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SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION ARGUMENTS: AN ANALYSIS OF THE TUSSMAN AND TENBROEK DISTINCTION

RUSSELL PANNIER†*

INTRODUCTION

It is a commonplace of constitutional doctrine that the United States Supreme Court distinguishes between equal protection and substantive due process arguments, and that it uses the equal protection clause to evaluate the former and the due process clauses to evaluate the latter.¹ There are at least two reasons why it is important to understand how to properly draw the line between these two classes of arguments.

One reason concerns the analysis and evaluation of the logical structure of legal discourse in general.² Legal discourse includes legal argument, which, in turn, is exemplified in differing patterns of argument. Hence, the analysis and evaluation of legal discourse includes the analysis and evaluation of the patterns of legal argument. Now, a necessary condition for analyzing and evaluating patterns of legal argument is an ability to distinguish those patterns from one another. Equal protection and due process arguments are distinct patterns of legal argument. Hence, achieving analytical clarity about the distinction between these two categories of arguments is a step toward achieving analytical clarity about the entire class of legal arguments.

The second reason is relevant even for lawyers unconcerned about the general project of understanding the logical struc-

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2. Important works concerning this general project are, H.L.A. HART, THE CONCEPT OF LAW (1961); J. RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM (2d ed. 1980); N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978).
ture of legal discourse. Courts often distinguish equal protection from substantive due process arguments. Lawyers serving as judges on these courts must understand the distinction in order to fulfill their judicial obligation to intelligently interpret the law. Lawyers representing the parties appearing in these courts must understand the distinction in order to adequately represent their clients' interests.

I shall propose a way of distinguishing equal protection from substantive due process arguments, and shall use that proposal to evaluate the method of drawing the line presupposed in the classical analysis of Tussman and tenBroek. I shall conclude with some brief illustrations of the Supreme Court's occasional failure to properly distinguish the two forms of argument.

I. THE DISTINCTION BETWEEN COMPARATIVE AND NONCOMPARATIVE FAIRNESS

I suggest that the best way of drawing the distinction between equal protection and substantive due process arguments is tying that distinction to the contrast between comparative fairness and noncomparative fairness. Equal protection arguments are best understood as arguments which rely upon considerations of comparative fairness. Due process arguments are best understood as arguments relying upon considerations of noncomparative fairness.

The characteristic feature of a comparative fairness argument is a comparison between the ways in which someone treats two or more other persons. Such an argument relies upon a comparison between the way in which some actor, A, treats a second person, B, on the one hand, and the way in which A treats at least one other person, C.

For example, suppose that parent, A, comes home to dis-

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4. Although I shall focus upon the category of substantive due process arguments as the contrast to the category of equal protection arguments, most of what I say could easily be translated to other contrasts, such as that between equal protection and procedural due process arguments, or that between equal protection and free speech or contract clause arguments.
5. For an illuminating discussion of the distinction between comparative fairness and noncomparative fairness arguments, see Feinberg, Noncomparative Justice, 83 PHIL. REV. 297 (1974).

I do not intend to suggest that what I am calling "substantive due process arguments" exhaust the class of noncomparative fairness arguments. They clearly do not.
cover that her children, B and C, have broken a vase while playing soccer in the living room. A had warned B and C about playing soccer in the living room. Suppose that A punishes B by withholding B's allowance for the next week, but does nothing to C. Now, B could make, or someone could make on his behalf, a comparative fairness argument. He could say: "It may be alright to punish me for breaking the vase, but if you punish me, you must punish C as well, because C is just as guilty as I am." B's argument is a comparative fairness argument because it relies upon a comparison between the way in which A is treating B, on the one hand, and the way in which A is treating C, on the other. B claims that the unfairness of A’s treatment of him can be grasped only by comparing that treatment with A’s treatment of C.

This is an example of an allocation of a burden. But, of course, comparative fairness arguments can also be made in response to allocations of benefits. Suppose that parent A gives child B a Coke without giving one to child C. C could make a comparative fairness argument based upon a comparison between the way in which A has treated B, on the one hand, and the way in which A has treated C, on the other. Thus, again we see that the characteristic feature of a comparative fairness argument is a reliance upon a comparison between the ways in which one actor has treated two or more other persons.

What is the characteristic feature of noncomparative fairness arguments? They rely upon an evaluation of the way in which some actor, A, treats some other person, B, without relying upon any consideration of the way in which A treats anyone else. The proponent of a noncomparative fairness argument claims that the actor’s treatment of the proponent, or someone whom the proponent represents, is unfair, and that this unfairness is ascertainable without consideration of the actor’s methods of treating anyone else.

Impositions of burdens can raise questions of noncomparative, as well as comparative, fairness. Consider, for example, the parent, A, who punishes her children, B and C, for playing soccer in the living room by locking them in the garage for three weeks. Despite the fact that she has treated both children in the same way, each child has a basis for alleging unfair treatment. Each could argue that the punishment was disproportionate to the wrong. And each could make that argument...
without mentioning A's way of treating the other child. That is, neither B nor C would have to rely upon any comparison between the way in which A was treating B and the way in which A was treating C.

Conferrals of benefits can also stimulate noncomparative fairness arguments. Suppose that parent A gives child B a gift of $100 for "being good," when, in fact, B has not been good at all. Now, even though C may not have been good either, C could complain about A's conferring the benefit upon B on the ground that B did nothing to merit it. Like the previous argument, this one does not rely upon any comparison between the way in which A is treating B and the way in which A is treating C.

Of course, I do not mean to suggest that situations raising issues of comparative fairness cannot also raise issues of noncomparative fairness, and vice versa. Many situations trigger both kinds of issues. Consider, for example, the case in which the children, B and C, have been playing soccer in the living room, contrary to parent A's orders. A comes home and punishes B by fining him $10,000 but lets C go without punishment. B would have both a comparative fairness argument (C was not punished), and a noncomparative fairness argument (the punishment was not proportionate to the wrong).

In summary, comparative fairness arguments rely upon a comparison between the way in which some actor, A, treats a second person, B, on the one hand, and the way in which A treats at least one other person, C, on the other hand. In contrast, noncomparative fairness arguments rely solely upon a consideration of the way in which some actor, A, treats a second person, B.  

6. Peter Westen has argued that all equal protection arguments are reducible to arguments concerning substantive rights, and that therefore the concept of equal protection is "empty." See Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (1982). I do not think that he has demonstrated this, but even if he has, it would not affect the project of distinguishing between equal protection and substantive due process arguments. The mere fact that one form of argument is reducible to another form, in the sense that any argument of the first form can be restated in terms of an argument of the second form, does not show that the two forms are indistinguishable. Indeed, if we are unable to distinguish the two forms, there is no point in claiming that one is reducible to the other. For example, it is well-known that the inference pattern of Existential Instantiation is derivable as a derived rule of inference in standard systems for first-order quantification logic. But this fact does not prove the absence of a distinction between arguments using Existential Instantiation

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The moral presupposition of noncomparative fairness arguments seems to be the principle that a human being has intrinsic worth and that justice requires that we recognize that worth by treating that person as he or she deserves. The rights a person has in virtue of this principle are noncomparative rights. Thus, the function of noncomparative fairness arguments is the protection of noncomparative rights.

The moral presupposition of comparative fairness arguments seems to be the proposition that persons have equal degrees of intrinsic worth and should be treated as such in the sense that differences of treatment must be consistent with the principle of equal intrinsic worth. An additional moral presupposition is the principle that the maxim of equal protection is a useful safeguard against our lack of omniscience when it comes to knowing exactly what another person "truly deserves." That is, in the absence of complete knowledge as to what treatment perfectly fits a person’s just deserts, it is best to be constrained by the rule of equal treatment. Thus, one should treat persons in the same way unless one is reasonably certain that they deserve differing treatment. The rights a person has by virtue of these principles are comparative rights. Thus, the function of comparative fairness arguments is the protection of comparative rights.

It seems that complete social justice could not be accomplished without complying with both the principle of comparative fairness and the principle of noncomparative fairness. It is perhaps true that, assuming perfect knowledge and perfect motivation, complying with the principle of noncomparative fairness would suffice for justice. But, given our imperfect understanding and our imperfect motives, the principle of comparative fairness is useful protection against the risk of misjudgment, bad faith, or both.

II. The Tussman–tenBroek Analysis

Tussman and tenBroek claim that the essence of the principle of equal protection is the proposition that those who are similarly situated should be treated similarly. This principle, in turn, is often expressed in terms of two more specific direc-

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and those not using it. See, e.g., E. MENDELSOHN, INTRODUCTION TO MATHEMATICAL LOGIC, 64–67 (3d ed. 1987).

7. Tussman & tenBroek, supra note 3, at 344.
tives: (i) Treat similar cases similarly, and (ii) Treat dissimilar
cases dissimilarly. 8

What does it mean to treat similar cases similarly? What is
the criterion for determining which cases are similar and which
dissimilar? Tussman and tenBroek define the concept of "simi-
larly situated" in terms of the objective of the particular law
being evaluated. As they put it, "A reasonable classification is
one which includes all who are similarly situated" with respect
to the purpose of the law. 9

They articulate the details in the following way. 10 The objec-
tive of a law may be either the elimination of some public evil
or the achievement of some public good. Because the analysis
is the same for both cases, we can safely focus upon the case of
eliminating a public evil. The defining characteristic of the leg-
islative classification is the Trait. The Trait associated with any
particular law is the characteristic, or set of characteristics,
which something must have in order to belong to the class to
which the law applies. The Mischief is the evil which the legisla-
ture was trying to eliminate by means of that law. Thus, the
relation of a law's classification to the law's objective is identi-
cal to the relation of that law's associated Trait to its associated
Mischief.

The Trait and Mischief associated with any particular law de-
terminate two classes, the T-class and the M-class. The T-class is
the class of persons who possess the Trait. The M-class is the
class of persons who possess the Mischief. Given any particu-
lar law with its associated T-class and M-class, there are five
possible relationships between the two sets.

The case of perfect rationality exists when the T-class and
the M-class are identical. That is, when all members of the T-
class are also members of the M-class, and all members of the
M-class are members of the T-class, there is a perfect fit be-
tween the legislative purpose and the legislative classification.

Perfect irrationality exists when the T-class and the M-class
are distinct, i.e., when no members of the T-class belong to the
M-class. This is a case of perfect irrationality because there is
no relationship at all between the legislative purpose and the
legislative classification.

8. Westen, supra note 6, at 539–40.
10. Id. at 346–53.
The case of underinclusiveness exists when the T-class is a proper subset of the M-class, that is, when all members of the T-class belong to the M-class, but there are some members of the M-class who do not belong to the T-class. In such cases the legislative classification serves the legislative objective only partially.

An overinclusive classification exists when the M-class is a proper subset of the T-class, that is, when all members of the M-class belong to the T-class, but there are some members of the T-class who do not belong to the M-class. In such cases the legislative classification burdens some who do not possess the Mischief at which the law is aimed.

Finally, a classification which is simultaneously overinclusive and underinclusive is one whose T-class includes persons who do not belong to the M-class, and whose M-class includes persons who do not belong to the T-class. Such a classification both fails to burden everyone who possesses the Mischief and burdens some who do not possess the Mischief at all.11

Tussman and tenBroek observe that examining the relationship between the associated T-class and the associated M-class of a particular law does not exhaust all possible equal protection issues.12 For, it is possible for a law to exemplify the case of perfect rationality but nevertheless violate the equal protection guarantee because its objective is impermissible. For example, a legislature might impose a statutory burden upon a racial minority out of a motive of racial enmity. The mere fact that the classification might be neither underinclusive nor overinclusive in terms of the legislative objective of imposing a

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11. Tussman and tenBroek used the following diagrams to illustrate the five possible relationships between the class defined by the Trait and the class defined by the Mischief:

(1) \( T \subset M \): All \( T \)'s are \( M \)'s and all \( M \)'s are \( T \)'s

(2) \( T \not\subset M \): No \( T \)'s are \( M \)'s

(3) \( M \not\subset T \): All \( T \)'s are \( M \)'s but some \( M \)'s are not \( T \)'s

(4) \( M \subset T \): All \( M \)'s are \( T \)'s but some \( T \)'s are not \( M \)'s

(5) \( T \not\subset M \): Some \( T \)'s are \( M \)'s; some \( T \)'s are not \( M \)'s; and some \( M \)'s are not \( T \)'s

\textit{Id.} at 347.

12. \textit{Id.} at 353.
special burden upon that particular minority would not save the statute from invalidation under the equal protection clause. Thus, equal protection concerns can be raised by the very use of certain kinds of classifications.

What does all this come to for purposes of drawing a line between equal protection and substantive due process arguments? The Tussman-tenBroek analysis seems to presuppose the following picture. Every burden-imposing law imposes its burden upon a certain class of persons. Hence, any burden-imposing law can be evaluated either by asking whether the burden is fair or by asking whether the classification is fair. Now, asking whether the burden is fair is a substantive due process question. On the other hand, asking whether the classification is fair is an equal protection question. Asking whether the classification drawn by a law is fair, in turn, resolves into asking whether the classification is underinclusive, overinclusive or both. Hence, any argument alleging either the underinclusiveness or overinclusiveness of a classification is an equal protection argument.

III. Evaluation of the Tussman-tenBroek Method of Drawing the Line

The claim that arguments focusing upon classifications are necessarily equal protection in nature seems most plausible with respect to arguments alleging underinclusive classifications. Consider, for example, the ordinance challenged in Railway Express Agency v. New York.\footnote{336 U.S. 106 (1949).} The ordinance prohibited advertisements carried on vehicles, but exempted advertisements of products sold by the owner of the vehicle on which the advertisements were carried. The stated objective of the ordinance was the reduction of visual distractions to motorists and pedestrians. It was argued that, while it might be fair in a due process sense, to prohibit advertisements on vehicles, it was not fair to do so unless all such advertisements were prohibited. Advertisements of products sold by the owners of the vehicles on which those advertisements were carried presented the same potential for visual distraction as advertisements of products not sold by the owners of the vehicles on which the advertisements were carried. This is a paradigm case of a com-
parative fairness argument. It relies upon a comparison between the way in which the government treats an owner of a vehicle bearing an "unrelated" advertisement, on the one hand, and the way in which the government treats the owner of a vehicle bearing a "related" advertisement, on the other.

In general, arguments relying upon claims of underinclusiveness seem to be clear cases of comparative fairness, and hence, equal protection arguments. For, such arguments depend upon contrasting the way in which members of the T-class are treated with the treatment given to persons belonging to the M-class but not to the T-class.

But matters are not so clear with respect to arguments relying upon claims of overinclusive classifications. Consider the facts giving rise to the Japanese Evacuation Cases. At the beginning of World War II United States military authorities believed that persons of Japanese ancestry living on the West Coast posed a security threat. President Roosevelt issued an executive order authorizing military commanders to be later designated to define military areas from which any or all persons could be excluded. Roosevelt named General DeWitt as Commander of the Western Defense Command. Acting pursuant to the executive order, DeWitt established a military zone which included the Pacific Coast states. He issued several orders applying to persons of Japanese ancestry living in the zone. Some of these orders were exclusion orders which required such persons to leave their homes and move to relocation centers further inland.

One of the arguments made in the case was based upon the overinclusiveness of the classification. Many Japanese Americans living in the military zone were not security threats at all, but were loyal American citizens and aliens. Now, this argument does not seem to be based upon considerations of comparative fairness. Rather, it seems to appeal to noncomparative fairness. Consider what a loyal Japanese American citizen or alien would say. "It may well be that some persons of Japanese ancestry living in the military zone are security threats to the United States. But I am not one of them. Hence, it is unfair to detain me at all. If your purpose in detaining people is to protect yourself against acts of sabotage,

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then it is unfair to detain me because I present no such threat." No appeal is made to the way in which the government is treating anyone else. The claim rather is that the way in which the government is treating the complainant is unfair in its own terms, without regard to the government's treatment of others.

Thus, it seems clear that at least some arguments alleging overinclusive classifications are arguments which appeal to noncomparative, rather than comparative, fairness. It follows that not all arguments which focus upon the nature of a law's classification, as opposed to the nature of the law's burden, are comparative fairness arguments. And if this is so, not all arguments which focus upon the nature of classifications are equal protection arguments.

On the other hand, some arguments alleging overinclusive classifications do seem to be genuine equal protection arguments. Consider, for example, a situation in which A engages in some industrial activity which pollutes the air. Suppose that B is also engaged in a polluting industrial activity and that the level of pollution caused by B's operation is twice as much as the level caused by A's operation. Suppose further that the government imposes a pollution tax on A and B at the same rate in each case. A could argue as follows, "I concede for the sake of argument that it is fair in some sense to burden me with a pollution tax, for I am polluting the environment. But it is unfair to burden me with the same rate of tax you are applying to B because B is causing twice as much pollution as I am. If you are going to burden me at all, you ought to burden me to a lesser extent than you burden B because B is causing a greater amount of the harm you are trying to reduce." This argument does appeal to comparative fairness. It makes the point that the classification is overinclusive in that it treats certain persons as if they all cause the same kind and degree of public harm, when not all of them do.

Thus, we have seen that some arguments alleging overinclusive classifications are noncomparative fairness, and hence due process, arguments, while other arguments alleging overinclusive classifications are comparative fairness, and hence genuine equal protection, arguments. Is there a way of defining the distinction between these two classes? It seems that the noncomparative fairness arguments are characterized by an allegation that the law's burden is imposed upon persons who do not possess the Mischief at all. In such cases it is noncom-
paratively unfair to bring such persons inside the T-class. On the other hand, the comparative fairness arguments are characterized by an allegation that, while the burden has been imposed upon a person who possesses the Mischief, that person does not possess the Mischief to the same degree as do other persons who are burdened by the law to the same degree. Thus, the M-class includes persons who possess the Mischief in varying degrees. One might think of the M-class as having a “core” containing persons possessing the Mischief to the greatest degree and concentric rings surrounding the core, each ring containing persons who possess the Mischief to a lesser degree than persons contained in rings inside that ring or in the core. A person located further toward the circumference of the M-class than another person could argue that it is unfair to treat all the zones within the M-class in the same way.

So, while some arguments alleging overinclusive classifications are equal protection arguments, not all of them are. The distinction between arguments which focus upon the nature of a law’s burden, on the one hand, and arguments which focus upon the nature of a law’s classification, on the other hand, is not identical with the distinction between due process and equal protection arguments. While it does seem that all arguments alleging underinclusive classifications are really equal protection arguments, the category of arguments alleging overinclusive classifications cuts across the category of equal protection arguments.

It therefore seems that we ought to modify the underlying picture of Tussman and tenBroek if we are to make it serve as an adequate means of distinguishing between equal protection and substantive due process arguments. I have argued that, with respect to burden-imposing laws, that picture classifies arguments which focus upon the nature of the burdens as due process arguments, and classifies arguments which focus upon the nature of the classifications as equal protection arguments. The picture needs correcting in at least the following ways.

One of the problems with the Tussman-tenBroek view is its apparent assumption that every law either imposes a burden or confers a benefit. As H.L.A. Hart has argued,\textsuperscript{15} this is probably not a very illuminating way of characterizing a legal system. There are many instances of what Hart has called “secondary

\textsuperscript{15} See H.L.A. Hart, \textit{supra} note 2, at 77–120.
rules,” whose function is to prescribe conditions under which persons can exercise certain kinds of powers, both public and private. Such power-conferring rules seem to be neither burden-imposing nor benefit-conferring rules, but rather seem to fall into a separate category altogether.

But let us put this point aside for the sake of argument and concentrate upon clear cases of burden-imposing laws. It seems that any such law must contain at least two parts or aspects. There must be some sort of description or specification of the burden, and there must be some sort of description or specification of the conditions under which the burden applies to someone. Tussman and tenBroek use the word “classification” to refer to the latter aspect of a legal rule. Thus, that aspect of a law which specifies the conditions under which the burden specified by that rule is applicable is the law’s “classification.”

Consider, for example, a statute which provides that any person convicted two or more times of grand larceny shall be subjected to compulsory sterilization. Suppose further that the statute specifically exempts persons convicted two or more times of embezzlement. That aspect of the law which specifies the punishment of sterilization is the specification of the law’s burden. And that aspect of the law which specifies the conditions under which the burden is imposable is what Tussman and tenBroek call the law’s “classification.” It is by reference to the classification in this sense that one can determine, with respect to any particular person, whether a law applies to that person.

Is it possible to get clearer on the particular sense in which Tussman and tenBroek use the word “classification?” There is a sense in which one “classifies” something in referring to it as an exemplification of some characteristic or universal rather than another. For example, there is a sense in which I classify when I say, “That black horse over there is eating the rhubarb again.” I have referred to the horse as an exemplification of the characteristic of being a black horse over there, as opposed to an exemplification of any of its other characteristics. I have also referred to the rhubarb as “rhubarb” instead of any of its

16. See Tussman & tenBroek, supra note 3, at 344.
17. For the case upon which this hypothetical is modeled, see Skinner v. Oklahoma, 316 U.S. 535 (1942).
other features. Thus, in one sense of "classify," one classifies whenever one refers to anything at all, since to refer to something is to refer to it in certain ways rather than others, and anything can be referred to in more than one way. Now, in this sense of "classify," that aspect of a law which specifies the burden is just as much a classification as is any other part or aspect of the rule. For, any legally imposed burden can be characterized in more than one way. Since Tussman and tenBroek choose not to use the word "classification" in connection with the specification of legally imposed burdens, it seems clear that they do not mean to use the word in this first sense.

There is another sense of the word "classify" in which one classifies whenever one refers to a proper subset of a larger set. For example, if I say, "Yellow spinner baits are better lures for largemouth bass than black spinner baits," I have classified in this second sense in at least two ways. I have referred to the class of yellow spinner baits, which, in turn, is a proper subset of the larger class of spinner baits. And I have referred to the class of largemouth bass, which, in turn, is a proper subset of the larger class of bass. This second usage seems closer to the sense Tussman and tenBroek have in mind, for they make the point that any law which applies its burden to something less than all persons in a jurisdiction classifies in their sense. Thus, they say, "It is clear that the demand for equal protection cannot be a demand that laws apply universally to all persons. The legislature, if it is to act at all, must impose special burdens upon or grant special benefits to special groups or classes of individuals. We thus arrive at the point at which the demand for equality confronts the right to classify. For it is the classification which determines the range of persons affected by the special burden or benefit of a law which does not apply to 'all persons.'"18

But although this second sense seems closer to the sense Tussman and tenBroek have in mind, it is not identical to it. For, it seems obvious that any specification of a legally imposed burden also classifies in this second sense. Any such specification marks a particular class of burdens as a proper subset of all possible legally imposed burdens.

Perhaps we can come closest to their meaning by saying that by "classification" they mean any specification of the condi-

18. See Tussman & tenBroek, supra note 3, at 343-44.
tions under which some legally imposed burden becomes applicable, where that specification entails that the burden is not applicable to all persons at all times and in all situations. Whether the word "classification" is the best possible word for this sense is an open question.

Now, suppose that we evaluatively focus upon a law's specification of its burden, without regard to the classification conditions to which that burden is attached. It seems that in such a case we could be raising only a noncomparative fairness issue. We could be claiming only that the burden itself is intrinsically unfair in the sense that it would be unjust to apply it to anyone under any circumstances. Thus, for example, with respect to our hypothetical sterilization statute, we might argue that the burden of sterilization cannot ever be fairly applied to anyone. We would, therefore, be making a substantive due process, rather than an equal protection, argument.

But now imagine that we turn our evaluative focus upon a law's classification conditions in Tussman and tenBroek's sense. Here, we may or may not be raising equal protection concerns. Whether we do depends upon the particular mode of argument in each case.

For example, we might argue that the law's burden cannot be fairly applied to persons satisfying the classification conditions, without regard to the government's treatment of any other persons. With respect to the sterilization statute, we might argue that it is inherently unfair to sterilize a person for being convicted two or more times of the crime of grand larceny. Our point would be that, although the burden of sterilization might be fairly imposed upon some persons for having committed certain other crimes, it cannot be fairly imposed upon a thrice-convicted grand larcenist simply because the punishment is disproportionate to the crime. Such an argument would be noncomparative in nature, and hence would be a due process, rather than an equal protection, argument.

On the other hand, we might argue that the burden of sterilization cannot be fairly applied to a thrice-convicted grand larcenist because the government has failed to apply that burden to thrice-convicted embezzlers, and that there is no significant difference between the crime of grand larceny and that of embezzlement with respect to genetic transmission. This would be a comparative fairness, and hence an equal protection, ar-
argument. For, it depends upon a comparison between the way in which the government treats grand larcenists, on the one hand, and the way in which it treats embezzlers, on the other.

What about arguments alleging overinclusiveness? As I have argued, such arguments may or may not be equal protection arguments, depending upon their nature. Again, with respect to the sterilization statute, if we argue that, although it may be fair to sterilize some criminals in order to prevent genetic transmission of criminal traits, it is unfair to sterilize some particular defendant because her or his traits are not genetically transmissible (assuming that we had some argument for this), we would be making a due process argument. For, our claim would be that, given the state's objective of preventing genetic transmission of criminal tendencies, it is unfair to apply the burden to this particular defendant because her or his tendencies are not transmissible at all. On the other hand, if we argue that the burden of sterilization cannot be fairly applied to some particular defendant because the state also applies that same burden to more serious felonies, then we are making a comparative fairness argument. For, our claim here would be that there are varying degrees to which persons included in the M-class class possess the Mischief, and that it is unfair to apply the same degree of burden to all members of the M-class.

In summary, arguments evaluating legal classifications are not necessarily equal protection arguments. If they rely upon considerations of noncomparative fairness, they are due process arguments. If they rely upon considerations of comparative fairness, they are equal protection arguments. In particular, arguments alleging overinclusive classifications are not necessarily equal protection arguments. The category of arguments alleging overinclusive classifications has two subclasses, only one of whose members are genuine comparative fairness arguments. There is no necessary connection between the property of being an argument alleging an overinclusive classification and the property of being an equal protection argument.

IV. The Line Drawn by the Court

At times the Supreme Court has drawn the line between equal protection and due process arguments in terms fairly
close to those I have proposed. For example, in *Ross v. Moffitt*, the Court said, "'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals 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." It is interesting that here the Court apparently ties the concept of an equal protection argument to the concept of an argument alleging an underinclusive classification. For, it is only such classifications which trigger the maxim, "Treat similar cases similarly."

But the Court has sometimes drawn the line differently. For example, it has treated equal protection arguments as though they were due process arguments. Consider *Moore v. City of East Cleveland*, in which the Court applied a due process analysis to a housing ordinance limiting occupancy of a dwelling unit to members of a single family. The ordinance defined "family" in such a way as to exclude a woman living together with her son and her two grandsons, where the grandsons were first cousins. The city sought to justify the ordinance as a means of preventing overcrowding, reducing traffic and parking congestion, and reducing the financial burden on the school system. In response to these purported objectives, 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.

Now, the argument focusing upon a hypothetical family with a half-dozen licensed drivers is a comparative fairness argument. For, its point is that, given the objective of burdening persons possessing the Mischief of contributing to traffic and parking congestion, the T-class fails to include all those possessing the

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20. *Id.* at 609.
22. *Id.* at 500.
Mischief. The family with six licensed drivers possess the Mischief, but fall outside the T-class. The argument alleges an underinclusive classification and, as we have seen, is a paradigm case of an equal protection argument. On the other hand, the second argument does make a noncomparative fairness point. The hypothetical family consisting of an adult brother and sister are included in the T-class but not in the M-class. They do not possess the Mischief at which the ordinance is directed. The argument based upon their situation makes a due process, rather than an equal protection, point. Given the city's objective, it is simply unfair to burden them at all.

Note that, while the Court treated both of the foregoing arguments as due process arguments, Tussman and tenBroek would have classified both as equal protection arguments because both focus upon the nature of a law's classification.

On the other hand, the Court has treated due process arguments as though they were equal protection arguments. Consider, for example, the Court's invalidation, under the equal protection clause, of a marriage statute in Zablocki v. Redhail. The statute provided that certain Wisconsin residents could not marry without obtaining a court order authorizing the marriage. The class of residents was defined to include "any Wisconsin resident having minor issue not in his custody and which he is under an obligation to support by any court order or judgment." The statute also provided that court permission should not be granted unless the applicant submitted proof of compliance with his support obligation and proved that the children protected by the support order were not then, nor were likely to become, public charges. The State put forward two objectives which it claimed supported the statute. First, the required proceeding provided a chance to counsel the applicant concerning the necessity of fulfilling his support obligations. Second, the law protected the welfare of the out-of-custody children. With respect to the second objective, the Court said:

First, with 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

24. Id. at 375.
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.25

These two arguments are clear cases of noncomparative, and hence due process, arguments. Their point is that, given the State's objective, it is inherently unfair to impose the burden of inability to marry upon these particular persons. Although it might be fair to bar some persons from marrying, it is unfair to bar these persons because, as applied to them, the prohibition simply does not advance the objective at all. These arguments do not rely upon any comparison between the way in which the State treats the excluded applicants and the way in which it treats anyone else. Hence, neither is an equal protection argument.

In response to the argument that the welfare of out-of-custody children was protected by the statute in that it prevented the marriage applicants from incurring new support obligations, the Court said,

But the 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.26

Now, the argument of underinclusiveness is a genuine case of an equal protection argument. But, the second argument is one of those arguments alleging overinclusiveness which is a noncomparative fairness, and hence, due process argument. For, its point is that, given the State's objective, it is noncomparatively unfair to burden persons who do not possess the Mischief which the State is trying to prevent. There is no need to rely upon any comparison with the State's treatment of others. The Court here follows the automatic presumption of

25. Id. at 387.
26. Id. at 390.
Tussman and tenBroek that any argument alleging an overinclusive classification is an equal protection argument.\footnote{For an interesting explanation of why the Court does this, see Cohen, \textit{Is Equal Protection Like Oakland? Equality as a Surrogate for Other Rights}, 59 \textit{TUL. L. REV.} 884 (1985).}

CONCLUSION

I have proposed that the distinction between equal protection and substantive due process arguments be drawn by tying it to the distinction between comparative fairness and noncomparative fairness arguments. I have argued that the method of distinguishing the two categories of arguments presupposed in the equal protection analysis of Tussman and tenBroek is inadequate, and I have suggested a way of modifying their analysis to make it more adequate. Finally, I have argued that, although the Supreme Court has sometimes drawn the line close to mine, it has not always done so.