Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA

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Religious Regulation and the Courts: Documenting the Effects of *Smith* and RFRA

AMY ADAMCZYK, JOHN WYBRANIEC, and ROGER FINKE

Following *Employment Division v. Smith* in 1990, critics charged that the Supreme Court overruled thirty years of religious Free Exercise Clause jurisprudence. Whereas *Sherbert v. Verner* in 1963 posited that the state must have "compelling interest" to infringe upon religious freedoms,[1] the *Smith* ruling asserted that religious beliefs and obligations do not relieve an individual of the duty to follow "neutral, generally applicable law." Whereas, *Wisconsin v. Yoder* in 1972, argued that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion," *Smith* acknowledged that "neutral, generally applicable law" might have the "incidental effect" of forbidding or requiring actions that are in conflict with religious beliefs.[2] The *Smith* decision appeared to remove compelling state interest as the primary test for adjudicating free exercise claims.

The outcry over the *Smith* decision was immediate and influential. Within weeks of the decision, a disparate alliance, including the American Civil Liberties Union, the American Jewish Congress, Americans

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1. *Sherbert v. Verner*, 374 U.S. 398 (1963).
2. *Division of Oregon v. Smith*, 494 U.S. 872 (1990).

United for the Separation of Church and State, the Lutheran Church-Missouri Synod, the Rutherford Institute, the General Conference of Seventh-Day Adventists, the National Council of Churches, and fifty-five constitutional scholars signed a petition protesting the decision.[3] When the Supreme Court denied a rehearing of the case, the coalition proposed the Religious Freedom Restoration Act (RFRA). A legislative act that was designed to "restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."[4] RFRA was introduced in the House of Representatives on 26 July 1990 and was eventually passed into law in November 1993.[5] But the legislative act was short lived, being ruled unconstitutional by the Supreme Court in 1997 (*City of Boerne v. Flores*).[6]

This series of judicial and legislative actions have received a great deal of attention from legal scholars and social scientists. Professor Craig Anthony Arnold has reasoned that the *Smith* decision will come to be viewed as the *Plessy* of the twentieth century[7] -- the infamous Supreme Court case that upheld government-mandated racial segregation on a "separate but equal theory."[8] Professor Michael McConnell has described *Smith* as "the biggest free-exercise change in doctrine ever."[9] And Professor Robert T. Drinan posits that the Supreme Court's ruling suggests that it has a view of the Free Exercise Clause "that is profoundly at odds with the notion on which America's religious organizations and Congress have operated."[10] Numerous reviews and comments have been written about the *Smith* decision that speculate about its significance.[11]

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3. James E. Wood Jr., "Abridging the Free Exercise Clause," *Journal of Church and State* 32 (1990): 741.

4. Religious Freedom Restoration Act 42. U.S.C. § 2000bb (1994).

5. Religious Freedom Restoration Act of 1993 (RFRA), (42 U.S.C. § 2000bb).

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

7. Craig Anthony Arnold, "Religious Freedom as a Civil Rights Struggle," *Nexus Journal of Opinion* 2 (1997): 149, 162.

8. *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

9. Quoted in James E. Wood, Jr., "The Religious Freedom Restoration Act," *Journal of Church & State* 33 (Autumn 1991): 673-74.

10. Robert F. Drinan, "Reflections on the Demise of the Religious Freedom Restoration Act," *Georgetown Law Journal* 89 (1997): 101, 115-16.

11. See, e.g., ibid.; Eric Pruitt, "Boerne and Buddhism: Reconsidering Religious Freedom and Religious Pluralism after *Boerne v. Flores*," *John Marshall Law Review* 33 (2000): 689; Michael W. McConnell, "Free Exercise Revisionism and the *Smith* Decision," *Chicago Law Review* 57 (1990): 1109; Melissa M. Furrer, "Recent Decision: The United States Supreme Court held that Congress' Passage of the Religious Freedom Restoration Act of 1993 Vio-

Despite all of this attention, however, researchers have not systematically examined court rulings before and after *Smith* or RFRA. Questions remain about the actual impact of these actions on religious cases brought to the court. By conducting an analysis of 2,109 cases between 1981 and 1997, we examine the influence of RFRA and *Smith* at all levels of the judiciary. Specifically, we document changes in the volume and outcome of free exercise cases and then use a larger historical framework on religious economies to explain the potential long-term consequences of these changes for American religion.

In the first section we give a brief history of the *Smith* decision, evaluate its impact, outline our methodology and analysis, and review current quantitative research on *Smith* and RFRA. Section two assesses the influence of RFRA and the ability of RFRA to counteract the *Smith* decision. The final section discusses the long-term effects of these court decisions on religious involvement and plurality in the United States.

I. RELIGIOUS FREEDOM AND THE *SMITH* DECISION

Despite an ambivalent relationship with American religion, the courts have been a viable place to which people could turn for religious freedom protection.[12] Any alteration in the classification of religious freedom can thus have a profound impact on court outcomes and the practice of religion.[13] With *Employment Division of Oregon, Department of Human Resources of Oregon v. Smith* the courts implemented a major change in how religious freedom cases would be decided.[14]

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lated the Enforcement Clause of the United States Constitution," *Duquesne Law Review* 36 (1998): 981; Kathryn S. Kanda, "Validity and Application of the Religious Freedom Restoration Act in the Tenth Circuit after *City of Boerne v. Flores*," *Denver University Law Review* 79 (2002): 295; William G. Buss, "Federalism, Separation of Powers, and the Demise of the Religious Freedom Restoration Act," *Iowa Law Review* 83 (1998): 391; Edward J.W. Blatnik, "No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of *City of Boerne v. Flores*," *Columbia Law Review* 98 (1998): 1410.

12. R. Laurence Moore, *Religious Outsiders and the Making of Americans* (New York: Oxford University Press, 1986); Rhys H. Williams "Breaching the Wall of Separation: The Balance between Religious Freedom and Social Order," in *Armageddon in Waco: Critical Perspectives on the Branch Davidian Conflict*, ed. Stuart A. Wright (Chicago, Ill.: University of Chicago Press, 1995).

13. James T. Richardson, "Law and Minority Religion: 'Positive' and 'Negative' Uses of the Legal System," *Nova Religio* 2 (1998): 93; James T. Richardson, *The Religious Freedom Restoration Act: A Short-lived Experiment in Religious Freedom* in *Religion, Pluralism, and the Law*, ed. C. Parrigan & D. Sinacore-Guin (Atlanta, Ga.: Scholars Press, 1999).

14. *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990).

Prior to *Smith* and since 1963, the courts relied on the *Sherbert*[15] test (compelling interest) to offer guidelines on how courts may rule in the interest of public welfare, while limiting the burden on religious freedom. With this test the court first asks whether the state has placed a burden on the plaintiff's religious freedom.[16] If the government has not unduly placed a burden, the Court rules against the plaintiff. If the court discerns that a burden is present, it asks: Do the legislatures have a compelling interest to carry forth an action that might burden the plaintiff or religion?[17] If the court feels that it must rule in the public's interest, the court attempts to find an alternative way to satisfy the complaint without infringing upon religious freedom.[18]

Once the *Sherbert* test was established, it remained an important technique for guiding how the courts ruled on religious freedom cases for the next three decades. However, in 1990 the *Smith* decision challenged this test. In *Employment Division of Oregon, Department of Human Resources of Oregon v. Smith*, the defendant denied unemployment benefits to Alfred Smith and Galen Black, two rehabilitation counselors who had been fired for ingesting peyote during a Native American Church ceremony. The Court did not dispute the use of peyote as an ancient and genuine sacramental practice, but nevertheless concluded that: "... the nation cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[19] Thus, critics contend that the *Smith* decision withdrew the compelling interest test as the standard for adjudicating free exercise claims. At the 1991 Bicentennial Conference on the Religion Clauses, Justice Sandra Day O'Conner addressed the meaning of the controversial ruling. As she explained, "The Free Exercise Clause does not mean very much if all a state has to do is make a law generally applicable in order

15. In *Sherbert v. Verner*, 374 U.S. 398 (1963)., the defendant, a Seventh-day Adventist, refused on religious grounds to work Saturdays after her employer shifted her schedule to include this day. Seventh-day Adventists observe Saturday as the Sabbath and proper day of rest. When Sherbert could not find alternative work and applied for benefits, the state denied them. Claiming a breach of religious freedom, Sherbert sued and the Supreme Court found in her favor. When the Supreme Court overturned a lower court's denial of Sherbert's claim it established the tri-partite (*Sherbert*) test that was used in free exercise cases until 1990.

16. Ibid. at 403.

17. Ibid. at 406.

18. Ibid. at 407.

19. *Smith*, 494 U.S. 872 (1990).

to severely burden a very central aspect of our citizens' lives."[20]

Profiling Outcomes of Free Exercise Cases

Smith's ruling seemed to set a new precedent for how courts would decide cases. However, until now we have not known the extent to which justices have followed *Smith*. Likewise, there has been a lack of research on how the compelling interest (*Sherbert*) test has influenced religious groups and individuals who brought forth First Amendment claims. Below, we explain how some of this ambiguity will be eliminated by systematically analyzing and comparing the cases before *Smith*, following *Smith* (but prior to RFRA), and during the RFRA period.

Our analysis uses cases from *The Religious Freedom Reporter*. This journal was published monthly by the Church-State Resource Center of the Norman Adrian Wiggins School of Law, Campbell University, from January 1981 to May 2002. The *Reporter* includes all levels of the judiciary and collected cases using two methods. It primarily used keyword searches of professional law databases, such as Westlaw and Lexis, to compile an index of court rulings. Additionally, it accepted cases submitted from outside contributors, which it then cross checked with individual database services to remove duplicates. For each case the *Reporter* offers a description of the proceedings, a decision rendered by the court, a listing according to the state in which the case appeared, the level of the court, and finally, a categorization by the type of case—constitutional, free exercise, establishment, tax law, family law, education, public institutions, etc.

For the review presented here, over three thousand cases were read for coding, and of these 2,109 were specifically coded for analysis.[21] All of these cases occurred between 1981 and 1997, and were divided into three distinct legal time periods: before *Smith*, after *Smith* (but before RFRA), and during the RFRA period. To be included in the analysis, the case had to have been decided and it had to have brought forth a First Amendment Claim. We also recognized that

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20. Ibid. at 677.

21. For more information on how court cases were selected, statistical methods, and the results presented in this essay, see John Wybraniec and Roger Finke, "Religious Regulation and the Courts: The Judiciary's Changing Role in Protecting Minority Religions from Majoritarian Rule," *Journal for the Scientific Study of Religion* 40 (2001): 427. For an extensive review, see John Wybraniec, *The Battle over Religious Freedom: Court Decisions and the Religious Economy in the United States* (Ph.D. diss., Purdue University Graduate School, 1998).

there were extreme cases in which it would be impossible to rule favorably for the religious group or individual involved. For example, in one case a father beat his son to death in an attempt to release "sin" from the boy's body. He then made a claim of free exercise during criminal proceedings and the court obviously denied the claim. We coded for highly unusual decisions—ones that were sure to result in an unfavorable ruling for religion—and consequently removed them from the analysis.[22]

As we compared court rulings over time, an obvious concern is if the merits of the claims vary across the legal periods. Clearly, each individual claim has strengths and weaknesses specific to it that determined why it was brought to court, whether the compelling interest test was cited, and ultimately the final decision. But our concern is if the claims vary with the time period, distorting the outcomes of our comparisons. For example, did the free exercise claims of one time period hold more merit than in another time period?

Although we have not attempted to evaluate the merits of each individual case, qualitative research suggests that following the *Smith* decision and prior to RFRA (May 1990-November 1993), minority religions were less likely to turn to the courts for protection and that the most marginal and frivolous cases were not brought before the court.[23] Consistent with this finding our data collection will document that far fewer free exercise cases were brought to the court following *Smith* and prior to RFRA. Indeed, the rate of free exercise cases initiated by religious groups dropped by over 50 percent immediately after *Smith*. This suggests that, if any differences occur across time periods, the claims following *Smith* should have greater merit. Nevertheless, as will be shown, despite the reduced number and possible increased merit of the claims following *Smith* and prior to RFRA, there was a significant *decline* in the number of favorable free exercise rulings during this legal period.

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22. Ibid. The analytical techniques and coding used to make conclusions in this essay have stood up to the rigorous review process involved in getting social science articles published in highly ranked specialty journals. We thus feel confident that our techniques, methods, and analyses are reliable.

23. See James T. Richardson, "Legal Status of Minority Religions in the United States," *Social Compass* 42 (1995): 249, 254.

Current Research

Few published articles have used systematic data collection and analysis to evaluate the impact of *Smith* and RFRA. When researchers have attempted such an analysis, their data collections have included only a small number of cases and have implemented limited coding techniques with only a few variables. Below we review these articles, laying out how our analysis expands beyond this current research.

In his 1997 article, Craig Anthony Arnold analyzed 174 cases that involved a decision about religious freedom claims under *Smith* and RFRA.[24] Similar to our results, he found that courts uphold religious exercise over government regulation in only about one-third of the cases. Arnold's study, however, coded few variables and his small sample only included cases from the time period before *Smith*. Our analysis goes beyond his research by not only offering a larger sample and many variables, but also by giving more details and explanations for understanding the negative impact of *Smith* for all religious groups, especially minority ones.

In a 1992 note, James E. Ryan analyzed the ninety-seven Supreme Court cases that brought forth free exercise claims between 1980 and 1990.[25] Relying on these previous Supreme Court cases, Ryan argued that if RFRA were passed, "it would be ineffectual and perhaps even detrimental to the protection of free exercise rights."[26] Because Ryan relied only on Supreme Court cases and thus was examining only those special cases that made it to the highest court, he could not assess the potential impact of RFRA on cases brought to lower courts. In addition, he was unable to speculate about the impact of *Smith* and RFRA because his research used data previous to the *Smith* decision.

Finally, in his 1998 article, Ira C. Lupu examined the ten times RFRA was cited in the Federal Register to argue that "there is absolutely no evidence that RFRA did anything to protect religion in decision making by the agencies of the United States."[27] Lupu then conducted a search in the Westlaw and Lexis databases for reported cases that mentioned RFRA and analyzed the 168 RFRA decisions (excluding decisions purely on RFRA's constitutionality). Because only 143 of

24. See Arnold, "Religious Freedom As a Civil Rights Struggle," 149, 162.

25. James E. Ryan, "*Smith* and the Religious Freedom Restoration Act: An Iconoclastic Assessment," *Virginia Law Review* 78 (1992): 1417.

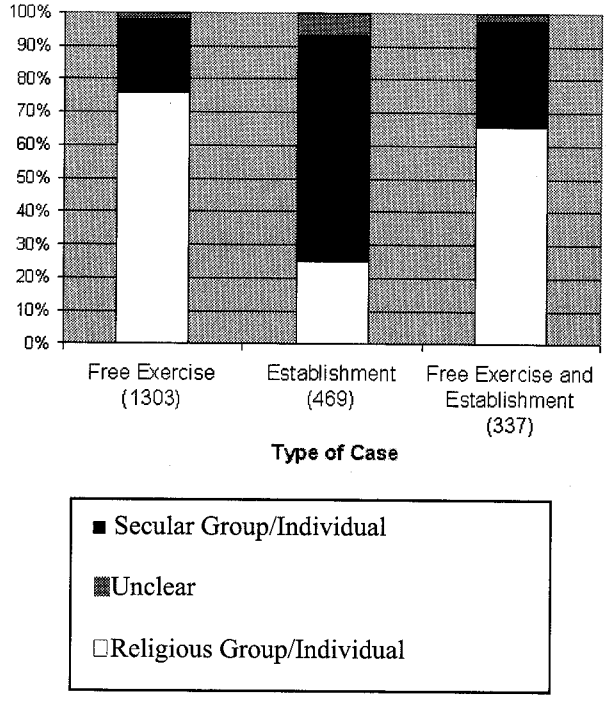
26. Ibid. at 1439.

27. Ira C. Lupu, "The Failure of RFRA," *University of Arkansas Little Rock Law Review* 20 (1998): 589.

the 168 cases examined produced denials of relief, Lupu concluded "it is difficult to look at this record and conclude that RFRA has made any significant contributions to religious liberty outside of prisons."[28]

Lupu based his conclusion on the number of wins versus losses during the RFRA period and not the number of wins versus losses in comparison to the pre-*Smith* and *Smith* periods. As will be shown in our analysis, cases that brought forth a free exercise claim on average tended to receive an unfavorable decision. The question remains, however, whether the number of unfavorable rulings were increased with the *Smith* decision and reduced once RFRA was enacted. When

Figure 1
Type of Legal Case by who Initiated Legal Action



compared to previous work, our analysis will not only include far more cases and offer more detailed measures for each case, but will also report on cases at all levels of the judiciary and will allow for comparisons across the three important time periods (i.e., prior to RFRA, after

28. Ibid. at 592.

Smith and prior to RFRA, and after RFRA).

Who Turns to the Courts for Religious Freedom?

The major historical cases of the last two centuries suggest that religious individuals and groups in the U.S. have relied substantially on the courts for protecting religious freedoms. Our systematic analysis supports this contention. Specifically, we found that the majority of court cases to bring a First Amendment claim were filed by religious institutions or individuals. When we looked at who initiated court action, we found that religions tend to seek protection from the courts when it comes to guarding their own religious freedoms. However, they are, not surprisingly, often the targets of legal action when their activities are perceived as threatening the separation of church and state (see Figure 1).

For 76 percent of the cases on religious freedom (the Free Exercise Clause), religious groups or individuals initiated the action. Conversely, when the separation of church and state was the issue (establishment), 68 percent of the cases were brought by secular litigants.

Since the courts, as interpreters of the Constitution, established themselves as the final authority on religious infringements, both majority and minority religious groups have turned to them for protection. As one might expect, our research shows that minority religious groups seek the most protection from the courts. Although America is a religiously diverse country, there are some religious groups that have little tension with mainstream secular society. Because they are part of the cultural mainstream, Lutherans, Methodists, and Presbyterians do not go to court as often as minority groups to fight for religious freedom. We thus find that while mainline churches represent 21 percent of U.S. church membership they are involved in only 4 percent of religious cases (see Figure 2). The reverse holds when one considers minority religious groups. Although Protestant sects make up less than 15 percent of the total U.S. church membership,[29] they are involved in almost 27 percent of free exercise claims. Likewise, even though cults represent only 1 percent of church membership, they are involved in over 16 percent of the free exercise court cases. When all minority religious groups are combined we find that although they only make up about 18

29. All estimates for church membership come from a combination of Barry A. Kosmin and Seymour P. Lachman, *One Nation Under God: Religion in Contemporary American Society* (New York: Harmony Books, 1993); and Kenneth B. Bedell, *Yearbook of American and Canadian Churches, 1997* (New York: Abingdon Press, 1997).

percent of the church membership in the U.S., they account for nearly 62 percent of the free exercise cases coming to the courts, and nearly one-half of all court cases on religion.

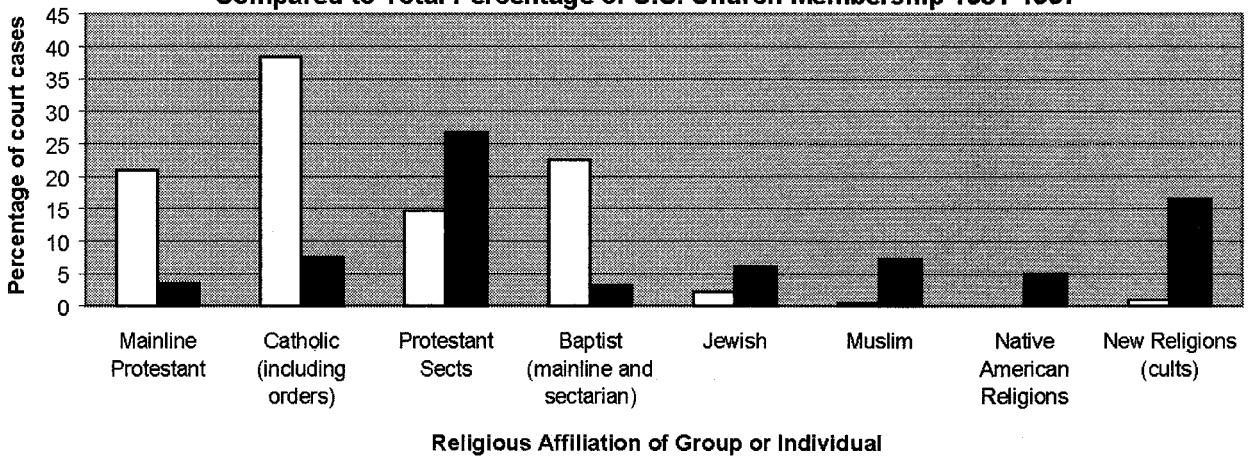
The values and beliefs of mainstream groups are more likely to be imbedded in the norms of a society, than those of minority religions. Thus, minority groups are more likely than mainstream ones to turn to the courts for protection. Speaking to the American Economic Association prior to *Smith* (in 1986), U.S. court of appeals Judge Richard A. Posner reiterated this point. He posited that the "modern courts" interpretation of the First Amendment "forbids the government to interfere with the free market . . . [of] religion,"[30] He explained that such rulings benefit "fringe" groups because they force the majority to accommodate to their needs. Although the results presented in Figure 1 and 2 may not seem all that surprising, documenting them with quantitative analysis helps us verify claims that minority groups have more difficulty in court than do mainstream religious groups. This information is also important for setting up our conclusions about the role of legal decisions for determining if religious actions have been unfairly burdened, which can influence the religious economy.

Majority Group Wins

Minority groups go to court more often, and they are less likely than mainstream religions to prevail. As can be seen in Figure 3, a compelling governmental interest often outweighs individuals' claims to free exercise exemptions for minority religious groups. Consider that while sects and cults make up a larger portion of the cases coming before the courts (Figure 2), their proportion of favorable rulings is relatively low, approximately 37 percent (Figure 3). In contrast, mainline Protestants are the only affiliation to rise above 50 percent favorable decisions, holding at almost 70 percent for all decisions and

30. Richard A. Posner, "The Law and Economics Movement," *American Economic Review* 77 (1987): 12.

Figure 2
Percentage of Court Cases on Free Exercise*
Compared to Total Percentage of U.S. Church Membership 1981-1997



* Free exercise estimates do not include atheists (7) or general Christian cases (77) in which a Christian religion was present but a specific affiliation/denomination could not be identified. Likewise they do not include 216 cases where religious identification either remained unclear or could not be identified. The total number of free-exercise cases included in this figure is 933 and the total membership is 157,078,000.

almost 65 percent for free exercise claims. The only surprise in Figures 2 and 3 is that Baptists and Catholics have relatively low levels of court involvement and a low rate of favorable rulings. In part, this likely reflects the diversity of the Baptist and Catholic groups. Although they are mainstream religions, each group still retains segments that hold a high level of tension with the culture. The high-tension segments receive a lower rate of favorable rulings, but the rate of cases for the group as a whole is still quite small. Overall, the trend shows that sects, cults, and other minority religions have a high level of involvement in the courts and a low rate of favorable rulings.

Like other minority groups, it may not be surprising that religious minorities are more likely than mainstream religious groups to bring forth cases and receive unfavorable rulings. However, unless we actually measure the number of cases and successful rulings, we do not know how many more cases they bring forward or the extent to which they receive unfavorable rulings. As will be shown later, changes in legislature or court precedence significantly impact these numbers. Thus, knowing this baseline measure helps us determine the extent to which RFRA and *Smith* had an influence on the number of favorable rulings and cases brought forth by minority religious groups.

The Immediate Consequences of *Smith*

While speaking for the majority in *City of Boerne v. Flores*, Justice Kennedy asserted that laws of general applicability very rarely burden the free exercise of religion in America.[31] His contention has been supported by legal scholars such as Ira C. Lupu[32] and James E. Ryan.[33] However, in contrast to these claims, our analysis reveals that the consequences of the *Smith* decision were swift and immediate. The percentage of favorable decisions for free exercise cases dropped from over 39 percent to less than 29 percent following *Smith* and returned to over 45 percent after RFRA was passed (see Table 1). Thus, Table 1 suggests that following *Smith* religious groups were less likely to receive a favorable ruling, but it does not explain the process through which these decisions were made.

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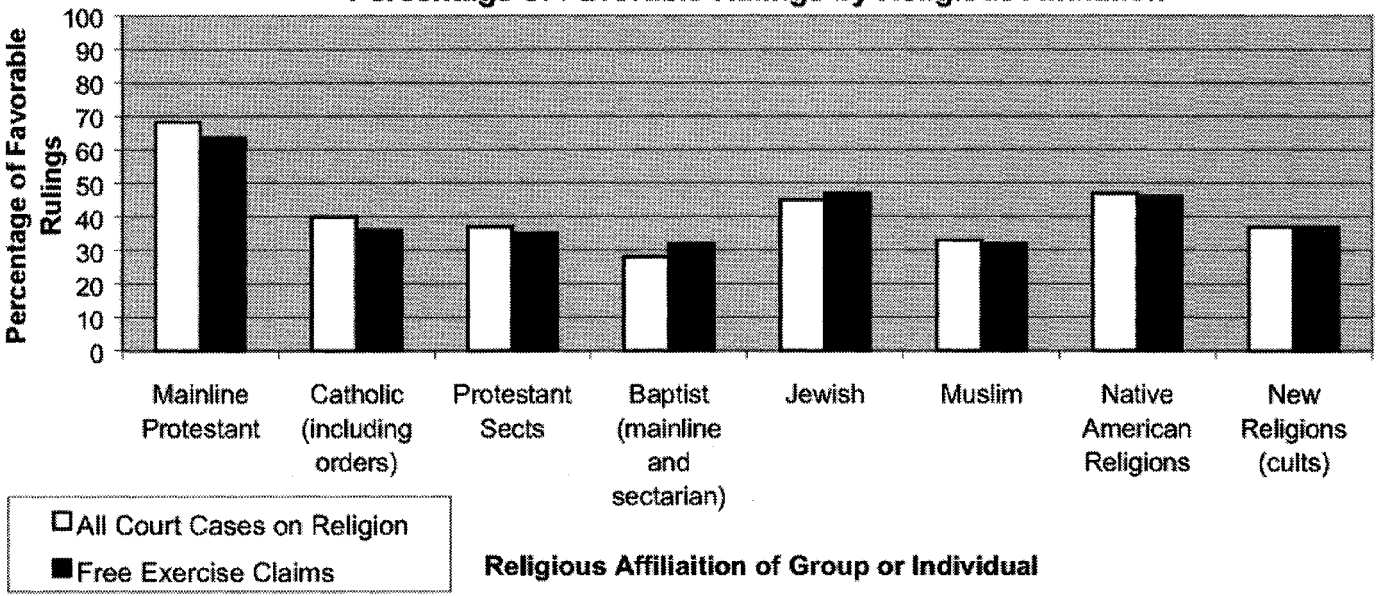
31. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).
32. See note 28, at 590.
33. See note 26, at 1456.

Figure 3
Percentage of Favorable Rulings by Religious Affiliation*



* Like Figure 2 this graph does not include general Christian cases (77), atheists (7), or the 216 cases where religious identification either remained unclear or could not be identified. For all court cases there were 387 cases that were unclear and 336 general Christian cases. This figure includes a total of 1379 court cases on religion and 933 free-exercise cases.

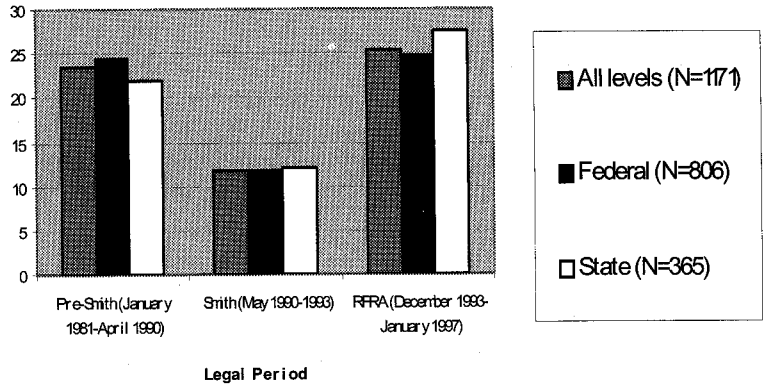
Table 1
Percentage of Successful Decisions by Legal Period

	Legal Period		
Decision	*Pre-Smith (January 1981-April 1990)*	*Smith (May 1990-November 1993)*	*RFRA (December 1993-January 1997)*
Favorable	39.5% (310)	28.4% (38)	45.2% (114)

Establishment clause cases are not included in the table (N=469). This is appropriate because not all cases of this nature include a question of religious freedom. There were 65 cases in which serious harm could be attributed to the religious group/individual's actions and the court certainly ruled unfavorably. We removed those cases to eliminate possible bias in favor of the theory and literature. Thus, the table presents conservative estimates of the independent variables effects on court decisions.

Figure 4 offers a summary of how frequently the compelling interest test was cited by state and federal courts during each of the three legal time periods. The steep drop following *Smith* and the sharp rise after RFRA supports critics' contentions that *Smith* sharply reduced the use of compelling interest as the standard for adjudicating free exercise claims. The percentage of free exercise cases citing compelling interest for all levels of the court was 24 percent prior to *Smith*, 12 percent after *Smith* and before RFRA, and 25 percent following RFRA. This evidence suggests that *Smith* had a significant impact on the use of the compelling interest test that was established thirty years earlier. During the *Smith* period (and prior to RFRA), courts not only were less likely to rule in favor of religious defenders, but they were less likely to rely on the compelling interest test as a standard by which to justify favorable and unfavorable decisions. Figure 4 also suggests that *Smith* had an immediate influence on lower court decisions. Following *Smith*, state and federal courts use of the compelling interest test declined sharply, and after RFRA, both courts increased their use of the test.

Figure 4
Percentage of Cases Citing a Compelling Interest Test by Legal Period



Thus, the consequences of the *Smith* decision resulted in a swift reduction in the use of the compelling interest test and a far lower rate of favorable free exercise decisions. However, these drops in favorable rulings and use of the compelling interest test underestimate the influence of *Smith*. Following *Smith* and prior to RFRA, we also found that religious groups were less likely to initiate free exercise claims. Whereas, religious groups initiated 7.1 free exercise cases per month prior to *Smith* (from 1981 to 1990), they only initiated 3.2 cases per month following the *Smith* case and prior to RFRA. Once RFRA was instated, the number of cases increased to 5.9 per month. When religious groups did not have recourse to the courts for free exercise exemptions, they very quickly limited its use. This suggests that if religions were burdened by laws of general applicability, the courts would not know about it because so few religious groups would come requesting an exemption.[34]

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34. After *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA), which was a form of the *Sherbert* test. The Supreme Court struck it down because they saw it as unconstitutional. In his essay, "Reflections on the Demise of the Religious Freedom Restoration Act," Professor Robert Drinan makes the similar point that we will not know what happens to religious individuals and persons if RFRA is not reinstated in some form. As he explains, "at the local level, zoning commissions will quietly deny access to Jewish temples, controversial denominations or Catholic schools. Appeals will not be taken nor will there be

One of the reasons cited for why general laws should not be subjected to "religious practice" exemptions is because they put an undue burden on the judiciary and inappropriate requests to determine the centrality of religious beliefs.[35] In his opinion Justice Scalia explained that "if the 'compelling interest' test were to be applied at all, it would have to be applied across the board, to all actions thought to be religiously commanded, such a rule would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind. . . ."[36] While dissenting from this holding, Justice Blackmun posited that the Court's apprehension of a flood of other religious claims is "purely speculative."[37] He sardonically cited Professor Lupu explaining that, "Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe."[38]

Table 2
Percentage of Successful Free-Exercise Cases Citing Compelling Interest by Legal Period

	Did case use compelling interest test?		
Legal Period	No	Yes	N
Pre-Smith (January 1981-April1990)			
Favorable Decision	42.7%	29.2%	310
Unfavorable Decision	57.3%	70.8%	475
Smith (May 1990-1993)			
Favorable Decision	29.7%	18.8%	38
Unfavorable Decision	70.3%	81.3%	96
RFRA (December 1993-January 1991)			
Favorable Decision	44.7%	46.9%	114
Unfavorable Decision	55.3%	53.1%	138
All Free-exercise claims			
Favorable Decision	41.4%	32.8%	462
Unfavorable Decision	58.6%	67.2%	709

any public outcry. The number of individuals who will seek to vindicate their rights under the *Smith* decision will be small." See Drinan, note 11, at 115-16. This concern echoes those raised by colonial Baptists. They chose not to appeal their cases to the courts because they had no representation "on the bench, none at the bar, and seldom any on the juries." See William G. McLoughlin, *New England Dissent, 1630-1833, Vol. I and II, 512* (Cambridge, Mass.: Harvard University Press, 1971).

35. *Employment Division v. Smith,* 494 U.S. 872 (1990) at 887, 888.
36. Ibid. at 888.
37. Ibid. at 917.
38. Quoted in ibid.

In agreement with Justice Blackmun we found that in the past the courts were not forced to give exemptions to all cases where the "compelling interest" test was used. In fact, we were surprised to learn that the chance of a favorable decision was reduced when the compelling interest test was cited. As shown in Table 2, we found that this held true for each of the legal time periods, except during RFRA's brief existence. But, even in the RFRA period, compelling interest was used as a test for evaluating the limits of religious freedoms, offering no assurances of a favorable decision.

The Ramifications of *Smith* for Minority Religions

Thus far we have shown that after the *Smith* decision there was a sharp reduction in the percentage of favorable free exercise rulings, decreased volume of free exercise cases initiated by religious groups, and reduction in the courts' use of the compelling interest test. In addition, many have proposed that such changes would be especially burdensome for minority religious groups. Justice Scalia explains that ". . . in leaving accommodation of religious practices to the political process will place at a relative disadvantage those religious practices that are not widely engaged in. . . ."[39] Nevertheless, he posits that our nation cannot afford the luxury of maintaining the free exercise exemption.[40]

Since the majority of Americans adhere to mainstream religious groups (See Figure 2), laws of general applicability are likely to be consistent with mainstream religious beliefs. Laws of general applicability are developed on the bases of majority norms, values, and beliefs. Thus, majority religious groups especially have an advantage over minority ones in terms of discrimination of their religious beliefs, values, and behaviors without free exercise exemptions. This is exactly Justice O'Connor's point, as she explains,

> The First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish.[41]

Previous research using multivariate models with this same data has revealed that Justice O'Connor and Justice Scalia are right: minority

39. *Division of Oregon v. Smith*, 494 U.S. 872 at 890.
40. Ibid.
41. Ibid. at 902.

religions are especially influenced by the removal of free exercise claims.[42] When controlling for region, level of court, legal period, citing the compelling interest test, and whether an individual or group brought the case forward, we found that minority religious groups were significantly less likely to receive favorable decisions when compared to mainline Protestant churches.[43] With the exception of Native American religions, the odds that sects, cults, and Muslims will receive a favorable ruling are about one-third of the odds for mainline Protestants. General Christians, members of the Jewish faith, and Catholics were also *less* likely to receive a favorable decision when compared to mainline Protestant groups.[44] The probability of a favorable decision in using the compelling interest test at the federal level for mainstream Protestants was 53 percent in the pre-*Smith* period, dropped to 40 percent during the *Smith* era (but before RFRA) and increased to 58 percent for the RFRA period. If a religious sect had a case in federal court and the compelling interest test was used, its probability of success was much lower. It was 27 percent in the pre-*Smith* period, 18 percent during the *Smith* era (but before RFRA), and 31 percent during the RFRA period.

Yang v. Struner offers one example of the burden minority religious groups faced after the *Smith* decision and prior to RFRA. *Yang v. Struner* was a case involving the parents of a Hmong man who died in his early twenties and on whom an autopsy was performed.[45] The parents, the Yangs, were originally from Laos and believe that autopsies are a mutilation of the body. Because of the autopsy, they believed that their son's spirit "would not be free, therefore his spirit will come back and take another person in his family."[46] The chief medical examiner had thus conducted the autopsy in violation of the Yangs' deeply held religious beliefs. The court initially ruled in the Yangs' favor, but while it was in the process of researching the case law regarding damages, *Smith* was decided. As a result, Judge Pettine reconvened the Yang's case early to inform the family that under the new precedent set by *Smith*, they did not have a claim for free exercise protection. Judge Pettine's comments express his deep regret at having to overturn his

42. See Wybraniec & Finke, *supra* note 22.

43. Aside from religious affiliation, legal period, and citing of the compelling interest test, the only other significant variable was level of court.

44. See Wybraniec and Finke, note 22, at 437, Table 4, Model 2.

45. *Yang v. Struner*, 750 F. Supp. 558 (1990).

46. Ibid.

previous decision and allude to some of the burdens placed on certain religious groups:

> My regret stems from the fact that I have the deepest sympathy for the Yangs. I was moved by their tearful outburst in the Courtroom during the hearing on damages. I have seldom, in twenty-four years on the bench, seen such a sincere instance of emotion displayed. I could not help but also notice the reaction of the large number of Hmongs who had gathered to witness the hearing. Their silent tears shed in the still Courtroom as they heard the Yangs testimony provided stark support for the depth of the Yangs' grief. Nevertheless, I feel that I would be less than honest if I were to now grant damages in the face of the Employment Division decision.[47]

II. ASSESSING THE INFLUENCES OF THE RELIGIOUS FREEDOM RESTORATION ACT (RFRA)

The Religious Freedom Restoration Act was a legislative attempt to restore the "compelling governmental interest" test used by earlier courts. Targeting the *Smith* decision, RFRA prohibited the government from substantially burdening the exercise of religion "even if the burden results from a rule of general applicability. . . ."[48] The Act also allowed individuals whose religious freedom had been burdened in violation of RFRA to "assert that violation as a claim or defense in a judicial proceeding and obtain relief against a government."[49] As demonstrated earlier in Figure 4, the citing of the compelling interest test rebounded to pre-*Smith* levels following the passage of RFRA.

RFRA was far-reaching in scope, applying to all federal and state statutory and judge-made laws. Individuals and groups raised RFRA claims in cases ranging from abortion to zoning. For example, RFRA was used to invalidate a school district policy that prohibited students from bringing ceremonial knives to school;[50] a community college's requirement that all employees profess a loyalty oath to the state, which conflicted with plaintiffs' Jehovah's Witness religion;[51] and portions of the federal Bankruptcy Code that allowed the government to recover funds that a debtor had tithed to a church.[52] Conversely, RFRA claims failed to invalidate drug possession and trafficking charges against a "Church of Marijuana" member[53] and under RFRA it was held that a

47. Ibid.
48. Ibid. at § 2000bb-1(a)
49. Ibid. at § 2000bb-1(c)
50. *Cheema v. Thompson*, 67 F.3d 883 (1995).
51. *Bessard v. California Community Colleges*, 867 F. Supp. 1454 (1994).
52. *United States v. Crystal Evangelical Free Church*, 82 F.3d 1407 (1996).
53. *United States v. Meyers*, 906 F. Supp. 1494 (1995).

county did not have to pay for certain accommodations to a hearing-impaired child for use in a private religious institution.[54]

Shortly after RFRA was signed into law, critics contended that it placed an undue burden on the majority and that Congress did not have the authority to overturn the Court's ruling in *Smith*.[55] June of 1997 brought this issue center stage with *City of Boerne v. Flores*, where city officials argued that RFRA had unconstitutionally burdened their governing capacity.[56] Specifically, RFRA had wrongfully expropriated power from state and local governments. The Supreme Court agreed and overturned RFRA, and in the process sent a strong message about who would be the final authority on free exercise cases.

After RFRA was overturned, RFRA advocates immediately began to explore other legislative alternatives. Because a constitutional amendment could take years, supporters sought more immediate legislation.[57] Congress passed the Religious Land Use and Institutionalized Persons Act of 2000, which essentially protects religious construction activities such as the building of churches.[58] Specifically, the Act prohibits enforcement of land use regulations "that impose a substantial burden on the religious exercise of a person, including a religious assembly or institution."[59]

Although limiting zoning ordinances for religious groups, the act does not come close to conferring the rights granted under RFRA. Thus, advocates continue to search for other means of recourse, with selected states passing legislation similar to RFRA. Professor Drinan has suggested that the most promising option is for Congress to implement the International Covenant on Civil and Political Rights, which was ratified by the U.S. Senate in 1992.[60] Article 18 of the cove-

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54. *Goodall by Goodall v. Stafford Copunty Sch. Bd.*, 60 F.3d 168 (1995).

55. In his analysis of the oral argument in *Boerne*, Professor Drinan points out that early in the debate, Justice Souter revealed that the real annoyance and anger of the justices derived from their conviction that with RFRA, Congress had openly sought to reverse *Smith*. See Drinan, note 11 at 106.

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

57. "Protecting Religious Freedom After *Boerne* v. *Flores*": Hearings on *Boerne v. Flores* Before the Subcomm. On the Constitution of the House Comm. On the Judiciary, 105th Cong. (1997). See written testimony of Rev. Oliver Thomas: "[Constitutional amendments] are broad. They are general. They are risky." cf., at 16, see the written testimony of Mark E. Chopko, General Counsel, United States Catholic Conference: "Only if it is satisfied that a statute would not solve the problem which the City of Boerne decision created, should Congress consider a constitutional amendment."

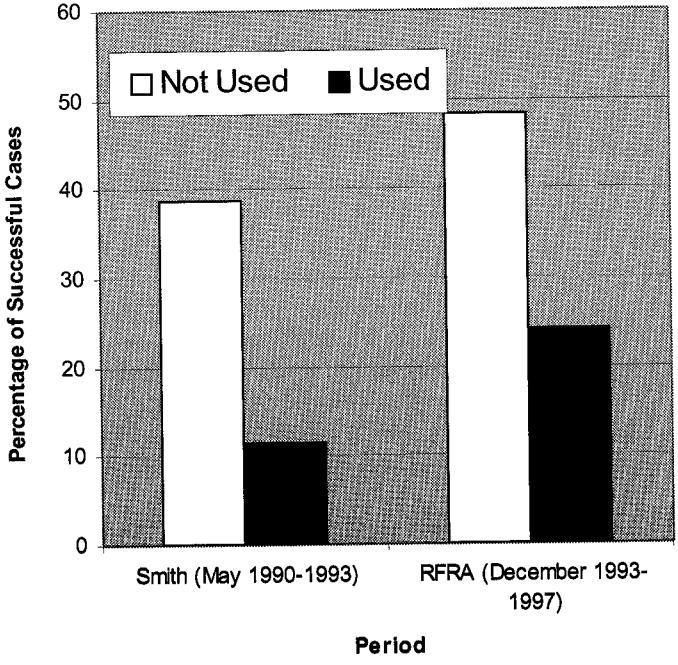
58. Pub. L. No. 106-274, 114 Stat. 803 (22 September 2000).

59. Ibid., 2(a)(1).

60. See Drinan, note 11, at 106.

nant expressly protects not only religious beliefs but also the "freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."[61] Additional options include attaching free exercise conditions to federal spending and employing the Commerce Clause to justify RFRA.[62]

Figure 5
Percentage of Successful Cases Citing Smith or Laws of General Applicability by Period
(Total successful and unsuccessful cases=867)



But how effective will these legislative actions be? To what extent can legislative actions neutralize the effects of the Court's *Smith* deci-

61. International Covenant on Civil and Political Rights, 16 December 1966, S. EXEC. DOC. NO. E, 95-2, 999 U.N.T.S. 171 (Sep 8, 1992) at art. 18 § 1.

62. See Drinan, note 11, for a discussion on some potential recourses that are being considered.

sion? We can get some indication of this by looking at how courts proceeded during the RFRA period—after the *Smith* decision had been decided and RFRA implemented. Did RFRA reduce the influence of *Smith*? Our data offer some mixed results.

We test the effects of RFRA in two ways. First, we look at the effects of citing *Smith* before and after RFRA. Were the effects of citing *Smith* reduced following RFRA? Second, we look at the effects of citing RFRA. Did citing RFRA increase the chance of a favorable decision?

Figure 5 shows that, regardless of the legal period, when *Smith* was cited court rulings were less favorable. Prior to RFRA, only 11 percent of the cases citing *Smith* issued a favorable ruling. This percentage jumped to 25 percent after RFRA, but it was still far below the 49 percent favorable decisions for cases not citing *Smith*. But if the effects of citing *Smith* were reduced during the RFRA period, the citing of RFRA had little effect on court decisions. During the RFRA legal period, 42 percent of the cases citing RFRA handed out favorable decisions compared to 47 percent that did not cite RFRA (Figure not shown). These results suggest that even during the RFRA period, citing *Smith* continued to have far more influence than citing RFRA.

Once again, previous analysis has used multivariate models to address these same questions and the results are virtually identical. The legal period of *Smith* by itself had a negative impact on court decisions,[63] but the period effect held even when we controlled for cases that did not specifically cite *Smith*.[64] Moreover, when we looked at cases that cited *Smith* during the RFRA period we found that the odds of a favorable decision for religion were significantly reduced by almost four to one.[65]

This implies that the precedent set by *Smith* had a general effect on religious freedom cases beyond merely the specific citing of this case or the general laws of applicability stemming from it. Not only can *Smith* be used as a justification to deny a free exercise claim, but also more generally such decisions have a very subtle influence on how court actions will proceed under the parameters set by the decision. The results indicate that when *Smith* and RFRA are placed in the same equation together, the more powerful factor is the original *Smith* decision. In effect, RFRA was not able to counteract the strength of the precedent set by *Smith*.

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63. Wybraniec and Finke, note 22, at 437, Table 4.
64. Ibid. at 439, Table 5.
65. Ibid. at 440, Table 6, Model 1.

III. *SMITH*'S POTENTIAL INFLUENCE ON AMERICA'S RELIGIOUS ECONOMY

The research presented in this essay has shown that minority religious groups are more likely to rely on the courts for religious freedom protections, but once in court are less likely than mainline Protestant groups to receive a favorable decision. We have also demonstrated that following *Smith*, fewer religious minorities approached the courts for free exercise protection, and were also less likely to receive it. Finally, we have seen that if the RFRA period is any indication, legislation did not eliminate the significantly negative influence of *Smith* on majority and minority religious groups receiving favorable rulings. The implications of these findings do not, however, end here. Rather, the research presented in this article has strong inferences for the way *Smith* can limit the level of religious involvement and pluralism in the United States.

Recent research in sociology and American religious history has found that the most significant religious changes often derive from shifting *supply*, not shifting demand.[66] The theoretical arguments, frequently referred to as the "new paradigm" for the study of religion, contend that religious economies (like commercial economies) are sensitive to changes in market structure. The most significant market change is regulation. The argument is simple:

Regulation restricts competition by changing the incentives and opportunities for religious producers (churches, preachers, revivalists, etc.) and the viable options for religious consumers (church members).[67] In other words, when governments are allowed to constrain

66. Roger Finke and Rodney Stark, *The Churching of America, 1776-1990* (New Brunswick, N.J.: Rutgers University Press, 1992); Roger Finke and Laurence R. Iannaccone, "Supply-Side Explanations for Religious Change," *Annals of the American Academy of Political and Social Science* 527 (1993): 27; R. Stephen Warner, "Work in Progress Toward a New Paradigm for the Sociological Study of Religion in the United States," *American Journal of Sociology* 98 (1993): 1044; Rodney Stark and Laurence Iannaccone, "A Supply-Side Reinterpretation of the 'Secularization' of Europe," *Journal for the Scientific Study of Religion* 33 (1994): 230; Roger Finke, "Supply-side Explanations for Religious Change," in *Rational Choice Theory and Religion: Summary and Assessment*, ed. Lawrence A. Young (New York: Routledge, 1997); Laurence Iannaccone, Roger Finke and Rodney Stark, "Deregulating Religion," *Economic Inquiry* 35 (1997): 350; Terry D. Bilhartz, *Urban Religion and the Second Great Awakening* (Rutherford, N.J.: Fairleigh Dickinson University Press, 1986).

67. Roger Finke, "Religious Deregulation: Origins and Consequences," *Journal of Church and State* 32 (Spring 1990): 609.

the religious action of individuals or groups, the range of religious choices and the level of religious activity will be reduced.[68]

When applied to American religious history, the argument helps to explain the religious surge of the early nineteenth century, known as the Second Great Awakening. During the colonial period in North America, sects and other non-Protestant religions struggled for acceptance, itinerant revivalists were denied preaching opportunities, and members often faced persecution.[69] When the regulations were lifted, however, the percent of the population involved in organized religion increased from 17 percent in 1776 to 34 percent in 1850. These emerging religious freedoms unleashed a diverse array of religious groups. Groups that introduced new forms of revivalism, religious music, and itinerant preaching offered more religious choices for the people, and brought more people into the pew.[70]

Social scientists have also found support for this argument with cross-national studies. For example, the lifting of religious regulations in Latin America unleashed a surge of new sects and contributed to the dominant Catholic Church advocating political and economic reforms benefiting the people rather than an existing political regime.[71] Following World War II and the introduction of new religious freedoms in Japan, new religions were described as arising "like mushrooms after a rainfall" and the new era was called the "rush hour of the gods.[72] Conversely, a number of sociologists of religion have posited that most European nations support low levels of religious pluralism and activity because they regulate religion through both support and suppression.[73]

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68. Legal scholars have also discussed the importance of religious freedom in the American religious market. In 1989, Richard A. Posner and University of Chicago law Professor Michael McConnell argued that "the First Amendment can be understood as positing that the 'market'—realm of private choice—will reach the 'best' religious results; or, more accurately, that the government has no authority to alter such results." See Michael W. McConnell and Richard A. Posner, "An Economic Approach to Issues of Religious Freedom," *Chicago Law Review* 56 (1998): 1, 14.

69. Sidney E. Mead, *The Lively Experiment* (New York: Harper & Row, 1963).

70. See Finke and Stark, note 67.

71. See Anthony J. Gill, *Rendering Unto Caesar: The Roman Catholic Church and the State in Latin America* (Chicago, Ill.: University of Chicago Press, 1998).

72. See Tsuyoshi Nakano, "The American Occupation and Reform of Japan's Religious System: A Few Notes on the Secularization Process in Postwar Japan," *The Journal of Oriental Studies* 26 (1987): 124, 132; H. Neill. McFarland, *The Rush Hour of the Gods: A Study of New Religious Movements in Japan* (New York: Macmillan, 1967).

73. For a review of the cross-cultural social science literature that has examined differences between the United States and Europe, see specifically chapter 9 in Rodney Stark and Roger Finke, *Acts of Faith: Explaining the Human Side of Religion* (Berkeley, Calif.: University of California Press, 2000). For a cross-national analysis of established religion's im-

When studying the public's response to new religious movements in Germany, Great Britain, and the United States, James Beckford found that once free exercise protections are reduced, this "creates conditions in which piecemeal, administrative sanctions can be applied behind a curtain of official detachment."[74]

How does all of this apply to American religion today? We are not suggesting that courts directly regulate religious action. Courts, per se, do not regulate or burden religion. However, they are often the last option for protecting freedoms. As Michael W. McConnell noted, the *Smith* case left "the court open to the charge of abandoning its traditional role as protector of minority rights against majoritarian oppression."[75] When the courts fail to defend free exercise rights, new burdens will inevitably arise and the burdens will weigh most heavily on the minority religious groups. Lacking the numerical size and public acceptance necessary for garnering legislative support, these groups rely on the judiciary for protection. As just reviewed, the *Smith* decision resulted in fewer minority religions seeking protection from the courts and being less successful when they sought such protections.

Some might suggest that restraints on the minority religions will have little impact on American religion. However, even a cursory glance at American religious history reveals that the religious outsiders of one era often join the mainstream in the next.[76] The revivalistic Methodists, exuding untamed religious experiences in the late eighteenth and early nineteenth century, were less than 0.5 percent of the population in 1776. By 1850, they accounted for nearly 12 percent of the total population and 34 percent of all church members. The once persecuted and struggling colonial Baptists now dominate the South, and the American Catholic Church, accused of supporting a papal conspiracy in the nineteenth century, is now the largest religious group in the nation.[77] A few of the religious outsiders of the early twentieth century, Mormons and Assemblies of God, arrived in the new century with burgeoning memberships and an increase in cultural acceptance.

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pact on the degree of religiosity within a country, see Carl R. Gwin and Charles M. North, *Religious Freedom and the Unintended Consequences of the Establishment of Religion*, presented at the annual meeting of the Society for the Scientific Study of Religion (2002). Also, see Stark & Iannaccone, note 67.

74. James A. Beckford, *Cult Controversies: The Societal Response to New Religious Movements* (London: Tavistock Publications, 1985), 286.

75. Michael W. McConnell, "Free Exercise Revisionism and the *Smith* Decision," *Chicago Law Review* 57 (1990): 1109, 1129.

76. Moore, *Religious Outsiders and the Making of Americans*.

77. See Finke and Stark, note 67.

Likewise, the once suspect immigrant religions, Lutherans and Jews, are now treated as America's own. Yet, the organizational success of each of these movements, especially the once sectarian groups (i.e., Methodists, Baptists, Mormons, and Assemblies of God), relied on religious freedoms.

Restraints on religious practice not only curb the growth of minority religious movements, but also other innovative segments of American religion, such as para-church organizations. Although these groups make no attempt to start new churches and typically focus on narrow organizational missions, they have shaped American religion for at least two centuries. The American Sunday School Union and American Tract Society serve as two of the most visible para-church groups in nineteenth-century America, with Campus Crusade for Christ, Prison Fellowship Ministries, and Promise Keepers serving as a few of the approximately eight hundred contemporary examples.[78] These kinds of organizations continue to introduce contemporary worship styles, innovative forms of evangelism, and new kinds of religious education. A significant number of mainline American denominations have copied these innovations.[79] Yet, despite their wide-ranging influence, para-church groups have little formal authority and lack a membership to initiate legislative actions.

To the extent that *Smith* reduces the court's role as protector of minority rights, the most innovative segments of the American religious economy will face challenges to their religious freedom. These are the very segments that have proven most effective in recruiting new members, starting new churches, and defining the future of American religion.

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78. Robert Wuthnow reports that the "approximately 800 nationally incorporated nonprofit voluntary associations that meet the Internal Revenue Service's qualifications for religious organizations, but which are not themselves churches of denominations . . . these religious associations comprise about 5 percent of the total [national nonprofit associations]." See Robert Wuthnow, *The Restructuring of American Religion* (Princeton, N.J.: Princeton University Press, 1988), 108.

79. For a more extensive discussion see Roger Finke, "Innovative Returns to Tradition: Using Core Beliefs as the Foundation for Innovative Accommodation," *Journal for the Scientific Study of Religion* 43 (2004): 19-34.