BLURRING LINES BETWEEN CHURCHES AND SECULAR CORPORATIONS: THE COMPLELING CASE OF THE BENEFIT CORPORATION'S RIGHT TO THE FREE EXERCISE OF RELIGION (WITH A POST-HOBBY LOBBY EPILOGUE)

Marc A. Greendorfer*

The United States Supreme Court will soon hear oral arguments on two cases, Sebelius v. Hobby Lobby Stores, Inc.[1] and Conestoga Wood Specialties Corp. v. Sebelius.[2] Both cases present similar questions with regard to the applicability of the First Amendment's "Free Exercise Clause"[3] to corporations.

In *Hobby* Lobby, the Tenth Circuit found that Free Exercise rights existed for a corporation, without regard to its status as a non-church, profit-seeking entity.

In *Conestoga*, however, the Third Circuit agreed that a corporation could have Free Exercise rights, but such rights did not apply if the corporation happened to be "secular" and "for-profit", defining characteristics which appear nowhere in the Constitution and which are contrary to recent First Amendment jurisprudence and other precedent, including the seminal case of Citizens United v. Federal Election Commission.[4]

Why would there be such a distinction relating to a right as fundamental as the exercise of religion?

According to the *Conestoga* court, it all comes down to profit. A legal entity that exists to produce profits for those who organized it can't exercise religion, but one that exists without an interest in profits miraculously is vested with the right to exercise religion.

In *Hobby Lobby*, the court summarized (and subsequently rejected) the government's position as being a black and white distinction between non-profit religious organizations, which have Free Exercise rights, and for-profit secular organizations, which have no such rights.[5] The government made the same argument in *Conestoga*, and in that case the majority adopted the government's position.

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Marc A. Greendorfer received his Bachelor of Arts degree from the University of California, Davis in 1986. He received his Juris Doctorate from Benjamin N. Cardozo School of Law in 1996. He graduated magna cum laude and served as Articles Editor-Submissions of the Cardozo Law Review from 1995 to 1996. After working at AmLaw 100 law firms in New York and San Francisco, Mr. Greendorfer founded Tri Valley Law in 2008, where he is currently a partner. Mr. Greendorfer submitted an *amicus curiae* brief based on this paper in the Conestoga case on January 23, 2014, available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-356_pet_amcu_tvl.authcheckdam.pdf

[1] 723 F.3d 1114 (10th Cir. 2013), *cert. granted* (U.S. Nov. 26, 2013) (No. 13-356).

[2] 724 F.3d 377 (3d Cir. 2013), *cert. granted* (U.S. Nov. 26, 2013) (No. 13-354).

[3] U.S. CONST. amend. I ("Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof").

[4] 558 U.S. 310, 365 (2010) (holding "the Government may not suppress political speech based on the speaker's corporate identity.")

[5] *Hobby Lobby* at 35.

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Not only is the government's distinction arbitrary and without logical or legal basis, it is utterly at odds with recent developments in corporate law.

The advent of the "Benefit Corporation" (or "B-Corp") has formally established a gray area between the black of the non-profit religious organization and the white of the for-profit secular organization with respect to First Amendment rights generally and Free Exercise rights specifically.

Indeed, a corporation organized as a B-Corp can be religious and formed for purposes other than the sole pursuit of profit. Such a creature was apparently beyond the knowledge of the *Conestoga* court.

Well, not the entire *Conestoga* court. Judge Kent Jordan, in his meticulously argued dissent, touched upon the radical upheaval in the law occasioned by the recent establishment of the B-Corp in many states, pointing out that a B-Corp, like a religious non-profit corporation, is a legal entity that exists for purposes other than the solitary pursuit of profit; in fact, B-Corps can be formed in furtherance of religious purposes, much like a religious non-profit.

The purpose of this paper is to elaborate on Judge Jordan's discussion of B-Corps in his *Conestoga* dissent and further, to argue that not only should Free Exercise rights apply to corporations that have a religious purpose, such as B-Corps, but also such rights should exist for what I refer to as "de-facto B-Corps." The broader issues of the Religious Freedom Restoration Act, the Establishment Clause and other First Amendment issues relating to corporations generally, are outside the scope of this paper.[6]

1. Background of the Conestoga decision

Conestoga, like Hobby Lobby, involves a challenge to the Patient Protection and Affordable Care Act's (Pub. L. No. 111-148 (March 23, 2010)) requirement that employers provide insurance that includes a broad array of reproductive health benefits. At issue in both cases is the requirement that certain drugs that interfere with the natural life cycle of a fertilized egg be covered by the employer-provided insurance[7] (the "ACA Contraception Mandate").

The employers in both Hobby Lobby and Conestoga are closely-held corporations owned by individuals with strong religious convictions and those religious convictions guide the operation of each business.[8] Both employers believe that the ACA Contraception Mandate would require

[6] *See*, *generally*, Ronald J. Columbo, *The Naked Private Square*, 51 HOUS. L. REV. 1 (2013).
[7] *See Conestoga* at 13.
[8] Hobby Lobby Inc. is owned by one family through a trust that specifically states that the trust exists to "honor God with all that has been entrusted [to the family]" and to "use the [family's assets] to create, support, and leverage the efforts of Christian ministries." The effect of this and a "Trust Commitment" signed by each member of the family is to ensure that the Hobby Lobby corporation is run in compliance with the family's Christian religious beliefs. *See* Verified Complaint of Hobby Lobby Stores, Inc., CIV-12-1000-HE, filed in the District Court for the Western District of Oklahoma on September 12, 2012, at page 9 (available at http://www.becketfund.org/wp-content/uploads/2012/09/Hobby-Lobby-Complaint-stamped.pdf).

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them to violate their religious beliefs by providing insurance that enables the termination of a human life.

The majority in *Conestoga* hewed to a strict interpretation of the Free Exercise Clause, differentiating a "religious, non-profit corporation", which the majority believed would have Free Exercise rights, from a "secular, for-profit corporation", which the majority said was never intended to be covered by the protections of the Free Exercise Clause. The *Conestoga* majority explicitly disagreed with the Tenth Circuit's theory in the *Hobby Lobby* decision, though it did not provide a discussion of why it disagreed.[9] Instead, the *Conestoga* court stated that based on its understanding of the history and purpose of the First Amendment, Free Exercise rights are unique to individuals.

In fact, the *Conestoga* court's conclusion wasn't so simple.

The *Conestoga* court initially stated that it"…must consider the history of the Free Exercise Clause and determine whether there is a similar history of court provisions free exercise protection to corporations"[10] and in the next sentence concluded that there was no such protection. Then the *Conestoga* court contradicted its conclusion by finding that a corporation could indeed have Free Exercise protections, but not if that corporation was "secular and for-profit." This is so, the court said, because a corporation isn't capable of exercising religion.[11] Confusing things even more, the *Conestoga* court admitted that churches, which are often corporations, and "other religious entities", a term which was not defined, do have Free Exercise rights.[12]

The *Conestoga* majority's decision hinged on the idea that one type of corporation can exercise religion while another can't. Creating a new category of corporation out of thin air, or perhaps by repeating the phrase 15 times in the course of its opinion, the *Conestoga* court broke new ground in First Amendment jurisprudence by finding that there was such a thing as a "secular" corporation, which only had partial First Amendment rights.[13]

Presumably, a secular corporation is any corporation that isn't a church or religious entity. Neither Hobby Lobby Stores, Inc. ("Hobby Lobby Inc.") nor Conestoga Wood Specialties Corporation ("Conestoga Corp.") was incorporated as a church, but it's clear that they both

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Conestoga Corp. is also owned entirely by the members of one family and they, acting as the Board of Directors of the corporation, have adopted a "Statement on the Sanctity of Human Life" which states that they "believe that human life begins at conception (at the point where an egg and sperm unite) and that it is a sacred gift from God and only God has the right to terminate human life. Therefore it is against our moral conviction to be involved in the termination of human life through abortion, suicide, euthanasia, murder, or any other acts that involve the deliberate taking of human life."

[9] *Conestoga* at note 7.
[10] *Conestoga* at 20. The court was comparing the instant case to the Supreme Court's finding that corporations had free speech rights under the First Amendment in *Citizens United*.
[11] *Id*. at 21.
[12] *Id*. at 22.
[13] *Id*. at 22, where the court admitted that there is ample precedent for finding that religious organizations, including corporations, as opposed to individuals, have Free Exercise rights, but went on to state that in none of the cases was the party being granted such rights a "secular for-profit" corporation.

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operate according to the religious principles of their respective owners. So to call either corporation a "secular" corporation is to ignore the common meaning of the word "secular".

2. Does Free Exercise cover corporations organized for religious purposes?

This leaves us with a conundrum. Assuming, for purposes of this paper, that a "secular for-profit corporation" can indeed be denied Free Exercise rights but a "religious entity" is protected, how do we distinguish the two?

Since the Conestoga court didn't define "secular", we have to assume that they meant for it to have its common meaning. The Merriam-Webster dictionary defines "secular" as "not spiritual: of or relating to the physical world and not the spiritual world: not religious: of, relating to, or controlled by the government rather than by the church". [14]

To bolster its position that there is a legal distinction for First Amendment purposes between "secular" and "religious" corporations, the *Conestoga* majority cited to a recently decided Free Exercise case for the proposition that "the text of the First Amendment…gives special solicitude to the rights of religious organizations."[15] The *Hosanna-Tabor* case, curiously, was one where the enforcement of a federal law (in this case, the Americans with Disabilities Act) against a religious employer was found to have violated the "ministerial exception" doctrine of the Free Exercise Clause.[16]

Had the *Conestoga* majority examined the history of the ministerial exception it would have discovered that the line between a "religious" corporation and "secular" corporation is quite blurred and, Hobby Lobby and Conestoga, as religious organizations, should be presumed to have Free Exercise rights.

In Hollins v. Methodist Healthcare, Inc.[17], the Sixth Circuit found that a hospital was a "religious organization" that was covered by the Free Exercise Clause.

Specifically, the *Hollins* court explained that under Free Exercise jurisprudence, the term "religious organization" has a very broad meaning

> *In order for the ministerial exception to bar an employment discrimination claim, the employer must be a religious institution….But, in order to invoke the exception, an employer* ***need not be a traditional religious organization such as a church, diocese, or synagogue, or an entity operated by a traditional religious organization****. Examining cases decided in all of the circuit courts, the Fourth Circuit found that the exception has been applied to claims against religiously affiliated schools, corporations, and hospitals by courts ruling that they*

[14] http://www.merriam-webster.com/dictionary/secular

[15] *Conestoga* at 22 (citing to *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694, 706 (2012)).

[1616] The "ministerial exception" generally provides that anti-discrimination laws are unconstitutional restrictions on religious organizations' Free Exercise rights. For a detailed discussion of this doctrine, *see* Lund, Christopher C., In Defense of the Ministerial Exception (December 20, 2011). North Carolina Law Review, Vol. 90, p. 1, 2011; Wayne State University Law School Research Paper No. 10-28. Available at SSRN: http://ssrn.com/abstract=1883657

[17] Hollins v. Methodist Healthcare, Inc., 474 F. 3d 223 (6th Circuit 2007)

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come within the meaning of a "religious institution." Its investigation led the Fourth Circuit to conclude that a religiously affiliated entity is considered "a `religious institution' for purposes of the ministerial exception ***whenever that entity's mission is marked by clear or obvious religious characteristics****".*[18]

What is important to note is that the focus is on the religious mission of the entity, not whether or not the entity is for-profit or non-profit. Unlike churches, which are non-profit entities, there are many hospitals and nursing homes, for example, which are operated for-profit. So clearly, a for-profit hospital that focused on serving the needs of Christians would just as surely be a religious organization as would a traditional church. The Fourth Circuit[19] and Eighth Circuit [20]also adhere to this definition.

Though the foregoing cases focused on the ministerial exception to anti-discrimination laws, the exception is based on the general guarantee of religious freedom in the First Amendment. The *Hollins* court explained

The ministerial exception, a doctrine rooted in the First Amendment's guarantees of religious freedom, precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees, based on the institution's constitutional right to be free from judicial interference in the selection of those employees. [21]

The Supreme Court, in *Hosanna-Tabor*, traced the ministerial exception to a Fifth Circuit case[22] which found that the ministerial exception was based on the Free Exercise Clause.

So while the *Conestoga* majority couldn't find caselaw to support the assertion that "for-profit, secular corporations" can exercise religion, there is more than adequate support for the fact that courts have frequently found employers very similar to Hobby Lobby and Conestoga to be religious organizations with Free Exercise rights. None of these cases made the for-profit or non-profit status of the religious organization a determinative factor in assessing the organization's Free Exercise rights.[23]

The rationale for non-profits having historically received Free Exercise protection is best summarized by Justice William Brennan's concurrence in Corporation of Presiding Bishop v.

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[18] *Id*. at 225-226 (emphasis added).

[19] *See* Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 309-310 (4th Cir. 2004) (finding a predominantly Jewish nursing home to be a "religious employer" subject to the ministerial exception).

[20] Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir.1991) (finding a hospital to be a religious institution for purposes of the ministerial exception).

[21] *Hollins* at 225.

[22] *Hosanna*-Tabor, slip op. at 21, *citing to* McClure v. Salvation Army, 460 F. 2d 553, 558 (5th Cir. 1972). For further detail on the Free Exercise Clause roots of the ministerial exception, *see The Ministerial Exception to Title VII: The Case For a Deferential Primary Duties Test*, 121 Harv. L. Rev. 1776, 1780 (2008) available at http://harvardlawreview.org/media/pdf/the_ministerial_exception.pdf.

[23] This paper's focus is on the points made in Judge Jordan's dissent with regard to Benefit Corporations. For a detailed analysis of the Free Exercise rights of corporations generally, *see* Ronald J. Columbo, *The Naked Private Square*, 51 Houston L. Rev 1.

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Amos,[24] a Supreme Court case deciding whether religious employers could choose employees based on the religion of the employee. Justice Brennan explained the blanket Establishment Clause protection for non-profits as follows

> *The risk of chilling religious organizations is most likely to arise with respect to nonprofit activities. The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation. In contrast to a for-profit corporation, a nonprofit organization must utilize its earnings to finance the continued provision of the goods or services it furnishes, and may not distribute any surplus to the owners. This makes plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose.* ***Furthermore, unlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply to engage in commerce. Churches often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster.***
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> *Nonprofit activities therefore are most likely to present cases in which characterization of the activity as religious or secular will be a close question. If there is a danger that a religious organization will be deterred from classifying as religious those activities it actually regards as religious, it is likely to be in this domain.* ***This substantial potential for chilling religious activity makes inappropriate a case-by-case determination of the character of a nonprofit organization, and justifies a categorical exemption for nonprofit activities****. Such an exemption demarcates a sphere of deference with respect to those activities most likely to be religious. It permits infringement on employee free exercise rights in those instances in which discrimination is most likely to reflect a religious community's self-definition. While not every nonprofit activity may be operated for religious purposes, the likelihood that many are makes a categorical rule a suitable means to avoid chilling the exercise of religion.*[25]

The Supreme Court believed that it was not the place of the courts to determine the sincerity of corporate religious belief; consequently, the provision of First Amendment religion clauses protections for non-profits has historically been a matter of expediency and deference to entities providing community service "as a means of fulfilling religious duties." There is nothing inherently unique about the non-profit entity for these purposes.

Nor is there anything that excludes corporate Free Exercise rights from these protections. As Justice Brennan noted in *Amos*, "[a]s a result, determining whether an activity is religious or secular requires a searching case-by-case analysis….Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity."[26] As the dissent in *Conestoga* points out, more than one of the concurring justices in

[24] 483 U.S. 327 (1987).
[25] *Id*. at 345 (internal citations omitted) (emphasis added).
[26] *Id*. at 343.

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Amos acknowledged that it is "…conceivable that some for-profit activities could have a religious character…" that would give rise to First Amendment religion clause protections.[27]

Since *Amos* (and its presumption that non-profits were religious actors for First Amendment purposes) was decided before the creation of the B-Corp, it is likely that the *Amos* court would have provided the same blanket presumption to B-Corps organized for religious purposes.

In fact, while the *Conestoga* majority didn't mention *Amos* in their opinion, the *Conestoga* dissent points out that in the oral arguments for *Conestoga* the government argued that *Amos* signaled a Supreme Court doctrine of providing religion clause protections only to non-profits. It's likely that the *Conestoga* majority, like the government, misunderstood *Amos* in the same way. *Amos* actually stands for the proposition that non-profits, due to the likelihood that they are organized for primarily religious purposes, are **presumed** to be capable of exercising religion and thus subject to Free Exercise protections, while for-profit corporations would have to be examined on a case-by-case basis, since they operate primarily for profit purposes.

It would be impractical for courts to engage in a case-by-case determination of the character of a corporation to determine if it is "religious" as that would thrust courts into a role that is outside of their traditional milieu[28]. However, it would be impermissible for courts to adopt a doctrine that results in the categorical denial of Free Exercise rights simply because a corporation isn't a non-profit. This would be especially true if a for-profit corporation was formed to pursue religious purposes and, by law, had a duty to pursue those religious purposes at the cost of profits.

Since *Amos*, a new type of corporation has emerged, one that is not a non-profit but is duty-bound to operate for purposes, including religious purposes, that are other than profit.

3. The Conestoga Dissent

Though the *Conestoga* majority ignored the long history of religious organizations of all types being afforded Free Exercise rights, Judge Kent Jordan's dissent artfully and thoroughly explained the deficiencies in the court's opinion. In particular, and for purposes of this paper, most importantly, Judge Jordan debunked the idea that only non-profit corporations possessed Free Exercise rights.[29]

Getting to the heart of the flaws in the majority's opinion, Judge Jordan concisely exposed the illogic of agreeing that individuals have Free Exercise rights while denying them those rights when they act in association with one another for some purposes but not for other:

[27] *Conestoga* dissent at 25.

[28] *See, generally,* Michael A. Helfand, *Litigating Religion*, 93 B. U. L. REV. 493 (2013) (discussing the "religious question" doctrine as an example of courts refusing to be drawn into matters relating to religious practice).

[29] "…there may not be directly supporting case law [for the proposition that for-profit corporations enjoy Free Exercise rights], but the 'conclusory assertion that a corporation has no constitutional right to free exercise of religion is also unsupported by any cited authority'." *Conestoga* dissent at 24, citing McClure v. Sports & Health Club, 370 N.W.2d 844, 850 (Minn. 1985).

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And what is the rationale for this "I can't see you" analysis? It is that for-profit corporations like Conestoga were "created to make money." It is the profit-making character of the corporation, not the corporate form itself, that the Majority treats as decisively disqualifying Conestoga from seeking the protections of the First Amendment or RFRA.... That argument treats the line between profit-motivated and non-profit entities as much brighter than it actually is, since for-profit corporations pursue non-profit goals on a regular basis. More important for present purposes, however, the kind of distinction the majority draws between for-profit corporations and non-profit corporations has been considered and expressly rejected in other First Amendment cases.

In Citizens United v. Federal Election Commission, for example, the Supreme Court said, "[b]y suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests." .... Because the First Amendment protects speech and religious activity generally, an entity's profit-seeking motive is not sufficient to defeat its speech or free exercise claims.

...

The forceful dissent of Judge John T. Noonan, Jr., in EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir.1988), put the point plainly:

"The First Amendment, guaranteeing the free exercise of religion to every person within the nation, is a guarantee that [for-profit corporations may] rightly invoke[ ]. Nothing in the broad sweep of the amendment puts corporations outside its scope. Repeatedly and successfully, corporations have appealed to the protection the Religious Clauses afford or authorize. Just as a corporation enjoys the right of free speech guaranteed by the First Amendment, so a corporation enjoys the right guaranteed by the First Amendment to exercise religion.

The First Amendment does not say that only one kind of corporation enjoys this right. The First Amendment does not say that only religious corporations or only not-for-profit corporations are protected. The First Amendment does not authorize Congress to pick and choose the persons or the entities or the organizational forms that are free to exercise their religion. All persons—and under our Constitution all corporations are persons—are free. A statute cannot subtract from their freedom."[30]

Notwithstanding such a broad declaration of rights for corporations, Judge Jordan acknowledges that corporations do not enjoy the same scope of constitutional rights as individuals.[31] Judge Jordan explained

I am not suggesting that corporations enjoy all of the same constitutionally grounded rights as individuals do. They do not, as the Supreme Court noted in First National Bank of Boston v. Bellotti, saying, "[c]ertain purely personal guarantees . are unavailable to corporations and other organizations because the historic function of the particular guarantee has been limited to the protection of individuals." .... The question in a case like

[30] *Conestoga* dissent at 33-36.
[31] *Id.* at 26-27.

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this thus becomes "[w]hether or not a particular guarantee is 'purely personal.' "And that, in turn, "depends on the nature, history, and purpose of the particular constitutional provision."[32]

In determining whether a corporation has Free Exercise rights, Judge Jordan cast aside the majority's illogical for-profit/non-profit test and instead focused on the substantive quality that gives rise to Free Exercise rights for corporations: "…the operative question under the First Amendment is what is being done—whether there is an infringement on speech or the exercise of religion—not on who is speaking or exercising religion."[33]

While Judge Jordan's reasoning is backed by both logic and law, there is a facial internal contradiction in the initial concession that corporations don't have the same constitutional rights as individuals and the subsequent dismissal of the importance of the identity of the person or entity claiming the right. If it's true that a corporation's constitutional rights are limited, there must be some way to determine whether, for purposes of the Free Exercise Clause, the corporation's acts are religious in nature.

In other words, if a large corporation seeks Free Exercise protection in deciding to not provide a benefit that it claims conflicts with its religious ideals, how can it be determined whether that corporation is truly exercising religion or simply looking for a pretext to eliminate an expense? What the *Conestoga* majority did to answer this question was to invert the presumption from the *Amos* concurrence. That is, they reasoned that if a non-profit is presumed to be a religious organization for First Amendment religion clauses purposes, then a for-profit should be presumed to not be a religious organization. This logical flaw is likely the unstated source of the *Conestoga* majority's non-profit/for-profit distinction and it forces the government into a position of presumptively chilling religious exercise.

Judge Jordan hinted at the solution to this conundrum in a footnote, where he briefly discussed the creation of B-Corps and the new dimension that they add to the corporate purpose inquiry.

4. The New Reality: B-Corps Blue The Traditional Lines Between For-Profit and Non-Profits.

Though Judge Jordan's reference to B-Corps was only a footnoted aside to his argument against the majority's baseless for-profit/non-profit distinction[34] it hit upon a critical problem with the majority's outdated and rigid approach to corporations.

Until recently it was true that there was a rather stark difference between a corporation formed as a non-profit and one formed as a for-profit.[35] Primary among those differences was the

[32] *Id*. (internal citations omitted).
[33] *Id*. at 32.
[34] *Id*. at note 18. Judge Jordan pointed out that many corporations spend significant corporate time and resources pursuing non-profit goals that benefit myriad constituencies, just like religious organizations do. In illustrating this point, Judge Jordan referred to the new hybrid profit/benefit corporate entity permitted to be formed by a number of states, the B-Corp.

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permitted activities of the traditional for-profit corporation. A traditional for-profit corporation ultimately had to be operated to enhance shareholder value. [36]

Enhancing shareholder value does not necessarily mean increasing the short term profitability of the traditional for-profit corporation. The debate surrounding whether profit maximization is truly the duty of a traditional for-profit corporation's board of directors has been thoroughly described in numerous cases and articles and is thus outside the scope of this paper. This paper is based on the conclusion that while mid and long term profit maximization may not always be the desire of a traditional for-profit corporation's shareholders, as a matter of law that is the default standard where a traditional for-profit corporation's shareholder base is diverse. [37]

In closely-held traditional for-profit corporations, such as Hobby Lobby or Conestoga, the shareholders often choose some goal other than profit maximization and thus voluntarily act against their own financial interests since they have foregone profit maximization. If, however, the shareholders were to subsequently divide on the desired goal of the corporation, with one group seeking profit maximization and the other seeking some other goal, the presumption of most courts would be in favor of profit maximization.

Consequently, unlike a non-profit corporation, if a traditional for-profit corporation sought to do something along the lines of promoting religion, it would have to do so as a secondary goal. To the extent the promotion of religion were to negatively and materially deviate from the interests of the shareholders, the shareholders would have any number of claims against the board of directors of that traditional for-profit corporation.[38]

The co-founder of B Lab[39], Jay Coen Gilbert, explained the limitations of the status quo as

> *[c]urrently, individuals and groups seeking to establish organizations with a public mission can either organize themselves as not-for-profit corporations, or use a traditional for-profit corporate form. In the case of non-profits, there are numerous restrictions on the nature of their activities, and non-profits are thus extremely limited in their ability to attract capital to allow them to achieve their mission at scale. In the case of traditional for profit*

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[35] At this point I will use the phrase "traditional for-profit corporation" in reference to for-profit corporations that are not B-Corps.

[36] See Leo. J. Strine, Jr., *Our Continuing Struggle With The Idea That For-Profit Corporations Seek Profit*, 47 Wake Forest L. Rev. 135 (2012). In this essay, Chancellor Strine of the Delaware Court of Chancery, arguably the preeminent authority on corporate law in the United States, outlines the duties of the board of directors of a for-profit corporation in a modern context. Chancellor Strine concludes "I do not mean to imply that the corporate law requires directors to maximize short-term profits for stockholders. Rather, I simply indicate that the corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders." *Id*. at 155.

[37] That is, to the extent all shareholders support a traditional for-profit corporation's board of directors' focus on activities that are not for profit maximizing purposes, since there is no one challenging the deviation from profit maximization there would be no court intervention. However, when the shareholder base does not unanimously support such a focus, even a minority shareholder base could successfully challenge the board's actions, as was the case in the *eBay* case (*see infra* note 34).

[38] *See generally* William M. Lafferty, Lisa A. Schmidt and Donald J. Wolfe, Jr., *A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law*, 116 PA. ST. L. REV. 837 (2012).

[39] *See infra* note 44 for a discussion of B Lab.

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corporations, such businesses are generally required under the current statutory and case law to be conducted for the benefit of the shareholders to whom the directors owe a fiduciary duty to maximize shareholder value, thus limiting their ability to consider the interests of their employees, communities, or the environment.[40]

The best example of the potential conflicts inherent in the non-profit/traditional for-profit regime is a recent Delaware case, eBay Domestic Holdings, Inc. v. Newmark.[41] In *eBay*, the Delaware Chancery Court had to determine whether Craigslist, a traditional for-profit corporation that operated with a focus on providing community services, rather than profit, could take corporate actions that elevated the preservation of a "culture" (i.e., providing free services to various communities) over providing a return on investment to all shareholders. In deciding that the majority shareholders of Craigslist had breached their fiduciary duties to the minority shareholder, Chancellor Chandler cogently set forth the distinction between a traditional for-profit corporation and a non-profit corporation:

> *[The majority stockholders] did prove that they personally believe craigslist should not be about the business of stockholder wealth maximization, now or in the future. As an abstract matter, there is nothing inappropriate about an organization seeking to aid local, national, and global communities by providing a website for online classifieds that is largely devoid of monetized elements. Indeed, I personally appreciate and admire [the majority stockholders'] desire to be of service to communities. The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. [The majority stockholders] opted to form craigslist, Inc. as a for-profit Delaware corporation and voluntarily accepted millions of dollars from [the minority stockholder] as part of a transaction whereby [the minority stockholder] became a stockholder. Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that. Thus, I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders—no matter whether those stockholders are individuals of modest means or a corporate titan of online commerce. If [the majority stockholders] were the only stockholders affected by their decisions, then there would be no one to object. [The minority stockholder], however, holds a significant stake in craigslist, and [the majority stockholders'] actions affect others besides themselves….**Directors of a for-profit Delaware corporation cannot … defend a business strategy that openly eschews stockholder wealth maximization**—at least not consistently with the directors' fiduciary duties under Delaware law.*[42]

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[40] Jay Coen Gilbert, *Remarks on White/Leach Benefit Corporation Bill upon Introduction to the Pennsylvania State Senate* 1 (Feb. 7, 2011).

[41] 16 A.3d 1 (Del. Ch. 2010).

[42] *Id*. at 60-61 (emphasis added).

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In sum, a traditional for-profit corporation is ultimately obligated to act in a profit-seeking manner so long as at least some shareholders desire profits.[43]

5. *Enter the B-Corp.*

The B-Corp first came into existence in the United States in late 2010 when the State of Maryland used the Model B-Corp Code produced in connection with the non-profit B Lab[44] to create a new, hybrid entity that at once could pursue social benefits, much like a non-profit corporation, while still working to provide profits to its shareholders.

As of the date of this paper, 19 states and the District of Columbia have enacted B-Corp legislation using either the Model B-Corp Code or some form thereof and 18 additional states are working on B-Corp legislation.[45]

In the context of Free Exercise jurisprudence and the for-profit/non-profit dichotomy created by the *Conestoga* majority, the key difference between a B-Corp and a closely held traditional for-profit corporation is that the shareholders of a B-Corp can take action to compel the corporation to engage in the social benefit goals it was founded to achieve (even if such activities are at the expense of profits), while a traditional for-profit corporation's shareholders can only compel the corporation to maximize profits.

This distinction upends the *Conestoga* majority's for-profit/non-profit, secular/religious Free Exercise doctrine.

The B-Corp fills the structural gap between the non-profit described by Justice Brenan in *Amos* [46]and the for-profit Conestogas and Hobby Lobbys currently being denied Free Exercise rights. As such, it, like non-profits, should benefit from the same presumption of exercise of religion so long as its corporate purpose is stated to be for religious benefit.

6. *What makes a B-Corp unique*

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[43] Though the example used here is from only one state, Delaware is widely seen as the authoritative jurisdiction with regard to corporate law principles. To the extent other states deviate from the Delaware position, the deviations are not material for purposes of this paper.

[44] *See* http://benefitcorp.net/for-attorneys/model-legislation. B Lab describes itself as "a nonprofit organization dedicated to using the power of business to solve social and environmental problems. B Lab drives systemic change through three interrelated initiatives: 1) building a community of Certified B Corporations to make it easier for all of us to tell the difference between 'good companies' and just good marketing; 2) accelerating the growth of impact investing through use of B Lab's GIIRS Ratings and Analytics platform; and 3) promoting legislation creating a new corporate form -- the benefit corporation -- that meets higher standards of corporate purpose, accountability, and transparency." http://benefitcorp.net/about-b-lab A B-Corp is formed under state law, totally unrelated to B Lab, though the model legislation that is the basis for most B-Corp legislation was promulgated in connection with efforts by B Lab. The model B Corp legislation, available at http://benefitcorp.net/for-attorneys/model-legislation and is hereinafter referred to as the "Model B-Corp Code".

[45] *See* http://benefitcorp.net/state-by-state-legislative-status. The states are: Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, and Virginia and the District of Columbia.

[46] *See supra* note 24.

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As an initial matter, it is important to understand that in almost all cases, corporations are formed under and governed by state, not federal, law.[47] The history and operations of each state's corporation laws are well beyond the scope of this paper and for the most part not relevant to the purpose of this paper.[48]

In certain basic ways B-Corps and traditional corporations (both for-profit and non-profits) share a common core in that they are all creatures of state corporation codes. To wit,

> *The benefit corporation laws of each state position the benefit corporation statutory regime within the context of the state's general corporations law, unlike the flexible purpose corporation (FPC), which has been adopted as a standalone entity with no necessary relationship to the general corporations law. This is advantageous for the benefit corporation because it allows each state's body of corporate governance law—most of which is useful to the operation of any business—to still apply to benefit corporations. Moreover, it allows the benefit corporation's body of corporate governance law to interact with and, to the extent that they are consistent, be updated by the cases and developments in other areas of the state's corporate governance law. While the benefit corporation statute is new, and therefore inheres some legal risk in the uncertainty of how courts will interpret the statute, there is, arguably, comparatively much less risk than in an FPC because the benefit corporation statute still sits upon the bedrock of the remainder of the corporate governance laws.*[49]

What is important for this paper, however, is how a B-Corp is substantively different from a traditional for-profit corporation in ways that would matter for Free Exercise purposes.

While a B-Corp is technically a for-profit corporation, it differs from a traditional for-profit corporation in many ways; most germane for the purpose of this paper are the primacy of social benefit over profit and the third party influence over the B-Corp's operations to ensure that it is operated in a socially beneficially manner.

B-Corp statues generally require the board of directors to consider the effects of their decisions on:

> *(i) the shareholders of the benefit corporation;*
>
> *(ii) the employees and work force of the benefit corporation, its subsidiaries, and its suppliers;*

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[47] There are a small number of federally chartered corporations, such as the Boy Scouts of America and the US Olympic Committee, as well as municipal corporations, but they are an anomaly when it comes to the overall number of corporations in the United States. For a general discussion of federally chartered corporations, *see* Paul E. Lund, *Federally Chartered Corporations and Federal Jurisdiction*, 36 FLA. ST. U. L. REV. 317 (2010). Corporations can also be created at the municipal level, such as in the case of transit districts and universities.

[48] For a general discussion of state corporation laws and a critique of B-Corp law as it relates to the foregoing, *see infra* note 62.

[49] *See* Westaway, *infra* note 62 at 1033.

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(iii) the interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the benefit corporation;

(iv) community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers are located;

(v) the local and global environment;

(vi) the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation; and

(vii) the ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose.[50]

The drafters of the Model B-Corp Code made it abundantly clear that the duty to maximize profits was a relic of traditional for-profit corporate governance and B-Corps would not be limited to such pecuniary goals. In the comment to Section 301(a)(1) of the Model B-Corp Code, the drafts explicitly stated

"This section is at the heart of what it means to be a benefit corporation. By requiring the consideration of interests of constituencies other than the shareholders, the section rejects the holdings in Dodge v. Ford, 170 N.W. 668 (Mich. 1919), and eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010), that directors must maximize the financial value of a corporation."[51]

If there were any doubt as to whether a B-Corp is more like a non-profit than a traditional for-profit corporation for Free Exercise purposes, the rejection of the duty to maximize profits and the creation of a duty to act in a manner that creates social benefits that are embedded within the Model B-Corp Code should convince even the *Conestoga* majority that a B-Corp is fraternal twin to the non-profit while being a mere distant cousin to the traditional for-profit corporation. If *eBay* stands for the proposition that in a traditional for-profit corporation "cannot … defend a business strategy that openly eschews stockholder wealth maximization" then the Model B-Corp Code clearly stands for the proposition that in a B-Corp, directors can defend a business strategy that does not involve stockholder wealth maximization, such as pursuing a religious purpose.

And since that's obviously the plain language of the Model B-Corp Code, a B-Corp is absolutely the functional twin of a non-profit for Free Exercise analyses.

This leads to the question of how a B-Corp can have a "religious purpose" similar to that of a non-profit, like a church.

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[50] Model B-Corp Code § 301(a)(1).
[51] Model B-Corp Code, comments to Section 301.

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A traditional for-profit corporation is formed with a "purpose" statement in its certificate of incorporation.[52] Though the "purpose" statement is a statutorily required term,[53] it is almost always left in the most general of terms possible.

The Delaware corporations code, for example, states

"*[i]t shall be sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware, and by such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations, if any*."[54]

In fact, the State of Delaware presumes that substantially all traditional for-profit corporations will be formed with a general purpose and as such, provides on its Secretary of State's website a sample certificate of incorporation to be filled in, with the purpose section pre-printed as "the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware."[55]

An exception in the area of purpose statements is usually found in the certificate of incorporation of "special purpose entities". These entities, formed either as corporations or limited liability companies, are organized to engage in specific acts and often have purpose statements that reflect this limited scope of permissible operations.[56] Outside of special purpose entities, however, it is exceedingly rare to find a certificate of incorporation that limits the powers of the company beyond engaging in all activities that are legally permissible in that jurisdiction.

Indeed, the remedy for a corporation violating its purpose statement, a suit based on the "ultra vires" doctrine, has mostly become a remnant of history.[57]

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[52] Though some jurisdictions refer to this document as the "articles of incorporation", the substantive elements of the two are virtually identical. As a result, the term "certificate of incorporation" in this paper also refers to articles of incorporation, as applicable.
[53] *See, e,g*., DEL. CORP. CODE § 102(a)(3).
[54] *Id*.
[55] Available at http://corp.delaware.gov/incstk09.pdf.
[56] The author of this paper has spent over 17 years practicing in the area of corporate finance and during that time formed a large number of corporations, including special purpose entities. In the author's practice, special purpose entities were formed in the context of joint ventures where a specific line of business was to be pursued. For example, the author was involved in the privatization of military housing, where the United States government formed a joint venture with a private developer to redevelop military housing and then act as the property manager for the renovated housing units. In such cases, the joint venture entity was formed with a purpose statement that limited the company to activities that were directly related to redeveloping and managing rental housing on military bases. Since a certificate of incorporation is filed with the secretary of state of the relevant jurisdiction, the use of a limited purpose statement puts all third parties on notice of the proper purposes of the corporation and, theoretically, forms the basis for the setting aside of any acts that are outside of the stated purposes of the corporation.
[57] *See, e.g.,* Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality*, 87 VA. L. REV. 1279 (2001) (arguing that while the ultra vires doctrine as a way to limit a corporation's activities is generally "dead or at least invalid", the only enduring use of the doctrine is as a way for shareholders to stop a corporation from engaging in illegal behavior, as almost all purpose statements still limit a corporation's permitted purposes to those that are legal).

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A B-Corp, on the other hand, is by its nature, limited to certain permitted activities.[58] At the very least, a B-Corp is required to identify itself as a benefit corporation in its certificate of incorporation. As such, the corporation is limited to creating a general public benefit, which is typically defined as "[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation."[59] In addition to the general public benefit purpose, a B-Corp can further list more specific purposes. The Model B-Corp Code lists the following as possible specific purposes:

(1) providing low-income or underserved individuals or communities with beneficial products or services;

(2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;

(3) protecting or restoring the environment;

(4) improving human health;

(5) promoting the arts, sciences, or advancement of knowledge;

(6) increasing the flow of capital to entities with a purpose to benefit society or the environment; and

(7) conferring any other particular benefit on society or the environment.[60]

In this context, it is important to note that "[t]he Model [B-Corp Code] explicitly states that '[t]he creation of a general public benefit and specific public benefit . . . is in the best interests of the benefit corporation.' **This serves to protect against the presumption that the financial interests of the corporation take precedence over the public benefit purposes**, which maximizes the benefit corporation's flexibility in corporate decision-making."[61]

Though each state's B-Corp laws contain differing provisions relating to the purpose for which a B-Corp may be formed,[62] Delaware, the authoritative jurisdiction for corporate law

[58] Unless otherwise indicated, discussions of various provisions of B-Corp law refer to the model benefit corporation legislation discussed *supra* note 44.
[59] Model B-Corp Code § 102.
[60] *Id*.
[61] White Paper, *The Need and Rationale for the Benefit Corporation: Why it is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors and, Ultimately, the Public*, at 17, dated January 18, 2013, available at http://benefitcorp.net/storage/documents/Benecit_Corporation_White_Paper_1_18_2013.pdf. (emphasis added).
[62] Because B-Corp statutes are in their legal infancy, it is still unclear whether the adoption of a specific purpose, such as the advancement of religion, would be subservient to the duty to promote general public benefits. For a discussion of this, and a conclusion that the adoption of a specific purpose would not be controlled by a duty to provide other general public benefits, see Kyle Westaway and Dirk Sampselle, *The Benefit Corporation: An economic Analysis With Recommendations to Courts, Boards and Legislatures*, 62 EMORY L. J. 999, 1036 (2013).

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jurisprudence, specifically includes religious activities as a permitted B-Corp purpose.[63] For purposes of this paper, pending the development of further refinements in state B-Corp law, it is assumed that religious activities would be a permitted B-Corp purpose in all states unless a state's B-Corp law explicitly excluded such a purpose (which exclusion, as of the time of the writing of this paper, is not a part of any state's B-Corp law).

A B-Corp with a religious purpose in its statement of purpose should be seen as identical to a non-profit under the *Amos* First Amendment doctrine-it can safely be presumed to be an entity organized for and acting in furtherance of religious purposes. Justice Brennan's concurrence in *Amos* was clear on this logic: "The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation."[64]

If this is true, then the fact that an operation's certificate of incorporation require it to be operated for religious purposes should remove any doubt, and any further inquiry, as to whether it is entitled to Free Exercise and Establishment Clause protections. Indeed, the Model B-Corp Code explicitly states the public benefits for which the corporation was established are the corporation's best interests (and thus take precedence over profit-making activities). Consequently, to avoid any chilling of protected religious exercise, the government and courts should accord all religious B-Corps the same blanket First Amendment protections that any non-profits receive.

Not only does a B-Corp have to specify in its certificate of incorporation the benefits that it is obligated to perform, it must provide an annual report on its progress in performing those benefits.[65] Included in the B-Corp annual report is an analysis of the B-Corp's performance of its social benefit goals compared to a third party standard for performance. The Model B-Corp Code commentary for this requirement describes the obligation as follows:

> *The requirement in section 401 that a benefit corporation prepare an annual benefit report that assesses its performance in creating general public benefit against a third-party standard provides an important protection against the abuse of benefit corporation status. The performance of a regular business corporation is measured by the financial statements that the corporation prepares. But the performance of a benefit corporation in creating general or specific public benefit will not be readily apparent from those financial statements. The annual benefit report is intended to permit an evaluation of that performance so that the shareholders can judge how the directors have discharged their responsibility to manage the corporation and thus whether the directors should be retained in office or the shareholders should take other action to change the way the corporation is managed. The annual benefit report is also intended to reduce "greenwashing" (the*

[63] Delaware General Corporation Law, Subchapter XV, § 362 requires any Delaware B-Corp to state in its certificate of incorporation at least one of the following purposes for which it was formed: "a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, **religious**, scientific or technological nature." (emphasis added).
[64] *Amos*, supra note 24, at 344.
[65] Model B-Corp Code § 401 requires each B-Corp to prepare and publicly publish an annual report consisting of a narrative describing the progress made in providing the stated benefit as well as a report that measures the B-Corp's progress against a third-party standard.

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phenomenon of businesses seeking to portray themselves as being more environmentally and socially responsible than they actually are) by giving consumers and the general public a means of judging whether a business is living up to its claimed status as a benefit corporation.

Additionally, a B-Corp may have (and, if it is a publicly traded corporation, is obligated to have), a "Benefit Director" who is a member of the board of directors charged with preparing an opinion describing any failures of the board or officers to fulfill their obligations in providing the B-Corp's stated benefits.[66]

In the event that a B-Corp fails to properly pursue its stated benefit, the Model B-Corp Code provides for a "benefit enforcement proceeding" as a remedy. A benefit enforcement proceeding can be initiated by either the B-Corp itself, by shareholders or by one or more director.[67] As a further protection, a B-Corp can't change its status as a B-Corp without the affirmative vote of 2/3rd of the B-Corp's shareholders.

Though many consider the tax status of an entity under the Internal Revenue Code of 1986, as amended (the "Code") to be the dispositive test for non-profit status, the truth is that a non-profit corporation, like a for-profit corporation, is a creature of state law. The provisions of the Code, specifically 501(c)(3), relate solely to the tax status of a corporation. A corporation organized as a Delaware not-for-profit corporation, for example, would not necessarily have to be a Code 501(c)(3) entity. However, courts tend to use the term "non-profit" in a generic way (e.g., the Amos and Conestoga majority opinions). For purposes of this paper, however, the important point is that the relevant court decisions that grant non-profits Free Exercise rights while depriving such rights to for-profits do so without any explanation as to importance of tax status in making such determinations. Assuming, however, that Code 501(c)(3) status is at the heart of this distinction, since such status is based upon, inter alia, the entity having a religious purpose, the equitable penalty for non-compliance with Code 501(c)(3) is simply the loss of tax exempt status. The penalty for a failure to fulfill the purpose of a B-Corp, on the other hand, includes, but is not limited to, a benefit enforcement proceeding, which could conceivably include a court-ordered affirmative order to engage in the B-Corp's stated beneficial purpose.

Added up, B-Corp governance procedures provide a guarantee that the entity will be guided by a commitment to public benefit over profit that is at least as robust as the rules that govern non-profits.

The *Conestoga* majority not only misconstrued the *Amos* non-profit/for-profit distinction, it failed to consider recent developments in corporate law that rendered the secular/religious corporation distinction irrelevant.

A B-Corp with a stated purpose of promoting religion is, for Free Exercise purposes, in substance the same as a non-profit and like a non-profit, such a B-Corp should be presumed to possess Free Exercise rights.

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[66] Model B-Corp Code § 302.
[67] *Id*. at §305(c).

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If the Free Exercise rights of B-Corps are not recognized, it sets up a scenario where federal rulemaking could cause a corporation to violate its certificate of incorporation and thus subject the board of directors and the corporation to liability under state law.

By way of example, let's assume that Conestoga Corp. was in fact a B-Corp and had stated in its certificate of incorporation the specific public benefit purpose of promoting adherence to Christian principles.[68] If the Supreme Court finds that Conestoga Corp. does not have Free Exercise rights and thus must comply with the ACA Contraception Mandate, Conestoga Corp. will be forced to violate its certificate of incorporation and will be subject to a benefit enforcement proceeding. The state court handling the benefit enforcement proceeding would then be put into the position of having to either order Conestoga Corp. to violate federal law or it will have to allow Conestoga Corp. to violate state law and frustrate the goals and religious beliefs of Conestoga Corp's shareholders when they formed Conestoga as a B-Corp.

The *Amos* court explained the presumption of Free Exercise rights for non-profits by pointing out that "[w]hile not every nonprofit activity may be operated for religious purposes, the likelihood that many are makes a categorical rule a suitable means to avoid chilling the exercise of religion."[69] That same logic militates against the denial of Free Exercise rights to B-Corps.

Without such a "categorical rule" (that B-Corps with a stated religious benefit purpose, like non-profits, operate for religious purposes and thus have Free Exercise rights) there is a significant risk of an unacceptable entanglement of government with religion.[70]

7. The Need For De-Fact B-Corp Jurisprudence.

The conclusion of the immediately preceding section of this paper that B-Corporations with a religious purpose gave Free Exercise rights leaves open the question of what happens in jurisdictions where B-Corp status is not yet available. While corporations are created under and governed by state law, Free Exercise rights are, in part, applied at the federal level.[71]

In particular, only 20 of 50 states have adopted B-Corp legislation and B-Corp legislation in most states, including Pennsylvania (where Conestoga Corp. is incorporated), is a very recent development. In fact, Pennsylvania's adoption of its B-Corp legislation only became effective

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[68] Delaware, as one example, explicitly states that religion can be a specific benefit purpose of a Delaware B-Corp. *See supra* note 63.

[69] *Supra* note 25.

[70] In this context, entanglement with religion is used in a generic manner. This phrase is often a reference to the three part test introduced in Lemon v. Kurtzman 403 U.S. 602 (1971) (deciding whether state funding of religious schools was a violation of the Establishment Clause). Because the issues dealt with in this paper relate to the Free Exercise Clause and focus on private, rather than state, action, the *Lemon* test is not directly applicable. However, the general notion of *Lemon*, that the state should not be excessively involved in religious matters, as it would be if it had to decide a benefit enforcement proceeding in the example used, is what is meant by unacceptable government entanglement with religion here.

[71] Though outside the scope of this paper, the Free Exercise Clause has been incorporated against the states. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

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after the *Conestoga* complaint had been filed[72] and Oklahoma (where Hobby Lobby Inc. is incorporated) has not adopted B-Corp legislation at all.

The answer to this question is to grant for-profit corporations that have a demonstrable religious purpose "de-facto B-Corp" status for First Amendment purposes.

It is important to remember that the original reason for establishing the presumption that non-profits have Free Exercise rights was to avoid the chilling of religious expression where the corporate actor was likely to be operating for religious purposes. The *Amos* court used the most expedient test that was relevant for its time, which was the non-profit/for-profit distinction. The rise of B-Corps, however, provides a more precise basis for the presumption, and one that will ensure less court entanglement in religious questions.

It is beyond question that both Hobby Lobby Inc. and Conestoga Corp. operate for religious purposes. While they don't yet adhere to established B-Corp rules, the combination of the small and united shareholder base and formal commitment to the promotion of religion put them in a position that is functionally equivalent to either a non-profit religious organization or a B-Corp with a religious purpose.

The doctrine of the "de-facto" corporation has a long history in the United States. Each state has different tests and rules pertaining to de-facto corporation status, but Delaware's is illustrative. In Delaware, a court will deem a corporation to exist even if one hasn't been properly formed under the state's law. The general theory behind the de-facto corporation doctrine is that where a party has made a bona fide attempt to organize as a corporation and it's likely that others have dealt with the entity assuming that it was a corporation, the courts should give legal effect to the expectations of the various parties.

A Delaware court will examine three factors to determine whether de-facto corporate status should apply. First, there must be a state law under which the corporation could have been formed. Second, there must be some evidence of an intent to form the corporation and comply with the corporate governance laws. Finally, there must have been some exercise of corporate powers in furtherance of the attempted incorporation.[73]

In the case of a de-facto B-Corp, the standard Delaware test could be easily modified and implemented to provide Free Exercise rights to a corporation that has a religious purpose. In the event the putative de-facto B-Corp is in a state that doesn't have B-Corp legislation, the court could look to the Model B-Corp Code. To prove evidence of intent to form a B-Corp, the court could look to see if the corporation has a purpose statement that includes a religious goal or if its board has adopted standards of conduct and operations that are religious in nature. Third, the court could look to see whether there had been exercise of corporate powers that showed that the company was being operated with an emphasis on religious purpose. Assuming that all three

[72] *Conestoga*'s first amended verified complaint was filed in the United States District Court for the Eastern District of Pennsylvania on January 9, 2013 (*see* http://www.adfmedia.org/files/ConestogaComplaint.pdf) while the Pennsylvania Benefit Corporation Act became effective on January 23, 2013 (*see* http://www.martindale.com/corporate-law/article_Schnader-Harrison-Segal-Lewis-LLP_1658442.htm) .
[73] Caudill v. Sinex Pools, Inc., C.A. No. 04C-10-090 WCC, 2006 WL 258302 (Del. Super. Ct. Jan. 18, 2006).

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elements existed, the court would deem the corporation to be a de-facto B-Corp for First Amendment purposes.[74]

It may take many years before the B-Corp is established in all 50 states and even more time before a robust body of B-Corp jurisprudence exists such that the B-Corp becomes well enough known that small business lawyers can guide their clients through the transition from a traditional for-profit corporation to a B-Corp. However, the mere existence of the B-Corp as a legal corporate for-profit entity with a religious purpose (if the shareholders so choose) proves that there is a much larger world than the one imagined by the *Conestoga* majority and its rigid, baseless "religious non-profit/secular for-profit" dichotomy. Until such time as B-Corp legislation exists in all 50 states and is familiar to all levels of business advisors[75], status as a de-facto B-Corp with attendant Free Exercise rights should inure to any for-profit corporation that asserts a religious purpose.

8. Conclusion

Courts are understandably reluctant to engage in case-by-case investigations into the religious practices of individuals or associations of individuals. There was a time not long ago when, for purposes of judicial efficiency, it was acceptable to create a presumption that non-profit corporations should have Free Exercise rights.

However, there never before has been a corresponding legal presumption that for-profit corporations were barred from claiming Free Exercise rights. The recent decision of the *Conestoga* majority to codify the denial of Free Exercise rights on an utterly arbitrary and whole-cloth legal construct of a "secular, for-profit" corporation is an unacceptable, unconstitutional shredding of one of the most fundamental of all rights-the right to exercise religion, whether as an individual or as an association of individuals.

B-Corps, when formed with a stated religious purpose, are no less capable of religious exercise than non-profit corporations. While Judge Jordan's *Conestoga* dissent was correct in stating that Free Exercise rights are based on the act and not the actor, this paper's proposal that B-Corps and de-facto B-Corps should benefit from the same presumption of religious exercise enjoyed by non-profit corporations will provide a level of assurance that a religious act is indeed motivated by religious belief when undertaken by a for-profit corporation, and thus is deserving of Free Exercise protection.

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[74] While this proposal is one of first impression, it comports with the intent behind the de-facto corporation doctrine generally, which is to give effect to the intent of the relevant parties. We can't know how many of the millions of corporations that currently exist would have been formed as B-Corps had such an option been available at the time of incorporation. Thus, we should look at how the corporation is run and what it publicly asserts to determine whether it appears to be the equivalent of a B-Corp formed with a religious social benefit purpose.

[75] The choice to change corporate form from a traditional for-profit corporation to a B-Corp will necessarily require business owners to consult with tax, financial, legal and other advisors to ensure that all aspects of the change are understood and accounted for. Consequently, it will take some period of time before the process of incorporating a B-Corp or converting an existing corporation or limited liability company to a B-Corp becomes routine and affordable.

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9. Epilogue

On June 30, 2014, the Supreme Court decided the consolidated *Hobby Lobby* and *Conestoga* cases.[76] Because the 5-4 decision was based upon the Religious Freedom Restoration Act[77] ("RFRA"), the Court did not explicitly address the First Amendment Free Exercise Clause challenges.[78]

Justice Alioto, writing for the majority, explained that RFRA was a Congressional response to then-existing First Amendment Free Exercise Supreme Court precedent[79] and was meant to provide more protection for religious exercise than was then provided under the First Amendment.[80]

The Court then found that RFRA applied to for-profit corporations because RFRA's definition of "persons" protected by that act explicitly includes corporations.[81] The dissent claimed that notwithstanding the plain language of the statute, the RFRA definition of person was intended to codify Supreme Court Free Exercise that existed prior to Employment Div., Dept. of Human Resources of Ore. v. Smith[82] (the case that spurred Congress to enact RFRA),[83] which, according to the dissent, did not include protections for for-profit corporate exercise of religion. After disabusing the dissent of their flawed argument against the plain language of the statute, Justice Alito squarely addressed the issue of whether for-profit corporations were protected by the First Amendment's Free Exercise clause prior to *Smith*:

> *[T]he one pre-Smith case involving the free-exercise rights of a for-profit corporation* ***suggests, if anything, that for-profit corporations possess such rights****. In Gallagher v. Crown Kosher Super Market of Mass., Inc., 366 U.S. 617 (1961), the Massachusetts Sunday*

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[76] Burwell, et. al., v. Hobby Lobby Stores, Inc., et. al., 573 U.S. ___ (2014) (slip op.). For purposes of this Epilogue, the consolidated case will be referred to as "Hobby Lobby et. al.").
[77] Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488 , 42 U.S.C. §2000bb et seq.
[78] *Id*. at 49 (slip op.) ("The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns.")
[79] *Id*. at 5-7 (slip op.) ("Congress responded to Smith by enacting RFRA..In order to ensure broad protection for religious liberty, RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability…If the Government substantially burdens a person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government "demonstrates that application of the burden to the person-(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest…RLUIPA amended RFRA's definition of the "exercise of religion… Before RLUIPA, RFRA's definition made reference to the First Amendment…(defining "exercise of religion" as "the exercise of religion under the First Amendment"). In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief…And Congress mandated that this concept "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."") (internal citations omitted).
[80] *Id*. at 17 (slip op.) ("As we have seen, RFRA was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required.")
[81] *Id*. at 18 (slip op).
[82] 494 U.S. 872 (1990).
[83] *Hobby Lobby, et. al, supra* note 76 at 25 (slip op).

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closing law was challenged by a kosher market that was organized as a for-profit corporation, by customers of the market, and by a rabbi. The Commonwealth argued that the corporation lacked "standing" to assert a free-exercise claim, but not one member of the Court expressed agreement with that argument. The plurality opinion for four Justices rejected the First Amendment claim on the merits based on the reasoning in Braunfeld, and reserved decision on the question whether the corporation had "standing" to raise the claim. The three dissenters, Justices Douglas, Brennan, and Stewart, found the law unconstitutional as applied to the corporation and the other challengers and thus implicitly recognized their right to assert a free-exercise claim. Finally, Justice Frankfurter's opinion, which was joined by Justice Harlan, upheld the Massachusetts law on the merits but did not question or reserve decision on the issue of the right of the corporation or any of the other challengers to be heard. It is quite a stretch to argue that RFRA, a law enacted to provide very broad protection for religious liberty, left for-profit corporations unprotected simply because in Gallagher-the only pre-Smith case in which the issue was raised-a majority of the Justices did not find it necessary to decide whether the kosher market's corporate status barred it from raising a free-exercise claim.[84]

From this important point, Justice Alito applied the RFRA's strict scrutiny standard to the ACA Contraception Mandate and found that the mandate substantially burdened the exercise of religion, and while the government interest in women's health was compelling, the ACA Contraception Mandate was not the least restrictive means of furthering that interest. With that, the ACA Contraception Mandate was found to violate the RFRA rights of closely held corporations.[85]

It is not clear why the majority qualified its opinion by reference to "closely held" corporations, rather than to corporations generally (for and not for profit). The most likely explanation is that the three corporations that were parties to *Hobby Lobby et. al*. were all closely held and the Supreme Court tries to keep its decisions as limited to the instant facts as possible. Since no non-closely held corporations were parties, there was no need to explicitly rule on their rights. This supposition is borne out by Justice Alito's response to the dissent's concern that the decision would give rise to large publicly held corporations seeking to deny benefits based on religious beliefs:

[Hobby Lobby et. al. does] not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims. HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. For example, the idea that unrelated shareholders-including institutional investors with their own set of stakeholders-would agree to run a corporation under the same religious beliefs seems improbable. In any event, we have no occasion in these cases to consider RFRA's applicability to such companies. The 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.

[84] *Id*. at 26-27(slip op.) (internal citations omitted) (emphasis added).
[85] *Id*. at 40-43, 49 (slip op.).

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The key issue in both RFRA and First Amendment Free Exercise cases, as indicated in the foregoing passage, is not the number of shareholders; rather it is whether the entity (be it an individual or a corporation) is acting (or failing to act) upon sincere religious beliefs.[86] It just so happens that the fewer the number of shareholders, the easier it would be, logically, to discern their interests (and thus, the corporation's interests). So as a matter of expediency, the Court focused on closely held corporations in deciding *Hobby Lobby et. al.*

Indeed, Justice Alito went so far as to say that under RFRA, federal courts were expected to undertake an examination of the sincerity of a for profit corporation that claimed it was exercising religion.[87]

The case for recognizing the free exercise rights of B-Corps (de-jure and de-facto) was made stronger by Justice Alito's discussion of the subject matter of this paper in response to the dissent's and government's assertion that the profit motive of for profit corporations vitiated any claim they may have to the exercise of religion.[88] Justice Alito pointed out that under B-Corp legislation, a corporation can be formed to further social goals, including the religious goals.[89]

This line of reasoning applies to free exercise questions raised under the First Amendment as well as RFRA. The majority opinion clearly rejected the claim that pre-*Smith* First Amendment precedent precluded Free Exercise rights for for-profit corporations. Furthermore, the arguments in favor of recognizing RFRA free exercise rights of corporations, whether they are de-jure B-Corps, de-facto B-Corps or closely held corporations, are based on the same principles as one would use in reviewing a case under First Amendment Free Exercise precedent.

One only has to look at Justice Brennan's *Amos* concurrence[90] to see that Justice Alito reiterated the enduring constitutional precedent that as long as a for-profit corporation's religious beliefs are found to be sincere, that corporation is entitled to the protections of the First Amendment's Free Exercise Clause.

Because *Hobby Lobby et. al.* involved only closely held corporations, there was no for the Court to explicitly discuss the free exercise rights of other types of for-profit corporations. However, it is clear from the general discussion of the potential for religious exercise by for-

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[86] *Id*. at note 28 (slip op.) ("To qualify for RFRA's protection, an asserted belief must be "sincere"; a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail. *Cf., e.g.,* United States v. Quaintance, 608 F. 3d 717 , 718-719 (CA10 2010).").

[87] *Id*. at 29-30 (slip op.).

[88] Though this paper was not directly cited to in the *Hobby Lobby et. al.* decision, the author of this paper filed an amicus brief based on this paper with the Supreme Court and there was a full discussion of B-Corps by the majority. *Hobby Lobby et. al. supra* note 76 at 24-25 (slip op.).

[89] *Hobby Lobby et. al., supra* note 76 at 24-25 and note 25 (slip op.) ("Not all corporations that decline to organize as nonprofits do so in order to maximize profit. For example, organizations with religious and charitable aims might organize as for-profit corporations because of the potential advantages of that corporate form, such as the freedom to participate in lobbying for legislation or campaigning for political candidates who promote their religious or charitable goals. In fact, recognizing the inherent compatibility between establishing a for-profit corporation and pursuing nonprofit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms. Over half of the States, for instance, now recognize the "benefit corporation," a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners.").

[90] *See* discussion at pages 6-7 hereof.

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profit corporations and, in particular, B-Corps, that this decision applies equally to other for-profit corporations that have sincere religious beliefs, and by affirming that for-profit corporations were persons for First Amendment Free Exercise purposes under pre-*Smith* precedent, Justice Alito's opinion makes it clear that this would be the case under First Amendment Free Exercise principles as well as under the RFRA.[91]

Going forward, as courts begin to grapple with the scope of the *Hobby Lobby et. al.* opinion, this paper's proposal *vis a vis* de-jure and, especially, de-facto B-Corps takes on added importance. It is inevitable that there will be a future case where a non-closely held for-profit corporation seeks the same protections that were afforded to the closely-held corporations in *Hobby Lobby et. al.* The de-facto B-Corp analysis outline herein would be true to the principles contained in Justice Alito's majority opinion as well as First Amendment and RFRA precedent.

It has been suggested by those who are unhappy with the *Hobby Lobby et. al.* decision that Congress should amend RFRA to explicitly exclude for-profit corporations from its coverage.[92] If this were to be done, for-profit corporations would then have to rely upon the First Amendment's Free Exercise clause from and after *Smith* if they sought to challenge the ACA Contraception Mandate.

Though a robust discussion of First Amendment Free Exercise clause jurisprudence post-*Smith* is outside the scope of this paper[93] a few principles thereof are generally agreed upon. First, the "…right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability…."[94]For neutral laws of general applicability, the standard of review under the First Amendment Free Exercise clause is rational basis, while for laws that are either not neutral or not generally applied, the standard of review under the First Amendment Free Exercise Clause is, in principle, the same as under RFRA-strict scrutiny.[95]

[91] It is important to note here that in the wake of the *Hobby Lobby et. al.* decision there have been calls for the RFRA to be amended to exclude for-profit corporations. If such an amendment were to be made, however, the First Amendment Free Exercise rights of for-profit corporations would still apply (though the level of scrutiny to be used would not necessarily be the same as under RFRA); in fact, it is likely that RFRA would be rendered unconstitutional if it were to be amended to exclude for-profit corporations.

[92] Kevin Daley, *After Hobby Lobby Ruling, Democrats Move to Amend RFRA*, WASH. EXAMINER (July 2, 2014), available at http://washingtonexaminer.com/after-hobby-lobby-ruling-democrats-move-to-amend-rfra/article/2550444 ("Liberal groups and congressional Democrats are moving forward with plans to reform the Religious Freedom Restoration Act in the wake of the Supreme Court's ruling Monday in Burwell v. Hobby Lobby.")

[93] For a detailed discussion of First Amendment Free Exercise jurisprudence post-*Smith*, *see* Richard. F. Duncan, *Free Exercise is Dead, Long Live Free Exercise; Smith, Lukumi and the General Applicability Requirement*, 3 U. PA J. Const. L. 850 (2001); *see, also* Marci A. Hamilton, *Employment Division v. Smith at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse,* 32 CARDOZO L. REV. 1671 (2011).

[94] *Smith*, *supra* note 82 at 879.

[95] Hope Lu, *Addressing the Hybrid-Rights Exception: How the Colorable-Plus Approach Can Revive the Free Exercise Clause*, 64 CASE W. RES. L. REV. 257, 262 (2012) ("The conclusion of Smith and its application in Hialeah yield the current state of free exercise jurisprudence. Even if a law encumbers religious practices, as long as the law does not single out religious practices for punishment and is not motivated by the desire to interfere with the individual's right to practice the religion, the law will likely be considered constitutional under Smith. Free exercise rights are not violated by a neutral law of general applicability so long as rational basis review is satisfied. Conversely, a law that is not of general applicability will be found unconstitutional if it does not meet strict scrutiny.")

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There can be no question that the ACA Contraception Mandate is a neutral law on its face. It simply requires the provision of a designated level of health insurance by employers.

Where the ACA Contraception Mandate runs into trouble, though, is in how it is applied. First, by the terms of the ACA Contraception Mandate itself, employers with fewer than 50 employees are exempt from the mandate.[96] Furthermore, as Justice Alito chronicles in the *Hobby Lobby et. al.* opinion, there are numerous exemptions for the ACA Contraception Mandate for religious entities and others.[97]

> *HHS also authorized the HRSA to establish exemptions from the contraceptive mandate for "religious employers." That category encompasses "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order. In its Guidelines, HRSA exempted these organizations from the requirement to cover contraceptive services.*
>
> *In addition, HHS has effectively exempted certain religious nonprofit organizations, described under HHS regulations as "eligible organizations," from the contraceptive mandate. An "eligible organization" means a nonprofit organization that "holds itself out as a religious organization" and "opposes providing coverage for some or all of any contraceptive services required to be covered . . . on account of religious objections." To qualify for this accommodation, an employer must certify that it is such an organization.*
>
> *When a group-health-insurance issuer receives notice that one of its clients has invoked this provision, the issuer must then exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries…*
>
> *In addition to these exemptions for religious organizations, ACA exempts a great many employers from most of its coverage requirements. Employers providing "grandfathered health plans"—those that existed prior to March 23, 2010, and that have not made specified changes after that date—need not comply with many of the Act's requirements, including the contraceptive mandate. And employers with fewer than 50 employees are not required to provide health insurance at all.*
>
> *All told, the contraceptive mandate "presently does not apply to tens of millions of people." This is attributable, in large part, to grandfathered health plans: Over one-third of the 149 million nonelderly people in America with employer-sponsored health plans were enrolled in grandfathered plans in 2013. The count for employees working for firms that do not have to provide insurance at all because they employ fewer than 50 employees is 34 million workers.*

[96] *Hobby Lobby et. al., supra* note 76 at 7 (slip op.) ("ACA generally requires employers with 50 or more full-time employees to offer 'a group health plan or group health insurance coverage' that provides 'minimum essential coverage'".)
[97] Id. at 9-10 (slip op.) (internal citations omitted).

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There can hardly be a better exemplar of a law that is not generally applicable than a law that through administrative discretion and political wrangling has exempted tens of millions of people from its effects.

The effect of the numerous exemptions that have been provided under the ACA Contraception Mandate (and the ACA generally[98]) is not only breathtaking in its scope, it clearly results in the ACA Contraception Mandate being a law that is not generally applicable. Indeed, if RFRA is amended to exclude for-profit corporations from its coverage as a result of the *Hobby Lobby et. al.* decision, the effect would be to amplify and formalize the fact that there are exemptions from the ACA Contraception Mandate. Any question as to whether the ACA Contraception Mandate is a law of general applicability would then be definitively be answered with a resounding "no".

Since the ACA Contraception Mandate is not a law of general applicability, what then of its fate under *Smith*?

As Professor Richard Duncan has explained, *Smith* left in place First Amendment Free Exercise caselaw that imposed strict scrutiny on cases where "…the State has in place a system of individual exemptions", in which case "… it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[99] Professor Duncan also characterized[100] the Court's decision in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*[101] as being a case where a law that was facially neutral and of general applicability failed Free Exercise muster because individual exemptions from the general requirements of the law were made available and the law, and its exemptions, were designed to limit its applicability to a certain group.

Professor Duncan summarizes the state of the law post-*Smith* as including a

> *…safe harbor for religious liberty when government adopts an individualized process for allocating governmental burdens or benefits. An 'individualized process' is one in which government officials make an 'individualized…assessment of the reasons for the relevant conduct' and thus of a person's eligibility for a government benefit or exemption from a governmental burden.*[102]

Professor Duncan clarifies the issue by stating that "the individualized assessment rule is best understood as a subset of the rule that applies rigorous strict scrutiny to non-neutral or non-

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[98] See Tyler Hartsfield and Grace-Marie Turner, *41 Changes to Obamacare…So Far*, Galen Institute Newsletter dated May 22, 2014, available at http://www.galen.org/newsletters/changes-to-obamacare-so-far/ (detailing compliance exemptions granted to small businesses, unions and employers generally as well as the exemption from compliance with the ACA provided to Congress).

[99] Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of Smith, Sherbert, Hogwarts, and Religious Liberty*, 83 NEB. L. REV 1178, 1185 (2005) (citing *Smith*).

[100] *Id*. at 1186.

[101] 508 U.S. 520 (1993). In this case, a local government sought to ban ritual animal killing. Though the law that was enacted was on its face neutral, in that it applied to all ritual animal killings where the animal was not later used for food, and generally applicable, the Supreme Court found that because the local government made determinations as to what type of killings fell under the law, it was not, in practice, a law of general applicability and thus was contrary to the First Amendment Free Exercise rights of the practitioners.

[102] Duncan, *supra* note 99 at 1186 (citing *Smith*).

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generally applicable laws…it is a categorical rule that classifies individualized exemption processes marked by discretionary decision-making as *per se* not neutral and not of general application."[103]

As Professor Duncan explains, strict scrutiny should be triggered "…in a large number of cases involving governmental policies and rules … in which government officials or agencies allocate benefits or burdens by means of an ad hoc system of discretionary application."[104] In other words, as soon as a formal or informal system of exemptions or waivers is applied to a law, as is the case in the ACA Contraception Mandate, that law is no longer one of general applicability for First Amendment Free Exercise purposes and it must be reviewed under strict scrutiny.

Though we will likely never know why Justice Alito went into such great detail discussing the various exemptions from the ACA Contraception Mandate, going so far as to quantify it as affecting millions of people, it is likely that he did so as a way to show that even if the RFRA was found to not apply to for-profit corporations, under *Smith* the ACA Contraception Mandate as applied to for-profit corporations would have been found to violate the First Amendment Free Exercise clause.

The result in *Hobby Lobby et. al.* applies to any corporation, whether it's for-profit or non-profit and whether it's closely held or widely held, so long as a court can determine that the corporation is acting on sincerely held religious beliefs. As a result of the individualized exemptions doctrine under *Smith*[105] *t*his result holds even if RFRA were to be amended to discriminate against for-profit corporations[106] .

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[103] *Id*.
[104] *Id*. at 1198.
[105] Many thanks to Professor Eugene Volokh, who was gracious enough to respond to my request for a critique of the ideas propounded in the Epilogue section of this paper. Professor Volokh's responses to my inquiries led me to a greater examination of the *Smith* case and its applicability to the ACA Contraception Mandate. By thanking Professor Volokh for his time, I am not implying that Professor Volokh has endorsed my analysis or any other aspect of this paper (in fact, he respectfully questioned the basis of my initial inquiry regarding the First Amendment Free Exercise remedies that might have been available in *Hobby Lobby et. al* and has not seen or commented on this Epilogue).
[106] Arguably, such an amendment would make stronger the case that the ACA Contraception Mandate is not one of general application since the amendment would introduce further discretionary delineations into the ACA Contraception Mandate's applicability.

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