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A Legal Sanctuary: How the Religious Freedom Restoration Act Could Protect Sanctuary Churches

ABSTRACT. The last three decades have witnessed tectonic shifts in the doctrine and political valence of laws protecting religious exercise. In this Note, I analyze how this change has created the potential for sanctuary churches to receive greater legal protections today than during the 1980s sanctuary movement. This case study illustrates significant shifts in religious accommodation doctrine and helps to illuminate the transsubstantive nature of religious exercise protections. By drawing attention to sanctuary claims, this Note also helps to disrupt the existing partisan divide over religious freedom by reminding progressives of the potential value of RFRA claims for marginalized individuals, while highlighting to conservatives the importance of placing limits on religious accommodation claims. My hope is that this will motivate a return to an earlier consensus around accommodation as a means to protect systemically vulnerable groups and individuals in our society.

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INTRODUCTION

On the morning of June 20, 2017, Nury Chavarria faced a heart-wrenching choice.¹ A victim of violence in her country of origin, Ms. Chavarria had fled Guatemala to the United States in 1993.² While she lacked an affirmative legal status that would permit her to remain in the country, Chavarria had not been an enforcement priority for Immigration and Customs Enforcement (ICE). She had no criminal record and was the mother of four U.S. citizen children, the oldest of whom suffered from cerebral palsy.³ Since 2011, she had faithfully attended her regular check-ins with ICE.⁴ After living in the country for twenty-four years, she had been told that her time had run out and that she should return to the ICE office within a month with a plane ticket.⁵ Instead of turning herself in on the morning of her scheduled deportation, she went to the Iglesia de Dios Pentecostal, a small, predominantly Latinx congregation in New Haven.⁶ The pastor of the church, Hector Otero, faced a choice of his own: turn Ms. Chavarria away at the door or let her in and risk retaliation from the federal government against his small church. By later that day, community members and faith leaders had begun to rally around the Iglesia de Dios Pentecostal, where Nury Chavarria was in sanctuary.⁷

The deeply personal decisions taken by Pastor Otero and Nury Chavarria took place against a complex backdrop of intersecting laws regulating immigration and protecting religious freedom. When Chavarria arrived at the church

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1. Jeff Cohen, *Norwalk Woman Ordered Deported Seeks Sanctuary in New Haven Church*, WNPR (July 20, 2017), <http://wnpr.org/post/norwalk-woman-ordered-deported-seeks-sanctuary-new-haven-church> [<https://perma.cc/FZ48-WU4J>].
 2. Sarah Jorgensen & Lauren del Valle, *Mom Taking Refuge in Church Gets Stay on Deportation*, CNN (July 26, 2017, 10:01 PM), <http://www.cnn.com/2017/07/26/us/ct-deportation-church-refugee-granted-stay> [<https://perma.cc/SY22-L32M>].
 3. *Id.*
 4. *Id.* Previously, where individuals were a low priority for removal, ICE could simply require them to check in at regular intervals. The Trump administration has broadly expanded the categories of enforcement priorities, resulting in arrests during these check-ins. See Joel Rose, *Once Routine, ICE Check-Ins Now Fill Immigrants in U.S. Illegally with Anxiety*, NPR (Apr. 18, 2017, 4:45 AM), <https://www.npr.org/2017/04/18/524365639/once-routine-ice-check-ins-now-fill-immigrants-in-u-s-illegally-with-anxiety> [<https://perma.cc/9GHZ-7GUL>].
 5. Sandra Gomez-Aceves, *Journey to Freedom Continues for Mother Facing Deportation*, HARTFORD COURANT (July 27, 2017, 6:22 AM), <http://www.courant.com/news/connecticut/hc-new-haven-nury-chavarria-20170726-story.html> [<https://perma.cc/X2P3-3MFE>].
 6. Jorgensen & del Valle, *supra* note 2.
 7. Cohen, *supra* note 1; Christopher Peak, *Fleeing ICE, Immigrant Moves into Church*, NEW HAVEN IND. (July 21, 2017, 2:03 PM), https://www.newhavenindependent.org/index.php/archives/entry/ICE_sanctuary_church [<https://perma.cc/VNV7-WLP8>].

doors seeking sanctuary, did federal antiharboring laws require Pastor Otero to close the door on her – or were his actions shielded under federal protections for religious exercise? And once Ms. Chavarria was in sanctuary, were there any legal limitations on ICE’s authority to come into the church to arrest and deport her? The last time these questions were litigated in federal court was during the sanctuary movement of the 1980s. Back then, the Courts of Appeals for the Fifth and Ninth Circuits held that providing sanctuary to undocumented immigrants was a felony; religion was no defense. The academic literature on sanctuary has generally accepted this conclusion. Yet the answer today may be quite different. Unbeknownst to the individuals in this story, their early morning decisions occurred at a time when religious freedom was coming to enjoy steadily increasing legal protection, thanks in a large part to the efforts of conservative Christian activists and lawyers.

This Note offers a novel analysis of how sanctuary claims would fare today under the Supreme Court’s recent interpretations of the Religious Freedom Restoration Act (RFRA). I argue that under both the doctrine and values of RFRA, churches like the Iglesia de Dios Pentecostal can lawfully provide some degree of sanctuary. In addition to analyzing this doctrinal claim, this Note also examines a broader shift that has occurred in the movement for religious freedom and the associated scholarly literature. Throughout much of the twentieth century, religious exceptions to laws of general applicability tended to find support among progressives and opposition from conservatives. Yet over the past decade and a half, the political allegiances have flipped. Today, conservative groups seek to expand the scope of RFRA through cases such as *Burwell v. Hobby Lobby*⁸ and *Zubik v. Burwell*,⁹ while progressives have mostly argued for more limited protection.

Yet these battle lines are far from inevitable. As they have historically, expanded religious freedom protections can serve to further goals that progressives consider important, providing meaningful safeguards for minority faiths and subordinate groups, as well as for those who assist them out of religious obligation. Perhaps counterintuitively, focusing on politically charged RFRA claims made by the left, such as sanctuary, could help to *defuse* partisan debates over religious freedom and produce a more stable equilibrium between the values underlying religious accommodation and society’s need to enforce laws of general applicability. By forcing conservatives and progressives to confront these questions of religious freedom from the opposite perspective, reconciliation and compromise can become more attainable. What might this look like? Bipartisan consensus around the need to protect disadvantaged groups from the greater

8. 134 S. Ct. 2751 (2014).

9. 136 S. Ct. 1557 (2016).

political influence of mainstream faiths was a core impetus behind RFRA's design and passage in 1993. Interpreting RFRA in light of this special solicitude for the needs of disadvantaged groups will help balance the need for accommodations with the protection of other essential values such as effective governance, LGBT rights, and access to reproductive health care.

Part I describes the history of the sanctuary movement and its current form today. Part II tracks the evolution and current state of religious freedom protections under RFRA. Part III analyzes two types of sanctuary issues under current RFRA doctrine: (1) whether sanctuary churches should receive an exception from federal laws prohibiting various forms of assistance to undocumented individuals; and (2) whether RFRA would place limits on ICE's ability to raid or surveil places of worship. Finally, Part IV examines the substantive-equality rationale and concerns about subordinate groups underlying RFRA's effects-based protections, as well as the perils of overaccommodation. This Part further argues that sanctuary claims could help restore a preexisting equilibrium to religious accommodation law by interpreting the doctrine in light of the commitment to substantive-equality that produced the initial consensus around RFRA. That is, if courts were to analyze various open questions in RFRA doctrine with an eye to the particular harms that arise from the unequal treatment of disadvantaged groups, this could help to restore the law's original consensus and avoid the divisiveness produced by recent claims brought by politically influential, mainstream faith groups.

I. SANCTUARY MOVEMENT PAST AND PRESENT

The last time that sanctuary congregations received national attention was the mid-1980s. As deadly violence raged in El Salvador and Guatemala, faith groups in the Southwest and across the country began providing shelter to refugees and helping them travel from place to place.¹⁰ In response, the federal government used informants to infiltrate churches, leading to the charging and conviction of sanctuary-movement members under felony antiharboring laws.¹¹ Nonetheless, the legal advocacy that emerged out of this sanctuary movement produced significantly stronger protections for refugees.¹² The legal legacy of the 1980s sanctuary movement is therefore a mixed one. While the religious defenses brought by sanctuary members in their criminal trials were unavailing, the movement's charity and acts of moral witness helped to reframe America's understanding of its legal obligation to refugees from Central America. And at

10. See *infra* Section I.A.

11. See *infra* Section I.B.

12. See *infra* Section I.C.

the human level, the sanctuary movement helped provide basic shelter, transport, and care for thousands.

A. *The Movement*

The sanctuary movement of the 1980s can only be understood in the context of the brutal violence taking place in El Salvador and Guatemala – and the U.S. government’s systematic failure to provide refuge to those fleeing that violence. Here, I provide an abridged account.

By 1980, El Salvador was in profound crisis.¹³ In October 1979, junior officers in the military overthrew the government, promising political and land reform.¹⁴ In response, the military high command, supported by large property owners, conducted a coup from within, consolidating power through brutal violence.¹⁵ Far-right death squads and military forces began a campaign of terror.¹⁶ Dissidents and activists associated with the Catholic Church and with labor unions were murdered, as were government officials and reformers within the military.¹⁷ On March 24, 1980, the widely respected Archbishop Óscar Arnulfo Romero was murdered while performing Mass.¹⁸ Romero had run a popular radio program, through which he delivered sermons denouncing the nation’s violence and human rights abuses to listeners across the country.¹⁹ In what would be his final homily, Archbishop Romero called upon soldiers to disobey orders to kill innocent civilians.²⁰ When 50,000 marchers took to the streets for Romero’s funeral, they were sprayed with pesticide by crop-dusting planes before gunfire and bombs killed dozens.²¹ Across the country, the violence intensified. In 1980 alone, between 16,000 and 20,000 El Salvadorans were killed

13. WILLIAM STANLEY, *THE PROTECTION RACKET STATE: ELITE POLITICS, MILITARY EXTORTION AND CIVIL WAR IN EL SALVADOR 178-83* (1996); Comm’n on the Truth for El Salvador, *From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador*, UNITED NATIONS 20-22 (Apr. 1, 1993), <https://www.usip.org/sites/default/files/file/ElSalvador-Report.pdf> [<https://perma.cc/4NRU-DPU2>] [hereinafter *From Madness to Hope*].

14. STANLEY, *supra* note 13, at 133-34.

15. *Id.* at 134-37, 180, 189-90.

16. *Id.* at 205-06.

17. *Id.* at 134-37, 178-80, 189-90, 205-06.

18. *Id.* at 178.

19. *Id.* at 196-97.

20. *Id.* at 197.

21. *Id.* at 198.

in the conflict.²² In some rural areas, entire communities were massacred.²³ A report by a United Nations commission would later publish testimony estimating that almost eighty-five percent of the acts of political violence during the conflict were attributable “to agents of the [El Salvadoran government], paramilitary groups allied with them, and the death squads.”²⁴

In Guatemala, a right-wing government exerted similar violence against those who advocated for political and economic reform, as well as those who advocated for the rights of indigenous Guatemalans.²⁵ The U.S. government bore some responsibility for the violence in both countries. As part of its wider Cold War strategy, the United States provided support for the ruling government of El Salvador during the civil war.²⁶ The CIA had been responsible for the coup that had initially placed a Guatemalan military junta in power.²⁷ And for a time, the United States was also the sole military contractor to the Guatemalan junta,²⁸ which was responsible for ninety-three percent of the registered violence in the country during the conflict and committed acts described by the United Nations as genocide.²⁹

The United States not only played a role in the conflicts, but also closed its doors to the refugees fleeing those conflicts – even when the refugees had legitimate asylum claims. Congress and President Carter had recently enacted the Refugee Act of 1980,³⁰ which established “uniform and nondiscriminatory standards for the admission of refugees.”³¹ The government would later admit it was thus under a legal obligation to consider refugees’ claims without refer-

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22. ELISABETH JEAN WOOD, *INSURGENT COLLECTIVE ACTION AND CIVIL WAR IN EL SALVADOR* 9 fig.1.3 (2003).
23. STANLEY, *supra* note 13, at 210.
24. *From Madness to Hope*, *supra* note 13, at 36.
25. Carolyn Patty Blum, *The Settlement of American Baptist Churches v. Thornburgh: Landmark Victory for Central American Asylum-Seekers*, 3 INT’L J. REFUGEE L. 347, 349 (1991); *Guatemala: Memory of Silence*, COMMISSION FOR HIST. CLARIFICATION 18-24, 29-33 (Feb. 1999), https://www.aaas.org/sites/default/files/migrate/uploads/mos_en.pdf [<https://perma.cc/BK2N-7JCX>].
26. STANLEY, *supra* note 13, at 182, 226.
27. TIM WEINER, *LEGACY OF ASHES: THE HISTORY OF THE CIA 93-103* (2008); *see also Guatemala: Memory of Silence*, *supra* note 25, at 19 (noting the role of the 1954 coup in closing political spaces and producing repression).
28. Douglas L. Colbert, *The Motion in Limine: Trial Without Jury: A Government’s Weapon Against the Sanctuary Movement*, 15 HOFSTRA L. REV. 5, 28 (1986).
29. *Guatemala: Memory of Silence*, *supra* note 25, at 33-34, 39-41.
30. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.
31. *Am. Baptist Churches in the U.S.A. v. Meese*, 712 F. Supp. 756, 767 (N.D. Cal. 1989).

ence to the relationship between the governments of their countries of origin and the United States.³² Despite this, the U.S. asylum process systemically disfavored refugees fleeing the violence in El Salvador and Guatemala. Indeed, while the sanctuary movement is remembered mostly as a kind of underground railroad, the first incarnation of the movement made sincere efforts to play by the rules. As Central American refugees poured in, church groups organized to help them navigate the official asylum process.³³ An interdenominational coalition of Southwestern churchgoers raised funds and mortgaged their homes to pay the bail of refugees and to provide them with lawyers for their asylum hearings.³⁴ Yet the agency adjudicating these claims, the Immigration and Naturalization Service (INS), was decidedly unsympathetic: none of the 1,400 people who filed for political asylum through these Arizona legal projects between 1980 and 1982 were granted it.³⁵ Between 1982 and 1985, the grant rate for El Salvadorans was 2.6%, and for Guatemalans less than 0.5%.³⁶ In contrast, refugees from countries whose governments were politically opposed to the United States had exponentially higher rates of asylum approvals.³⁷ In 1983, for example, the approval rate for Iranian applicants was 72%, for Afghans 62%, and for Poles just over 30%.³⁸

Refugees who presented themselves to the U.S. government and failed to receive asylum faced deportation and a serious threat of violence upon return to their countries of origin. The road connecting the airport where deported Salvadorans would arrive to the capital of San Salvador was called the “road to death” due to the frequent display of dead bodies along the roadside.³⁹ In 1980, this road was the site of the infamous kidnapping, rape, and murder of three American Maryknoll nuns and a lay worker.⁴⁰

It was in response to these twin crises – the horrific violence in Central America and the U.S. government’s failure to follow its legal obligations – that some churches announced they would begin providing physical sanctuary. The term “sanctuary” encapsulated different things for different members of the move-

32. *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991).

33. Colbert, *supra* note 28, at 33-34.

34. *Id.* at 33.

35. *Id.* at 34.

36. *Id.*

37. Blum, *supra* note 25, at 350 n.18 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-GGD-87-33BR, ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN – FEW DENIED APPLICANTS DEPORTED (1987)).

38. Colbert, *supra* note 28, at 35.

39. *Id.* at 31 n.132.

40. *Id.*

ment, but the aspect I focus on here can be specifically defined: the network of places of worship of multiple denominations that provided shelter, aid, and transportation for refugees from El Salvador and Guatemala.⁴¹ At the height of the movement in 1987, an interfaith network of congregations operated around 400 public sanctuaries.⁴² A small subset of sanctuary activists also traveled to Central America to escort refugees up from Mexico.⁴³

B. Arrests, Prosecutions, and Convictions

From the federal government's perspective, the sanctuary movement threatened its ability to control the borders and determine refugee policy. It also brought public attention to the violence in Central America, highlighting the United States' complicity at home and abroad. The federal government was not long in retaliating. As early as 1983, the INS began an undercover investigation dubbed "Operation Sojourner" to disrupt the sanctuary movement.⁴⁴ The INS recruited two former "coyotes"—persons who smuggled others for profit—to pose as refugees and infiltrate sanctuary churches.⁴⁵ These former coyotes and other undercover INS agents recorded conversations, "tracked people who attended services during which Sanctuary was discussed," and wiretapped Bible study meetings.⁴⁶ Ultimately, the INS arrested over sixty sanctuary workers, primarily charging them under 8 U.S.C. § 1324 for offenses related to harboring and transporting undocumented individuals, such as helping them to enter the country.⁴⁷

The sanctuary providers raised a number of defenses, including the argument that religious sanctuary was protected by the Free Exercise Clause.⁴⁸ The

41. Karen E. Lavarney, Note, *The Closing of the Golden Door: Necessity, International Law and Freedom of Religion Are Failing as Defenses for Sanctuary Movement Workers*, 25 U. RICH. L. REV. 367, 369 (1991).

42. GRACE YUKICH, ONE FAMILY UNDER GOD: IMMIGRATION POLITICS AND PROGRESSIVE RELIGION IN AMERICA 77 (2013).

43. Lavarney, *supra* note 41, at 369.

44. Emily Breslin, Note, *The Road to Liability Is Paved with Humanitarian Intentions: Criminal Liability for Housing Undocumented People Under 8 U.S.C. S 1324(a)(1)(a)(III)*, 11 RUTGERS J.L. & RELIGION 214, 218-19 (2009).

45. Sung-Hee Suh, *Sanctuary: A Story of American Conscience and Law in Collision*, 24 HARV. C.R.-C.L. L. REV. 602, 605 (1989) (book review).

46. *Id.* at 605 n.5.

47. See *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989); Lavarney, *supra* note 41, at 372.

48. Breslin, *supra* note 44, at 222.

Fifth and Ninth Circuits rejected these arguments in a string of cases — *Merkt I*,⁴⁹ *Elder*,⁵⁰ *Merkt II*,⁵¹ and *Aguilar*.⁵² These cases arose at a time when constitutional protections for religious freedom were in flux. Conscious of the uncertainty in the law and perhaps out of an abundance of caution, courts purported to apply a test akin to heightened scrutiny.⁵³ Under this test, courts would analyze whether prosecution for providing sanctuary placed a substantial burden on the defendants' religious exercise, and if so, whether that burden was imposed in furtherance of a compelling government interest via the least restrictive means available.⁵⁴ Although RFRA formally incorporates this same standard today, the test as applied is quite different from what it was in the 1980s.

In *Merkt*, the Fifth Circuit rejected the claim that prosecution under anti-harboring laws placed a “substantial burden” on the religious exercise of sanctuary workers. First, the court noted that § 1324 was a law of general application that “contain[ed] no explicit prohibition on religious practices or beliefs.”⁵⁵ Second, the court relied on testimony by other members of Catholic and Methodist clergy, who stated “that devout Christian belief [does not] mandate[] participation in the ‘sanctuary movement.’”⁵⁶ In essence, the court applied a standard under which the First Amendment only protects individuals from laws that specifically target *obligatory* religious conduct, as understood by certain clergy members of the same faith. This was incorrect even then, as the Supreme Court had found in *Thomas v. Review Board of the Indiana Employment Security Division*⁵⁷ that differing interpretations between members of the same faith did not justify rejecting a free exercise claim.⁵⁸ The Fifth Circuit also expressed skepticism that sanctuary workers were acting out of religious motives, as opposed to political ones. Rather than gathering funds for Salvadorans or “perform[ing] their ministry in El Salvador,” sanctuary workers “chose confrontational, illegal means to

49. *United States v. Merkt*, 764 F.2d 266 (5th Cir. 1985).

50. *United States v. Elder*, 601 F. Supp. 1574 (S.D. Tex. 1985).

51. *United States v. Merkt*, 794 F.2d 950 (5th Cir. 1986).

52. *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989).

53. *See, e.g., Aguilar*, 883 F.2d at 694; *Merkt II*, 794 F.2d at 955.

54. *Merkt II*, 794 F.2d at 956.

55. *Id.*

56. *Id.*

57. 450 U.S. 707 (1981).

58. *Id.* at 715 (“The Indiana court also appears to have given significant weight to the fact that another Jehovah’s Witness had no scruples about working on tank turrets Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences . . .”).

practice their religious views – the ‘burden’ was voluntarily assumed and not imposed on them by the government.”⁵⁹

The Fifth and Ninth Circuits went further than just assessing substantial burden, however, determining that the government had a compelling interest in the general and uniform application of immigration law. Controlling immigration was a “fundamental sovereign attribute” and decisions by the political branches regarding expulsion or exclusion were “largely immune from judicial control.”⁶⁰ The courts also rejected the defendants’ arguments that the government needed to show a compelling interest in the enforcement of each of the statutory subsections under which they had been convicted.⁶¹ The prohibitions set out in § 1324 were “but one facet of the comprehensive legal framework governing entry into the United States and admission to its citizenship.”⁶² The government had a compelling interest in the uniform and general application of this system, especially since criminal penalties were involved.⁶³

These courts were also suspicious that a “less restrictive” alternative was available. Allowing a free exercise exception to § 1324 would effectively open the floodgates, they argued. The defendants were members of four Christian denominations with an “incalculable” number of members who would “purportedly require their adherents to engage in sanctuary activity.”⁶⁴ The Ninth Circuit raised the specter of a slippery slope, positing that providing an exception for sanctuary would “result in no immigration policy at all.”⁶⁵

As a result, the courts conclusively rejected the activists’ free exercise defenses. The courts treated these outcomes as forgone conclusions. This is not surprising, given the retrenchment of religious freedom protections then underway. However, as I argue in Part III, an analogous case under RFRA would fare far better today.

59. *Merkt II*, 794 F.2d at 956.

60. *United States v. Aguilar*, 883 F.2d 662, 695 (9th Cir. 1989) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)); *Merkt II*, 794 F.2d at 955 (“Control of one’s borders and of the identity of one’s citizens is an essential feature of national sovereignty.”).

61. *Aguilar*, 883 F.2d at 695 (“[A]ppellants invite us to analyze their first amendment claim by focusing on smuggling, transporting, and harboring individually, requiring the government to demonstrate an overriding interest with respect to each. We decline this invitation.” (citation omitted)).

62. *Merkt II*, 794 F.2d at 955.

63. *Id.* at 956.

64. *Aguilar*, 883 F.2d at 696 (quoting *United States v. Elder*, 601 F. Supp 1574, 1579 (S.D. Tex. 1985)).

65. *Id.*

C. *Aftermath and Legacy*

While religious-sanctuary claims fared poorly in the courts, the sanctuary movement played an important role in drawing public attention to the plight of Salvadoran and Guatemalan refugees.⁶⁶ As part of a coalition of immigrants' rights activists, sanctuary churches undertook an energetic campaign of press, legislative advocacy, and litigation.

In 1991, religious organizations achieved a favorable settlement to litigation on behalf of a nationwide class of Guatemalan and Salvadoran refugees, challenging the refugee system as discriminatory and alleging violations of the First Amendment.⁶⁷ Although the First Amendment claims were largely dismissed on standing grounds,⁶⁸ the plaintiffs in *American Baptist Churches v. Thornburgh* negotiated an important settlement, in which the government agreed to the de novo adjudication of over 100,000 class members' applications.⁶⁹ In essence, this amounted to an implicit concession that many refugee applications had been unfairly adjudicated. While awaiting readjudication, class members were to receive work authorization, be protected from deportations, and, in most cases, be free from detention.⁷⁰

The INS also announced that it would promulgate new asylum regulations, creating a new corps of dedicated asylum officers to replace the "mere handful of harried examiners in district offices."⁷¹ This reform was significant, as the prior system had been criticized for a lack of training and guidance, as well as for "brusqueness, bias and ineptitude" among the examiners, which partly explains why bias and political pressure had been able to play such a large role in individual outcomes.⁷² Beyond the executive branch, Congress passed a new law creat-

66. YUKICH, *supra* note 42, at 76 (noting the prevalence of media interest from the outset); Rose Cuison Villazor, *What Is a "Sanctuary"?*, 61 SMU L. REV. 133, 141-42 (2008).

67. Eli Coffino, *A Long Road to Residency: The Legal History of Salvadoran and Guatemalan Immigration to the United States with a Focus on NACARA*, 14 CARDOZO J. INT'L & COMP. L. 177, 186-88 (2006).

68. *Am. Baptist Churches in the U.S.A. v. Meese*, 712 F. Supp. 756, 762 (N.D. Cal. 1989).

69. *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991); Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1211.

70. Blum, *supra* note 25, at 354.

71. David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1376 (1990).

72. Peter C. Diamond, *Temporary Protected Status Under the Immigration Act of 1990*, 28 WILLAMETTE L. REV. 857, 872 (1992).

ing Temporary Protected Status (TPS)⁷³ for Salvadoran nationals physically present in the United States as of 1990. The law established criteria and procedures for these individuals to receive work authorization and a stay of deportation until conditions in El Salvador improved.⁷⁴ By October 31, 1991, 186,030 Salvadorans had applied for TPS.⁷⁵ Peace negotiations in El Salvador began and were finalized on January 16, 1992.⁷⁶ As the violence quieted down and the U.S. government began considering asylum applications in a nondiscriminatory manner, the physical sanctuary movement dissipated.⁷⁷

The sanctuary movement was an incomplete response to a human catastrophe of massive proportions. The movement was composed of a wide variety of actors with different motivations—some political, some religious, many both.⁷⁸ It nonetheless helped to galvanize public opinion in the United States and, in the meantime, provided shelter and safe haven for thousands of refugees who had been unlawfully denied asylum status.⁷⁹ If the movement had waited for the legal vindication of its claims of bias in the asylum system, hundreds of refugees would have been deported, some to their deaths. Despite the government's emphasis on the rule of law, the sanctuary movement and resulting litigation exposed the INS's systematic noncompliance with the legal rules protecting asylum seekers. The sanctuary movement arose as an emergency response to this failure. Once the government agreed to fulfill its legal obligations in a nondiscriminatory manner, the movement receded.

D. Sanctuary Today

Interest in a new sanctuary movement arose again in the mid-2000s in response to the failures of comprehensive immigration reform efforts and the deportations of the parents of U.S.-citizen children. Commentators tend to date the resurgence of interest in sanctuary to August 2006, when Elvira Arellano

73. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified at 8 U.S.C. § 1254a (2018)).

74. Diamond, *supra* note 72, at 858, 865-71.

75. *Id.* at 871.

76. WOOD, *supra* note 22, at 29.

77. Villazor, *supra* note 66, at 142 n.58.

78. See, e.g., Suh, *supra* note 45, at 606-07 (discussing the tensions within the movement and the different motivations of different actors).

79. See Villazor, *supra* note 66, at 141-42.

took sanctuary in Adalberto United Methodist Church in Chicago.⁸⁰ Ms. Arellano had previously been granted a stay of deportation after a private relief bill was introduced in the Senate in 2003, citing the medical needs of her seven-year-old son Saul, a citizen.⁸¹ Although similar bills had been introduced in the House, they had not yet been acted upon when Ms. Arellano received an order to report from the Department of Homeland Security.⁸² The church's pastor justified helping Ms. Arellano on religious grounds: "There's a tradition in this country as well as around the world that governments respect the dignity and the faith of the church and don't trample on that . . . I'm much more afraid of God than I am of Homeland Security."⁸³ In May of 2007, representatives from a variety of different religious traditions met and declared the founding of the New Sanctuary Movement (NSM).⁸⁴

This resurgent movement mirrors the sanctuary movement of the 1980s in certain ways.⁸⁵ In both cases, places of worship opened their doors to individuals whose immigration status exposed them to danger, both here and potentially in their countries of origin. While the Central American civil wars of the 1980s and 1990s are over, gang-related violence in certain Central American countries—particularly Honduras and El Salvador—has reached levels comparable to those found in war zones.⁸⁶ It is true that the new movement is not a response to political bias in asylum law. But it has emerged from the recognition of a different kind of legal injustice, an immigration policy in which Congress passes laws far stricter than it intends to enforce, relegating over ten million individuals to a

80. See YUKICH, *supra* note 42, at 82; Villazor, *supra* note 66, at 144.

81. See Gretchen Ruethling, *Chicago Woman's Stand Stirs Immigration Debate*, N.Y. TIMES (Aug. 19, 2006), <http://www.nytimes.com/2006/08/19/us/19immigrant.html> [<https://perma.cc/9XUP-UP2H>].

82. *Id.*

83. *Id.*

84. See Villazor, *supra* note 66, at 144; Kara L. Wild, *The New Sanctuary Movement: When Moral Mission Means Breaking the Law, and the Consequences for Churches and Illegal Immigrants*, 50 SANTA CLARA L. REV. 981, 995-96 (2010).

85. See YUKICH, *supra* note 42, at 85-88; Wild, *supra* note 84, at 996-97.

86. See Kuang Keng Kuek Ser, *Map: Here Are Countries with the World's Highest Murder Rates*, PUB. RADIO INT'L (June 27, 2016, 2:45 EDT), <https://www.pri.org/stories/2016-06-27/map-here-are-countries-worlds-highest-murder-rates> [<https://perma.cc/8QNP-WNZZ>]. For example, these homicide rates approach levels of violence during some of the years of El Salvador's civil war. See WOOD, *supra* note 22, at 8-9 (displaying that for several years, the rates of war-related deaths were around 4,000 out of a total population of 5 million, or 80 per 100,000).

shadow existence.⁸⁷ The movement has often focused on keeping families together, particularly in cases where the children are U.S. citizens, for whom the consequences of separation can be devastating.⁸⁸

Another feature of the NSM is that congregations will usually make known that they are providing sanctuary. The movement argues this openness limits the churches' potential liability under the federal antiharboring statute.⁸⁹ Commentators are divided on the validity of this interpretation of the statute.⁹⁰ Sanctuary congregations, however, have not publicly argued that religious freedom could provide greater legal protection now than it did in the 1980s, and commentators have generally assumed that requests for religious exemptions would fare the same today as in previous times.⁹¹ News stories on sanctuary often say the same.⁹² Yet these past three decades have seen significant shifts in both the law and politics of claims by religious persons for exemptions from neutral laws of general applicability. This shift raises new possibilities for RFRA claims by the NSM or other congregations interested in sanctuary.

II. THE SHIFTING SANDS OF RELIGIOUS FREEDOM

The sanctuary cases of the 1980s arose during a period in which religious freedom jurisprudence was in flux, both in doctrine and application. The sanctuary decisions of the Fifth and Ninth Circuits reflected a particular conception

87. See *infra* note 249 and accompanying text.

88. See, e.g., Paola Benefo, *What It's Like to Have Your Parents Deported*, N.Y. TIMES (Feb. 27, 2017), <https://www.nytimes.com/2017/02/27/opinion/what-its-like-to-have-your-parents-deported.html> [<https://perma.cc/4B5N-48SZ>]; Villazor, *supra* note 66, at 145-46.

89. See Villazor, *supra* note 66, at 146-47.

90. See *id.* For those arguing this is a correct reading of § 1324, see Gregory A. Loken & Lisa R. Babino, *Harboring, Sanctuary and the Crime of Charity Under Federal Immigration Law*, 28 HARV. C.R.-C.L. L. REV. 119, 142 (1993); and Breslin, *supra* note 44, at 242. For commentators arguing that sanctuary violates § 1324, see Pamela Begaj, *An Analysis of Historical and Legal Sanctuary and a Cohesive Approach to the Current Movement*, 42 J. MARSHALL L. REV. 135, 160 (2008); and Wild, *supra* note 84, at 1006.

91. See, e.g., YUKICH, *supra* note 42, at 75 (“In the United States, sanctuary has no legal grounds: it never has.”); Victoria J. Avalon, *The Lazarus Effect: Could Florida’s Religious Freedom Restoration Act Resurrect Ecclesiastical Sanctuary?*, 30 STETSON L. REV. 663, 700 (2000); Begaj, *supra* note 90, at 160; Michael J. Davidson, *Sanctuary: A Modern Legal Anachronism*, 42 CAP. U. L. REV. 583, 615 (2014); Marie A. Failing, “No More Deaths”: *On Conscience, Civil Disobedience, and a New Role for Truth Commissions*, 75 UMKC L. REV. 401, 435 (2006).

92. See, e.g., Jason Hanna, *Can Churches Provide Legal Sanctuary to Undocumented Immigrants?*, CNN (Feb. 17, 2017, 10:27 AM), <https://www.cnn.com/2017/02/17/us/immigrants-sanctuary-churches-legality-trnd/index.html> [<https://perma.cc/Q4KH-SR79>].

of requests for religious exemptions. To reiterate the courts' views, they held that there should not be an exception made for individual religious exercise that interferes in an area of comprehensive, neutral government regulation, especially when that regulation is enforced by criminal sanctions. At the time these decisions came down, that view of religious freedom was one of several readings of the Supreme Court's First Amendment jurisprudence. It would soon become the one adopted by the Court in its landmark decision, *Employment Division v. Smith*.⁹³

To properly understand how a claim for a sanctuary exception to criminal harboring laws might fare in the present day, one must first understand the rapidly shifting legal and political context of religious exemptions. In this Part, I will discuss the evolution of free exercise doctrine, both constitutional and statutory, from the first sanctuary movement to the present day.

A. From Smith to RFRA in Three Short Years

During the 1980s, official doctrine held that neutral laws of general applicability would receive some form of heightened scrutiny when they imposed a burden on an individual's religious exercise. This standard came out of a series of decisions by progressive civil libertarians to protect the rights of unpopular or insular minorities, such as Jehovah's Witnesses,⁹⁴ the Amish,⁹⁵ and Seventh-day Adventists.⁹⁶ This doctrine dates back to the Supreme Court's famous reversal in its decisions on the right of Jehovah's Witness schoolchildren to refuse to salute the flag. In *Minersville School District v. Gobitis*, the Court denied them this right.⁹⁷ Yet just three years later, after witnessing the violent reprisals against Jehovah's Witnesses, the Court reversed itself in *West Virginia State Board of Education v. Barnette*.⁹⁸ Subsequent decisions articulated a test commonly referred to as the *Sherbert* test, after a case involving a Seventh-day Adventist.⁹⁹ Under

93. 494 U.S. 872 (1990).

94. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

95. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

96. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

97. 310 U.S. 586 (1940).

98. *Barnette*, 319 U.S. at 642 (overturning *Gobitis*, 310 U.S. 586); see SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION 8-16 (2000); Robert L. Tsai, *Reconsidering Gobitis: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363, 373 (2008).

99. *Sherbert*, 374 U.S. at 403.

the *Sherbert* test, neutral laws of general applicability should not burden individual free exercise unless they further a compelling state interest. In essence, religious persons should receive an accommodation when a law imposes an unnecessary disparate impact on their ability to practice their faiths.

Yet the Fifth and Ninth Circuits in the sanctuary cases correctly sensed the shifting winds. By the end of the 1980s, religious accommodation claims would suffer the same fate as several other progressive judicial expansions of rights. In 1986, the Court denied a Jewish military doctor's request to be allowed to wear a yarmulke at his job.¹⁰⁰ The very next year, the Court declined to apply *Sherbert* in the prison context to a claim brought by Muslim inmates.¹⁰¹ In 1988, the Court rejected a religious accommodation claim by Native Americans who sought protection of a forest that they had traditionally used for religious purposes.¹⁰² In each case, Justices Brennan, Blackmun, and Marshall dissented. Justice Brennan, joined by Justice Marshall, stated the objection succinctly: "[U]nder the guise of neutrality and evenhandedness, majority religions are favored over distinctive minority faiths."¹⁰³

Then, in 1990, the Court in *Smith* held that neutral laws of general applicability burdening religion should receive no more than rational-basis review – the lowest form of judicial scrutiny.¹⁰⁴ Addressing a claim raised by Native Americans who ceremonially used peyote, Justice Scalia, writing for the Court, quoted *Gobitis* approvingly: "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."¹⁰⁵ To allow such exemptions was "in effect to permit every citizen to become a law unto himself,"¹⁰⁶ which would be especially problematic in the area of criminal law.¹⁰⁷ This would be "anarchy."¹⁰⁸ On the one hand, Justice Scalia was careful to explain that just as classifications based on race are subject to "the most exacting scrutiny," "governmental classifications based on religion" should also be "strictly scrutinize[d]."¹⁰⁹ On the other hand, he wrote that just as "race-neutral

100. *Goldman v. Weinberger*, 475 U.S. 503, 509-10 (1986).

101. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987).

102. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447-53 (1988).

103. *Goldman*, 475 U.S. at 521 (Brennan, J., dissenting).

104. *Emp't Div. v. Smith*, 494 U.S. 872, 878 (1990).

105. *Id.* at 879 (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594 (1940)).

106. *Id.* (citation omitted).

107. *Id.* at 884.

108. *Id.* at 888.

109. *Id.* at 886 n.3.

laws that have the *effect* of disproportionately disadvantaging a particular racial group” do not trigger strict scrutiny,¹¹⁰ neither should an effects-based standard be used for religion.

While Justice Scalia acknowledged that “leaving accommodation to the political process [would] place at a relative disadvantage” less popular religions, this was an “unavoidable consequence of democratic government.”¹¹¹ Justice Blackmun, joined by Justices Brennan and Marshall in dissent, intoned that courts must not “turn a blind eye to the severe impact of a State’s restrictions on the adherents of a minority religion.”¹¹² Though there is no question that *Smith* represented a sea change in the letter of free exercise doctrine, its practical effect is more contested, as the *Sherbert* test had been “strict in theory but feeble in fact.”¹¹³ Nonetheless, at least in the lower courts, the success rate of free exercise claims diminished in *Smith*’s wake.¹¹⁴

The *Smith* Court’s position on what truly constituted discrimination was emblematic of a broader conservative assault on effects-based understandings of antidiscrimination.¹¹⁵ As Reva Siegel has documented, during the 1980s, “the newly articulated constitutional distinction between purpose and effects became a lightning rod” for conservative arguments over antidiscrimination, both in the courts and Congress.¹¹⁶ According to these arguments, judicially enforced, effects-based protections in the name of antidiscrimination posed a threat to democratic self-governance and raised the specter of special rights for minorities.¹¹⁷

110. *Id.* (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

111. *Id.* at 890.

112. *Id.* at 919 (Blackmun, J., dissenting).

113. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994) (footnote omitted); see also James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1413-22 (1992) (explaining that free exercise claims were often unsuccessful before *Smith*).

114. See Amy Adamczyk et al., *Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA*, 46 J. CHURCH & ST. 237, 246-55 (2004).

115. See Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 15-29 (2013) (describing conservative social, political, and legal mobilization against disparate impact); see also Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 855 (1992) (attributing *Smith* to a pattern of conservative Justices retrenching judicial constitutional protections).

116. Siegel, *supra* note 115, at 23.

117. *Id.* at 27-28.

This was part of a larger project to “shift debate over civil rights remedies from courts to politics.”¹¹⁸

Smith led to political backlash across the board – from newspapers to law reviews, from left to right, and from political and religious figures alike.¹¹⁹ Legislative efforts to restore the *Sherbert* test began immediately, championed by influential figures in both parties such as Senators Orrin Hatch and Ted Kennedy.¹²⁰ By 1993, Congress had passed the Religious Freedom Restoration Act with nearly full bipartisan support.¹²¹ The bill had been supported by a diverse array of groups from both the left and the right, ranging from Americans United for Separation of Church and State to the National Association of Evangelicals.¹²² Ironically, while the Supreme Court had warned that religious exemptions in our diverse society might produce divisiveness,¹²³ in the early 1990s at least, religious exemptions seemed to be something that almost everyone could agree on.¹²⁴

The only major political holdouts at the outset were the Catholic Church and other pro-life groups. They worried that RFRA would potentially *expand* women’s access to abortions. With President George H.W. Bush’s appointment of two new Justices to the Court, these groups thought they saw the end of *Roe v. Wade*¹²⁵ on the horizon. With *Roe* gone, laws would be passed to significantly limit access to abortions. Their concern about RFRA was that women, particu-

118. Reva Siegel, *The Constitutionalization of Disparate Impact—Court-Centered and Popular Pathways: A Comment on Owen Fiss’s Brennan Lecture*, 106 CALIF. L. REV. (forthcoming 2018) (manuscript at 116) (on file with author).

119. Ryan, *supra* note 113, at 1409 (documenting the backlash). See also *infra* Section IV.A for a longer discussion of the many critiques of *Smith* surrounding the passage of RFRA.

120. Ryan, *supra* note 113, at 1411 n.29.

121. *Actions Overview H.R.1308—103rd Congress (1993-1994)*, CONGRESS.GOV, <https://www.congress.gov/bill/103rd-congress/house-bill/1308/actions> [https://perma.cc/M5BJ-5ZEH]. The bill passed the House through a unanimous voice vote, passed the Senate with ninety-seven votes, and was signed into law by President Bill Clinton. The Senate amended the bill, which the House then agreed to without objection. *Id.*

122. Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210 n.9 (1994).

123. *Emp’t Div. v. Smith*, 494 U.S. 872, 888 (1990).

124. In significant part due to concerns about favoritism toward religion, some influential First Amendment scholars either supported *Smith*, see William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991), or opposed RFRA, see Eisgruber & Sager, *supra* note 113, at 1247-48.

125. 410 U.S. 113 (1973).

larly some Jewish women,¹²⁶ could bring claims under RFRA to access abortions.¹²⁷ This debate occupied dozens of pages of the legislative history and delayed the passage of the bill for years.¹²⁸ Only after *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹²⁹ and Clinton's election had dampened the hopes that *Roe* would soon be overturned did opposition to RFRA by pro-life groups diminish.¹³⁰

As a piece of legislation, RFRA is remarkable both for its brevity and its structure. The law is only three pages long.¹³¹ The text notes the importance of the "free exercise of religion as an unalienable right" and explains that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."¹³² The Court's decision in *Smith*, however, "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."¹³³ Congress found that the Court's pre-*Smith* jurisprudence had set forth a "workable test for striking sensible balances between religious liberty and competing prior governmental interests."¹³⁴ The statute therefore required that government action could substantially burden a person's sincere exercise of religion only if that burden was the least restrictive means of furthering a compelling state interest.¹³⁵ RFRA

126. Pro-life groups advocated creating a specific exception to RFRA for abortion claims, which provoked a cutting response from an Orthodox Jewish group, Agudath Israel of America. See *Religious Freedom Restoration Act of 1991: Hearings Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary on H.R. 2797*, 102d Cong. 417 (1992) [hereinafter *1992 House Subcommittee Hearings*] ("It is most ironic—to put it charitably—that a bill carrying the noble title 'Religious Freedom Act' would expressly exclude a tenet of the Jewish faith from legal consideration as an expression of free religious exercise.").

127. Ryan, *supra* note 113, at 1411 n.30.

128. Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 *FORDHAM L. REV.* 883, 896 (1994).

129. 505 U.S. 833 (1992).

130. Laycock, *supra* note 128, at 896; Ira C. Lupu, *The Failure of RFRA*, 20 *U. ARK. LITTLE ROCK L.J.* 575, 582-83 (1998). Mainstream faith groups had also worried that RFRA would be used to challenge government benefits to religious groups through Establishment Clause-style claims. This was resolved in large part by explicitly writing in Article III standing requirements, stating that granting government benefits would not violate RFRA and stating that the Establishment Clause was unaffected. H.R. REP. NO. 103-88, at 8-9 (1993).

131. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2018)).

132. 42 U.S.C. § 2000bb(a)(1)-(2).

133. *Id.* § 2000bb(a)(4).

134. *Id.* § 2000bb(a)(5).

135. *Id.* § 2000bb-1(b)(1)-(2).

therefore imposed heightened scrutiny on the government at every level—federal, state, and local.¹³⁶ As applied to the federal government, RFRA was justified as an exercise of Congress’s authority to supervise federal agencies and provide “rule[s] of interpretation for future federal legislation”; its application to the states was justified as an exercise of Congress’s enforcement power under Section 5 of the Fourteenth Amendment.¹³⁷

B. Back from the Grave: From Boerne to Hobby Lobby

RFRA did not have a smooth landing. A dispute over a zoning ordinance governing historic landmarks in the small town of Boerne, Texas led the Supreme Court to declare RFRA an invalid exercise of Congress’s Section 5 power.¹³⁸ The Court held that Congress’s power under Section 5 extended only to “remedial” or “preventative” measures targeting unconstitutional action.¹³⁹ Justice Kennedy, writing for the Court, declared that “RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning.”¹⁴⁰ RFRA’s “sweeping coverage” was “out of proportion to a supposed remedial or preventive object” and would create “intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.”¹⁴¹ While proof that a “state law disproportionately burdened a particular class of religious observers . . . might be evidence of an impermissible legislative motive,” Justice Kennedy wrote, citing *Washington v. Davis*, “RFRA’s substantial-burden test, however, is not even a discriminatory-effects or disparate-impact test.”¹⁴² RFRA, as applied to states, was therefore unconstitutional.¹⁴³ Since RFRA’s effect on the federal government was not part of

136. § 5, 107 Stat. at 1489 (“[T]he term ‘government’ includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State.”).

137. See Laycock & Thomas, *supra* note 122, at 211.

138. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

139. *Id.* at 524.

140. *Id.* at 532.

141. *Id.*

142. *Id.* at 535 (citing *Washington v. Davis*, 426 U.S. 229, 241 (1976)). This statement is subject to multiple interpretations, but likely reflected a specific vision of disparate impact, not as a remedy for structural inequality, but as a proxy for improper intent. See Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 95-96 (2000) (describing different readings of disparate impact protections).

143. *Boerne*, 521 U.S. at 536.

the holding in *Boerne*, its application to federal law survived. Nonetheless, RFRA claims appear to have enjoyed little success in federal courts during this period.¹⁴⁴ Thus, in 1998, one scholar declared RFRA “all but dead.”¹⁴⁵

Yet a renewed push for a legislative override was underway. Initial efforts to reenact RFRA’s broad protections under the Commerce or Spending Clause fell short.¹⁴⁶ This approach had faced not only the legal obstacle of *Boerne*, but also political headwinds. While a bipartisan coalition had supported a broad RFRA in 1993, by the end of the decade, civil rights groups were growing concerned about attempts to secure religious exceptions from state antidiscrimination laws.¹⁴⁷ Instead, in 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA)¹⁴⁸ with unanimous support in both houses.¹⁴⁹ The statute restored the RFRA test for areas where patterns of disparate impact, misuse of discretion, and pretextual justifications were well documented—the rights of incarcerated persons and zoning laws—the former of which involved a clearly subordinate group while the latter affected all faiths but disproportionately burdened minority ones.¹⁵⁰ In so doing, Congress had “narrowed the sweep of the legislation to those areas of law where the congressional record of religious discrimination and discretionary burden was the strongest.”¹⁵¹ This limited scope partly reflected the Supreme Court’s concerns in *Boerne* and partly reflected civil rights groups’ worries about overbroad protections.¹⁵² In a 2005

144. Lupu, *supra* note 130, at 591.

145. *Id.* at 575.

146. See 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, 333-34 (2003); Aaron Keesler, *Religious Land-Use and the Fourteenth Amendment’s Enforcement Clause: How the FMLA Paved the Way to the RLUIPA’s Constitutionality*, 3 AVE MARIA L. REV. 315, 335-36 (2005); 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, 943-44 (2001).

147. See Hamilton, *supra* note 146, at 334; Storzer & Picarello, *supra* note 146, at 943.

148. Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5 (2018)).

149. 146 CONG. REC. H7192 (daily ed. July 27, 2000) (noting no objections in the House of Representatives); 146 CONG. REC. S7779 (daily ed. July 27, 2000) (noting unanimous consent in the Senate).

150. See Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 780-81, 789 (1998).

151. Storzer & Picarello, *supra* note 146, at 943; see *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) (noting that prior to passing RLUIPA, “Congress documented, in hearings spanning three years, that ‘frivolous or arbitrary’ barriers impeded institutionalized persons’ religious exercise”).

152. See Storzer & Picarello, *supra* note 146, at 943.

case brought by prisoners of “nonmainstream” faiths, a unanimous Supreme Court upheld the constitutionality of RLUIPA.¹⁵³

Since then, the protections afforded by RFRA and RLUIPA have expanded through the case law, while the bipartisan consensus over religious exceptions has frayed through the culture-war debates. In 2006 in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Supreme Court unanimously affirmed a grant of a preliminary injunction against criminal prosecution for a small religious sect that used a hallucinogenic sacramental tea.¹⁵⁴ In *Holt v. Hobbs*,¹⁵⁵ a Muslim inmate challenged an Arkansas Department of Correction regulation that forbade him from growing a half-inch beard.¹⁵⁶ In 2015, the Court again ruled unanimously for the prisoner, though both Justices Ginsburg and Sotomayor concurred to comment on the limits of religious exemptions.¹⁵⁷ In explaining her position, Justice Ginsburg distinguished a recent case that, as much as anything else, helps to symbolize the political fissures within the area of religious exemptions: *Burwell v. Hobby Lobby Stores, Inc.*¹⁵⁸

In *Hobby Lobby*, closely held family companies sued the federal government for exceptions to regulations under the Affordable Care Act (ACA), which mandated that for-profit employers offer health plans that included contraceptives.¹⁵⁹ This case was at the cross-currents of fraught debates over reproductive justice, religious freedom, gender equality, corporate personhood, and the ACA itself. Over a vigorous dissent by the Court’s four liberals, Justice Alito’s majority opinion (joined by Justice Scalia, the author of *Smith*, and Justice Kennedy, the author of *Boerne*) held that for-profit corporations were protected by RFRA from having to offer such coverage.¹⁶⁰

In the wake of *Hobby Lobby*, conservative groups have continued proposing and supporting litigation across the country involving accommodations from laws designed to provide greater access to reproductive care or to protect LGBT individuals.¹⁶¹ These cases are controversial and conspicuous, and each has produced an avalanche of amicus briefs. The different sides in these briefs, penned

153. *Cutter*, 544 U.S. at 712.

154. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006).

155. 135 S. Ct. 853, 859 (2015).

156. *Id.*

157. *Id.* at 867 (Ginsburg, J., concurring); *id.* (Sotomayor, J., concurring).

158. 134 S. Ct. 2751 (2014).

159. *Id.* at 2759.

160. *Id.*

161. See, e.g., *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (challenging a requirement to cover contraceptives through health plans unless petitioners, mostly nonprofits, submitted a form to their

by former allies in the fight for religious exemptions, illustrate a growing divide between the left and right. Echoing Justices Ginsburg and Sotomayor's caution in their *Holt* concurrences, groups dedicated to a progressive vision of religious freedom are calling for limitations on the doctrine—especially in cases involving the interplay of antidiscrimination law and risks of third-party harms.¹⁶²

C. *Conclusion: The Current Landscape of Religious Freedom*

The recent history of religious accommodation doctrine is enough to give one whiplash. Today, religious exercise is afforded stronger legal protections than ever before. The shifting configurations of Supreme Court Justices in cases from *Smith* to *Boerne* to *Hobby Lobby* mirror a larger debate in which the modern conservative movement has come to embrace religious exemptions. Rhetoric has shifted dramatically; whereas earlier conservatives claimed a “moral majority” with a mandate to define the nation’s social mores, today they often speak in the register of an embattled minority, persecuted by an ascendant social liberalism.¹⁶³ This shift has been accompanied by growing concerns among progressives that federal and state religious freedom laws shield unequal or even discriminatory treatment of members of the LGBT community and women seeking access to reproductive care.

The political valence of such exceptions is now essentially bifurcated. There is a highly contested area where religious exceptions come into conflict with other antidiscrimination principles. As these claims have become caught up in culture war struggles over LGBT rights and access to reproductive care, the bipartisan consensus over accommodation has eroded. But space exists for agreement on religious protections for minority faiths or subordinate groups, characterized by past unanimous votes in Congress and the Supreme Court. Indeed, the unanimous decision in *Holt* came only one year after *Hobby Lobby*. In Part IV, I discuss how a sanctuary claim could help disrupt these current partisan battle lines. But before we get there, I assess how a hypothetical sanctuary claim would fare under today’s religious freedom doctrine.

insurer or the federal government stating an objection on religious grounds); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018) (seeking an exception from antidiscrimination protections to fire a transgender employee); *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015) (challenging a Washington state law requiring pharmacies to stock emergency contraception, regardless of religious objections).

162. See, e.g., NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* 67–70 (2017); Frederick Mark Gedicks & Rebecca G. Van Tassel, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 356 (2014); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2579–91 (2015).

163. NeJaime & Siegel, *supra* note 162, at 2553.

III. A LEGAL SANCTUARY

On the legal front, a sanctuary claim would fare much better today than in the 1980s. RFRA's test now consists of a front end and a back end. On the front end, the religious person bears the burden. That individual must demonstrate (1) a sincerely held religious belief that is (2) substantially burdened. On the back end, the government bears the burden. It must demonstrate that the burdening law serves (3) a compelling government interest that is (4) achieved through the least restrictive means available. While this test is presented as a restoration of the standard applied in the 1980s, several of its key elements have evolved to offer stronger protections to religious exercise. The result is that a sanctuary claim of the sort raised in the 1980s today would likely turn out quite differently. Indeed, the analysis presented in this Part illustrates how cases like *O Centro*, *Hobby Lobby*, and (to a lesser degree) *Holt* have considerably strengthened accommodation protections from the pre-*Smith* era.

In this Part, I examine how RFRA would interact with two legal questions central to sanctuary congregations: (A) whether RFRA would provide protection to sanctuary congregations from prosecution under federal laws criminalizing various forms of assistance to undocumented individuals, and (B) whether RFRA would place limits on ICE's ability to conduct raids or surveillance of immigrant congregations or sanctuary churches.

A. RFRA Protections for Sanctuary Congregations

Federal law makes it illegal to harbor, conceal, shield, or transport undocumented immigrants, or to assist or encourage them to enter or reside in the country unlawfully.¹⁶⁴ It was under these provisions that sanctuary movement members were successfully prosecuted in the 1980s. Today, however, many sanctuary congregations would be entitled to an exception from such laws under RFRA.

1. RFRA and Antiharboring Laws

Sanctuary workers in the 1980s were prosecuted primarily under subsections of 8 U.S.C. § 1324, which prohibit a variety of actions related to assisting noncitizens in entering or remaining in the country unlawfully. Today, this law remains essentially the same. Subsections (a)(1)(A)(i) to (a)(1)(A)(v) prohibit, in turn: (i) assisting a noncitizen in entering the country other than at a designated port of entry; (ii) transporting an illegally present noncitizen within the United States in furtherance of that presence; (iii) concealing, harboring, or shielding

¹⁶⁴ 8 U.S.C. § 1324(a)(1)(A)(i)-(v) (2018).

an illegally present noncitizen, or attempting to do so, within any place, including a building or means of transportation; (iv) encouraging or inducing a noncitizen to unlawfully come, enter, or reside in the United States; and (v) conspiracy to commit, and aiding or abetting, the preceding acts.¹⁶⁵

A sanctuary congregation that did not help bring people into the country would likely avoid liability under subsections (i) and (iv) for assisting in, or inducing, entry. A public sanctuary committed to honoring warrants would likely avoid liability under the provisions of subsection (iii) prohibiting concealing or shielding. However, potential liability under the other subsections would vary from circuit to circuit. Different circuits have given significantly different scopes of liability to subsections prohibiting the transporting, harboring, or encouraging of noncitizens to reside in the country. Several courts have read subsection (ii)'s "in furtherance of" language as applying only where there is a "direct and substantial relationship" between the transportation and the noncitizen's unauthorized presence, which excludes instances of "incidental" transportation, such as driving someone to work.¹⁶⁶ Some circuits, such as the Second, have found that, in order to constitute "harboring" under subsection (iii), an individual's actions "must be intended (1) substantially to facilitate an illegal alien's remaining in the United States, and (2) to prevent the alien's detection by immigration authorities."¹⁶⁷ This would appear to exclude providing public sanctuary, a position supported by some commentators and the New Sanctuary Movement itself.¹⁶⁸ Other circuits, however, have not read this subsection so narrowly.¹⁶⁹ Finally, at least one circuit, the Eleventh, has defined "encouraging to reside" under subsection (iv) in a troublingly broad manner that would appear to encompass

165. *Id.*

166. For circuits that have adopted this test, see *United States v. Khalil*, 857 F.3d 137, 140 (2d Cir. 2017); *United States v. Stonefish*, 402 F.3d 691, 695 (6th Cir. 2005); *United States v. Velasquez-Cruz*, 929 F.2d 420, 422-24 (8th Cir. 1991); and *United States v. Moreno*, 561 F.2d 1321, 1322-23 (9th Cir. 1977). However, the Tenth Circuit defines the act of furtherance broadly as meaning "help, advance, or promote." *United States v. Barajas-Chavez*, 162 F.3d 1285, 1288 (10th Cir. 1999).

167. *United States v. George*, 779 F.3d 113, 118 (2d Cir. 2015).

168. *Loken & Babino*, *supra* note 90, at 142; *Wild*, *supra* note 84, at 998.

169. See *United States v. Jimenez*, 391 F. App'x 818, 818 (11th Cir. 2010); *United States v. Balderas*, 91 F. App'x 354, 355 (5th Cir. 2004); *United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1071-72 (5th Cir. 1982). In one of the sanctuary cases, the Ninth Circuit adopted a similarly expansive reading of "harboring." *United States v. Aguilar*, 883 F.2d 662, 690 (9th Cir. 1989). However, more recent decisions in that circuit have cast doubt on the continuing validity of that interpretation. See, e.g., *United States v. You*, 382 F.3d 958, 962, 966 (9th Cir. 2004).

a vast range of potentially charitable conduct for undocumented individuals.¹⁷⁰ There are compelling arguments that none of these subsections should properly be applied to a congregation that publicly provides sanctuary. These arguments, however, did not prevail in the 1980s, nor are they consistent with some of the more punitive interpretations later courts have given to § 1324. Indeed, the Seventh Circuit recently noted that sanctuary churches would exemplify a violation of the prohibition on harboring an illegally present noncitizen.¹⁷¹

However, the prohibitions of § 1324 must now be read in light of RFRA. RFRA applies “to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.”¹⁷² Although there are different ways of characterizing RFRA’s interaction with the rest of the U.S. Code, the functional effect remains the same: it applies to all federal law unless specifically exempted.¹⁷³

Another reason that a RFRA claim would fare better today than free exercise claims did in the 1980s is that RFRA is a congressionally mandated “amendment” or “rule of interpretation.” In the sanctuary cases of the 1980s, courts cited the broad power of Congress and the executive over the field of immigration law to argue for narrow judicial review.¹⁷⁴ Under traditional plenary power doctrine, the level of scrutiny given to constitutional claims is reduced in the context of exclusion and sometimes expulsion of immigrants.¹⁷⁵ However, even if plenary

170. For narrower definitions, see *United States v. Borrero*, 771 F.3d 973, 979 (7th Cir. 2014); *United States v. Thum*, 749 F.3d 1143, 1144 (9th Cir. 2014); and *DelRio-Mocci v. Connolly Properties Inc.*, 672 F.3d 241, 249 (3d Cir. 2012). The Eleventh Circuit is an outlier in adopting a broad reading of “encouragement” that includes actions that merely “help” an undocumented individual reside in the United States. *United States v. Lopez*, 590 F.3d 1238, 1249-51 (11th Cir. 2009). The Fourth Circuit’s standard is unclear, but may be somewhere in between. See *United States v. Oloyede*, 982 F.2d 133, 137 (4th Cir. 1992).

171. See *United States v. Costello*, 666 F.3d 1040, 1047 (7th Cir. 2012).

172. 42 U.S.C. § 2000bb-3(a) (2018).

173. Compare *Rweyemamu v. Cote*, 520 F.3d 198, 202 (2d Cir. 2008) (describing RFRA as an amendment to the entire U.S. Code), with *Korte v. Sebelius*, 735 F.3d 654, 673 (7th Cir. 2013) (explaining that “RFRA is structured as a ‘sweeping “super-statute,” cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach” (quoting Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253 (1995))).

174. See *Aguilar*, 883 F.2d at 695 (remarking that the Supreme Court “has long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control” (internal quotation marks omitted) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953))).

175. See Adam B. Cox, *Immigration Law’s Organizing Principles*, 157 U. PA. L. REV. 341, 347-49 (2008).

power doctrine were to apply to a RFRA claim brought by a sanctuary congregation—which is itself debatable¹⁷⁶—it would not reduce the *legislatively* mandated level of scrutiny.

Plenary power doctrine is justified by a theory of judicial deference to Congress and, to a certain degree, to the executive.¹⁷⁷ Yet, because RFRA's heightened scrutiny is statutorily mandated, its least-restrictive-means test represents the judgment of Congress. As the Supreme Court noted, "RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test *set forth by Congress*."¹⁷⁸ Accordingly, courts have interpreted RFRA as applying a uniform level of scrutiny even in areas where courts traditionally defer to the other branches, such as controlled substances classification,¹⁷⁹ the armed forces,¹⁸⁰ and prisons.¹⁸¹

2. *Sincere Exercise by a Religious Person*

For RFRA's protections to apply, a religious person must be engaged in sincere religious exercise. Most bona fide sanctuary congregations would have little trouble fulfilling the "religious person" element of this standard, which includes religious nonprofits.¹⁸²

The standard for whether conduct qualifies as a religious exercise is expansive and includes conduct that is neither compelled by nor central to a person's faith.¹⁸³ Congregations providing sanctuary would certainly qualify. As one

176. In the immigration context, an equal protection claim brought on behalf of an alleged U.S. citizen does not receive reduced scrutiny. See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693-94 (2017).

177. See *Fiallo ex rel. Rodriguez v. Bell*, 430 U.S. 787, 792, 796 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 765-70 (1972) (describing Congress as having delegated plenary power to the executive).

178. *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006) (emphasis added).

179. *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236, 1254 (D.N.M. 2002), *aff'd*, 342 F.3d 1170 (10th Cir. 2003), *aff'd*, 389 F.3d 973 (10th Cir. 2004) (en banc), *aff'd sub nom. Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

180. See *United States v. Sterling*, 75 M.J. 407, 410, 414 (C.A.A.F. 2016).

181. See *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015).

182. See *O Centro*, 546 U.S. 418.

183. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014).

court recently noted, “the concept of acts of charity as an essential part of religious worship is a central tenet of all major religions.”¹⁸⁴ Scriptural support for a duty to help those in need can be found across various religious texts.¹⁸⁵ One district court in the 1980s found that a Roman Catholic who had helped transport and house refugees from El Salvador was exercising a religious belief.¹⁸⁶ More recently, in 2002, the Second Circuit faced a case involving a New York City church’s provision of “outdoor sanctuary” to homeless people.¹⁸⁷ The church, in an effort to help the homeless, provided them with access to its property as a form of shelter.¹⁸⁸ The City, alleging ongoing violations of a number of local codes,¹⁸⁹ sent in the NYPD to arrest and eject the homeless persons.¹⁹⁰ When the church sued under the Free Exercise Clause, the city argued “that al-

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184. *W. Presbyterian Church v. Bd. of Zoning Adjustment*, 862 F. Supp. 538, 544 (D.D.C. 1994).
185. See, e.g., *Deuteronomy* 10:18-19 (Jewish Publication Society Tanakh) (“For the LORD your God is God supreme and Lord supreme, the great, the mighty, and the awesome God, who shows no favor and takes no bribe, but upholds the cause of the fatherless and the widow, and befriends the stranger, providing him with food and clothing. – You too must befriend the stranger, for you were strangers in the land of Egypt.”); *Leviticus* 19:33-34 (Jewish Publication Society Tanakh) (“When a stranger resides with you in your land, you shall not wrong him. The stranger who resides with you shall be to you as one of your citizens; you shall love him as yourself, for you were strangers in the land of Egypt: I the LORD am your God.”); *Matthew* 25:37-40 (New International) (“Then the righteous will answer him, ‘Lord, when did we see you hungry and feed you, or thirsty and give you something to drink? When did we see you a stranger and invite you in, or needing clothes and clothe you? When did we see you sick or in prison and go to visit you?’ The King will reply, ‘Truly I tell you, whatever you did for one of the least of these brothers and sisters of mine, you did for me.’”); *Mosiah*, in THE BOOK OF MORMON 4:16 (“And also, ye yourselves will succor those that stand in need of your succor; ye will administer of your substance unto him that standeth in need; and ye will not suffer that the beggar putteth up his petition to you in vain, and turn him out to perish.”); THE QUR’AN 2:177 (Sahih International) (“[R]ighteousness is [in] one who believes in Allah, the Last Day, the angels, the Book, and the prophets and gives wealth, in spite of love for it, to relatives, orphans, the needy, the traveler, [and] those who ask [for help]” (second, third, and fourth alterations in original)).
186. See *United States v. Elder*, 601 F. Supp. 1574, 1577 (S.D. Tex. 1985).
187. *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574-75 (2d Cir. 2002). Here, the Second Circuit affirmed a preliminary injunction, prohibiting the city from entering church property to arrest homeless individuals. The district court later issued a permanent injunction and granted summary judgment for the church. See *Fifth Ave. Presbyterian Church v. City of New York*, No. 01 Civ. 11943(LLM), 2004 WL 2471406 (S.D.N.Y. Oct. 29, 2004), *aff’d*, 177 F. App’x 198 (2d Cir. 2006).
188. *Fifth Ave. Presbyterian*, 293 F.3d at 572.
189. *Id.* at 573.
190. *Id.*

lowing homeless persons to sleep outside . . . does not constitute legitimate religious conduct.”¹⁹¹ The church replied that it was “commanded by scripture to care for the least, the lost, and the lonely of this world” and that in ministering to the homeless, it was “giving the love of God There is perhaps no higher act of worship for a Christian.”¹⁹² The Second Circuit panel sided unanimously with the church.¹⁹³ Other courts have routinely found provision of care to the needy or homeless to be religious exercise.¹⁹⁴ None of these precedents will be as important as what a given congregation believes, of course. But for various faith traditions, the provision of sanctuary would have historical and theological pedigree.

RFRA also requires that religious exercise be sincere. Because of concerns about acting as “inquisitors,” courts are reluctant to adjudicate sincerity, and indeed government defendants raise it only rarely.¹⁹⁵ When contested, sincerity is a factual determination and will turn heavily on the individuals involved.¹⁹⁶ Courts tend to only infer insincerity in extreme instances.¹⁹⁷ Nonetheless, if plaintiffs appear opportunistic, in practice, this can sometimes undermine their claims at other stages of the RFRA analysis.¹⁹⁸ If a sanctuary congregation seems to be motivated by politics primarily—as critics of the movement have long maintained¹⁹⁹—this might prejudice the claim even outside of the specific sincerity analysis. There is an important conceptual difference between the political action of civil disobedience and a claim for legal accommodation. Yet an accommodation claim should not be denied simply because religious exercise overlaps with politics.²⁰⁰ It is at the core of an accommodation claim that one must disobey an unjust law because one cannot in good conscience comply.

191. *Id.* at 574.

192. *Id.* at 574-75 (internal quotation marks omitted).

193. *Id.* at 576.

194. See *Harbor Missionary Church Corp. v. City of San Buenaventura*, 642 F. App'x 726, 729-30 (9th Cir. 2016); *World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 537 (7th Cir. 2009); *W. Presbyterian Church v. Bd. of Zoning Adjustment*, 862 F. Supp. 538, 544-46 (D.D.C. 1994).

195. See Frederick Mark Gedicks, “Substantial” Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA, 85 GEO. WASH. L. REV. 94, 98 (2017).

196. See *United States v. Quaintance*, 608 F.3d 717, 721 (10th Cir. 2010).

197. See, e.g., *id.* at 722.

198. See Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1215-20 (2017).

199. See Begaj, *supra* note 90, at 159.

200. See *Callahan v. Woods*, 658 F.2d 679, 684-85 (9th Cir. 1981).

The question may be better framed as whether the religious person in question is engaging in the conduct *primarily* to expose the injustice of a law or state action. In the case of the first sanctuary movement, there is little doubt that some actors were motivated by a desire to bring attention to the U.S. government's foreign policy. But their primary goal was to help thousands escape the reach of horrific violence. The fact that they sought to publicize the plight of those individuals can hardly be invalidating. Consider faith-based groups like No More Deaths, which leave stashes of water and food in particularly dangerous areas along the U.S.-Mexico border. According to best estimates, hundreds of migrants die each year attempting the perilous crossing of the deserts along the border.²⁰¹ In placing these supplies, these groups may come into conflict with federal laws regarding what individuals can do in a protected desert. Indeed, the government has begun to prosecute members of these groups under this theory.²⁰² Does providing potentially life-saving supplies to human beings in need cease to be religious exercise if No More Deaths criticizes government policy?

Similarly, the day-to-day experience of sanctuary is marked by the development of meaningful relationships between those involved, far from any media attention.²⁰³ To the extent that congregations are motivated by concern for the person in question, not merely the politics, they have a legitimate claim to sincere exercise.

3. *Substantial Burden*

The second element of the front-end test is whether the government action in question places a “substantial burden” on the person's religious exercise. The requirement that the burden be “substantial” was the result of legislative compromise to ensure the government would not have “to justify every action that

201. See *Missing Migrants: Tracking Deaths Along Migratory Routes*, INT'L ORG. FOR MIGRATION (Apr. 16, 2018), <https://missingmigrants.iom.int/region/americas?region=1422> [<https://perma.cc/C3U8-MQL6>].

202. See Daniella Silva, *Volunteer Arrested After Giving Food, Water to Undocumented Immigrants in Arizona*, NBC NEWS (Jan. 23, 2018, 7:32 PM EST), <https://www.nbcnews.com/news/latino/volunteer-arrested-after-giving-food-water-undocumented-immigrants-arizona-n840386> [<https://perma.cc/QFR9-652E>].

203. See, e.g., Esteban L. Hernandez, *Undocumented Immigrant in Sanctuary at New Haven Church Receives Temporary Reprieve*, NEW HAVEN REG. (Nov. 22, 2017, 5:38 PM EST), <https://www.nhregister.com/news/article/Undocumented-immigrant-in-sanctuary-at-New-Haven-12377585.php> [<https://perma.cc/S9BB-25FD>] (describing the relationship that developed between the individual in sanctuary and the reverend of the church); see also YUKICH, *supra* note 42 at 85-88 (describing the close relationship between an individual receiving sanctuary support in the form of accompaniments to his immigration check-ins and the congregation).

has some effect on religious exercise.”²⁰⁴ As the other requirements of the front-end test have become less demanding, courts seeking to avoid RFRA claims before imposing the exacting back-end on the government will often do so at the “substantial burden” stage.²⁰⁵

There is an intuitive argument that applying § 1324’s antiharboring requirements to a sanctuary congregation would burden its ability to perform what they see as an act of religious charity. It would mean that when a family arrives at the church door, the church is required to turn them away. Sanctuary congregations argue that this is something their faith does not permit them to do. They cannot, consistent with their beliefs, turn away a person in need like Ms. Chavarria. In such cases, the fact that federal law criminalizes this act of charity would impose a substantial burden.²⁰⁶

Where exactly the substantial burden test stands (and should stand) after *Hobby Lobby* is hotly contested. Some commentators argue that only the penalty for violating the law should be taken into account.²⁰⁷ Others argue that doing so would essentially render religious persons the judges of their own claims, as Justice Scalia argued in *Smith*, since few laws impose trivial penalties.²⁰⁸ Mirroring the scholarly disagreement, different circuits have adopted different definitions of substantial burden under RFRA.²⁰⁹ So far, the Supreme Court has declined to further define the substantial burden standard. Given its centrality to the RFRA analysis, this question cannot be deferred indefinitely.

In Part IV, I discuss how substantial burden analysis relates to the values underlying accommodation claims and where limits should be set. Sanctuary, however, does not present the dilemmas that have generated much of the debate,

204. 139 CONG. REC. 26180 (1993); Gedicks, *supra* note 195, at 118–22.

205. Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1777.

206. Of course, providing sanctuary does not always begin with an individual showing up on a church’s doorstep unannounced. But the point remains the same even when the congregation announces its status as a sanctuary church, since that very announcement simply states its position that it would not turn anyone away.

207. See Helfand, *supra* note 205, at 1793 n.130.

208. See Gedicks, *supra* note 195, at 113–14.

209. Compare *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (quoting *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981)) (defining a substantial burden as a situation where “the state puts substantial pressure on an adherent to modify his behavior and to violate his beliefs” (internal quotation marks and alterations omitted)), with *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069–70 (9th Cir. 2008) (defining substantial burden as only two situations: when a person is forced “to choose between following the tenets of their religion and receiving a governmental benefit,” or “coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions” (emphasis added)).

such as causal attenuation, complicity claims, and concerns surrounding the importance of the religious belief to the adherent.²¹⁰ Rather, bringing a felony prosecution against someone for an act of religious charity would count as a substantial burden under any of the available definitions.

The substantial burden analyses in the sanctuary cases of the 1980s are thus incompatible with RFRA. The Fifth Circuit held that sanctuary movement members could not show that prosecution under § 1324 was a substantial burden, since (on the testimony of other members of their faiths) providing sanctuary was not required by their faiths. Rather, per the Fifth Circuit, sanctuary amounted to a choice. RFRA, however, does not require that a particular exercise be compelled, nor that the individual's beliefs be shared by other members of the faith.²¹¹ Nor is it a sufficient defense that while the government burdens one practice, a person has other means of practicing her faith.²¹²

4. *Compelling Interest*

Once the front end of the test has been satisfied, the burden shifts to the government to demonstrate “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.”²¹³ The existence of a compelling interest is generally (though not always)²¹⁴ addressed first. If the government is unable to meet its burden, a court will rule for the religious person,²¹⁵ in this case, the sanctuary congregation.

As noted above, the Fifth and Ninth Circuits in the 1980s found that the government satisfied the compelling interest requirement, since the government had an interest in the general and uniform regulation of immigration. While this analysis may be consistent with the conception of religious exemptions that the

210. See Gedicks, *supra* note 195, at 125-27. For further discussion, see *infra* Part IV.

211. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014) (discussing how Congress “defined the ‘exercise of religion’ to include ‘any exercise of religion, whether or not compelled by, or central to, a system of religious belief’”).

212. See *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (“[T]he availability of alternative means of practicing religion is a relevant consideration, but RLUIPA provides greater protection.”). As noted by the Court in *Holt*, the relevant section of RLUIPA mirrors RFRA and would thus be analyzed accordingly. *Id.* at 860.

213. *Hobby Lobby*, 134 S. Ct. at 2761 (quoting 42 U.S.C. § 2000bb-1(b) (2012)).

214. Courts sometimes begin by presuming a compelling interest and then go on to find that the law is not the least restrictive means of achieving that interest. See, e.g., *id.* at 2780.

215. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006).

Court articulated in *Smith*, it is at odds with the compelling interest test that has emerged from subsequent RFRA cases.

First, assertion of a general interest in either enforcing the law or in regulating a given area is no longer sufficient. The analysis the Supreme Court undertook in *O Centro* is instructive.²¹⁶ In *O Centro*, a nonprofit corporation sought to use *hoasca*, a Schedule I controlled substance, as part of its religious rituals.²¹⁷ The government maintained that there was no need to assess the particulars of the church's use of the substance or to weigh the impact of the exemption for that specific use, "because the Controlled Substances Act serves a compelling purpose and simply admits of no exceptions."²¹⁸ This is exactly the argument that courts adopted in the sanctuary cases.²¹⁹ And it was categorically rejected by the Supreme Court in *O Centro*: "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."²²⁰ Assertions of a general interest will be insufficient, even where that interest is "paramount," as with controlled substances or the education of children.²²¹

Second, a preexisting religious exception to § 1324 further undermines a claim that the government has a compelling interest in denying an accommodation for sanctuary. In *O Centro*, the existence of a statutory exemption for peyote for religious use had "fatally undermine[d]" the government's contention that the Act admitted no exceptions.²²² Similarly, there is an existing exception to several subsections of § 1324 for actions involving undocumented missionaries and ministers.²²³ Under this exception, enacted in 2005,²²⁴ a religious nonprofit can "encourage, invite, call, allow, or enable an alien who is present in the United

216. *Id.* at 427-30.

217. *Id.* at 425.

218. *Id.* at 430.

219. See *United States v. Aguilar*, 883 F.2d 662, 695 (9th Cir. 1989) ("[A]ppellants invite us to analyze their first amendment claim by focusing on smuggling, transporting, and harboring individually, requiring the government to demonstrate an overriding interest with respect to each. We decline this invitation." (citation omitted)).

220. *O Centro*, 546 U.S. at 430-31.

221. *Id.* at 431 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972)).

222. *Id.* at 434.

223. 8 U.S.C. § 1324(a)(1)(C) (2018).

224. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-97, § 796, 119 Stat. 2120, 2165 (2005).

States to perform the vocation of a minister or missionary” as a volunteer.²²⁵ This extends to the provision of “room, board, travel, medical assistance, and other basic living expenses” for the undocumented individual, so long as he or she “has been a member of the denomination for at least one year.”²²⁶ While preexisting exemptions do not undermine the assertion of *any* government interest, under *O Centro*, this would undercut assertion of an interest in uniformity for its own sake.²²⁷

As a brief historical aside, the story of this amendment sheds light on the shifting politics of religious exemptions. The amendment was introduced by former Republican Senator Bob Bennett from Utah to protect Mormon or Church of Jesus Christ of Latter-day Saints (LDS) communities that worked with undocumented missionaries.²²⁸ The LDS faith had experienced significant growth among undocumented communities.²²⁹ The church requires missionary work for young male members and encourages its young female members to participate as well.²³⁰ As a result, a significant number of its younger undocumented members may be working domestically as missionaries at any given time, as well as receiving room and board at LDS facilities. After passage of the amendment, anti-immigration firebrand Representative Tom Tancredo led an effort to repeal it, warning that places of worship could be used to shelter terrorists.²³¹ Though Tancredo’s repeal effort was unsuccessful, one of the cosponsors of Tancredo’s effort was then-Representative Mike Pence, who later, as Governor of Indiana and then as Vice President, would vigorously defend the importance of religious exemptions to laws burdening religious exercise.²³²

225. § 1324(a)(1)(C).

226. *Id.*

227. For a more detailed discussion of how preexisting exemptions should be analyzed, see *infra* Section IV.B.1.

228. See Associated Press, *Foe of Illegal Immigration Attacks Bennett Legislation*, SALT LAKE TRIB. (Nov. 15, 2005, 1:23 AM), <https://archive.sltrib.com/article.php?id=3216804&ittype=NGPSID> [<https://perma.cc/V4HN-CBUF>]; Sheena McFarland, *Missionary’s Arrest Sparks Discussion, Fear*, SALT LAKE TRIB. (Apr. 27, 2009, 3:47 PM), http://archive.sltrib.com/story.php?ref=/News/ci_12223689 [<https://perma.cc/F8L9-UWTS>].

229. See, e.g., Jack Rodolico, *Mexican, Undocumented and Mormon*, ABC NEWS (May 2, 2013), https://abcnews.go.com/ABC_Univision/mexican-undocumented-mormon/story?id=19091737 [<https://perma.cc/N3MD-K2VB>].

230. See *Preparing to Serve*, CHURCH JESUS CHRIST LATTER-DAY SAINTS, <https://www.lds.org/callings/missionary/faqs?lang=eng> [<https://perma.cc/6HBR-8MTM>].

231. See Associated Press, *supra* note 228.

232. *Cosponsors H.R.4321 – 109th Congress (2005-2006)*, CONGRESS.GOV, <https://www.congress.gov/bill/109th-congress/house-bill/4321/cosponsors> [<https://perma.cc/K37M-6TYP>].

Returning to the compelling interest analysis, since a general interest in immigration regulation or uniformity would be insufficient, the government would have to show a specific compelling interest in prosecuting sanctuary congregations. While exempting sanctuary congregations from legal sanction may raise the administrative costs of deporting the specific individuals in sanctuary, it likely will not do so in all cases. The government carries an “onerous burden”²³³ of demonstrating that sanctuary would “meaningfully compromise[]”²³⁴ its interests. If the evidence were “in equipoise,” then prosecuting sanctuary congregations would violate RFRA.²³⁵ If congregations were to publicly announce their sanctuary status – as many churches in the sanctuary movement today do – this practice would, if anything, lower the costs of detecting undocumented individuals. Much of the New Sanctuary Movement is also committed to allowing immigration enforcement to enter the sanctuary so long as they have a valid judicial warrant²³⁶ – and not simply one of ICE’s “administrative warrants.”²³⁷ The main cost would therefore be that of obtaining a warrant. This cost is unlikely to rise to the level of a sufficiently compelling interest.

Congregations committed to refusing entry to ICE, even with a judicial warrant, could impose a clearer administrative burden on the government. This matter is still not cut and dry, however. The government has only as much interest in carrying out an arrest as it would in any case where an individual is guilty of an ongoing civil violation, such as unlawful presence – an interest that would be higher if the individual in sanctuary had committed a crime.²³⁸ In the case of sanctuary for undocumented individuals, the civil violations are unlikely to be indefinite. As was true for Elvira Arellano, who left sanctuary after a year, sanctuary is not a realistic long-term option for many. The experience can be trying for both the individual in sanctuary, who is often stuck indoors, and the conger-

233. *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236, 1262 (D.N.M. 2002), *aff’d*, 342 F.3d 1170 (10th Cir. 2003), *aff’d*, 389 F.3d 973 (10th Cir. 2004) (en banc), *aff’d sub nom. Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

234. *United States v. Christie*, 825 F.3d 1048, 1057 (9th Cir. 2016).

235. *O Centro*, 282 F. Supp. 2d at 1262.

236. See, e.g., Maria Clark, *Local Churches Revive Sanctuary Movement*, TIMES-PICAYUNE (June 9, 2017, 11:39 AM), https://www.nola.com/nolamundo/2017/06/local_churches_revive_sanctuar.html [<https://perma.cc/4SHL-MSQ2>].

237. Nathan Treadwell, *Fugitive Operations and the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids*, 89 N.C. L. REV. 507, 528-32 (2011) (describing the difference between administrative warrants and judicial warrants).

238. See Breslin, *supra* note 44, at 236-38.

gation itself.²³⁹ A pattern that has developed across a number of cases, including Ms. Chavarria's, is that sanctuary is a momentary respite to allow an individual to pursue certain legal avenues before she is deported.²⁴⁰ Because Ms. Chavarria sought sanctuary, she was able to prepare a motion to reopen her asylum case and received a stay of removal.²⁴¹ When an individual plans to remain in sanctuary while pursuing legal avenues of relief, the government's interest is merely that of executing punishment right away, before the individual has had the chance to explore various legal protections to which she may be entitled. It is a close question whether this is a sufficiently compelling interest, and courts might come out either way based on the specific facts of individual cases.²⁴²

In cases where congregations refuse to honor a judicial warrant, the government may have a compelling interest in avoiding the administrative costs posed by sanctuary congregations and in promptly enforcing specific deportation orders. These interests are narrower than those accepted by courts in the 1980s and lay a foundation for a least-restrictive-means analysis that will prove even harder for the government to pass: the narrower the interest, the easier it is to further by other means.

5. *Least Restrictive Means*

If a compelling interest is shown, the government must then demonstrate that prosecuting sanctuary congregations represents the "least restrictive means" of pursuing its interest. In the words of the Supreme Court, this standard is "exceptionally demanding."²⁴³ The least-restrictive-means analysis boils down to

239. See Sharon Otterman, *Manhattan Church Shields Guatemalan Woman from Deportation*, N.Y. TIMES (Mar. 28, 2018), <https://www.nytimes.com/2018/03/28/nyregion/guatemala-deportation-church-sanctuary.html> [<https://perma.cc/269B-Q4MK>].

240. For similar examples, see Daniel González, *ICE Grants 1-Year Deportation Stay to Arizona Father of 5-Year-Old Battling Cancer*, AZCENTRAL (Feb. 12, 2018, 7:56 PM), <https://www.azcentral.com/story/news/politics/immigration/2018/02/12/ice-grants-1-year-deportation-stay-jesus-berrones-father-5-year-old-battling-cancer/331701002> [<https://perma.cc/PWE4-UD5N>]; Hernandez, *supra* note 203; Jorgensen & del Valle, *supra* note 2; and Noelle Philips, *Jeanette Vizguerra Leaves Sanctuary After 86 Days Avoiding Immigration Authorities*, DENVER POST (May 12, 2017, 5:15 PM), <https://www.denverpost.com/2017/05/12/jeanette-vizguerra-arturo-hernandez-garcia-stay-deportation> [<https://perma.cc/42Y4-U7YQ>].

241. See Jorgensen & del Valle, *supra* note 2.

242. Though appeals in these cases remain to be decided, in urgent circumstances, some district courts have found that immigrants' interest in accessing determinations of their eligibility for relief outweighed the government's interest in hasty removal or justified a stay of removal. See *Calderon v. Sessions*, No. 18 CIV. 5222 (PAC), 2018 WL 3677891, at *2 (S.D.N.Y. Aug. 1, 2018), *appeal filed*, No. 18-2926 (2d Cir. Oct 3, 2018); *Hamama v. Adducci*, 261 F. Supp. 3d 820, 840 (E.D. Mich. 2017), *appeal filed*, No. 17-2171 (6th Cir. Sept. 28, 2017).

243. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014).

the question of whether there is another option, besides prosecution, by which the government could satisfy its compelling interest that would impose less of a burden on sanctuary congregations. That is, if *any* less restrictive alternative exists, the government must employ it. As with the other elements of a RFRA claim, this analysis would be highly fact specific and would differ depending on how sanctuary was provided.

The easiest case would be a church that adopted the rules of the New Sanctuary Movement – announcing its stance publicly and being willing to honor a judicial warrant. ICE could fulfill its interest simply by obtaining a warrant. Although there would be some administrative costs associated with this process, those costs would be no greater than if the person had remained in their home. ICE’s less restrictive means would simply be to follow the procedures it would for any home: get a warrant.

A church that has not publicly announced its sanctuary status but that would be willing to honor a judicial warrant presents a more complicated scenario. Unless the church were actively concealing the individual (e.g., if they kept the individual hidden in a back room), ICE could simply follow the procedures that it normally would in seeking to detect someone who was unlawfully present. Even if ICE could show that sanctuary had raised its cost of detecting the individual, this would not end the analysis. Under RFRA, ICE may be required to bear certain increased costs to accommodate religious exercise.

Administrative costs will only render a potential less restrictive means infeasible when those costs would threaten the fundamental viability of the program in question. RFRA mandates that courts strike a “sensible balance[] between religious liberty and competing prior government interests.”²⁴⁴ But both RFRA and RLUIPA contemplate that the government may at times be required to shoulder costs to protect religious exercise.²⁴⁵ The paradigmatic case where costs precluded an accommodation is *United States v. Lee*,²⁴⁶ in which the Supreme Court held that exempting individuals from the general system of taxation on religious grounds would fundamentally compromise the program. Under *Hobby Lobby*, however, the Court explained that the “holding in *Lee* turned primarily on the special problems associated with a national system of taxation.”²⁴⁷ Rather than being a question of administrative cost alone, “[t]he fundamental point” was that “there simply [was] no less restrictive alternative to the categorical requirement to pay taxes.”²⁴⁸

244. 42 U.S.C. § 2000bb(a)(5) (2018).

245. *Hobby Lobby*, 134 S. Ct. at 2781.

246. 455 U.S. 252, 260 (1982).

247. *Hobby Lobby*, 134 S. Ct. at 2784.

248. *Id.*

Immigration does not share the features of the national tax system that make it unamenable to exemptions. First and foremost, because money is fungible, almost anyone can find a government program funded by their tax dollars that they vehemently oppose on religious grounds. And unlike the tax system, our modern immigration system is fundamentally characterized by laws that were not intended to be fully applied. Systemic underenforcement and wide prosecutorial discretion are already baked in. This is partly because Congress has played a two-faced game in which members appear tough on immigration by passing sweeping laws that would render millions of individuals deportable, while at the same time underfunding enforcement to such an extent that it would be impossible to deport all of the people in violation of the current laws.²⁴⁹ This underfunding is not merely about deficits, but about sensitivity to the political reality that deporting all, or even large numbers, of undocumented individuals in this country would not be a popular position.²⁵⁰ Congress's failure has produced a system that tolerates millions of undocumented individuals and will continue to do so, while requiring wide-ranging discretion in enforcement. This includes not just programs like Deferred Action for Childhood Arrivals, but also thousands of discretionary deferrals of enforcement and case-by-case determinations of deferred action and other forms of limited relief that fall short of conferring solid legal status.²⁵¹ The lack of uniformity in immigration enforcement is not the exception; it is the rule.

To be sure, even absent a scenario identical to *Lee*, there probably will be a point where increased costs render a potential less restrictive alternative impracticable. Nonetheless, the harms in question must be “more than a possibility” and not solely speculative.²⁵² The nature of the costs is also relevant. Costs imposed on specific third parties are concerning,²⁵³ while costs that are “limited

249. See, e.g., Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 *YALE L.J.* 104, 132 (2015); Breslin, *supra* note 44, at 236–38.

250. See Robert P. Jones, *Not Even the Reddest States Support Deportation*, *ATLANTIC* (Jan. 27, 2017), <https://www.theatlantic.com/politics/archive/2017/01/immigration-polling/514700> [<https://perma.cc/88N9-PHCQ>]; *Polling Update: Post-Election Still Little Support for Mass Deportation*, *NAT'L IMMIGR. F.* (Nov. 22, 2016), <http://immigrationforum.org/blog/polling-update-post-election-still-little-support-for-mass-deportation> [<https://perma.cc/Y9SS-U9G2>].

251. See Zuzana Cepla, *Deferred Action Basics*, *NAT'L IMMIGR. F.* (Apr. 15, 2016), <https://immigrationforum.org/article/deferred-action-basics> [<https://perma.cc/4C4S-BGPD>].

252. *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (quoting *Sherbert v. Verner*, 374 U.S. 398, 407 (1963)).

253. See *supra* note 162 and accompanying text.

and borne by society as a whole”²⁵⁴ can be more easily tolerated.²⁵⁵ RFRA can simply require the government to shoulder minor increased costs of investigation and detection.²⁵⁶ It is not plausible that ordinary costs of investigation would be so great that no alternative existed to charging sanctuary workers with felonies.

For congregations committed to nonviolent noncompliance with judicial warrants, the analysis is more complex still. Though it would depend on the circumstances, increased costs of enforcement might be high enough to support ICE’s claim that prosecution is the only option. Nonetheless, when a congregation is only providing sanctuary temporarily—such as when a parent explores her legal avenues of relief in order to remain with a citizen child—ICE would have to show that it could not wait for that process to finish before removing the individual. While the process may take weeks or even months, this waiting period likely does not significantly compromise ICE’s interests. Indeed, if the person turns out to be eligible for forms of affirmative relief, then no real interest has been compromised at all. And if congregations imposed their own limits on sanctuary—such as not providing sanctuary to individuals who posed public dangers or only providing sanctuary to individuals who had potential avenues of immigration relief open to them—it would be harder still to show that waiting this temporary period is not a less restrictive alternative.

The existence of a preexisting religious exemption also matters. Although one exemption does not automatically trigger another under RFRA,²⁵⁷ the existence of an exemption for a similarly situated group is often meaningful. For example, in *Hobby Lobby*, the fact that religious nonprofits were already exempted from the contraception mandate was evidence that the government had a less restrictive means available.²⁵⁸ Similarly—unless ICE could prove otherwise—the missionary exception to § 1324 is an indication that the government can pursue its interest of policing unauthorized presence without prosecuting religious organizations.

The missionary exemption is, of course, not identical to a sanctuary exemption. But it is neither as narrow nor as different as it may initially appear. Both

254. NeJaime & Siegel, *supra* note 162, at 2526.

255. While the question of undocumented immigration’s economic effect is hotly contested, it is unnecessary to resolve that question here. Even if undocumented immigration in general had the effect of slightly lowering wages, providing sanctuary for parents who risk deportation and separation from their children will impose no harms on specific third parties.

256. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 (2014).

257. This will be discussed further in Section IV.B.1.b *infra*.

258. See *Hobby Lobby*, 134 S. Ct. at 2782.

are religious exemptions. And both the missionary exemption and a sanctuary exemption would cover several of the same activities and raise the same potential liabilities. The distinction between whether the undocumented person is volunteering as a missionary or minister is irrelevant for the purposes of any asserted government interest.²⁵⁹ Given its requirement of missionary service, in the LDS context alone, the missionary exemption could potentially cover hundreds of undocumented individuals,²⁶⁰ receiving potentially greater assistance than sanctuary seekers.²⁶¹

For the same reasons as with sanctuary, the missionary exemption may make it marginally costlier for the government to pursue an interest in identifying and apprehending undocumented individuals. The existing exemption is evidence that despite this, the government already has a means of pursuing its immigration enforcement without prosecuting people of faith. While not dispositive, it weighs in favor of an accommodation when a system is *already* in place for granting accommodations and there is no evidence that this accommodation has meaningfully prevented the government from pursuing its interest. Finally, while some may contend that no country could function with a sanctuary accommodation, the judiciary of at least one other country, France, has created a humanitarian exemption to its antiharboring laws.²⁶²

B. RFRA as a Limit to Raids on Places of Worship

Legal protections for sanctuary congregations might effectively shield undocumented individuals in sanctuary from deportation, since it may be politically costly for ICE to raid sanctuaries. Even in the 1980s, when the INS was willing to prosecute sanctuary workers, the agency was nonetheless unwilling to

259. In this sense, it is similar to the arguments the Court rejected in *O Centro* that the peyote exemption was a product of specific relationship between the government and Native American tribes. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433-34 (2006).

260. See, e.g., Rodolico, *supra* note 229 (explaining the difficulties that young, undocumented Latinx Mormons face when attempting to complete missions in the United States).

261. If anything, providing indefinite lodging and transportation to an undocumented missionary is a greater obstacle to immigration enforcement than providing sanctuary. And neither process appears more disruptive to enforcement than simply renting an apartment to an undocumented person.

262. See Josh Jacobs & Sam Schechner, *French Court Rules in Favor of Humanitarian Aid to Illegal Migrants*, WALL ST. J. (July 6, 2018, 3:47 PM ET), <https://www.wsj.com/articles/french-court-rules-in-favor-of-humanitarian-aid-to-illegal-migrants-1530906461> [<https://perma.cc/BU84-C7D6>].

break into the churches themselves. However, these political costs may not always be prohibitive. During the Vietnam War, for example, law enforcement went into churches to arrest AWOL service members, despite the seeming political costs of such a strategy.²⁶³ Thus, the possibility of ICE raiding sanctuary churches is not too far-fetched and ought to be examined. In this Section, I will explore whether any legal constraints exist on ICE's ability to raid sanctuary churches or more generally conduct enforcement actions at churches with undocumented members.

ICE currently operates under a memorandum that imposes certain procedural hurdles on its ability to conduct enforcement actions, including arrests and surveillance, at a variety of secular and religious "sensitive locations," including places of worship and sites of religious ceremonies.²⁶⁴ The "Sensitive Locations Memo" is designed to ensure that, as a general rule, ICE will only carry out arrests or surveillance at certain locations in exigent circumstances.²⁶⁵ The 2011 memo builds on, and supersedes, similar memos reaching back to 1993.²⁶⁶ The memo states that when an enforcement action "could reasonably be viewed as being at or near a sensitive location," ICE agents should consult with their superiors and generally hold off unless exigent circumstances exist.²⁶⁷ So long as places of worship are not providing sanctuary to an individual who poses a national security threat, is termed a "dangerous felon," presents an imminent danger to public safety, or whose freedom poses an imminent risk of destruction of evidence, they would likely not fall under the exigent circumstances noted in the memo.²⁶⁸

Because the Sensitive Locations Memo is only guidance, however, it could be rescinded by ICE at any time and attempts to enforce it in court could face serious obstacles. I argue that RFRA would provide an enforceable substitute, imposing limits on ICE's ability to conduct raids or surveillance at places of worship. While the scope of protection provided by RFRA would not be absolute, it

²⁶³. See Davidson, *supra* note 91, at 617.

²⁶⁴. Memorandum from John Morton, Dir., Immigration & Customs Enforcement, to Field Office Directors, Special Agents in Charge, & Chief Counsel 2 (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf> [<https://perma.cc/H673-PK BK>] [hereinafter Morton Memorandum].

²⁶⁵. *Id.* at 1.

²⁶⁶. See, e.g., Memorandum from James A. Puleo, Acting Assoc. Comm'r, Immigration & Naturalization Serv., to District Directors & Chief Patrol Agents (May 17, 1993), <http://library.niwap.org/wp-content/uploads/2015/IMM-Memo-SensLocationsEnforce.pdf> [<https://perma.cc/PT2W-8HK2>].

²⁶⁷. Morton Memorandum, *supra* note 264, at 2.

²⁶⁸. *Id.* at 2-3.

would necessitate similar “exigent circumstances” and procedures as the Sensitive Locations Memo does.²⁶⁹

The legal analysis of sincerity and free exercise are unchanged from the previous Section. Rather than repeat them here, I focus instead on the substantial burden analysis. A raid on sanctuary premises would undoubtedly burden a congregation’s ability to exercise its religion by providing sanctuary. While the burden here is less direct than charging congregation members with felonies, it comes close. As the Second Circuit noted in *Fifth Avenue Presbyterian Church v. City of New York*, a place of worship can hardly provide sanctuary if law enforcement can simply come in and arrest those inside.²⁷⁰ On the other hand, it cannot be the case that *any* law enforcement action limiting a congregation’s ability to provide sanctuary—such as arresting a person prior to their arrival at the place of worship—constitutes a substantial burden. Here, the Sensitive Locations Memo itself gives an example of where the line could be drawn. It mandates that “special consideration” be given to enforcement actions “across the street from” a sensitive location.²⁷¹ This might mean extending protections to individuals who are arrested immediately prior to their entrance or exit from the sanctuary—as occurred recently in Virginia, where ICE arguably violated its own policy by arresting immigrants who had just left a church program that ministered to the homeless.²⁷² At the very least, the line should be drawn at the threshold of the sanctuary itself, after which an intrusion of federal officers would constitute a substantial burden.

Beyond the specific question of sanctuary, an ICE raid or surveillance at a place of worship could constitute a burden on the ability of the institution to provide religious services to its congregation, as well as on its congregants’ ability to practice. This is particularly true of congregations with a significant number of immigrant members. If ICE were to park several marked vehicles outside of a Catholic church in an immigrant community, many congregants would stay

269. For example, with respect to the harboring analysis above, if ICE were absolutely barred from conducting any investigation of sanctuary churches or from obtaining a warrant, sanctuary congregations would be hard-pressed to show that a less restrictive means was available.

270. See 293 F.3d 570, 574-76 (2d Cir. 2002).

271. Morton Memorandum, *supra* note 264, at 2.

272. See Associated Press, *ICE Agents Arrest Men Leaving Alexandria Church Shelter*, U.S. NEWS & WORLD REP. (Feb. 16, 2017 6:34 PM), <https://www.usnews.com/news/virginia/articles/2017-02-16/ice-agents-arrest-men-leaving-alexandria-church-shelter> [https://perma.cc/LV32-J45Z].

away.²⁷³ It is hard to imagine a more direct burden on exercise than where the threat of arrest and deportation hangs over an undocumented couple's ability to be married in a church, an undocumented parent's ability to have her child baptized at the font, or an undocumented family's opportunity to be together at a loved one's burial in the church cemetery. If surveillance interfered with a church's ability to minister to its congregation, by causing a decline in attendance or creating an atmosphere of fear in the church, this would surely constitute a burden.²⁷⁴ For similar reasons, in a case challenging INS's surveillance of the sanctuary movement, a federal district court in Arizona recognized that the First Amendment imposed certain limitations on government surveillance in places of worship.²⁷⁵

As with prosecutions under § 1324, the government could not rely on general assertions of interest in immigration enforcement and would instead have to show a specific compelling interest in raiding a church. The compelling interest analysis would be similar to the one provided above: the government would have to show a fairly limited and particularized interest in the avoidance of certain administrative costs and in immediate enforcement.

As to least restrictive means, the government's particularized interest could be achieved within limitations akin to the current sensitive locations policy. After all, the existing policy does not provide an absolute bar to such enforcement actions at places of worship. Rather, it requires that they be undertaken only after a determination of exigent circumstances, such as when a threat to public safety is involved. The policy also imposes certain procedural requirements, such as sign-offs by higher government officials, which ensure greater political accountability. These are manageable costs. Another possibility would be for ICE to hold off until after the individual in sanctuary has had a meaningful chance to explore her options for immigration relief. While the government may have an interest in enforcing deportation orders, it would be hard to argue that an individual

273. Even immigrants with legal status might be deterred, as it is not uncommon for ICE to detain immigrants who ultimately turn out to be lawfully present. *See, e.g., Galarza v. Szalczyk*, 745 F.3d 634, 637-38 (3d Cir. 2014).

274. *See, e.g., Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 522 (9th Cir. 1989) (relying on evidence that, as a result of INS surveillance, members from multiple churches have withdrawn from "active participation . . . , a bible study group has been canceled for lack of participation, clergy time has been diverted from regular pastoral duties, support for the churches has declined, and congregants have become reluctant to seek pastoral counseling and are less open in prayers and confessions").

275. *See, e.g., Presbyterian Church (U.S.A.) v. United States*, 752 F. Supp. 1505, 1516 (D. Ariz. 1990).

spending a few days in a sanctuary would entirely defeat that interest.²⁷⁶ Nonetheless, given the compelling interest defined above, RFRA would likely not pose an absolute bar to enforcement actions at a sanctuary – especially if public safety concerns were in play. RFRA would instead serve as a potential replacement (and an enforceable one) for the religious elements of the existing sensitive locations policy. As for enforcement action at nonsanctuary places of worship with immigrant congregations, unless ICE could show that other locations would be impracticable, it is unlikely this could pass the least-restrictive-means test.

IV. SANCTUARY WITHIN THE CURRENT LANDSCAPE OF RELIGIOUS FREEDOM

RFRA therefore has the potential to offer legal protections for sanctuary churches, individuals in sanctuary, and immigrant congregations. But the normative question of whether there should be a sanctuary accommodation is a larger one, requiring a deeper dive into the values implicated in religious accommodation. In this Part, I first offer an overview of the promise and perils of RFRA. In particular, I focus on reviving an understanding of RFRA as a guarantee of substantive equality in the sphere of religious exercise, offering effects-based protection to ensure *de facto* equal treatment for subordinate groups. On the other side of the coin, I note some of the principal risks of overly strong religious protections for governance in general, and for the rights of LGBT individuals and access to reproductive care in particular. In Section IV.B, I argue that applying this substantive-equality lens to several of the most contentious unanswered questions in RFRA doctrine could thread the needle between these benefits and risks and, in so doing, help restore an equilibrium to accommodation protections. Specifically, I argue that this balance could be restored by applying RFRA with a special solicitude to the needs of disadvantaged groups. The possibility of sanctuary cases can help motivate the move toward this equilibrium, as it offers a compelling reason to conservatives for imposing limits on accommodation doctrine, while also providing progressives with reason to support these limited protections instead of retreating from the project of accommodation entirely.

276. *Cf.* *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 437 (2006) (treating with skepticism the government’s argument that an “exception could not be made even for ‘rigorously policed’ use of ‘one drop’ of [the hallucinogenic tea at issue in the case] ‘once a year’” (quoting Transcript of Oral Argument at 17)).

A. *The Promise and Peril of Religious Accommodations*

1. *RFRA as Civil Rights Law: Promoting Equality at the Intersection of Systemic Disadvantage and Religious Exercise*

A core purpose of RFRA was to ensure that systemically disadvantaged groups would not face de facto inequality in the treatment of their religious exercise. The statute's legislative history and debates around its enactment are replete with warnings that *Smith* had established a regime under which influential, mainstream faiths would receive accommodations, while disadvantaged groups would not. To remedy this, RFRA is structured to provide *effects-based* protections, a mechanism familiar from other areas of civil rights law as a means to more effectively address systemic inequality by eschewing the complex inquiry into motives.

If religious accommodation is left solely to legislatures or agencies, the result will tend to be a structural imbalance in favor of mainstream faiths.²⁷⁷ Because of their political clout, mainstream faiths will either receive explicit accommodations, or, more often than not, laws burdening their exercise will not be passed in the first place. On the other hand, where a law of general applicability burdens the free exercise of systemically underrepresented groups, such as minority faiths or prisoners, they will instead face either legislative indifference or outright hostility. Even absent any outright prejudice, these imbalances in political representation produce a de facto favoritism for mainstream faiths. The resulting legal inequality has both practical and expressive effects, as disadvantaged groups will face greater burdens on core elements of their identities and lives, which in turn will communicate that the faiths and practices of these groups enjoy a lesser status.²⁷⁸

To remedy this, RFRA takes an effects-based approach, limiting the extent to which government action can have a disparate impact on religious persons — instead of asking about discriminatory motive or purpose. This represents a specific view of how to address disparate treatment, one that tracks larger debates in antidiscrimination theory. On one view, discrimination is when improper bias

277. See *infra* notes 297-304 and accompanying text.

278. There is reason to think that such expressive effects are particularly problematic in the sphere of religion, as the Court has at times recognized in the Establishment Clause context. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (noting that endorsement communicates to “nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community” (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring))).

leads to individuals being treated differently based on their group status. Effects-based protections, however, take aim at deeper, structural inequality. This takes different forms in different contexts. It may target employment policies that cause a sufficiently disparate statistical result between races.²⁷⁹ Or it may mean requiring accommodations for individuals with disabilities,²⁸⁰ reflecting a recognition that society is otherwise typically structured to accommodate the needs of those without them. Religious accommodation protections are not exactly identical to either, though they are perhaps closer to the latter, insofar as they are a recognition that laws will tend to be implicitly structured around the mainstream. But at a general level across contexts, the goal of effects-based protections extends beyond just preventing improper considerations (explicit or unconscious) from prejudicing decision-making, to preventing accumulated or structural disadvantage from entrenching de facto favoritism of certain groups over others.²⁸¹ So while Scalia was undoubtedly right that, in our pluralistic society, different faith groups will unavoidably enjoy different levels of political clout,²⁸² RFRA would ensure that these inevitable differences would not lead to unequal distributions of legal burdens or tacit governmental approval of unequal status. And given the number and diversity of faiths in our country, and thus the difficulty of foreseeing all possible conflicts between faith and law, RFRA provided for case-by-case determinations as each particular burden arose.

The text of RFRA applies to religion generally. This is similar to the general framing of other civil rights laws. As is the case with seminal civil rights statutes, legislative remedies for systemic inequality are often written in language that applies broadly to “race” or “sex.”²⁸³ Yet as with other such laws,²⁸⁴ a focus on ensuring de facto equal protection for the rights of systemically disadvantaged groups was a crucial element in RFRA’s history and structure. While RFRA’s enactment of a single standard of review was intended to ensure equal treatment across all faiths, not all faiths were equally in need of such protection; to the

279. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (allowing for challenges to facially neutral employment practices that had a disparate racial impact).

280. See Americans with Disabilities Act tits. I, II, 42 U.S.C. §§ 12112(b)(5), 12132 (2018).

281. See Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 657-58 (2015) (describing disparate impact protections in the context of race as addressing intentional, unconscious, and structural discrimination).

282. See *Emp’t Div. v. Smith*, 494 U.S. 872, 890 (1990).

283. See, e.g., Civil Rights Act of 1964 tit. VII, 42 U.S.C. § 2000e-2(a) (2018).

284. For an interpretation of Title VII in which disparate impact is a means to remedy systemic disadvantage, see generally *Griggs*, 401 U.S. 424.

contrary, RFRA would have the effect of undoing de facto favoritism for mainstream faiths.²⁸⁵ In addition to protecting minority faiths, effects-based protections would serve as correctives in a wider set of contexts where systemic disadvantage intersects with religious exercise, such as prisons.

Applying this effects-based test to remedy systemic underrepresentation serves to promote substantive equality in religious exercise. Yet while this means providing disadvantaged groups with the same level of protection as mainstream faiths, it does not necessarily entail preventing representative government from adjusting the extent to which mainstream faiths influence and shape society—particularly if this influence comes at the expense of disempowered groups. Indeed, RFRA was designed to limit the relative overinfluence of mainstream faiths. There are several ways in which this principle may be articulated.²⁸⁶ Without rejecting the validity of other formulations, I find it useful here to draw on literature that employs the lens of “antibsubordination.”²⁸⁷ As RFRA itself applies beyond just subordinate groups, I will employ the term “substantive equality” when describing the law’s purposes more generally and “antibsubordination” when focusing on the specific concerns about such populations. Under an antibsubordination theory, the goal is to create a “community of equals” by preventing the government from “engaging in a practice that aggravates, perpetuates, or merely carries over a disadvantage” of a structurally disadvantaged group.²⁸⁸ This accurately captures the de facto concrete and status harms subordinate groups faced under *Smith*.

285. See *infra* note 301 and accompanying text; see also Jed Rubenfeld, *Antidiseestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2350 (1997) (“[RFRA] required states to abolish the favoritism of majority religious practices that their laws of general applicability inevitably effect.”).

286. See Eisgruber & Sager, *supra* note 113, at 1251, 1283 (articulating a theory of “equal regard” that is attentive to “the special vulnerability of minority religious beliefs to hostility or indifference”); see also CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 4-6, 13, 52-53, 279-80 (2007) [hereinafter EISGRUBER & SAGER, RELIGIOUS FREEDOM] (articulating these concerns as balanced in the concept of “Equal Liberty” and applying this to the question of accommodations).

287. See generally Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) (articulating a vision of the Equal Protection Clause grounded in what Fiss calls “the group-disadvantaging principle”); Reva B. Siegel, *Equality Talk: Antibsubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004) (revisiting the early debates over *Brown* to shed light on the overlapping and distinct values of anticlassification and antibsubordination underlying the Equal Protection Clause).

288. Owen M. Fiss, *The Accumulation of Disadvantages*, 106 CALIF. L. REV. (forthcoming 2018) (manuscript at 4). Similar concepts have been articulated as “anticaste.” See generally Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994) (detailing the “anticaste principle” and explaining its roots in liberty and equality values).

This antistatutory justification for RFRA permeated congressional hearings, the legislative record, and contemporary academic commentary. During the congressional hearings, testimony repeatedly stressed the importance of RFRA to protect minorities *from* the overrepresentation of mainstream faiths in the political process.²⁸⁹ Minorities were invoked in the hearings as often as conscience itself.²⁹⁰ The Senate committee report stated that state and local legislatures “cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths.”²⁹¹ It did

289. This was not, of course, the only justification given. I discuss some other justifications *infra* notes 316-323 and accompanying text. Yet these antistatutory-style arguments were repeatedly and powerfully invoked as the moral and legal justification for RFRA. See *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong. 31-32 (1992) [hereinafter *Senate Committee Hearings*] (statement of Elder Dallin H. Oaks) (“The worshippers who need [constitutional] protections are the oppressed minorities, not the influential constituent elements of the majority.”); *id.* at 145 (statement of Forest Montgomery, Counsel, National Association of Evangelicals) (warning that the government is “now free to impose laws without any regard for the religious sensibilities of minorities”); *id.* at 171-72 (statement of Nadine Strossen, President, American Civil Liberties Union) (“[T]he Supreme Court showed such a callous view toward the religious rights, and, by analogy, other constitutional rights of the disempowered, the unpopular, the minority religious and racial groups, turning on its head our understanding that the primary purpose of the free exercise clause and other provisions of the Bill of Rights was precisely to protect those disempowered minorities.”); *id.* at 5-29 (describing stories of Hmong immigrants); *id.* at 30-40 (describing persecution of Mormons); *id.* at 50-58 (providing an appendix of post-*Smith* cases, many of which involve either minority faiths, subordinate persons such as prisoners or immigrants, or very specific instances where the political process appears systematically to break down, such as land use); *id.* at 135-47 (statement of Forest Montgomery). The House Subcommittee hearings are partly duplicative, so I will only cite variations here. See *1992 House Subcommittee Hearings*, *supra* note 126, at 54 (question by Rep. Craig Washington); *id.* at 104 (testimony of Nadine Strossen) (describing a history in which Catholics got legislative exemptions for wine but not Native Americans for peyote as “a matter of the mainstream, the powerful versus the minority and the oppressed”); *id.* at 118 (statement of original sponsor Rep. Stephen Solarz) (criticizing Justice Scalia’s position that “accommodating the religious preferences of minorities is a luxury which we cannot afford”); *id.* at 157 (statement of Edward Gaffney, Dean and Professor of Law, Valparaiso University School of Law) (“Sending unpopular religious minorities to city councils and State legislatures for relief is like sending the Jehovah’s Witnesses to the very legislative bodies in the 1930s that were doing their level best to get rid of them.”).

290. Across the three legislative hearings, “minority/ies” is used in a relevant way 145 times, and “conscience/s” is used 147 times. See *Senate Committee Hearings*, *supra* note 289; *1992 House Subcommittee Hearings*, *supra* note 126; *Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. (1990).

291. S. REP. NO. 103-111, at 8 (1993).

not employ the term “conscience.”²⁹² The House committee report quoted *Barnette* in stating that the “very purpose of a Bill of Rights” is to place certain issues “beyond the reach of majorities and officials” and excoriated Justice Scalia’s comfort with the fact that *Smith* would disproportionately disadvantage minority faiths.²⁹³ And indeed, the test that RFRA sought to restore had emerged to provide equal protection to subordinate groups.²⁹⁴ When interpreting legislation, it is instructive to ask what harm the law in question was intended to solve. Here, the harm was that the line of cases culminating in *Smith* was leaving Native Americans, Jews, and Muslims without judicial recourse.²⁹⁵ Indeed, the two cases cited most frequently in public and legal justifications of why RFRA was urgently needed involved Orthodox Jewish and Hmong families whose loved ones were subjected to routine autopsies that deeply violated their faiths.²⁹⁶

Academic commentators from across the board echoed the argument that *Smith* left minorities at the mercy of a political process in which they were systematically underrepresented.²⁹⁷ As Michael McConnell, who for decades has been one of the most influential conservative voices in favor of religious accommodations, explained the argument for exemptions in 1990: “Judicially enforceable exemptions under the free exercise clause are therefore needed to ensure that unpopular or unfamiliar faiths will receive the same consideration afforded mainstream or generally respected religions by the representative branches.”²⁹⁸

292. *Id.*

293. H.R. REP. NO. 103-88, at 4, 6 (1993). The term “conscience” only appeared in a quotation from *Smith*.

294. See *supra* note 96 and accompanying text; see also Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1132 (1990) (“Prior to *Smith*, the Free Exercise Clause functioned . . . to extend to minority religions the same degree of solicitude that more mainstream religions are able to attain through the political process. The Free Exercise Clause, prior to *Smith*, was an equalizer.”).

295. See *supra* Section II.A.

296. See *City of Boerne v. Flores*, 521 U.S. 507, 530-32 (1997); S. REP. NO. 103-111, at 8 n.13; Elliot M. Minberg, *A Progressive Organization’s Look at RFRA*, 21 CARDOZO L. REV. 801, 803-04 (1999).

297. See, e.g., Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 21 (1994) (“A prime goal of granting judicially recognized exceptions from general legislation is to ensure that minority religious practices receive the same consideration in the courts that majority practices already receive in the political process.”); Laycock, *supra* note 128, at 899-901; Minberg, *supra* note 296, at 803-04.

298. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1419-20 (1990).

This outlined a vision in which equality required de facto equal treatment *between* minorities and influential mainstream faiths.²⁹⁹ Stephen Carter, who had advised President Clinton on religious issues,³⁰⁰ argued that stronger accommodation protections were acutely needed to restore the balance between religious persons who had legislative clout and those who did not.³⁰¹ Referring to *Washington v. Davis*,³⁰² Carter wrote that *Smith* had placed “members of nontraditional religions in the same bizarre predicament as people of color, whose chances of proving equal protection violations have been severely circumscribed by a series of decisions insisting on direct proof of a motive to discriminate when the challenged law does not draw racial distinctions on its face.”³⁰³ The coalition of progressive groups behind RFRA, vital to the law’s passage and bipartisan support, also justified the law by the urgency of protecting minorities and disadvantaged groups.³⁰⁴

Perhaps most telling was that it was not only the advocates of RFRA’s framework but also some of the law’s strongest judicial critics whose treatment of the statute reflected their views on effects-based protections. The decisions striking down the *Sherbert* test in *Smith*, and then partially invalidating RFRA in *Boerne*, reflected a broader rejection of effects-based protections.³⁰⁵ The Court would subsequently cite *Boerne* itself to partly invalidate the Americans with Disabilities Act’s accommodation protections for individuals with disabilities.³⁰⁶

299. See Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 15 (“Constitutionally adjudicated exemptions for small or unpopular religious minorities merely match the legislative exemptions commonly granted to larger or more accepted faiths.”); McConnell, *supra* note 294, at 1147 (“To achieve equal rights of conscience, the courts should frame the free exercise inquiry as follows: Is the governmental interest so important that the government would impose a burden of this magnitude on the majority in order to achieve it?”).

300. See David Owen, *From Race to Chase*, NEW YORKER (June 3, 2002), <https://www.newyorker.com/magazine/2002/06/03/from-race-to-chase> [<https://perma.cc/Q4AL-JM9W>].

301. See Stephen L. Carter, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 139-40 (1993) (arguing that “it is the domination of our politics by the mainline faiths, which the state never threatens, that makes the need for accommodation so acute,” and that courts should be “far more” skeptical of actions that interfere with religious practice when those religions are “outside the mainstream”).

302. 426 U.S. 229 (1976).

303. *Id.* at 128. For McConnell, the analogy was rather to individuals with disabilities. McConnell, *supra* note 294, at 1140.

304. See, e.g., *Senate Committee Hearings*, *supra* note 289, at 171-73 (testimony of Nadine Strossen); Minberg, *supra* note 296, at 803-04.

305. See *supra* notes 115-118, 138-143 and accompanying text.

306. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 357-58, 370-74 (2001) (discussing *City of Boerne v. Flores*, 521 U.S. 507, 530-31, 536 (1997)).

True to their purpose, effects-based accommodation protections have indeed helped to ensure a more equal society in the sphere of religious exercise—and done so with bipartisan support. Recent RFRA and RLUIPA claims by a small indigenous sect from the Amazon,³⁰⁷ by a group of prisoners of “‘nonmainstream’ religions: the Satanist, Wicca, and Asatru religions, and the Church of Jesus Christ Christian,”³⁰⁸ and by a Muslim prisoner,³⁰⁹ have won unanimous victories at the Supreme Court. Even those who have advocated forcefully for accommodation for mainstream faiths will often foreground protecting minorities as a justification for religious accommodation.³¹⁰ Consider RLUIPA. While the statute provides protection to prisoners, it was signed by the same President and passed by an ideologically similar Congress to the one that, just four years earlier, had dramatically limited court access and habeas rights with the Prison Litigation Reform Act³¹¹ and the Antiterrorism and Effective Death Penalty Act.³¹² Beyond that, the 1990s were a period in which tough-on-crime rhetoric produced bipartisan laws increasing sentences and contributing to rising mass incarceration. In this climate, it is nothing short of remarkable that a unanimous Congress passed a law focused explicitly on the free exercise rights of incarcerated persons. As Andrew Koppelman put it: “RLUIPA generates the only prisoner claims that are treated with any respect by the courts. Absent a discourse of religious liberty, it is hard to see how one could smuggle into American law the notion that convicts are human beings with rights.”³¹³ And since its enactment, RLUIPA has been relatively successful at helping prisoners bring a wide variety of accommodation claims.³¹⁴

Other interpretations of RFRA have been offered, though none offer a satisfactory account of the statute without reference to the concerns about subordinate groups outlined above. These include theories based around concepts of (1)

307. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

308. *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005).

309. *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

310. See, e.g., Dylan Mathews, *Why a Pro-Same-Sex-Marriage Law Professor Supports Indiana’s Religious Freedom Law*, VOX (Mar. 31, 2015, 12:00 PM), <https://www.vox.com/2015/3/31/8319415/indiana-religious-freedom-discrimination> [<https://perma.cc/P8N4-XU6Q>] (describing religious accommodation cases as primarily about nonmainstream, minority group religions).

311. Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 to 1321-77 (1996).

312. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

313. Andrew Koppelman, *Kent Greenawalt, Defender of the Faith*, 95 TEX. L. REV. 821, 829 (2017) (book review) (footnote omitted).

314. See Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA’s Prisoner Provisions*, 28 HARV. J.L. & PUB. POL’Y 501, 566-68 (2005).

liberty of individual conscience and (2) neutrality, though there is at times significant overlap between the two.

On an individual conscience account, the statute serves to protect a substantive liberty right, without reference to the treatment of others. There would be no special harms in minority faiths or subordinate groups being burdened. Therefore, courts would not need to take any particular concerns into consideration when evaluating the claims from such groups. This view of religious freedom as fundamentally a matter of individual conscience is relatively prevalent.³¹⁵ However, the idea that RFRA was *solely* about individual liberty—without reference to structural imbalances or disfavored groups—is not as apt a fit for the statute’s history, the problem the statute sought to address, and the effects-based protections it established.

To be sure, legislative history rarely speaks with one voice, and RFRA was no exception. Even in the early 1990s, some of RFRA’s supporters argued that mainstream faiths needed just as much protection as minorities.³¹⁶ This argument was not as prevalent in testimony, but it was present and when offered, was forcefully made.³¹⁷ Yet even among those who affirmatively argued that mainstream faiths required protection, the explanation for why RFRA was constitutional under Section 5 of the Fourteenth Amendment emphasized the history of religious persecution of minorities.³¹⁸ This was understandable, as Sec-

315. See, e.g., ROBERT P. GEORGE, *CONSCIENCE AND ITS ENEMIES: CONFRONTING THE DOGMAS OF LIBERAL SECULARISM*, at ix-xii, 110-113 (2013).

316. See William P. Marshall, *Extricating the Religious Exemption Debate from the Culture Wars*, 41 HARV. J.L. & PUB. POL’Y 67, 72-73 (2018).

317. See, e.g., *Senate Committee Hearings*, *supra* note 289, at 42-43 (statement of Oliver S. Thomas, General Counsel, Baptist Joint Committee on Public Affairs); *id.* at 63-77 (statement of Douglas Laycock, Professor, University of Texas School of Law).

318. See *id.* at 95-96 (statement of Douglas Laycock) (“Religious minorities are no safer than racial minorities if their rights depend on persuading a federal judge to condemn the government’s motives.”); *id.* at 96, 129 (testimony of Douglas Laycock) (analogizing RFRA to the Voting Rights Act and stating that in order for the statute to be a constitutional exercise of Section 5 power, Congress should make findings that (1) generally applicable laws have been used as instruments of religious persecution; (2) members of Congress are experts on the political process; and (3) adjudicating the motive of government actors case-by-case “is not a workable means of protecting religious liberty”). The idea that RFRA was analogous to other statutory disparate impact protections also played a crucial role in the law’s defense in *Boerne*. See Brief of Respondent Flores, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074), 1997 WL 10293 (relying heavily on an analogy to disparate impact protections in defending RFRA); Brief for the United States, *Boerne*, 521 U.S. 507 (No. 95-2074), 1997 WL 13201, at *24-27, *29-32 (“Because minority religions often lack the political power to obtain accommodations, Congress concluded that legislation was needed to preserve for them the same religious freedom enjoyed by more established faiths.”).

tion 5 would require proportionality,³¹⁹ and effects-based protections would be an odd fit for groups that wielded significant political clout. Some have characterized progressives as being deceived by RFRA, tricked into supporting the law by legislative advocates who pitched it as protective of minorities and disadvantaged groups.³²⁰ Yet as an empirical matter, many commentators were likely correct that, at the time of its passage, mainstream faiths would rarely, if ever, need a second line of defense in the courts.³²¹ This helps explain the initially lukewarm support for RFRA among certain mainstream faith groups, who saw little to gain and signed on only after they were reassured that they had little to lose.³²² For these groups, remedying *Smith* was not pressing; their opposition delayed passage of the law for three years.³²³ Even beyond that, while there was a theoretical gulf, in 1993 it was still possible for these different approaches to be politically consistent. Because mainstream faiths would so rarely be burdened, it was reasonable to believe, as so many did, that RFRA could be justified independently and primarily as about protecting disadvantaged groups. Inversely, it is implausible to imagine that RFRA could have been passed in the way that it was absent the widespread sense that minority rights were being consistently underprotected.

There are also profound incongruities between an individual-conscience account of what RFRA protects and how it protects it. While a full accounting of the problems with an explanation of RFRA as *solely* focused on individual conscience is beyond the scope of this Note, I will touch on a few of the most significant. First, existing protections are problematically underinclusive. Whether religion should be treated as “special” compared to secular conscience has provoked considerable debate.³²⁴ While the question of religion as a broad soci-

319. *Boerne*, 521 U.S. at 520.

320. See, e.g., Marci A. Hamilton, *The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act Is Bad Public Policy*, 9 HARV. L. & POL’Y REV. 129, 155 (2015).

321. See, e.g., Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 721, 734 (1992) (“Of course, truly mainstream religions have little need for accommodations at all. Given their influence on the culture, it is unlikely that the laws will conflict in any serious way with their deeply held principles.”).

322. See *supra* notes 126–130 and accompanying text.

323. See *supra* notes 126–130 and accompanying text.

324. See, e.g., BRIAN LEITER, WHY TOLERATE RELIGION? (2012); Eisgruber & Sager, *supra* note 113, at 1315; Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571; Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1352 (2012); Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1131 (2011).

ological phenomenon may be more complex, *from the perspective of individual conscience alone*, there is simply no principled reason to protect against only laws that compel individuals to act contrary to their deeply held *religious* beliefs, while leaving other deeply held moral beliefs unprotected.³²⁵ There is a clear problem on an individual conscience account when a religious prisoner’s vegetarian diet is protected by strict scrutiny, while burdens on the diet of a lifelong ethical vegetarian are subject to highly deferential court review. Yet some courts persist in extending RFRA’s protections only to belief systems that have the “accoutrements” of traditional religion.³²⁶ While other courts have adopted definitions of “religion” as “moral, ethical, or religious beliefs about what is right and wrong” that are “held with the strength of traditional religious convictions,”³²⁷ this raises its own problems. As interpreted in *Hobby Lobby*, RFRA protects all religious exercise—even when not central to a religion or compelled by it.³²⁸ This covers conduct that goes well beyond matters of deepest conscience. Expanding protections to conduct that was neither compelled nor central to *all* conscience would not only raise thorny definitional questions—such as what exactly constitutes noncentral moral conscience—but would also extend protections well beyond manageability if not tempered by a limiting principle like special solicitude for disadvantaged groups.

Second, the protection of individual conscience *alone* is a poor fit for RFRA’s effects-based approach. There are genuine concerns about the policy impact of allowing such a wide swath of laws to be subjected to strict scrutiny solely based on effects.³²⁹ As was appreciated long ago,³³⁰ legislative policy compromises will

325. A few courts have also recently found in other contexts that differentiating between similarly situated religious and secular conscience would be unconstitutional. *See, e.g.,* Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk, 758 F.3d 869 (7th Cir. 2014) (finding both a First Amendment and an equal protection violation); *March for Life v. Burwell*, 128 F. Supp. 3d 116, 127-28 (D.D.C. 2015) (finding an equal protection violation). And some proponents of religious accommodation protections appear to accept the idea that such protections could extend to conscience more generally. *See* Mark L. Rienzi, *The Case for Religious Exemptions—Whether Religion Is Special or Not*, 127 HARV. L. REV. 1395, 1408-13 (2014) (book review).

326. *See* *United States v. Meyers*, 95 F.3d 1475, 1483 (10th Cir. 1996); *see also* *Africa v. Pennsylvania*, 662 F.2d 1025, 1031-36 (3d Cir. 1981).

327. *United States v. Ward*, 989 F.2d 1015, 1018 (9th Cir. 1992) (quoting *Welsh v. United States*, 398 U.S. 333, 340 (1970)); *see also* *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984); *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981). These courts draw this definition from landmark Supreme Court conscientious objection cases. *See generally* *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh*, 398 U.S. 333.

328. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014).

329. *See supra* Section III.A.2.

330. *See, e.g.,* *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

not always stand up to this degree of scrutiny. While effects-based protections may be necessary in the case of minorities or groups systemically disadvantaged in the political process,³³¹ it is difficult to explain why it would plausibly extend to all religious conscience in all contexts. In the Title VII employment context, for example, an employer may deny a religious accommodation upon a showing of undue hardship, a much lower standard.³³² Indeed, in other areas of law, indirect burdens on expressive conduct receive considerably less than strict scrutiny.³³³ And to the extent the individual conscience account would allow RFRA to remain a means for influential mainstream faiths to get a second chance at protecting traditional hierarchies in the courts after losing in the legislatures, it may well produce, rather than mitigate, the kinds of fractures we have seen thus far.³³⁴

331. *Id.* at 152 n.4.

332. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986) (“[A]n accommodation causes ‘undue hardship’ whenever that accommodation results in ‘more than a *de minimis* cost’ to the employer.” (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977))).

333. The closest thing might be the *United States v. O’Brien* test for incidental burdens on expressive conduct, *see* 391 U.S. 367 (1968), but the Court has interpreted it to be far less searching than strict scrutiny, *see* *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289, 296-302 (2000) (referring to *O’Brien* as “less stringent” than strict scrutiny, applying it deferentially as to the facts found by the legislature, and making clear that it is not a “least restrictive means” analysis).

334. *See infra* text accompanying note 349. Another justification sometimes given for laws like RFRA is that accommodations are necessary in order to preserve a space for religion, specifically religious communities in civil society or the public sphere. *See, e.g.*, Sherif Girgis, *Nervous Victors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel*, 125 YALE L.J.F. 399, 408 (2016) (arguing for protecting religious communities as part of the “infrastructure of free expression”). Yet this theory is hard put to explain the magnitude and scope of RFRA’s protections. This argument operates primarily in a register of jurisdictional or associational concerns. *See* Richard W. Garnett, *Standing, Spending, and Separation: How the No-Establishment Rule Does (and Does Not) Protect Conscience*, 54 VILL. L. REV. 655, 674 (2009); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 116-22 (2009); *see also* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981) (differentiating between church autonomy arguments and “the right of conscientious objection to government policy”). Yet other associational rights, such as those of political parties or unions, are not protected by an effects-based strict scrutiny test every time any member of the group finds that conduct related to their membership is indirectly burdened by government regulation out in the world. Or take units of our country that are formally quasi-autonomous or sovereign, such as the states and tribes. These provide many of the benefits attributed to religious groups as safeguards of pluralism and sites of identity- and law-creation. *See, e.g.*, Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 641-43 (1981); Judith Resnik, *Accommodations, Discounts, and Displacement: The Variability of Rights as a Norm of Federalism(s)*, 17 JUS POLITICUM 209, 213 (2017). Yet neither states nor tribes are protected by effects-based strict scrutiny when federal government action displaces their sphere of activity—such

This does not mean that conscience has no role in RFRA—it does. Indeed, equality in this context will often mean ensuring equal respect for conscience across groups, analogous perhaps to the role of employment in laws protecting against discrimination in employment. In that sense, it serves to provide the content onto which a lens of substantive equality is overlaid.

Beyond individual conscience, other equality-style explanations for RFRA's effects-based protections have been given, often framed in the language of neutrality.³³⁵ Take, for example, Douglas Laycock's theory of substantive neutrality, under which "[g]overnment should not interfere with our beliefs about religion either by coercion or by persuasion."³³⁶ Yet as Laycock recognizes, accommodations can encourage religion if they provide an exemption that would otherwise be desirable for nonreligious reasons.³³⁷ There are a number of possible situations where this might arise under RFRA's protections: military service exemptions,³³⁸ access to mind-altering substances,³³⁹ exemptions to employers from providing certain kinds of insurance,³⁴⁰ or benefits for religious prisoners.³⁴¹ While the incentives produced may range in strength, they are hardly neutral.³⁴²

as when, for example, a federal law might burden an individual's ability to participate in the social and political culture of a state. Instead, preemption analysis allows displacement when state or tribal law is an obstacle to federal purposes. It is implausible that religious communities would somehow be entitled to greater protections than such formally sovereign units. As such, this account can explain constitutional decisions limiting specific interference with the religious right to association, such as *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), but not RFRA's broad protections.

335. See, e.g., Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990). For an account of how accommodation and neutrality interact, see generally ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* (2013).

336. Laycock, *supra* note 335, at 1002.

337. *Id.* at 1017-18; Laycock, *supra* note 299, at 17.

338. Laycock, *supra* note 335, at 1018.

339. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

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

341. Note, *In the Belly of the Whale: Religious Practice in Prison*, 115 HARV. L. REV. 1891, 1899 n.43 (2002).

342. See Laycock, *supra* note 335, at 1017-18. Furthermore, if indirect, incidental burdens are sufficient to constitute nonneutral coercion, would not incidental benefits constitute nonneutral persuasion? Even slight incentives can have outsized effects on conduct. Under a neutral-impact rule, any government support to religion could constitute incidental persuasion. Not only would such a reading imperil a whole swath of government programs, but RFRA expressly maintains that "[g]ranting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter." 42 U.S.C. § 2000bb-4 (2018); see also EISGRUBER & SAGER, *RELIGIOUS FREEDOM*, *supra* note 286, at 28 (noting that "government inevitably, and quite desirably, influences choices about religion").

More generally, these accounts often fail to offer compelling answers as to neutrality of *what*. RFRA could not have been about ensuring neutrality between religious persons and nonreligious persons with conscientious objections to laws, since neither enjoyed more than the other under *Smith*. The idea that neutrality requires that there be a total neutral impact between specifically *religious* persons compared to those who do not feel strongly about a law problematically erases secular conscience.

The importance of substantive equality and concern for subordinate groups to RFRA's passage is evidenced by its statutory structure, legislative history, and position in the broader history of protections for religious exercise. Not only does adopting this lens offer a compelling explanation for this statute, it also holds out the promise of defusing current partisan fractiousness around accommodation claims by returning to the shared consensus that animated the law's 1993 passage. Although extending effects-based protections for subordinate groups was not the sole justification for RFRA among its supporters, it unquestionably constituted a core purpose of the statute in light of which lacunae or ambiguities can and should be interpreted.³⁴³ And even if one thought the statute was primarily about individual conscience, for the reasons I give in the following Sections, there are still strong prudential reasons for concluding that subordinate status provides valuable context at various stages of the RFRA analysis.

2. *The Risks of Overaccommodation*

No protection of rights comes without important trade-offs, and religious accommodation is no exception. Decisions such as *Hobby Lobby*, as well as litigation brought by conservative advocacy groups, offer a troubling vision of a potential future for religious accommodations. These developments carry two principal risks: first, that accommodation claims will be used to undermine regulatory efforts across the board, making effective governance unduly burdensome, and second, that religious accommodations will be employed to systematically undermine antidiscrimination protections for LGBT individuals and reduce access to reproductive care.

As to the first, echoing Scalia's warning in *Smith* of "anarchy," some commentators have noted the dangers that strong accommodation protections pose to effective governance.³⁴⁴ This country is home to a great diversity of religious

343. See *infra* Section IV.B.1.

344. See, e.g., LEITER, *supra* note 324, at 94-107.

belief. Religious faiths frequently attach significance to any number of oft-regulated areas – food and its production, public and private spaces, health care, and so forth. Strengthening accommodation protections, the argument goes, will produce continual obstacles to effective governance, as any attempt at regulation risks conflicting with some idiosyncratic faith somewhere.³⁴⁵

Yet while small, idiosyncratic faiths are most likely to present accommodation claims that government actors could not have envisioned, accommodating them is also less likely to impede governance generally. RFRA, after all, does not strike down statutes on their face, but rather grants targeted, often individualized exceptions. When the number of adherents is small, regulation is not impeded in any meaningful sense, and the entire process may indeed run somewhat more smoothly by avoiding unnecessary conflict. Furthermore, as I discuss above, protecting small or unpopular faiths is perhaps the strongest justification for robust, effects-based accommodation protections.

The real risk posed by accommodation to effective governance comes rather from large faith communities that either directly control important institutions in society, such as hospitals, or whose members make up such a significant proportion of society that their ability to opt out of regulatory projects would have a meaningful effect on the scope of those projects. For example, as Reva Siegel and Douglas NeJaime note, a significant proportion of patients – perhaps more than one in six – receive care at religious hospitals that may have grounds for a variety of religiously motivated healthcare refusals.³⁴⁶ These numbers may well be considerably higher in various areas of the country.³⁴⁷ In this context, accommodations may create entire jurisdictions in which generally applicable federal laws no longer apply.

Nowhere is this risk more salient today than in the areas of LGBT rights and access to reproductive care. In such instances, politically influential mainstream faith groups have attempted, at times successfully, to employ the accommodation doctrine to limit the scope of rights expansions with which they disagree.³⁴⁸ Even if one does not agree that the resulting outcomes or the partisan polarization they have produced are problematic in themselves – though there is strong reason to believe that they are – such cases are also hard to square with the structure of RFRA’s effects-based protections. Effects-based protections serve as a second line of defense for groups systemically underrepresented in the political

345. See *Emp’t Div. v. Smith*, 494 U.S. 872, 888 (1990); Marc O. DeGirolami, *Religious Accommodation, Religious Tradition, and Political Polarization*, 20 LEWIS & CLARK L. REV. 1127, 1131-32 (2017) (critiquing the view that “[a]ccommodation is for the exotic, the peculiar, and (especially) the unthreatening”).

346. NeJaime & Siegel, *supra* note 162, at 2556-58.

347. *Id.* at 2557 (pointing to the example of Washington State).

348. See *supra* notes 159-161 and accompanying text.

process. When extended to well-represented mainstream faiths, they instead offer a second bite at the apple whenever those groups do not happen to win legislatively. Of course, laws passed with prejudicial purposes toward any faith, mainstream or not, are rightly forbidden by the Free Exercise Clause. But this does not translate coherently into a guarantee of effects-based protections. The result threatens to be a de facto limit on how – and where – the government can act to protect LGBT individuals from various forms of accumulated disadvantage or even outright prejudice. Applying effects-based protections to politically powerful, mainstream faiths in a way that perpetuates existing societal hierarchies would be quite anomalous for a statute that was designed as a means of ensuring equal protection to the vulnerable in order to achieve a more equal society. The result may well be a significant obstacle to governance and redistribution in favor of private ordering,³⁴⁹ the burdens of which will fall most heavily on vulnerable groups.

B. How Sanctuary Claims Can Help Restore Equilibrium to Religious Freedom Doctrine

For some, the concerns described above may be sufficient to support the complete dismantling of RFRA and similar protections. Yet I am not so willing to leave behind the bipartisan, minority-protecting spirit that helped produce legislation providing such strong protection to unpopular faiths and prisoners. The need for it is especially acute. In the United States, the facial neutrality of a policy restricting access from primarily Muslim-majority countries was sufficient to shield it from more searching review.³⁵⁰ In other Western countries, coverings (such as burqas) have been banned in certain spaces on the basis of facially neutral security justifications.³⁵¹ The United States currently incarcerates millions of persons whose ability to practice their faiths can be a crucial bulwark against the dehumanizing carceral context.³⁵² On the border, faith-based groups are being

349. See Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015) (arguing that courts are resurrecting “Lochnerism” – that is, a libertarian skepticism of government intervention – in RFRA jurisprudence).

350. *Trump v. Hawaii*, 138 S. Ct. 2392, 2418–23 (2018).

351. Matthew Weaver, *Burqa Bans, Headscarves, and Veils: A Timeline of Legislation in the West*, GUARDIAN (May 13, 2018), <https://www.theguardian.com/world/2017/mar/14/headscarves-and-muslim-veil-ban-debate-timeline> [https://perma.cc/6ZT8-FWEK].

352. Danielle Kaeble & Mary Cowhig, *Correctional Populations of the United States, 2016*, U.S. DEP’T JUST. (Apr. 2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf> [https://perma.cc/2BGA-S5CW]. As Justice Brennan eloquently put it in his dissent in *Shabazz*, “Incarceration by its nature denies a prisoner participation in the larger human community. To deny the

criminally prosecuted for providing food, water, and shelter to undocumented migrants in a desert where hundreds of migrants die each year.³⁵³ We already have a shared vocabulary of religious tolerance and conscience that can protect vulnerable individuals, minority faiths, and church communities that minister to the needy. Restoring concerns about subordination to religious accommodation would be an important step toward reclaiming and embracing this valuable legacy.

However, even if one were to disagree with those normative positions, it appears unlikely that RFRA will be fundamentally weakened by the courts anytime soon. RFRA's protections for subordinate groups may cut crossways on any attempt to build a legislative coalition to repeal the law. Furthermore, constitutional free exercise protections, which implicate a number of the issues addressed below, may very well be effectively expanded in upcoming years. As such, even progressive critics of the statute or religious accommodation generally have good reason to support a realignment of the doctrine to be attentive to substantive equality. In this Section, I discuss how sanctuary claims can help move RFRA doctrine toward a more stable equilibrium and defuse existing partisan divides. And to the extent that there are efforts to read certain elements of RFRA case law back into constitutional free exercise protections, the discussion in this Section would be relevant to those debates as well.

I should be careful at the outset to note that the existence of political conflict in itself does not render decisions like *Hobby Lobby* problematic – just as subsequent “backlash” does not indicate a fundamental defect in landmark civil rights or reproductive rights decisions.³⁵⁴ Some of our most deeply held values are the ones that provoke the most debate. Political conflict is an inherent part of a healthy democratic system.³⁵⁵ Courts are rightly understood as interlocutors within these debates, as the history of accommodation law illustrates well. Yet one of the defining features of RFRA and RLUIPA was nearly unanimous bipartisan support. This was central to their legitimacy and these statutes' claim to

opportunity to affirm membership in a spiritual community, however, may extinguish an inmate's last source of hope for dignity and redemption.” *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 368 (1987) (Brennan, J., dissenting).

353. Rafael Carranza, *Migrant Aid Group Says Border Patrol Targeted Them with Arrests*, ARIZ. REPUBLIC (May 12, 2018), <https://www.azcentral.com/story/news/politics/border-issues/2018/05/12/border-patrol-targeting-aid-workers-scott-warren-no-more-deaths/587940002> [<https://perma.cc/UE8F-TT6Q>].

354. See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) (arguing that “interpretive disagreement [i]s a normal condition for the development of constitutional law”).

355. See CHANTAL MOUFFE, ON THE POLITICAL 19-21 (2005).

speak in a constitutional register, giving meaning to some of our most fundamental protections. These laws were built on the idea that we as a society could form a consensus around what it meant to protect vulnerable faiths and the persons who adhere to them. In this sense, RFRA could have been a kind of superstatute, as William Eskridge and John Ferejohn use the term – that is, a law that arises out of significant public deliberation and seeks to go beyond simple regulation, to instead create and entrench a popular consensus around a fundamental norm.³⁵⁶ As the original consensus indicated, RFRA had the chance to establish such a norm, and something important is being lost as this consensus erodes. While the statutory language might remain the same, RFRA is at risk of losing its status as the embodiment of bipartisan shared values, an outcome that should be concerning to all.

1. *Clarifying Doctrinal Limits*

Sanctuary claims can help render concrete for conservatives the peril of various expansive accounts of RFRA's scope. In this Section, I examine several arguments for broadening RFRA's protections that have been advanced in recent litigation and discuss how each relates to a substantive-equality understanding of effects-based accommodation, concerns about overaccommodation, and finally sanctuary claims themselves. I should note at the outset that applying this lens would not mean that mainstream faiths would *never* be protected, as RFRA applies to religion generally and establishes a single doctrinal test. Instead, it would mean applying the exceptionally concise test laid out by the statute with greater attention to the concerns about subordinate groups that helped motivate it. Partly due to the brevity of the law, certain live questions, such as the role of preexisting exemptions, receive little guidance from the text. Any answer will require a theory of accommodation of some kind. This lens simply requires that courts ask whether an accommodation would further (or undercut) the effort to give equal consideration to the concerns of disadvantaged and powerful groups alike.

a. *Substantial Burden*

In the *Zubik* litigation, religious nonprofits challenged the process for opting out of providing contraceptive insurance coverage under the Affordable Care

356. WILLIAM N. ESKRIDGE, JR. & JOHN FEREOHNS, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 12-13 (2010).

Act.³⁵⁷ These nonprofits argued that even filling out a form to opt out, which would place the cost of coverage on a third-party insurer or the government, rendered them complicit in providing contraceptives.³⁵⁸ The nonprofits contended that the substantial burden analysis should only ask whether the religious claimants consider the burden substantial and whether the failure to obey the law would result in substantial penalties.³⁵⁹ Yet this would effectively make religious plaintiffs judges in their own cases. An overwhelming majority of circuit courts rejected this argument, holding that the substantial burden analysis required courts to inquire whether, as a question of law, the burden was objectively substantial.³⁶⁰ The Supreme Court declined to answer this question, instead remanding with an instruction that the parties find agreement.³⁶¹

This question is relevant to sanctuary. A common critique is that churches have many options to help the needy but choose to provide sanctuary for political reasons; prohibiting sanctuary would not prevent a church from engaging in its religious obligations to help others, since plenty of other legal means of charity remain available.³⁶² These kinds of concerns could be addressed by adopting the objective substantial burden inquiry that federal courts of appeals continue to use post-*Zubik*.³⁶³ Courts can judge whether a religious claimant's description of how the law operates is accurate or whether, on the claimant's own account of her beliefs, the law imposes a legally substantial burden.³⁶⁴ When a person asks society to reorganize itself around her conduct, she should at the very least be willing to explain how much she herself would be willing to forego to engage in that conduct. While outsiders may not agree with her faith, the question of how much a given legal requirement burdens her ability to practice (and whether that satisfies an objective burden standard) is as readily comprehensible as other

357. *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016).

358. *Id.*

359. Petition for Writ of Certiorari at 14, *Univ. of Dall. v. Burwell*, 136 S. Ct. 2008 (2015) (mem.) (No. 15-834), 2015 WL 9592025; see also Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1775 (arguing that courts should assess only “the substantiality of the civil penalties triggered by religious exercise”).

360. See *Eternal Word Television Network, Inc. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 818 F.3d 1122, 1144-45 (11th Cir. 2016) (“We agree with our seven sister circuits that the question of substantial burden also presents ‘a question of law for courts to decide.’” (quoting *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014))).

361. *Zubik*, 136 S. Ct. at 1560.

362. *United States v. Merkt*, 794 F.2d 950, 956 (5th Cir. 1986).

363. See, e.g., *Eternal Word*, 818 F.3d at 1144-51.

364. *Id.*

commonplace judicial inquiries into subjective states of mind or emotional harms.³⁶⁵

From the standpoint of substantive equality, courts should also be attentive to societal context. For example, the Seventh Circuit has found that “whether a given burden is substantial depends on its magnitude in relation to the needs and resources of the religious organization in question.”³⁶⁶ The same burden might be greater on an immigrant congregation of a nontraditional faith than on the Episcopal Church. In individual cases, a burden on certain elements of someone’s religious practice might be more substantial where their liberty and identity are otherwise fundamentally limited, such as in detention. There may also be cases where a burden, viewed within the social and historical context, will be understood to express societal disapproval of a minority faith, which raises different concerns than a purely incidental burden on mainstream religious conduct.³⁶⁷

The impact of an objective analysis on sanctuary claims would vary from case to case. If a congregation saw sanctuary as no more than one of several perfectly equivalent means of performing their duty of care to others, the burden might not be substantial.³⁶⁸ Substantial burdens would still likely exist where congregations thought that there was something unique about sanctuary, such that a congregation did not feel there was another way to fulfill their obligations. This might be particularly stark along the border, where humanitarian activists face the question of turning away migrants in physical distress or in need of food and water.³⁶⁹

b. Preexisting Exemptions

Another one of the most contentious unanswered questions in RFRA doctrine today is what role preexisting exemptions should play in a court’s analysis. In other words, where the law in question already includes an exemption for similar conduct in other instances, how should this factor in to whether a particular religious individual should be granted an exemption? In *Hobby Lobby*, for

365. See *id.* at 1146-47; see also *United States v. Sterling*, 75 M.J. 407, 417-20 (C.A.A.F. 2016).

366. *World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009).

367. This was the case, for example, in the aftermath of *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). See *supra* note 98 and accompanying text.

368. See *Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012, 1017 (9th Cir. 2016) (finding no substantial burden where a legal alternative could serve “the exact same religious function”).

369. See *supra* note 202 and accompanying text.

example, the Court treated an existing exemption for religious nonprofits as a decisive argument in favor of expanding the accommodation to include religious for-profit companies with effectively the same beliefs.³⁷⁰ Read broadly, this could mean that where an exception already exists, a less restrictive means is essentially per se available to the government.

Applying this broad reading of *Hobby Lobby* into the sanctuary context would make an accommodation inevitable, given the existing exemption for ministers and missionaries. Hopefully this example helps reveal the impracticability of such a broad position. Legislatures have a need to craft compromises around accommodations, which will often involve weighing a number of factors, religious and otherwise. Treating every exception as justification for opening the door to all other accommodations is problematic in its own right and would have the counterproductive effect of deterring legislative accommodations.³⁷¹ Instead, courts should be attentive to several factors, including the reason that the existing exception was created and how many individuals it covers. Attentiveness to subordination offers a principled line when evaluating such cases. Take *O Centro*, where a larger faith group had received a legislative accommodation for the use of a hallucinogenic compound in religious ceremonies, while a smaller group faced criminal prosecution for functionally similar conduct.³⁷² Expanding the existing accommodation to the smaller group helps remedy exactly the kind of inequality RFRA targeted.

Yet where a preexisting exemption does not distinguish between faiths and where the requested accommodation represents mainstream views that had been well represented in the legislative process, the existence of exceptions should not be as determinative. The preexisting exemption in *Hobby Lobby*, for example, did not raise concerns about disparate treatment between faiths or systemic underrepresentation.³⁷³ Not only were the religious views advanced by the for-profit business owners politically well represented in general, but the existing regulatory accommodation for nonprofits itself reflects political influence. In other words, the government had already accounted for the relevant religious

370. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782 (2014).

371. The amicus brief of the Baptist Joint Committee in *Zubik*, authored in part by Douglas Laycock, offers a good explanation of why this broad reading would threaten the existence of legislative accommodations. Brief of Baptist Joint Committee for Religious Liberty as Amicus Curiae in Support of Respondents at 28-37, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418), 2016 WL 692850.

372. *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

373. See *Hobby Lobby*, 134 S. Ct. at 2763, 2781-83 (describing the preexisting accommodation for religious nonprofits).

objections and struck a balance. In such instances, courts can take existing exemptions into account but should be reluctant to render them dispositive. An even clearer case would be *Zubik*, in which the claimant nonprofits had already received a degree of accommodation, or *Stormans*, in which the existing exemptions did not favor another group of believers.³⁷⁴

Determining when existing exemptions raise subordination concerns will not always be straightforward, nor is it amenable to a bright-line rule. But neither are power differentials invisible. Courts can look to a number of factors, including the size of the relevant groups, their past history of treatment, whether different groups' concerns were taken into account in the political process, and the plausibility of the reasons given for treating the groups differently.³⁷⁵ This is not the same thing as requiring proof of prejudicial intent, but instead involves evaluating broader context to identify possible concerns of disparate treatment, including inaction.³⁷⁶ While this evaluation may at times impose a more nuanced task on the courts, it is less costly than an approach that, by blinding itself to the very asymmetries of political influence that justified the statute in the first place, treats any legislative compromise as the grounds for its own undoing.³⁷⁷

374. *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433 (2016); *Zubik*, 136 S. Ct. 1557.

375. In the case of RLUIPA, for example, these contexts were identified by documenting historical patterns of differential treatment, arbitrary use of discretion, and pretextual explanations. See, e.g., Storzer & Picarello, *supra* note 146, at 943-44. These factors are not all that dissimilar from the familiar *Arlington Heights* inquiry performed by courts in other areas of law. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-68 (1977). Indeed, some accommodation advocates have argued that the *Arlington Heights* factors should be taken into account when evaluating preexisting exemptions in the constitutional free exercise context. See Thomas C. Berg & Douglas Laycock, *Masterpiece Cakeshop and Reading Smith Carefully: A Reply to Jim Oleske*, TAKE CARE BLOG (Oct. 30, 2017), <https://takecareblog.com/blog/masterpiece-cakeshop-and-reading-smith-carefully-a-reply-to-jim-oleske> [https://perma.cc/GJJ5-FG6Z]. And courts have been willing to create rules that are particularly attentive to the vulnerable position of disfavored minority groups. See *Brown v. Socialist Workers '74 Campaign Comm.* (Ohio), 459 U.S. 87, 88, 91-98 (1982) (noting that in the context of disclosure requirements on political parties, the Court had set a lower bar for the showing required from minor parties).

376. This analysis is similar to the "equal regard" idea advocated by Eisgruber & Sager, *supra* note 113, though it does not involve hypothetical comparisons to how mainstream faiths would be treated but rather an examination of existing exemptions.

377. Of course, the relative size and political influence of faiths is not fixed forever. Indeed, part of what explains the current divides over accommodation is that in various areas religious conservatives have lost a relative degree of influence. This leads to questions about where to draw the line. What would happen if a small group were to become larger or more powerful over time, or the reverse? And what about groups that may be minorities nationally, but powerful locally or at the state level? In both instances, RFRA's focus on a particularized inquiry helps

Nor does taking subordination into account mean impermissibly favoring minority faiths over mainstream faiths. There is no doubt that government favoritism of certain faiths would run afoul of the Establishment Clause. Yet taking power differentials into account when evaluating the propriety of government action is not an expression of favoritism, but rather quite the opposite. It seeks to more accurately identify instances of de facto systemic favoritism in order to dismantle them. In so doing, it treats different *relevant societal and political contexts* differently, not the faiths themselves – just as would happen in the constitutional free exercise context if in one case there was evidence of prejudice behind a law, but in an otherwise similar case there was not. Because of RFRA’s case-by-case application, different claims by different faiths (or by different individuals of the same faith) will tend to receive a different analysis based on the context giving rise to those claims. A look at the broader social context would simply be another part of this particularized analysis.

c. Administrative Costs

There is a short section of dictum in *Hobby Lobby* that can be read as saying that courts should only weigh increased administrative costs associated with granting an accommodation when those costs would be significant relative to the cost of the entire regulatory project (in that case, the ACA).³⁷⁸ Otherwise, if the government tried claiming that granting an accommodation would be too expensive, this would undercut the government’s own assertion that it was pursuing an interest of the highest order.³⁷⁹ As the sanctuary context makes clear, however, at some point administrative costs must be taken into account. RFRA strikes a balance between protections of exercise and the ability of the government to operate. It is therefore entirely consistent with the law to apply a rule of proportionality and reason to increased administrative expenses. In the case of sanctuary, where congregations would be willing to honor a valid judicial warrant, this cost can hardly be considered dispositive. Yet in a hypothetical situation where sanctuary volunteers were actively smuggling persons across the border, the increased costs on the government of detecting and apprehending those individuals would weigh heavily against granting an accommodation.

provide an answer. Because courts look closely to the context at the time of the case, a meaningful change in circumstances would not preclude subsequent reexamination. As to the latter, the relevant analysis would be the group’s representation at the level of the governmental unit that took the action in question.

378. *Hobby Lobby*, 134 S. Ct. at 2781.

379. *Id.*

d. Antidiscrimination and Compelling Interest

While the relationship between religious accommodation doctrine and other antidiscrimination laws does not arise in sanctuary cases, I will address it briefly here because it would be informed by understanding RFRA as part of a broader equality project. The question of religious accommodations from antidiscrimination laws is at the center of high-profile cases in which religious business owners ask for religious exceptions from antidiscrimination laws to deny certain services to LGBT couples³⁸⁰ or to fire transgender employees based on their gender identity.³⁸¹ Preserving status hierarchies by allowing mainstream faiths³⁸² to opt out of legal protections for historically subordinate groups is at odds with a statute that was presented as an important *complement* to other civil rights laws protecting minorities and thus part of a broader, intersectional project of creating a more equal society.³⁸³ This is especially true when requested religious accommodations would impose direct harms on third-parties *because of* their status as members of historically subordinate groups. As Justice Kennedy noted in *Masterpiece*, if all providers of goods and services for weddings could refuse to serve a same-sex couple on religious grounds, the result would be “a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure

380. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018).

381. See, e.g., *EEOC v. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018).

382. Accommodation requests by minority faiths in a context that raised concerns about systemic underrepresentation would raise different concerns, but not different outcomes in the mine-run of cases. Evidence that exemptions were in fact being made for better-represented groups would be legitimate cause for concern. Accommodations for small, insular groups would not raise the same threat of “community-wide stigma” that Justice Kennedy mentions. See *infra* note 384 and accompanying text. So while in certain cases the analysis could differ, to the extent burdens would be placed on concrete third parties, in the balance an accommodation should typically be denied.

383. See 1992 *House Subcommittee Hearings*, *supra* note 126, at 337 (statement of Douglas Laycock) (“Racial and ethnic minorities are often also religious minorities. The civil rights laws are to little avail unless they provide for religious liberty as well as for racial and ethnic justice.”); see also Transcript of Oral Argument at 57, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074) (stating that without RFRA, “more influential and politically well-connected religions, powerful sector interests, will get exemptions when more marginal religions, particularly those that represent racial and ethnic minorities, will not get exemptions”); Carter, *supra* note 301, at 129-30 (noting that the lack of effects-based accommodation protections will particularly harm “people of color and (in recent years) religions that draw their members principally or exclusively from people of color”).

equal access to goods, services, and public accommodations.”³⁸⁴ Though *Masterpiece* was a constitutional free exercise case, the same concerns would clearly carry over into the RFRA context.

Furthermore, antidiscrimination laws are necessary for ensuring the protection of religious minorities.³⁸⁵ Allowing employers religious exemptions from antidiscrimination laws would tend to disproportionately burden minority faiths—precisely the opposite outcome from what RFRA intended.³⁸⁶ Courts should therefore recognize that antidiscrimination protections are compelling interests that can rarely be effectively pursued by granting accommodations that restore the societal disadvantage of protected groups.³⁸⁷ *Masterpiece* is not to the contrary, as it turned on a finding of actual prejudice, rather than the appropriateness of creating an accommodation from a neutral, generally applicable law.³⁸⁸ Nor would interpreting RFRA in this way conflict with *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,³⁸⁹ in which a unanimous Court granted a church an exemption to an antidiscrimination law in selecting its minister under a “ministerial exemption” based in the Religion Clauses.³⁹⁰ *Hosanna-Tabor* is best understood as based on core principles of association and community autonomy, rather than as a guide for interpreting all cases raised by religious claimants seeking effects-based accommodations from neutral, generally applicable laws.³⁹¹

And finally, beyond these specific doctrinal questions, there is a deep requirement—at the very least—of evenhandedness in RFRA’s effective application.

384. *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

385. See Brief of Amici Curiae 15 Faith and Civil Rights Organizations in Support of Respondents at 17, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

386. The possibility of such cases is not hypothetical. See, e.g., Campos v. City of Blue Springs, 289 F.3d 546 (8th Cir. 2002); Sarah Posner, *South Carolina Sought an Exemption to Allow a Foster-Care Agency to Discriminate Against Non-Christians*, NATION (June 15, 2018), <https://www.thenation.com/article/south-carolina-sought-exemption-allow-foster-care-agency-discriminate-non-christians> [<https://perma.cc/CRF4-4QHY>] (detailing attempts to secure an exemption under RFRA for a foster-care-placement agency that “refuses to place foster children with non-Christian families”); cf. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2031 (2015) (holding that an employer’s refusal to hire a Muslim individual because her headscarf did not match the store’s “Look Policy” was a violation of Title VII).

387. For a nuanced and lucid account of this position, see Robert Post, *RFRA and First Amendment Freedom of Expression*, 125 YALE L.J.F. 387 (2016).

388. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

389. 565 U.S. 171 (2012).

390. *Id.* at 188.

391. See *supra* note 334.

There is some evidence that, in practice, faith groups most in need of counter-majoritarian protection have fared the worst in courts.³⁹² If courts were to consciously understand RFRA as showing a special solicitude to minority faiths and subordinate persons, this might help counteract this trend. This is not solely speculative, as prisoner claims under RLUIPA, which singled out this population for protection, were more successful than those under RFRA.³⁹³ Other stark asymmetries would also need to be remedied. For example, the term “person” in RFRA has been read to extend to for-profit corporations holding mainstream beliefs, yet not to include prisoners held at Guantanamo Bay.³⁹⁴

2. *Rebuilding Consensus*

On the other side, sanctuary can be a reminder of why, historically, religious exemptions were once a progressive priority.³⁹⁵ Accommodations to laws of general applicability help produce a more equal society in several ways. Effects-based protections help ensure de facto parity between the exercise protections of mainstream faiths and those of minorities or disfavored groups such as prisoners, as recent court cases illustrate.³⁹⁶ Accommodation can also shield religious communities seeking to assist members of disfavored groups, like protecting the church in *Fifth Avenue Presbyterian*’s ability to provide sanctuary to homeless persons without being raided by the NYPD.³⁹⁷ Religious exercise protections have also served to block local communities from effectively evicting or barring religious organizations from operating homeless shelters, soup kitchens, or rehabilitative services to addicts.³⁹⁸

Various forms of sanctuary fit within the above values and in so doing contribute to a more equal society. As the Supreme Court recognized in 1982, our

392. Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371, 1374 (2013) (“Notably, among claimants, Muslims were significantly and powerfully associated with adverse outcomes before the courts.”). Quantitative analyses of court cases are difficult, however, and not all studies have found the same results. See, e.g., Caleb C. Wolanek & Heidi Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases*, 78 MONT. L. REV. 275, 308 (2017).

393. Gaubatz, *supra* note 314, at 560.

394. See *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014).

395. See *supra* Part II.

396. See *Holt v. Dobbs*, 135 S. Ct. 853 (2015); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

397. *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002).

398. See *supra* note 194 and accompanying text.

immigration policies have allowed a “permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.”³⁹⁹ Speaking in an antisubordination register, the Court noted that “[t]he existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.”⁴⁰⁰ RFRA’s limitations on surveillance or raids on places of worship with undocumented congregants are analogous to protections for systemically disadvantaged groups whose status renders their ability to practice especially vulnerable. Surveillance and raids would interfere directly with the religious practice of a politically marginalized population—both undocumented individuals and documented family members. As with incarcerated persons, religious freedom in such contexts is fundamentally tied to a basic right to exist as a human being with beliefs society should take seriously, despite one’s relegation to a secondary legal status.

In cases where sanctuary was not part of the religious practice of the individuals in sanctuary themselves, the connection to substantive-equality concerns is more indirect. Though in these cases sanctuary does not implicate the structural underrepresentation of certain religious groups in the same way, none of the doctrinal limitations discussed earlier in this Part would bar such a claim. And such claims illustrate how religious exercise protections can foster broader goals of equality by protecting religious communities that seek to assist members of disfavored groups. Through sanctuary, congregations are in effect saying that an undocumented individual is more than just a secondary legal status—she is a fellow human being who is entitled to care and shelter as such. Subordination concerns are clearly at stake when our laws tell people that if they treat a fellow human being as more than their secondary legal status they will face criminal sanction. It is one thing to say that for the purpose of certain legal entitlements, undocumented individuals are on a different footing. It is quite another to require that undocumented persons, who have often been *de facto* members of communities for years, not be treated as such by others. This places the undocumented not just in a secondary legal status, but beyond the pale of basic interpersonal moral obligations. Sanctuary in its various forms carves out room for persons of conscience to treat their undocumented neighbors or fellow community members as such, and to extend a hand when they are in need. This same logic would apply with even greater force to faith-based groups providing life-saving assistance to migrants in the desert. A migrant, stranded and dehydrated

399. *Plyler v. Doe*, 457 U.S. 202, 218-19 (1982).

400. *Id.* at 219.

in the Sonoran Desert, is not just an “unlawful border crosser” but a human being whose life is at risk. To punish volunteers for providing assistance to that person is to enforce the migrant’s subordination to the point that it denies her ability to make even the most basic claim on a shared humanity.

And sanctuary congregations are not really making their own immigration laws, as courts had warned in the 1980s. Instead, they are providing a kind of “community stay” of a person’s deportation. This allows an individual to assess her options with the support and resources of family, community, and lawyers — all of which may become more difficult to access if she is deported almost immediately. Synagogues, mosques, and churches can claim the legitimacy to provide such stays in part because of their role in the fabric of our civil society as representative, accountable, community institutions. Sanctuary is thus similar to the private bills that lawmakers would introduce to protect individuals from deportation at the request of their constituencies, which used to result in automatic stays of removal.⁴⁰¹

Sanctuary claims therefore present a concrete and timely example of why progressives should not be unduly hasty in retreating from religious accommodation claims. Of course, courts could ultimately find ways to reject such claims while simultaneously expanding accommodations to antidiscrimination laws protecting LGBT individuals and laws concerning reproductive care. If that occurs, RFRA and accommodation protections generally will continue to become more politically divisive and ultimately more tenuous. This is an outcome that should gravely concern anyone who is serious about ensuring equal treatment across faiths or about protecting religious freedom more generally.

CONCLUSION

The renewed interest in sanctuary among communities of faith has come at a propitious time. Legal protections for exemptions to laws of general applicability receive considerably more protection in practice than they did in the 1980s. Shifts in the political valence of religious exemption arguments have created an environment where religious conservatives are significantly more open to the arguments in favor of such exceptions. In this piece, I have outlined doctrinal and normative arguments for why the protection of sanctuary congregations is consistent with the current laws around religious freedom. While sanctuary is — as

401. Thomas D. Homan, *Policy Number 5004.1: Stays of Removal and Private Immigration Bills*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (May 5, 2017), https://www.ice.gov/doclib/foia/dro_policy_memos/removalStaysPrivateImmigrationBills_05_05_2017.pdf [https://perma.cc/STU5-FFUE].

was true in the 1980s – a fundamentally incomplete response to a greater injustice, it can nonetheless play an important role in allowing communities to protect people in danger and bear witness to the harms being visited upon these individuals and their families. For those in sanctuary, it can often serve as a crucial reprieve for them to pursue various forms of legal immigration relief. In so doing, such claims hold the potential to defuse growing partisan divides over RFRA and restore an equilibrium around the protection of the most vulnerable members of our society. This piece has offered an affirmative account of what that equilibrium should look like. An account of RFRA as showing a special solicitude to minority faiths and disadvantaged groups is consistent with the history and structure of the statute. At the same time, it would help create principled limits to accommodation, staving off some of the more controversial efforts by mainstream faith groups to expand RFRA’s protections. A bipartisan consensus over RFRA was possible at one point in the not-so-distant past – whether it can be reclaimed in the future remains to be seen.