Sanctuary Places in America: One Year of the Trump Administration

Thursday, February 22, 2018
6:30 - 8:30 p.m.

Fordham Law School
3rd Floor – Room 3-03

Although the concept of sanctuary cities has deep roots in the western tradition, new sanctuary movement has emerged in response to the Trump administration’s deportation policies. Churches, Mosques, Synagogues and other places of worship are declaring — or considering declaring — themselves sanctuaries for undocumented immigrants.

This panel will explore the current use and interpretation of the term “sanctuary,” how it comes into play in policies around law enforcement, religious and educational settings, and the current administration’s position.

It will also explore the moral issues associated with local sanctuary policies and examine three arguments in its favor: public safety, civil disobedience, and collective resistance arguments.

Speakers
Jonathan Nelson, partner at Nelson Madden & Black, LLP.
Gemma Solimene, Clinical Associate Professor of Law at Fordham Law School.
Rabbi Jill Jacobs, Executive Director of TRUah – The Rabbinic Call for Human Rights
Engy Abdelkader, Lecturer at Rutgers University.

Register at
law.fordham.edu/sanctuaryplaces

Free and open to the public.

Continuing Legal Education (CLE) credits have been approved in accordance with the requirements of the New York State CLE Board for a maximum of two (2) nontransitional professional practice credits.

CLE Fee: $65 for practitioners ($35 for public interest attorneys and Fordham Alumni).

The Institute on Religion, Law & Lawyer’s Work aims to help practicing lawyers and law students in their efforts to live integrated lives of faith in the context of the challenges of legal practice, and to promote dialogue on issues related to religion and law. It sponsors national and local interfaith conferences, lectures, and programs on religion, spirituality, and legal practice.
“SANCTUARY PLACES IN AMERICA:
ONE YEAR OF THE TRUMP ADMINISTRATION”

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Gemma Solimene, Clinical Associate Professor of Law at Fordham University School of Law.

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Jonathan Nelson, partner at Nelson Madden & Black, LLP, and President of the New York Chapter of the Christian Legal Society.

Engy Abdelkader, Lecturer at Rutgers University, Political Science Department.

Material for Continual Legal Education (2 non-transitional professional practice credits):


Morton, John, Memorandum for Field Office Directors, Special Agents in Charge, Chief Counsel: Enforcement Actions at or Focused on Sensitive Locations, U.S. Immigration and Customs Enforcement, Policy Number 10029.2 / FEA Number 306-112-002b, (October 24, 2011)

ICE, FAQ on Sensitive Locations and Courthouse Arrests, Enforcement and Removal Operations, (01/31/2018)

White House, Executive Order: Enhancing Public Safety In The Interior Of The United States; (January 25, 2017)

White House, Border Security And immigration Enforcement Improvements; (January 25, 2017)

Department of Justice, Office of Public Affairs, Justice News: *Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs*; (July 25, 2017)

*Simpson Thacher’s Daily Summary & Overview on Travel Ban and Sanctuary Cities litigation; Summary of Litigation challenging the “Sanctuary Cities” Executive orders*
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February 22, 2018
Timeline

VENUE: Fordham Law School, Room 3-03, Lincoln Center Campus

6:30 PM Welcome by Endy Moraes. Introduction of the program for the evening and the moderator Professor Gemma Solimene.

6:35 PM Professor Solimene introduces the speakers.

6:40 PM Engy Abdelkader’s presentation.

6:55 PM Rabbi Jill Jacobs’ presentation.

7:10 PM Jonathan Nelson’s presentation.

7:25 PM Professor Solimene’s presentation.

7:40 PM The speakers engage in discussion.

7:55 PM Q&A session (Professor Solimene)

8:27 PM Thank you and announcements
Biographies

Speakers

**Professor Gemma Solimene**
Professor Gemma Solimene is a Clinical Associate Professor of Law at Fordham University School of Law. Professor Solimene has over 28 years of experience representing underserved New Yorkers. While at Fordham, Professor Solimene has directed the Immigrant Rights Clinic, through which students represent individuals who are seeking to maintain or obtain legal immigration status in the U.S. She has taught in various clinics in the Law School’s Clinical Program, including the Social Justice Clinic and the Federal Litigation Clinic. Professor Solimene has taught the Immigration Law course, as well as an Ethics in Public Interest Law course, a simulation-based skills course and an externship seminar. Outside of the law school, Professor Solimene has conducted trial skills trainings for law firms and served as Co-Chair of the ABA’s Clinical Skills Committee. Prior to joining the Fordham Law faculty in 1999, Professor Solimene spent her career working in the public interest. She litigated cases at The Legal Aid Society’s Civil Division and was the Attorney-in-Charge of The Legal Aid Society’s Immigration Law Unit. Professor Solimene also taught in the NYU School of Law Clinical Program from 1993 to 1996 and was a Pro Se Law Clerk in the Second Circuit Court of Appeals. Professor Solimene received her BA *magna cum laude* for S.U.N.Y. Stony Brook and her JD from NYU School of Law.

**Rabbi Jill Jacobs**
Rabbi Jill Jacobs is the Executive Director of T’ruah - The Rabbinic Call for Human Rights, which mobilizes 1,800 rabbis and cantors and tens of thousands of American Jews to protect human rights in North America and Israel.
Over the past year, T’ruah has established a Jewish Sanctuary Network (called Mikdash)—seventy synagogues that have pledged to protect immigrants and refugees facing deportation.
"SANCTUARY PLACES IN AMERICA:
ONE YEAR OF THE TRUMP ADMINISTRATION"


Jonathan Nelson
Jonathan Nelson is a partner at Nelson Madden & Black, LLP. He practices primarily in the fields of civil litigation and corporate law, with a concentration on the representation of religious institutions. He is the President of the New York Chapter of the Christian Legal Society. Jonathan is an expert on immigration and has been doing research on the sanctuary movement.
He is a highly-regarded church law practitioner.

Mr. Nelson established an independent law office in 1991, after eight years of practice in corporate litigation and financial transactional work with major law firms in Chicago and New York City. Over the next twenty-five years, Mr. Nelson represented or advised hundreds of clients in the religious community, including Christian churches of many kinds, a religious order, Hindu temples, Jungians, a Yoruba cultural center, mosques, pastors, church trustees, missionaries, and victims of religious persecution seeking asylum. Mr. Nelson has advised lay boards and clergy on a wide variety of legal concerns. Mr. Nelson has been a panelist at meetings organized by the American Bar Association and other lawyers’ groups. He also served as lead counsel in numerous judicial and administrative litigations, including a precedent-setting lawsuit brought by the Fifth Avenue Presbyterian Church against the City of New York in 2001 to enforce the church’s First Amendment rights to serve homeless people on the steps of the church. Mr. Nelson has been listed in SuperLawyers since 2012, and has been rated “AV Preeminent” since 1998.

He has a B.A. from Yale College; a J.D. from the Northwestern University School of Law; and a M.A. from The Fletcher School of Law and Diplomacy, Tufts University.
Engy Abdelkader
Engy Abdelkader is a Lecturer at Rutgers University, Political Science Department. She is a scholar, researcher and humanitarian who teaches graduate seminars on international human rights law as well as undergraduate writing courses. In her prior role as a senior fellow at Georgetown University, Abdelkader participated in colloquia and conferences by invitation and pursuant to calls for papers, including at Harvard, UC Berkley and Notre Dame; organized a joint international conference with the Organization for Security and Cooperation in Europe; authored one of the most widely cited research reports exploring the relationship between anti-Muslim political rhetoric and acts and threats of violence directed against the minority faith community during the 2016 U.S. presidential election cycle; and participated in United Nations meetings as an invited expert.

Prior to joining Georgetown, and while previously teaching at Rutgers, her efforts – from leading international workshops ensuring access to education and employment for women to presenting at the European Parliament to organizing an academic conference highlighting human rights abuses against religious minorities – have been recognized by a number of entities including the German Marshall Fund of the United States where she was invited to join a transatlantic leadership program.

Abdelkader has a long record of working for under-represented and marginalized communities. In the aftermath of 9/11, for instance, she volunteered as a cooperating attorney with the American Civil Liberties Union (ACLU) and the Center for Constitutional Rights (CCR). While she researched the intersection of race, religion and terrorism at the ACLU, she provided research support to CCR attorneys litigating a lawsuit on behalf of Maher Arar — the first publicized case of “extraordinary rendition,” the U.S. government practice of sending individuals to countries with deplorable human rights records to be tortured in connection with suspected terrorist activity.

Previously, as a public interest attorney, she successfully litigated cases on behalf of indigent immigrant survivors of violence fleeing religious, political and other persecution around the world while undertaking research, writing, and lecturing about racial, ethnic and social justice issues. At this time, she
co-founded and was elected the first president of the New Jersey Muslim Lawyers Association (NJMLA), a specialty bar organization dedicated to addressing the needs of Muslim American attorneys in the New Jersey area. As NJMLA’s first president, she met with then New Jersey Governor Jon S. Corzine’s staff about enhancing diversity in the judiciary and helped secure the appointment of the first Muslim American judge to the Superior Court of New Jersey.

Her commitment to public service was recognized by a variety of entities, ultimately culminating in appointments to the New Jersey Supreme Court Board on Continuing Legal Education, New Jersey Supreme Court Committee on Minority Concerns, New Jersey State Bar Foundation Respect Editorial Advisory Board, New Jersey State Bar Association Diversity and Membership Committees and American Bar Association Committees on National Security and Civil Rights and the Committee on Religious Freedom, respectively.

As chairperson of the ABA Section of Individual Rights and Responsibilities (IRR) Committee on National Security and Civil Liberties, her committee’s work earned the 2014 Committee Excellence Award for providing leadership on human rights, civil rights, and the rule of law. During the Obama Administration, the White House also recognized her groundbreaking voice as featured in or covered by the Huffington Post, TIME, Christian Science Monitor, CNN, Washington Post, National Geographic, among others.
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Ecclesiastical Sanctuary: Worshippers' Legitimate Expectations of Privacy

Julie A. Mertus

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Ecclesiastical Sanctuary: Worshippers’ Legitimate Expectations of Privacy

Julie A. Mertus*

The Immigration and Naturalization Service (INS) has repeatedly sent spies into Arizona churches to collect information about worshippers’ efforts to aid Central American political refugees, efforts commonly termed “the sanctuary movement.” In both civil and criminal cases, churches and sanctuary workers have argued that the government’s sending of informers into religious meetings without prior judicial approval violates worshippers’ legitimate expectations of privacy in their places of worship as guaranteed by the fourth amendment. In rejecting this argument, courts have refused to suppress evidence gathered through government-sponsored church infiltration,¹ and have instead held that “as far as the ⁴th amendment claims are concerned . . . there was no legitimate expectation of privacy.”²

This Current Topic examines the tension between the government’s right to enforce laws and an individual’s right to practice religion freely, in the context of the sanctuary trials. It argues that due to the sacred nature of religious places and the special protections they are granted under the first amendment, worshippers do indeed have a reasonable expectation of privacy from government spying. Thus, there is a strong presumption that government infiltration of churches violates the fourth amendment.

* The author would like to thank attorneys Ellen Yaroshefsky at the Center for Constitutional Rights in New York, and Janet Napolitano at Lewis and Roca in Phoenix, Arizona, for their assistance. However, the views expressed in this Current Topic, as well as any errors, are those of the author alone.


2. Transcript of oral decision, Presbyterian Church v. United States, No. Civ. 86-0072 PHX CLH (D. Ariz. Oct. 30, 1986) (granting defendant’s motion to dismiss and summarily holding that the federal government has sovereign immunity and that “plaintiffs’ churches have no standing to raise the freedom of religion claim.”) appeal docketed, No. 86-2860, (9th Cir. Nov. 18, 1986).
I. Introduction: The Sanctuary Trials

A considerable and growing number of clergy and lay people have become concerned about the plight of Central American refugees escaping political oppression in El Salvador and Guatemala. Motivated by scripture and supported by declarations from their denominations, people of faith meet, discuss, pray, and conduct services about these refugees. From these religious concerns has come what is called the sanctuary movement, a term that covers a wide range of denominations, churches, individuals and activities.

In January 1985, 16 sanctuary workers were indicted on criminal charges of conspiracy to violate the laws of the United States, including bringing in, transporting, concealing, and harboring illegal aliens. On May 1, 1986, eight of these workers were convicted in *U.S. v. Aguilar*. The evidence on which the indictments and subsequent convictions were based was collected during an undercover operation in which federal government informants, posing as sanctuary workers, taped church services and conversations, producing over 40,000 pages of transcripts.

As planned and conducted, the scope of the INS undercover operation, entitled “Operation Sojourners,” was not restricted to those individuals who were targeted for surveillance, and probable indictment. Instead, Sojourners involved the unwarranted taping, surveillance, and infiltration of churches, services, Bible study meetings, and mission planning meetings that included persons who were not even arguably engaged in criminal behavior. For example, at one

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3. Church officials are not only concerned about refugees in a religious and humanitarian sense but also are concerned “that the present U.S. administration’s treatment of these refugees violates the Geneva and Helsinki Accords, the U.N. Convention on Refugees, and the U.S. Refugees Act of 1980, and that this lawlessness undermines the fabric of respect for law.” MacEoin, *A Brief History of the Sanctuary Movement*, in Sanctuary: A Resource Guide for Understanding and Participating in the Central American Refugees’ Struggle 14 (G. MacEoin ed. 1985) [hereinafter Sanctuary].


6. *Indictment*, United States v. Aguilar, No. CR 85-008-EHC (D. Ariz. Jan. 14, 1985), *appeal docketed* No. 86-1208-1215 (9th Cir. Aug. 6, 1986). Prosecution was based upon 8 U.S.C. § 1324, which forbids the transportation and harboring of illegal aliens. Six of the defendants were convicted of conspiring to smuggle Central Americans into the United States. Two other defendants were found guilty of lesser charges, including harboring or transporting illegal aliens. *N.Y. Times*, May 2, 1986, at A19, col. 2.


church service, participants were given a bulletin at the door that revealed that the service would entail Bible readings, prayers, hymns, and fellowship. Without any ground for believing that criminal activity would take place, and without a warrant, government agents entered the church, pretended to engage in worship, tape-recorded virtually the entire service, and departed early in order to record the license plate numbers on worshippers’ automobiles.\footnote{9}

Church infiltration is currently being challenged in three cases. The defendants in \textit{Aguilar} \footnote{10} are appealing their convictions, arguing that evidence obtained by warrantless government informants should be suppressed.\footnote{11} A group of churches in \textit{Presbyterian Church v. United States} \footnote{12} is suing the United States government for a declaratory judgment that the undercover infiltration was illegal, as well as for injunctive relief.\footnote{13} In \textit{American Baptist Churches in the U.S.A. v. Meese},\footnote{14} another group of 80 churches is suing the United States government to stop prosecution of sanctuary workers on the grounds that prosecutions have been in bad faith, and to prevent further deportation of Central American refugees.\footnote{15}

86-2860 (9th Cir. Nov. 18, 1986). From March 1984 until January 1985, government agents infiltrated, electronically tape-recorded, and otherwise spied on worship services, Bible study classes, and mission planning meetings at Alzona Lutheran Church in Phoenix, Camelback Presbyterian Church in Phoenix, Sunrise Presbyterian Church in Phoenix, and Southside Presbyterian Church in Tucson. \textit{Id.} at 6-11.\footnote{9}

\textit{Id.} at 8. The INS has acknowledged that government agents tape-recorded services that were not illegal. Transcript of Oral Argument at 52, Presbyterian Church v. United States, No. Civ. 86-0072 PHX CLH (D. Ariz. Oct. 30, 1986), \textit{appeal docketed}, No. 86-2860 (9th Cir. Nov. 11, 1986). Still, that the government had no reason to believe that illegal activity would occur during the infiltrated services is not determinative. This Current Topic argues that regardless of the government’s beliefs, warrantless church infiltration is presumptively invalid.\footnote{10}


Church infiltration is only one of the issues included in the appeal. \textit{See Memorandum in Support of Motion to Suppress Evidence, United States v. Niegorski, No. Cr. 85-008-PHX-EHC, (D. Ariz. Jan. 14, 1985), appeal docketed, No. 86-1210 (9th Cir. Aug. 6, 1986).}\footnote{12}


First Amended Complaint, \textit{supra} note 4, at 24. Even though the lead plaintiffs are the Presbyterian Church (U.S.A.) and the American Lutheran Church, the case has attracted support from a variety of religious denominations. In the appeal to the Ninth Circuit Court of Appeals, an amicus brief has been filed jointly by the National Council of Churches (U.S.A.), the American Jewish Committee, the Baptist Joint Committee on Public Affairs, the Christian Church (Disciples of Christ), the Unitarian Universalist Church, and United Church of Christ. In addition, amicus briefs have been filed by the American Jewish Congress and the Arizona Civil Liberties Union. Telephone interview with Janet Napolitano, Attorney, Lewis & Roca (Apr. 10, 1987).\footnote{14}

No. C-85-3955-RFP (D.N.D. Cal. Mar. 30, 1987).\footnote{15}

On Mar. 30, 1987, District Court Judge Robert F. Peckham denied the government’s motion to dismiss the claim that the government should stop prosecution of
The defendants in these cases claim that church infiltration violates: (1) the free exercise clause of the first amendment, (2) the rights of worshippers to a reasonable expectation of privacy in their places of worship as guaranteed by the fourth amendment, and (3) the due process clause of the fifth amendment. It is the second claim that is the focus of this Current Topic, which argues that because a limited concept of ecclesiastical sanctuary is deeply embedded in both American social and legal traditions, worshippers may reasonably expect freedom from governmental interference in their religious gatherings.

II. Ecclesiastical Sanctuary's Ancient Past

By the institution of sanctuary, specific persons or places may afford other individuals special safeguards that extend beyond protection of ordinary law. Ecclesiastical sanctuary is based on the ancient belief that holy places, by virtue of their sacred nature, are inviolable by pursuing mortals. Holy places, consequently, can provide asylum to the pursued. Governments have not always recognized ecclesiastical sanctuary; the concept has been applied selectively at times, and at other times it has been deemed a privilege rather than a right. Nevertheless, the many examples of sanctuary's recognition throughout history lend credence to the theory of sanctuary workers. Thus, he allowed discovery on, among other issues, whether the government-sponsored church infiltration was in bad faith. Id.

16. The churches and sanctuary workers did not argue that the act of giving sanctuary was itself protected religious expression. This argument was recently rejected in United States v. Merkt, 794 F.2d 950 (5th Cir. 1986) (although defendants contended that they were religiously motivated in conducting sanctuary activities, their convictions for transporting illegal aliens were not barred by the first amendment), cert. denied, 107 S.Ct. 1603 (1987). See also United States v. Elder, 601 F. Supp. 1574 (S.D. Tex. 1985) (free exercise clause of the first amendment does not preclude prosecution of defendant who felt he had a Christian commitment to assist those fleeing violence in El Salvador). See Comment, Ecumenical, Municipal & Legal Challenges to U.S. Refugee Policy, 21 Harv. C.R.-C.L. L. Rev. 475 (1986) for a discussion of other challenges to church infiltration.

17. This focus is not intended to suggest that the fourth amendment claims can be entirely separated from the first amendment claims. Indeed, this discussion of the legitimate privacy expectations of worshippers relies on and is informed by first amendment concerns.

18. This is one of the most common definitions of sanctuary. See Siebold, Sanctuary, Encyclopedia of the Social Sciences 534 (D. Sills ed. 1934).

19. Murphy, A Historical View of Sanctuary, in Sanctuary, supra note 3, at 75. This ancient concept of sanctuary is the background for the broadest conceptions of sanctuary: "It has something to do with the sacred, with almighty God, and with God's presence in our community as well as the world." Id.

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that worshippers in American churches have a reasonable expectation of privacy.

The concept of ecclesiastical sanctuary is deeply imbedded in the Hebrew tradition.21 The institution of the "city of refuge" came into existence when the Hebrews changed from a nomadic to a sedentary existence. While wandering in the desert, a tribe carried an easily accessible tabernacle offering sanctuary to fugitives. But when all temples were abolished except the temple at Jerusalem, the Hebrews found Jerusalem difficult to reach from distant locations and, therefore, established cities of refuge.22 A fugitive who reached one of these cities was safe while within its walls. Such a system protected criminals from summary vengeance and simultaneously punished the criminals by making them live in exile.23

An even more extensive sanctuary system was developed in ancient Greece. Temples were designated as sanctuaries and, under almost all circumstances, could protect the oppressed and the persecuted—slaves, debtors, malefactors, and criminals. Not all temples, however, gave protection to the accused; a city usually only recognized asylum in the temple of its patron god.24 When sanctuary was granted, even murderers and those under death sentences had a claim to protection and could dwell in the grounds surrounding a temple until their own deaths.25 Greek states also granted asylum to fugitive slaves and foreigners fleeing from the justice of their own countries.26

The Romans restricted the right to sanctuary and integrated that right into their legal system. During the reign of Emperor Tiberius, places of asylum were ordered to prove to the Roman Senate their right to accord asylum.27 Generally, Roman justice did not yield to

21. For example, in the Book of Kings of the Bible there is mention of Adonija who, suspected of conspiring against Solomon, fled, found refuge at the foot of an altar and left it when the king promised to spare his life. 1. Kings, 1:50-53. A.P. Bissel, The Law of Asylum in Israel (1884), quoted in S. Sinha, supra note 20, at 7.

22. See Exodus 21:13, Joshua 20:5, Numbers 35:6-34, Deuteronomy 4:41-43. In addition to the cities of refuge, 48 Levite cities were able to give asylum with the consent of their inhabitants. L. Ginzberg, Asylum in Rabbinical Literature, reprinted in 2 Jewish Encyclopedia 257-59 (C. Adler ed. 1902).


25. Siebold, supra note 18, at 534. The Greeks' policy of providing sanctuary for murderers and convicted criminals has been criticized as being too lenient. N.M. Trenholme, supra note 23, at 4. Also, some very notable cases of violations of sanctuary have been recorded. Id. Despite such violations, the Greeks are generally noted for having one of the most extensive systems of sanctuary in the Western world. Id.


27. S. Sinha, supra note 20, at 9.
religious sentiments. A limited system of sanctuary was eventually recognized, however, especially for slaves. In most cases, the fugitive would be taken by government officials from the sanctuary—often a temple of Caesar—and would offer his defense before a magistrate. If the magistrate found him guilty, the fugitive would suffer the appropriate penalty. Sanctuary thus only saved a criminal from summary and immediate vengeance and afforded a respite before trial.  

The practice of allowing Christian churches to extend sanctuary to fugitives dates from the time of Constantine’s Edict of Toleration in 313 A.D. Church authorities interceded before the courts and the emperor to defend the persecuted, to obtain a modification of a sentence passed upon the condemned, and to free those imprisoned. In 431 A.D., Theodosius the Younger extended the privilege from the churches’ altars and naves to the adjacent buildings. Certain classes of offenders were excluded from sanctuaries in accordance with considerations of state policy. By the Novella of Justinian, public debtors, murderers, adulterers, and rapists were all denied the protection of sanctuaries.

Throughout the Middle Ages, the extent of protection afforded by ecclesiastical sanctuary was dependent upon the relative power of state and church. When ecclesiastical power grew, churches no longer restricted asylum to the maliciously pursued innocent; they extended it to all fugitives. Places of sanctuary were increasingly expanded to include convents, monasteries, cemeteries, homes of bishops, hospitals, and even crosses placed along a road. When state authority increased, a struggle was mounted against the perceived abuses of sanctuary, including the belief that the most “guilty of malefactors . . . enjoy[ed] immunity within sacred walls.” The Catholic Church limited the right of sanctuary by barring certain criminals, such as assassins and political offenders, but retained the institution in principle.

29. Id. See also S. Sinha, supra note 20, at 10.
30. Siebold, supra note 18, at 535.
31. S. Sinha, supra note 20, at 11.
32. Novella XVII, c.7, cited in N.M. Trenholme, supra note 23, at 9 n.15. See also Siebold, supra note 18, at 535.
33. Siebold, supra note 18, at 535.
34. S. Sinha, supra note 20, at 11.
36. Codex juris canonici, can. 1160, 1179, cited in Siebold, supra note 18, at 536. Church buildings were still declared inviolable, and refugees were not to be removed from them without permission of the rector. Id.
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The growth of centralized, secular power and the development of effective national systems of justice eventually led to a shift from the practice of ecclesiastical asylum to that of political asylum. There is no clear demarcation line in history to indicate this shift. A gradual change occurred between the seventeenth and eighteenth century. 37 In England, for example, ecclesiastical sanctuary was greatly curtailed under the reign of Henry VIII and was officially abolished in 1727. The concept of sanctuary was also gradually abandoned in France after the French Revolution. 38

In time, ecclesiastical sanctuary was no longer widely recognized as a formal, inviolable system. Yet, because it was so deeply entrenched in the traditions of so many peoples, it did not simply disappear. The idea of hospitality and protection underlying the practice of sanctuary continued to exist in a modified form. Sanctuary began to be developed in places not recognized as religiously sacred, such as certain towns and countries. 39 The idea that religious places have a special, sacred nature that may place them beyond the reach of government also did not vanish. 40 This idea, albeit modified, is deeply entrenched in American society and is reflected throughout American law.

III. The Bases of an Ecclesiastical Sanctuary Doctrine

One of the objectives of the first amendment is to protect religious liberty and to prohibit coercion of religious practices. 41 In line with this objective, the Court has determined that separation of church and state requires that secular institutions avoid direct involvement with religious organizations. 42 It is such “excessive gov-

38. See Murphy, supra note 19, at 77. See also M.C. Bassiouri, supra note 37, at 90. For an account of the decline of ecclesiastical sanctuary in Central America, see C.N. Roming, Diplomatic Asylum 25-26 (1965).
39. For example, cities of asylum were established on the Hawaiian Islands. S. Sinha, supra note 20, at 36 n.7. Also, because of its special status in international law as a neutral state, Switzerland continues to grant sanctuary today to foreigners fleeing prosecution for political crimes. Siebold, supra note 18, at 537.
40. For example, in the United States during the Civil War, congregations and abolitionists who participated in the Underground Railroad relied on biblical texts to justify giving refuge to fugitive slaves. H. Strother, The Underground Railroad in Connecticut 182 (1962). Many years later, at the time of the Vietnam War, churches claimed a right to provide sanctuary to conscientious objectors and to soldiers who went AWOL. Ferber, A Time to Say No (1967), reprinted in Civil Disobedience in America 271 (D. Weber ed. 1978).
ernmental entanglement with religion" that threatens private liberty and public order alike. Thus, the Constitution demands that government protect religious liberty without entangling itself in religious practices. Recognition of a limited concept of ecclesiastical sanctuary advances this separation in a manner similar to other judicial doctrines that afford greater protections to religious institutions than are available to secular ones, when such protections are necessary to preserve the very sacred nature of religion.

A. Traditional Treatment of Religious Institutions

Perhaps the most striking situation in which courts have found that the first amendment requires that religious organizations be treated differently from secular institutions is the seminal tax case, 


In Walz, a real estate owner claimed that the Tax Commission’s grant of exemptions to church property indirectly required him to make a contribution to religious bodies, thereby violating the establishment clause of the first amendment. Rejecting Walz’s contention, Chief Justice Burger’s opinion for the majority found it significant that Congress, from its earliest days, has taxed churches on a different basis than secular institutions.

One rationale for treating religious organizations differently from secular institutions in tax policy is that religious institutions provide special services that are in the public interest. The Court in Walz sustained the tax exemptions and emphasized that such exemptions result in less entanglement with religion than would the taxation of church property. Chief Justice Burger warned that eliminating the exemption would “give rise to tax valuation of church property, tax

44. Private liberty is endangered because government involvement in religion may promote the supremacy of particular religious beliefs, lead to the official establishment of religion, and encourage the suppression of divergent beliefs. Board of Educ. v. Allen, 392 U.S. 236, 254 (1968). Government entanglement also necessitates government involvement in the internal workings of religious sects and decreases religious leaders’ authority. Public order is threatened when the state allies itself with one particular form of religion, causing the government to incur “the hatred, disrespect, and even contempt of those who hold contrary beliefs.” Engel v. Vitale, 370 U.S. at 451.
45. Professor Lawrence Tribe summarizes: “The Supreme Court has recognized for nearly a quarter-century that, whatever may be true of other private associations, religious organizations as spiritual bodies have rights which require distinct constitutional protection.” L. Tribe, American Constitutional Law 876 (1978).
47. 397 U.S. at 677.
48. 397 U.S. at 672-73.
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liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.”

Church “autonomy” cases provide other striking examples in which religious associations are treated differently by the courts because of their very nature. Judicial deference to the internal decisionmaking organs of these groups began as early as 1871 in Watson v. Jones. There the Court held:

Whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of those church jurisdictions to which the matter has been carried, the legal tribunal must accept these decisions as final and binding on them, in their application to the case before them.

The Court later reaffirmed the ability of religious organizations to establish their own rules and regulations for internal discipline and governance in Kedroff v. Saint Nicholas Cathedral. At issue in Kedroff was a New York religious corporations law that had the effect of transferring the administration and control of Russian Orthodox churches in North America from Moscow to authorities selected by a convention of North American churches. The Kedroff Court held that the law violated the first amendment, not so much because any individual’s religious liberty was infringed demonstrably by the transfer, but because the government should respect:

a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

Even in those cases where a legally recognized property right followed from church custom or law on ecclesiastical issues, church

49. 397 U.S. at 674. Similarly, in concurring opinions, Justice Brennan sought to avoid “extensive state investigation into church operations and finances,” 397 U.S. at 691 (Brennan, J., concurring), and Justice Harlan indicated concern about the entanglement of “government in difficult classifications of what is or is not religious.” 397 U.S. at 698 (Harlan, J., concurring).

50. 80 U.S. (13 Wall) 679 (1871).

51. 344 U.S. 94 (1952).

52. 344 U.S. at 99 n.3.

53. 344 U.S. at 116. See also Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960) (applying Kedroff principle to parallel attempt by New York courts). Even more recently, in Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724-25 (1976), the Court stated that “the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters.” See also Hutchinson v. Thomas, 789 F.2d 392 (6th Cir. 1986) (district court did not have subject matter jurisdiction over action by minister challenging his enforced retirement under church disciplinary rules).
rule has been held to be controlling. The Court has thus continually recognized that religious associations have rights which may be different from those of similarly situated secular institutions.

B. Differential Treatment Based on Sacred Nature of Religious Institutions

In many cases, courts have justified the differential treatment of a religious organization by citing the state's legitimate interest in protecting religion's sacred nature. Some courts have found that, in order to protect free exercise, harms directed against sacred places may be met with harsher sanctions than near-identical harms directed against secular buildings. For example, in State v. Vogenthaler, the court affirmed a conviction for violation of a state statute prohibiting desecration of a church. The court reasoned that the statute, which defined desecration of a church as willfully, maliciously, and intentionally defacing a church or any portion thereof, did not violate the federal or state constitutions' clauses prohibiting the establishment of religion.

The respondent in Vogenthaler argued that the statute advanced religion generally by making it a greater crime to desecrate a church than to criminally destroy any other kind of property. The court dismissed this argument, finding that the state had a legitimate interest in protecting religion, and, to best protect religious exercise, the statute had a rational basis for treating criminal damage to a church differently from criminal damage to other property.

Churches 'uniquely contribute to the pluralism of American society by their religious activities.' Neutrality of the state toward religion 'does not dictate obliteration of all our religious traditions.' A rational basis for treating criminal damage to a church differently than criminal damage to other property is the role of religion in society as a whole.

55. Presbyterian Church in the United States v. May Elizabeth Blue Hill Memorial Presbyterian Church, 393 U.S. 440 (1969) (the state's common law, which implied a trust on local church property on the condition that the general church adhere to its tenants of faith, violated the first amendment; therefore, the common law could not be used to resolve a property dispute).

56. 548 P.2d 112 (N.M. 1976), cited with approval in Friedman v. Board of County Comm. of Benalillo County, 781 F.2d 777, 792 n.6 (10th Cir. 1985) (upholding use of Latin cross and Spanish motto translated as "with this we conquer" on county seal).

57. 548 P.2d at 114. The statute applicable to churches made damage of less than $1,000 a misdemeanor while the statute applicable to secular buildings made such damage a petty misdemeanor.

58. 548 P.2d at 115 (citations omitted). Vogenthaler also claimed that the statute advanced the religion of one religious group over others. The court rejected this argument, finding that the term "church" as used in the statute did not advance the Christian religion because it was meant to apply to all places of worship. 548 P.2d at 115.
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Special sanctions have thus been applied against those who violate the sacred nature of a place of worship by defacement.\(^{59}\)

In a like manner, courts have found legitimate the state's interest in protecting the special, sacred nature of churches and therefore have upheld convictions based upon statutes prohibiting the disturbance of religious meetings. In *Riley v. District of Columbia,*\(^{60}\) the district court found that the defendants had disturbed a church service in violation of a local statute by passing out leaflets during the service. The court reasoned that the statute did not constitute an establishment of religion, but protected the rights of members of a religious group to hold services in a manner in accordance with their faith.\(^{61}\) The defendants' actions, the court explained, violated the sacred nature of the religious service.

The convictions are based upon the cumulative effect of the appellants' actions upon members of the congregation and of the clergy by disobeying a specific directive of the pastor and distributing literature during the offertory, in a precipitous manner, contrary to the customs and usages of the Blessed Sacrament Church, causing prayers to be interrupted and the Mass to be halted.\(^{62}\)

It is commonplace for differential treatment toward speech or conduct inside a church to be upheld because of the need to protect the church's sacred nature.\(^{63}\) In one case, *State of Minnesota v. Donald Olsen,*\(^{64}\) the defendant was convicted of violating a statute prohibiting conduct disturbing the peace and quiet of others. The conviction rested on the fact that the defendant's loud speech occurred inside a church, instead of some other, nonsacred building. The court wrote:

We believe that one who invites himself to a private place of worship such as a church or synagogue in order to contest the teachings of its pastor, minister, or rabbi, in the presence of a congregation engaged

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59. This is not a new doctrine. See Saffell v. State, 167 S.W. 483 (Ark. 1914) (upholding conviction based on statute making it a misdemeanor to cut, write on, deface, disfigure, or damage any part or appurtenance of any church); State v. Brant, 14 Iowa 180 (1862) (affirming judgment for willful and malicious injury to a church). See also State of Connecticut v. Harold Fahy, 183 A.2d 258 (Conn. 1962) (finding willful injury to public property when defendants painted swastikas on synagogue; in light of severity of penalty, 60 days in jail, decision arguably was based in part upon sacred nature of the synagogue).

60. 283 A.2d 819 (D.C. 1971).

61. 283 A.2d at 823.

62. 283 A.2d at 824 (footnote omitted).


64. 178 N.W.2d 230 (Minn. 1970).
in formal religious worship, should inform himself before doing so whether and when such a disputation would be considered less than offensive.\textsuperscript{65}

The defendant in \textit{Olsen} interrupted what the court found was the most "profoundly solemn" part of the service, the Canon of the Mass.\textsuperscript{66} Because "the defendant could be expected to be sensitive to the religious feelings of others," the court held that his insulting remarks "exceeded the permissible limits of free speech and . . . infringed upon the rights of others to worship according to the dictates of their conscience."\textsuperscript{67}

The sacred nature of a religious organization and the legitimate state interest in protecting this special nature have also influenced courts' reasoning in cases other than those concerning disturbance and desecration. Many courts have upheld statutes and ordinances that recognize the sacred nature of alcohol in religious services. For instance, \textit{Salatka v. Oklahoma Alcoholic Beverage Control Board}\textsuperscript{68} held that religious officials, unlike other citizens, were not required to make wine purchases from licensed liquor stores because use of wines solely for sacramental purposes was not included in the term "alcoholic beverage" as used in state laws.\textsuperscript{69} Courts have also upheld ordinances prohibiting the issuance of licenses to sell liquor within a certain distance to places of worship. Such ordinances, reflecting a desire to protect the sacred nature of a church, have been justified as reasonably related to health and public welfare.\textsuperscript{70} Similarly, courts have rejected arguments that ordinances regulating the sale of kosher food violate the establishment clause. Rather than establishing religion, courts have found that such statutes merely reflect the state's legitimate interest in safeguarding the observance of a religion and prohibiting actions that improperly interfere with religious freedom.\textsuperscript{71}

\begin{footnotes}
\footnote{65. 178 N.W.2d at 232.}
\footnote{66. 178 N.W.2d at 232.}
\footnote{67. 178 N.W.2d at 232.}
\footnote{68. 607 P.2d 1355 (Okl. 1980).}
\footnote{69. 607 P.2d at 1357.}
\footnote{71. \textit{See} Sossin Systems v. Miami Beach, 262 So.2d 28, 30 (Fla. 1972) (upholding conviction for violation of municipal ordinance dealing with the sale of kosher food). \textit{See generally} Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925) (kosher food laws do not violate the fourteenth amendment); Erlich v. Municipal Court of Beverly Hills Judi-}
\end{footnotes}
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C. Circumscribed Police Powers

Several cases not only recognize the sacred nature of religious places but also circumscribe use of police powers because of such places’ very nature. In **People v. Woody**, the court found that a statute proscribing use of peyote was a legitimate exercise of California’s police powers. However, that statute could not be applied so as to prevent Indian tribes from using peyote in their religious worship. The court found that the statute imposed a burden on the free exercise of the religion by Navajo Indians. Preventing alleged deleterious effects of peyote did not constitute a state interest so compelling as to warrant abridgment of the Indians’ constitutional right to freedom of religion.

Police power was more recently circumscribed in order to protect Indian tribes’ first amendment rights in **Northwest Indian Cemetery Protective Association v. Peterson**. In **Northwest**, government plans to permit logging in a national forest affected an area that was indispensable to Indian religious leaders as a place where they received the “power” that permitted them to fulfill their religious roles. The Ninth Circuit found that the proposed operations would “virtually destroy the plaintiff Indians’ ability to practice their religion.” Because the government’s interest in timber harvesting and road construction did not justify interference with Indian tribes’ free exercise rights, the government plan was declared invalid.

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72. 394 P.2d 813 (Cal. 1964).
73. “Peyote itself constitutes an object of worship; prayers are directed to it as much as prayers are devoted to the Holy Ghost. On the other hand, to use peyote for nonreligious purposes is sacrilegious. Members of the church regard peyote also as a ‘teacher’ because it induces a feeling of brotherhood with other members; indeed, it enables the participant to experience the Deity.” 394 P.2d at 817-18.
74. 394 P.2d at 818. See also Peyote Way Church of God, Inc. v. Smith, 742 F.2d 193 (5th Cir. 1984) (record did not show a compelling state interest in denying members the right to use peyote in religious ceremonies).
75. 795 F.2d 688 (9th Cir. 1986), cert. granted, 55 U.S.L.W. 3746 (June 4, 1987).
76. 795 F.2d at 693. The finding that the government plan would virtually destroy the Indians’ free exercise rights distinguishes **Northwest Indian Cemetery** from **Bowen v. Roy**, 106 S.Ct. 2147 (1986). In **Bowen**, the Court found that government use of an Indian child’s social security number for purposes of providing governmental benefits did not significantly impair the Indian’s ability to exercise his religion. Similarly, an Indian tribe failed to establish that use of lands affected by a proposed dam was central to their religion. **Sequoyah v. TVA**, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980). The tribe claimed that the dam would flood their sacred homeland, destroying sacred sites. Failure to establish a significant interference with religions’ exercise was also fatal in **Wilson v. Block**, 708 F.2d 735 (D.C. Cir. 1983), cert. denied, 464 U.S. 956 (1983) (development of ski resorts on San Francisco Peaks would not cause Indian tribes to be denied access to any sacred areas).
Churches also enjoy a different status than commercial enterprises in zoning matters. Courts have explicitly held that religious use may not be prohibited by unreasonable or inappropriate regulations, even if such regulations may be applied to secular uses.\textsuperscript{77} Because land used for a religious purpose bears a substantial relationship to public health, safety, and welfare, courts have given religious places favored status, and have applied different standards when considering zoning applications for sacred places.\textsuperscript{78} In this same vein, the police power to require variances and use permits has been restricted when the applicant was a religious group.\textsuperscript{79}

Courts have considered the taking of property belonging to a religious organization as an interference with the free exercise of religion, when the property is unique or essential to the group's religious activities. The decision by an urban renewal authority to condemn church property, which included a religious organization's first church, interfered with the free exercise of religion in \textit{Pillar of Fire v. Denver Urban Renewal Authority}.\textsuperscript{80} The court recognized that "religious faith and tradition can invest certain structures and land sites with significance which deserves first amendment protection."\textsuperscript{81} Therefore, the court found that before the state could take church property under its power of eminent domain, it had to balance the organization's interest in freedom of religion against the state's interest in urban renewal.\textsuperscript{82}


\textsuperscript{78} Congregation David Ben Nuchim v. Oak Park, 199 N.W.2d 557 (Mich. App. 1972) (use of land for synagogue bears a substantial relationship to public welfare and therefore such use may be granted preferred zoning status); Westchester Reform Temple v. Brown, 239 N.E.2d 891 (N.Y. App. 1968) (religious structures enjoy constitutionally protected status severely curtailing permissible extent of governmental regulation in name of police powers).


\textsuperscript{80} 509 P.2d 1250 (Colo. 1973).

\textsuperscript{81} 509 P.2d at 1254.

\textsuperscript{82} 509 P.2d at 1254. The court in \textit{Order of Friars Minor of Province of the Most Holy Name v. Denver Urban Renewal Auth.}, 527 P.2d 804 (Colo. 1974) also required that the state urban renewal authority apply different standards when taking church property than when taking secular property. The court in \textit{Order of Friars} noted that the taking of a church parking lot constituted an interference with the free exercise of religion where absence of the parking lot would discourage parishioners from attending church. The practice of exempting sacred land from condemnation is not new; in 1917, church property that was used for a sexton's house was held to be land used for church purposes and was therefore exempt from condemnation. In \textit{Re Additional Site for Boy's High School}, 34 Lanc. L. Rev. 393 (Pa. 1917).
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Perhaps the area in which restrictions on police power are best recognized is communication between clergy and penitents. At common law, communications to clergy were not privileged.83 However, in most states, statutes have been enacted providing in substance that communications made to clergy in their professional capacity are privileged.84 A clergy-communicant privilege is also contained in the Uniform Rules of Evidence.85 While varying from state to state, the privilege generally has been applied broadly.86 Courts have concluded that statutes establishing clergy-communicant privileges do not use the term "confession" to mean only those communications that are compulsory because such a construction would make the privilege applicable only to a priest of the Catholic Church.87 One also need not be an ordained minister to be considered a member of the clergy within the privilege; a few courts have recognized that those whose duties conform to those of the clergy may themselves be considered clergy for the purposes of applying the privilege.88

As the above discussion indicates, courts have not only treated religious institutions differently than secular ones, but also have based differential treatment on their recognition of a legitimate state interest in protecting the sacred nature of religion. Without extra protection, the courts have determined, the sacred nature of religion is often eroded and free exercise of religion is impaired.

83. Since the Restoration and for two centuries thereafter, the "almost unanimous expression of judicial opinion" was that there was no privilege. 8 J. Wigmore, Evidence § 2394 (3d ed. 1940).
87. See In Re Swenson, 237 N.W. 589 (1931) (holding Lutheran minister entitled to clergy-communicant privilege). The court reasoned that if the legislature had intended to limit the privilege to Catholic priests, the legislature would have used the word "priest" in the statute rather than the term "clergyman."
88. See In Re Verplank, 329 F. Supp. 433 (Cal. App. 1971) (draft counseling staff who were not ordained ministers came within privilege of clergy where activities conformed in a general way to those of minister of Protestant denomination); Reutemecier v. Nolte, 161 N.W. 290 (Iowa App. 1917) (elders of Presbyterian church were ministers of the gospel within the meaning of a state statute). But see, In Re Murtha, 278 A.2d 889 (N.J. Super. 1971) (clergy-penitent privilege did not apply to a nun who had conversations with a youth suspected of homicide).
IV. The Impact of Ecclesiastical Sanctuary on Fourth Amendment Violations

In the Arizona sanctuary cases, the government ignores the courts' consistent recognition of the need to protect the sacred nature of religion and argues that, because church meetings and services are open to the public, worshippers have no legitimate expectation of privacy. The government notes that recent Supreme Court and Ninth Circuit decisions have held that the use of governmental agents or informants in undercover activities to record conversations in public places does not violate the fourth amendment. Individuals were found not to have had reasonable expectations of privacy in these cases because either they consented to the presence of the informer or they assumed the risk of engaging in such conversations. The key to these decisions—none of which involved churches—was stated in Hoffa v. United States.

Neither this Court nor any member of it has ever expressed the view that the fourth amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.

In the government’s view, a church should be treated just like any other public place. There is nothing sacred, special, or significant about churches that should caution concern or restraint when the government enters their premises. Under this approach, a church must close its doors to keep out unwarranted government informers. This view ignores the special treatment courts have repeatedly accorded to sacred places. Indeed, police powers are often circumscribed and different standards are applied when religious liberties are implicated. Police powers should be similarly constrained when the government seeks to obtain evidence of criminal behavior at churches.

It has been suggested that the only way to limit spying that takes place at a church would be through a per se rule requiring a search warrant for all spying on religious property. While such a rule would protect the sacred nature of churches, it would be contrary to

92. Defendant’s Motion to Dismiss, supra note 89, at 33.
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sound public policy in the limited situations where immediate government surveillance on church property was necessary. However, a per se rule is not the only possibility. Instead, the courts' consistent treatment of sacred places dictates a presumptive rule: Because of the special nature of churches, church infiltration should be condoned only in conditions of absolute necessity. While the government's use of informants in churches is not unconstitutional per se, there should be a *strong presumption* in sanctuary cases that the fourth amendment requires both a warrant and a demonstration that infiltration is the least intrusive means for gathering information.

The presumptive rule follows from the eminent domain and zoning cases in which courts recognized the limitations of police power over religious institutions and applied different standards. It also closely parallels the desecration and disruption cases in which the court recognized that greater sanctions may be applied when harm is directed against a religious place. In the sanctuary cases, the harm directed against the church is infiltration and spying. It follows then that there should be a stronger presumption that such activity is invalid when it is directed against a religious institution rather than against a secular institution.

The proposition that the fourth amendment must be strictly applied when first amendment interests are implicated is not novel. The Supreme Court has repeatedly emphasized that one reason for adoption of the fourth amendment was to protect citizens in their exercise of first amendment liberties. A seizure which may be reasonable in one setting may be unreasonable when first amendment rights are involved. In *Zurcher v. Stanford Daily*, the Court explicitly stated that where the affected interest was protected by the first

93. See * supra* notes 77-82 and accompanying text.
94. See * supra* notes 56-67 and accompanying text.
96. In *United States v. United States Dist. Court for the Eastern Dist. of Michigan*, 407 U.S. 297, 314 (1972), the Court cautioned: “fourth amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.” In requiring a search warrant for electronic surveillance of defendants who allegedly bombed a CIA office, the Court reasoned that “[t]he price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power . . . For private dissent, no less than open public discourse, is essential to our free society.” 407 U.S. at 314. See also *Roaden v. Kentucky*, 415 U.S. 496, 501 (1973).
amendment, the fourth amendment warrant requirement must be applied with "scrupulous exactitude."

In order to apply a presumptive rule to a sanctuary case, two conditions must be present. First, worshippers' expectations of privacy must be ones "that society is prepared to recognize as being reasonable." Second, the government activity must indeed impinge on protected first amendment interests. No single factor is dispositive in determining whether a privacy expectation is legitimate. In making this judgment, the Court previously has considered four factors: the intentions of the Framers of the Constitution, societal expectations that have deep roots in the history of the fourth amendment, the nature of the place where the intrusion occurred, and the uses to which the place is put.

If these factors are considered in the sanctuary cases, the privacy expectations of the worshippers were indeed legitimate. First, even though the Framers did not specifically consider ecclesiastical sanctuary, they did intend to prevent government meddling with religion as demonstrated by both the free exercise and establishment clauses. Second, courts have consistently recognized the special, sacred nature of religion and have found specifically that churches are protected places. The Court has stated succinctly:

The 'establishment of religion' clause of the First Amendment means at least this: . . . neither a state nor the Federal Government can,

97. 436 U.S. at 564. The Court went on to hold that although first amendment interests were implicated by the search of a newspaper office, the search in question did not exceed constitutional boundaries because the preconditions for the issuance of a warrant (probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness) were met. 436 U.S. at 567-68. In the present case, however, these preconditions were not met. Less restrictive means for gathering information about the sanctuary movement could have included: conducting interviews, issuing grand jury subpoenas, tailing suspects without entering religious services, and reading newspapers and watching news reports.


102. Oliver v. United States, 466 U.S. at 178, recognized that the fourth amendment "reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference." Cf. Weeks v. United States, 232 U.S. 383 (1914) (a home is a protected place).


104. James Madison, drafter of the first amendment, wrote that, "there is not a shadow of right in general government to meddle with religion. Its least interference would be a most flagrant usurpation." Quoted in O. Cord, Separation of Church and State: Historical Fact and Current Fiction 8 (1982).
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openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.105 Thus, numerous judicial opinions provide society with informed expectations that government will stay out of religious worship.

Not only does an expectation of privacy in religious places have deep roots in the historical treatment of the first and fourth amendments, but also in the practices of peoples from which the United States draws its traditions, thus fulfilling the third factor of the Court's test.106 Lastly, because churches seek to provide both a sacred forum for the devoted and a place in which to convert nonbelievers, their "public invitation" is unique. Religious openness is founded on faith, not on guarded secrecy or wary caution.107 Worshippers' expectations of privacy are indeed reasonable given the Framers' intent, societal expectations, and the nature and uses of such places. Therefore, even though their churches or synagogues are open to the public, worshippers have legitimate expectations that the person sitting next to them is not a government agent recording their every utterance.

What remains to be determined is whether the government's spying implicates protected first amendment interests—here, the ability of worshippers to exercise their religion freely. The Court has found that even the minimal presence of state education officials in monitoring the expenditure of funds for school supplies and course materials used in parochial schools violates the first amendment by risking government entanglement with religion.108 One court has also held that government subpoenas of church documents, in an investigation of the overall costs of religious schools, violated the first amendment.109 In sanctuary cases, the government presence is

106. See supra notes 18-40 and accompanying text.
107. For Presbyterians, "the church is called to a new openness to its own membership, by affirming itself as a community of diversity, becoming in fact as well as in faith a community of men and women of all ages, races and conditions . . . ." Office of the General Assembly, Presbyterian Church, The Book of Order, ch. 3, § G-3.0400 (1985).
108. Aguilar v. Felton, 473 U.S. 402 (1985) (establishment clause violated when federal funds were used to pay public school teachers who taught in parochial schools where a form of "surveillance" would be required to account for expenditures for school supplies).
109. In Surinach v. Pesquera de Busquets, 604 F.2d 73 (1st Cir. 1979), the court found that such an investigation created a substantial potential for violations of religious freedom and continuous impermissible government monitoring of religious schools. Government inquiries into church finances have been allowed, however, where no free exercise rights are violated, and the risk of governmental entanglement is minimal. See United States v. Freedom Church, 613 F.2d 916 (1st Cir. 1979) (IRS could subpoena documents shown to be necessary in determining church's tax exempt status). Also, discovery orders may be enforced where the government is not a party to the suit. See
much more egregious, and the constitutional risk of entanglement is even greater; government agents *physically entered* worship services, posed as sympathetic worshippers, and proceeded to record conversations.

Whether religious services and church operations are immediately and physically disrupted is not dispositive. Government action that impedes religious observances may be "invalid even though the burden may be characterized as being only indirect."\(^{110}\) Church infiltration is invalid because it undermines the trust that is essential to a religious community and impinges on the confidential relationship between pastors and parishioners. Several pastors have testified to the burdensome effects of spying.\(^{111}\) In some churches, Bible study classes were cancelled because the parishioners were afraid to attend after learning of the activities of the informants.\(^{112}\) In other churches, some members have withdrawn from active participation altogether while others are fearful of such consequences as IRS audits and loss of security clearances.\(^{113}\)

Thus, the two conditions necessary for the creation of a rule that government infiltration of churches is presumptively invalid are met: worshippers have a legitimate expectation of privacy and church infiltration does indeed impinge on first amendment interests. Therefore, courts should demand both that church infiltration be the least restrictive means of gathering information and that a search warrant be procured in all but exceptional circumstances.

**Conclusion**

The tension between the government's right to enforce its immigration laws and an individual's right to exercise religion freely can be accommodated without crippling law enforcement or impinging on religious worship. The sacred, special nature of churches, which has been long recognized by society and the courts, demands the government's respect; the reasonable expectations of privacy held by worshippers compel government restraint in infiltrating religious organizations. Policy makers and courts should recognize a limited

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\(^{112}\) First Amended Complaint, supra note 4, at 18.

\(^{113}\) Id. at 16.
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correct concept of ecclesiastical sanctuary and presume that without a showing of extraordinary circumstances, church spying is constitutionally invalid.
**ARTICLE: SANCTUARY: A MODERN LEGAL ANACHRONISM**

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**Highlight**

The crowd saw him slide down the façade like a raindrop on a windowpane, run over to the executioner’s assistants with the swiftness of a cat, fell them both with his enormous fists, take the gypsy girl in one arm as easily as a child picking up a doll and rush into the church, holding her above his head and shouting in a formidable voice, “Sanctuary!” 1

**Text**

[*583] I. INTRODUCTION

The ancient tradition of sanctuary is rooted in the power of a religious authority to grant protection, within an inviolable religious structure or area, to persons who fear for their life, limb, or liberty. 2 Television has [*584] romanticized the ancient tradition of sanctuary in such shows as Highlander, 3 in which combatants could not kill


2 Michael Scott Feeley, Toward the Cathedral: Ancient Sanctuary Represented in the American Context, 27 SAN DIEGO L. REV. 801, 802 (1990) (“Sanctuary is the power of guardians of a defined religious site to grant protection to one who seeks safety out of fear of life or limb.”); see M. M. Sheehan, Asylum, Right of, in I NEW CATHOLIC ENCYCLOPEDIA 994 (1967) (Sanctuary, also known as religious asylum, concerns “the custom or privilege by which certain inviolable places become a recognized refuge for persons in danger.”). Sanctuary differs markedly from modern-day "asylum," which is a statutorily based “form of humanitarian protection that provides refuge for individuals who are unable or unwilling to return to their home countries because they were persecuted or have a well-founded fear of persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion.” U.S. GOVT ACCOUNTABILITY OFFICE, GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 11-12 (2008). The law concerning asylum was first established in the Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102, 102-05 (1980) (codified at 8 U.S.C. §§ 1101(a)(21), 1157-1159 (2012)). Id. at 1 n.1.

3 See Highlander: The Series (Gaumont television broadcast). The fictional right to sanctuary as portrayed in the television series is loosely similar to the church doctrine established during the Middle Ages, which provided a refuge from blood feuds. St. John’s Evang. Luth. Church v. Hoboken, 479 A.2d. 935, 938 (N.J. Super. Ct. Law Div. 1983) (“If [a combatant] could reach a place sheltered by the protection of the church, he could evade the challenge to battle.”).
each other on holy ground, as well as *M*A*S*H* 4 and *Law & Order*, 5 in which individuals running afoul of the law have invoked sanctuary as a legal protection against military or civil authorities.

Seen more frequently on television than in the courtroom, this legal anachronism continues to be raised in modern times against law enforcement authorities despite the legal basis for it having been eliminated long ago. 6 Undocumented aliens and war resisters have invoked sanctuary with some limited success, 7 albeit the success resulting for more practical than legal reasons. Further, some domestic jurisdictions are now pursuing passive-aggressive policies in opposition to enforcement of immigration laws by becoming so-called sanctuary cities. 8

First, this Article discusses the ancient origins of the sanctuary tradition. 9 Next, the Article discusses the development of sanctuary in the United States from a virtual dearth of incidents to a relatively recent flurry of activity involving illegal aliens and war resisters. 10 With this historically recent flurry of activity, law enforcement has radically altered 11 its reaction to sanctuary claims despite the general recognition that no legal right to sanctuary-related protections exist in the United States. 11 Finally, the Article discusses sanctuary cities—an institutional act of civil disobedience against the nation’s immigration laws with only a tangential link to religious moralism. 12

II. HISTORICAL BACKGROUND

A. Ancient History

The sanctuary tradition dates back to at least biblical times. The ancient Israelites designated six cities as places of refuge: on the west side of the Jordan River was Kedesh, Shechem, and Hebron; and to the east of the Jordan River was Bezer, Ramoth, and Golan. 13 These cities of refuge were partially in response to the ancient practice of blood vengeance (also known as a blood feud); a close male relative of a homicide victim had both the

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4 In *M*A*S*H*: A Holy Mess, Father Mulcahy, a Catholic Army Chaplain, grants sanctuary to a soldier in the mess tent. See *M*A*S*H*: A Holy Mass (CBS television broadcast Feb. 1, 1982). Although there are no reported instances of sanctuary being granted in a military chapel, the possibility exists that military clergy will be confronted with such a request. See GERALD R. GIOGLO, DAYS OF DECISION: AN ORAL HISTORY OF CONSCIENTIOUS OBJECTORS IN THE MILITARY DURING THE VIETNAM WAR 234 (1989) (discussing a Vietnam War-era soldier who was denied a conscientious objector discharge after he had initially planned to seek sanctuary in the base chapel).


6 See infra Parts II.B-C, III.

7 See infra Part III.A-B.

8 See infra Part III.C.

9 See infra Part II.A-B.

10 See infra Parts II.C-III.B.

11 See infra Part III.B.

12 See infra Part III.C.

13 MARY MIKHAIL, 2009-2010 HORIZONS BIBLE STUDY: JOSHUA 71-72 (W. Eugene March ed., 2009). The cities of refuge were created shortly after the tribes of Israel entered and occupied portions of the land of Canaan, sometime between 1250 B.C. and 1200 B.C. See id. at 6, 71.
responsibility and right to avenge the killing.  

14 Any Israelite, or a person dwelling with an Israelite, who committed an unintentional homicide could seek refuge in these cities pending a trial by the city elders.  

15 However, the family avenger could put the fugitive to death if the avenger caught the fugitive before he reached the city of refuge.  

16 If the sanctuary seeker proved to the city elders that the killing had been accidental, the blood avenger could not seek vengeance within the "city or its suburbs."  

17 No protections existed beyond these areas, however, and the avenger could take revenge if the fugitive ventured outside the protected area.  

18 The fugitive was required to remain within the city until the death of the high priest, after which the fugitive could [586] return home in safety.  

19 Conversely, the fugitive would be put to death if the city elders determined that the killing was deliberate.  

20 A form of altar sanctuary also existed in ancient Israel, but this type of limited sanctuary likely predated the cities of refuge and appears not to have carried the legal force of the protections afforded by the cities of refuge.  

21 After the Israelites entered Canaan, they replaced the local custom of altar asylum with a limited and temporary version.  

22 In the two Old Testament references to altar asylum, Solomon granted it to one attempted usurper to his throne, but denied it to another—and ordered him to be killed—without any meaningful distinction between the two decisions.  

23 Some form of sanctuary existed in ancient Greece and during the early Roman Empire.  

24 Sanctuary within Greek temples was originally intended as a humanitarian act, designed to provide a safe haven for those who committed involuntary crimes or who were otherwise being pursued.  

25 Eventually, criminals began to abuse the Greek system and the misuse was "aggravated by the extension of sanctuary protection to cemeteries (where there were

14 Id. at 71; see also IGNATIUS BAU, THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES 125 (1985) ("[A]ny killing--even if accidental--could not be expiated by monetary compensation (ransom), but only by another death.").

15 MIKAEL, supra note 13, at 71.

16 BAU, supra note 14, at 125.

17 Id.

18 Id.

19 Id. ("[T]he fugitive could return home and the avenger of blood would lose the right of vengeance if the reigning high priest died."); see J. CHARLES COX, THE SANCTUARIES AND SANCTUARY SEEKERS OF MEDIAEVAL ENGLAND 1 (1911) (The refugee must remain "until released from banishment by the death of the high priest."). The death of the high priest served as the "substitutionary death" that satisfied the avenger's blood feud requirements. BAU, supra note 14, at 126.

20 Feely, supra note 2, at 805.

21 BAU, supra note 14, at 129 ("[A]ltar sanctuary could be violated with impunity by a strong-willed ruler.").

22 Id. at 128.

23 Id. at 128-29 (discussing 1 Kings 1:50-53 and 1 Kings 2:28-29).

24 Id. at 130; see also St. John's Evang. Luth. Church v. Hoboken, 479 A.2d 935, 937 (N.J. Super. Ct. Law Div. 1983) (noting the Greeks and Romans recognized sanctuary); LINDA RABEN, GIVE REFUGE TO THE STRANGER 50 (2011) ("Cultures and societies remote from Western civilization also have long traditions of sanctuary and asylum."); Sheehan, supra note 2, at 994 (noting that the ancient Jews, Egyptians, Greeks, and Romans recognized sanctuary).

25 BAU, supra note 14, at 130; COX, supra note 19, at 2.
tombs of Greek heroes), forests, and even entire cities." 26 Some Greeks resorted to starving the fugitive into surrender because the vilest [*587] criminal could claim sanctuary and not be forcibly removed from the place of refuge. 27

Also well intentioned, 28 the Roman Empire’s sanctuary system was more limited and regulated than the Greek model. 29 Sanctuary afforded only temporary protection from civil authorities and it terminated at trial. 30 Before formally being granted sanctuary protections, the fugitive was extensively questioned at a preliminary hearing during which the fugitive was required to present a legal defense. 31 The Roman system also suffered from abuses, as fugitives claimed sanctuary after "fleeing to statues and busts of the Caesars, pictures of the emperors, battle standards of the Roman legions[,] and even the persons of vestal virgins." 32

For Christian churches, the custom of granting sanctuary to fugitives reflected the early church’s commitment to preventing bloodshed and violence. 33 The Christian custom was first recognized in the fourth century following Constantine’s Edict of Toleration in 303 A.D. 34 The Theodosian Code of 392 is the first known law to specifically recognize sanctuary as a legal right. 35 Initially, the Code limited sanctuary’s protection to the area of the altar within the church, but, by 450 A.D., the protection extended beyond the church itself, "to the walls of the churchyard or precincts, including the houses of bishops and clergy, cloisters, courts, and [*588] cemeteries." 36 Further, sanctuary protections did not extend to embezzlers of state funds, Jews, heretics, or apostates. 37 Pope Leo I

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26 BAU, supra note 14, at 130; see also NORMAN MAACLAREN TRENHOLME, THE RIGHT OF SANCTUARY IN ENGLAND: A STUDY IN INSTITUTIONAL HISTORY 5 (Frank Thilly ed., 1903) ("[I]n Greece the right of asylum became an abuse rather than a benefit.").

27 TRENHOLME, supra note 26, at 4.

28 "[T]he Roman Empire generally sought to limit the protection of the sanctuary privilege for the unfortunate and needy who would be unable to endure the often harsh and merciless application of the criminal law." BAU, supra note 14, at 130.

29 Id.; see also TRENHOLME, supra note 26, at 6, 7 ("The right of [sanctuary] . . . was made a part of their legal system . . . ." Id. at 7.).

30 BAU, supra note 14, at 130; see also TRENHOLME, supra note 26, at 6 ("The right of [sanctuary] was . . . afforded protection and immunity until formal inquisition could be made and judgment, based on evidence, given.").

31 BAU, supra note 14, at 130.

32 Id.

33 COX, supra note 19, at 3; see also HUW PRYCE, NATIVE LAW AND THE CHURCH IN MEDIEVAL WALES 170 (1993) (discussing eighth-century Irish canon law, which provided for sanctuary and was partially in response to "the code of the blood feud," providing protection "from the avenging kinsman of the victim").

34 COX, supra note 19, at 2; see also TRENHOLME, supra note 26, at 7; St. John’s Evang. Luth. Church v. Hoboken, 479 A.2d 935, 937 (N.J. Super. Ct. Law Div. 1983) ("It is probable that the church sanctuary came into existence from the time of Constantine, A.D. 303.").

35 COX, supra note 19, at 3 ("[T]he law . . . was [enacted, however,] in order to explain and regulate a privilege already recognized and well established.").

36 Id.; see also BAU, supra note 14, at 131.

37 BAU, supra note 14, at 131; see also COX, supra note 19, at 4. By the sixth century, the exclusions were extended to "murders, adulterers[,] and ravishers of virgins." Id. at 4. Cf. TRENHOLME, supra note 26, at 8-9 ("Certain classes of offenders had been excluded[, including] debtors, . . . murderers, adulterers, and commiters of rape.").
issued a papal decree confirming these laws, but also required that a Church official examine the sanctuary seekers and take action based on the evidence obtained. 38

B. England

Although some form of sanctuary was likely practiced during the Roman occupation of England, 39 it was not until the sixth century that any record of its official recognition exists. 40 In 597 A.D., the newly converted and baptized Christian King Ethelbert, King of Kent, issued an Anglo-Saxon code of laws that included the recognition of the Church's right to grant sanctuary and provided a penalty for a violation of the Church's peace (frith). 41 Sanctuary was specifically recognized in the subsequent laws of Ine, King of Wessex, in 680 A.D., Alfred the Great in 887 A.D., King Athelstan in 930 A.D., and King Ethelred in 1000 A.D. 42

England recognized two general types of sanctuary: chartered sanctuary and the more general sanctuary privilege afforded to all churches and other qualifying religious structures. 43 The King granted a special charter to certain favored locations, which then enjoyed the Peace of the King, 44 whereas churches and various religious buildings possessed the [*589] Peace of the Church. 45 Some religious locations possessed both. 46 Generally, chartered sanctuaries enjoyed more extensive jurisdiction and formalized procedures than ordinary sanctuary. 47 In 930 A.D., for example, King Athelstan granted a charter to St. John of Beverley, which extended the protected area for sanctuary seekers from the church itself to over a mile from the church door. 48

Following his conquest of England in 1066, Norman King William the Conqueror adopted the bulk of the existing Saxon laws and customs as part of a policy of conciliation toward the local populace. 49 In 1067, King William granted a charter to Battle Abbey in Hastings, which permitted the resident monks the power to afford "full and complete sanctuary to fugitives and criminals." 50 By the eleventh century, sanctuary was firmly established in

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38 BAU, supra note 14, at 131; COX, supra note 19, at 3.

39 Id., supra note 19, at 5.

40 Id. at 5-6.

41 Id. at 6; see also TRENHOLME, supra note 26, at 11 ("[T]his reference to the sanctity of churches is important, as showing how quickly they came to be recognized as inviolable.").

42 COX, supra note 19, at 7-8. Alfred the Great provided that anyone fleeing to a church was protected from harm for three to seven days. TRENHOLME, supra note 26, at 13. Anyone who harmed a sanctuary seeker during this period was subject to a heavy fine. Id. Eighth-century Irish canon law recognized the right to sanctuary, which was "modelled on the Levitical 'cities of refuge.'" PRYCE, supra note 33, at 169. Welsh law also recognized sanctuary by the eighth century and similarly based it on the biblical cities of refuge. Id.

43 COX, supra note 19, at 48; see also PRYCE, supra note 33, at 164.

44 TRENHOLME, supra note 26, at 13.

45 Id. (Anglo-Saxon times).

46 Id.

47 Id. at 47.

48 Id. at 14.

49 Id. at 18.

50 Id., at 19; see also COX, supra note 19, at 195 ("On this religious house the Conqueror conferred every possible privilege, as is testified in a succession of charters, which were confirmed by several of his successors.").
England and would remain relatively unchanged for the next three centuries. However, the King began to seek more control over sanctuary as the secular legal system matured. For example, the Pope permitted the regulation of sanctuary to King Henry VII in 1486.

Sanctuary was not afforded to anyone who was armed or to "those guilty of heresy, necromancy, or witchcraft." Further, the clergy refused sanctuary to those who committed crimes within the church itself. In 1487, King Henry VII, with the accord of the Pope, "exclud[ed]" every form of high treason in England from sanctuary benefit.

[*590] The requirement for a formal abjuration of the realm appeared early during the thirteenth century and its application was generally limited to England. Indeed, the practice of sanctuary generally was more firmly established in England than in the rest of Europe. After a period of time, usually forty days, a person granted sanctuary had to elect to stand trial in the crown's court or confess to the alleged misconduct, take an oath to abjure the realm of England, and travel quickly to a nearby port for transport to another kingdom. Those who failed to make an election during the grace period were often starved.

Frequently, an administrative official known as a coroner provided the abjuror with specific traveling directions, including instructions on where to spend the night. The safety of the abjuror was inviolable while traveling along

51 TRENHOLME, supra note 26, at 26.
52 See, e.g., id.
53 RABBEN, supra note 24, at 64. "Kings Henry VII and VIII severely limited its operation." Id. at 67.
54 COX, supra note 19, at x ("[T]he Church never suffered any sanctuary seeker to approach who bore in his hand or on his person any kind of a weapon."); see RABBEN, supra note 24, at 65 ("[T]he sanctuary seeker could bring no weapons into the church.").
55 COX, supra note 19, at 59.
56 Id.; see PRYCE, supra note 33, at 164 (It "excluded from sanctuary those who abused it by fighting or killing in its precincts.").
57 COX, supra note 19, at 93.
58 Id. at 10; see TRENHOLME, supra note 26, at 23 ("Abjuration of the realm is first definitely met with at the close of the twelfth century and beginning of the thirteenth . . . ."). Originally, abjuration of the realm was intended to extend the sanctuary seeker's period of protection beyond the initial period of refuge. COX, supra note 19, at 11.
59 COX, supra note 19, at 10 ("Abjuration was of Anglo-Norman origin and peculiar to England . . . ."); see TRENHOLME, supra note 26, at 23 ("[A]bjuration of the realm became a peculiarly English institution."). Although it may have been practiced "for a time and irregularly, in Normandy, it has to be considered as derived from England." COX, supra note 19, at 12.
60 COX, supra note 19, at 34.
61 Id. at 10-11, 12-15, 27, 113-14; see also TRENHOLME, supra note 26, at 23-24. During the forty-day period, the sanctuary seeker remained unharmed in the church, but lost this protection if the sanctuary seeker committed a felony within the church. PRYCE, supra note 33, at 164.
62 TRENHOLME, supra note 26, at 24.
63 COX, supra note 19, at 29.
the King's highway to a port of embarkation so long as the abjuror adhered to any restrictive conditions. Constables gave protection to some abjurors during their journey. Straying from the prescribed route, however, was done at the abjuror's peril.

[*591] One who abjured the realm forfeited all property to the crown. In some cases, the abjuror had to relinquish all clothing and travel to the port of embarkation, dressed only in a sackcloth or white robe bearing a red cross. Some abjurors were made to carry a wooden cross while traveling. During the reign of King Henry VIII, abjurors were branded to identify them, should they attempt to return to England. Abjuration was for life, unless the King pardoned the offender.

The Church enforced sanctuary through imposition of acts of penance or by excommunication, which could sometimes be lifted through absolution after payment of a large fine. The Church officially recognized excommunication as a penalty for violating sanctuary in the late seventh century. In addition, sanctuary was enforced through a system of fines and monetary penalties. In some cases, the penalty system was elaborate. For example, sanctuary at the Church of the Blessed John of Beverly in Northern England was enforced

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64 Id. at 11 ("[T]he person of the abjuror was sacred, under certain conditions, whilst seeking a port of embarkation."); see TRENHOLME, supra note 26, at 22 ("Sanctuary-seekers were ... allowed to depart unharmed from the precincts of the sanctuary to take their journey into exile.").

65 COX, supra note 19, at 114, 118.

66 Id. at 32 ("Several examples of the beheading of an abjuror who had strayed from the highway, by the populace or individuals, [can be found . ...]); TRENHOLME, supra note 26, at 24 ("[T]hese unfortunate beings journeyed along the king's highway, turning neither to the left nor to the right, for fear of being slain.").

67 TRENHOLME, supra note 26, at 24.

68 COX, supra note 19, at 32; TRENHOLME, supra note 26, at 24.

69 COX, supra note 19, at 114.

70 THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 431 (5th ed. 1956) (noting that, if the abjuror was caught returning, the abjuror was subject to being hanged); see also TRENHOLME, supra note 26, at 29.

71 COX, supra note 19, at 25; see also TRENHOLME, supra note 26, at 24 ("Their oath of abjuration bound them never to set foot in England again, save by [license] of the king . . ."). For a short period of time, Henry VIII prohibited abjurors from leaving England; instead, he required them to live in an English sanctuary for life. Id. at 29. Henry was concerned by the large numbers of abjurors leaving England and was also concerned that they were "harming the country by instructing foreigners in archery and disclosing the secrets of the realm." Id.

72 COX, supra note 19, at 151.

73 Id. at 42, 193, 247; PRYCE, supra note 33, at 163; TRENHOLME, supra note 26, at 72, 82, 84.

74 COX, supra note 19, at 52.

75 RABBEN, supra note 24, at 56. The Catholic Church did not eliminate excommunication as a penalty for violating sanctuary until the 1919 Code of Canon Law. Id. at 56, 69.

76 COX, supra note 19, at 86 (sheriff fined); id. at 126-27, 151; RABBEN, supra note 24, at 61 ("in the second half of the [eleventh] century[,] William the Conqueror's laws ... established stiff fines for its violation."); TRENHOLME, supra note 26, at 15 (noting that, by 1014, Saxon law dictated a scale of fines depending upon the nature of offense against one granted sanctuary and the importance of the church in which the offense occurred). Restitution was also imposed on those who damaged the church while violating sanctuary. See, e.g., COX, supra note 19, at 9 (espousing that, in 1004, local Englishman, who burned down a monastery in order to kill several Danes who had taken sanctuary after being condemned to death, were required to pay restitution adequate to rebuild the monastery and increase its endowments).
by "six degrees of safety." The penalty for violating sanctuary within one mile of the town surrounding the church was 16 pounds, which increased to 32 pounds if violated within the town, 48 pounds within the walls surrounding the church, 96 pounds within the church itself, and 144 pounds within "the gates of the quire." A stone chair, located near the church altar, was considered inviolable because "no pecuniary penalty could compensate for the outrage . . . ." Under Saxon law, one who killed an individual under sanctuary while within church walls was subject to the death penalty.

Regardless, violations occurred infrequently during the Anglo-Saxon period, but more frequently as the practice matured and became subject to abuse. Approximately 1,000 persons per year took advantage of sanctuary protections during the bulk of England's experience with the practice.

Increasingly, sanctuary began to be seen as an abusive mechanism for thwarting justice. The Earl of Chester (the Earl) viewed the grant of sanctuary as a significant source of revenue, collecting fines from all sanctuary seekers and offering sanctuary to virtually anyone who desired it. In exchange, the Earl suspended the requirement to abjure the realm within forty days and, instead, granted permanent residence. Eventually, "Palatinate of Chester became the most notorious nest of criminals in England," until King Henry IV passed an act revoking the immunity of residents of Chester "and made [them] liable to abjuration or outlawry and forfeiture of their goods."

In 1402, there were accusations that the College of Saint Mary's le Grand in London was providing sanctuary and refuge to bandits, which triggered opposition to the Church's unbridled sanctuary powers. The House of Commons launched a series of largely unsuccessful efforts to reduce the Church's sanctuary powers. In 1467, to respond to abuses of the privilege, King Henry VII obtained a papal bull from Pope Innocent VIII that limited sanctuary's scope, including revoking protections for anyone granted sanctuary who continued to commit felonies.

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77 COX, supra note 19, at 155.
78 Id.
79 Id.
80 TRENHOLME, supra note 26, at 15. They were "thrown into prison to await torture and a horrible kind of death." Id. at 74.
81 Id. at 16, 25. But cf. COX, supra note 19, at ix ("For every violation of sanctuary, there were hundreds of cases wherein its privileges were profoundly respected, and carried out after the accustomed fashion.").
82 COX, supra note 19, at 33 ("[T]here were usually a thousand persons in sanctuary during any given year for several centuries of England's history . . . ."); see also TRENHOLME, supra note 26, at 70.
83 TRENHOLME, supra note 26, at 26 ("Owing to the undue extension of the privilege of sanctuary it soon began to be a great abuse and a clog on justice in England."); see PRYCE, supra note 33, at 163 ("Abuse of the privilege prompted attempts--by Charlemagne, for example--to prevent certain categories of offenders, such as homicides, from availing themselves of it.").
84 TRENHOLME, supra note 26, at 85-86.
85 Id. at 86.
86 Id.
87 Id. at 27 ("This began the war against privileged places of sanctuary resort, especially in the metropolis.").
88 Id. at 27-28 ("In 1425, in 1429, in 1454, and finally in 1478, the Commons sought to modify and abridge the Church's right to afford sanctuary.").
Still, in 1487, groups of sanctuary men ventured forth from Westminster Abbey to rob the homes of soldiers loyal to King Henry VII while the soldiers were with the King in the field putting down a rebellion.

With minor exceptions, sanctuary came to an end in England during the reign of King Henry VIII. In 1624, any remaining legal rights associated with sanctuary were formally abolished by statute. Similarly, "sanctuary had all but disappeared [in the remainder of Europe] by the 1700s."

C. Early History of the United States

For almost the first 200 years of its existence, the United States did not experience the invocation of sanctuary by a religious authority or entity against civil authorities. The American colonists did not resurrect sanctuary as a legal privilege. Although many colonists came to the New World to escape persecution, sanctuary as a legal right existed neither in statute nor as a matter of common law.

Prior to the American Civil War, slaves escaped from Southern bondage to the freedom of the North along a decentralized and often haphazard system of routes popularly known as the Underground Railroad. Although these escape routes existed since at least the early 1800s, the term Underground Railroad did not become

\[ \text{\textsuperscript{[594]}} \]

90 Id. at 28.

RABBEN, supra note 24, at 66 (quoting Isobel Thomley, The Destruction of Sanctuary, in TUDOR STUDIES 182, 186 (R.W. Seton-Watson ed., 1924)). Cf. PRYCE, supra note 33, at 173 ("[P]eople could seek sanctuary in order to escape the enmity of their princes, only to set out more boldly from it to attack the surrounding countryside.").

COX, supra note 19, at 33; see also TRENHOLME, supra note 26, at 28-29. Until her death in 1558, there was a very limited resurgence of the tradition during the short reign of Queen Mary. COX, supra note 19, at 74, 148. Sanctuary in Scotland was largely abolished during the Reformation. TRENHOLME, supra note 26, at 92. Until 1880, Scottish debtors continued to obtain sanctuary at the royal palace in Holyroodhouse. RABBEN, supra note 24, at 68.


93 Id. at 175. In 1539, King Francis I abolished sanctuary in France. RABBEN, supra note 24, at 69.

94 BAU, supra note 14, at 161; ANN CRITTENDEN, SANCTUARY: A STORY OF AMERICAN CONSCIENCE AND LAW IN COLLISION 63 (1988) (explaining that sanctuary was first explicitly invoked in the United States during the Vietnam War).

95 Church Sanctuary for Illegal Aliens, 7 Op. O.L.C. 168, 169 (1983) ("[T]he Office of Legal Counsel has found no evidence that the colonists revived church sanctuary in America."); BAU, supra note 14, at 159 ("[T]he law of sanctuary was not adopted as part of the colonial common law."); RABBEN, supra note 24, at 72 ("The Massachusetts Bay Colony and other early European settlements in America did not have sanctuary laws.").

96 Church Sanctuary for Illegal Aliens, 7 Op. O.L.C. at 170 ("[S]anctuary . . . did not enter the United States as part of the common law."); CRITTENDEN, supra note 94, at 62 ("The sanctuary privilege never became part of American common law or statute, although it could be argued that the continent itself was a sanctuary, a new Promised Land for early colonists.").

97 Larry Gara, Myth and Reality, in UNDERGROUND RAILROAD 7, 11 (1998) ("[T]here was some organized activity in certain localities, but none nationwide. Much of the aid to fugitives was haphazard."); see RABBEN, supra note 24, at 85 (noting that the Underground Railroad was "a decentralized, grassroots network"); see also C. Peter Ripley, The Underground Railroad, in UNDERGROUND RAILROAD, supra, at 45, 45 ("As a formal term, it refers to the movement of African-American slaves escaping out of the South and to the allies who assisted them in their search for freedom.").

98 CHARLES L. BLOCKSON, THE UNDERGROUND RAILROAD 1 (1987) (noting that the Underground Railroad was popular at "the beginning of the nineteenth century").
popular until the widespread construction of railroads in the late 1830s to early 1840s, which immediately preceded the greatest period of Underground Railroad [*595] activity. Associated with the imagery of railroads, the movement had no meaningful link to that form of transportation.

The fleeing slaves usually traveled at night and "were hidden in livery stables, attics, and storerooms, under feather beds, in secret passages, and in all sort of out-of-the-way places." Members of the clergy and some religious communities assisted fleeing slaves by hiding them in churches. Much of the criticism behind the antislavery movement stemmed from a sense of Christianity-based morality.

Although churches and religious figures were active in the Underground Railroad, there is no record of a church or its clergy expressly invoking sanctuary as a legal privilege. To some extent, the absence of a single reported invocation of sanctuary may be explained by prevailing views of the majority of clergy. Surprisingly, through at least 1850, the bulk of American clergy were either hostile or indifferent to the [*596] antislavery movement, with the obvious exception of African-American ministers. A large segment of the clergy

99 RABBEN, supra note 24, at 85; Gara, supra note 97, at 11; see BLOCKSON, supra note 98, at 2 (explaining that the Underground Railroad did not have a name in the early 1830s).

100 BLOCKSON, supra note 98, at 4 ("[T]he period of greatest activity [was] from 1850 through 1860."); RABBEN, supra note 24, at 96 ("During the 1850s, as the nation moved toward civil war, the UGRR stepped up its activities . . . .").

101 Ripley, supra note 97, at 45 (noting that the Underground Railroad had "no literal association with railroading").

102 BLOCKSON, supra note 98, at 2-3.

103 See, e.g., RABBEN, supra note 24, at 86-87 (describing the ways in which Quakers in North Carolina helped slaves); Ripley, supra note 97, at 58 (noting that ministers in Washington, D.C. assisted fleeing slaves).

104 CRITTENDEN, supra note 94, at 63; see, e.g., BLOCKSON, supra note 98, at 206-07 (explaining that fleeing slaves passing through Ohio were hidden in churches); id. at 245 (stating that the Mother Zion Church "became a sanctuary for freedom-seeking slaves until all danger of discovery disappeared"); RABBEN, supra note 24, at 89 (noting that Philadelphia's African Methodist Episcopal Church was an Underground Railroad "station").

105 HENRY F. BEDFORD, THE UNION DIVIDES: POLITICS AND SLAVERY 1950-1861, at 13-14 (1963) ("The northern indictment of slavery rested on the premise that Negro servitude was a moral evil incompatible with the principles of democracy and of the Christian faith.").

106 BAU, supra note 14, at 160 ("[I]t is well documented that churches and church communities formed integral parts of the Underground Railroad."); see, e.g., BLOCKSON, supra note 98, at 166 (stating that a reverend in South Carolina offered "a haven for journeying fugitive slaves").

107 BAU, supra note 14, at 160 ("[T]here was . . . no express invocation of the defunct English privilege."); see RABBEN, supra note 24, at 96 ("[C]hurches providing sanctuary did not seek to claim a legal privilege.").

108 STANLEY W. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860, at 66-67 (1970). The bulk of the population from the North did not actively oppose slavery or laws protecting the rights of slave owners. See id. at 49 ("By far the greater majority [of Northerners], . . . although unsympathetic with the harsh provisions of the law, was willing to acquiesce in the return of fugitive slaves to their owners in order to maintain good relations with the South and to prevent disruption of the Union.").

109 BLOCKSON, supra note 98, at 4 ("Many black ministers, in particular, felt that organized assistance to fugitives was necessary to challenge the prevailing religious dogma of many white churches that a truly religious person was patient, in passive acceptance of the will of God.").
disfavored "antislavery agitation" and its disruptive effect on the Union. Further, a significant number of clergy were slave owners. By 1851, "an estimated 16,346 ministers of the Methodist, Presbyterian, Baptist, and Episcopal faiths owned slaves."  

In addition, the legal consequences of assisting fleeing slaves could be severe. Federal law imposed a fine on anyone who assisted a slave to escape. Southern laws were particularly harsh, "stipulating heavier fines and hard-jail time for anyone convicted of helping a slave on the run." The Fugitive Slave Act of 1850 provided slaveholders with enhanced legal rights for reclaiming slaves who had fled to the North and imposed significant penalties on U.S. marshals and deputy marshals who refused to enforce the law or did so poorly. In addition, the Fugitive Slave Act provided for a fine not to exceed $1,000 and imprisonment of up to six months for anyone who knowingly obstructed the arrest of a fugitive slave, [*597] or a person who "attempted to rescue, aid, harbor, or conceal a fugitive, knowing him to be such."  

The Fugitive Slave Act, which abolitionists claimed violated biblical injunctions, triggered a gradual change in Northern public opinion against slavery, but it did not inspire widespread efforts to eradicate slavery or actively assist slaves fleeing to freedom in the North. The inaction of Northern clergy reflected the sentiment of their congregations that "the shepherds were driven by the sheep."  

III. MODERN APPLICATION

110 CAMPBELL, supra note 108, at 66. Abolitionist clergy were also subject to acts of violence. See, e.g., Scott McCabe, Crime History: Pro-Slavery Mob Kills Abolitionist Publisher, WASH. EXAMINER, Nov. 7, 2012, at 8 (describing an abolitionist pastor who published a religious newspaper that was killed by a proslavery mob in Alton, Illinois).

111 CAMPBELL, supra note 108, at 67.

112 Ripley, supra note 97, at 51 (subjecting one who assisted a slave in escaping to a $500 fine under the Fugitive Slave Law of 1793).

113 Id.

114 Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1851) (repealed 1864).

115 CAMPBELL, supra note 108, at 24. Marshals who refused to enforce the law were subject to a fine up to $1,000. Id. Further, a marshal who lost custody of a fugitive slave "was liable for the slave's full value." Id.

116 Id.

117 "Abolitionists thundered that the law violated the biblical injunction in Deuteronomy 23:15-16 'not to deliver unto his master the servant that hath escaped.' RABBEN, supra note 24, at 95.

118 Ripley, supra note 97, at 63 ("[T]he Fugitive Slave Law changed popular attitudes among many Northerners who viewed some provisions of the 1850 law as serious violations of cherished personal liberties and constitutional guarantees.")

119 CAMPBELL, supra note 108, at vii-viii. "[O]nly a few citizens in isolated communities engaged in active opposition to enforcement of the Fugitive Slave Law." Id. "A great majority of the northern population . . . did not actively oppose this unpopular law." Id. at 55. Generally, the policy of the federal government was to enforce the law and federal marshals endeavored to do so. Id. at vii. "[T]he law was enforced by those charged with responsibility for enforcement . . . ." Id. "Id. was the policy of the national government . . . to enforce the law." Id. at 113. In contrast, many Southerners believed that the North was not adequately enforcing the Fugitive Slave Act of 1850 and that the institution of slavery was in peril, fueling secession efforts. Id. at 110.

120 Id. at 68. "Of an estimated [30,000] ministers in the United States . . . 'not one in a hundred' openly condemned slavery or 'lifted a finger' to protect a fugitive slave." Id. (quoting SAMUEL J. MAY, SOME RECOLLECTIONS OF OUR ANTI SLAVERY CONFLICT 365 (1869)).
Sanctuary policies that restrict the exchange of information about a person’s immigration status between the federal government and state or local law enforcement agencies facially violate both the Immigration Reform Act and the Welfare Reform Act. 262 Similarly, sanctuary policies that obstruct "the accomplishment and execution of the full purposes and objectives of Congress" in the field of immigration law may also be preempted by federal law. 263 Despite the seemingly obvious conflict between city and county sanctuary laws with federal immigration law, federal efforts to confront such policies appear to be sparse and largely unsuccessful. 264

IV. CONCLUSION

No legal right of sanctuary exists within the United States, and supporters of sanctuary rarely defend their actions on legal grounds. Indeed, active participants in a sanctuary movement risk violating the law. One who knowingly protects a deserter from military authorities commits a [*616] federal crime. 265 Similarly, sanctuary participants who knowingly harbor an illegal alien could violate 8 U.S.C. § 1324. 266

259 Id. The Texas attorney general referenced De Canas v. Bica, 424 U.S. 351 (1976), a United States Supreme Court decision that gave rise to three tests used to determine if federal law preempts a local government law relating to immigration. Accordingly, a court will find federal preemption if (1) a state statute "is a regulation of immigration," (2) "there is a showing that it was the clear and manifest purpose of Congress to effect a complete ouster of state power in the area of regulation," or (3) the "state statute ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’ or conflicts with federal law in such a way that compliance with both a federal and state law is impossible." Id. (quoting Villas at Parkside Partners v. City Farmers Branch, 496 F. Supp. 2d 757, 764-65 (N.D. Tex. 2007)); see also De Canas, 424 U.S. at 364-57, 363. The Texas attorney general determined that such a policy failed the third test of De Canas. Tex. Atty Gen. Op., supra note 256, at 2. Congress enacted a much more comprehensive immigration law regime since De Canas was decided. See Arizona v. United States, 132 S. Ct. 2492, 2504 (2012).


261 Id. (citing OKLA. STAT. tit. 74, § 20(j)(F) (2012) ("[T]his section . . . allow[s] for a private right of action by any natural or legal person lawfully domiciled in this state to file for a writ of mandamus to compel any noncooperating local or state governmental agency to comply with such reporting laws.").

262 Cf. Arizona, 132 S. Ct. at 2508 (“Consultation between federal and state officials is an important feature of the immigration system.”).

263 See id. at 2505. “The ordinary principles of preemption include the well-settled proposition that a state law is preempted where it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

264 Jerry Seper, GOP Bill Targets ‘Sanctuary Cities’ for Illegal Aliens, WASH. TIMES, Sept. 19, 2007, at A3 (discussing legislation that was introduced to withhold federal funding to sanctuary cities after similar legislation in the past had failed); see Stephan Dinan, Sanctuary Cities May Be Facing Legal Action, WASH. TIMES, July 11, 2012, at A1, A14 (discussing Department of Homeland Security officials asking the Department of Justice to take legal action to force cooperation with federal immigration officials). Cf. Villas at Parkside Partners v. City of Farmers Branch, 726 F. 3d 524, 573 (5th Cir. 2013) (“Congress passed no law concerning either ‘sanctuary cities’ or, at the opposite pole, cities that have attempted to discourage influxes of illegal aliens.”).

265 See Bridges v. Davis, 443 F.2d 970, 971 n.1 (9th Cir. 1971) (“[S]ervicemen, when in the sanctuaries, were defying the military authorities and could well be classified as deserters.”). Federal law criminalizes the knowing harboring, concealment, protection, or assisstance of a deserter. 18 U.S.C. § 1381 (2012).
Smith—the case around which this symposium has been organized. Smith cast aside the strict scrutiny model for the Free Exercise Clause, which had been built up in cases like Sherbert v. Verner and Wisconsin v. Yoder. Under that old model, burdens on religious liberty had to be justified—the government had to show the regulation in question was backed by a compelling governmental interest and pursued by the least restrictive means.

Smith changed all that. It said that burdens on religion no longer needed any justification, as long as the laws in question were neutral and generally applicable. Burdens on religious exercise now need not be supported by any evidence or logic. They do not need to be reasonable or even rational. They only need to be neutral and generally applicable. Take one recent case where a Jehovah's Witness was selected to be Director of Finance for a small town. The quarterly budget meetings were held on Saturdays. Religiously obligated not to work on Saturday, her Sabbath, she suggested a slew of alternatives. The Saturday meetings could be held on other days, which had sometimes been done in the past. She could appoint someone else to attend the meetings in her place, as also had been done in the past. Surely, she said, there must be some reasonable accommodation out there where she could keep her job but miss these Saturday meetings. After all, they only lasted a few hours and happened just four times a year. But the district court explained that she had gotten Smith all wrong: “For the employment requirement to be neutral and generally applicable, Defendants need not make, or even try to make, a reasonable accommodation for Plaintiff's religious practice.” The district judge seemed to think this was a good thing. But whether he is right about that or not, his sentence does accurately depict the Smith rule. After Smith, the government has the right to treat religious people unreasonably.

Now Smith did not completely define the meaning of neutrality or general

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34. See Thomas C. Berg, The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States, 19 EMORY INT'L L. REV. 1277, 1296 (2005) (explaining how “[t]he compelling interest standard . . . was drawn from Sherbert and Yoder”); see also Laycock, supra note 9, at 201-202 & nn. 272-278.
35. Smith, 494 U.S. at 879 (“Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law prescribes (or prescribes) conduct that his religion prescribes (or prescribes).”) (citations and quotations omitted); id. at 886 n.3 (“Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.”).
37. For all these allegations—which were uncontradicted and had to be taken as true anyway given that the defendant was seeking judgment on the pleadings—see Plaintiff's Memorandum of Law in Support of her Motion for Partial Summary Judgment Against Defendant Village of Bolingbrook, at 2-5, in Filinovich v. Clair, No. 04-7189, 2006 WL 1994580 (N.D. Ill. July 14, 2006), available at 2005 WL 2247363.
38. See Filinovich, 2006 WL 1994580, at *5.
applicability—people still fiercely debate that. But Smith makes clear that judicially mandated religious exceptions are now themselves exceptional. To the extent secular law clashes with religious obligation, religious obligation generally loses. The narrowest reading of Smith, though a common one, is that it forbids only intentional discrimination. But a ban solely on intentional discrimination quickly becomes a recipe for neglect. Religious groups cannot really allege intentional discrimination if the government simply ignores them. But their claim looks better if the government first considers the negative impact its action will have on religious communities, but then continues on that course of action anyway. Neglect is the logical result of those incentives—after Smith, the best way of insulating a decision from judicial scrutiny under the Free Exercise Clause is by pretending not to see the impact it has on religious groups. Smith does not just allow that neglect; Smith rewards it.

But with each passing year, Smith becomes more and more entrenched. With each Supreme Court case that addresses the Free Exercise Clause but fails to reconsider it and with each lower court opinion that relies on it, Smith becomes more interwoven into our constitutional fabric. Even in semester-long classes on religious liberty, Sherbert and Yoder are now covered quickly; Smith receives all the attention. Smith was heavily criticized for overturning longstanding precedent, like Sherbert and Yoder. But Smith itself is now almost as old as Sherbert was when it was overruled, and it is now older than Yoder. The same considerations of stare decisis that cut against Smith now counsel in favor of it. We may be stuck with Smith; we should probably get used to it.

But Smith, of course, was not the end of the story. It was in fact the beginning of a long series of events. Three years after Smith and in direct response to it, Congress passed RFRA, the Religious Freedom Restoration Act. RFRA brought back the same sort of strict scrutiny model that had been


40. See Marci Hamilton, The Supreme Court Issues a Monumental Decision: Equal State Scholarship Access for Theology Students Is Not Required by the Free Exercise Clause, Findlaw (Feb. 27, 2004), available at http://writ.news.findlaw.com/hamilton/20040227.html (“The Court could not have been clearer: There are few instances where strict scrutiny is justified under the Free Exercise Clause. In Free Exercise challenges, hostility to religion must be shown for strict scrutiny to apply.”) (emphasis in original); see also Thomas v. Anchorage Equal Rights Comm’n, 165 F.3d 692, 702 (9th Cir. 1999) (rejecting a Free Exercise claim because there was “no indication that Alaska lawmakers were impelled by a desire to target or suppress religious exercise” in enacting the relevant law), vacated on ripeness grounds, 220 F.3d 1134 (9th Cir. 2000).


42. Smith is now 20 years old. Sherbert was 27 years old when Smith was decided. Yoder was at that time 18 years old. See Smith, 494 U.S. 872 (1990); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

jettisoned in Smith. RFRA was a statute rather than a constitutional provision, but the effect was the same. The clock was turned back. Burdens on religious liberty were again evaluated under a compelling-interest framework. But RFRA provoked controversy. And in City of Boerne v. Flores, the Court broke RFRA up into two parts—the part that modified federal law and the part that modified state law. The latter, the Court held, was unconstitutional. It was beyond the power of Congress to so modify state laws. But Boerne left RFRA’s application to federal law untouched.

RFRA’s meaning in that context was taken up for the first time a few terms ago in Gonzales v. O Centro Espirita Beneficente União do Vegetal. The Supreme Court considered whether a Brazilian group had the right to import hoasca, a sacramental tea, even though doing so violated federal law because hoasca contains dimethyltryptamine (DMT), a prohibited Schedule I substance. The Supreme Court gave the plaintiffs a preliminary injunction against enforcement of the law, finding that the government had failed to demonstrate a compelling interest in denying the UDV their tea. The Court rejected the government’s claim that it always had a compelling interest in prohibiting Schedule I substances as too generalized. And the Court rejected the government’s more specific claim that hoasca posed health and safety risks as unsubstantiated. By rejecting overly general reasons altogether and by insisting that specific reasons be proven, the Supreme Court gave RFRA the sort of expansive interpretation it deserved. And in some ways, it left us to wonder whether religious liberty was even better off under Gonzales than it had been before Smith. Think of the position taken by Justice O’Connor. Concurring in Smith, she held onto the strict scrutiny model, but found that Oregon had a compelling interest in stopping peyote. Representing the middle of the Court,

44. See 42 U.S.C. § 2000bb-1(b) (“Government may substantially burden a person’s exercise of religion only if it 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.”); see also Ina C. Lupu, Of Time and the RFRA: A Lawyer’s Guide to the Religious Freedom Restoration Act, 56 Mont. L. Rev. 171, 172 (1995) (“RFRA rejects wholesale selected aspects of [Smith] and replaces [it] with instructions to return to the future; that is, to reemploy doctrines gleaned from prior law developed in [Free Exercise] adjudication.”).

46. See Douglas Laycock, Conceptual Gulfs in City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 745 (1998) (“Flores held that RFRA is unconstitutional as applied to state and local governments. The decision does not affect RFRA’s application to federal law, which is based on Congress’s Article I powers and in no way depends on the Fourteenth Amendment.”).
48. Id. at 425 (noting that hoasca is “a sacramental tea” that “contains dimethyltryptamine (DMT), a hallucinogen,” which “is listed in Schedule I of the Controlled Substances Act”).
49. Id. at 432 (“Under the more focused inquiry required by RFRA and the compelling interest test, the Government’s mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day.”).
50. Id. at 437 (“The Government failed to convince the District Court at the preliminary injunction hearing that health or diversion concerns provide a compelling interest in banning the UDV’s sacramental use of hoasca . . . and cannot compensate for that failure now.”).
her opinion in Smith perhaps best represents how the Sherbert/Yoder standard was applied in practice. In Smith, she accepted the government’s contention that no religious exemption was possible because Schedule 1 substances were inherently dangerous and because allowing any exceptions at all would threaten the regulatory scheme.\(^{51}\) But Gonzales utterly rejects that position. In fact, it mocks it—Chief Justice Roberts called it “the classic rejoinder of bureaucrats throughout history.”\(^{52}\) Gonzales thus required what Sherbert/Yoder only purported to require—that government assert interests rather than just uniform laws, and that government prove the compelling nature of those interests with the ordinary tools of litigation. If followed faithfully by lower courts, Gonzales can provide significant protection for religious liberty.\(^{53}\)

II. AN INTRODUCTION TO STATE RFRAS

Gonzales bodes well for religious liberty. But its limitations are obvious. Gonzales only protects against burdens imposed by the federal government. But usually when religious liberty is burdened, it is burdened by state and local governments. Gonzales offers no protection against those burdens. In this way, Gonzales can give some very false impressions. Just consider the state of the law today as regards hoaaca. Gonzales gave the UDV an exemption from federal law to use hoaaca. But that does not mean that the UDV can actually use hoaaca. Apart from New Hampshire and Vermont, every state bases their drug laws on the Uniform Controlled Substances Act.\(^{54}\) And the Uniform Controlled

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51. See Employment Div. v. Smith, 494 U.S. 872, 905-06 (O’Connor, J., concurring in the judgment) (“Oregon’s criminal prohibition represents that State’s judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous . . . . Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon’s stated interest in preventing any possession of peyote.”).

Professor Lupa has probably phrased this concern best: “Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe.” Ira C. Lupa, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 HARV. L. REV. 953, 947 (1989).

52. Gonzales, 546 U.S. at 436. Chief Justice Roberts’s full point was this:

[The government’s argument] rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law. The Government’s argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.


53. There is always the question of whether it will be followed faithfully. One early report is skeptical. See Matthew Nicholson, Note, Is O Centro a Sign of Hope for RFRA Claimants?, 95 VA. L. REV. 1281 (2009).

Substances Act prohibits hoasca.\textsuperscript{55} So apart from New Hampshire and Vermont, it turns out that every state criminalizes hoasca.\textsuperscript{56} And none of them make any exception for religious use.\textsuperscript{57} So, at the end of the day, \textit{Gonzales} only really applies in two of the smallest of the fifty states. In the other forty-eight, the UDV Church has no legal right to exist. They can practice their religion only under constant threat of criminal and civil penalties. That is no great triumph for religious liberty.

This reinforces a key and often overlooked point. \textit{Smith} and \textit{Boerne} together mean that we live today in a multiple-exemption regime. Religious observers will need to win exemptions from all the legal regimes that bind them—from federal laws, from state laws, and from local laws. They must wage battles in every political sphere simultaneously and they must win each one. If they fail anywhere, they fail completely.\textsuperscript{58} For in our system of multiple sovereigns, being protected from one governmental entity offers no immunity from any other. So while the federal RFRA is necessary for the protection of religious liberty, it is not sufficient. States must also choose to accommodate religious freedom within their respective spheres.

This is where state RFRA comes into play. A number of states now have state RFRA—state analogues to the federal Religious Freedom Restoration Act.

\textsuperscript{55} See \textit{NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS}, \textit{Uniform Controlled Substances Act} of 1994, § 204(3)(xy) (listing "dimethyltryptamine (other names: DMT)" as a prohibited Schedule I substance), available at \url{http://www.law.upenn.edu/bll/ucl/fnact99/1990s/uacs94.pdf}.


\textsuperscript{57} See sources cited in supra note 56.

\textsuperscript{58} See Douglas Laycock, \textit{The Religious Freedom Restoration Act}, 1993 BYU L. REV. 221, 229 ("Churches have to win these battles over and over, at every level of government. They have to avoid being regulated by the Congress, by the state legislatures, by the county commissions, by the city councils, and by the administrative agencies at each of these levels. Churches have to avoid being regulated this year and next year and every year after that. If they lose even once in any forum, they have lost the war.")
The state RFRA movement began in 1993, three years after Smith and the year the federal RFRA passed. The movement hit its stride shortly after City of Boerne v. Flores. Ten states passed their RFRA in the years from 1998 to 2000. But while state RFRA bills passed in some states, they failed in many others. State RFRA bills were supported by a number of diverse groups. And while much effort was spent on their behalf, that opposition often won out. State RFRA, for example, were ultimately rejected in California and New York, two of the three largest states. And recently the trend toward state RFRA has slowed. Only three states have passed RFRA in the past six years.

In their effect, the enacted state RFRA operate much like the federal


63. See supra note 60 (providing citations to failed state RFRA bills); see also Bettina Krause, Coalition Building and Legislative Realities, 32 U.C. DAVIS L. REV. 811, 817 (1999) (statement of Michael Lieberman, Counsel for the Anti-Defamation League) (“Of the more than twenty state RFRA introduced last year, only four were successful in state legislatures, and one of these was defeated by a governor’s veto.”).

64. See supra note 60 (providing citations); see also Alan Reich, Why We Need State RFRA Bills: A Panel Discussion, 32 U.C. DAVIS L. REV. 823, 831-32 (1999) (discussing the efforts in California).

65. See infra note 67 and Table 1 (providing citations and information).
RFRA did before Boerne, requiring state and local laws that impede religious exercise to be justified by a compelling interest. These state RFRA s thus eliminate the Smith standard, rejecting it in favor of that of Sherbert and Yoder. As a typical example, consider the main operative part of Arizona’s RFRA:

Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person is both:

1. In furtherance of a compelling governmental interest.
2. The least restrictive means of furthering that compelling governmental interest.66

66. See ARIZ. REV. STAT. ANN. §§41-1493.01(C) (2009).
Sixteen states have now passed state RFRA's of this generic type. The below chart provides some basic information on them:

<table>
<thead>
<tr>
<th>State</th>
<th>Year</th>
<th>Required Threshold Showing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Connecticut</td>
<td>1993</td>
<td>Burden</td>
</tr>
<tr>
<td>Florida</td>
<td>1998</td>
<td>Substantial Burden</td>
</tr>
<tr>
<td>Illinois</td>
<td>1998</td>
<td>Substantial Burden</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>1998</td>
<td>Restrictions on Religious Liberty</td>
</tr>
<tr>
<td>Alabama</td>
<td>1999</td>
<td>Burden</td>
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<tr>
<td>Arizona</td>
<td>1999</td>
<td>Substantial Burden</td>
</tr>
<tr>
<td>South Carolina</td>
<td>1999</td>
<td>Substantial Burden</td>
</tr>
<tr>
<td>Texas</td>
<td>1999</td>
<td>Substantial Burden</td>
</tr>
<tr>
<td>Idaho</td>
<td>2000</td>
<td>Substantial Burden</td>
</tr>
<tr>
<td>New Mexico</td>
<td>2000</td>
<td>Restrictions on Religious Liberty</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>2000</td>
<td>Substantial Burden</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>2002</td>
<td>Substantial Burden</td>
</tr>
<tr>
<td>Missouri</td>
<td>2004</td>
<td>Restrictions on Religious Liberty</td>
</tr>
<tr>
<td>Virginia</td>
<td>2007</td>
<td>Substantial Burden</td>
</tr>
<tr>
<td>Utah</td>
<td>2008</td>
<td>Substantial Burden</td>
</tr>
<tr>
<td>Tennessee</td>
<td>2009</td>
<td>Substantial Burden</td>
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</tbody>
</table>

This table documents some of the more obvious differences between these state RFRAs. Though all of the sixteen state RFRAs adopt a compelling-interest test, they differ in what they require as a threshold—that is, they differ in what a plaintiff must initially show in order to trigger the government’s obligation to demonstrate a compelling interest. 68 Eleven of the sixteen take the approach of the federal RFRRA, requiring that the plaintiff show a “substantial burden” on religious exercise before the compelling-interest test kicks in. 69 Two of these states—Arizona and Idaho—water this requirement down a bit by saying that this threshold showing is only meant to weed out “trivial, technical or de minimis” burdens. 70 Such language, for reasons that will be discussed, should be made part of all state RFRAs. Two other states seem to go further in this direction, dropping out the word “substantial” altogether, and requiring only that plaintiffs show a “burden” on religious exercise. 71 Finally, three other states avoid using the word “burden” at all, simply demanding that all “restrictions on religious liberty” be justified by compelling interests. 72 It is unclear what that change was originally meant to accomplish, but textually it would suggest dropping out the threshold issue of burden altogether.

A side-by-side comparison of the statutes reveals other differences between state RFRAs as well. Most state RFRAs allow winning plaintiffs to recover attorneys’ fees and costs 73 just as the federal RFRRA does 74 —although there are exceptions. 75 Four states explicitly allow successful plaintiffs to recover monetary damages, 76 while two states explicitly reject them 77 and others do not

68. See Table I (sorting the state RFRAs by type). Some commentators have offered other suggestions for how state RFRAs should be drafted, but those suggestions have so far not been taken. See Daniel O. Conkle, Free Exercise, Federalism, and the States as Laboratories, 21 CARDozo L. REV. 493, 496-98 (1999) (exploring various different options that states could use in drafting their RFRAs); Eugene Volokh, A Common-Law Model for Religious Exemptions, 46 UCLa L. REV. 1465, 1503-04 (1999) (proposing a model state RFRRA that asks generally whether substantial burdens on religious exercise are “justified”).


70. See ARIZ. REV. STAT. ANN. §§41-1493.01(E) (2009) (“In this section, the term substantially burden is intended solely to ensure that this article is not triggered by trivial, technical or de minimis infractions.”); IDAHO CODE ANN. §§73-402(5) (2009) (same exact quoted language).

71. The states are Alabama and Connecticut. See Table I and note 67.

72. The states are Rhode Island, New Mexico, and Missouri. See Table I and note 67.

73. ARIZ. REV. STAT. ANN. § 41-1493.01(D) (2009); FLA. STAT. ANN. § 761.04 (West 2010); IDAHO CODE ANN. § 73-402(4) (2009); ILL. COMP. STAT. ANN. 55/20 (West 2009); N.M. STAT. § 28-22-4(A)(2) (2006); OKLA. STAT. ANN. tit. 51, § 256(B) (West 2010); S.C. CODE ANN. § 1-32-50 (2010); TENN. CODE ANN. § 4-1-407(E) (2009); TEX. CIV. PRAC. & REM. CODE ANN. § 110.005(a)(4) (2009); VA. CODE ANN. § 57-2.02(D) (2009).


75. See 71 PA. CONS. STAT. ANN. § 2405(f) (West 2009) (“Unless the court finds that the actions of the agency were dilatory, obdurate or vexatious, no court shall award attorney fees for a violation of this act.”).


77. 71 PA. CONS. STAT. ANN. § 2405(f) (West 2009); VA. CODE ANN. § 57-2.02(D) (2009).
address the issue. There are also some other important differences between these state RFRA s. Some RFRA s have detailed notice and exhaustion procedures. Some RFRA s have coverage exclusions—areas carved out by statute where the state RFRA does not apply or applies with less force. These differences matter greatly, but we turn first to some even larger issues.

III. THE FAILURE OF STATE RFRA S

When one looks at these state RFRA s in the abstract, they can seem quite protective of religious liberty. After all, they legislatively restore the compelling-interest test of Sherbert and Yoder. If Gonzales is any guide, we might expect religious liberty to be thriving at the state level. But this is an incomplete account of what is going on. When we get beyond looking at the statutes themselves and start to examine things on the ground, our perspective changes.

A. THE LACK OF STATE RFRA S

We should begin by noting the most obvious point: many states do not have state RFRA s. Sixteen states have them. But that is less than one in three. RFRA bills failed in California and New York, where more than 1 out of every 6 Americans live. Some states, to be sure, have state constitutional provisions protecting religious liberty. But that still leaves about 15 to 20 states with neither a state RFRA nor such a constitutional provision. In those jurisdictions, Smith rules. Gonzales may be generous in giving religious exemptions from federal laws to people in those states. But Gonzales can do nothing to provide exemptions from state and local laws, which are the main source of trouble for religious believers.

B. THE LACK OF STATE RFRA CASES

Yet even in the states that have state RFRA s, there is reason to doubt that state RFRA s provide meaningful protection for religious observance. State RFRA s have been heavily litigated in some states, like Texas, Illinois, and Florida. But in many jurisdictions, there is virtually no state RFRA litigation. Some simple numbers are quite shocking. Alabama and South Carolina passed their state RFRA s in 1999. Idaho, New Mexico, and Oklahoma passed theirs in 2000. Ten years later, state and federal courts together have decided in reported decisions four Idaho RFRA claims, three Oklahoma RFRA claims, two

78. See infra Part III.E.
79. See infra Part III.F.
80. See infra note 64 (explaining that point).
81. See infra note 170; see also Laycock, supra note 9, at 211 & n.370.
82. See infra note 97 (providing citations to roughly twenty Florida RFRA cases).
South Carolina RFRA claims, one Alabama RFRA claim, and one New Mexico RFRA claim. More than sixteen million people over more than 10 years in 5 states have apparently litigated just 11 state RFRA claims to judgment. But even more amazingly, there are no decided state RFRA cases at all in four states—Rhode Island, Missouri, Virginia, and Utah. Those four state RFRA have simply not been the subject of any reported judicial decisions. Take all this together, it means that of the 16 states with state RFRA, 10 of them have two or fewer reported cases.

Some potential reasons may explain this or at least part of it. State court cases, particularly at the trial level, are hard to find; they may not be on Lexis or Westlaw, which for the most part is how these searches were conducted. And decided cases are certainly not all that matters. State RFRA surely increase prospects of favorable settlements for religious claimants, both before and after complaints are filed. So state RFRA probably do some work that these numbers do not catch. But even with all these qualifiers, state RFRA litigation seems surprisingly light.

There are many conceivable explanations for this. But I suspect a part of it is that the attorneys who bring Free Exercise cases may often be simply unaware of state RFRA. These state RFRA are well known to those who teach church and state classes, but they may be just obscure provisions of state law to practitioners. Practitioners usually do not specialize in Free Exercise the way they specialize in tax or bankruptcy; they have no reason to know about Title 51

89. This is an important point stressed by those who work in the field. See, e.g., Protecting Religious Freedom After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 26, 26-27 (1997) (statement of Mark E. Chopke, General Counsel, U.S. Catholic Conference) (“RFRA served as an important tool in negotiation, bargaining, and reaching compromise.”); Alan Reinhart, Why We Need State RFRA Bills: A Panel Discussion, 32 U.C. DAVIS L. REV. 823, 832 (1999) (statement of Pat Nolan, President of the Justice Fellowship) (“I think the greatest significance that the Federal RFRA held was in bargaining. It gave a person a seat at the table with any government official whose conduct impeded one’s ability to practice their faith.”); id. at 844 (statement of Douglas Laycock, then a Professor at the University of Texas School of Law) (“I want to reinforce what Pat Nolan said. The common understanding of the meaning of Smith among government lawyers is: ‘We don’t have to talk to you anymore.’”)
90. Professor Lupu offered similar qualifications regarding the reach of his study of the federal Religious Freedom Restoration Act, reminding us that there are “cases filed in which no reported opinions had been rendered . . . cases settled after the initiation of RFRA litigation, and . . . matters resolved without resort to litigation.” Ian C. Lupu, The Failure of RFRA, 20 U. ARK. LITTLE ROCK L.J. 575, 587 (1998).
of the Oklahoma Code. Or it could be that attorneys are aware of these state RFRA claims, but just do not believe that such claims are worth pursuing. They might trust the well known and assume that the Free Exercise Clause provides whatever protection is available. But whatever the reason, it is clear that attorneys are failing to bring state RFRA claims when they should. In many cases in states with an applicable state RFRA, plaintiffs have brought Free Exercise Clause claims alone without bringing corresponding state RFRA claims. These cases were lost under Smith, even though a properly pled state RFRA claim would have changed the standard of review.

And if the number of state RFRA cases itself is disappointing, even more disappointing are how scarce the victories are. In the four states without any decided state RFRA cases, obviously no plaintiff has ever won a court judgment. But victories are scarce in other states as well. There is one victory in Oklahoma, and arguably one victory each in Idaho, Arizona, and Alabama. There are no victories in New Mexico and South Carolina. Yet even in states where litigation is heavy, victories are rare. Florida passed its RFRA early; it has seen substantial litigation. Yet of all the claims asserted over the years, only a single state Florida RFRA claim litigated to judgment has won. And there

94. It depends, of course, on what counts as a victory. Two cases involved plaintiffs obtaining relief on their RULIPA claims, where the Court said something suggesting that they also might have won under their state RFRA claims as well. See Simonsen v. Arizona Dep’t of Corr., No. 2 CA-CV 2008-0123, 2009 WL 1600401 (Ariz. Ct. App. June 8, 2009); Hyde v. Fisher, 146 Idaho 782, 203 P.3d 712 (Idaho Ct. App. 2009). I count these as victories, but only to be generous to the concept. In fact, they probably meant nothing practically speaking; the plaintiffs likely would have been entitled to as much relief without them. The other case involved a plaintiff apparently surviving a motion for summary judgment on his state RFRA claim, even though the court’s opinion did not address it specifically. See Presley v. Edwards, No. 2-04-cv-729-WKW, 2007 WL 174153 (M.D. Ala. Jan. 19, 2007).
have been a lot of litigated losses. 97 Of course, plaintiffs have won some important victories using state RFRA.s 98 These should not be overlooked. And tallying wins and losses may not be the best measure of the efficacy of a state RFRA anyway—many religious liberty claims are meritless and deserve to lose. 99 But it probably does mean something when more than half of the jurisdictions have no litigated victories under their state RFRAs. Attorneys will be even more likely to forget about state RFRAs or unwisely dismiss their potential. Courts will be less likely to take them seriously. And the leverage that such claims will provide in the bargaining process drops as well—a state will be less likely to settle state RFRA claims if it has never lost one before.

C. STATE RFRAS IN FEDERAL COURT

In the last section, this piece discussed the simple lack of state RFRA litigation. But another important issue is how when state RFRA claims are brought, they are often brought in the wrong place. Attorneys are used to bringing First Amendment claims in federal court. So when a religious liberty dispute arises, an attorney will probably think first of filing there. She might not think of a state RFRA claim. But if she does, she will probably just include it as another claim in her federal complaint. Yet this creates a problem, because federal courts will often lack the power to properly adjudicate these claims. These obstacles are largely unrelated to the Religion Clauses, but they are


99. See, e.g., Elliot M. Mincberg, A Progressive Organization's Look at RFRA, 21 CARDOZO L. REV. 801, 804 (1999) (noting that it is "not necessarily bad" that "religious litigants only win a relatively small percentage of cases" under RFRA, because there are a lot of religious freedom claims that should not succeed). Also, as discussed earlier, leverage in the bargaining process is a key virtue of state RFRAs, which does not show up in studies of the reported cases. See supra note 89.
important obstacles just the same.

The first obstacle lies in the doctrine of supplemental jurisdiction. Under this doctrine, federal courts have the power to decide state-law claims connected to federal claims.\(^{100}\) So in a case with a Free Exercise (or RLUIPA) claim, a federal court has supplemental jurisdiction to hear a state RFRA claim as well. But the key is this. Federal courts will often not assert supplemental jurisdiction over state claims once all the federal claims have been resolved.\(^{101}\) So a federal court that rejects a plaintiff’s federal Free Exercise claim (or RLUIPA claim) will usually then dismiss the plaintiff’s suit entirely and never even get to any state RFRA claim that the plaintiff has also brought. This has happened quite frequently.\(^ {102}\) And another point comes in here too. A federal court will also dismiss a state RFRA claim when the plaintiff is successful on his federal claims, on the theory that resolving the state RFRA claim is now an unnecessary waste of time.\(^ {103}\) When you take those two points together, you see that federal courts have the power to decline to hear state RFRA cases altogether. This can cause serious waste. A plaintiff who spends years in federal court litigating his less powerful Free Exercise claim only to have to then re-file his better state RFRA claim in state court will have wasted a lot of time and resources. And he may not be inclined to start the whole thing over again.

The second obstacle lies with an issue of remedies and state sovereign immunity. In Pennhurst State School & Hospital v. Halderman,\(^ {104}\) the Supreme Court held that the Eleventh Amendment prohibits federal courts from ordering

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\(^{100}\) See 28 U.S.C. §1367(a) (2009) ("[T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.").

\(^{101}\) See 28 U.S.C. §1367(c) (2009) ("[T]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if ... (3) the district court has dismissed all claims over which it has original jurisdiction..."); see also Deborah J. Chellenger & John B. Howell III, Remand and Appellate Review Issues Facing the Supreme Court in Carlsbad Technology, Inc. v. HIF Bio, Inc., 103 NW. U. L. REV. COLLOQUIO 418, 419 (2009) (explaining how "supplemental jurisdiction is a doctrine of discretion, not of plaintiffs' right") (quoting City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 172 (1997)).


\(^{103}\) See Calvary Chapel Church, Inc. v. Broward County, Fla., 299 F. Supp.2d 1295 (S.D. Fla. 2003) (dismissing a plaintiff's Florida RFRA claims because of the success of the plaintiff's First Amendment Free Speech claim); Nichol v. ARIN Intermediate Unit 28, 268 F. Supp.2d 536 (W.D. Pa. 2003) (dismissing a Pennsylvania RFRA claim because of the success of the attached Free Exercise claim); cf. Wilson v. Moore, 270 F. Supp.2d 1328 (N.D. Fla. 2003) (doing the same even though the plaintiff's Free Exercise and Equal Protection Claim were only partially successful and only entitled the plaintiff to part of the relief he was seeking).

state officials to comply with state law. 105 *Pennhurst* matters greatly for state RFRA claims, because it means that federal courts hearing state RFRA claims often have no power to give a plaintiff injunctive relief, even if he wins on the merits. 106 Now *Pennhurst* only protects states—local government units like cities, counties, and school boards have no Eleventh Amendment immunity. 107 So they can be enjoined by federal courts under state RFRA s. 108 But where the defendant is the state itself, bringing state RFRA claims in federal court is practically useless; there is little point in bringing claims for which there is no possibility of an effective remedy. And indeed, in this context, bringing such claims is worse than useless. Under the supplemental jurisdiction statute, the statute of limitations is usually tolled for pendant state-law claims while they are in federal court. 109 But there is no tolling for state-law claims that get dismissed on Eleventh Amendment grounds. 110 All this is to say that for state RFRA claims brought in the wrong court initially, it will often be too late to correct the error later.

These obstacles are important. They are in some sense procedural, but they affect substance. They prevent federal courts from acting to redress real claims. And this again emphasizes just how important states now are in the protection of religious liberty. Just as religious groups now depend on state law for their rights to religious exercise, they now depend on state courts for the vindication of those rights. Attorneys need to get used to bringing these claims in state court. Their important efforts—and the right of religious liberty—may be lost otherwise.

### D. THE INTERPRETATIONS OF STATE RFRA S

Let us assume the rosy picture of a state with a state RFRA and a state

105. A federal court’s grant of relief against state officials on the basis of state law, whether prospective or retrospective, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.


108. See, e.g., Mercad v. Kasson, 577 F.3d 578 (5th Cir. 2009) (ordering injunctive relief against municipal officials pursuant to Texas’ state RFRA).

109. See 28 U.S.C. §1367(d) (2009) (“The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.”).

110. See Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 541-46 (2002) (holding that the supplemental jurisdiction statute does not toll the statute of limitations as regards state law claims dismissed by a federal court on grounds of state sovereign immunity).
RFRA claim that is resolved on its merits. Perhaps the most troubling part of a detailed examination of state RFRA's is how courts interpret them. Courts often interpret state RFRA's in an incredibly watered down manner that does not resemble Gonzales-style review or even Sherbert/Yoder-style review. This is one of the surest ways of taking the teeth out of state RFRA's.

One consistent problem has been simply in understanding what state RFRA's do. A surprising number of courts have interpreted state RFRA's to provide less protection than the constitutional clauses they were meant to augment. This may be hard for us to understand, but it happens with regularity. Florida offers some good examples. One Florida court found a federal Free Exercise Clause violation under Smith, but still rejected the Florida RFRA claim. Another court rejected the state RFRA claim after finding actual intentional religious discrimination prohibited by Lukumi. A third court struck down a zoning ordinance under the Equal Protection Clause on the ground that there was no rational basis for it, which apparently was easier than deciding the merits of the plaintiff's state RFRA claim. This seems like judicial confusion, pure and simple. State RFRA's are supposed to be more powerful than the Free Exercise Clause or the Equal Protection Clause—not less. But courts misunderstand that, and frequently interpret state RFRA's to mean very little instead.

As another example, take the current situation in Connecticut. Textually speaking, Connecticut has one of the strongest RFRA's. Adopted back in 1993, it rejects the substantial-burden standard, requiring only that plaintiffs show a "burden" on religious exercise. It has no coverage exclusions—no subject areas where it either does not apply or applies with less force. And the

111. See First Vagabonds Church Of God v. City Of Orlando, Fla., 578 F.Supp.2d 1353, 1362 (M.D. Fla. 2008) ("[T]he Court finds that the application of this Ordinance violates the First Amendment rights of Nichols and FVCG [under Smith and Lukumi].").

112. Id. at 1361-62 ("[T]his Court held that Plaintiffs have failed to show that the Ordinance places a 'substantial burden' on this activity as defined under the RFRA.").

113. Hollywood Cmty. Synagogue, Inc. v. City of Hollywood, Fla., 430 F.Supp.2d 1296, 1321-22 (S.D. Fla. 2006) (noting that "the Court has previously found that Plaintiff had not demonstrated a substantial burden ... [and therefore] finds that Plaintiff's Florida RFRA claims fail to state a claim upon which relief may be granted").

114. Id. at 1315 ("In short, the Synagogue has provided ample evidence of a City policy and practice of harassment and selective enforcement against the Synagogue, and further demonstrated that nothing was done to prevent this conduct despite the fact that such policy was well known or should have been well known to City officials.").

115. Open Homes Fellowship, Inc. v. Orange County, Fla., 325 F.Supp.2d 1349, 1365 (M.D. Fla. 2004) (concluding that "the County's ordinance on religious institutions violated Open Homes' equal protection rights and not addressing the Florida RFRA claim.").

116. See CONN. GEN. STAT. ANN. §52-571b(a) (West 2005) ("The state or any political subdivision of the state shall not burden a person's exercise of religion ... except as provided in subsection (b) of this section.") (emphasis added); cf. Murphy v. Zoning Com'n of Town of New Milford, 289 F.Supp.2d 87, 114-15 (D. Conn. 2003) ("That statute is modeled after RFRA, which the Supreme Court has held to be unconstitutional as applied against the States ... [But] ACRF literally requires only a 'burden,' rather than a 'substantial burden,'") (citation omitted); Cambodian Buddhist Soc'y of Conn. v. Newtown Planning and Zoning Com'n, No. CV030350572S, 2005 WL 3370834, at *6 (Conn. Super. Nov. 18, 2005) [hereinafter Cambodian I] ("While the RUIPA requires a 'substantial burden' on religious exercise, RFA merely requires a 'burden' on religious exercise.").
legislators who passed Connecticut’s RFRA made clear what it was supposed to do: “[T]he overarching purpose of § 52-571b was to provide more protection for religious freedom under Connecticut law than the Smith decision would provide under federal law.”117

It is surprising then to find that Connecticut courts interpret their RFRA to mean simply Smith and nothing more. An influential opinion adopted by the Connecticut Court of Appeals said this about its RFRA:

Churches and religious organizations can be regulated under a state’s police power if that regulation is religiously neutral and for secular purposes. . . . “The first amendment cannot be extended to such an extent that a claim of exemption from the laws based on religious freedom can be extended to avoid otherwise reasonable and neutral legal obligations imposed by government.” Grace Community Church v. Bethel, Superior Court, judicial district of Danbury, Docket No. 306994, 1992 WL 174923 (July 16, 1992) (Fuller, J.), citing Employment Division v. Smith, 494 U.S. 872, 888, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).118

The citation to Smith jumps off the page. Connecticut has here done the one thing almost unimaginable; it has interpreted its RFRA as equivalent to the very standard it was intended to supersede. Following this opinion, Connecticut cases repeat the maxim that state laws are immune from challenge when they are “religiously neutral and for secular purposes.”119 And, to be clear, they mean this just as a ban on intentional discrimination: “Secular concerns such as safety do not impinge on the exercise of religion, assuming, of course, that the recitation of such concerns is not a mere pretext . . . The statutes seeking to preserve the value of freedom of religion [i.e., Connecticut’s RFRA] can peacefully coexist [with such secular concerns] so long as those concerns are not used to mask discriminatory intent.”120 Without a showing of discriminatory

117. Rweyemamu v. Comm’n on Human Rights and Opportunities, 911 A.2d 319, 328 (Conn. App. Ct. 2006) (discussing the legislative history of the bill). The Connecticut Supreme Court later made the same point:

Like RFRA, § 52-571b was enacted in response to the United States Supreme Court’s decision in Employment Division, Dept. of Human Resources v. Smith, . . . in which the court held that a generally applicable prohibition against socially harmful conduct does not violate the free exercise clause, regardless of whether the law burdens religious exercise. Also like RFRA, the purpose of § 52-571b was to restore the balancing standard, articulated by the United States Supreme Court in Sherbert v. Verner, supra, at 374 U.S. at 403, 83 S.Ct. 1790, under which a law that burden[s] religious exercise must be justified by a compelling governmental interest.


119. Cross Street, LLC v. Zoning Bd. of Appeals of Town of Westport, No. CV046008077, 2007 WL 448684, at *5 (Conn. Super. Ct. Jan. 26, 2007) (“The Connecticut Religious Freedom Act, General Statutes § 52-571b (RFA) prohibits a state or local authority from placing a ‘burden on a person’s exercise of religion’ . . . [but] churches and religious organizations can be regulated under the police power as long as the regulation is religiously neutral and for secular purposes.”); see also Cambodian I., supra note 116, at *10-*11 (similar).

120. Farmington Ave. Baptist Church v. Town of Farmington Planning and Zoning Comm’n, No.
intent then, religious observers can have no claim under Connecticut’s RFRA. This is not just *Smith*—this is the narrowest conceivable interpretation of *Smith*. This cannot be what Connecticut’s RFRA means, whatever its courts say.

Courts also have trouble with the threshold requirements, and Connecticut again offers an example. In 2008, the Connecticut Supreme Court decided *Cambodian Buddhist Society*, a case where a Buddhist group sought a special exception to build a Temple on its property. The town’s zoning and planning commission denied the exception, and the Connecticut Supreme Court ultimately affirmed, rejecting the plaintiffs’ Connecticut RFRA claim and other claims. But its reasoning was startling. It did not hold there was some compelling interest. It did not hold that the plaintiffs’ religious liberty was insufficiently burdened. Instead, the Court held that the construction of a place of worship simply was not religious exercise at all. This was not about the plaintiffs being Buddhists. This was not about the plaintiffs wanting to use the property for something other than worship. The Court simply held as a categorical matter that building a place of worship was not religious exercise under the state’s RFRA:

The United States Supreme Court has not considered the extent to which the construction and use of places of worship constitute the exercise of religion under the free exercise clause of the first amendment. Our research, however, has revealed no pre-*Smith* cases supporting the proposition that the construction and use of a place of worship constitutes the exercise of religion per se.

Perhaps the reason why the United States Supreme Court had never considered whether building a place of worship is the exercise of religion before is because it had never been disputed or litigated before. On the theory announced by the Connecticut Supreme Court here, a government that wanted to ban the Mass could do so by simply banning people from building any place in which to conduct the Mass. On this theory, instead of declaring RFRA unconstitutional, *City of Boerne v. Flores* should have just held RFRA inapplicable—after all, the plaintiffs there too were seeking to build a church, which apparently is not religious exercise, at least in Connecticut. Again, *Cambodian Buddhist Society* was not a holding about burden; the Connecticut Supreme Court did not say that the zoning ordinances did not sufficiently burden religious exercise. It said that all land-use restrictions are legitimate under Connecticut’s RFRA, regardless of the burden, because what they burden is not

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CV0108115635, 2003 WL 21771916, at *5 n.4. (Conn. Super. Ct. July 9, 2003); see also *Cambodian I, supra* note 116, at *11 (quoting *Farmington*).

121. See supra note 40 (providing citations to commentators and courts who adopt such a view). For an example of a broader interpretation of *Smith*, see Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999).

122. See *Cambodian II, supra* note 117.

123. *Cambodian II, supra* note 117, at 889 n.20 (citation omitted).

religious exercise. This too simply cannot be right.\textsuperscript{125}

On the burden issue, consider also the\textit{Freeman} case.\textsuperscript{126} The plaintiff there was Sultaana Freeman, a Muslim woman. In February 2001, she applied for a Florida drivers' license. But she insisted on wearing a Muslim veil known as the niqab, which covered her face apart from her eyes. Florida initially gave her the license without any problem. But nine months later in November 2001, after the events of September 11th, Florida wrote her back. Florida claimed it had erroneously given her a license and insisted that she come back to be photographed without the veil. She refused. Florida revoked her license and she sued. The court upheld Florida's decision to revoke her license, holding that the photographing requirement had not substantially burdened Freeman's religious exercise.\textsuperscript{127}

Freeman had asserted a burden on her religious exercise. The court itself explained this early on: "Freeman testified that taking a photograph without her veil 'is just not an option.' She firmly believes that Islam mandates that she wear the veil in situations such as this, i.e., the taking of a photograph."\textsuperscript{128} But the court came to doubt her beliefs, because of contrary expert testimony:

[The expert] testified that in Islamic countries there are exceptions to the practice of veiling. Consistent with Islamic law, women are required to unveil for medical needs and for certain photo ID cards... The only qualification is that the taking of the photograph accommodate Freeman's beliefs. Here, the Department's existing procedure would accommodate Freeman's veiling beliefs by using a female photographer with no other person present... [W]e affirm the trial court's conclusion because it does not compel Freeman to engage in conduct that her religion forbids - her religion does not forbid all photographs. Her veiling practice is merely inconvenience by the photograph requirement.\textsuperscript{129}

The court essentially says that because other Muslim women in other countries remove the veil for photographs, Freeman should consider herself free to do so as well. But this just amounts to telling Freeman she is wrong about her religion. And that is a problem. Individuals have a right to religious accommodation even on matters where they differ from their co-religionists. The Supreme Court has been clear about this.\textsuperscript{130} And deep down, the court here

\textsuperscript{125} Cf. Douglas Laycock, \textit{State RFRAs and Land Use Regulation}, 32 U.C. DAVIS L. REV. 755, 755-56 (1999) ("The right to assemble for worship is at the very core of religious liberty. In every major religious tradition - Christian, Jewish, Muslim, Buddhist, Hindu, whatever - communities of believers assemble together, at least for shared rituals and usually for other activities as well.")


\textsuperscript{127} See Freeman, 924 So.2d at 57.

\textsuperscript{128} Id. at 52.

\textsuperscript{129} Id. at 56-57 (citations and quotations omitted).

\textsuperscript{130} See Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 715-16 (1981) ("The guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").
understands full well that Florida’s offered accommodation would not really fix the problem. Here is how it concludes the case:

We recognize the tension created as a result of choosing between following the dictates of one’s religion and the mandates of secular law. However, as long as the laws are neutral and generally applicable to the citizenry, they must be obeyed.131

This first sentence, of course, simply contradicts the no-burden finding. The court now sees quite clearly what it could not see earlier—that Freeman cannot both follow the law and the dictates of her religion. But the really startling thing is the second sentence. The Florida RFRA was passed to replace the Smith standard—to give religious observers protection even against laws that were neutral and generally applicable. The Florida legislature believed so.132 The RFRA it passed said so.133 The Florida Supreme Court held so.134 But the court here ignores all of that. It boldly takes its language about neutrality and general applicability right out of the Smith opinion.135

And Florida’s law, by the way, was hardly generally applicable. In interrogatories, Florida admitted to exempting more than 800,000 people from the photograph requirement. It issued temporary driving permits without photographs. It let citizens of other states and countries drive in Florida without a photo license. It issued permanent licenses without photographs to those in the military, those currently out of state, those who could not show up for medical reasons, and those who wanted to renew their license on a day the camera was broken.136 Florida could exempt all those people from having any photo at all, but it could not let Sultaana Freeman wear the niqab in hers.

131. Freeman, 924 So.2d at 57.
132. See Fla. STAT. ANN. § 761.01 (West 2005) (“WHEREAS, it is the intent of the Legislature of the State of Florida to establish the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205, (1972), to guarantee its application in all cases where free exercise of religion is substantially burdened . . .”) (quoting the Preamble to 1998, Fla. Laws 3296-97).
133. See id. § 761.03 (1) (West 2005) (“The government shall not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person[.]”) (emphasis added).
134. [T]he RFRA expands the free exercise right as construed by the Supreme Court in Smith because it reinstates the Court’s pre- Smith holdings by applying the compelling interest test to neutral laws of general application . . . Thus, the RFRA is necessarily broader than United States Supreme Court precedent, which holds that the “right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law prescribes (or prescribes) conduct that his religion prescribes (or proscribes).”

135. See Smith, 494 U.S. at 879 (holding that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability’”).
136. All of this came from interrogatory responses and deposition testimony by Florida’s representatives. See Plaintiff’s Response to Defendant’s Motion for Partial Summary Judgment at 4-5, Freeman v. State of Florida, (No. CIO-02-2828) (Fla. Cir. Ct., June 6, 2003), 2003 WL 15884233.
E. NOTICE AND EXHAUSTION PROVISIONS UNDER STATE RFRAS

Having looked at how state RFRAs are interpreted generally, we should add the ways in which certain state RFRAs create additional obstacles for religious claimants. Consider notice and exhaustion provisions. Of the sixteen states with state RFRAs, three have some sort of process that must be exhausted before filing suit, thus allowing offending governments an opportunity to fix problems before litigation.137 Sensible in theory, these requirements have caused problems for some unaware plaintiffs. Again the problem may be that attorneys with general practices have little experience in this area. Because neither the Free Exercise Clause nor the federal RFRA has any exhaustion provision, attorneys may be used to simply filing complaints and dealing with details later. But this has led even promising religious liberty claims to get barred. Maybe the most prominent example was Webb v. City of Philadelphia.138 Kimberlie Webb was a practicing Muslim and police officer for the City of Philadelphia, who wanted to wear a Muslim veil while at work. The City refused, even though they allowed other officers to wear headscarves for other reasons—even, apparently, just for fashion’s sake.139 But Webb failed to exhaust the notice and exhaustion provisions of Pennsylvania’s RFRA.140 So instead of being analyzed under the compelling-interest standard of Pennsylvania’s RFRA, Webb’s claim was analyzed under Title VII’s deferential religious-accommodation standard. Instead of asking whether Philadelphia had a compelling interest in denying her the veil, the Third Circuit asked only whether the cost on Philadelphia would be “more than [ ] de minimis.”141 Webb might have lost this case anyway, of course. So we cannot really gauge the impact of the notice provision, but surely

137. 71 PA. STAT. ANN. § 2405(B) (West 2009) (barring a person from generally bringing a state RFRA “unless, at least 30 days prior to bringing the action, the person gives written notice to the [state] agency” providing certain information about the potential claim); TEX. CIV. PRAC. & REM. CODE ANN. § 110.006(a) (Vernon 2009) (barring a person from generally bringing a state RFRA claim “unless, 60 days before bringing the action, the person gives written notice to the government agency” providing certain information about the potential claim); UTAH CODE ANN. § 63L-5-302(1) (2008) (“A person may not bring an action under [Utah’s state RFRA] unless, 60 days before bringing the action, the person sends written notice of the intent to bring an action.”).

138. 562 F.3d 256 (3d Cir. 2009).

139. Id. at 258 n.1 (noting that while Directive #78 of the Police Department’s protocols allowed certain scarves, the Police Department interpreted it to bar the khimar); id. at 262 n.5 (noting that Directive #78 allows “scarves” when they are “black or navy blue”).

140. Id. at 259 (“The District Court granted summary judgment on all claims, finding Webb . . . failed to meet the statutory notice requirements for the RFPA [Pennsylvania’s state RFRA] claim[.]”) Webb also failed to timely bring her constitutional claims against the City of Philadelphia and forfeited those as well. See id. at 263-64 (“Neither Webb’s first complaint nor her amended complaint presents a constitutional claim; nor was a constitutional claim raised before the District Court . . . . We do not reach the merits of Webb’s constitutional claims.”).

141. Id. at 259-60 (noting that “Title VII religious discrimination claims often revolve around the question of whether the employer can show that reasonable accommodation would work an ‘undue hardship’” and adding that “an accommodation constitutes an undue hardship if it would impose more than a de minimis cost on the employer”) (citations and quotations omitted). The de minimis standard goes back to Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), where the Court held that “[i]t require [employers] to bear more than a de minimis cost in order to [accommodate their employee’s religious needs] is an undue hardship.” Id. at 84.
it did not help.142

F. COVERAGE EXCLUSIONS UNDER STATE RFRAS

Another important difference among state RFRAs relates to coverage. Many state RFRAs have statutory exclusions—that is, areas carved out by statute where the state RFA either does not apply or applies less forcefully.143 Here states vary widely. Inmate claims, for example, are treated in a variety of ways. Oklahoma excludes challenges that would threaten the health and safety of inmates or others.144 Texas says that prison interests must be treated as presumptively compelling under the compelling-interest standard, though that presumption is rebuttable.145 Pennsylvania gets rid of the compelling-interest standard altogether for prisoner claims, saying that prison actions need only be “reasonably related to legitimate penological interests.”146 But of all the states, Virginia goes the furthest. Virginia statutorily defines the government so as simply not to include the Department of Corrections at all—thus simply writing inmates out of the protections of Virginia’s RFA.147

142. For an example of a claim barred by the notice provisions of Texas’s RFA, see Cornerstone Christian Schools v. University Interscholastic League, No. SA-07-CA-139-FB, 2008 WL 2097477 (W.D. Tex. Apr. 1, 2008).

143. The federal RFA, by contrast, has never had any coverage exclusions, although there was a last minute effort to exclude prisons from its scope which ultimately failed. See Ira C. Lupu, Of Time and the RFA: A Lawyer’s Guide to the Religious Freedom Restoration Act, 56 Mont. L. Rev. 171, 191 (1995) ("[A] group of state attorneys general and prison administrators launched a last minute move to exclude prisons from RFA.")

144. A state or local correctional facility’s regulation must be considered in furtherance of a compelling state interest if the facility demonstrates that the religious activity: 1. Sought to be engaged by a prisoner is presumptively dangerous to the health or safety of that prisoner, or 2. Poses a direct threat to the health, safety, or security of other prisoners, correctional staff, or the public.

OKLA. STAT. ANN. tit. 51, § 254 (West 2008).

145. For purposes of [Texas’s RFA], an ordinance, rule, order, decision, or practice that applies to a person in the custody of a jail or other correctional facility operated by or under a contract with the department is presumed to be in furtherance of a compelling governmental interest and the least restrictive means of furthering that interest. The presumption may be rebutted.

TEX. GOV’T CODE ANN. § 493.024 (Vernon 2004); see also Balawajder v. Texas Dept. of Criminal Justice Institutional Div., 217 S.W.3d 20 (Tex. Ct. App. – 1st Dist. 2006) (holding that an inmate plaintiff had effectively rebutted this presumption and remanding for trial).

146. To the extent permitted under the Federal law, an agency shall be deemed not to have violated the provisions of this act if a rule, policy, action, omission or regulation of a correctional facility or its correctional employees is reasonably related to legitimate penological interests, including the deterrence of crime, the prudent use of institutional resources, the rehabilitation of prisoners or institutional security.

71 PA. CONS. STAT. ANN. § 2405(g) (West 2009).

147. Government entity means any branch, department, agency, or instrumentality of state government, or any official or other person acting under color of state law, or any political subdivision of the Commonwealth and does not include the Department of Corrections, the Department of Juvenile Justice, and any facility of the Department of Behavioral Health and Developmental Services that treats civically committed sexually violent predators, or any local.
These inmate exclusions have potentially broad implications. For now those implications are largely checked because of the Religious Land Use and Institutionalized Persons Act (RLUIPA), a federal law that reintroduces the compelling interest standard for state and local laws in the prison context.\footnote{VA. CODE ANN. § 57-2.02(A) (2009) (emphasis added).} States can exclude inmates from their own RFRA, but RLUIPA still mandates the compelling-interest test regardless. But if RLUIPA were repealed or declared beyond Congress’s power to enact,\footnote{In Cutter v. Wilkinson, 544 U.S. 709 (2005), the Supreme Court held that the part of RLUIPA dealing with institutionalized persons did not violate the Establishment Clause. See id. at 720 (“On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.”). But the Supreme Court did not address the constitutionality of the land-use provisions or the issues of federal power, which remain open questions. For quite different views of RLUIPA, compare Roman P. Storzer & Anthony R. Picarello, Jr., The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices, 9 GEO. MASON L. REV. 929 (2001), with Marci A. Hamilton, Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act, 78 IND. L.J. 311 (2003).} these inmate exclusions would leave prisoners without a substantive right to practice their religion in many states. And because they negatively impact only the incarcerated, we can expect these coverage exclusions to go largely unnoticed outside prison walls.

States also have other idiosyncratic coverage exclusions—some significant, others less so. Oklahoma’s RFRA explicitly says that it entitles no one to a same-sex marriage.\footnote{See OKLA. STAT. ANN. tit. 51, § 255 (West 2010) (“Nothing in this act shall be construed to authorize same sex marriages: unions, or the equivalent thereof.”).} But that provision seems mostly symbolic, as it is hard to imagine a court ever interpreting a RFRA-like statute to give gay people the right to marry.\footnote{Tex. CIV. PRAC. & REM. CODE ANN. § 109.001 (Vernon 2005).} Other coverage exclusions have greater practical effect. Florida, for example, excludes all drug-related claims from its RFRA.\footnote{[This chapter does not establish or eliminate a defense to a civil action or criminal prosecution under a federal or state civil rights law although it is] fully applicable to claims regarding the employment, education, or volunteering of those who perform duties, such as teaching faith, performing devotional services, or internal governance, for a religious organization.\footnote{71 PA. CONS. STAT. ANN. § 2406(d) (West 2009); MD. ANN. STAT. § 1.307(3) (West 2010).} Texas’s RFRA forecloses religious exemptions to civil rights laws in some contexts.\footnote{71 PA. CONS. STAT. ANN. § 2406(d) (West 2009); MD. ANN. STAT. § 1.307(3) (West 2010).} The RFRA of Pennsylvania and Missouri have a litany of coverage exclusions—no drug-law challenges, no challenges to health or safety laws, no challenges to the motor vehicle laws, no challenges to the laws regarding child support, child abuse, or child endangerment, no rights to physically injure others, and no rights to possess a weapon.\footnote{71 PA. CONS. STAT. ANN. § 2406(d) (West 2009); MD. ANN. STAT. § 1.307(3) (West 2010).} Some of these exclusions make sense, but others can be problematic. Keep in mind how we live in a multiple-exemption regime, where religious people...
often need exemptions from every level of government.\textsuperscript{154} Gonzalez may exempt the UDV from the federal laws prohibiting hoasca.\textsuperscript{155} But the UDV still cannot use hoasca in Florida, even despite Florida’s RFRA, because Florida criminalizes its possession\textsuperscript{156} and excludes drug-related challenges from the protection of its RFRA.\textsuperscript{157}

There seems to be little constitutional problem with these coverage exclusions. State RFRA’s modify state laws. One can think of a state RFRA as simply amending every statute in a state’s code simultaneously, specifying in each case that religious believers are exempt from the statute in question when it burdens their religious exercise without the necessary justification. Viewed this way, coverage exclusions create no real issue. Nothing stops Virginia from choosing to amend all of its laws except the prison-related ones. Nothing stops Texas from amending all of its laws except the civil-rights related ones. Certainly some coverage exclusions would be problematic. Virginia could not exclude Buddhists from its state RFRA; nor could it exclude Hispanics or Republicans. But as long as the coverage exclusion is unrelated to a protected class or activity, there should be no problem with it. Smith is the constitutional floor. States have the general power to raise it in the kinds of cases they choose. This conclusion holds also for the federal RFRA; Congress, if it chose, could craft exceptions to it. This also explains RLUIPA; there is nothing constitutionally troubling about the fact that Congress now protects religious observance in the areas of land use and institutionalized persons, but not in the area of home schooling. Writ large, states are free to design their RFRA’s how they like, excluding or including whatever activities they feel appropriate.

**G. The Problem of Post-Enactment Coverage Exclusions**

But coverage exclusions can create other sorts of problems. One troubling issue relates to the power that states have to subsequently amend their state RFRA’s. Always free to modify existing statutes, states can choose to later narrow the scope of their state RFRA’s.\textsuperscript{158} Consider events from Illinois.\textsuperscript{159} Illinois passed its RFRA in 1998. Later on, it became interested in expanding Chicago’s O’Hare airport. But two religious cemeteries objected. In 2003, Illinois passed the O’Hare Modernization Act, which covered a number of topics

\textsuperscript{154} See supra notes 54-58 and accompanying text (explaining this point).


\textsuperscript{156} See Fla. Stat. Ann. § 893.031(1)(c)(12) (West 2010) (listing dimethyltryptamine or DMT, the active ingredient in hoasca, as a prohibited Schedule I substance under Florida law).


\textsuperscript{158} Commentators have noted this point. See Eugene Volokh, A Common-Law Model for Religious Exemptions, 46 UCLA L. REV. 1465, 1474-75 (1999) ("State RFRA’s, being state statutes, can be modified by the legislature that enacted them” and “state RFRA’s leave the final decision to legislative discretion."); Ira C. Lupu, The Case Against Legislative Codification of Religious Liberty, 21 CARDOZO L. REV. 565, 567 (1999) ("Such legislation nevertheless puts political branches in ultimate control of the subject.").

\textsuperscript{159} What follows, in the text above, comes from St. John’s United Church of Christ v. City of Chicago, 502 F.3d 616 (7th Cir. 2007).
related to the airport expansion. But a crucial part of it was this language added to the state RFRA:

35/30. O’Hare Modernization

§ 30. O’Hare Modernization. Nothing in this Act limits the authority of the City of Chicago to exercise its powers under the O’Hare Modernization Act for the purposes of relocation of ceme- 

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teries or the graves located therein.

Shortly after the Act passed, one of the religious ceme- 

teries (St. John’s) sued. St. John’s argued that Section 30’s modification of Illinois’s state RFRA violated the federal Free Exercise Clause. The Seventh Circuit disagreed, concluding that Section 30 was neutral and generally applicable and thus legitimate under Smith and Lukumi. Considered in its entirety, the Court said, the Modernization Act aimed at destroying all obstacles in the way of the O’Hare project, religious and secular alike. If there had been 10 cemeteries in the way of the project, all secular, Illinois would have done precisely the same thing. For those reasons, the Court concluded that Section 30 was essentially religion-neutral—it treated religion exactly the way it would have treated everything else.

In his dissent, Judge Ripple pointed out difficulties with this analysis. The entire point of Section 30, he stressed, was to allow Chicago to take and destroy these cemeteries over religious objection. In that sense, it could hardly be neutral or generally applicable. Section 30 was not neutral; it was passed precisely to burden these two religious groups. And Section 30 was not generally applicable either; it applied to no one else.

This is a difficult problem. Consider it a specialized variant of the more general “take back” question: under what circumstances can government take back a religious exemption (or a possible religious exemption under a generalized statute like RFRA)? In St. John’s, Illinois had given the religious cemeteries RFRA protection, and the question was whether Illinois could take it back. This is a remarkably undertheorized question in the law-and-religion field. Free Exercise Clause scholarship focuses on the circumstances in which exemptions can be given. It tends not to focus on the circumstances in which exemptions can be taken back.

Judge Ripple’s position in St. John’s makes a good deal of sense, but I do not think it can carry the day. The core problem with it is that it seems to mean government can never take back religious exemptions. Consider, for example, the federal statute that exempts the Native American religion from the peyote laws.161 Now imagine a move to get rid of that exemption. If Judge Ripple is right, that exemption simply cannot be removed. It is a permanent part of the United States Code. For under Judge Ripple’s view, any statute repealing it

160. 775 ILL. COMP. STAT. ANN. 35/30 (West 2009) (emphasis added).
161. See 42 U.S.C. § 1960a(b)(1) (“Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State.”).
would violate the Free Exercise Clause. It could not be neutral, because its objective would be to make it harder on adherents of the Native American religion. It could not be generally applicable, because it would apply only to them. The government could argue about secondary purposes or motives—it could stress the secular objectives it might be trying to accomplish by restricting Native American religious peyote use. But that would not change anything. The Free Exercise Clause bars government from singling out religion. Absent some truly compelling interest, it does not permit government to do so simply because it has secondary purposes in mind.

Under Judge Ripple’s model, legislative exemptions become fixed and unalterable. That, standing alone, might be fine; the Sherbert/Yoder regime was also a fixed and unalterable one. But here it would create some very bad incentives. Once legislatures become aware that they cannot revoke religious exemptions, they will hesitate to ever give them. They will be particularly reluctant to give controversial religious exemptions and would never give across-the-board ones like state RFRA. As a result then, we should have very limited judicial review over revocations of religious exemptions. The answer, I believe, must be this: legislatures should be as free to revoke religious exemptions as they are to deny them in the first instance. A religious group should only be able to challenge the revocation of a religious exemption on the same terms that it can challenge its outright denial.

Yet this can create problems which we should rightly fear. Legislatures may abuse their power to take back religious exemptions. Consider what happened in the Freeman case. Freeman, again, involved a Muslim woman who sought to wear a veil on her state driver’s license. She brought claims under Florida’s state RFRA. But midway through the litigation, Florida amended its RFRA in a way that excluded coverage for Freeman’s claim: “Notwithstanding chapter 761 or s. 761.05 [Florida’s RFRA], the requirement for a fullface photograph or digital image of the identification card holder may not be waived.” This is a very troubling aspect of legislative codification. Because states are free to amend their state RFRA, they have the power to exclude unpopular claims—and unpopular people—from coverage. We have gotten lucky so far. St. John’s and Freeman are the only two examples I know of where state RFRA have been modified after enactment. But this can change. And if we get to the point where states routinely cut back on their RFRA in order to deprive unpopular claims of protection, religious minorities may find state RFRA almost useless. Also note that the two examples we have of state

162. See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) (holding that “the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs”).
164. Freeman, 924 So.2d at 50–51 n.2 (quoting Fla. Stat. Ann. § 322.142(1) (West 2010)). The Court found it unnecessary to reach the effectiveness of this amendment; it said it would rule against Freeman either way. Id. at 51 n.2.
165. Thanks to Douglas Laycock and Marc Stern for pointing this out to me in correspondence.
Smith—the case around which this symposium has been organized. Smith cast aside the strict scrutiny model for the Free Exercise Clause, which had been built up in cases like Sherbert v. Verner and Wisconsin v. Yoder. Under that old model, burdens on religious liberty had to be justified—the government had to show the regulation in question was backed by a compelling governmental interest and pursued by the least restrictive means.

Smith changed all that. It said that burdens on religion no longer needed any justification, as long as the laws in question were neutral and generally applicable. Burdens on religious exercise now need not be supported by any evidence or logic. They do not need to be reasonable or even rational. They only need to be neutral and generally applicable. Take one recent case where a Jehovah’s Witness was selected to be Director of Finance for a small town. The quarterly budget meetings were held on Saturdays. Religiously obligated not to work on Saturday, her Sabbath, she suggested a slew of alternatives. The Saturday meetings could be held on other days, which had sometimes been done in the past. She could appoint someone else to attend the meetings in her place, as also had been done in the past. Surely, she said, there must be some reasonable accommodation out there where she could keep her job but miss these Saturday meetings. After all, they only lasted a few hours and happened just four times a year. But the district court explained that she had gotten Smith all wrong: “For the employment requirement to be neutral and generally applicable, Defendants need not make, or even try to make, a reasonable accommodation for Plaintiff’s religious practice.” The district judge seemed to think this was a good thing. But whether he is right about that or not, his sentence does accurately depict the Smith rule. After Smith, the government has the right to treat religious people unreasonably.

Now Smith did not completely define the meaning of neutrality or general

35. Smith, 494 U.S. at 879 (“Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law prescribes (or prescribes) conduct that his religion prescribes (or prescribes).”) (citations and quotations omitted); id. at 886 n.3 (“Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.”).
37. For all these allegations—which were uncontradicted and had to be taken as true anyway given that the defendant was seeking judgment on the pleadings—see Plaintiff’s Memorandum of Law in Support of her Motion for Partial Summary Judgment Against Defendant Village of Bolingbrook, at 2-5, in Filiavin v. Clar, No. 04-7189, 2006 WL 1994580 (N.D. Ill. July 14, 2006), available at 2005 WL 2241363.
38. See Filiavin, 2006 WL 1994580, at *5.
applicability—people still fiercely debate that. But Smith makes clear that judicially mandated religious exceptions are now themselves exceptional. To the extent secular law clashes with religious obligation, religious obligation generally loses. The narrowest reading of Smith, though a common one, is that it forbids only intentional discrimination. But a ban solely on intentional discrimination quickly becomes a recipe for neglect. Religious groups cannot really allege intentional discrimination if the government simply ignores them. But their claim looks better if the government first considers the negative impact its action will have on religious communities, but then continues on that course of action anyway. Neglect is the logical result of those incentives—after Smith, the best way of insulating a decision from judicial scrutiny under the Free Exercise Clause is by pretending not to see the impact it has on religious groups. Smith does not just allow that neglect; Smith rewards it.

But with each passing year, Smith becomes more and more entrenched. With each Supreme Court case that addresses the Free Exercise Clause but fails to reconsider it and with each lower court opinion that relies on it, Smith becomes more interwoven into our constitutional fabric. Even in semester-long classes on religious liberty, Sherbert and Yoder are now covered quickly; Smith receives all the attention. Smith was heavily criticized for overturning longstanding precedent, like Sherbert and Yoder. But Smith itself is now almost as old as Sherbert was when it was overruled, and it is now older than Yoder. The same considerations of stare decisis that cut against Smith now counsel in favor of it. We may be stuck with Smith; we should probably get used to it.

But Smith, of course, was not the end of the story. It was in fact the beginning of a long series of events. Three years after Smith and in direct response to it, Congress passed RFRA, the Religious Freedom Restoration Act. RFRA brought back the same sort of strict scrutiny model that had been


40. See Marcia Hamilton, The Supreme Court Issues a Monumental Decision: Equal State Scholarship Access for Theology Students Is Not Required by the Free Exercise Clause, Findlaw (Feb. 27, 2004), available at http://writ.news.findlaw.com/hamilton/20040227.html (“The Court could not have been clearer: There are few instances where strict scrutiny is justified under the Free Exercise Clause. In Free Exercise challenges, hostility to religion must be shown for strict scrutiny to apply.”) (emphasis in original); see also Thomas v. Anchorage Equal Rights Com'n, 165 F.3d 692, 702 (9th Cir. 1999) (rejecting a Free Exercise claim because there was “no indication that Alaska lawmakers were impelled by a desire to target or suppress religious exercise” in enacting the relevant law), vacated on ripeness grounds, 220 F.3d 1134 (9th Cir. 2000).


42. Smith is now 20 years old. Sherbert was 27 years old when Smith was decided. Yoder was at that time 18 years old. See Smith, 494 U.S. 872 (1990); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

jettisoned in *Smith*. RFRA was a statute rather than a constitutional provision, but the effect was the same. The clock was turned back. Burdens on religious liberty were again evaluated under a compelling-interest framework. But RFRA provoked controversy. And in *City of Boerne v. Flores*, the Court broke RFRA up into two parts—the part that modified federal law and the part that modified state law. The latter, the Court held, was unconstitutional. It was beyond the power of Congress to so modify state laws. But *Boerne* left RFRA’s application to federal law untouched.

RFRA’s meaning in that context was taken up for the first time a few terms ago in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*. The Supreme Court considered whether a Brazilian group had the right to import hoasca, a sacramental tea, even though doing so violated federal law because hoasca contains dimethyltryptamine (DMT), a prohibited Schedule I substance. The Supreme Court gave the plaintiffs a preliminary injunction against enforcement of the law, finding that the government had failed to demonstrate a compelling interest in denying the UDV their tea. The Court rejected the government’s claim that it always had a compelling interest in prohibiting Schedule I substances as too generalized. And the Court rejected the government’s more specific claim that hoasca posed health and safety risks as unsubstantiated. By rejecting overly general reasons altogether and by insisting that specific reasons be proven, the Supreme Court gave RFRA the sort of expansive interpretation it deserved. And in some ways, it left us to wonder whether religious liberty was even better off under *Gonzales* than it had been before *Smith*. Think of the position taken by Justice O’Connor. Concurring in *Smith*, she held onto the strict scrutiny model, but found that Oregon had a compelling interest in stopping peyote. Representing the middle of the Court,

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46. Id. at 425 (noting that hoasca is “a sacramental tea” that “contains dimethyltryptamine (DMT), a hallucinogen,” which “is listed in Schedule I of the Controlled Substances Act”).

47. Id. at 432 (“Under the more focused inquiry required by RFRA and the compelling interest test, the Government’s mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day.”).

48. Id. at 437 (“The Government failed to convince the District Court at the preliminary injunction hearing that health or diversion concerns provide a compelling interest in banning the UDV’s sacramental use of hoasca . . . [and] cannot compensate for that failure now.”).
her opinion in Smith perhaps best represents how the Sherbert/Yoder standard was applied in practice. In Smith, she accepted the government’s contention that no religious exemption was possible because Schedule I substances were inherently dangerous and because allowing any exceptions at all would threaten the regulatory scheme. But Gonzales utterly rejects that position. In fact, it mocks it—Chief Justice Roberts called it “the classic rejoinder of bureaucrats throughout history.”

Gonzales thus required what Sherbert/Yoder only purported to require—that government assert interests rather than just uniform laws, and that government prove the compelling nature of those interests with the ordinary tools of litigation. If followed faithfully by lower courts, Gonzales can provide significant protection for religious liberty.

II. AN INTRODUCTION TO STATE RFRAS

Gonzales bodes well for religious liberty. But its limitations are obvious. Gonzales only protects against burdens imposed by the federal government. But usually when religious liberty is burdened, it is burdened by state and local governments. Gonzales offers no protection against those burdens. In this way, Gonzales can give some very false impressions. Just consider the state of the law today as regards hoasca. Gonzales gave the UDV an exemption from federal law to use hoasca. But that does not mean that the UDV can actually use hoasca. Apart from New Hampshire and Vermont, every state bases their drug laws on the Uniform Controlled Substances Act. And the Uniform Controlled

51. See Employment Div. v. Smith, 494 U.S. 872, 905-06 (O’Connor, J., concurring in the judgment) (“Oregon’s criminal prohibition represents that State’s judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous. . . . Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon’s stated interest in preventing any possession of peyote.”).

Professor Lupu has probably phrased this concern best: “Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe.” Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 HARV. L. REV. 933, 947 (1989).

52. Gonzales, 546 U.S. at 436. Chief Justice Roberts’s full point was this:

[The government’s argument] rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law. The Government’s argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.


53. There is always the question of whether it will be followed faithfully. One early report is skeptical. See Matthew Nicholson, Note, Is O Centro a Sign of Hope for RFRA Claimants?, 95 VA. L. REV. 1281 (2009).

Substances Act prohibits hoasca. 55 So apart from New Hampshire and Vermont, it turns out that every state criminalizes hoasca. 56 And none of them make any exception for religious use. 57 So, at the end of the day, Gonzales only really applies in two of the smallest of the fifty states. In the other forty-eight, the UDV Church has no legal right to exist. They can practice their religion only under constant threat of criminal and civil penalties. That is no great triumph for religious liberty.

This reinforces a key and often overlooked point. Smith and Boerne together mean that we live today in a multiple-exemption regime. Religious observers will need to win exemptions from all the legal regimes that bind them—from federal laws, from state laws, and from local laws. They must wage battles in every political sphere simultaneously and they must win each one. If they fail anywhere, they fail completely. 58 For in our system of multiple sovereigns, being protected from one governmental entity offers no immunity from any other. So while the federal RFRA is necessary for the protection of religious liberty, it is not sufficient. States must also choose to accommodate religious freedom within their respective spheres.

This is where state RFRA come into play. A number of states now have state RFRA—state analogues to the federal Religious Freedom Restoration Act.


57. See sources cited in supra note 56.

58. See Douglas Laycock, The Religious Freedom Restoration Act, 1993 BYU L. Rev. 221, 229 ("Churches have to win these battles over and over, at every level of government. They have to avoid being regulated by the Congress, by the state legislatures, by the county commissions, by the city councils, and by the administrative agencies at each of these levels. Churches have to avoid being regulated this year and next year and every year after that. If they lose even once in any forum, they have lost the war. . . .")
The state RFRA movement began in 1993, three years after Smith and the year the federal RFRA passed. The movement hit its stride shortly after City of Boerne v. Flores.59 Ten states passed their RFRAs in the years from 1998 to 2000. But while state RFRAs bills passed in some states, they failed in many others.60 State RFRAs were opposed by a number of diverse groups.61 And while much effort was spent on their behalf,62 that opposition often won out.63 State RFRAs, for example, were ultimately rejected in California and New York, two of the three largest states.64 And recently the trend toward state RFRAs has slowed. Only three states have passed RFRAs in the past six years.65

In their effect, the enacted state RFRAs operate much like the federal

63. See supra note 60 (providing citations to failed state RFRA bills); see also Bettina Krause, Coalition Building and Legislative Realities, 32 U.C. DAVIS L. REV. 811, 817 (1999) (statement of Michael Lieberman, Counsel for the Anti-Defamation League) ("Of the more than twenty state RFRAs introduced last year, only four were successful in state legislatures, and one of these was defeated by a governor's veto.");
64. See supra note 60 (providing citations); see also Alan Reinach, Why We Need State RFRA Bills: A Panel Discussion, 32 U.C. DAVIS L. REV. 823, 831-32 (1999) (discussing the efforts in California).
65. See infra note 67 and Table 1 (providing citations and information).
RFRA did before Boerne, requiring state and local laws that impede religious exercise to be justified by a compelling interest. These state RFRA s thus eliminate the Smith standard, rejecting it in favor of that of Sherbert and Yoder. As a typical example, consider the main operative part of Arizona’s RFRA:

Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person is both:

1. In furtherance of a compelling governmental interest.
2. The least restrictive means of furthering that compelling governmental interest.66

66. See ARIZ. REV. STAT. ANN. §§41-1493.01(C) (2009).
Sixteen states have now passed state RFRA's of this generic type. The below chart provides some basic information on them:

Table 1

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<tr>
<th>State</th>
<th>Year</th>
<th>Required Threshold Showing</th>
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<td>Connecticut</td>
<td>1993</td>
<td>Burden</td>
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<td>Florida</td>
<td>1998</td>
<td>Substantial Burden</td>
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<td>Illinois</td>
<td>1998</td>
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<td>Rhode Island</td>
<td>1998</td>
<td>Restrictions on Religious Liberty</td>
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<td>Alabama</td>
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<td>Arizona</td>
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<td>South Carolina</td>
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67. See ARIZ. REV. STAT. ANN. §§41-1493 to -1493.02 (2009); CONN. GEN. STAT. ANN. §52-571b (West 2009); FLA. STAT. ANN. §§761.01-05 (West 2010); IDAHO CODE ANN. §§73-401 to -404 (2009); 775 ILL. COMP. STAT. ANN. 35/1-99 (West 2009); MO. ANN. STAT. §§1302-307 (West 2010); N.M. STAT. §§28-22-1 to 28-22-5 (2006); OKLA. STAT. ANN. tit. 51, §§251-258 (West 2010); 71 PA. CONS. STAT. ANN. §§2461-2407 (West 2009); R.I. GEN. LAWS §§42-80.1-1 to -4 (2006); S.C. CODE ANN. §§1-32-10 to -60 (2010); TENN. CODE ANN. § 4-1-407 (2009); TEX. CIV. PRAC. & REM. CODE ANN. §§110.001-012 (Vermont 2009); UTAH CODE ANN. §§63L-5-101 to -403 (2008); VA. CODE ANN. §§ 57-1 to -2.02 (2009). Alabama's state RFRA is embedded in its state constitution. See ALA. CONST. art. 1, § 3.01. This changes things slightly. It should make Alabama's RFRA immune from state constitutional challenges and prevent it from being narrowed or repealed by mere state statutes. See Thomas C. Berg & Frank Myers, The Alabama Religious Freedom Amendment: An Interpretative Guide, 31 CUMB. L. REV. 47, 56-58 (2000-01) (making these points). Also Utah's RFRA should probably be considered a state RUIPA (or perhaps a state RLUA), given that it only applies to issues of land use. See UTAH CODE ANN. § 63L-5-101 (2008) (“This chapter is known as the ‘Utah Religious Land Use Act.’”).
This table documents some of the more obvious differences between these state RFRAs. Though all of the sixteen state RFRAs adopt a compelling-interest test, they differ in what they require as a threshold—that is, they differ in what a plaintiff must initially show in order to trigger the government’s obligation to demonstrate a compelling interest.\(^68\) Eleven of the sixteen take the approach of the federal RGRA, requiring that the plaintiff show a “substantial burden” on religious exercise before the compelling-interest test kicks in.\(^69\) Two of these states—Arizona and Idaho—water this requirement down a bit by saying that this threshold showing is only meant to weed out “trivial, technical or de minimis” burdens.\(^70\) Such language, for reasons that will be discussed, should be made part of all state RFRAs. Two other states seem to go further in this direction, dropping out the word “substantial” altogether, and requiring only that plaintiffs show a “burden” on religious exercise.\(^71\) Finally, three other states avoid using the word “burden” at all, simply demanding that all “restrictions on religious liberty” be justified by compelling interests.\(^72\) It is unclear what that change was originally meant to accomplish, but textually it would suggest dropping out the threshold issue of burden altogether.

A side-by-side comparison of the statutes reveals other differences between state RFRAs as well. Most state RFRAs allow winning plaintiffs to recover attorneys’ fees and costs\(^73\) just as the federal RGRA does\(^74\)—although there are exceptions.\(^75\) Four states explicitly allow successful plaintiffs to recover monetary damages,\(^76\) while two states explicitly reject them\(^77\) and others do not.

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\(^68\) See Table I (sorting the state RFRAs by type). Some commentators have offered other suggestions for how state RFRAs should be drafted, but those suggestions have so far not been taken. See Daniel O. Conklin, Free Exercise, Federalism, and the States as Laboratories, 21 CARDozo L. Rev. 493, 496-98 (1999) (exploring various different options that states could use in drafting their RFRAs); Eugene Volokh, A Common-Law Model for Religious Exemptions, 46 UCLA L. Rev. 1463, 1503-04 (1999) (proposing a model state RGRA that asks generally whether substantial burdens on religious exercise are “justified”).

\(^69\) The states are Arizona, Florida, Idaho, Illinois, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and Utah. See Table I and note 67.

\(^70\) See ARIZ. REV. STAT. ANN. §§41-1493.01(E) (2009) (“In this section, the term substantially burdens is intended solely to ensure that this article is not triggered by trivial, technical or de minimis infractions.”); IDAHO CODE ANN. §§73-402(5) (2009) (same exact quoted language).

\(^71\) The states are Alabamna and Connecticut. See Table I and note 67.

\(^72\) The states are Rhode Island, New Mexico, and Missouri. See Table I and note 67.

\(^73\) See ARIZ. REV. STAT. ANN. § 41-1493.01(D) (2009); FLA. STAT. ANN. § 761.04 (West 2010); IDAHO CODE ANN. § 73-402(4) (2009); ILL. COMP. STAT. ANN. 15/20 (West 2009); N.M. STAT. § 28-22-4(A)(2) (2006); OKLA. STAT. ANN. tit. 51, § 256(B) (West 2010); S.C. CODE ANN. § 1-32-50 (2010); TENN. CODE ANN. § 4-1-407(E) (2009); TEX. CIV. PRAC. & REM. CODE ANN. § 110.005(a)(4) (Vernon 2009); VA. CODE ANN. § 57-2.02(D) (2009).


\(^75\) See 71 PA. CONS. STAT. ANN. § 2405(f) (West 2009) (“Unless the court finds that the actions of the agency were dilatory, obdurate or vexatious, no court shall award attorney fees for a violation of this act.”).


\(^77\) 71 PA. CONS. STAT. ANN. § 2405(f) (West 2009); VA. CODE ANN. § 57-2.02(D) (2009).
address the issue. There are also some other important differences between these state RFRA s. Some RFRA s have detailed notice and exhaustion procedures. Some RFRA s have coverage exclusions—areas carved out by statute where the state RFRA does not apply or applies with less force. These differences matter greatly, but we turn first to some even larger issues.

III. THE FAILURE OF STATE RFRA S

When one looks at these state RFRA s in the abstract, they can seem quite protective of religious liberty. After all, they legislatively restore the compelling-interest test of Sherbert and Yoder. If Gonzales is any guide, we might expect religious liberty to be thriving at the state level. But this is an incomplete account of what is going on. When we get beyond looking at the statutes themselves and start to examine things on the ground, our perspective changes.

A. THE LACK OF STATE RFRA S

We should begin by noting the most obvious point: many states do not have state RFRA s. Sixteen states have them. But that is less than one in three. RFRA bills failed in California and New York, where more than 1 out of every 6 Americans live. Some states, to be sure, have state constitutional provisions protecting religious liberty. But that still leaves about 15 to 20 states with neither a state RFRA nor such a constitutional provision. In those jurisdictions, Smith rules. Gonzales may be generous in giving religious exemptions from federal laws to people in those states. But Gonzales can do nothing to provide exemptions from state and local laws, which are the main source of trouble for religious believers.

B. THE LACK OF STATE RFRA CASES

Yet even in the states that have state RFRA s, there is reason to doubt that state RFRA s provide meaningful protection for religious observance. State RFRA s have been heavily litigated in some states, like Texas, Illinois, and Florida. But in many jurisdictions, there is virtually no state RFRA litigation. Some simple numbers are quite shocking. Alabama and South Carolina passed their state RFRA s in 1999. Idaho, New Mexico, and Oklahoma passed theirs in 2000. Ten years later, state and federal courts together have decided in reported decisions four Idaho RFRA claims, three Oklahoma RFRA claims, two

78. See infra Part III.E.
79. See infra Part III.F.
80. See infra note 64 (explaining that point).
81. See infra note 170; see also Laycock, supra note 9, at 211 n.370.
82. See infra note 97 (providing citations to roughly twenty Florida RFRA cases).
South Carolina RFRA claims, one Alabama RFRA claim, and one New Mexico RFRA claim. More than sixteen million people over more than 10 years in 5 states have apparently litigated just 11 state RFRA claims to judgment. But even more amazingly, there are no decided state RFRA cases at all in four states—Rhode Island, Missouri, Virginia, and Utah. Those four state RFRAs have simply not been the subject of any reported judicial decisions. Take all this together, it means that of the 16 states with state RFRAs, 10 of them have two or fewer reported cases.

Some potential reasons may explain this or at least part of it. State court cases, particularly at the trial level, are hard to find; they may not be on Lexis or Westlaw, which for the most part is how these searches were conducted. And decided cases are certainly not all that matters. State RFRAs surely increase prospects of favorable settlements for religious claimants, both before and after complaints are filed. So state RFRAs probably do some work that these numbers do not catch. But even with all these qualifiers, state RFRA litigation seems surprisingly light.

There are many conceivable explanations for this. But I suspect a part of it is that the attorneys who bring Free Exercise cases may often be simply unaware of state RFRAs. These state RFRAs are well known to those who teach church and state classes, but they may be just opaque provisions of state law to practitioners. Practitioners usually do not specialize in Free Exercise the way they specialize in tax or bankruptcy; they have no reason to know about Title 51

89. This is an important point stressed by those who work in the field. See, e.g., Protecting Religious Freedom After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 26, 26-27 (1997) (statement of Mark E. Chopko, General Counsel, U.S. Catholic Conference) (“RFRA served as an important tool in negotiation, bargaining, and reaching compromise.”); Alan Reimach, Why We Need State RFRA Bills: A Panel Discussion, 32 U.C. Davis L. Rev. 823, 832 (1999) (statement of Pat Nolan, President of the Justice Fellowship) (“I think the greatest significance that the Federal RFRA held was in bargaining. It gave a person a seat at the table with any government official whose conduct impeded one’s ability to practice their faith.”); id. at 844 (statement of Douglas Laycock, then a Professor at the University of Texas School of Law) (“I want to reinforce what Pat Nolan said. The common understanding of the meaning of Smith among government lawyers is: ‘We don’t have to talk to you anymore.’”)
90. Professor Lupu offered similar qualifications regarding the reach of his study of the Federal Religious Freedom Restoration Act, reminding us that there are “cases filed in which no reported opinions had been rendered . . . cases settled after the initiation of RFRA litigation, and . . . matters resolved without resort to litigation.” Irwin C. Lupu, The Failure of RFRA, 20 U. ARK. LITTLE ROCK L.J. 575, 587 (1998).
of the Oklahoma Code. Or it could be that attorneys are aware of these state RFRA claims, but just do not believe that such claims are worth pursuing. They might trust the well known and assume that the Free Exercise Clause provides whatever protection is available. But whatever the reason, it is clear that attorneys are failing to bring state RFRA claims when they should. In many cases in states with an applicable state RFRA, plaintiffs have brought Free Exercise Clause claims alone without bringing corresponding state RFRA claims. These cases were lost under Smith, even though a properly pled state RFRA claim would have changed the standard of review.

And if the number of state RFRA cases itself is disappointing, even more disappointing are how scarce the victories are. In the four states without any decided state RFRA cases, obviously no plaintiff has ever won a court judgment. But victories are scarce in other states as well. There is one victory in Oklahoma, and arguably one victory each in Idaho, Arizona, and Alabama. There are no victories in New Mexico and South Carolina. Yet even in states where litigation is heavy, victories are rare. Florida passed its RFRA early; it has seen substantial litigation. Yet of all the claims asserted over the years, only a single state Florida RFRA claim litigated to judgment has won. And there

94. It depends, of course, on what counts as a victory. Two cases involved plaintiffs obtaining relief on their RIIUPA claims, where the Court said something suggesting that they also might have won under their state RFRA claims as well. See Simonsen v. Arizona Dep’t of Corr., No. 2 CA-CV 2008-0123, 2009 WL 1600401 (Ariz. Ct. App. June 8, 2009); Hyde v. Fisher, 146 Idaho 782, 203 P.3d 712 (Idaho Ct. App. 2009). I count these as victories, but only to be generous to the concept. In fact, they probably meant nothing practically speaking: the plaintiffs likely would have been entitled to as much relief without them. The other case involved a plaintiff apparently surviving a motion for summary judgment on his state RFRA claim, even though the court’s opinion did not address it specifically. See Presley v. Edwards, No. 2-04-cv-729-WK, 2007 WL 174153 (D. Ala. Jan. 19, 2007).
have been a lot of litigated losses. Of course, plaintiffs have won some important victories using state RFRA s. These should not be overlooked. And tallying wins and losses may not be the best measure of the efficacy of a state RFRA anyway—many religious liberty claims are meritless and deserve to lose. But it probably does mean something when more than half of the jurisdictions have no litigated victories under their state RFRAs. Attorneys will be even more likely to forget about state RFRAs or unwisely dismiss their potential. Courts will be less likely to take them seriously. And the leverage that such claims will provide in the bargaining process drops as well—a state will be less likely to settle state RFRA claims if it has never lost one before.

C. STATE RFRAS IN FEDERAL COURT

In the last section, this piece discussed the simple lack of state RFRA litigation. But another important issue is how when state RFRA claims are brought, they are often brought in the wrong place. Attorneys are used to bringing First Amendment claims in federal court. So when a religious liberty dispute arises, an attorney will probably think first of filing there. She might not think of a state RFRA claim. But if she does, she will probably just include it as another claim in her federal complaint. Yet this creates a problem, because federal courts will often lack the power to properly adjudicate these claims. These obstacles are largely unrelated to the Religion Clauses, but they are


99. See, e.g., Elliot M. Mincberg, A Progressive Organization’s Look at RFRA, 21 CARDOZO L. REV. 801, 804 (1999) (noting that it is “not necessarily bad” that “religious litigants only win a relatively small percentage of cases” under RFRA, because there are a lot of religious freedom claims that should not succeed). Also, as discussed earlier, leverage in the bargaining process is a key virtue of state RFRAs, which does not show up in studies of the reported cases. See supra note 89.
important obstacles just the same.

The first obstacle lies in the doctrine of supplemental jurisdiction. Under this doctrine, federal courts have the power to decide state-law claims connected to federal claims.\(^{100}\) So in a case with a Free Exercise (or RLUIPA) claim, a federal court has supplemental jurisdiction to hear a state RFRA claim as well. But the key is this. Federal courts will often not assert supplemental jurisdiction over state claims once all the federal claims have been resolved.\(^{101}\) So a federal court that rejects a plaintiff’s federal Free Exercise claim (or RLUIPA claim) will usually then dismiss the plaintiff’s suit entirely and never even get to any state RFRA claim that the plaintiff has also brought. This has happened quite frequently.\(^{102}\) And another point comes in here too. A federal court will also dismiss a state RFRA claim when the plaintiff is successful on his federal claims, on the theory that resolving the state RFRA claim is now an unnecessary waste of time.\(^{103}\) When you take those two points together, you see that federal courts have the power to decline to hear state RFRA cases altogether. This can cause serious waste. A plaintiff who spends years in federal court litigating his less powerful Free Exercise claim only to have to then re-file his better state RFRA claim in state court will have wasted a lot of time and resources. And he may not be inclined to start the whole thing over again.

The second obstacle lies with an issue of remedies and state sovereign immunity. In *Pennhurst State School & Hospital v. Halderman*,\(^ {104}\) the Supreme Court held that the Eleventh Amendment prohibits federal courts from ordering

100. See 28 U.S.C. §1367(a) (2009) (“[T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”).

101. See 28 U.S.C. §1367(c) (2009) (“[T]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—(3) the district court has dismissed all claims over which it has original jurisdiction.”); see also Deborah J. Challenger & John B. Howell III, *Remand and Appellate Review Issues Facing the Supreme Court in Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 103 NW. U. L. REV. COLLOQUIO 418, 419 (2009) (explaining how “supplemental jurisdiction is a doctrine of discretion, not of plaintiffs’ right”) (quoting City of Chicago v. Int’l Coll. of Surgeons, 522 U.S. 156, 172 (1997)).


103. See Calvary Chapel Church, Inc. v. Broward County, Fla., 299 F.Supp.2d 1295 (S.D. Fla. 2003) (dismissing a plaintiff’s Florida RFRA claims because of the success of the plaintiff’s First Amendment Free Speech claim); Nichol v. ARIN Intermediate Unit 28, 268 F.Supp.2d 536 (W.D. Pa. 2003) (dismissing a Pennsylvania RFRA claim because of the success of the attached Free Exercise claim); cf. Wilson v. Moore, 270 F.Supp.2d 1328 (N.D. Fla. 2003) (doing the same even though the plaintiff’s Free Exercise and Equal Protection Claim were only partially successful and only entitled the plaintiff to part of the relief he was seeking).

state officials to comply with state law.\textsuperscript{105} \textit{Pennhurst} matters greatly for state RFRA claims, because it means that federal courts hearing state RFRA claims often have no power to give a plaintiff injunctive relief, even if he wins on the merits.\textsuperscript{106} Now \textit{Pennhurst} only protects states—local government units like cities, counties, and school boards have no Eleventh Amendment immunity.\textsuperscript{107} So they can be enjoined by federal courts under state RFRA.\textsuperscript{108} But where the defendant is the state itself, bringing state RFRA claims in federal court is practically useless; there is little point in bringing claims for which there is no possibility of an effective remedy. And indeed, in this context, bringing such claims is worse than useless. Under the supplemental jurisdiction statute, the statute of limitations is usually tolled for pendant state-law claims while they are in federal court.\textsuperscript{109} But there is no tolling for state-law claims that get dismissed on Eleventh Amendment grounds.\textsuperscript{110} All this is to say that for state RFRA claims brought in the wrong court initially, it will often be too late to correct the error later.

These obstacles are important. They are in some sense procedural, but they affect substance. They prevent federal courts from acting to redress real claims. And this again emphasizes just how important states now are in the protection of religious liberty. Just as religious groups now depend on state law for their rights to religious exercise, they now depend on state courts for the vindication of those rights. Attorneys need to get used to bringing these claims in state court. Their important efforts—and the right of religious liberty—may be lost otherwise.

D. THE INTERPRETATIONS OF STATE RFRA

Let us assume the rosy picture of a state with a state RFRA and a state

\textsuperscript{105.} A federal court’s grant of relief against state officials on the basis of state law, whether prospective or retrospective, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.


\textsuperscript{107.} See Mount Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977) (school boards); Workman v. New York, 179 U.S. 552 (1900) (cities); Lincoln County v. Lanning, 133 U.S. 529 (1890) (counties).

\textsuperscript{108.} See, e.g., Merced v. Kasson, 577 F.3d 578 (5th Cir. 2009) (ordering injunctive relief against municipal officials pursuant to Texas’ state RFRA).

\textsuperscript{109.} See 28 U.S.C. §1367(d) (2009) (“The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.”).

\textsuperscript{110.} See Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 541-46 (2002) (holding that the supplemental jurisdiction statute does not toll the statute of limitations as regards state law claims dismissed by a federal court on grounds of state sovereign immunity).
RFRA claim that is resolved on its merits. Perhaps the most troubling part of a detailed examination of state RFRA's is how courts interpret them. Courts often interpret state RFRA's in an incredibly watered down manner that does not resemble Gonzales-style review or even Sherbert/Yoder-style review. This is one of the surest ways of taking the teeth out of state RFRA's.

One consistent problem has been simply in understanding what state RFRA's do. A surprising number of courts have interpreted state RFRA's to provide less protection than the constitutional clauses they were meant to augment. This may be hard for us to understand, but it happens with regularity. Florida offers some good examples. One Florida court found a federal Free Exercise Clause violation under Smith, but still rejected the Florida RFRA claim. Another court rejected the state RFRA claim after finding actual intentional religious discrimination prohibited by Lukumi. A third court struck down a zoning ordinance under the Equal Protection Clause on the ground that there was no rational basis for it, which apparently was easier than deciding the merits of the plaintiff's state RFRA claim. This seems like judicial confusion, pure and simple. State RFRA's are supposed to be more powerful than the Free Exercise Clause or the Equal Protection Clause—not less. But courts misunderstand that, and frequently interpret state RFRA's to mean very little indeed.

As another example, take the current situation in Connecticut. Textually speaking, Connecticut has one of the strongest RFRA's. Adopted back in 1993, it rejects the substantial-burden standard, requiring only that plaintiffs show a “burden” on religious exercise. It has no coverage exclusions—no subject areas where it either does not apply or applies with less force. And the

111. See First Vagabonds Church Of God v. City Of Orlando, Fla., 578 F.Supp.2d 1353, 1362 (M.D. Fla. 2008) (“[T]he Court finds that the application of this Ordinance violates the First Amendment rights of Nichols and FVCG [under Smith and Lukumi].”).

112. Id. at 1361-62 ("[T]his Court held that Plaintiffs have failed to show that the Ordinance places a 'substantial burden' on this activity as defined under the RFRA.").

113. Hollywood Cnty. Synagogue, Inc. v. City of Hollywood, Fla., 430 F.Supp.2d 1296, 1321-22 (S.D. Fla. 2006) (noting that “the Court [has] previously found that Plaintiff had not demonstrated a substantial burden ... [and therefore] finds that Plaintiff's Florida RFRA claims fail to state a claim upon which relief may be granted”).

114. Id. at 1315 (“In short, the Synagogue has provided ample evidence of a City policy and practice of harassment and selective enforcement against the Synagogue, and further demonstrated that nothing was done to prevent this conduct despite the fact that such policy was well known or should have been well known to City officials.”).

115. Open Homes Fellowship, Inc. v. Orange County, Fla., 325 F.Supp.2d 1349, 1365 (M.D. Fla. 2004) (concluding that “the County's ordinance on religious institutions violated Open Hones' equal protection rights and not addressing the Florida RFRA claim).”

116. See CONN. GEN. STAT. ANN. §§52-571b(a) (West 2005) (“The state or any political subdivision of the state shall not burden a person's exercise of religion ... except as provided in subsection (b) of this section.”) (emphasis added); cf. Murphy v. Zoning Com'n of Town of New Milford, 289 F.Supp.2d 87, 114-15 (D. Conn. 2003) (“That statute is modeled after RFRA, which the Supreme Court has held to be unconstitutional as applied against the States ... [but] ACRE literally requires only a 'burden,' rather than a 'substantial burden,'” (citation omitted); Cambodian Buddhist Soc'y of Conn. v. Newtown Planning and Zoning Com'n, No. CV030350572S, 2005 WL 3370834, at *6 (Conn. Super. Nov. 18, 2005) [hereinafter Cambodian I] (“While the RLiIPA requires a ‘substantial burden’ on religious exercise, RFA merely requires a ‘burden’ on religious exercise.”).
legislators who passed Connecticut's RFRA made clear what it was supposed to do: "[T]he overarching purpose of § 52-571b was to provide more protection for religious freedom under Connecticut law than the Smith decision would provide under federal law."\(^{117}\)

It is surprising then to find that Connecticut courts interpret their RFRA to mean simply Smith and nothing more. An influential opinion adopted by the Connecticut Court of Appeals said this about its RFRA:

Churches and religious organizations can be regulated under a state's police power if that regulation is religiously neutral and for secular purposes . . . "The first amendment cannot be extended to such an extent that a claim of exemption from the laws based on religious freedom can be extended to avoid otherwise reasonable and neutral legal obligations imposed by government." Grace Community Church v. Bethel, Superior Court, judicial district of Danbury, Docket No. 306994, 1992 WL 174923 (July 16, 1992) (Fuller, J.), citing Employment Division v. Smith, 494 U.S. 872, 888, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).\(^{118}\)

The citation to Smith jumps off the page. Connecticut here has done the one thing almost unimaginable; it has interpreted its RFRA as equivalent to the very standard it was intended to supersede. Following this opinion, Connecticut cases repeat the maxim that state laws are immune from challenge when they are "religiously neutral and for secular purposes."\(^{119}\) And, to be clear, they mean this just as a ban on intentional discrimination: "Secular concerns such as safety do not impinge on the exercise of religion, assuming, of course, that the recitation of such concerns is not a mere pretext . . . The statutes seeking to preserve the value of freedom of religion [i.e., Connecticut's RFRA] can peacefully coexist with such secular concerns so long as those concerns are not used to mask discriminatory intent."\(^{120}\) Without a showing of discriminatory

\(^{117}\) Rwychmanu v. Comm'n on Human Rights and Opportunities, 911 A.2d 319, 328 (Conn. App. Ct. 2006) (discussing the legislative history of the bill). The Connecticut Supreme Court later made the same point:

Like RFRA, § 52-571b was enacted in response to the United States Supreme Court's decision in Employment Division, Dept. of Human Resources v. Smith, in which the court held that a generally applicable prohibition against socially harmful conduct does not violate the free exercise clause, regardless of whether the law burdens religious exercise. Also like RFRA, the purpose of § 52-571b was to restore the balancing standard, articulated by the United States Supreme Court in Sherbert v. Verner, supra, at 374 U.S. at 403, 83 S.Ct. 1790, under which a law that burdens religious exercise must be justified by a compelling governmental interest.

\(^{118}\) First Church of Christ, Scientist v. Historic Dist. Comm'n of Ridgefield, 738 A.2d 224, 231 (Conn. Sup. Ct. 1998), opinion adopted by First Church of Christ, Scientist v. Historic Dist. Comm'n of Town of Ridgefield, 737 A.2d 989, 989-90 (Conn. App. Ct. 1999) (accepting this language as a "well reasoned decision" regarding the plaintiff's claim that it was deprived of its right to "free exercise of religion in violation of General Statutes § 52-571b [Connecticut's RFRA].")

\(^{119}\) Cross Street, LLC v. Zoning Bd. of Appeals of Town of Westport, No. CV064008077, 2007 WL 448684, at *5 (Conn. Super. Ct. Jan. 26, 2007) ("The Connecticut Religious Freedom Act, General Statutes § 52-571b (RFRA) prohibits a state or local authority from placing a 'burden on a person's exercise of religion' ... [but] churches and religious organizations can be regulated under the police power as long as the regulation is religiously neutral and for secular purposes."); see also Cambodian I., supra note 116, at *10-*11 (similar).

\(^{120}\) Farmington Ave. Baptist Church v. Town of Farmington Planning and Zoning Comm'n, No,
intent then, religious observers can have no claim under Connecticut’s RFRA. This is not just Smith — this is the narrowest conceivable interpretation of Smith. This cannot be what Connecticut’s RFRA means, whatever its courts say.

Courts also have trouble with the threshold requirements, and Connecticut again offers an example. In 2008, the Connecticut Supreme Court decided Cambodian Buddhist Society, a case where a Buddhist group sought a special exception to build a Temple on its property. The town’s zoning and planning commission denied the exception, and the Connecticut Supreme Court ultimately affirmed, rejecting the plaintiffs’ Connecticut RFRA claim and other claims. But its reasoning was startling. It did not hold there was some compelling interest. It did not hold that the plaintiffs’ religious liberty was insufficiently burdened. Instead, the Court held that the construction of a place of worship simply was not religious exercise at all. This was not about the plaintiffs being Buddhists. This was not about the plaintiffs wanting to use the property for something other than worship. The Court simply held as a categorical matter that building a place of worship was not religious exercise under the state’s RFRA:

The United States Supreme Court has not considered the extent to which the construction and use of places of worship constitute the exercise of religion under the free exercise clause of the first amendment. Our research, however, has revealed no pre-Smith cases supporting the proposition that the construction and use of a place of worship constitutes the exercise of religion per se.

Perhaps the reason why the United States Supreme Court had never considered whether building a place of worship is the exercise of religion before is because it had never been disputed or litigated before. On the theory announced by the Connecticut Supreme Court here, a government that wanted to ban the Mass could do so by simply banning people from building any place in which to conduct the Mass. On this theory, instead of declaring RFRA unconstitutional, City of Boerne v. Flores should have just held RFRA inapplicable — after all, the plaintiffs there too were seeking to build a church, which apparently is not religious exercise, at least in Connecticut. Again, Cambodian Buddhist Society was not a holding about burden; the Connecticut Supreme Court did not say that the zoning ordinances did not sufficiently burden religious exercise. It said that all land-use restrictions are legitimate under Connecticut’s RFRA, regardless of the burden, because what they burden is not


121. See supra note 40 (providing citations to commentators and courts who adopt such a view).

122. See Cambodian II, supra note 117.

123. Cambodian II, supra note 117, at 889 n.20 (citation omitted).

religious exercise. This too simply cannot be right.\footnote{125}

On the burden issue, consider also the Freeman case.\footnote{126} The plaintiff there was Sultaana Freeman, a Muslim woman. In February 2001, she applied for a Florida drivers’ license. But she insisted on wearing a Muslim veil known as the niqab, which covered her face apart from her eyes. Florida initially gave her the license without any problem. But nine months later in November 2001, after the events of September 11th, Florida wrote her back. Florida claimed it had erroneously given her a license and insisted that she come back to be photographed without the veil. She refused. Florida revoked her license and she sued. The court upheld Florida’s decision to revoke her license, holding that the photographing requirement had not substantially burdened Freeman’s religious exercise.\footnote{127}

Freeman had asserted a burden on her religious exercise. The court itself explained this early on: “Freeman testified that taking a photograph without her veil ‘is just not an option.’ She firmly believes that Islam mandates that she wear the veil in situations such as this, i.e., the taking of a photograph.”\footnote{128} But the court came to doubt her beliefs, because of contrary expert testimony:

[The expert] testified that in Islamic countries there are exceptions to the practice of veiling. Consistent with Islamic law, women are required to unveil for medical needs and for certain photo ID cards . . . The only qualification is that the taking of the photograph accommodate Freeman’s beliefs. Here, the Department’s existing procedure would accommodate Freeman’s veiling beliefs by using a female photographer with no other person present . . . [W]e affirm the trial court’s conclusion because it does not compel Freeman to engage in conduct that her religion forbids — her religion does not forbid all photographs. Her veiling practice is merely inconvenienced by the photograph requirement.\footnote{129}

The court essentially says that because other Muslim women in other countries remove the veil for photographs, Freeman should consider herself free to do so as well. But this just amounts to telling Freeman she is wrong about her religion. And that is a problem. Individuals have a right to religious accommodation even on matters where they differ from their co-religionists. The Supreme Court has been clear about this.\footnote{130} And deep down, the court here

\footnote{125} Cf. Douglas Laycock, State RFRAs and Land Use Regulation, 32 U.C. DAVIS L. REV. 755, 755-56 (1999) (“The right to assemble for worship is at the very core of religious liberty. In every major religious tradition – Christian, Jewish, Muslim, Buddhist, Hindu, whatever – communities of believers assemble together, at least for shared rituals and usually for other activities as well.”)


\footnote{127} See Freeman, 924 So.2d at 57.

\footnote{128} Id. at 52.

\footnote{129} Id. at 56-57 (citations and quotations omitted).

\footnote{130} See Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 715-16 (1981) (“[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”).
understands full well that Florida's offered accommodation would not really fix
the problem. Here is how it concludes the case:

We recognize the tension created as a result of choosing between
following the dictates of one's religion and the mandates of secular law.
However, as long as the laws are neutral and generally applicable to the
citizenry, they must be obeyed. 131

This first sentence, of course, simply contradicts the no-burden finding.
The court now sees quite clearly what it could not see earlier—that Freeman
cannot both follow the law and the dictates of her religion. But the really
startling thing is the second sentence. The Florida RFRA was passed to replace
the Smith standard—to give religious observers protection even against laws that
were neutral and generally applicable. The Florida legislature believed so. 132
The RFRA it passed said so. 133 The Florida Supreme Court held so. 134 But the
court here ignores all of that. It boldly takes its language about neutrality and
general applicability right out of the Smith opinion. 135

And Florida's law, by the way, was hardly generally applicable. In
interrogatories, Florida admitted to exempting more than 800,000 people from
the photograph requirement. It issued temporary driving permits without
photographs. It let citizens of other states and countries drive in Florida without
a photo license. It issued permanent licenses without photographs to those in the
military, those currently out of state, those who could not show up for medical
reasons, and those who wanted to renew their license on a day the camera was
broken. 136 Florida could exempt all those people from having any photo at all,
but it could not let Sultana Freeman wear the niqab in hers.

131. Freeman, 924 So.2d at 57.
132. See Fla. Stat. Ann. § 761.01 (West 2005) ("WHEREAS, it is the intent of the Legislature of
the State of Florida to establish the compelling interest test as set forth in Sherbert v. Verner, 374 U.S.
398 (1963), and Wisconsin v. Yoder, 406 U.S. 205, (1972), to guarantee its application in all cases
where free exercise of religion is substantially burdened . . . .") (quoting the Preamble to 1998, Fla. Laws
3296-97).
133. See id. § 761.03 (1) (West 2005) ("The government shall not substantively burden a person's
exercise of religion, even if the burden results from a rule of general applicability, except that
government may substantially burden a person's exercise of religion only if it demonstrates that
application of the burden to the person[.]")(emphasis added).
134. [T]he RFRA expands the free exercise right as construed by the Supreme Court in Smith
because it reinstates the Court's pre-Smith holdings by applying the compelling interest test to
neutral laws of general application . . . . Thus, the RFRA is necessarily broader than United
States Supreme Court precedent, which holds that the "right of free exercise does not relieve
an individual of the obligation to comply with a valid and neutral law of general applicability on
the ground that the law proscribe (or prescribes) conduct that his religion prescribes (or
proscribes)."
Warner v. City of Boca Raton, 887 So.2d 1023, 1032 (Fla. 2004) (quoting Employment Div. v. Smith,
494 U.S. 872, 879 (1990)).
135. See Smith, 494 U.S. at 879 (holding that "the right of free exercise does not relieve an
individual of the obligation to comply with a 'valid and neutral law of general applicability'.")
136. All of this came from interrogatory responses and deposition testimony by Florida's
representatives. See Plaintiff's Response to Defendant's Motion for Partial Summary Judgment at 4-5,
E. NOTICE AND EXHAUSTION PROVISIONS UNDER STATE RFRAS

Having looked at how state RFRAs are interpreted generally, we should add the ways in which certain state RFRAs create additional obstacles for religious claimants. Consider notice and exhaustion provisions. Of the sixteen states with state RFRAs, three have some sort of process that must be exhausted before filing suit, thus allowing offending governments an opportunity to fix problems before litigation.137 Sensible in theory, these requirements have caused problems for some unaware plaintiffs. Again the problem may be that attorneys with general practices have little experience in this area. Because neither the Free Exercise Clause nor the federal RFRA has any exhaustion provision, attorneys may be used to simply filing complaints and dealing with details later. But this has led even promising religious liberty claims to get barred. Maybe the most prominent example was Webb v. City of Philadelphia.138 Kimberlie Webb was a practicing Muslim and police officer for the City of Philadelphia, who wanted to wear a Muslim veil while at work. The City refused, even though they allowed other officers to wear headscarves for other reasons—even, apparently, just for fashion’s sake.139 But Webb failed to exhaust the notice and exhaustion provisions of Pennsylvania’s RFRA.140 So instead of being analyzed under the compelling-interest standard of Pennsylvania’s RFRA, Webb’s claim was analyzed under Title VII’s deferential religious-accommodation standard. Instead of asking whether Philadelphia had a compelling interest in denying her the veil, the Third Circuit asked only whether the cost on Philadelphia would be “more than [ ] de minimis.”141 Webb might have lost this case anyway, of course. So we cannot really gauge the impact of the notice provision, but surely

137. 71 PA. STAT. ANN. § 2405(B) (West 2009) (barring a person from generally bringing a state RFRA “unless, at least 30 days prior to bringing the action, the person gives written notice to the [state] agency” providing certain information about the potential claim); TEX. CIV. PRAC. & REM. CODE ANN. § 110.006(a) (Vernon 2009) (barring a person from generally bringing a state RFRA claim “unless, 60 days before bringing the action, the person gives written notice to the government agency” providing certain information about the potential claim); UTAH CODE ANN. § 63L-5-302(1) (2008) (“A person may not bring an action under [Utah’s state RFRA] unless, 60 days before bringing the action, the person sends written notice of the intent to bring an action.”).
138. 562 F.3d 256 (3d Cir. 2009).
139. Id. at 258 n.1 (noting that while Directive #78 of the Police Department’s protocols allowed certain scarves, the Police Department interpreted it to bar the khimar); id. at 262 n.5 (noting that Directive #78 allows “scarves” when they are “black or navy blue”).
140. Id. at 259 (“The District Court granted summary judgment on all claims, finding Webb failed to meet the statutory notice requirements for the RFPA [Pennsylvania’s state RFRA] claim[.]”) Webb also failed to timely bring her constitutional claims against the City of Philadelphia and forfeited those as well. See id. at 263-64 (“Neither Webb’s first complaint nor her amended complaint presents a constitutional claim; nor was a constitutional claim raised before the District Court. . . . We do not reach the merits of Webb’s constitutional claims.”).
141. Id. at 259-60 (noting that “Title VII religious discrimination claims often revolve around the question of whether the employer can show [that] reasonable accommodation would work an ‘undue hardship’ and adding that ‘an accommodation constitutes an undue hardship if it would impose more than a de minimis cost on the employer’) (citations and quotations omitted). The de minimis standard goes back to Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), where the Court held that “[t]o require [employers] to bear more than a de minimis cost in order to [accommodate their employee’s religious needs] is an undue hardship.” Id. at 84.
it did not help. 142

F. COVERAGE EXCLUSIONS UNDER STATE RFRAS

Another important difference among state RFRAs relates to coverage. Many state RFRAs have statutory exclusions—that is, areas carved out by statute where the state RFA either does not apply or applies less forcefully. 143 Here states vary widely. Inmate claims, for example, are treated in a variety of ways. Oklahoma excludes challenges that would threaten the health and safety of inmates or others. 144 Texas says that prison interests must be treated as presumptively compelling under the compelling-interest standard, though that presumption is rebuttable. 145 Pennsylvania gets rid of the compelling-interest standard altogether for prisoner claims, saying that prison actions need only be "reasonably related to legitimate penological interests." 146 But of all the states, Virginia goes the furthest. Virginia statutorily defines the government so as simply not to include the Department of Corrections at all—thus simply writing inmates out of the protections of Virginia’s RFA. 147

142. For an example of a claim barred by the notice provisions of Texas’s RFA, see Cornerstone Christian Schools v. University Interscholastic League, No. SA-07-CA-139-FB, 2008 WL 2997477 (W.D. Tex. Apr. 1, 2008).

143. The federal RFA, by contrast, has never had any coverage exclusions, although there was a last minute effort to exclude prisons from its scope which ultimately failed. See Ira C. Lupu, Of Time and the RFA: A Lawyer’s Guide to the Religious Freedom Restoration Act, 56 Mont. L. Rev. 171, 191 (1995) ("[A] group of state attorneys general and prison administrators launched a last minute move to exclude prisons from RFA.")

144. A state or local correctional facility’s regulation must be considered in furtherance of a compelling state interest if the facility demonstrates that the religious activity: 1. Sought to be engaged by a prisoner is presumptively dangerous to the health or safety of that prisoner, or 2. Poses a direct threat to the health, safety, or security of other prisoners, correctional staff, or the public.

OKLA. STAT. ANN. tit. 51, § 254 (West 2008).

145. For purposes of [Texas’s RFA], an ordinance, rule, order, decision, or practice that applies to a person in the custody of a jail or other correctional facility operated by or under a contract with the department is presumed to be in furtherance of a compelling governmental interest and the least restrictive means of furthering that interest. The presumption may be rebutted.

TEX. GOV’T CODE ANN. § 493.024 (Vernon 2004); see also Balawajder v. Texas Dept. of Criminal Justice Institutional Div., 217 S.W.3d 20 (Tex. Ct. App. – 1st Dist. 2006) (holding that an inmate plaintiff had effectively rebutted this presumption and remanding for trial).

146. To the extent permitted under the Federal law, an agency shall be deemed not to have violated the provisions of this act if a rule, policy, action, omission or regulation of a correctional facility or its correctional employees is reasonably related to legitimate penological interests, including the deterrence of crime, the prudent use of institutional resources, the rehabilitation of prisoners or institutional security.

71 PA. CONS. STAT. ANN. § 2405(g) (West 2009).

147. Government entity means any branch, department, agency, or instrumentality of state government, or any official or other person acting under color of state law, or any political subdivision of the Commonwealth and does not include the Department of Corrections, the Department of Juvenile Justice, and any facility of the Department of Behavioral Health and Developmental Services that treats civilly committed sexually violent predators, or any local.
These inmate exclusions have potentially broad implications. For now those implications are largely checked because of the Religious Land Use and Institutionalized Persons Act (RLUIPA), a federal law that reintroduces the compelling interest standard for state and local laws in the prison context.\textsuperscript{148} States can exclude inmates from their own RFRA's, but RLUIPA still mandates the compelling-interest test regardless. But if RLUIPA were repealed or declared beyond Congress’s power to enact,\textsuperscript{149} these inmate exclusions would leave prisoners without a substantive right to practice their religion in many states. And because they negatively impact only the incarcerated, we can expect these coverage exclusions to go largely unnoticed outside prison walls.

States also have other idiosyncratic coverage exclusions—some significant, others less so. Oklahoma’s RFRA explicitly says that it entitles no one to a same-sex marriage.\textsuperscript{150} But that provision seems mostly symbolic, as it is hard to imagine a court ever interpreting a RFRA-like statute to give gay people the right to marry. Other coverage exclusions have greater practical effect. Florida, for example, excludes all drug-related claims from its RFRA.\textsuperscript{151} Texas’s RFRA forecloses religious exemptions to civil rights laws in some contexts.\textsuperscript{152} The RFRA's of Pennsylvania and Missouri have a litany of coverage exclusions—no drug-law challenges, no challenges to health or safety laws, no challenges to the motor vehicle laws, no challenges to the laws regarding child support, child abuse, or child endangerment, no rights to physically injure others, and no rights to possess a weapon.\textsuperscript{153}

Some of these exclusions make sense, but others can be problematic. Keep in mind how we live in a multiple-exemption regime, where religious people


\textsuperscript{149} In Cutter v. Wilkinson, 544 U.S. 709 (2005), the Supreme Court held that the part of RLUIPA dealing with institutionalized persons did not violate the Establishment Clause. See id, at 720 (“On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.”). But the Supreme Court did not address the constitutionality of the land-use provisions or the issues of federal power, which remain open questions. For quite different views of RLUIPA, compare Roman P. Storzer & Anthony R. Picarello, Jr., The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices, 9 Geo. Mason L. Rev. 929 (2001), with Marc A. Hamilton, Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act, 78 Ind. L.J. 311 (2003).

\textsuperscript{150} See Okla. STAT. ANN. tit. 81, § 255 (West 2010) (“Nothing in this act shall be construed to ... a religious organization.”).

\textsuperscript{151} See Fla. STAT. ANN. § 761.05(4) (West 2010) (“Nothing in this act shall be construed to circumvent the provisions of chapter 893 [Drug Abuse and Prevention Laws].”).

\textsuperscript{152} [This chapter does not establish or eliminate a defense to a civil action or criminal prosecution under a federal or state civil rights law [although it is] fully applicable to claims regarding the employment, education, or volunteering of those who perform duties, such as spreading or teaching faith, performing devotional services, or internal governance, for a religious organization.]

\textsuperscript{153} Tex. CIV. PRAC. & REM. CODE ANN. § 110.011 (Vernon 2005).

\textsuperscript{154} 71 Pa. Cons. Stat. ANN. § 2406(d) (West 2009); Md. ANN. STAT. § 1,307(3) (West 2010).
often need exemptions from every level of government.\textsuperscript{154} \textit{Gonzales} may exempt the UDV from the federal laws prohibiting hoasca.\textsuperscript{155} But the UDV still cannot use hoasca in Florida, even despite Florida's RFRA, because Florida criminalizes its possession\textsuperscript{156} and excludes drug-related challenges from the protection of its RFRA.\textsuperscript{157} 

There seems to be little constitutional problem with these coverage exclusions. State RFRA's modify state laws. One can think of a state RFRA as simply amending every statute in a state's code simultaneously, specifying in each case that religious believers are exempt from the statute in question when it burdens their religious exercise without the necessary justification. Viewed this way, coverage exclusions create no real issue. Nothing stops Virginia from choosing to amend all of its laws except the prison-related ones. Nothing stops Texas from amending all of its laws except the civil-rights related ones. Certainly some coverage exclusions would be problematic. Virginia could not exclude Buddhists from its state RFRA; nor could it exclude Hispanics or Republicans. But as long as the coverage exclusion is unrelated to a protected class or activity, there should be no problem with it. \textit{Smith} is the constitutional floor. States have the general power to raise it in the kinds of cases they choose. This conclusion holds also for the federal RFRA; Congress, if it chose, could craft exceptions to it. This also explains RLUIPA; there is nothing constitutionally troubling about the fact that Congress now protects religious observance in the areas of land use and institutionalized persons, but not in the area of home schooling. Writ large, states are free to design their RFRA's how they like, excluding or including whatever activities they feel appropriate.

G. THE PROBLEM OF POST-ENACTMENT COVERAGE EXCLUSIONS

But coverage exclusions can create other sorts of problems. One troubling issue relates to the power that states have to subsequently amend their state RFRA's. Always free to modify existing statutes, states can choose to later narrow the scope of their state RFRA's.\textsuperscript{158} Consider events from Illinois.\textsuperscript{159} Illinois passed its RFRA in 1998. Later on, it became interested in expanding Chicago's O'Hare airport. But two religious cemeteries objected. In 2003, Illinois passed the O'Hare Modernization Act, which covered a number of topics

\begin{itemize}
  \item \textsuperscript{154} See supra notes 54-58 and accompanying text (explaining this point).
  \item \textsuperscript{155} See generally Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).
  \item \textsuperscript{156} See Fla. Stat. Ann. § 893.03(1)(c)(12) (West 2010) (listing dimethyltryptamine or DMT, the active ingredient in hoasca, as a prohibited Schedule I substance under Florida law).
  \item \textsuperscript{157} See Fla. Stat. Ann. § 761.05 (West 2005).
  \item \textsuperscript{158} Commentators have noted this point. See Eugene Volokh, A Common-Law Model for Religious Exemptions, 46 UCLA L. REV. 1465, 1474-75 (1999) ("[S]tate RFRA's, being state statutes, can be modified by the legislature that enacted them" and "state RFRA's leave the final decision to legislative discretion."); Ira C. Lupu, The Case Against Legislative Codification of Religious Liberty, 21 CARDOZO L. REV. 565, 567 (1999) ("Such legislation nevertheless puts political branches in ultimate control of the subject.")
  \item \textsuperscript{159} What follows, in the text above, comes from St. John's United Church of Christ v. City of Chicago, 502 F.3d 616 (7th Cir. 2007).
\end{itemize}
related to the airport expansion. But a crucial part of it was this language added to the state RFRA:

35/30. O’Hare Modernization

§ 30. O’Hare Modernization. Nothing in this Act limits the authority of the City of Chicago to exercise its powers under the O’Hare Modernization Act for the purposes of relocation of cemeteries or the graves located therein. 160

Shortly after the Act passed, one of the religious cemeteries (St. John’s) sued. St. John’s argued that Section 30’s modification of Illinois’s state RFRA violated the federal Free Exercise Clause. The Seventh Circuit disagreed, concluding that Section 30 was neutral and generally applicable and thus legitimate under Smith and Lukumi. Considered in its entirety, the Court said, the Modernization Act aimed at destroying all obstacles in the way of the O’Hare project, religious and secular alike. If there had been 10 cemeteries in the way of the project, all secular, Illinois would have done precisely the same thing. For those reasons, the Court concluded that Section 30 was essentially religion-neutral—it treated religion exactly the way it would have treated everything else.

In his dissent, Judge Ripple pointed out difficulties with this analysis. The entire point of Section 30, he stressed, was to allow Chicago to take and destroy these cemeteries over religious objection. In that sense, it could hardly be neutral or generally applicable. Section 30 was not neutral; it was passed precisely to burden these two religious groups. And Section 30 was not generally applicable either; it applied to no one else.

This is a difficult problem. Consider it a specialized variant of the more general “take back” question: under what circumstances can government take back a religious exemption (or a possible religious exemption under a generalized statute like RFRA)? In St. John’s, Illinois had given the religious cemeteries RFRA protection, and the question was whether Illinois could take it back. This is a remarkably undertheorized question in the law-and-religion field. Free Exercise Clause scholarship focuses on the circumstances in which exemptions can be given. It tends not to focus on the circumstances in which exemptions can be taken back.

Judge Ripple’s position in St. John’s makes a good deal of sense, but I do not think it can carry the day. The core problem with it is that it seems to mean government can never take back religious exemptions. Consider, for example, the federal statute that exempts the Native American religion from the peyote laws. 161 Now imagine a move to get rid of that exemption. If Judge Ripple is right, that exemption simply cannot be removed. It is a permanent part of the United States Code. For under Judge Ripple’s view, any statute repealing it

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160. 775 ILL. COMP. STAT. ANN. 35/30 (West 2009) (emphasis added).
161. See 42 U.S.C. § 1960a(b)(1) (“Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State.”).
would violate the Free Exercise Clause. It could not be neutral, because its objective would be to make it harder on adherents of the Native American religion. It could not be generally applicable, because it would apply only to them. The government could argue about secondary purposes or motives—it could stress the secular objectives it might be trying to accomplish by restricting Native American religious peyote use. But that would not change anything. The Free Exercise Clause bars government from singling out religion. Absent some truly compelling interest, it does not permit government to do so simply because it has secondary purposes in mind.  

Under Judge Ripple’s model, legislative exemptions become fixed and unalterable. That, standing alone, might be fine; the *Sherbert/Yoder* regime was also a fixed and unalterable one. But here it would create some very bad incentives. Once legislatures become aware that they cannot revoke religious exemptions, they will hesitate to ever give them. They will be particularly reluctant to give controversial religious exemptions and would never give across-the-board ones like state RFRA’s. As a result then, we should have very limited judicial review over revocations of religious exemptions. The answer, I believe, must be this: legislatures should be as free to revoke religious exemptions as they are to deny them in the first instance. A religious group should only be able to challenge the revocation of a religious exemption on the same terms that it can challenge its outright denial.

Yet this can create problems which we should rightly fear. Legislatures may abuse their power to take back religious exemptions. Consider what happened in the *Freeman* case. *Freeman*, again, involved a Muslim woman who sought to wear a veil on her state driver’s license.  

163 She brought claims under Florida’s state RFRA. But midway through the litigation, Florida amended its RFRA in a way that excluded coverage for Freeman’s claim: “Notwithstanding chapter 761 or s. 761.05 [Florida’s RFRA], the requirement for a fullface photograph or digital image of the identification card holder may not be waived.”  

164 This is a very troubling aspect of legislative codification. Because states are free to amend their state RFRA’s, they have the power to exclude unpopular claims—and unpopular people—from coverage. We have gotten lucky so far. *St. John’s* and *Freeman* are the only two examples I know of where state RFRA’s have been modified after enactment.  

But this can change. And if we get to the point where states routinely cut back on their RFRA’s in order to deprive unpopular claims of protection, religious minorities may find state RFRA’s almost useless. Also note that the two examples we have of state

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162. See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) (holding that “the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs”).


164. *Freeman*, 924 So.2d at 50-51 n.2 (quoting FLA. STAT. ANN. § 322.142(1) (West 2010)). The Court found it unnecessary to reach the effectiveness of this amendment; it said it would rule against Freeman either way. *Id.* at 51 n.2.

165. Thanks to Douglas Laycock and Marc Stern for pointing this out to me in correspondence.
RFRAs being modified after enactment have been examples of where their protection has been cut back. We have no instances of state RFRAs being broadened to expand protection. There have been a lot of judicial losses under state RFRAs—many more losses than wins. It is telling that none of the losses have been changed by legislation.\footnote{Eugene Volokh, writing before either Freeman or St. John’s, noted that this would be an interesting empirical question and indeed it is. See Eugene Volokh, A Common-Law Model for Religious Exemptions, 46 UCLA L. Rev. 1465, 1476 (1999) (“When the legislature concludes that a court was too stingy with exemptions from some statute, it will enact an explicit religious exemption. When the legislature concludes that a court was too generous, it will specifically provide that the statute has no exemption.”); see also id. at 1475 n.24 (“[I]t would be interesting to know how often legislators in fact override judicial rulings under state RFRAs, and how effective the argument that ‘you shouldn’t tamper with this important statute’ is in fighting such moves. State RFRAs are, however, too new for any empirical inquiry into these questions.”).}

Recognizing the potential unfairness that can arise in these situations, we could try to think of some fix that might aid the particular plaintiff in Freeman but still allow states flexibility over their state RFRAs. For example, we could insist that when states narrow their RFRAs, they do so only prospectively. But it is hard to see where such a requirement would come from—the federal constitution generally allows states to change their laws retroactively, as Florida did in Freeman.\footnote{See Landgraf v. USI Film Products, 511 U.S. 244, 267 (1994) (“The Constitution’s restrictions, of course, are of limited scope. Absent a violation of one of those specific provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope.”)} One could try to reconfigure the idea of religious neutrality in a way that might bar what Florida did. One could say that the problem with Freeman is that Florida did to Muslims what it would not do to Christians. But the truth of that claim is not beyond doubt and it is probably impossible to prove to judicial satisfaction. Ultimately, this is a problem that goes back to Smith. Religious exemptions are now a matter of legislative grace. That grace can be bestowed, denied, or bestowed and then revoked. Changing that requires revisiting Smith.

IV. CONCLUSION

Twenty years after it was handed down, Smith’s legacy remains unclear. Smith set in motion a chain of events that have not yet come to an end. At the federal level, religious observers now have hope in RFRA and Gonzales. But the future of religious freedom really rests with the states, and things there seem even less clear.

\footnote{A retroactive withdrawal of RFRA coverage in a criminal case would look differently—it would violate the Constitution’s prohibition of Ex Post Facto laws. See, e.g., Collins v. Youngblood, 497 U.S. 37, 49 (1990) (“A law that abolishes an affirmative defense of justification or excuse contravenes [the Ex Post Facto prohibition] because it expands the scope of a criminal prohibition after the act is done.”); Beazell v. Ohio, 269 U.S. 167, 169-170 (1925) (“It is settled, by decisions of this court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.”) (emphasis added).}
The question becomes what to do. To me, the kitchen-sink approach makes the most sense; advocates for religious freedom should do what they can at every level to restore religious freedom. At an opportune time, we should press for a revisiting of Smith and Boerne; we should also push in Congress for a new version of the Religious Liberty Protection Act. Any federal floor for Free Exercise that goes beyond Smith would be a good thing.

At the state level, we should work to continue the state RFRA movement.168 Sixteen states have state RFRA, but some very key states—California, New York, Ohio, and Michigan—do not.169 We also need to care for state RFRA after their passage, perhaps with an educational campaign of Continuing Legal Education classes for attorneys and judges. Hopefully, over time, attorneys will realize the value of these overlooked provisions. And hopefully, over time, the worst judicial misinterpretations will be corrected. Another possibility lies in state constitutional provisions relating to religious liberty. I worry about whether those provisions really have much effect, but others have seen cause for optimism.170 None of these bullets will be magic, but we should strive to do the best we can.

Finally and most importantly, we must work harder to convince people why religious liberty is worth protecting. Without that understanding, legislators will never vote for RFRA. Without that understanding, judges will hesitate to interpret them fairly. Without that understanding, religious liberty will soon become a second class right, relegated to theory and to memory. We should fight that at all costs.171

169. See supra notes 80-81 and accompanying text.
171. In my judgment, the best piece working toward that understanding is Douglas Laycock, Religious Liberty as Liberty, 7 J. CONTEMP. LEGAL ISSUES 313 (1996).
Harbor: Overview of the Law

The Immigration and Nationality Act (INA) prohibits individuals from concealing, shielding, or harboring unauthorized individuals who come into and remain in the United States. Under the law it is a criminal offense punishable by a fine or imprisonment for any person who:

knowing or in reckless disregard of the fact than an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation. INA §274(a)(1)(A)(ii); 8 U.S.C. §1324(a)(1)(A)(ii) [hereinafter the “harboring provision” or “Section 1324 (a)”].

The Harboring Prohibition Applies to Everyone

The harboring prohibition is not restricted to those individuals who are in the business of smuggling undocumented immigrants into the United States or who employ undocumented immigrants in sweatshop-like conditions. As interpreted by the courts, harboring can apply to any person who knowingly harbors an undocumented immigrant. See, e.g., United States v. Shum, 496 F.3d 390 (5th Cir. 2007); United States v. Zheng, 306 F.3d 1080, 1085 (11th Cir. 2002), cert. denied, 558 U.S. 925 (2003); United States v. Kim, 193 F.3d 567, 573-74 (2d Cir. 1999); United States v. Rubio-Gonzalez, 674 F.2d 1067, 1073 (5th Cir. 1982); United States v. Cantu, 557 F.2d 1173, 1180 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978).

What Are the Elements of Harbor?

To establish a violation of the harboring provision, the government must prove the following in most jurisdictions: “(1) the alien entered or remained in the United States in violation of the law, (2) the defendant concealed, harbored, or sheltered the alien in the United States, (3) the defendant knew or recklessly disregarded that the alien entered or remained in the United States in violation of the law, and (4) the defendant's conduct tended to substantially facilitate the alien remaining in the United States illegally.” Shum, 496 F.3d at 391-392 (quoting United States v. De Jesus-Batres, 410 F.3d 154, 160 (5th Cir. 2005), cert. denied, 546 U.S. 1097 (2006) (emphasis added)). The U.S. Court of Appeals for the Seventh Circuit has rejected the fourth element asserting that the phrase “conduct tending substantially to facilitate” is a judicial addition to the statute that is unnecessary for a conviction because the statute requires no specific degree of assistance. United States v. Xiang Hui Ye, 588 F.3d 411, 415-416 (7th Cir. 2009).

What Actions Constitute Harbor?

Although Congress passed legislation to prohibit and punish the “harboring” of undocumented individuals, it never defined the term. The work of defining what constitutes “harboring” has been left to the courts. As shown below, the federal courts have not settled on one uniform definition, but rather many of the circuit courts have adopted their own definition of “harboring.”

Harbor: Overview of the Law
• Harboring is conduct that substantially facilitates an immigrant’s remaining in the U.S. illegally and that prevents the authorities from detecting the individual’s unlawful presence. (U.S. Court of Appeals for the Second Circuit)

• Harboring includes affirmative conduct such as providing shelter, transportation, direction about how to obtain false documentation, or warnings about impending investigations that facilitates a person’s continuing illegal presence in the United States. (U.S. Court of Appeals for the Third Circuit)

• Harboring is conduct tending to substantially facilitate an immigrant’s remaining in the U.S. illegally. (U.S. Courts of Appeals for the Fifth Circuit)

• Harboring is conduct that clandestinely shelters, succors, and protects improperly admitted immigrants. (U.S. Court of Appeals for the Sixth Circuit)

• Harboring is conduct that provides or offers a known undocumented individual a secure haven, a refuge, a place to stay in which authorities are unlikely to be seeking him. (U.S. Court of Appeals for the Seventh Circuit)

• Harboring is conduct that affords shelter to undocumented individuals. (U.S. Court of Appeals for the Ninth Circuit)

**Explanation of Harboring Through Case Law**

**U.S. Court of Appeals for the Second Circuit**

In the influential case, United States v. Lopez, the U.S. Court of Appeals for the Second Circuit went through the legislative history of the harboring provision and stated that the term *harbor* “was intended to encompass conduct tending substantially to facilitate an alien’s ‘remaining in the United States illegally,’ provided that the person charged has knowledge of the immigrant’s unlawful status.” 521 F.2d 437, 441 (2d Cir 1975), cert. denied, 423 U.S. 995 (1975) (emphasis added).

In this case, Mr. Lopez owned at least six homes in Nassau County, New York, where he operated safe havens for undocumented individuals. Mr. Lopez knew that the people staying in his homes were undocumented. Each person paid Mr. Lopez $15 per week to live in his houses. In many cases, people received the address for a particular house before they left their home countries, and, upon crossing the border illegally, they proceeded directly to the house. Mr. Lopez also helped these individuals obtain jobs by completing work applications and transporting them to and from work. He arranged sham marriages for many so that they could appear to be in the U.S. in lawful status. With a warrant, immigration authorities searched six of Lopez’s homes and found twenty-seven undocumented individuals. He was charged with harboring illegal immigrants.

Mr. Lopez argued that the mere providing of shelter to undocumented immigrants does not constitute harboring. *Id.* at 439. He argued that to constitute harboring the conduct must be part of the process of smuggling immigrants into the U.S. or facilitating the immigrants’ illegal entry into the U.S. *Id.* The circuit court noted that he essentially argued that to constitute harboring the sheltering would have to be provided either clandestinely or for the purposes of sheltering the immigrants from the authorities. *Id.*
The Second Circuit rejected these arguments. It held that the statute criminalizes conduct that tends substantially to facilitate an alien’s remaining in the United States illegally. Id. at 441. The circuit court found that Mr. Lopez’s conduct did just that. It pointed out that Mr. Lopez had a large number of undocumented immigrants living at his houses; they obtained the addresses and, upon entering the U.S., proceeded to those houses; Mr. Lopez provided transportation for them to and from work; and, he helped arrange sham marriages. Id. The Second Circuit did not require that Mr. Lopez provide the shelter clandestinely nor that he shield the illegal immigrants from detection by immigration authorities. Id.

The case of United States v. Kim also is instructive on the meaning of harboring. 193 F.3d 567 (2d Cir. 1999). It states that harboring within the meaning of Section 1324(a) “encompasses conduct tending substantially to facilitate an alien’s remaining in the U.S. illegally and to prevent government authorities from detecting [the immigrant’s] unlawful presence.” Id. at 574 (emphasis added). In this case, Mr. Myung Ho Kim owned and operated a garment-manufacturing business called “Sewing Masters” in New York City. He employed a number of undocumented workers, including Nancy Fanfar. During the course of her employment, Mr. Kim instructed Ms. Fanfar to bring in new papers with a different name that would indicate that she had work authorization. He instructed Ms. Fanfar to change her name and remain in his employ a second time, even while he was being investigated by immigration authorities.

According to the circuit court, Mr. Kim’s actions constituted harboring, for they were designed to help Ms. Fanfar remain in his employ and to prevent her continued presence from being detected by the authorities. Thus, his conduct substantially facilitated her ability to remain in the U.S. illegally in violation of the harboring provision. Id. at 574-575.

U.S. Court of Appeals for the Third Circuit
The Third Circuit also has considered what conduct constitutes “shielding,” “harboring,” and “concealing” within the meaning of Section 1324(a). Like the Second Circuit, it determined that these terms encompass conduct “tending to substantially facilitate an alien’s remaining in the U.S. illegally” and [that] prevent[s] government authorities from detecting the alien’s unlawful presence.” U.S. v. Ozcelik, 527 F.3d 88, 100 (3d Cir. 2008) (emphasis added); see also Delrio-Mocci v. Connolly Props., 672 F.3d 241, 246 (3d Cir. 2012); U.S. v. Cuevas-Reyes, 572 F.3d 119, 122 (3d Cir. 2009); U.S. v. Silveus, 542 F.3d 993, 1003 (3d Cir. 2008).

In United States v. Ozcelik, the defendant knew that the individual remained in the U.S. illegally and advised him to “lay low” and “stay away” from the address he had on file with the government. 527 F.3d at 100. However, Mr. Ozcelik did not actively attempt to intervene or delay an impending immigration investigation and the Third Circuit held that advising an individual without legal status to stay out of trouble and to keep a low profile does not tend substantially to facilitate their remaining in the country. Id. at 100-01. The circuit court reasserted that shielding or harboring a person without status ordinarily includes affirmative conduct such as providing shelter, transportation, direction about how to obtain false documentation, or warnings about impending investigations that facilitates a person’s continuing illegal presence in the United States. See Id. at 99.

Harboring: Overview of the Law
In United States v. Silveus, the Third Circuit held that cohabitation, along with reasonable control of premises during an immigration agent’s inquiry regarding the whereabouts of the suspected undocumented individual, does not constitute harboring without sufficient evidence that a defendant’s conduct substantially facilitated the individual’s remaining in the U.S. illegally and prevented authorities from detecting his/her unlawful presence. 542 F.3d at 1002-04. In this case, the agent never saw the suspected undocumented individual, but only heard the apartment door slam, heard some bushes break, and as he approached, saw the defendant shut her front door. Id. at 1002. The defendant spoke to the agent through her window and when asked if anybody had run out of her apartment, she said “I don’t know.” Id. at 1003. The circuit court determined that the act of shutting a door as an agent rounded the corner and her subsequent reply to the agent’s question did not establish “harboring” under Section 1324(a) because it only led to speculation as to the suspect’s presence. Id. at 1004.

In United States v. Cuevas-Reyes, the Third Circuit reaffirmed that shielding an undocumented person includes affirmative conduct (such as providing shelter, transportation, direction about how to obtain false documents, or warnings about impending investigations) that facilitates the person’s continuing illegal presence in the U.S. 572 F.3d at 122. The circuit court held that the defendant’s actions (taking undocumented people from the U.S. to the Dominican Republic in his private plane) were undertaken for the purpose of removing them from the U.S., not helping them remain in the U.S. Id. It noted that the goal of Section 1324 is to prevent undocumented individuals from entering or remaining illegally in the U.S. by punishing those that shield or harbor. Id. It asserted that punishing a defendant for helping individuals without legal status leave the U.S. would be contrary to that goal. Id.

More recently, the Third Circuit reiterated that “harboring” requires some act that obstructs the government’s ability to discover the undocumented person and that it is highly unlikely that landlords renting apartments to people lacking lawful status could, without more, satisfy the court’s definition of harboring. Delrio-Mocci, 672 F.3d at 246 (citing Lozano v. City of Hazleton, 620 F.3d 170, 223 (3d Cir. 2010)). The circuit court reiterated that “[r]enting an apartment in the normal course of business is not in and of itself conduct that prevents the government from detecting an alien’s presence.” Id.

U.S. Court of Appeals for the Fifth Circuit
The Fifth Circuit’s definition of harboring is broader than the Second and Third Circuits. It rejects the notion that to be convicted of harboring a defendant’s conduct must be part of a smuggling operation or involve actions that hide immigrants from law enforcement authorities. See De Jesus-Batres, 410 F.3d at 162 (specific intent is not an element of the offense of harboring). An early Fifth Circuit decision, U.S. v. Cantu, 557 F.2d 1173 (5th Cir. 1977), remains informative.

In Cantu, immigration agents visited the restaurant owned by Mr. Cantu because they received information that he was employing undocumented workers. The agents wanted to question the employees. Mr. Cantu refused admission to his restaurant until they could provide a warrant.

While the immigration authorities waited outside for the warrant, Mr. Cantu made arrangements with at least two of his patrons to drive some of his undocumented employees into town. Mr.
Cantu also arranged for his employees to sit in the restaurant and then leave the restaurant like customers. As the employees left the restaurant, the immigration agents approached them and questioned them about their immigration status. The agents determined their illegal status and arrested them.

Mr. Cantu argued that, because he did not instruct his employees to “hide,” and because the employees left the restaurant in full view of the officers, he could not be charged with shielding immigrants from detection. He also argued that his actions were not connected to any smuggling activity. The Fifth Circuit, relying on the Second Circuit’s Lopez decision, rejected these arguments, and determined that Mr. Cantu’s actions – instructing the employees to act like customers so they could evade arrest – tended to facilitate the immigrants remaining in the U.S. illegally. Id. at 1180.

In another Fifth Circuit case, United States v. Varkonyi, 645 F.2d 453 (5th Cir. 1981), the court cited to Lopez to assert that the harboring statute prohibits “any conduct which tends to substantially facilitate an alien’s remaining in the U.S. illegally.” Id. at 459. Mr. Varkonyi provided a group of undocumented immigrants with steady employment at his scrap metal yard six days a week as well as lodging at his warehouse. On previous occasions, he had instructed and aided the men in avoiding detection and apprehension. On the day of their detention, Mr. Varkonyi interfered with Customs and Border Protection agents’ actions by forcibly denying them entry to his property through physical force.

Here, the circuit court found that Mr. Varkonyi’s conduct went well beyond mere employment and thus constituted harboring. Id. at 459. In this case, the court pointed out that Mr. Varkonyi knew of the immigrants’ undocumented status; he had instructed the immigrants on avoiding detection on a prior occasion; he was providing the immigrants with employment and lodging; he interfered with immigration agents to protect the immigrants from apprehension; and he was partly responsible for the escape of one of the immigrants from custody. Id. Given these facts, the circuit court found that Mr. Varkonyi’s conduct, both before and after the detention of the immigrants, was calculated to facilitate the immigrants remaining in the U.S. unlawfully. Id. at 460.

In 2007, the Fifth Circuit ruled in another employment harboring case that “substantially facilitate” means to make an individual’s illegal presence in the United States substantially “easier or less difficult.” United States v. Shum, 496 F.3d 390, 392 (5th Cir. 2007) (citations and quotation marks omitted). The court noted that Section 1324(a) was enacted to deter employers from hiring unauthorized individuals and it refused to adopt a narrow definition of “substantially facilitate” that undermines Congress’s purpose. Id.

In this case, Mr. Shum was vice-president of an office-cleaning company and he employed janitors without legal status. According to witnesses, he provided false identifications to the workers to facilitate background checks so that the workers could clean government office buildings.

**HARBORING: OVERVIEW OF THE LAW** 5
Mr. Shum argued on appeal that the government failed to prove that his conduct (employing illegal workers) substantially facilitated their ability to remain in the U.S. illegally. Id. at 392. He asserted that their employment made it more likely that they would be detected and deported. Id. He also argued that those individuals whom he was charged with harboring remained in the U.S. before and after they were employed by him, and thus his conduct had no bearing on them remaining in the U.S. Id.

The Fifth Circuit rejected Mr. Shum’s arguments. It held that Mr. Shum made it easier for the workers to remain in the United States illegally by employing them and shielding their identities from detection by the government. Id. At 392-393. The circuit court observed that Mr. Shum not only hired the undocumented workers, but he provided false identification to them to facilitate the background checks required to clean government buildings. Id. In addition, the circuit court remarked that Mr. Shum did not file Social Security paperwork on these workers. According to the Fifth Circuit, there was sufficient evidence to show that Mr. Shum “substantially facilitated” these workers’ ability to remain in the United States illegally. Id. at 392.

The District Court for the Eastern District of Louisiana followed Shum in the case of United States v. Louisiana Home Elevations, LLC, CRIM.A. 11-274, 2012 WL 1033619 (E.D. La. Mar. 27, 2012). Here, the defendants challenged the sufficiency of the indictment. They argued that the charge that they conspired to harbor workers without status was deficient because the mere employment of people without legal status does not constitute “substantial facilitation.” Id. at *2. In opposition, the government argued that, by providing the workers with a means of financial support through employment at LHE work sites, the defendants did knowingly and intentionally combine, conspire, confederate, and agree with each other to conceal, harbor, and shield from detection and attempt to conceal, harbor, and shield said workers from detection. Id. at *4. The district court considered the breadth of the Fifth Circuit’s standard and concluded that it cannot hold that knowingly employing undocumented individuals is insufficient as a matter of law to constitute “substantial facilitation.” Id. at *4-5. It also noted that the case was then at the indictment stage and that the indictment did cite and track the four essential elements of a harboring charge. Id. at *6-7.

The U.S. Court of Appeals for the Sixth Circuit
The Sixth Circuit’s interpretation of the harboring provision differs markedly from the approach taken by the Fifth Circuit. The Sixth Circuit construes “harbor” to mean “to clandestinely shelter, succor and protect improperly admitted aliens ....” Susnjari v. United States, 27 F.2d 223, 224 (6th Cir. 1928). This case, though quite old, remains the precedent in the Sixth Circuit. See United States v. Belevin-Ramales, 458 F. Supp. 2d 409, 411 (E.D. Ky. 2006) (court recognizes that Susnjari is a 1928 case and was decided before the Supreme Court ruling in United States v. Evans, 333 U.S. 483 (1948) and amendments to the statute; however, because neither the Evans case nor the amendments contain language which warrants a holding that Susnjari has been abrogated or implicitly overruled, the court cannot ignore Susnjari). Thus, in the Sixth Circuit, to be guilty of harboring, a person must harbor the undocumented individual secretly or in hiding. Hager v. ABX Air, Inc., 2:07-CV-317, 2008 WL 819293, at *6-7 (S.D. Ohio Mar. 25, 2008) (knowingly hiring and employing undocumented immigrants does not
establish concealment, harboring, or shielding within the Sixth Circuit because there are no allegations in the complaint that the defendants provided housing or other shelter to the employees and no allegations that the defendants took any steps to shield the employees from detection.

**U.S. Court of Appeals for the Seventh Circuit**

In *United States v. Xiang Hui Ye*, 588 F.3d 411 (7th Cir. 2009), the defendant was initially convicted under Section 1324(a)(1)(A)(iii) for employing and shielding undocumented workers. On appeal, defendant Ye argued that “shielding” should not have been defined as “the use of any means to prevent the detection of illegal aliens in the U.S. by the Government,” and cited the Fifth Circuit’s use of “tending substantially to facilitate” as the proper definition through which to examine his conduct. *Id.* at 415. The circuit court rejected the use of the phrase “conduct tending substantially to facilitate.” It also affirmed Ye’s conviction, taking note that defendant Ye advised undocumented workers to purchase fake documents, kept them off payroll records, provided them with transportation to work, and provided them with housing by entering into lease agreements and making rent payments.

In a recent case, the Seventh Circuit refused to equate harboring with providing a place to stay through cohabitation. See *United States v. Costello*, 666 1040, 1050 (7th Cir. 2012). In this case, the defendant had a romantic relationship and cohabited with her undocumented boyfriend who was eventually removed from the U.S. and subsequently returned without authorization. *Id.* at 1042. Sometime after his return, the defendant picked him up at a bus terminal and drove him to her home where he then lived more or less continuously until his arrest. *Id.* The district court judge characterized her actions, including picking the boyfriend up at the Greyhound station, giving him shelter, and coming to his aid after he was arrested, as ‘substantial assistance’ that made his illegal presence in the U.S. easier and helped him avoid detection. *Id.* at 1042. The circuit court rejected this characterization and the use of “substantial facilitation.” *Id.* at 1042-3, 1050. Instead, it defined harboring as providing or offering a known undocumented person a secure haven, a refuge, a place to stay in which the authorities are unlikely to be seeking him. *Id.* at 1050. The Seventh Circuit held that cohabitation, without more, is not harboring. *Id.* The circuit court also rejected the notion that the primary meaning of harboring is “simple sheltering.” *Id.* at 1049. The Seventh Circuit concluded that there was nothing in the facts to suggest that defendant Costello induced the illegal entry or planned for the illegal entry and subsequent cohabitation. *Id.* at 1049-50.

**U.S. Court of Appeals for the Eighth Circuit**

The U.S. Court of Appeals for the Eighth Circuit has determined that a conviction for harboring does not require proof of secrecy or concealment. See *United States v. Rushing*, 313 F.3d 428, 434 (8th Cir. 2002). In this case, two defendants, Mr. Jones and Mr. Ma, were convicted of harboring an undocumented immigrant, Mrs. Zhong. On appeal, they argued that the evidence was not sufficient, and that the jury instruction was in error, because they did not try to hide Mrs. Zhong -- she was working in their restaurant in plain view. *Id.* The circuit court rejected their arguments. It noted that the evidence justified a finding that Mr. Ma, knowing that Mrs. Zhong had entered the country illegally, gave her a job and a place to live. *Id.* It also noted that there was sufficient evidence that Mr. Jones, with the same knowledge, helped her to receive

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medical care and banking privileges. Id. Thus, according to the circuit court, there was more than enough to support a conviction for harboring. Id.

The Court of Appeals for the Eighth Circuit also found sufficient evidence to convict a defendant of harboring in United States v. Sanchez, 927 F.3d 376, 379 (8th Cir. 1991). Here the defendant, Mrs. Sanchez, was convicted of, among other things, harboring an undocumented immigrant. The evidence at trial showed that she and her husband met with undocumented immigrants; her husband told the immigrants that he could provide them with immigration papers; her husband rented the undocumented immigrants an apartment; Mrs. Sanchez took the undocumented immigrants to the apartment; and, she told an undocumented immigrant that she would give him a paper that would allow him to work. The Eighth Circuit found that these actions were sufficient evidence to support the jury’s finding of guilt for harboring. Id.

The U.S. Court of Appeals for the Ninth Circuit
In an early precedent-setting case, the Ninth Circuit found that the mere provision of shelter, with knowledge of a person’s illegal presence, constituted harboring. See United States v. Acosta De Evans, 531 F.2d 428 (9th Cir.), cert. denied, 429 U.S. 836 (1976).

In this case, the U.S. Border patrol visited Ms. Margarita Acosta De Evans’ apartment after a tip that undocumented immigrants were living there. At the apartment, the Border Patrol found four undocumented immigrants who stated that they were at the apartment in passing. While the Border Patrol was questioning these individuals, another individual returned to the apartment from a shopping trip. She was an undocumented relative and had been living in the apartment for approximately two months. Ms. Acosta De Evans knew that her relative was not authorized to be present in the United States.

The government charged Ms. Acosta De Evans with harboring unauthorized immigrants. She argued that she did not engage in activities to prevent detection of the unauthorized individuals by law enforcement agents. Id. at 429.

The Ninth Circuit rejected her argument. It noted that the standard definition of “harbor” includes both concealment and simple sheltering, and stated that the latter appears to be the primary meaning. Id. at 430. The circuit court also looked at the legislative history of the harboring provision and found that the purpose of the section is to keep unauthorized individuals from entering or remaining in the country, and that this “purpose is best effectuated by construing ‘harbor’ to mean ‘afford shelter to.’” Id.

As noted above, the Acosta De Evans court concluded that the word “harbor” means “to afford shelter to,” and it does not require that the harboring involve the “intent” to shield an immigrant from detection by the authorities. See United States v. Aguilar, 883 F.2d 662, 689-690 (9th Cir. 1989) (harbor means to afford shelter to and does not require an intent to avoid detection) (citations omitted).

However, it is unclear from more recent Ninth Circuit cases if this still remains the standard in the Ninth Circuit or if harboring involves conduct that gives an undocumented individual shelter to avoid detection from authorities. For instance, in United States v. You, 382 F.3d 958 (9th
Cir.), cert. denied, 543 U.S. 1076 (2005), the Ninth Circuit appears to have held that where a defendant is charged with illegal harboring under Section 1324(a), the jury must find that the defendant intended to violate the law. Id. at 966. In this case, defendants were charged with violating 8 U.S.C. §1324(a)(1)(A)(iii), for harboring illegal immigrants. Id. at 962. In a challenge to the jury instructions, the circuit court held that the instruction that required the jury to find that the defendant acted with “the purpose of avoiding [the alien’s] detection by immigration authorities” was adequate, and synonymous with having acted with necessary intent. Id. at 966; see also United States v. Latysheva, 162 Fed. App’x. 720, 727 (9th Cir. 2006) (“harboring of illegal aliens, 8 U.S.C. §1324(a)(1)(A)(iii), is a specific intent crime”); see also United States v. Castaneda-Meche, 387 Fed. App’x. 767, 769 (9th Cir. 2010) (following You as binding precedent). However, the intent requirement was not clear in the case of Hernandez v. Balakian, CVF06-1383OWW/DLB, 2007 WL 1649911 at *6-8 (E.D. Cal. June 1, 2007), where the court found that agricultural workers sufficiently alleged the RICO predicate act of harboring undocumented immigrants by alleging that defendants conspired to provide housing to undocumented immigrants and directed their hiring personnel to obtain the housing.

U.S. Court of Appeals for the Eleventh Circuit
In 2007, the U.S. Court of Appeals for the Eleventh Circuit decided the case of United States v. Khanani, 502 F.3d 1281 (11th Cir. 2007). This complicated case involves businessmen who hired undocumented workers to work in their retail stores. Before the district court, the defendants were found guilty of, among other things, conspiracy to conceal, harbor, and shield immigrant workers from detection in violation of 8 U.S.C. §1324(a)(1)(A)(iii). On appeal, they argued that the district court erred in failing to give an instruction stating “that mere employment of undocumented workers cannot support a conviction for harboring.” Id. at 1288. The circuit court rejected this argument. It concluded that the instruction properly required the government to prove a level of knowledge and intent beyond mere employment of illegal immigrants. Id. at 1289. Additionally, the circuit court rejected defendant Portlock’s argument that there was insufficient evidence to convict him of harboring. Id. at 1294. According to the Eleventh Circuit, the jury could reasonably have found that defendant Portlock, the accountant for the businesses, knew that his efforts in forming the four sham companies furthered the defendants’ actions in harboring illegal immigrants, and that his preparation of tax returns was done with the knowledge that the information in those returns improperly omitted sales that were diverted toward paying unauthorized workers. Id. at 1294.

In 2010, the Eleventh Circuit discussed more fully the issue of whether knowingly employing illegal aliens is enough by itself to constitute a violation of the harboring provision. Edwards v. Prime Inc., 602 F.3d 1276 (11th Cir. 2010). In its decision, the circuit court examined the statutory evolution of Section 1324(a)(i)(A)(iii) and noted that knowingly or recklessly hiring illegal aliens is probably enough by itself to establish concealing, harboring, or shielding from detection under the statute. Id. at 1298. However, the circuit court held that they did not need to decide this exact issue because the allegations in the complaint indicated that the defendants not only knew of the workers’ undocumented status, but also that they provided names, social security numbers, and cash payments in order to prevent detection. Id. at 1299 (citing Shum, 496 F. 3d at 392; United States v. Kim, 193 F.3d at 574-75; and United States v. Ye, 588 F.3d 411, 417 (7th Cir. 2009).
Knowledge of or Reckless Disregard for Unauthorized Status

For an individual to be convicted under the harboring provision, the law requires that the accused either “know” that the individual is not authorized to be in the U.S. or “recklessly disregard” the fact that the individual is not authorized to be in the U.S. INA §274(a)(1)(A)(iii); 8 U.S.C. §1324(a)(1)(A)(iii).

The Kim case described above discusses the concept of “knowledge.” United States v. Kim, 193 F.3d at 567. Here, the court found that Mr. Kim clearly knew or recklessly disregarded Ms. Farfan’s illegal status. Id. at 574. Proof of Mr. Kim’s knowledge included the facts that Mr. Kim initially instructed his manager to fire Ms. Farfan because she and others were believed to be illegal immigrants; he allowed Ms. Farfan to remain as an employee and asked her why she had chosen “Ortiz” as her first substitute surname; Ms. Farfan’s real name and first substitute surname appeared on the suspect document list submitted by the immigration authorities; the list indicated that Ms. Farfan’s real name and her substitute name did not have valid social security numbers, and this list was served on Mr. Kim; Mr. Kim and Ms. Farfan spoke several times about her lack of work authorization; and, Mr. Kim told his manager that if the employment scheme was discovered he (Mr. Kim) could go to jail. Id.

While the Kim case involved direct knowledge, circuit courts have noted that circumstantial evidence alone can establish a defendant’s knowledge or reckless disregard that the individuals harbored are illegally in the country. See United States v. De Jesus-Batres, 410 F.3d 154, 161 (5th Cir. 2005) (evidence showed that the defendant had knowledge that the immigrants were illegal as she was part of an operation to smuggle illegal immigrants for a fee, the immigrants came to her home directly upon entry into the U.S. with the smugglers who led them over the border, and defendant took turns guarding the immigrants until their fee was paid); United States v. Rubio-Gonzalez, 674 F.2d at 1071-72 (defendant’s knowledge inferred from circumstantial evidence where evidence showed that immediately after the immigration officer released the defendant, he rode his motorcycle to the base of the hill to where two undocumented immigrants were working and told them that “immigration” was there, that the immigrants were from the defendant’s home state in Mexico, with one from his home town, and that the defendant’s brother also was an undocumented immigrant working at the site).

An Eleventh Circuit case, United States v. Perez, 443 F.3d 772 (11th Cir. 2006), discusses “reckless disregard” in the context of a case involving co-defendants who allowed Cuban nationals to board their boat. It interprets the phrase “reckless disregard” by referring to cases and jury instructions for the prohibition for “transporting illegal aliens.”

The phrase “reckless disregard of the fact,” as it has been used from time to time in these instructions, means deliberate indifference to facts which, if considered and weighted in a reasonable manner, indicate the highest probability that the alleged aliens were in fact aliens and were in the United States unlawfully. Id. at 781 (citing United States v. Zlatogur, 271 F.3d 1025, 1029 (11th Cir. 2001) (quoting United States v. Uresti-Hernandez, 968 F.2d 1042, 1046 (10th Cir. 1992)).

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1 It is a well-established canon of statutory interpretation that identical words used in the same statute are intended to have the same meaning.
Applying the facts to the law, the court found that the defendant, Mr. Perez, acted knowingly or with reckless disregard of the fact that his passengers were Cuban nationals and, thus, inadmissible immigrants. Id. The court observed the following: Mr. Perez allowed the passengers to board the boat after their boat became stranded; while some of the individuals presented identification to Mr. Perez, one individual was not asked to do so; when Mr. Perez asked them where in Miami they wanted to go, the passengers simply indicated they wanted to reach “land;” Mr. Perez did not try to help/assist the captain of the first boat after the boat broke down or to report that it was still stranded; Mr. Perez acted nervously and failed to reveal the presence of the passengers in the cabin of the boat before the police officer discovered them; there was no indication that the passengers on the boat had been fishing as Mr. Perez indicated; and Mr. Perez had been convicted of alien smuggling in 2002. Id.

Importantly, the district court noted that Mr. Perez was in a different position than his co-defendant because of his prior conviction. Because of his plea and conviction in a similar case, “he was put on notice that it’s not enough to simply take somebody aboard and bring them over here, and the failure to do more, the failure to inquire further, other than to look at some driver’s licenses, in his position and under these facts does lead me to conclude that he did act in reckless disregard.” Id. at 782. As noted above, the Eleventh Circuit agreed.

Charges for Past Conduct
Charges for harboring an individual pursuant to 8 U.S.C. §1324(a) are now governed by a ten-year statute of limitations. 18 U.S.C. §3298.

A district court in the Sixth Circuit was the first court to address the issue of whether harboring an undocumented individual under 8 U.S.C. §1324(a)(1)(A)(ii) is a continuing offense. United States v. Arce, CRIMINAL ACTION NO. 3:11CR-79-H., 2012 BL 131927 (W.D. Ky. May 30, 2012). Because it is not evident in the language of the statute whether the crime is construed so as to extend beyond the time period encompassing the completion of its elements, the court examined the implicit nature of the conduct targeted by the legislature with respect to the tension created with a statute of limitations. Id. at 2. The court compared harboring to other continuing offenses, holding that harboring could likewise “be completed over long periods of time, in different geographic locations, and through a multitude of overt acts.” Id. at 3, citing United States v. Lopez, 484 F.3d 1186, 1192-93 (holding that bringing in an illegal alien can constitute a continuing offense under 8 U.S.C. §1324(a)(2)); United States v. Strain, 396 F.3d 689, 697 (5th Cir. 2005) (holding that, for the purpose of venue selection, harboring a fugitive is a continuing offense).

The district court ultimately dismissed the defendant’s motion to dismiss, holding that the defendant could be liable for his conduct beginning in June of 1994 and continuing through 2006, so long as an overt act of furtherance of harboring occurred between 2001 and 2011. Arce, 2012 BL 131927 at *3 (W.D. Ky. May 30, 2012). The defendant was indicted for violations of 8 U.S.C. §§ 1324(a) and 1324(b), on the grounds that he and his wife had knowingly employed an undocumented individual as a live-in domestic worker for nearly 12 years, through which the defendant provided the undocumented individual with a small amount of monetary support and shelter in exchange for her labor. Id. at 1.
Criminal Penalties -- Commercial Advantage or Private Financial Gain

The criminal penalties for violating the harboring provision are set forth in the INA §274(a)(1)(B); 8 U.S.C. §1324 (a)(1)(B). A defendant convicted of violating this provision may be fined and/or imprisoned for not more than ten years for each foreign national he/she harbors, when the violation “was done for the purpose of commercial advantage or private financial gain.” INA §274(a)(1)(B)(i); 8 U.S.C. §274(a)(1)(B)(i). See United States v. Zheng, 306 F.3d 1080, 1086 (11th Cir. 2002).

Importantly, the statute does not mandate that the government prove that the defendant received payment or asked for any money or anything else of value. Instead, it merely requires that the government show that the defendant acted for the purpose of commercial advantage or financial gain.

Criminal Penalties: No Commercial Advantage, Bodily Injury, & Death

For each foreign national with respect to whom a violation occurs, but where there is no showing that the violation was done for commercial advantage or private financial gain, the defendant may be fined and/or imprisoned for not more than five years. INA §274(a)(1)(B)(ii); 8 U.S.C. §274(a)(1)(B)(ii).

For each foreign national with respect to whom a violation occurs and in which the defendant “causes serious bodily injury … or places in jeopardy the life of any person, may be fined and/or imprisoned for not more than twenty years. INA §274(a)(1)(B)(iii); 8 U.S.C. §274(a)(1)(B)(iii).

For each foreign national with respect to whom a violation occurs and which results in the death of any person, the defendant may be punished by death or imprisoned for any term of years or for life, fined, or both. INA §274 (a)(1)(B)(iv); 8 U.S.C. §274(a)(1)(B)(iv).

Conclusion

To establish a violation of the harboring provision, all the government needs to show is that: (1) the immigrant entered or remained in the United States in violation of the law, (2) the person concealed, harbored, or sheltered the immigrant in the United States, (3) the defendant knew or recklessly disregarded the fact that the immigrant was not authorized to be present in the U.S., and (4) the person took some action that tended to substantially facilitate the immigrant’s remaining in the United States in violation of the law. As noted above, this fourth element is not necessary in the jurisdiction covered by the U.S. Court of Appeals for the Seventh Circuit.

Without a doubt, harboring is not restricted to smugglers or those in the smuggling business or to employers that operate businesses in sweatshop-type conditions. Indeed, it applies to any person who knowingly harbors an undocumented immigrant. The definitions of “harboring” adopted by the federal circuit courts are varied:

- conduct that substantially facilitates an immigrant’s remaining in the U.S. illegally and that prevents government authorities from detecting the individual’s unlawful presence. (U.S. Court of Appeals for the Second Circuit)
- conduct such as providing shelter, transportation, direction about how to obtain false documentation, or warnings about impending investigations that facilitates a person’s
continuing illegal presence in the United States. (U.S. Court of Appeals for the Third Circuit)
- conduct tending to substantially facilitate an immigrant’s remaining in the U.S. illegally (U.S. Courts of Appeals for the Fifth Circuit);
- conduct that clandestinely shelters, succors, and protects improperly admitted immigrants (U.S. Court of Appeals for the Sixth Circuit);
- conduct that provides or offers a known undocumented individual a secure haven, a refuge, a place to stay in which authorities are unlikely to be seeking him (U.S. Court of Appeals for the Seventh Circuit); and,
- conduct that affords shelter to undocumented individuals (U.S. Court of Appeals for the Ninth Circuit).

In today’s world of increased immigration enforcement, it is difficult to list all of the conduct that may constitute harboring. In the employment context, harboring, thus far, has been interpreted by most courts to require an affirmative act in addition to the mere employment of undocumented immigrants. Indeed, in the cases analyzed above, the employers’ conduct included at least one other affirmative act (besides employing an undocumented worker) that made it easier for the individual to remain in the U.S. illegally. For example, in United States v. Kim, the defendant not only knowingly employed undocumented workers, but he instructed the employee to bring in new papers with a different name to indicate that she was work authorized, and he instructed her to change her name a second time while immigration authorities were investigating the company. In United States v. Shum, the employer not only hired workers without legal status, but he provided the workers with background checks so that they could clean government buildings and not have their status revealed to authorities. Additionally, he failed to file paperwork for the workers with the Social Security Administration. In United States v. Zheng, the employers not only hired undocumented workers, but they housed the workers, paid them low wages for long hours of work, and failed to withhold federal taxes or pay into Social Security.

As noted above, employers have not been convicted of violating the harboring provision for the mere employment of undocumented workers. However, it seems reasonable to infer from case law that some circuit courts, especially the U.S. Courts of Appeals for the Fifth and Eleventh Circuits, with the right set of facts, would determine that knowingly or recklessly hiring illegal workers could be enough (by itself) to establish a violation of the harboring provision.

Outside the employment context, the case law shows that harboring can consist of providing shelter to an undocumented immigrant if this conduct substantially facilitates (makes it easier for) the immigrant to remain in the U.S. illegally, undetected by immigration authorities. United States v. Acosta De Evans, above. In the housing context, harboring, thus far, also has been interpreted by the courts to require an affirmative act in addition to merely providing an apartment or house to rent. For instance, in Delrio-Mocci v. Connolly Props, the Third Circuit concluded that renting an apartment, in the normal course of business is not in and of itself harboring. Also, in United States v. Silveus, and United States v. Costello, the Third Circuit and Seventh Circuit Courts found that cohabitation without more is not enough to constitute harboring. That said, it seems reasonable to extrapolate from the case law that some circuit
courts, including the U.S. Court of Appeals for the Fifth, Eleventh, and Ninth Circuits, with the right set of facts, would determine that knowingly or recklessly providing housing to undocumented individuals could be enough (by itself) to establish a violation of the harboring provision.

It also seems clear from case law that any conduct that instructs undocumented immigrants on how to avoid arrest and detection by immigration authorities and conduct that impedes an investigation may fall within the ambit of harboring. Thus, union organizers, teachers, and social workers, for example, should be wary of hindering an immigration investigation in any way and telling undocumented individuals how to avoid arrest and detection by immigration authorities.

In situations where a person is helping an undocumented immigrant seek lawful status in the United States, it does not appear that the government is pursuing penalties under the harboring provision. Indeed, CLINIC has never seen reported or heard of a harboring case that involves this type of legal assistance.

In summary, it appears likely that the government will continue to prosecute harboring cases and argue for the broadest possible definition. It also appears likely that the federal courts will continue to grapple with the meaning of what conduct constitutes harboring. Finally, it seems likely that contradictory precedents will guide decisions in the federal circuit courts.

This document was updated in March of 2013 by Karen A. Herrling with the assistance of legal interns Julie Silvia and Théophé Love. This document is for informational purposes only and is not intended as legal advice. For questions, please contact CLINIC’s State & Local Advocacy Attorney, Jen Riddle at (202)635-7410 or jriddle@cliniclegal.org.
Sanctuary for Immigrants: Hugely Symbolic, Rarely Used
Judson Memorial Church in Greenwich Village has offered a safe haven to immigrants at risk of deportation.

(Tony) / Wikimedia Commons

Jan 23, 2018 · by Arun Venugopal

For the most part, Judson Memorial Church, located next to Washington Square Park, blends into its surroundings, but as soon as you approach you realize this isn't your average church.

"If we saw two men wearing badges come in, we would immediately hit our internal cell phone alerts," said Rev. Donna Schaper, the Senior Minister at Judson, "and all 50 of us would be out there, escorting those gentlemen out."

Judson is a sanctuary church, which means that at times it houses undocumented immigrants who face deportation and seek a safe haven or at the very least have come in for counseling. Schaper said there is a perennial fear that federal immigration agents will enter the premises, unannounced.

https://www.wnyc.org/story/sanctuary-hugely-symbolic-rarely-used/
At Judson Memorial Church, which offers sanctuary to undocumented immigrants, volunteers are reminded to keep doors locked at all times. Arun Venugopal / WNYC

But beyond security, sanctuary is a big, complicated endeavor. And it’s rarely used. While an estimated 800 religious congregations in the U.S. have joined the sanctuary movement, Church World Service estimates only 32 of them are publicly housing people at risk of deportation.

"If somebody comes and stays within your house of worship, and is wanted by the law for instance, what does that mean for your congregation, your safety?" asked Sunita Vishwanath, an activist with the progressive Hindu group Sadhana, which enlisted a temple in Queens into the movement. "Does it in any way compromise you and your institution?
These kinds of questions come to mind when people consider this question of sanctuary.

There are also questions for an immigrant considering sanctuary. Namely, are they really willing to subject themselves to it? Stacey is an undocumented immigrant from Jamaica who didn't want to give her real name. She spent a month in sanctuary at Judson Memorial Church.

"You're not really able to enjoy spring, or summer, or fall if you like fall, or if you have a family you can't take your kids to the park, or you can't take your wife on dates. You can't have those family moments that a typical individual would have. It really is, in a technical sense of the word, like a physical prison. But that's your best option."

Stacey observed another undocumented immigrant, and realized that his time in sanctuary "broke him down" over time.

For these reasons, Rev. Schaper said she interviews applicants for sanctuary, to ensure that they're resilient.

"You also don't want them in your space if they're going to steal from you, or break things, or be messy. Or have a dog," because the individual wouldn't be able to take the dog out for walks.

As it is, sanctuary means that dozens of people could be helping take care of you and your family's various needs. Jazmin Delgado works with the
New Sanctuary Movement of Philadelphia, which is helping support Carmela Hernandez and her four children at the Church of the Advocate.

“The children, for example, are very used to Mexican home cooking, so our team makes sure that they deliver ingredients that Carmela can cook with,” said Delgado, who estimates that at least 30 people are working on a weekly basis to support the Hernandez family.

Aside from food, some volunteers take care of the family’s medical needs, while others are strategizing how to carpool the kids to school without drawing the attention of immigration agents.

For Stacey, this daily show of support is a silver lining of sanctuary. It isn’t simply a place where someone can evade the law, but a community of well-wishers, people you can talk to or have a cup of coffee with in the morning.

"Who make you feel like a dignified human being again."

7 Comments

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THE MUSLIM BAN AND SEPARATION OF POWERS DOCTRINE IN TRUMP’S AMERICA

BY ENGY ABDELKADER, JD, LL.M.

"An elective despotism was not the government we fought for..."
Thomas Jefferson

"Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting, but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must, accordingly, be treated at all times as the heirs of the American experiment, and as entitled to all the rights and freedoms guaranteed by the Constitution."
U.S. Supreme Court Justice Frank Murphy, Korematsu v. United States (dissenting)

Donald J. Trump’s ascension to the White House is arguably the most consequential development for religious freedom in contemporary America – particularly as it relates to Muslims. The 2016 U.S. presidential election cycle exacerbated already worsening anti-Muslim sentiment across the country. Then Republican presidential candidate Trump specifically ran a campaign that exploited national divisions, animosities and anxieties surrounding Islam and Muslims, even inspiring a foreign government’s covert propaganda operation. To help elect Mr. Trump, Russian operatives secretly purchased advertisements on Facebook that spread stereotypes and disinformation about Muslims, including the threat the group poses, in battleground states influential in the presidential race. Significantly, such divisive messages merely mirrored what Mr. Trump propagated – and then absorbed and reflected back by supporters.

Just a few months after declaring his candidacy, during a September 2015 town hall meeting in New Hampshire, one of Mr. Trump’s supporters asked when the Government would “get rid of [Muslims]” while referencing imaginary “training camps” sprawled across the country. Rather than providing a corrective, Mr. Trump responded, “We’re going to be looking at that and a lot of different things.” In the days and weeks that followed, in fact, Mr. Trump publicly advocated for closing mosques. He also spoke in favor of special identification cards, warrantless searches and a religious registry for Muslim Americans.

On December 7, 2015, Mr. Trump unveiled his infamous Muslim ban. In the aftermath of a tragic mass shooting at a disability center by a Muslim couple in San Bernardino, California, Mr. Trump released a written campaign statement that called for “… a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.” Later that same
day, on MSNBC, Mr. Trump explained how immigration officials would operationalize the measure: “[T]hey would say, are you Muslim?” When asked, “And if they said yes, they would not be allowed in the country?” Mr. Trump replied, “That’s correct.”

Soon thereafter, candidate Trump likened his Muslim ban to former U.S. President Franklin D. Roosevelt’s decision during the Second World War to intern Japanese Americans because of a perceived national security risk. Mr. Trump explained in relevant part, “This is a president highly respected by all, [Roosevelt] did the same thing.” Indeed, on February 19, 1942, two months after Japan attacked Pearl Harbor, a U.S. naval base near Honolulu, Hawaii, President Roosevelt signed Executive Order 9066. The order forced the relocation of more than 100,000 Japanese Americans into internment camps around the country. The U.S. Supreme Court upheld the order’s constitutionality in Korematsu v. United States, finding the Government’s exclusion of citizens to be lawful during wartime to avoid espionage. While Korematsu has been left undisturbed, the episode is widely regarded as one of the most appalling violations of civil liberties in American and legal history.

After becoming the presumptive Republican presidential nominee, Mr. Trump began tempering his language but remained staunchly in favor of the discriminatory immigration policy. For instance, when asked about the Muslim ban in a July 17, 2016, interview with 60 Minutes, he responded, “Call it whatever you want. We’ll call it territories, ok?” A few days later, in a July 24, 2016, interview on Meet the Press, Mr. Trump was asked, “The Muslim ban. I think you’ve pulled back from it, but you tell me.” Mr. Trump explained,

“I don’t think it’s a rollback. In fact, you could say it’s an expansion. I’m looking now at territories. People were so upset when I used the word Muslim. Oh, you can’t use the word Muslim. Remember this. And I’m okay with that, because I’m talking territory instead of Muslim. Our Constitution is great. . . . Now, we have a religious, you know, everybody wants to be protected. And that’s great. And that’s the wonderful part of our Constitution. I view it differently.”

Even after prevailing in the presidential contest, Mr. Trump remained intent on enacting the Muslim ban. On December 21, 2016, for instance, a reporter asked Mr. Trump whether he “had cause to rethink or reevaluate [his] plans to create a Muslim register or ban Muslim immigration to the United States.” President-elect Trump responded, “You know my plans all along, and I’ve been proven to be right, 100 percent correct.”
Now in the White House, President Trump has persisted in exploiting divisions around religion. He consistently labels Muslims, numbering approximately 1.6 billion globally, in dehumanized terms: disloyal, suspicious, dangerous national security risks. Representative is a presidential tweet spreading a widely debunked myth that "a method hostile to Islam – shooting Muslims with bullets dipped in pig's blood – should be used to deter future terrorism." What is more, President Trump delivered on his pledge to ban Muslims from entering the U.S. during his first 100 days. And, all of his statements on the campaign trail are now probative evidence of the chief of state's intent to discriminate against a minority faith group.

As President Trump fulfills campaign promises, like the Muslim ban currently characterized as a "travel ban," such discriminatory laws, practices and policies have broader social, political and economic ramifications. First, they reinforce misconceptions about Islam as an inherently violent religion. Second, they also breed intolerance, fear and hostility among the general population toward a marginalized minority faith community. Third, they signal Government approval for discrimination against Muslims – citizens and immigrants alike – from the classroom to the neighborhood Panera Bread and well beyond. Moreover, such institutionalized discrimination creates a precedent for the Government to similarly mark other minority groups for official disfavor in the future.

However, President Trump does not enjoy unfettered authority even in the Oval Office. The Separation of Powers doctrine, U.S. Constitution and rule of law remain substantial checks in a federalist system. From adjudicating constitutional challenges to the Muslim ban to introducing legislative measures to defund it, the other branches of state and federal government are engaged in dialogue with President Trump about the limits on the executive and, arguably, the place of Muslims in America. This chapter examines this extraordinary dialectic at the intersection of law, politics and religion. Specifically, it interrogates the executive, legislative and judicial branches as sources of protection for or discrimination against Muslims in the era of Trump. And, it does so through the lens of the Muslim ban for an international readership.

**MUSLIMS AND ISLAM IN AMERICA: A DEMOGRAPHIC SKETCH**

Muslim Americans are a small minority religious group that enjoys academic achievement and economic challenges. There are approximately three to seven million Muslims in America. Whereas Christians comprise approximately 70% of the entire population, Muslim Americans constitute a mere one to two percent. The majority identify with the Sunni branch of Islam consistent with data about the global Muslim community. Approximately 31% are college graduates and an additional 11% hold postgraduate degrees. While Muslim Americans often enjoy a public image as financially successful professionals – including doctors, engineers,
businessmen and lawyers – the research evidence reveals a more complicated reality. Consistent with their public image, approximately 23% enjoy a household income in excess of $100,000, on par with other non-Muslim Americans. However, almost twice as many – more than 40% - live on less than $30,000. In fact, Muslim Americans are significantly more likely than any other faith group to report such a low household income. For the sake of perspective, note that middle class is generally defined as families earning between $40,000 and $80,000 annually. According to this standard, more Muslim Americans are living outside of the middle class. Rather, group members appear to now largely comprise the nation’s lower class. Other empirical data may provide relevant insight.

Significantly, only 44% of Muslim adults are fully employed and 29% are underemployed. Even prior to the 2016 presidential election results, Muslim Americans were the most likely religious group to report having personally experienced racial or religious discrimination. For years the minority faith group confronted increased religious animus. Such social hostilities resulted in disproportionate levels of bias incidents in schools, at work and on the street. As the Trump administration normalizes and legitimizes anti-Muslim prejudice and discrimination, economic challenges may become a reality for many more Muslims struggling to realize the American dream and religious liberty. For this and other reasons, the experience of Muslims living in poverty deserves additional research and analysis.

In addition to enjoying college degrees, most Muslim Americans are U.S. citizens, racially and spiritually diverse and proud of their national and religious identity. Approximately 82% are American citizens with approximately one half born in the U.S. The minority community is diverse in its racial and ethnic composition with approximately 41% self-identifying as “white” (including Arab, Middle Eastern and Persian/Iranian; 28% as Asian (including South Asian; 20% as black; and 8% as Hispanic. That diversity is similarly reflected in Muslim American belief and faith practices. Representative divisions surround diet and dress. Approximately 48% and 44% view consumption of halal food and modest religious attire as significant, respectively. A similar number attend weekly religious services and observe the five daily prayers as proscribed by orthodox teachings. Despite such diversity, however, the overwhelming majority - 79% - agrees that religion is important. There is a similar consensus about the complementary roles of one’s religious and national identity: 89% are proud to be Muslim and American with 60% viewing themselves as having “a lot” in common with other Americans.

While Muslims may see commonalities with their compatriots, the American public remains suspicious about Islamic laws, beliefs and practices. About 44% of non-Muslim Americans believe Islamic teachings conflict with democracy while 65% of Muslim Americans see no such incompatibility. Those who saw tension generally attributed it to conflicting “principles” and “morals,” with one respondent elaborating, “There is no democracy in Islam.” What is more, one half of Americans view Islam as outside of mainstream society, a sentiment that is only likely to
increase with executive actions such as the Muslim ban. In addition, Americans have also rated Muslims more negatively in surveys than other religious groups including Jews, Mormons, Catholics, Hindus and Buddhists. According to one such survey asking Americans to rate religious groups on a “feeling thermometer,” for instance, respondents felt the coldest and most negative feelings towards Muslims. Additionally, 25% believe half or more of Muslim Americans are “anti-American,” and another 24% said “some” Muslims are anti-American.

The data also suggests that American perceptions of Islam have worsened over the past fifteen years. In March of 2002, approximately six months following the September 11th terrorist attacks, 25% of Americans believed Islam encourages violence more than other religions while 51% disagreed. But, in December of 2016, 41% said Islam is more likely to promote violence among adherents. It is important to note that these sentiments translate into popular support for discriminatory policies. According to a 2016 Chapman University study, for instance, approximately one-third of Americans viewed a blanket prohibition on Muslim immigration favorably. Dr. Ed Day, who led the research study during the presidential election cycle aptly observed, “A third of the population is basically saying we need institutionalized discrimination based on religion.”

THE SEPARATION OF POWERS DOCTRINE

The Declaration of Independence, U.S. Constitution and Bill of Rights are the country’s foundational documents. They outline national values, principles and laws. The U.S. Constitution, specifically, creates three separate co-equal branches of the federal government to guard against the abuse of power by individuals or groups. This is known as the Separation of Powers Doctrine. By distributing the balance of power and providing for institutional checks, the Framers of the Constitution sought to curb Government abuses. This section provides a brief overview.

First, the legislative branch – also known as the U.S. Congress – establishes laws and regulations for the country. It also has authority to impeach the President in exceptional circumstances, reject or confirm presidential appointments and declare war.

Second, the executive branch – including the President, Vice President, Cabinet and executive agencies and commissions – enforces laws. The President leads the country as chief of state and serves as the Commander of Chief of the Armed Forces. To counteract Congressional powers, the President may veto (reject) legislation that should not become law. Of course, the President must exercise his executive authority lawfully. When he does not do so, it becomes the responsibility of the other branches to curtail those unlawful actions.
Third, the judiciary – essentially, the U.S. Supreme Court and other federal courts – adjudicates cases in which it interprets the application of laws according to the U.S. Constitution. The Supreme Court, the nation’s highest court, can reject unconstitutional laws enacted by Congress or the President as invalid. Whereas American citizens have the right to vote for members of Congress and the President in free elections to ensure a representative government, the President nominates Justices to the Supreme Court who are subject to confirmation by the U.S. Senate. Notably, all three branches are seated in Washington, D.C., the nation’s capitol.

In addition, the U.S. Constitution grants the nation’s fifty states authorities. On a state level, a representative government also operates with its own constitution outlining local laws and principles. State governments mirror the federal separation of powers with three equally powerful branches. In every state the governor leads the executive branch and is elected by the people in confidential ballots. Further, state legislatures are also comprised of elected representatives. It enacts laws introduced by members or suggested by the governor. Similar to the federal structure above, states also have a high (or supreme) court that adjudicates appeals from lower-state courts. Additionally, the federal judicial system has lower courts located in each of the states to hear cases that raise federal issues. If a case involves a question under the U.S. Constitution, a litigant may appeal the state supreme court decision to the U.S. Supreme Court for consideration.

In essence, the state governments share responsibilities with the national government in a federalist system. For instance, state governments oversee public schools and universities, tourism, police departments, local transportation, public health operations and libraries. In the context of the Muslim ban, the federal judiciary and states have played a powerful role in protecting constitutional guarantees against executive excesses.

**THE FIRST AMENDMENT AND RELIGIOUS FREEDOM**

The Bill of Rights refers to the first ten amendments to the U.S. Constitution protecting individual civil liberties from Government encroachment. Specifically, the First Amendment protects the free exercise of religion and prevents Government from favoring one religion over another. It states,

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government of grievances."}^{22}
As such, the First Amendment consists of two clauses ensuring religious freedom: the Free Exercise Clause and the Establishment Clause.

**Free Exercise Clause**

First, the Free Exercise Clause prevents government interference with religious beliefs and faith practices. Specifically, the government "may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious dogma." Notably, the Free Exercise Clause protects individuals against actions by both the state and federal government. A related lawsuit must demonstrate that a government action burdened an individual's sincerely held faith practice. In related litigation, however, the U.S. Supreme Court found that an individual's right to freely exercise religion is not absolute.

In *Employment Division v. Smith*, a controversial decision from 1990, the Court held that government interference with religious conduct is constitutional where the law is generally applicable to everyone and neutral to religion, affecting it only incidentally. In that case, the State of Oregon denied unemployment benefits to Native American workers whose private employer fired them for ingesting peyote, a hallucinogenic drug, according to a sincerely held religious belief. The state cited a local law disqualifying workers from unemployment compensation when terminated for "misconduct." Under Oregon law, consumption of peyote is a crime. The discharged workers challenged the law. They argued that it criminalized their religious beliefs and violated the Free Exercise Clause. The Supreme Court upheld the state action, however. The Court drew a distinction between laws that regulate religious beliefs, specifically, and those that are religiously neutral and generally applicable.

In response, in 1993, Congress passed the Religious Freedom Restoration Act (RFRA). The federal law prohibits both federal and state government from "substantially burden[ing]" religious conduct even with generally applicable laws unless it is "the least restrictive means of furthering ... a compelling governmental interest." Where a law affects a person's faith practices, the state must use the least restrictive means to accomplish its objectives while respecting religious beliefs. In 1997, the Supreme Court struck down part of the statute. It held that it was unconstitutional in so far as it applied to states because Congress lacked that authority. In reaction, almost two dozen states enacted local versions of the RFRA.

**Establishment Clause**

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Second, the Establishment Clause provides that "Congress shall make no law respecting an establishment of religion."28 The Supreme Court has held that “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”29 When a law discriminates on its face, the Supreme Court has required the Government to show a compelling interest and that the measure is “closely fitted to further that interest.”30 On the other hand, when a law is facially neutral, making no specific reference to religion, the courts are guided by a three-part test set forth in its decision in Lemon v. Kurtzman.31

According to Lemon, to avoid running afoul of the Establishment Clause, Government action (1) must have a primary secular purpose, (2) may not have the principal effect of advancing or inhibiting religion, and (3) may not foster excessive entanglement with religion. If a measure does not satisfy any one of these three prongs of the Lemon test, the challenged law or policy is invalidated.32 In order to make this determination, courts must consider “both direct and circumstantial evidence,” including, “among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by . . . the decisionmak[er].”33 The Establishment Clause jurisprudence proves particularly relevant in the instant context of the Muslim ban.

As a result of First Amendment protections, the Muslim American community enjoys autonomy and the same rights as other religious communities free from Government interference. Muslim Americans are permitted to own and operate halal butcher shops, for instance, and freely purchase and consume such products. Similarly, they are permitted to perform male circumcision rituals and participate in weekly prayer services. In addition, they are permitted to operate religiously affiliated cemeteries and practice Islamic burial rituals. Further, they are permitted to observe religious attire. In the event of discriminatory Government action, on a state or federal level, one may seek legal redress in court.

What is more, Muslim Americans, similar to other religious communities, may form commercial organizations (such as corporations, sole proprietorships, general partnership, limited liability partnership, and limited liability companies) or nonprofit organizations (which are typically organized as corporations) to obtain legal personality. Commercial entities and nonprofit corporations are formed under the law of the state in which they are formed. Most religious and faith groups are organized as nonprofit corporations to obtain favorable tax-exempt status.

It is important to note that in addition to the U.S. Constitution, federal statutes and state laws provide additional protections for religious groups and persons against discrimination. These include, for instance, the Religious Land Use and
Institutionalized Persons Act, Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009 and the Civil Rights Act of 1964, among others.

THE MUSLIM BAN

Despite legal protections, bias attitudes have too often translated into discriminatory practices in myriad contexts. In fact, Muslim (75%) and non-Muslim Americans (69%) agree that the minority faith group experiences a lot of discrimination. Muslim Americans classify discrimination, ignorance and misconceptions about Islam as the most significant challenges confronting their community today. Significantly, one half say it is more difficult to be Muslim in America today while citing, in relevant part, President Trump's rhetoric and policies. The Muslim ban is the minority faith community's case in chief. The ban also illuminates the role of the executive, legislative and judicial branches as sources of protection for and discrimination against Muslims in the era of Trump.

The First Executive Order

On January 27, 2017, one week following his inauguration, President Trump signed an executive order entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States." The order, also known as the Muslim ban, explained that its objective was to protect Americans from immigrants who "bear hostile attitudes" toward the U.S. and the Constitution, who would "place violent ideologies over American law," or who "engage in acts of bigotry or hatred." To that end, it immediately barred entry of immigrants and refugees from seven Muslim majority countries – Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen — for ninety days. The order applied to non-citizens with lawful permanent residence, immigrants previously authorized to live and work in the country permanently; those outside the U.S. were barred from re-entry. In addition, immigrants enrolled in universities or employed on temporary work visas were halted at the border if they arrived from one of the seven designated countries.

The order also temporarily suspended the U.S. Refugee Admissions Program in its entirety, preventing travel into the country and any decisions on refugee applications for a period of 120 days. Once the admissions program resumed, the order explained, the Government would prioritize "refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." Syrian refugees were barred indefinitely. This part of the directive's purpose, President Trump clarified in a subsequent television interview, was designed to bar resettlement of Muslim refugees from Muslim-majority contexts while giving Christians preferential treatment.
Significantly, while the order repeatedly cites 9/11 in the context of its purported objective to enhance national security, none of those hijackers came from the enumerated countries. According to research from the Cato Institute, not a single person from the designated countries has killed anyone in a terrorist attack on U.S. soil. Still, at the order’s signing ceremony, President Trump read the title aloud and stated, “We all know what that means.” He then explained that the measure was “establishing a new vetting measure to keep Islamic radical terrorists out” while adding, “We don’t want them here.”

Still, the order avoided explicit references to “Muslims” so as to appear facially neutral to religion. However, many pointed to President Trump’s prior campaign promise to ban Muslim immigration as evidence of discriminatory intent. In fact, the day after its issuance, President Trump’s advisor, Rudolph Giuliani, confirmed public suspicion when he explained on television:

“When [Mr. Trump] first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’”

Mr. Giuliani said he assembled a group of “expert lawyers” that “focused on, instead of religion, danger—the areas of the world that create danger for us. . . . It’s based on places where there is substantial evidence that people are sending terrorists into our country.”

The response from Congress, including dozens from President Trump’s own Republican political party, was swift. Some condemned the religious animus inspiring the ban. For instance, Arizona Senator Jeff Flake observed, “Enhancing long term national security requires that we have a clear-eyed view of radical Islamic terrorism without ascribing radical Islamic terrorist views to all Muslims.” Similarly, Maine Senator Susan Collins said, “A preference should not be given to people who practice a particular religion, nor should a greater burden be imposed on people who practice a particular religion. As I stated last summer, religious tests serve no useful purpose in the immigration process and run contrary to our American values.”

Others highlighted the threat to the nation’s constitutional structure and the Separation of Powers Doctrine, intimating that the order exceeds executive authority. For example, Michigan Representative Justin Amash stated, “President Trump’s executive order overreaches and undermines our constitutional system. It’s not lawful to ban immigrants on basis of nationality. If the president wants to change immigration law, he must work with Congress.” Nevada Senator Dean Heller added, “I encourage the Administration to partner with Congress to find a solution.” Additionally, New York Congresswoman Elise Stefanik criticized, “It is Congress’ role
to write our immigration laws and I strongly urge the President to work with Congress moving forward as we reform our immigration system to strengthen our homeland security.” Similarly, New Jersey Representative Leonard Lance stated, “It is Congress’ role to amend our immigration laws and I strongly urge President Trump to work with legislators to enact a clear, effective and enhanced vetting and monitoring process.”

However, Republican condemnations did not evolve into concrete legislative initiatives. Rather, Democratic Congressmen John Conyers and Zoe Lofgren introduced legislation, the Statue of Liberty Values Act, in the House of Representatives to rescind the order and prohibit funding to enforce it. While House Democrats overwhelmingly supported it – with 185 of 196 signing on – Republicans acted along partisan lines and blocked a vote. Similarly, Democratic Congresswoman Dianne Feinstein introduced corresponding legislation in the Senate, cosponsored by 38 of the chamber’s 48 Democrats, but Republicans played politics. In both houses of Congress, Republican leadership blocked a vote on legislation to repeal the Muslim ban. Essentially, partisan politics paralyzed the legislative branch from guarding against executive abuses as the Framers of the Constitution intended. But, this was not hold true of the judiciary.

Almost immediately, a wave of lawsuits filed by states, organizations and individuals around the country challenged the ban in a number of venues as unlawfully excluding Muslims. As such, the Government action disfavored a religious denomination over others, litigants claimed, in violation of the Establishment Clause. Representative is State of Washington v. Trump.

On January 30th, several days after President Trump signed the first executive order, the State of Washington challenged the action on myriad legal grounds, asserting the rights of its residents – such as students and faculty at public universities – in federal district court. Significantly, the suit alleged that the order violated the Establishment Clause by disfavoring Muslims and Islam. To demonstrate its unlawful purpose, the state attorneys general cited then presidential candidate Trump’s repeated campaign promises to bar Muslim immigration and engage in “extreme, extreme vetting” as probative evidence. It argued that the first executive order was the fulfillment of that pledge. The state of Minnesota also joined the lawsuit.

On February 3rd, the court agreed with the state’s arguments and temporarily blocked key portions of the ban in a nationwide injunction becoming the first court to do so. The court found that the ban would adversely impact the state residents in the areas of employment, education, business, family relations and freedom to travel. The court also found that the states themselves were harmed in terms of the missions of public universities, public funds, tax bases and other operations. Interestingly, in a nod to the Separation of Powers Doctrine, the court noted its own role as one of three coequal branches of the federal government and its
responsibility to ensure that the actions of the executive and legislative comport with the U.S. Constitution.

Subsequently, the Government appealed the decision to the Ninth Circuit Court of Appeals, a San Francisco appellate court with federal jurisdiction. The Ninth Circuit refused to overturn the lower federal court’s decision, noting a likely Establishment Clause violation among other legal concerns. In response, on February 16th, the Government stated that it planned to revise the order to address the court’s constitutional concerns. At that time, President Trump pledged, “I keep my campaign promises...[W]e can tailor the order to [the Ninth Circuit] decision and get just about everything, in some ways, more.” Rather than continue with the litigation, the Government moved to dismiss its own appeal.

The Second Executive Order

On March 6, 2017, one month after the federal court had blocked the original Muslim ban, President Trump rescinded it and issued a revised order. It was entitled identically as its predecessor, “Protecting The Nation From Foreign Terrorist Entry Into The United States,” but was somewhat distinct in substance. The revised order removed Iraq from the list of designated countries, for instance. This version was also limited to foreign nationals outside the U.S. without visas, dual nationality, diplomatic status or legal permanent residency. Further, it eliminated preferences for religious minorities. It clarified that the original order was not motivated by religious animus but designed to protect religious minorities. It also omitted any specific references to Syrian refugees.

In essence, the revised order temporarily suspended refugee programs and visa approvals for immigrants from six Muslim majority countries although government officials could allow specific individuals entry upon review on a case-by-case basis. For instance, immigrants who were working or studying in the U.S. for continuous periods of time but outside of the country at the time of the order could receive a waiver. Also foreign nationals who sought entry to visit close family members, such as a child, parent or spouse, also qualified for a waiver. Young children and infants in need of medical care also deserved special consideration, the order explained. And, those employed or sponsored by, or visiting to meet with employees of, the Government could also gain entry.

Still, most drew little distinction between the original and revised orders’ discriminatory intent. They pointed to statements by members of the Trump administration as evidence. On February 21, shortly before the revised order was signed, Senior Advisor to the President, Stephen Miller, appeared on Fox News and explained: “Fundamentally, you’re still going to have the same basic policy outcome for the country, but you’re going to be responsive to a lot of very technical issues that were brought up by the court and those will be addressed. But in terms of protecting the country, those basic policies are still going to be in effect.” In fact, the
revised ban engendered another wave of lawsuits almost immediately. Representative is *State of Hawaii v. Trump*.

In *State of Hawaii v. Trump*, the state argued that the second order was tainted by religious discrimination in the same fashion as its predecessor, undermining constitutional and other legal guarantees. Similar to *State of Washington v. Trump*, Hawaii state attorneys general argued that its residents would be unable to receive visits from family members and friends traveling from the enumerated countries. Further, the state’s interests in recruiting faculty and students to attend public universities would be adversely impacted, among other areas such as its tourist driven economy.

The state attorneys general argued that the order’s implementation would run counter to the Establishment Clauses of both the federal and state constitutions, forcing it to tolerate an unconstitutional policy that disfavors one religion over another. As evidence of discriminatory purpose and illegitimate motive, the state emphasized the historical context: President Trump’s rhetoric about Muslims on the campaign trail. It described “a perception that the Government has established a disfavored religion” with respect to Islam. While the order cited national security as its secular justification, the state pointed to additional research evidence that belied such concerns as pre-textual. Specifically, it cited a February 2017 Department of Homeland Security (DHS) report characterizing citizenship an “unlikely indicator” of terrorism threats. The DHS report confirmed that very few persons from the enumerated countries had perpetrated, or attempted to carry out, terrorist activities since 2011. The evidence suggested that the executive’s action did not have a secular national security purpose, as required by the *Lemon* test. Rather, the state attorneys general argued, the second order was inspired by anti-Muslim animus. As such, the second ban injured its institutions, economy, and state interest in preserving the separation between church and state. Further, it stigmatized Muslim refugees and immigrants as well as Muslim American citizens. The state asked the court to prevent the ban’s implementation during the course of litigation due to likely constitutional violations.

To counter, the Government argued that the revised ban did not facially discriminate for or against any particular religion. The Government emphasized that Congress and the Obama Administration had found that the enumerated countries "posed special risks of terrorism." It further argued that the Muslim ban could not have been religiously motivated because (a) the ban applied to everyone in those countries regardless of their religion, and (b) the affected countries only represent 9% of the world’s fifty Muslim majority nations. Stressing the revised order’s facially neutral language, it cautioned the court against a "judicial psychoanalysis of a drafter’s heart of hearts."

Ultimately, the federal district court agreed with the State’s assessment, granted injunctive relief, and rejected the Government’s arguments. It held that “specific historical context, contemporaneous public statements and specific sequence of

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events leading to its issuance would conclude that the Executive Order was issued with a purpose to disfavor a particular religion," thus resulting in a likely Establishment Clause violation. The court reasoned that the second ban’s seemingly neutral language did not shield Government action targeting religious conduct. By targeting the enumerated countries, in which 99% of population is Muslim, the court explained, the Government likewise targets Islam. The court rejected the Government’s argument that religious animus toward a group is only evidenced when targeting all members of that group. It also highlighted the dearth of evidence supporting the purported national security objective.

Applying the Lemon test, the court found the ban’s stated “secular purpose” – protecting national security – “at the very least, ‘secondary to a religious objective’ of temporarily suspending the entry of Muslims.” In finding that religious animus inspired the proclamation, the court emphasized context over the revised version’s facially neutral text. Significantly, the court clarified that the Trump Administration’s prior statements and conduct does not necessarily “forever taint any effort by it to address the security concerns of the nation” but that the revised ban is devoid of “genuine changes in constitutionally significant conditions.” In the event the context changes, the court explained, so may the legal evaluation.

The Government appealed to the Ninth Circuit Court of Appeals. On June 12th, the appellate court largely agreed with the lower federal court’s decision but relied on distinct legal analysis. Rather than assessing an Establishment Clause violation, the court found that President Trump exceeded the authority intended by Congress in the Immigration and Nationality Act (INA).

By way of background, the Constitution gives Congress the primary authority to establish U.S. immigration policy. Congress, in turn, delegated considerable power to the Executive but the president must exercise that authority within the INA’s statutory parameters. As in the original version, President Trump executed the second order pursuant to his power under the INA allowing him to exclude non-citizens outside the country with no ties to the U.S. Specifically, section 212 (f) provides in relevant part:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

The Ninth Circuit found that President Trump exceeded his authority by establishing visa procedures in violation of INA provisions prohibiting nationality-based discrimination. It declined to address the Establishment Clause claim and
upheld injunctive relief. In response, the Government appealed to the U.S. Supreme Court, which delivered a mixed response.

Specifically, on June 26th, the U.S. Supreme Court blocked the ban’s application only to foreign nationals or refugees who have “bona fide relationships” with persons or entities in the U.S. Subsequent litigation clarified that the ban did not apply to immigrants with certain familial relationships including parents, parents-in-law, spouses, fiancés, children, adult sons and daughters, sons- and daughters-in-law, siblings (half and whole relationships), step relationships, grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins. Notably, the Supreme Court criticized the lower courts for blocking the ban against foreign nationals who have no connection to the country. The Court reasoned that while the exclusion of the former group would burden American parties by inflicting “concrete hardships,” banning the latter group would not.

The Third Executive Order

On September 24, 2017, President Trump signed the third iteration of the original Muslim ban. Entitled, “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats,” the proclamation was more narrowly tailored than its predecessors. It explains that seven countries do not meet a “baseline for the kinds of information required from foreign governments” to facilitate official vetting of immigrants and refugees. Specifically, the criteria require data to assess identity, security and public-safety threats, and national security risks. According to the baseline criteria, sixteen countries were initially categorized as “inadequate” while thirty-one additional nations were found to be “at risk” of becoming “inadequate.” A subsequent “engagement” period allowing countries additional time to meet the baseline criteria yielded significant improvements, according to the proclamation. Ultimately, however, seven countries were still deemed “inadequate” and placed on the list.

Unlike in prior versions, the designated countries – Chad, Iran, Libya, North Korea, Syria, Venezuela and Yemen – do not consist exclusively of Muslim-majority nations. However, as to Venezuela, the ban only applies to high-level officials while few immigrants travel to the U.S. from North Korea. Notably, the list also includes Somalia even though the country met the baseline criteria while omitting Iraq, which did not. As with the first and second versions, foreign nationals from the Muslim majority countries are barred from traveling to the U.S. – but, this time, indefinitely. Similarly, this executive action inspired a wave of lawsuits claiming violations of constitutional and statutory guarantees. Representative, again, is State of Hawaii v. Trump.

On October 15th, the State of Hawaii challenged the third iteration of the original Muslim ban, presently described as a “travel ban,” in federal district court on similar
grounds and asked for another nationwide injunction as litigation proceeds. While the third ban includes eight countries, the state attorneys general challenged only the restrictions against the nationals of the six Muslim-majority countries.

The Government argued for judicial deference in favor of presidential supremacy in matters of national security and foreign policy. It explained that “the Executive must be permitted to act quickly and flexibly” in these areas. As such, the Government cautioned the court against “second-guess[ing]” the “Executive Branch’s national-security judgments.”

Despite the Government’s assertions, the federal district court was guided by the Ninth Circuit’s approach to the second Muslim ban. It held that the proclamation likely violated the INA’s statutory provisions because (a) it does not make sufficient findings justifying the exclusion; and (b) it discriminates on the basis of nationality in its issuance of visas.

First, the Court highlighted that in order to exercise authority under the INA, the president must find, and provide evidence demonstrating, that entry of a certain group of immigrants is “detrimental” to national interests. The order contains no such findings, the court reasoned. Since the president did not present sufficient findings justifying the exclusion of millions of men, women and children as detrimental to national interests, the court stated, he exceeded his authority as intended by Congress under the INA.

Second, the court found that the ban’s discriminatory treatment of immigrants on account of nationality violates the INA provision that requires, “no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.” Since it found likely statutory violations under the INA, the court did not reach the constitutional claim under the Establishment Clause, as in prior cases. The court granted the nation wide injunction for these reasons thus temporarily blocking the ban yet again.

The Government appealed to the Ninth Circuit, the same federal appellate court in San Francisco that had decided the previously discussed cases challenging the first and second orders. In the interim, on December 4th, the U.S. Supreme Court issued a surprising if not foreboding decision in Hawaii v. Trump allowing the third version of the originally conceived Muslim ban to take full effect nationwide during the pendency of the Government’s appeal.

Subsequently, on December 22nd, the Ninth Circuit issued its decision. The appellate court agreed with the federal district court’s ruling but only upheld the injunction as it applied to foreign nationals who have a bona fide relationship with a person or entity in the United States. In other words, as litigation ensued, those without bona fide relationships – like so many immigrants and refugees who have arrived at American shores since her founding – were effectively banned.
In granting injunctive relief, the Ninth Circuit clarified that the Executive branch must demonstrate a threat to public interest, welfare, safety or security in order to use its authority to exclude foreign nationals pursuant to the INA. Otherwise, the court explained, Congress has already enacted legislation, regulations and programs to prevent terrorists and those who pose a public safety risk from entering the country. As such, and while alluding to the Separation of Powers Doctrine, it found that the Executive Branch:

"...has overridden Congress's legislative responses to the same concerns the Proclamation aims to address. The Executive cannot without assent of Congress supplant its statutory scheme with one stroke of a presidential pen."

The court further highlighted the INA’s legislative history to find that the president is barred from broad authority to suspend immigration in the instant fashion outside exigencies, such as war or a national emergency, making it impossible for Congress to act in a timely manner. Further, the court cited the Executive branch’s historical practice of using such proclamations to find that President Trump’s action “is unprecedented in its scope, purpose, and breadth.”

The Ninth Circuit also reiterated the rationale set forth by the lower district court. It made clear that “National security is not a ‘talismanic incantation’ that, once invoked, can support any and all exercise of executive power...” In sum, in granting another nationwide injunction temporarily blocking the ban’s application, the Ninth Circuit held:

"The Proclamation, like its predecessor executive orders, relies on the premise that the Immigration and Nationality Act ("INA") ... vests the President with broad powers to regulate the entry of aliens. Those powers, however, are not without limit. We conclude that the President’s issuance of the Proclamation once again exceeds the scope of his delegated authority. The Government’s interpretation ... not only upends the carefully crafted immigration scheme Congress has enacted through the INA, but it deviates from the text of the statute, legislative history, and prior executive practice as well. Further, the President did not satisfy the critical prerequisite Congress attached to his suspension authority: before blocking entry, he must first make a legally sufficient finding that the entry of the specified individuals would be ‘detrimental to the interests of the United States.’ The Proclamation once again conflicts with the INA’s prohibition on nationality-
based discrimination in the issuance of immigrant visas. Lastly, the President is without a separate source of constitutional authority to issue the Proclamation."

The Government has appealed the decision. Ultimately, the U.S. Supreme Court will determine the fate of the executive proclamation.

**WHY DOES THIS MATTER?**

One may draw myriad lessons from the sequence of executive, legislative and judicial events described above. First, the dialectic process that continues to unfold since President Trump’s inauguration highlights the significance of civic engagement. According to research evidence, Muslim Americans are the least likely faith group to vote in elections citing apathy. Still, Executive orders and Congressional inaction in the instant context highlights the significant role that each elected official plays in the U.S. political system. Only by casting a ballot or running for office can Muslim Americans, and members of other marginalized minority communities, influence that process.

Second, the Separation of Powers Doctrine is situated in a larger political context. One’s political affiliation or persuasion may serve as a lens through which a spectrum of issues – such as, religious freedom, national security and immigration – are viewed. Arguably, the constitutional structure envisioned by the Framers of the Constitution is undermined when a particular party dominates all three government branches. Consider, for instance, the Ninth Circuit’s judicial role repeatedly checking executive abuses of power in *Washington v. Trump* and *Hawaii v. Trump*. The appellate court has long enjoyed a reputation for its liberal persuasion. But, in March of 2017, the court’s Republican-appointed judges broke ranks with the three-judge-panel that decided those cases. They issued an unsolicited filing supporting President Trump’s ban: "Whatever we, as individuals, may feel about the President or the Executive Order, the President's decision was well within the powers of the presidency." In the era of Trump, and the Republican party’s political dominance, the Muslim ban reveals a Separation of Powers Doctrine fundamentally at risk together with the civil liberties of the individuals it was designed to protect.

Lastly, U.S. institutions play a complicated role in the lived experiences of Muslim Americans. In the era of Trump, the Muslim ban evidences the executive’s religious animus toward Islam and Muslims. But, responses from the legislative and judicial branches are mixed. On the one hand, Republican Congressmen rhetorically condemned the Muslim ban but blocked a vote on their Democratic colleagues’ legislative initiatives to defund and repeal it. Similarly, the Ninth Circuit has repeatedly blocked key portions of the ban from taking effect but the U.S. Supreme Court ultimately allowed for its implementation during the course of litigation. Are the executive, legislative and judicial branches sources of protection for or
discrimination against Muslims in the era of Trump? Perhaps the most accurate answer is: It's complicated.

1 323 U.S. 214 (1944).


4 See A Dozen Times Trump Equated the Travel Ban with a Muslim Ban, CATO Institute, Aug. 14, 2017, https://www.cato.org/blog/dozen-times-trump-equated-travel-ban-muslim-ban


10 See id.

11 See id.


16 See id.

17 See id.


22 U.S. Const. amend. I.


24 See id.

25 Id. at 878-89.


28 U.S. Const. amend. I.

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30 See id. at 246-47.


35 In a January 27, 2017 interview with Christian Broadcasting Network, President Trump said that persecuted Christians would be given priority under the first Executive Order.
MEMORANDUM FOR: Field Office Directors  
Special Agents in Charge  
Chief Counsel  

FROM: John Morton  
Director  

SUBJECT: Enforcement Actions at or Focused on Sensitive Locations  

Purpose  
This memorandum sets forth Immigration and Customs Enforcement (ICE) policy regarding certain enforcement actions by ICE officers and agents at or focused on sensitive locations. This policy is designed to ensure that these enforcement actions do not occur at nor are focused on sensitive locations such as schools and churches unless (a) exigent circumstances exist, (b) other law enforcement actions have led officers to a sensitive location as described in the “Exceptions to the General Rule” section of this policy memorandum, or (c) prior approval is obtained. This policy supersedes all prior agency policy on this subject.  

Definitions  
The enforcement actions covered by this policy are (1) arrests; (2) interviews; (3) searches; and (4) for purposes of immigration enforcement only, surveillance. Actions not covered by this policy include actions such as obtaining records, documents and similar materials from officials or employees, providing notice to officials or employees, serving subpoenas, engaging in Student and Exchange Visitor Program (SEVP) compliance and certification visits, or participating in official functions or community meetings.  
The sensitive locations covered by this policy include, but are not limited to, the following:

1 Memorandum from Julie L. Myers, Assistant Secretary, U.S. Immigration and Customs Enforcement, “Field Guidance on Enforcement Actions or Investigative Activities At or Near Sensitive Community Locations” 10029.1 (July 3, 2008); Memorandum from Marcy M. Forman, Director, Office of Investigations, “Enforcement Actions at Schools” (December 26, 2007); Memorandum from James A. Puleo, Immigration and Naturalization Service (INS) Acting Associate Commissioner, “Enforcement Activities at Schools, Places of Worship, or at funerals or other religious ceremonies” HQ 807-P (May 17, 1993). This policy does not supersede the requirements regarding arrests at sensitive locations put forth in the Violence Against Women Act, see Memorandum from John P. Torres, Director Office of Detention and Removal Operations and Marcy M. Forman, Director, Office of Investigations, “Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2003” (January 22, 2007).
Enforcement Actions at or Focused on Sensitive Locations

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- schools (including pre-schools, primary schools, secondary schools, post-secondary schools up to and including colleges and universities, and other institutions of learning such as vocational or trade schools);
- hospitals;
- churches, synagogues, mosques or other institutions of worship, such as buildings rented for the purpose of religious services;
- the site of a funeral, wedding, or other public religious ceremony; and
- a site during the occurrence of a public demonstration, such as a march, rally or parade.

This is not an exclusive list, and ICE officers and agents shall consult with their supervisors if the location of a planned enforcement operation could reasonably be viewed as being at or near a sensitive location. Supervisors should take extra care when assessing whether a planned enforcement action could reasonably be viewed as causing significant disruption to the normal operations of the sensitive location. ICE employees should also exercise caution. For example, particular care should be exercised with any organization assisting children, pregnant women, victims of crime or abuse, or individuals with significant mental or physical disabilities.

Agency Policy

General Rule

Any planned enforcement action at or focused on a sensitive location covered by this policy must have prior approval of one of the following officials: the Assistant Director of Operations, Homeland Security Investigations (HSI); the Executive Associate Director (EAD) of HSI; the Assistant Director for Field Operations, Enforcement and Removal Operations (ERO); or the EAD of ERO. This includes planned enforcement actions at or focused on a sensitive location which is part of a joint case led by another law enforcement agency. ICE will give special consideration to requests for enforcement actions at or near sensitive locations if the only known address of a target is at or near a sensitive location (e.g., a target’s only known address is next to a church or across the street from a school).

Exceptions to the General Rule

This policy is meant to ensure that ICE officers and agents exercise sound judgment when enforcing federal law at or focused on sensitive locations and make substantial efforts to avoid unnecessarily alarming local communities. The policy is not intended to categorically prohibit lawful enforcement operations when there is an immediate need for enforcement action as outlined below. ICE officers and agents may carry out an enforcement action covered by this policy without prior approval from headquarters when one of the following exigent circumstances exists:

- the enforcement action involves a national security or terrorism matter;
- there is an imminent risk of death, violence, or physical harm to any person or property;
Enforcement Actions at or Focused on Sensitive Locations

- the enforcement action involves the immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individual(s) that present an imminent danger to public safety; or
- there is an imminent risk of destruction of evidence material to an ongoing criminal case.

When proceeding with an enforcement action under these extraordinary circumstances, officers and agents must conduct themselves as discretely as possible, consistent with officer and public safety, and make every effort to limit the time at or focused on the sensitive location.

If, in the course of a planned or unplanned enforcement action that is not initiated at or focused on a sensitive location, ICE officers or agents are subsequently led to or near a sensitive location, barring an exigent need for an enforcement action, as provided above, such officers or agents must conduct themselves in a discrete manner, maintain surveillance if no threat to officer safety exists and immediately consult their supervisor prior to taking other enforcement action(s).

Dissemination

Each Field Office Director, Special Agent in Charge, and Chief Counsel shall ensure that the employees under his or her supervision receive a copy of this policy and adhere to its provisions.

Training

Each Field Office Director, Special Agent in Charge, and Chief Counsel shall ensure that the employees under his or her supervision are trained (both online and in-person/classroom) annually on enforcement actions at or focused on sensitive locations.

No Private Right of Action

Nothing in this memorandum is intended to and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

This memorandum provides management guidance to ICE officers exercising discretionary law enforcement functions, and does not affect the statutory authority of ICE officers and agents, nor is it intended to condone violations of federal law at sensitive locations.
Enforcement and Removal Operations

FAQ on Sensitive Locations and Courthouse Arrests

These frequently asked questions address ICE's sensitive locations policy and courthouse arrests.

Sensitive Locations

Expand All  Collapse All

Does ICE's policy sensitive locations policy remain in effect?

Yes, ICE has previously issued and implemented a policy concerning enforcement actions at sensitive locations. These FAQs are intended to clarify what types of locations are covered by those policies.

How does ICE decide where a specific enforcement action will take place? What factors are considered when making such a decision?

Determinations regarding the manner and location of arrests are made on a case-by-case basis, taking into consideration all aspects of the situation, including the target's criminal history, safety considerations, the viability of the leads on the individual's whereabouts, and the nature of the prospective arrest location.

What does ICE policy require for enforcement actions to be carried out at sensitive locations?

Pursuant to ICE policy, enforcement actions are not to occur at or be focused on sensitive locations such as schools, places of worship, unless:

1. Existent circumstances exist;
2. Other law enforcement actions have led officers to a sensitive location, or
3. Prior approval is obtained from a designated supervisory official.

The policy is intended to guide ICE officers and agents' actions when enforcing federal law at or focused on sensitive locations, to enhance the public understanding and trust, and to ensure that people seeking to participate in activities or utilize services provided at any sensitive location are free to do so, without fear or hesitation.

What does ICE mean by the term "sensitive location"?

Locations treated as sensitive locations under ICE policy would include, but are not be limited to:

- Schools, such as known and licensed daycares, preschools and other early learning programs; primary schools; secondary schools; post-secondary schools up to and including colleges and universities; as well as scholastic or education-related activities or events, and school bus stops that are marked and/or known to the officer; during periods when school children are present at the stop;
- Medical treatment and health care facilities, such as hospitals, doctors' offices, accredited health clinics, and emergent or urgent care facilities;
- Places of worship, such as churches, synagogues, mosques, and temples;
- Religious or civil ceremonies or observances, such as funerals and weddings; and
- During a public demonstration, such as a march, rally, or parade.
What is considered an enforcement action as it relates to sensitive locations?

Enforcement actions covered by this policy are apprehensions, arrests, interviews, or searches, and for purposes of immigration enforcement only, surveillance. Actions not covered by this policy include activities such as obtaining records, documents, and similar materials from officials or employees, providing notice to officials or employees, serving subpoenas, engaging in Student and Exchange Visitor Program (SEVP) compliance and certification visits, guarding or securing detainees, or participating in official functions or community meetings.

Are sensitive locations located along the international border also protected?

The sensitive locations policy does not apply to operations that are conducted within the immediate vicinity of the international border, including the functional equivalent of the border. However, when situations arise that call for enforcement actions at or near a sensitive location within the immediate vicinity of the international border, including its functional equivalent, agents and officers are expected to exercise sound judgment and common sense while taking appropriate action, consistent with the goals of this policy.

Examples of operations within the immediate vicinity of the border are, but are not limited to, searches at points of entry, activities undertaken where there is reasonable certainty that an individual just crossed the border, circumstances where ICE has maintained surveillance of a subject since crossing the border, and circumstances where ICE is operating in a location that is geographically further from the border but separated from the border by rugged and remote terrain.

Will enforcement actions ever occur at sensitive locations?

Enforcement actions may occur at sensitive locations in limited circumstances, but will generally be avoided. ICE officers and agents may conduct an enforcement action at a sensitive location if there are exigent circumstances, if other law enforcement actions have led officers to a sensitive location, or with prior approval from an appropriate supervisory official.

When may an enforcement action be carried out at a sensitive location without prior approval?

ICE officers and agents may carry out an enforcement action at a sensitive location without prior approval from a supervisor in exigent circumstances related to national security, terrorism, or public safety, or where there is an imminent risk of destruction of evidence material to an ongoing criminal case. When proceeding with an enforcement action under exigent circumstances, officers and agents must conduct themselves as discreetly as possible, consistent with officer and public safety, and make every effort to limit the time at or focused on the sensitive location.

Are court houses considered a sensitive location and covered by the sensitive locations policy?

No. ICE does not view courthouses as a sensitive location.

Where should I report an ICE enforcement action that I believe may be inconsistent with these policies?

There are a number of locations where an individual may lodge a complaint about a particular ICE enforcement action that may have taken place in violation of the sensitive locations policy. You may find information about these locations, and information about how to file a complaint, on the DHS or ICE websites. You may contact ICE Enforcement and Removal Operations (ERO) through the Detention Reporting and Information Line at (888) 351-4024 or through the ERO information email address at ERO.INFO@ice.dhs.gov, also available at https://www.ice.gov/webform/ero-contact-form. The Civil Liberties Division of the ICE Office of Diversity and Civil Rights may be contacted at (202) 732-0092 or ICE.Civil.Liberities@ice.dhs.gov.
<table>
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<th>Answer</th>
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<td>Will all aliens be subject to arrest inside courthouses?</td>
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<td>Is there any place in a courthouse where enforcement will not occur?</td>
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<td>Is it legal to arrest suspected immigration violators at a courthouse?</td>
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<td>Are there other advantages to arresting criminals and fugitives at a courthouse?</td>
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Last Reviewed/Updated: 01/31/2018
Executive Order: Enhancing Public Safety in the Interior of the United States

Issued on: January 25, 2017

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA) (8 U.S.C. 1101 et seq.), and in order to ensure the public safety of the American people in communities across the United States as well as to ensure that our Nation’s immigration laws are faithfully executed, I hereby declare the policy of the executive branch to be, and order, as follows:

Section 1. Purpose. Interior enforcement of our Nation’s immigration laws is critically important to the national security and public safety of the United States. Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety. This is particularly so for aliens who engage in criminal conduct in the United States.

Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic.

Thousands of removable aliens have been released into communities across the country, solely because their home countries refuse to accept their repatriation. Many of these aliens are criminals who have served time in our Federal, State, and local jails. The presence of such individuals in the United States, and the practices of foreign nations that refuse the repatriation of their nationals, are contrary to the national interest.

Although Federal immigration law provides a framework for Federal-State partnerships in enforcing our immigration laws to ensure the removal of aliens who have no right to be in the United States, the Federal Government has failed to discharge this basic sovereign responsibility. We cannot faithfully execute the immigration laws of the United States if we exempt classes or categories of removable aliens from potential enforcement. The purpose of this order is to direct executive departments and agencies to employ all lawful means to enforce the immigration laws of the United States.

Sec. 2. Policy. It is the policy of the executive branch to:

(a) Ensure the faithful execution of the immigration laws of the United States, including the INA, against all removable aliens, consistent with Article II, Section 3 of the United States Constitution and section 3331 of title 5, United States Code;

(b) Make use of all available systems and resources to ensure the efficient and faithful execution of the immigration laws of the United States;

(c) Ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law;

(d) Ensure that aliens ordered removed from the United States are promptly removed, and

(e) Support victims, and the families of victims, of crimes committed by removable aliens.

Sec. 3. Definitions. The terms of this order, where applicable, shall have the meaning provided by section 1101 of title 8, United States Code.

Sec. 4. Enforcement of the Immigration Laws on the Interior of the United States. In furtherance of the policy described in section 2 of this order, I hereby direct agencies to employ all lawful means to ensure the faithful execution of the immigration laws of the United States against all removable aliens.

Sec. 5. Enforcement Priorities. In executing faithfully the immigration laws of the United States, the Secretary of Homeland Security (Secretary) shall prioritize for removal those aliens described by the Congress in sections 237(a)(1) and (a)(2), and (a)(4)(A), 235, and 237(a)(2) and (a)(4) of the INA (8 U.S.C. 1123(a)(2), (a)(3), and (a)(4)(A)), 1225, and 1227(a)(3) and (4)), as well as removable aliens who:

(a) Have been convicted of any criminal offense;

(b) Have been charged with any criminal offense where such charge has not been resolved.
Executive Order: Enhancing Public Safety in the Interior of the United States

(a) Have committed acts that constitute a chargeable criminal offense;

(b) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;

(c) Have abused any program related to receipt of public benefits;

(d) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or

(e) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

Sec. 6. Civil Fines and Penalties. As soon as practicable, and not to exceed one year after the date of this order, the Secretary shall issue guidance and promulgate regulations, where required by law, to ensure the assessment and collection of all fines and penalties that the Secretary is authorized under the law to assess and collect from aliens unlawfully present in the United States and from those who facilitate their presence in the United States.

Sec. 7. Additional Enforcement and Removal Officers. The Secretary, through the Director of U.S. Immigration and Customs Enforcement, shall, to the extent permitted by law and subject to the availability of appropriated funds, hire a reasonable number of immigration officers, who shall be trained and be authorized to perform the law enforcement functions described in section 287 of the INA (8 U.S.C. 1357).

Sec. 8. Federal-State Agreements. It is in the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law.

(a) In furtherance of this policy, the Secretary shall immediately take appropriate action to engage with the Governors of the States, as well as local officials, for the purpose of preparing to enter into agreements under section 287(g) of the INA (8 U.S.C. 1357(g)).

(b) To the extent permitted by law and with the consent of State or local officials, as appropriate, the Secretary shall take appropriate action, through agreements under section 287(g) of the INA, or otherwise, to authorize State and local law enforcement officials, as the Secretary determines, to take appropriate action, to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and supervision of the Secretary. Such authorization shall be in addition to, rather than in place of, Federal performance of these duties.

(c) To the extent permitted by law, the Secretary may structure each agreement under section 287(g) of the INA in a manner that provides the most effective model for enforcing Federal immigration laws for that jurisdiction.

Sec. 9. Sanctuary Jurisdictions. It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or any political subdivision of a State, shall comply with 8 U.S.C. 1373.

(a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.

(b) To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall utilize the Declined Deporter Outcome Report or its equivalent and, on a weekly basis, make public a comprehensive list of criminal actions committed by aliens in any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.

(c) The Director of the Office of Management and Budget is directed to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction.

Sec. 10. Review of Prior Immigration Actions and Policies. The Secretary shall immediately take appropriate action to terminate the Priority Enforcement Program (PEP) described in the memorandum issued by the Secretary on November 20, 2014, and to reinstitute the immigration program known as "Secure Communities" referenced in that memorandum.

Sec. 11. Department of Justice Prosecutions of Immigration Violators. The Attorney General and the Secretary shall work together to develop and implement a program that ensures that adequate resources are devoted to the prosecution of criminal immigration offenses in the United States, and to develop cooperative strategies to reduce violent crime and the reach of transnational criminal organizations into the United States.

Sec. 12. Recalcitrant Countries. The Secretary of Homeland Security and the Secretary of State shall cooperate to effectively implement the sanctions provided by section 243(d) of the INA (8 U.S.C. 1353(d)). To appropriate the Secretary of State shall, to the maximum extent permitted by law, ensure that diplomatic efforts and negotiations with foreign states include as a condition precedent the acceptance by those foreign states of their nationals who are subject to removal from the United States.

Sec. 13. Office for Victims of Crimes Committed by Removable Aliens. The Secretary shall direct the Director of U.S. Immigration and Customs Enforcement to take all appropriate and lawful action to establish within the U.S. Immigration and Customs Enforcement an office to protect the rights of victims of crimes committed by removable aliens and the family members of such victims. This office shall provide quarterly reports studying the effects of the victimizations by criminal aliens present in the United States.

Sec. 14. Privacy Act. Agencies shall, to the extent consistent with applicable law, ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information.

Sec. 15. Excluding. Except as otherwise provided in this order, the Secretary and the Attorney General shall each submit to the President a report on the progress of the directives contained in this order within 90 days of the date of this order and again within 180 days of the date of this order.

Sec. 16. Transparency. To promote the transparency and situational awareness of criminal aliens in the United States, the Secretary and the Attorney General are hereby directed to collect relevant data and provide quarterly reports on the following:

(a) The immigration status of all aliens incarcerated under the supervision of the Federal Bureau of Prisons;

(b) The immigration status of all aliens incarcerated under the supervision of the United States Marshal's Service; and

(c) The immigration status of all convicted aliens incarcerated in State prisons and local detention centers throughout the United States.

Sec. 17. Personnel Actions. The Office of Personnel Management shall take appropriate and lawful action to facilitate hiring personnel to implement this order.

Sec. 18. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:
   (i) the authority granted by law to an executive department or agency, or the head thereof, or
   (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,

The White House
Executive Order: Border Security and Immigration Enforcement Improvements

Issued on: January 25, 2017

Executive Orders

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) (INA), the Secure Fence Act of 2006 (Public Law 109-367) (Secure Fence Act), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208 Div. C) (IIRIRA), and in order to ensure the safety and territorial integrity of the United States as well as to ensure that the Nation’s immigration laws are faithfully executed, I hereby order as follows:

Section 1. Purpose. Border security is critically important to the national security of the United States. Aliens who illegally enter the United States without inspection or admission present a significant threat to national security and public safety. Such aliens have not been identified or inspected by Federal immigration officers to determine their admissibility to the United States. The recent surge of illegal immigration at the southern border with Mexico has placed a significant strain on Federal resources and overwhelmed agencies charged with border security and immigration enforcement, as well as the local communities into which many of the aliens are placed.

Transnational criminal organizations operate sophisticated drug- and human-trafficking networks and smuggling operations on both sides of the southern border, contributing to a significant increase in violent crime and United States deaths from dangerous drugs. Among those who illegally enter are those who seek to harm Americans through acts of terror or criminal conduct. Continued illegal immigration presents a clear and present danger to the interests of the United States.

Federal immigration law both imposes the responsibility and provides the means for the Federal Government, in cooperation with State and local Governments, to secure the Nation’s southern border. Although Federal immigration law provides a robust framework for Federal-State partnerships in enforcing immigration laws – and the Congress has authorized and provided appropriations to secure our borders – the Federal Government has failed to discharge this basic sovereign responsibility. The purpose of this order is to direct executive departments and agencies (agencies) to deploy all lawful means to secure the Nation’s southern border, to prevent further illegal immigration into the United States, and to apprehend illegal aliens swiftly, consistently, and humanely.

Sec. 2. Policy. It is the policy of the executive branch to:

(a) secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism;

(b) detain individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law, pending further proceedings regarding those violations;

(c) expedite determinations of apprehended individuals’ claims of eligibility to remain in the United States;

(d) remove promptly those individuals whose legal claims to remain in the United States have been lawfully rejected, after any appropriate civil or criminal sanctions have been imposed;

(e) cooperate fully with States and local law enforcement in enacting Federal-State partnerships to enforce Federal immigration priorities, as well as State monitoring and detention programs that are consistent with Federal law and do not undermine Federal immigration priorities.

Sec. 3. Definitions. (a) “Asylum officer” has the meaning given in section 333(h)(1)(B) of the INA (8 U.S.C. 1231(b)(4))

(b) “Southern border” shall mean the contiguous land border between the United States and Mexico, including all points of entry.

(c) “Border States” shall mean the States of the United States immediately adjacent to the contiguous land border between the United States and Mexico.

(d) Except as otherwise noted, “the Secretary” shall refer to the Secretary of Homeland Security.

Executive Order: Border Security and Immigration Enforcement Improvements

(c) "Wall" shall mean a contiguous, physical wall or other similar security, contiguous, and impassable physical barrier.

(f) "Executive department" shall have the meaning given in section 101 of title 5, United States Code.

(g) "Regulations" shall mean any and all Federal rules, regulations, and directives lawfully promulgated by agencies.

(h) "Operational control" shall mean the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.

Sec. 4. Physical Security of the Southern Border of the United States. The Secretary shall immediately take the following steps to obtain complete operational control, as determined by the Secretary, of the southern border:

(a) In accordance with existing law, including the Secure Fence Act and U.S.C.A, take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border, using appropriate materials and technology to most effectively achieve complete operational control of the southern border;

(b) Identify and, to the extent permitted by law, allocate all sources of Federal funds for the planning, designing, and constructing of a physical wall along the southern border;

(c) Project and develop long-term funding requirements for the wall, including preparing Congressional budget requests for the current and upcoming fiscal years; and

(d) Produce a comprehensive study of the security of the southern border, to be completed within 180 days of this order, that shall include the current state of southern border security, all geophysical and topographical aspects of the southern border, the availability of Federal and State resources necessary to achieve complete operational control of the southern border, and a strategy to obtain and maintain complete operational control of the southern border.

Sec. 5. Detention Facilities. (a) The Secretary shall take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico.

(b) The Secretary shall take all appropriate action and allocate all legally available resources to immediately assign immigration judges to immigration detention facilities for the purpose of accepting asylum referrals and conducting credible fear determinations pursuant to section 235(b)(1) of the INA (8 U.S.C. 1225(b)(1)) and applicable regulations and reasonable fear determinations pursuant to applicable regulations.

(c) The Attorney General shall take all appropriate action and allocate all legally available resources to immediately assign immigration judges to immigration detention facilities operated or controlled by the Secretary, or operated or controlled pursuant to contract by the Secretary, for the purpose of conducting proceedings authorized under title 8, chapter 12, subchapter 31, United States Code.

Sec. 6. Determination of Illegal Entry. The Secretary shall immediately take all appropriate actions to ensure the detention of aliens apprehended for violations of immigration law pending the outcome of their removal proceedings or their removal from the country to the extent permitted by law. The Secretary shall issue new policy guidance to all Department of Homeland Security personnel regarding the appropriate and consistent use of lawful detention authority under the INA, including the termination of the practice commonly known as "catch and release," whereby aliens are routinely released in the United States shortly after their apprehension for violations of immigration law.

Sec. 7. Return to Territory. The Secretary shall take all appropriate action, consistent with the requirements of section 1232 of title 8, United States Code, to ensure that aliens described in section 235(b)(2)(C) of the INA (8 U.S.C. 1225(b)(2)(C)) are returned to the territory from which they came pending a formal removal proceeding.

Sec. 8. Additional Border Patrol Agents. Subject to available appropriations, the Secretary, through the Commissioner of U.S. Customs and Border Protection, shall take all appropriate action to hire 5,000 additional Border Patrol agents, and all appropriate action to ensure that such agents enter on duty and are assigned to duty stations as soon as is practicable.

Sec. 9. Foreign Aid Reporting Requirements. The head of each executive department and agency shall identify and quantify all sources of direct and indirect Federal aid or assistance to the Government of Mexico on an annual basis over the past five years, including all bilateral and multilateral development aid, economic assistance, humanitarian aid, and military aid. Within 30 days of the date of this order, the head of each executive department and agency shall submit this information to the Secretary of State. Within 60 days of the date of this order, the Secretary shall submit to the President a consolidated report reflecting the levels of such aid and assistance that has been provided annually, over the past five years.

Sec. 10. Federal State Agreements. It is the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law.

(a) In furtherance of this policy, the Secretary shall immediately take appropriate action to engage with the Governors of the States, as well as local officials, for the purpose of preparing to enter into agreements under section 287(g) of the INA (8 U.S.C. 1357(g)).

(b) To the extent permitted by law, and with the consent of State and local officials, as appropriate, the Secretary shall take appropriate action, through agreements under section 287(g) of the INA, or otherwise, to authorize State and local law enforcement officials, as the Secretary determines are qualified and appropriate, to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and supervision of the Secretary. Such authorization shall be in addition to, rather than in place of, Federal performance of these duties.

(c) To the extent permitted by law, the Secretary may structure each agreement under section 287(g) of the INA in the manner that provides the most effective model for enforcing Federal immigration laws and obtaining operational control over the border for that jurisdiction.

Sec. 11. Parole, Asylum, and Removal. It is the policy of the executive branch to end the abuse of parole and asylum provisions currently used to prevent the lawful removal of removable aliens.

(a) The Secretary shall immediately take all appropriate action to ensure that the parole and asylum provisions of Federal immigration law are not illegally exploited to prevent the removal of otherwise removable aliens.

(b) The Secretary shall take all appropriate action, including by promulgating any appropriate regulations, to ensure that asylum referrals and credible fear determinations pursuant to section 235(b)(1) of the INA (8 U.S.C. 1225(b)(1)) and 8 CFR 208.30, and reasonable fear determinations pursuant to 8 CFR 208.31, are conducted in a manner consistent with the plain language of these provisions.

(c) Pursuant to section 235(b)(1)(A)(ii)(I) of the INA, the Secretary shall take appropriate action to apply, at his sole and unreviewable discretion, the provisions of section 235(b)(1)(A)(ii)(I) and (C) of the INA to the aliens designated under section 235(b)(1)(A)(ii)(I).

(d) The Secretary shall take appropriate action to ensure that parole authority under section 212(d)(5) of the INA (8 U.S.C. 1182(d)(5)) is exercised only on a case-by-case basis in accordance with the plain language of the statute, and in all circumstances only when an individual demonstrates urgent humanitarian reasons or a significant public benefit derived from such parole.