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The War on Drugs and Denominational Preferences: Farewell to Strict Scrutiny Analysis

I. INTRODUCTION

Substance abuse in the United States has triggered a war on drugs, and religious liberty is one casualty of the fight.¹ This war has recently crossed into the denominational preference² sphere of the establishment clause.³ The U.S. Government has elected to accommodate one religious denomination's (the Native American Church) use of a controlled substance (peyote)⁴ while denying others similar accommodations.⁵ In *Olsen v. DEA*,⁶ the Drug Enforcement Agency (DEA) denied the Ethiopian Zion Coptic Church (Church) a limited religious exemption for the sacra-

1. See, e.g., *Employment Div. v. Smith*, 485 U.S. 660 (1988); *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983); *Peyote Way Church of God, Inc. v. Meese*, 698 F. Supp. 1342 (N.D. Tex. 1988); *United States v. Warner*, 595 F. Supp. 595 (D.N.D. 1984); *Randall v. Wyrick*, 441 F. Supp. 312 (W.D. Mo. 1977); *Whyte v. United States*, 471 A.2d 1018 (D.C. 1984); *State v. Roucheleau*, 142 Vt. 61, 451 A.2d 1144 (1982); *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

2. The denominational preference prong of the establishment clause was explained by the Supreme Court in *Larson v. Valente*, 456 U.S. 228, 244 (1982): "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." The Court further stated that

no State can pass laws which aid one religion or that prefer one religion over another. . . . "[T]he fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief." In short, when we are presented with a . . . law granting a denominational preference, our precedents demand that we treat the law as suspect, and that we apply strict scrutiny in adjudging its constitutionality.

Id. at 246 (citation omitted).

3. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

4. The Native American Church's peyote exemption is codified in 21 C.F.R. § 1307.31 (1990):

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. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.

5. See *Olsen v. DEA*, 878 F.2d 1458 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1126 (1990); see also *supra* note 1.

6. 878 F.2d at 1458.

mental use of marijuana. A priest in the Church, Carl Eric Olsen, challenged the decision, claiming it resulted in a denominational preference. On appeal, the Circuit Court of Appeals for the District of Columbia employed an equal protection analysis to dismiss the denominational preference challenge to the DEA's decision.

Olsen v. DEA was a clear government victory in the war on drugs, but the ultimate cost may be more than religious freedom. This note suggests that the court in *Olsen* created a "war on drugs" standard of review that may apply to other fundamental rights and constitutional guarantees. This new standard may emerge as a substitute for traditional strict scrutiny analysis.⁷ The D.C. Circuit's standard of review appears to require a compelling government interest and a rational relationship between that interest and the means employed to further it. Because the rationality requirement is so easily met, and because the war on drugs is a compelling government interest, this "war on drugs" standard would justify any anti-drug regulation or decision. Carried to its logical extreme, the standard could seriously undermine American freedom and liberty.

This note begins with a background discussion of the doctrine of denominational preference in Part II. Part III discusses the facts, background, and holding of *Olsen*. Part IV analyzes *Olsen* in terms of denominational preference, concluding that al-

7. The standard of review given a particular constitutional challenge depends on the nature of the classification, or the right infringed upon. Strict scrutiny analysis is often thought to be "strict in theory, but fatal in fact" because it is such a demanding standard of review. In strict scrutiny analysis, the challenged class or law must be necessary to achieve a compelling governmental interest, and must be the least restrictive means available. See *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Larson v. Valente*, 456 U.S. 228 (1982) (establishment clause violation of denominational preferences); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (restrictions on fundamental right to marry); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972) (restriction on first amendment rights); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (restricting fundamental right of interstate travel); *Harper v. Virginia Bd. of Educ.*, 383 U.S. 663 (1966) (restrictions on fifteenth amendment voting rights); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (racial classifications).

Equal protection (or due process) analysis for most laws consists of a rational basis test to determine constitutionality. The rational basis test requires that a classification be "rationally related to furthering a legitimate government interest." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (state law requiring retirement of police officers at age 50 held constitutional under a rational basis test). Most socio-economic regulations meet this low standard of review. An intermediate level of review has also been found appropriate in some quasi-suspect classifications (such as gender) in which the class (or law) must be substantially related to an important government interest. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981) (intermediate review in upholding challenge to male-only draft).

though the *Olsen* court's equal protection approach to denominational preference claims is justifiable, the analysis itself can only be understood in a war on drugs context.

II. BACKGROUND: THE DOCTRINE OF DENOMINATIONAL PREFERENCE

Establishment clause jurisprudence involves at least two concepts: separation of church and state, and nonpromotion of any single sect.⁸ Consequently, establishment clause challenges can be brought when a law benefits all religions (separation) or just some religions (preference). Part II focuses on the latter.

The doctrine of denominational preference was defined by the Supreme Court in *Larson v. Valente*: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."⁹ In *Larson*, the Unification Church challenged the Minnesota Charitable Solicitations Act, which provided that only those religious organizations that receive more than half of their total contributions from members or affiliated organizations were exempt from the Act's registration and reporting requirements.¹⁰ The Unification Church did not qualify for the statutory exemption, while other churches did. The Court held that the statute created a preference on its face, and stated that the "fifty percent rule . . . clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents."¹¹

The *Larson* Court explained that establishment clause analysis employing the traditional three-prong *Lemon* test¹² is "in-

8. See generally G. GUNTHER, CONSTITUTIONAL LAW 1463 (11th ed. 1985).

9. See *Larson v. Valente*, 456 U.S. at 244.

10. *Id.* at 228.

11. *Id.* at 246. The Court explained that the statute was not even neutral on its face, but distinguished between different religious organizations. The Court stated, "We agree with the Court of Appeals' observation that the provision effectively distinguishes between 'well-established churches' that have 'achieved strong but not total financial support from their members,' on the one hand, and 'churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members,' on the other hand."

Id. at 246-47 n.23 (citations omitted).

12. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The test as stated reads: Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances

tended to apply to laws affording a uniform benefit to all religions"¹³ (separation), but that when a law benefits only some religions (preference), "our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality."¹⁴ Drawing on the history of denominational preference jurisprudence,¹⁵ the *Larson* Court concluded that any law granting a denominational preference must be "invalidated unless it is justified by a compelling governmental interest, and . . . is closely fitted to further that interest."¹⁶

Prior to *Larson*, the Supreme Court discussed denominational preferences in terms of nonpromotion and neutrality, and stressed the importance of equality (nonpreference) among the sects.¹⁷ Equal protection analysis is useful in nonpreference cases to ensure that all religions are treated similarly.¹⁸ The non-

nor inhibits religion; finally, the statute must not foster "an excessive entanglement with religion."

Id. (citations omitted).

13. *Larson v. Valente*, 456 U.S. at 252.

14. *Id.* at 246.

15. *See id.* The Court summarized its denominational preference jurisprudence as follows:

Since *Everson v. Board of Education*, 330 U.S. 1 (1947), this court has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can "pass laws which aid one religion" or that "prefer one religion over another." *Id.* at 15. This principle of denominational neutrality has been restated on many occasions. In *Zorach v. Clauson*, 343 U.S. 306 (1952), we said that "[t]he government must be neutral when it comes to competition between sects." *Id.* at 314. In *Epperson v. Arkansas*, 393 U.S. 97 (1968), we stated unambiguously: "The First Amendment mandates governmental neutrality between religion and religion . . . the State may not adopt programs or practices which 'aid or oppose' any religion . . . This prohibition is absolute." *Id.* at 104, 106 (citing *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963)). And Justice Goldberg cogently articulated the relationship between the Establishment Clause and the Free Exercise Clause when he said that "[t]he fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief." *Abington School District, supra*, at 305.

Id.

16. *Larson v. Valente*, 456 U.S. at 247.

17. *See Walz v. Tax Comm'n*, 397 U.S. 664, 694 (1980) (Harlan, J., filing a separate opinion). The establishment clause has two requirements: neutrality and voluntarism. Justice Harlan explained, "The statute . . . satisfies the requirement of neutrality. Neutrality in its application requires an equal protection mode of analysis." *Id.* at 696.

18. *See, e.g., Fowler v. Rhode Island*, 345 U.S. 67 (1953) (Frankfurter, J., concurring). The Court held that a statute allowing religious services in a public park could not discriminate against the practices of any particular sect: "To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another." *Id.* at 70.

preference requirement of the establishment clause requires a "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."¹⁹

An early example of the Court's equal protection analysis under the religion clauses is *Walz v. Tax Commission*.²⁰ In *Walz*, plaintiffs challenged a New York law exempting all religious organizations from property taxes. Since the New York law benefitted all religious organizations, the Court employed a *Lemon* analysis.²¹ Justice Harlan, in a separate opinion, suggested that in applying the neutrality requirement of the establishment clause, an equal protection mode of analysis was appropriate.²²

Larson's strict scrutiny analysis for laws that prefer one denomination over another is a logical extension of Justice Harlan's equal protection/neutrality analysis in *Walz*. *Larson* can be "conceptualized as requiring the equal protection of religions under the establishment clause."²³ Under a *Larson* equal protection analysis, any denominational preference is treated as a suspect class and strictly scrutinized.²⁴

III. *Olsen v. DEA*

A. *Facts, Procedure and Holding*

Carl Eric Olsen is a priest and member of the Ethiopian Zion Coptic Church.²⁵ The Church's religious sacrament is mari-

See also *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987). In *Amos*, a challenge was made to a congressional exemption granted all churches from a federal statute (Title VII of the 1964 Civil Rights Act) that prohibited employers from discriminating on the basis of the employees' religious beliefs. In considering the exemption, the Court employed an equal protection type analysis to ensure that the exemption was even-handedly granted to all religious organizations, supporting the holding in *Larson*. *Id.*

19. *Corporation of Presiding Bishop v. Amos*, 483 U.S. at 334 (quoting *Walz v. Tax Comm'n*, 397 U.S. at 673).

20. 397 U.S. 664, 696 (1970) (Harlan, J., filing separate opinion).

21. *See supra* note 12.

22. *Walz v. Tax Comm'n*, 397 U.S. at 696 (Harlan, J., filing separate opinion).

23. Note, *Another Brick in the Wall: Denominational Preferences and Strict Scrutiny Under the Establishment Clause*, 62 NEB. L. REV. 359, 371 (1983).

24. *See Larson v. Valente*, 456 U.S. 228, 246 (1982).

25. *Olsen v. DEA*, 878 F.2d 1458, 1466 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1126 (1990). Although not critical to an analysis of this case, a brief history of the Ethiopian Zion Coptic Church (Church) may be beneficial to the reader. The Church finds its historical roots and traditions in the ancient Coptic Church of Ethiopia (4000 B.C.). Presently, the Church has a considerable following in Jamaica, while membership in the U.S. has varied between 60 and 200 members. Its members believe they are descendants of

juana. Believing that his church was entitled to the same privileges afforded the Native American Church,²⁶ Olsen petitioned the DEA for a religious use exemption to the Controlled Substances Act.²⁷ The DEA denied Olsen's request based on "the immensity of the marijuana abuse problem" and the "compelling governmental interest" in controlling it.²⁸ Olsen petitioned the Circuit Court of Appeals for the District of Columbia to review the DEA's decision. On remand, court-appointed amicus curiae²⁹ requested a "restrictive religious exemption"³⁰ to the Controlled Substances Act similar to the peyote exemption granted the Native American Church.³¹ Amici presented a denominational preference argument supporting extension of the controlled substance exemption to the Ethiopian Zion Coptic

the ancient Israelites. The Church is a Christian order, believing in the teachings of the New and Old Testaments, with Jesus Christ as their primary prophet. Members of the Church undergo a detailed confession ritual wherein they forsake worldly sin and corruption, and pursue a life free from materialism. Membership is very restrictive. The Church's goal is to seek spiritual liberation of believers. The Church neither accepts nor solicits donations from nonmembers. It traces its sacramental use of marijuana to the Bible through the many references made to incense and herbs, as well as to the ancient Coptic Church. For sacramental purposes, marijuana is mixed with tobacco and smoked "as an offering of devotion." Members do not drink or use drugs, and intoxication is forbidden. For the interested reader, see W. Wells, *History of the Ethiopian Zion Coptic Church*, THE COPTIC WORLD (Dec. 26, 1987). See also Wells, *Marijuana and the Bible* (Ethiopian Zion Coptic Church Publication).

26. Olsen raised this issue in several previous criminal cases, but never in a denominational preference context and never seeking a restrictive religious use exemption. See, e.g., *Olsen v. Iowa*, 808 F.2d 652 (8th Cir. 1986); *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984), cert. denied, 470 U.S. 1004 (1985).

27. Controlled Substances Act, 21 U.S.C. §§ 801-904 (1988).

28. *Olsen v. DEA*, 878 F.2d at 1459 (quoting letter from John C. Lawn, DEA Administrator, to Carl Eric Olsen (Apr. 22, 1986)).

29. William A. Bradford, Jr. and Steven J. Routh, Hogan and Hartson, Washington, D.C.

30. Memorandum of Court Appointed Amicus Curiae in Support and on Behalf of Petitioner Carl E. Olsen at 29-30, *Olsen v. DEA*, 878 F.2d 1458 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 1126 (1990) (submitted to DEA on remand). The restrictive religious exemption consists of

- Limiting consumption of marijuana to their Saturday evening prayer ceremony;
- Church members would not leave the place of the ceremony during or after the ceremony for a period of eight hours;
- Ingestion of marijuana would be limited to Church members who had reached the age of maturity;
- Ingestion of marijuana would be limited to full church members who had undergone the confession ritual for entering the Church community

Id.

31. 21 C.F.R. § 1307.31 (1990).

Church.³² Amici argued that the government's official accommodation of the Native American Church and its refusal to accommodate the Zion Ethiopian Coptic Church created an unconstitutional denominational preference.³³

In its Final Order,³⁴ the DEA denied Olsen's petition and claimed lack of authority to grant the exemption.³⁵ However, it addressed the issue "[b]ecause of the possibility that the . . . court . . . may find that the Administrator does have the authority"³⁶ The DEA accepted *arguendo* that the Ethiopian Zion Coptic Church was a bona fide religion whose religious sacrament is marijuana. However, it rejected Olsen's denominational preference claim by couching it in equal protection terms and by finding that the Ethiopian Zion Coptic Church was not similarly situated to the Native American Church.³⁷ The DEA also rejected Olsen's free exercise claims,³⁸ reasoning that Olsen's Church

32. Olsen v. DEA, 878 F.2d at 1463 n.5.

33. See Larson v. Valente, 456 U.S. 228 (1982). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244.

34. DEA Final Order, In the matter of Carl E. Olsen for the Ethiopian Zion Coptic Church For An Exemption From The Controlled Substance Act, *reprinted as appendix*, Olsen v. Lawn, 878 F.2d 1458, 1464 (1989) (No. 86-1442).

35. *Id.* at 1466 (appendix).

36. *Id.* The issue of whether the Administrator of the DEA has this authority or not could prove to be very important. The Olsen court commented, "The DEA's contention that Congress directed the Administrator automatically to turn away all churches save one opens a grave constitutional question. A statutory exemption authorized for one church alone, and for which no other church may qualify, presents a 'denominational preference' not easily reconciled with the establishment clause." *Id.* at 1461 (citing Larson v. Valente, 456 U.S. at 245).

37. Olsen v. DEA, 878 F.2d at 1465 (appendix).

38. See *id.* at 1461. "It is familiar doctrine that the free exercise clause 'embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.'" *Id.* (quoting Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940)). The court applied a three-prong test developed by the Supreme Court for free exercise questions: (a) whether the law interferes with the free exercise of sincere religious belief; (b) whether the law is essential to accomplish an overriding governmental objective; and (c) whether accommodating the religious conduct would unduly interfere with fulfillment of the governmental interest. See United States v. Lee, 455 U.S. 252, 256-59 (1982). Because the DEA accepted the Ethiopian Zion Coptic Church as a bona fide religion sincere in its beliefs, and because the Church did not dispute the government interest in controlling marijuana use, the resolution of Olsen's free exercise claim rested on whether Olsen and his Church could be accommodated without undue interference with the government's interest. The DEA, in agreement with several other circuits, found the answer to be no. See Olsen v. Iowa, 808 F.2d 652, 653 (8th Cir. 1986); United States v. Rush, 738 F.2d 497, 513 (1st Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985);

advocates the continuous use of marijuana or "ganja," while the Native American Church's use of peyote is isolated to specific ceremonial occasions . . . [and], while peyote and marijuana are both Schedule I controlled substances with a defined high potential for abuse, the actual abuse and availability of marijuana in the United States is many times more pervasive . . . than that of peyote.³⁹

The District of Columbia Circuit Court of Appeals upheld the DEA's decision due to "the immensity of the marijuana control problem in the United States."⁴⁰ The court justified its decision by applying an equal protection analysis to the denominational preference claim, finding that the Ethiopian Zion Coptic Church was not similarly situated to the Native American Church for equal protection purposes.⁴¹ Although the Supreme Court unambiguously explained the meaning and application of denominational preference analysis in *Larson v. Valente*,⁴² the *Olsen* court did not find it applicable to Olsen's denominational preference challenge. The D.C. Circuit departed from the strict scrutiny review that the Supreme Court in *Larson* required for denominational preference claims. Although the court may have been justified in its assessment that the marijuana problem is a "compelling government interest," its finding that the Ethiopian Zion Coptic Church is not similarly situated does not do justice to *Larson*'s strict means requirement that the DEA's decisions be "closely fitted" to furthering the governmental interest.

B. *The District of Columbia Circuit Court of Appeals' Opinion*

The *Olsen* court defined a "denominational preference" as "[a] statutory exemption authorized for one church alone, and for which no other church may qualify."⁴³ In other words, no

United States v. Middleton, 690 F.2d 820, 825 (11th Cir. 1982), cert. denied, 460 U.S. 1051 (1983).

39. *Olsen v. DEA*, 878 F.2d at 1467 (appendix).

40. *Id.* at 1464.

41. *Id.*

42. 456 U.S. 228 (1982).

43. *Olsen v. DEA*, 878 F.2d at 1461. The DEA contended in its Final Order that it did not have the authority to grant Olsen the exemption he sought. The court noted that if this were true, it would create "a grave constitutional question. A statutory exemption authorized for one church alone, and for which no other church may qualify, presents a 'denominational preference' not easily reconciled with the establishment clause." *Id.* (citation omitted). See also *United Christian Scientists v. Christian Science Bd. of Direc-*

denominational preference exists as long as the exemption is available to other qualified religious organizations.⁴⁴ The court noted that although amici characterized Olsen's challenge with an "establishment clause headline, . . . [w]e do not believe the label consequential [I]n cases of this character, establishment clause and equal protection analyses converge."⁴⁵ The court suggested that if another church were "similarly situated" to the Native American Church, equal protection (and/or the establishment clause) would require "even-handed" treatment.⁴⁶ The court assumed the peyote classification was valid, and concluded that the Ethiopian Zion Coptic Church was not similarly situated to the Native American Church.⁴⁷

The court distinguished the two churches by the controlled substance each used, noting the vast difference between the marijuana and peyote control problems⁴⁸ and the difference between each church's traditional ceremonial drug use.⁴⁹ The court also mentioned the peyote exemptions's relation to the *sui generis* legal status of the American Indians as another distinction, but expressed no opinion on the matter.⁵⁰

The *Olsen* court justified its decision by stating that even if it accepted Olsen's denominational preference arguments, "the

tors, 829 F.2d 1152, 1162 n.49 (D.C. Cir. 1987) (dicta recognizing that any government policy that "singles out one religious denomination as the recipient of an unusual religious benefit" must be strictly scrutinized).

44. *Olsen v. DEA*, 878 F.2d at 1464.

45. *Id.* at 1463 n.5.

46. *Id.* at 1464.

47. *Id.* at 1463. The court stated that Olsen had asserted similar claims in previous criminal cases, and "had the DEA timely objected, we might have held the issue precluded." *Id.* (citation omitted). See *Olsen v. Iowa*, 808 F.2d 652, 653 (8th Cir. 1986); *United States v. Rush*, 738 F.2d 497, 513 (1st Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985).

48. *Olsen v. DEA*, 878 F.2d at 1463. The court stated,

[T]he 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.

Id. at 1467 (quoting DEA's Final Order).

49. *Id.*

50. "We mention too—but express no opinion concerning—the view of the First Circuit that the peyote exemption is bound up with the federal policy of preserving Native American culture, and thus can be comprehended properly only 'in light of the *sui generis* legal status of the American Indians.'" *Id.* at 1464 (citation omitted).

remedy [Olsen seeks] . . . hardly follows."⁵¹ The court suggested that acceptance of Olsen's argument would result in invalidation of the peyote exemption rather than a new marijuana exemption;⁵² otherwise, a flood of marijuana users would seek similar treatment.⁵³

IV. ANALYSIS

The judges disagreed over the "label" given Olsen's constitutional challenge, the majority choosing "equal protection" and the dissent "denominational preference."⁵⁴ Theoretically, either label should have produced the same analysis. Although form should not supersede substance,⁵⁵ the court's characterization proved critical.

A. *Issues Raised by the Court's Definition of Denominational Preference*

The *Olsen* court's definition of denominational preference raises some interesting questions. The court explained that an exemption for which only one denomination may qualify while all others would be turned away would raise a severe constitutional challenge.⁵⁶ Yet, whether any other church may qualify for the exemption granted the Native American Church is unclear. Some courts have found that the peyote exemption is limited solely to the Native American Church,⁵⁷ while others have

51. *Id.* The court continued, "Faced with the choice between invalidation and extension of any controlled substance religious exemption, which would the political branches choose? It would take a court bolder than this one to predict . . . that extension, not invalidation, would be the probable choice." *Id.*

52. *Id.* at 1464. See also *Califano v. Westcott*, 443 U.S. 76, 89-93 (1979). Justice Harlan stated that when confronted with a statute that was underinclusive, "there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring).

53.

Olsen v. DEA, 878 F.2d at 1464 ("Were the DEA to consider a marijuana exemption, equal protection (and/or the establishment clause) . . . would indeed appear to command that it do so even-handedly.").

54. *Id.* at 1463. "The dissent describes Olsen as choosing 'an Establishment Clause battleground' in preference to an equal protection one." *Id.* at 1463 n.5. "The majority treats Olsen's denominational preference claim as an equal protection challenge rather than as one involving the Establishment Clause." *Id.* at 1468 (Buckley, J., dissenting).

55. See, e.g., *Knetsch v. United States*, 364 U.S. 361 (1960).

56. *Olsen v. DEA*, 878 F.2d at 1461.

57. See *Peyote Way Church of God, Inc. v. Meese*, 698 F. Supp. 1342 (N.D. Tex.

suggested that any bona fide peyote religion would fall within the exception.⁵⁸ The DEA's Chief Counsel believes that, as a practical matter, no other church may qualify.⁵⁹

This creates a dilemma the court did not address: Is a statutory exemption for which, as a practical matter, only one church may qualify a denominational preference? If not, laws that are tailored to benefit one specific religion escape *Larson's* strict scrutiny analysis as long as there are no absolute bars against other religions qualifying. As in *Olsen*, the "similarly situated" requirement of equal protection would keep other religions from acquiring similar treatment for their particular religious practices, essentially barring any significant equal protection or establishment clause challenge. Specific sect-oriented legislation of this nature theoretically escapes the *Lemon* analysis as well⁶⁰ because such legislation is not intended to benefit all religions. By refusing to recognize that the peyote exemption is a denominational preference, the D.C. Circuit created a gap within traditional establishment clause analysis that may enable the government to "prefer" a particular religion of its choosing. This result is precisely what the first amendment was designed to prevent.

B. *Equal Protection Analysis of a Denominational Preference Claim*

The ultimate goal of equal protection analysis is to determine whether a law is constitutional.⁶¹ The level of judicial review depends upon the classification or right burdened.⁶² When a law affects a suspect class or burdens a fundamental right, strict scrutiny applies, and the government must prove that the law is necessary and closely fitted to accomplish a compelling government interest. The remaining analysis involves statutory

1988). The court there found that "the Native American Church . . . is . . . the only one of its kind." *Id.* at 1347 (citations omitted).

58. See *Native American Church of New York v. United States*, 468 F. Supp. 1247 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 205 (2d Cir. 1980). The court in this case concluded that the peyote exemption could be extended to any bona fide religious organization that used peyote for sacramental purposes and regarded peyote as a deity (these are the characteristics of the Native American Church). *Id.* at 1251.

59. Memorandum Opinion for the Chief Counsel, Drug Enforcement Administration, *Peyote Exemption for Native American Church* 403, 420 (Dec. 22, 1981).

60. *Larson v. Valente*, 456 U.S. 228, 252 (1982) (the *Lemon* test applies to laws that create a uniform benefit to all religions).

61. See J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 519 (3d ed. 1986).

62. See *supra* note 7.

interpretation to determine who should benefit from the law. The equal protection clause generally guarantees that people who are similarly situated will be treated similarly, and those who are not similarly situated will not be treated similarly.⁶³

Because *Larson* articulated and formalized the equal protection of religions under the establishment clause, the *Olsen* court was fundamentally correct in applying an equal protection analysis. However, the Supreme Court in *Larson* declared that a denominational preference should be treated as a suspect class and strictly scrutinized.⁶⁴ The *Olsen* court properly concluded that equal protection analysis was appropriate, but oversimplified its analysis and never addressed the specific issue of whether the peyote exemption did in fact prefer one religion over another.

The *Olsen* court did mention the *sui generis* legal status of the Indians, but expressed no opinion on the matter.⁶⁵ The court simply assumed, "arguendo, the legitimacy" of the peyote exemption in analyzing Olsen's petition.⁶⁶ By doing so, the court escaped all meaningful establishment clause analysis by failing to discuss whether the peyote exemption was a denominational preference. Although the *Olsen* court did not explicitly base its "similarly situated" analysis on any past cases, it may have implicitly relied on the analyses of two lines of cases which held that the peyote exemption was valid.⁶⁷ However, none of those cases dealt with a denominational preference challenge to the Native American Church exemption.⁶⁸

The *Olsen* court may have accepted the equal protection analysis offered in *United States v. Warner*.⁶⁹ The *Warner* court characterized the Native American Church peyote exemption as a political classification and determined that rational basis was the appropriate standard of review.⁷⁰ It concluded that the pe-

63. L. TRIBE, CONSTITUTIONAL LAW 1438 (2d ed. 1986).

64. *Larson v. Valente*, 456 U.S. at 246.

65. *Olsen v. DEA*, 878 F.2d 1458, 1464 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1126 (1990).

66. *Id.* at 1464-65.

67. *See id.* at 1463.

68. *See, e.g., United States v. Rush*, 738 F.2d 497 (1st Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985); *Peyote Way Church of God, Inc. v. Meese*, 698 F. Supp. 1342 (N.D. Tex. 1988); *United States v. Warner*, 595 F. Supp. 595 (D.N.D. 1984).

69. 595 F. Supp. 595 (D.N.D. 1984).

70. *Id.* at 600 (citing *Peyote Way Church of God, Inc. v. Smith*, 556 F. Supp. 632, 638-39 (N.D. Tex. 1983)).

The preference given to Indian "members" of the NAC is not racial in nature

yote exemption was rationally related to the government's unique obligation to the Indians and was therefore constitutionally valid.⁷¹ A significant fallacy in this analysis is that the peyote exemption is extended only to members of the Native American Church, and not to the American Indians as a political entity. When the Department of Justice's legal counsel addressed the peyote exemption, he observed that the exemption was not based on the "unique political status of the Indians," but on the "religion of the Indians."⁷²

The court in *Olsen* should have made greater inquiry into the legislative objectives of the peyote exemption in order to determine whether the two churches are similarly situated for equal protection purposes.⁷³ The *Olsen* court alluded to, but did not explain, its interpretation of the peyote exemption: The exemption is intended to benefit bona fide peyote religions, specifi-

but political in nature. Congress has a power or duty to the Indians to preserve their dependent nations as a cohesive culture until such time as they become so assimilated in the mainstream of American culture so as not to be "a people apart." In the American Indian Religious Freedom Act, 42 U.S.C. § 1996, Congress has recognized this duty. The government furthers this policy with the exemption for the use of peyote in the rituals of the NAC.

Id. (citations omitted). See also *Peyote Way Church of God*, 698 F. Supp. at 1349.

71. *United States v. Warner*, 595 F. Supp. at 601 (Native American Church exemption from Controlled Substances Act is "tied rationally to the fulfillment of the government's unique obligation toward the Indians and does not violate . . . equal protection").

72. Memorandum Opinion for the Chief Counsel, Drug Enforcement Administration, *Peyote Exemption for Native American Church* 403, 419 (Dec. 22, 1981) (citations omitted). The Chief Counsel's opinion elaborated,

[T]he special treatment of Indians under our law does not stem from the unique features of Indian religion or culture. With respect to these matters, Indians stand on no different footing than do other minorities in our pluralistic society. Rather, the special treatment of Indians is grounded in their unique status as political entities, formerly sovereign nations preexisting the Constitution, which still retain a measure of inherent sovereignty over their peoples unless divested by federal statute or by necessary implication of their dependent status.

An exemption for Indian religious use of peyote would not be grounded in the unique political status of Indians. Instead, the exemption would be based on the special culture and religion of the Indians. In this respect, Indian religion cannot be treated differently than other religions similarly situated without violation of the Establishment Clause.

Id.

73. See *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (the Court upheld as constitutional a statutory rape statute by determining that men and women are not similarly situated because the objective of the statute was to discourage illegitimate teenage pregnancy).

cally, the Native American Church.⁷⁴ This fact alone should be sufficient to warrant a denominational preference inquiry.

74. A brief legislative history follows. Peyote use, consumption, and sale was first controlled in the Drug Abuse Control Amendments of 1965. 79 Stat. 226 § 3(a) (1965). These amendments were later superseded by the Controlled Substances Act of 1965. 21 U.S.C. §§ 812-1007 (1965). The Drug Abuse Control Amendments of 1965 were introduced in the House as House Bill 2. House Bill 2 exempted from control "peyote but only insofar as its use is in connection with the ceremonies of a bona fide religious organization." 111 CONG. REC. 14,608 (1965). The Senate Committee on Labor and Public Welfare recommended that the peyote exemption be omitted. S. REP. NO. 337 (quoted at 111 CONG. REC. 14,609 (1965)). The Senate passed House Bill 2 without the peyote exemption. *Id.* The House then passed House Bill 2 without the peyote exemption since the views of the Food and Drug Administrations were that the bill "cannot forbid bona fide religious use of peyote." *Id.* at 15,977.

If the church is a bona fide religious organization that makes sacramental use of peyote, then it would be our view that H.R.2, even without the peyote exemption which appeared in the House-passed version, could not forbid bona fide religious use of peyote. We believe that the constitutional guarantee of religious freedom fully safeguards the rights of the organization and its communicants.

Id. The Department of Health, Education and Welfare regulated peyote in 1965, but included an exemption for the Native American Church. (Codified then as 21 C.F.R. § 166.3). Congress later enacted the Controlled Substances Act of 1970 after officials of the Bureau of Narcotics and Dangerous Drugs (who were then responsible for enforcing the 1965 Amendments because of Reorganization Plan No. 1 of 1968) testified that the peyote exemption would be continued in regulation form, which it was. The actual exemptions for religious use of peyote were not expressly included in the statutes, but were left for departmental regulation.

Although it is clear that the intent of the exemption was to benefit the Native American Church (or its equivalent), the actual legal basis for the exemption itself is unsettled. "The special treatment of Indians under our law does not stem from the unique features of Indian religion or culture. With respect to these matters, Indians stand on no different footing than do other minorities in our pluralistic society." *See United States v. Wheeler*, 435 U.S. 313 (1978) (Department of Justice's Office Legal Counsel concerning the Native American Church Exemption).

An exemption for Indian religious use of peyote would not be grounded in the unique political status of Indians. Instead, the exemption would be based on the special culture and religion of the Indians. In this respect, Indian religion cannot be treated differently than other religions similarly situated without violation of the establishment clause. Memorandum for Chief Counsel of the DEA, *Peyote Exemption for the Native American Church*, 403, 420 (1981). *See generally* Statement of Larry L. Simms on S.J. Res. 102 before the Senate Select Committee on Indian Affairs, Feb. 27, 1978 (noting that congressional preference for Indian over non-Indian religions could raise establishment clause problems).

The American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1988), declares a federal policy to "protect and preserve for American Indians their inherent right of freedom to believe, express and exercise their traditional religions . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." *See, e.g., United States v. Rush*, 738 F.2d 497 (1984), *cert. denied*, 470 U.S. 1004 (1985); *Peyote Way Church of God, Inc. v. Meese*, 698 F. Supp. 1342 (N.D. Tex. 1988); *United States v. Warner*, 595 F. Supp. 595 (D.N.D. 1984).

The court may have also relied on other cases involving the Ethiopian Zion Coptic Church.⁷⁵ In *United States v. Rush*,⁷⁶ Olsen and others were convicted of possession with intent to distribute marijuana. They raised an equal protection defense based on the exemption granted the Native American Church. The *Rush* court held that

[m]arijuana is not covered by the peyote exemption [T]he peyote exemption is uniquely supported by the legislative history and congressional findings underlying the American Indian Religious Freedom Act, which declares a federal policy of "protect[ing] and preserv[ing] for American Indians their inherent right of freedom to believe, express and exercise their traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites. . . . In light of the *sui generis* legal status of the American Indians . . . and the express policy of the American Indian Religious Freedom Act, . . . we think the Ethiopian Zion Coptic Church cannot be deemed similarly situated to the Native American Church for equal protection purposes.⁷⁷

Olsen also raised a first amendment free exercise defense in *Rush*, but the court rejected it as a matter of law. The *Rush* court stated that since marijuana control is an issue of national health and social welfare, as determined by Congress and accepted by a majority of courts, no broad religious exemptions could be granted because it would render the marijuana enforcement laws meaningless.⁷⁸ *Olsen* is easily distinguished from *Rush*. First, *Olsen* involves a very limited religious exemption; second, the first amendment claim in *Olsen* was based on de-

75. Letter from Carl Eric Olsen to John C. Lawn, DEA Administrator (May 2, 1986). "I would like you to respond to the issue of equal protection Why are you discriminating against my religion by denying the same benefits which are given to the sacramental uses of peyote and wine?" *Id.* See also *United States v. Rush*, 738 F.2d 497, 513 (1st. Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985); *Olsen v. Iowa*, 649 F. Supp. 14, 15 (S.D. Iowa 1986) *aff'd*, 808 F.2d 652 (8th Cir. 1986).

76. 738 F.2d 497 (1st Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985).

77. *Id.* at 513 (citations omitted).

78. *Id.* The *Rush* court explained that first amendment free exercise claims were governed by the standard explained in *United States v. Lee*, 455 U.S. 252, 256-59 (1982). The *Lee* standard involves three inquiries: first, whether the challenged law interferes with free exercise of a religion; second, whether the challenged law is essential to accomplish an overriding governmental objective; and third, whether accommodating the religious practice would unduly interfere with fulfillment of the governmental interest.

nominationnal preferences, while the claim in *Rush* was based on free exercise.

C. *Applicability of the Lemon Test.*

Prior to *Larson*, the *Lemon* test was applied to the peyote exemption in *United States v. Warner*.⁷⁹ In *Warner*, a criminal defendant convicted of possessing and distributing peyote raised an establishment clause defense based on the Native American Church's peyote exemption. The defendant claimed to be a member of the Native American Church, although not of Indian blood. The court in *Warner* applied the traditional *Lemon* test⁸⁰ and concluded that the exemption was constitutional. The *Warner* court found that the purpose of the peyote exemption was secular: it merely enabled the Native American Church the free exercise of its traditional religion; there was no sponsorship or support of the religion; and there was no excessive government entanglement in the church's affairs.⁸¹ The *Warner* court did not consider a denominational preference approach.

The DEA's Chief Counsel also applied the *Lemon* test to the peyote exemption in a 1981 memorandum opinion.⁸² The Chief Counsel's opinion basically mirrors the *Warner* findings relative to the constitutionality of the exemption, and states that any bona fide peyote religion could be covered without violating the establishment clause.⁸³

In light of *Larson's* discussion of the applicability of the *Lemon* test to cases in which the government benefits religion as a whole, *Lemon* seems to be an inappropriate test in the *Warner* context because the peyote exemption is not intended to benefit all religious organizations. Perhaps for these reasons the *Olsen*

79. 595 F. Supp. 595 (D.N.D. 1984).

80. See *supra* note 12.

81. *United States v. Warner*, 595 F. Supp. at 599-600. The *Warner* court also pointed out another interesting twist to the peyote exemption granted the Native American Church: The Native American Church membership charter requires that members be at least one-fourth Indian blood. This suggests that the peyote exemption may not only be a denominational preference, but also a racial classification as well, which would also require strict scrutiny analysis under equal protection jurisprudence.

82. Memorandum Opinion for the Chief Counsel, Drug Enforcement Administration, *Peyote Exemption for Native American Church* 403, 415 (Dec. 22, 1981). This memorandum opinion was written before the *Larson* decision.

83. *Id.* at 419. Chief Counsel for the DEA felt that there would not be an intolerable amount of government entanglement in religion by accommodating the sacramental exemption. *Id.*

court did not consider applying the *Lemon* test to Olsen's claims.

D. The Court Should Have Found a Denominational Preference

1. The peyote exemption discriminates on its face

The court could have found a denominational preference by looking at the face of the peyote exemption itself.⁸⁴ In *Larson*, a state statute that exempted religious organizations from a requirement that charitable organizations register and file annual reports with the State was held unconstitutional because it limited the exemption to "those religious organizations that received more than half of their total support from members or affiliated organizations."⁸⁵ Because the statute on its face preferred some denominations over others and the Unification Church was unable to qualify, the Court held that a denominational preference existed and applied the strict scrutiny test.⁸⁶ Just as in *Larson*, a denominational preference exists in *Olsen* because the controlled substance exemption is limited to a specific denomination on its face. By failing to determine whether the controlled substance exemption was impermissibly underinclusive, the *Olsen* court avoided the constitutional question of denominational preference and equal protection of religions under the establishment clause.

2. The two churches are similarly situated

The *Olsen* court could have found that the two churches were similarly situated for equal protection purposes by focusing on their similarities rather than their ideological and practical differences. Both churches are bona fide religious organizations and both desire a Schedule I controlled substance for limited⁸⁷ sacramental use.⁸⁸ The dissent acknowledged these similarities.⁸⁹

84. 21 C.F.R. § 1307.31 (1990) ("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 . . .")

85. *Larson v. Valente*, 456 U.S. 228, 231-32 (1982).

86. *Id.* at 251.

87. *See supra* note 30.

88. *Olsen v. DEA*, 878 F.2d at 1468 (Buckley J., dissenting). Both peyote and marijuana are Schedule I controlled substances. The DEA accepted the Zion Ethiopian Cop-tic Church as a bona fide religion that utilizes marijuana in its religious sacrament. This

*E. Applying Strict Scrutiny**1. The clear standard of review*

In his dissent, Judge Buckley stated that "the majority fail[ed] to address the Establishment Clause implications" of the DEA's denial of Olsen's exemption request.⁹⁰ "That denial creates a clear-cut denominational preference in favor of the Native American Church."⁹¹ In his opinion, Judge Buckley stated that *Larson's* strict scrutiny standard was clearly appropriate:

Although certain aspects of the Supreme Court's Establishment Clause jurisprudence are complex, the doctrine applicable in this particular case is straightforward. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." When we are presented with government action "granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality."⁹²

Although the legislative history of the peyote exemption is interesting and informative, the fact remains that "the United States Government unquestionably has granted the Native American Church an accommodation that it has declined to extend to the Ethiopian Zion Coptic Church."⁹³ The denial of Olsen's petition is a denominational preference under *Larson*.

2. An obligation to apply the appropriate standard of review

The *Olsen* court had an obligation to apply a strict scrutiny standard of review because equal protection analysis classifies denominational preferences as a suspect class. The court justified its refusal to apply strict scrutiny review by alluding to the

same conclusion has been found by the Florida Supreme Court. "The record substantiated the trial court's findings that the church was a religion within the first amendment, that petitioner sincerely subscribed to the beliefs of the church, and that the use of cannabis was an integral part of the religion." *Town v. State ex rel. Reno*, 377 So. 2d 648, 650 (Fla. 1979).

89. *Olsen v. DEA*, 878 F.2d at 1468-69 (Buckley, J., dissenting). "[T]he DEA has permitted the Native American Church to make sacramental use of a drug listed as a Schedule I controlled substance under the Controlled Substances Act, but denied the Ethiopian Zion Coptic Church a similar accommodation." *Id.* at 1468.

90. *Id.* at 1468.

91. *Id.*

92. *Id.* (quoting *Larson v. Valente*, 456 U.S. 228, 244, 246 (1982)).

93. *Id.* at 1469.

problems such a decision might create. The court feared that a marijuana exemption would open a flood-gate for others seeking similar treatment.⁹⁴ However, "the Supreme Court has consistently recognized that conceptual problems regarding appropriate remedial actions do not relieve [courts of their] obligation to review government classifications that are impermissibly underinclusive."⁹⁵ Although either extension or invalidation of the exemption would be highly controversial, the court's duty was to address the issue rather than skirt it.

3. *The DEA's ruling could not survive strict scrutiny*

The DEA's Final Order does not survive strict scrutiny analysis. Judge Buckley, in his dissent, addressed each of the DEA's reasons for denying Olsen's exemption request and applied strict scrutiny review, looking for a very close fit⁹⁶ between the DEA's denial of a limited marijuana exemption and the government interest being asserted.

According to Judge Buckley, the DEA's first reason for denying Olsen's petition was that the religious tradition of the Ethiopian Zion Coptic Church advocates continuous marijuana use rather than limited peyote use.⁹⁷ The flaw in this argument is that Olsen sought a *limited* use exemption so that members of his church could congregate on specified occasions and partake of their holy sacrament.⁹⁸ The DEA rejected the restrictive use possibility because of "the large amounts of marijuana available in this country, and the difficulty the DEA would have in trying to monitor compliance" with the restrictions.⁹⁹ This reasoning fails because "any member of the Church found in possession of the drug outside the limited hours and place set aside for its ceremonial use would not be shielded by the exemption."¹⁰⁰ The

94. *Id.* Before any other organization seeking a similar accommodation for marijuana could succeed, it would have to overcome a substantial hurdle: it must prove that it is a bona fide religious organization that utilizes the controlled substance in a bona fide religious ceremony. See *Kennedy v. Bureau of Narcotics and Dangerous Drugs*, 459 F.2d 415 (9th Cir. 1972) (The Church of the Awakening was unable to get an amendment to the peyote exemption, and was further denied inclusion in the exemption because it was unable to prove that it was a legitimate religious organization.).

95. *Olsen v. DEA*, 878 F.2d at 1471. See also *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

96. *Larson v. Valente*, 456 U.S. 228, 247 (1982).

97. *Olsen v. DEA*, 878 F.2d at 1470.

98. *Id.*

99. *Id.*

100. *Id.*

DEA has no difficulty monitoring the 250,000 members of the Native American Church, yet because the "streets are awash" with marijuana, monitoring the 100-200 members of the Ethiopian Zion Coptic Church is "impractical."¹⁰¹ Strict scrutiny analysis demands more than an inconsistent analysis of administrative policy concerns.

The DEA's second reason for denying Olsen's request was the difference between society's abuse of marijuana and peyote. The DEA seized over 15 million pounds of marijuana between 1980 and 1987, but only 19 pounds of peyote.¹⁰² The DEA asserted, and the court accepted, that "this overwhelming difference . . . explains why" the Native American Church can be accommodated but the Ethiopian Zion Coptic Church cannot.¹⁰³ Judge Buckley's dissent acknowledged that "the difference in pounds seized" is truly overwhelming, but the "explanation is not."¹⁰⁴ Congress has an equally compelling reason to control each Schedule I controlled substance. A strict quantitative justification fails to muster scrutiny the same way the "fifty-percent" rule failed in *Larson*.¹⁰⁵ Vague reasoning in terms of the war on drugs should be insufficient to withstand strict scrutiny analysis.

F. The "War on Drugs" Factor

1. A basis for the court's decision

Olsen contains two elements that make it unique: the special legal status of American Indians, and the fact that the sub-

101. *Id.* at 1471.

102. *Id.*

103. *Id.* (quoting DEA's Final Order).

104. *Id.*

105. *Id.* Judge Buckley argued that a strictly quantitative analysis was an insufficient basis on which to make a constitutional decision of this nature. The DEA seems to be suggesting that unpopular or scarce drugs are suitable for exemptions, while abundant drugs are not. However, the relative government interest in controlling a particular drug is determined not by its availability, but by its inherent chemical properties. Consequently, the Controlled Substance Act classifies drugs by schedule. Peyote and marijuana are both Schedule I drugs, indicating an equal level of government interest in their control. Therefore, the quantitative availability justification fails. This reasoning is also applicable to the registration exemption statute in *Larson*, which was implemented to further the government interest of controlling non-member solicitations by religious organizations. The government interest in preventing these activities was equal for all religious organizations. The *Larson* Court never reached the legitimacy of this government interest, because the quantitative classification created an unjustifiable denominational preference.

ject matter was drug-related. Either element could have formed the cornerstone of the court's decision. The overriding factor, however, proved to be the war on drugs. The court accepted the war on drugs rationale offered by the government and expressed no opinion on the Indian issues. Justifying its decision on the immensity of the marijuana problem in this country, the court engaged in denominational preference analysis that was nothing more than an extremely narrow statutory interpretation of the peyote exemption.

2. *A new standard of review*

We are left to ask whether the war on drugs is creating its own standard of judicial review. Granted, there are many situations where a rational relationship between the means chosen to obtain victory in the war on drugs will pass constitutional means-ends analysis. However, when a fundamental right or constitutional guarantee is involved, a mere rational relation to a compelling state interest should never suffice.

In *Olsen*, the court dismissed a constitutional challenge involving a fundamental right when the government offered a rational basis "war on drugs" argument. The war on drugs should not free the government or the judiciary to avoid difficult decisions by lowering the appropriate standard of review. As Judge Buckley's dissent suggests, the case should have been remanded to the DEA for consideration of the true establishment clause issues presented by *Olsen*.¹⁰⁶ The government should be put to the strict scrutiny test whenever a fundamental right is at stake, no matter how controversial the result.

G. *Implications of the Court's Decision*

1. *Practical implications*

The denial of a limited religious use exemption to the Controlled Substances Act may have a major impact on the Ethiopian Zion Coptic Church. The members may not be able to congregate and practice their religion for fear of attracting suspicion

106. *Id.* at 1471. Judge Buckley stated that remand was the appropriate remedy in this case. *Id.* It is possible that the government could have made a case sufficient to withstand strict scrutiny analysis, and the court may not have had to make the difficult choice of invalidation or extension of the controlled substance exemption.

and possible prosecution. Members of the Native American Church are not subject to the same fears. This is wholly inconsistent with the fundamental tenets of religious freedom contained in the Constitution. Freedom of religion for all sects can only be realized when "legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations."¹⁰⁷

If the war on drugs is such a compelling government interest that it changes the standard of review and legal analysis traditionally required in constitutionally sacred areas, then a "war on drugs" justification may surface in other areas of constitutionally protected liberty. Some of the immediate rights that may be affected include the freedom from unreasonable search and seizure, the right to privacy, and the right to bear arms. Carried to its logical extreme, the war on drugs could develop into a "super-bootstrap compelling government interest," enabling government to suspend any fundamental right with a mere rational basis means-end argument.

2. *Farewell to strict scrutiny*

Because this decision was the D.C. Circuit's first chance to address the establishment clause in light of the *Larson* decision, it may have established a precedent that undermines the strict scrutiny requirement in denominational preference analysis. The D.C. Circuit could also treat this case as a mere aberration from or exception to established precedent. The court very well might have responded in a much different manner had the subject matter not been drug-related. Nevertheless, "small, new or unpopular denominations" should be given equal treatment and their constitutional rights afforded due respect in all situations. The "war on drugs" alone should not be sufficient justification to avoid this responsibility. Whether the D.C. Circuit has bid farewell to strict scrutiny analysis in all cases involving the war on drugs is yet to be seen. However, the court's analysis in *Olsen* suggests that in the denominational preference context, strict scrutiny analysis will not be applied in similar cases, even though it clearly belongs.

107. *Larson v. Valente*, 456 U.S. 228, 245 (1982).

V. CONCLUSION

The *Olsen* court employed a logically correct but incomplete analysis to justify its "war on drugs" decision. In applying an equal protection analysis to a denominational preferences claim, the court was correct in its fundamental assumption that the two analyses converge in cases of this nature. However, the court overlooked the primary aspect of a denominational preference challenge: the classification itself is suspect and should undergo strict scrutiny analysis in determining whether it is necessary and closely fitted to a compelling government interest. By skipping this vital step in equal protection/denominational preference analysis, the court did no analysis at all. This is a disturbing development in the area of fundamental rights.

The compelling government interest test needs to be harnessed and controlled at all times, with an eye to protecting the unpopular and powerless minorities. The sword of compelling interests has the power to decapitate and eviscerate Lady Liberty.¹⁰⁸ If we bid farewell to strict scrutiny analysis, the "war on drugs" may become an avenue for a passive judiciary to forsake its responsibility as protectorate of the unpopular minority. If this is the case, then *Olsen v. DEA* is merely a sign of the times, and "a chill wind blows."¹⁰⁹

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108. Throughout history, "compelling" government interests have been used to justify heinous crimes of war and destruction. Among the most notable and horrific examples include the Nazis' brutal killing of millions of Jews, the tragedy of the American Indian massacres, the slaughter of millions of Cambodians in post-Vietnam Cambodia, and the countless political murders by totalitarian regimes around the world.

109. *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3079 (1989) (Blackmun, J., dissenting).