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Some preliminary remarks on the impact of COVID-19 on the exercise of religious freedom in the United States and Italy *

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1 - Introduction

In Italy, the so-called lockdown, imposed to restrain (or at least limit) the spread of COVID-19, has, in the two seemingly endless months since it started, had an overwhelming impact not only on our personal lives, as a reminder of the limits of our human condition, but also on domestic regulatory frameworks¹, as "the emergence generated (not necessarily reasonable) law"². Influential Academics have strongly underlined that, in

* Article peer evaluated.

¹ See **D. MILANI**, *Fede e salute al tempo del coronavirus: per un primo bilancio a un mese dal lockdown*, in *OLIR*, April 8, 2020 (<https://www.olir.it/focus/daniela-milani-fede-e-salute-al-tempo-del-coronavirus-per-un-primo-bilancio-a-un-mese-dal-lockdown/>).

² See **P. CONSORTI**, *La libertà religiosa travolta dall'emergenza*, in *Forum di Quaderni Costituzionali* (www.forumcostituzionale.it), 2/2020, p. 371.



times of deep crisis, like the current global health crisis, the long-term “viability of legal institutions” and of “whole legal systems” are put to a severe test³. In this period, in fact, during the lockdown period, the protection of health - which is at the forefront of this emergency situation - is the “leading principle”⁴ a precondition that orientates all the current legal “tragic choices”⁵.

Such an unprecedented health emergency also raises a serious challenge in terms of fundamental rights and liberties. Several basic rights that normally enjoy robust protection under constitutional, supranational, and international guarantees, have experienced a devastating “suspension”⁶ for the sake of public health and safety, thus giving rise to a vigorous debate concerning whether and to what extent the pandemic emergency “justifies limitations on fundamental rights”⁷. Furthermore, concern is increasing about “a radical change” in our value systems, the long-term impact of which will extend beyond the time when the preservation of health and life is given maximum priority domestically and internationally⁸.

Religious freedom has been deeply affected by newly imposed health measures, and religious communities have experienced unparalleled restrictions on their practices, ceremonies and rituals. The current tension between competing rights has been severely felt by religious communities during religious holidays (Easter, Ramadan, Passover). However, these restrictions are not aimed only and specifically at religious freedom, but are part of the wider framework of provisions that severely restrict freedom of movement and assembly⁹.

³ See **A. RUGGERI**, *Il coronavirus, la sofferta tenuta dell'assetto istituzionale e la crisi palese, ormai endemica, del sistema delle fonti*, in *Consulta on line* (www.giurcost.org), 1/2020, pp. 210-211.

⁴ See **A. LICASTRO**, *Il lockdown della libertà di culto pubblico al tempo della pandemia*, in *Consulta on line* (www.giurcost.org), 1/2020, p. 229.

⁵ See **G. CALABRESI, P. BOBBITT**, *Tragic Choices. The Conflicts Society Confronts in the Allocation of Tragically Scarce Resources*, 1st ed., W. W. Norton & Co Inc., New York, 1978.

⁶ See **S. PRISCO, F. ABBONDANTE**, *I diritti al tempo del coronavirus. Un dialogo*, in *Federalismi.it, Osservatorio emergenza Covid-19* (www.federalismi.it), 1, 2020, p. 6; **D. MILANI**, *Fede e salute*, cit.

⁷ See **F. DE STEFANO**, *La pandemia aggredisce anche il diritto*, *Intervista a Corrado Caruso, Giorgio Lattanzi, Gabriella Luccioli e Massimo Luciani*, in *Giustizia insieme* (www.giustiziainsieme.it) (2 April 2020), interview with Corrado Caruso (<https://www.giustiziainsieme.it/it/diritto-dell-emergenza-covid-19/961-la-pandemia-aggredisce-anche-il-diritto>).

⁸ See **F. DE STEFANO**, *La pandemia aggredisce anche il diritto*, cit.

⁹ See **A. FERRARI**, *Covid-19 e libertà religiosa*, in *Settimana News*, 6 April 2020 (<http://www.settimananews.it/diritto/covid-19-liberta-religiosa/>).



In this unprecedented period of human history, the effects of which will surely have significant long-term consequences, scholars are increasingly questioning if the “alarmed”¹⁰ government responses correctly balanced all the interests at stake. “Public power” should have a “mediation” role when a “dialectics of rights” surfaces¹¹: specifically whether, and to what degree, government policies, which give “absolute prevalence” to *salus corporum* over *salus animarum*, are subject to a proper cost-benefits analysis and are consistent with the principle of proportionality that should lead government actions¹². Legal systems responded individually, and with differences, to the pandemic emergency, ranging from a complete interruption of the collective exercise of religious worship (Italy), to a more cautious recognition of forms of religious accommodation (United States). As the COVID situation is changing so rapidly in the United States, in Italy, and around the world, I clarify that the information in the present paper relates at the situation as at the end of June 2020.

2 - Italian legal responses to COVID-19: the Italian constitutional and legal framework on religious freedom

In Italy, a complex constitutional structure, particularly in relation to religious freedom, played a significant part in the Italian response. The response faced the challenge of balancing the principle of mutual independence of the Catholic Church and the State, secularism, religious pluralism and equal freedom for all religion denominations, the recognition of religious denominations’ self-governance in matters of their own jurisdiction, freedom of worship, and no discrimination against religious organizations. The most distinctive feature of the constitutional framework in relation to Church and State is that religious denominations can come to bilateral agreements with the State, on matters concerning the mutual relationship between the State and a religious denomination. This constitutional framework does not lead to an “assimilationist” perception of secularism; instead, it connects religious neutrality while promoting

¹⁰ See **S. FERRARI**, *In Praise of Pragmatism*, in A. FERRARI, S. PASTORELLI (eds.), *The Burqa Affair Across Europe: Between Public and Private Space*, Routledge, London-New York, 2016, pp. 10-11.

¹¹ See **F. DE STEFANO**, *La pandemia aggredisce anche il diritto*, cit.

¹² See **A. LICASTRO**, *Il lockdown della libertà*, cit., 229.



safeguarding religious freedom, both individual and collective¹³. However, the only unilateral statute (law no. 1159 of 1929) protecting religious freedom now seems completely insufficient to govern a profoundly changed institutional framework. An updated statute that sought to protect a general religious freedom, and to be more consistent with the constitutional framework, would guarantee a more transparent implementation of a democratic religious pluralism, thus stemming the risk of a privileged recognition of majority narratives¹⁴.

3 - The suspension of religious assemblies during phase one of the pandemic

However, since the outbreak of COVID-19, a sequence of emergency legal provisions has pervasively limited religious freedom. At first, provisions affecting religious activities only in some areas of Italy, were enforced and implemented. On 25 March 2020, the provisions were extended to the entire country. All public events throughout Italy, held in any public or private space, were suspended, even those of a religious nature, including funerals. Places of worship could remain open, provided that measures were taken to avoid large gatherings of people, taking into account the size and features of the spaces, and guaranteeing that visitors could comply with the requirement for interpersonal distance of at least one meter¹⁵.

¹³ See S. DOMIANELLO, *Aporie e opacità dell'otto per mille: tra interesse pubblico a un pluralismo aperto e interessi specifici alla rigidità del mercato religioso*, in Stato, Chiese e pluralismo confessionale, Rivista telematica (<https://www.statoechiese.it>), 5/2020, p. 5.

¹⁴ See R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *La legge che non c'è. Proposta per una legge sulla libertà religiosa in Italia*, il Mulino, Bologna, 2019.

¹⁵ The decree-law of February 23, 2020, n. 6, converted, with modifications (law of March 5, 2020, n. 13), authorized the President of the Council of Ministers to adopt urgent measures aimed at preventing the spread of the SARS-CoV-26 virus. Later, a series of increasingly restrictive provisions, also including religious gatherings, came into force (decree of the Prime Minister February 23, 2020; decree of March 1, 2020, decree of March 4 2020; decree of March 8, 2020; Presidential Decree March 9, 2020). Finally decree-law of March 25 2020, no. 19, which provided new "Urgent measures to deal with the epidemiological emergency from COVID-19", came into force. In its preamble, it referred to Art. 16 of the Constitution, which "allows limitations on the freedom of movement for health reasons", and emphasized the pressing need to establish measures to limit the spread of the virus, relying on the standards of "adequacy and proportionality". The decree authorized the President of the Council to define the measure of the restriction or suspension of events of any nature, and of any other form of gathering in public or private places, even of a religious nature, as well as that of the suspension of civil and



Immediately, many academics criticized the “form”, not the “substance”, of these provisions as being in contradiction of the “rule of law”, which should govern “conflict between fundamental rights”.¹⁶ However, no one could have ever imagined such an unprecedented threat to human life, and the question of how to frame the threat and its impact on fundamental human rights in legal terms is controversial. With regard to this crucial aspect, some commentators try to compare the current public health emergency with a “state of exception” (which is not addressed in the constitutional text) and with a state of war (which is provided for in Article 78 of the Constitution, which provides for wide-reaching government powers, but in relation to completely different circumstances), and argue that Article 7 of the Code of Civil Protection (d.lgs. 1/2018), which identifies emergency situations that require exceptional interventions for civil protection, is the proper provision¹⁷. The necessity to give priority to, and focus the collective interest on health allows, during such an unimaginable pandemic crisis such we are facing now, pervasive restrictions on the basic right of religious freedom. Emergency decrees, which are the legal vehicle through which restrictions are imposed, are controversial, but have been used, nevertheless, to meet the need to prevent irreparable harmful consequences¹⁸.

When the Italian government issued the emergency measures relating to the exercise of religious worship it neither contemplated an “illegal disregard” of religious freedom nor was there any intent to “subvert” our democratic and pluralistic constitutional framework¹⁹. These pervasive limitations-the “legitimacy” of which is related to their “exceptional” and “temporary” character and the “severe threat” from the pandemic-have to be understood within the global framework of the precautionary measures imposing social distancing practices, and only

religious ceremonies, as well as the limitation of entry to places of worship. The Presidential Decree of April 1, 2020 extended the deadline of the previous measures and the Presidential Decree of April 10, 2020, the provisions of which concern the religious matters, and mirror, although with some changes, the provisions of the Presidential Decree of March 8, 2020. See **A. LICASTRO**, *Il lockdown della libertà*, cit., 230-31.

¹⁶ See **F. DE STEFANO**, *La pandemia aggredisce anche il diritto*, cit. (interviews with Gabriella Luccioli and Corrado Caruso).

¹⁷ See **F. DE STEFANO**, *La pandemia aggredisce anche il diritto*, cit. (interview with Giorgio Lattanzi); **P. CONSORTI**, *La libertà religiosa*, cit., p. 373.

¹⁸ See **A. FERRARI**, *Covid-19 e libertà religiosa*, cit.

¹⁹ See **A. LICASTRO**, paper presented at the webinar “*La libertà religiosa in Italia ai tempi del COVID-19*”, 30 April 2020.



allowing movement for work, health, or other necessity²⁰. So the government had to undertake not only a simple reconciliation between two concurrent liberties, but also a more complex balancing of many fundamental freedoms with the urgent need to protect public health and safety and to do so very quickly²¹.

However, the range of the provisions concerning the opening of places of worship raised many questions, giving rise to different interpretations, ranging from more extensive opening (fully open to the public, as an essential service) to more restricted opening (access restricted to religious staff)²².

The question was whether access to places of worship was considered as included in “situations of necessity”, thus justifying movements of citizens/religious adherents within the borders of the municipality where they live. However, the prevailing reading was that the provisions only allowed access to places of worship when an individual was out on an essential errand (e.g., buying food or medication, they could go into a religious space while they were out); so it seems that worshipping on its own, to satisfy an intimate faith need, was not considered a legitimate reason for leaving home²³. The intention of the emergency measures was to prevent a misuse of the religious justification so as to evade precautionary measures. However, according to some scholars, the government seemed to misunderstand freedom of worship, seeing it not so much as *libertas fidelium*, but rather, and mainly, as *libertas ecclesiae*, therefore leading to the need to severely restrict people’s genuine freedom to practice their religion²⁴.

In relation to religious ceremonies, the Department for Civil Liberties and Immigration, Central Administration for Religious Affairs’ note of 28 March 2020 clarified the real meaning of the Prime Ministerial Decree, stating that “celebrations [...] are not forbidden, but they can

²⁰ See **F. DE STEFANO**, *La pandemia aggredisce anche il diritto*, cit. (interview with Corrado Caruso).

²¹ See **G. CASUSCELLI**, paper presented at the webinar “*La libertà religiosa in Italia ai tempi del COVID-19*”, 30 April 2020.

²² See **A. LICASTRO**, *Il lockdown della libertà*, cit., pp. 232-233.

²³ Ministry of the Interior, Department for Civil Liberties and Immigration, Central Administration of Affairs of Cults, 27 March 2020 - Questions regarding the containment and management of the epidemiological emergency from COVID-19. Needs determined by the exercise of the right to freedom of worship. See **A. LICASTRO**, *Il lockdown della libertà*, cit., p. 233; **P. CONSORTI**, *La libertà religiosa*, cit. p. 380.

²⁴ See **A. LICASTRO**, *Il lockdown della libertà*, cit., p. 239.



continue to take place without the participation of the people, precisely to avoid groupings that could become potential opportunities for contagion”.

Academics raised concerns about such pervasive restrictions. The crucial question was whether the nature of “necessary services” of religious practices had been properly assessed or whether, instead, an unnecessary equalization of secular and religious activities had been performed (putting the latter into the activities that “a person can easily forego”)²⁵.

The government’s attention to the right to exercise religious freedom was clear in the provisions that avoided a complete closure of places of worship, and, in fact, allowed them to remain open, provided that safety measures were complied with²⁶. However, such safety measures undeniably negatively affected the most common ways of collectively exercising religious freedom²⁷.

The emergency provisions imposed a fundamental restriction on the protection of the collective dimension of religious freedom, thereby generating great concern about the legitimacy of state imposed limitations on the exercise of that freedom. However, it would be better to see such restrictions as an exceptional “constriction” of a “specific way” of using religious freedom, that is, the “communal form” of religious celebrations, because of exceptional circumstances that justify measures to prevent dangerous mass gatherings, instead of as an infringement of basic constitutional principles²⁸. Unfortunately, given the highly contagious and life-threatening nature of the virus, collective and public exercise of freedom, including religious freedom, would have unavoidably had a devastating cost, thus burdening the entire society²⁹.

The controversial provisions gave rise to a sharp division between commentators. The crucial concern focused on “which” constitutional provisions were considered during the decision-making about such delicate matter³⁰.

²⁵ See **A. LICASTRO**, *Il lockdown della libertà*, cit., p. 237.

²⁶ See **A. FERRARI**, *Covid-19 e libertà religiosa*, cit.

²⁷ See **A. FERRARI**, *Covid-19 e libertà religiosa*, cit.

²⁸ See **A. GIANFREDA**, *Libertà religiosa e culto dei defunti nell’epoca del coronavirus*, in *OLIR*, 17 March 2020, <https://www.olir.it/focus/anna-gianfreda-liberta-religiosa-e-culto-dei-defunti-nellepoca-del-coronavirus/>

²⁹ See **A. FERRARI**, *Covid-19 e libertà religiosa*, cit.

³⁰ See **D. MILANI**, *Fede e salute*, cit.



The contentious debate should not underestimate the fact that the government had to make a paradigmatic “tragic choice”³¹ between health and religious freedom. The element of religious freedom involved was the right to religious freedom that the Italian Constitution (Art. 19) guarantees to all religious communities, based on the key principle of equal freedom that orientates church-state relationships (Article 8.1 of the Constitution). As a difficult balance between Articles 32 (protection of health as an individual and collective right) and 19 of the Constitution was required, the government operated in its proper sphere, which is covered by specific constitutional safeguards (Art. 7.1 of the Constitution);³² Article 7.1 is the bastion of a secular state and defines the specific tasks of the State in relation to religious freedom³³.

From a literal interpretation perspective, Article 19 seems to guarantee freedom of religious worship, with the only limit being the respect of morality. This provision cannot, however, be read outside of the constitutional structure, in which all constitutional provisions contribute to define a unitary framework³⁴. Instead, Article 19 has to be read in conjunction with Article 17 (right of association), with the result that it may be possible that religious gatherings can be subject to limits related to security and public safety³⁵.

It seems that the government, when imposing the current precautionary provisions, ignored any balancing process, as the provisions give absolute priority to the protection of health, to the detriment of the collective exercise of religious worship³⁶.

However, limitations on some specific ways of exercising religious freedom seemed inextricably connected to the “fundamental state task”- the protection of health-that obviously sought to preserve the “supreme good” of life, which was at imminent high risk because of the COVID-19 infection³⁷.

For this compelling reason, the balance worked in favor of health. The weight of the public health dimension as a collective interest was emphasized during phase one of the current emergency situation. As

³¹ See **G. CALABRESI, P. BOBBITT**, *Tragic Choices*, cit.

³² See **A. FERRARI**, *Covid-19 e libertà religiosa*, cit.; **N. COLAIANNI**, *La libertà di culto al tempo del coronavirus, Stato, Chiese e pluralismo confessionale*, cit., 7/2020, pp. 1-40.

³³ See **S. DOMIANELLO**, *Aporie e opacità dell’otto per mille*, cit., pp. 1-32.

³⁴ See **N. COLAIANNI**, *La libertà di culto*, cit., p. 31.

³⁵ See **N. COLAIANNI**, *La libertà di culto*, cit., p. 31.

³⁶ See **F. DE STEFANO**, *La pandemia aggredisce anche il diritto*, cit.

³⁷ See **N. COLAIANNI**, *La libertà di culto*, cit., 32.



Marta Cartabia (President of the Constitutional Court) underlined during an interview in April 2020, the constitutional text remains the “compass” that governs the relationships between “public institutions and citizens”³⁸. The constitutional text covers the possibility of limiting individual and collective rights, and constitutional case law has established that any balance of competing rights has to be managed in the light of the principles of proportionality, adequacy, reasonableness and necessity³⁹.

This is consistent with the protection of religious freedom in international treaties⁴⁰ and at the European Convention on Human Rights (ECHR) level (Art. 9.2), which provides that freedom to manifest one’s religion or beliefs may be subject to limitations connected to the interests of public safety, health, morals and even the protection of the rights and freedoms of others⁴¹. The last element clearly expands the possibility of restrictions on the exercise of religious freedom in the name of general third-party interests, which are not definable in advance⁴².

From an ECHR perspective, a “guarantee of proportionality”⁴³ has become the main standard, which enables the reconciliation of competing rights and the principles of adequacy, proportionality, and necessity in the pursuit of a legitimate aim, where the use of the least restrictive means has become the most appropriate “yardstick of reasonableness”⁴⁴. These principles are aimed at not only preventing undue limitations of religious freedom but also overexpansion of religious freedom, which would result

³⁸ See **G. BIANCONI**, *Coronavirus, intervista a Marta Cartabia: «Nella Costituzione le vie per uscire dalla crisi»*, in *Corriere della Sera*, April 20, 2020 (https://www.corriere.it/esteri/20_aprile_29/coronavirus-intervista-marta-cartabia-nella-costituzi-one-vie-uscire-crisi-c1893622-8982-11ea-8073-abb9eae2ee6.shtml).

³⁹ See **G. BIANCONI**, *Coronavirus, intervista a Marta Cartabia*, cit.; **N. COLAIANNI**, *La libertà di culto*, cit., p. 26.

⁴⁰ See Article 18 of the 1966 International Covenant on Civil and Political Rights.

⁴¹ See **N. COLAIANNI**, *La libertà di culto*, cit., p. 32.

⁴² See **A. LICASTRO**, paper presented at the webinar “*La libertà religiosa in Italia ai tempi del COVID-19*”, cit.

⁴³ See **N. COLAIANNI**, *Voci in dialogo: organizzazioni, istituzioni di tendenza e diritti delle parti*, *Seconda voce*, in *Quad. Dir. Pol. Eccl.*, 1/2013, p. 235.

⁴⁴ See **A. MADERA**, *La libertà di aprire luoghi di culto e i suoi limiti nella più recente giurisprudenza nazionale e sovranazionale*, in **A. FUCCILLO** (ed.), *Le proiezioni civili delle religioni tra libertà e bilateralità. Modelli di disciplina giuridica*, ESI, Napoli, 2017, pp. 560-562, and its bibliographical references; **M. CARTABIA**, *I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana*, relazione presentata alla Conferenza trilaterale delle Corti Costituzionali italiana, portoghese e spagnola, Roma, 24-26 ottobre 2013, p. 11 (https://www.cortecostituzionale.it/documenti/convegni_seminari/RI_Cartabia_Roma2013.pdf).



in an undue “immunization” of religious freedom against any form of conflict with other “constitutionally protected interests”⁴⁵.

Following this perspective, the Italian Constitutional Court stated that the constitutional protection of fundamental rights is grounded on their “mutual integration” as no one of them can be recognized as having absolute dominance, thereby becoming a “tyrant” compared with other constitutionally protected “juridical situations”⁴⁶.

Given the serious threat to public health, its devastating impact, the uncertainty about the evolution of COVID-19, the risks to the capacity of the health-care system, proportionality was assessed not “in abstract” but taking into consideration the concrete circumstances of fact⁴⁷. Furthermore, the balance took into serious consideration not only the dichotomy of public health and collective religious worship, but also the strength of Article 2 of the Constitution, which imposes on people, both collectively and individually, a duty of solidarity, as well as Article 4, which imposes the duty on everyone to participate in the material and spiritual advancement of society⁴⁸. The exceptional and temporary nature of the emergency defined the “limits” of the “legitimacy” of the precautionary measures and justified the absolutization of the protection of public health and the impossibility of balancing competing rights in a way that could provide a reasonable accommodation for the exercise of religious freedom, without any intention of denying its distinctive nature and role in our pluralistic democratic system⁴⁹.

The “balance” reached was not an attempt to establish “a permanent hierarchical order” of constitutional values, but was strictly connected with the emergence of the pandemic⁵⁰.

Other commentators complained that the path of cooperation, which is a distinctive feature of the Italian model of church-state

⁴⁵ See **A. MADERA**, *La libertà di aprire luoghi di culto*, cit., pp. 560-562, and its bibliographical references.

⁴⁶ See Constitutional Court, No. 85 of 2013; **A. MADERA**, *La libertà di aprire luoghi di culto*, cit., p. 560, and its bibliographical references.

⁴⁷ See **F. DE STEFANO**, *La pandemia aggredisce anche il diritto*, cit.

⁴⁸ See **F. DE STEFANO**, *La pandemia aggredisce anche il diritto*, cit.; **P. CONSORTI**, *Esercizi di laicità: dalla bilateralità pattizia al dialogo interreligioso (a causa del Covid-19)*, Università di Pisa, 7 May 2020 (https://people.unipi.it/pierluigi_consorti/esercizi-di-laicità-dalla-bilateralità-pattizia-al-dialogo-interreligioso--a-causa-del-covid-19/); **G. MACRÌ**, *La libertà religiosa alla prova del Covid-19. Asimmetrie giuridiche nello “stato di emergenza” e nuove opportunità pratiche di socialità*, *Stato, Chiese e pluralismo confessionale*, cit., 9/2020), p. 24.

⁴⁹ See **F. DE STEFANO**, *La pandemia aggredisce anche il diritto*, cit..

⁵⁰ See **F. DE STEFANO**, *La pandemia aggredisce anche il diritto*, cit.



relationships, was not properly enhanced⁵¹. Given that the circumstances certainly did not allow for the proper legal procedures, a robust academic debate evolved about how religious authorities should have been involved, and whether the informal ways employed for such consultation could be assessed as completely satisfactory⁵².

Certainly, coronavirus disease preventive measures negatively affected religious freedom of all religious communities, which all suffered the same burdensome restrictions, but whether and to what degree the measures put all of them on an equal level remains an open question.

The availability of social media, offering religious groups supplementary resources to guarantee alternative ways to exercise a fundamental right, mitigated the exceptional precautionary measures⁵³, which the Catholic Church made extraordinary use of during the Easter period. The crucial concerns are whether these resources guaranteed and supported an effective pluralistic religious liberty, whether the alternative measures satisfied, to the same degree, the religious needs of all religious groups, and whether more visibility was given to majority groups, to the detriment of religious minorities⁵⁴.

4 - A “cautious resumption” of religious gatherings during the phase two in Italy

In any event, in the first phase, religious groups quietly accepted restrictions and, in some cases, autonomously adopted self-imposed restrictions, even though some isolated incidents of disobedience occurred. As far as the Catholic Church is concerned, its general conduct displayed strong coherence with Article 1 of the Agreement between the State and the Catholic Church, pursuant to which it is committed to mutual cooperation for the good of the person and the nation.

⁵¹ See **V. PACILLO**, *La sospensione del diritto di libertà religiosa in tempo di pandemia*, in *OLIR*, 16 March 2020 (<https://www.olir.it/focus/vincenzo-pacillo-la-sospensione-dei-diritti-nel-tempo-della-pandemia/>).

⁵² See **A. LICASTRO**, *Il lockdown della libertà*, cit., 238, **L.M. GUZZO**, *Law and Religion During (and After) Covid-19 Emergency: The Law is Made for Man not Man for Law*, in *Diresom*, 30 March 2020 (<https://diresom.net/2020/03/30/law-and-religion-during-and-after-covid-19-emergency-if-the-law-is-made-for-man-for-law/>).

⁵³ See **A. LICASTRO**, *Il lockdown della libertà*, cit., 239.

⁵⁴ See **A. LICASTRO**, *Il pluralismo in materia religiosa nel settore dei «media»*, in **S. DOMIANELLO**, *Diritto e religione in Italia. Rapporto nazionale sulla salvaguardia della libertà religiosa in regime di pluralismo confessionale e culturale*, 2012, il Mulino, Bologna, p. 96.



However, in “phase two” the crucial challenge will be to reconcile effective measures of prevention of the disease with the essential guarantees of protection for fundamental rights. So the precautionary measures have to be updated taking into consideration the development of the situation, and avoiding disproportionate restrictions⁵⁵. As witnessed by an intensive dialogue and a preliminary discussion between the National Episcopal Conference and the Italian government, great expectations of a resumption of religious activities accompanied the first steps toward the beginning of this second phase. Italian Academics too submitted proposals for a “cautious resumption” of religious assemblies with measures aimed at preventing the spread of the COVID-19 infection⁵⁶. At first, concern about mass gatherings and the more vulnerable condition of many elderly religious adherents nevertheless prevailed and such expectations have not yet, as of early May, been fulfilled. The Presidential decree of 26 April 2020, covering the period from 4 to 18 May, did not grant the hoped-for resumption of religious ceremonies, with the exception of funerals, even though it provided for a progressive loosening of lockdown restrictions in relation to some businesses. According to the decree, religious ceremonies must be held in open spaces, and are limited to a maximum of 15 people) and have to comply with other precautionary measures. The Administrative Court dismissed the precautionary request of suspension of the decree of 26 April 2020, briefly determining that in the balance of competing interests, the preservation of health prevails⁵⁷.

The Italian Conference of Bishops reacted harshly to the decree, and released a statement claiming a violation of freedom of worship, as the new provisions “arbitrarily excluded the possibility of celebrating Mass with the people”. The impact of the statement was reduced by Pope Francis, who, in a homily, solicited obedience to civil laws and a cautious

⁵⁵ See **A. FUCCILLO**, *La libertà contagiata dal virus? La libertà religiosa nella collaborazione Stato-Chiesa nell'emergenza covid-19*, in *OLIR*, 21 April 2020 (<https://www.olir.it/focus/antonio-fuccillo-la-religione-contagiata-dal-virus-la-liberta-religiosa-nella-collaborazione-stato-chiesa-nelle-emergenza-covid-19/>); **P. CONSORTI**, *La libertà religiosa*, cit., p. 385.

⁵⁶ See **DIRE SOM**, *Proposal for a Safe Resumption of Religious Celebrations in Italy*, in *Diresom*, 27 April 2020 (<https://diresom.net/2020/04/27/position-paper-proposta-per-una-cauta-risposta-in-sicurezza-delle-celebrazioni-religiose/>).

⁵⁷ See Administrative Court of Lazio-Rome, Section I, April 29, 2020, no. 3453. The court added that the sacrifice of the understandable need to physically participate in religious ceremonies can be considered temporarily compensated by the possibility of satisfying one's religious sentiment by taking advantage of the numerous alternatives offered through IT tools.



attitude because of the risk of resurgence of the infection and the Conference of Bishops, which later declared its intent to avoid conflicts with the Italian government, in view of its wish to loyally cooperate with the government. The Prime Minister guaranteed that “a protocol will be studied that will allow the faithful to participate in liturgical celebrations as soon as possible in conditions of maximum security”. The Episcopal Conference and the Italian government eventually reached a preliminary agreement about guidelines that should govern the second phase, which resulted in a protocol on May 7 2020, allowing a cautious resumption of religious celebrations, provided that measures concerning sanitization of premises, social distancing, size requirements of the venue, and other precautionary measures are complied with. This protocol seeks to satisfy the specific religious needs of the Catholic Church, even though local detail is missing, giving rise to the question of whether the protocol should be homogeneously applied in every regional context, or whether different local situations should be assessed as appropriate⁵⁸.

Furthermore, phase two led to a new complex legal framework of emergency measures, which included a conversion into law of a previous decree, a law decree, and a decree of the president of the cabinet⁵⁹. This

⁵⁸ The bishops of Sardinia showed disappointment at not having been consulted. They decided to resume religious gatherings starting from 4 May, with the due precautionary measures, claiming a judicial distinction between religious functions and religious ceremonies, which would be grounded on Article 405 of the Criminal Code. According to **A. LICASTRO**, *Il lockdown della libertà*, cit., p. 234, such distinction is connected to the essential or ancillary nature of ceremonies for worship.

⁵⁹ See L. n. 35, May 22, 2020, which converted the decree n. 19 of March 25, 2020 and at Article 1.2.g repeats the “limitation or suspension of events or initiatives of any nature, of events and of any other form of meeting or gathering in a public or private place, including those of a cultural, recreational, sporting, recreational and religious nature”. The government is still allowed to establish a “suspension of civil and religious ceremonies [and the] limitation of entry to places intended for worship”. However, on 6 May 2020 an amendment to the converted law was approved, which provided that the government had to adopt health protocols in agreement with the Catholic Church and with religious denominations “different from the catholic one”. See also decree May 6 2020, “Further urgent measures to deal with the epidemiological emergency from Covid-19”, Article 1.11, ruling on religious gatherings: “Religious functions with the participation of people are carried out in compliance with the protocols signed by the Government and by the respective confessions containing the appropriate measures to prevent the risk of contagion”. Art. 1.12 specified that the provisions concerning religious assemblies “are implemented with measures adopted pursuant to Article 2 of decree-law no. 19 of 2020, which may also establish different terms of effectiveness”. Finally, President of the Ministry Council decree May 17, 2020, addressed both individual worshipping at Art.1.1n: “access to places of worship takes place with organizational measures to avoid gatherings of people, taking into account the size and characteristics of



framework intertwines with the protocols with certain religious groups seeking to define the necessary measures for the safe performance of religious functions⁶⁰. The protocols aimed to solve the problems religious communities were facing in connection with the then-current health measures and to find shared solutions, taking into account the specific needs of every faith community. So the spirit of the protocols mirrors the idea of dialogue and confrontation that led the 5 May 2020 meeting of the Minister of Internal Affairs and representatives of many religious groups.

The current emergency crisis therefore offers the opportunity for the State to promote and implement a more effective pluralistic framework, where social actors, including religious ones, should not be “marginalized”, but instead invited to give their “contribution to the enhancement of social dynamics”⁶¹. However, the Minister did not opt for the adoption of a unitary protocol for all religious groups, instead opting for specific protocols with single faith communities or small groups of faith communities.

5 - U.S. legal responses to COVID-19: U.S. constitutional and legal framework about religious freedom

In the U.S. context, the reading of the free exercise clause and its extent has fluctuated for many years between restrictive and expansive legislative and judicial trends⁶². Although lawmakers are increasingly gaining a key role in religious freedom matters, so as to give rise to the perception that religious freedom is decreasingly governed by the free exercise clause,

the places, and such as to guarantee visitors the opportunity to respect the distance between them of at least one meter”, and collective forms of worshipping at art.1.10: “religious functions with the participation of people are carried out in compliance with the protocols signed by the government and the respective confessions”.

⁵⁹ See. **A. TIRA**, *Normativa emergenziale ed esercizio pubblico del culto. Dai protocolli con le confessioni diverse dalla cattolica alla legge 22 maggio 2020, n. 35*, in *Giustizia Insieme*, 8 June 2020 (<https://www.giustiziainsieme.it/it/diritto-dell-emergenza-covid-19/1132-normativa-emergenziale-ed-esercizio-pubblico-del-culto-dai-protocolli-con-le-confessioni-diverse-dalla-cattolica-alla-legge-22-maggio-2020-n-35?hitcount>), about the anomalies concerning the chronological order of this provisions, where higher sources are subsequent to the memorandums or were prepared during the same period.

⁶¹ See **G. MACRÌ**, *La libertà religiosa*, cit., p. 36; **P. CONSORTI**, *Esercizi di laicità*, cit.

⁶² See **A. MADERA**, *Spunti di riflessione sulla decisione Hobby Lobby e sul suo impatto sulla tutela della libertà religiosa negli U.S.A.*, in *il Diritto Ecclesiastico*, vol. 125, 2014, 685 ff., and its bibliographical references.



case law has had deep impact on the degree of recognition of religious exceptions⁶³.

According to *Sherbert v. Verner*, a famous 1963 Supreme Court case which gave a wide reading of the free exercise clause, the government must demonstrate the presence of a compelling state interest whenever a religious person suffers a substantial burden because of a public action, which implied that government had to use the least restrictive means (strict scrutiny) to pursue its aims⁶⁴. However, later, in 1990, in *Employment Division, Department of Human Resources of Oregon v. Smith*, the Supreme Court took a more narrow view and held that generally applicable laws that impose burdens on the exercise of religious freedom are constitutionally consistent and need only meet a rational basis review when they are religiously neutral⁶⁵. According to this perspective, general applicability means that government conduct cannot selectively target religion “in pursuit of legitimate interests, [and] cannot in a selective manner impose burdens only on conduct motivated by religious belief”⁶⁶. Nonetheless, the *Smith* decision left open the possibility for individual states to adopt specific legislative religious exemptions in their own statutes: the Supreme Court recognized that lawmakers were expected to be “solicitous” toward religious convictions, delegating to “political processes” the option to enforce “permissive” religious exemptions⁶⁷.

However, Congress reversed the *Smith* rationale, enacting a “broadly-framed legislation” (the Religious Freedom Restoration Act of 1993) (RFRA)⁶⁸, the aim of which was to restore the compelling-interest and least restrictive means test in circumstances where religious freedom suffers a serious burden, and to operate “striking balances” between religious freedom and “competing prior governmental interests”⁶⁹. Although the enactment of the RFRA revitalized the compelling state interest test and the strict scrutiny standard, the *Boerne* decision precludes

⁶³ See **A. MADERA**, *Spunti di riflessione*, cit., p. 709, and its bibliographical references.

⁶⁴ See *Sherbert v. Verner*, 374 U.S. 398 (1963).

⁶⁵ See *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

⁶⁶ See *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

⁶⁷ See *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990).

⁶⁸ See 42 USC2000bb(a)(1)(1994). See **D.O. CONKLE**, *Congressional Alternatives in the Wake of City of Boerne v. Flores: the (Limited) Role of Congress in Protecting Religious Freedom from Local and State Infringement*, in *UALR Law Journal*, vol. 20, 1998, p. 643.

⁶⁹ See 42 USC2000bb(a)(1)(1994).



the application of the RFRA's "demanding test"⁷⁰ at the state level⁷¹. As the main protector of the constitutional framework, the Supreme Court clarified that Congress, with its broad intervention, "undermined vital principles necessary to maintain separation of powers and the federal balance"⁷², as Congress can only enact "remedial or preventive legislation to enforce the 14th Amendment and its incorporation of Bill of Rights standards", but it does not have "substantive power [...] to redefine the meaning of the constitutional rights"⁷³. According to the Court,

"the substantial costs [the] RFRA exacts, both in practical terms of imposing a heavy litigation burden on the states and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*"⁷⁴.

However, the Court recognized that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern", and granted "wide latitude" to the Congress "in determining where it lies"⁷⁵. In any event, any intervention should meet a "test of rationality"⁷⁶, as proportionality and congruency are required "between the injury to be prevented or remedied and the means adopted to that end"⁷⁷, taking into account the "nature" and the "extent" of the state constitutional infringement and the scope of the Congress response to that injury⁷⁸. The

⁷³ See **R. FRETWELL WILLSON, B.A. SMITH, T.J. BEAN**, *Defiant Congregations in a Pandemic. Public Safety Precedes Religious Rights*, in *Canopy Forum* (www.canopyforum.org), 21 March 2020.

⁷¹ See *Boerne v. Flores*, 521 U.S. 507 (1997); **A. MADERA**, *Spunti di riflessione*, cit., p. 685, and its bibliographical references.

⁷² See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

⁷³ See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). See also **D.O. CONKLE**, *Congressional Alternatives in the wake of City of Boerne v. Flores: the (limited) role of the Congress in protecting Religious Freedom from state and local infringement*, in *UARL Law Journal*, vol. 20, 1998, pp. 633-640; **V.C. BRANNON**, *Banning Religious Assemblies to Stop the Spread of Covid-19*, in *Congressional Research Service*, June 1. 2020, 1-5.

⁷⁴ See *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

⁷⁵ See *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997).

⁷⁶ See **D.O. CONKLE**, *Congressional Alternatives*, cit., p. 647. According to the Author, Congress could enact "procedural legislation or laws concerning specific areas of state and local regulation where there is an high risk of "purposeful" religious discrimination".

⁷⁷ See *City of Boerne v. Flores*, 521 U.S. 507 (1997). See also **V.C. BRANNON**, *Banning Religious Assemblies*, cit., 1-5.

⁷⁸ See **D.O. CONKLE**, *Congressional Alternatives*, cit., p. 642.



Supreme Court recently, in March 2020, reaffirmed this understanding of the Congress's powers, emphasizing that "that assessment usually (though not inevitably) focuses on the legislative record, which shows the evidence Congress had before it of a constitutional wrong"⁷⁹.

In 2006, the Supreme Court upheld the constitutional legitimacy of the application of the RFRA to federal statutes⁸⁰, as long as the invalidation of the RFRA at the state level is only partially filled by the enactment of the *Religious Land Use and Institutionalized Persons Act (RLUIPA)*, which regulates only specific aspects of religious freedom⁸¹ but gives a broad definition of the understanding of "exercise of religion"⁸².

Furthermore, twenty-one states responded at the *Boerne* decision by enforcing their own version of the *Religious Freedom Restoration Act*⁸³. Currently it seems that the protection of religious freedom is mainly entrusted to the federal and state lawmakers enacting, so conflicting views of religious freedom exist side by side. Given the highly pluralistic religious scenario in the United States, this legal framework generated a fragmentation of religious freedom, leaving unresolved the question of whether and to what extent religious exemptions have to be provided.

The situation is increasingly complex in the wake of several Supreme Court decisions, which provided over-expansive reading of the protection of free exercise of religion grounded on federal and state statutes, and endorsed "new" forms of conscientious objection from "new" religious actors⁸⁴. Many business organizations are now using the courts to claim a religious affiliation in order to be exempted from laws of general applicability, where those laws contradict their ethical-religious convictions⁸⁵. The judicial trend toward religious accommodation has

⁷⁹ See *Allen v. Cooper*, Certiorari to the United States Court of Appeals for the Fourth Circuit, No. 18-877, March 23, 2020

⁸⁰ See *Gonzales v. O Centro Espírita*, 546 U.S. 418 (2006).

⁸¹ See **A. MADERA**, *Spunti di riflessione*, cit., 685.

⁸² The RLUIPA (42 U.S.C. § 2000cc et seq.) covers any exercise of religion "whether or not compelled by, or central to, a system of religious belief", being "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution".

⁸³ See **A. MADERA**, *Spunti di riflessione*, cit., p. 685, and its bibliographical references.

⁸⁴ See **A. MADERA**, *Nuove forme di obiezione di coscienza fra oneri a carico della libertà religiosa e third-party burdens. Un'analisi comparativa della giurisprudenza della Corte Suprema U.S.A. e della Corte di Strasburgo*, in *Stato, Chiese e pluralismo confessionale*, cit., 16/2017, p. 1, and its bibliographical references.

⁸⁵ See *Burwell, Secretary of Health and Human Services, et al., v. Hobby Lobby Stores*, 573 U.S. 682 (2014), where the Supreme Court found that closely held for-profit corporations



generated an ongoing and growing academic concern about third-party burdens (namely on vulnerable classes of individuals), the risk of weakening the role of nondiscrimination safeguards, with a serious negative impact on abortion and LGBT rights, and an increasing politicization of the new “culture wars”⁸⁶. Therefore an increasingly suspicious attitude has developed about religious accommodation, mainly when that accommodation seems connected to a type of rising “corporate religious liberty”⁸⁷.

6 - The legal patchwork because of the pandemic

The COVID-19 emergency exacerbated legal fragmentation⁸⁸. In the early days of the emerging situation, several state and local governments have promulgated orders directing residents to stay at home, forbidding assemblies, and closing “non-essential” activities⁸⁹. The prohibitions include the closure of religious premises and the banning of religious assembly. According to a survey in April 2020, the pandemic crisis generated a complex legal patchwork⁹⁰. In some states, religious exemptions were not provided, and the ban gave rise to litigation in federal courts (e.g., California)⁹¹. In other states, the prohibitions clearly

are exempt from a general applicable law (Patient Protection and Affordable Care Act), when their owners exercise a religious objection to, if there is a less restrictive means of pursuing the compelling state interest, according to the provisions of the RFRA; *Masterpiece Cakeshop LTD v. Colorado Equal Rights Commission*, 138 S. Ct. 1719 (2017). See **A. MADERA**, *Spunti di riflessione*, cit., p. 684, and its bibliographical references; **F.M. GEDICKS**, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Employee Burdens*, *Harv. Journal of Law & Gender*, vol. 39, 2015, p. 1.

⁸⁶ See **F.M. GEDICKS, R.G. VAN TASSEL**, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, in *Harvard Civil Rights-Civil Liberties Law Review* vol. 49, 2014, p. 343; **D. LAYCOCK**, *Religious Liberty and the Culture Wars*, *University of Illinois Law Review*, 3/2014, p. 839.

⁸⁷ See **M. SCHWARTZMAN, C. FLANDERS, Z. ROBINSON** (eds.), *The Rise of Corporate Religious Liberty*, Oxford University Press, Oxford, New York, 2016.

⁸⁸ About federal general preventive measures to restrain the spread of the virus, see **C. GRAZIANI**, *Libertà di culto e pandemia (COVID-19): La Corte Suprema degli Stati Uniti divisa*, in *Consulta on Line* (www.giurcost.org), II/2020, pp. 358-360

⁸⁹ See **V.C. BRANNON**, *Banning Religious Assemblies*, cit., 1-5.

⁹⁰ See **S. MERVOSH, D. LU, V. SVALES**, *Which States and Cities have Told to Residents to Stay at Home*, in *The New York Times*, 20 April 2020 (<https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>).

⁹¹ See **S. MERVOSH, D. LU, V. SVALES**, *Which States and Cities*, cit.; **V.C.**



also include religious assemblies, but there are exceptions when gatherings (including religious ones) meet strict number limitations, so as to guarantee social distancing⁹². Some states have issued official interpretative guidelines to clarify whether religious gatherings can take place and the size of gatherings⁹³. In any event, online services have been strongly encouraged. Yet other states seem to allow religious exceptions provided that appropriate physical distancing and size restrictions are respected⁹⁴.

Even in those states that formally provide religious exceptions, and qualify religious services as “essential services” along with other secular activities, religious worship is subject to restrictions, the stringency of which varies from state to state⁹⁵. Such *de minimis* accommodations are also allowed in states that do not recognize exemptions for religious groups⁹⁶. The main difference among states seems to be that some state orders make explicit use of the language of religious exemption, while others don’t have express exemptions, even though churches are subject to the same limitations and permissions provided for secular activities, in relation to social distancing, size requirements, and sanitization measures.

Many religious communities embraced alternative ways of practicing their rituals, using technological devices, and encouraging their adherents to follow the precautionary measures, thus giving rise to forms of “religious creativity” (i.e., drive-in services)⁹⁷. Some states allowed a

BRANNON, *Banning Religious Assemblies*, cit., pp. 1-5.

⁹² On 11 April 2020, the Kansas Supreme Court dismissed an attempt by Republican leaders to reject the stay-at-home order regardless of the governor's prohibition concerning such gatherings. *Kelly v. Legislative Coordinating Office, et al.*, Supreme Court of the State of Kansas, No. 122,765. See **J. PARTON**, *Kansas Supreme Court Rules Legislative Council Can't Overturn Governor's Religious Service Ban*, in *Courthouse News Service*, 11 April 2020 (<https://www.courthousenews.com/kansas-supreme-court-hears-arguments-on-fight-over-ban-on-religious-gatherings/>). See also *First Baptist Church. v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021 (D. Kan. Apr. 18, 2020) “[C]hurches and religious activities appear to have been singled out among essential functions for stricter treatment. It appears to be the only essential function whose core purpose - association for the purpose of worship - had been basically eliminated”.

⁹³ See **V.C. BRANNON**, *Banning Religious Assemblies*, cit., pp. 1-5.

⁹⁴ See **S. MERVOSH, D. LU, V. SVALES**, *Which States and Cities*, cit.

⁹⁵ See **S. MERVOSH, D. LU, V. SVALES**, *Which States and Cities*, cit.; **V.C. BRANNON**, *Banning Religious Assemblies*, cit., pp. 1-5.

⁹⁶ See **S. MERVOSH, D. LU, V. SVALES**, *Which States and Cities*, cit.

⁹⁷ See **M. FAGGIOLI**, *Pandemic and Religious Liberty in the USA; Between Privatization of the Church and Neo-Integralism*, in *Diresom*, 8 April 2020 (<https://diresom.net/2020/04/08/pandemic-and-religious-liberty-in-the-usa-between-privatization-of-the-church-and-neo-integralism/>).



specific relaxation of stay-at home order for the celebration of religious holidays, funerals, or to meet the needs of end-of-life individuals (Colorado, North Carolina) or allowed churches to “open their doors to people who walk in who want a quiet place to pray alone” (District of Columbia)⁹⁸ In some cases, further exemptions are provided for religious organizations also engaged in providing primary goods or services (Kentucky, Michigan)⁹⁹.

Freedom of religion is surely in accordance with interests of the highest order that are guaranteed under the Constitution, but this protection does not imply an absolute right to engage in conduct coherent with one’s religious convictions. The question is whether and to what extent state governments can limit religious freedom when an emergency situation occurs¹⁰⁰.

Some academics claim that religion can “harm” when it negatively affects public health policies intended to prevent the spread of an ominous infection¹⁰¹. On the flip side, some conservative religious groups-with strong connections to President Trump and the Republican Party-support the idea that religious groups should enjoy exemptions from stay-at-home orders, including being allowed in-person services¹⁰².

7 - Judicial balance between individual liberties and the preservation of health

A crucial issue seems to be that preservation of health is a matter within state jurisdiction under the Tenth Amendment¹⁰³. The constitutional text provides for states to perform many “vital functions of modern government”, including “police power”¹⁰⁴, even though the federal jurisdiction is required to protect “individual liberties”¹⁰⁵.

⁹⁸ See **M. FAGGIOLI**, *Pandemic and Religious Liberty*, cit.

⁹⁹ See **M. FAGGIOLI**, *Pandemic and Religious Liberty*, cit.

¹⁰⁰ See **V.C. BRANNON**, *Banning Religious Assemblies*, cit., pp. 1-5.

¹⁰¹ See **M.A. HAMILTON**, *Toxic Religious Liberty in the Covid-19 Era*, in *Verdict*, 7 April 2020 (<https://verdict.justia.com/2020/04/07/toxic-religious-liberty-in-the-covid-19-era>); **S.H. BARCLAY**, *First Amendment “Harms”*, in *Indiana Law Journal*, vol. 95, 2020, p. 331; , *Banning Religious Assemblies*, cit., pp. 1-5.

¹⁰² See **M. FAGGIOLI**, *Pandemic and Religious Liberty*, cit.

¹⁰³ See US. Const., amend. X”.The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”.

¹⁰⁴ **D. MESSERE MAGEE**, *The Constitution and Federalism in the Age of Pandemic*, in *Ri.*



Mile stone decisions underlined that even though United States “law, policy and culture” is inclined to emphasize individual freedoms, the Constitution, in its preamble, recognizes the importance of the “general welfare” of the “people”¹⁰⁶. Public health laws mirror constitutional standards, aim to protect the common good, namely the health and the welfare of the whole community, and establish responsibilities to safeguard public health.

According to the Supreme Court,

“in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand”¹⁰⁷ even where “a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law”¹⁰⁸.

As a result, government can take extraordinary, temporary measures to protect the public. Extraordinary emergency situations, as the Fifth Circuit recently emphasized in April 2020,

“allow the state to restrict, for example, one’s right to peaceably assemble, to publicly worship, to travel, and even to leave one’s home”¹⁰⁹. Furthermore, “[t]he right to practice religion freely does not include the liberty to expose the community [...] to communicable disease”¹¹⁰.

Bar. Jnl., 68, May 2020, pp. 11-14.

¹⁰⁵ See *New York v. United States*, 505 U.S. 144, 181, 112 S. Ct. 2408, 120 L.Ed.2d 120 (1992): “State sovereignty is not just an end in itself: rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power”; *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 567 U.S. 519, 183 L.Ed.2d 450, 80 U.S.L.W. 4579, 23 Fla. L. Weekly Fed. S 480, (2012): “By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power”.

¹⁰⁶ See U.S. Const. pmb.; **B.L. ATWELL**, *From Public Health to Public Wealth: The Case for Economic Justice*, in *Kentucky Law Journal*, vol. 108, 2019-2020, p. 388.

¹⁰⁷ See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 29 (1905) (concerning mandatory vaccinations).

¹⁰⁸ See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 31 (1905).

¹⁰⁹ See *In re Abbott*, - F.3d -, 2020 WL. 1685929, 6 (5th Cir. Apr. 7, 2020); **V.C. BRANNON**, *Banning Religious Assemblies*, cit., pp. 1-5.

¹¹⁰ See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).



The *Jacobson*¹¹¹ and *Prince*¹¹² cases show that when serious health issues are involved, public well-being is “paramount”, even though these issues can negatively affect individual liberties¹¹³. However, it cannot be underestimated that in the *Jacobson* case no First Amendments issues were involved: this lack gave rise to the claim that it can be considered just a sort of “precursor” and not an “alternative” to the “strict scrutiny required for laws infringing free exercise rights”¹¹⁴.

During a pandemic, state powers are subject to a *de minimis* judicial review, with enhanced weight given to the medical experts assessing the most appropriate strategies to deal with the crisis¹¹⁵: when a health crisis occurs the Supreme Court should rely on a rational basis review, so state regulations can be judicially subverted only where the *Jacobson* standards are met¹¹⁶. Currently, if a health emergency is occurring, state governments are empowered to adopt the most appropriate measures, and their powers are grounded on specific statutes¹¹⁷. Congress in fact stated that, “[n]o court of the United States, or of any State, shall have subject matter jurisdiction to review, whether by mandamus or otherwise, any action by the Secretary under this [Public Health Service Act] subsection”¹¹⁸. Specifically, Stafford Act, which is the main “federal

¹¹¹ See *Jacobson v. Commonwealth of Massachusetts*, cit.

¹¹² See *Prince v. Massachusetts*, cit.

¹¹³ See **B.L. ATWELL**, *From Public Health*, cit., p. 387.

¹¹⁴ Cfr. *Elim Romanian Pentecostal Church, et al., Applicants v. J. B. Pritzker, Governor of Illinois*, May 27, 2020, No. 19A1046.

¹¹⁵ See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 38 (1905): “While this court should guard with firmness every right appertaining to life, liberty or property as secured to the individual by the Supreme Law of the Land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law”. Although this decision predated the incorporation of the Religious Clauses against the states, its rationale was re-affirmed in *Sherbert*. See **V.C. BRANNON**, *Banning Religious Assemblies*, cit., pp 1-5.

¹¹⁶ See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 29-31 (1905) where the Court held that where there is a “palpable invasion of rights secured by the fundamental law” and that the “means prescribed by the State”, “to stamp out the disease”, [have] no real or substantial relation to the protection of the public health and the public safety”. So” [...] it is [then] the duty of the courts to so adjudge, and thereby give effect to the Constitution”.

¹¹⁷ **D. MESSERE MAGEE**, *The Constitution*, cit., p. 12, relies on the National Emergencies Act, the Public Health Service Act, the Defense Production Act of 1950, and the Stafford Act. All these Acts have been quoted by Trump in his Executive Order and in his National Emergency Declaration due to the Covid-19 pandemic.

¹¹⁸ See 42 U.S.C. § 247d-6d(b)(7).



emergency response statute" dealing with the pandemic, aims to balance "states prerogatives" and the "federal coordination scheme", and "federalism" and "dual sovereignty"¹¹⁹, to

"provide an orderly and continuing means of assistance by the Federal Government to state and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters"¹²⁰.

The interplay between state and federal governments in relation to this devastating health emergency and the key role of the principle of subsidiarity will probably become the object of increasing debate in the near future¹²¹, given that the health crisis is far from over¹²².

The crucial questions are whether and to what extent constitutional rights can be affected in the time of health emergency and how courts can navigate between citizens' claims of infringement of their constitutional "due process" and "equal protection" guarantees and the preservation of common good. Case law indicates that judicial intervention is limited to cases when

"the police power of a state, whether exercised by the legislature or by a local body acting under its authority" are "exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression"¹²³.

¹¹⁹ See **D. MESSERE MAGEE**, *The Constitution*, cit., p. 12.

¹²⁰ See Stafford Disaster Relief and Assistance and Emergency Act 2000, 42 U.S.C. ch. 68 § 5121.

¹²¹ In this complex framework, we should also rely on a mile stone decision, that clarified that presidential powers "are not fixed but fluctuate depending on the disjunction or conjunction with those of Congress". See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952). 863 (Jackson, J., concurring): "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate ... [w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain [w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb".

¹²² See **M.C. GREEN**, *Religious Freedom and Subsidiarity in the Coronavirus Pandemic*, in *Canopyforum*, 3 May 2020 (https://canopyforum.org/2020/05/03/religious-freedom-subsidiarity-in-the-coronavirus-pandemic/?fbclid=IwAR1Wr_UoBO5YWRiqtq3Eq_RrRW8dRXczGzF8nVr3Z1x5wgt9xkAu_-6iKg).

¹²³ See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 38 (1905).



A further question is whether the more recent *Hobby Lobby*¹²⁴ case undermined the *Jacobson* rationale by allowing religious exemptions to a generally applicable statute aimed at promoting public health and expanding free access to health care.

8 - Litigation in lower courts about the exercise of religious freedom during Covid-19

Some state prohibitions led to refusals to comply and fierce litigation, with religious petitioners ranging from conservative groups to extremist voices¹²⁵.

At first, some clergy were arrested for unlawful assembly and infringement of the emerging health protection rules. They ostentatiously refused to comply with the health emergency rules, claiming the essential nature of religious services, and that they had been burdened with the “cost” of their noncompliance that was for religious reasons¹²⁶. However, their actions drove the subsequent amendment of the county stay-at-home order (making it consistent with Florida provisions) so as to include “attending religious services conducted in churches, synagogues and houses of worship” within “essential activities”¹²⁷.

In some states (e.g., California), where no accommodation was provided, churches challenged the stay-at-home orders, arguing that the orders infringe the First Amendment right to freedom of religion and assembly, and that the churches can practice social distancing just like other services that are deemed essential (California). However, district courts found that “during the state of emergency the executive powers [...] are empowered to provide for emergency remedies which may infringe on fundamental constitutional rights”¹²⁸.

¹²⁴ See *Burwell, Secretary of Health and Human Services, et al., v. Hobby Lobby Stores*, cit.

¹²⁵ See *Hotze v. Hidalgo*, No. 2020-22609 (Tex. Dist. Ct. Harris Cty. Apr. 13, 2020).

¹²⁶ See **P. MAZZEI**, *Florida Pastor arrested after Defying Virus Orders*, in *New York Times*, March 30, 2020 (<https://www.nytimes.com/2020/03/30/us/coronavirus-pastor-arrested-tampa-florida.html>); see **V.C. BRANNON**, *Banning Religious Assemblies*, cit., 1-5.

¹²⁷ See State of Florida, Office of the Governor, Executive Order Number 20-91, Section 3Ai.

¹²⁸ See **Z. BUDRYK**, *Judge Rejects Attempt by Three California Churches To Hold Services Despite Stay at Home Orders*, in *The Hill*, 22 April 2020 (<https://thehill.com/regulation/court-battles/494243-judge-rejects-attempt-by-three-california-churches-to-hold-services>); See **V.C. BRANNON**, *Banning Religious Assemblies*, cit., 1-5.



In other states, although limited forms of accommodation were provided, the main complaint of some pastors and churches is that there was an undue equalization of religious and secular activities, that was inconsistent with the First Amendment¹²⁹.

According to the petitioners, the restrictions on in-person worship services violated the “religious liberty” of pastors who wished to gather their parishioners together during the pandemic period¹³⁰. In South Virginia, a judge rejected a suit by a resident claiming a religious exemption from the stay-at-home order, as it “would seriously undermine the Commonwealth’s efforts to slow the spread of a once-in-a-century pandemic”¹³¹.

In phase one, courts seemed reluctant to uphold these challenges even though justices embrace different approaches to free exercise claims against stay-at-home orders, alternatively applying more rigorous or more lenient standards of review. The emergency did not destabilize the actual legal framework for the protection of religious freedom but emphasized the underlying crucial issue about which legal standard should govern judicial review when free exercise of religion is at stake so as to reach a fair balance between general rules and religious claims¹³².

If precautionary measures have to be subject to a strict scrutiny, the judicial analysis should focus on whether the global pandemic emergency can be seen as a compelling state interest and whether the government has a less restrictive alternative by which to pursue its goals. However, given the pandemic situation, the protection of health could surely be deemed a compelling state interest. Government has a compelling interest in protecting the health and safety of the public, and that interest becomes much stronger when it is connected with the prevention of the spread of an infectious disease that puts lives at risk. Strict limitation of gatherings, even religious ones, and self-quarantine by those who are at higher risk of infection, in order to avoid to undermining the public interest, can be considered as a rational pursuit of this public interest¹³³. Pre-*Smith*

¹²⁹ See D.R. HOOVER (ed.), *Religion and American Exceptionalism*, Routledge, New York, 2014.

¹³⁰ *Hotze v. Hidalgo*, cit.

¹³¹ **M. BARAKAT**, *Judge Rejects Lawsuit Over Order; No Religious Exemption*, Associated Press, 9 April 2020 (<https://wtop.com/virginia/2020/04/judge-rejects-lawsuit-over-order-no-religious-exemption/>); **V.C. BRANNON**, *Banning Religious Assemblies*, cit., pp. 1-5.

¹³² See **V.C. BRANNON**, *Banning Religious Assemblies*, cit., pp. 1-5.

¹³³ See *Friends of DeVito v. Wolf*, No. 68 MM 2020, _ A.3d _, 2020 WL 1847100 (Pa. Apr. 13, 2020).



Supreme Court decisions denied religious exemptions from laws that protected public health from serious threats¹³⁴, and lower federal courts complied with the rationale¹³⁵. Furthermore, orders should meet the strict scrutiny standard and the compelling-interest test also requires that the challenged law be narrowly tailored to address the governmental interest at stake. Based on this perspective, whether orders have temporal limits and provide alternative ways to allow individuals to exercise their religious freedom should be currently seriously taken into consideration by courts, as well as the fact that no vaccine for COVID-19 yet exists, hospitals are experiencing severe shortages of the necessary personal protective equipment and that the viability of the health-care system is at risk¹³⁶.

If the *Smith* rationale prevails (rational basis review), claims for religious accommodation are not connected to a strict scrutiny test under the First Amendment and the religious nature of claims does not justify noncompliance or exceptions to generally applicable laws, which are neutral toward religion. From this standpoint, state orders prohibiting gatherings are generally applicable, religiously neutral laws, so religious assemblies should be subject to the provisions limiting gatherings. According to *Smith*, legal orders are consistent with the Constitution as long as issues of religious accommodation are placed on the same level as other secular interests¹³⁷. Furthermore, laws forbidding fraud and restricting other activities that put at risk public health and safety cannot be subject to religious exemptions¹³⁸.

However, even when a law is pursuing legitimate interests, it cannot directly target religion by imposing burdens only on religiously motivated conduct¹³⁹. So governments cannot impose restrictions on religious conduct while supporting “nonreligious conduct that endangers

¹³⁴ See *Sherbert v. Verner*, cit.

¹³⁵ See *Workman v. Mingo City Bd. of Educ.*, 419 F. App'x 348, 353-54 (4th Cir. 2011); *McCormick v. Stalder*, 105 F.3d 1059, 1061 (4th Cir. 1997); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1089-90 (S.D. Cal. 2016); *Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017).

¹³⁶ See V.C. BRANNON, *Banning Religious Assemblies*, cit., 1-5.

¹³⁷ See V.C. BRANNON, *Banning Religious Assemblies*, cit., 1-5.

¹³⁸ On 10 March 2020, the State of Missouri sought a restraining order against a televangelist preacher so as to prohibit him from selling or advertising miracle remedies for COVID-19. *Missouri v. Bakker*, In the Circuit Court of Stone County, Mississippi. See S.C. PILL, *Selling Religious Cures and Other First Amendment Pitfalls in the Age of Coronavirus*, in *Canopyforum*, 16 March 2020 (<https://canopyforum.org/2020/03/16/selling-religious-cures-and-other-first-amendment-pitfalls-in-the-age-of-coronavirus-by-shlomo-pill/>).

¹³⁹ See *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 543 (1993).



[the asserted governmental] interests in a similar or greater degree”¹⁴⁰, as this will result in religious discrimination¹⁴¹. Yet, it cannot be underestimated that some religious groups are more severely burdened by restrictive measures, as restrictions have a deeper impact on their practices and rites or they cannot take advantage of alternative means to satisfy their worshipping needs, as those means contradict some groups’ beliefs and values¹⁴².

Therefore, some cases require careful analysis, to assess whether there was an intention to target the any specific religious group’s exercise of their religion or whether secular businesses received a preferential treatment. The potential impact of restrictions on religious groups requires a more rigorous level of governmental scrutiny, and government bears the onus of proof that pervasive precautionary measures specifically aim to address the emergency and the compelling state interest. We have to remember that recent case law has emphasized a renewed sensibility toward disparity of treatment or selective discriminations against religiously affiliated entities¹⁴³.

9 - New creative ways of worshipping in Covid-19 times: drive-in religious services

Some successful lawsuits concerned a new creative and controversial worshipping practice: drive-in religious services, which allow religious adherents to gather in person while respecting social distancing¹⁴⁴.

In Kentucky a religious organization successfully challenged the ban against drive-in religious assemblies: on 11 April 2020, a federal district court issued a temporary restraining order, preventing local authorities from forbidding “drive-in church services” (specifically, Easter services)¹⁴⁵. The federal trial court found that the banning of “drive-in church services” established a public policy that was not “neutral’

¹⁴⁰ See *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533-534, 542-543.

¹⁴¹ See **V.C. BRANNON**, *Banning Religious Assemblies*, cit., 1-5.

¹⁴² See **M. FAGGIOLI**, *Pandemic and Religious Liberty*, cit.

¹⁴³ See *Trinity Lutheran Church of Columbia, Inc., v. Comer*, 582 U.S. _ (2017).

¹⁴⁴ See **E. SCHOR**, *Religious Freedom Attorneys Pick their Battles Amid Pandemic*, in *AP News*, 7 April 2020 (<https://apnews.com/d32b6b477e0500db86a5ccf2c10a13bd>).

¹⁴⁵ See *Fire Christian Center v. Greg Fischer*, No. 3:20-cv-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020); **V.C. BRANNON**, *Banning Religious Assemblies*, cit., 1-5.



between religious and non-religious conduct”¹⁴⁶. In fact, the local authority (the mayor of Louisville) issued “orders and threats that [were] not ‘generally applicable’ to both religious and non-religious conduct”, as the orders allowed other secular activities (non-religious drive-ins and drive-throughs, including drive-through liquor stores) to remain open¹⁴⁷. According to the court,

“the principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause”¹⁴⁸.

The trial court referred to the Fifth’s Circuit’s test for assessing the emergency order, and emphasized the need for appropriate deference to “the expertise of public health officials in evaluating potential distinctions between a drive-in church and other permitted essential activities”¹⁴⁹.

However, emergency measures should be implemented when they “have at least some ‘real or substantial relation’ with the actual emergency situation and are not ‘beyond all question, a plain, palpable invasion of rights secured by the fundamental law’”¹⁵⁰. In the *Fire Christian Center* case, the municipal health measures were held as “underinclusive” because other equally dangerous (or equally harmless) activities were permitted by virtue of being deemed “essential”¹⁵¹.

The federal district court held that, according to the Kentucky Religious Freedom Restoration Act (RFRA), the municipality conduct had to be subject to a “strict scrutiny” analysis, proving that the public interest is compelling and regulation narrowly addressed to pursue that interest. Although the regulation met the first standard, banning residents from “worshiping together” “in the relative safety of their cars” seems not to be “the least restrictive means to prevent the spread of coronavirus”¹⁵². The court found that the order, “beyond all question”, violated the free exercise clause as the order was not “narrowly tailored to advance that interest”¹⁵³. The government’s “proffered objectives are not pursued with

¹⁴⁶ See *Fire Christian Center v. Greg Fischer*, cit.

¹⁴⁷ See *Fire Christian Center v. Greg Fischer*, cit.

¹⁴⁸ See *Fire Christian Center v. Greg Fischer*, cit.

¹⁴⁹ See *In re Abbott*, - F.3d -, 2020 WL 1685929 (5th Cir. Apr. 7, 2020); V.C. BRANNON, *Banning Religious Assemblies*, cit., pp. 1-5.

¹⁵⁰ See *Fire Christian Center v. Greg Fischer*, cit.

¹⁵¹ See *Fire Christian Center v. Greg Fischer*, cit.

¹⁵² See *Fire Christian Center v. Greg Fischer*, cit.

¹⁵³ See *Fire Christian Center v. Greg Fischer*, cit.



respect to analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree¹⁵⁴. Louisville's actions seem disproportionate because the public interest in preventing religious adherents from spreading COVID-19 would be achieved by welcoming the accommodation proposed by the religious organization, namely drive-in religious services. So the strict scrutiny test was not satisfied, as religious drive-in services received a harsher treatment than non-religious gatherings¹⁵⁵.

However, in relation to a San Diego order forbidding religious assemblies, the California federal court refused to afford a church a similar exemption for drive-in services, even though the municipality allowed gatherings for several other businesses. The federal judge held that the order, as a law of general applicability, could survive the *Smith* standards. The California government had an overriding interest in protecting public health from an imminent threat and the church could provide streaming services¹⁵⁶. It now appears that San Diego county is modified its previous precautionary measures and allows drive-in church services, provided that social distancing is guaranteed¹⁵⁷.

10 - Third-party burdens and the successful nondiscrimination approach

Case law shows that the possibility that religious accommodation can detrimentally affect third parties has to receive equal serious consideration. The neutrality rule, grounded on the establishment clause, prohibits government not only from targeting religious groups for discriminatory treatment, but also from granting religious exemptions that would have a serious negative impact on nonbeneficiaries: the latter situation would result in a preferential treatment of religion over the rights and interests of nonbeneficiaries, thereby infringing the establishment clause¹⁵⁸. The free exercise case law complied with this rationale, showing that religious exceptions that significantly impact on

¹⁵⁴ See *Fire Christian Center v. Greg Fischer*, cit.; V.C. BRANNON, *Banning Religious Assemblies*, cit., 1-5.

¹⁵⁵ See *Fire Christian Center v. Greg Fischer*, cit.

¹⁵⁶ See V.C. BRANNON, *Banning Religious Assemblies*, cit., 1-5.

¹⁵⁷ See G. MORAN, *San Diego County says it will allow drive-in church services*, in *The San Diego Union Tribune*, 22 April 2020 (<https://www.sandiegouniontribune.com/news/courts/story/2020-04-22/san-diego-county-says-it-will-allow-drive-in-church-services>).

¹⁵⁸ See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).



others are not constitutionally viable. The Supreme Court established that a religious accommodation “must be measured so that it does not override other significant interests”¹⁵⁹ and must not “impose substantial burdens on nonbeneficiaries”¹⁶⁰, with the only exceptions being matters that fall into the exclusive purview of religious organizations¹⁶¹.

The issue of third-party burdens arose in another case¹⁶², where some Kentucky residents claimed an exemption from Kentucky’s Cabinet for Health and Family Services order, which temporarily prohibited mass gatherings.

In the Kentucky case, a national nonsectarian organization (Americans United for Separation of Church and State) filed an amicus brief, arguing that it would be unconstitutional to exempt religious gatherings from the order and to exempt from quarantine those who have attended religious gatherings. The amicus brief argues that the order complies with the standards defined by the Supreme Court in *Smith*, which held that “general applicable laws reflecting no discriminatory intent toward religion do not violate the Free Exercise Clause”¹⁶³. In the present case, the challenged measures applied to all mass gatherings, including religious ones, with the only exception being essential activities; and there is no government intention to discriminate against religion by targeting only religious activities for failing to follow the precautionary measures. In addition, according to the brief, the order would be consistent even with the heightened review under the compelling state interest test, “because the challenged public-health measures are narrowly tailored to advance the compelling governmental interest in protecting Kentucky residents from a deadly disease”¹⁶⁴. Finally, the *amicus curiae* emphasized that the establishment clause forbids the government from imposing harms on third parties when it recognizes a religious exemption, as it would “impermissibly favor the benefited religion and its adherents

¹⁵⁹ See *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)

¹⁶⁰ See *Texas Monthly, In. v. Bullock*, 489 U.S. 1, 18, n.8 (plurality opinion).

¹⁶¹ See *Hosanna-Tabor Lutheran Evangelical Church & School v. EEOC*, 565 U.S. 171, 194-95 (2012), **S.H. BARCLAY**, *First Amendment “Harms”*, cit., pp. 343-345.

¹⁶² See *Roberts, et al., v. Neace, et al.*, No. 2:20-cv-054, ECF. No. 46 (E.D. Ky. May 4, 2020), *appeal docketed*, No. 20-5465 (6th Cir. May 5, 2020).

¹⁶³ See *Roberts, et al., v. Neace, et al.*, cit., Brief of Americans United for Separation of Church and State as Amicus Curiae in Opposition to Plaintiffs’ Emergency Motion for Preliminary Injunction and/or Temporary Restraining Order.

¹⁶⁴ See *Roberts, et al., v. Neace, et al.*, Brief of Americans United for Separation of Church and State, cit.



over the rights, interests, and beliefs of the nonbeneficiaries¹⁶⁵. It is remarkable that the *amicus curiae* relies on other courts' decisions that rejected similar challenges, not only concerning claims for religious exemptions, but also exceptions for firearms businesses¹⁶⁶.

However, it seems, once again, that where claims focus on the non-discrimination standards, which imply courts triggering strict scrutiny review, this approach is successful where states permit comparable gatherings, and prevails over third-party burden concerns.

In the Kentucky case, in fact, the Sixth Circuit Court of Appeals eventually prohibited the enforcement of the executive order, finding that restrictions on drive-in and in-person worship services violated the First Amendment when "serial exemptions for secular activities pose comparable public health risks"¹⁶⁷. The court recognized that "on one side of the line, a generally applicable law that incidentally burdens religious practice usually will be upheld"¹⁶⁸. However, the court found that the Kentucky order

"likely fall[s] on the prohibited side of the line", as "a law that discriminates against religious practices usually will be invalidated because it is the rare law that can be justified by a compelling interest and is narrowly tailored to advance that interest"¹⁶⁹. Furthermore "the Governor has offered no good reason for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the

¹⁶⁵ See *Roberts, et al., v. Neace, et al.*, Brief of Americans United for Separation of Church and State, cit.

¹⁶⁶ See *Maryville Baptist Church v. Beshear*, No. 3:20-cv-278-DJH-RSE, 2020 WL 2393359 (W.D. Ky. May 8, 2020): although it previously denied the temporary restraining order, the court later granted preliminary injunction. The court eventually held that the governor failed to meet the burden to prove the less restrictive means under the strict scrutiny standard: "The Governor fails, however, to present any evidence or even argument that there was no other, less restrictive, way to achieve the same goals". The court also held plaintiffs were likely to succeed on merits of free exercise and Kentucky RFRA claims for both drive-in and in-person services. See also *Legacy Church v. Kunkel*, No. 1:20-cv-327, ECF No. 29 (D.N.M. Apr. 17, 2020) *Tolle v. Northam*, No. 1:20-cv-00363-LMB-MSN, ECF No. 9 (E.D. Va. Apr. 8, 2020) *Nigen v. New York*, No. 1:20-cv-1576-EK-PK, ECF No. 7 (E.D.N.Y. Mar. 29, 2020); *Binford v. Sununu*, No. 217-2020-CV-152 (N.H. Super. Ct. Mar. 25, 2020); *Friends of Danny DeVito v. Wolf*, No. 68 MM 2020, _ A.3d _, 2020 WL 1847100, at *1 (Pa. Apr. 13, 2020); *Civil Rights Defense Firm v. Wolf*, No. 63 MM 2020, _ A.3d_, 2020 WL 1329008, at *1 (Pa. Mar. 22, 2020); *Brandy v. Villanueva*, No. 2:20-cv-2874, ECF No. 29 (C.D. Cal. Apr. 9, 2020).

¹⁶⁷ See *Roberts, et al., v. Neace, et al.*, cit.

¹⁶⁸ See *Roberts, et al., v. Neace, et al.*, cit.

¹⁶⁹ See *Roberts, et al., v. Neace, et al.*, cit.



same. The limitations cannot even be justified by the fact that religious congregations can gather online as the free exercise clause does not protect sympathetic religious practices alone” and “the federal courts are not to judge how individuals comply with their own faith as they see it”¹⁷⁰.

Similarly, the Eastern District of North Carolina issued a temporary restraining order prohibiting the North Carolina governor from enforcing a 10-person limit on religious worship (even though religious worship was categorized within essential businesses and operations) because it violated the free exercise clause. This case is not about drive-in services, but about strict size requirements; in any event, the issue of discrimination was raised again. The church claimed that the 10-person limit for worship gatherings “represent[s] precisely the sort of ‘subtle departures from neutrality’ that the free exercise clause is designed to prevent”¹⁷¹.

The court declared that “there is no pandemic exception to the Constitution of the United States or the free exercise clause of the First Amendment”, and further argued that “these glaring inconsistencies between the treatment of religious entities and individuals and non-religious entities and individuals take [the orders] outside the ‘safe harbor for generally applicable laws’”¹⁷². Furthermore, the North Carolina orders’ “impossibility” exception to the 10-person limit raises further constitutional concerns about strictly religious matters¹⁷³.

¹⁷⁰ See *Roberts, et al., v. Neace, et al.*, cit.

¹⁷¹ See *Berean Baptist Church, Return America, Inc., et al., v. Governor Roy A. Cooper, III*, No. 4:20-CV-81-D, United States District Court for the Eastern District of North Carolina.

¹⁷² See *Berean Baptist Church, Return America, Inc., et al., v. Governor Roy A. Cooper, III*, cit.

¹⁷³ See *Berean Baptist Church, Return America, Inc., et al., v. Governor Roy A. Cooper, III*, cit.: “the Guidance then states that the 10-person indoor attendance limit does not apply if it is ‘not possible’ to meet outdoors...The Guidance then gives an example of impossibility to include when ‘particular religious beliefs dictate that some or all of a religious service must be held indoors and that more than ten persons must be in attendance’”. The *Berean Baptist Church* case raised the crucial question of “who decides whether a religious organization or group of worshipers correctly determined that their religious beliefs dictated the need to have more than 10 people inside to worship”? The Court underlined that “Under [the orders], the answer is a sheriff or another local law enforcement official. This court has grave concerns about how that answer comports with the Free Exercise Clause”. See also *Tabernacle Baptist Church, Inc. v. Beshear*, No. 3:20-cv-00033- GFVT, 2020 WL 2305307, (E.D. Ky. May 8, 2020) (statewide temporary restraining order), where the court emphasized that “there is ample scientific evidence that COVID-19 is exceptionally contagious. But evidence that the risk of contagion is heightened in a religious setting any more than a secular one is lacking. If social distancing is good



However, it cannot be underestimated that the health crisis has given rise to many disparate religious and controversial claims, which risk weakening religious freedom advocacy.

In May 2020, the owner of a faith-based business filed a lawsuit against a state stay-at-home-order, claiming an infringement of her constitutional right to exercise her religious freedom and freedom of speech. According to the claimant, she “has sincerely held religious beliefs in the Scriptures, and lives her life in an attempt to incorporate her faith into her everyday life”, so the closure of her activity because of the restraining orders, that

“impermissibly burden [her] sincerely held religious beliefs, compel [her] to either change her beliefs or to act against them, and force [her] to choose between the teachings and requirements of her sincerely held religious beliefs and the obedience of the Orders”¹⁷⁴.

The orders were claimed by the plaintiff to be “under-inclusive [because they limited] their gathering prohibitions to only certain businesses or organizations deemed ‘essential’ or who Defendant Governor Evers or Defendant Secretary Palm has decided is ‘deserving’”¹⁷⁵. This case is one in the growing number of faith-based business corporations that claim that government cannot force them to be involved in activities that contradict their religious beliefs.

In addition, in April 2020, a candidate for government filed an individual motion against the Washington stay-at-home order, which included religious gatherings. The plaintiff claimed that the Washington Temporary Restraining Order prevented him from holding meetings with only one person to pray and read the Scripture, even though all the precautionary measures were taken, whereas similar social interaction was permitted to continue in some business premises¹⁷⁶.

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enough for Home Depot and Kroger, it is good enough for in-person religious services, which, unlike the foregoing, benefit from constitutional protection”.

¹⁷⁴ See *Kindom Knuts, and Jessica Netzel v. Anthony S. Evers, et al.*, Case No. 1:20-cv-0723, United States District Court, Eastern District of Wisconsin, Northern Division.

¹⁷⁵ See *Kindom Knuts, and Jessica Netzel v. Anthony S. Evers, et al.*, cit.

¹⁷⁶ See *Joshua Freed v. Jay Inslee*, The United States District Court, Western District of Washington, No.: 2:20-cv-00599-TLF.



Legal disputes over orders that impact upon religious meetings are unlikely to disappear in the short term, as some conservative groups are soliciting the re-opening of churches, while respecting sanitization, size requirements and distancing measures, in accordance with the Trump Administration's schedule for phase two.

Given the difficulty of reconciling conflicting rights, different sides have sought a congressional intervention on the issue of federal precautionary measures. Some lawmakers suggested a strict federal stay-at-home order, whereas some ideological groups want a congressional measure that guarantees a uniform protection of religious practice across the nation during the pandemic emergency¹⁷⁷ so that religious assemblies don't suffer any "unequal treatment" or any "special disability" because of their "religious status", compared with secular businesses¹⁷⁸. Certain ideological groups ask for the congressional powers in Section 5 of the 14th Amendment to be used¹⁷⁹. However, a trajectory of this kind (Congress using the powers in section 5) risks opening another constitutional conundrum, as the Supreme Court has clarified the "limited alternatives" that Congress enjoys "in protecting religious freedom against local and state infringement"¹⁸⁰. The crucial question is whether a federal intervention in this controversial matter (religious freedom during the time of COVID-19) can be included within the "narrowly tailored legislation under section 5" granted to Congress on the basis of the Fourteenth Amendment¹⁸¹.

The unparalleled health crisis has also led to several United States Department of Justice (DoJ) interventions in many religious liberty cases. These interventions solicit the relaxations of COVID-19 measures, claiming that a discriminatory treatment is imposed on religious activities, compared to that of secular businesses¹⁸².

At first, the DoJ upheld the churches' position, that being that they need protection against unequal treatment, when it addressed a statement

¹⁷⁷ See **V.C. BRANNON**, *Banning Religious Assemblies*, cit., pp. 1-5.

¹⁷⁸ See *Trinity Lutheran Church of Columbia, Inc., v. Comer*, cit.

¹⁷⁹ See **V.C. BRANNON**, *Banning Religious Assemblies*, cit., pp. 1-5.

¹⁸⁰ See **D.O. CONKLE**, *Congressional Alternatives in the Wake of City of Boerne v. Flores: the (Limited) Role of Congress in Protecting Religious Freedom from Local and State Infringement*, in *UALR Law Journal*, vol. 20, 1998, pp. 633-688.

¹⁸¹ See **D.O. CONKLE**, *Congressional Alternatives in the Wake of City of Boerne v. Flores*, cit., pp. 633-688..

¹⁸² See **A. C. MCCARTHY**, *It wasn't just religious liberty that Chief Justice Roberts strangled*, in *The Hill*, 31 May 2020 (<https://thehill.com/opinion/judiciary/500315-it-wasnt-just-religious-liberty-that-chief-justice-roberts-strangled>).



of interest in support of the plaintiff (a conservative group) in a federal trial court in Mississippi¹⁸³. Relying on the *Jacobson* decision, the DoJ took the view that the Constitution does not prevent government from taking necessary, temporary measures to meet a genuine emergency¹⁸⁴. The DoJ also noted that “there is no pandemic exception [...] to the fundamental liberties the Constitution safeguards” and held that a local measure (in contradiction to the state order that qualified religious activities as “essential”) banning drive-in church services implied a discriminatory treatment of religious organizations as the city “fail[ed] to prohibit nonreligious conduct that endangers [its] interests in a similar or greater degree”¹⁸⁵. As the various abovementioned provisions in relation to drive-in worship services seem to be neither neutral nor generally applicable, but seem to single out religious activities for distinctive treatment, a heightened standard of analysis under the free exercise clause should be required in judicial review. However, the Mississippi RFRA seems to excessively burden churches’ exercise of their religion. The question is why banning drive-in church services has to be considered the least restrictive means of protecting public health, as the city allowed other secular activities that pose an equal risk¹⁸⁶. According to the U.S. DoJ

¹⁸³ As a result the mayor of Greenville stated that drive-in services can be attended, provided that precautionary measures are complied with (social distancing and windows closed). See **E. WAGSTER PETTUS**, *Mayor: Drive in Church, with windows up, ok during the pandemic*, in *AP News*, in 15 April 2020 (<https://apnews.com/6f0b7d442d40e024f257d079986b51ee>). Another mayor in Tennessee reversed his previous stay-at-home order too so as to allow drive-in services, after a filesuit had been filed against the ban. See *Tennessee city allows drive-in church services after a lawsuit*, in *Ap news* 18 April 2020 (<https://apnews.com/c4471567e09afbc26bd7b62341dd7497>).

¹⁸⁴ See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 29 (1905).

¹⁸⁵ *The United States’ Statement of Interest In Support of Plaintiffs, Temple Baptist Church v. City of Greenville*, United States District Court for the Northern District of Mississippi, Case No. 4:20-cv-64-DMB-JMV. “The court should apply heightened scrutiny under the free exercise clause if it determines, after applying appropriate deference to local officials, that the church has been treated by the city [or state] in a non-neutral and generally non-applicable manner... if the court determines that the city’s [or state’s] prohibition is not in fact the result of a neutral and generally applicable law or rule, then the court may sustain it only if the city [or state] establishes that its action is the least restrictive means of achieving a compelling governmental interest”. Furthermore, the Fifth Circuit Court of Appeals granted an Injunction Pending Appeal to a Mississippi church enjoining enforcement of the Mississippi governor’s order restricting worship in *First Pentecostal Church v. City of Holly Springs, Miss.*, No. 20-60399, 2020 WL 2616687 (5th Cir. 22 May 2020).

¹⁸⁶ See **V.C. BRANNON**, *Banning Religious Assemblies*, cit., pp. 1-5.



“the Court should apply heightened scrutiny under the free exercise clause if it determines, after applying appropriate deference to local officials, that the church has been treated by the city [or state] in a non-neutral and generally non-applicable manner [...] if the Court determines that the city's [or state's] prohibition is not in fact the result of a neutral and generally applicable law or rule, then the Court may sustain it only if the city [or state] establishes that its action is the least restrictive means of achieving a compelling governmental interest”¹⁸⁷.

In May 2020, the DOJ filed a similar statement in support of a small congregation in Virginia, which had filed a Motion for an Injunction Pending Appeal, claiming its right to hold religious gatherings, provided that precautionary measures are taken, as the Virginia Order exempts various secular activities resulting in gatherings of more than 10 people¹⁸⁸. The Virginia Department of Justice also relied on the abovementioned *Lutheran Church of Columbia* ruling, which underlined that the free exercise clause prevents the government from targeting religious organizations for special restrictions because of their religious identity¹⁸⁹.

The U.S. DoJ's various interventions show that limitations on religious freedom can involve federal agencies.

These interventions underlined one of the main differences between claims concerning the exclusion of religious organizations from the range of “essential activities” and claims concerning religious organizations that were subject to an unequal treatment in comparison with secular activities within the same geographical context¹⁹⁰. Where state laws provide an equal treatment to secular and nonsecular institutions, the Supreme Court has upheld that public health laws can impose restrictions on the exercise of religious freedom in the light of a general interest¹⁹¹. However, religious organizations cannot be subject to selective discriminatory treatment¹⁹².

The U.S. DoJ welcomed the approach that an unprecedented pandemic can justify a rational basis test when reviewing state actions and

¹⁸⁷ See *The United States' Statement of Interest In Support of Plaintiffs, Temple Baptist Church v. City of Greenville*, United States District Court for the Northern District of Mississippi, cit.

¹⁸⁸ See *The United States' Statement of Interest in Support of Plaintiff's Motion For an Injunction Pending Appeal, Lighthouse Fellowship Church v. Ralph Northam*, United States District Court Eastern District of Virginia, Case No. 2:20-cv-00204-AWA-RJK.

¹⁸⁹ See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017).

¹⁹⁰ See **D. MESSERE MAGEE**, *The Constitution*, cit., pp. 11-14.

¹⁹¹ See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 29 (1905).

¹⁹² See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, cit.



a high level of deference to experts' opinion, and only extremely "arbitrary" "oppressive" exercise of executive powers can justify the "interference of the courts"¹⁹³. "[Only then is it] the duty of the courts to so adjudge, and thereby give effect to the Constitution"¹⁹⁴.

The crucial question is whether federal intervention can facilitate the reconciliation of competing interests or whether it risks increasing the current tension over the precautionary measures. The presidential use of religion as a "cultural wedge" enflaming an "atmosphere already saturated with polarizing rhetoric" cannot be underestimated¹⁹⁵. In May 2020, Trump identified churches as "essential services" and solicited their reopening, threatening to "override governors" who did not do so¹⁹⁶.

12 - Supreme Court intervention in temporary state restrictions on religious assemblies

It is within this controversial framework that the U.S. Supreme Court faced the critical question of whether, and to what degree, executive powers are allowed to restrict fundamental liberties that are grounded in Constitution because of the need to preserve the public welfare during an extremely severe pandemic.

On 29 May 2020, in a five to four decision, the Supreme Court rejected a challenge by a California church (*South Bay United Pentecostal Church*), seeking to block a ruling of the court of appeals¹⁹⁷ about the enforcement of further COVID-19 restrictions relating to religious gatherings¹⁹⁸. On 22 May, President Trump announced that all states must immediately lift their restrictions on places of worship. Then, on 25 May 2020, Governor Newsom, the California Governor, issued new safety guidelines specifically relating to "Places of Worship and Providers of

¹⁹³ See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 38 (1905).

¹⁹⁴ See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 31 (1905).

¹⁹⁵ See. **L GREENHOUSE**, *The Supreme Court, Too, in on the Brink*, in *The New York Times*, 4 June 2020 (<https://www.nytimes.com/2020/06/04/opinion/sunday/supreme-court-religion-coronavirus.html>).

¹⁹⁶ See Press Briefing by Press Secretary Kayleigh McEnany, 23 May 23, 2020 (<https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-kayleigh-mcena-ny-052220/>).

¹⁹⁷ See *South Bay United Pentecostal Church, et al., v. Gavin Newsom, Governor of California, et al.*, No. 20-55533, United States Court of Appeals for the Ninth Circuit, 22 May 2020.

¹⁹⁸ See *South Bay United Pentecostal Church, et al., v. Gavin Newsom, Governor of California, et al.*, 590 U.S._ (2020).



Religious Services and Cultural Ceremonies". The new guidelines specified how and when places of worship could reopen in California. The measures limited attendance at houses of worship to 25 percent of building capacity or a maximum of 100 people¹⁹⁹. The plaintiffs sought injunctive relief against the order so as to be permitted to hold worship services during Pentecost Sunday (31 May 2020), by virtue of their commitment to adhere to the neutral social distancing requirements that apply in the County of San Diego which allow certain commercial establishments, like grocery stores, to operate under more flexible guidelines that do not impose percentage caps. The church claimed that churches and secular businesses are treated differently, which is an infringement of the First Amendment.

Although the judges were split over whether public health measures can justify exemptions in the name of religious freedom, the *Jacobson* rationale remained the cornerstone of the decision, governing the balance between the safeguarding of public health and the protection of fundamental liberties. According to the Chief Justice's opinion, the restrictions are consistent with the free exercise clause as similar restrictions apply to "comparable" secular activities "where large groups of people gather in close proximity for extended periods of time"²⁰⁰. Exemptions or more lenient treatment concern "dissimilar" activities "in which people neither congregate in large groups nor remain in close proximity for extended periods"²⁰¹. Joining the liberal wing of the Court, Roberts (the Chief Justice) declared that "[t]he safety and the health of the people" has to be given precedence. According to Roberts "the precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement"²⁰². The solution of such question is therefore entrusted to "the politically accountable officials of the states"²⁰³. When those officials "undertake [...] to act in areas fraught with medical and

¹⁹⁹ See **CALIFORNIA DEPARTMENT OF PUBLIC HEALTH**, *Covid-19 Industry Guidance: Places of Worship and Providers of Religious Services and Cultural Ceremonies*, 23 May 2020.

²⁰⁰ See *South Bay United Pentecostal Church, et al., v. Gavin Newsom, Governor of California, et al.*, 590 U.S._ (2020).

²⁰¹ See *South Bay United Pentecostal Church, et al., v. Gavin Newsom, Governor of California, et al.*, 590 U.S._ (2020).

²⁰² See *South Bay United Pentecostal Church, et al., v. Gavin Newsom, Governor of California, et al.*, 590 U.S._ (2020).

²⁰³ *Jacobson v. Massachusetts*, 197 U. S. 11, 38 (1905).



scientific uncertainties²⁰⁴, their freedom of action “must be especially broad”²⁰⁵. Furthermore,

“where those broad limits are not exceeded, they should not be subject to second-guessing by an ‘unelected federal judiciary,’ which lacks the background, competence, and expertise to assess public health and is not accountable to the people”²⁰⁶.

So for this reason, the claim that the state measures are unconstitutional seems “improbable”²⁰⁷. The decision confirms the judgement of the court of appeals, which found that in the present case churches had not been singled out for discriminatory treatment and a correct balance between competing interests has been reached. Making reference to another milestone Supreme Court test case²⁰⁸, the court of appeals declared that:

“We’re dealing here with a highly contagious and often fatal disease for which there presently is no known cure [...] if a court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact”²⁰⁹.

²⁰⁴ *Marshall v. United States*, 414 U. S. 417, 427 (1974).

²⁰⁵ *Marshall v. United States*, cit.

²⁰⁶ *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 545 (1985).

²⁰⁷ See *South Bay United Pentecostal Church, et al., v. Gavin Newsom, Governor of California, et al.*, 590 U.S._ (2020).

²⁰⁸ See *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) (dissenting opinion of Robert Jackson).

²⁰⁹ However, in his dissenting opinion, Judge Daniel P. Collins wrote that California had failed to comply “with its constitutional duty to accommodate a critical element of the free exercise of religion - public worship [...]. I do not doubt the importance of the public health objectives that the state puts forth [...] but the state can accomplish those objectives without resorting to its current inflexible and overbroad ban on religious services”. He underlined that the *South Bay United Pentecostal Church, et al.* decision “has established a very strong likelihood of success on the merits of this claim”. California relied on “no authority that can justify its extraordinary claim that the current emergency gives the Governor the power to restrict any and all constitutional rights”. California did not simply “proscribe specific forms of underlying physical conduct that it identified as dangerous, such as failing to maintain social distancing or having an excessive number of persons within an enclosed space”. Instead, it “presumptively prohibited California residents from leaving their homes for any reason”, other than when an exception “granted back the freedom to conduct particular activities or to travel back and forth to such activities”. San Diego County allowed the reopening of many secular activities; nevertheless, “religious services” are included in a wider class along with “movie theaters” and other “personal & hospitality services”. According to Judge Collins the postponement of the reopening of in-person “religious services” to a future stage without any further indication expressly implies that the state “discriminates on its face against



In his dissenting opinion, Justice Kavanaugh complained that Roberts' opinion supported "a narrative of invidious religious discrimination"²¹⁰. According to Kavanaugh, the claimant suffered the imposition of a worse treatment, compared to other secular activities, because of its religious status, and the church "would suffer irreparable harm from not being able to hold services on Pentecost Sunday in a way that comparable secular businesses and persons can conduct their activities"²¹¹. Even though the State of California has a compelling interest in combating the spread of the COVID-19, Kavanaugh said the state needed to provide a

"compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap;" also, the state cannot "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings"²¹².

The Supreme Court intervention, despite its merely procedural nature, raised a fierce debate.

The judges split on a crucial question, that is the role of the judiciary, namely whether the current health crisis requires a deferential attitude toward representatives of the will of specific people or whether it justifies a more interventionist role on the part of the judiciary, which would substitute its judgement in place of democratically elected

religious conduct". This would result in an absolute ban on religious services even though they respect the same guidelines that allow the reopening of secular activities.

According to Judge Collins, religious discrimination results from the circumstance "that the very same people who cannot be trusted to follow the rules at their place of worship can be trusted to do so at their workplace and that the state cannot assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings". See *South Bay United Pentecostal Church, et al., v. Gavin Newson, Governor of California, et al.*, No. 20-55533, United States Court of Appeals for the Ninth Circuit, 22 May 2020.

²¹⁰ See *South Bay United Pentecostal Church, et al., v. Gavin Newson, Governor of California, et al.*, 590 U.S._ (2020). It is interesting to notice that Justices Gorsuch and Thomas signed Justice Kavanaugh's opinion, Justice Alito did not. See **M.J. STERN**, *Roberts Upholds COVID-19 Restrictions on Churches, Scolds Kavanaugh*, in *Slate*, 30 May 2020 (<https://slate.com/news-and-politics/2020/05/supreme-court-coronavirus-california-churches.html>).

²¹¹ See *South Bay United Pentecostal Church, et al., v. Gavin Newson, Governor of California, et al.*, 590 U.S._ (2020).

²¹² See *South Bay United Pentecostal Church, et al., v. Gavin Newson, Governor of California, et al.*, 590 U.S._ (2020).



powers²¹³. This question has not only legal, but also political implications as the issue concerning the “special” nature of religion is currently at the center of an increasing debate. In the *South Bay United Pentecostal Church* case the state asked the Court to decline to issue an injunctive order, as provisions were about to expire or to be replaced by more lenient measures²¹⁴. However, Justice Roberts declined to adopt a more cautious approach, which would have avoided facing controversial constitutional issues, and felt necessary to explain, in an opinion of his own, why the Court dismissed the church’s claim.

Immediately, some commentators claimed that although the Court is inclined to protect new rights (gay rights, abortion rights), it seems to adopt a self-restraint attitude when a well-established basic freedom is at stake²¹⁵; specifically, the Chief Justice was accused of “faux judicial modesty”²¹⁶. Commentators also raised concerns about whether such extensive government powers contradict the Bill of Rights, and about the incorporation of jurisprudence that the Supreme Court case applied to the state in the California case²¹⁷. However, Roberts’ opinion emphasized the power of government officials, during a health crisis, to impose rules of conduct on those who elected them, thus excluding “second-guessing by an unelected federal judiciary”, showing, once again, that the *Jacobson* rationale is far from overruled²¹⁸. It cannot be underestimated that although strict orders during a health crisis are generally issued without any explanation, the Chief Justice appears to have considered it important to openly and strongly reject the dissent logic, which inclines to a more benevolent attitude toward majority narratives (and their holidays)²¹⁹.

This decision shows, once again, a highly “ideologically polarized” Court²²⁰, where the Chief Justice increasingly plays the role of “the court’s

²¹³ See **L. GREENHOUSE**, *The Supreme Court*, cit.

²¹⁴ See **A. HOWE**, *Court declines to lift restrictions on crowds at church services*, in *Scotusblog*, 30 May 2020 (<https://www.scotusblog.com/2020/05/court-declines-to-lift-restrictions-on-crowds-at-church-services/>).

²¹⁵ See **A.C. MCCARTHY**, *It wasn’t just*, cit.

²¹⁶ **EDITORIAL BOARD**, *The Roberts rule on Churches*, in *WSJ*, 31 May 2020 (<https://www.wsj.com/articles/the-roberts-rule-on-churches-11590959039>).

²¹⁷ See **A.C. MCCARTHY**, *It wasn’t just*, cit.

²¹⁸ See *South Bay United Pentecostal Church, et al., v. Gavin Newsom, Governor of California, et al.*, 590 U.S. (2020).

²¹⁹ See **L. GREENHOUSE**, *The Supreme Court*, cit.

²²⁰ See **M.O. DE GIROLAMI**, *Constitutional Contraction: Religion and the Roberts Court*, in **P. ANNICCHINO** (ed.), *La Corte Roberts e la tutela della libertà religiosa*, European University Institut, Fiesole, 2017, p. 23.



ideological center”, often exercising the “deciding vote”²²¹. In the California case, Roberts tried to reconcile his conservative attitude with his institutional perspective, so as to prevent the highest judicial board from being dragged in a political conundrum, and thereby losing its credibility²²². However, four conservative judges, two of them appointed by the President, preferred to undermine public policies, using the Court’s powers to support an alleged religious discrimination.

In any event, both wings of the Supreme Court appeared to start from the assumption that religious activities are to be put at the same level as secular businesses during a pandemic crisis, which indicated that the *Smith* approach is fully welcomed.

The main difference between the two opinions seems to turn on the identification of the most appropriate secular comparator when assessing whether religious discrimination can be identified. The case, in fact, raises concern about secular activities to which religious gatherings have to be compared. The judges wondered if religious gatherings are more similar to grocery stores, where people stay as little time as possible, and “neither congregate in large groups nor remain in close proximity for extended periods”, or to concerts “where large groups of people gather in close proximity for extended periods of time”²²³. According to Roberts, religious gatherings require stricter rules than certain secular activities, such as shopping, banking and so on, because of the way they are conducted, which raises further concerns (staying in close proximity, for longer times, singing and speaking at worship services, all “increasing the danger” as people who potentially infected will “project respiratory droplets that contain the virus”)²²⁴.

Consequently, during a severe health crisis a basic freedom enjoying constitutional protection can have severe restrictions, where its accommodation seems not “reasonable”. According to Roberts, absolute

²²¹ See **J. KRUZEL, H. NEIDING**, *The 7 Most Anticipated Supreme Court Decisions*, in *The Hill*, 7 June 2020 (<https://thehill.com/regulation/court-battles/501437-the-7-most-anticipated-supreme-court-decisions>); **C. GRAZIANI**, *Libertà di culto e pandemia*, cit., pp. 357-368.

²²² According to **H. HOTTERBEIN**, *Liberal groups black plan to expand Supreme Court*, in *Politico*, 11 June 2020 (<https://www.politico.com/news/2020/06/11/liberal-groups-expand-supreme-court-plan-313037>), progressive organizations aim to support the appointment of new judges in the Supreme Court in order to weaken the conservative majority.

²²³ See *South Bay United Pentecostal Church, et al., v. Gavin Newson, Governor of California, et al.*, 590 U.S. (2020).

²²⁴ See *South Bay United Pentecostal Church, et al., v. Gavin Newson, Governor of California, et al.*, 590 U.S. (2020).



precedence has to be given to protecting health in the face of “a novel severe acute respiratory illness”, which has “killed [...] more 100,000 people nationwide”, and for which “there is no known cure, no effective treatment, and no vaccine”²²⁵.

Another concern is whether this decision may have an impact on the views of the lower courts. However, as there is no majority opinion, the nature of the judgement (a request for emergency injunctive relief that “demands a significantly higher justification than a stay”), the varying restrictive measures from state to state, the absence of a clear explanation of the distinction among different activities, and the purpose of restrictions indicate that lower courts are unlikely to be strictly bound by the decision²²⁶.

Two Romanian-American Christian churches in the Chicago area filed a similar lawsuit, asking the Supreme Court to issue a similar order for injunctive relief²²⁷. The churches claimed that Illinois’s stay-at-home and reopening plan, which imposed a 10-person limitation on worship services, infringed the Constitution. Specifically, they noted a crucial conflict of loyalty for religious adherents, who

“face an impossible choice: skip [church] service[s] in violation of their sincere religious beliefs, or risk arrest [...] or some other enforcement action for practicing those sincere religious beliefs”, and claiming that “the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”²²⁸.

In this case, the claim was founded not only on the free exercise clause, but also on 1) on the state RFRA (Illinois Religious Freedom Restoration Act)²²⁹, the express purpose of which is

“to restore the compelling-interest test as set forth in [*Yoder*] and [*Sherbert*], and to guarantee that a test of compelling governmental interest will be imposed on all state [...] laws, ordinances, policies, procedures, practices, and governmental actions in all cases in which

²²⁵ See *South Bay United Pentecostal Church, et al., v. Gavin Newson, Governor of California, et al.*, 590 U.S. (2020).

²²⁶ See **CHRISTIAN LEGAL SOCIETY, CENTER FOR LAW AND RELIGIOUS FREEDOM**, *Covid 19 and religious freedom* (<https://clsreligiousfreedom.org/covid19freedom>).

²²⁷ See *Elim Romanian Pentecostal Church, et al., Applicants v. J. B. Pritzker, Governor of Illinois*, No. 19A1046, May 27, 2020.

²²⁸ See *Elim Romanian Pentecostal Church, et al., Applicants v. J. B. Pritzker, Governor of Illinois*, cit.

²²⁹ See Ill. Rev. Stat. Ch. 775, §35/1, et seq.



the free exercise of religion is substantially burdened [and] to provide a claim [...] to persons whose exercise of religion is substantially burdened by government”;

and 2) on the establishment clause, because the government’s orders

“purport to impose on Churches what worship the Governor deems acceptable-designating religious worship as an ‘Essential Activity’ but in the same provision effectively banning it except for drive-in or online services”²³⁰.

This case seems the first time during the health crisis that the churches grounded their claims on the nondiscrimination provision of the RLUIPA. The churches claimed that the state orders were in contradiction with this Act, which provides that no government can

“impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion”, when the orders “imposed a blanket 10-person restriction on Churches and religious gatherings that does not apply to other Essential Activities, and numerous less restrictive alternatives were available”²³¹.

They also claimed that the orders clashed also with exclusions and limits provision of the same Act, which provides that no government can enact a land use regulation “that [...] totally excludes religious assemblies from a jurisdiction; or [...] unreasonably limits religious assemblies, institutions, or structures within a jurisdiction”, which occurs when provisions have “the effect of depriving both [Churches] and other religious institutions or assemblies of reasonable opportunities to practice their religion, including the use and construction of structures”²³². In the Illinois case, the plaintiff churches claimed that

“the Orders have unquestionably deprived Churches of the use of their facilities to host worship services with more than 10 people, despite Churches’ promises and ability to abide by the social distancing and hygiene protocols sufficient for non-religious Essential Activities that are not subject to numerical limit”.

The Court reversed the claim with a short brief, as in the meanwhile the state loosened the restrictions concerning religious worship, thus avoiding the likelihood of facing many crucial challenges. However, the

²³⁰ See *Elim Romanian Pentecostal Church, et al., Applicants v. J. B. Pritzker, Governor of Illinois*, cit.

²³¹ See *Elim Romanian Pentecostal Church, et al., Applicants v. J. B. Pritzker, Governor of Illinois*, cit.

²³² See *Elim Romanian Pentecostal Church, et al., Applicants v. J. B. Pritzker, Governor of Illinois*, cit.



Court left open the possibility that the churches could file a new motion “if circumstances warrant”²³³.

13 - “Religious America” and “secular” Italy during COVID-19 phase one

At first glance, analysis contrasts, on the one hand, a “religious America” where religious exemptions were extensively provided at a state level during the early part pandemic crisis (even though with the introduction of size limits and precautionary measures), with, on the other hand, a “secular” Italy where some forms of collective exercise of religious freedom were, at least during phase one, denied²³⁴.

We could argue that in Italy, religion was not considered “special enough” to justify accommodation during the phase one of the health crisis. The Italian constitutional framework founded on church-state cooperation and the usual recognition of a high level of church autonomy did not influence the implementation of the precautionary measures, resulting in a severe suspension of the collective exercise of religious freedom. In the United States, however, lawmakers tried to balance health protection and religious accommodation more accurately so as to avoid discriminatory treatment of religious liberty when compared to that treatment of secular activities.

However, such analysis seems to contradict the usual stereotypical legal understanding of both systems: the United States as a model where church state relationships are founded on church-state separation (the so-called wall of separation) and Italy as a legal system where church-state relationships are ruled by bilateral agreements with the Catholic Church and the other religious denominations that are deeply rooted in the country.

Nevertheless, the situation is more complex than that, and different judicial reactions are affected by many things, which in turn leads to the dynamism of legal systems, which are affected by internal and external sociopolitical changes.

²³³ See *Elim Romanian Pentecostal Church, et al., Applicants v. J. B. Pritzker, Governor of Illinois*, cit.: “The application for injunctive relief presented to Justice Kavanaugh and by him referred to the Court is denied. The Illinois Department of Public Health issued new guidance on May 28. The denial is without prejudice to Applicants filing a new motion for appropriate relief if circumstances warrant”.

²³⁴ See **P. BERGER, G. DAVIS, E. FOCAS**, *Religious America, Secular Europe? A Theme and Variations*, Ashgate, Farnham-Burlington (VT), 2008.



In both legal systems, regardless of the established models of church-state relationships- be they separationist or cooperative-the pandemic crisis emphasized underlying judicial, political, sociocultural, and economic challenges, giving rise to a tension between competing rights and exacerbating concerns about the “special” role of religion (“exceptionalism”²³⁵ in the United States, the “primacy”²³⁶ in Italy), which continues to be the object of increasing debate. Plus such tension gave rise to further questions concerning the crucial interrelationship between law, religion, and COVID-19.

14 - Management of religious freedom during the pandemic and the lack or presence of a statute governing religious freedom

In both legal systems, in recent months the pandemic crisis emphasized the crucial question of “what degree” of religious freedom can be granted and the inadequacy of actual frameworks, which are increasingly subject to the complex dynamics between majority consent and minority claims, with democratic process leaving the latter dissatisfied, even though for different reasons²³⁷.

A key question is whether the presence or the lack of a statute governing religious freedom affected the management of the exercise of religious freedom during the pandemic in either or both countries.

For many years, the lack of updated legislative provisions aimed at bridging the gap between constitutional guarantees and increasingly pluralist demands for religious freedom and at finalizing the implementation of the constitutional framework has strongly affected the Italian model of church-state relationships²³⁸. Unfortunately, the robust

²³⁵ See D.R. HOOVER (ed.), *Religion and American Exceptionalism*, cit.

²³⁶ See S. BERLINGÒ, *Fonti del diritto ecclesiastico*, in S. BERLINGÒ, G. CASUSCELLI, S. DOMIANELLO, *Le fonti e i principi di diritto ecclesiastico*, Giappichelli, Torino, 2000, p. 3.

²³⁷ See A. MADERA, *Nuove forme di obiezione di coscienza*, cit., p. 1, and its bibliographical references; D.O. CONKLE, *Religion, Law and the Constitution*, LEG, St. Paul, 2016; J.A. NICHOLS, J. WITTE JR., *National Report Unites States of America: Religious Law and Religious Courts as a Challenge to the State*, in U. KISCHEL (ed.) *Religious Law and Religious Courts as a Challenge to the State. Legal Pluralism in Comparative Perspective*, Verlag Mohr Siebeck, Tübingen, 2016, p. 83.

²³⁸ See A. MADERA, *La definizione della nozione di religione ed il ruolo della giurisprudenza: una comparazione fra l'ordinamento statunitense e quello italiano*, in *Anuario de Derecho Eclesiástico del Estado*, vol. 34, 2018, p. 563, and its bibliographical referencespp.



academic and judicial debate concerning the “substantive” nature of Article 19 of the Constitution underestimated its inability to cover the various demands for positive religious freedom and to make the exercise of religious freedom effective, without a law filling in the details of the constitutional framework²³⁹.

The historical lack (despite several political attempts to produce bills, which never received final approval) of a unilateral statute providing a basic level of religious freedom to every religious community resulted in the overexpansion of the use of bilateral negotiations, the borders of which risk becoming increasingly blurred and overlapping with matters that should be governed unilaterally by lawmakers²⁴⁰. This overexpansion resulted in the development of a peculiar methodological path: on one hand, bilaterality, with revitalization of the agreements as the means to guarantee protection of a basic level of religious freedom (resulting in the approval of further agreements with other religious groups, and thus increasing the inequality of the treatment of groups which do not enjoy agreements); on the other hand, unilaterality, with the increasing number of draft laws regulating only specific aspects of religious freedom, in the pursuit of skeptical (“repressive”) solutions (burqas, places of worship)²⁴¹. This model of church-state relationships emphasized the risk of a secularism resulting in a “multi-denominationalism” that will provide a privileged regime only to religious groups that reach an agreement with the State, but also in a kind of “neo-separatism” for those groups whose demands for protection of religious freedom are not met²⁴². The current

²³⁹ See **G. AMATO**, *Prefazione. La libertà di coscienza e di religione*, in R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *La legge che non c'è. Proposta per una legge sulla libertà religiosa in Italia*, il Mulino, Bologna, 2019, p. 9; **S. DOMIANELLO**, *Il matrimonio e le intese*, *ivi*, p. 200.

²⁴⁰ Regarding this perspective, some academics warn about the increasing confusion between the religious nature of entities that claim religious protection, which does not unavoidably imply resorting to the stipulation of agreements, and the matters that should be bilaterally ruled. See **S. DOMIANELLO**, *Libertà religiosa tra bilateralità necessaria, diffusa e impropria*, in A. FUCILLO (ed.), *Le proiezioni civili delle religioni*, *cit.*, pp. 43-45; **G. CASUSCELLI**, *Il pluralismo in materia religiosa nell'attuazione della Costituzione ad opera del legislatore repubblicano*, in S. DOMIANELLO (ed.), *Diritto e religione in Italia*, *cit.*, p. 28.

²⁴¹ See **R. ZACCARIA**, *Il gruppo di studio e il metodo di lavoro*, in R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *La legge che non c'è*, *cit.*, pp. 19-22.

²⁴² See **G. CASUSCELLI**, **S. DOMIANELLO**, *Intese con le confessioni religiose diverse dalla cattolica*, in **S. BERLINGO**, **G. CASUSCELLI**, **S. DOMIANELLO**, *Le fonti e i principi di diritto ecclesiastico*, *cit.*, pp. 33-40; see **S. DOMIANELLO**, *Libertà religiosa tra bilateralità necessaria, diffusa e impropria*, *cit.*, p. 51.



status quo has increased the perception, in the eyes of religious denominations, of an agreement with the State as the only guard able to protect religious freedom, and has generated an increasing trend to seek an agreement so as to be protected against forms of discrimination rather than to enjoy a specific safeguard of their own “identity features”²⁴³.

The pandemic emphasized this debate, giving rise to questions, both old and new, about whether the government acted properly during the pandemic, whether it dealt properly with religious communities, and whether the lack of a unilateral statute governing religious freedom affected in some way government’s implementation of religious pluralism during the health crisis. Although the Italian model of church-state relationships is that of “multilevel” protection of religious freedom, the pandemic emergency increased concerns about the proper legal vehicles to protect the basic aspects at the core of the protection of religious freedom of all religious groups, in both its individual and collective dimensions²⁴⁴. Basic protection cannot be subject to further “filters” (namely, agreements with the State) that give rise to “asymmetric” treatment of different religious groups, and to an underestimation of the increasing demands for visibility by new religious-ideological subjects²⁴⁵.

Academics specifically deplored, even in phase two, a low level of government solicitude toward the issue of religion, which comes from the lack of a proper updated “church-state politics”, able to properly replace the bilateral technique, and the lack of a “control room” devoted to religious freedom; the latter would have allowed more effective participation and contribution by all religious actors in the development of appropriate policies during the health crisis²⁴⁶.

The signature, in May 2020, of several protocols with different religious groups, allowing them to resume religious celebrations provided that precautionary measures are respected, gave rise to other academic comment²⁴⁷. Academics are in divided over the almost identical content of

²⁴³ See **N. COLAIANNI**, *Ateismo de combat e Intesa con lo Stato*, in *Rivista AIC*, 4/2014, p. 15; **A. MADERA**, *La definizione della nozione di religione*, cit., p. 563, and its bibliographical references.

²⁴⁴ See **A. LICASTRO**, *La Corte Costituzionale torna protagonista dei processi di transizione della politica ecclesiastica italiana?*, in *Stato, Chiese e pluralismo confessionale*, cit., 26/2016, p. 26.

²⁴⁵ See **N. COLAIANNI**, *La libertà di culto*, cit., p. 33; **G. MACRI**, *La libertà religiosa*, cit., p. 36.

²⁴⁶ See **A. FERRARI**, *CEI: Un’occasione mancata*, in *Settimana News*, April 29, 2020, <http://www.settimananews.it/diritto/cei-unoccasione-mancata/>.

²⁴⁷ *Protocolli per le celebrazioni delle confessioni religiose diverse dalla cattolica*, in *Diresom*,



these memorandums (access to places of worship, religious ceremonies, size requirements, social distancing, identification of a responsible person for the respect of the measures in every place of worship, sanitation of spaces and objects, option of services in open spaces if the place of worship cannot respect the measures). According to some academic, protocols are inherently limited, as they duplicate the experience of the “photocopy agreements”²⁴⁸, and the State did not take advantage of the current opportunity to provide a “general space of negotiation” in which all religious groups could freely join²⁴⁹. According to other academics, these protocols must be considered a positive step toward a fully pluralistic legal framework for all religious groups²⁵⁰. Although the main public concern remains that of public health, the government accommodated the common need of all religious denominations to resume religious gatherings, making some room for certain specific features (relating in the main, to liturgical aspects); in addition, religious communities showed their commitment to contributing to the implementation of the health measures and to reconciling their religious practices with the exceptional situation of the pandemic, in the pursuit of a fair balance between “freedom” and “responsibility”²⁵¹.

However, the intent of the protocols is not to recognize specific features of some religious groups. Surely the response to the pandemic is outside the issue of church-state relationships. However, the government made use of the language of conciliation and cooperation with religious entities, to promote a fair balance between the collective exercise of religious freedom and the preservation of public health, within a constitutional framework that requires the protection of fundamental rights and the fulfillment of the duty of social solidarity both to

May 15, 2020 (<https://diresom.net/2020/05/15/protocolli-per-le-celebrazioni-delle-confessioni-religiose-diverse-dalla-cattolica/>).

²⁴⁸ See **G. MACRÌ**, *Brevi considerazioni in materia di governance delle pratiche di culto tra istanze egualitarie, soluzioni compiacenti e protocolli (quasi) “fotocopia”*, in *Stato, Chiese e pluralismo confessionale*, cit., 11/2020, p. 75.

²⁴⁹ See **G. MACRÌ**, *Brevi considerazioni*, cit., pp. 72-74.

²⁵⁰ See **M.L. LO GIACCO**, *I “Protocolli per la ripresa delle celebrazioni delle confessioni diverse dalla cattolica”: una nuova stagione nella politica ecclesiastica italiana*, in *Stato, Chiese e pluralismo confessionale*, cit., 12/2020, p. 108.

²⁵¹ See **P. CONSORTI**, *Esercizi di laicità*, cit.; **L.M. GUZZO**, *Riprendono anche i riti non cattolici. Per la prima volta accordi con islamici e confessioni senza intesa. Intervista al Prof. Pierluigi Consorti*, in *Diresom Papers*, May 20, 2020, p. 2.; **A. TIRA**, *Normativa emergenziale*, cit.



individuals and collective entities²⁵², thus developing new forms of “dialogue”²⁵³. So religious communities seem involved, as social actors committed to the pursuit of the material and spiritual development of society²⁵⁴.

In the United States, the two negative provisions of the First Amendment ban the government from enforcing laws that would amount to a state establishment of religion and would, as well, prohibit the free exercise of religion.

“According to the judicial readings of these clauses, state interference and ‘excessive entanglement’ in church matters are therefore prohibited; and the churches are traditionally exempted from certain generally applicable laws”²⁵⁵.

The First Amendment to the United States Constitution requires neutrality “not only toward religion, but also among religions”²⁵⁶. Both the lawmakers and the judiciary make use of the “language of religious accommodation”²⁵⁷, which shows the propensity of public actors to modify general rules in order to mitigate the kind of “disability” suffered by minority groups that disagree with majority narratives²⁵⁸.

As the United States follow the common law tradition, its legal system has a more skeptical attitude toward legislation dealing with religion than the Italian legal system, and its judiciary assumes the key

²⁵² See **P. CONSORTI**, *Esercizi di laicità*, cit.; **A. TIRA**, *Normativa emergenziale*, cit.

²⁵³ See **M.L. LO GIACCO**, *The dialogue between States and Religious Groups*, paper presented at the Diresom webinar “Law and Religion at the Time of Covid-19”, 24 June 2020.

²⁵⁴ See **A. TIRA**, *Normativa emergenziale*, cit.

²⁵⁵ See **A. MADERA**, *Clerical Sexual Abuses and Church’s Civil Responsibility: A Comparative Analysis of American and Italian Case Law*, in *Journal of Church and State*, vol. 62/1, 2020, p. 63, and its bibliographical references; **W.W. BASSETT**, **W.C. DURHAM**, **R.T. SMITH**, *Religious Organizations and the Law*, Thomson Reuters, St. Paul, 2013, pp 11-21; **A. CARMELLA**, *The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedom*, in *Boston College Law Review*, vol. 44, 2003, p. 1036.

²⁵⁶ See **L.H. GREENHAW**, **M.H. KOBY**, *Constitutional Conversations and New Religious Movements*, in *Vanderbilt Journal of Transnational Law*, vol. 38, 2005, p. 677.

²⁵⁷ Cfr. **L. G. BEAMAN**, “It Was All Slightly Unreal”: What’s Wrong with Tolerance and Accommodation in the Adjudication of Religious Freedom?, in *Can. J. Women & L.*, vol. 23, 2011, pp. 443-445.

²⁵⁸ **A. MADERA**, *Il porto dei simboli religiosi nel contesto giudiziario*, in *Stato, Chiese e pluralismo confessionale*, cit., 4/2020, pp. 82-93; **K. ALIDADI**, *Religion, Equality and Employment in Europe. The Case for Reasonable Accommodation*, Bloomsbury, Oxford-Portland (OR), 2017.



role of “judicial interpretation” in completing the constitutional framework²⁵⁹. The only federal attempt to provide a unitary regulatory framework concerning religious freedom was the enactment of the RFRA, which included a type of general clause accommodating religious freedom. This attempt to severely limit the *Smith* logic (which was intended to promote only specific legislative exemptions) and to force an alternative reading²⁶⁰ resulted in the RFRA being declared unconstitutional because it applied to state and local governments, it exceeded the congressional powers under section 5 of the 14th Amendment, and did not satisfy the standards of proportionality and congruency²⁶¹. Since then, Congress avoided “push[ing] the limits of its congressional power”, because of the high risk of “invalidation”, and preferred an attitude of “inaction”, even though it can exercise an influence on “other actors” in other more “cautious and creative ways” (i.e., through its spending powers), and thus indirectly affect state legislative choices and the legislators’ understanding of religious freedom²⁶².

The health crisis simply brought to surface the abovementioned underlying crisis in relation to religious freedom, namely that nowadays religious freedom is mainly entrusted to the interplay between federal and state statutes, that define its spaces and its limits, which leads to a high risk of implementation of different degrees of religious freedom in different contexts or matters. The current pandemic highlights a sharp statutory and judicial division in relation to which secular exceptions religious conducts should be compared (essential or non-essential activities), which could lead to discrimination against religious activities where those activities are not granted the same accommodation as secular businesses. It is to be noticed that successful religious claims about health-protections measures occurred in states with some kind of RFRA, which the courts relied upon as a legal basis for accepting the claims²⁶³.

²⁵⁹ See L.H. GREENHAW, M.H. KOBAY, *Constitutional Conversations*, cit., p. 670.

²⁶⁰ See D.O. CONKLE, *Congressional Alternatives*, cit., p. 638.

²⁶¹ See D.O. CONKLE, *Congressional Alternatives*, cit., p. 683. The abovementioned *Boerne* decision in 1997 clarified that only “preventive or remedial legislation” can pass “judicial review”. According to the author, congressional remedial legislation includes “procedural” legislation or laws concerning specific areas of state and local regulation where there is an high risk of “purposeful” religious discrimination.

²⁶² See D.O. CONKLE, *Congressional Alternatives*, cit., pp. 683-688.

²⁶³ See CHRISTIAN LEGAL SOCIETY, CENTER FOR LAW AND RELIGIOUS FREEDOM, *Covid 19 and religious freedom*, cit. As an example, see *Maryville Baptist Church, Inc. v. Beshear*, No. 20-5427 (6th Cir. 2020) (where the court held that the plaintiffs had



Therefore, the pandemic emphasized that in a health crisis enhanced federal and state synergic action would provide more viable strategies to balance individual liberties and the preservation of common good in ways consistent with the federal constitutional framework.

15 - Effect of the pandemic on the question of whose religious freedom should be protected

The legal scenario is firmly connected with the question of “whose” religious freedom has to be protected. In Italy, the most crucial challenge is the implementation of a more effective religious pluralism, consistent with the constitutional provisions that promote an equal freedom for all religious groups and a wide recognition of the collective dimension of religion, so as to satisfy demands for religious freedom of all faith communities, and thus providing a fairer balance between unilateral and bilateral rules²⁶⁴. The current legal situation indicates that some faith communities enjoy a higher level of religious freedom, which in turn signals “promotional measures” for some religions, while other religious groups are subject to treatment based on hostility and “political discretion”²⁶⁵. The management of religious pluralism is increasingly complex because of the growing presence of new religious groups (e.g., the migration of adherents of Islam), which claim both integration in host societies, and accommodation for a “deeper” kind of religious diversity²⁶⁶, but do not have a unitary representative body (because of their non-monolithic nature). The presence of small faith communities and of groups of nonbelievers, which do not have features of religious denominations, even though claiming some form of constitutional protection of their

good chances of being successful with their claims founded on the Kentucky RFRA); *On Fire Christian Center, Inc. v. Fischer*, No. 3:20-cv-264 (W.D. Ky. Apr. 11, 2020) (where Kentucky’s RFRA was identified as one of the fundamental legal elements on which the church was expected to triumph in litigation); *First Baptist Church v. Kelly*, [cit.](#) (where the court relied on both First Amendment grounds, but petitioners also founded their claims on the Kansas RFRA).

²⁶⁴ See **G. MACRÌ**, *La libertà religiosa*, cit., p. 42; **P. CONSORTI**, *Esercizi di laicità*, cit.

²⁶⁵ See **G. CASUSCELLI**, “Volendo togliere ogni dubbio ...”, in R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *La legge che non c’è*, cit., p. 262.

²⁶⁶ See **K. ALIDADI, M.-C. FOLETS**, *Framing Multicultural Challenges in Freedom of Religion Terms: Limitation of Minimal Rights for Managing Religious Diversity in Europe*, in *Netherlands Quarterly of Human Rights*, vol. 30, 2012, 389.



organizational dimension, further complicates the issue²⁶⁷. In Italy, a group of academics produced a law proposal that distinguishes between religious denominations and religious associations²⁶⁸. This proposal promotes the organizational dimension of religious freedom, in view of the implementation of a “multilevel” system of protection of religious freedom²⁶⁹. In this way, new associative realities would enjoy protection against discrimination, but also their claims of “public visibility” would receive proper consideration²⁷⁰.

The incomplete framework affected the management of the exercise of religious freedom during the pandemic.

During phase one of the pandemic, as it is well known, “the virus was religiously neutral”²⁷¹ and equally affected the exercise of religious freedom of all religious groups. However, during phase two, a more immediate responsiveness to the needs of the Catholic Church was seen, which found support in that the State found the precautionary measures proposed by the Catholic Church to be adequate. However, the government collected the input from many academics about the implementation of a more pluralist response²⁷². This resulted, first, in an assembly of all religious denominations (not only those that enjoyed an agreement with the State)²⁷³ and the Ministry of Internal Affairs to seek a common protocol about safe resumption of religious gatherings, and second, in the signature of Protocols with several religious groups aimed at the resumption of religious rituals and practices, but respecting of

²⁶⁷ See **G. AMATO**, *Prefazione*, cit., 11.

²⁶⁸ See **G. AMATO**, *Prefazione*, cit., 12.

²⁶⁹ **A. LICASTRO**, *La Corte Costituzionale*, cit., p. 26.

²⁷⁰ See **A. FERRARI**, *Le linee generali della Proposta di legge sulla libertà di coscienza e di religione*, in R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *La legge che non c'è*, cit., pp. 57-103.

²⁷¹ See **A. FERRARI**, *Covid-19 e libertà religiosa*, cit.

²⁷² See **DIRE SOM**, *Position Paper. Proposal for a Safe Resumption of Religious Ceremonies*, in *Diresom*, 27 April 2020, https://diresomnet.files.wordpress.com/2020/04/position-paper_diresom-1.pdf; **A. FERRARI**, *CEI: Un'occasione mancata*, cit.; **A. FUCCILLO**, **M. ABU SALEM**, **L. DECIMO**, *Fede interdetta? L'esercizio della libertà religiosa collettiva durante l'emergenza COVID-19: attualità e prospettive*, in *Calumet, Intercultural Law and Humanities Review*, 4 April 2020 (http://www.windogem.it/calumet/upload/pdf/mat_97.pdf).

²⁷³ All the Protocols in their preamble provide that “the need to adopt measures to contain the epidemiological emergency from SARS-CoV-2 makes it necessary to draft a protocol with religious denominations. The Protocol, in respect of the right to freedom of worship, is independent of the existence of bilateral agreements, reconciling the exercise of religious freedom with the needs to contain the ongoing epidemic”.



health measures²⁷⁴. As the range of the recipients of public positive “responses” has been extended, this can be seen as a first step toward a multi-lateral system of church-state relationships in a key dialogue with religious communities²⁷⁵. The hope is that this experience of “open consultation”²⁷⁶ (which is strictly connected to a specific topic and to specific exceptional circumstances) is a new model of cooperation between religious and secular powers in the spirit of the principles of secularism, democracy and religious pluralism²⁷⁷.

As to U.S. legal context, the pandemic emphasized the issue of a recent controversial promotion of the abovementioned “expansive” reading of religious freedom²⁷⁸. For this reason, “whose” religious freedom has to be protected is increasingly a crucial issue.

Although some academics saw state RFRAs as a potentially fruitful chance to implement religious freedom, others emphasized the risk of minority communities being increasingly vulnerable, as “politically influential religious groups” would have more opportunities to “distort the laws in favor of their preferences and needs”²⁷⁹. An emblematic example is the wide meaning given to the expression “person” in both federal and state RFRAs, which allows an extremely politically divisive judicial extension of religious rights to some classes of for-profit corporations²⁸⁰. The democratic processes that Justice Scalia, in *Smith*, confidently saw as a proper solution to the issue of religious exemptions was not an effective workable compromise, as it gave rise not only to a “relative disadvantage”, but also a disproportionate burden for uncommon religious practices²⁸¹.

²⁷⁴ See **P. CONSORTI**, *Esercizi di laicità*, cit.; **M.L. LO GIACCO**, *I “Protocolli per la ripresa delle celebrazioni delle confessioni diverse dalla cattolica”: una nuova stagione nella politica ecclesiastica italiana*, in *Stato, Chiese e pluralismo confessionale*, cit., 12/2020, p. 110.

²⁷⁵ See **G. MACRÌ**, *Brevi considerazioni*, cit., 73-77.

²⁷⁶ See **M.L. LO GIACCO**, *I Protocolli*, cit., p. 113.

²⁷⁷ See **G. CASUSCELLI**, paper presented at the webinar “*La libertà religiosa in Italia ai tempi del COVID-19*”, cit.; **G. MACRÌ**, *La libertà religiosa*, p. 31.

²⁷⁸ See *Burwell, Secretary of Health and Human Services, et al., v. Hobby Lobby Stores*, cit. See also **P. HORWITZ**, *The Hobby Lobby Moment*, in *Harvard Law Review*, vol. 128, 2014, p. 1.

²⁷⁹ See **C. BARNER-BARRY**, *Contemporary Paganism: Minority Religions in a Majoritarian America*, Palgrave MacMillan, New York, 2005, 21.

²⁸⁰ See *Burwell, Secretary of Health and Human Services, et al., v. Hobby Lobby Stores*, cit.; See **A. MADERA**, *Spunti di riflessione*, cit., p. 695, and its bibliographical references.

²⁸¹ See *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990): “But that unavoidable consequence of democratic government must be



In principle, the U.S. non-preferentialism allows religious claims on both the “ends of the political spectrum” (conservative and progressive)²⁸². However, in an era where “cultural wars” are expanding, claims for religious accommodation concern not only minority groups, but also, increasingly, majority groups, as the accommodation is seen a means of protection of values and convictions that are becoming progressively politically divisive in a highly secularized and multicultural society²⁸³.

The growing number of demands for religious exemptions by the abovementioned “new” religious actors (as faith-based businesses) is making religious accommodation an increasingly unmanageable matter and leading to an heightened critical attitude on the part of the general public toward religious accommodation, thus raising concerns about discrimination and inequality²⁸⁴. Recent Supreme Court case law weakened the substantial burden parameter, which traditionally required a petitioner to show that a law caused a substantial burden to their religious practice, compelling them to contravene a religious rule²⁸⁵. Furthermore, there is a growing perception by the general public of religious organizations as “small businesses”, which have increasing access to federal funding and are granted religious exemptions, which in turn this gives rise to strong arguments by opponents of religious accommodation who want secular and religious organizations to be treated the same way, as “you cannot have your cake and eat it too”. Demands for an equal treatment of all religious ethical-philosophical beliefs and convictions are expanding, in light of a progressive diminution

preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs”.

²⁸² **C.M. CORBIN**, *A Religious Right to Disregard Mandatory Ultrasounds*, in *Canopyforum*, 1 April 2020 (<https://canopyforum.org/2020/04/01/a-religious-right-to-disregard-mandatory-ultrasounds/>).

²⁸³ See **A. MADERA**, *Spunti di riflessione*, cit., p. 694, and its bibliographical references; **D. LAYCOCK**; *Religious Liberty and the Culture Wars*, in *University of Illinois Law Review*, 3, 2014, p. 839 ff.; **D. NEJAIME, R. SIEGEL**, *Conscience Wars: Complicity-Based Conscience in Religion and Politics*, in *The Yale Law Journal*, vol. 124, 2015, p. 2516; **F.M. GEDICKS**, *American Church-State Relations and the Culture Wars : A New Phase ?*, in *Quad. Dir. Pol. Eccl.*, vol. 23, 2/2015, p. 325 ff.

²⁸⁴ See **A. MADERA**, *Spunti di riflessione*, cit., pp. 695-709, and its bibliographical references; **I.C. LUPU**, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, in *Harvard Journal of Law and Gender*, vol. 38, 2015, pp. 14-23.

²⁸⁵ The *Hobby Lobby* decision held kinds of “attenuated” and “indirect” burdens on religious freedom to be “substantial”, dramatically expanding the range of religious objection. See **C.M. CORBIN**, *A Religious Right to Disregard Mandatory Ultrasounds*, cit.



of religious “exceptionalism”²⁸⁶ and an equal treatment of secular and religious interests²⁸⁷.

The health crisis has catalyzed the politically divisive issue of religious freedom, namely whether religious freedom is special enough to deserve exceptional protection in the light of the U.S. constitutional framework, and what are the limits of constitutional coverage²⁸⁸. During the pandemic, the most rooted religious groups seemed more prone to litigating their rights than the smaller or newer groups, although all religious groups were subject to the same restrictions. The crucial question is whether and to what extent numerical data and grounding of religious groups influenced the result of judicial debate.

The pandemic made clear the need to redefine the standards of judicial review. The abovementioned *Smith* rationale, is that religious organizations deserve accommodation only when they are targeted because of their religious beliefs, and when compared to secular organization²⁸⁹.

The debate about “how much” religious freedom opens another question: whether religious organizations’ access to government funding for organizations that suffered economic loss during the pandemic is on a

²⁸⁶ See D.R. HOOVER (ed.), *Religion and American Exceptionalism*, cit.

²⁸⁷ See **M. SCHWARTZMAN**, *What If Religion Isn’t Special?* in *University of Chicago Law Review*, vol. 79, 2012, pp. 1351-1427; **B. LEITER**, *Why Tolerate Religion ?* Princeton University Press, Princeton-Oxford, 2013, pp. 100-101; **A. MADERA**, *Dealing with Atheism: una lettura alternative dei rapporti fra Stato e Confessioni nell’ordinamento statunitense*, in *Quad. Dir. Pol. Eccl.*, vol. 27, 3/2019, pp. 851-881, and its bibliographical references; **A. MADERA**, *Spunti di riflessione*, cit., p. 710, and its bibliographical references.

²⁸⁸ We have to take into account that the claims of faith-based businesses even during this period, are exacerbating the skepticism about religious exemptions. See *Kingdom Kuts, et al., v. Anthony s. Evers*, Case No. 1:20-cv-0723, United States District Court Eastern District of Wisconsin Northern Division. In this case the owners of a business activity, (hair salon), claiming a faith-based identity, claimed that the emergency order imposing closure of non-essential business activities violated their rights to exercise of religious freedom and religious assembly and asked the “Court to issue a Temporary Restraining Order restraining and enjoining the Defendants, and all other persons in active concert or participation with them, from enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with the ORDERS or any other order to the extent any such order prohibits Plaintiffs from exercising their constitutional rights”.

²⁸⁹ According to **L. GOODRICH**, *Wedding Vendors’ Messy Battle for Religious Liberty*, in *World*, 5 May 2020 (https://world.wng.org/content/wedding_vendors_messy_battle_for_religious_liberty), a compromise solution could be granted by resorting to free speech rights: in this case the more “religiously expressive” is the business, the more it cannot be “compelled” to participate in “expression” it disagrees with.



par with secular institutions and is consistent with both the clauses of the First Amendment²⁹⁰.

Indeed, parties to cases during the health crisis emphasized the need for the Supreme Court to revisit *Smith*, arguing that the judiciary, in managing many RFRA cases, has sufficiently demonstrated that it is “entirely capable of balancing claims for religious accommodation against governmental interests”²⁹¹. The pandemic increased academic awareness that

“by leaving protection of religious minorities to the vicissitudes of majoritarian rule, the *Smith* rule undermines a core motivation for adoption of the Free Exercise Clause: protection of the religious exercises of minority religions”²⁹².

In February 2020, the Supreme Court accepted a petition of certiorari in the case of *Fulton v. City of Philadelphia*²⁹³. So the Court will have to assess whether the *Smith* rationale can be revised, given its unsatisfactory results in the long term²⁹⁴. In the future, the traditional U.S. non-preferential attitude about religion could develop in two directions: deny any religious exemption for all religious organizations or expanding equally the protection grounded on the free exercise clause²⁹⁵.

²⁹⁰ Many houses of worship and religiously-affiliated schools applied for the Paycheck Protection Program, a federal program giving financial support to small businesses suffering from the impact of COVID-19, had their applications approved, and received loans to “keep the employees on their payrolls”. See **C. CAPATIDES**, *More than 12,000 Catholic churches in the U.S. applied for PPP loans and 9,000 got them*, in *CBS News*, 8 May 2020 (<https://www.cbsnews.com/news/catholic-churches-paycheck-protection-program-12000-applied-9000-got/>).

²⁹¹ See *Ricks v. Idaho Contracting Board*, on petition for a writ of certiorari to the Idaho Court of Appeals, n. 19-66. Brief for Amici Curiae General Conference of Seventh-Day Adventists, Church of God in Christ, The Church of Jesus Christ of Latter-Day Saints, Ethics and Religious Liberty Commission, the Lutheran Church Missouri Synod, and Union of Orthodox Jewish Congregations of America in support of Petitioner.

²⁹² See *Ricks v. Idaho Contracting Board*, on petition for a writ of certiorari to the Idaho Court of Appeals, n. 19-66. Brief for Amici Curiae Ten Legal Scholars in Support of Petitioner.

²⁹³ *Fulton v. City of Philadelphia*, 922 F3d 140 (3d Cir. 2019), *Cert. Granted*, 24 February 2020. The case is about the exclusion of a religious agency from the city’s foster care system unless the agency committed to act and speak in a way incoherent with its religious convictions about marriage.

²⁹⁴ See **V.C. BRANNON**, *Banning Religious Assemblies*, cit., pp. 1-5.

²⁹⁵ See **A. MADERA**, *La definizione della nozione di religione*, cit., p. 549, and its bibliographical references.



16 - Guaranteeing a fair level of religious accommodation during a pandemic

A further element of concern is “who” is in charge of the task of guaranteeing a fair level of religious accommodation. In both legal systems, the constitutional text “sets the parameters of the constitutional conversation” about religious freedom²⁹⁶. The complex dynamics between legislative and jurisprudential sources have a deep impact on the framework used by those in charge of public choices during a pandemic. The crucial question of whether and to what extent the “tension between new religious perspectives and established norms can be negotiated in a [...] courtroom setting” and whether and to what degree judicial decisions “are able to affect the governing legal standards” is the object of on-going debate and processes²⁹⁷.

Italy’s civil law system has a “multilevel”²⁹⁸ system of protection of religious freedom, often resulting in a disparate treatment of, and a “distinctive voice” for, certain faith groups²⁹⁹. Italian constitutional provisions provide a “more detailed structure” than the United States’ First Amendment negative injunctions³⁰⁰. The Italian system provides the potential for cooperative relationships, and guarantees the individual and collective dimension of religious freedom, specifying possible limitations to religious freedom and autonomy³⁰¹. Although the Constitution guarantees equal freedom and nondiscrimination for all religious groups, and strictly confines limitations to the exercise of religious freedom, there exist different legal regimes governing the rights, privileges and benefits for certain religious groups, depending on the agreement a particular group has with the State.

According to civil law tradition, the constitutional text implies that legislation is “sufficiently clear, coherent and complete to make it unnecessary for courts to create precedent”³⁰². However, given the absence of a uniform law governing the protection of religious freedom of

²⁹⁶ See L. HUNT GREENHAW, M. H. KOBY, *Constitutional Conversations*, cit., p. 619.

²⁹⁷ See L. HUNT GREENHAW, M. H. KOBY, *Constitutional Conversations*, cit., p. 618.

²⁹⁸ See A. LICASTRO, *La Corte Costituzionale*, cit., p. 26.

²⁹⁹ See L. HUNT GREENHAW, M. H. KOBY, *Constitutional Conversations*, cit., p. 675.

³⁰⁰ See L. HUNT GREENHAW, M. H. KOBY, *Constitutional Conversations*, cit., p. 671.

³⁰¹ See L. HUNT GREENHAW, M. H. KOBY, *Constitutional Conversations*, cit., pp. 670-671.

³⁰² See V. FERRERES COMELLA, *The European Model of Constitutional Review of Legislation: Toward Decentralization*, in *Int’L J. Const. L.*, vol. 2, 2004, p. 463.



all religious denominations, the courts (in particular, the Constitutional Court) are increasingly charged with the duty to “lead a difficult transition” toward a fairer allocation of such primary commodity (religious freedom) and to enhance the search for new viable forms of protection and to balance fundamental rights³⁰³. The Constitutional Court has been progressively charged with the task of implementing the constitutional text, so as to remove the contradictions between the constitutional charter and the old law about “tolerated religions” and ruling on new religious demands case by case³⁰⁴. In any event, the “centralized” constitutional control leads to less dynamism in the “constitutional conversation”³⁰⁵, fewer actors participating in it, less power for religious actors to “negotiate legal meanings” and to promote a “competing narrative” in litigation and more “predictability” of results, compared to the U.S. common law system³⁰⁵. During the pandemic up to late June 2020 the Constitutional Court did not have the opportunity to address the choices of public policies adopted to deal with the health crisis, as did the court in the United States, Germany and France³⁰⁶.

The ECHR enriches the “constitutional conversation” and “centers” the debate on human rights and their “enforcement” in national contexts, increasing the opportunities to give renewed meaning to constitutional texts and making these texts more “responsive” to minority claims³⁰⁷. Its importance should not be underestimated. During the pandemic, the language of the ECHR has sought the endorsement of the “common standard of proportionality” between the means used and the pursued aims; it also showed concern about “the rights and the freedoms of others”³⁰⁸.

However, in Italy, church-state agreements have not been counterbalanced by a general law that guarantees a basic level of religious freedom to all faith communities and seeks to limit the discretion of the

³⁰³ See **A. LICASTRO**, *La Corte Costituzionale*, cit., p. 32.

³⁰⁴ See **G. CASUSCELLI**, “Volendo togliere ogni dubbio ...”, cit., p. 262.

³⁰⁵ See **L. HUNT GREENHAW, M. H. KOBY**, *Constitutional Conversations*, cit., pp. 668-669 and 677.

³⁰⁶ See Bundesverfassungsgericht 29 April 2020 - 1 BvQ 44; Conseil d’État, ord. 18 May 2020, nn. 440366, 440380, 440410, 440531, 440550, 440562, 440563, 440590.

³⁰⁷ See **L. HUNT GREENHAW, M. H. KOBY**, *Constitutional Conversations*, cit., p. 650 and p. 675.

³⁰⁸ See **A. MADERA**, *La libertà di aprire luoghi di culto*, cit., p. 561, and its bibliographical references; **A. RUGGERI**, *Dialogo fra le Corti e tecniche decisorie, a tutela dei diritti fondamentali*, in *I Quaderni europei* 59/2013, p. 20 (http://www.cde.unict.it/sites/default/files/Quaderno%20europeo_59_dicembre_2013.pdf).



executive branch. Here, again, the pandemic emphasizes that the lack of general updated law about religious freedom makes it more difficult to reach the correct balance between equality (which should be guaranteed to all religious groups) and specific differences (which are safeguarded by bilateral agreements only for some faith communities), a balance that would guarantee legislative standards and thus avoid fluctuations in the outcome of judicial review and excessive government discretion and would establish general principles leading the regulation of matters covered by concurring legislative powers vested in the Regions³⁰⁹. The pandemic crisis offers a unique opportunity for democratic processes to reclaim their role as the main driver of the implementation of positive secularism³¹⁰.

In the United States, the Supreme Court has a fundamental role within a common law system, where its case law provides judicial understanding, as well as substantial changes to the understanding of constitutional principles, thereby establishing concrete rules governing specific circumstances³¹¹. Test cases that come before it influence the decisions of lower courts³¹². The specific features of the whole system is its flexibility and ability to offer more opportunities than the Italian civil law system for judicial review: the “decentralized judicial review” means that all levels of the judiciary are provided with “room for judicial construction of constitutional meaning” and have opportunities to “fill the gaps” in the constitutional framework³¹³.

The highest judicial board has traditionally represented the compass of the “tension” between the two religious clauses, which “paradoxically” guaranteed their “mutual strengthening”³¹⁴. Furthermore,

³⁰⁹ See **G. CASUSCELLI**, “Volendo togliere ogni dubbio ...”, cit., pp. 264-269. See also Constitutional Court, No. 63/2016.

³¹⁰ See **J. PASQUALI CERIOLI**, *Una proposta di svolta*, in R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *La legge che non c'è*, cit., p. 351.

³¹¹ See **A. MADERA**, *Nuove forme di obiezione di coscienza*, cit., p. 4, and its bibliographical references.

³¹² See **A. MADERA**, *Nuove forme di obiezione di coscienza*, cit., p. 4, and its bibliographical references.

³¹³ See **L. HUNT GREENHAW**, **M.H. KOBY**, *Constitutional Conversations*, cit., pp. 671-672.

³¹⁴ See **A. MADERA**, “Dealing with Atheism: una lettura alternativa dei rapporti fra Stato e Confessioni nell’ordinamento statunitense”, in *Quaderni di Diritto e Politica Ecclesiastica* 3/2013, pp. 865, and its bibliographical references; **A. BROWNSTEIN** *Attempting to Engage in Socially Coherent Dialogue about Religious Liberty and Equality*, in *UC Davis Legal Studies Research Paper Series*, 2018, p. 9.



it “expanded the reach of constitutional law” and exercised a critical review of the actions of other branches of federal and, in particular, state governments, making large use of the “incorporation doctrine” and playing the role of “vigilant protector” of “personal liberties”³¹⁵. In relation to the free exercise clause, the Supreme Court articulated a clear distinction between “mandatory accommodations” (which are compelled under the free exercise clause) and “discretionary accommodations” (which have often been restrained in light of the establishment clause)³¹⁶, and guaranteed religious minorities the role of “active participants” in the “constitutional conversation”, which is grounded on the free exercise clause, and made room for the narratives of those communities³¹⁷. The ongoing dialogue between the Supreme Court and the lower courts plays a key role in the evolutive processes of the meaning of the constitutional text. However, after *Smith*, the free exercise clause lost its central role as bastion of protection of religious freedom. The Supreme Court was traditionally interventionist within a separationist understanding of church-state relationships; but, since 2004, a reversal of this trend can be noted, as more “conservative” attitude toward legislative choices has developed³¹⁸. The Supreme Court adopted a self-restraint, an almost “deferential” approach toward state legislative choices about religious freedom, indirectly supporting a fragmented system of religious exemptions recognized at the state level³¹⁹. The pandemic crisis emphasized the need for the Supreme Court to take back its role as the “paramount voice” in the “constitutional conversation” about religious freedom while it is still able, as its most recent intervention in the field of religious freedom shows, to have a significant impact on the “meaning of the constitutional text”³²⁰. Its so far brief intervention into the question of religious freedom in the context of the pandemic shows, on one hand, its crucial role as guardian of the correct balance between competing interest, in view of the obligation of the lower courts to follow Supreme Court precedents. On the other hand, its current split shows the difficulty of

³¹⁵ See **L. HUNT GREENHAW, M.H. KOBY**, *Constitutional Conversations*, cit., p. 619 and p. 641.

³¹⁶ See **S.H. BARCLAY**, *First Amendment “Harms”*, cit., 340.

³¹⁷ See **L. HUNT GREENHAW, M.H. KOBY**, *Constitutional Conversations*, cit., p. 634.

³¹⁸ See **E.G. QUILLEN**, *Atheist Exceptionalism: Atheism, Religion and the United States Supreme Court*, Routledge, New York, 2018, p. 106 ff.; See **A. MADERA**, “*Dealing with Atheism*”, cit., p. 861, and its bibliographical references.

³¹⁹ See **A. MADERA**, *Nuove forme di obiezione di coscienza*, cit., p. 3, and its bibliographical references.

³²⁰ See **L. HUNT GREENHAW, M.H. KOBY**, *Constitutional Conversations*, cit., pp. 628.



reaching proper balances, and the high risk of an increasingly conservative mindset, depending on personal inclinations of individual judges.

The crucial question is whether, in the near future, the Court will move toward a “more generous interpretation” of the free exercise clause³²¹, as some justices are indirectly showing their dissatisfaction with the current interpretation of the constitutional framework³²². In any event, the Supreme Court justices should remember that “the religious liberty rights they create will not necessarily be confined to the religions and causes they favor”³²³.

17 - Enhanced need to balance the exercise of religious freedom with third-party harm during a pandemic

In both legal systems, the current pandemic crisis shows that religious freedom cannot have absolute protection, cannot be considered immune to legislative supervision, and has to be reconciled with other compelling and pressing needs; and, surely, public health and safety can be included in those compelling and pressing needs. In both countries the pandemic situation offers the opportunity to think about the increasing concern over the negative impact, namely the “cost”, of the exercise of religious freedom on civil society. Indeed, the analysis of third-party burdens is progressively becoming a crucial element in the difficult balance between state interests and demands for religious accommodation, which judicial review has been increasingly taken into consideration³²⁴.

On both sides of the ocean the pandemic has emphasized the critical question of whether and to what extent religious liberty can

³²¹ See **D.O. CONKLE**, *Congressional Alternatives*, cit., p. 685.

³²² In *Kennedy v. Bremerton School District*, 586 U.S. _ (2019), a case raised by a high school football coach who was subject to suspension for guiding students in prayers before and after games, the Court denied the writ of certiorari. However, four justices released a statement on the Court’s ruling, concluding that “Petitioner’s decision to rely primarily on his free speech claims as opposed to these alternative claims may be due to certain decisions of this Court. In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990), the Court drastically cut back on the protection provided by the free exercise clause, and in *Trans World Airlines, Inc. v. Hardison*, 432 U. S. 63 (1977), the Court opined that Title VII’s prohibition of discrimination on the basis of religion does not require an employer to make any accommodation that imposes more than a *de minimis* burden. In this case, however, we have not been asked to revisit those decisions”.

³²³ See **C.M. CORBIN**, *A Religious Right*, cit.

³²⁴ See **A. MADERA**, *Nuove forme di obiezione di coscienza*, cit., p. 27.



impose “costs of observing one’s religion on someone else” where that someone else does not receive any advantage from religious accommodation³²⁵.

Both European and U.S. case law about religious freedom provides a wide range of different features of harm (level of seriousness, “direct” or “indirect” nature, “intended” or “unintended” harm, and so on), that can justify different judicial responses, ranging from complete lack of religious accommodation to the possibility of reconciling competing interests³²⁶. However, where important community interests are at stake (public health, public welfare), or the request for accommodation comes from a public servant, judicial responses should be influenced by the availability or the lack³²⁷ of social safety measures that seek to balance access to fundamental services and claims of religious freedom, so as to prevent the risks of undermining government ability to pursue public aims³²⁸. The ECHR (more than the U.S. Supreme Court) showed special solicitude to a vital factor for accommodation: whether or not public policies can provide a secular alternative to guarantee that the fundamental service at stake is available for the community³²⁹.

Although there are accommodations that could “obstruct the achievement of major social goals”³³⁰, or disproportionately burden some classes of individuals, there are also accommodations where the costs are “minimal” and “widely shared”³³¹ (or, according to some academics, that cause the same harm as is permitted for secular activities)³³²; so a crucial

³²⁵ See **F.M. GEDICKS, A. KOPPELMAN**, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, in *Vand. L. Rev. En Banc*, vol. 67, 2014, p. 51.

³²⁶ See **S.H. BARCLAY**, *First Amendment “Harms”*, cit., pp. 337-338.

³²⁷ As an example, in the United States the phenomenon of religious organizations operating as social services and healthcare providers has often raised the question of who is charged to provide those services, to which religious institutions object, in an environment highly governed by market rules and with scarce public supervision.

³²⁸ See **A. MADERA**, *Nuove forme di obiezione di coscienza*, cit., p. 29.

³²⁹ See ECHR, Section III, October 2 2001, *Pichon et Sajous c. France* (application n. 49853/99); **A. MADERA**, *Nuove forme di obiezione di coscienza*, cit., p. 32.

³³⁰ See **D. NEJAIME, R. SIEGEL**, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, in S. MANCINI, M. ROSENFELD (eds.), *The Conscience Wars: Rethinking The Balance Between Religion, Identity, and Equality*, Cambridge University Press, Cambridge, 2018, pp. 199-200.

³³¹ See **D. NEJAIME, R. SIEGEL**, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, in *Yale L. J. F.*, vol. 128, 2018, p. 201.

³³² See **S.H. BARCLAY**, *First Amendment “Harms”*, cit., p. 353.



factor is whether the costs of religious liberty are spread across the whole civil community or whether the costs of religious accommodation burden specific vulnerable classes of individuals³³³. It has also to be taken into consideration that “[c]ertain kinds of externalities are both difficult to see and difficult to measure, usually because they involve increased risk rather than an immediately discernible, concrete effect”³³⁴. Furthermore, different legal environments can justify different legal response; for example, the unique character of the prison context (low budgets and prisoners depending on public officials to exercise their rights), or the workplace, where, traditionally, in both Europe and the United States a low threshold of accommodation is considered acceptable, or the educational context, where courts have often given precedence to the high risk of “religious indoctrination” over claims for religious accommodation³³⁵. Recently, in both Europe and the United States, antidiscrimination law emphasized the increasing tension between religious exemptions and claims for equal protection and nondiscrimination in the field of LGBT rights³³⁶. In the U.S. context, academics have increasingly emphasized the relevance of “dignitary harms” to those who “do not share the [religious] claimant’s belief”³³⁷ and perceive as “offensive” and “hurtful” the refusal of a service, “particularly when it involves goods or services related to one’s identity and significant personal life”³³⁸. In the European scenario, the principle of non-

³³³ See *Burwell, Secretary of Health and Human Services, et al., v. Hobby Lobby Stores, Inc.*, cit.

³³⁴ See **L. GROW SUN, B. DANIELS**, *Mirrored Externalities*, in *Notre Dame L. Rev.*, vol. 90, 2014, p. 160.

³³⁵ See **S.H. BARCLAY**, *First Amendment “Harms”*, cit., pp. 355-357, which underlines that in the United States specific provisions (Title VII) recognize as relevant “undue hardship” which causes “more than a de minimis cost” on an employer is sufficient reason to deny religious exemptions. In the European context, freedom to resign has often been considered a sufficient guarantee for religious freedom. See ECHR, Section IV, *Jakobski v. Pologne* (application No. 18429/06), 7 December 2010. However, see ECHR, Section IV, *Eweida and Others v. United Kingdom* (applications Nos. 48420/10, 59842/10, 51671/10 and 36516/10), 27 May 2013.

³³⁶ See **A. MADERA**, *Nuove forme di obiezione di coscienza*, cit., pp. 22-23; **R. FRETWELL WILSON**, *Bargaining for Religious Accommodations. Same-Sex Marriage and LGBT Rights After Hobby Lobby*, in *The Rise of Corporate Religious Liberty*, cit., p. 257 ss.; **R. FRETWELL WILSON**, “Getting the Government out of Marriage” post *Obergefell: the Ill-Considered Consequences of Transforming the State’s Relationship to Marriage*, in *University of Illinois Law Review*, 2016, p. 1445 ss.

³³⁷ See **S.H. BARCLAY**, *First Amendment “Harms”*, cit., pp. 337-338.

³³⁸ See **S.H. BARCLAY, M.L. RIENZI**, *Constitutional Anomalies as Applied Challenges? A*



discrimination often has a prevailing role in judicial decisions and it can justify restrictions on religious freedom, while its sacrifice in front of religious grounds would require “very weighty reasons”³³⁹.

The increasing weight of third-party harms in both European and U.S. cases is likely to have an expanding impact on judicial choices about religious accommodation.

The U.S. Supreme Court has traditionally relied on the idea of reasonableness of accommodation. However, in recent cases, an over-expansive protection guaranteed to forms of “corporate conscience”³⁴⁰, resulted in limited consideration of the possible “least restrictive alternative” that would provide a fairer distribution of social costs of rights protected under the First Amendment³⁴¹. This protection, which indirectly favors majority narratives, risks leading to the dismantling of an already frail balance between general rules and religious exemptions.

The ECHR approach (which should be a guideline for national choices) emphasized that religious freedom is subject to those limits that are “necessary in a democratic society” to safeguard the “liberties and rights of the others” and underlined “positive obligations” upon States to reduce social conflicts³⁴². Claims for accommodation of the right to manifest one’s religious observance always include an analysis of proportionality, which takes into serious consideration not only the impact of religious accommodation on third parties (specifically minority or vulnerable categories), but also the preservation of the values of the democratic and religiously neutral legal system involved (in the light of the margin of appreciation)³⁴³. However, in the European context, the transition from a severe analysis of specific facts, legal contexts, and

Defense Religious Exemptions, 59 in *B.C.L. Rev.*, vol. 59, 2018, p. 1623. See *Masterpiece Cakeshop LTD v. Colorado Equal Rights Commission*, 138 S. Ct. 1719 (2017).

³³⁹ See ECHR, Section IV, *Eweida and others v. United Kingdom*, cit., cases Ladele and MacFarlane. See also **A. MADERA**, *Nuove forme di obiezione di coscienza*, cit., pp. 35-38.

³⁴⁰ See *Burwell, Secretary of Health and Human Services, et al., v. Hobby Lobby Stores, Inc.*, cit.

³⁴¹ See **S.C. BURCLAY**, *First Amendment “Harms”*, cit., p. 386.

³⁴² See ECHR, section IV, October 30 2012, *P. and S. v. Poland* (application n. 57375/08: States have “to organize the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation”

³⁴³ See ECHR, Section IV, *Eweida and others v. United Kingdom*, January 15 2013 (applications 48420/10, 59842/10, 51671/10 and 36516/10). See also **A. MADERA**, *Nuove forme di obiezione di coscienza*, cit., pp. 35-40.



material and concrete injuries “for the rights and freedom of the others”, to the enhancement of abstract principles (the “living together”) with a dangerous over-expansion of the protection of the rights and freedom of the others, which are dangerously identified with the majority views, to the detriment of uncommon disliked religious minorities, need to be carefully monitored³⁴⁴.

This article’s comparative perspective shows that courts may balance parties’ rights, and sometimes a certain amount of third-party harm is acceptable in the protection of religious rights, or to reach a wider social benefit. Courts also need to balance the competing sacrifices that stem from the protection of religious rights³⁴⁵. However, both an abstract and decontextualized concern about “the rights and liberties of others”, as well as the underestimation of the third-party burdens, can have a detrimental impact on the protection of religious freedom in the long term.

An assimilation of different situations should be avoided. An undue equalization of all situations could lead to paradoxical “over-inclusive” (the removal of all religious exemptions, even those enjoyed by religious minorities) or “under-inclusive” results (underestimation in the cost benefits analysis of the harms that would burden vulnerable classes of individuals served or employed by religious institutions that operate by virtue of a religious exemption granted by state law, and understatement of the general benefits coming from the reduction of social conflicts)³⁴⁶.

However, as noticed by academics, a pandemic emergency does lead to an ordinary collision between two competing interests, as it is a genuine, extremely serious and imminent threat to public health and safety³⁴⁷. In both legal systems, the aim of restrictions on religious freedom was not to discriminate or prosecute religion, but was the unavoidable result of a “democratic harmonization” of several rights³⁴⁸. Religious restrictions should not be considered “uniquely pervasive”, on the

³⁴⁴ See ECHR, *Grand Chamber, S.A.S. v. France* (ric. n. 43835/11), 1 July 2014

³⁴⁵ See **S.H. BARCLAY**, *First Amendment “Harms”*, cit., p. 382.

³⁴⁶ See **S.H. BARCLAY**, *First Amendment “Harms”*, cit., p. 358 ff.

³⁴⁷ See **G. CASUSCELLI**, paper presented at the webinar “*La libertà religiosa in Italia ai tempi del COVID-19*”, cit.

³⁴⁸ See **A. LICASTRO**, *La Messe est servie. Un segnale forte dal Consiglio di Stato francese in materia di tutela della libertà religiosa*, in *Consulta on Line* (www.giurcost.org), 2/2020, p. 317; **C. RAIU**, *Is the lockdown of churches an aggression towards freedom of religion or belief?*, in *DiReSoM*, 26 May 2020 (<https://diresom.net/2020/05/26/is-the-lockdown-of-churches-an-aggression-towards-freedom-of-religion-or-belief/>).



contrary, they require an understanding, in the global context, of limitations on the rights of assembly because of COVID-19³⁴⁹.

Crucial decisions have not been taken autonomously by executive powers but have been subject to the extraordinary process of the “medicalization” of law, which speeds the decision-making process more widely than merely judicially. An exceptionally cautious approach is, therefore, recommended to prevent any serious negative impact of religious choices on “third parties” (using U.S. judicial language) and on “rights and freedoms of others” (Art. 9.2, ECHR). During phase one of the pandemic, autonomous religious choices could not receive priority protection if there existed an alternative way of exercising the right to religious worship. In both countries, specific cautionary measures are still in force about social situations, particularly in relation to indoor spaces, close proximity, longer times of assembly, practices and rituals that increase danger. A careful negotiation between all the parties involved in making decisions about health safety makes it easier to overcome critical aspects of the collective exercise of religious freedom, as occurred in Italy in phase two. Otherwise an absence of dialogue can lead to the judiciary reacting to the situation and restricting both religious and secular assembly (as the U.S. Supreme Court did). It should be noted that in the United States the claim in front of the Supreme Court did not concern a complete banning of religious services but was a request for injunctive relief against guidelines that allow religious gatherings with precautionary measures, where the appropriateness of the guidelines to the specific context of religious gatherings is the object of dispute. The crucial question is whether and to what degree it is acceptable and reasonable to impose a risk on third parties while satisfying a “basic need of the person”³⁵⁰. The answer is influenced by the stage of the health crisis in different geographical areas, all of which have different levels of COVID-19 infection, and risk of the increased transmission of the virus³⁵¹. So the severity and extent of the health crisis is a crucial factor to define the terms of the restrictions, as it is what leads to the need for restrictions.

However, it has been authoritatively argued that the “long-term viability” of a “genuinely democratic system” is strictly connected with its “resilience”, namely its ability to find the correct balance between ordinary rules and “acceptable deviations”, which have to be incorporated

³⁴⁹ See **S.H. BARCLAY, M.L. RIENZI**, *Constitutional anomalies as applied Challenges?*, cit., p. 1606.

³⁵⁰ See **A. LICASTRO**, *La Messe est servie*, cit., p. 318.

³⁵¹ See **A. LICASTRO**, *La Messe est servie*, cit., p. 323.



into a framework of “established guarantees” and leave little space for “improvisations”³⁵². Therefore, emergency limitations are not an “autonomous source of law”, but a “circumstance that has to be governed by law”, even though with “exceptions” and “flexible” regulations; this factor marks the threshold between “*force majeure*” and “arbitrary discretion”³⁵³.

In both legal systems, during the crucial phase two, the resolution of conflicts about religious worship will require a careful balance of means used and pursued purposes, because of the need to The “necessity” and the “proportionality” of the renunciations demanded of all the parties involved have to be carefully monitored, and limitations should be strictly connected to specific needs and temporal limits³⁵⁴. However, if phase two remains and we have to cope with the virus in the long term, the prerequisite of the extraordinary and temporary character of the measures will become increasingly weaker and new balances between competing interests will need to be found in order to reach a well-thought-out equilibrium across all the values at stake³⁵⁵, taking into account that religious freedom is at the core of the protection offered by international treaties, which should not allow deviations³⁵⁶; religious freedom cannot be marginalized, even in secular societies³⁵⁷. Some European courts that had to cope with these issues of religious freedom and the protection of public health followed the concept of reconciliation of competing interests, focusing on the standard of proportionality³⁵⁸.

³⁵² See **REDAZIONE ANSA**, *Soro, sì alle misure anticoronavirus ma si rispettino i diritti. Garante Privacy, limiti a libertà proporzionata e temporanei* (interview with Antonello Soro) in *ANSA*, 17 March 2020 (https://www.ansa.it/sito/notizie/topnews/2020/03/17/soro-si-alle-misure-anticoronavirus-ma-si-rispettino-i-diritti_837282ce-a26d-465e-9128-c8e606453cf0.html).

³⁵³ See **REDAZIONE ANSA** *Soro, sì alle misure*, cit.

³⁵⁴ See **N. COLAIANNI**, *Voci in dialogo*, cit., p. 235; **A. MADERA**, *La libertà di aprire luoghi di culto*, cit., pp. 560-561, and its bibliographical references.

³⁵⁵ See **A. LICASTRO**, *La Messe est servie*, cit., 313.

³⁵⁶ See **S. CECCANTI**, *Una libertà comparata. Libertà religiosa, fondamentalismi e società multietniche*, il Mulino, Bologna, 2001, p. 38.

³⁵⁷ See **A. LICASTRO**, *La Messe est servie*, cit., p. 322.

³⁵⁸ Germany’s Constitutional Court, on 29 April 2020 issued an order (1BvQ 44/20, cit.) reversing an absolute ban on religious services during the coronavirus crisis, holding that specific exceptions could be granted if sufficient precautions were taken to avoid infection. The judgement was about an Islamic community that “intend[ed] to carry out Friday prayers ... in the remaining weeks of the fasting month Ramadan”. The Court stated that taking into consideration the “serious infringement of religious freedom” caused by the prohibition, it was “hardly tenable” that there was no possibility of recognizing an exception, depending on whether “an increase in the risk of infection



18 - Impact of the pandemic on the exercise of religious freedom in the long term

The all-important question is whether the pandemic will influence future political responses to religious freedom and whether legal systems will move toward a more considered implementation of religious pluralism, which would be consistent with their constitutional frameworks.

Phase two can be used to revisit legal protection of religious freedom, which is continually evolving, mirroring social, political and cultural changes³⁵⁹, in pursuit of “building a society” able to face future crises without excessively limiting individual liberties³⁶⁰.

In the United States there is a long tradition of religious accommodation, which is founded on a balancing process that takes into consideration the “complex nature of the interests involved”, the “difficulty of reconciling them in a multi-religious society”, and the existence of many “borderline situations”, which all lead to the “risk” of civil authorities intruding into “matters of ecclesiastical scope”³⁶¹. The balancing test has enabled the filtering of demands for religious accommodation, as well as allowing vital management of the difficulties between majority and minority groups.

The maintenance of a “deep” pluralism (which guarantees the accommodation of “deep diversity”)³⁶² - the genuine distinctive feature of the American judicial mode - should be the preferred path, as well as the way to prevent forms of exploitation of the religious element. However, Judge Scalia’s fear of implementing “a system in which each conscience is a law unto itself”³⁶³ should also be taken into consideration in future

could be reliably denied”. The Court found that the prohibition was extremely burdening “with respect to the Friday prayers during Ramadan”, even though the general prohibition concerned places of worship of many religious denominations. The court determined that a general and absolute prohibition of religious gatherings is disproportionate in comparison with the aim of protection of public health and it causes a severe and illegitimate of freedom of worship. See also BVerfG, 10 April 2020, BvQ 28/20. In France, see *Conseil d’État*, ord. 18 May 2020, cit.

³⁵⁹ See **V. BRANNON**, *Banning Religious Assemblies*, cit, pp. 1-5.

³⁶⁰ See **P. CONSORTI**, *La libertà religiosa*, cit., p. 386.

³⁶¹ See **A. MADERA**, *Nuove forme di obiezione di coscienza*, cit., p. 4, and its bibliographical references.

³⁶² See **K. ALIDADI, M.-C. FOBLETS**, *Framing Multicultural Challenges in Freedom of Religion Terms*, cit., p. 389.

³⁶³ See *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990).



political and judicial choices about religious freedom, and specific attention be given to the risk of negative consequences for vulnerable categories of people³⁶⁴.

The role and duties of all religious organizations that operate in civil society and their consistent mindfulness toward the most vulnerable individuals, even during the current health crisis, cannot be underestimated. However, their role should also include a more “responsible” use of the freedom guaranteed by a constitutional framework³⁶⁵, in terms of cooperation with civil authorities to facilitate the implementation of measures aimed at preventing the disease from infecting more people³⁶⁶. For this reason, religious communities are charged with the duty of observing a course of conduct that does not negatively affect the rights of others, even though faith needs cannot be discriminated against by uncontrolled discretionary state restrictions³⁶⁷.

In Italy, the constitutional framework provides all the necessary equipment to deal with critical situations; flexible readings of the Constitution, depending on different circumstances and contexts, are consistent with constitutional guarantees³⁶⁸.

In the second stage, at least, the Italian “constitutional apparatus should also provide ‘more space’ for the strategic development of a ‘common language’ and ‘shared responses’”³⁶⁹. However the linguistic register of cooperation should be revised, to imply not only a “bilateral”, but also an effective “multiparty” dialogue, so as to be consistent with our system of values, which is founded on pluralism and democracy, in the pursuit of a genuine “material and spiritual advancement of society” and “loyal cooperation” between the State and all religious groups³⁷⁰.

³⁶⁴ See **F.M. GEDICKS, R.G. VAN TASSEL**, *RFRA Exemptions*, cit., p. 343.

³⁶⁵ See **A. CARMELLA**, *The Protection of Children and Young People*, cit., p. 1031.

³⁶⁶ See **F. SANEI**, *Re-Centering Religious Freedom v. Public Health Debate*, in *Canopy Forum*, April 29, 2020 (https://canopyforum.org/2020/04/29/recentering-the-religious-freedom-v-public-healthdebate/?fbclid=IwAR2VLBQc5et863R1N20S7jxY7W70EfruthLPBDiCt7iYMHqqQ0Jm__ita6c).

³⁶⁷ See **F. SANEI**, *Re-Centering Religious Freedom*, cit.

³⁶⁸ See **G. BIANCONI**, *Coronavirus, intervista a Marta Cartabia*, cit.

³⁶⁹ See **S. DOMIANELLO**, *L'istituto della responsabilità in regime di pluralismo giuridico*, in *Stato, Chiese e pluralismo confessionale*, cit., 24/2015, p. 12; **A. MADERA**, *Clerical Sexual Abuses*, cit., p. 84.

³⁷⁰ See **G. CASUSCELLI**, paper presented at the webinar “*La libertà religiosa in Italia ai tempi del COVID-19*”, cit.



The pandemic experience offers a special opportunity to reconsider the importance of a model of pluralism founded on inclusivity and participation - even though the concrete ways of implementing such religious dialogue need further investigation - in the pursuit of a more inclusive participation of all collective entities that want to offer their contribution and commitment to dialogue and cooperation³⁷¹.

In both legal systems, a regime founded on democracy, State neutrality, and religious pluralism is consistent with the recognition of forms of religious accommodation aimed at implementing a “social order” where different systems of values can harmoniously “coexist”³⁷². Indeed, whether a pluralist regime is genuinely pluralist is closely connected to its ability to guarantee the “maximum protection of the competing rights”, which requires “promoting and balancing interventions” that aim to prevent both the implementation of strictly separationist models (which would discourage active participation of religious organizations “in the pursuit of shared goals”), and at the same time “mitigating regressive modalities of the exercise of religious freedom”, which negatively affect and hinder the integration of those who do not share the same system of values: all this would support the building of increasingly inclusive societies³⁷³.

³⁷¹ See **P. CONSORTI**, *Esercizi di laicità*, cit.; **A. MADERA**, *La definizione della nozione di religione*, cit., p. 572; **G. MACRÌ**, *La libertà religiosa*, cit., p. 30.

³⁷² See **A. MADERA**, *Nuove forme di obiezione di coscienza*, cit., p. 47, and its bibliographical references.

³⁷³ See **A. MADERA**, *Nuove forme di obiezione di coscienza*, cit., p. 47, and its bibliographical references; **A. MADERA**, *La definizione della nozione di religione*, cit., p. 572, and its bibliographical references; **S. DOMIANELLO**, *Conclusioni. Salutari esercizi di liberalismo nel ‘farsi’ del diritto antidiscriminatorio in materia di religione*, in *Quad. Dir. Pol. Eccl.*, vol. 21, 1/2013, pp. 237-252.