Marijuana and Religious Freedom in the United States

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America's Regulation of Marijuana

Marijuana first fell under legislative scrutiny in the United States during the early twentieth century (*Gonzales v. Raich* 2005). Before that, neither American states nor their national government expressed much interest in regulating it. Indeed, to the extent marijuana was at all relevant, it was considered a vital war commodity. Hemp, after all, was needed to produce rope, a necessary ingredient to successful navies and armies.

By 1913, however, several States had passed laws prohibiting the possession and sale of marijuana (*Gonzales v. Raich* 2005). The impetus behind these laws ostensibly was the drug's debilitating effect. It was considered, not unlike opium and other narcotics, to be dangerous to users.

Because of its limited authority under the Constitution of the United States, Congress's regulation of marijuana proceeded cautiously. Unlike the American states, Congress does not possess general legislative powers.[1] Instead, it must ground its laws in specific grants found in the Constitution. By and large, modern Congresses have used Article I's "interstate commerce clause" to support their wars

[1] The National government, for the most part, finds its powers in Article I of the United States Constitution. These powers include regulating commerce between the states and with foreign nations, as well as collecting taxes, creating postal roads, outfitting a navy, and raising an army. Missing is any authority to generally enact criminal law or regulate drugs. To the extent the national government has enacted criminal drug laws, it is today understood to fall under its Article I power to regulate commerce between the states (*Gonzales v. Raich* 2005). And under this power, the regulated drugs and criminal activities no longer have to actually cross state lines. It is enough that they, in the aggregate, somehow "affect" interstate commerce (*Gonzales v. Raich* 2005). The Supreme Court in *Gonzales v. Raich* (2005) ruled that this principle allows Congress to regulate marijuana production and consumption that is confined to a particular state.

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on drugs, the argument being that drugs "affect" interstate commerce and therefore fall within congressional reach.

But before 1937, the reach of the Constitution's interstate commerce clause was quite limited according to the Supreme Court of the United States. It could not be used to support labor legislation, limits on manufacturing, or agricultural measures, like growing marijuana (*Carter v. Carter Coal Co*. 1936). Thus, Congress, believing it could not simply regulate or prohibit drugs like marijuana, turned to alternative measures to restrict their use. One such measure was taxation. The Constitution authorizes Congress to tax commodities and producers; so that is exactly what Congress did with drugs. Another alternative used by Congress was its plenary power to prohibit the movement of commodities across state lines. Thus, through taxation (and its incidents, like record-keeping and reporting) and prohibitions on the movement of drugs, Congress in the first half of the twentieth century began its war on drugs.

For example, as early as 1906, Congress (with its Pure Food and Drugs Act) imposed labeling restrictions on certain medications and prohibited the manufacture or shipment of "adulterated" or "misbranded" drugs that would be moved across state lines. In 1914, Congress enacted the Harrison Narcotics Act, which sought to control narcotics and cocaine by requiring producers, distributors, and purchasers to register with, and pay taxes to, the Federal Government. Violations were treated as crimes; thereby bringing America's drug trade under the auspices of the national government's criminal justice system for the first time.

Congress's Marihuana Tax Act followed in 1937, taking a similar form. Like the Harrison Act, the Marihuana (as it was spelled in 1937) Tax Act did not outlaw the possession or sale of marijuana outright. Rather, it imposed registration and reporting requirements for all individuals importing, producing, or selling marijuana, and required the payment of annual taxes in addition to transfer taxes whenever marijuana changed hands. Moreover, doctors wishing to prescribe marijuana for medical purposes were required to comply with burdensome administrative reporting requirements that were ancillary to the tax laws. Violations were treated severely, with large fines and prison terms available. Thus, as with opiates and cocaine a generation before, marijuana (albeit indirectly) fell under the national government's criminal umbrella.

After 1937, the Supreme Court's interpretation of the Constitution's interstate commerce clause broadened (*National Labor Relations Board v. Jones & Laughlin Steel Corp*. 1937). Congress was, under this new interpretation, allowed more power to regulate and criminalize just about anything throughout the United States. No longer did goods and services have to actually cross state lines; rather, goods and services could be regulated and criminalized by Congress wherever in the United States they were found (*Perez v. United States* 1971).

Armed with this broader interpretation of its power, the inherent limitations found in the Harrison Act and Marihuana Tax Act, and what was perceived to be the wishes of America's "silent majority," in 1970, the Congress and President Richard Nixon, as part of the national "War on Drugs" (and contempt for the youthful counter-culture in America), rewrote America's drug laws. The Comprehensive

Drug Abuse Prevention and Control Act, also known as the Controlled Substance Act (CSA), passed by Congress in 1970, repealed most of Congress's earlier drug laws, such as the Marihuana Tax Act, in favor of a comprehensive regime to combat international and domestic drug abuse (*Gonzales v. Raich* 2005).

In order to effectuate this goal, Congress created a closed regulatory system, making it unlawful to manufacture, distribute, dispense, or possess any "controlled" substance, except as specifically authorized by the CSA. "Controlled" substances were catalogued in five "schedules," based on their accepted medical uses, potentials for abuse, and psychological and physical effects on humans. Each schedule or group was then afforded different controls regarding manufacture, distribution, and use. Schedule I drugs, under this regime, are simply illegal; they cannot be possessed or used for any purpose. Schedule II drugs, and so on down the line, can ordinarily be obtained and put to medical uses, often requiring some sort of written script from physicians.

In 1970, Congress classified marijuana as a Schedule I drug, meaning it cannot be possessed within the jurisdiction of the United States. Schedule I drugs, according to the CSA, have a high potential for abuse, lack accepted medical use, and are unsafe for use in medically supervised treatment. Many narcotics, in contrast, were labeled as Schedule II substances, meaning they could be obtained and put to medical uses. By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, Congress insured that the manufacture, distribution, or possession of marijuana anywhere in America became a federal criminal offense (*Gonzales v. Raich* 2005).

One point often misunderstood is that the national and local governments in the United States are separate sovereigns. Consequently, whether marijuana possession in any given state is legal or illegal is not relevant to the authority of the federal prosecutors to bring charges based on marijuana possession[2] (*Gonzales v. Raich* 2005). Even if marijuana possession, distribution, and use is perfectly legal under local law, it is all still criminal under the CSA. There can be no local immunity to prosecution by the national government.

Of course, this "separate sovereign" point proved largely academic in the years immediately following passage of the CSA in 1970. States uniformly stepped up efforts to enforce existing drug laws, including those criminalizing marijuana possession, and passed new drug laws modeled on the CSA. Consequently, for the first 20–30 years following passage of the CSA, marijuana possession in the United States was criminal under both the CSA and local laws. Both the national

[2] This is not to say that local authorities must lend helping hands. They need not. The Supreme Court has concluded that the national government cannot force local governmental officials to enforce Congress's laws (*Printz v. United States* 1997). The national government's inability to fully police the CSA throughout the United States, then, is largely a matter of limited resources. It simply does not have enough drug agents. Consequently, in a jurisdiction like California, which has relaxed its marijuana laws, users enjoy a practical right to purchase and use marijuana. This flows from California authorities' unwillingness to enforce the CSA and the practical inability of federal agents to do so.

and local governments were on the same page and both routinely prosecuted marijuana users.

Change came slowly, but by the 1990s, several American states passed laws authorizing the "medicinal use" of marijuana. California, for example, passed its medicinal use exception to the criminalization of marijuana possession in 1996 (*Gonzales v. Raich* 2005). Still, notwithstanding the relaxation of marijuana laws on the local level, Congress has steadfastly stood behind the CSA. And in 2005, the Supreme Court of the United States ruled that Congress' ban on marijuana possession and use continues to trump any relaxations found in local laws (*Gonzales v. Raich* 2005). Domestic laws throughout the United States therefore still criminalize marijuana possession, distribution, and use, no matter the location.

Freedom of Religion Under the First Amendment

The First Amendment to the United States Constitution guarantees the "free exercise" of religion. Although the text of this amendment speaks directly to Congress, and hence the national government, by the middle part of the twentieth century the Supreme Court had concluded that it applies to the several states, too (*Cantwell v. Connecticut* 1940). Neither the national government nor state governments can constitutionally abridge the free exercise of religion.

The devil in this constitutional limitation lies in its details. What does "free exercise" mean? Indeed, what is "religion"? For the most part, the Supreme Court has interpreted "religion" broadly to include not only one's belief in and relationship to a supreme being (*Torcaso v. Watkins* 1961), but also ethical and moral considerations that guide one's life[3] (*United States v. Seeger* 1965). In two cases addressing the scope of the conscientious objector exemption to America's draft laws, for example, the Supreme Court interpreted the federal statute to protect atheists as well as moral and ethical objectors. Lower courts have read this to mean that even in the First Amendment context atheists can claim religious protection just like Christians, Muslims, and Jews (*Kaufman v. McCaughtry* 2005).

Novel religions, too, qualify for constitutional protection under the First Amendment. In a famous mail fraud case, where the defendant claimed he was acting pursuant to his religious principles, the Supreme Court explained that religious protection couldn't be neatly confined to longstanding, traditional beliefs that focus on a supreme being:

[3] *United States v. Seeger* (1965), and a later case, *Welsh v. United States* (1970), involved the statutory meaning of "religion" for purposes of conscientious objector status under the Universal Military Training and Service Act of 1948. These precedents are today accepted to mean that "religion" under the Free Exercise Clause extends beyond conventional and historical understandings of religion.

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. (*United States v. Ballard* 1944).

In a later case, the Supreme Court went so far as to identify several religions that qualify for protection under the First Amendment notwithstanding their lacking any singular deity in the conventional, American sense: Buddhism, Taoism, ethical culture and secular humanism (*Torcaso v. Watkins* 1961).

Given its broad definition of religion under the First Amendment's free exercise clause, the Supreme Court has cautioned lower courts to avoid questioning the veracity of particular religions. The constitutional question, instead, is whether someone—usually a criminal defendant—credibly and sincerely believes the religion's tenets. If so, then whatever is "arguably religious" qualifies for constitutional protection (Tribe 1978). Of course, as explained below, the Supreme Court's amorphous definition of religion has not resulted in many successful defenses. Lower courts have employed various techniques to deny freedom of religion defenses, including simply concluding that a defendant's claim to a religious use of illicit drugs is not sincere or credible. Under this latter approach, the court assumes that a religion incorporating drug use exists, but then concludes the defendant does not truly believe it. With new and non-traditional religions, this technique has proven very effective.

The vague nature of the religion inquiry has caused many lower courts to pass over it and focus on the equally difficult problem of "free exercise." Broadly interpreted, of course, this language could cause anarchy. People might claim they believed in human sacrifice, and that laws prohibiting murder abridged this right. The Supreme Court therefore has historically avoided a broad definitional solution to the problem, and instead has opted for a narrow analytical approach. For example, in one famous case the state of South Carolina refused to pay unemployment insurance benefits to a worker who was fired from her job after she refused to work on Saturday (*Sherbert v. Verner* 1963). The worker practiced the Seventh Day Adventist faith and claimed that Saturday was her day of rest within the meaning of the Judeo-Christian Bible. The Supreme Court ruled that in the absence of a "compelling" justification for its denial, South Carolina's denial of unemployment benefits violated the worker's right to freely exercise her religion.

The *Sherbert* case marked a significant development for the free exercise of religion. Prior to *Sherbert*, the Supreme Court had employed a belief-action distinction that allowed government to regulate conduct as it saw fit[4] (*Reynolds v. United States* 1878). In the Supreme Court's words, "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country"

[4] *Reynolds v. United States* (1878) dealt with the Utah Territory's prohibition of polygamy. The Supreme Court concluded that it complied with the First Amendment and did not violate the religious rights of practicing Mormons. The Court reasoned that Mormons were free to believe whatever they liked; they simply could not practice these beliefs. The Mormon Church subsequently abandoned the practice of plural marriage.

(*Davis v. Beason* 1890). Consequently, the national government was free to outlaw plural marriage throughout the Western Territories.

The Supreme Court's 1963 decision in *Sherbert* radically broke from this precedent.[5] It ruled, contrary to teachings of earlier cases, that civil and criminal laws that adversely impact religious practices are constitutionally suspect under the free exercise clause of the First Amendment. Laws like these can only survive First Amendment scrutiny if they can pass "strict scrutiny," which requires that the law prove absolutely necessary to some compelling justification. The Supreme Court reiterated this point in a later case that invalidated as infringing religious liberty a Wisconsin law requiring that children be schooled until the age of sixteen (*Wisconsin v. Yoder* 1972). As applied to Old Order Amish, the court ruled, Wisconsin had no compelling reason for the requirement. The religious beliefs and practices of the Old Order Amish required that children be reared outside the classroom. The law's contrary command violated this free exercise of religion.

Sherbert was handed down in 1963, meaning that it was in force during the cataclysmic cultural revolution of the 1960s and early 1970s. While war raged in Southeast Asia and race riots rocked major American cities, recreational drug use skyrocketed. The so-called Woodstock Generation embraced numerous drugs, of course, but marijuana became a particular favorite. Although it had been used for generations in America, marijuana now found itself the poster-child of illicit drugs. Indeed, in some East and West Coast locales its use even became fashionable, if not fully tolerated.

But this was hardly the case in Middle America, where marijuana use was understood to threaten the very essence of Western civilization. Merle Haggard sang in his 1969 country music hit, "Okie from Muscogee":

We don't smoke marijuana in Muskogee;
We don't take our trips on LSD;
We don't burn our draft cards down on Main Street;
We like livin' right, and bein' free.

America's heartland, like Merle Haggard, equated marijuana with hippies, dissent, disgust, and all that ailed the country.

The federal government, for its part, hardly turned a blind eye to marijuana use during this turbulent period in American history. The prosecution (persecution?) of Dr. Timothy Leary, an icon of the youth movement, proves the point (*Leary v. United States* 1967). Leary and his daughter were arrested for marijuana possession when they attempted to return from Mexico across the Texas border (Brown 1983). Border guards noticed a few seeds (later proved to be marijuana) on the floor of Leary's car, which led to additional searches and the discovery of more marijuana.

[5] This break was foreshadowed by *Cantwell v. Connecticut* (1940), which ruled that a state law barring the public distribution of religious literature without a license violated the First Amendment. Although the court's discussion included the free exercise clause, Cantwell can be better understood today as free speech case.

(See chapter by Devin R. Lander in this volume for more information.) Leary was prosecuted all the way to the Supreme Court of the United States, which eventually reversed his conviction on technicalities.[6]

States, too, continued to enforce marijuana laws; either because they truly believed marijuana to be dangerous or because they feared the emerging youthful counter-culture. With the national government's adoption of the CSA in 1970, and the continuing onslaught of prosecutions, freedom of religion was perhaps the only effective defense.

The Native American Church's experience with peyote, the bud of a cactus plant, has provided the model for defenses against marijuana prosecutions. The Native American Church, which includes a collection of tribes, traces its use of peyote to pre-Columbian times. More recently, it has incorporated Biblical teachings—in particular, that part of the Bible that speaks of a root grown from dry ground—to reinforce the prominence of peyote in its belief system (*People v. Woody* 1964). When ingested, this cactus bud (which contains mescaline) has psychedelic effects not unlike those associated with marijuana. And because of these psychedelic effects, peyote has long been criminalized in the United States. Indeed, as early as 1926, Montana successfully prosecuted peyote possession, notwithstanding a Native American's freedom of religion defense (*State v. Big Sheep* 1926).

In 1964, The California Supreme Court ruled that California's criminal prohibition on peyote could not be applied to members of the Native American Church (*People v. Woody* 1964). The court found no compelling justification for refusing a religious exemption to the Native American Church. Peyote, after all, is not a truly marketable drug: its physical effects (including nausea) are unpleasant and production is apparently difficult. The Native American Church, moreover, has a 400 year history and uses peyote as a ritualistic sacrament, as opposed to encouraging recreational use.

California courts subsequently extended this religious exemption for peyote use to others, even though they were not members of the Native American Church (*In re Grady* 1964). They steadfastly refused, however, to apply the same logic to marijuana. In a series of opinions beginning in 1966 and culminating in 1975, California courts ruled that the religious use of marijuana enjoyed no First Amendment protection (*People v. Mitchell* 1966; *People v. Collins* 1969; *People v. Werber* 1971; *People v. Mullins* 1975). A clear line was drawn in California; peyote enjoyed religious protection while marijuana did not.

[6] Leary was prosecuted under the Marihuana Tax Act, which was in force at the time of his arrest. The act did not completely ban marijuana importation and possession, as does the modern CSA. Rather, the Tax Act allowed the transfer and possession of marijuana so long as one complied with reporting requirements and paid applicable taxes. The Supreme Court ruled that the reporting requirements violated the Fifth Amendment's privilege against self-incrimination (*Leary v. United States* 1969). (See chapter by Devin R. Lander in this volume for more information.) Reporting his transfer of marijuana to the federal government, after all, would have likely resulted in his being prosecuted under Texas law by local authorities.

Additional states, and the national government, followed California's lead. Arizona courts, for example, ruled that peyote possession by members of the Native American Church is protected (*State v. Whittingham* 1973). Oklahoma courts, meanwhile, ruled that, while peyote possession is protected (*Whitehorn v. State* 1977), marijuana use by members of the Universal Life Church is not (*Lewellyn v. State* 1971). North Carolina likewise ruled that members of the Neo-American Church enjoy no protected right to use marijuana (*State v. Bullard* 1966). This same result followed in Missouri for members of the Aquarian Brotherhood Church (*State v. Randall* 1976), in New York for practicing members of the Church of the Missionaries of the New Truth (*People v. Crawford* 1973), and followers of the Ethiopian Zion Coptic Church in Florida (*Town v. State ex rel. Reno* 1979).

The national government likewise rejected religious defenses for marijuana (*Randall v. Wyrick* 1977; *United States v. Middleton* 1982), while fashioning a regulatory exemption for peyote use by the Native American Church (21 C.F.R. § 1307.31). In 1994, Congress statutorily extended this exemption for peyote use to all Native American Tribes (42 U.S.C. § 1996a[b][1]). Even Timothy Leary, who claimed that he believed in Hinduism and followed the Brahmakrishna religion (which led him to use marijuana for enlightenment), failed in his attempt to assert a freedom of religion defense (*Leary v. United States* 1967). The United States Court of Appeals rejected his claim out-of-hand. (See chapter by Devin R. Lander in this volume for more information.)

Retraction of Constitutional Protection

In September of 1983, Galen Black, a drug and alcohol abuse counselor in Oregon, ingested peyote during a Native American Church ceremony. When his employer learned of this, Black was discharged. He sought unemployment benefits under Oregon law, only to have the state conclude that his discharge was proper based on his misconduct. Peyote, after all, remained illegal in Oregon (*Employment Division v. Smith* 1990).

Black appealed the state's refusal to the Oregon Supreme Court, which in 1987 ruled that Black's use of peyote was protected by the First Amendment's freedom of religion defense, just as Sherbert's refusal to work on Saturday was protected back in 1963. Following the California Supreme Court's holding in *Woody*, the Oregon Supreme Court concluded that the state's action substantially burdened Black's free exercise of his religion.

Because the Oregon Supreme Court's holding was consistent with existing American precedent—that is, courts had commonly ruled that peyote use by Native Americans was protected by the First Amendment—it came as something of a surprise when the United States Supreme Court chose to intervene. In 1990, reversing the Oregon court's holding, the Supreme Court of the United States ruled that religious practices would no longer be immune to criminal laws

(*Employment Division v. Smith* 1990). Rather, states are free to substantially burden religious practices so long as their criminal laws are "general" and "neutral."

By way of contrast, the Supreme Court ruled 3 years later that laws "targeting" religious practices remain subject to strict First Amendment scrutiny under *Sherbert*. The case originated in south Florida, where followers of the Santeria faith practiced ritualistic animal sacrifice (*Church of the Lukumi Babalu Aye, Inc. v. Hialeah* 1993). The City of Hialeah passed an ordinance banning the practice, while otherwise allowing for the slaughter of animals for other purposes (and in accord with other religious beliefs). The Supreme Court concluded that because the ordinance specifically targeted the Santeria faith and its "ritualistic" practice, it differed from the neutral criminal law found in *Smith*. It was therefore subject to strict scrutiny and required a compelling government end—a rare event with American constitutional law—to survive.

In the wake of *Smith*, compelling interests need not justify general criminal prohibitions on drug use, even when they completely prohibit sincere religious practices. And no exceptions need be made for any particular religion or group. The Supreme Court noted in *Smith* that although the national government had exempted the religious use of peyote by Native Americans from the prohibitions found in the CSA, it was not constitutionally required to do so. (See chapter by Kevin Feeney in this volume for more information.) Likewise, even though several states, like California, had immunized the religious use of peyote from applications of their drug laws, they did not constitutionally have to do so. Consequently, religious exemptions for drug use in America following Smith were left to the political process; they were no longer a matter of constitutional law.

Statutory Protections for Religion

This United States Supreme Court's decision in *Smith* sent shock waves through America's religious communities. Not because it removed First Amendment protection from Native Americans, but because it threatened the religious practices of mainstream religions. What if a state, for example, were to prohibit alcohol use? Could this be applied to the Catholic Church's use of sacramental wine?

The religious firestorm that erupted quickly caused passage by Congress of the Religious Freedom Restoration Act of 1993 (RFRA). This law restored religious protections in America to where they stood in 1989, before the Supreme Court intervened. Under RFRA, both local and National laws that substantially burden sincerely held religious beliefs and practices must be justified by compelling governmental interests. Peyote use was again protected: not by the First Amendment, but by RFRA.

The Supreme Court again intervened. In 1997, in a case involving a Catholic Church's efforts to expand its premises, the Supreme Court ruled that RFRA's application to state and local governments violated federalism principles contained in the United States Constitution (*City of Boerne v. Flores* 1997). The result was

that local zoning officials in Texas could deny to the church its requested variance, even though the denial interfered with the church's practice of its religion.

As with the passage of RFRA following *Smith*, Congress quickly responded to this result in 2000 by passing the Religious Land Use and Institutionalized Persons Act (RLIUPA) (*Cutter v. Wilkinson* 2005). RLIUPA specifically protects religion by requiring that local governmental land use decisions impacting religious properties pass strict scrutiny. In an odd bargaining twist, the statute extends similar religious protections to inmates across the United States. In 2005, the Supreme Court ruled that this law was a proper exercise of congressional power[7] (*Cutter v. Wilkinson* 2005). Whether RLIUPA protects the rights of inmates to receive and use sacramental drugs like peyote, hoasca, and marijuana in prison has never been decided by the Supreme Court. To date, no court in the country has ruled that RLIUPA commands such a result. In light of the modern cases described below, which uniformly reject the right of free Americans to use marijuana as part of their religious ceremonies, it is quite doubtful that any court will hold in favor of inmates under RLIUPA in the future.

The result of these federal statutory efforts is this: The national government itself remains bound by RFRA. States and their local subdivisions, meanwhile, cannot be required to follow RFRA's commands. States and their local subdivisions, however, are now governed by the limited land use and inmate protections found in RLIUPA; which is of little to no use in the context of religiously employed drugs. American states are free to apply neutral drug laws to religious practices. Peyote use and marijuana use find no protection in federal law; neither that found in the First Amendment nor that created by RFRA.

While states now are free to ban drug use, Congress and its agents must comply with RFRA. This means that federal laws that interfere with sincerely held religious beliefs and practices must be justified by compelling concerns. In 2006, the Supreme Court explored this problem in the context of a domestic religious group's (O Centro Espírita Beneficente União do Vegetal) attempt to import hoasca, a sacramental tea made from two plants unique to the Amazon region of South America (*Gonzales v. O Centro Espírita Beneficente União do Vegetal* 2006). One of the plants, *Psychotria viridis,* contains dimethyltryptamine (DMT), a hallucinogen whose effects are enhanced by alkaloids from the other plant, *Banisteriopsis caapi*. The compound is listed as a Schedule I substance under the CSA (like marijuana) and thus cannot be possessed in the United States, let alone imported.

O Centro Espírita Beneficente União do Vegetal (UDV) is a Christian Spiritist religion based in Brazil with a small following in the United States of just over 150 members (Labate and Feeney 2012). In 1999, United States Customs inspectors

[7] The Supreme Court's ruling focused on whether RLIUPA violated the Establishment Clause of the First Amendment (*Cutter v. Wilkinson* 2005). It concluded it did not. Although the Supreme Court's decision specifically addressed only the Establishment Clause, conventional wisdom has it that RLIUPA also survives federalism concerns, since it addresses the finite problem of religious organizations using their land (*Cutter v. Wilkinson* 2005).

intercepted a shipment of three drums of hoasca sent from South America (*Gonzales v. O Centro Espírita Beneficente União do Vegetal* 2006). The Supreme Court of the United States ruled that the UDV's receipt and use of hoasca is protected by RFRA. The national government, the Supreme Court explained, has long exempted peyote use by the Native American Church from criminal prosecution under the CSA, and in 1994 even extended this protection to all Native American tribes. Hoasca is similar to peyote in that there is no identifiable commercial market. Thus, the government has no compelling interest in preserving a uniform ban on the substance. Put another way, there was no absolute need to ban the religious use of the drug in order to avoid undercutting any recreational market.

In the wake of RFRA, several states passed similar measures offering protections to religion. Commonly, the laws require that any significant interference with sincere religious practices be justified by compelling governmental interests. Arizona, for example, passed a law with commands that were almost identical to those found in RFRA (*State v. Hardesty* 2009). While local measures like these have been applied to protect peyote use, however, their protections have not yet been extended to marijuana. Because of the "disparate magnitudes of the illicit use and trafficking of peyote as opposed to marijuana," the Arizona Supreme Court concluded, differential treatment of the two is justified by compelling governmental concerns.

Post-RFRA Results

Modern American courts continue to refuse to provide protection for marijuana use even after the adoption of RFRA and similar local laws. In contrast to the religious use of peyote, no state provides a specific exemption for the religious use of marijuana. Marijuana is thus treated quite differently than peyote, which, when used by Native Americans, is specifically exempted by congressional statute as well as the positive laws of several states. Nor are state and federal courts sympathetic to extending religious exemptions to marijuana use. A United States Court of Appeals summarized the results found in federal courts:

> Every federal court that has considered this issue has accepted Congress' determination that marijuana poses a real threat to individual health and social welfare and has upheld criminal penalties for possession and distribution even where such penalties may infringe to some extent on the free exercise of religion. Defendant has not persuaded us that a broad religious exception from the laws dealing with the possession and distribution of marijuana is constitutionally required. (*United States v. Greene* 1989).

State courts have reached this same result. Both before 1990, when states were operating under the First Amendment's compelling interest test, and after, when they were given free license by the Supreme Court of the United States to apply their neutral drug laws to religious practices (*Rheuark v. State* 1992), states uniformly rejected religious exemptions for marijuana use. Even in states that exempt peyote and otherwise provide a state constitutional or statutory freedom

of religion defense, marijuana use does not qualify for protection (*State v. Hardesty* 2009).

Why marijuana use, unlike the uses of peyote and hoasca, has failed to achieve religious protection in the United States presents a complex question. Marijuana, after all, is much like peyote and hoasca in the sense that it is organic with a largely hallucinogenic effect. It is not a narcotic or stimulant. While its health effects for long-term use are still being debated, it would not seem that marijuana use is that different than peyote use in the context of general health. Still, American courts have found relevant differences justifying disparate treatment.

First and foremost, courts have questioned whether marijuana use is truly a religious practice. As early as 1966, though they had extended religious protections to peyote, California courts refused to immunize marijuana (*People v. Mitchell* 1966). The reason was simple; no organized religion in California used marijuana for religious purposes. Criminal defendants at best claimed personal religious beliefs that courts found to be less-than-convincing (*People v. Mullins* 1975). In the absence of an organized religion, those who sought to use marijuana were commonly found to be insincere.

Indeed, many courts, contrary to the Supreme Court's teachings on the meaning of religion, rejected "personal" religious beliefs out-of-hand. The New Mexico Supreme Court, for example, concluded that in order to find protection under the First Amendment, religious practices must not only be embraced by organized groups, they must be "traditional" (*State v. Brashear* 1979). Newly emerging religions that expressed religious beliefs in marijuana simply could never succeed under this standard.

It was largely the lack of a relevant marijuana-based "tradition" that led Oklahoma and North Carolina courts to reject the religious defenses of the Universal Life Church (*Llewellyn v. State* 1971; *State v. Carignan* 2006), Missouri courts to reject claims of the Aquarian Brotherhood Church (*State v. Randall* 1976), and New York courts to reject defenses raised by the Church of the Missionaries of the New Truth (*People v. Crawford* 1973). None of these churches was proven to be relatively ancient, and none of them could point to traditional religious beliefs revolving around marijuana.

The Neo-American Church, which asserted that the use of "marijuana is most advisable" (*State v. Ballard* 1966), doubly sabotaged itself. First, it chose to insert "neo" in its name. Next, it chose for its motto, "Victory over Horseshit!" It also used a three-eyed toad as its church symbol, and selected "Puff, the Magic Dragon" and "Row, Row, Row Your Boat" as church hymns. In dismissing the church's religious defense to marijuana charges, the United States District Court in Washington, DC noted its "inescapable impression that the membership is mocking established institutions, playing with words and totally irreverent in any sense of the term" (*United States v. Kuch* 1968).

Along these same lines, the Church of Cognizance, which based its sacramental worship of marijuana on "Neo-Zoroastrian tenets," had little chance of success under Arizona's religious freedom law (*State v. Hardesty* 2008). And the Church of

Marijuana in Wyoming probably had an even smaller chance (*United States v. Meyers* 1995).

Three religious organizations in America have been recognized as professing sincere, legitimate, "traditional" beliefs in marijuana. The Ethiopian Zion Coptic Church in Florida has been found to be a long-standing religion that professes a sincere belief that cannabis is the mystical body and blood of Jesus (*Town v. State ex rel. Reno* 1979). Marijuana use, it claims, brings members closer to their God. Florida courts have thus recognized that members of this church are engaged in legitimate religious practices.

Similarly, the Oklevueha Native American Church (NAC), with approximately 500,000 members in 100 branches throughout 24 States, has been found to possess a legitimate religious interest in marijuana (*Oklevueha Native American Church of Hawaii, Inc. v. Holder* 2012). This branch of the Church, according to its members, is an earth-based healing religion, the primary purpose of which is to "administer sacramental ceremonies." These ceremonies involve the consumption of drugs, including both peyote and marijuana. Like peyote, marijuana is claimed to be a crucial part of this branch's tradition; its members consume marijuana as a sacrament in their religious ceremonies and rites in addition to, or as a substitute for, peyote. Based upon these representations, a United States Court of Appeals sitting in California concluded that the church could at least attempt to a free exercise of religion argument under RFRA.

The case, however, was not, strictly speaking, a criminal matter. Rather, it was a civil proceeding initiated by the church against the United States to recover marijuana that had been seized by federal agents. The trial court dismissed the entire action, but the United States Court of Appeals reversed in part, holding that the church should be allowed to press its religious claims under RFRA for declaratory and injunctive relief. Although it was not going to retrieve the marijuana, which had already been destroyed, or recover money damages (since the United States is immune from monetary relief), the court concluded, it could proceed with the litigation in an effort to prevent future seizures. It is not clear as of this writing that the argument proved successful or was rejected by the trial court on remand from the United States Court of Appeals.

Rastafarians, too, have been recognized as a legitimate religious organization that worships marijuana. (See chapter by Melissa Bone in this volume for more information.) Rastafarianism is a religion that first took root in Jamaica in the nineteenth century (*United States v. Bauer* 1996). Since then, it has won thousands of followers in the United States. Standard descriptions of the religion emphasize the use of marijuana in cultic ceremonies designed to bring believers closer to the divinity. Functionally, marijuana—which is called ganja by the religion's followers—operates as a sacrament. "Like bread and wine are the body and blood of Christ, marijuana is the 'spirit' of Christ" (*Loop v. United States* 2006).

Of course, gaining recognition as a legitimate religion with a traditional belief in marijuana is only the first step. It does not ensure religious freedom under the First Amendment, RFRA, or local analogs. Both the First Amendment, prior to the Supreme Court's decision in *Smith* in 1990, and RFRA thereafter require that

governmental action *substantially interfere* with religious practices to run afoul of the freedom of religion defense. It is not enough that a law marginally or tangentially interferes with religion. The law, moreover, must significantly impact a "central" religious practice (Brown 1983).

Many courts have turned to this requirement to reject religious defenses to marijuana-based charges. A California court, for example, noted that while the defendant "subjectively holds a belief in marijuana, with respect to its being used for religious purposes," he "does not worship or sanctify marijuana, but employs its hallucinogenic biochemical properties as an auxiliary to a desired capacity for communication" (*People v. Collins* 1969). For this reason, the court concluded that it was not "indispensable" to his religion, but was only helpful. And because it was not indispensable, California's criminal prohibition on marijuana use did not significantly interfere with his central religious practice.

This same result has been achieved with Rastafarianism. In one case, a practicing Rastafarian (Loop) had his marijuana pipe and paraphernalia seized by court personnel when he entered a federal courthouse (*Loop v. United States* 2006). Loop thereafter sued to retrieve the items, only to lose because the court was not convinced that the pipe and paraphernalia were religiously needed to be in Loop's possession at all times. "Loop has made no showing that he would be substantially burdened by having to leave his marijuana pipe and other related items at home during his brief visits to the courthouse. In addition, because Loop has not asserted that the marijuana pipe and case are irreplaceable, Loop has not been substantially burdened by the seizure of these items by federal defendants" (*Loop v. United States* 2006).

Another example is found in Hawaii, where a state court rejected a freedom of religion defense asserted against a marijuana charge by a follower of Hindu Tantrism (*State v. Blake* 1985). The court observed that, notwithstanding the claims of the defendant to the contrary, "the role of marijuana in Hindu Tantrism is in fact optional," that marijuana has merely a "peripheral role . . . in Hindu Tantrism," and that "followers of Hindu Tantrism can freely practice their religion without marijuana." Based on these findings, application of the state's criminal prohibition on marijuana possession did not significantly interfere with the defendant's religious practices. Put another way, because marijuana was not central to his religion, but was only optional, the defendant's free exercise defense could not succeed.

Lastly, even when a criminal prohibition significantly interferes with an established religion's traditional religious use of marijuana, it will always survive scrutiny when supported by a compelling governmental interest. Even in those jurisdictions that have adopted statutory protections for religion like those found in RFRA, criminal penalties can be imposed on religious uses of marijuana when supported by compelling justifications. And courts eagerly have searched for compelling reasons.

For example, although Florida courts have recognized the Ethiopian Zion Coptic Church as an established religion with a traditional worship of marijuana, these same courts have also concluded that the state of Florida has a compelling interest in eradicating marijuana use (*Town v. State ex rel. Reno* 1979). Unlike peyote

consumption by Native Americans, which is isolated and occasional, the Coptics marijuana use, the court observed, was constant. Florida's overarching concern in preventing recreational marijuana use—which was indistinguishable from Coptic use—was therefore found to be compelling (*Town v. State ex rel. Reno* 1979). Federal courts have reached similar results in cases involving Coptics (*United States v. Middleton* 1982). Indeed, federal courts have commonly come to this same conclusion with little to no analysis, often simply stating that marijuana is simply not protected:

> The government's compelling interest in upholding the drug laws and protecting the public health and safety laws is more than evident. Indeed, the governmental interest in prohibiting the possession and distribution of a Schedule I substance is "of the highest order," because use of these substances 'poses a substantial threat to public health, safety and welfare.' (*United States v. Jefferson* 2001).

Other federal courts have pointed to the inherent dangers that accompany marijuana use:

> It is well established that the absolute constitutional protection afforded freedom of religious belief does not extend without qualification or limitation to religious conduct. Religious conduct remains subject to regulation for the protection of society. Congress may control the use of drugs that it determines to be dangerous, even if those drugs are used for religious purposes. (*United States v. Greene* 1989).

In sum, the vast majority of jurisdictions and courts in the United States, including, importantly, the national government and its federal courts, have rejected a freedom of religion defense for marijuana use. In many states, this result is justified by the Supreme Court's 1990 decision in *Smith*, which held that neutral drug laws are not subject to a freedom of religion defense. With the national government, which is subject to the statutory protection afforded freedom of religion found in RFRA, courts have consistently concluded that marijuana use is either not part of a protected religious belief system, is not central to that belief system, or is otherwise overcome by compelling governmental interests in eradicating recreational drug use. States that have enacted measures similar to RFRA have come to these same conclusions. And even if they did not, the CSA would still uniformly outlaw marijuana use with or without religion throughout the United States.

The Future?

While marijuana has fared poorly in the First Amendment arena, at least two courts have offered a measure of hope for more egalitarian treatment. In 1996, a United States Court of Appeals ruled in a case originating in Montana that Rastafarianism expresses a traditional belief in marijuana that might enjoy religious protection under RFRA (*United States v. Bauer* 1996). At least in the context of simple possession of marijuana, as opposed to its distribution or importation, which courts

have uniformly held are not central to Rastafarianism (*Guam v. Guerrero* 2002), freedom of religion may insulate adherents from criminal prosecution. It therefore reversed a lower court's conclusion to the contrary and sent the matter back for a full trial on the merits, where the defendant would be entitled to present his freedom of religion defense.

In 2012, this same court ruled that a branch of the Native American Church should be allowed to make this same argument under RFRA (*Oklevueha Native American Church of Hawaii, Inc. v. Holder* 2012). Whether either religious organization prevailed is not clear; the former case has no documented history following the Court of Appeals holding, and the latter has of this writing not been concluded.

A similar result was achieved in New Mexico, where a state appellate court refused to reverse a lower court's holding that the defendant, charged with marijuana possession, would be allowed to present a freedom of religion defense under local law (*State v. Augustin M.* 2003). The appellate court, however, refused to decide whether a freedom of religion defense exists under New Mexico law. As with the two cases mentioned above, no documented history following the appellate court's holding establishes that the defense proved successful.

Challenges have also been pressed under the Fourteenth Amendment's equal protection clause, which generally prohibits disparate treatment based on race, ethnicity, and the exercise of fundamental rights. As described above, the national government and several states exempt the religious use of peyote by Native Americans. Non-natives, to date, have unsuccessfully argued that authorizing religious peyote use by Native Americans is unconstitutionally discriminatory under the Fourteenth Amendment (*Peyote Way Church of God, Inc. v. Thornburgh* 1991). (See chapter by Kevin Feeney in this volume for more information.) Followers of other religions, like the UDV, have made this same argument, again unsuccessfully, in the context of other drugs, like hoasca (*O Centro Espírita Beneficente União do Vegetal v. Ashcro*ft 2002). Lower courts have so far willingly embraced the government's rejoinder that Native Americans are unique and can be treated differently.

Interestingly, this argument under the Fourteenth Amendment's equal protection clause would seem to have been bolstered by the Supreme Court's interpretation of RFRA (*Gonzales v. O Centro Espírita Beneficente União do Vegetal* 2006). There, the Supreme Court ruled that the UDV's receipt and use of hoasca was protected by RFRA in the same way that Native Americans' religious use of peyote was protected by its federal exemption. The Supreme Court rejected the government's claim that Native Americans are unique in the American constitutional scheme. Extrapolating from this statutory holding (which applies only to the national government), future progress may be made under the Fourteenth Amendment.

In the end, unfortunately, it appears that even this small measure of egalitarian hope has not withstood what many courts see as the government's compelling interest in eradicating recreational marijuana use. One federal court, for example, after recognizing that marijuana has not been established to be any more harmful than other illicit drugs (like peyote), concluded that a compelling interest still exists in criminalizing marijuana's use, even for religious purposes:

> The actual abuse and availability of marijuana in the United States is many times more pervasive . . . than that of peyote.... The amount of peyote seized and analyzed by the DEA between 1980 and 1987 was 19.4 pounds. The amount of marijuana seized and analyzed by the DEA between 1980 and 1987 was 15,302,468.7 pounds. This overwhelming difference explains why an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies, and not for a religion which espouses continual use of marijuana. (*United States v. Lepp* 2008).

That marijuana is an *extremely* popular recreational drug, according to the weight of authority, thus precludes recognizing religious exemptions. If it were any other way, the exemptions would swallow the criminal rule.

Conclusion

Does the American experience with marijuana make religious and constitutional sense? Probably not. Excusing some organizations, like the Native American Church, from criminal penalties for some drugs, like peyote, smacks of religious discrimination, which has generally been deemed a violation of egalitarian principles found in the First Amendment's Establishment Clause (*Board of Education of Kiryas Joel School District v. Grumet* 1994). Indeed, one might credibly claim that providing religious exemptions *at all* violates the First Amendment's Establishment Clause, though the Supreme Court has ruled to the contrary (*Cutter v. Wilkinson* 2005). Nonetheless, today's precedents establish that when groups and drugs differ, different rules can be applied to them. Picking and choosing among religious groups, then, is constitutionally permissible as far as drugs of choice are concerned.

Notwithstanding their many similarities, marijuana differs from peyote (and hoasca) in several ways. First and foremost, as explained by numerous courts, marijuana is marketable. Peyote and hoasca, in contrast, do not draw large audiences. Given negligible recreational markets (*United States v. Lepp* 2008), states and the national government can easily and efficiently provide religious exemptions for the latters' use (*Gonzales v. O Centro Espírita Beneficente União do Vegetal* 2006). At least doing so does not compromise the uniform enforcement of drug laws. Exempting marijuana (for any reason), in contrast, could swallow the criminal prohibition completely. Everyone, the government argues, would convert to religions that follow the god of marijuana!

Second, though courts will not often admit it, the groups that choose marijuana are distinct from those that worship peyote. The Native American Church, for example, includes a collection of Indian tribes that, in part, have incorporated Biblical teachings to justify their use of peyote (*People v. Woody* 1964). Courts first began exploring religious exemptions for Native Americans in the 1960s and 1970s, when Eurocentric Americans were first coming to grips with the genocide practiced by their ancestors on the natives. The "civilizing" influence of the Western Bible, too, likely played a part. Confronted with an emerging modern recognition of past wrongs practiced on its natives, mainstream America proved

comfortable with a religious exemption: "The least we can do is allow Indians to practice their religions."

Contrast marijuana use, which was thrust back to the forefront in the 1960s and 1970s by the revolutionary youth movement during a turbulent, chaotic chapter in American history. The Vietnam conflict was raging, young adults were protesting, African-Americans were rioting, and the United States, according to President Nixon's "silent majority," was on the verge of anarchical collapse. "Law and order" was Nixon's promise, and criminalizing the "hippies" and their drug of choice, marijuana, easily fit the theme in 1970. Marijuana was demonized, in significant part because of the groups that preferred it.

Any religious uses for marijuana, meanwhile, proved isolated and unique to fringe religious groups with few connections to Western cultures. Rastafarians and Coptics came to the United States from Caribbean islands, like Jamaica, and had, most Americans believed, "foreign" belief-systems. Indeed, America's Eurocentric mainstream continues to view these island-based religions as something closely approaching "voodoo"[8] (*Church of the Lukumi Babalu Aye*, *Inc*. *v*. *Hialeah* 1993). Rejecting religious exemptions for the practices of Rastafarians and Coptics was accordingly, and remains to this day, quite easy.

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[8] *Church of the Lukumi Babalu Aye*, *Inc*. *v*. *Hialeah* (1993), for example, involved the criminalization in southern Florida of the Santeria practice of ritualistic animal sacrifice. The Santeria faith originated in the nineteenth century when hundreds of thousands of members of the Yoruba people were brought as slaves from western Africa to Cuba. Their traditional African religion there absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santeria, "the way of the saints." Although the Supreme Court of the United States overturned the ordinance, the fact that it could be passed in the first instance illustrates the antipathy many Americans show toward these "island religions."

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