Journal of Markets & Morality
Volume 21, Number 1 (Spring 2018): 71–93

What Is a Compelling Governmental Interest?

Robert T. Miller
Professor of Law and F. Arnold Daum Fellow in Corporate Law, University of Iowa College of Law
Fellow and Program Affiliated Scholar, Classical Liberal Institute at New York University School of Law

The Supreme Court has never attempted to state in general terms what makes a governmental interest (that is, an end) compelling. Progress can be made by asking for which ends the government has a significant cost advantage relative to other institutions. This is a necessary (but not sufficient) condition of that end's being a compelling governmental interest. I consider the relationship between this account and the as-applied standard that developed prior to RFRA and RLUIPA and that was embodied in those statutes. Applying the necessary condition advocated here would affect the outcome of some important religious freedom cases. Finally, I discuss whether the condition here identified as necessary is also sufficient and conclude that it is not.

Introduction

Under the Religious Freedom Restoration Act (RFRA),[1] if a person proves that the federal government has substantially burdened his exercise of religion, even by a rule of general applicability, then the government must show that applying the burden to the person "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[2] The test under the Religious Land Use and Institutionalized Persons Act (RLUIPA),[3] which applies to the states, is similar. As is well known, the language in these statutes embodies the test denominated *strict judicial scrutiny*, the standard of review that the courts apply to the most constitutionally suspect government actions, such as racial classifications or viewpoint discriminations in regulations affecting speech.[4]

As explained more fully below, the Supreme Court has never given a general account of what makes some ends that government may pursue compelling and others not. This is a surprising omission since, by its terms, strict scrutiny would seem to require, as a first step in its application, a determination of whether the end that the government is pursuing in the challenged action is truly compelling. The primary purpose of this article is to begin addressing this omission by offering an account of what makes an end a compelling governmental interest. Nevertheless, the account offered here is limited in two distinct ways. First, strict scrutiny may well mean different things in different legal contexts,[5] and the argument presented here relates only to the context of free exercise of religion under RFRA, RLUIPA, and the cases interpreting them. Second, a complete account of compelling governmental interests would set forth necessary and sufficient conditions for an end to count as compelling, and the account here sets forth only a necessary condition. That is, if the argument in this essay is sound, it shows only that there are certain properties such that, if a purported compelling governmental interest lacks these properties, it is not really a compelling governmental interest. On the other hand, however, possession of the identified properties does not, without more, entail that an end is a compelling governmental interest.

This article is divided into five sections. In the first, I consider why, despite the concept of a compelling governmental interest being central to the analysis in some of its most important decisions in the last fifty years, the Supreme Court has never attempted to state in general terms what makes an end compelling. In the second section, I suggest that progress can be made on this seemingly intractable issue by asking which ends in the pursuing of which the government has a significant cost advantage relative to other institutions, most importantly, the market. Here I present my key argument, which is that if another institution in society has a significant cost advantage in pursuing a given end, then that end cannot be a compelling interest of the government; that is, no matter how important the interest may be, if another institution in society can serve that end as well and better than can the government, then although government's pursuing that end may well be constitutionally permissible, it cannot be compelling. The government's having a significant cost advantage in pursuing a given end is thus a necessary (but not sufficient) condition of that end's being a compelling governmental interest. In the third section of the article, I consider the relationship between the account offered here—a necessary condition for a government end's being compelling *in general*—and the as-applied standard that developed in the case law prior to RFRA and RLUIPA and that was embodied in those statutes. In the fourth section, I explore how applying the necessary condition advocated here would affect the outcome of some important religious freedom

cases. Finally, in the last section of the article I offer some concluding remarks, including concerning whether the condition here identified as a necessary condition of an end being a compelling governmental interest ought also be regarded as a sufficient one.

Difficulty in Defining a Compelling Governmental Interest

As all constitutional lawyers know, strict scrutiny is distinguished from both intermediate scrutiny and rational basis review. All three levels of scrutiny refer both to an end that government is pursuing and the connection between such end and the means adopted. The three levels of scrutiny differ as to the value attributed to the end and the tightness of the connection between the means adopted and the end. That is, whereas under strict scrutiny the end must be "compelling" and the means "narrowly tailored," under intermediate scrutiny the end must be "important" and the means "substantially related" to the end,[6] while under rational basis review the end must be "legitimate" and the means "rationally related" thereto.[7] Usually thought to derive from the famous Footnote 4 in *Carolene Products*,[8] the system of three levels of scrutiny clearly implies a hierarchy of ends that government may pursue, with some ends carrying more normative force than others.[9]

Working in the common-law method, the courts have had to decide only whether the particular ends asserted by the government in a given case are compelling. For example, in *Roberts v. United States Jaycees*, the Supreme Court held that, in the context of large, impersonal organizations, promoting gender equality was a compelling governmental interest that justified restricting freedom of association,[10] and in *Grutter v. Bollinger* the Court held that achieving a diverse student body in a public law school justified the government's considering race in admissions decisions.[11] Of course, since the Court need only decide the questions essential to resolving the case before it, categorizing particular governmental interests as compelling or not, as such interests are presented in cases as they arise, is all that the common-law method requires. Nevertheless, after decades of deciding such cases, it might seem that the Supreme Court would have announced some general principles concerning which ends of government are compelling and which not; at the very least, such guidance would be useful to lower courts deciding strict scrutiny cases. Such general principles, however, have never appeared. On the contrary, where possible, the Supreme Court has even gone out of its way to *avoid* deciding whether particular governmental interests are compelling. One common strategy, as in *Hobby Lobby*, has been

to assume without deciding that the government's stated end (in *Hobby Lobby*, providing women with contraceptives at no cost) is compelling but to hold that the government's means are not narrowly tailored to advance that interest.[12] In other cases, petitioners have won cases when courts held that a governmental interest, as applied to the petitioners in the case, is not compelling, but this as-applied inquiry similarly assumes away the logically prior question of whether the asserted interest is, generally speaking, a compelling one.[13] The upshot of these approaches is that, in striking down government action as violations of free exercise rights, the courts have almost always done so in ways that have allowed them to avoid holding that a stated governmental interest is not compelling. Only in cases upholding a government action subjected to strict scrutiny, which logically require that the court find the end of the challenged action is a compelling governmental interest, do we get any information about which ends are compelling.[14] Thus, we get a small number of *positive* results (a few ends have been held to be compelling), but very few negative ones (virtually no ends have been held to be not compelling).

But this result is not surprising. Any general account of why some ends that government may pursue are more important than others would seem to require a complete political philosophy and maybe even a complete moral philosophy as well. For example, a classical Aristotelian approaching the question would think that the most important ends that government may pursue would be closely related to the final end of human nature, the foundational concept of Aristotle's eudaimonistic moral philosophy.[15] By contrast, Hobbes thought that the most important ends of government involved only the physical safety of the individuals who come together to form Leviathan.[16] A classical Lockean, however, would think that the most important ends of government are protecting the natural rights of human beings as identified in Locke's moral philosophy.[17] Thus, in one of its most Lockean passages, the Declaration of Independence states that it is to protect the inalienable rights of life, liberty, and the pursuit of happiness "that governments are instituted among men." Or again, the early Rawls of *A Theory of Justice* says that promoting equality among citizens is the most important end government can pursue.[18] Very naturally, therefore, if the Supreme Court attempted to go beyond the most modest claims (e.g., suppressing private violence is a compelling governmental interest), it would soon encounter two seemingly insuperable problems: on the one hand, to make a convincing argument that a particular end was a compelling governmental interest would require premises that could not in any plausible way be drawn from traditional constitutional law sources, and, on the other hand, the needed premises would be highly controversial, both among the justices on the court and more broadly. A general account of

which ends are compelling governmental interests and which are not would—it seems—require the Supreme Court to choose sides in some of the most contested issues in political philosophy, and the reasons for not doing that are manifest. No wonder, then, that the Supreme Court has shown no appetite for articulating a general theory of which governmental interests are compelling but instead has avoided such issues whenever it could.

An Argument about Comparative Advantages in Pursuing Various Ends

Nevertheless, there may be a way to make some progress on the general question of which governmental interests suffice to withstand strict scrutiny and which do not, without invoking some fully elaborated political theory. So far, the question has seemed to be which governmental interests are compelling and which not, which interests reflect the most important political values and which do not. This way of framing the question is encouraged by the distinction between strict scrutiny and the two less-exacting standards of review, intermediate scrutiny and rational basis review, which refer to certain supposedly less valuable ends government may pursue. And, as noted above, this way of viewing the question has proved fruitless.

To make progress, we should shift our attention from the word *compelling* in the phrase *compelling governmental interest* to the word *governmental*. That is, as long as we concentrate on the word *compelling*, the inquiry is entirely a normative one about the correct ranking of the ends that government might pursue and is likely to remain intractable. If we concentrate on the word *governmental*, however, the question can be understood as concerning not which ends government *ought* to pursue but which ends government *can* pursue. More precisely, if we ask what is a compelling *governmental* interest, the question is more naturally understood as concerning which ends government can pursue more effectively than can individuals or other institutions in society. The ground of the discussion shifts. The question is no longer a normative one about the value attributed to different ends but a factual one about the relative effectiveness of government, as compared to other institutions, in pursuing given ends. As such, it may well be under significant empirical control and so be considerably more tractable than the normative inquiry we seek to displace.

At this point, it is worthwhile to recall that in his famous paper on *The Problem of Social Cost*, Ronald Coase referred not to transaction costs but to the costs of carrying out market transactions to alter and combine rights, and he expressly contrasted these costs with the administrative costs of a firm altering and combining

rights inside the firm.[19] His point was that, for any particular reallocation of rights, the costs of effecting that reallocation will vary with the internal structure of the institution carrying it out. Different institutions will have different costs, with some having a comparative advantage with respect to some kinds of transactions and others have comparative advantage with respect to others. This is true not only for the market and the firm but for other kinds of institutions as well, including the government, the family, and the church.[20] The primary suggestion in this essay is that, for any end to qualify as a compelling governmental interest, a necessary (but not sufficient) condition is that the end be one in the effecting of which government has a significant comparative advantage over other institutions in society—that is, one in the effecting of which government faces significantly lower transaction costs than other institutions.

The argument for this is straightforward. If another institution in society, whether it be the market, the firm, or anything else, has a significant transaction-cost advantage in effecting a particular end, then that end can be achieved more efficiently by such other institution and without governmental action. The justification for governmental action in such a case is weak and so in particular not compelling. More generally, the whole point of subjecting some forms of governmental action to strict scrutiny is that we believe that some rights are so important that they ought not be infringed by governmental action absent the most powerful reasons. But no matter how important the governmental end involved may be, if other institutions in society can achieve the end more effectively than government can, then the end can likely be achieved *without* government infringing the right to be protected. Hence, whatever one's normative theory of the ends of government, even if the end in question is one invested with great value according to that theory, nevertheless the reasons supporting *governmental* action to effect the end cannot be very powerful. Therefore, the interest in question cannot be a compelling governmental interest.

Now, this is not to say that, when other institutions in society have significant transaction-cost advantages over the government with respect to a particular end, it is somehow illegitimate or wrong (in some robust normative sense) for the government to pursue that end. All that strictly follows from what I have said so far is that government's pursuing such an end is likely to be inefficient in the technical economic sense (for instance, it could involve converting a competitive market into a monopoly or a cartel). Some people may say that this is enough to make governmental action in such cases wrong in some stronger normative sense (a position with which I am inclined to agree but which forms no part of the argument in this essay), and, of course, if one holds some robust normative theory about the proper ends of government, that theory might supply

independent normative grounds to show that the governmental action in question is wrong. But such considerations are beyond the scope of the argument in this essay. The claim here is much more modest. It is simply that, when, with respect to a given end, government faces significantly higher transaction costs in effecting that end, then, because other institutions in society can achieve the end more effectively than can government, government's interest in effecting the end is not compelling.

There are two clear benefits to this comparative-advantage criterion. The first is that the criterion is neutral as between virtually all normative theories of the proper ends of government. That is, the argument here has force against a theory provided only that the theory, in valuing a particular end of government as compelling, values the effecting of the end, not the means by which the end is effected. In any such theory, the fact that the end in question can be achieved more effectively by other institutions should entail that the government's interest in achieving the end declines to the extent that the end is being achieved by other institutions in society. This conclusion will not follow only if a normative theory of the proper ends of government values, in and of itself, that certain ends be achieved by government, *even if they can be achieved more effectively by other institutions in society*. I am familiar with no such theory, and clearly such a theory would involve some fairly problematic, counterintuitive claims. At the very least, none of the major normative theories of government in the western tradition include such implausible claims. Hence, at least for practical purposes, the comparative-advantage criterion is neutral as between normative theories of government in political philosophy.

The second benefit to the comparative-advantage criterion is that it shifts the grounds of the argument from grand normative questions about the proper ends of government (is it more important for government to promote equality among citizens or liberty?) to factual questions about the relative transaction costs faced by various kinds of institutions in effecting particular kinds of changes. Although such questions are hardly free from doubt, in some cases at least they are relatively simple, and in all cases they are under some degree of empirical control. We should thus expect that, at least sometimes, there will be more agreement on such questions than there will ever be on large questions of political philosophy. This means that, at least sometimes, the comparative-advantage criterion advocated here will have real bite and could be used to settle cases.

Now, if we accept the comparative advantage, transaction-cost criterion, the question becomes, with respect to the effecting of which ends do other institutions in society have a comparative advantage over the government. Clearly, there are many such ends, but the most obvious involve the production and distribution

of most normal goods and services—that is, goods and services that are generally produced in competitive markets. In the vast majority of such cases, the market clearly overperforms the government to an immense degree, and thus, according to the argument in this essay, there is no compelling governmental interest in producing or distributing such goods and services.[21] This point may be subject to an important exception when the end involved is merely transferring wealth, but, then again, perhaps not, because private charities may well be more efficient than the government in effecting wealth transfers, and if so, then even this purported exception would fail.[22] Conversely, for reasons familiar from the economic analysis of law, there is also a range of ends with respect to which the government usually has a significant transaction-cost advantage. Such ends include suppressing force and fraud, maintaining the monetary system, providing public goods in the true economic sense (e.g., national defense, roads, city parks), regulating natural monopolies, and remedying clear market failures, as when market activities result in relatively small, negative externalities being spread over large numbers of third parties (e.g., pollution). In each of these cases, market transaction costs are very high, but the administrative costs of government are relatively low, and so such ends would meet the necessary condition in the comparative-advantage criterion.

Notice that the ends of government that clearly fulfill the necessary condition in the comparative-advantage criterion—suppressing force and fraud, maintaining the monetary system, providing public goods, regulating natural monopolies, and remedying clear market failures—are the proper ends of government as articulated in classical liberalism. This suggests an obvious, but specious, objection. For the key problem in saying what makes a governmental interest compelling was that any attempt to do so would have to appeal to some general political philosophy or other, and whichever philosophy may be chosen would be hopelessly controversial. It may seem that I have merely suggested classical liberalism for this controversial role, and if that were what I am doing here, then we would indeed have made no progress at all. But that is not my argument.

Although I subscribe to a classical liberal theory of government, I am *not* here relying on that theory to determine the proper ends of government generally and then applying that theory to the particular case of strict judicial scrutiny to determine which ends are compelling for purposes of that constitutional test.[23] I am suggesting a quite different argument, an argument unrelated to the proper ends of government generally, an argument that, as I argued above, should have significant purchase with adherents of virtually any theory of the proper ends of government. That is, rather than beginning with a classical liberal theory of government, I am beginning with the constitutional doctrine of strict scrutiny,

which refers to compelling governmental interests. I take that concept as given in constitutional law, and I ask, consistent with the common-law method of constitutional law, what may be a sensible explication of it within our constitutional tradition. My argument is that, *regardless of one's general political philosophy*, in determining which interests to count as compelling for purposes of strict scrutiny, it makes no sense to include ends that there is little need for government to pursue at all because other institutions in society, having significant cost advantages over government in relation to such ends, can pursue them much more effectively. That is, if other institutions can serve these ends much better than government can, government's interest in serving them (while perhaps legitimate, generally speaking, depending on one's political theory) cannot in fact be compelling for purposes of strict scrutiny.[24] This argument is independent of all normative accounts of the proper ends of government, including classical liberalism.

As I also noted above, if government chooses to pursue some end that other institutions in society can and do pursue more effectively, then nothing I say here questions the general constitutional or political legitimacy of the government's doing so. In contradistinction to the argument presented here, classical liberalism as a political philosophy would impugn such governmental actions on general principles. Rather, all I am saying here is that, when pursuing ends that other institutions in society can pursue more effectively than can government, government cannot plausibly claim that its interest in pursuing such ends is compelling *for purposes of applying strict scrutiny* in constitutional law. Therefore, if, in pursuing such an end, the government infringes one of those individual freedoms traditionally protected by strict scrutiny, the government's claim ought to yield to the individual right.

If all this is right, then the next question would seem to be how the comparative-advantage criterion advocated here would work in practice in free exercise of religion cases. Before turning to that question, however, I need to make some preliminary points about the application of strict scrutiny in such cases, for the criterion suggested here is a general one and the application of the compelling interest standard in the case law and under RFRA and RLUIPA has virtually always been understood to be on an as-applied basis.

The General Comparative-Advantage Criterion and the As-Applied Standard

By its terms, strict scrutiny is a two-pronged test: The challenged governmental action must (a) serve a compelling governmental interest, and (b) serve that interest by narrowly tailored means. One might thus think that, in applying this

test in free exercise contexts, courts would have asked, in relation to the test's first prong, whether the government's asserted interest is, generally speaking, compelling. If it is not, then the petitioner would win the case immediately. If the interest is compelling in general, the court would then move on to the as-applied inquiry, determining whether the government's interest in applying the challenged statute or regulation to the particular petitioner is also compelling. At times, courts have intimated that this double inquiry was the appropriate course. Thus, Justice Blackmun once wrote that in testing "the constitutionality of a state statute that burdens the free exercise of religion," the court inquires whether "the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest."[25]

But in practice courts virtually always performed only a single compelling interest inquiry. Although not expressly distinguishing a general inquiry about the statute and an inquiry about the application of the statute to the plaintiffs in question, in both *Sherbert v. Verner*[26] and *Yoder v. Wisconsin*,[27] the Supreme Court conducted only the second kind of inquiry, considering only the interests of the government in applying the challenged statutes to the particular plaintiffs in the cases. One reason for using the as-applied standard, no doubt, is the general difficulty noted above in determining whether a governmental interest is compelling. Another reason is that, as J. Morris Clark put it in an early and often-cited law review article, "The importance of the law should be measured not by all the benefits it confers on society, but by the incremental benefit of applying it to those with religious scruples."[28] The reason for requiring the as-applied test is clear: If the court balanced the governmental interest in enforcing a statute generally against the particular harm to the petitioner (often a lone individual) from having the statute enforced against him, the former would almost always seem vastly greater than the latter, and the government's interest would practically always seem compelling. Such an approach would be fallacious, however, because the petitioner is not seeking to enjoin the statute generally but merely to enjoin it as applied to himself. Whether the petitioner gets his injunction or not, the statute will in general be enforced (i.e., will be enforced against everyone other than the petitioner), and the government's end will still be achieved with respect to all others against whom the statute is applied. Although the court has not always adhered to the as-applied inquiry,[29] Congress subsequently codified the as-applied approach in RFRA[30] and RLUIPA,[31] and the Supreme Court expressly adopted it in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, holding that RFRA "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to … the particular claimant whose sincere exercise of religion is being substantially burdened."[32]

As McConnell and Posner put it, courts have to "weigh the *marginal* impact on religious freedom against the *marginal* impact on the government's purposes."[33]

Now, there are two key points about the relationship between the abstract inquiry of whether an asserted governmental interest is compelling and the as-applied inquiry that courts have usually undertaken in the cases. The first and more important is that the two questions are logically independent of each other: That is, whether an interest is generally compelling does not determine whether it is compelling as-applied in a particular case (which is easy to see), and, conversely, whether an interest is compelling as-applied does not determine whether it is compelling in general (which is harder to see, since it might seem that if an interest is compelling as-applied, it must be compelling in general, but, as I will show below, this is not the case). The second point then follows from the first: Since the two questions are logically independent, in applying strict scrutiny they are in no way exclusive alternatives but complements. Hence, any interpretation of strict scrutiny that seeks to protect free exercise rights (and protecting individual rights is, after all, the whole point of invoking strict scrutiny) should require that the government demonstrate that its asserted interest is *both* generally compelling *and* compelling as-applied to the particular petitioner. Or, at least, it should do this if it is to be more protective of individual rights rather than less so—an assumption I shall make but not further defend.

But why are the two questions, the general and the as-applied, logically independent? The answer is that, at the general level, the threefold constitutional division of compelling, important, and rational governmental interests logically presupposes some background normative values that allow us to rank governmental interests, placing some higher and others lower.[34] As explained above, we are extremely unlikely to get a tolerable consensus as to what those values are, but the fact remains that any talk about some governmental interests being more important (for lack of a better word) than others is cognitively meaningful only if we have some normative assumptions that permit us to compare and rank such interests.[35] When we switch to the as-applied question, however, the nature of the inquiry changes fundamentally. The question then becomes a comparison of costs—the costs to the government from forgoing application of the challenged statutory or regulatory rule to the petitioner as compared to the costs to the petitioner of having his free exercise rights burdened by having the rule applied to him. The costs to the plaintiff, even though they are usually akin to moral or dignitary harms, are presumed to be substantial, but the former—the costs to the government of forgoing application of the law to the petitioner—are clearly highly fact-dependent. This fact-dependency in the costs comparison opens the space needed for the as-applied inquiry to become logically independent

of the general inquiry. That is, the fact that a governmental interest ranks high according to some scale of values espoused in a theory of government (i.e., is a compelling governmental interest) simply does not imply that, in some particular factual situation, the costs of forgoing application of a rule advancing that interest will be high. For instance, those costs may be nothing but the lost benefits of applying the rule in the last case, and because applying the rule may be subject to diminishing returns, the benefit forgone in the last case may be negligible. Hence, being generally compelling does not imply that the interest will be compelling as-applied. Conversely, the fact that a governmental interest ranks low according to some scale of values espoused in a theory of government (i.e., is *not* a compelling governmental interest) likewise does not imply that, in some particular factual situation, the cost of forgoing application of a rule advancing that interest will be low. Although things may usually work out this way, there is no logical necessity to the matter: For example, in unusual cases, the cost of making the exception for the plaintiff could involve immense transaction costs in the form of modifying software, record-keeping procedures, and so on. Therefore, failing to be a generally compelling interest does *not* imply that the interest will not be compelling as-applied.

Some examples will make this clear. Start with a relatively easy case, one in which the governmental interest is obviously compelling generally but in which its interest on an as-applied basis is not. In *Yellowbear v. Lampert*,[36] a case arising under RLUIPA, the petitioner had been convicted of a highly publicized murder of a child (in fact, his own daughter), and, while serving his sentence in state prison, he was accordingly housed for his own protection in a special section of the prison complex. An adherent of a Native American religion that required him to pray and meditate in a sweat lodge, the petitioner sued prison authorities when they denied him access to an existing sweat lodge on the prison grounds.[37] Neither the sincerity of the petitioner's religious belief nor the substantiality of the burden on the free exercise of his religion arising from his inability to access the sweat lodge was in dispute.[38] If the court had considered the governmental interest at the general level, it would have been easy to see that the government's end—punishing violent offenders safely—is one that easily meets the comparative-advantage criterion advocated here. Of course, in keeping with the usual judicial practice, the court moved directly to the as-applied inquiry. Indeed, Judge (now Justice) Gorsuch expressly relied on reasoning like that explained above to justify the as-applied inquiry, stating that "we must examine both sides of the ledger on the same case-specific level of generality: asking whether the government's particular interest in burdening this plaintiff's particular religious exercise is justified in light of the record of the case."[39]

In performing that inquiry, Judge Gorsuch considered various arguments from the government, but one of these is especially illuminating for our purposes—to wit, the government's argument that since sweat lodges involve hot coals and fire, they are inherently unsafe in a prison environment. Although Judge Gorsuch acknowledged the potential force of this argument, he nevertheless rejected it in the case at bar because the prison in which the petitioner was held already had a sweat lodge that other inmates were permitted to use.[40] Although a prison without a sweat lodge may well not be required to construct one to accommodate an inmate's free exercise rights, a prison that already has a sweat lodge cannot cite the general costs of having one to deny a particular prisoner access to the lodge.[41] This is highly significant for our purposes because it highlights the fact-specific nature of the as-applied inquiry: Whether or not the prison already has a sweat lodge becomes a crucial fact in computing the marginal cost to the government of accommodating the petitioner who wants access to a sweat lodge, but surely whether or not a particular prison has a sweat lodge in no way affects the normative ranking of any governmental end as compelling, important, or legitimate.

Thus, in *Yellowbear*, a governmental interest that is generally compelling (punishing violent offenders safely) was not compelling on an as-applied basis because, on the facts of the case, the governmental end could be achieved even if the petitioner's free exercise rights were accommodated. A converse situation can easily be imagined—that is, a situation in which the end the government is pursuing seems anything but compelling but in which accommodating the petitioner would be extremely costly. Suppose that, to protect consumers from certain unwise financial bargains, Congress enacts a statute that requires any contract between individuals for the sale and purchase of residential real estate in the United States to include certain substantive provisions, such as a limit on debt financing (including seller financing) for the transaction.[42] Imagine further that, in a certain religious community, religious doctrine requires that parents pass down their interest in the family farm to the eldest child on terms that, occasionally, will violate the statutory provisions concerning seller financing. A parent and adult child who wish, for religious reasons, to enter into a transaction that violates the statute sue under RFRA to enjoin the statute's application against them.

Clearly, given the reasonably competitive nature of the residential real estate markets and the highly competitive nature of the consumer financial markets, individuals and the market have significant cost-advantages over the government in preventing inefficient transactions in such markets. Hence, the asserted governmental interest in the statute fails the necessary condition in the comparative-advantage criterion proposed in this essay and is not generally compel-

ling. Nevertheless, it is easy enough to imagine facts that would make the cost to the government of granting the accommodation requested by the petitioners extremely high. For example, the accommodation could require extensive modifications of property recordation systems; special regulatory changes at banking institutions to allow them to participate in the transaction as lenders; changes in capital requirements to allow banks holding such mortgages to account for them for regulatory capital purposes; changes in securities regulations to allow the inclusion of mortgages related to such transactions in residential mortgage-backed securities; changes in the regulations of several government programs subsidizing home mortgage loans; changes in the Internal Revenue Code related to the deductibility of home mortgage interest payments; and so on, in each case along with complex record-keeping procedures having to be developed and implemented. Given the higher default rate of mortgages related to such transactions, there would presumably be other costs to the government as well, at least to the extent that the government guarantees the mortgage or securities backed by it. In such a case, it is quite possible that a court might conclude that the costs to the government of accommodating the plaintiffs outweigh the harm to the plaintiff's free exercise rights. Hence, as-applied, the government's interest would be compelling.[43]

Therefore, as noted above, the question of whether a governmental interest is compelling in general and the question of whether the same interest is compelling as-applied to the petitioner in a particular case, while often closely related, are logically independent. Also as noted above, requiring that a purported governmental interest be compelling both in general and as-applied is therefore more protective of free exercise rights than the as-applied standard standing alone that the courts have usually used in RFRA and RLUIPA cases. The next issue is to see how adding the requirement that the governmental interest be compelling in general (or at least the necessary condition that such an interest satisfy the comparative-advantage criterion discussed above) may affect the outcomes in individual cases.

Application of the Comparative-Advantage Criterion to Some Real Cases

The two most famous pre-RFRA cases involving free-exercise challenges to statutes of general applicability, *Sherbert v. Verner*[44] and *Wisconsin v. Yoder*,[45] present a nice contrast for our purposes. In the first, the plaintiff challenged a state agency's denying her unemployment benefits. It was essentially undisputed that the only reason the agency denied the plaintiff the benefits she sought was

that she refused to work on Saturdays, and that she refused to work on Saturdays because she was a member of the Seventh-Day Adventist Church, the teachings of which forbad her to do so.[46] Assume that, in order to prevail, the government should first have to demonstrate that the governmental interest it is advancing is generally compelling. If so, the plaintiff in *Sherbert* would likely have won the case at that stage. For, in supplying unemployment insurance, the government has no clear cost advantage over the market (indeed, the contrary would seem to be the case), and at least today (if not in 1963) there is a functioning market for unemployment insurance.[47] Since another institution in society (i.e., the market) could serve government's stated interest better than the government itself can, there is little call for the government to enter this area. It may constitutionally choose to do so, but if it does, it may not burden anyone's free-exercise rights in the process. Under the analysis suggested in this essay, since the government's interest is not generally compelling, the plaintiff in *Sherbert v. Verner* wins at the first stage of that analysis.

Indeed, the argument from the failure of the government's interest to be generally compelling has particular force in a context, such as this one, in which the government not only enters a market but does so in a way that largely forces people to participate in the market on the government's terms. That is, by providing unemployment insurance to all workers "for free" (but actually taxing their employers and so indirectly the workers themselves to support the system), on its own terms, the government may well be crowding out of the market private insurers who would have happily sold policies on a variety of different terms—including terms that would have accommodated the religious scruples of the plaintiff in *Sherbert v. Verner*. By largely preempting the market, the government was likely depriving the plaintiff of the opportunity to purchase such a policy and effectively forcing her to purchase a different policy that she would not have chosen—one that, if the government prevailed, would not have paid out when the plaintiff made a claim. Under circumstances like these, it is difficult to see why the plaintiff should not win regardless of the cost to the government of affording her an accommodation within the government system.

In *Wisconsin v. Yoder*, however, things were somewhat different. In that case, Amish parents challenged on free exercise grounds those provisions of a Wisconsin statute that required their children to attend high school from the ages of fourteen to sixteen.[48] Again assume that the government should first be required to show that its interest is, in general, compelling. In *Yoder*, that interest lies in providing primary and early secondary education, which economists widely believe produces large positive externalities. For transaction costs reasons, capturing these externalities proves difficult both for the educated person and for his or

her teachers and schools, and so the market is likely to produce a suboptimal level of education. Hence, government funding of such education (supported by general taxation) is likely efficient,[49] and the governmental interest at issue meets the necessary condition in the comparative-advantage criterion suggested in this essay. The analysis would thus have to continue on to the as-applied stage, which the court held (correctly in my view) worked out in the plaintiff's favor.[50]

From this discussion of *Sherbert* and *Yoder* it is not difficult to see how the comparative-advantage criterion would be applied in other cases. In the drug cases, such as *Employment Division v. Smith*[51] and *Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal*,[52] the governmental interest at stake involves enforcing criminal statutes that flatly prohibit the possession or consumption of certain dangerous substances. These are ends that no institution in society can achieve nearly as well as government, and so the governmental interest will meet the comparative-advantage criterion, requiring us to go on to the as-applied inquiry. Similarly, in the cases involving the military draft, such as *United States v. Seeger*,[53] the government's interest lies in national defense against foreign enemies, a classic public good, and in these cases, too, the government's interest would meet the comparative-advantage criterion and so be generally compelling.

By contrast, in *Burwell v. Hobby Lobby*,[54] regulations promulgated by the Department of Health and Human Services required the plaintiffs, who were controlling shareholders, directors, and officers of a for-profit corporation, to provide employees of the corporation with health insurance plans that included certain contraceptives to which the plaintiffs objected on religious grounds. Whether we view the regulations in question as interventions in the employment market, the health insurance market, or the contraceptives markets, the result is the same: In each case, the market has very significant cost advantages relative to the government, and the government's interest fails the comparative-advantage criterion and is not in general compelling. The plaintiffs in *Hobby Lobby* should have been able to win the case at the general stage of the inquiry, there being no need to go to an as-applied or narrowly tailored analysis. As with *Sherbert v. Verner*, if the government chooses to assume a function that the market can achieve more efficiently, its action is constitutionally permissible, but the government may not infringe free-exercise rights in the process. Absent government intervention, there would very likely have been a lower-cost solution that both placed contraceptives in the hands of those who wanted them and did not adversely affect anyone's free-exercise rights. When Congress disturbs that solution, it must at least not infringe anyone's free-exercise rights. It could, for example, fund the benefits it wishes to confer directly from its general revenues without involving private parties who object on religious grounds to being involved.

Concluding Remarks

The arguments in this article attempt to show that, in connection with the strict judicial scrutiny to be applied in free exercise cases under RFRA and RLUIPA, (a) the question, neglected in the case law, of whether a governmental interest is in general compelling is logically independent of the as-applied question commonly asked in the case law, (b) requiring that the government demonstrate that its interest is both in general compelling and compelling as-applied is thus more protective of free exercise rights than requiring the government to meet the as-applied standard alone, and (c) a necessary condition of a governmental interest being compelling in general is that the government possess a significant transaction-cost advantage over other institutions in society in the pursuing of that end.

As I emphasized throughout, the comparative-advantage criterion advocated here is a necessary but not a sufficient condition of a governmental interest being compelling. It may be tempting to treat the criterion as being sufficient as well, but I think that would be a mistake. For instance, consider a general antidiscrimination statute that requires virtually all vendors of consumer goods or services to sell to all comers regardless of characteristics such as race, gender, or sexual orientation. Suppose that, when challenged, the government asserts that the end it is pursuing in enforcing this law is not ensuring that all classes of people have access to various goods and services (an end surely better obtained through the market and thus likely to fail the comparative advantage criterion), but protecting individuals from dignitarian injuries they might suffer if denied good or services based on the characteristics enumerated in the statute. Government may not be very effective in protecting people from dignitarian injuries, but clearly it has cost advantages in this area relative to other institutions in society. Protecting people from dignitarian injuries thus fulfills the necessary condition in the comparative advantage criterion. I would be very reluctant on this basis, however, to say that protecting people from dignitarian injuries, which I take to be a fool's errand (in part because it usually involves the government in *inflicting* dignitarian harms on one group as it attempts to prevent such harms being inflicted on another), is a compelling governmental interest.

In fact, it is easy to posit all manner of ends that fulfill the necessary condition in the comparative-advantage criterion that are not only not compelling governmental interests but interests that government surely ought *not* pursue. For example, consider "an abolition of debts" or "an equal division of property,"[55] both of which involve coercing large numbers of individuals. Neither the market, nor the family, nor the church is remotely capable of such things,

but the government is, and so if it set out to accomplish such an "improper and wicked project,"[56] the governmental end would satisfy the comparative advantage criterion. In a way, this is hardly surprising, for that criterion was designed to be value-neutral, and so it is only natural that both good and bad ends might satisfy it. This brings us back, however, to pretty much where we started. Although the comparative-advantage criterion can provide a partial and occasionally useful explication of the concept of a compelling governmental interest, this concept will forever remain an essentially normative one that can be treated adequately only in a robust normative theory of the proper ends of government.

Notes

1. 42 U.S.C. 2000bb–2000bb-4 (2017).

2. 42 U.S.C. 2000bb-1(b). By its terms, RFRA applies to both the federal government and the states, but in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court limited RFRA to the federal government, holding that, at least on the record before it, Congress lacked authority under Section 5 of the Fourteenth Amendment to extend RFRA to the states.

3. 42 U.S.C. 2000cc-1–2000cc-5 (2017). Following *City of Boerne*, Congress compiled a more comprehensive record and on the basis thereof enacted RLUIPA to enforce against the states RFRA-like limits in the two specific areas mentioned in the title of the statute—land use (e.g., zoning restrictions) and institutionalized persons (e.g., prisoners.

4. On the history of strict scrutiny, see generally Stephen A. Siegel, *The Origins of the Compelling State Interest Test and Strict Scrutiny*, 48 Am. J. Legal Hist. 355 (2006).

5. For example, in *Grutter v. Bollinger*, 538 U.S. 306,325 (2003), the Court held that a public law school's obtaining a diverse student body was a compelling government interest, but in so doing it said that it was giving "a degree of deference to a university's academic decisions," *id.* at 328, and that the academic institution's "good faith" would be "presumed" absent a showing to the contrary. *Id*. at 329. This is clearly different from the usual strict scrutiny inquiry, including as that inquiry is formulated in RFRA, in which the burden of proof is squarely on the government, which enjoys no deference or presumption. See Richard H. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1257 (2007).

6. E.g., Craig v. Boren, 429 U.S. 190 (1976) (classifications based on illegitimacy reviewed under intermediate scrutiny); Caban v. Mohammed, 441 U.S. 380 (1979) (same).

7. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973) ("Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest."). The rational basis test turns out to be less restrictive of government action than its verbal formulation may suggest, because the Court has held that the assumptions underlying the government's purported rationale need only be "conceivable." See Federal Communications Comm. v. Beach Comm., Inc., 508 U.S. 307,309 (1993).

8. United States v. Carolene Products Company, 304 U.S. 144 (1938)

9. On the psychological pull of trichotomy when a twofold division would seem to do, see W.V. Quine, *Quiddities* at 210–212 (1987).

10. 468 US 609 (1984).

11. 539 US 306 (2003).

12. Burwell v. Hobby Lobby, 134 S.Ct. 2751 (2014).

13. See Section C below.

14. Besides those already mentioned, some examples include collecting of income taxes, Hernandez v. Commissioner, 490 U.S. 680 (1989), maintaining a comprehensive Social Security system, United States v. Lee, 455 U.S. 252 (1982), and drafting men into the armed forces, Gillette v. United States, 401 U.S. 437 (1971).

15. *Politics*, lib. vii, cap. 1 (1323a14–1324a4); lib. vii, cap. 13 (1331b24–1332b10).

16. *Leviathan*, cap. xvii.

17. *Second Treatise on Government*, cap. 9.

18. John Rawls, *A Theory of Justice* (1971).

19. Ronald H. Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1 (1960).

20. Regarding the application of Coase's point to churches, see in this issue Richard A. Epstein, *The Nature of the Religious Firm*, 21 J. Markets & Morality (2018).

21. So, in competitive labor markets, the government's interest in prohibiting discrimination would not generally be compelling. See Richard A. Epstein, *Forbidden Grounds* (1995).

22. Of course, since government's having a significant comparative advantage in effecting an end is a necessary but not sufficient condition of the end's being a compelling governmental interest, even if the exception mentioned above holds, it would not follow without more evidence that there is a compelling governmental interest in transferring wealth.

23. Indeed, on a classical liberal theory, *any* legitimate government action would have to be ordered to one of the ends mentioned above in the text (suppressing force and fraud, supplying economic public goods, etc.), and so there would be no place for a special class of government actions to be reviewed to determine whether they are aimed at such ends. In effect, classical liberalism would subject all government actions to strict scrutiny with this class of ends counting as the compelling ones.

24. Compare the well-established principle that "a law cannot be regarded as protecting an interest of the highest order … when it leaves appreciable damage to that supposedly vital interest unprohibited." Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 547 (1993). The assumption underlying this principle is that, if an end is truly compelling, the government would adopt all readily available means to effect it. The assumption underlying the argument in the text is that, if there are nongovernmental means readily available to effect an end, then the end is not compelling as an end *of government*.

25. Employment Division v. Smith, 494 U.S. 872, 907 (J. Blackmun, dissenting).

26. 374 U.S. 398 (1963).

27. 406 U.S. 205 (1972).

28. J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L. Rev. 327, 331 (1969).

29. For example, in *Lee*, the Court considered only the government's general interest in maintaining the Social Security system, not its interest in applying the Social Security tax to the Old Amish plaintiff who refused to accept Social Security benefits (and thus to pay Social Security taxes) on religious grounds. In *Smith*, the disagreement between Justice O'Connor and Justice Blackmun arises because Justice O'Connor considers the government's interest in drug laws generally and Justice Blackmun, quoting the Clark article, considers the government's interest in applying those laws to the plaintiffs in question, who were violating them only by consuming peyote in connection with the religious rites of the Native American Church. Compare *Smith* at 903–907 with *Smith* at 909–911. In fact, both Justices are likely correct: The government's interest in enforcing drug law generally *is* compelling, but its interest in enforcing those laws against the particular plaintiffs was not. A difficult question arises if we consider whether there is anything intermediate between the general inquiry and the as-applied one—e.g., whether the government has a compelling interest in *suppressing drug use in religious ceremonies*. I think such questions are probably not useful. On the one hand, they cannot displace the general inquiry. On the other, they probably cannot displace the as-applied inquiry either because, no matter how carefully the intermediate case is formulated, additional facts may result in a different outcome. For example, in religious ceremonies using otherwise illegal drugs, much depends on the drug in question, the religion's institutional constraints

on its use, and so on. If the drug is LSD and the quantities ingested in the ritual in accordance with the church's norms were sufficient to cause serious harm to the person ingesting it, the government's interest, even on an as-applied basis, would very likely be compelling. Cf. *Olsen v. Iowa*, 808 F.2d 652 (8th Cir. 1986) (no religious exemption for members of the Ethiopian Zion Coptic Church whose "sacramental" use of marijuana is "continuous and public" regardless of the member's "age or occupation").

30. 42 U.S.C. 2000bb-1 (providing that the government must demonstrate that "application of the burden to the person … is in furtherance of a compelling governmental interest"). See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–431 (2006).

31. 42 U.S.C. 2000cc(a) and 2001cc-1(a).

32. 546 U.S. 418, 430–431 (2006) (internal quotation marks omitted). See also Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2779 (2014) (RFRA requires the court "to look to the marginal interest in enforcing" the challenged regulation against the plaintiffs in the case).

33. Michael W. McConnell and Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 59 U. Chi. L. Rev. 1, 51 (1989) (emphasis in original). For the express appeal to marginalist concepts in this context, see also Yellowbear v. Lampert, 741 F.3d 48, 64 (10th Cir. 2014) (Gorsuch, J.).

34. Richard Epstein has suggested to me that it is hard, if not impossible, to rank values like this in a marginalist world. I think the marginalist problem arises only in actual cases, where the inquiry would be the as-applied one, not the general one. For example, we can certainly say that, in general, saving human lives is more important than playing chess, but for marginalist reasons it may be that, in particular cases, it is better to play chess than save a human life.

35. Theoretically, two people could disagree on these background normative assumptions and nevertheless agree on the ranking of governmental interests (compare, for example, how, on the set of natural numbers, $x \leq y$ if and only if $x^2 \leq y^2$; whether we order the natural numbers by the usual $\leq$ relation or the relation that holds when the square of the first number bears the usual $\leq$ relation to the square of the second, we get the same order of natural numbers). One way of understanding strict scrutiny is that it is a judicial conceit that, despite the manifest philosophical and political pluralism of our society, this extremely unlikely theoretical possibility will hold, at least generally and at least when it matters to the outcome of cases.

36. 741 F.3d 48 (10th Cir. 2014) (Gorsuch, J.).

37. *Yellowbear* at 53.

38. *Yellowbear* at 56.

39. *Yellowbear* at 57.

40. *Yellowbear* at 58.

41. *Yellowbear* at 58.

42. Scholars have suggested similar regulations. E.g., Ryan Bubb and Prasad Krishnamurthy, *Regulating Against Bubbles: How Mortgage Regulation Can Keep Main Street and Wall Street Safe—from Themselves*, 163 U. Penn. L. Rev. 1539 (2015) (arguing for federal regulation to limit mortgage leverage, debt-to-income levels, and other contractual features preventing borrowers from taking out larger mortgage loans).

43. Of course, the petitioner might still ultimately win the case if the government failed to demonstrate that it was pursuing this as-applied compelling governmental interest by narrowly-tailored means.

44. 374 U.S. 398 (1963).

45. 406 U.S. 205 (1972).

46. *Sherbert* at 399.

47. The market leader is Income Assure, a member of the Great American Insurance Group, which is owned by American Financial Group, a $9 billion (market capitalization) public company listed on the New York Stock Exchange. Naturally, the ubiquity and mandatory nature of government unemployment insurance preempts a very large part of what would presumably be a much larger market. See Ron Lieber, *Finally, Private Unemployment Insurance. But Will Anyone Buy It?* New York Times (May 27, 2016).

48. *Yoder* at 207–210.

49. Milton Friedman, *Capitalism and Freedom* (1962). Whether government control over the provision of education through public schools is also efficient is a quite different matter.

50. Here as elsewhere, I assume that, when a governmental interest satisfies the comparative-advantage criterion, courts should go on to the as-applied inquiry. Since the comparative-advantage criterion is only a necessary condition of an interest being compelling in general and not a sufficient one, however, it does not strictly follow that an interest that satisfies the criterion is compelling in general. In the absence of both necessary and sufficient conditions, however, when an interest satisfies the necessary condition in the comparative advantage criterion, I suggest that moving on to the as-applied inquiry is reasonable, provided that no independent grounds for thinking the interest in question is not generally compelling appear.

51. 494 U.S. 872 (1990).
52. 546 U.S. 418 (2006).
53. 380 U.S. 163 (1965).
54. 134 S.Ct. 2751 (2012).
55. *The Federalist*, No. 10 (Madison).
56. *The Federalist*, No. 10 (Madison).