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‘Exemptions’ & Court-Sanctioned Discrimination: The Post-*Hobby Lobby* Tension Between the Religious Freedom Restoration Act (“RFRA”) & Federal Anti-Discrimination Laws

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I. Introduction

In *Burwell v. Hobby Lobby Stores, Inc.*,[1] an all male Supreme Court majority held that closely held corporations controlled by religious families could not be required to pay for contraceptive coverage.[2] While purporting to recognize that all individuals have the constitutional right to contraceptives,[3] the *Hobby Lobby* Court effectively eliminated the right for female employees in religious corporations to access contraceptive coverage through employer-covered health plans.[4] This

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[1] *See* Burrell v. Hobby Lobby Stores, Inc.,134 S. Ct. 2751 (2014).
[2] *Id.* at 2751.
[3] *Id.* at 2779–80 (citing Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965)).
[4] *Id.* at 2780 (“. . . [the Department of Health and Human Services] tells us that ‘[s]tudies have demonstrated that even moderate copayments for preventive services can deter patients from receiving those services.’”) (quoting Brief for the Petitioners at 50, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13–354) (additional internal quotation marks omitted)).

analysis will consider how *Hobby Lobby*, in practice, violates federal anti-discrimination law under the Religious Freedom Restoration Act ("RFRA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), and the Pregnancy Discrimination Act of 1978 ("PDA"). As an avenue around *Hobby Lobby*'s seemingly dire consequences, activists ought to bring a Title VII challenge to employer insurance policies that deny women the right to contraceptive coverage.[5]

II. The Trouble with *Hobby Lobby*

The *Hobby Lobby* suit was a consolidated action brought by families who own three closely held for-profit religious corporations and have "sincere Christian beliefs that life begins at conception."[6] The families sued the Department of Health and Human Services ("HHS") and other federal officials under RFRA seeking to enjoin application of the Affordable Care Act's ("ACA") contraceptive mandate insofar as it requires them to provide health coverage for certain "objectionable contraceptives."[7]

In *Hobby Lobby*, the Supreme Court elected to substantially broaden RFRA's reach, thus dealing a victory to religious corporations. RFRA prohibits the government from imposing a substantial burden on a person's exercise of religion unless the government proves it has a compelling interest and has chosen the least restrictive means of furthering that interest.[8] In his majority opinion, Justice Alito first rejected the government's argument that the RFRA did not cover for-profit corporations. Alito wrote that federal law includes corporations within the definition of

[5] *See* Carey v. Population Servs., Int'l, 431 U.S. 678, 686 (1977) (finding that regulations imposing burden on decision as fundamental as whether to bear or beget a child may be justified only by compelling state interests and must be narrowly drawn to express only those interests); *see also* Eisenstadt v. Baird, 405 U.S. 438, 454 (1972).
[6] *Hobby Lobby*, 134 S. Ct. at 2775.
[7] *Id.* at 2774–75 (the "objectionable contraceptives" in question are those that "may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus.").
[8] *See* 42 U.S.C. § 2000bb-1(a)–(b) (2015); *see also Hobby Lobby*, 134 S. Ct. at 2754.

"persons."[9] Second, in determining whether the ACA's contraceptive coverage requirement imposed a "substantial burden," Alito found that the companies faced "severe economic consequences" unless they provided the mandated insurance coverage.[10] Specifically, the Court found that if the companies refused to provide contraceptive coverage, they would have to pay a total of $793 million.[11] Alito concluded that because the ACA's contraceptive requirement "forces [the companies] to pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs."[12]

Thus, ultimately couching the issues of "public health" and "gender equality,"[13] the Supreme Court dealt a heavy blow to reproductive health advocates. Indeed, scholars have argued that Alito's opinion represents a significant departure from other Supreme Court jurisprudence that has recognized (and even exalted) a woman's right to privacy and reproductive choice.[14] Scholars at the Women's Law Center noted that the *Hobby Lobby* Court "seems to have set up different rules for reproductive rights when the rights of for-profit corporations are at stake."[15] For example, the *Hobby Lobby* Court wrote, "[t]he owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the Nation."[16] This language is in stark and stunning distinction to a quote from the Court's 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which

[9] *Hobby Lobby*, 134 S. Ct. at 2768.
[10] *Id.* at 2757.
[11] *Id.* at 2776 ("These sums are surely substantial.").
[12] *Id.* at 2779.
[13] *Id.* (quoting Brief for the Petitioners at 46, 49, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13–354) (internal quotation marks omitted)).
[14] *See* Hillary Schneller, *Rewriting Hobby Lobby: If Women Were People, Birth Control Was Health Care, and Sex Discrimination Was Discrimination*, NAT'L WOMEN'S L. CENTER (July 8, 2014), http://www.nwlc.org/our-blog/rewriting-hobby-lobby-if-women-were-people-birth-control-was-health-care-and-sex-discrimina.
[15] *Id.*
[16] *Hobby Lobby*, 134 S. Ct. at 2783.

reads: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[17] The stark contrast between these two quotes (nearly twelve years apart) illustrates the *Hobby Lobby* Court's woeful disregard for women's rights at the hands of religious liberty and corporate interests. Tellingly, Justice Ginsburg begins her infamous *Hobby Lobby* dissent with the aforementioned *Casey* quotation, reinforcing the disconnect between Alito's majority and women's reproductive health concerns.[18]

Justice Ginsburg's scathing dissent points out, among a host of other things, that the *Hobby Lobby* majority has entered a minefield.[19] Joined by Justices Sotomayor, Breyer and Kagan, Justice Ginsburg makes a forceful case for contraceptive coverage as not only a right but also an economic necessity for women in the workforce.[20] Ginsburg states,

> Even if one were to conclude that [the corporations at issue] meet the substantial burden requirement, the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence.[21]

Ginsburg also argues that the Court's designation of corporations as akin to people who can exercise a religion is a slippery slope. "There is little doubt" Ginsburg writes, "that RFRA claims will proliferate, for the Court's expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith."[22]

Ginsburg reminds us that, "by law, no religion-based criterion can restrict the work force of

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[17] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992).
[18] *See generally* Schneller, *supra* note 14.
[19] *See Hobby Lobby*, 134 S. Ct. at 2787–88.
[20] *See generally id.* at 2788–90.
[21] *Id.* at 2799.
[22] *Id.* at 2797.

for-profit corporations."[23] Although Justice Alito's majority notes that corporations seeking to engage in, for example, racial discrimination, cannot hide behind the shield of RFRA, the Court does not address possible tensions between RFRA and Title VII.[24] Neither does Alito address anything about RFRA's tensions with sex, sexual orientation, or gender-identity discrimination. In contrast, Ginsburg's dissent recognizes the reality that religious employers may make decisions about women's health care and reproductive freedom in violation of Title VII. The Supreme Court has held that while Title VII requires reasonable accommodation of an employee's religious exercise, such accommodation must not come at the expense of other employees."[25] Ginsburg's dissent illuminates the harsh and untenable tension that the *Hobby Lobby* majority created between RFRA and Title VII.

III. Title VII of the Civil Rights Act & The Pregnancy Discrimination Act Contravene *Hobby Lobby*'s Holding

Title VII prohibits employers from discriminating on the basis of sex, including enacting policies that, while gender neutral on their face, disproportionately hurt either men or women.[26] In 1978, Congress passed the PDA to clarify that Title VII was meant to protect employees from discrimination based on pregnancy.[27] Under the PDA, employers are required to treat women affected by pregnancy "the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."[28] In *International Union v. Johnson Controls, Inc.,* the Supreme Court held that discrimination on the basis of *potential pregnancy* was discrimination on the basis of sex under Title

[23] *Id.* at 2795 (citing 42 U.S.C. §§ 2000e(b), 2000e-1(a), 2000e-2(a) (2015)).
[24] *Id.* at 2783.
[25] *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 80–81 (1977).
[26] *See* 42 U.S.C. § 2000e-2(a)(1)–(2).
[27] 42 U.S.C. § 2000e(k).
[28] *Id.*; *see also* AT & T Corp. v. Hulteen, 556 U.S. 701, 719 (2009).

VII and the PDA.[29] Nevertheless, federal courts remain conflicted as to whether contraceptive coverage (or the denial of said coverage) falls under the protections of the PDA.[30] The Supreme Court has yet to rule on the precise issue of whether denial of contraceptive coverage violates the PDA.

However, guidance from the Equal Employment Opportunity Commission ("EEOC") suggests that denial of contraceptive coverage *does* amount to sex-based discrimination under Title VII and the PDA. In December 2000, the EEOC issued a Commission ruling explicitly stating that Title VII's prohibition against sex discrimination reaches employees whose employer-sponsored health insurance plans provide coverage of other prescription drugs and preventive services but fail to provide coverage of contraceptives.[31] The Commission resoundingly concluded that an employer's exclusion of prescription contraceptives violated the PDA *whether the contraceptives were used for birth control or for other medical purposes.*[32] The Commission noted that Congress rationally would have intended to include contraceptive coverage within its PDA protections.[33] Federal courts are not required to adopt EEOC guidance; rather, courts may use such guidance as persuasive authority.[34]

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[29] *See* 499 U.S. 187, 199 (1991).

[30] *See, e.g.*, Stocking v. AT & T Corp., 436 F. Supp. 2d 1014, 1016 (W.D. Mo. 2006) (concluding that plaintiffs have a sound PDA claim based on the employer's denial of certain contraceptives in its health plan, and also noting, "the limitation of prescribed contraceptives applies to women only, under current availability conditions, and also disregards the importance of pregnancy or freedom from that condition for women, for health conditions . . . ."); Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1276–77 (W.D. Wash. 2001) (same); *but see In re* Union Pac. R.R. Emp't Practices Litig., 479 F.3d 936, 942 (8th Cir. 2007) (holding that contraception is not "related to" pregnancy for PDA purposes because, like infertility treatments, contraception is a treatment that is only indicated prior to pregnancy).

[31] Coverage of Contraception, 2000 WL 33407187, at *1, *5 (Equal. Emp't Opportunity Comm'n Dec. 14, 2000) *available at* http://www.eeoc.gov/policy/docs/decision-contraception.html.

[32] *Id.* at *2–4 (emphasis added).

[33] *Id.* at *3; *see also* 42 U.S.C. § 2000e(k) (1991) ("This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion . . . .").

[34] *See* Michelle S. Silverman, *EEOC Issues Pregnancy Discrimination Enforcement Guidance*, NAT'L L. REV. (July 16, 2014), http://www.natlawreview.com/article/eeoc-issues-pregnancy-discrimination-enforcement-guidance (noting that EEOC enforcement guidelines do not receive deference pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984)); *see also* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 n.6 (2002) ("[W]e have held that the EEOC's interpretive guidelines do not receive *Chevron* deference.").

Nevertheless, following the 2000 EEOC guidance, several federal courts have held that employers under Title VII, as amended by the PDA, must cover contraceptives.[35]

Less than one month after the *Hobby Lobby* ruling, the EEOC issued new guidance on pregnancy discrimination in the workplace.[36] The guidance reaffirms that employers may not discriminate against women by reason of pregnancy or capacity to become pregnant.[37] It confirms that discrimination against an employee because she "intends to, is trying to, *or simply has the potential to become pregnant* is . . . illegal discrimination."[38] The new guidance *explicitly* states that a health insurance plan facially discriminates against women on the basis of sex if it excludes prescription contraception but otherwise provides comprehensive coverage.[39] This language is crucial for activists and attorneys hoping to dismantle *Hobby Lobby* through a challenge to a religious employer's facially discriminatory health plan. For example, taking from the 2014 EEOC guidance, if a religious employer's health insurance covers preventive care for medical conditions other than pregnancy, such as vaccinations, physical examinations, and/or preventive dental care, then prescription contraceptives also must be covered pursuant to Title VI.

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[35] *See, e.g.,* Cooley v. DaimlerChrysler Corp., 281 F. Supp. 2d 979, 984–85 (E.D. Mo. 2003) (holding that the exclusion of prescription contraceptives from an employee insurance plan, while "seemingly neutral" placed a burden on women since only they have the capacity to become pregnant and the only prescription contraceptives available were for women); *Erickson*, 141 F. Supp. 2d at 1268–71 (finding that employer's exclusion of contraceptive coverage while offering otherwise comprehensive health care coverage was sex discrimination under Title VII).

[36] EQUAL OPPORTUNITY EMP'T COMM'N, NO. 915.003, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES, (2014), *available at* http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#risk.

[37] *Id.* at 7 ("The Supreme Court has held that Title VII "prohibit[s] an employer from discriminating against a woman because of her capacity to become pregnant." (quoting Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc., 499 U.S. 187, 206 (1991)).

[38] *Id.* (emphasis added) (quoting Pacourek v. Inland Steel Co., 858 F. Supp. 1393, 1401 (N.D. Ill. 1994); Batchelor v. Merck & Co., Inc., 651 F. Supp. 2d 818, 830–31(N.D. Ind. 2008) (plaintiff was member of protected class under PDA where her supervisor allegedly discriminated against her because of her stated intention to start a family); Cleese v. Hewlett–Packard Co., 911 F. Supp. 1312, 1317–18 (D. Or. 1995) (plaintiff, who claimed defendant discriminated against her because it knew she planned to become pregnant, fell within PDA's protected class).

[39] *See* EQUAL OPPORTUNITY EMP'T COMM'N, *supra* note 35, at 8 (quoting *Erickson*, 141 F. Supp. 2d at 1272 ("In light of the fact that prescription contraceptives are used only by women, [defendant's] choice to exclude that particular benefit from its generally applicable benefit plan is discriminatory.")).

IV. Post-*Hobby Lobby* Legislation & Guidance

Also in the wake of *Hobby Lobby*, House Democrats swiftly introduced legislation that would prevent employers from denying birth-control coverage to women.[40] The bill, entitled "The Protect Women's Health from Corporate Interference Act of 2014," would prohibit for-profit companies with group health plans from using religious beliefs to deny employees contraception coverage or any other vital health service required by federal law.[41] Specifically, the intended impact of the bill is to (1) stop employers from being able to single out women's health for discriminatory treatment; (2) stop employers from being allowed to impose their religious beliefs on their employees; and (3) protect employees from employer attempts to refuse to provide other types of health care coverage.[42] The bill tracks the language of Justice Ginsburg's dissent and artfully highlights the potentially unlawful effects of the *Hobby Lobby* ruling. For example, the bill explicitly states, "[b]y allowing employers who otherwise cover preventive services to refuse to cover critical women's services in this manner, the Court has sanctioned gender discrimination. Employers must not be allowed to discriminate against their employees in this manner."[43]

This is powerful language. Although the bill is presently sitting in a subcommittee on Health, Employment, Labor and Pensions (as of November 17, 2014),[44] it provides fertile ground for activism. Questioned about the new bill, Cecile Richards, President of Planned Parenthood Action Fund, states, "[t]his bill would help close the door for denying contraception before more

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[40] Ferdous Al-Farque, *House Dems Propose Bill to Counter Hobby Lobby Ruling*, THE HILL (July 9, 2014, 10:15 AM), http://thehill.com/policy/healthcare/211684-house-dems-propose-bill-to-counter-hobby-lobby-ruling.
[41] Protect Women's Health from Corporate Interference Act of 2014, H.R. 5051, 113th Cong. (2014).
[42] *Id.*; *see also Protect Women's Health from Corporate Interference Act*, U.S. SENATOR PATTY MURRAY, http://www.murray.senate.gov/public/_cache/files/30554052-0f84-485a-babc-ccc04af85bb6/protect-women-s-health-from-corporate-interference-act---one-page-summary---final.pdf (last visited May 11, 2015).
[43] *Protect Women's Health from Corporate Interference Act*, *supra* note 42.
[44] *Related Bills – H.R.5051 – 113th Congress (2013-2014): Protect Women's Health from Corporate Interference Act of 2014*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/house-bill/5051/related-bills (last visited June 22, 2015).

corporations can walk through it."[45] Indeed, the bill's language is an indication of the intensity of feeling stemming from the *Hobby Lobby* ruling, and signifies the on-going debate about RFRA and federal anti-discrimination laws in the United States.

V. Between RFRA & Title VII, Where Does the Scale Tip?

The aforementioned case law, EEOC guidance, and proposed legislation signify the viability of a successful Title VII challenge to employer insurance policies that deny contraceptive coverage. Although the *Hobby Lobby* ruling holds that the ACA cannot require closely held corporations to follow its contraception mandate, Title VII and the PDA do require employers to provide contraceptive coverage.[46] Because access to contraceptive coverage is based in the fundamental rights of liberty and privacy,[47] RFRA *cannot* trump those constitutional guarantees.

Indeed, the Supreme Court has recognized that the right to free religious exercise in a workplace cannot be exercised at the expense of other employees.[48] Thus, although $793 million in fines per year for denying contraceptive coverage may be a substantial sum of money,[49] it should *not* come at the expense of denying female employees the fundamental right of reproductive choice.[50]

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[45] Al-Farque, *supra* note 40.
[46] *See generally* Alexandra Brodsky & Elizabeth Deutsch, *How Civil-Rights Law Could Overturn Hobby Lobby*, BLOOMBERG VIEW (July 21, 2014, 9:03 AM), http://www.bloombergview.com/articles/2014-07-21/how-civil-rights-law-could-overturn-hobby-lobby.
[47] *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977); Eisenstadt v. Baird, 405 U.S. 438, 454 (1972); Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965).
[48] *See* Trans World Airlines v. Hardison, 432 U.S. 63, 85 (1977) ("[T]he paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.").
[49] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2757, 2759 (2014).
[50] *See id.* at 2779–80 ("[W]omen (and men) have a constitutional right to obtain contraceptives . . . ." (citing Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965))); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992) ("It is settled now … that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood … as well as bodily integrity" (citing Moore v. E. Cleveland, 431 U.S. 494 (1977); Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535 (1942); Washington v. Harper, 494 U.S. 210, 221–22 (1990); Winston v. Lee, 470 U.S. 753 (1985); Rochin v. California, 342 U.S. 165 (1952))).

Columbia Law Professor Katherine Franke agrees:

> By treating a right to reproductive health care as negotiable … the Court attempts to distinguish it from other forms of health care like transfusions and vaccinations, and other forms of discrimination, like race or sexual orientation. But this effort to limit the broad reach of today's decision only reinforces the separation and erosion of women's right to sexual liberty and equality.[51]

Finally, although the *Hobby Lobby* ruling suggests that women whose employers deny contraceptive coverage may be able to access said coverage on the open market, low-income women who want coverage for contraceptive methods opposed by their employers are out of luck.[52]

In its brief, HHS demonstrated that "the [contraceptive] mandate serves a compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing,"[53] and "[s]tudies have demonstrated that even moderate copayments for preventive services can deter patients from receiving those services."[54] Ginsburg's dissent further highlights the financial impact on low income women who wish to receive non-employer covered contraceptives: "the cost of an [intra-uterine device, or 'IUD'] is nearly equivalent to a month's full-time pay for workers earning the minimum wage."[55] IUDs can cost over $1,000 irrespective of insurance.[56] Hobby Lobby Stores pays its full-time employees roughly $14 per hour, which amounts to about $560 a week before taxes. Part-time Hobby Lobby employees make about $9 per hour.[57]

Thus, with respect to the fundamental right to reproductive choice the scale must tip in favor

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[51] Cindy Gao, *Columbia Law School Experts Available to Comment on U.S. Supreme Court's Affordable Care Act Decisions*, GENDER & SEXUALITY L. BLOG (June 30, 2014), http://blogs.law.columbia.edu/genderandsexualitylawblog/2014/06/30/columbia-law-school-experts-available-to-comment-on-u-s-supreme-courts-affordable-care-act-decisions-hobby-lobby-and-conestoga-wood-specialties//.
[52] *See* Tara Culp-Ressler, *Ginsburg Got It Right: Poor Women are Getting Screwed by Hobby Lobby*, THINK PROGRESS (July 1, 2014, 12:46 PM), http://thinkprogress.org/health/2014/07/01/3455185/hobby-lobby-low-income-women/.
[53] *Hobby Lobby*, 134 S. Ct. at 2779 (citations omitted).
[54] Brief for the Petitioners at 50, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13–354) (internal quotation marks omitted).
[55] *Hobby Lobby*, 134 S. Ct. at 2800 (Ginsburg, J., dissenting).
[56] *See* Culp-Ressler, *supra* note 52.
[57] Culp-Ressler, *supra* note 52.

of Title VII and the PDA. Of course, there may be instances where RFRA protections would allow employers to restrict certain workplace activities for the sake of religious beliefs. For example, there is no fundamental right to eat pork on the employer's premises (Jewish and Muslim prohibitions) or to drinking caffeine (a common Mormon prohibition). However, a woman's right to contraceptive coverage is fundamental and non-negotiable.[58] RFRA cannot be a vehicle to deny women fundamental rights to reproductive choice.

VI. Conclusion

The *Hobby Lobby* ruling has created an untenable tension between RFRA and federal anti-discrimination law. Scholars like Professor Katherine Franke and Columbia Research Fellow Kara Loewentheil emphasize the importance of activism *now* to right the potential wrongs of *Hobby Lobby*. "The problem with these decisions," Franke and Loewentheil commented, "is that they allow religious believers to create their own laws."[59]

Advocates, activists, and scholars alike must utilize Justice Ginsburg's dissent and the aforementioned jurisprudence about the PDA to mount a challenge to the *Hobby Lobby* ruling as soon as practicable. Alito's majority overlooked women's rights under Title VII, and refused to consider the disparate impact that its ruling would have on low-income women. Denying contraceptive coverage to female employees places an undue burden on their fundamental rights to reproductive choice. For the aforementioned reasons, post-*Hobby Lobby* activism continues to gain momentum, and promises – for better or worse – to ignite an arguably complacent post-feminist movement.

[58] Culp-Ressler, *supra* note 52.
[59] Gao, *supra* note 51.