

January 2015

Nuts and Seeds: Mitigating Third-Party Harms of Religious Exemptions, Post-Hobby Lobby

Toni M. Massaro

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Toni M. Massaro, Nuts and Seeds: Mitigating Third-Party Harms of Religious Exemptions, Post-Hobby Lobby, 92 Denv. U. L. Rev. 325 (2015).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Nuts and Seeds: Mitigating Third-Party Harms of Religious Exemptions, Post-Hobby Lobby

NUTS AND SEEDS: MITIGATING THIRD-PARTY HARMS OF RELIGIOUS EXEMPTIONS, POST-*HOBBY LOBBY*

TONI M. MASSARO[†]

ABSTRACT

The United States Supreme Court in *Burwell v. Hobby Lobby* held that for-profit businesses may claim a statutory right to an exemption from federal laws that burden their religious expression. The Court ostensibly limited the decision to its facts, but more commercial actors likely will seek religious exemptions in the years ahead.

This Article offers a first look at steps government might take if this occurs. It moves beyond the vigorous debate over whether to grant an exemption, and explores alternatives that may mitigate third-party burdens imposed by such exemptions when granted. It examines in particular an “exemption-subject-to-notice” option, under which commercial actors either would be required to provide notice to adversely affected third parties or would be subject to government-provided notice of their noncompliance.

A notice condition on exit from generally applicable laws is not a problem-free option. Nevertheless, it is worth exploring as a third way for government to manage the inevitable liberty collisions of a pluralistic democracy, and it is a superb vehicle for illuminating the relative costs of emerging regulatory patchworks.

[†] Regent's Professor and Milton O. Riepe Chair in Constitutional Law, University of Arizona James E. Rogers College of Law. Warm thanks to Barbara Babcock, Derek Bambauer, Jane Bambauer, and Genevieve Leavitt for their insights.

TABLE OF CONTENTS

INTRODUCTION.....	326
I. THREE VIGNETTES	334
<i>A. No Contraception Coverage</i>	334
<i>B. No Wedding Photo Services</i>	336
<i>C. No Male Clients in Divorce Actions</i>	337
<i>D. A Notice Condition on Exemption?</i>	338
II. TRUTH AND CONSEQUENCES?	340
III. CONSTITUTIONAL OBJECTIONS TO MANDATORY DISCLOSURES ...	343
<i>A. Free Exercise of Religion Objections</i>	344
<i>B. Freedom of Speech Objections</i>	348
1. Compelled Speech Objections.....	348
2. Commercial Speech?	353
3. Trade Regulation?.....	356
IV. GOVERNMENT NOTICE	357
V. POLICY CONCERNS	359
CONCLUSION	361

INTRODUCTION

An intractable feature of liberalism in a plural society is that the liberties of some conflict with the liberties of others. Government mandates that are designed to protect women's reproductive autonomy trigger religious-based defiance. Nondiscrimination laws that apply to places of public accommodation prompt refusal to serve objections. Professional regulations designed to assure equal access to services give rise to compelled speech and freedom of expressive association claims.

Whether the owners of the craft-store chain Hobby Lobby should be required to cover birth control without a co-payment under its employer health plan,¹ and whether a New Mexico commercial photographer can be required to photograph a same-sex wedding ceremony,² were two recent examples of this clash of liberties. In the first case, the United States Supreme Court ruled in favor of the craft store.³ In the latter case, the New Mexico Supreme Court denied the photographer's request for an exemption and the Court denied certiorari.⁴

There is no satisfactory to all outcome in such cases.

When the commercial actors prevail, arguments arise about sanctioning private discrimination and imposing costs of religious convic-

1. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

2. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

3. *Hobby Lobby*, 134 S. Ct. at 2785.

4. *Elane Photography*, 309 P.3d at 72, *cert. denied*, 134 S. Ct. 1787 (2014).

tions on others. To the extent granting new exemptions undermines government regulatory power over commercial actors, doing so also gives rise to patchwork concerns.

Exemptions also create catch-22s. Granting them to religious actors and not others smacks of worrisome religious exceptionalism; yet applying them to every claimant with a liberty-based objection leads to worse patchwork issues. This concern is especially visible if the religious actors assert a right to an exemption based on freedom of speech or association grounds rather than on religious freedom grounds per se, and the religious actors win. Nothing about speech or association arguments should make them available only to commercial actors who seek to be excused from regulation on religious grounds.⁵

Nor will courts find it easy to second-guess assertions of a substantial burden on religious liberty. The Court in *Burwell v. Hobby Lobby Stores, Inc.*,⁶ stressed that courts should not be arbiters of the truth or falsity of religious claims, and should not question sincere assertions that compliance with government regulations will burden faith.⁷ Thus, such claims could proliferate as new religions emerge, religious pluralism expands, and rifts develop in older religions. Who are courts to deny assertions about conflicts with one's faith, provided that the claims are sincerely made?

Greater pressure, inevitably, then will be placed on government to prove that accommodation of the exemption request is infeasible. The practical administrative and normative consequences of expanded exemptions may be significant. This is especially true if exemptions are sought when the commercial entity engages in religious-based action that imposes harms on third parties, such as depriving them of money,⁸ or denying them services or benefits available to others. Although the Court in *Hobby Lobby* stressed that the government could alleviate the third-party burden of the requested exemption by itself paying for the denied preventative health benefits, or demanding that third-party insurers do so,⁹ not all exemption cases will be susceptible to such allegedly "win-win" solutions.

5. See *infra* text accompanying notes 131–32. Preferring religion over non-religion also may violate neutrality norms of the Establishment Clause, though these are more weakly policed under modern doctrine. Free Exercise jurisprudence also contains a non-discrimination principle, captured by the requirement that the lower standard of judicial review applies only to measures that are general and neutrally applied. See *infra* text accompanying notes 113–15.

6. 134 S. Ct. 2751 (2014).

7. See *id.* at 2778. Although *Hobby Lobby* was based on statutory grounds, the Court has made similar assertions in constitutional cases. See *United States v. Ballard*, 322 U.S. 78, 86 (1944) (stating that courts may not inquire into the veracity of religious beliefs).

8. *Ballard* involved a mail fraud prosecution against the founders of the "I Am" religious movement. The religious leaders asked people to send in donations in exchange for religious cures from disease. See 322 U.S. at 79–80.

9. *Hobby Lobby*, 134 S. Ct. at 2780–82.

When the religious commercial actors do *not* prevail, however, they may cite this as evidence that they are civil rights victims, punished and stigmatized by laws that are intolerant of, if not affirmatively hostile to, religious actors. Others may insist that distinctions between for-profit and not-for-profit businesses are a form of partisan hostility to profit-making entities.¹⁰ This is the chord that rang the corporations-have-political-speech-rights bell in *Citizens United v. Federal Election Commission*.¹¹

I agree courts should be wary of tests that compel them to distinguish between “religious” versus “commercial” activity or require them to evaluate the rationality of religious expression—even in a commercial context.¹² Almost by definition, religious faith is not susceptible to secular reason scrutiny or analysis—which is no small part of the conundrum religious autonomy poses for liberal democracy.

I also agree that an economic motive for religious expression or conduct, *by itself*, should not doom the liberty claim—even though the more commercial and public any activity becomes, the more government regulation it typically must and should endure. Likewise, the decision to conduct business in a corporate form, *by itself*, is an insufficient reason to deny all basic individual liberties, including freedom of speech.¹³

But the invocation of the corporate form should retain significance in effecting the liberty balance. Adoption of a business organization form has legal consequences that commercial actors assume knowingly and voluntarily, and that do not apply to similar actions if engaged in without the corporate cloak.¹⁴

The belief versus conduct distinction also matters. What we think in public contexts is one thing, whether this springs from economic or non-economic, religious or non-religious reasons. What we *do* in the secular shared space is quite another. An important point about the current debates about exemptions for commercial actors is that the exemptions are for religious-based conduct, such as refusal to comply with mandates that require employers to provide specific medical benefits,¹⁵ not for pure

10. See *infra* text accompanying notes 121–22.

11. 558 U.S. 310, 349 (2010).

12. See *infra* text accompanying notes 135–36; see also Bernadette Meyler, *Commerce in Religion*, 84 NOTRE DAME L. REV. 887, 889 (2009) (“Although the Supreme Court opinions demonstrate a willingness to treat apparently commercial activities as falling outside the purview of the financial immunity accorded to religious activity under taxation and other regulatory schemes, they tend not to separate out religious from commercial activity per se.”).

13. *Citizens United*, 558 U.S. at 342–43. The centerpiece of *Hobby Lobby* was whether religious freedoms likewise apply to for-profit businesses, and if so, what that means for exemptions based on religious freedom. *Hobby Lobby*, 134 S. Ct. at 2759.

14. For a recent analysis of the intersection of corporate law and constitutional rights that outlines the many limits on corporate action, see John C. Coates, IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, CONST. COMMENT. (forthcoming 2015), available at <http://ssrn.com/abstract=256675>.

15. See *Hobby Lobby*, 134 S. Ct. at 2759.

speech or private convictions. Expanding these exemptions poses regulatory patchwork concerns that are potentially much graver than granting exemptions that expand expressive autonomy.

Moreover, liberty-based objections to allegedly coercive government regulations more generally have spiked in recent years, and have led to victories by individuals,¹⁶ expressive associations,¹⁷ corporations,¹⁸ and even mighty sovereigns.¹⁹ Courts have shifted toward greater sympathy for parties who argue that laws impose unconstitutional burdens, even in cases that involve conditions on funding—where the alternative to compliance is to just turn down the money versus direct prohibitions on conduct.²⁰

This shift, to some, is a long overdue correction of the excesses of the post-*Lochner* era of judicially unchecked government regulatory power.²¹ Yet, it may have long legal legs. Judicial blessing of more liberty-based exemptions, perhaps especially those with a religious patina, could destabilize considerable doctrinal *terra firma*.

Some believe the shift is a worthy restoration of deeper liberty foundations.²² This may well be, in some contexts; but an unthinking easing of the coercion criterion in service of liberty also can mean a shift toward liberty and equality losses for others. This paradox ought to be an up-front part of the liberty calculus in decisions about whether to grant an exemption.

In this Article, I proceed from four assumptions. First, I assume a majority of the current Court will continue to be sympathetic to religious for-profit and not-for-profit businesses' arguments for treatment comparable to private individuals. *Hobby Lobby* supports this assumption, though it hardly stands alone.²³

16. See *Holt v. Hobbs*, 135 S. Ct. 853 (2014).

17. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 643 (2000); see also ANDREW KOPPLEMAN WITH TOBIAS BARRINGTON WOLFF, *A RIGHT TO DISCRIMINATE?* xii (2009) (describing some arguments for the asserted right to exclude as “only slightly modified versions of old, discredited libertarian objections to the existence of any antidiscrimination law at all”).

18. *Citizens United*, 558 U.S. at 364–65 (“No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”).

19. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578, 2608 (2012) (upholding states’ right to reject the “Medicare expansion”).

20. See, e.g., *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2328 (2013). A related and ongoing debate concerns whether religious commercial actors should be exempted from a planned Executive Order that would prohibit government contractors from discriminating based on sexual orientation. Julie Hirschfeld Davis & Erik Eckholm, *Faith Groups Seek Exclusion From Bias Rule*, N.Y. TIMES, July 9, 2014, <http://www.nytimes.com/2014/07/09/us/faith-groups-seek-exclusion-from-bias-rule.html>.

21. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 5, 199–201 (2004).

22. Arguments for wider accommodation of dissent, including religious dissent, are not exclusive to neo-libertarians: they ring bipartisan bells. See ABNER S. GREENE, *AGAINST OBLIGATION* 13–14 (2012); LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* 67–69 (2012).

23. 134 S. Ct. 2751, 2768 (2014). Wheaton College, a non-profit college argued that religious objections to providing coverage for contraception services prevented it from signing a mandated

Second, I assume more states may be emboldened to expand existing religious-based rights to include for-profit commercial religious actors, despite political headwinds.²⁴ Third, I predict a majority of the current Court will continue to hold that the Free Exercise Clause rarely *compels* the government to excuse for-profit commercial religious actors from general laws, but also that exemptions rarely are *prohibited* by the eroding Establishment Clause.²⁵ In other words, prior cases that construe both the Free Exercise and Establishment Clauses narrowly will be upheld. If anything, the Establishment Clause barriers will become even lower, which will offer government substantial “play in the joints”²⁶ to accommodate religion if it wishes.

One thing is certain: lawsuits and wider struggles over the consequences of constitutional and statutory exemptions will continue. *Hobby Lobby*’s holding that the Religious Freedom Restoration Act applies to religious individuals acting through a closely-held, for-profit, commercial activity was simply a prelude—though a crucial one—to future cases and debates.

Finally, I assume courts will protect some of these religious exemption claims on the independent ground that compliance is a form of compelled affirmation or speech.²⁷ This in turn will lead to more exemptions for non-religious individual and business entities, insofar as freedom of expression and association rights are not religion-specific.

All of these projected and actual developments will at first be highly context-specific. They will depend on the nature of the regulation, the impact of the business practice on others, the degree to which public boycotts erupt against the practices, and the extent to which the Court views the applicable burden on religious or expressive autonomy as un-

government form that would transfer delivery of free contraception, including intrauterine devices and “morning-after” pills, to others. *Wheaton Coll. v. Burwell*, No. 1:13-cv-08910, 2014 WL 2826336, at *1 (N.D. Ill. June 23, 2014), *rev’d* 134 S. Ct. 2806 (2014). Wheaton College believed that filling out the form impermissibly facilitated abortions. *Id.* The transfer form had three requirements: (1) that the college state that it has a religious objection to some or all of the forms of contraception; (2) that it is non-profit; and (3) that it “holds itself out as [a] religious [organization].” 134 S. Ct. at 2807 (issuing an injunction temporarily exempting the College from that form requirement over strenuous objection by Justices Sotomayor, Kagan, and Ginsburg). *Cf.* *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014) (mem.).

24. See, e.g., H.B. 2453, 85th Leg., Reg. Sess. (Kan. 2013) (regarding “religious freedom” related to marriage); S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014) (expanding the definition of “exercise of religion”). Even when ultimately unsuccessful, such legislative steps undermine the claim that hostility to religious freedom is widespread. See Toni M. Massaro, *Religious Freedom and “Accommodationist Neutrality”: A Non-Neutral Critique*, 84 OR. L. REV. 935, 951–52, 964, 966–67 (2005).

25. See *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 439 (2006); *Cutter v. Wilkinson*, 544 U.S. 709, 719–20 (2005); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987).

26. *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 669 (1970).

27. For an example of this argument being used unsuccessfully, see *Elane Photography, LLC v. Willock*, 309 P.3d. 53, 68–70 (N.M. 2013).

reasonable given the availability of other means of mitigating third-party harms.

I begin on the day *after* these projected and actual events. What comes next?

How might government attempt to reconcile the competing interests? Can it mitigate the third-party and other harms of granting exemptions with means that are less burdensome to religious actors?²⁸

One option is for government itself to fund or provide the denied service or benefit, or require intermediaries to do so. The Court in *Hobby Lobby* endorsed such moves as less restrictive ways of advancing government goals that make third parties whole while lifting burdens on religious actors.²⁹ The provision of a government-funded or intermediary-provided alternative would work reasonably well in some contexts, especially where the most powerful government argument in favor of a mandate is economic—such as assuring wider access to adequate health insurance by spreading the cost of insurance. These economic mandates have gender and other equity reverberations, to be sure; but the principal goal is to even the access to the economic playing field more generally, not to promote reproductive or women's rights per se or to impose secular humanist conformity.³⁰

Nevertheless, a government or third party pays alternative will not work in many other cases. Government-provided comparable benefits for those who are denied photographic services for wedding photos,³¹ employment,³² a room in a bed and breakfast,³³ or other goods by observant commercial actors would be far less feasible or politically acceptable. Also, government reimbursement of significant costs that otherwise

28. Also likely, in this age of social media, will be stepped-up private efforts to bring notoriety to the underlying regulatory policy issues and to the noncompliance involved.

29. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779–80 (2014).

30. *But see* Linda Greenhouse, Op-Ed., *Doesn't Eat, Doesn't Pray and Doesn't Love*, N.Y. TIMES, Nov. 27, 2013, <http://www.nytimes.com/2013/11/28/opinion/greenhouse-doesnt-eat-doesnt-pray-and-doesnt-love.html> (arguing that resistance to the mandate is less about religion than revisiting culture wars).

31. *See Elane Photography*, 309 P.3d at 59–60.

32. For examples of pregnancy discrimination in the employment context, see *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1317–18 (11th Cir. 2012); *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2013 WL 360355, at *1 (S.D. Ohio Jan. 30, 2013). *See also* Evan Allen, *Gordon College Leader Joins Request for Exemption to Hiring Rule*, BOSTON GLOBE, July 4, 2014, <http://www.bostonglobe.com/metro/2014/07/03/gordon-college-president-signs-letter-asking-for-religious-exemption-from-order-banning-anti-gay-discrimination/79cgrbFOuUg7lxH2rKXOgO/story.html> (discussing Gordon College president's request for an executive order allowing sexual orientation employment discrimination for religious organizations).

33. *Cervelli v. Aloha Bed & Breakfast*, No. 11-1-3103-12 ECN, 2013 WL 1614105 (Haw. Cir. Ct. Apr. 11, 2013) (prohibiting a bed and breakfast from discriminating against a lesbian couple).

would fall on religious actors could spike Establishment Clause anxieties, if not successful constitutional objections.³⁴

I propose a partial solution to the competing equity and liberty claims where other avenues fail: notice of noncompliance. Specifically, I explore two notice options that government might pursue in response to requests for exemptions from generally applicable commercial regulations. First, government might require that exempted commercial actors provide adequate, targeted notice to affected individuals of their deviation from baseline legal requirements, such as nondiscrimination mandates. Second, government might provide this notice to the public itself.

The first type of factual disclosure would be treated like other mandatory disclosures that allow a commercial actor to engage in conduct but condition that conduct on making factual disclosures or disclaimers—such as the provision of warnings on products manufactured in facilities that use nuts and seeds, or advise consumers of the nutritional content of products. For example, prospective Hobby Lobby employees, as well as its current employees, would be given adequate workplace and pre-employment notice that Hobby Lobby does not cover birth control without a co-payment under its health insurance plan. Likewise, potential clients of a commercial actor who will not provide goods or services that conflict with her religious convictions might be alerted to this in the actor's commercial advertisements and in brochures or other materials about her business available at the commercial establishment.

The second type of notice would be similar to government-sponsored notice of commercial “best practices” or seals of approval regarding compliance with government standards, e.g., “FDA approved.” The government would provide consumers with information about compliant businesses and allow compliant businesses to bear an “approved” message; it would not require that a noncompliant business itself post a notice of its noncompliance.

To permit private discrimination subject to such notice is hardly a perfect response to the dueling liberty objections, but it is a familiar legal compromise that courts have upheld in other contexts.³⁵ It also is a way to test the provocative argument made decades ago that allowing dis-

34. Establishment Clause challenges to government funding that flows to religious institutions are increasingly likely to fail, or be dismissed for lack of standing, though litigants continue to bring them. *See, e.g.*, *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (ruling plaintiffs lacked standing to challenge a tax credit program in Arizona that permitted support for scholarships applied to private religious schools); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (rejecting Establishment Clause challenge of school voucher program).

35. *See infra* text accompanying notes 92–94.

crimination may actually deter it, if employees, customers, and others simply vote with their feet in response to these practices.³⁶

Finally, an exemption-conditioned-on-notice approach is a more calibrated—more “nudge” than bludgeon³⁷—response to resistance to new forms of equal rights (e.g., nondiscrimination mandates that cover sexual orientation) than is a “no exemptions” response. It is a speed bump, not a stop sign. This may ease, but not fully vanquish, the “pluralism anxiety” that the newer civil rights may produce as they mature.³⁸

Of course, this middle ground feature of a mandatory public notice remedy also may ease, but not fully vanquish, the discrimination anxiety that animates the newer mandates. It is sure to trigger its own round of constitutional and policy objections, which I also outline here.

I conclude the exemption-subject-to-notice option is worthy of serious consideration, in at least some contexts, if liberty-based exemptions from generally applicable commercial laws expand. Arguments for and against a notice option usefully illuminate the enormous doctrinal and practical complexities of extending individual constitutional rights to religious commercial actors without substantial adjustments or caveats—complexities that are relevant to several constitutional contexts.³⁹ It is not an overstatement to describe some modern constitutional developments as a trend toward deregulation and weakening deference to some government regulatory policy decisions in the socio-economic realm.⁴⁰ This

36. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 9–12 (1992). *But see, e.g.*, Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 SOC. PHIL. & POL'Y 22, 24–31 (1991). See generally Symposium, *Standing Firm, On Forbidden Grounds*, 31 SAN DIEGO L. REV. 1 (1994) (debating whether market forces or governmental regulations are more efficient in decreasing the amount of employment discrimination).

37. Focusing on private, free market solutions to economic, social, and political issues is often associated with conservative values, but the approach has bipartisan appeal. See CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* 38 (2013) (arguing that government measures should preserve freedom of choice, if possible, and suggesting that expanded disclosures are one way to promote desired behavior without imposing more coercive restrictions on the disfavored activity).

38. For a discussion on “pluralism anxiety,” see Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 751–52 (2011).

39. Compare *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2673 (2011) (Breyer, J., dissenting) (“The far stricter, specially ‘heightened’ First Amendment standards that the majority would apply to this instance of commercial regulation are out of place here.”), with *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 484 n.3 (1997) (Souter, J., dissenting) (“[T]he Court appears to hold that a compelled subsidy of speech does not implicate the First Amendment if the speech *either* is germane to an otherwise permissible regulatory scheme *or* is nonideological. . . .”) (emphasis added). See also KOPPELMAN & WOLFF, *supra* note 17, at 116 (comparing the libertarianism of *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), to that expressed in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895)); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 18, 30 (1979) (noting the risk of commercial speech law reviving *Lochner*-type judicial review of economic legislation); Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555, 582–83 (2006).

40. See Linda Greenhouse, Op-Ed, *The Free Speech Puzzle*, N.Y. TIMES, Aug. 22, 2012, <http://opinionator.blogs.nytimes.com/2012/08/22/the-free-speech-puzzle/?smid=pl-share> (describing the compelled-speech doctrine as “an arrow in the quiver of First Amendment doctrines available for

shift might at least be tempered with measures aimed at mitigating its potential third-party harms.

I. THREE VIGNETTES

To focus an analysis of a notice condition on exemption argument, three vignettes, drawn from actual refusals to provide commercial or professional services or benefits, are useful examples. Two involved religion-based refusals, and one involved a politics-based refusal.

A. No Contraception Coverage

The United States Supreme Court in November of 2013 heard two cases⁴¹ that challenged provisions of the Patient Protection and Affordable Care Act of 2010 (the ACA) that compelled employers with more than fifty full-time employees to provide health insurance coverage, and required that most of the health insurance plans cover FDA-approved contraceptives.⁴² Among other exemptions,⁴³ the ACA exempts religious employers such as churches and their integrated auxiliaries from having to provide coverage for contraceptives or sterilization.⁴⁴

In *Conestoga Wood Specialties Corporation v. Secretary of the United States Department of Health and Human Services*,⁴⁵ Mennonite Christians were the sole owners of a for-profit corporation and objected to the ACA mandate on the ground that some of the FDA-approved contraceptives may inhibit the implantation of an embryo in the womb, and therefore are abortifacients.⁴⁶ They argued the mandate violated their constitutional right to free exercise of religion and their statutory rights under the Religious Freedom Restoration Act (RFRA).⁴⁷ In *Hobby Lobby*, two closely held, for-profit corporations, and the Protestant family

the courts to use as tools of deregulation” and noting that the deregulation trend is in tension with other results that uphold compelled speech by health care professionals regarding abortion). For an extended discussion of the trend and potential implications for substantive due process and equal protection, see Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. (forthcoming 2015).

41. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *consolidating on appeal* *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc) and *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013).

42. 42 U.S.C. § 300gg-13(a), (a)(4) (2012); 45 C.F.R. § 147.130(a)(1)(iv) (2014); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

43. 42 U.S.C. § 18011 (2012).

44. 45 C.F.R. § 147.131 (2014).

45. 724 F.3d 377, 382 (3d Cir. 2013), *rev’d and remanded sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

46. *Id.* at 382.

47. *Id.* at 380.

members that owned or operated them, challenged the mandate on the same grounds.⁴⁸

The court of appeals in *Conestoga* denied a preliminary injunction on the ground “for-profit, secular corporations cannot engage in religious exercise”⁴⁹ and there is no “pass through” free exercise right of individual owners of a corporation that flows to the corporation.⁵⁰ It did not decide whether a corporation is a “person” for purposes of RFRA.⁵¹

In *Hobby Lobby*, a divided eight-judge en banc panel of the appellate court held that the family-owned corporate businesses had demonstrated a likelihood of success on their claim that their free exercise rights were substantially burdened, in violation of their statutory rights under RFRA.⁵² In the majority’s view, “as a matter of constitutional law, Free Exercise rights may extend to some for-profit organizations.”⁵³

In *Hobby Lobby* the United States Supreme Court reached only the statutory claim.⁵⁴ In an opinion by Justice Alito, the Court held that *Hobby Lobby* and *Conestoga* were entitled to claim a federal statutory exemption under RFRA, and the government could not deny the requested exemption.⁵⁵ For-profit corporations are “persons” within the meaning of RFRA that can “exercise religion.”⁵⁶ The government thus was obliged to justify what the Court viewed as a substantial burden on the company owners’ sincere religious beliefs and conduct.⁵⁷ This burden was not met because a less restrictive alternative to requiring that the companies provide coverage for the challenged benefits was available.⁵⁸ An administrative system was already in place for other exempted employers, under which third-party intermediaries would offer the benefits with no cost sharing.⁵⁹ Also, the Court noted, government itself might have provided the benefits.⁶⁰ The third parties would not suffer, and the religious actors’ substantial burden would be lifted. Win-win.

48. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1122, 1125 (10th Cir. 2013) (en banc), *aff’d sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

49. *Conestoga Wood Specialties*, 724 F.3d at 381.

50. *Id.* at 389; *see also* *Gilardi v. U.S. Dep’t of Health & Human Servs.*, 733 F.3d 1208, 1211 (D.C. Cir. 2013) (holding that secular corporations were not persons entitled to challenge a burden of exercise of religion under the Religious Freedom Restoration Act), *vacated*, 134 S. Ct. 2902 (2014).

51. *Conestoga Wood Specialties*, 724 F.3d at 388.

52. *Hobby Lobby*, 723 F.3d at 1141.

53. *Id.* at 1129. This was based on “the logic of *Citizens United*,” which held that freedom of political speech rights extend to corporations and unions no less than to individuals. *Id.* at 1135; *see also* *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009) (holding that a pharmacy had standing to assert the free exercise rights of its owners).

54. 134 S. Ct. 2751, 2785 (2014).

55. *Id.*

56. *Id.* at 2769.

57. *Id.* at 2779.

58. *Id.* at 2780–82.

59. *Id.* at 2782.

60. *Id.* at 2780.

B. No Wedding Photo Services

Elane Huguenin is a New Mexico-based commercial photographer who co-owns the Elane Photography studio.⁶¹ Under New Mexico law, her business is a “public accommodation” prohibited from discriminating on the basis of, *inter alia*, sexual orientation.⁶² The studio “offers wedding photography services to the general public and posts its photographs on a password-protected website for its customers.”⁶³ When Vanessa Willock contacted the studio via email to inquire about the studio’s services, she was informed the lead photographer and co-owner would not photograph a commitment ceremony between two women because the photographer is “personally opposed to same-sex marriage and will not photograph any image or event that violates her religious beliefs.”⁶⁴

Willock filed a discrimination complaint against Elane Photography with the New Mexico Human Rights Commission, which ruled in her favor.⁶⁵ The studio appealed to the New Mexico district court, where it again lost.⁶⁶ The case was reviewed by the New Mexico Supreme Court, which affirmed the lower court grant of summary judgment for Willock.⁶⁷ The Court rejected the studio’s arguments that it did not discriminate on the basis of sexual orientation because it would have provided portrait photographs for Willock and her partner, so long as they did not request photos that would appear to endorse same-sex weddings.⁶⁸

It likewise rejected the studio’s claims that enforcement of the New Mexico Human Rights Act constituted a violation of the studio’s freedom of speech,⁶⁹ was an impermissible form of compelled speech,⁷⁰ and violated Elane Photography LLC’s right to free exercise of religion.⁷¹ As to this last point, the Court stated “[i]t is an open question whether Elane Photography, which is a limited liability company rather than a natural person, has First Amendment free exercise rights.”⁷² Even if the company did possess such rights, however, they were not violated by enforcement of the New Mexico law because it was a valid and neutral law of general applicability.⁷³

61. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013).

62. *Id.*; New Mexico Human Rights Act, N.M. STAT. ANN. § 28-1-7 (2004).

63. *Elane Photography*, 309 P.3d at 58–59.

64. *Id.* at 59–60.

65. *Id.* at 60.

66. *Id.*

67. *Id.*

68. *Id.* at 61.

69. *Id.* at 63.

70. *Id.* at 63–64.

71. *Id.* at 72–73.

72. *Id.* at 72.

73. *Id.* at 73–74.

The Court also was unpersuaded that “creative and expressive professions” such as photography should be entitled to exemption from anti-discrimination laws, on the ground that these laws may unduly interfere with their constitutional rights of expression or association.⁷⁴ In Justice Bosson’s view, the result in the case was “sobering” but the co-owners of the studio were:

free to think, to say, to believe, as they wish; they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead. The Constitution protects [them] in that respect and much more. But there is a price . . .

In the smaller, more focused world of the marketplace, of commerce, of public accommodation, [they] have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different.⁷⁵

The case divided free speech advocates, with the ACLU lining up in support of Willock while the libertarian Cato Institute sided with the studio.⁷⁶ In November of 2013, the studio filed a petition for certiorari with the United States Supreme Court, but the Court denied the petition.⁷⁷

C. No Male Clients in Divorce Actions

The foregoing religious freedom cases can be contrasted with a case from 1997 in which an attorney refused to represent male clients in divorce actions.⁷⁸ When a claim was filed against the attorney under the Massachusetts public accommodation statute, the Hearing Commissioner ruled that the lawyer could not refuse to represent male clients.⁷⁹ He did not reach the question of whether the lawyer had a First Amendment right to do so.⁸⁰

The lawyer in the case, Judith Nathanson, argued that she should be able to control her expressive and associational autonomy by refusing to represent or serve male clients in divorce actions.⁸¹ Her professional speech was not subject to unlimited government control, and the non-

74. *Id.* at 71–72 (relying on *Hishon v. King & Spalding*, 467 U.S. 69, 71–73 (1984), which rejected a law firm’s argument that Title VII should not apply to selection of partners because this would violate the freedom of association or expression).

75. *Id.* at 79–80. (Bosson, J., concurring).

76. Adam Liptak, *Weighing Free Speech in Refusal to Photograph Lesbian Couple’s Ceremony*, N.Y. TIMES, Nov. 16, 2013, <http://www.nytimes.com/2013/11/19/us/weighing-free-speech-in-refusal-to-photograph-ceremony.html>.

77. *Elane Photography, LLC v. Willock*, 134 S. Ct. 1787 (2014) (mem.).

78. *Stropnick v. Nathanson*, 19 M.D.L.R. 39, 1997 Mass. Comm. Discrim. LEXIS 12, at *1, *3 (Mass. Comm’n Against Discrimination Feb. 25, 1997) (Walker, Comm’r.).

79. *Id.* at *12–14.

80. *Id.* at *15–16 (concluding that the free speech issue was beyond the scope of the Commissioner’s authority).

81. *Id.* at *12–15.

discrimination mandate, imposed on places of public accommodation under Massachusetts law, thus did not trump her individual right to refuse to serve clients where doing so would unduly burden her expressive and associational autonomy.⁸²

D. A Notice Condition on Exemption?

Can the government in each case grant the requested exemption without violating the Constitution? Would government action in the first two examples violate the Establishment Clause? In all three, would government action to permit, but not compel, the private discrimination in question constitute entanglement with the private conduct sufficient to make the private discrimination "state action" under applicable constitutional law? These preliminary questions are tied to the question of whether government *must* grant the exemptions, as a matter of statutory or constitutional law.

In *Hobby Lobby*, the Court resolved the first two questions in favor of closely-held, for-profit businesses seeking religious-based exemptions from the ACA mandatory coverage for contraception provision, and never reached the third.⁸³ But the case left open countless questions about its scope and future applications in other contexts.⁸⁴

82. See Leora Harpaz, *Compelled Lawyer Representation and the Free Speech Rights of Attorneys*, 20 W. NEW ENG. L. REV. 49, 54–56, 58–59, 61–72 (1998) (analyzing First Amendment arguments and concluding they would justify an attorney's refusal to represent male clients in divorce actions).

83. See *Hobby Lobby*, 134 S. Ct. 2751, 2767–68, 2775–76, 2778–82, 2784–85 (holding for-profit businesses in that context were entitled to exemption from contraception mandate, on grounds that the mandate violated their religious freedom rights under the RFRA); see also *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1215–19, 1224 (D.C. Cir. 2013) (holding that the federal health care law mandate that employers provide free coverage for contraception violated individual religious liberty in a case involving a secular business whose owners had religious objections to contraception), *vacated*, 134 S. Ct. 2902 (2014) (mem.).

84. For example, the Court does not explain when a non-closely held corporation might nevertheless satisfy the statutory criteria or whether incidental burdens on third parties matter. Shortly after the decision, the federal government issued new rules that expand accommodations for non-profit religious organizations and proposed rules to solicit comments on how to expand accommodations to include for-profit entities. Coverage of Certain Preventative Services Under the Affordable Care Act, 79 Fed. Reg. 51118–19, 51121–23, 51126–27 (proposed Aug. 20, 2014) (to be codified at 26 C.F.R. § 54, 29 C.F.R. § 2590, 45 C.F.R. § 147); see also *Women's Preventive Services Coverage and Non-Profit Religious Organizations*, CTR. FOR MEDICARE & MEDICAID SERVS., <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html> (last visited Nov. 5, 2014) (discussing the proposal to expand accommodations to include closely held for-profit entities that have a religious objection to covering contraceptives). Nor do we know how to determine the sincerity of a religious-based request for exemption. Given the consequences of an exemption for a regulated commercial actor, it also seems likely that government will need to monitor the company to assure continued fidelity to the beliefs that animated the exemption, lest the rationale disappear while the conduct continues. Yet monitoring may risk entanglement issues. It also raises a serious concern that by demanding that a religious actor continue to observe religious principles, as a condition of receiving a government benefit (the exemption), government may cross the state action line and constitutionalize the ostensibly private actor's conduct. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171–79 (1972) (discussing concern about state action where government granted a liquor license to a private social club in a private building that discriminated on the basis of race, and noting that where the government compels a private club to follow its discrimina-

The focus here is not on resolving these gnarly threshold debates; it is on whether commercial actors who are granted exemptions from generally applicable regulations can be compelled to provide notice of the exemption.

For example, might government demand the employers who offer employee health insurance coverage, but deny it for contraception, so advise an applicant as part of recruitment and hiring procedures? Might it also provide this notice—visibly and boldly—in employee benefits package documents, and any annual renewal of benefits? Might government also require the employer to post notice of this departure in the workplace alongside other mandatory workplace notices?

In the case of the commercial photographer, might government require her to accompany any advertisements for wedding or engagement photography services with notice of her refusal to offer her services to same-sex partners? May the attorney be required to accompany any advertisement of her services with notice of her refusal to represent male clients in divorce proceedings? May both be obliged to post notice of this refusal in their respective offices or on the public door to the office? If not, why not?

Even when the Court declares the applicable standard for measuring government regulatory power that burdens religious liberties in a given commercial context is elevated or strict scrutiny,⁸⁵ it is likely to conclude government can meet the standard in some cases. Again, the more “commercial” and public the religious activity becomes, and the greater the third-party costs of that activity become, the greater the government desire and power to rein in the religious actor become. Regulation of commercial religious actors thus is not likely to become a “‘strict’ in theory and fatal in fact”⁸⁶ zone, unless the Court is prepared to displace or superintend a vast swath of traditional state and federal business regulations that have not previously been thought to pose serious constitutional or statutory concerns.⁸⁷

Also, to the extent commercial religious actors rely on free speech or association, versus religious freedom grounds, nothing would confine a judicially or legislatively granted exemption request to religious actors.

tory membership rules, the discriminatory action may become “state action”). Perhaps the biggest question is to what extent the logic of *Hobby Lobby*, a statutory case, will migrate out to Free Exercise Clause cases. Arguments that it should seem inevitable.

85. An applicable statute that grants the exemption may impose such a higher standard. See Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb(a)(3), (5), 2000bb-1(a)–(b) (2012), *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997). Or the Court may in some contexts hold that the Constitution imposes this standard. See *infra* notes 102–08 and accompanying text.

86. Gerald Gunther, Foreword, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

87. See *infra* notes 92–94 and accompanying text.

On the contrary, to grant statutory or constitutional exemptions solely to religious actors may violate the subject and viewpoint neutrality principles of the First Amendment, especially given the current Court's anxiety about "speaker-identity"—specific speech rules in the commercial context.⁸⁸ It also would spike Establishment Clause concerns that could curb government enthusiasm for statutory exemptions, no matter what standard of review applies.⁸⁹

In any event, strict scrutiny is the statutory standard applied to federal government measures that substantially burden individual or institutional religious freedom. This standard now applies equally to measures that burden some for-profit, commercial religious actors.⁹⁰ In the wake of this determination, the number of religious exemption requests by commercial actors almost certainly will rise—though to an unknown level. State and local government also may elect to permit more such exemptions, even where the Constitution or more general religious freedom laws do not demand them. After all, *Hobby Lobby* was a statutory, not constitutional, case.⁹¹ When these anticipated new exemptions for religious commercial actors are upheld, legal and social counter-moves surely follow, given the importance of many of the relevant government mandates and the political salience of the underlying debate about corporate religious and speech rights.

II. TRUTH AND CONSEQUENCES?

Mandatory disclosures by commercial actors are fairly routine requirements.⁹² In a recent analysis of the debate over mandatory graphic tobacco warnings, Nathan Cortez offers the following examples:

[C]orporations have to disclose mountains of financial information. Publicly traded firms must disclose any information "material" to investors. New vehicles must disclose their gas mileage and safety ratings. Products containing certain poisonous chemicals must be labeled as poisonous. Food labels must include the food's ingredients and nutritional content, including unflattering things like total fat, cholesterol, and sodium. Drug labels must include the most salient health risks, which also tend to be unflattering Hazardous mate-

88. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664–65, 2667–68, 2672 (2011).

89. See *infra* note 113 and accompanying text.

90. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759, 2761 (2014) (applying strict scrutiny to the Affordable Care Act under a RFRA challenge).

91. See *Hobby Lobby*, 134 S. Ct. at 2785.

92. For example, the Federal Trade Commission may require companies to modify privacy policies to disclose to consumers that they are collecting personal data or correct deceptive advertisements. See *United States v. Sony BMG Music Entm't*, No. 08 Civ. 10730 (LAK), slip op. at 1–3 (S.D.N.Y. Dec. 15, 2008) (consent decree), available at <http://www.ftc.gov/os/caselist/0823071/081211consentp0823071.pdf>; see also Michael J. Pelgro, *The Authority of the Federal Trade Commission to Order Corrective Advertising*, 19 B.C. L. REV. 899, 924–26 (1978) (discussing the Federal Trade Commission's authority to compel affirmative disclosure).

rials must be labeled as such and specify their risks. Home appliances must disclose how much energy they consume. Toy packaging must recommend an appropriate age for use. Pesticides must list their ingredients and include instructions on how to use them properly. Restaurant chains will soon have to disclose the calories in their menu offerings, which could be a frightening prospect to some. Health warnings have been required for decades on alcohol products and, of course, tobacco products.⁹³

In addition to ubiquitous health and safety-type mandatory disclosures, are the mandatory workplace postings designed to alert employees of their rights under federal and state safety, wage, and non-discrimination laws. These postings not only advise employees of their rights, but also direct them to information about filing charges against an unlawfully noncompliant employer.⁹⁴

Mandatory disclosure of information relevant to employees of a lawfully noncompliant commercial actor arguably would impose no greater burden than these customary Equal Employment Opportunity Commission postings or the health and safety notices affixed to many products. Mandatory notices about exemptions also almost certainly would impose a lesser burden on the noncompliant parties than would mandatory compliance with the applicable laws.

The granting of a religious exemption only would occur in response to the commercial actor's decision to invoke it in order to undertake specific actions that depart from general laws. The exemption would be designed to relieve the direct burdens of good faith, conscientious *noncompliance with the government mandate itself*. Thus, an exemption is not best understood as an effort to protect a private religious act from the burdens of government disclosure of the expressive or privacy dimensions of that religious conduct. At some point, the noncompliant com-

93. Nathan Cortez, *Do Graphic Tobacco Warnings Violate the First Amendment?*, 64 HASTINGS L.J. 1467, 1496–97 (2013) (footnotes omitted); see also ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 2–6 (2007) (providing examples where the government required mandatory disclosures in areas such as the car industry, manufacturing industry, hospitals, schools, and banks); Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 563–64 (2012) (providing additional examples of mandatory disclosures by commercial actors such as disclosures regarding packaged food, hazardous substances, pesticides, alcoholic beverages, and children's toys).

94. See, e.g., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, "EQUAL EMPLOYMENT OPPORTUNITY IS THE LAW" POSTER (2009), available at http://www.eeoc.gov/employers/upload/poster_screen_reader_optimized.pdf (EEO mandatory posting that directs employees to www.eeoc.gov). Cf. Accommodation in Connection with Coverage of Preventive Health Services, 26 C.F.R. § 54.9815–2713A(d) (2012) (providing model language to satisfy disclosure requirements under the Patient Protection and ACA); Coverage of Preventive Health Services, 29 C.F.R. § 2590.715–2713A(d) (2013) (requiring insurance companies to inform female employees and students that those companies will be covering contraceptive costs for a non-profit entity that has received an exemption to the ACA mandate); Preservation of Right to Maintain Existing Coverage (Temporary), 26 C.F.R. §§ 54.9815–1251T(a)(2)(ii) (2010) (providing model language to satisfy disclosure requirements under the ACA).

mercial actor would have to disclose to the customer or employee the fact of its noncompliance, by refusing to offer the benefit or service that the law requires. The much-ballyhooed argument that filling out a government form and mailing it to others—who will pick up the compliance burden *for* the religious actor—constitutes complicity with evil is beside the point to the proposed notice mandate.⁹⁵ Indeed, lawyers that advise religious entities might be wise to counsel their clients to disclose their noncompliance decisions without being required to do so, in order to later defend a claim that their sincere religious convictions prevent them from complying with the applicable law.

The proposed notice requirement would move up in time and space the inevitable disclosure, in order to mitigate the harms of the noncompliance to potentially affected third parties. In this way, the proposed notice requirement is actually less burdensome than food labels or EEO regulations, which involve disclosures the commercial actors might not make at all, were they not required to do so.

Disclosure also would enable potential employees and customers to vote with their feet on the basis of truthful and non-misleading information that may be relevant to their employment and economic decisions.⁹⁶ Like the “contains nuts and seeds” warning signs on a food product, the disclosure would allow individuals to avoid potential harms—economic, dignity, health—that the commercial activity may cause them, even if the commercial activity is lawful.

Disclosure might also be analogized to informed consent laws in the medical arena, which have become especially controversial in the context of abortion-related services.⁹⁷ These cases underscore that a consumer of medical care is entitled to make informed choices, and a demand that doctors provide them with state-mandated information is permissible as long as that information is truthful, non-misleading, and relevant to the patient’s decisions. If such a demand can be made of medical professionals without violating their independent professional autonomy or invad-

95. See cases cited *supra* note 23.

96. ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* 119–54 (2013) (discussing foot voting’s potential shortcomings and relative advantages over ballot voting).

97. See *Evergreen Ass’n, Inc. v. City of New York*, 740 F.3d 233, 251 (2d Cir. 2014) (upholding in part, and striking down in part, compelled disclosures by pregnancy services providers); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889, 906 (8th Cir. 2012) (en banc) (upholding a South Dakota law which mandated that doctors recite an “increased risk” script to women seeking abortions in order to apprise them of certain evidence suggesting a correlation between abortion and suicide ideation for some women); *Stuart v. Loomis*, 992 F. Supp. 2d 585, 587, 609–10 (M.D.N.C. 2014) (striking down North Carolina law that required doctors to perform an ultrasound, display the images to the patient, and describe them to her); see also *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264, 287–88 (4th Cir. 2013) (en banc) (holding strict scrutiny may not be an appropriate standard for Baltimore ordinance requiring so-called “limited-service pregnancy centers” to disclose that they do not provide abortion and contraceptive services).

ing the doctor–patient relationship, then asking other commercial actors to provide factual notice of an exemption from health insurance benefit laws also should be permissible.

Finally, and importantly, if exemptions are granted for commercial actors that have no other visible signs of their religious commitments—the name Hobby Lobby, for example, signals no religious affiliation in the way the name Little Sisters of the Poor plainly does⁹⁸—then the notice requirement seems all the more crucial to alerting employees and potential customers they may be refused benefits or service on religious grounds. It may also assist them in distinguishing accurately among religious commercial actors, not all of whom may opt for an exemption, and in clarifying the scope of the exemption being invoked. In the case of *Elane Photography*, the refusal to serve was narrowly confined to photographic services of weddings or other images that represented same-sex commitments and relationships, not to photographing gays or lesbians in other contexts or settings.⁹⁹

III. CONSTITUTIONAL OBJECTIONS TO MANDATORY DISCLOSURES

The religious businesses, of course, are likely to respond to an exemption conditioned on mandatory disclosure with arguments that the mandatory disclosure itself constitutes an impermissible burden on their religious autonomy and is an impermissible form of compelled speech. Simply because government-mandated disclosures are commonplace does not mean these demands are constitutional, especially if they are not aimed at consumer deception or fraud.¹⁰⁰ That is, religious commercial actors could challenge the notice requirements on the same grounds they have challenged the regulations themselves, with a compelled speech kicker.

Non-religious commercial actors then could add their liberty objections to the mix, which should be especially forceful if the government

98. Though Hobby Lobby stores do close on Sundays, play religious music, and offer free spiritual counseling to employees. See Adam Liptak, *Court Confronts Religious Rights of Corporations*, N.Y. TIMES, Nov. 24, 2013, <http://www.nytimes.com/2013/11/25/us/court-confronts-religious-rights-of-corporations.html>; Cf. *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2806 (2014) (mem.) (enjoining enforcement of ACA regulations requiring non-profit religious organizations to file a form and send copies to health insurance issuers or third-party administrators, which would trigger the third party's obligation under the ACA to provide the contraception coverage without cost-sharing), *modifying*, No. 1:13-cv-08910, 2014 WL 2826336 (N.D. Ill. June 23, 2014); *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 893, 893 (2013) (mem.) (granting temporary injunction in response to challenge of regulations requiring religious organizations to sign a certification allowing insurance companies to provide contraception coverage, even though they need not provide the coverage themselves under federal law, where the third-party administrator was a "church plan" with no legal obligation to provide contraception services), *modifying*, 6 F. Supp. 3d 1225 (D. Colo. 2013).

99. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 61 (N.M. 2013).

100. Keighley, *supra* note 93, at 565–66 (discussing the importance of deception as a justification for compelled commercial speech but arguing it is not the only legitimate basis for lower scrutiny of such demands).

were to give religious-based refusals to serve or provide benefits greater protection than non-religious based refusals.¹⁰¹

Insofar as these objections to notice requirements would be based on constitutional, versus statutory claims, they would proceed as described in the following sections.

A. Free Exercise of Religion Objections

Religious commercial actors could claim mandatory disclosures of the decision to seek a religious exemption from otherwise applicable government regulations constitute a constitutionally unlawful burden on their free exercise of religion. Even if the exemption itself is not constitutionally required as a matter of religious freedom,¹⁰² mandatory notice of an exemption cannot be the price of pursuing one. The greater power—to deny the exemption altogether—does not include the arguably lesser power of granting it subject to a disclosure requirement. This arguably would be an unconstitutional condition on the exercise of its statutory, if not constitutional, rights.

Free exercise claims must satisfy *Employment Division v. Smith*,¹⁰³ in which the Court held exemptions from generally applicable valid and neutral laws are not required simply because they impose burdens on religious actors.¹⁰⁴ If the government is free to regulate the conduct itself, then *Smith* holds religious objections are not sufficient to overcome the government interest in enforcing the regulation as long as the measure is reasonable.¹⁰⁵ Cases that impose a higher standard either involve “hybrid” constitutional claims—such as free exercise coupled with freedom

101. They also may have a colorable but increasingly difficult to mount Establishment Clause argument. See *infra* note 112; see also Massaro, *supra* note 24, at 964–66 (discussing the lowering of Establishment Clause barriers to accommodation). Basically, they would argue that a carve-out of religion-inflected refusals from a mandatory notice condition on exemptions would be an impermissible form of religious preferentialism, rather than merely an effort to accommodate religious freedom. See, e.g., Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 336–37 (1987).

102. Whether it is unconstitutional to require a religious commercial actor to comply with a generally applicable law that is neutral in its application is its own complex question under *Employment Division v. Smith*, 494 U.S. 872, 877–79, 881–82 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000(bb)–(bb)(4), *as stated in* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760–62 (2014). For one thing, the Court has not fully clarified when laws satisfy the “general and neutral” requirements. For a discussion of the scope and content of these demands, see Brief for Appellees at 43–45, *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013) (No. 13-1144), 2013 WL 1752562, at *43–45, *rev’d sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Brief of Appellants at 38–44, *Conestoga Wood Specialties*, 724 F.3d 377 (No. 13-1144), 2013 WL 1193682, at *38–44; see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 579–80, 604 (1983) (upholding I.R.S. power to deny tax-exempt status to a private Christian university that espoused the belief that the Bible prohibited interracial dating and marriage, and denied admission to African-Americans); *Runyon v. McCrary*, 427 U.S. 160, 179 (1976) (prohibiting racial exclusion from private schools). Moreover, if the administrative scheme allows for some exemptions, it may fit within the *Smith* rule.

103. 494 U.S. 872.

104. *Id.* at 878–79.

105. *Id.* at 879.

of speech or parental rights¹⁰⁶—or involve administrative schemes, such as unemployment benefits regulatory measures, that anticipate individualized government assessments of eligibility and grant them on bases other than religion.¹⁰⁷ In Justice Scalia's view, "we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."¹⁰⁸ He then added an important caveat: religious actors who seek exemptions should pursue the political process, rather than pursuing judicial action based on constitutional objections.¹⁰⁹

In the context analyzed here, the exemption-subject-to-notice proposal assumes the religious exemption has been allowed, either by judicial decree or via democratic processes.¹¹⁰ Also, it has been allowed only after the religious commercial actors sought the excusal; the threshold decision to do so was theirs and triggered by a desire to be excused from otherwise applicable laws. Thus, the constitutional question is much narrower than in *Smith*: what are the free exercise limits on government power to grant an exemption where it has been requested and granted, including in cases where no exemption is *constitutionally* required? Is the compulsory notice condition itself a free exercise violation under *Smith*?

The commercial actors may insist it is. First, they would claim a compulsory notice condition on exemption lifts the case from a rational basis standard of review to strict scrutiny insofar as it involves both a free exercise *and* a compelled speech dimension.

Second, at least some of the laws from which religious commercial actors may seek exemption may be administrative schemes such as the ACA,¹¹¹ which already allow other exemptions. As such, the government may handle a religion-based request for exemption as easily as it does these other exemptions.¹¹²

106. *Id.* at 881–82.

107. *Id.* at 884.

108. *Id.* at 888.

109. *Id.* at 890.

110. This is the RFRA claim that was made in *Hobby Lobby*. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1120 (10th Cir. 2013) (en banc), *aff'd sub nom. Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014). In other contexts, the exemption may be granted based on state laws that grant to religious freedom claims greater protection than the United States Constitution requires, or ones that are built into a regulatory scheme, as occurs under Title VII. *See, e.g., Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339–40 (1987) (upholding Title VII exemption for religious employers to discriminate on the basis of religion).

111. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780–82 (2014).

112. *See* Brief for Petitioners at 43–48, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-356), 2014 WL 173487, at *43–48 (arguing that the contraception mandate under the ACA is not generally applicable or neutrally applied, given other exceptions to the mandate for secular businesses). *Cf. Hobby Lobby*, 134 S. Ct. at 2780–82 (2014) (concluding under RFRA, that other exemptions indicated that failure to provide a similar exemption for two for-profit, closely held corporations was not the least restrictive alternative).

A third, but ultimately non-persuasive, argument would be that the exemption condition is a non-neutral law, rather than a generally applicable one, because the condition would apply primarily if not solely to religious commercial actors.¹¹³

A first response to these arguments is that a notice condition on an exemption is hardly hostile to religion. If *denying* the exemptions is constitutionally allowed, because of the importance of the secular interests at stake and because the laws were written for all similarly situated commercial actors, then government willingness to *grant* the exemptions subject to notice is better characterized as exceptionally sensitive government accommodation of conflicting interests than as senseless hostility to religion. Yet, even if an exemption is constitutionally required for religious actors only, then granting the exemption subject to the factual notice still may be a way of reducing the inevitable third-party burdens of this protection. Moreover, if part of the argument against denying the exemptions is that some secular actors also receive exemptions, then all actors—not just religious actors—would be facing the same requirement.

This is why the third argument fails so miserably. The notice requirement is not government singling out of religious actors; it is conditioning exit from the general rules *by anyone* on giving fair notice of the exit to potentially affected others. The primary government purpose in granting a conditional right to exit would be to balance liberty tensions within a pluralistic order. If the notice burden falls disproportionately on religious actors, this is because the underlying secular law has disproportionate but unintended effects on religious commercial actors—not be-

113. The more powerful the claim of targeting of religious actors, the more powerful the claim that the law not only violates free exercise but also the Establishment Clause. The Court has indicated that religious-based accommodations that burden third parties can violate the Establishment Clause. *See, e.g.,* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985) (involving accommodation of employee Sabbath observance); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 302 (1985) (involving the Fair Labor Standards Act's minimum wage requirement); United States v. Lee, 455 U.S. 252, 261 (1982) (involving employer exemption from payroll taxes). In comparison, consider the *de minimis* test for Title VII accommodations. *See, e.g.,* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 67, 69 (1986). Yet, it has also been recognized there is "play in the joints" that allows accommodation without violating the Establishment Clause. *See, e.g.,* Cutter v. Wilkinson, 544 U.S. 709, 713–14 (2005) (quoting Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 669 (1970)); *Corp. of the Presiding Bishop*, 483 U.S. at 334–35; Wallace v. Jaffree, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 723–27 (1981) (Rehnquist, J., dissenting); Gillette v. United States, 401 U.S. 437, 453 (1971). *See generally* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 356–59 (2014). *But see* Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 47 (2014) (arguing religious exemptions have a secular purpose); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 698, 711 (1992) (arguing the case-by-case consideration of exemptions can account for potential third-party harms). The latter claim, though, is decidedly weaker under current doctrine insofar as the government can justify the regulation on a neutral, secular ground. *See* Massaro, *supra* note 24, at 964–65. They also may supplement the constitutional claim with statutory claims under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000(bb)(1)(a)–(b) (2012), or state laws that protect free exercise of religion.

cause the law or the exemption-subject-to-notice option itself was designed to punish them. If the breathing room between the Establishment Clause prohibition and Free Exercise Clause allows government to grant exemptions, then it should include this much room to modify them.¹¹⁴

Moreover, an argument that a condition on the exemptions is non-neutral—even when exemptions are designed to lift burdens on religious actors in particular—logically invigorates arguments that granting the exemption in the first place represents unconstitutional religious favoritism.¹¹⁵ Religious commercial actors should take care in cherry-picking arguments or fracturing doctrinal logic in ways that favor religious actors only.

Religious commercial actors also should consider that government disincentives to granting exemptions may mount, not decline, if government is put to an all-or-nothing choice. This is the problem with holding it against the government that granting some exemptions, but not all, leads to a retreat from exemptions altogether. Prohibiting the exemption-subject-to-notice riff may force government to devise other, less efficient or less generous means of mitigating this harm.

As for the argument that the notice condition makes this a hybrid case, and therefore subject to strict scrutiny, the standard of review analysis will depend on whether the free speech component to the argument is a colorable claim.¹¹⁶ I address that argument in the following section.

Finally, whether an exemption-subject-to-notice option would place the regulation within the unemployment benefits set of Free Exercise cases¹¹⁷ would depend on a particular regulatory context. Government's decision to grant an exemption in the first place presumably would entail some administrative mechanism for filing and reviewing an exemption request. That government should be subject to judicial strict scrutiny of the exemption eligibility decisions—to police undue burdens on, or impermissible discrimination among, applicants—makes sense. This is especially so if exemptions are allowed for secular as well as religious reasons.¹¹⁸

A much harder question is whether the part of the administrative scheme that places a notice condition on all granted exemptions likewise is subject to judicial strict scrutiny. The best view, I conclude, is “no.”

114. See *Locke v Davey*, 540 U.S. 712, 718–20 (2004); see also *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006).

115. See Massaro, *supra* note 24, at 984–97 (discussing problems with “heads we win, tails you lose” approaches to the religions clauses (internal quotation marks omitted)).

116. The hybrid right theory in *Smith* is an odd one. If the underlying free speech component is one that does not trigger strict scrutiny (e.g. because it burdens commercial speech only) then it seems odd to say that a rational basis free exercise claim, when coupled with an intermediate scrutiny free speech claim, somehow adds up to a strict scrutiny hybrid right claim.

117. See *Emp’t Div. v. Smith*, 494 U.S. 872, 884 (1990).

118. Brief for Petitioners, *supra* note 112, at 32–33.

The condition would be neutrally and generally applicable to all exempted actors, religious and non-religious, in order to promote a legitimate government interest in promoting transparency and mitigating third-party harms.

But this is debatable. Also, other arguments that the notice condition may trigger elevated, if not strict, scrutiny deserve respect. The legal question may boil down in any event to three questions: whether government can show important or compelling reasons for the notice condition, whether a notice condition directly advances those government interests, and whether there are other, less restrictive, means of achieving government goals.

B. Freedom of Speech Objections

The free exercise claims outlined above rest in part on whether the commercial actors can mount a colorable freedom of expression claim, and whether the freedom of speech claim triggers elevated judicial scrutiny. The answer is surprisingly unclear, and involves difficult threshold questions about how to characterize the mandate.

Is the mandatory notice a form of compelled non-commercial speech that triggers strict scrutiny? Even if it is non-commercial speech, is there a lower standard that applies to compelled factual disclosures by commercial actors? Alternatively, is the mandatory notice a form of compelled commercial speech? If so, is it subject to a lesser standard of review under commercial speech case law? Finally, is the requirement that a regulated business notify employees or customers of their exemption from a generally applicable regulatory measure best seen as a customary limit on commercial activity that triggers mere rational basis analysis?

1. Compelled Speech Objections

Compelled speech arguments often begin with the arresting—though misleadingly absolute¹¹⁹—language from *Barnette v. West Virginia State Board of Education*¹²⁰ that states “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹²¹ Commercial actors will emphasize their equivalence to private individuals, in terms of their freedom of speech liberties,¹²² and then characterize a mandatory notice of exemption as speech coerced by

119. See Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 407–15 (2014).

120. 319 U.S. 624 (1943).

121. *Id.* at 642.

122. See, e.g., *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16–17 (1986) (plurality opinion) (noting that “[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say” and applying strict scrutiny).

the state.¹²³ They also will invoke case law that treats the right to speak and the right to refrain from speaking as “complementary components of the broader concept of ‘individual freedom of mind’”¹²⁴ and note that this principle has not been restricted to matters of belief but also compulsory utterance of statements of fact.¹²⁵ To the extent the Court has deemed expenditure of funds as equivalent to speech,¹²⁶ the cases that limit government’s power to mandate expenditures by commercial actors to promote the government’s message offer support to a compelled speech objection to mandatory notice requirements.¹²⁷

Finally, the commercial actors will argue the root of this notice requirement is not a purely factual disclosure comparable to labels that list the nutritional content of food, but a viewpoint-inflected, controversial mandate designed to discourage or burden the exercise of the underlying religious beliefs that prompted the commercial actor to seek the exemption. As such, they are not about the “flow of truthful and legitimate commercial information.”¹²⁸ Rather, they are about an underlying political controversy that pits religious commercial actors against government orthodoxy as expressed through government regulatory schemes that demand either compliance or exemption subject to compelled speech,¹²⁹ both of which are constitutionally objectionable demands. The burden of disclosure is hardly a minimal one for the religious commercial actor, and there are two constitutional concerns at stake: the free speech-centered interest in not compelling private parties to become billboards for government messages, and the religious freedom-centered interest in

123. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977) (“For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.”). Cf. *Harris v. Quinn*, 134 S. Ct. 2618, 2638 (2014) (holding that partial-public employees may refuse to pay union dues based on First Amendment grounds but declining to overrule *Abood*).

124. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *Barnette*, 319 U.S. at 637); see also *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 573–74 (1995).

125. See *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) (striking down a state law that required professional fundraisers to disclose the percentage of charitable contributions that went to the charities themselves).

126. See *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam) (explaining that spending money in a political campaign is a form of political speech protected by the First Amendment because “virtually every means of communicating ideas in today’s mass society requires the expenditure of money”).

127. See *United States v. United Foods*, 533 U.S. 405, 410–11 (2001) (striking down assessments on mushroom handlers that supported generic advertisements that these handlers regarded as inconsistent with their belief that their mushrooms were superior to other mushrooms); cf. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562–63 (2005) (noting that where speech is the government’s own, it is exempt from First Amendment scrutiny).

128. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976).

129. In this respect, they might invoke similar arguments to those raised by healthcare professionals who object to the mandatory scripts imposed on doctors in abortion cases. See *supra* note 95 and accompanying text. Of course, “[t]he line between factual and normative disclosures may seem somewhat arbitrary: after all, factual disclosures also serve the government’s normative agenda.” Keighley, *supra* note 93, at 570. Also, the Court’s apprehension about compelled commercial disclosures reveals that its concerns are not limited to audience-centered information interests. See Post, *supra* note 39, at 577.

making sincere religious conduct as free from government interference as possible. Surely, the argument would continue, the Jehovah's Witnesses schoolchildren in *Barnette* would not have felt significantly less coerced by the mandatory flag salute if they were excused, but required to wear badges at school indicating they had done so. If protection from compelled speech is about protecting individuals from a "crisis of conscience,"¹³⁰ then the exemption-subject-to-notice proposal should trigger the *Barnette* strict scrutiny test, which is exceedingly difficult to meet.

The aggressiveness of the argument, though, gives one pause. In the freedom of speech context, religious speakers receive no more or less protection than other actors who speak from other perspectives. The great victory for religious freedom advocates in recent decades has been pushing the "viewpoint neutrality" mandate of free speech cases to include religion, rather than allowing government to treat religion differently in contexts where it is allowed to regulate on the basis of subject-matter versus viewpoint.¹³¹ A free speech victory for religious actors, thus, is also a free speech victory for political dissidents, conscientious objectors, and others who too may find the notice condition offensive or unduly burdensome. A commercial actor's crisis of religious conscience should stand on no higher ground than a commercial actor's crisis of political conscience that might prompt the actor to deny services or benefits.

Moreover, when a government regulation imposes an "undue burden" on a religious actor's freedom of speech, courts should not weigh the burden as categorically different from the freedom of speech burdens imposed on other conscientious objectors.¹³² Some of the more creative arguments currently being made by advocates about what constitutes a substantial burden on religion seem to ignore this internal symmetry point and its far-reaching implications.¹³³ Government respect for religious freedom is a legitimate, even compelling, reason for granting an exemption to religious speakers in some cases; but this should not teeter

130. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 472 (1997) (concluding that the compelled subsidy of speech in that case did not engender such a crisis).

131. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993); Massaro, *supra* note 24, at 945-49.

132. Within this doctrinal channel, it surely does make sense to require a coherent theory of burden, even if it may not be sensible across contexts. See *infra* text accompanying notes 168-69.

133. See *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2813 (2014) (Sotomayor, J., dissenting) (arguing that merely participating in any process may be a substantial burden); see also Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL'Y 318, 336, 340, 359 n.258 (2010) (arguing for accommodation of public employees, when staffing and other conditions permit, to exempt a religious government employee from having to issue a marriage license to a same-sex couple); cf. *Univ. of Notre Dame v. Sebelius*, 743 F.3d. 547, 558 (7th Cir. 2014) (holding that the self-certification form that asks an objecting organization to provide the name, title, address, and phone number of person certifying that he or she opposes providing contraceptive coverage was not an undue burden on the University of Notre Dame's freedom of religion).

into a form of religious exceptionalism that undermines the neutrality demands central to freedom of speech.¹³⁴ A Jehovah's Witness has an equal, *not superior*, right to excusal from a mandatory flag salute, even if she explains that the requirement burdens both her religious freedom and speech autonomy, and nothing in constitutional law supports a claim that the former is a categorically heavier imposition on individual liberty than is the latter.¹³⁵

This concern about making invidious distinctions between religious and non-religious speakers becomes even more critical when the religious speaker also is engaged in commercial activity. As Bernadette Meyler has observed, the intersection of religion and commercial activity puts courts in the uncomfortable position of having to distinguish between religious proselytizing that involves a monetary exchange and "commercial speech."¹³⁶

The natural inclination of courts is to side-step inquiries into religious truth, which may lead to greater deference to religious commercial actors. As the Court stressed in *Hobby Lobby*, "it is not for us to say that [the parties'] religious beliefs are mistaken or insubstantial. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction.'"¹³⁷

Yet, as religious commercial actors expand their claims of protected religious expression to reach more of their for-profit, commercial activities, collisions with secular interests in commercial speech regulation will become more visible, prevalent, and harder to avoid.¹³⁸ The higher the standard of judicial review, the greater the disruption of government policy determinations; and the more deference given to religious commercial actors over non-religious commercial actors, the greater the concerns become about regulatory patchworks and appearance of religious favoritism.

In any event, a factual notice condition on exemption does not impose the kind of direct and substantial burden a flat prohibition of the

134. Again, religious exceptionalism also may violate the Establishment Clause, according to doctrine that insists on government neutrality, though the Establishment Clause barrier has been lowered by recent doctrinal developments. See Massaro, *supra* note 24, at 956–67.

135. If anything, religious freedom claims may be given less constitutional solicitude when they rest on religious-inspired conduct rather than on pure expression or expressive conduct. Respect for religious *belief* is nigh on absolute; respect for religious *conduct* is not, per *Smith*. *Emp't Div. v. Smith*, 494 U.S. 872, 878–79 (1990).

136. Meyler, *supra* note 12, at 898–99. Meyler notes that the "Court will intervene in the assessment of whether fraud has occurred in the religious sphere only under a very specific and narrow range of circumstances." *Id.* at 899.

137. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) (alteration in original) (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)).

138. As one court has observed, "the bare fact that the subject message contains a 'theological' component is insufficient to transform it into noncommercial speech." *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1275 (10th Cir. 2000). But it does make it more difficult to select the proper standard of review and to balance the relevant interests.

religious conduct does. Courts have recognized this difference, even in the context of core, political speech; mandatory factual disclosure requirements often are given greater judicial deference than other forms of compelled speech. For example, in the realm of campaign finance regulation commercial actors enjoy robust free speech protection.¹³⁹ Yet the Court has treated disclosure laws that require them to make public their campaign expenditures as consistent with the anti-corruption goals and constitutionally permissible.¹⁴⁰ Despite the right not to disclose one's identity in some political speech contexts,¹⁴¹ the Court also has upheld other disclosure requirements where necessary to protect the integrity of the electoral processes.¹⁴² In doing so, it has applied a test that looks less like strict than intermediate scrutiny—"exacting scrutiny"¹⁴³—demanding only that the disclosure requirement bear a "substantial relation" to a "sufficiently important" government interest, with a caveat for cases in which the requirement exposes politically vulnerable individuals or groups to intimidation or harassment.¹⁴⁴ The Court has expressly noted that disclosure is a "less restrictive alternative to more comprehensive speech regulations" and promotes transparency that assists voters in making informed decisions.¹⁴⁵

Where there is a risk of consumer deception, such as in cases that require peddlers of commercial goods to disclose their identities, the Court has been even more willing to uphold disclosure regulations under a lower standard of review.¹⁴⁶ Compelled speech on matters of opinion is treated differently.¹⁴⁷

139. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010); *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976) (per curiam).

140. See *Buckley*, 424 U.S. at 66–68.

141. See *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 210–11 (1999) (Thomas, J., concurring) (holding a requirement that initiative-petition circulators wear identification badges unconstitutional); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–42 (1995) (holding ban on distribution of anonymous campaign literature unconstitutional); *Talley v. California*, 362 U.S. 60, 65 (1960) (holding ban on anonymous handbills unconstitutional).

142. See *Doe v. Reed*, 561 U.S. 186, 196–99 (2010) (upholding demand that individuals who sign ballot proposition petitions reveal their identity on facial challenge). See generally Richard Briffault, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 WM. & MARY BILL RTS. J. 983, 985 (2011) (discussing disclosure doctrine in context of political campaigns).

143. *Buckley*, 424 U.S. at 64.

144. *Doe v. Reed*, 561 U.S. at 196 (internal quotation marks omitted).

145. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 316 (2010).

146. But see *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 163 (2002) (striking down ordinance that prohibited door-to-door advocacy and solicitation before first registering with the city and receiving a permit, though stressing the extent to which this ordinance applied beyond commercial context and might reach political speech and also constituted a form of prior restraint).

147. See *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (emphasizing that the disclosure requirement at issue compelled disclosure of "purely factual and uncontroversial" information about legal services and that the regulated party's interest in nondisclosure was "minimal"); see also *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) (upholding mandatory disclosure provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act).

Exemptions subject to a notice caveat would serve the government interests in mitigating third-party burdens, promoting transparency, and enabling employees and consumers to make informed decisions in time to avoid the harshest consequences of the exempted conduct. The exemptions identified here all involve deviations from otherwise generally applicable regulations. As such, the proposed notice requirements would alert the relevant members of the public to departures from common laws, which they would have little reason to foresee until the consequences of the exempted behavior fall directly upon them. Also, and this is key, other commercial actors are legally required to adhere to the relevant nondiscrimination, health care benefits, or other regulations. Exit from *otherwise unlawful* commercial conduct, subject to compelled disclosure, is distinguishable from compelled disclosure attached to *lawful* commercial conduct.

In the case of health insurance benefits, the information also is quite technical. Many employees may not fully appreciate the limitations until they submit reimbursement requests and are denied benefits. They also may not fully appreciate that coverage for the same benefits is legally required of other employers who are subject to the mandate, or that working elsewhere might have contributed to their full compensation package in a material fashion.

The notion that employees who understand these variations would not vote “with their feet” is extremely implausible.¹⁴⁸ The information is plainly relevant to employment decisions. Imagine, for example that an employer did not cover cancer-related therapies under its health insurance policy. An employee with a pre-existing condition, or even one with a strong family history or identified genetic predisposition to a particular form of cancer, surely would want up front information about this restriction *before* signing on. Notice provisions would provide employees with job-related, material economic information at a key point in their decision-making. Informed choices are a cornerstone of liberty.

2. Commercial Speech?

When the notice requirement proposed here would accompany the commercial actors’ advertisements, it may be subject to a lower standard of constitutional review under the Court’s commercial speech line of cases. A threshold issue would be whether a mandatory notice fell within

148. EPSTEIN, *supra* note 36, at 61; see *Burwell v. Hobby Lobby Stores, Inc.* 134 S. Ct. 2751, 2776–77 (2014) (noting that “[h]ealth insurance is a benefit that employees value” and that not providing it would place employers at a “competitive disadvantage”). The same is true of consumers seeking other commercial goods. A telling example of the importance of notice as it relates to how consumers may want to know in advance in order to plan their affairs is that there still exist gay travel sites, which are designed to alert LGBT persons how to avoid discrimination, as well as where to find gay-friendly accommodations. See Steven McElroy, *Finding Comfort and Safety as a Gay Traveler*, N.Y. TIMES, May 30, 2014, <http://www.nytimes.com/2014/06/01/travel/finding-comfort-and-safety-as-a-gay-traveler.html>.

the commercial speech rubric or constituted speech by a commercial actor. The current test for commercial speech is a fuzzy one—does it propose a commercial transaction, based on its context¹⁴⁹—and has been applied to labels on alcoholic beverages,¹⁵⁰ attorney solicitations of business,¹⁵¹ trade names,¹⁵² and on-site price and other advertisements for tobacco.¹⁵³ The location and context of a mandatory notice requirement, therefore, would affect the analysis.

If the required notice is deemed to be commercial speech, then the scope of cases that apply a rational basis test to demand that “purely factual and uncontroversial information” be included in the commercial speech would be relevant.¹⁵⁴ The rationale of these cases is that a mandatory, factual disclosure requirement is a less burdensome alternative to prohibiting the commercial speech altogether.¹⁵⁵ The application of this reasoning in turn hinges on whether this rational basis test applies solely to cases in which the mandatory notice is designed to prevent deception, versus to promote other legitimate government goals. The available case law on this is fuzzy.¹⁵⁶

Finally, it hinges on whether a mandatory notice of exemption is in fact designed to correct for public deception or confusion, where the reasonable, baseline public expectation would be the generally applicable law applied to the noncompliant commercial actor.

If the rational basis test is not applicable to such notices, then the intermediate scrutiny test of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*¹⁵⁷ likely would apply.¹⁵⁸ This oft-maligned¹⁵⁹ but still applicable¹⁶⁰ commercial speech regulation test re-

149. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

150. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995).

151. See, e.g., *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

152. *Friedman v. Rogers*, 440 U.S. 1, 12–13 (1979).

153. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 532 (2001).

154. See *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

155. *Id.* at 651 n.14.

156. See Keighley, *supra* note 93, at 562–67 (analyzing the relevant cases on compelled commercial speech and concluding cases that limit the rational basis test to mandatory disclosures that prevent consumer deception are too narrow and should extend to other cases in which the goal is a more informed public). Indeed, as Keighley points out, if the goal is to prevent deception and the commercial speech without the notice is fraudulent or misleading, then the speech arguably could be banned wholly apart from the Court's commercial speech cases. *Id.* at 557 (noting that “misleading commercial speech lies outside the First Amendment”). There still would need to be a link to harm to others, but this likely is satisfied by the alleged deception of consumers. See *United States v. Alvarez*, 132 S. Ct. 2537, 2546–47 (2012) (plurality opinion) (discussing the constitutional status of falsehoods and noting that not all are unprotected speech).

157. 447 U.S. 557 (1980).

158. See *id.* at 566.

159. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring); see also Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 452–58 (1971); Rodney

quires that regulation of truthful and non-misleading commercial speech about lawful activities directly advance a substantial government interest, in a manner that is “not more extensive than is necessary to serve that interest.”¹⁶¹

A possible curve ball to this is *Sorrell v. IMS Health, Inc.*,¹⁶² in which the Court applied an “exacting scrutiny” test to commercial speech regulations designed to prevent pharmacies from selling or disclosing information about physicians’ prescribing habits.¹⁶³ The regulation “disfavored speech by disfavored speakers” and sought to protect physicians from factual information provided by pharmaceutical company representatives about brand-name drugs.¹⁶⁴ Key to this, however, was that the Court felt the state’s justifications for treating the regulated commercial speakers differently from non-commercial speakers were insufficient.¹⁶⁵ In the exemption-subject-to-notice case, the government would have a much stronger—likely compelling—reason to demand the notice of only noncompliant businesses rather than all businesses, as the demand would cover all similarly situated speakers. The distinction would not hinge on the commercial actor’s status as an economic actor per se, and would not be selectively applied to them versus other similarly situated speakers acting without a profit motive.

Thus, the most rigorous scrutiny that likely would apply to the mandatory notice is intermediate scrutiny, if it is deemed to be commercial speech. Because this demands less of government than the *Barnette* strict scrutiny compelled speech test, success under *Barnette* should assure success under intermediate scrutiny.

Crucial to the government’s case under either scenario would be to characterize the notice requirement as factual and non-ideologically motivated—a nudge less burdensome than a prohibition—and a carefully tailored effort to prevent consumer confusion or deception and thereby promote more informed marketplace choices and transparent government policy.

Some religious businesses, of course, will argue against this characterization. Key to their success will be to cast the notice mandate as regu-

A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780 (1993).

160. See *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2672 (2011) (applying intermediate scrutiny analysis).

161. *Central Hudson*, 447 U.S. at 566.

162. 131 S. Ct. 2653 (2011).

163. *Id.* 2668–69.

164. *Id.* at 2663.

165. *Id.* at 2670–71.

lation of non-commercial speech and a form of viewpoint-specific compelled speech that both triggers and flunks strict scrutiny.¹⁶⁶

3. Trade Regulation?

Closely related to the argument for relaxed scrutiny of mandatory disclosures imposed on commercial actors is the argument that government policy decisions about factual disclosures and disclaimers in the realm of commerce deserve significant deference. The First Amendment interest in maximizing the flow of information is promoted, not hindered, by these demands. The burden on the commercial actor's speech is minimal, not undue. This is especially true when government clearly has the baseline power to demand compliance with its standards, yet grants exemptions that are not constitutionally required subject only to this factual, noncompliance notice condition.

The notice requirements at issue here also arguably are less about the commercial actors' speech than about its commercial conduct—its refusal to serve customers, to provide benefits, or to otherwise keep the commerce doors open to all, on equal terms. Nothing prohibits the businesses from posting workplace signs that register their disapproval of government policies that constrain their commercial conduct or to otherwise distance themselves from any attribution of shared purposes or beliefs that accompany the conduct.¹⁶⁷

In any event, the proposed notice makes no direct demand they engage in the offensive conduct; it excuses that conduct subject to a more modest measure that has an expressive, but non-evaluative and non-pejorative dimension designed to signal the departure from otherwise applicable laws. And it does so for the purpose of alerting third parties who will lose the benefits, services, or other protections they are entitled to under the otherwise applicable government demands. It is notice tailored to mitigating real harms to others who have every reason to expect the business in question would offer the benefits, services, or other protections.

In other words, the government interest in demanding the notice is even stronger than it is in demanding that consumers are alerted to the presence of nuts and seeds; it is more like letting consumers know they

166. They may rely on arguments made against municipal regulations that require crisis pregnancy centers to disclose the nature of their services and make clear that they do not make referrals for abortion or birth control services. *See, e.g.,* *Evergreen Ass'n v. City of New York*, 740 F.3d 233, 249 (2d Cir. 2014); *Greater Balt. Ctr. For Pregnancy Concerns, Inc. v. Mayor of Baltimore*, 721 F.3d 264, 287 (4th Cir. 2013) (en banc); *see also supra* note 97 and accompanying text.

167. *Cf. Rumsfeld v. Forum for Academic and Inst'l Rights*, 547 U.S. 47, 60 (2006) (noting in a conditional funding case that Congress could have directly demanded that universities provide access to military recruiters despite their disagreement with the "Don't Ask, Don't Tell" government policy that applied to the military at the time, and that universities could take affirmative steps to distance themselves from the offending government message by posting signs so stating).

are buying a product that is exempt from applicable government standards. Absent the up front and timely disclosure, the consumer or employee has little reason to think or expect the commercial actor will deny them the benefits or services, until the denial (and thus the full weight of the harm) occurs.

Finally, any argument that these exemptions impose no real burden on third parties because government need not provide the protections of the regulations in the first place is unconvincing. The argument would go as follows: Government-mandated health benefits and non-discrimination on the basis of sexual orientation are not constitutionally required baselines. If government does not have to make these demands of commercial actors at all, it surely can make the demands subject to exemptions.

The problem with this argument is that it is based on a questionable “bitter with the sweet” theory of burdens and limits on government-conferred benefits or regulations. The argument also has huge boomerang potential; government may not be *constitutionally* required to provide these religious exemptions in the first place, under Free Exercise case law.¹⁶⁸ To credit the baseline argument when government shows solicitude for third parties’ constitutionally insufficient harms, but not when it shows solicitude for religious commercial actors’ constitutionally insufficient harms smacks of impermissible favoritism.

More fundamentally, the argument ignores the way in which government should have the power to decide, as a policy matter, whether a third-party burden is significant enough to warrant some form of government *redress*, even if it is not sufficient to trigger a constitutional *right*. The notice proposal described here is not based on an assumption that notice is constitutionally required, given the third-party burdens at stake; it is based on an argument that notice is constitutionally *allowed* as a means of protecting individuals from the potential harms of the exempted behavior. These are not the same thing, and should not depend on a unitary theory of burden.¹⁶⁹

IV. GOVERNMENT-PROVIDED NOTICE

Constitutional and other concerns about compelling private commercial actors to provide notice of exemptions might prompt government

168. See *supra* text accompanying notes 102–15. Cf. *United States v. Lee*, 455 U.S. 252, 261 (1982) (“When followers of a particular sect enter into commercial activity as a matter of choice [their personal limits] on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees.”).

169. The burden equivalence argument is much more central to arguments that granting an exemption in the first place violates the Establishment Clause, though this is beyond the scope of this Article.

to offer this notice itself. A municipality could, for example, publish a list of all businesses that comply fully with applicable non-discrimination mandates. Motivated consumers could consult the lists before seeking goods or services in that locality and could vote with their feet. Motivated citizens could use the government-provided notice to create social media and other shout outs in support of the compliant businesses' practices. In all of these cases, the information would be factual and non-misleading information relevant to a commercial transaction.

Noncompliant commercial businesses that objected to government-sponsored sites, from which their noncompliance could be inferred, might again launch freedom of religion or speech arguments. But they would have a more difficult time establishing a burden sufficient to trigger a constitutional violation. They would need to argue that the government's actions constitute a form of coercion equivalent to requiring the commercial actors *themselves* to disclose their noncompliance to make a convincing compelled speech problem. This argument would be especially difficult to make if government listed only fully compliant actors, versus offered a listing of businesses that sought and received exemptions.

Government's own speech—which such a list would constitute—arguably poses *no* free speech problem.¹⁷⁰ Government's use of its own speech to celebrate, even on viewpoint-specific grounds, private expression or conduct that comports with its favored viewpoint likely would be permissible.¹⁷¹

Arguments that even this government listing of “good businesses” should constitute a form of government censure of “bad businesses” and thus violates the noncompliant businesses' constitutional rights, would parallel the arguments made against the government in compelled notice cases. Here, the government's posting would constitute the alleged burden on expression, in place of the mandatory publication by the business itself. If the businesses have a right not to disclose their noncompliance, versus a right not to be compelled to carry a government imposed message per se, then government arguably should not be allowed to out them either.

170. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 464 (2009) (describing a permanent monument as government speech and thus not subject to First Amendment scrutiny); *see also* *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005) (noting that it matters whether the speech is the government's own, in which case it is “exempt from First Amendment scrutiny”). For a criticism of the apparent breadth of the government speech doctrine, *see* Massaro, *supra* note 119, at 401–03.

171. *But see* *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71 (1963) (holding unconstitutional a law labeling certain expression morally “objectionable” (internal quotation marks omitted)); *cf.* *Meese v. Keene*, 481 U.S. 465, 472–73 (1987) (discussing whether government can label expression “propaganda” without violating the First Amendment).

One can quickly see, however, why courts might be reluctant to embrace this reasoning. Government often uses its bully pulpit to encourage commercial practices that conform to government standards. Courts would be faced with complex issues about when government bully pulpits become government billy clubs. Also, government has an expressive interest in signaling to the public its disassociation from the message conveyed by a refusal to serve a sub-group of customers or employees or—at the least—to clarify the basis for its grant of an exemption.¹⁷² The same government interest that underlies the regulatory policy itself may support the government interest in a notice condition on the exemption. This, in turn, may promote the public's interest in a more transparent government. Thus, government listing of fully compliant businesses may be an effective and constitutional option that imposes a less restrictive burden on the noncompliant business while furthering legitimate government ends.

V. POLICY CONCERNS

Even if the notice proposals outlined here are constitutional, none of them is a perfect remedy and all would need to be considered in context. For example, many workers will not have the luxury of opting for an employer that covers contraception fully under its health care plan or simply avoiding one that does not. They do not want *notice* of noncompliance departures; they want more uniform *compliance*.

Notice of the decision to invoke an exemption from general non-discrimination laws—whether provided by the government or by the commercial actor itself—also may have multiple untoward or uncontrollable spillover effects, as is true of any expressive mandate.¹⁷³ Publicity could enhance the commercial success of the noncompliant businesses, on the one hand, or it could inspire negative economic or other reprisals that are not intended and that might be disproportionately harsh and crude.¹⁷⁴ To some businesses, mandatory notice may smack of a Scarlet

172. Compare this principle with cases that discuss a public employer's right to discipline employees where their speech damages the image and effectiveness of the employer. See *Pappas v. Giuliani*, 290 F.3d 143, 146–48 (2d Cir. 2002).

173. I am against most government measures designed to shame offenders, though the thrust of the argument is based on measures aimed at individuals versus corporate entities or businesses per se. See, e.g., Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 694, 696 (1997) (discussing spillover effects of shaming and proportionality concerns).

174. For a discussion of the potential boomerang effects of disclosure in context of political speech, see Michael D. Gilbert & Benjamin F. Aiken, *Disclosure and Corruption*, ELECTION L.J. (forthcoming 2015). For an extremely interesting discussion of the “race” of corporate entities, and how it may affect business strategies, see Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023 (2006).

Letter punishment¹⁷⁵ masquerading as fair warning to consumers and employees.¹⁷⁶

In other cases, there may be little way to provide notice that comes sooner than the commercial actor's refusal to serve and does not pose serious "shaming" consequences. A same-sex couple that enters Elane Photography presumably will learn that the business will not photograph a same-sex marriage ceremony when they seek to engage the business.¹⁷⁷ A mandatory notice that would come sooner—a sign on the door or in the business's web-based or other advertisements—would be more effective in steering the couple away from the business before making the trip there, entering the store, and suffering the indignity of a refusal. But it also is sure to have greater peripheral publicity effects than a face-to-face, on-site refusal.

Of course, demanding that the business put a sign on the door produces its own ironies given the civil rights history of businesses that proudly posted signs that read: "We Reserve the Right to Refuse Service to Anyone," or worse, "Whites Only." These self-imposed notices were based on the belief that such refusals too were justified by private liberty, even religious liberty, interests. Yet for government to require signs may raise concerns about religious persecution or sectarian boycotts facilitated by on-site notices that alert customers to the religion of the proprietors.

These are very serious objections to on-site notice requirements. But the concerns of those who will not be served, who will learn only after arriving on a Hawaiian island that they will be denied a room previously reserved at a local bed and breakfast,¹⁷⁸ or will not receive certain health care benefits or other services, are likewise serious matters. And these are real, not far-fetched or historically distant examples.

I conclude that the constitutional and policy objections are not weighty enough to rule out context-specific, narrowly tailored and factual disclosure mandates. Disclosure in certain cases can be a less burden-

175. See Massaro, *supra* note 173, at 694 (arguing against government shaming, in the context of individual criminal sanctions). Private shaming also can have extensive, potentially merciless consequences. See JON RONSON, *SO YOU'VE BEEN PUBLICLY SHAMED* (2015) (discussing social media shaming and the potentially harsh consequences on shamed persons).

176. See *Doe v. Reed*, 561 U.S. 186, 203 (2010) (Alito, J., concurring) (discussing possible harassment of petition signers as basis for upholding right to anonymity); see also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (discussing the chilling effect of compelled disclosure of names of rank and file members). Of course social media options already exist that allow private parties to inexpensively and widely out the commercial actor in any event. The request for an exemption itself is not a wholly secret act, and the refusal to serve or provide benefits to employees or customers is a non-secret message that the commercial actor itself must deliver to a person subject to no constitutional constraint against publicizing the refusal.

177. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013).

178. See *supra* text accompanying note 33.

some alternative to denying exemptions altogether, and a means of mitigating the third-party and social harms of regulatory patchworks.

The goal and primary effect of the notice mandate, however, must be patron/employee notification, not commercial actor shaming or isolation. Every effort should be made to assure that the notice requirement is tied to the potential lack-of-notice harms and that such wider impacts are contained. Thus, in the case of Elane Photography, the proper notice may not be a sign on the door, but a disclaimer in any advertisements or brochures that specifically describe the wedding or engagement photography services. That notice might read: “Elane Photography provides photography services for marriages and engagements between one man and one woman.”

All residual spillover or unintended effects of such a mandatory factual disclosure obviously could not be eliminated: other potential customers may see the disclaimer and decide to avoid the photographer or even decide to steer business there. But these publicity and spillover consequences may occur in any event—whether through social media or word of mouth, once the business invokes its exemption and refuses to provide photography services for a same-sex couples’ marriage or engagement. This is not a case in which secrecy for religious conduct is feasible or even allowed. Also, the same-sex couple may be spared the indignity of entering the business and being denied services, if the notice is accessible via the website or other commercial advertisements. Finally, the residual consequences of this more tailored notice requirement may be a reasonable price to pay for choosing to do business in a plural society *and* being allowed to affirmatively deny service or benefits that other commercial actors are required by law to offer.

CONCLUSION

In a liberal democratic order, religious freedom matters, as do the risks of unreasonable government or private interference with religious-based conduct. This is so even when religious freedom is expressed in working lives and in public, business practices. Yet neither our Constitution nor public policy ever has afforded individuals a free pass for religious conduct, especially when engaged in the commercial arena.

Not all government mandates that burden religious conduct are equally coercive. Exemption from general rules, subject to factual notice, is not the same thing as a prohibition of an exemption. A regulatory nudge is not always a government shove, even when it feels uncomfortably sharp-elbowed.

As modern courts confront invigorated constitutional and statutory objections to generally applicable laws by religious commercial actors, they must balance these baseline concerns and should do so cautiously. A

great deal of regulatory power is at stake, and strict judicial scrutiny of that regulatory power may not be the best option.

When courts do uphold government power to allow religious-based exemptions, they should consider seriously allowing government to do so subject to the notice conditions described here. Moreover, religious actors should consider these conditions as the less restrictive price of doing business in a plural world, lest they push government to the more burdensome option of denying the exemptions altogether when allowed to do so. Government now must explore new routes through the pluralism thicket, and courts should offer them constitutional room for these experiments.