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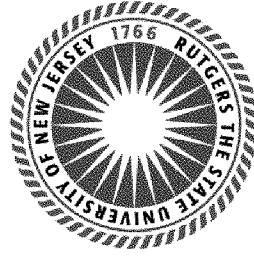
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THE AFTERMATH OF *HOBBY LOBBY*: HSAs AND HRAs AS THE LEAST RESTRICTIVE MEANS

EDWARD A ZELINSKY

I. Introduction

In *Burwell v. Hobby Lobby Stores, Inc.*,¹ the United States Supreme Court held that the Religious Freedom Restoration Act of 1993 (RFRA)² does not require closely-held corporations' employer-sponsored medical plans to provide forms of contraception that shareholders of such corporations object to on religious grounds. The question now raised is how the President, Congress, and the departments of Health and Human Services (HHS), Treasury and Labor, ought to respond to the *Hobby Lobby* decision.

The best alternative is to require any employer which objects to providing contraception, to fund independently-administered health savings accounts (HSAs)³ or health reimbursement arrangements (HRAs) for their respective employees.⁴ An HSA or HRA permits the covered employee to spend employer-provided, pre-tax healthcare dollars on any medical service the

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

² 42 U.S.C. §2000bb (2012).

³ I.R.C. § 223 (LexisNexis 2014). For a discussion of health savings accounts ("HSAs"), see EDWARD A. ZELINSKY, THE ORIGINS OF THE OWNERSHIP SOCIETY: HOW THE DEFINED CONTRIBUTION PARADIGM CHANGED AMERICA (2007) at 83-84; JOHN H. LANGBEIN ET AL., PENSION AND EMPLOYEE BENEFIT LAW at 60-62 (5th ed. 2010).

⁴ Rev. Rul. 2002-41, 2002-2 C.B. 75. For a discussion of health reimbursement arrangements, see ZELINSKY, *supra*, note 3 at 81-82.

employee chooses without implicating the employer in the employee's decision. The HSA/HRA alternative respects the religious rights of sponsoring employers since, unlike conventional insurance or self-insured health plans, the employer's plan does not provide a menu of choices, which frames the employees' decisions. The HSA/HRA approach respects the autonomy of employees to spend healthcare dollars on medical services they select, including services to which the employer objects.

For RFRA purposes, HSAs and HRAs are analogous to cash wages and allow the employee to spend this money as she chooses. Under the HSA/HRA approach, there would be no need for the employer to become involved with its employee's decisions on contraception. The employer could establish an HSA or HRA for each employee to spend as they wish. Such accounts are the "least restrictive means"⁵ by which the federal government can assure women have the ability to obtain the contraception they seek with employer-provided, pre-tax healthcare dollars without burdening the religious beliefs of employers who object to such contraception. The HSA/HRA response to *Hobby Lobby* is a compelling compromise.

II. The *Hobby Lobby* and *Conestoga Wood* Cases

"Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination."⁷ They are also successful entrepreneurs—Norman Hahn's story is a classic American success saga. As a young man, he started wood working in his garage. Today, Conestoga Wood Specialties Corporation, a Pennsylvania corporation wholly-owned by the Hahn family, has 950 employees.⁸

The story of the Green family is similar. As a young man, "David Green started an arts-and-

⁵ 42 U.S.C. § 2000bb-1(b)(2) (1993).

⁶ The *Hobby Lobby* case was heard by the U.S. Court of Appeals for the Tenth Circuit. The *Conestoga Wood* case was heard by the U.S. Court of Appeals for the Third Circuit. The U.S. Supreme Court consolidated the two cases and decided them together.

⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 U.S. 2751, 2764 (2014).

⁸ *Id.*

craft store that has grown into a nationwide chain called Hobby Lobby.”⁹ Today, Hobby Lobby Stores, Inc., an Oklahoma corporation, has 500 stores nationwide and “more than 13,000 employees.”¹⁰ Hobby Lobby remains closely-held by the Green family who are strongly-committed Christians.¹¹ One of David Green’s sons started Mardel, a chain of 35 Christian bookstores that employ close to 400 people.¹² Mardel is also a closely-held Oklahoma corporation.¹³

Conestoga Wood, Hobby Lobby and Mardel all provide medical insurance to their employees. The Hahns and the Greens do not oppose all birth control.¹⁴ The families oppose abortion on religious grounds. They classify so-called “morning after” pills and certain intrauterine devices as religiously unacceptable abortion devices rather than permissible forms of birth control.¹⁵

Under the Patient Protection and Accountable Care Act of 2010 (ACA),¹⁶ the medical insurance offered by employers like Conestoga Wood, Hobby Lobby and Mardel must meet certain standards of “minimum essential coverage.”¹⁷ Pursuant to their administrative authority under ACA, the Secretaries of Health and Human Services, Labor and Treasury, decreed that such minimum essential coverage requires an employer-sponsored medical plan covered by ACA to offer all 20 methods of FDA-approved contraception.¹⁸ These required methods include the morning after pills and intrauterine devices, which the Hahns and the Greens consider to constitute abortion.

⁹ *Id.* at 2765.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 2766.

¹⁵ *Id.*

¹⁶ Patient Protection and Affordable Care Act, 124 Stat. 119 (2010) (enacted).

¹⁷ I.R.C. §§ 4980D, 4980H; *see also* 42 U.S.C. § 300gg-13(a)(4). This is the codification of § 2713(a)(4) of the Public Health Services Act as amended by ACA. These provisions are incorporated into the Internal Revenue Code by I.R.C. § 9815(a) and are incorporated into the Employment Retirement Income Security Act of 1974 (ERISA) by ERISA § 715(a), 29 U.S.C. § 1185d(a).

¹⁸ 45 C.F.R. § 147.130(a)(1)(iv). Equivalent regulations were issued by the Departments of Treasury and Labor as 26 C.F.R. § 54.9815-2713(a)(1)(iv) and 29 C.F.R. § 2590.715-2713(a)(1)(iv). *See also* Health Resources and Services Administration, Women’s Preventive Services Guidelines. These guidelines require that a qualified health plan must provide, *inter alia*, at no cost “[a]ll Food and Drug Administration approved contraception methods.” These approved methods include the IUDs, Plan B and Ella to which Hobby Lobby, Mardel and the Greens object on religious grounds.

If Conestoga Wood, Hobby Lobby and Mardel do not provide medical coverage to their respective work forces, the corporations will be subject to substantial monetary penalties under the ACA.¹⁹ If these corporations offer medical coverage without providing four types of contraception, including morning after pills and intrauterine devices, the corporations will be subject to yet other penalties under the ACA for failing to provide minimum essential coverage.²⁰ To avoid these penalties, the Greens, the Hahns, Mardel, Hobby Lobby, and Conestoga Wood all sued under RFRA.²¹

While the regulations under the ACA generally require employers covered by the ACA to offer contraception to their employees, those regulations exempt churches from providing contraceptive services to which they object.²² At the time of the Court's *Hobby Lobby* decision, these regulations also *accommodated* religiously-affiliated nonprofit organizations other than churches by allowing such non-church religious organizations to certify their objections to contraception.²³ As a result, the insurer or third-party administrator who runs the medical plan for a self-certifying religious organization must, at its own expense, provide the contraception to the employees of such organization. However, at the time of the *Hobby Lobby* decision, there was no statutory or regulatory exemption for companies like Hobby Lobby, Conestoga Wood or Mardel, namely, closely held for-profit corporations whose owners hold religious objection to some or all forms of contraception.

III. The Majority Opinion

¹⁹ I.R.C. § 4980H (LexisNexis 2014) (see above notes on publication date).

²⁰ I.R.C. § 4980D (LexisNexis 2014) (see above note on publication date).

²¹ In the courts below, they also raised claims under the First and Fifth Amendments of the U.S. Constitution and under the Administrative Procedure Act. Burwell v. Hobby Lobby, Inc., 134 S. Ct. 2751 at 2765-2766. The U.S. Supreme Court only addressed RFRA.

²² 45 C.F.R. § 147.131(a).

²³ 45 C.F.R. § 147.131(b)-(e). Equivalent regulations were issued by the Departments of Treasury and Labor as 26 C.F.R. § 54.9815-2713 and 29 C.F.R. § 2590.715-2713. As discussed *infra*, after the *Hobby Lobby* decision, the three federal departments – Health and Human Services, Treasury, and Labor – moved to expand these regulatory exemptions. However, the regulations do not provide any option for a non-church religious organization, which self-administers a self-funded health plan.

Writing for himself and four of his colleagues in *Hobby Lobby*, Justice Samuel Alito held that the RFRA forbids federal regulations mandating provisions for the contraception to which the Greens and the Hahns object. In reaching this conclusion, the Court held that the RFRA applies to closely-held corporations like Hobby Lobby, Mardel, and Conestoga Wood; that the challenged regulations impose a substantial burden on religion by requiring these closely-held corporations to provide as “minimum essential coverage” the four types of contraception to which the corporations’ respective shareholders object on religious grounds; and that the federal government’s compelling interest in making these forms of contraception available could be implemented through less restrictive means that would not burden the Hahns’ and Greens’ religious beliefs. The federal government could itself provide contraception to women whose employers’ object to providing it. Alternatively, the federal government could extend the same regulatory accommodation which allows religious, non-church, non-profit corporations to withhold contraception that contradicts their religious beliefs to Hobby Lobby, Mardel, and Conestoga Wood. Under this exemption, an employer’s certification of religious opposition to some or all forms of contraception shifts the obligation to the insurer or third-party administrator of the employer’s health plan to provide such contraception.²⁴

The RFRA applies to “person[s].”²⁵ According to the Federal Dictionary Act,²⁶ the term “person” includes “corporations...unless the context indicates otherwise.” Since the federal government concedes that non-profit corporations are “persons” covered by the RFRA,²⁷ there is no warrant, according to Justice Alito, for concluding that, profit-making corporations like Hobby Lobby, Mardel and Conestoga Wood, are not also “persons” covered by the RFRA. In Justice

²⁴ As discussed *infra*, this approach was embraced after the *Hobby Lobby* decision by the Departments of Health and Human Services, Labor, and Treasury.

²⁵ 42 U.S.C. §2000bb-1(a).

²⁶ 1 U.S.C. § 1 (2014).

²⁷ Burwell v. Hobby Lobby, Inc., 134 U.S. 2751, 2768, 2771 (2014).

Alito's words, "no conceivable definition of the term ["person"] includes natural persons and non-profit corporations, but not for-profit corporations."²⁸

According to Justice Alito, "it seems unlikely that...corporate giants...will often assert RFRA claims."²⁹ In any event, "[t]he companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs."³⁰ Thus, "a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA."³¹

Therefore, under the RFRA, the question is whether the regulations defining "minimum essential coverage" as including the four challenged forms of contraception "substantially burden" the exercise of religion.³² The Court answered this in the affirmative as the regulations then in effect, left the Greens and the Hahns with no viable choice. Complying with the regulations by providing the four challenged forms of contraception would violate the Greens' and Hahns' religious beliefs which maintain that they must not participate in "the destruction of an embryo" by providing morning-after pills and intrauterine devices which they believe may do just that.³³

Defying the regulations by deleting these objectionable contraception choices from the menu of employer-provided health care options would cause Hobby Lobby, Conestoga Wood and Mardel to pay recurring multi-million dollar fines for maintaining employer-sponsored health insurance which fails the "minimum essential coverage" test.³⁴ Dropping employer-provided medical coverage altogether would trigger yet another large annual financial penalty.³⁵ Moreover, cancelling employer-sponsored health coverage to avoid complicity in abortion would violate the Greens' and

²⁸ *Id.* at 2769.

²⁹ *Id.* at 2774.

³⁰ *Id.*

³¹ *Id.* at 2765.

³² *Id.* at 2775 (quoting 42 U.S.C. §2000bb-1(a)).

³³ *Id.*

³⁴ *Id.* at 2775 (quoting I.R.C. §4980D).

³⁵ *Id.* at 2776 (quoting I.R.C. §4980H).

Hahns' religiously-based commitments to their employees³⁶ and would trigger the "conventional business"³⁷ cost of making their closely-held companies less attractive workplaces.

The federal government and the Court's dissenters argued that the challenged regulations impose no substantial burden on the Hahns' and Greens' religious beliefs since there is only an "attenuated" connection between the employer's payment of an insurance premium and the subsequent decision of an employee to use that insurance to purchase one of the four forms of contraception to which the Hahns and Greens object.³⁸ Writing for the Court, Justice Alito noted that the Hahns and the Greens sincerely believe that their religion forbids such a premium payment and that it is not the role of the courts to assess the reasonableness of that "honest conviction...[b]ecause the contraceptive mandate forces them to pay an enormous sum of money – as much as \$475 million per year in the case of Hobby Lobby – if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs."³⁹

Hence, the final RFRA inquiry is whether the regulations are "the least restrictive means of furthering [a] compelling governmental interest."⁴¹ For this purpose, the Court assumed that the federal government has a compelling interest in the provision of the four forms of contraception to which the Hahn and Green families object on religious grounds.⁴² However, "[t]he least-restrictive-means standard is exceptionally demanding, and it is not satisfied here."⁴³

One less restrictive alternative to the challenged regulations is for the federal government itself to provide these forms of contraception to women who cannot obtain them from their

³⁶ *Id.* at 2776.

³⁷ *Id.*

³⁸ *Id.* at 2777.

³⁹ *Id.* at 2778-79 (internal quotation marks omitted).

⁴¹ *Id.* at 2779 (quoting 42 U.S.C. §2000bb-1(b)).

⁴² *Id.* at 2780.

⁴³ *Id.*

workplace plans.⁴⁴ A second option identified by Justice Alito is to extend the regulatory accommodation which certain non-church, non-profit religious employers need not provide contraception to which they object to closely-held, for-profit corporations like Hobby Lobby, Conestoga Wood and Mardel.⁴⁵ In this case, insurers or third party administrators who work with non-profit, religious employers provide contraception at no cost to the employers.⁴⁶

While some nonprofits criticize this accommodation as inadequate,⁴⁷ for purposes of the current case, Justice Alito wrote, the accommodation remains as a less restrictive alternative to the contraception mandate to which the Greens, the Hahns and their closely-held corporations object.⁴⁸

IV. The Dissent

Justice Ginsburg, joined by Justice Sotomayor, objected to the majority's analysis in virtually all respects.⁴⁹ Justices Kagan and Breyer concluded that the Court need not decide whether closely-held corporations are "person[s]" covered by the RFRA, but otherwise agreed with the rest of Justice Ginsburg's dissent.⁵⁰

The RFRA, Justice Ginsburg notes, refers to "a person's exercise of religion."⁵¹ For-profit corporations, like Hobby Lobby, Mardel and Conestoga Wood, are thus not "persons" under the RFRA "for the exercise of religion is characteristic of natural persons, not artificial legal entities."⁵² Non-profit corporations are different since "religious organizations exist to serve a community of

⁴⁴ *Id.*

⁴⁵ *Id.* at 2782.

⁴⁶ 45 C.F.R. § 147.131(b)-(e); see also 26 C.F.R. § 54.9815-2713; 29 C.F.R. § 2590.715-2713.

⁴⁷ *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014); *Eternal Word TV Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339 (11th Cir. 2014).

⁴⁸ See *supra* note 45 at 2785. Justice Kennedy joined Justice Alito's opinion for the Court and also wrote a separate concurrence.

⁴⁹ *Id.* at 2787.

⁵⁰ *Id.* at 2793.

⁵¹ *Id.* (quoting 42 U.S.C. §2000bb-1(a)) (emphasis deleted).

⁵² *Id.* at 2794.

believers. For-profit corporations do not fit that bill.”⁵³

Even if Hobby Lobby, Mardel and Conestoga Wood are deemed to be “persons” covered by the RFRA, Justice Ginsburg wrote, the majority “elides entirely the distinction between the sincerity of a challenger’s religious belief and the substantiality of the burden placed on the challenger.”⁵⁴ In this case, “the connection between the [Hahn and Green] families’ religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial.”⁵⁵

Under the regulatory mandate, the corporations themselves do not “purchase or provide the contraceptives they find objectionable.”⁵⁶ Rather, the corporations just pay insurance premiums, “undifferentiated funds that finance a wide variety of benefits under comprehensive health plans.”⁵⁷ Moreover, “[a]ny decision to use contraceptives made by a woman covered under Hobby Lobby’s or Conestoga’s plan will not be propelled by the Government; it will be the woman’s autonomous choice, informed by the physician she consults.”⁵⁸

Thus, the contraceptive mandate imposes no substantial burden on the Green and Hahn families or on their respective corporations. Even if it did, according to Justice Ginsburg, there is a compelling public interest in the provision of “the mandated contraception coverage [which] enables women to avoid the health problems unintended pregnancies may visit on them and their children.”⁵⁹ Through the ACA, “Congress sought to accomplish...comprehensive preventive care for women furnished through employer-based health plans.”⁶⁰ This goal would be implemented by neither of the allegedly less restrictive alternatives identified by the Court’s majority.⁶¹

⁵³ *Id.* at 2796.

⁵⁴ *Id.* at 2798.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 2799.

⁶⁰ *Id.* at 2803.

⁶¹ *Id.*

V. The Initial Regulatory Response to *Hobby Lobby*

In the wake of the Supreme Court's *Hobby Lobby* decision and the Court's subsequent interim order in *Wheaton College v. Burwell*,⁶² the Departments of Health and Human Services, Labor and Treasury, promulgated proposed⁶³ and "interim final"⁶⁴ regulations. These regulations made two important changes. First, in response to *Hobby Lobby*, the proposed regulations would extend to closely-held businesses like Hobby Lobby, Mardel and Conestoga Wood the accommodation previously limited to religious non-profit entities other than churches. The proposed regulations leave the precise definition of a closely-held business qualifying as "an eligible institution" entitled to this accommodation up for future development.

Second, the new interim final regulations give the eligible institution accepting the accommodation an alternative in addition to the previous option of certifying to its insurer or third-party administrator the institution's opposition to some or all forms of contraception. The new interim final regulations give the eligible institution the second course of certifying its opposition to contraception to the Department of Health and Human Services. Health and Human Services will then arrange with that insurer or administrator for the contraception to which the eligible institution objects. Religious groups have made clear that this second option of certifying to Health and Human Services (rather than to the eligible institution's insurer or third party administrator) does not satisfy their concerns as they believe that this option still involves them in the process of obtaining contraception to which they object on religious grounds.⁶⁵

⁶² *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014).

⁶³ 79 Fed. Reg. 51118 (Aug. 27, 2014).

⁶⁴ 79 Fed. Reg. 51092 (Aug. 27, 2014).

⁶⁵ Louise Radnofsky, *The Birth-Control Fight Isn't Over*, WALL ST. J., Sept. 10, 2014, at A2.

VI. Discussion

How ought the President, the Congress and the Departments of Health and Human Services, Labor and Treasury react to the Court's *Hobby Lobby* opinion? Justice Alito's opinion for the Court identifies two possible responses.⁶⁶ The regulatory accommodation now limited to religious non-profit entities can be extended to closely-held for-profit corporations. Alternatively, the federal government itself may, directly or through subcontractors such as Planned Parenthood, make contraception available to women who lack such coverage from their employer-sponsored health plans. The regulations proposed⁶⁷ in response to *Hobby Lobby* proceed along the first of these lines by declaring that for-profit, closely-held firms will be deemed "eligible institutions" which can use the accommodation originally promulgated only for non-church, non-profit religious employers.

Commentators have expressed reservations about both the approaches identified by Justice Alito. Some women's health groups argue that a federal program will stigmatize the women who receive their contraception from such a program.⁶⁸ Moreover, the Department of Veterans Affairs suggests the need for skepticism about the federal government as a direct provider of medical services.⁶⁹ A number of religious groups contend that the regulatory accommodation for non-church employers, even as recently amended, does not go far enough and still leaves employers complicit.⁷⁰

Senator Patty Murray has proposed legislation to overturn *Hobby Lobby*.⁷¹ Senators Kelly Ayotte and Deb Fischer, along with many of their Republican colleagues, have introduced legislation confirming *Hobby Lobby*.⁷² In the current political environment, there is little chance of either bill becoming law any time soon.

⁶⁶ See *supra* note 61 at 2780-81.

⁶⁷ 79 Fed. Reg. 51118 (Aug. 27, 2014).

⁶⁸ Louise Radnofsky, *After Hobby Lobby Ruling, Coverage Alternatives Face Hurdles*, WALL ST. J., July 2, 2014 at A6.

⁶⁹ See, e.g., Melinda Henneberger, *Detailing VA's Culture of Retaliation*, WASH. POST, July 10, 2014, at A19.

⁷⁰ *Wheaton College v. Burwell*, 134 S. Ct. 2806; *Eternal Word TV Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1332; Radnofsky, *supra* note 65.

⁷¹ Protect Women's Health From Corporate Interference Act of 2014, S. 2578, 113th Cong., 2d Sess.

⁷² Preserving Religious Freedom and a Woman's Access to Contraception Act, S. 2605, 113th Cong., 2d Sess.

The best alternative in the wake of *Hobby Lobby* is to require any ACA-covered employer⁷³ which objects to providing contraception to fund instead for their respective employees independently-administered HSAs or HRAs. An HSA or HRA permits a covered employee to spend his or her pre-tax healthcare dollars on any medical service the employee chooses. Therefore, the HSA/HRA approach lets the employee spend his or her employer-funded healthcare dollars without involving the religiously-sensitive employer.

The HSA/HRA alternative would eliminate the need for eligible institutions to certify that they oppose some or all forms of contraception. Instead, an employer would simply establish and fund for its employees' health accounts for the employees to spend as they want – just as the employees spend their cash wages as they want.

Suppose, for example, that Hobby Lobby establishes an HSA or HRA administered by the company's bank for each of its employees. A Hobby Lobby employee could submit receipts to the bank for any type of medical care the employee selects. The employee would subsequently receive from the bank a reimbursement check for this care from his or her HSA/HRA account. Alternatively, HSA/HRA debit cards have become popular devices. These cards allow a covered employee to swipe when receiving health care services with the card then transferring to the medical service provider payment from the employee's HSA/HRA account upon which the card draws.

Under this proposal, employers opposing contraception on religious grounds would establish independently-administered HSAs or HRAs for all employees covered by medical insurance. These accounts could be used by each employee to defray any medical expense the employee elects including, but not limited to, the kinds of contraception to which the employer objects.

⁷³ Employers are not covered by ACA if they employ less than fifty (50) full-time employees. I.R.C. §§ 4980D(d)(2) and 4980H(c)(2)(A).

In a fortuitous paradox, the HRA/HSA approach satisfies Justice Ginsburg's narrower definition of the federal government's interest as employer-provided contraception while this approach also removes the religious employer from any involvement in forms of contraception to which the employer objects.

Among the many points of disagreement between the *Hobby Lobby* majority and the dissenters was the federal government's interest at stake in that case. In dissent, Justice Ginsburg defined that interest as employer-provided contraception.⁷⁴ As defined, neither of the alternatives identified by the Court's majority is satisfactory. When the federal government, insurers, or third party administrators provide contraception, by definition, the employer does not. However, under the HSA/HRA proposal, the employer would fund the accounts which employees could use for all medical services including contraception.

Justice Ginsburg asserts that an employer's involvement in contraception is "attenuated" when the employer pays an "undifferentiated" premium to an insurer and the employee then selects for herself contraceptive coverage.⁷⁵ This assertion is unpersuasive for two reasons. First, the employee selecting contraception chooses it from a pre-approved menu which is a component of the employer-sponsored plan covering the employee. That menu specifically enumerates the forms of contraception opposed by religiously-objecting employers and frames the employees' choices among those forms. Second, the employer's future premium payments may be affected by the employees' choices since those choices may increase costs and, hence, future premiums.

In contrast, with an HSA or HRA there is no pre-approved menu of acceptable medical choices. An employee can use the funds in his or her account for any form of medical care the employee selects. The employer's plan does not frame the employees' choices since the employee's

⁷⁴ See *supra* note 66 at 2803.

⁷⁵ *Id.*

HRA/HSA funds can be spent on any medical services the employee elects. Moreover, the employer places into the account a fixed sum for each employee. That fixed sum does not vary with the employees' subsequent medical choices.

For RFRA purposes, HSAs and HRAs are analogous to wages. A Hobby Lobby employee can spend her wages however she wants. Hobby Lobby is not implicated in the employee's decision to use her wages to purchase contraception since the wages are the employee's own funds to spend as she selects. The same is true of HSA and HRA funds: The employee can spend those funds (or not) on any medical outlay.

From the vantage of a religious employer, the HSA/HRA approach is less restrictive than either of the two alternatives identified by the Court in *Hobby Lobby*.⁷⁶ If the federal government supplies contraceptives to a woman whose employer elects against covering such contraceptives, the employer will need to declare itself to the government as a religious non-provider of birth control so that the government can furnish birth control to the employer's female employees. Similarly, under the accommodation approach of the existing⁷⁷ and proposed⁷⁸ regulations, the religious employer must identify itself as opposed to contraception coverage so that the employer's insurer or third-party administrator can furnish such coverage to the employer's employees.

By contrast, under the HSA/HRA alternative, the religious employer furnishes an account to all employees to be used for all medical services. A net premium cost to the employer is not necessary since the HSA/HRA will be integrated into the employer's medical plan to provide the same initial coverage as before. The employer's contribution to the HSA or HRA will be another form of cash wage, which the employee can spend on medical services as she wishes. The employer will not need to state its opposition to contraception.

⁷⁶ *Id.* at 2780-81.

⁷⁷ 45 C.F.R. § 147.131(b)-(e); 26 C.F.R. § 54.9815-2713; 29 C.F.R. § 2590.715-2713.

⁷⁸ 79 Fed. Reg. 51118 (Aug. 27, 2014).

A religious employer might argue that some of its contributions to HSAs or HRAs can be used for contraception, which the employer objects. Such a retort is not and does not disqualify HSAs or HRAs as the “least restrictive means” for RFRA purposes. It is true that paid wages might be used to purchase contraception, but state and federal law strongly protect the rights of employees to receive their wages free from employer interference.⁷⁹

It is unrealistic for the RFRA to allow employers to withhold wages when such employers disagree with employee’s choices as to the spending of such wages. For RFRA purposes, HRAs and HSAs are analogous to cash wages. The HSA/HRA alternative respects both the religious rights of employers who do not want to be complicit in contraception and the autonomy of employees who want to spend employer-provided pre-tax health dollars to obtain contraception.

The HSA/HRA approach also potentially has political legs. The Departments of Health and Human Services, Treasury, and Labor could adopt regulations implementing this approach. Legislatively, conservatives favor HSAs and HRAs since these accounts implement a consumer-driven approach to health care. The HSA/HRA approach eliminates the self-certification which troubles some religious groups. Liberals want to ensure access to contraception even if employers object. The HSA/HRA response to *Hobby Lobby*, thus, has bi-partisan appeal and is a compelling compromise as a matter of law and public policy.

The most difficult quandary posed by the HRA/HSA proposal is determining a religious employer’s annual contribution to its employees’ accounts, so as to be relieved of the contraception mandate. Justice Ginsburg indicates that intrauterine devices generally cost “more than \$1,000,”⁸⁰ a price that discourages low income women from using the devices.⁸¹ Planned Parenthood indicates

⁷⁹ *Massachusetts v. Morash*, 490 U.S. 107, 109-10 (1989) (Forty-seven states, the District of Columbia, and the United States have statutes protecting payment of wages to employees). Under many of these statutes, it is a criminal offense to fail to pay wages earned by employees. *See, e.g.*, § 290.080 R.S. Mo. (failure to pay “wages and salaries” is a misdemeanor).

⁸⁰ *See supra* note 76 at 2780.

⁸¹ *Id.* at 2781.

that an intrauterine device “[c]osts between \$500 and \$1,000 up front, but lasts up to 12 years,”⁸² whereas birth control pills cost between \$15 and \$50 per month.⁸³ At stores like CVS and Wal-Mart, Plan B (a form of contraceptives to which the Greens and Hahns object) costs around \$35 to \$50.⁸⁴

There is no magic number here. My instinct is that a religious employer should be able to opt out of the contraceptive mandate if it annually provides each employee an HRA or HSA totaling \$500 or so. However, this is a judgment call for which reasonable people may disagree, particularly since most HSA and HRA funds will be spent on medical services, and not just contraception.

Conclusion

In the wake of *Hobby Lobby*, the best alternative is to require any employer which objects to providing contraception to provide employees independently-administered HSAs or HRAs. An HSA or HRA lets employees spend employer-provided pre-tax health care dollars on any medical services that the employees elect, without implicating the employer.

The HSA/HRA alternative respects the religious rights of sponsoring employers since, unlike conventional insurance or self-insured health plans, its plan does not provide a menu of limited choices which frames the employees’ decisions. Simultaneously, the HSA/HRA approach respects employee autonomy to spend health care dollars on elected medical services, including services to which the employer objects.

For RFRA purposes, HSAs and HRAs are analogous to cash wages, such that the employer pays the employee and the employee spends as he chooses. Such accounts are the “least restrictive means”⁸⁵ by which the federal government can assure women access to contraception without burdening an employer’s religious beliefs of employers. Employers are not required to certify their

⁸² *IUD*, PLANNED PARENTHOOD (last visited Jan. 22, 2015).

⁸³ *Birth Control Pills*, PLANNED PARENTHOOD (last visited Jan. 22, 2015).

⁸⁴ *Using Health Spending Accounts (FSA, HSA) Cards at H-E-B, H-E-B* (last visited Jan. 22, 2015). HSA pays for Plan B with a prescription. I.R.C. § 223(d)(2)(A); see also Pam Belluck, *F.D.A. Grants Exclusivity to Plan B One-Step*, N.Y. TIMES, July 24, 2013, at A16 (“Plan B One-Step retails for about \$50; generics sell for at least \$10 or \$15 less.”).

⁸⁵ 42 U.S.C. § 2000bb-1(b)(2) (2014).

objections to contraception.

Thus, the HSA/HRA response to *Hobby Lobby* is a compelling compromise as a matter of law and public policy.