

Most religious groups have willingly complied with public health limits on large gatherings. But not all. These claims of religious exemption, and some states' responses to them, raise important constitutional issues.

There have been a [couple of cases](#) in the spotlight. Rodney Howard-Browne is a Florida preacher who prayed over Trump in the Oval Office in 2017. He refused to stop religious service and vowed not to stop services or discouraging his flock from shaking hands in greetings. (Last Thursday, he [said](#) he was discontinuing services due to a "tyrannical government." But now he's starting about starting again.) A Louisiana preacher, Tony Spell, was warned by police after holding a service with hundreds of followers, saying he wouldn't allow "any dictator law" to interfere.

These two cases do not stand alone. Just last [Sunday](#), at the Godspoke Calvary Chapel in Thousand Oaks, California, members of the congregation took communion. Their pastor had resigned from the city council as a prelude to violating the stay-at-home order. The church did implement social distancing, but California is past the point where such efforts are considered sufficient.

Religious rights advocates have [filed](#) lawsuits challenging restrictions on religious gatherings, and they are threatening to do so in the case of the California church. It seems unlikely that those legal efforts to win exemptions for churches will be successful.

Claims that churches are constitutionally *entitled* to exemptions run headlong into Supreme Court precedent. The Court has made it clear, in an [opinion](#) by none other than conservative icon Antonin Scalia, that religions are subject to the same general laws as everyone else. As Scalia's observed, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." In that case, the Court held that a church's central sacrament (the use of peyote by a Native American group) is as much subject to drug laws as any other use of the drug.

A church service is also an exercise of freedom of speech and freedom of association. Social distancing rules can restrict those rights in the case of a church, just as they would in the case of political rally or a rock concert.

But none of those rights is absolute. In a [1991 opinion](#), the Court held that restriction on First Amendment rights are valid if they satisfy what's called strict scrutiny. That means that that "the State must show that its regulation is

necessary to serve a compelling state interest and is narrowly drawn to achieve that end.”

Arguably, that standard is too strict for a restriction on meetings during a pandemic. Since the ban on large groups does not relate to the content of speech or the purpose of a meeting there’s an argument that it should be subject to less rigorous review than this. And in an abortion case decided yesterday, conservative judges in the Fifth Circuit [said](#) settled law “allows the state to restrict, for example, one’s right to peaceably assemble, to publicly worship, to travel, and even to leave one’s home.” That court seemed more than willing to allow fundamental rights to be restricted. However, it’s not necessary to consider such less demanding constitutional tests. In a pandemic, a ban on all large gatherings should survive even strict scrutiny.

Combatting a serious epidemic — and even President Trump is [now talking](#) about a hundred thousand or more deaths — undoubtedly qualifies as a compelling state interest. Moreover, bans on large gatherings are as “narrowly drawn” as possible insofar as they apply to the churches, since they are limited to the time the epidemic continues. Louisiana pastor Tony Spell has [argued](#) that churches should be exempted if large stores like Walmart are exempted. But Walmart and other stores do not pack crowds close together, and they sell essential items like food and drugs. After all, a mega-church in California [spawned](#) 70 new cases, and who knows how many hundreds more were infected by those folks?

In fact, if a state bans other large gatherings such as concerts or music clubs, it is probably unconstitutional to exempt churches, as Florida Governor DeSantis has done. The Supreme Court has emphasized time and again that the government has no business giving higher value to some perspectives than others. Treating gatherings for religious speech as exempt, while banning gatherings for other types of speech, rests squarely on this impermissible desire to favor some kinds of speech over others.

In any event, the state’s power to ban religious gatherings as well as other gatherings like concerts or parades seems clear. It’s been said that the Constitution is not a suicide pact. It’s not likely that the Supreme Court, which currently believes it is unsafe for the nine Justices to meet, will forget that wisdom.

[An earlier version of this post mistakenly attributed the “suicide pact” remark to Justice Holmes.]

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