Commentary: Supreme Court, free exercise of religion & COVID-19

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In *The Challenge of Pluralism*, Stephen V. Monsma and J. Christopher Soper posed a question facing every democratic society: "How far can a democratic polity go in permitting religiously motivated behavior that is contrary to societal welfare and norms?"

During the past year of the pandemic, states and local communities grappled with this long-asked question on multiple fronts.

As Monsma and Soper wrote: "There is general agreement that when the exercise of religious freedom by one group has the effect of endangering the health or safety of others … the claims of religious freedom must yield to the welfare of the broader society. … But this leaves many questions. How serious must the threat to public health and safety be before the government insists that even religiously motivated practices must be curtailed?"

The recent Supreme Court injunction in *Tandon v. Newsom* pertaining to California's restrictions on religious gatherings conveys the complexity of answering such questions.

Proper limitation vs. free exercise

Under the U.S. Constitution, no right is absolute, even when it comes to free exercise. For example, no one argues the government cannot restrict religious child sacrifice. We accept that as a proper limitation.

However, this becomes murkier in other areas. For example, at what point are individual religious rights of parents overridden by a government's concern for proper health care for a child?

These complicated matters require thoughtfulness and nuance for both the individuals claiming rights and the government limiting those rights.

In *Religion and the American Constitutional Experiment*, John Witte Jr., wrote: "At the heart of a free exercise case is a conflict between the exercise of governmental power and the exercise of a private party's religion. … Their claim is that the law at issue infringes upon their beliefs of conscience. It inhibits their acts of worship. … It commands them to do something, or to forgo something, that conflicts with the demands of their individual conscience or collective faith. It discriminatorily singles out their activity, organization, or property for duties or exclusions that are not imposed on other individuals or groups similarly situated."

Ultimately, a healthy separation of church and state depends on the Supreme Court recognizing the uniqueness with which the free exercise of religion is treated by the First Amendment.

Reducing free exercise protections

As state and local governments grappled with how best to handle COVID-19, governmental regulations clashed inevitably with deeply held religious beliefs. How should the government balance public health needs with free exercise rights?

When considering the proper role of the government in limiting free exercise, it is desirous for the Supreme Court to use a strict scrutiny approach, which means free exercise rights may be infringed only narrowly in pursuit of a compelling state interest. The burden, then, is on the state to justify the restrictions on free exercise.

In *Sherbert v. Verner* (1963), the state was required to demonstrate "the conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order," and that the government has "some compelling state interest" that "justifies the substantial infringement of appellant's First Amendment right" only when "'the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"

However, in *Employment Division v. Smith* (1990), Justice Antonin Scalia rejected the need for strict scrutiny, thus lowering the state requirement to mere neutrality, resulting in the weakening of free exercise protections.

Under neutrality, the state no longer needs to demonstrate a compelling interest, as long as the law is generally applicable. This unfortunate decision granted the state the upper hand in free exercise cases.

As church-state scholar James E. Wood Jr., wrote at the time: "Without any real basis for exemption given to the free exercise of religion, the majority opinion in *Smith* gives to the state the right to force compliance with all its valid laws without any balancing of the claims of the free exercise of religion with a compelling state interest." This approach has been the standard for the court over the last 30 years.

Strengthening free exercise protections

However, the recent opinion by the Supreme Court in *Tandon v. Newsom* appears to lean toward requiring a compelling state interest in order to limit free exercise. In the opinion, the majority explains that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise."

Specifically calling out California's COVID-19 regulations on worship gatherings, the Court cited strict scrutiny reminiscent of *Sherbert*, stating: "[T]he government has the burden to establish that the challenged law satisfies strict scrutiny … where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied."

Placing the burden on the state, aside from whether the law is applied neutrally or not, grants greater protections for free exercise rights.

Balancing free exercise and public health

Obviously, responsible conduct for gatherings during a pandemic has been discussed widely this past year. In states that do not restrict worship gatherings, some churches have returned to business as usual, while others have opted for a more reserved approach, remaining online or meeting in smaller groups. But in those states, the government grants the freedom to the individual houses of worship to make responsible choices.

One can argue how responsible various actions are; however, how individuals practice free exercise is separate from the need for the government to protect free exercise.

In our constitutional democracy, requiring a compelling state interest to limit free exercise protects all faiths. However, churches must never abuse the right just "because we can." Instead, we should respect the common good, realizing our actions not only impact our congregations, but the community as a whole.

Inevitably, church and state will collide. As Witte writes: "Today's state is

not the distant, quiet sovereign of Jefferson's day from whom separation was both natural and easy. Today's modern welfare state, whether for good or ill, is an intensely active sovereign from whom complete separation is impossible … Both confrontation and cooperation with the modern welfare state are almost inevitable for any religion. When a state's regulation imposes too heavy a burden on a particular religion, the free exercise clause should provide a pathway to relief."

In *Tandon v. Newsom*, the Supreme Court recognizes the complexity of this relationship. Erring on the side of free exercise should be the government's aim. Erring on the side of the public good in society should be the church's aim.

In other words, concerning church-state matters, practicing the Golden Rule by "doing unto others" should be a guiding mantra for all in our communities, our churches, our states, our nation and our world.

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