Not My Boss’s Business

The Supreme Court’s holding in *Hobby Lobby* and beyond

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Setting up the case in Hobby Lobby

- This case is about RFRA, not the First Amendment
- Arguments used to support government’s position based on previous First Amendment case law
Setting Up the Final Outcome

- Alito clearly signals where he is going with his decision early on
  - RFRA was Congress’ response to the *Smith* decision – (RFRA: “very broad protection for religious liberty”)
  - *City of Boerne* case and subsequent congressional action (“in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment”)
Facts and Word Choice Matter

- What happens when there are statements made that affect women, but women are missing from the picture?
  - “The HRSA in turn consulted the Institute of Medicine, a nonprofit group of volunteer *advisers*, in determining which preventive services require.”

- “The owners…believe that life begins at conception regard these four methods as causing abortion, *but federal regulations*, which define pregnancy as beginning as implantation.”

- The opinion uses the word "women" or "woman" a mere 13 times in 49 pages
What is the future of the RFRA test

Which For-Profits can bring claims under RFRA?

- Unclear boundaries, what is the definition of “closely held”/”small business owners”

- Ginsburg dissent: “‘Closely held’ is not synonymous with ‘small.’”

- And what does this mean for corporate law?
  - “Corporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.”

- What about the women who are employees of these companies
Substantial Burden

- No real analysis of whether burden is substantial. “little trouble”

- What happens to the question of sincerity of belief? Conflation of two different issues?

- Ginsburg’s dissent: what’s the difference with insurance coverage versus paying salary that is used to access birth control
Compelling Interest

- Test: “look to the marginal interest in enforcing the contraceptive mandate in these cases”
- Alito asserts it’s an “arguable” issue
- No grappling with how the requirement actually improves health and equality for women
Least Restrictive Means

- This test is “exceptionally demanding” – but what does it mean?

- Flips the test: Government may have to spend extra for Hobby Lobby’s religious exercise
Where do we stand with RFRA?

- Suggestion that holding is restricted to insurance coverage of birth control

- What’s the message here?
  - “Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases)”
  - “The Government has a compelling interest in providing an equal opportunity to participate in the work force without regard to race…”
What can we do now?

- What was missing in this decision?
- What can you do to make sure women’s voices are being heard?
- What’s next?
The true cost of birth control:

6 days of work

The pill

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\times & & & & \\
\end{array}\]

11 days of work

The ring

\[\begin{array}{cccccc}
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1 month of work

I.U.D.

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For a minimum-wage worker, paying for birth control could take days or even weeks. This is why we need to #FixHobbyLobby