, meaning that the apparent conflict between them was resolvable even without construing *both* as protecting only comparative rights.

The *Good News* Court began by construing the speech claim at issue as a comparative justice claim. It assumed that by allowing community groups to use school facilities after school hours for certain purposes, the school board had created a limited public forum.[129] Under the Court's limited public forum doctrine, the governmental entity that creates such a forum may reasonably reserve it for the discussion of particular subjects and thus may engage in what would be deemed subject-matter discrimination in an unlimited public forum.[130] However, it may not engage in viewpoint discrimination — barring a speaker because of her viewpoint on a permitted topic.[131]

A claim that one has been illicitly excluded from a limited public forum thus raises a classic comparative justice argument. In such a case, the excluded speaker claims that the government unfairly gave others a benefit — access to the forum — that it denied to the speaker. There is no violation of the Principle of Noncomparative Justice at stake, since the government, having no obligation to open the forum in the first place, could remedy the violation either by opening the forum to the excluded class or by excluding all similarly situated speakers from the forum.

The key in any such case, of course, is to determine which speakers are similarly situated. In the limited public forum context, the first level of that analysis requires determining whether the excluded speaker wishes to speak on a topic or subject that is barred from the forum or wishes to speak on a permitted topic. If the speech in which the speaker wishes to engage is on a disallowed subject — which here would include speech on the unpermitted topic of religion — there is no violation of comparative justice principles wrought by the speaker's exclusion, since all similarly situated speakers (those who wish to speak on disallowed topics) are similarly excluded. However, if the speaker wishes to speak on a permitted topic, the speaker's exclusion is comparatively unjust; some speakers on permitted topics are allowed to speak and others are excluded, depending on the viewpoint they wish to articulate. The *Good*

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[129] *Id.* at 106.

[130] *Id.* at 106–07.

[131] *Id.*

News majority determined that the Club's desired speech *was* on a permitted topic — "the teaching of morals and character"[132] — and thus found that, for purposes of the Free Speech Clause, its exclusion from the forum was comparatively unjust.[133]

Under that analysis, the school board could remedy the injustice with either of two alternative courses of conduct: It could choose to allow in all speakers who wished to speak on permitted topics, including the Club, or it could choose to close the forum to everyone. At that point, then, any apparent conflict between the Free Speech Clause and the Establishment Clause would evaporate. The Court could safely interpret the Establishment Clause as protecting *either* comparative rights or noncomparative rights without creating a conflict with the Free Speech Clause.

Construing the Establishment Clause to protect only comparative justice claims under the circumstances — as the Court did — meant that both remedial alternatives remained available to the school board. The *Good News* Court held that where a governmental program is "neutral" as to religion, giving religious and nonreligious speakers the same benefits, a claimant who argues that a religious speaker must be excluded to avoid violating the Establishment Clause "faces an uphill battle."[134] The

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[132] *Id.* at 109.

[133] An evaluation of whether the Court's analysis was correct is beyond the scope of this article. On the one hand, the Club's sponsors could be characterized as speakers who wanted to discuss and instruct in moral and character development (a permitted topic); on the other, they could be viewed as speakers who wanted to proselytize, to convert, and to worship with children (a forbidden topic) — the position that Justices Stevens and Souter took. *See id.* at 130–34 (Stevens, J., dissenting); *id.* at 137–39 (Souter, J., dissenting).

The disagreement between the majority and dissenting opinions shows how very malleable the construction of comparison groups can be. It also points to a second, related problem, which is that in the public forum context, deciding on the appropriate comparison group determines not only whether the exclusion of a particular speaker constitutes subject-matter discrimination, allowable in a limited public forum, or viewpoint discrimination, which is generally forbidden in such a forum, but also determines whether the forum is to be considered a limited or unlimited public forum in the first place. For example, in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), the Court determined that where a state-owned television station limited participation in a publicly-sponsored televised debate to the Democratic and Republican contenders for a congressional seat, the debate was not a public forum designated for the limited purpose of a discussion among all of the ballot-qualified candidates. Therefore, the Court said, the exclusion of a third ballot-qualified candidate, an independent, did not have to be justified by a compelling governmental interest. *Id.* at 673–80. Rather, the Court reasoned tautologically, the debate was a nonpublic forum and not presumptively open to all ballot-qualified candidates, precisely *because* the station had excluded Forbes. *Id.* For further discussion of the Court's problematic forum analysis in *Forbes*, see Raleigh Hannah Levine, *The (Un)Informed Electorate: Insights into the Supreme Court's Electoral Speech Cases*, 54 CASE W. RES. L. REV. 225, 284–89 (2003), and Jamin B. Raskin, *The Debate Gerrymander*, 77 TEX. L. REV. 1943, 1952–55 (1999).

[134] *Good News Club*, 533 U.S. at 114.

claimant must establish that despite the government's actual neutrality, the relevant community would nonetheless perceive a lack of neutrality and consequently, an endorsement of religion[135] — something that the majority believed was not demonstrated in the case before it (and apparently can virtually never be demonstrated). Thus, the school board could remedy the comparative injustice under the Free Speech Clause by allowing in all speakers — since including the Good News Club would not violate the Establishment Clause — or by excluding all speakers.

If the Court had instead chosen to interpret the Establishment Clause as giving rise to a noncomparative justice claim, however, it still could have done so without creating a conflict with the Free Speech Clause. If the Court believed that the school board would violate the constitutionally mandated separation of church and state by allowing religiously oriented speakers (even those who spoke on permitted topics, such as moral development) to use the school's facilities, then the alternative of allowing in all speakers would be foreclosed under the Establishment Clause, but the option of closing the forum altogether would satisfy both the Establishment and the Free Speech Clauses.[136]

As the above analysis demonstrates, courts faced with two apparently conflicting constitutional norms can resolve the conflict without resorting to principles other than those of comparative and noncomparative justice, even without determining that both norms give rise only to comparative justice claims. The entailment relationship between comparative justice and noncomparative justice arguments means that so long as *one* of the constitutional norms at issue is viewed as giving rise to comparative justice claims alone, the conflict can be resolved within the confines of the comparative/noncomparative justice framework, whether the second norm is viewed as giving rise to comparative justice claims *or* noncomparative justice claims.

Of course, having determined that one of the two norms is comparative, a court may find that one of the two available options strikes it as constitutionally impermissible. Here, for instance, a hypothetical court could have construed the Free Speech Clause as comparative, given the limited-public-forum context, but could then have found untenable the option of allowing in *all* speakers on permitted

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[135] *See id.* at 115; *see also* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring) (opining that, if a reasonable observer would confuse an incidental benefit to religion, conveyed by a religiously-neutral governmental practice, with a governmental endorsement of religion, the practice violates the Establishment Clause).

[136] If the Court had interpreted the Establishment Clause in the manner described, it could have available a third option that would then be permissible under both the Free Speech and Establishment Clauses. If the Court found that including speakers like the Good News Club would violate the Establishment Clause, it could re-formulate the free speech analysis to hold either that because the Club's speech would violate the Establishment Clause, it was not "similarly situated" to other speakers on permitted topics, or that the dissimilar treatment between the Club and other permitted-topic-speakers was justified by the school board's compelling need to avoid violating the Establishment Clause.

topics, since that would mean including even those speakers who would address the topic from a religious viewpoint. In that case, one might conclude that the court should determine that the *other* norm — the Establishment Clause — protects non-comparative rights, a decision that would foreclose the option of allowing in all speakers. Instead, the school board would have the option of either closing the forum, or continuing to allow in speakers on permitted topics *except* for those speakers who would speak from a religious viewpoint (which would still be comparatively just under the current limited public forum doctrine[137]). Nonetheless, the point remains that the court could choose to construe the second norm as protecting either a (relatively weak) set of comparative rights alone or a (much stronger) set of noncomparative rights as well, without creating any conflict with the first norm.

F. Courts Should Not Make a Comparative Justice Argument in the Name of a Constitutional Norm Apparently Expressed in Noncomparative Justice Language, or a Noncomparative Justice Argument in the Name of a Constitutional Norm Apparently Expressed in Comparative Justice Language, Without Articulating a Compelling Reason to Override the Semantic Boundaries of the Text's Language

If the text of the Constitution expresses a constitutional norm in language that appears to be either comparative or noncomparative in nature, then it would seem obligatory for courts to use arguments that exceed the apparent semantic scope of that language only when they can persuasively argue that there is some strong justification for doing so. The critical question, then, is what sort of a justification would suffice. One sufficient justification might be that the text's language is inherently misleading and that consequently, it fails to express the full scope of the underlying constitutional norm.

Some might argue that another sufficient justification is the court's decision that the semantic limitations of the constitutional text are unfair or unwise or otherwise distasteful, and that the court should therefore ignore them. Certainly, there are scholars, lawyers, and judges who believe that the Constitution comprises simply the set of norms on which a present majority of the Supreme Court agrees (or, perhaps, *should* agree). In that view, the language of the constitutional text should not be regarded as controlling. Obviously, that view is a highly controversial one, and we do not propose to engage in that debate here. Whatever the merits of that view, however, a court's explicit endorsement of it would at least be a step in the direction of greater political and legal transparency.[138] Most people would agree that the greater the degree to which courts (and other governmental agents, for that

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[137] *See supra* note 130.

[138] One can embrace the conception of the Constitution as a flexible, "living" document and still agree that courts should make explicit *their* embrace of that conception.

matter) make their activities transparent to the public, the better. Thus, it seems that even those who regard the text of the Constitution as fundamentally irrelevant would agree that the courts owe the American public some plausible rationale for exceeding what appear to be the semantic boundaries of the constitutional text, even if that rationale ultimately comes down to telling the public that the language of the text is not determinative.

The cases discussed in Part II.A, *Moore v. City of East Cleveland* and *Zablocki v. Redhail*, illustrate these points. As we explained, the *Moore* Court offered a comparative justice argument under the Due Process Clause of the Fourteenth Amendment. The language of that Clause — "No State shall . . . deprive any person of life, liberty, or property, without due process of the law"[139] — seems to be non-comparative in nature (even assuming, *arguendo*, that an earlier Court was justified in construing it to include substantive, as well as procedural, due process considerations).[140] Nevertheless, the *Moore* Court made a comparative justice argument without acknowledging the discrepancy between the nature of the argument offered and the apparent semantic scope of the Clause and, *a fortiori*, without offering any explicit rationale for doing so.

An analogous example is the Court's interpreting the Due Process Clause of the Fifth Amendment to include a comparative justice component. As early as the decision in *Detroit Bank v. United States*,[141] the Court mentioned the possibility of interpreting the Due Process Clause of the Fifth Amendment as implicitly containing an equal protection component, in the sense that some discriminatory burdens "may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment."[142] This interpretative possibility was actualized in *Bolling v. Sharpe*,[143] in which the Court applied to the federal government the equal protection holding of *Brown v. Board of Education*.[144] After explicitly noting that the Fifth Amendment does not contain an Equal Protection Clause, the *Bolling* Court went on to say that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive,"[145] thereby indicating that the Fifth Amendment's Due Process Clause implicitly contains at least part of the comparative justice guarantee of the Equal Protection Clause of the Fourteenth Amendment. Eventually, following a lengthy evolutionary development of this doctrine,[146] the Court held in *Adarand Constructors, Inc. v. Pena* that "the

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[139] U.S. CONST. amend. XIV, § 2.

[140] *See, e.g.*, Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

[141] 317 U.S. 329 (1943).

[142] *Id.* at 338.

[143] 347 U.S. 497 (1954).

[144] 347 U.S. 483 (1954).

[145] *Bolling*, 347 U.S. at 499.

[146] For an overview of this development, see *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213–18 (1995).

Constitution imposes upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection of the laws."[147] Thus, the Court apparently has concluded that the Due Process Clause of the Fifth Amendment entails the Equal Protection Clause of the Fourteenth Amendment.

Contrary to its approach in *Moore*, in this latter line of Fifth Amendment cases the Court has explicitly acknowledged the semantic issue. Whether or not one finds persuasive its rationale that the constitutional norms of equal protection and due process both stem from the American ideal of fairness, the Court's argument seems to overlook the interpretive consequences for the Equal Protection Clause of the Fourteenth Amendment.[148] If the phrase "due process of law" entails the phrase "equal protection of the laws," then it seems to follow that the Equal Protection Clause of the Fourteenth Amendment is redundant. Some might find troubling, at best, an interpretation of one constitutional provision that seems to render another provision redundant.

With respect to the maxim that courts should not make a noncomparative justice argument in the name of a constitutional norm apparently expressed in comparative justice language, we noted that the *Zablocki* Court offered noncomparative justice arguments under the Equal Protection Clause of the Fourteenth Amendment.[149] The language of that clause seems to be comparative in nature, given that it requires "equal" treatment. Nonetheless, the Court made noncomparative justice arguments, again without acknowledging the discrepancy between the nature of those arguments and the apparent semantic scope of the invoked clause, much less offering any explicit rationale for doing so.[150]

G. If a Court Determines that Governmental Action Is Noncomparatively Unjust, It Need Not Decide Whether the Action Is Comparatively Unjust; But if the Court Is Not Convinced, It Should Decide Whether the Action Is Comparatively Unjust

Our conclusions that the Principle of Noncomparative Justice entails the Principle of Comparative Justice but that the Principle of Comparative Justice is nonetheless a

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[147] *Id.* at 231–32.

[148] Again, one need not agree that the rationale is unpersuasive to understand that it may have logical consequences that are unintended or undesirable.

[149] *See supra* notes 69-76 and accompanying text.

[150] The Court has been much more consistent in construing the Privileges and Immunities Clause of Article IV, another paradigmatic example of a comparative justice norm, in terms of comparative justice alone. *See, e.g.*, Supreme Court of Va. v. Friedman, 487 U.S. 59, 64, 70 (1988) (holding that Virginia violated the Privileges and Immunities Clause when it allowed a lawyer admitted to the bar of another state to "waive" into the Virginia bar only if the lawyer was a permanent resident of Virginia and noting that the Clause "was designed 'to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned'").

necessary tool for promoting justice lead logically to two more maxims that should guide constitutional jurisprudence. First, if a court determines that governmental action is noncomparatively unjust, it need not also decide whether the action is comparatively unjust. Second, if a court cannot say definitively that the governmental action is noncomparatively unjust, it should decide whether the action is comparatively unjust.

If governmental action is noncomparatively unjust, whether it is comparatively unjust as well is irrelevant. This principle follows from our conclusion that the Principle of Comparative Justice does not entail the Principle of Noncomparative Justice: All people could be treated equally badly, giving each a claim of noncomparative injustice and none a claim of comparative injustice. Similarly, if it is clear that each person is being treated in a manner that is noncomparatively just, and thus that each is being treated in accord with her respective degree of merit or desert, no person can be heard to complain that she is being treated unjustly because she is being treated unlike someone else.

However, as we have explained, there are many circumstances in which it is virtually impossible to determine whether someone is being treated in a manner that is noncomparatively just. Sentencing convicted criminals is a prime example: Without considering how grave the crime is compared to other crimes, or considering whether a particular crime is being punished consistently with like crimes, it is difficult to be sure that a particular sentence is indeed just (as opposed to clearly unjust). Thus, in instances where it cannot be said definitively that governmental action, such as the imposition of a sentence, is noncomparatively unjust, it behooves the courts to consider as well the question of whether the action is comparatively unjust.

The Supreme Court got these principles backward in *Ewing v. California*.[151] *Ewing* required the Court to consider the scope of the "proportionality principle" that applies to noncapital sentences under the Eighth Amendment's Cruel and Unusual Punishments Clause.[152] At issue was California's three-strikes law, under which a defendant who is convicted of a felony must be sentenced to twice the term otherwise provided for that felony if she was previously convicted of one serious or violent felony, and must be sentenced to life in prison if she was previously

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[151] 538 U.S. 11 (2003) (plurality opinion).

[152] *Id.* at 20–24. On its face, the Cruel and Unusual Punishments Clause seems to suggest both a comparative and a noncomparative dimension. To deem a punishment for a crime "unusual" would require comparing it to other punishments for the same or other crimes, while a punishment could be deemed "cruel" without regard to whether it is imposed on others for the same or other crimes. Justices Thomas and Scalia believe otherwise, however. *See id.* at 31 (Scalia, J. concurring) ("[T]he Eighth Amendment's prohibition of 'cruel and unusual punishments' was aimed at excluding only certain *modes* of punishment, and was not a 'guarantee against disproportionate sentences.'"); *id.* at 32 (Thomas, J., dissenting) ("In my view, the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle.").

convicted of two or more serious or violent felonies.[153] Under this three-strikes law, the petitioner, Gary Ewing, who had previously been convicted of three burglaries and a robbery, was sentenced to twenty-five years to life for shoplifting three golf clubs from a golf course pro shop.[154]

In determining that the sentence did not violate the Eighth Amendment because it was not disproportionate to the crime committed, the plurality — Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy — decided to apply a three-factor test that contains both comparative and noncomparative justice elements.[155] First, the plurality said, the Cruel and Unusual Punishments Clause requires a threshold comparison of the gravity of the crime committed and the harshness of the sentence imposed.[156] In the "rare case" that that comparison leads the court to infer that there is a "gross disproportionality" between the two, it must then examine whether the judgment of gross disproportionality is borne out by an examination of the sentences imposed on other criminals in the same jurisdiction, the second factor, and of the sentences imposed for commission of the same crime in other jurisdictions, the third factor.[157]

The plurality determined that the first, threshold factor of "gross disproportionality" between the crime and the punishment was not met in the *Ewing* case, as grand theft is a serious crime, and recidivists merit harsh punishments.[158] Thus, there was no need to perform inter- and intra-jurisdiction comparative analyses.

Justice Breyer, in a dissenting opinion joined by Justices Stevens, Souter and Ginsburg, applied the same three-factor test.[159] In his view, however, the *Ewing* case was the "rare" case in which the first, threshold factor was satisfied — a case "in which a court can say with reasonable confidence that the punishment is 'grossly disproportionate' to the crime."[160] That was so, Justice Breyer said, because the sentence — of at least twenty-five years — was "most severe," while shoplifting is "one of the less serious forms of criminal conduct."[161] Turning to the intra- and inter-jurisdiction comparative analyses, Justice Breyer concluded that those analyses demonstrated that "[o]utside the California three strikes context," Ewing's sentence

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[153] *Id.* at 15–16 (citing Cal. Penal Code Ann. §§ 667.5, 1192.7 (West Supp. 2002)).

[154] *Id.* at 17–20.

[155] Justices Scalia and Thomas, who concurred in the judgment, opined that in noncapital cases, the Eighth Amendment does not require that the length of the sentence be proportionate to the gravity of the offense. *Id.* at 31–32 (Scalia, J., concurring); *id.* at 32 (Thomas, J., concurring).

[156] *Id.* at 22.

[157] *Id.* at 22–30 (plurality opinion); *see also id.* at 36–37 (Breyer, J., dissenting).

[158] *Id.* at 28–30.

[159] *Id.* at 36–37 (Breyer, J., dissenting).

[160] *Id.* at 37.

[161] *Id.* at 40.

was "virtually unique in its harshness for his offense of conviction, and by a considerable degree."[162]

While the dissenters and the plurality purported to apply the same test, the threshold they set for the first factor was different. In the dissenters' view, the threshold requirement was satisfied if there was an "unusually strong" argument that the punishment did not fit the crime.[163] In the plurality's view, the threshold requirement apparently was satisfied only if the court was essentially already convinced that the punishment did not fit the crime.[164]

Both formulations of the test seem to misunderstand the relationship between comparative and noncomparative justice principles. If the court is convinced that the case before it is the "'exceedingly rare'" case in which the crime and punishment are grossly disproportionate, as, for example, when "'a legislature [makes] overtime parking a felony punishable by life imprisonment,'"[165] then the court can and should conclude that the sentence is noncomparatively unjust. There is no need in such a case to perform a comparative justice analysis. Even if, for example, the court were to determine that the sentence was comparatively just because every jurisdiction sentenced every overtime parker to life in prison — and thus every jurisdiction treated every similarly situated offender equally badly — the sentence would still be unconstitutional to the extent that the Cruel and Unusual Punishments Clause contains a noncomparative dimension requiring proportionate sentences, as a majority of the Supreme Court believes it does.

On the other hand, when the court is *not* convinced that a sentence is noncomparatively unjust, that is precisely when it is appropriate to perform a comparative justice analysis. As we have explained, the Principle of Noncomparative Justice entails the Principle of Comparative Justice, and thus we can say that if a government is treating all of its citizens in a manner that conforms perfectly to each citizen's degree of merit, no person can make a viable claim that she is being treated unjustly because she is being treated differently from a person who is similarly situated, or treated the same as a person who is dissimilarly situated. Her claim would be wrong by definition because when each person is treated precisely as she deserves, all people who are similarly situated as to their merits are treated similarly and all people who are dissimilarly situated as to their merits are treated dissimilarly. Note, though, that — questions of standing aside — person *A* has claims of both comparative and noncomparative injustice when *A* gets precisely what *A* deserves, but *B*, a similarly situated person, is treated better than *A* is treated (and thus is treated better than *B* deserves). In that case, the Principle of Comparative Justice is

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[162] *Id.* at 47.

[163] *See id.* at 42.

[164] *See id.* at 29–31 (plurality opinion).

[165] *Id.* at 21 (quoting Rummel v. Estelle, 445 U.S. 263, 272, 274 n.11 (1980)).

violated because similarly situated people are treated dissimilarly. The Principle of Noncomparative Justice is also violated, as *B* is not treated in perfect conformity with *B*'s degree of merit.

However, as we have also explained, it is virtually impossible for government to measure correctly the merits of individual citizens without regard to each other. Further, even if such a calculus could be performed, it would take a vast amount of time and resources to perform the calculus fairly and accurately. And perhaps most importantly, performing a comparative analysis allows us to double-check the calculus, to guard against governmental bad faith or arbitrary action.

In a case such as *Ewing*, then, unless a court is absolutely convinced that the punishment does not fit the crime — that the sentence is noncomparatively unjust — an analysis that requires a comparison to those who are similarly and dissimilarly situated would seem to be critical. If a court has concluded that the punishment does not fit the crime — that it is noncomparatively unjust — a comparative analysis adds nothing of value. But by deciding that a court should examine sentences for the same and other crimes in the same and other jurisdictions only if the court has *already* inferred that there is a "gross disproportionality" between the punishment and the crime,[166] *Ewing* dictates that a comparative justice analysis is appropriate only when the court is already convinced that the punishment is noncomparatively unjust — an analysis that gets things precisely backwards.

CONCLUSION

In this article, we have attempted to create and apply a novel approach to constitutional adjudication. By fleshing out the logical and practical relationships between arguments that allege comparative injustices and those that allege noncomparative injustices, and then applying the resulting analytic framework to a variety of constitutional settings, we have devised a set of guidelines that courts, lawyers, and scholars can use to make and evaluate constitutional arguments. Arguments that allege the violation of the Principles of Comparative and Noncomparative Justice are most familiar in Equal Protection and Substantive Due Process contexts, respectively, but we have not limited our analysis to such claims. Rather, we have applied our framework to a variety of claims arising under the First, Fifth, Eighth, and Fourteenth Amendments, as well as claims alleging the violation of the unenumerated right to travel.

We have explained why we believe that, given the entailment relationship between the Principles of Comparative and Noncomparative Justice, noncomparatively just actions are by definition comparatively just; comparatively unjust actions are noncomparatively unjust; but comparatively just actions may or may

[166] *Id.* at 22–30 (plurality opinion); *see also id.* at 36–37 (Breyer, J., dissenting).

not be noncomparatively unjust. We have also described why we maintain that, although these logical relationships seem to render the Principle of Comparative Justice superfluous, its application is nonetheless necessary for an adequately just social order.

Given the logical and practical relationships between these principles and the arguments that invoke them, we can discern a number of errors — ranging from the misleading to the dire — in the United States Supreme Court's use and evaluation of constitutional arguments that can be characterized as comparative justice arguments, noncomparative justice arguments, or both. The Court's mistakes range from mischaracterizing its own arguments to using the wrong analysis altogether. The Court has treated comparative and noncomparative justice arguments as functionally equivalent, and thus has mistakenly dismissed claims of noncomparative injustice with the response that the action was comparatively just. The Court has unnecessarily weakened constitutional norms by construing them as giving rise to comparative justice claims alone. And the Court has so mistaken the logical and practical relationships between the two principles that it has confused the occasions on which courts should and should not perform a comparative justice analysis to safeguard against action that appears to be, but is not, noncomparatively just. The guidelines we have set out in this article should help to ensure that in the future, other courts, scholars, and lawyers can avoid the same kinds of mistakes.