

**PUT THAT IN YOUR THURIBLE AND SMOKE IT: *RELIGIOUS  
GERRYMANDERING OF SACRAMENTAL INTOXICATION***

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*Introduction*

The Religious Freedom Restoration Act of 1993 prohibits the Federal Government from substantially burdening an individual's free exercise of religion unless the Government is able to demonstrate "that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that government interest."<sup>1</sup> This was the key argument maintained by the UDV,<sup>2</sup> in the case of *Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal*, brought before the United States Supreme Court in November, 2005.<sup>3</sup> The pervasive use of illegal drugs within the United States has forced the government to strike a balance between the necessity of permitting religious freedom, and the importance of enforcing the Controlled Substance Act.<sup>4</sup> One context in which the interests of the individual's freedom has seemed to supercede the interests of the government is in certain cases of sacramental narcotics use. Yet the justification for religious based drug use is not so cut-and-dry as to permit enjoyment of this freedom by all established religions. Some have argued that "religious gerrymandering"<sup>5</sup> has made acceptable partaking in particular

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<sup>1</sup> 42 U.S.C. 2000bb-1(b).

<sup>2</sup> O Centro Espirita Beneficente Uniao Do Vegetal is the Portuguese translation for "The Spirit Center of the Beneficent Union of the Two Plants."

<sup>3</sup> 126 S.Ct 1211 (2006) (Roberts, C.J.).

<sup>4</sup> 21 U.S.C. 801 (2006). The act regulates the importation, manufacture, distribution and use of psychotropic substances, and divides these substances into five schedules based on their potential for abuse, accepted medical applicability, and general safety.

<sup>5</sup> *Walz v. Tax Comm'n of New York City*, 397 U.S. 664 (1970).

activities for selected groups, while leaving others wondering why they are unable to obtain equivalent rights.<sup>6</sup>

In *Uniao*, the Supreme Court accepted the argument by the plaintiff, a representative for the religious organization, that the Government's interference with the organization's use of a Schedule I restricted substance, ayahuasca<sup>7</sup>, was a substantial burden on the exercise of his religion. The Government conceded that their actions amounted to such a burden, however argued that the burden did not violate Religious Freedom Restoration Act (RFRA) because applying the Controlled Substance Act was the least restrictive means of advancing the government's compelling interest: that of "protecting the UDV member's health and safety, preventing diversion of [aya]h[u]asca from the church to recreational users, and complying with the 1971 United Nations Convention of Psychotropic Substances."<sup>8</sup> The Supreme Court disagreed, holding that the Government failed to demonstrate that this burden would be justified under either the health and safety or risk of diversion grounds, and that the 1971 Convention did not apply to ayahuasca.

This justification for religious drug use, however, has not always fallen consistently among differing faiths, and leads an observer to question the distinction between one religion's permitted accommodations over another's. In *Olsen v. Drug Enforcement Administration*,<sup>9</sup> the Supreme Court rejected the Free Exercise and

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<sup>6</sup> See Lesley R. Frank, *Accommodating Religious Drug Use and Society's War on Drugs* 58 Geo. Wash. L.Rev. 1019, 1033-1040 (1990) (discussing the government's selective drug policies in relation to religious organizations).

<sup>7</sup> 21 U.S.C. 812(a)(1) (1988). Schedule I refers to substances which (A) have a high potential for abuse; (B) have no currently accepted medical use in treatment in the United States; (C) have a lack of accepted safety for use of the substance under medical supervision.

<sup>8</sup> *Uniao*, 126 S.Ct at 1218.

<sup>9</sup> 878 F.2d 1458 (D.C. Cir. 1989) (Ginsburg, J., joined by Silberman, J., with Buckley J., dissenting), *cert. denied*.

Establishment Clause claims brought by petitioner Carl Olsen, a member of the Ethiopian Zion Coptic Church, who sought an exemption on religious grounds from laws prohibiting the use and possession of marijuana. *Olsen* was considered distinguished from the then unique exemption for Native American ceremonial use of the hallucinogen, peyote.<sup>10</sup> However the facts and arguments in *Olsen* bear a stronger resemblance to those presented in *Uniao* than *Uniao* resembles the justification granted to the Native American Church. This article seeks to address the discrepancies between religious freedom granted in *Olsen* and *Uniao*, while using the Native American Church exemption and RFRA as foundations to draw precedent from. Part I presents the case history of *Uniao*, as well as their beliefs and historical background. Part II analyzes the differences between the drugs associated with each religious group, and compares the Court's rulings to its justification of the Native American peyote exemption. Part III suggests a test which could be implemented to aid the Court in determining the legitimacy of a religious organization's sacramental drug request. Part IV considers the disparity between an individual's freedom to believe and freedom to act, as well as the differences relating to secular practice and religious belief. Part V presents the issue of religious gerrymandering and xenophobia to non-traditional faiths. Part VI addresses potential issues that arise associated with past judicial decisions.

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<sup>10</sup> 21 C.F.R. 1307.31 provides: "The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration."

## *I. Background*

O Centro Espirita Beneficente Uniao do Vegetal (UDV) is a Christian sect which was founded in Brazil in 1961 by Jose Gabriel da Costa, known to his followers as Mestre Gabriel, and which currently has over 7,000 members across forty cities.<sup>11</sup> The UDV first appeared in the United States in 1988 in Norwood, Colorado. Members of the pioneer group became associated with Jeffrey Bronfman, plaintiff to this case and representative for the UDV in 1989. Over the years between 1989 and 1992, Bronfman traveled to and from Brazil to learn with the Instructive Body of the UDV. He was taught Portuguese, and in 1994 became a full Mestre of the organization.<sup>12</sup> Bronfman returned to the United States and established his church in Santa Fe, New Mexico, which in 2006 had about one-hundred and thirty members. At the time of this case, there also existed congregations in Seattle, Washington, Norwood, Colorado, Marin County, California, and Plantation, Florida, with a total of eighty-one additional members.

Central to the UDV faith is receiving communion through ayahuasca tea, made from the combination of two plants native to Brazil.<sup>13</sup> On May 21, 1999, customs services seized 4 drums of ayahuasca plants. According to the plaintiff's declaration, twenty to thirty agents arrived at the church, accompanied by several state and local police officers, and responded as if the UDV was under a drug bust, searching for

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<sup>11</sup> Centro Espirita Beneficente Uniao do Vegetal, <http://www.udv.org.br/english>.

<sup>12</sup> Declaration of Plaintiff at 52, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, et al.*, 126 S.Ct 1211(2006) (No. 04-1084) (A "Mestre" is a religious leader of the UDV).

<sup>13</sup> The tea is prepared by combining two plants; the first is *Psychotria viridis*, and contains the drug in question, dimethyltryptamine, a hallucinogen found on Schedule I of the Controlled Substances Act. The second plant is called *Banisteriopsis Caapi*. The name "Uniao do Vegetal" refers to the combination of these two plants, which are believed to have sprung from the graves of the religion's revered historical figures. These plants symbolize the spirits of these individuals, much like the wafer and wine represent the flesh and blood of Christ in communion by the Catholic Church.

materials to produce and distribute narcotics.<sup>14</sup> Investigation revealed that there had been fourteen prior shipments of the plants to Santa Fe, however eleven of these previous shipments had been formally declared and cleared by customs and the FDA.<sup>15</sup> The agents threatened the UDV with prosecution if they were later discovered to come into possession of more of the plants, but it was the UDV who brought suit, seeking an injunction and declaratory relief for the repossession of the plants. The UDV alleged that applying the Controlled Substances Act to the UDV's use of ayahuasca violated RFRA.

The Government focused on the argument of protecting the health and safety of the UDV members, and presented expert witnesses to testify that the drug had adverse and potentially permanent effects on its users.<sup>16</sup> The UDV responded by presenting its own experts, who refuted the Government's assertions for a lack of evidence and limited studies on the drug's physiological effects.<sup>17</sup> Chief Justice Roberts focused on the word "demonstrates" in RFRA, defining the word as having met "the burden of going forward with the evidence and of persuasion."<sup>18</sup> Roberts felt that unlike the government, the UDV was the one who effectively demonstrated that its sincere exercise of religion had been burdened. The Court looked to Circuit Court's precedent in applying a balancing test, stating that "the balance is between actual irreparable harm to [the] plaintiff and

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<sup>14</sup> See *supra* note 12, at 68

<sup>15</sup> *Id.*, at 69

<sup>16</sup> See Alicia B. Pomilio, *Ayahuasca: an Experimental Psychosis that Mirrors the Transmethylation Hypothesis of Schizophrenia*, *Journal of Ethnopharmacology*, Feb. 27, 1997, at 29 (study showing that users experienced symptoms similar to schizophrenia). See also J. Riba, *Subjective Effects and Tolerability of the South American Psychoactive Beverage Ayahuasca in Healthy Volunteers*, *Psychopharmacology*, 2001 at 154 (study using six healthy male volunteers to use the drug, one of which experiencing anxiety disorder). See also James C. Callaway and Charles S. Grob, *Platelet Serotonin Uptake Sites Increased in Drinkers of Ayahuasca*, *Journal of Psychoactive Drugs*, 1998, at 367

<sup>17</sup> See Report of Alexander M. Walker, M.D., Ph.D. at 132, *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, et al.*, 126 S.Ct 1211(2006) (No. 04-1084) (discussing a lack of adequate research by Callaway & Grob). See also Report of Donald Robert Jasinski, M.D. at 141, *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, et al.*, 126 S.Ct 1211 (2006) (No. 04-1084) (discussing lack of evidence that ayahuasca use leads to addiction).

<sup>18</sup> *Uniao*, 126 S.Ct at 1219.

potential harm to the government which does not even rise to the level of preponderance of the evidence.”<sup>19</sup>

The Government next tried to argue that under the Controlled Substances Act, the requisites that the substance has a high potential for abuse, no currently accepted medical use and a lack of accepted safety under medical supervision, itself precludes any individual consideration or exceptions except those explicitly authorized by the Act.<sup>20</sup> The Court rejected this argument, fearing that accepting it would lead to a Controlled Substance Act that would admit no exceptions. Rather, the Court states that RFRA requires the Government demonstrate that the compelling interest test be satisfied for the individual rather than burdening an entire class.

Lastly, the Government referred to *Morton v. Mancari*,<sup>21</sup> arguing that there exists a “unique” relationship between the United States and the Tribes which permits the Native Americans to use peyote, however that relationship would not necessarily apply to any other religion. Roberts flatly criticized the Government’s argument by pointing out that they never explained what the “unique” relationship was, and why such a relationship would justify the Government in permitting the use of a drug that, according to its own arguments, creates a risk of abuse and could prove dangerous to its users.<sup>22</sup> The Court continues by emphasizing that granting permission to the Native American Church to use peyote has not undercut the Government’s ability to enforce its bans for

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<sup>19</sup> See *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d at 1009 (Seymour, J., concurring in part and dissenting in part).

<sup>20</sup> *Uniao*, 126 S.Ct at 1220.

<sup>21</sup> 417 U.S. 535.

<sup>22</sup> [If] any Schedule I substance is in fact *always* highly dangerous in any amount no matter how used, what about the unique relationship with the Tribes justifies allowing their use of peyote? Nothing about the unique political status of the Tribes makes their members immune from the health risks the Government asserts accompany any use of a Schedule I substance, nor insulates the Schedule I substance the Tribes use in religious exercise from the alleged risk of diversion. *Uniao*, 126 S.Ct 1222 (Roberts, C.J.).

secular use. Lastly, the Court rejected the Government's claim that the importation of the substance violated the 1971 Convention because the Government failed to submit evidence addressing the international consequences of granting such an exemption.

The Court concluded that the Government failed to demonstrate a compelling interest in barring the UDV from its sacramental use of ayahuasca. There were no dissenters of this opinion.

## *II. Differentiation Among Schedule I Substances*

Throughout the Court's opinion, there is no mention of *Olsen*, where the D.C. Circuit Court refused to grant an exemption for marijuana use by the Ethiopian Zion Coptic Church.<sup>23</sup> Rather than distinguishing *Uniao* from *Olsen*, the Court focuses on drawing similarities between the Native American Church and the Uniao do Vegetal, from both a policy standpoint, as well as the effects of the two drugs. The question arises as to whether the Court actively attempted to avoid the subject of *Olsen*, and if argued today, if *Olsen* still would have been decided the way it had.

The three drugs in question, dimethyltryptamine (the hallucinogenic chemical in ayahuasca), mescaline (found in peyote) and marijuana, all fall into the same class of Schedule I substances,<sup>24</sup> but have been treated differently by the courts over the years. Marijuana has itself been the subject of scrutiny for a number of religion oriented cases, although unlike other drugs, has continually been rejected exceptions for religious purposes. This is likely due to the fact that marijuana use has proven to be much more

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<sup>23</sup> The majority opinion rejecting sacramental drug use in *Olsen* was written by Ruth Bader Ginsburg, now a member of the Supreme Court who joined the decision by Roberts in *Uniao* to permit similar sacramental drug use.

<sup>24</sup> See *supra* note 7.

pervasive in the United States than any other illegal substance. According to a 2005 study by the Drug Enforcement Administration, 44.8% of 12th-graders had used marijuana in their lifetimes, as opposed to a much smaller percent of peyote and DMT users.<sup>25</sup> In *McBride v. Shawnee County*,<sup>26</sup> the court noted that almost 800,000 times as many pounds of marijuana had been confiscated by the DEA than peyote between 1980 and 1987.<sup>27</sup> If these statistics hold true for today, that may create a potential justification by the Government in promoting the interest of preventing diversion of non-adherents to the religion in question. Yet these statistics only refer to the general pervasiveness of the drug, and speaks nothing about the justification under the other prong of the compelling interest test.

In addition, the Court in *McBride* justified itself by referring to the special rights granted to Native Americans which were specifically rejected in *Uniao*. The Court pressed the differences even more by stating that under *Cherokee Nation v. Georgia*,<sup>28</sup> Native Americans have special benefits because they are considered domestic dependant nations. A question arises as to whether it is thus justified for the government to place favor on one particular cultural group over another, and thus grant them further rights based on the fact that they were abused by the government generations ago. By granting the Native American Church specific enumerated rights as a kind of “affirmative action,” using law a law that was written over 150 years ago to remedy a situation long since passed, the government effectively shuts out other potentially shunned and ostracized cultures from being granted their own social rights solely on the justification that the U.S.

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<sup>25</sup> Marijuana Use/User Population, <http://www.drugabuse.gov/infofacts/marijuana.html> (discussing trends of marijuana use by grade school students over a twelve year period).

<sup>26</sup> 71 F.Supp.2d 1098 (1999).

<sup>27</sup> *Id.* at 1111.

<sup>28</sup> 30 U.S. 1 (1831).



government does not owe them restitution. Yet if the Rastafarian Church in *McBride* is to be treated equally as other religions, while the Native Americans are considered the exception, that would further the court's attempts to prohibit drug use for religious purposes by separating the two groups of religions, those aboriginal to North America, and everyone else. This may get around RFRA by construing rules related to drug use by the Native American Church as a unique exception, but would be inconsistent with the decision by the Roberts Court in *Uniao*.

Under The Protection and Preservation of Traditional Religions of Native Americans Act,<sup>29</sup> the government permits Native Americans the use of peyote, mitigating the acquiescence by stating that peyote has existed for centuries, and that its use has been permitted since 1965. Although a court would not be able to argue that because it has been used since 1965 it has a history and tradition of use, it may be justified in arguing the legitimacy of the Native American peyote use as a traditional cultural act indigenous to the United States. The government may then be justified in permitting the use of ayahuasca by members of the UDV by noting that the UDV is a religion native to the Americas, and thus similarly situated under the statute. However, the government would then essentially be favoring religions of those who originated in the Americas as opposed to those who had moved here from another continent. In addition, the United States has traditionally granted unique benefits to Native Americans which have not been permitted for other cultures<sup>30</sup>

The definition "Indian Religion" may be one way in which the government can justify a similarity between the UDV and the Native American Church while drawing it

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<sup>29</sup> 42 U.S.C. 1996.

<sup>30</sup> See Indian Employment Credit Act, 26 U.S.C. 45A.

further from the Ethiopian Zion Coptic Church. Under the statute, the term “Indian Religion” means any religion “which is practiced by Indians, and the origin and interpretations of which is a form within a traditional Indian culture or community.”<sup>31</sup> There is no statutory definition of what is an “Indian,” which could lead an objective observer to conclusively assume that all Native Americans are also Indians. The “origin and interpretation” of the UDV faith comes from a pre-Columbian belief indigenous to the Americas. Like many other religions whose practices have been assimilated under a Christian umbrella,<sup>32</sup> the UDV has still originated from a traditional Indian culture or community.

The flaw in this argument is that it would permit converts of the religion to be granted the same rights as those with blood lines to the culture. Where the Native American Church is made up entirely of those born into the faith, the majority of members of the North American UDV Churches are converts.<sup>33</sup> By permitting sacramental use of ayahuasca to non-native converts to the faith, the government may be opening the potential for non-Native Americans to acquire and use peyote by asserting that they are indeed members of the faith, and being that a religion is an individual’s subjective lifestyle, it would be difficult for an outsider to disprove. Yet the statute explicitly states that only those who are recognized as Indians will the statute apply to, thus potentially raising an equal protection concern.<sup>34</sup>

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<sup>31</sup> 42 U.S.C. 1996a(c)(3).

<sup>32</sup> See Richard Fletcher, *The Barbarian Conversions: From Paganism to Christianity* (1998).

<sup>33</sup> See *supra* note 10.

<sup>34</sup> U.S. Const. amend. XIV, § 1.

### *III. The Adherents of Faith Test*

There are certainly many cultural differences between the religions in question, as well as the practices they adhere to while consuming their respective intoxicants. Aside from the actual effect of the drug used, the combination and ritual of the plants *psychotria viridis* and *banisteripsis caapi*,<sup>35</sup> bear a strong resemblance that of taking communion for the Catholic Church. Where one drug is the actual intoxicant, the other serves as another important component of enacting the ritual. The legality of the substance has no bearing on the ritualistic and spiritual factors involved in receiving a religious communion. Consider the Constitutional prohibition of alcohol in the early part of the 20th century,<sup>36</sup> enacting laws which make alcohol illegal does not alter the necessary and sacred purpose of obeying the word of one's god<sup>37</sup>. Forcing an individual to forsake his or her own beliefs due to the requirements of the government would effectively violate the perceived notion of a separation of Church and State. If the Church must adhere to the commands of the State, then the Church is no longer a house of faith but an inhibited institution pinned under the regime of an omnipotent secular authority. This can not be the case, as the State would never conversely permit the Church to undermine the actions and decisions of a government. Where a government is the exertion of influence in a State, religion is the exertion of influence in a Church. A Church must be free to decide upon the rules and declarations of a religious faith, just as a State must be free to determine what is necessary for the advancement of a government.

Under this analysis, no religion should be forced to adhere to the laws of the State, and a State should not be forced to adhere to religious doctrine. Perhaps a State should

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<sup>35</sup> See *supra* note 12.

<sup>36</sup> U.S. Const. amend. XVIII, *repealed by* U.S. Const. amend. XXI.

<sup>37</sup> Both Judaism and Catholicism require the consumption of sacramental wine.

permit the smaller, less powerful religion to co-exist as an independent authority yet still subsumed by political governance, much like tribal land within the United States, or consulates within foreign nations. Unfortunately, doing so would also present problems in both the enforcement of laws intended to protect the citizenry, as well as establishing the legitimacy of a religion. In order to allow a Church to exist without the pressures of a State, but still enjoy the comfort and security it provides, the State would have to be willing to accept a modified policing regime, enforcing laws which protect the individual from outside harms but still permitting that individual to make independent decisions for his or her self. Thus one would not be allowed to commit a crime against another, but the compelling interest related to protecting the health and safety of the individual would be null, and thus leave actions such as consumption of intoxicating substances up to the discretion of that individual. Hence the individual would be given a choice as to whether to partake in the use of a sacramental drug without fear of repercussion by the State. The State could still promote anti-drug endeavors in the public setting, as well as restrict Churches from advertising their use of sacramental intoxicants, much like restrictions upon federal funding for advertisement of abortion clinics.<sup>38</sup>

A question may arise as to how this would affect the children of members of such organizations. Traditionally, the Government does not recognize the interests of the individual child as being separate from the interests of the parent<sup>39</sup> This system may itself be flawed in that it may neglect adequate protection for the welfare of the youth, however the Government's own argument has consistently maintained that a parent

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<sup>38</sup> See *Rust v. Sullivan*, 500 U.S. 173 (1991).

<sup>39</sup> See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Douglas, J., dissenting).

should be permitted to raise his or her child in whatever manner the individual sees fit.<sup>40</sup> The Uniao do Vegetal places a strong emphasis on the importance of family unity,<sup>41</sup> as do adherents of many other religions believe it necessary to instill the tenets of the family's faith in the child at a young age. Consider Confirmation by the Catholic Church, or a Bar Mitzvah in Jewish families. In accordance with cultural and religious beliefs, the child becomes an adult at the age of thirteen, far younger than the age in which modern American society passes such title. Thus, regardless of the legal standing of the adolescent by the Government, sincere devotees to various religious structures have considered their children to be adults at differing ages. Hence, a child should be permitted the same freedom as an adult to participate in the activities of a smaller independent religious society if such a right is consistent with the religion's canon, even if not necessarily in concurrence the secular standard.

A second problem may exist in determining the legitimacy of a given religion, which religions are able to obtain exclusive church rights, and how large, individually and overall, a Church may be. By enabling a Church to grow too large, the State would be forfeiting its own power to the Church, and increasing the risk of adherents to these faiths forsaking their loyalties to the State in favor of their religion. If the State were to attempt to limit the size and authority of the Church, the State would effectively be violating the Establishment Clause. A State would then need to have a system to determine the legitimacy of a Church. This could be achieved through considering (A) the history and tradition of the Church, (B) the degree of commonality of faith and

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<sup>40</sup> See *Troxel v. Granville*, 530 U.S. 57 (2000) (O'Connor, J.).

<sup>41</sup> Declaration of Plaintiff at 62, *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, et al.*, 126 S.Ct 1211(2006) (No. 04-1084)

practice by its adherents, and (C) the burden in which permitting its practices would usurp the authority of the State.

Under the first prong, the court would question the history and tradition of a given Church. The UDV was founded in 1961,<sup>42</sup> however adherents to faith may also argue that their cultural practice in consumption of ayahuasca has been occurring since pre-Columbian times, long before the establishment of the United States and its laws.<sup>43</sup> The same argument could follow from the Native American Church, as the government has asserted that traditional Indian practices must be kept intact.<sup>44</sup> The Ethiopian Zion Coptic Church was developed in 1914 by Marcus Garvey and later became the inspiration for the practice of Rastafarianism.<sup>45</sup> According to the Rastafarians, the Jamaican Negroes originated in Ethiopia, their symbolic leader being the Emperor Haile Selassie I.<sup>46</sup> The question would arise as to how long a religion must exist before it is considered as having had a history. Currently there are between 3,000 to 5,000 Rastafarians in the United States, and almost one million adherents worldwide.<sup>47</sup> Based on these numbers the burden would be on the State to prove that such a faith lacks a

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<sup>42</sup> Declaration of Plaintiff at 50, *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, et al.*, 126 S.Ct 1211(2006) (No. 04-1084).

<sup>43</sup> Centro Espirita Beneficente Uniao do Vegetal, <http://www.udv.org.br/english>

<sup>44</sup> There may be reason to believe that the United States preserves the Native American way of life and grants them additional unique freedoms in order to sustain as sort of a living museum of the prehistoric existence of Tribes in the Americas. Consider that in the United States, if an archaeological study is conducted in which human bones are excavated from the site, the Tribes are given the opportunity to inspect the site and even close it down if they believe the site belonged to their ancestors. After which they are permitted to appropriate the site. This creates much frustration for the American archaeological community. See T.J. Ferguson, *Native Americans and the Practice of Archaeology*, 25 Annual Review of Anthropology 63, 63-79 (1996). See also Sarah Richardson, *Skull Wars: Kennewick Man, Archaeology, and the Battle for Native American Identity* (2000).

<sup>45</sup> Clifton L. Holland, *Towards a Classification System of Religious Groups in the Americans by Major Traditions and Family Types* 126 (2004).

<sup>46</sup> *Id.* at 110.

<sup>47</sup> J. Gordon Melton, *Encyclopedia of American Religions* 1754 (5th ed. 1996).

tradition. Additionally, the Court in *Olsen* accepted that, for purposes of its decision, the Ethiopian Zion Coptic Church was a bona fide religion.<sup>48</sup>

It may be argued that defending the freedom of older religions while denying such rights to relatively younger religions would effectively be a violation of equal protection. Therefore, it would be necessary for the court to decide not only how heavily to weigh this factor, but also whether a religion has a valid enough argument that its belief structure can be categorized as a new religious sect rather than a frivolous cult. The fear of permitting relatively younger religions the same autonomy as more established faiths is that there may be no evidence that the younger religion would thrive, or that it actually has an assembly of members who adhere to an identical set of beliefs. By having a sort of “religious tenure,” the Government would be able to test the organization to see if it can maintain a strong member foundation before granting it such freedoms. Thus, a bona fide church should be capable of surviving long enough to establish that its members deserve such equivalent rights.

The second prong may prove to be a strong factor in resolving the discrepancies between the religious organizations which are currently be permitted sacramental intoxicant use and those which are denied such rights. The UDV maintains a hierarchical ranking system for members and leaders of the church. In addition, members are required to learn Portuguese, as it is the language used during ceremonial services, similar to the way Latin is used in the Catholic Church and Hebrew in a Jewish Synagogue.<sup>49</sup> Members have a certain day and time in which the sacramental use of

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<sup>48</sup> 878 F.2d at 1466.

<sup>49</sup> Declaration of Plaintiff at 53, *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, et al.*, 126 S.Ct 1211(2006) (No. 04-1084).

ayahuasca occurs, as well as celebrations for enumerated calendar holidays.<sup>50</sup> This differs from the lack of uniformity and structure by the Rastafarians. The court in *McBride* noted that although members proscribed to the same faith, the practices of the faith itself were only a loose network of postulates, actions being up to the discretion of the individual.<sup>51</sup> Additionally, there is no specific day or time in which the sacramental drug was used. In *State v. Olsen*,<sup>52</sup> the petitioner argued that “ganja” was used “continually all day, through everything we do.”<sup>53</sup> In view of this argument, a court must either assume that everything the religion does all day is sacramental, or that the drug use is not in fact sacred to the faith. If the court determines the latter, then it follows that the faith is not in fact a religion for purposes of this test.

Although it may be argued again that favoring formalized churches over unstructured, informal churches would pose an equal protection problem, the court would be able to address this concern by taking into consideration whether the informal organizations maintain a cohesive enough ideological structure to regard the group as a church as opposed to an assortment of disjointed beliefs. The Government would likely want to avoid granting freedoms to such unorganized religions for fear that some individuals would join the faith solely for the purpose of obtaining illegal substances as opposed to a sincere desire to practice religious dogma. Thus, in requiring a formal structure, the church would be able to regulate its own members by requiring them to participate in all religious activities, and not leave it up to the individual to cherry-pick.

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<sup>50</sup> *Id.* at 58.

<sup>51</sup> 71 F.Supp 2d at 1100.

<sup>52</sup> 31 N.W.2d 1 (Iowa 1982) (Larson, J.J.).

<sup>53</sup> *Id.* at 7.



Lastly, the burden must be upon the State to prove that permitting the organizations adherents to participate in religious activities, such as sacramental drug use, would hinder the State in exerting its authority. This is where the current standing compelling interest would be analyzed; if prohibiting the organization to act as an independent Church contributes to the furtherance of a compelling government interest and is the least restrictive means of furthering that compelling governmental interest, then the government has met its burden.<sup>54</sup> A result of this analysis in favor of the government would effectively eliminate the religious organization, however if the previous two prongs have been satisfied, the government would need a significant compelling reason to show that the religion poses a substantial burden on a governmental interest. In essence, the third factor would be used to supplement a courts decision made in light of the first two prongs.

Peyote and ayahuasca are relatively uncommon drugs, and followers of their religious beliefs, although extensive in numbers, in relation to the rest of the United States population are few and far between.<sup>55</sup> Marijuana, on the other hand, is a very common drug, but the government has no more standing to prohibit marijuana use by religious adherents solely based on the fact that it is more common than it has to prohibit the generally low incidences of peyote and ayahuasca use. In other words, all three drugs are illegal, and all fall within the same category of Schedule I substances, but if two are permitted use by their religious group, it follows that the third should be as well. The government would likely attempt to argue that permitting the use by the religious group

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<sup>54</sup> 42 U.S.C. 2000bb-1(a).

<sup>55</sup> *See supra* note 25.

would encourage more people to falsely become adherents, however such a hypothesis would be moot as it is difficult to prove what a person does and does not actually believe.

Essentially, as the current compelling governmental interest test has proven vague, it must be supplemented by a more practical and consistent test. Governmental interests are constantly changing, depending politics and the necessities of a nation. However permitting a religion to act free of a government's decisions would be the most practical method of establishing a freedom of religion, as well as separating Church and State. The only requirement by the government would be for the organization to prove that it is in fact a true religion, and that its tenets are strictly adhered to.

#### *IV. Beliefs, Actions, and Civil Religion*

In *Cantwell v. Connecticut*,<sup>56</sup> the Court differentiated between the two freedoms that derive from the establishment clause; a freedom to believe and a freedom to act.<sup>57</sup> The first, the Court considered absolute in nature, whereas the second was not. The Court justified this by stating that conduct remains subject to regulation and protection of our society.<sup>58</sup> In *Reynolds v. United States*,<sup>59</sup> the state upheld a criminal statute proscribing polygamy, despite the fact that polygamy was a basic tenet of the defendant's Mormon religion. However unlike the cases above, the religious belief in *Reynolds* was not achieved through polygamy, instead polygamy followed the tenets of the religious belief. Based upon the holding in *Cantwell*, it may be possible for a religion to be denied its right to belief by not being permitted their right to act, as beliefs often follow from

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<sup>56</sup> 310 U.S. 296 (1939) (Roberts, J.).

<sup>57</sup> *Id.* at 303.

<sup>58</sup> *See also* Braunfeld v. Brown, 366 U.S. 599 (1961).

<sup>59</sup> 98 U.S. 145 (1878) (Waite, J.).

acts. If the purpose of using the drug is to put the believer in a certain mental state, one which they would not be able to achieve but for the drug's use, then the only way that user will be able to obtain his desired spiritual nirvana is through committing those actions which are themselves subject to this kind of regulation

In Mirsky's *Civil Religion and the Establishment Clause*,<sup>60</sup> the author argues that the separation between church and state is actually less existent than we think, as the formation of a "civil religion" has transpired in formation of our national heroes, such as Washington and Lincoln, and holy days, such as the Fourth of July and Memorial Day.<sup>61</sup> The permissiveness and denial of drug use by our civil religion has thus trumped the laws of the less powerful non Judeo-Christian faiths. Consider "under god" in the pledge, as well as "in god we trust." These slogans are controversial in that they fit with the whole societal schema by which the United States developed under, and thus society may be reluctant to remove such simple prayers from their everyday lives.<sup>62</sup> However to enforce such acts, not beliefs, as referring to god in a pledge, and not allowing the use of illegal drugs, essentially concedes that the civil secular faith is to be taken seriously, whereas the small minority faith is not. It has been said that "one religious denomination cannot be officially preferred over another,"<sup>63</sup> yet this may not be true if the majority civil religion has formulated the laws by which the minority faiths are governed.

It is certainly true that many people in the United States consider their religious beliefs to be more important and compulsory than obeying government enacted laws. Throughout history, there have existed cultures of individuals which have been

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<sup>60</sup> 95 Yale L.G. 1237 (1986).

<sup>61</sup> Mirsky, *supra* note 57 at 1251.

<sup>62</sup> See *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004).

<sup>63</sup> *Larson v. Valente*, 456 U.S. 228 (1982).

persecuted for their faiths who have preferred death in abiding by gods command, believing it to be more important than living and having sinned.<sup>64</sup> Although it may seem that modern society no longer lives under the judgment of a god, rather the practicality of science,<sup>65</sup> it would still be difficult for anyone, including a government, to convince a sincere religious adherent that his genuine religious beliefs are false, even in the face of public adversity. The United States is home to many devout religious organizations which, by society's standards, may seem a bit extreme and unreasonable, but are still permitted to believe and act as they choose without reprimand by the government.<sup>66</sup> Unfortunately, while some of these religious organizations are favored by the government because their belief structure falls in sync with the political standing of a dominant political party, other religious organizations suffer as political and social xenophobia makes their practices unaccepted by society.

In addition, people are often born into their faiths, and are not given an opportunity to truly question their belief structure until they are old enough to see the world through more scrupulous eyes. There continues to exist a minority of Americans who disagree with the tenets of the civil religion,<sup>67</sup> and many break these tenets through illegal acts such as underage drinking, drunk driving, jay-walking, and cheating on one's taxes. Although these acts are certainly not condonable, they serve as indication that even the tenets of the majority civil faith are not fully believed nor adhered to by the

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<sup>64</sup> See Jacob Rader Marcus, *The Jew in the Medieval World: a Source Book: 315-1791* (1999).

<sup>65</sup> But see South Park, Episode 151, *Go, God, Go! Part II* (2006) (Satirical commentary on secular extremists who believe that by eliminating religion entirely, war and poverty would end, and the practical likelihood that even without religion, societies would still go to war over for simple socio-cultural differences).

<sup>66</sup> See Craig M. Kibler, *Assembly Declines to Make Clerk More Accountable*, 36, *The Layman*, A Publication of the Presbyterian Lay Committee, July 2003 at 9 (A Christian newspaper article referring to the Uniao Do Vegetal as spirit, plant and animal worshipers who encourage ritualistic vomiting)

<sup>67</sup> See David DeLeon, *The American Anarchist: Reflections of Indigenous Radicalism*, Johns Hopkins University Press, 117 (1979)

people, and thus have no more right to be accepted than the belief-based actions of the minority religions.

Yet one could always argue before the courts or petition legislatures to change laws, as law, like religion, is ever changing to accommodate what is accepted and desired by society into its own belief structure.<sup>68</sup> Perhaps the government's strongest argument in this situation is to say that its beliefs are based on a safe and prolonged livelihood of its people. Perhaps the establishment clause was submitted by the founding fathers to prevent war and strife over religion within the nation's bounds, and drug use, drunk driving, and jay-walking, although not necessarily analogous to war and strife, are similarly dangerous to the people's livelihoods, and are thus not permissible.

[O]ne man's "bizarre cult" is another's true path to salvation."<sup>69</sup> The Judeo-Christian faiths have stories of when their own religion was once considered a cult, wrong, and illegal. History speaks of times when people were killed for their individual beliefs in god. Prior to Constantine, the Christians were fed to the lions. Mennonites were pushed out of Europe for simple cultural differences in faiths.<sup>70</sup> Many sought the United States for freedom from persecution because of their cultural differences. Have we grown too full to allow new faiths in our borders, and too intolerant to accept their cultural practices? Perhaps nowadays we aren't seeking more workers to build our towns and harvest our crops, and thus have become less warm and welcoming to anyone or anything that does not fit within our social comfort zone.

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<sup>68</sup> See *supra* note 42.

<sup>69</sup> New York Times, Feb. 16, 1977, at 25.

<sup>70</sup> See Harold S. Bender, *Mennonite and Their Heritage* (1964).

### *V. Religious Gerrymandering*

“Beliefs need not be acceptable, logical, consistent or comprehensible to other in order to merit First Amendment Protection.”<sup>71</sup> The Court’s goal is to look objectively into the merits of a case and be able to provide impartial justice for all individuals, regardless of whether that individual’s activities fall outside what a society constitutes as “normal.” But it is the society that deems certain drugs to be evil and impermissible, regardless of whether or not the drug in question is justifiably a detriment to society, and to what degree it is more or less injurious than legal drugs.<sup>72</sup> What our society regards as damaging is reflected in the laws, yet the same society permits the use of alcohol and tobacco but not peyote, mescaline or marijuana.

A society’s standards have been ruled by the Courts to be an unworkable justification for the prevention of a religious activity. In *Church of Lukumi Babalu Aye v. City of Hialeah*,<sup>73</sup> a religious Santeria group was prohibited by a Florida animal cruelty statute from performing animal sacrifices. The Government argued that the statute punishes “whoever...unnecessarily...kills an animal,”<sup>74</sup> and that killings for religious reasons are always deemed unnecessary. The Court determined that the government’s interests were not compelling, that “the Free Exercise Clause commits government itself

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<sup>71</sup> *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981).

<sup>72</sup> See Robert S. Gable, *Comparison of Acute Lethal Toxicity of Commonly Abused Psychoactive Substances*, *Addiction*, 99, June 2004 at 686 (Study testing the relative levels of toxicity of psychoactive substances, finding marijuana and DMT to be relatively non-lethal, Mescaline rarely lethal, and alcohol commonly lethal and most common co-intoxicant in cause of death). See also H. Kalant et al., *The Health Effects of Cannabis*, Toronto Center for Addiction and Mental Health, 1999. See also J.C. Callaway et al., *Pharmacokinetics of Hoasca Alkaloids in Healthy Volunteers*, *Journal of Ethnopharmacology*, 65, 1999 at 243.

<sup>73</sup> 508 U.S. 520 (1993) (Kennedy, J.).

<sup>74</sup> Fla. Stat. § 828.12 (1987).

to religious tolerance,<sup>75</sup> and that it is the duty of the legislators to remember the duties and rights granted by the Constitution.

If this sort of religious gerrymandering prohibits a government from excluding one religious group based on its unusual activities, would it not necessarily be gerrymandering if it were to exclude a religious group from using a controlled substance solely because the controlled substance also has a widespread recreational use? Suppose that the Florida statute was enacted to prevent people from deliberately harming house pets and having cock fights. Similar anti-drug laws are enacted to prevent recreational use of drugs. If the Court is able to strike down a statute in that it is was passed specifically to target the unusual activities of one religion, that of sacrificing animals for religious purposes, it should follow that certain law may be struck down in that it denies the use of controlled substances for religious purposes. The Court has already created such exceptions for the two drugs that have less pervasive recreational use, but lacks a compelling analysis to reject requests for religious marijuana use.

When Councilman Martinez, a supporter of the animal cruelty statutes, stated that people were put in jail for practicing this religion in pre-revolution Cuba, the audience at a Hialeah City Council meeting applauded.<sup>76</sup> Does this imply that we too should seek a nation where certain religious groups are seen as outsiders, and their actions are looked upon with a sense of racial intolerance? In Nazi Germany, the government solicited advertisements depicting Jews and monsters and vampires, so when they were removed from the cities, the Germans too would applaud.<sup>77</sup> The Court rejected the Councilman's

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<sup>75</sup> *Lukumi*, 508 U.S. at 547.

<sup>76</sup> *Id.* at 541.

<sup>77</sup> See Randall L. Bytwerk, *Bending Spines: The Propagandas of Nazi Germany and the German Democratic Republic* (2004).

indications of the desires of the masses because it suggested a suppression of minority religion. Adhering to the masses unknowledgeable rejection of sacramental drug use also suppresses religions like the Ethiopian Zion Coptic Church, and thus the Court should consider the same dilemma when refusing the religion to act upon the tenets of its faith.

The ordinances permitted such killing as fishing, extermination of rats and mice, and euthanasia of stray, neglected, abandoned or unwanted animals.<sup>78</sup> The determinative factors of which animals may and may not be killed according to the city seemed arbitrary, but the city carved out specific animals it would permit removal of. The statute stated that an animal may be killed “for humanitarian reasons, or when the animal is of no commercial value,”<sup>79</sup> or “the infliction of pain or suffering is in interest of medical science.”<sup>80</sup> Had the ordinance been passed, the Court would have effectively been saying that commercial purposes and medical science outweigh the interests in pursuit of religion.

This degree of lack of trust and understanding about the practices of another religion is exactly the type of mindset the Court has attempted to remove from law. A control should be placed over government from inhibiting religious practice solely because a practice does not fit within the confines of what society dictates is normal. Where a group of people are permitted to have their own ethnocentric beliefs as to what is and is not fitting and correct, those personal beliefs of the individual and the mass should never be allowed to breach another individual’s conviction in the value of his or her religion.

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<sup>78</sup> *Lukumi*, 508 U.S. at 543.

<sup>79</sup> Fla. Stat. § 828.073(4)(c)(2).

<sup>80</sup> Fla. Stat. § 828.02.



## VI. *The Lesser of Evils*

The District court noted in *Uniao* that the Courts must balance the actual irreparable harm to the plaintiff and the potential harm to the government.<sup>81</sup> Excluding the irreconcilable Rubix Cube that can be a Court's justification of a judicial decision, the actual practical difference between *Uniao* and *Olsen* was the risk associated with diversion. In *Uniao*, the plaintiff took careful steps to avoid the drug getting into the wrong hands. The UDV set up strict rules as to who was allowed to use the ayahuasca and when it could be consumed.<sup>82</sup> Members who violated these rules were subject to expulsion from the organization. The UDV also indicated to the court that they maintained strict policies against other narcotics use. The plaintiff claimed that he only imported quantities of the plant necessary to fulfill to enact the church ceremonies.<sup>83</sup>

The plaintiff in *Olsen*, on the other hand, was caught with large quantities of marijuana prepared for distribution.<sup>84</sup> The Court is likely aware of the relative ease of obtaining marijuana in the United States as opposed to less common drugs such as peyote and ayahuasca.<sup>85</sup> Perhaps the Court should have been aware that due to the pervasive use of marijuana, member of the Ethiopian Zion Coptic Church were likely going to acquire marijuana regardless of their Court's decision. This kind of oversight creates a problem in that it makes preventing marijuana overuse practically unenforceable. Preventing a religion from obtaining its sacramental drug, while have knowledge that members will

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<sup>81</sup> *Uniao*, 126 S.Ct at 1219.

<sup>82</sup> Declaration of Plaintiff at 63, *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, et al.*, 126 S.Ct 1211(2006) (No. 04-1084).

<sup>83</sup> *Id.* at 66.

<sup>84</sup> *State v. Olsen*, 315 N.W.2d 1 (1982).

<sup>85</sup> *See supra* note 25.

continue to do so anyway, essentially encourages the performance of illegal acts. A court must realize that the law will only be as constructive as it is obeyed.

Additionally, it should follow that the more dangerous a drug, the more it should be restricted. Studies have shown that marijuana use is considerably less dangerous than DMT,<sup>86</sup> and yet DMT is permitted limited used to a special class of individuals. Marijuana, although a Schedule I drug, has in fact had a history of accepted medical use in the United States.<sup>87</sup> Further, if the Court were to mitigate with the Ethiopian Zion Coptic Church and permit it regulated marijuana use,<sup>88</sup> perhaps it would decrease the likelihood of Church members from engaging in illegal acts, or limit their use of marijuana to sacramental activities. Rather the Court rejects the Church's requests, and permits the use of peyote, whose users spend an average of eight hours incapacitated.<sup>89</sup> If the Court were to base its determination of which religions are permitted to use the illegal drug and which are not on the relative dangerousness of the drug, they would be hard pressed to justify the use of peyote or ayahuasca over marijuana.

### *Conclusion*

If the Court were required to take an all or nothing approach in permitting religious drug use rather than continue to employ its current method of cherry-picking which organizations may obtain such an exclusion, it would be forced to extend equal rights to all organizations whom request individual religious benefits, lest the government

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<sup>86</sup> See *supra* note 69.

<sup>87</sup> See *Gonzales v. Raich*, 545 U.S. 1 (2005)

<sup>88</sup> The Court appointed amicus curiae proposed a limited "restrictive religious exemption" for the Ethiopian Zion Coptic Church. Church members over the age of majority would be permitted to use marijuana during their Saturday evening prayer, and would not be allowed to leave the place where the ceremony was conducted until eight hours had passed. The DEA denied this exemption. *Olsen*, 878 F.2d at 1460.

<sup>89</sup> John H. Halpern, et al., *Psychological and Cognitive Effects of Long-Term Peyote Use Among Native Americans*, 58, *Biological Psychiatry*, Oct. 15, 2005 at 624

is capable of discerning a legitimate compelling reason to eliminate that freedom from all religions.

Considering the implausibility of such a *carte blanche* approach, it would be beneficial for the government to establish a precise test by which all petitioning religions could be adjudicated by. The Court should first look into the history and tradition of the religion to determine its legitimacy as a sincere and comprehensive faith. Second, the Court should explore the commonalities between adherents of the faith, and question to what degree its members adhere to similar tenets with one another. Lastly, the Court should balance the burden that permitting such freedoms would have on the State, and decide whether granting those freedoms serve a more just function than those of the specific goals of the government. If the Court does not adopt a standard method of weighing the freedoms of religious organizations adequately, it will be forced to continue using an ad hoc inquiry to designate such freedoms.

The Court in *Uniao* understood that the freedom to religious practice is essential to furthering the goals set by the Constitution. By encumbering the freedom for religious groups to act in accordance with their faith, the Court would effectively be stripping a part of that freedom from its citizens. If the Ethiopian Zion Coptic Church were to come before the Supreme Court and argue the merits of their case, the Court would be hard pressed after *Uniao* to come up with justification for denying a legal exemption. Unfortunately, the likelihood of such a case coming before the Supreme Court is slim. Perhaps other motives have pressed the Court to hear *Uniao* and extend the UDV such a controversial freedom, however the prospect of legalizing marijuana use is certainly a fire the Court doesn't want to play with.