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Mark A. Levine

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AN OPIATE OF THE MASSES: RELIGIOUS GERRYMANDERING OF SACRAMENTAL INTOXICATION

MARK A. LEVINE*

INTRODUCTION

The Religious Freedom Restoration Act of 1993 (RFRA) 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."¹ Such was the argument maintained by the O Centro Espirita Beneficente Uniao do Vegetal (UDV),² in *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal* (*Uniao*), brought before the Supreme Court of the United States in November 2005.³ 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 (CSA).⁴ One context in which the interests of an individual's freedom may supercede the interests of the government lies in cases of sacramental narcotics use. Yet the justification for religious-based drug use may not be so cut-and-dry as to permit enjoyment of this freedom by all established religions. Some have argued that "religious gerrymander[ing]"⁵ has made acceptable the involvement of otherwise impermissible activities for selected groups, while leaving others wondering why they are unable to obtain equivalent rights.⁶

* J.D., Florida State University, College of Law, 2008.

1. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b) (2005).

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

3. 546 U.S. 418 (2006).

4. 21 U.S.C. §§ 801-863 (2006) (regulating 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).

5. *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 696 (1970).

6. See Lesley R. Frank, *Accommodating Religious Drug Use and Society's War on Drugs*, 58 GEO. WASH. L. REV. 1019, 1033-40 (1990) (discussing the government's selective drug policies in relation to religious organizations).

In *Uniao*, the Supreme Court granted writ of certiorari in order to review a preliminary injunction, which barred the Attorney General from enforcing the CSA as it applied to the UDV; the CSA prevented the religious organization's importation of the Schedule I restricted substance, ayahuasca.⁷ The basis of the UDV's argument was that a prohibition would constitute a substantial burden on the exercise of their religion.⁸ The Government conceded that their actions amounted to such a burden but argued that the burden did not violate the RFRA because applying the CSA was the least restrictive means of advancing the government's compelling interest of "protecting the health and safety of UDV members[,], preventing diversion of [aya]h[u]asca from the church to recreational users, and complying with the 1971 United Nations Convention of Psychotropic Substances[.]"⁹ 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.¹⁰

Courts have not consistently applied religious exemptions among differing faiths, which leads an observer to question the distinction between one religion's permissible accommodations over another's. In *Olsen v. Drug Enforcement Administration*,¹¹ the United States Court of Appeals for the District of Columbia rejected the Free Exercise and Establishment Clause claims brought by petitioner Carl Olsen, a member of the Ethiopian Zion Coptic Church, who sought a religious exemption from laws prohibiting the use and possession of marijuana.¹² *Olsen* was distinguishable from the then-unique exemption for Native American ceremonial use of the hallucinogen peyote.¹³ The facts and arguments in *Olsen*, however, bear a stronger resemblance to those presented in *Uniao* than to the justification granted to the Native American Church. This article seeks to address the discrepancies between *Olsen* and *Uniao*, while using the Native American Church exemption and RFRA as foundations from which to draw precedent. Part I presents the case history of *Uniao*, as well as UDV's

7. 21 U.S.C. § 812(a)(1) (2006) (defining a Schedule I drug as a substance, which (A) has a high potential for abuse; (B) has no currently accepted medical use in treatment in the United States; and (C) has a lack of accepted safety for use of the drug or substance under medical supervision).

8. *Uniao*, 546 U.S. at 426.

9. *Id.*

10. *Id.* at 438-39.

11. 878 F.2d 1458 (D.C. Cir. 1989).

12. *Id.* at 1459.

13. 21 C.F.R. § 1307.31 (2009) ("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.").

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 in order to aid the Court in determining the legitimacy of a religious organization's sacramental drug use 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 the xenophobia towards non-traditional faiths. Part VI addresses potential concerns created by past judicial decisions.

I. BACKGROUND

UDV is a Christian sect founded in Brazil in 1961 by Jose Gabriel da Costa, known to his followers as Mestre Gabriel.¹⁴ About 8,000 people belong to the UDV in Brazil.¹⁵ In 1993, the UDV officially established a branch in the United States.¹⁶ Members of the pioneer group became associated with Jeffrey Bronfman, the plaintiff in *Uniao* and representative for the UDV, in 1989.¹⁷ Between 1989 and 1992, Bronfman traveled between Brazil and the United States to learn with the UDV's Instructive Body.¹⁸ He learned Portuguese and, in 1994, became a full Mestre of the organization.¹⁹ Bronfman later returned to the United States and, in Santa Fe, New Mexico, established his church which housed around 130 members in 2006.²⁰ At the time of this case, there also existed congregations, with a total of eighty-one members, in Seattle, Washington; Norwood, Colorado; Marin County, California; and Plantation, Florida.²¹

Central to the UDV faith is receiving communion through ayahuasca tea made from the combination of two plants native to Brazil.²² In 1999, United States Customs and Border Protection

14. Joint Appendix (Vol. 1) at 50, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (No. 04-1084), 2005 WL 1628869.

15. *Id.*

16. *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 282 F. Supp. 2d. 1236, 1240 (D.N.M. 2002).

17. *Id.*

18. See Joint Appendix (Vol. 1), *supra* note 14, at 51.

19. *Id.* at 51, 53.

20. *Id.* at 56.

21. *Id.*

22. *Id.* at 64. 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

(Customs) seized three drums of ayahuasca plants.²³ According to the plaintiff's declaration, twenty to thirty agents arrived at the church accompanied by several state and local police officers and acted as if the UDV were under a drug bust by searching for materials used to produce and distribute narcotics.²⁴ Investigations revealed that there had been fourteen prior shipments of the plants to Santa Fe; eleven of these previous shipments, however, had been formally declared and cleared by customs officials and the United States Food and Drug Administration (FDA).²⁵ The agents threatened the UDV with prosecution if they were later found in 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.²⁶ The UDV alleged that applying the CSA to the UDV's use of ayahuasca violated RFRA.²⁷

The Government argued that the health and safety of the UDV members needed protection and presented expert witnesses to testify that the drug had adverse and potentially permanent effects on its users.²⁸ The UDV responded by presenting its own experts who argued that there was little evidence to support the Government's assertions.²⁹ Chief Justice Roberts focused on the word "demonstrates" in RFRA, defining the word as having satisfied "the burdens of going forward with the evidence and of persuasion."³⁰ Chief Justice Roberts reasoned that the UDV effectively demonstrated that its sincere exercise of religion had been burdened.³¹ The Court looked to circuit court precedent in applying a balancing test and stated that "[t]he balance is between actual irreparable harm to [the] plaintiff and potential harm to the government which does not even rise to the level of preponderance of the evidence[.]"³²

individuals, much like the wafer and wine represent the flesh and blood of Christ in communion by the Catholic Church. *See id.* at 64-65.

23. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 425 (2006).

24. *See* Joint Appendix (Vol. 1), *supra* note 14, at 68.

25. *Id.* at 69.

26. *Id.* at 17, 30.

27. *Id.* at 35.

28. *Uniao*, 546 U.S. at 426. *See also* Alicia B. Pomilio, *Ayahuasca: An Experimental Psychosis that Mirrors the Transmethylation Hypothesis of Schizophrenia*, 73 J. ETHNOPHARMACOLOGY 29, 29 (1999) (showing that users experienced symptoms similar to schizophrenia); Jordi Riba et al., *Subjective Effects and Tolerability of the South American Psychoactive Beverage Ayahuasca in Healthy Volunteers*, 154 PSYCHOPHARMACOLOGY 85 (2001) (showing that among six healthy male volunteers who used the drug, one experienced anxiety disorder); James C. Callaway & Charles S. Grob, *Platelet Serotonin Uptake Sites Increased in Drinkers of Ayahuasca*, 116 PSYCHOPHARMACOLOGY 385 (1994).

29. *Uniao*, 546 U.S. at 426. *See also* Joint Appendix (Vol. 1), *supra* note 14, at 134-41 (discussing a lack of adequate research by Callaway and Grob).

30. *Uniao*, 546 U.S. at 428.

31. *Id.*

32. *Id.* at 429 (quoting *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1009 (10th Cir. 2004) (Seymour, J., concurring in part and dissenting in part)).

The Government further attempted to argue that, under the CSA, the requirements that the substance have a high potential for abuse, no currently accepted medical use, and a lack of accepted safety under medical supervision precluded any individual consideration or exceptions absent those explicitly authorized by the Act.³³ The Court rejected this argument as well, fearing that accepting such a determination would lead to a CSA that would admit no exceptions.³⁴ Rather, the Court stated that RFRA requires the Government to demonstrate that the compelling interest test be satisfied for the individual rather than burdening an entire class.³⁵

Finally, the Government referred to *Morton v. Mancari*,³⁶ arguing that there exists a “unique” relationship between the United States and the tribes which permits the Native Americans to use peyote and that the relationship would not necessarily apply to any other religion.³⁷ Chief Justice Roberts flatly criticized the Government’s argument by pointing out that they neither explained what the “unique” relationship was nor why such a relationship would justify permitting the use of a drug that, according to its own arguments, creates a risk of abuse and could prove dangerous to its users.³⁸ The Court emphasized that granting permission to the Native American Church for the use of peyote had not undercut the Government’s ability to enforce its bans for secular use.³⁹ The Court also 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.⁴⁰ Thus, in a unanimous decision, the Court concluded that the Government failed to demonstrate a compelling interest in barring the UDV from its sacramental use of ayahuasca.⁴¹

33. *Id.* at 429-30.

34. *Id.* at 430.

35. *Id.* 430-31.

36. 417 U.S. 535 (1974).

37. *Uniao*, 546 U.S. at 433-34.

38. *Id.* at 434.

[I]f 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.

Id.

39. *Id.* at 433.

40. *Id.* at 438.

41. *Id.* at 439.

II. DIFFERENTIATION AMONG SCHEDULE I SUBSTANCES

Throughout the Court's opinion, there is no mention of *Olsen v. DEA*, where the D.C. Circuit refused to grant an exemption for marijuana use by the Ethiopian Zion Coptic Church.⁴² Rather than distinguishing *Uniao* from *Olsen*, the Court focuses on drawing similarities between the Native American Church and the UDV, with respect to policy and the effects of the two drugs.⁴³ Questions arise as to whether the Court deliberately avoided *Olsen*, and, if argued in today's Court, whether *Olsen* would have been decided differently.

The three drugs in question—dimethyltryptamine, (the hallucinogenic chemical in ayahuasca),⁴⁴ peyote, and marijuana—all fall into the same class of Schedule I substances⁴⁵ but have been treated differently by courts over the years. Marijuana has itself been the subject of scrutiny for a number of religious freedom cases but, unlike other drugs, has continually been rejected as an exception for religious purposes.⁴⁶ This is likely due to the fact that marijuana use has proven to be much more pervasive in the United States than any other illegal substance.⁴⁷ According to a 2007 study by the Drug Enforcement Administration (DEA), 41.8% of twelfth graders had used marijuana in their lifetimes, as opposed to a much smaller percent of peyote and DMT users.⁴⁸ In *McBride v. Shawnee County*,⁴⁹ the United States District Court for the District of Kansas noted that almost 800,000 times as many pounds of marijuana had been confiscated by the DEA than peyote between 1980 and 1987.⁵⁰ If these statistics hold true for today, there would be a strong argument validating the Government's interest in preventing diversion of non-adherents to the religion in question. Yet these statistics refer only to the general pervasiveness of the drug and not the religion-based justifications subject to the compelling interest test.

42. See generally *id.* See also *Olsen v. DEA*, 878 F.2d 1458 (D.C. Cir. 1989) (rejecting sacramental drug use). The majority opinion in *Olsen* was written by Judge Ruth Bader Ginsburg, now a Supreme Court Justice, who joined the decision by Chief Justice Roberts in *Uniao* to permit similar sacramental drug use.

43. *Uniao*, 546 U.S. at 433-34.

44. *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 282 F. Supp.2d. 1236, 1240 n.2 (D. N.M. 2002).

45. 21 U.S.C. § 812(a)(1) (2006).

46. See *Olsen*, 878 F.2d at 1458 (D.C. Cir. 1989); *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984); *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982); *United States v. Spears*, 443 F.2d 895 (5th Cir. 1971).

47. U.S. Drug Enforcement Admin., <http://www.usdoj.gov/dea/concern/marijuana.html> (last visited Mar. 5, 2009).

48. Nat'l Inst. on Drug Abuse, *Monitoring the Future Survey*, <http://www.drugabuse.gov/infocfacts/marijuana.html> (last visited Mar. 5, 2009) (discussing trends of marijuana use by grade school students over a thirty-three year period).

49. 71 F. Supp.2d 1098 (D. Kan. 1999).

50. *Id.* at 1101.

In addition, the court in *McBride* justified itself by referring to the special rights granted to Native Americans, which were specifically rejected in *Uniao*.⁵¹ The court pressed these differences further by stating that, under *Cherokee Nation v. Georgia*,⁵² Native Americans have special benefits because they are considered domestic-dependant nations.⁵³ This presents the issue of whether the Government is justified in favoring one particular cultural group over another and, therefore, empowering the court to use these remedies to redress historic *de jure* discrimination. By granting the Native American Church specific enumerated rights as a degree of “affirmative action” through use of a law written over 150 years ago to remedy past discriminatory conduct, the Government may effectively preclude other cultures from being granted similar rights based on the justification that the Government does not owe similar restitution. In essence, giving the Rastafarian Church in *McBride* equal treatment with other religions, while considering the Native Americans as the exception, furthers the court’s attempts to prohibit drug use for religious purposes by separating the two groups of religions—those of Native Americans and those of non-Native American cultures. This may conform with RFRA by construing rules related to drug use by the Native American Church as a unique exception but may be inconsistent with the decision by the Roberts Court in *Uniao*.

Under the Protection and Preservation of Traditional Religions of Native Americans Act,⁵⁴ the Government permits Native American use of peyote, mitigating the acquiescence by stating that peyote has existed for centuries and that its use has been permitted since 1965.⁵⁵ Although a court would be unable to argue that solely because peyote has been used since 1965 it has a history and tradition of use, a court may be, nevertheless, justified in arguing the legitimacy of a Native American sacramental intoxicant used 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 is, thus, similarly situated under the statute. However, by doing so, the Government would then essentially be maintaining special faith-based privileges for religions that originated in the Americas, while denying similar exceptions to those religious groups that originated on other continents. In addition, the United States has traditionally granted

51. *Id.* at 1102.

52. 30 U.S. 1 (1831).

53. *McBride*, 71 F. Supp.2d at 1102.

54. 42 U.S.C. § 1996a (2006).

55. *Id.*

unique benefits to Native Americans,⁵⁶ which have not been extended to other groups, particularly the UDV.

The definition of "Indian Religion" may be one way in which the Government may rationalize a similarity between the UDV and the Native American Church while drawing it 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."⁵⁷ The statutory definition of "Indian" does not clearly state whether all Native Americans are also Indians.⁵⁸ The "origin and interpretation" of the UDV faith comes from a pre-Columbian belief indigenous to the Americas.⁵⁹ Like many other religious groups whose practices have been assimilated by Christian beliefs,⁶⁰ the UDV has its origins in a traditional Indian culture and community.⁶¹

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.⁶² By permitting sacramental use of ayahuasca by non-native converts to the faith, the Government may be opening the floodgates for non-Native Americans to acquire and use peyote by asserting that they are indeed members of the faith. Since religious belief is subjective to an individual's lifestyle, the Government would have the burden of proving the legitimacy of one's adherence to his or her faith. Yet the statute explicitly states that only those who are recognized as Indians may apply, which potentially raises equal protection concerns.⁶³

III. THE ADHERENTS OF FAITH TEST

There are numerous cultural distinctions between the religions in question, particularly regarding the beliefs to which they adhere while consuming their respective intoxicants. Aside from the actual effect of the drug used, the ritual use of the plants *psychotria viridis* and

56. See Indian Employment Credit Act, 26 U.S.C. § 45A (2006).

57. 42 U.S.C. § 1996A(c)(3) (2006).

58. *Id.* § 1996A(c)(1-2) (defining "Indian" as "a member of an Indian Tribe").

59. Council on Spiritual Practices, *Uniao do Vegetal*, <http://www.csp.org/nicholas/A18.html> (last visited Apr. 3, 2009).

60. See generally RICHARD FLETCHER, *THE BARBARIAN CONVERSIONS: FROM PAGANISM TO CHRISTIANITY* (1998).

61. See Council on Spiritual Practices, *supra* note 59.

62. See generally Charles S. Grob et al., *Human Psychopharmacology of Hoasca, a Plant Hallucinogen Used in Ritual Context in Brazil*, 184 J. OF NERVOUS & MENTAL DISEASE, Feb. 1996, at 87.

63. U.S. CONST. amend. XIV, § 1.

banisteripsis caapi bears a strong resemblance to the taking of Communion in the Catholic Church; where one component is the intoxicant, the other serves as another important constituent of enacting the ritual.⁶⁴ 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;⁶⁵ enacting laws which made alcohol illegal did not alter the necessary and sacred purpose of obeying the word of one's god. Forcing an individual to forsake his or her own beliefs based upon the prohibitions of the Government would effectively violate the separation of Church and State. If the Church must adhere to the command of the State, then the Church is no longer a house of faith but an inhibited institution restricted by the command of an omnipotent secular authority. This cannot 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 would be forced to adhere to the laws of a state, and a state would not be forced to adhere to religious doctrine. Arguably, a state could permit the smaller, less powerful religion to co-exist as an independent authority yet remain 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, a state would have 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 him or herself. 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, therefore, leave actions, such as consumption of intoxicating substances, 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 the Church from advertising its use of sacra-

64. See *supra* note 22 and accompanying text.

65. U.S. CONST. amend. XVIII, repealed by U.S. CONST. amend. XXI.

mental intoxicants, much like restrictions upon federal funding for advertisement of abortion clinics.⁶⁶

A question may arise as to how this would affect the children of such organizations' members. Traditionally, the Government does not recognize the interests of the individual child as being separate from the interests of the parent.⁶⁷ This system may itself be flawed in that it may neglect adequate protection for the welfare of the child; however, the Court has maintained that a parent should be permitted to raise his or her child in whatever manner the individual sees fit.⁶⁸ The UDV places a strong emphasis on the importance of family unity, and, like adherents of many other religions, the UDV believe it necessary to instill the tenets of the family's faith in the child at a young age.⁶⁹ Consider the Bar Mitzvah in the Jewish faith. 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.⁷⁰ Thus, regardless of the legal standing of the adolescent by the Government, sincere devotees of various religions consider their children to be adults at differing ages. Hence, a child would 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 with 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, may the Church be? By enabling the 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 violate the Establishment Clause.⁷¹ The State would need to create a system in order to determine the legitimacy of the Church. This could be achieved by considering: (A) the history and tradition of the Church; (B) the degree of commonality of faith and practice by its adherents; and (C) the burden in which permitting its practices would usurp the authority of the State.

66. See generally *Rust v. Sullivan*, 500 U.S. 173 (1991).

67. See generally *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Douglas, J., dissenting).

68. See *Troxel v. Granville*, 530 U.S. 57 (2000).

69. See Joint Appendix (Vol. 1), *supra* note 14, at 62.

70. See Leonard Mars, *Coming of Age Among Jews: Bar Mitzvah and Bat Mitzvah Ceremonies*, in *ANTHROPOLOGY & THE RIDDLE OF THE SPHINX: PARADOXES OF CHANGE IN THE LIFE COURSE* 64 (Paul Spencer ed., 1990).

71. See U.S. CONST. amend. I.

Under the first prong, a court would question the history and tradition of a given church. The UDV was founded in 1961;⁷² however, adherents to the faith may also argue that the cultural practice of ayahuasca consumption has been occurring since pre-Columbian times, long before the establishment of the United States and its laws.⁷³ The same argument could follow from the Native American Church, as the Government has asserted that traditional Indian practices must be kept intact.⁷⁴ The Ethiopian Zion Coptic Church was developed in 1914 by Marcus Garvey and later became the inspiration for the practice of Rastafarianism.⁷⁵ According to the Rastafarians, the Jamaican Negroes originated in Ethiopia, their symbolic leader being the Emperor Haile Selassie I.⁷⁶ An issue would arise as to how long a religion must exist before it is considered to have a "history." Currently there are between 3,000 to 5,000 Rastafarians in the United States and almost one million adherents worldwide.⁷⁷ Based on these numbers, the burden would be on the State to prove that such a faith lacks a tradition. Additionally, the Court in *Olsen* accepted that, for purposes of its decision, the Ethiopian Zion Coptic Church was a bona fide religion.⁷⁸

It may be argued that defending the freedom of older religions, while denying such rights to relatively younger religions, would effectively violate the Equal Protection Clause.⁷⁹ Therefore, it would be necessary for a court to decide not only how heavily to weigh this factor, but also whether a religion has a valid argument that its belief structure can be categorized as a new religious sect rather than a frivolous cult. The fear of permitting more recently established religions the same autonomy as more established faiths is that there may be no evidence that the more recent religion would thrive or that it actually

72. See Joint Appendix (Vol. 1), *supra* note 14, at 50.

73. Choque Chinchay, *AYAHUASCA: An Overview of an Extraordinary Healing Plant and its Companions*, <http://www.biopark.org/ayahuasca.html> (last visited Apr. 3, 2009).

74. See T.J. Ferguson, *Native Americans and the Practice of Archaeology*, 25 ANN. REV. OF ANTHROPOLOGY 63, 63-79 (1996); DAVID HURST THOMAS, SKULL WARS: KENNEWICK MAN, ARCHAEOLOGY, AND THE BATTLE FOR NATIVE AMERICAN IDENTITY 214-15 (2000). 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.

75. J. GORDON MELTON, ENCYCLOPEDIA OF AMERICAN RELIGIONS 1413 (Gale Group, 5th ed. 1996) (1978).

76. *Id.* at 1754.

77. *Id.*

78. *Olsen v. DEA*, 878 F.2d 1458, 1466 (D.C. Cir. 1989).

79. U.S. CONST. amend. XIV, § 1.

has an assembly of members who adhere to an identical set of beliefs. By having a "religious tenure," the Government would be able to test the organization to see if it could 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 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.⁸⁰ In addition, members are required to learn Portuguese, as the language is used during ceremonial services, similar to the way Latin was used in the Catholic Church and Hebrew is used in a Jewish Synagogue.⁸¹ UDV members make sacramental use of ayahuasca on certain days and times, as well as during celebration for enumerated calendar holidays.⁸² This differs from the lack of uniformity and structure in the Rastafarian Church.⁸³ 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.⁸⁴ Additionally, there is no specific day or time in which the sacramental drug was used.⁸⁵ In *State v. Olsen*,⁸⁶ the petitioner argued that "ganja" was used "continually all day, . . . through everything that we do."⁸⁷ In view of this argument, a court must presume either 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 Equal Protection problems, a court would be able to address these concerns by taking into consideration whether the informal organizations maintain a cohesive enough ideological structure to regard the groups as churches. The Government would likely want to avoid granting freedoms to unorganized religions for fear that some individuals would join the faith solely for the purpose of obtaining illegal substances rather than out of a sincere desire to practice religious dogma. Thus, in requiring a

80. See Joint Appendix (Vol. 1), *supra* note 14, at 50.

81. *Id.* at 52-53.

82. *Id.* at 58-60.

83. *McBride v. Shawnee County*, 71 F. Supp.2d 1098, 1101 (D. Kan. 1999).

84. *Id.*

85. *Id.*

86. 315 N.W.2d 1 (Iowa 1982).

87. *Id.* at 7.

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.”

Lastly, the burden must be upon the State to prove that permitting the organization’s adherents to participate in religious activities, such as sacramental drug use, would hinder the State in exerting its authority. This is where the currently 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, the Government will have met its burden.⁸⁸ The result of this analysis favors the Government and 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 court’s decision made in light of the first two prongs.

Peyote and ayahuasca are relatively uncommon drugs, and persons who use these substances in religious rituals, although extensive in numbers, are uncommon in relation to the rest of the United States population.⁸⁹ Marijuana use, on the other hand, is very common, 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, and 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 would encourage more people to become false adherents; however, such an argument would be tenuous as it is difficult to prove what a person does and does not 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 on the politics and the necessities of the nation. However, permitting a religion to act free of the 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 observed.

88. 42 U.S.C. § 2000bb-1(a) (1993).

89. See *supra* note 48 and accompanying text.

IV. BELIEFS, ACTIONS, AND CIVIL RELIGION

In *Cantwell v. Connecticut*,⁹⁰ the Court differentiated between the two freedoms that derive from the establishment clause—a freedom to believe and a freedom to act.⁹¹ The Court considered the first absolute in nature, whereas the second was not.⁹² The Court justified this by stating that “[c]onduct remains subject to regulation for the protection of society.”⁹³ In *Reynolds v. United States*,⁹⁴ the Supreme Court upheld a criminal statute proscribing polygamy, despite the fact that polygamy was a basic tenet of the defendant’s Mormon religion.⁹⁵ However, unlike the cases above, the religious belief in *Reynolds* was not achieved through polygamy; instead, polygamy followed the tenets of the religious belief.⁹⁶ Based upon the holding in *Cantwell*, it may be possible for a religion to be denied its right to a particular belief by not being permitted their right to act, as beliefs often follow from acts. If the purpose of using the drug is to put the believer in a certain mental state, one which he or she would not be able to achieve but for the drug’s use, then the only way that user will be able to obtain his or her 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*,⁹⁷ the author argues that the separation between Church and State is actually less concrete than we think, as the formation of a “civil religion” has transpired in the formation of our national heroes, like Washington and Lincoln, and holy days, like the Fourth of July and Memorial Day.⁹⁸ 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.”⁹⁹ These slogans are controversial in that they fit with the whole societal schema under which the United States developed, so society may be reluctant to remove such simple prayers from their everyday lives.¹⁰⁰ But enforcing acts, not beliefs, like 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

90. 310 U.S. 296 (1940).

91. *Id.* at 303.

92. *Id.* at 304.

93. *Id.* See also *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961).

94. 98 U.S. 145 (1878).

95. *Id.* at 166-67.

96. See *id.* at 166.

97. Yehudah Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986).

98. *Id.* at 1251.

99. See *id.* at 1238.

100. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

religious denomination cannot be officially preferred over another,"¹⁰¹ yet this may not be true if the majority civil religion has formulated the laws by which the minority faiths are governed.

Historically, the people of the United States have considered religious beliefs, in many instances, to be more important than obeying laws enacted by the government, one instance being the creation of the First Amendment to the United States Constitution. Throughout history, adherents of various faiths have suffered persecution; some have preferred a death in accordance with divine command to a life of sin.¹⁰² Although it seems that much of modern society lives under the practicality of science, rather than the judgment of a god, 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.¹⁰³ Unfortunately, while some of these religious organizations are favored by the Government because their belief structure is aligned 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.¹⁰⁴ There exists a minority of Americans who disagree with the tenets of the civil religion,¹⁰⁵ and many break these tenets through illegal acts such as underage drinking, drunk driving, jay-walking, and tax fraud. 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 people and thus have no more right to be accepted than the belief-based actions of the minority religions.

101. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

102. See JACOB RADER MARCUS, *THE JEW IN THE MEDIEVAL WORLD: A SOURCE BOOK* 315-1791 (1999).

103. See Craig M. Kibler, *Assembly Declines to Make Clerk More Accountable*, THE LAYMAN: A PUBLICATION OF THE PRESBYTERIAN LAY COMMITTEE, July 2003 at 9, available at <http://www.layman.org/TheLayman.aspx> (referring to the Uniao do Vegetal as spirit, plant, and animal worshippers who encourage ritualistic vomiting).

104. RELIGIOUS TRADITIONS OF THE WORLD: A JOURNEY THROUGH AFRICA, NORTH AMERICA, MESOAMERICA, JUDAISM, CHRISTIANITY, ISLAM, HINDUISM, BUDDHISM, CHINA, AND JAPAN 385-86, 445-46, 682-83 (H. Byron Earhart ed., 1993) (explaining the "born into" nature of Judaism and, to a lesser extent, the rites of passage of Islam).

105. See DAVID DELEON, *THE AMERICAN AS ANARCHIST: REFLECTIONS ON INDIGENOUS RADICALISM* 16-23, 47, 117 (1978).

Yet one could always argue before the courts or petition legislatures to change laws. Law, like religion, is ever changing to accommodate what is accepted and desired by society.¹⁰⁶ Perhaps the Government's strongest argument in this situation is to say that its beliefs are based on the 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. Drug use, drunk driving, and jay-walking, although not necessarily analogous to war and strife, are similarly dangerous to peoples' livelihoods and, as a result, are not permissible.

"[O]ne man's 'bizarre cult' is another's true path to salvation."¹⁰⁷ The Judeo-Christian faiths have stories of when their own religion was once considered a cult, wrong, and illegal.¹⁰⁸ 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.¹⁰⁹ Many came to the United States for freedom from religious persecution. Perhaps we are no longer 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.

V. RELIGIOUS GERRYMANDERING

"Beliefs need not be acceptable, logical, consistent[,] or comprehensible to other[s] in order to merit First Amendment Protection."¹¹⁰ 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 of what a society considers normal,¹¹¹ but it is society that deems certain drugs impermissible, regardless of the extent to which that drug poses a danger to society and to what degree it is more or less injurious than legal drugs.¹¹² What our society regards as damaging is reflected in the

106. See Joint Appendix (Vol. 1), *supra* note 14, at 73-74.

107. Harvey Cox, *Playing the Devil's Advocate, As it Were*, N.Y. TIMES, Feb. 16, 1977, at A25.

108. See RELIGIOUS TRADITIONS OF THE WORLD, *supra* note 105, at 495-502 (describing the origins of early Christianity, its various sects, its ties to Judaism, and Roman laws regulating and persecuting Christianity). See also NINIAN SMART, THE WORLD'S RELIGIONS 246-47 (2d ed. 1998) (describing early Christianity as a "mystery cult" and mentioning the Roman persecution of both Christians and Jews).

109. See HAROLD S. BENDER & C. HENRY SMITH, MENNONITES AND THEIR HERITAGE (4th ed. 1973).

110. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981).

111. *Id.*

112. See Robert S. Gable, *Comparison of Acute Lethal Toxicity of Commonly Abused Psychoactive Substances*, 99 ADDICTION 686 (2004) (discussing a study testing the relative levels

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*,¹¹³ a Santeria group was prohibited by a Florida animal cruelty statute from performing animal sacrifices.¹¹⁴ The Government argued that the statute punishes "[w]hoever . . . unnecessarily . . . kills any animal," and that killings for religious reasons are always unnecessary.¹¹⁵ The Court determined that the Government's interests were not compelling; that "the Free Exercise Clause commits government itself to religious tolerance[;]"¹¹⁶ and that it is the duty of Congress 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 that was passed specifically to target the unusual activities of one religion, like sacrificing animals for religious purposes, it should follow that certain laws may be struck down if they deny 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 it has rejected similar requests for the more prevalent religious marijuana use.¹¹⁷

When Councilman Martinez, a supporter of the animal cruelty statutes, "stated that in prerevolution Cuba 'people were put in jail for practicing this religion,' the audience [at a Hialeah City Council meeting] applauded."¹¹⁸ Does this imply that we too should seek a nation where certain religious groups are seen as outsiders, and their actions

of toxicity of psychoactive substances and finding marijuana and DMT relatively non-lethal, mescaline rarely lethal, alcohol commonly lethal and the most common co-intoxicant in cause of death). See also HAROLD KALANT et al., THE HEALTH EFFECTS OF CANNABIS 437 (1999); J.C. Callaway et al., *Pharmacokinetics of Hoasca Alkaloids in Healthy Humans*, 65 J. OF ETHNOPHARMACOLOGY 243 (1999).

113. 508 U.S. 520 (1993).

114. *Id.* at 527-28.

115. *Id.* at 526 (quoting FLA. STAT. § 828.12 (1987)).

116. *Id.* at 547.

117. See *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Olsen v. DEA*, 878 F.2d 1458 (D.C. Cir. 1989).

118. *Lukumi*, 508 U.S. at 541.

are looked upon with a sense of racial intolerance? In Nazi Germany, the Government solicited advertisements depicting Jews as monsters and vampires, so when they were removed from the cities, the Germans too would applaud.¹¹⁹ The Court rejected the Councilman's indications of the desires of the masses because it suggested a suppression of minority religion.¹²⁰ Adhering to the masses' unknowledgeable rejection of sacramental drug use may also suppress religions like the Ethiopian Zion Coptic Church; so it is arguable that the Court should consider the same dilemma when refusing to allow 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.¹²¹ The determinative factors for which animals may and may not be killed according to the city seemed arbitrary, but the City explicitly carved out specific factors for which it would permit euthanizing. The statute stated that an animal may be killed "for humanitarian reasons or [when the animal] is of no commercial value[.]"¹²² or when the infliction of pain or suffering is "in the interest of medical science."¹²³ 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 the 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 masses should never be allowed to breach another individual's conviction in the value of his or her religion.

VI. THE LESSER OF EVILS

The district court noted in *Uniao* that courts must balance the actual irreparable harm to the plaintiff and the potential harm to the Gov-

119. See RANDALL L. BYTWERK, *BENDING SPINES: THE PROPAGANDAS OF NAZI GERMANY AND THE GERMAN DEMOCRATIC REPUBLIC* (2004).

120. *Lukumi*, 508 U.S. at 542.

121. *Id.* at 543.

122. FLA. STAT. § 828.073(4)(c)(2) (2009).

123. FLA. STAT. § 828.02 (2009).

ernment.¹²⁴ Thus, the actual practical difference between *Uniao* and *Olsen* cases was the risk associated with diversion. In *Uniao*, the plaintiff took careful steps to avoid the drug getting into the wrong hands.¹²⁵ The UDV set up strict rules as to who was allowed to use the ayahuasca and when it could be consumed.¹²⁶ Members who violated these rules were subject to expulsion from the organization.¹²⁷ The UDV also indicated to the Court that they maintained strict policies against other narcotics use.¹²⁸ The plaintiff claimed that he only imported quantities of the plant necessary to perform the church ceremonies.¹²⁹

The plaintiff in *State v. Olsen*, on the other hand, was caught with large quantities of marijuana prepared for distribution.¹³⁰ 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. Perhaps the court was also aware that, due to the pervasive use of marijuana, members of the Ethiopian Zion Coptic Church were likely going to acquire marijuana regardless of their court's decision. This creates a problem because it makes preventing marijuana misuse practically unenforceable. Prohibiting a religion from obtaining its sacramental drug, while recognizing that members will continue to do so anyways, essentially encourages the performance of illegal activity. Courts must realize that the law will only be as constructive as it is obeyed.

Additionally, it may be argued that the more dangerous a drug is, the more it should be restricted. Studies have shown that marijuana use is considerably less dangerous than DMT,¹³¹ yet DMT is permitted limited use among a certain individuals.¹³² Marijuana, although a Schedule I drug, has in fact had a history of accepted medical use in the United States.¹³³ Further, if the Court permitted regulated marijuana use in the Ethiopian Zion Coptic Church, perhaps it would decrease the likelihood that the Church members would engage in illegal acts and increase the likelihood that they would limit their use of ma-

124. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) (citing *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1009 (10th Cir. 2004) (Seymour, J., concurring in part and dissenting in part)).

125. See Joint Appendix (Vol. 1), *supra* note 14, at 69.

126. *Id.* at 63.

127. *Id.* at 64.

128. *Id.* at 63.

129. *Id.* at 66.

130. *State v. Olsen*, 315 N.W.2d 1, 4 (Iowa 1982).

131. See *supra* note 113 and accompanying text.

132. *Uniao*, 546 U.S. at 423.

133. *Gonzales v. Raich*, 545 U.S. 1, 11 (2005).

marijuana to sacramental activities.¹³⁴ Rather, the Court rejects such requests, yet permits the use of peyote, whose users spend an average of eight hours incapacitated.¹³⁵ 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 either peyote or ayahuasca.

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 finely detailing which organizations may obtain such an exclusion, it would be forced to extend equal rights to all organizations which request individual religious benefits. Otherwise, the Government would be capable of discerning a legitimate compelling reason to eliminate such freedom from all religions.

Considering the implausibility of such a *carte blanche* approach, it would be beneficial for the Government to establish a more precise test by which all petitioning religions could be judged. First, the Court should 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 the degree to which its members adhere to similar tenets. 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 these freedoms.

The Court in *Uniao* understood that the freedom of 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 expound a justification for denying a similar legal exemption. However, the likelihood of

134. 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 v. DEA*, 878 F.2d 1458, 1460 (D.C. Cir. 1989).

135. John H. Halpern et al., *Psychological and Cognitive Effects of Long-Term Peyote Use among Native Americans*, 58 BIOLOGICAL PSYCHIATRY 624 (2005).

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, yet the prospect of legalizing marijuana use is certainly a fire with which the Court does not want to play.