MANDATORY VACCINATION V. CONSCIENTIOUS OBJECTION: A COMPARATIVE ANALYSIS BETWEEN THE US AND THE EUROPEAN APPROACH

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Abstract: The development of vaccines and their delivery has been a key turning point in the fight against COVID-19, and it has allowed life to return to normal as soon as a high level of immunization had been achieved. However, a new legal challenge is whether vaccination can be mandatory, and in which settings, and whether an individual can refuse vaccination for various reasons. In the view of law and religion scholars, the focus is on claims for faith-based exemptions. In multicultural societies, there is a huge number of individuals or groups objecting to vaccination for non-medical reasons, putting at risk the achievement of the so-called herd-immunity. The aim of this paper is to analyze conscientious claims against vaccine mandates in the US and in the European responses, to compare various judicial responses and the evolution of the standards of review adopted, and to investigate the impact of new legal challenges on the protection of religious freedom, with a view to exploring new predictable trajectories.

Keywords: vaccine mandate, conscientious objections, judicial responses, standard of review.

Resumen: El desarrollo de vacunas y su administración ha sido un punto de inflexión clave en la lucha contra el COVID-19, y ha permitido que la vida vuelva a la normalidad en cuanto se ha alcanzado un alto nivel de inmunización. Sin embargo, un nuevo reto jurídico es si la vacunación puede ser obligatoria, y en qué contextos, y si una persona puede rechazar la vacunación por diversos motivos. En opinión de los estudiosos del derecho y la religión, la

atención se centra en las reclamaciones de exenciones basadas en la fe. En las sociedades multiculturales, hay un gran número de individuos o grupos que se oponen a la vacunación por razones no médicas, poniendo en peligro la consecución de la llamada inmunidad de rebaño. El objetivo de este artículo es analizar las demandas de conciencia contra los mandatos de vacunación en los EE. UU. y en las respuestas europeas, comparar diversas respuestas judiciales y la evolución de los criterios de revisión adoptados, e investigar el impacto de los nuevos desafíos jurídicos en la protección de la libertad religiosa, con vistas a explorar nuevas trayectorias previsibles.

Palabras clave: vacunación obligatoria, objeción de conciencia, respuestas judiciales, criterio de revisión.

1. INTRODUCTION

Although conscientious objection has been deemed a fundamental technique in a multicultural society to manage religious diversity,[1] the real question is whether, and to what extent, the accommodation of religious diversity is workable in liberal, democratic pluralistic states without undermining current domestic and international legal frameworks.[2] It goes without saying that the

[1] RODOTÀ, S., «Problemi dell'obiezione di coscienza», in *Quaderni di Diritto e Politica Ecclesiastica*, 1 (1993), p. 59.

[2] CONKLE, D. O., *Religion, Law and the Constitution*, LEG, St. Paul (MN), 2016; NICHOLS, J. A., J. WITTE JR., J., «National Report Unites States of America: Religious Law and Religious Courts as

collision between an increasingly skeptical political approach toward religious accommodationism and the proliferation of a «new generation claims for religious exemptions to generally applicable laws» [3] has been exacerbated in the COVID-19 era. The outbreak of the health crisis due to the spread of the COVID-19 infection has, indeed, emphasized a collision between competing fundamental rights, exacerbating a pre-existent tension, as individual claims for faith-based exemptions could compromise public interests and affect third parties who did not share analogous views.[4] Since 2020, legal systems have undergone a new severe stress-test with regard to the manner and how far the pursuit of compelling state interests can be reconciled with the new challenging demands of religious communities[5].

During the acute response to the health crisis, such a tension was provoked by restrictive measures: scientific uncertainty, a high rate of infection and lack of preventive treatments provoked governmental enforcement of restrictive measures such as lockdown and curfews, as the safest solution to limit the spread of the pandemic, which severely affected basic freedoms. Nowadays, the new legal challenge is whether and to what extent mandatory vaccinations are constitutionally consistent. There is little doubt that the development of vaccines and their delivery has been a key turning point in the fight against COVID-19, and it has allowed life to return to normal as soon as a high level of immunization had been achieved. High vaccination rates have conferred important benefits to economic recovery as businesses have resumed face-to-face services and public offices have re-opened, so the efforts by states and employers to encourage vaccination are comprehensible.[6] Although mandatory vaccination has been traditionally linked with childhood immunization against serious diseases, to preserve the safety of the educational environment, the issue is nowadays about adult vaccination, as a condition to carry out daily ac-

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a Challenge to the State», in Kishel, U. (ed.) *Religious Law and Religious Courts as a Challenge to the State. Legal Pluralism in Comparative Perspective*, Mohr, Tübingen, 2016, p. 83 ff.

[3] See Mancini, S., Rosenfeld, M., «Introduction: The New Generation of Conscience. Objections in Legal, Political and Cultural Context», in Mancini, S., Rosenfeld, M. (Eds.), *The Conscience Wars. Rethinking the Balance between Religion, Identity and Equality*, Cambridge University Press, Cambridge, 2018, pp. 1-19.

[4] Leigh, I., «Vaccination, Conscientious Objection and Human Rights», in *Legal Studies*, 2022, p. 1

[5] Ahdar, R. H., «Navigating Law and Religion: Familiar Waterways, Rivers Less Travelled and Unchartered Seas», in Ahdar, R. H. (ed.), *Research Handbook on Law and Religion*, EE Elgar, Cheltenham, 2018, pp. 2-16.

[6] Madera, A., «COVID-19 Vaccines v. Conscientious Objections in the Workplace: How to Prevent a New Catch-22», in *Canopy Forum*, April 30 (2021), «https://canopyforum.org/2021/04/30/covid-19-vaccines-v-conscientious-objections-in-the-workplace-how-to-prevent-a-new-catch-22/».

tivities.[7] So, a key issue is whether vaccination can be mandatory, and in which settings, and whether an individual can refuse vaccination for various reasons.

It goes without saying that people with specific pathologies cannot be administered certain vaccines, as well as the fact that there is not sufficient scientific evidence on the safety of vaccination for certain classes of vulnerable individuals (children, pregnant women, patients with compromised immune systems). However, the crucial issue is about claims for non-medical exemptions. In multicultural societies, there is a huge number of individuals or groups objecting to vaccination for non-medical reasons, generating alarm about the effective achievement of the so-called herd-immunity[8].

The aim of this paper is to analyze conscientious claims against vaccine mandates in the US and in the European responses, to compare various judicial responses and the evolution of the standards of review adopted, and to investigate the impact of the new legal challenges on the international and constitutional protection of religious freedom, with a view to exploring new predictable trajectories.

2. RELIGIOUSLY-BASED OBJECTIONS TO IMMUNIZATION

Although many religious groups promote the delivery of vaccines, considering them as a «divine gift», a «precautionary measure» and a «moral imperative» due to the need to preserve the main good of public health, some faith communities have traditionally raised concern about vaccines.[9] According to Grabenstein, religious opposition to vaccines are due to various reasons: «violation of prohibition against taking life… violation of dietary laws …interference with natural order by not letting events to take their course»[10]. Among religious groups who oppose to vaccination the Scientist Church invites its fellows to refuse vaccination, because they believe that prayers are the only effective remedy to diseases[11]; some Dutch reformed faith communities oppose to vaccination because they connect it with distrust in God, as according to their

[7] ALEKSEENKO, A., «Implications for COVID-19 Vaccination Following the European Court of Human Right's Decision in Vavřička and oths v. Czech», 22(1) *Medical Law International*, (2022), p. 76.

[8] BARKER, R., «Covid Vaccine: Why Public Health Interests May Outweigh Religious Freedom», in *The Conversation*, August 26 (2020)

[9] LEIGH, I., «Vaccination…», p. 6.

[10] GRABENSTEIN, J., «What the World's Religions Teach, Applied to Vaccines and Immune Globulins», in *Vaccine*, 31 (2013) p. 2011.

[11] *Board of Educ. v. Maas*, 56 N. J. Super. 245, 152 A.2d 394 (1959), cert. denied, 363 U. S. 843 (1960).

convictions God should provide immunization to his faithful; Amish opposition mirrors their hostility toward modernity; Scientology raises a strong theological opposition to vaccination, founded on the idea of the sacrality of the human body which must not be contaminated by chemical products, blood or animal tissues, as only God can cure it.[12] However, religious reasons have been often strictly entangled with secular reasons: in the US context, since 1798, in the wake of the development of first vaccines, there has been a rise of anti-vaccination groups, who have grounded their refusal to vaccination in religious reasons as well as on alternative approaches to medicine[13].

Furthermore, although large religious groups support vaccination, there are some dissident voices inside them who do not adhere to the majority's views. As an example, the Jewish community has never adopted an oppositive approach to vaccines. Instead, Jewish leaders find that the prohibition concerning non-kosher food does not include medicines, as their aim is to save human life. However, recently, some orthodox Jewish groups in New York have raised a fierce opposition to vaccine mandates, provoking a harsh state reaction (the elimination of religious exemptions).[14] Similarly, Muslim scholars hold that the process which non-halal substances have to undergo to be converted into medicines terminates any link between the earlier non-halal elements and the final by-product. Further principles of Islamic law that justify the delivery of vaccines are the principle of necessity, the right to protect life, the duty to avoid a danger and the protection of public interests.[15] However, in the case of COVID-19 vaccines, although Muslim leaders have monitored the production of vaccines to avoid the use of prohibited substances, some religious leaders have raised concern that some elements were not halal.

The issue of vaccines has been thoroughly analyzed in catholic teaching. Although catholic doctrine established that formal cooperation in evil is prohibited,[16] it identified different degrees of responsibility. In *Dignitas*

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[12] Leigh, I., «Vaccination…», p. 6.; Lo Giacco, M. L., «Il rifiuto delle vaccinazioni obbligatorie per motivi di coscienza. Spunti di comparazione», in *Stato, Chiese e Pluralismo Confessionale*, 7 (2020), pp. 42-43.

[13] Lo Giacco, M. L., «Il rifiuto delle vaccinazioni obbligatorie…», p. 44.

[14] Upton, G. C., «Locke in Lakewood: Locating the Proper Meaning of the Free Exercise of Religion in the Time of COVID-19», in *Journal of Church and State*, 64 (2022), pp. 581-599.

[15] Lo Giacco, M. L., «Il rifiuto delle vaccinazioni obbligatorie…», pp. 46-47.

[16] John Paul II, *Evangelium Vitae*, § 74.2 «Indeed, from the moral standpoint, it is never licit to cooperate formally in evil. Such cooperation occurs when an action, either by its very nature or by the form it takes in a concrete situation, can be defined as a direct participation in an act against innocent human life or a sharing in the immoral intention of the person committing it. This cooperation can never be justified either by invoking respect for the freedom of others or by appealing to the fact that civil law permits it or requires it».

Personae, the Congregation expressed its view on the issue of vaccines, and held that serious reasons «may be morally proportionate» to «justify the use» of «biological material» of illicit origin.[17] In a 2005 important pronouncement of the Pontifical Academy for Life on vaccines, vaccination was defined as an indirect passive moral cooperation to evil, so Catholic practitioners and parents were encouraged to opt for alternative vaccines (which did not imply the use of material of illicit origin) and to solicit pharmaceutic firms to change the preparation of vaccines. However, the Church gave priority to the protection of the health of children and to the principle of solidarity.[18] Such arguments have been reiterated by the Pontifical Academy for Life, the National Office for the Pastoral of Health of the National Conference of Catholic Bishops and the Association of the Italian Catholic Practitioners.[19] During the COVID-19 pandemic, the Congregation furtherly investigated the issue concerning the existence of different degrees of responsibility and clearly stated that not only has each individual a duty to self-protect but also to cooperate in the pursuit of the common good, taking into serious account the risks more vulnerable classes of individuals could undergo in the case of outbreaks of communicable serious diseases.[20] It underlined that, in the case of vaccine, moral cooperation in evil is extremely attenuated and the compelling reason to prevent serious risks to health and the spread of devastating infection has to be given priority. Although the moral acceptability of vaccines has been emphasized with regard to the newly developed anti-COVID-19 vaccines, pharmaceutical companies and governmental bodies have been strongly solicited to produce and roll out vaccines which give not rise to conscience issues.[21] Pope Francis adopted a clear

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[17] CONGREGATION FOR THE DOCTRINE OF FAITH, *Dignitas Personae*, 8th December 2008, § 35. The Instruction underlined that «danger to the health of children could permit parents to use a vaccine which was developed using cell lines of illicit origin, while keeping in mind that everyone has the duty to make known their disagreement and to ask that their healthcare system make other types of vaccines available».

[18] PONTIFICAL ACADEMY FOR LIFE, *Moral Reflections on Vaccines Prepared From Cells Derived From Aborted Human Foetuses* (2005) «https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6699053/»; CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Instruction Dignitas Personae on Certain Bioethical Questions* (2008), para 35 «https://www.vatican. va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_en.html».

[19] PONTIFICAL ACADEMY FOR LIFE, *Note on Italian Vaccine Issue*, 31st July 2017, «https://www.academyforlife.va/content/pav/en/the-academy/activity-academy/note-vaccini.html».

[20] CONGREGATION FOR DOCTRINE OF FAITH, *Note on the Morality of Using Some Anti-COVID Vaccines*, December 21, 2020, Nota della Congregazione per la Dottrina della Fede sulla moralità dell'uso di alcuni vaccini anti-Covid-19 (vatican.va).

[21] CONGREGATION FOR DOCTRINE OF FAITH, *Note on the Morality of Using Some Anti-COVID Vaccines*, December 21, 2020, Nota della Congregazione per la Dottrina della Fede sulla moralità dell'uso di alcuni vaccini anti-Covid-19 (vatican.va); VATICAN COVID 19 COMMISSION IN COLLABORATION WITH THE PONTIFICAL ACADEMY FOR LIFE, *Vaccine for All. 20 Points for a Fairer and*

position on COVID-19 vaccines. In January 2021 he defined vaccination as a «moral obligation» and a refusal of vaccination as «suicidal denialism.» In August 2021, he strongly reiterated his appeal to receive vaccination, as «an act of love».[22] However, during the COVID-19 pandemic, some Catholic groups showed skepticism against vaccines for fear of moral complicity in abortion in the case that some vaccines have been developed using materials deriving from aborted human fetuses.

Furthermore, Evangelical groups in the US fiercely opposed to vaccine mandates due to the spread of the COVID-19 infection and some Buddhists raised concern about some elements used for the preparation of vaccines.[23]

So, the COVID-19 pandemic has emphasized a further serious legal challenge: the adjudication of claims for exemptions founded on idiosyncratic beliefs,[24] and on religiously «hybrid» convictions,[25] namely on rejection of a faith community's doctrine and practice, replaced with personal deeply held moral or ethical beliefs[26].

3. US EARLY VACCINE MANDATES AND US SUPREME COURT RELATED LITIGATION

For more than a century US courts have rejected claims for non-medical exemptions against mandatory vaccination and upheld state mandates due to a pressing interest to protect public health.[27] The Supreme Court faced the colli-

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Healthier World, December 29, 2020, «https://www.vatican.va/roman_curia/pontifical_academies/acdlife/documents/rc_pont-acd_life_doc_20201229_covid19-vaccinopertuttti_en.html».

[22] Watkins, D., «Pope Francis Urges People to Get Vaccinated against COVID-19», in *Vatican News*, August 18, 2021, «https://www.vaticannews.va/en/pope/news/2021-08/pope-francis-appeal-covid-19-vaccines-act-of-love.html».

[23] Mercer, M., «Why Evangelicals are Encouraging the Anti-Vaccination Movement», May 4, 2021, Why Evangelicals are Encouraging the Anti-Vaccination Movement - The College of Arts & Sciences at Texas A&M University (tamu.edu).

[24] [24] *Brown v. Children's Hospital of Philadelphia*, 794 Fed. App. 226 (3rd Cir. 2020).

[25] Burton, T. I., *Strange Rites: New Religions for a Godless World*, Public Affairs, New York 2020, p. 22.

[26] *Together Employees v. Mass General Brigham Inc.*, 573 F. Supp.3d 412, 426 (D. Mass. 2021), aff'd, 32 F.4th 82 (1st Cir. 2022), where a hospital employee refused vaccination «on the basis of his Christian religious belief that he must keep his "body as pure of any foreign substances as humanly possible."» See also *Kane v. DeBlasio*, 19 F.4th 152, 168 (2nd Cir. 2021); *Harris v. University of Massachusetts, Lowell*, 557 F. Supp. 3d 304, 311 (2021); *Federoff v. Geisinger Clinic*, 571 F. Supp. 3d 376, 388 (M. D. Pa. 2021). On the issue, see Movsesian, M., «The New Thoreau», in *Loyola University Chicago Law Journal*, (2022), forthcoming.

[27] Moran, S., «Thou Shalt Not Take Thy Lord's Name in Vein: Vaccine Mandates & Religious Objections», in *Seton Hall Legis. J.*, 46 (2022), pp. 735-775.

sion between religious freedom and vaccine mandates for the very first time in the landmark decision *Jacobson v. Massachusetts*, where it found that the preservation of public health has to be given priority against individual liberties.[28]

Here the Court did not face a First Amendment challenge, as the case was adjudicated before its incorporation against the states,[29] which occurred later.[30] Instead, the Court relied on police power to define the boundaries of the Fourteenth Amendment's application to state jurisdiction[31], and grounded such power in the public interest to pursue the «common good», which is the main aim of the «social compact».[32] Furthermore, according to the Court, the use of «police powers»[33] was justified by the need of a community to self-defend against the risks for safety due to the outbreak of an epidemic through the enforcement of precautionary measures, such as a vaccine mandate. The case was about a citizen in Massachusetts who opposed to smallpox mandatory vaccination imposed through a statute, claiming that «compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and... is nothing short of an assault upon his person.» Using a hybrid language between the modern rational-basis review and the strict scrutiny test[34], the Supreme Court upheld the vaccination mandate, arguing that freedoms based on the Fourteenth Amendment cannot be immunized by state-imposed limitations, which are «necessary» to protect public interests such as public health, safety or welfare[35] and justified the imposition of restriction on

[28] *Jacobson v. Massachusetts*, 197 U. S. 11 (1905).

[29] KILLMOND, M., «Why is Vaccination Different? A Comparative Analysis of Religious Exemptions», in *Colum. L. Rev.*, 117 (2017), pp. 913-951.

[30] *Cantwell v. Connecticut*, 310 U. S. 296 (1939).

[31] PARMET, W. E., «Rediscovering Jacobson in the Era of COVID-19», in *Boston University Law Review Online*, 100 (2020), pp. 118-133.

[32] *Jacobson v. Massachusetts*, 197 U. S. 11, 27 (1905). See CLINE, T., «Common Good Constitutionalism and Vaccine Mandates: A Review of Jacobson v. Massachusetts in Light of COVID-19», in *Appalachian L. J.*, 21 (2021), p. 11.

[33] In the US federalist system, the federal government and the states share authority to regulate public health matters. Police powers are the powers of states to enact laws to regulate public health, safety and morals. *Barnes v. Glen Theatre, Inc.*, 501 U. S. 560, (1991).

[34] POLLARD SACKS, D. «Judicial Protection of Medical Liberty», in *Fla. St. U. L. Rev.*, 49 (2022), p. 528.

[35] «There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,–especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that 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» (*Jacobson*, at 29).

individual liberties for the sake of the interest of the community (public safety) through «reasonable regulations».[36] According to the Supreme Court, the Massachusetts regulations were not arbitrary and unreasonable as they did not go «so far beyond what was reasonably required for the safety of the public,» so they did not infringe the constitutional text. The Court underlined that the situation of «public necessity», due to the spread of a smallpox epidemic gave a relevant reason for severe restrictions.[37] In any case, the penalty was not a forced vaccination but a mere fine. So, the question of whether, lacking a situation of emergency, governments should be allowed to enforce compulsory vaccination, has still remained open. Although the Court accorded that state action could restrict individual liberties because of a pressing need to defend public health, due to the circumstances of the case, the Court was far from adopting a blind deference approach. Instead, the Court acknowledged that, given the circumstances of the case, the plaintiff failed to demonstrate that «the means prescribed by the State» to the goal pursued «ha[d] no real and substantial relation to the protection of the public health and the public safety,» namely that a less restrictive alternative was available to face the epidemic. So, in *Jacobson v. Massachusetts* the Supreme Court found a striking balance between individual liberty and police powers[38].

Following its reasoning, the judiciary has been charged with the task to protect individual liberties against a government's arbitrary use of police powers: in the case concerned, resorting to the standards of necessity and reasonableness, the Supreme Court carefully scrutinized the existence of scientific evidence about vaccination and set the boundaries of state policy powers[39].

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[36] «[e]ven liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to [the] equal enjoyment of the same right by others. It is then, liberty regulated by law» (*Jacobson*, at 27).

[37] «It might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all, might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons». (*Jacobson*, at 28).

[38] Pollard Sacks, D., «Judicial Protection of Medical Liberty…», p. 552.

[39] «[N]o rule prescribed by a State, nor any regulation adopted by a local governmental agency... shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures.» (*Jacobson*, at 25).

Relying on *Jacobson*, subsequent Supreme Court decisions confirmed that vaccine mandates were within state police power,[40] and upheld that children who did not undergo vaccination because their parents refused vaccination could be excluded from schools, dismissing religious claims, even in the absence of an outbreak of an infection.[41] In a case concerning a Jehovah's Witness who brought a child around to preach and ask for donations, where the application of a child labor law to a religious minority was at stake, the Supreme Court, in an *obiter dictum*, strongly reiterated that «the right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death» [42]: not only do vaccine mandates guarantee the protection of health of those who are not vaccinated, but also of those with whom such persons can come into contact.

4. US LEGAL BACKGROUND

In the wake of the Supreme Court's decisions, states have grounded the authority to enforce immunization legislation in the judicially recognized police powers to protect the public from the spread of contagious diseases and enforced a complex regulation, imposing vaccine mandates to certain classes of individuals (school children, healthcare workers) as a condition to have access to certain settings (schools, workplace)[43].

Since *Jacobson*, vaccination schemes have provided a legal mismatch, as they have varied from state to state, not only including medical exemptions, but also religious exemptions. In the 1960s, states started to enforce religious, philosophical and even personal exemptions to school immunization policies, providing that parents could raise objection against their children's vaccination for various reasons.[44] Indeed, the original intent was to protect religious minorities, namely small faith communities opposing to vaccination. During the 1960s,

[40] *Prince v. Massachussets*, 321 U. S. 158 (1944); *Zucht v. King*, 260 US 174 (1922). Here a student claimed to be admitted to school without proof of vaccination, as there was no current onset of smallpox in the geographical area concerned.

[41] *Zucht v. King*, 260 US 174 (1922).

[42] *Prince v. Massachussetts*, 321 U. S. 158 (1944).

[43] SHEN, W. W., *State and Federal Authority to Mandate COVID-19 Vaccination*, Congressional Research Service Report, May 17, 2022, «https://crsreports.congress.gov/product/pdf/R/R46745; LEFEVER, L. E., «Religious Exemptions from School Immunization: A Sincere Belief or a Legal Loophole?», in *Penn. State Law Review*, 110.4 (2006), pp. 1047-1067.

[44] NATIONAL CONFERENCE OF STATE LEGISLATURES, *States with Religious and Philosophical Exemptions from School Immunization Requirements*, Apr. 30, 2021, «https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx».

given the lack of serious health emergencies, governments did not perceive religious exemptions as a threat for the rest of society. Individuals had to demonstrate they had sincerely held beliefs (in compliance with *Wisconsin v. Yoder*)[45] and that they adhered to a religious organization whose tenets were contrary to vaccination.[46] However, over time, such exemptions have been more broadly extended to avoid disparate treatment among religious communities. Non-traditional religious beliefs and deeply-held secular philosophical convictions has been considered as similar to religious beliefs and made subject to an equal treatment to prevent Establishment Clause and Equal Protection claims. The over-expansion of provisions granting religious exemptions, even when claims are not connected with a set of beliefs shared by an organized religious group, together with the reluctance of judicial boards to assess the validity of alleged faith-based convictions, has raised increasing concern about the risk of abuses[47].

However, even states that introduced exemptions adopted the viewpoint that they were not required to do so, as a vaccination mandate without religious exemptions was a reasonable exercise of police powers[48].

The resurgence of contagious diseases and the increasing reluctance of parents to have their children vaccinated (because of an increasing fear of side-effects of vaccines) has recently given rise to an alarmed state reaction, aimed at eliminating or making more difficult access to exemptions. In 2013, a measles outbreak in Disneyland exacerbated the skepticism toward non-medical exemptions.

Although the majority of states imposing vaccine immunization for schoolchildren have traditionally provided religious and philosophical exemptions through statutes, since 2014 four states (California, Maine, Connecticut and New York) have repealed non-medical exemptions from school vaccination mandate and medical exemptions have become more difficult to obtain, as a medical statement declaring that the patient suffers from a serious disease which makes vaccination extremely risky, has been required.

5. LOWER COURTS' RESPONSES

Since their enforcement, state vaccination mandates have given rise to fierce litigation. However, courts have adopted an increasingly deferential ap-

[45] *Wisconsin v. Yoder*, 406 U. S. 205 (1972).

[46] *Dalli v. Board of Educ.*, 358 Mass. 753, 267 N. E.2d 219 (1971).

[47] Rubenstein Reiss, D., «Thou Shalt Not Take the Name of Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements», in *Hastings L. J.*, 65 (2014), p. 1551.

[48] *Maier v. Besser*, 73 Misc. 2d 241, 341 N. Y. S.2d 411 (1972).

proach toward legislative decisions as far as vaccine mandates were concerned:[49] they have accorded to States broad discretion in deciding whether enforcing exemptions and have self-restrained from second-guessing issues connected with public health and safety. Indeed, *Jacobson* has been regularly interpreted as justifying a proactive action of public authorities, regardless of the outset of a disease. In specific contexts, where there was a higher risk of spread of the infection, courts have been extremely reluctant to grant forms of reasonable accommodation of religious claims, even though a believer had to face a difficult choice between his religious convictions and access to public spaces where fundamental rights can be exercised (schools, workplace). In the case of school immunization requirements, for a century, courts have consistently held that school vaccination mandates were constitutional, even when they did not provide non-medical exemptions,[50] on the basis of a «substantial relationship» between immunization requirements and the public interest to protect public health.[51] So parents who opposed to vaccination had the only option to keep their children from attending school[52].

The first challenges were about infringements of the Fourteeenth Amendment (equal treatment under law). In some cases, parents also challenged immunization statutes claiming a violation of their children's right to attend school. However, courts relied on the Supreme Court's earlier decisions to consistently give priority to state regulations aimed at protecting public health[53].

In the modern era, in cases concerning parents' religious opposition to school immunization requirements, courts reiterated a deferential approach toward state decision-making. Provided that the incorporation of the First Amendment implied its application to state action[54], justices adopted a Free Exercise analysis and its related standards of review[55].

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[49] POLLARD SACKS, D., «Judicial Protection of Medical Liberty…», p. 516.

[50] RUBENSTEIN REISS, D., «Litigating Alternative Facts: School Vaccine Mandates in the Courts», in *U. Pa. Const. Law*, 21 (2018), p. 207. See recently *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015).

[51] *Jacobson v. Massachusetts*, 197 U. S. 11, 31 (1905).

[52] Furthermore, parents could be convicted for misconduct. See *In re Elwell*, 55 Misc. 2d 252, 284 N. Y. S.2d 924 (1967). In some cases children were even removed from the custody of their parents. See *Cude v. State*, 237 Ark. 927, 377 S. W.2d 816 (1964). See DOVER, T. E., «An Evaluation of Immunization Regulations in Light of Religious Objections and the Developing Right of Privacy», *University of Dayton Law Review*, 4 (1979), p. 406.

[53] *Hartman v. May*, 168 Miss. 477, 151 So. 737 (1934); *Herbert v. Board of Educ*., 197 Ala. 617, 73 So. 321 (1916).

[54] *Cantwell v. Connecticut*, 310 U. S. 296 (1940).

[55] *Workman v. Mingo Cty. Bd. of Educ*., 419 Fed. App'x. 348, 353-55 (4th Cir. 2011), where the court held that the prevention of communicable diseases is a compelling state interest, even though a clear and present danger is lacking. According to the Court, the *Prince* case supported the consti-

As is known, over time the Supreme Court has adopted various standards of review with regard to religious freedom, ranging between accommodationist and separationist approaches. The standard of review adopted has traditionally had a significant impact on the degree of a court's deference toward state action. The strict scrutiny was adopted for the first time in *Sherbert v. Verner*[56] with regard to religious freedom claims. In order to justify a substantial burden on religious freedom, such a standard required that a government had the burden of demonstrating that a law aims at pursuing a compelling state interest, that the law concerned was narrowly tailored to meet that aim, and that no alternative restrictive means was available to satisfy the state's aim. As judicial concern arose about a proliferation of religious exemptions, leading to sidestepping «civic obligations of almost every conceivable kind», in 1990 the Supreme Court reversed the strict scrutiny standard of review, and replaced it with a rational basis review[57]. Under such a standard, a statute is considered as valid where it is rationally related to a legitimate state interest and religious claims do not receive accommodation where a statute is generally applicable and religiously neutral. Although the Court recognized that a generally applicable law can have a disparate impact on religious minorities, it held that such «unavoidable consequence of democratic government must be 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.»[58]

The Court distinguished Smith from earlier cases arguing that it concerned a free exercise claim unconnected to other fundamental rights: according to its reasoning, only laws infringing hybrid rights or directly targeting religion re-

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tutional consistency of a vaccine mandate, regardless of the interference with religious freedom. In *Boone v. Boozman*, 217 F. Supp. 2d 938, 952 (E. D. Ark. 2002), the court found that the Free Exercise Clause does not require exemptions from laws of general applicability and held that «the State may enact reasonable regulations to protect the public health and the public safety, and it cannot be questioned that compulsory immunization is a permissible exercise of the State's police power». Furthermore the court held that the U. S. Supreme Court «has frowned upon extending strict scrutiny to compulsory immunization laws, albeit in dictum» so «the right to free exercise of religion and parental rights are subordinated to society's interest in protecting against the spread of disease.»

[56] *Sherbert v. Verner*, 374 U. S. 398, 406 (1963). The case was about a Seventh Day Adventist Church member who was dismissed because of his refusal to work on Saturdays and denied state unemployment benefits.

[57] *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U. S. 872, 888-89 (1990). The case involved two Native Americans who were denied state unemployment benefits because they were dismissed for work-related misconduct, as they infringed a state law against the use of peyote.

[58] *Smith*, at 890. See Gitter, D. M., «First Amendment Challenges to State Vaccine Mandates: Why the U. S. Supreme Court Should Hold That the Free Exercise Clause Does Not Require Religious Exemption», in *Am. L. Rev.*, 71 (2022) (forthcoming).

quired a strict scrutiny standard of review. Such a self-restraint judicial approach left federal and state legislatures free to introduce religious exemptions through statutes, and they have taken advantage of this option[59]. However, a constitutional right to religious accommodation could no longer be claimed.

Religious objections against vaccine mandates did not directly reach the Supreme Court. In some cases courts adopted a balancing test, carefully assessing competing interests,[60] but in others they did not operate any balance at all, and held statutes as constitutionally consistent[61]. They consistently reiterated the traditional argument that «[i]t has long been settled that one area in which religious freedom must be subordinated to the compelling interests of society involves protection against the spread of disease»[62]. Furthermore, one court went so far as to find that the recognition of religious exemption to the children of parents whose religious beliefs conflict with the immunization requirements would provoke a discrimination against the great majority of children whose parents do not share such convictions, giving rise to a violation of the Fourteenth Amendment (Equal Protection Clause)[63].

Regardless of the standard of review adopted, lower courts held that the public interest to preserve public health could justify a state recognition of exemptions from vaccination only for medical reasons and the imposition of limitations on individual freedom for the sake of the good of society as a whole.[64] Indeed, the state's aim to prevent the spread of communicable diseases was qualified as a compelling state interest which had to be prioritized against private religious beliefs of a minority[65] and justified the imposition of

[59] With a view to restoring the strict scrutiny standard of review, the Congress enacted the Religious Freedom Restoration Act, 42 U. S. C. § 2000bb, and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U. S. C. §§ 2000cc. As the Supreme Court struck down the RFRA as an unconstitutional use of the Congress's powers under the Fourteenth Amendment in *Boerne v. Flores*, 521 U. S. 507 (1997), its application has been restricted to federal statutes. Several states reacted enforcing statutes aimed at protecting religious freedom, whose provisions mirror the RFRA.

[60] In *Workman*, cit., the court applied the strict scrutiny standard of review and held that «the West Virginia statute requiring vaccinations as a condition of admission to school does not unconstitutionally infringe Workman's right to free exercise» (353-354).

[61] *Wright v. DeWitt School Dist.*, 238 Ark. 906, 385 S. W.2d 644 (1965). In *Boone v. Boozman*, 217 F. Supp. 2d 938, 950-51 (E. D. Ark. 2002) the court held that a vaccine mandate is a generally applicable statute which does not require to be «justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice».

[62] *Sherr v. Northport*, 672 F. Supp. 81, 83 (E. D. N. Y. 1987).

[63] *Brown v. Stone*, 378 So. 2d 218 (Miss. 1979).

[64] *Wright v. DeWitt School Dist.*, 385 S. W. 2d 644 (Ark. 1965).

[65] *Dalli v. Board of Educ*., 358 Mass. 753, 267 N. E.2d 219 (1971).

vaccination as a condition for the attendance of classes.[66] Courts also emphasized the need to prevent harm for the general public welfare and the rights of others[67].

Not only did courts rely on *Jacobson* in school immunization cases but also in cases concerning university vaccine mandates. Courts held that university boards had the power to require vaccination as a condition of admission to courses without providing religious exemptions, with a view to preventing the spread of contagious diseases among students. Reading Free Exercise rights through the lens of a restrictive interpretation of the *Jacobson*'s standard of review, courts found that vaccine mandates did not infringe religious freedom of the claimants.[68] Furthermore, some courts referred to Smith to hold that colleges' policies have to be deemed as generally applicable and religiously neutral laws, without any intent to single out religion for discriminatory treatment[69].

More recently, the repeal of religious exemptions in some states has provoked a new wave of litigation, where courts have consistently rejected free exercise claims, holding that a state is not constitutionally required to provide religious exemptions to vaccine mandates and reiterated the *Prince*'s obiter dictum according to which «the right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.»[70] Strongly relying on *Smith*, courts have consistently held that religious claimants are not relieved from the duty to comply with generally applicable and religiously neutral laws and that the compelling state interest to protect public health justifies legislative changes.[71] As an example, in California, in 2016, the enforcement of a new vaccine mandate concerning school children gave rise to Free Exercise claims. In the *Whitlow* case, parents claimed that the removal of the personal belief exemption from the school immunization requirements was not narrowly tailored, as the prior law

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[66] *Workman v. Mingo County Board of Education*, 419 F. App.'x 348 (4th Cir. 2011); *Phillips v. the State of New York*, 775 F.3d 538, 542 (2d Cir. 2015). See also *Sherr v. Northport-East Northport Union Free Sch. Dist*., 672 F. Supp. 81, 88 (E. D. N. Y. 1987); *Caviezel v. Great Neck Public Schools*, 739 F. Supp. 2d 273 (E. D. N. Y. 2010), 285, aff'd, 500 F. App'x 16 (2d Cir. 2012).

[67] *Wright v. DeWitt School Dist.*, 238 Ark. 906, 913, 385 S. W.2d 644, 648 (1965); *Cude v. State*, 237 Ark. 927, 377 S. W.2d 816 (1964).

[68] For an in-depth analysis, Rubenstein Reiss, D., DiPaolo, J., «COVID-19 Vaccine Mandates for University Students», in *Legislation and Public Policy* 24 (2021), pp. 1-66.

[69] *George v. Kankakee Cmty Coll*., 2016 Ill. App. 3d 160116 (Ill. App. Ct. 2016).

[70] *Brown v. Smith*, 235 Cal. Rptr. 3d 218 (2d Cal. Ct. App. 2018).

[71] *F. F. v. State*, 143 N. Y. S.3d 734, 741 (N. Y. A. D. 2021); *C. F. v. New York City Dept. of Health & Mental Hygiene*, 139 N. Y. S.3d 273, 291 (N. Y. A. D 2020); *W. D. v. Rockland County*, 521 F. Supp.3d 358, 405 (S. D. N. Y. 2021); *Doe v. Zucker*, 496 F. Supp.3d 744, 759 (N. D. N. Y. 2020); *V. D. v. State of New York*, 403 F. Supp.3d 76, 87 (S. D. N. Y. 2019).

provided it, and was therefore a less restrictive alternative to achieve the state's goal.[72] The court held that neither religious nor personal exemptions are constitutionally required. Furthermore, the court held that the goal of the new law was more pervasive than that of the prior law: the state aimed at reaching a total immunity and made a reasonable use of its «police powers» to meet it. Although the claimants raised the argument that *Jacobson* predated the incorporation of the Free Exercise Clause toward states, so it has no longer been applied in the case of religious exemptions to vaccine mandates,[73] such an argument is still extremely controversial. On this point, some scholars have argued that California's claimants did not take into account that even more recent case law reiterated the above mentioned *Prince*'s reasoning, according to which freedom of religion cannot be given priority to the detriment of public health.[74] Furthermore, the court emphasized that the landmark *Smith* reasoning reiterated that «compulsory vaccination laws» should not be assessed through a strict scrutiny standard of review.[75] In a recent case, a claimant also resorted to the »hybrid rights» doctrine, which, under *Smith*, should make a religious claim stronger, as combined with another fundamental right claim, and should trigger a strict scrutiny review. In the case concerned, freedom of religion combined with parental autonomy to take medical decisions regarding their children. However, according to the court: the «hybrid rights doctrine has been widely criticized, and, notably, no court has ever allowed a plaintiff to bootstrap a free exercise claim in this manner.»[76] For this reason, the court declined to resort to a strict scrutiny standard of review. So the analysis of case law shows a consistently deferential approach toward public policies, regardless of the standard of review adopted[77].

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[72] *Whitlow v. California*, 203 F. Supp. 3d 1074, 1086 n.4 (S. D. Cal. 2016). See also *Brown v. Smith*, 235 Cal. Rptr. 3d 218 (2d Cal. Ct. App. 2018), where the court rejected free exercise claims in a similar way.

[73] *Whitlow v. California*, 203 F. Supp. 3d 1074, 1086 n.4 (S. D. Cal. 2016).

[74] *Phillips v. the State of New York*, 163 775 F.3d 538, 543 (2d Cir. 2015). See RUBENSTEIN REISS, D., «Litigating Alternative Facts», p. 24.

[75] *Smith*, at 888-889. It seems significant that the court also added that «nowhere in [Smith] does the court state that if the government provides a secular exemption to a law or regulation that it must also provide a religious exemption» and underlined that «a majority of the Circuit Courts of Appeal have refused to interpret Smith as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption».

[76] *Whitlow v. California*, 203 F. Supp. 3d 1079, 1086 n. 4 (S. D. Cal. 2016).

[77] POLLARD SACKS, D., «Judicial Protection of Medical Liberty…», p. 567.

6. ESTABLISHMENT CLAUSE CLAIMS

Another series of cases focused on which conscientious claims could deserve protection under the vaccine mandates and whether religious protection could be extended to moral and philosophical claims. Although the Supreme Court has gradually overcome its traditional Christian approach to the religious phenomenon[78], the Supreme Court has not provided clear guidelines on what can be defined as religion.

As is known, in earlier cases about conscientious objection to military service, the Supreme Court held that secular deeply-held convictions can enjoy a treatment analogous to religion where «a given belief», is «sincere and meaningful», and «… occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God».[79] In the above-mentioned cases, the Court also emphasized that an individual's religious beliefs deserve protection under the Free Exercise Clause, even if they are not shared by his religious community[80].

However, the Supreme Court reversed such an approach in *Yoder*, where it emphasized the importance of the institutional dimension of religion and the difference between convictions shared by a religious community, endowed with an organizational structure, which have an impact on the life-style of the individual believer, and those which are the outcome of a kind of personal preference.[81] As the Supreme Court did not give clear guidelines, lower courts adopted various approaches. The lack of a uniform approach has given rise to a judicial reluctance to determine the «reasonableness» of religious beliefs, where courts focused instead on the sincerity of a given belief.[82] In any case, we cannot underestimate that, on several occasions, the lower courts have adopted specific standards which should facilitate a consistent assessment of belief systems and avoid an excessive judicial discretion, focusing on whether a set of beliefs «addresses fundamental and ultimate questions having to do with deep and imponderable matters», whether it has a comprehensive nature and makes use of «any formal, external, or surface signs that may be analogized to ac-

[78] *United States v. Ballard*, 322 U. S. 78 (1944).

[79] *Welsh v. United States*, 398 U. S. 333 (1970); *United States v. Seeger*, 380 U. S. 163 (1965); *Frazee v. Illinois Department of Employment Security*, 489 U. S. 829 (1989).

[80] Madera, A., «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*, 34 (2028), pp. 539-542.

[81] *Wisconsin v. Yoder*, 406 U. S. 205 (1972).

[82] Luk, S. B., «Conspiracy Theories Are Not Religions: Scrutinizing Religious Exemptions to the COVID-19 Vaccine», *U. S. F. L. Rev*., 57 (2022), p. 85.

cepted religion».[83] Such an approach has been consistently reiterated in recent decisions[84].

The first claims against vaccine mandates, where states selectively accommodated religious claims of members of organized religious communities but not those of non-traditional or idiosyncratic religions, were dismissed as the petitioner's beliefs were founded on «personal opinions, fears unsupported by any competent medical proof, and a purported exercise of their own consciences»[85] or «personal moral code or philosophy not based on or by reason of religious training, belief or conviction»[86].

However, in 1971, a Massachusetts court found that a statute violated the First and the Fourteenth Amendment as it provided an exemption to compulsory vaccination limited to members of an organized religion, giving them preferential treatment. According to the court, such a statute generated a serious violation of the Establishment Clause, as it provoked an undue endorsement of specific religions to the detriment of other beliefs and convictions. So, courts have increasingly held that limiting religious exemptions to mainstream religions violated the principle of neutrality[87].

The Massachusetts court held that judicial scrutiny should be founded on the sole standard of the sincerity of religious beliefs: if the beliefs were sincerely held they deserve equal protection regardless of the lack of an institutional dimension.[88] In the wake of this judgment, another judicial board found that religious exemptions limited to «bona fide members of a recognized religious organization» gave rise to an undue endorsement of religion and an excessive entanglement of government in religious matters[89].

However, an analysis based on the mere sincerity of religious beliefs of the claimant is problematic too. On one hand, there is a thin boundary between investigating the sincerity of religious beliefs and judicial interference into the

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[83] See *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979); *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981).

[84] *Friedman v. S. Cal. Permanente Med. Gpr.*, 125 Cal. Rptr. 2d 663 (Ct. App. 2002).

[85] *In re Elwell*, 284 N. Y. S.2d 924, 932 (N. Y. Fam. Ct. 1967).

[86] *McCartney v. Austin*, 293 N. Y. S.2d 188, 199 (N. Y. App. Div. 1968).

[87] However, they did not propose a uniform remedy to disparate treatment: in some cases they achieved equalization extending the exemption to those who do not adhere to organized religions, in others, severing the exemption from the statute, with a view to eliminating the religious exemption for all the believers. In some cases courts declared the entire statute as unconstitutional. See LEVIN, H. Y., «Why Some Religious Accommodations for Mandatory Vaccinations Violate the Establishment Clause», in *Hastings L. J.*, 68 (2017), pp. 1193-1241.

[88] *Dali v. Board of Education*, 267 N. E 2d. 219 (Mass. 1971).

[89] *Sherr. v. Northport- East Northport Union Free Sch. Dist.*, 672 F. Supp. 81 (E. D. N. Y. 1987). See NOVAK, «The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges», in *U. Pa. J. Const. L.*, 7 (2005), 1115-16.

validity of one's religious beliefs. Such uncertainty has traditionally given rise to judicial reluctance of intruding in religious matters. On the other hand, there is a state need to monitor the risk of the abuse of religiously-based conscientious objections, which could mask mere hesitancy or scientifically wrong convictions because other courts granted them. [90] Given the proliferation of claims for religious exemptions, and the costs they impose on the government and third parties the idea that courts should «adjudicate religious sincerity» is gaining momentum[91].

As is known, the imposition of vaccine mandates has provoked the rise of religious groups whose only aim is claiming religious exemptions on behalf of their children against vaccination mandates.[92] A further concern are cases where the convictions of the claimant clashed with those of the community he claimed to adhere to: such cases provoked judicial skepticism and lack of a uniform judicial approach[93].

As the accommodation of non-medical exemptions has become increasingly divisive, federal courts have recently tried to draw a line between religious and philosophical opposition to vaccination.[94] In contrast with a recent judicial orientation aimed at equalizing moral-ethical claims to religious claims,[95] in recent cases, courts ruled that convictions are not religiously-based if they are grounded in a subjective evaluation and rejection of the majority's

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[90] *Berg v. Glen Cove City Sch. Dist*., 853 F. Supp. 651 (E. D. N. Y. 1994); *Matter of Shmuel G. v. Rivka G*, 800 N. Y. S.2d 357 (N. Y. Fam. Ct. 2005). However, a Kentucky federal court upheld the constitutionality of limiting exemptions to: «members of a nationally recognized and established church or religious denomination, the teachings of which are opposed to medical immunization against disease.» *Kleid v. Bd. of Educ. of Fulton*, 406 F. Supp. 902, 904 (W. D. Ky. 1976). After the decision, the lawmaker amended the exemption and removed the clause limiting the exemptions to organized religious comunities.

[91] Chapman, N. S., «Adjudicating Religious Sincerity», in *Wash. L. Rev*., 92 (2017), p. 1185.

[92] Rubenstein Reiss, D., «Thou Shalt…», p. 1568.

[93] *McCartney v. Austin*, 293 N. Y. S.2d 188, 200 (N. Y. App. Div. 1968).

[94] Recently, courts adopted a more skeptical approach toward claims for religious exemptions coming from idyosincratic and personal beliefs. See *Brox v. Woods Hole, Martha's Vineyard, And Nantucket Steamship Authority*, F. Supp.3d --- (D. Mass. 2022), 2022 WL 715566. Furthermore, courts rejected legal challenges as lacking a sufficient religious basis (*Brown v. Children's Hospital of Philadelphia*, 794 Fed. Appx. 226 (3rd Cir. 2020)) or disconnected from a comprehensive set of religious tenets and values. See *Geerlings v. Tredyffrin/Easttown School District*, 2021 WL 4399672 (E. D. Pa. 2021).

[95] Recently, an expansive approach has been adopted toward moral-ethical claims on the basis of the «similarly situated standard» grounded in the Equal Protection Clause. See *March for Life v. Burwell*, 128 F. Supp. 3d 116 (D. D. C. 2015); *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869 (7th Cir. 2014).

contemporary secular values, if they concern merely secular philosophical concerns, or if they are just a matter of personal preference[96].

Such a cautious approach is based on a case about conscience objection to vaccination of an employee in the healthcare setting, where a court dismissed an employee's claim of conscientious objection.[97] Here, an employee was dismissed as he refused to be vaccinated against certain diseases and claimed a religious discrimination grounded in Title VII of the Civil Rights Act. The court clarified that personal moral codes cannot be covered under the constitutional protection of religious freedom and also that religion typically concerns «ultimate ideas» about «life, purpose and death» and does not cover «social, political, or economic philosophies, as well as mere personal preferences». Indeed, the court held that a mere opposition to vaccines, due to a conviction that «one should not harm their own body» and a personal concern that a flu vaccine might provoke more harm than good could not be qualified as religion.[98] This reasoning relies on the above-mentioned milestone Third Circuit precedent where Justice Adams designed a test, according to which a global system of beliefs «addresses fundamental and ultimate questions having to do with deep and imponderable matters». Such fundamental questions concern «the meaning of life and death, man's role in the Universe, [and] the proper moral code of right and wrong.» Such a test implies that conscientious objections should be founded on «a comprehensive system of beliefs about fundamental or ultimate matters», and not on a mere «isolated moral teaching» of the claimant, even lacking «formal and external signs»[99].

7. FREE EXERCISE LITIGATION DURING THE PANDEMIC: MOVING TOWARD NEW STANDARDS OF REVIEW?

The devastating pandemic due to the spread of the COVID-19 infection has exacerbated the never-ending debate about the proper relationship between general rules and exemptions with regard to mandatory vaccinations.

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[96] *Mason v. Gen. Brown Cent. Sch. Dist.*, 851 F.2d 47 (2d Cir. 1988).

[97] *Fallon v Mercy Catholic Medical Center* 877 F3d 487 (3d Cir 2017).

[98] *Fallon v Mercy Catholic Medical Center*, at 492

[99] *Fallon v Mercy Catholic Medical Center*, at 492. See *Africa v. Pennsylvania*, 662 F.2d 1025, 1034 (3d. Cir. 1981) «[I]t is crucial to realize that the free exercise clause does not protect all deeply held beliefs, however «ultimate» their ends or all-consuming their means. An individual or group may adhere to and profess certain political, economic, or social doctrines, perhaps quite passionately. The first amendment, though, has not been construed, at least as yet, to shelter strongly held ideologies of such a nature, however all-encompassing their scope… [T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief».

In 2021 various state and local government enforced COVID-19 vaccination mandates. Various universities imposed immunization as a condition for in-person attendance and employment and refused to provide religious exemptions with regard to their students and staff, giving rise to a new wave of legal challenges[100].

Private employers increasingly refused to provide religious exemptions when they imposed vaccine mandates to their employees, especially in the healthcare field. In the case of private actors, such as employers, the legitimacy of vaccine mandates has to be scrutinized with regard to their consistency with the Title VII of the Civil Rights Act. As is known, such an Act adopts employer-friendly standards to assess religious claims[101].

With regard to state actors, a new challenging question is whether a conscientious claim can survive a Free Exercise analysis: can religious convictions or concerns relating to vaccines be held as a sufficient justification to refuse a mandatory vaccination aimed to protect public health? It goes without saying that in a pluralistic society the recognition of faith-based exemptions is a workable mechanism of management of religious diversity, which contributes to «reduce social conflict» and shows respect for individual conscience.[102] Under the current Supreme Court's standard of review *(Smith),* as long as a vaccine mandate is a religiously neutral and generally applicable law and does not aim at targeting religion for a discriminatory treatment or impose a disability on the basis of religion, the policy should be held as consistent with the Free Exercise Clause[103].

According to commentators, under *Smith* Free Exercise has been restricted to an «equality right against religious discrimination.»[104] Although the introduction of such a standard should have removed the strict scrutiny standard of review, tensions concerning the interpretation of the Free Exercise Clause have persisted.

As is known, during the first phase of the pandemic, when restrictive measures indirectly affected religious gatherings, at first, courts revitalized *Jacob-*

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[100] *Kiel v. Regents of Univ. Of Cal.*, No. HG20-072843, 2020 WL 9396579, 8 (Cal. Super. Alameda Cnty. Dec. 4 2021); *Klaasen v. Trs. Of Ind. Univ.*, No. 1-21-CV-238 DRI., 2021 (U. S. Dist. Lexis 133300 (N. D. Ind. July 18 2021). See Rubenstein Reiss, D., Di Paolo, J., «COVID-19 Vaccine Mandates…», p. 15.

[101] Doty, D. A., Chopko, M. E., «Work With What You Have-Navigating Religious Accommodations in the American Vaccine Era», in *Journal of Church and State*, 64(4) (2022), pp. 600-620.

[102] Killmond, M., «Why is Vaccination Different…», p. 941.

[103] Furthermore, some scholars raised concern about the inconsistency of religious exemptions to vaccines mandates with the Establishment Clause, as the exercise of religious freedom could have a negative impact on third parties who do not share the same convictions. Levin, H. Y., «Why Some Religious Accommodations…», p. 1193.

[104] Rothshild, Z., «Individualized Exemptions, Vaccine Mandates and the New Free Exercise Clause», in *The Yale Law Journal Forum*, April 14 (2022), p. 1111.

son, with a view to adopting a deferential approach toward the government. Following this perspective, courts have read Jacobson as holding that, during a health emergency, measures which restrict fundamental rights can be enforced where 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». So, they held that governments have broad powers of regulation where the public interest to protect the welfare of children comes into play[105].

As soon as the first stage of the health crisis has passed, the Supreme Court has become skeptical toward an extremely deferential approach toward government's decisions and some justices warned against the risk of disregarding the First Amendment in times of crisis. [106] The real problem is that justices have become increasingly aware of the failure of managing religious diversity under a standard which neutralizes religious diversity. Indeed, conservative justices would have liked to take advantage of the *Fulton* judgment to overrule *Smith,* and restore the strict scrutiny standard of review.[107] However other justices adopted a more cautious approach toward overturning such a «bright line rule» as *Smith,*[108] and replacing it with an «equally categorical» standard of review, and invoked a more «nuanced» balance between Free Exercise claims and governmental interests.[109] Given the «ideological divide» among justices about which standard of review should replace *Smith,*[110] the Court adopted an inter-

[105] *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020).

[106] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U. S. __, 141 S. Ct. 63, 74 (2020) (Kavanaugh, J., concurring): «[J]udicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised».

[107] In his concurring opinion in *Fulton*, Justice Alito argued that: «If Smith is overruled, what legal standard should be applied in this case? The answer that comes most readily to mind is the standard that Smith replaced: a law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest».

[108] SORONEN, L., «Defending Smith by Ignoring Soundbites and Considering The Mundane», in *Scotusblog*, November 2, 2020, «https://www.scotusblog.com/2020/11/symposium-defending-smith-by-ignoring-soundbites-and-considering-the-mundane/».

[109] In *Fulton*, Justice Barrett filed a concurring opinion, arguing that «I am skeptical about swapping Smith's categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights–like speech and assembly–has been much more nuanced». See «»Yet what should replace Smith?» How the question of what comes next exposed an ideological divide in the new SCOTUS majority», in *The Federalist Society*, October 21, 2021, edsoc.org/commentary/fedsoc-blog/yet-what-should-replace-smith-how-the-question-of-what-comes-next-exposed-an-ideological-divide-in-the-new-scotus-majority.

[110] «Yet what should replace Smith?…»

mediate approach, which allowed the Chief Justice to gain a «unanimous holding»[111].

In cases concerning restrictive measures, conservative judges focused their analysis on the search of the most appropriate secular comparator between religious and secular activities, expressing skepticism toward the neutrality and general applicability of the COVID-19 precautionary measures, alleging a disparate treatment of religious activities and calling into question that *Smith* was the most appropriate standard of review to adjudicate those cases. [112] So, during the pandemic, some dissenting opinions[113] have triggered a gradual process of «deactivation» of *Smith* and a move toward new judicial trajectories[114].

Indeed, although the Court has showed its reluctance to overrule Smith, in recent free exercise decisions the Supreme Court has gradually sidestepped it or has narrowed the scope of such a standard of review with a view to expanding protection of religious freedom and there is little doubt that the appointment of Justice Barrett facilitated a religion-promotional turn of the Supreme Court's majority.[115] The outcome is a mitigated version of the rational-basis review, which has paradoxically generated a result opposite to the most genuine Smith reasoning's intent.

The so-called «most favored nation» approach comes from some *obiter dicta* in Supreme Court cases, which have been resumed by federal lower courts, promoting an alternative and more protective interpretation of the *Smith'*s stan-

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[111] Hewitt, H., «Chief Justice opts for restraint, the center and a cease-fire», in *The Washington Post*, June 18, 2021, «https://www.washingtonpost.com/opinions/2021/06/18/chief-justice-roberts-opts-restraint-center-cease-fire/».

[112] *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020). See Madera, A. «Some Preliminary Remarks on the Impact of COVID-19 on the Exercise of Religious Freedom in the United States and Italy», in *Stato, Chiese e Pluralismo Confessionale,* 16/2020, p. 111.

[113] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U. S. __, 141 S. Ct. 63 (2020); *Tandon v. Newsom*, 2 593 U. S. __ (2021), 141 S. Ct. 1294 (2021).

[114] Reinbold, J., «How COVID-19 Changed the World (of Free Exercise)», in *Journal of Church and State*, 64 (2022), pp. 562-580, underlined that the dissenting opinions of conservative justices in the *South Bay* and *Calvary Chapel* cases have gradually gained momentum and prevailed in cases adjudicated during the second phase of the pandemic, as soon as the Supreme Court acquired a conservative majority.

[115] *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021), concerning the issue of whether the City of Philadelphia could terminate an agreement with a religiously-affiliated foster-agency because it refused to provide its services to same-sex couples. See Hornbeck, P., «General Applicability: An Ambiguous Concept after *Fulton»* in *Canopy Forum*, September 16 (2021). «https://canopyforum.org/2021/09/16/general-applicability-an-ambiguous-concept-after-fulton/».

dard of review[116]. It focuses on «underinclusiveness» and discrimination, due to a disparate treatment between religious and secular exceptions[117].

Struggling to emphasize the difference between *Sherbert* and *Smith,* in the Smith decision the Court argued that the «Sherbert test was developed in a context that lent itself to individualized governmental assessment of the reasons for a relevant conduct» and held that where «a state has in place a system of individualized exemptions, it may not refuse to extend that system to cases of religious hardship without a compelling reason.»[118] In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court held that the ordinance concerned was unconstitutional, as it targeted a religious minority and its religious practices whereas it introduced «a system of individualized governmental assessment of the reasons for the relevant conduct», and concluded that the city's «application of the ordinance's test of necessity devalue[d] religious reasons for killing by judging them to be of lesser import than nonreligious reasons.... [the church's] religious practice [was] singled out for discriminatory treatment»).[119] So the Court set the boundaries of the general applicability and the neutrality of a law[120]: a law cannot be qualified as religiously neutral «when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation»[121]. Furthermore, the Court underlined that «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»[122].

Although such a doctrine has received narrow interpretation for a long time, the Supreme Court revitalized it in the so-called pandemic case law. Taking advantage of the so-called «most favored nation» approach, during the second phase of the COVID pandemic, the Supreme Court adopted a new approach with regard the legitimacy of restrictive measures affecting religious gatherings. Although in all these cases the court ruled on procedural matters (the so called

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[116] *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999). Here the Court found a Free Exercise infringement where a police department granted medical exemptions but denied comparable religious ones from a policy prohibiting officers from wearing beards.

[117] LUND, C. C., «Second-Best Free Exercise», in *Fordham Law Review*, 91 (2022), p. 849.

[118] *Smith*, at 884.

[119] *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U. S. 520 (1993), at 537-538. In the case concerned, the applicants challenged a city ordinance which prohibited them to sacrifice animals in religious rituals.

[120] KONG, J., «Safeguarding the Free Exercise of Religion During the COVID-19 Pandemic», in *Fordham Law Review*, 80 (2020), p. 1604.

[121] *Lukumi*, at 543.

[122] IBID.

«shadow docket»), it established that religious activities suffered a disparate treatment whenever they were not subject to a legal treatment analogous to that adopted for secular activities, considered as «comparable» on the basis of the threshold of risk. This reasoning led the Court to find that a religious exemption is constitutionally required whenever a secular exemption is granted.[123]

In *Tandom v. Newsom*, the Court furtherly developed the «most favored nation» approach. It emphasized that laws have to be scrutinized under a strict scrutiny standard of review «whenever they treat *any* comparable secular activity more favorably than religious exercise.» According to the Court, two activities are comparable for the purposes of the Free Exercise Clause on the basis of «the asserted government interest that justifies the regulation at issue.» Indeed, where the government authorizes the resumption of comparable secular activities, religious activities cannot be subject to more severe limitations, unless the government can show that the religious exercise gives rise to a more serious risk of spreading the infection «even when the same precautions are applied».[124]

The scope of the reasoning has been furtherly clarified in Fulton, where the Court held that a law cannot be qualified as generally applicable «if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.» According to the Court, the contract concerned allowed «the government to consider the particular reasons for a person's conduct.» As secular reasons are given more consideration than religious ones, «a mechanism for individualized exemptions» has been provided.[125] So, where a general rule provides a secular exemption, the government should extend the exemption to comparable religious activities. In the *Fulton* case, the mere circumstance that the contract accorded the city a certain degree of discretion in granting exemptions, even though the municipality had never taken advantage of such a provision, implied that «the City may not refuse to extend» such a system of individualized exemptions for «religious hardship without compelling reason.» [126] Thereby, whenever a secular exemption is provided, the general applicability of a statute is irreversibly compromised, as religious conduct can undermine the public asserted interest in a similar way. Thereby, the lack of «general applicability» of a regulation places the case

[123] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U. S. __ (2020), 141 S. Ct. 63 (2020).
[124] *Tandon v. Newsome*, 593 U. S. __ (2021), 141 S. Ct. 1294 (2021).
[125] *Fulton*, at 1877.
[126] *Fulton*, at 1877.

concerned outside the scope of *Smith,* as the government's failure to grant religious exemptions triggers a heightened scrutiny review[127].

8. RELIGIOUS EXEMPTIONS AGAINST VACCINATION MANDATES DURING THE COVID-19 HEALTH CRISIS

The weakening of the deferential approach adopted in earlier COVID-19 decisions and the reliance on the individualized exemptions raised concern where courts began to scrutinize vaccine mandates under the new standard of review.[128]

For the very first time, lower courts adopted inconsistent approaches with regard to vaccine mandates. Although some courts reiterated that vaccine mandates are generally applicable laws[129], others accepted religious claims against vaccine mandates which did not provide non-medical exemptions.[130] As an example, in *Dahl v. Board of Trustees of Western Michigan University* some student athletes challenged the university's COVID-19 vaccine mandate because of the lack of religious exemptions. They claimed that their sincere religious beliefs clashed with the duty of vaccination. The university rejected their claims explaining that it has a compelling interest to prevent the spread of the infection between athlete students. Although the university allowed conscientious objec-

[127] LUND, C. C., «A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence», in *Harv. J. L. & Pub. Pol'y*, 628 (2003), p. 628; HORNBECK, P., «General Applicability…».

[128] ROTHSHILD, Z., «Free Exercise's Lingering Ambiguity, California Law Review Online», 11 (2020), p. 282.

[129] *We The Patriots USA, Inc. v. Conn. Office of Early Childhood Dev*., No. 3:21cv597, 2022 WL 105191 (D. Conn. Jan. 11, 2022). Here the court held that a mandatory vaccination, as a condition to school enrollment, lacking a religious exemption, does not violate the free exercise clause. Although Connecticut law previously granted religious exemptions, the new regulation does not provide religious exemptions to students regardless of the fact they enjoyed a pre-existent exemption. The court held that the vaccine mandate is a neutral and generally applicable law and that is rationally linked with a legitimate state purpose. The court underlined the difference between medical exemptions and religious exemptions because the medical exemption aims to protect children who could be subject to side-effects of vaccines, whereas a religious exemption undermines the compelling state interest to protect children's health.

[130] *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728 (6th Cir. 2021). Furthermore, in *Thomas v. Maricopa County Community College District*, No. CV-21-01781, 2021 WL 5162538 (D. Ariz. Nov. 5, 2021), two nursing students asked for an exemption from the vaccination mandate. Although the college allowed the students concerned to participate in ordinary educational activities, it did not accord an accommodation with regard to the in-person clinical rotation. The court held that the university's system to assess the requests for accommodation gave rise to an «individualized mechanism».

tors to maintain their scholarships and their full membership in the athletic department, it did not allow them to participate in athletic practices and competitions. The university argued that the exclusion from sport activities concerned all unvaccinated students, even those unvaccinated for medical reasons. However, the Court of Appeals held that the university had «exercise[ed] discretion» in granting accommodations and its policy could not be qualified as «generally applicable», as it included a clause according to which «accommodations will be considered on an individual basis.» Although the court recognized that the university had a compelling interest in «fighting COVID-19», the policy was not narrowly tailored to pursue that aim: the activation of a «system for individualized exemptions» required a strict scrutiny analysis.

Some cases culminated in litigation before the Supreme Court. In *Doe 1-6 v. Mills* a group of health workers challenged the 2021 Maine Vaccination Mandate, which included COVID-19 within the list of mandatory vaccinations, claiming that the lack of religious exemptions violated the Free Exercise Clause and their rights under Title VII. According to the claimants, the availability of medical exemptions changed the vaccine mandate in an individualized-exemptions scheme. The government argued that the acknowledgement of medical exemptions was not discretional, as it depended on the employee's submission of a medical statement in support the request for a medical exemption. Furthermore, the new regulation was necessary due to the spread of a highly communicable disease, the high risk of infection in the healthcare setting, the limited workforce availability, the ineffectiveness of alternatives. The District Court and the First Circuit dismissed the claim and considered the vaccine mandate as generally applicable, as it did not «single out religious objections... because of their religious nature» and it «applie[d] equally across the board» without allowing the state government «to exercise discretion in evaluating individual requests for exemptions.» The Maine District Court held that religious freedom is sufficiently guaranteed as the claimant was not forced to vaccinate against his will and he freely exercised his religious beliefs (even though to the detriment of his job position). This conclusion does not intend to minimize the implications of refusal of vaccination on employment or to privilege secular political or philosophical interests over religious interest but aims to give priority to the protection of public health. According to this view, the statute was religiously neutral and generally applicable, and subject to rational basis review. The First Circuit added that the exemption granted to healthcare workers for medical reasons could not be considered as a scheme of individualized exemptions because it depended on a pratictioner's statement, where the existence of a risk of side-effects to vaccination and the need for an exemption for medi-

cal reasons is assessed. So, in the case concerned, the exemption derived from an objective assessment of a third-party healthcare authority because of the establishment of the risk of medical side-effects («good cause»): neither did the medical exemption accord to the government any discretion nor undermine the government's interests. The First Circuit added that, in the famous *Sherbert* case, «the government had discretion to decide whether "good cause" existed to excuse the requirement of an unemployment benefits scheme,» while in the case concerned a «single objective exemption» was provided[131].

In October 2021, the Supreme Court refused to enjoin the enforcement of the Maine's COVID-19 vaccine mandate. In a concurring opinion, Justices Barrett and Kavanaugh raised concern about the increasing use of the «shadow docket» to render cases more relevant and the risk of «forcing the court to give a merit preview in cases where it would be unlikely to take» and argued that as the case raises new issues it could not be decided «without full benefit of briefing and oral argument.» However, conservative judges, in a dissenting opinion, argued that the case would have required a strict scrutiny standard of review. They raised concern about «a serious error» and an «irreparable injury» to workers who are dismissed because of their adherence to their religious beliefs. On the basis of *Fulton,* they argued that a statute cannot be considered as generally applicable if it includes a scheme of individualized exemptions. In the case concerned, «the State's mandate is not absolute, individualized exemptions are available». According to the dissenting judges, Maine failed to demonstrate that granting religious exemptions would undermine the public health interest any more than medical exemptions do. So, according to the dissenting judges, the mere maintenance of a minimal amount of government's discretion and the abstract availability of secular exemptions for any class of individuals undermines the general applicability of a statute and triggers a strict scrutiny analysis.[132]

In December 2021, the Supreme Court rejected another application for emergency relief. The case concerned a challenge against the Prevention of COVID-19 Transmission Rule, issued in August 2021, which imposed that hospitals, nursing homes, hospices, adult care facilities and other healthcare structures should require health care workers to be vaccinated against COVID-19. Although the Rule established medical exemptions, which could be applied only until the imunization was found detrimental to employees, and required a certification of a licensed practitioner, it did not provide religious

[131] *Doe v. Mills*, 16 F.4th 20 (2021).

[132] ROTHSHILD, Z., «Individualized Exemptions, Vaccine Mandates and the New Free Exercise Clause», p. 1133. According to the commentator, an excessive analysis on discretion risks to minimize the importance of an assement of the sincerity of religious beliefs.

exemptions. A group of healthcare workers challenged the emergency regulation, claiming that it was not neutral and violated their Free Exercise rights because it did not provide religious exemptions, regardless of the establishment of medical exemptions. According to the claimants, the earlier governor, Cuomo, introduced a religious exemption in a proposal of mandate. The exemption was removed in the final approval of the mandate, without any explanation. As the change of the policy coincided with the appointment of the new governor, Hochul, the repeal of a previously planned exemption appeared as intentional and non-neutral. District courts did not provide a uniform response. A New York district court accorded to the claimants a temporary restraining order and a preliminary injunction, holding that the government singled out religion for disfavored treatment, as it removed a religious exemption which had been granted in an earlier version of the mandate. Furthermore, the court held that the mandate was not a generally applicable law as it granted medical exemptions, without granting an equal treatment to religious believers, so it required a strict scrutiny review. Finally, the court held that the government did not demonstrate that granting the exemption which was previously included in the order to religious claimants would cause any more harm. However, another federal district court denied the preliminary injunction, holding that plaintiffs provided any evidence that the rule was not a generally applicable law and that it does not meet rational basis review. According to the First Circuit ruling, the Second Circuit, in a combined judgment, rejected all the claims and overturned the injunction issued by the district court.[133] Medical exemptions could not be qualified as a system of individualized exemptions as they concerned a limited class of individuals. Furthermore, medical exemptions complied with the public interest to protect public health whereas an enforcement of religious exemptions «would have potentially far-reaching and harmful consequences for governments' ability to enforce longstanding public health rules and protocols.»[134]

Finally, in another «shadow docket» decision, the Supreme Court denied the certiorari refusing to enjoin the mandate regardless of the lack of religious exemptions.[135] According to the majority, the burden to demonstrate that the State singled out religious objectors fell on the religious claimants. Conservative judges wrote a harsh dissenting opinion, where they argued that the mandate was tainted with animosity toward religion because of the circumstances of its enforcement. Indeed, according to the dissenting judges, even a «slight suspicion» that government's action

[133] *We the Patriots USA, Inc. v. Hochul*, 4 17 F.4th 266, 274 (2d Cir. 2021).
[134] *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 287 (2d Cir. 2021).
[135] *Dr. A et al. v. Hochul*, 595 U. S. _ (2021) (mem.), 142 S. Ct. 552, (2021).

«stems from animosity to religion or distrust of its practices» deserves careful scrutiny. In the case concerned, the vaccine mandate was «designed» to «single out for special disfavor healthcare workers who failed to comply with the revised mandate» and the mandate shows «suspicion» toward those who adhere to unpopular religious beliefs in contradiction with the free exercise clause, which «protects not only the right to hold unpopular religious beliefs inwardly and secretly… It protects the right to live out those beliefs publicly in "the performance of (or abstention from) physical acts.» Furthermore, the dissenting judges added that the mandate was not neutral as it prohibited religious exemptions while permitting medical exemptions, so it required strict scrutiny.

Although the Supreme Court had no opportunity to consider full briefs, and a judicial analysis on the merits is lacking, recent case law shows a sharp contrast among justices on the neutrality of vaccine mandates.[136] Indeed, the dissenting opinions of conservative judges cannot be underestimated. During the acute response to the COVID-19 pandemic, the dissenting opinions of the conservative wing of the Supreme Court expressed skepticism toward the neutrality and general applicability of the restrictive measures, triggering a gradual process of dismantlement of the *Smith'*s reasoning. So, we cannot exclude that in the near future such opinions will affect the decisions concerning vac-

[136] The Supreme Court denied review in *F. F. v. New York* too. In this case, the New York state appellate court dismissed the parents' constitutional claim concerning the elimination of religious exemption from the vaccine mandate of school children. Parents claimed that the repeal was due to religious animus and hostility toward religion. On the contrary, the Court of Appeal held that the mandate was a neutral law of general applicability aimed to guarantee the preservation of public health. Furthermore, the mandate was motivated by concern for the risk of abuse of religious exemptions, and aimed to avoid state entanglement in religious matters, namely to «relieve public school officials from the challenge of distinguishing sincere expressions of religious beliefs from those that may be fabricated». In *Doe v. San Diego School* District, (Sup. Ct., Feb. 18, 2022), the U. S. Supreme Court issued an Order where it refused to enjoin a school district's COVID vaccine mandate because of the lack of religious exemptions. In the case concerned, three judges of the U. S. Circuit Court of Appeals issued and then withdrew an emergency order to enjoin the vaccine mandate which granted medical exemptions but did not provide exemptions for religious reasons. Previously, a district court blocked the enforcement of the mandate, expressing concern about a violation of fundamental liberties. According to the federal appeal court, the aim of the mandate is the preservation of students' health. In *Keil v. City of New York*, the Supreme Court refused to review a challenge raised by New York teachers, who claimed that the vaccine mandate violated their Free Exercise rights. In the case concerned, the Second Circuit found that the process for deciding whether a teacher or administrator was eligible to receive a religious exemption infringed the constitutional text. So, it required the school system to reconsider the requests for religious exemptions within a reasonable time. However, the City granted only one of the plaintiffs an exemption.

cine mandates and will have an impact on the interpretation of the Free Exercise Clause.[137]

9. VACCINE MANDATES IN EUROPE AND THEIR INTERFERENCE ON FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

In Europe there has traditionally been a variable geometry with regard to mandatory vaccinations: member states have ranged between the lack of any vaccination duty to the establishment of mandatory vaccinations[138] and have struggled with the need to reconcile promotion of vaccination and avoidance to impose disproportionate burdens on the fundamental rights of those who are reluctant toward vaccines[139].

During the COVID-19 pandemic, vaccination has gained a key role in the fight against the spread of a highly communicable and extremely dangerous disease and member states have taken their positive duty to adopt measures aimed at protecting public health more seriously. Various state members adopted vaccine mandates, at least with regard to certain settings: Austria was the first state to enforce mandatory vaccination for all adults, with few medical exceptions.[140] Italy enforced mandatory vaccination with regard to specific classes of individuals.[141] It goes without saying that mandatory vaccination is something different from forcible vaccination, which would imply coercing a person to be vaccinated against his/her will. However, non-vaccination will

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[137] However, we cannot underestimate that as late as 2016 courts held that secular exemptions to vaccine mandates did not imply that religious exemptions should be provided. See *Whitlow*, at 1086-1087. Gitter, D. M., «First Amendment Challenges to State Vaccine Mandates…».

[138] Lo Giacco, M. L., «Il rifiuto delle vaccinazioni obbligatorie…» pp. 41-65; Pizzetti, F. G., Risicato, L., Ruggeri, A., Spadaro, A., Curreri, S., Sorrenti, G., Salazar, C., *et al*., «Vaccini obbligatori: le questioni aperte», ed. A. Morelli, in *BioLaw Journal - Rivista di BioDiritto*, June 2017, pp. 15–50.

[139] Nilsson, A., «Is Compulsory Childhood Vaccination Compatible with the Right to Respect for Private Life? A Comment on Vavřička and Others v. the Czech Republic», in *European Journal of Health Law*, 28 (2021), pp. 323-340; Thomas, R., Charrier, L., Zotti, C. M., «Is Obligation the Proper Policy to Increase Immunization Coverage? A Comparison of 16 OECD Countries», in *European Journal of Public Health* 30 (2020) (Supplement 5).

[140] King, J., Motta Ferraz, O. L., Jones, A., «Mandatory COVID-19 Vaccination and Human Rights», in *Lancet*, 399 (2022), pp. 220-222. In England, since 1898, the Vaccination Act has allowed conscientious objection for moral reasons. See Panagopoulou, F., «Mandatory Vaccination during the Period of a Pandemic: Legal and Ethical Considerations in Europe», in *BioTech*, 10 (2021), p. 29.

[141] Tomaino, K., «La vaccinazione obbligatoria contro il COVID-19 alla luce della Convenzione Europea dei Diritti dell'Uomo», in *BioLaw Journal*, no. 2/2022, p. 331.

expose an individual to penalties or limitations to access to certain public spaces or services.

So, public discourse has focused on the question of whether mandatory vaccination is justifiable under the ECHR standards[142]: mandatory vaccination is likely to have a serious impact on human rights, especially the right to private life and the freedom of thought, conscience and religion. [143] Following the European Commission approach[144], on many occasions the ECtHR[145] has reiterated that the imposition of a medical treatment where the informed consent of competent adult is lacking gives rise to a violation of article 8 ECtHR, which protects the right to privacy and to physical and psychological integrity; however, such a right can be subject to limitations due to the state need to protect public health, provided that such restrictions are necessary in a democratic society.[146] However, the recognition of a faith-based conscientious objection to vaccination is a more controversial issue.

In the ECtHR case law, conscientious objection is acknowledged as a powerful «technique of resolution of conflicts»[147]. As is known, article 9 protection covers freedom of conscience, of thought and religion. Moreover, the protection of freedom of conscience is incorporated in many international human rights texts[148]. However, article 9 ECHR does not expressly refer to con-

[142] The ECtHR has already rejected various applications against COVID-19 mandatory vaccinations: Application no. 41950/21 (*Abgrall and 671 Others v. France*), Application no. 43375/21 (*Kakaletri and Others v. Greece*), Application no. 43910/21 (*Theofanopoulou and Others v. Greece*). Furthermore, it rejected claims for interim measures under the Rule 39 of the Rules of Courts, as a «real risk of irreversible harm» was lacking. PANAGOPOULOU, F., «Mandatory Vaccination during the Period of a Pandemic…», p. 32.

[143] Since 2022, domestic courts have dealt with faith-based conscientious claims against vaccine mandates. See *Employment Tribunal of the United Kingdom*, August 3, 2022, no. 1403077, in *Quaderni di Diritto e Politica Ecclesiastica*, 3/2022; p. 818; Court of Modena (Italy), First Civil Section, Decree February 8, 2022, in *Quaderni di Diritto e Politica Ecclesiastica*, 3/2022; p. 823; Court of Bergamo (Italy), Labour Section, Decree January 21, 2022, no. 239, in *Quaderni di Diritto e Politica Ecclesiastica*, 3/2022; p. 824. See MILANI, D., «Vaccinazioni e bene comune: la prospettiva ecclesiasticistica», in *Quaderni di Diritto e Politica Ecclesiastica*, 2/2022, pp. 363-370.

[144] European Commission of Human Rights, *Acmanne and Others v. Belgium*, App. No. 10435/83, 10 december 1984.

[145] The ECtHR is a judicial board established within the Council of Europe, whose aim is to guarantee that Member States give effective implementation to the rights provided in the ECHR.

[146] PANAGOPOULOU, F., «Mandatory Vaccination during the Period of a Pandemic…», p. 30.

[147] VALENTE, V., «Tutela della coscienza, fra "freedom to resign" e indeclinabilità delle funzioni pubbliche», in *Stato, Chiese e pluralismo confessionale*, n. 24/2016, pp. 1-23.

[148] In the EU framework (to which pertains the Charter of Fundamental Rights), the protection of conscientious objection is grounded in article 10.1 of the Charter of Fundamental Rights, which expressly refers to a right to conscientious objection. Nevertheless, the provision leaves its implementation to the autonomy of states. So, states are the main actors in regulating the scope of the right to conscientious objection, and in setting its boundaries, although they cannot go so far as to

scientious objection, so the extent States have to provide exceptions to general rules is unclear.

In the ECtHR reasoning, freedom of conscience has often been connected with freedom of thought and freedom of religion, and has received recognition in its internal and external dimension.[149] As all the freedoms covered by article 9 ECHR, freedom of conscience is subject to limits in its external dimension, as it has to be balanced with other relevant public interests and the rights of others[150].

In its interpretation of article 9 ECHR, for many years the ECtHR has adopted a cautious approach with regard to the recognition of a right to conscientious objection.[151]. Although States have to comply with the ECHR's standards, they have enjoyed a broad margin of appreciation with regard to the recognition of conscientious objection, its scope and its limits. So, the ECtHR has aligned with the earlier Commission's approach, according to which article 9 does not impose to States to satisfy conscientious objection claims[152].

However, in the milestone judgment *Bayatyan v. Armenia*, the ECtHR recognized that when the refusal of an individual to comply with a state-imposed regulation is provoked by a serious and insurmountable conflict of conscience or founded on convictions or beliefs that are of sufficient cogency, seriousness, cohesion, and importance, it enjoys the protection of Article 9 ECHR[153].

Such a decision nevertheless did not result in a generalized more favorable judicial approach toward conscientious claims. Although the ECtHR adopted a more interventionist approach in cases of conscientious objection where there is a broad European consent (i.e. conscientious objection to military service), it is more reluctant to legitimize new conscientious claims.

Especially, in healthcare cases the Court has adopted an even more restrictive approach, according to which conscientious claims cannot be accommodated where there is a risk that third parties would be burdened of the

withhold a fundamental right, whose protection is grounded in the international and supranational framework. Furthermore, article 52 of the Charter provides that limitations to fundamental rights have to meet the standards of legitimacy, necessity and proportionality, and are justified where they aim to pursue general goals recognized by the Union or to protect the rights of the others. Navarro Valls, R., Martínez Torrón, J., Valero Estarellas, M. J., *Eutanasia y objeción de Conciencia*, Palabra, Madrid, 2022, pp. 23-24.

[149] Valero Estarellas, M. J., «Freedom of Conscience of Healthcare Professionals and Conscientious Objection in the European Court of Human Rights», in *Religions*, vol. 13, 2022, p. 558 ff.

[150] Martínez-Torrón, J., «Objeción de conciencia al aborto: Un paso atrás en la jurisprudencia de Estrasburgo», in 53 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* (2020), pp. 1-11.

[151] Lo Giacco, M. L., «Il rifiuto delle vaccinazioni obbligatorie…», p. 63.

[152] Valero Estarellas, M. J., «Freedom of Conscience…», p. 558 ff.

[153] ECtHR, Grand Chamber, *Bayatyan v. Armenia*, app. 23459/03, 7 July 2011.

cost of religious convictions they do not share.[154] So, in the field of healthcare the Court focuses on the protection of third-parties, which justifies limitations to the right to free exercise of religion if its accommodation would result in restricting access to healthcare services to the detriment of certain classes of individuals.[155]

10. ECTHR'S RESPONSES TO CONSCIENTIOUS CLAIMS AGAINST MANDATORY VACCINATION

With regard to compulsory medical interventions (i.e. vaccination), the ECHR has traditionally scrutinized them in the light of article 8 ECHR, emphasizing the key role of a patient's informed consent. Indeed, compulsory medical interventions can result in an interference in the right to private life, which incorporates psychological and moral integrity[156].

The analysis of an intersection between the right to privacy and the freedom of religion in the case of vaccine mandates is not foreign to the US legal context. Although vaccination mandates have often been challenged on the basis of religious beliefs or personal-philosophical convictions, since *Jacobson*, personal autonomy claims, equal protection and due process claims have been given distinctive consideration. However, influential commentators have underlined the intersection between the right to privacy and freedom of religion concerning vaccine mandates, which could support individuals who oppose such medical practices because of personal convictions but could not ground their objection in religious reasons[157].

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[154] ECtHR, Third Section, 2 October 2001, *Pichon and Sajous v. France* (app. no. 49853/99).

[155] ECtHR, Fourth Section, *R. R. v. Poland*, 26 May 2011 (app. no. 27617/04). MADERA, A., «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 USA e della Corte di Strasburgo» in *Stato, Chiese e pluralismo confessionale,* 16/2017, pp. 31-32.

[156] MESEGUER VELASCO, S., «Libertad religiosa, salud pública y vacunación COVID-19», in *Rivista General De Derecho Canonico y Derecho Eclesiástico del Estado*, 56 (2021), p. 21.

[157] DOVER, T. E., «An Evaluation of Immunization Regulations…», pp. 417-421. According to the commentator the decision to refuse vaccination is similar to personal decisions concerning reproductive rights: it involves an individual's personal autonomy to take free decisions concerning his body, against medical practices which are perceived as «as an assalt on one's body». It goes without saying that, since late 1800 the right to privacy has received broad judicial protection. See *Union Pacific Railway Co. v. Botsford*, 141 U. S. 250 (1891); Meyer v. Nebraska, 262 U. S. 390 (1923). Later it has gained the status of a fundamental right underlying several provisions of the Bill of Rights, which could not be subject to restrictions unless the need to give priority to a compelling state interest was established. See *Griswold v. Connecticut*, 381 U. S. 479 (1965). The Supreme Court recognized the primacy of the right to privacy, as an individual's right to take autonomous

In the European context, in *Solomakhin v. Ukraine*[158] the ECtHR held that the right to the physical integrity of the claimant, grounded in article 8 ECHR, justified restrictions due to the pressing social need to protect public health and to the necessity to prevent the spread of dangerous infections. Furthermore, the court considered whether the necessary precautions had been taken to guarantee the suitability of vaccination for the individual situation concerned (§ 36) [159].

However, the European Commission faced the interplay between the protection public health, the right to privacy and freedom of religion in *Boffa and Others v. San Marino*,[160] where it held that a restriction on the fundamental right to privacy has to be provided by law, and comply with the standards of necessity in a democratic society and proportionality to the aim pursued. In such a case, the court adopted a facial neutrality approach, according to which vaccination mandates are generally applicable laws which are enforced against all individuals, regardless of their religious convictions, and are consistent with article 9 ECHR. Such a standard is similar to the one adopted in Smith, as it minimizes the impact of generally applicable laws on specific classes of individuals. On this basis, in *Boffa v. San Marino* the Commission acknowledged that states have a broad margin of appreciation on the issue of preservation of public health and held that conscientious objection to compulsory vaccination is not covered by the protection guaranteed to religious freedom of thought conscience and religion.

The recent *Vavřička* case concerned the Czech vaccination mandate which provided that children could attend pre-schools after receiving the required vaccination.[161] The applicants were parents of children who were refused entry

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decisions concerning his body and has extended its application to the right to take marital decisions, to reproductive rights to the delicate issues of euthanasia and right to die and whenever other important decisions concerning «bodily integrity» are concerned. See *Roe v. Wade*, 410 U. S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U. S. 833, 927 (1992); *Loving v. Virginia*, 388 U. S. 1, 12 (1967); *Whalen v. Roe*, 429 U. S. 589 (1977); *Cruzan v. Director*, Miss. Dep't of Health, 497 U. S. 261 (1990); *Washington v. Glucksberg*, 521 U. S. 702 (1997); *Washington v. Harper*, 494 U. S. 210, 221-22 (1990). See Pollard Sacks, D., «Judicial Protection of Medical Liberty...», p. 515.

[158] ECtHR, Fifth Section, *Solomakhin v. Ukraine*, app. no. 24429/03, 15th March 2012.

[159] More recently, in the *Vavřička* case, Judge Wojtyczek emphasized that freedom to take decisions about one's own body is a fundamental right whose protection is grounded in the Convention and whose restrictions require pressing justifications, so as to justify a narrow margin of appreciation accorded to states. See *Vavřička and Others v. Czech Republic,* Nos. 47621/13 and 5 others, ECtHR (Grand Chamber), 8th April 2021.

[160] European Commission of Human Rights, *Boffa v. San Marino*, app. no. 26536/95, 15th January 1998.

[161] *Vavřička and Others v. Czech Republic,* Nos. 47621/13 and 5 Others, ECtHR (Grand Chamber), 8 April 2021. See Bertolino, C., «Vaccinazioni obbligatorie nei confronti di minori quale «misura necessaria in una società democratica». Pronuncia della Corte Europea sul caso della Repubblica Ceca. Riflessi possibili sulla campagna vaccinale contro il Covid-19?» in *Diritti Com-*

or removed from preschools because they did not receive the required vaccination. Objector parents were fined because they refused to have their children vaccinated. The applicants claimed a violation of articles 8 and 9 ECHR and article 2 of the Protocol no. 1. First of all, the Court found that the mandatory vaccination regime implied an interference with the right to private life and faced the key issue of whether the interference on such a fundamental right met the standards of legitimacy, necessity and proportionality. Although the vaccine mandate was imposed through secondary legislation, the court found it was «in accordance with law», as laws include «legal acts and instruments of lesser rank» which have to be «adequately accessible and be formulated with sufficient precision to enable those to whom it applies to regulate their conduct and, if need be with appropriate advice, to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail». Furthermore, the ECtHR found that the Czech vaccine mandate pursues the legitimate aim of the protection of the public health and of the rights of the others: namely the aim is the protection of both those who receive vaccination and those who cannot be vaccinated (and thus are in a state of vulnerability) against the risk of diseases which represent a serious risk for health. Finally, the Court considered whether the vaccine regulation was «necessary in a democratic society». On this point, the court accorded to the Czech State a broad margin of appreciation, taking into account that on health matters, especially on mandatory vaccination, a European consensus is lacking and that the Czech State did not impose vaccination against the will of recipients.[162] Furthermore, although there is no European consensus about the most appropriate vaccination policy to guarantee the safety of children, there is broad consensus among member states that «vaccination is one of the most successful and cost-effective health interventions» and that states «should aim to achieve the highest possible level of vaccination among its population», whereas decrease in vaccination is giving rise to increasing concern at an European level. So, the Strasbourg Court identified the pressing state need in the compelling interest to protect individuals against serious diseases and to «guard against any downward trend in the rate of vaccination among children». However, in the case concerned, the assessment of a pressing need depended on the existence of scientific consensus about

parati, April 29, 2021, pp. 1-7; LIBERALI, B. «Vaccinazioni obbligatorie e raccomandate tra scienza, diritto e sindacato costituzionale», in *BioLaw Journal - Rivista di BioDiritto*, 18 (3) (2019), pp. 115-142.

[162] : «[W]hile vaccination is a legal duty in the respondent State its compliance cannot be directly imposed, in the sense that there is no provision allowing for vaccination to be forcibly administered». *Vavřička and Others v. Czech Republic*, § 293.

the connection between a high rate of vaccination, the decrease of the infection and the protection of public health, with specific regard to children[163].

A key issue is whether alternative, less restrictive measures are available and equally effective (i.e. information campaign to promote voluntary vaccination)[164]. According to the Court's reasoning, as voluntary vaccination is not sufficient to achieve herd immunity, compulsory vaccination is justified by relevant and sufficient reasons and there are no equally effective less restrictive alternatives to achieve the aim.[165] Finally, in a proportionality analysis, the Court did not find the compulsory vaccination as disproportionate because no individual could be forced to receive vaccination, and the penalties for failure to comply with the mandate are quantitatively relatively minor. Moreover, the option to contest the legal implications of non compliance through administrative appeals is guaranteed, satisfying «the procedural fairness of the duty» of vaccination.[166] The Court also appreciated that the Czech law provided exemptions for medical reasons and even conscientious objection.

Finally, the Court also considered that although unvaccinated children were prevented from attending pre-schools and so forewent an important educational opportunity, this was the result of their parents' choice. Furthermore, «they were not deprived of all possibility of personal, social and intellectual development, even at the cost of additional, and perhaps considerable, effort and expense on the part of their parents», and «upon reaching the age of mandatory school attendance, their admission to primary school was not affected by their vaccination status».

However, commentators emphasized that a controversial aspect of the case is the reference to the principle of solidarity. Can a duty of solidarity be connected with the imposition of a vaccine mandate with a view to achieving a herd immunity, imposing in this way a positive duty on individuals? Most of all, what will the impact of the reference to social solidarity be in future litigation? Is there a concrete risk to over-expand the margin of appreciation granted to states, referring to «sociological» rather than to legal principles?[167]

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[163] Trispiotis, I., «Mandatory Vaccination, Religious Freedom, and Discrimination», in *Oxford Journal of Law and Religion*, 0/2023, p. 13; Tomasi, M., «La proporzionalità degli obblighi vaccinali nella lettura della Corte Edu», in *Quaderni Costituzionali*, 2/2021, pp. 445-448.

[164] Panagopoulou, F., «Mandatory Vaccination during the Period of a Pandemic…», p. 33.

[165] *Vavřička and Others v. Czech Republic Vavřička and Others v. Czech Republic*, § 293: «the notional availability of less intrusive means to achieve this purpose, as suggested by the applicants, does not detract from this finding.»

[166] Trispiotis, I., «Mandatory Vaccination, Religious Freedom…», p. 14.

[167] Meseguer Velasco, S., «Libertad religiosa, salud pública…», p. 27.

The innovative aspect of the case is that the Strasbourg Court considered the case even through a religious freedom lens, namely in the light of article 9 ECHR. First, the Grand Chamber preliminarily noted that not all opinions and convictions can be qualified as beliefs covered under article 9. In the case concerned, the philosophical and religious aspects of the claimants' opposition to vaccination were «secondary» and «lacked consistency». Indeed, the refusal of the applicant to consent the vaccination of his children, because he was convinced that the vaccine could provoke them health damages, «did not constitute a conviction of belief of sufficient cogency seriousness cohesion and importance to attract the guarantees under article 9.»[168] So, the applicants failed to substantiate their claim as they did not provide evidence that their opposition to vaccine was not a mere personal opinion but was sufficiently connected with a «protected conviction or belief». [169] Furthermore two applicants did not challenge an alleged violation of their religious freedom before the domestic courts, and the third raised the challenge too late in the domestic proceedings. [170]

So, the Court emphasized that article 9 cannot guarantee an absolute right to act in the public sphere in a way that is coherent with one's religious beliefs.

Second, the case shows an evolution in the Court's reasoning, as for the very first time it moves toward the acknowledgment of compulsory vaccinations as a potential interference with Article 9 ECHR. Indeed, the Court emphasised that the national law provided «an exceptional waiver of the penalty for non-compliance with the vaccination duty where the circumstances call in a fundamental manner for respecting the autonomy of the individual», namely in the case «reasons of conscience» are concerned[171]. Furthermore, in his dissenting opinion, Judge Wojtyczek emphasized that such a conscientious exception was «a very important argument» in the assessment of measure's consistency with the Convention[172].

Furthermore, the Court significantly referred to the *Bayatyan v. Armenia* judgment, according to which, where there is a serious and insurmountable conflict between a state-imposed obligation and a person's conscience or his deeply and genuine held religious beliefs, conscientious objection finds protection under article 9 ECHR. So, the Court seems to argue that *Bayatyan v. Armenia* governs the conflict between conscientious objections and vaccine mandate. Following this perspective, an application of article 9 to future claims

[168] *Vavřička and Others v. Czech Republic*, § 335.
[169] *Vavřička and Others v. Czech Republic*, § 334.
[170] *Vavřička and Others v. Czech Republic*, §§ 334-336.
[171] *Vavřička and Others v. Czech Republic*, § 334.
[172] *Vavřička and Others v. Czech Republic*, judge Wojtyczek, dissenting opinion, § 17.

cannot be ruled out and freedom of conscience should be granted distinctive and higher protection compared to mere personal autonomy.[173]

Indeed, these statements show that the Court significantly went beyond the standard of facial neutrality established in *Boffa and others v. San Marino,* according to which general regulations concerning public health enjoy a general application and are not subject to exemptions. For the very first time, the ECtHR did not exclude that conscientious objection to immunization might find coverage under article 9 ECtHR, so domestic authorities should seriously consider the conflict of loyalty between compliance with a general provision and adherence to a religious conviction a believer has to face.[174] However, we cannot underestimate that, in a previous judgment, the ECtHR emphasized that the right to respect of private life and self-determination combined with (and boosted by) the right to freedom of religion cannot be given priority against public health concerns where there is a pressing need to protect third parties.[175] In the case of a vaccine mandate, there is a strong need to protect vulnerable individuals (i.e. those who cannot undergo vaccination for medical reasons, whose safety depends on the achievement of herd immunity).

Although the *Vavřička* case emphasizes the overlapping between refusal of vaccination as a mere act of personal autonomy and as a religiously based conscience claim, it distinguished the two claims, demonstrating that a conscience argument would add significant weight to an autonomy claim.[176] In the European context, such a difference mirrors the ECtHR structure, where individuals are entitled to claim their religious freedom rights grounded in article 9 ECHR separately or in addition to claims grounded in article 8 (the right to private life) and the two claims deserve separate consideration[177].

So, the evolution of European standards is still in progress. As is known, the *Vavřička* decision is narrowly tailored to rule a case where ordinary vaccination of children against well-known diseases is concerned and not a COVID-19 vaccine. In the case concerned, the effectiveness and safety of vaccines is well established and there is scientific evidence on the issue. Such a situation is not comparable to the COVID-19 vaccines, given their rapid development due to the pandemic situation. For this reason, the Court underlined the limited

[173] Leigh, I., «Vaccination, Conscientious Objection…», p. 9.
[174] Trispiotis, I., «Mandatory Vaccination, Religious Freedom, and Discrimination», p. 15.
[175] ECtHR, First Section, *Jehovah's Witnesses of Moscow and Others v. Russia*, App. no. 202/02, 10th June 2010.
[176] Leigh, I., «Vaccination, Conscientious Objection…», p. 9.
[177] Id., p. 10.

scope of the decision, whose conclusions cannot be mechanically extended to different situations.[178]

However, the Court opens the way toward the possibility that religiously based opposition to vaccine can be grounded in article 9 ECHR and links the proportionality of vaccine mandates with state availability of medical and non-medical exemptions. So, the ECtHR judgment shows a moderate approach, where the balancing process between competing interests has been given priority. Pressing state interests have been taken into account, but the European Court seems inclined to give significant weight to the nature of the interest concerned, and to go beyond the Vavřička's reasoning if religious freedom is concerned[179].

However, the *Vavřička* judgement referred to a high level of cogency, seriousness, cohesion and importance that a conscientious objection against vaccinations has to meet to be covered under article 9 ECHR. Furthermore the Court clarifies the standards member states have to comply with if they impose vaccine mandates: vaccination should be mandated by law (intended in a substantial way); and it should respond to the relevant state interest to protect citizens against a serious disease.[180] Finally, states should appropriately balance public interests pursued with the means used, taking into serious consideration their impact on human rights[181].

11. A COMPARATIVE ANALYSIS IN THREE STEPS:

a) *A transatlantic trend to limit conscientious objections*

In both the US and the European context, vaccination mandates give rise to a new constitutional conundrum. On one hand, justices are reluctant to intefere in religious matters to assess the compulsory nature and the relevance of

[178] The Court underlined that the judgment «relates to the standard and routine vaccination of children against diseases that are well known to medical science» (*Vavřička and Others v. Czech Republic*, § 158). WAZIŃSKA-FINCK, K., «Anti-Vaxxers Before the Strasbourg Court: Vavřička and Others v. Czech Republic», in *Strasbourg Observers*, June 2, 2021, «https://strasbourgobservers.com/2021/06/02/anti-vaxxers-before-the-strasbourg-court-vavricka-and-others-v-the-czech-republic/»; TOMAINO, K., «La vaccinazione obbligatoria contro il COVID-19…», p. 338.

[179] ALEKSEENKO, A., «Implications for COVID-19 vaccination...», p. 88.

[180] UTRILLA, D., «It's About Proportionality! Strasbourg Clarifies Human Rights Standards For Compulsory Vaccination Programmes», *EU Law Live*, 8 April 2021, pp. 1-7.

[181] FRATI, P., LA RUSSA, R., DI FAZIO, N., DEL FANTE, Z., DELOGU, G., «Compulsory Vaccination for Healthcare Workers in Italy for the Prevention of Sars-Co V-2 Infection», in *Vaccines MDPI*, 9 (2021), p. 966.

a religious practice within a set of beliefs and the consistency of individual religious beliefs with the official doctrine of the faith community concerned, as they are not equipped to do so. On the other hand, justices face the controversial issue of whose conscience has to be protected in a democratic religiously-neutral legal system. New challenges show the increasing need, on both the sides of the Atlantic, to distinguish between a mere vaccine hesitancy, due to concern about the health effects of vaccine and disbelief in scientific accepted views, or personal convictions about its necessity and value, and genuine objections to vaccine based on a comprehensive set of values which have a key role in the worldview and lifestyle of an individual. The latter case requires a careful balancing of the competing rights concerned whereas the former is a manifestation of political dissent against a generally applicable law which cannot find coverage under provisions protecting religious freedom[182].

The history of vaccination hesitancy demonstrates that opposition is not a new phenomenon and is due to various reasons, not necessarily connected with religion (i.e. mistrust of pharmaceutical companies and their conduct)[183].

Indeed, the US history of vaccination shows that vaccine reluctance has often been due to fear of injury, useless sacrifice of few for the benefit of society, opposition to the use of certain materials. Such a variety of reasons rendered the boundary between religious, philosophical and personal claims for exemptions blurred. Over time, state approach toward exemptions has ranged between two opposite approaches. At first, states aknowledged the hybrid nature of vaccination objections, and granted both philosophical and religious exemptions. However, the over-expansion of conscientious claims founded on religious and philosophical conviction has increasingly problematized the management of reasonable accommodation, has given rise to concern about undermining the compelling state interest of protecting public health, has enhanced skepticism and concern about false claims, and has finally rendered exemptions politically vulnerable[184]. There is little doubt that many religious claims are not genuine, and mask vaccine hesitancy or have even acquired a political meaning to defend a right to refuse vaccination.[185] Taking into account the difficulty to manage the proliferation of conscientious claims, several governments finally

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[182] Paris. D., *L'obiezione di coscienza. Studio sull'ammissibilità di un'eccezione dal servizio militare alla bioetica*, Passigli Editore, Bagno a Ripoli (Firenze), 2011, p. 132.

[183] Panagopoulou, F., «Mandatory Vaccination during the Period of a Pandemic…», p. 29.

[184] *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728 (6th Cir. 2021); *Harris v. University of Massachusetts, Lowell*, 557 F. Supp. 3d 304 (2021).

[185] Rubenstein Reiss, D., «Thou Shalt Not Take the Name…», p. 1551 ff.

opted to carry out equal treatment and religious neutrality through the removal of all non-medical exemptions.

This is the main reason why lower courts failed in adopting a uniform approach where they were asked to remove disparate treatment between mainstream and non-traditional or personal faiths and, more recently, are struggling to identify reliable standards which could restrict individuals' eligibility for exemptions.[186] A judicial analysis on the sincerity of beliefs is extremely difficult[187] and courts are extremely cautious, in order to prevent the risk that an individual might undergo a kind of trial for «heresy», giving rise to a palpable interference in religious matters.[188] The majority of vaccine objections would fail the *Africa* test, as they are not founded on a comprehensive system of beliefs which addresses fundamental and ultimate questions, and no formal and external signs are present. Even claiming that vaccine objection is founded on a belief that «occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God»[189] seems unconvincing. Indeed, we cannot underestimate that the majority of faith communities encouraged their faithful to undergo vaccination.

So, in the case of religious exemptions to vaccine mandates the US experience shows the urge to set boundaries, in order to avoid cases of vaccine hesitancy being erroneously qualified as religious claims. An over-expansion of religious exemptions, including those with an uncertain religious basis, has given rise to increasing skepticism toward religion, to the detriment of genuine religious objections, which will have greater difficulty to be accommodated. Indeed, there is strong public concern to legitimize a broad elusion of laws concerning public health and safety, with a devastating impact during a pandemic[190].

The ECtHR has adopted a cautious approach about grounding conscientious objections to vaccine mandates in article 9 ECHR, underlining that religious protection under article 9 ECHR does not cover any kind of opinion or idea: only beliefs which reach a certain level of cogency, seriousness, cohesion and importance can find coverage under article 9 ECHR, as well as having to

[186] *Fallon v Mercy Catholic Medical Center* 877 F.3d 487 (3d Cir 2017).

[187] LAYCOCK, D., «What's the Law on Vaccine Exemptions? A Religious Liberty Expert Explains», in *The Conversation*, September 15 (2021), https://theconversation.com/whats-the-law-on-vaccine-exemptions-a-religious-liberty-expert-explains-166934.

[188] ROSSI, S., «Lezioni americane. Il bilanciamento tra interesse della collettività e autonomia individuale in materia di vaccini» in *Rivista Trimestrale di Diritto Pubblico,* 2 (2018), p. 749 ff.

[189] *United States v. Seeger*, 380 U. S. 163 (1965).

[190] LUK, S. B., «Conspiracy Theories Are Not Religions…», p. 110.

satisfy a standard of sincerity.[191] In any case, art. 9 ECHR should justify individualized responses to individual religious claims, regardless of the lack of of a group dimension of the claim[192].

On this point, in *Boffa v. San Marino* the Court also emphasized that article 9 ECHR «does not cover each and every act which is motivated or influenced by religion or belief».[193] Indeed, an act can qualify as a «manifestation» of religious freedom if it is «intimately linked to the religion or belief»; which implies that there is a «sufficiently close and direct nexus between the act and the underlying belief». An act being only «remotely connected to a precept of faith» will not be sufficient[194].

In any case, the ECtHR follows an established judicial tradition[195], according to which conscience has traditionally been at the core of the protection granted by the ECHR, as it is connected with those «core beliefs» that contribute to give shape to an individual's «moral identity» and his perception of «moral integrity.»[196] Such beliefs enjoy protection comparable to religion if they are «genuinely held», if they are not a «mere opinion or viewpoint based on the present state of information available», if they are provided with sufficient «cogency, seriousness, cohesion and importance», if they concern «a

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[191] ECtHR, *Kosteski v. the Former Yugoslav Republic of Macedonia*, App. no. 55170/00 (13rd April 2006).

[192] *Eweida and others v. United Kingdom*, Fourth Section (app. 48420/10), 27th May 2013.

[193] European Commission of Human Rights, *Boffa v. San Marino*, app. no. 26536/95, 15th January 1998.

[194] *Eweida and others v. United Kingdom*, Fourth Section (app. 48420/10), 27th May 2013.

[195] Maclure, J., Taylor, C., *Secularism and Freedom of Conscience*, Harvard University Press, Cambridge (MA), 2011, pp. 89-90. See *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293. In *Eweida v. the United Kingdom*, judges Vu˘cini´c and de Gaetano provided an exaustive definition of freedom of conscience: «[...] no one should be forced to act against one's conscience or be penalised for refusing to act against one's conscience. Although freedom of religion and freedom of conscience are dealt with under the same Article of the Convention, there is a fundamental difference between the two [...]. In essence [conscience] is a judgment of reason whereby a physical person recognises the moral quality of a concrete act that he is going to perform, is in the process of performing, or has already completed. This rational judgment on what is good and what is evil, although it may be nurtured by religious beliefs, is not necessarily so, and people with no particular religious beliefs or affiliations make such judgments constantly in their daily lives.» Although the Court recognized the importance of conscience, there is a lack of jurisdiction of judges in assessing the legitimacy of beliefs and convictions. In *Kokkinakis v. Greece*, the ECtHR stated that «freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention.» *Kokkinakis v. Greece* (app. 14307/88), 25 May 1993. So such a freedom has been deemed as a precious asset not only for those who adhere to a religious set of values, but also for atheists, agnostics, sceptics, and indifferent people. In *Arrowsmith v. the United Kingdom* the ECtHR aknowledged that freedom of conscience and thought include also secular and philosophical convictions such as pacifism. *Arrowsmith v. the United Kingdom* (app. 7050/75), 12 October 1978.

[196] Leigh, I., «Vaccination, Conscientious Objection…», p. 5.

weighty and substantial aspect of human life and behaviour», if they are «worthy of respect in a democratic society», «not incompatible with human dignity» and do not «conflict with the fundamental rights of others».[197]

So, in the *Vavřička* judgement the ECtHR rules on a secular coscience objection, which gains a constitutional dimension in Czech case law,[198] in the light of article 9, emphasizing that the protection accorded to beliefs should incorporate all claims of conscience, even the deeply held secular ones, if they comply with the above-mentioned standards.

b) *A comparison between the US Supreme Court and the ECtHR standards of review*

In the US context, the issue of vaccine mandates has revitalized the judicial discourse on whether and to what extent a government can impose restrictions on religious freedom. Since 1990, the Supreme Court has imposed a standard of formal neutrality which disregards the disparate impact of generally applicable laws on faith communities. According to *Smith,* the government has no duty to accommodate religious needs against a generally applicable and religiously neutral law, unless such a law directly targets religion, singling it out for discriminatory treatment or until such a law harms a hybrid right (religious freedom combined with another constitutionally granted right). Such a standard of review is highly deferential standard to public action (rational basis review): a generally applicable law is presumed to be constitutionally consistent and the burden to demonstrate that such a law has a disparate impact on religious freedom is upon the religious claimant. However, such a standard has failed to satisfy demands of religious diversity appropriately in a multicultural society. Recent case law shows a turn more favorable to religious freedom. During the pandemic era, US courts have increasingly relied on an equality approach which implies the search for a «secular comparator» to assess whether secular and religious activities have been put on an equal footing, in order to meet a facial neutrality standard of review. The establishment of a disparate treatment is, in fact, pivotal to trigger a strict scrutiny test. So, during the pandemic, restrictive measures affecting religious gatherings have been compared with secular activities on the basis of the threshold of risk they give rise to, as the

[197] *Graiger v. Nicholson* [2010], IRLR 4. See also ECtHR, *Arrowsmith v. the United Kingdom* (app. 7050/75), 12 October 1978; *H v UK* (1992) 16 EHRR CD 44; *Campbell and Cosans v. United Kingdom* (1982) 4 EHRR 293; *Chappell v. United Kingdom* (1987) 53 DR 241.

[198] *Vavřička v. Czech Republic*, § 93.

only measure to assess a discrimination of religion. So, Courts have been deeply engaged in a meticulous analysis of the circumstances of the case (i.e. the size of buildings, the number of persons, the ability to comply with measures of sanitization) in order to identify the most appropriate secular comparator (theatres, stores, casinos). Although such an approach has been blamed for removing any value judgement from the judicial analysis, underestimating the essential importance of religious activities and the inner meaning they have for the faithful, in various cases it facilitated the triumph of various religious claims.[199] Such a victory was due to the ability of courts to identify neutral parameters to make a comparison between religious and secular activities. However, the weakness of such an equality approach is connected with the main requirement on which it is focused: religion can be accommodated only when «religious needs happen to overlap with nonreligious needs» and remains entrusted to «more or less random factors».[200] Under this standard of review, courts have been charged with the controversial task of assessing whether granting religious exemptions would undermine the state interest as much as secular exemptions.

The weakness of the secular comparator approach has been exacerbated in the vaccination challenges, where lower courts focused on the controversial issue of the comparison between religious and medical exemptions. According to religious claimants, the establishment of a medical exemption, where religious exemptions are lacking, implies the non-neutrality of a regulation. In *Dr. A. v. Hochul*, Justice Gorsuch argued that state interest would be affected «equally whether the worker happens to remain unvaccinated for religious reasons or medical ones.»[201]

In my view, assessing whether medical and religious reasons are comparable with regard to the compelling state interest pursued is an extremely tricky question, as they are not similarly situated with regard to the threshold of risk they give rise to. Indeed such a standard of neutrality provides insufficient guidance where the interests concerned are too different to be «measured up against a simple baseline of equal treatment».[202] First, lower courts underlined that medical exemptions and vaccination mandates pursue a common public inter-

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[199] Durham, W. C., Jr., «The Coronavirus, the Compelling State Interest in Autonomy, and Religious Autonomy», in *Canopy Forum*, 2nd October 2020 «Law, Religion, and Coronavirus in the Unites States: A Six Month Assessment», https: //canopyforum.org/2020/10/02/the-coronavirus-the-compelling-state-interest-in-health-and-religious-autonomy/.

[200] Lund, C. C., «Second-Best Free Exercise…», p. 846 and p. 870.

[201] *Dr. A. v. Hochul*, 142 S. Ct. 552 (2021), 556 (Gorsuch J., dissenting).

[202] Laborde, C., «The Evanescence of Neutrality», in *Political Theory*, 46 (2018), p. 102; Hornbeck, P., «General Applicability...».

est: the protection of public health and the safeguarding of the most vulnerable individuals, through vaccination of all those who can be safely vaccinated, even though granting exemptions to those with relevant health problems who risk serious side-effects from vaccination. Instead, religious exemptions aim to prevent a loyalty conflict for the religious believer, letting him avoid facing a difficult choice between compliance with general provisions and adherence to his religious convictions. Not only do religious exemptions put at risk unvaccinated conscientious objectors but also expose to a higher risk third-parties (vulnerable individuals) and the society. So, medical reasons are «important and contingent» and simply «stronger» during a health crisis[203]: they aim to protect the «supreme good» of public health, which has to be given priority due to the outbreak of a devastating and highly communicable infection[204].

Second, although Justice Gorsuch in *Does v. Mills* raised concern that granting medical exemptions implies that even mere «trepidation» over vaccination will be sufficient to avoid the delivery, it is not exactly like that. Indeed, courts underlined that medical exemptions are limited to narrowly tailored cases. According to state laws, a medical exemption requires a written statement of a licensed practitioner which establishes that vaccination can be detrimental or medically contraindicated to a patient's health or that it is in accordance with the guidelines of a medical advisory committee. Therefore, their number should be limited and controlled so that neither can they give rise to a system of individualized exemptions, nor do decisions of government enjoy discretion in granting them, as they are connected with a professional judgement of a licensed practitioner. Instead, religious objectors can potentially put at higher risk the public interest to protect public health. The over-expansion of claims for religious, personal and philosophical exemptions and the reluctance of courts to interfere in religious matters could make the management of religious exemptions extremely difficult, give rise to abuses and could go so far as to undermine the state interest to achieve herd immunization[205].

So, an analysis that compares secular and religious exemptions merely focusing on the «harm» religious accommodation could give rise to, arguing that a conscientious objector should be considered as similarly situated with a regard to a person who would risk side-effects from vaccination, is hard to

[203] LUND, C. C., «Second-Best Free Exercise…», p. 863; HORNBECK, P., «General Applicability...».

[204] COLAIANNI, N., «La libertà di culto al tempo del coronavirus», in *Stato Chiese e Pluralismo Confessionale*, 7 (2020), p. 32.

[205] RUBENSTEIN REISS, D., «Vaccine Mandates…», p. 75.

defend, and there is a strong risk that such a standard may result in excessive judicial discretion[206].

The European approach adopts a more balanced approach to the relationship between general rules and exemptions, according to which individuals may be justified if they do not comply with generally applicable regulations under certain conditions. It goes without saying that reasonable accommodation of religious needs is not considered as an «anomaly», but it is guaranteed at an international level (article 9 ECHR). [207] However, religious freedom cannot be immunized from comparison with legitimate public interests, so a government can impose restrictions on religious freedom, if they meet the standards of legitimacy, necessity and proportionality.

So, religiously-based conscientious objections to vaccine mandates should be subject to a rigorous scrutiny organized in various steps. In the *Vavřička* case, the ECtHR has acknowledged that the vaccine mandates interfere with fundamental rights. Indeed, they can impose a (more or less) substantial burden on the exercise of religious freedom as non-vaccination may have legal implications for a conscientious objector, so a rigorous judicial scrutiny is required to prevent violations of rights. First of all, vaccination mandates should be prescribed by law, namely the restriction has to be founded on a domestic provision, has to be accessible and foreseeable, and must provide enough guarantees against arbitrary application[208].

Furthermore, they should respond to a «legitimate aim.» On this point the test seems similar to the US rational basis review, as it does not require a textual «threshold» («compelling») state interests have to achieve to justify limitations on religious freedom.[209] However, we should not underestimate that the standard of legitimacy is combined with those of necessity in a democratic society and proportionality. Under the necessity test, restrictions require to serve a pressing social need and to respond to sufficient and relevant reasons. So a government has the burden to demonstrate its urgency to pursue a relevant public interest, even at the cost of imposing restrictions on religious exercise interest, and the lack of less restrictive means to achieve the legitimate aim pursued[210].

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[206] Hornbeck, P., «General Applicability…»; Lund, C. C., «Second-Best Free Exercise…», p. 859.

[207] Collings, J., Hall Barclay, S., «Taking Justification Seriously: Proportionality, Strict Scrutiny, and the Substance of Religious Liberty» in *Boston College Law Review*, 63 (2022), p. 517.

[208] Leigh, I., «Vaccination, Conscientious Objection…», pp. 10-15; Del Bò, C., 2022. «L'obbligo vaccinale durante la pandemia da Covid-19 Profili etici», in *Quad. Dir. e Pol. Eccl.,* 2/2022, pp. 333-340.

[209] Collings, J., Hall Barclay, S., «Taking Justification Seriously…» p. 517.

[210] Rivers, J., «Proportionality and Variable Intensity of Review», *The Cambridge Law Journal*, 65 (2006), p. 198

In the case of vaccine mandates, there is little doubt the states are under a positive duty to protect public health, with special regard of children and vulnerable classes of individuals. Where there is a serious risk of the spread of contagious diseases which can have severe implications (and even cause death) a state has a legitimate interest in achieving herd immunity through vaccination. In *Vavřička*, the Court held that where «a policy of voluntary vaccination is not sufficient to achieve and maintain herd immunity» a state «may reasonably introduce compulsory vaccination policy in order to achieve an appropriate level of protection against serious diseases.»[211] So public health concerns and the protection of the rights of others could be considered as a sufficient and relevant justification to interfere with privacy rights as well as with religious freedom, such as the «weighty public health rationale underlying this policy choice, notably in terms of efficacy and safety of childwood vaccination».[212]

However, a proportionality analysis is not limited to analyzing the legitimacy and necessity of the contested public measure, but also incorporates a scrutiny on proportionality which implies to balance between individual human rights and general public interests, to assess which and to what extent has to be given priority. The interference on fundamental rights should be proportionate to the aim pursued, namely the social benefit should be greater than the individual sacrifice and the effective availability of less restrictive alternatives aimed at reaching the same purpose at a minor cost for the fundamental right concerned should be judicially assessed.[213] Provided that an individual cannot be physically forced to be immunized, mandatory vaccination should be the «last resort solution», as the workability of less restrictive alternative should be previously assessed[214].

As an example, in the *Vavřička* case a relevant weight is given to the impact on a conscientious objector: the Strasbourg Court considered the negligible nature of the penalty imposed for disregard of the vaccination duty. We cannot underestimate that other countries imposed more burdensome penalties.[215] The proportionality analysis could be crucial where a State adopts a conditional vaccination scheme: in this case, access to other activities will depend on compliance to the vaccine mandate. In the *Vavřička* case, the Court

[211] *Vavřička*, § 288.

[212] *Vavřička*, § 285. See LEIGH, I., «Vaccination, Conscientious Objection…», p. 10.

[213] ALEKSEENKO, A., «Implications for COVID-19 vaccination...», p. 80; TOMASI, M. «Vaccini e salute pubblica: percorsi di Comparazione in equilibrio fra diritti individuali e doveri di Solidarietà», in *Diritto Pubblico Comparato Ed Europeo*, 2/2017, pp. 455-82.

[214] PANAGOPOULOU, F., «Mandatory Vaccination during the Period of a Pandemic…», p. 35.

[215] As an example, Greece imposed a monthly fine on the non-vaccinated. LEIGH, I., «Vaccination, Conscientious Objection…», pp. 10-15.

considered that the deprivation for minors of educational opportunities could be remedied and had temporary duration:[216] this could imply that in the case of a health emergency the mandate should be temporarily restricted to a limited period of time[217].

However, in future cases, we cannot exclude that the court will reach a different result in the case where compliance to vaccination conditioned access to fundamental rights, and the religious claimant would suffer a disproportionate burden if he had to choose between compliance with general provisions or with his religious tenets. We cannot underestimate that in the *Vavřička* case the proportionality of vaccine mandates has been connected with state availability of medical and non-medical exemptions, and adequate scientific evidence about the safety of the vaccination.

Furthermore, within a proportionality analysis the Strasbourg court will consider «the rights of others». In the US context, the issue of reasonable accommodation of religion has become extremely controversial because 1) the analysis on the substantiality of the burden on religious freedom has been blurred and 2) because of the concern of third-party harms.

In the US history, although mandatory vaccinations have been traditionally considered as a «significant intrusion on individual freedoms» (freedom of choice, bodily control, freedom of religion) they have been generally upheld, as courts balanced the sacrifice on individual freedom with other values which have been given priority (protection of public health, achievement of herd immunity).[218] However, in recent rulings[219], the Supreme Court has weakened the importance of the determination on the effectiveness of the substantial burden, giving relevance to attenuated burdens (complicity claims and the financial penalties imposed on the religious objector for non-compliance to a general law)[220].

Second, the implications of religious accommodation on third parties have been removed from the balance of competing interests,[221] making such an approach politically divisive and vulnerable. Indeed, although academics emphasized[222] that the cost of religious freedom on third parties should be taken in

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[216] Nugraha, I. Y., Montero Regules, J., Vrancken M., «Vavřička and Others v. Czech Republic. International Decision: Case Review», in *The American Journal of International Law*, 11 (2022), pp. 579-585.

[217] Panagopoulou, F., «Mandatory Vaccination during the Period of a Pandemic…», p. 36.

[218] Killmond, M., «Why is Vaccination Different…», p. 947.

[219] *Burwell v, Hobby Lobby Stores*, 573 U. S. 682 (2014).

[220] Killmond, M., «Why is Vaccination Different…», p. 943.

[221] *Burwell v, Hobby Lobby Stores*, 573 U. S. 682 (2014).

[222] Gedicks, F. M., Van Tassell, R. G., «RFRA Exemptions from the Contraception Mandate: an Unconstitutional Accommodation of Religion», *Harvard C. R.-C. L. L. Rev*., 49 (2014), p. 347.

high consideration in an Establishment Clause analysis,[223] there has not traditionally been a uniform judicial approach with regard to the threshold of third-party harms determining a constitutional infringement, as courts have ranged between restrictive (where third-party burdens should be «significant» and «substantial» to deserve consideration)[224] and more broad approaches (where it is sufficient that third parties suffer from «de minimis burdens»).[225] In the case of vaccines, the issue of third-party harms should be central. Until recently, courts have taken in high consideration risks for unvaccinated children, for children or classes of vulnerable individuals who cannot be vaccinated for medical reasons. However, both key factors (substantial burden, third-party harms) risk being minimized in a judicial analysis which merely focuses on the comparability between secular and religious exemptions. In many cases, the inability to properly balance these key factors in the judicial analysis has influenced the political trend to achieve equalization of religious and philosophical exemption through the removal of accommodation of every kind of conscientious claim.

On the contrary, the Strasbourg Court has often adopted a «third-party centric» approach.[226] With specific regard to cases where public health is concerned, the Court has been extremely cautious in assessing whether and to what extent the exercise of religious freedom burdened third parties who did not share the same set of values. In the case of vaccine mandates, not only did the ECtHR's analysis give weight to the positive duty of states, grounded in article 2 and article 8 ECHR) to protect public health but also to «the protection of the rights of others through social solidarity» (implying that those for whom immunization does not give rise to health risks have to undergo vaccination to facilitate the protection of vulnerable individuals).[227] The health crisis has justified relevant and unorthodox sacrifices of well-established fundamental free-

[223] However, the Court focused on third-party harms in few decisions: *Estate of Thornton v. Caldor*, 472 U. S. 703 (1985); *Texas Monthly v. Bullock*, 489 U. S. 1 (1989).

[224] GEDICKS, F. M., VAN TASSELL, R. G., «RFRA Exemptions from the Contraception Mandate…», p. 366.

[225] TEBBE, N., SCHWARTZMAN, M., SCHRAGGER, R., «How Much May Religious Accommodations Burden Others?», in LYNCH, H. F., COHEN, I. G., SEPPER, E. (eds.), *Law, Religion, and Health in the United States*, Cambridge University Press, New York, 2017, p. 217; LEVIN, H. Y., «Why Some Religious Accommodations…», in *Hastings L. J.*, 68 (2017), p. 1220.

[226] MCGOLDRICK, D., «Religion and Legal Spaces, in Gods We Trust; in the Church We Trust, but Need to Verify», in *Human Rights Law Review*, 12 (2012), pp. 759-786.

[227] TRISPIOTIS, I., «Mandatory Vaccination, Religious Freedom…», pp. 1-20. Furthermore, Judge Lemmens, in his separate opinion underlined that the «value of social solidarity…requires respect by each member of society for certain minimum requirements» and implies that «apart from fundamental rights, there are also fundamental duties and responsibilities». *Vavřička* (Lemmens., J., part. concur., part. diss. opinion, § 2).

doms to safeguard the weakest members of community on behalf of social solidarity.[228] However, although third-party harms are relevant they are not the only element which determines the judicial result and a serious harm on a religious claimant should not be imposed in order to avoid a minimal impairment on the rights of others[229].

So, US judicial approach to religious freedom would gain a lot if the equality standard were incorporated in a more complex proportionality analysis, which can offer a higher level of protection to conscientious objection to vaccine than a rational basis review.[230] Proportionality does not put religious freedom on the tip of a hierarchy of fundamental rights. However, it does not deny the special role of religious freedom and it does not justify *a priori* any governmentally imposed restriction on religious freedom because of the existence of a legitimate state need. Indeed, the government has to demonstrate the achievement of a fair balance between the goal pursued and the means used and impossibility of reaching the intended aim through less restrictive alternatives for religious freedom. So, a balancing approach shows that between the recognition of a blanket immunity and a complete neutralization of religious needs there could be a space for intermediate solutions, [231] where «everybody hands something over, but nobody surrenders or capitulates»[232].

We cannot underestimate that, in the *Jacobson* case, the Supreme Court anticipated the standards that should govern the balance between state action and individual liberties and is not far from the ECtHR's reasoning in the *Vavřička* judgment.[233] Indeed, taking advantage of the language of reasonableness, necessity, proportionality and harm prevention, the Court did not adopt a blanket deference toward the government. First, it carefully scrutinized the achievement of a balance between the state need to satisfy a pressing social need and the use of means «reasonably tailored» to the need concerned.[234] Second, the nature of the burden imposed on individual liberty was taken into high consideration. Finally, the decision was strictly connected to the circumstances of the case, as the upcoming and serious threat to public health was the

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[228] *Constantin-Lucian Spînu v. Romania*, App. no. 29443 /20, 11st October 2022.

[229] Collings, J., Hall Barclay, S., «Taking Justification Seriously…», p. 518.

[230] Baldwin, G., «The Coronavirus Pandemic and Religious Freedom: Judicial Decisions in the United States and United Kingdom», *Judicial Review* 26 (2021), p. 316.

[231] Minow, M., «Foreword», in Lynch, H. F., Cohen, I. G., Sepper, E., (eds.), *Law, Religion and Health in the United States*, Cambridge University Press, New York, 2017, p. xvii.

[232] Cartabia, M., «The Many and the Few: Clash of Values or Reasonable Accommodation?», in *American University International Law Review*, 23 (2018), p. 677.

[233] Rossi, S., «Lezioni americane…», p. 749 ff.

[234] Cline, T., «Common Good Constitutionalism and Vaccine Mandates…», p. 16.

key factor determining the «reasonableness» of the state action.[235] In a recent judgment, Justice Gorsuch, in his concurring opinion, underlined that neither did *Jacobson* «seek to depart from normal legal rules during a pandemic», nor did it justify «cutting the Constitution loose during a pandemic»; [236] instead, it promoted the application of a balancing test whenever a «tragic choice»[237] is required between competing rights.

In my view, a balancing test should be required where fundamental rights are involved as their protection cannot be merely «a matter luck», depending on the existence of a proper secular comparator[238]. During a health crisis, although an «absolutization» of certain interests could be a tempting alternative for public policies, it gives rise to an irresolvable conflict.[239] On this point, the Italian Constitutional Court has strongly maintained that no right can become «tyrant» to the detriment of other competing values[240]. In modern democratic legal systems, a crystallization of a hierarchy of absolute values is not workable, whereas a careful balance of conflicting interests is a more defendible approach, as not only does it take into serious account the measure, its scope, and its limits, but also the specific situation justifying its enforcement.[241] In this way, not only would the «costs» of accommodating religion be scrutinized, but also the benefits, namely the importance that a religious practice plays for a believer: the inner value of religion can justify an assessment on whether and to what extent, a certain «amount of risk» can be imposed on civil society.[242] However, neither should a reasonable accommodation of religion imply an immunization of conscientious claims against vaccine mandates from a rigorous judicial analysis nor an undervaluation of state interests.[243] A careful balance between the interests concerned would require an assessment of the existence of a substantial burden on religious freedom, the establishment of a compelling state interest, the search for less restrictive alternatives, and is governed by the

[235] IBID., p. 25.

[236] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020).

[237] CALABRESI, G., BOBBIT, P., *Tragic Choices*, W. W. Norton, New York, 1978.

[238] LUND, C. C., «Second-Best Free Exercise…», p. 869.

[239] LO GIUDICE, A. «La tentazione tirannica dei valori assoluti», in INGRATOCI, C., MADERA, A., PELLEGRINO, F. (eds.), *I diritti fondamentali al tempo della pandemia da COVID-19*, ESI, Napoli, 2021, p. 139.

[240] Italian Constitutional Court, no. 85/2013.

[241] HAYNES, J., «Trump and the Politics of International Religious Freedom», in MADERA A., (ed.), *The Crisis of Religious Freedom in the Age of COVID-19 Pandemic*, MDPI, Basel, 2021, pp. 19-27; PANAGOPOULOU, F., «Mandatory Vaccination during the Period of a Pandemic…», p. 33.

[242] LUND, C. C., «Second-Best Free Exercise…», p. 866.

[243] LAYCOCK, D., «What's the Law on Vaccine Exemptions? A Religious Liberty Expert Explains», in *The Conversation*, September 15 (2021), https://theconversation.com/whats-the-law-on-vaccine-exemptions-a-religious-liberty-expert-explains-166934.

standards of necessity and proportionality. Where children's vaccination is concerned, this implies that a state duty to protect the children concerned and other children attending the educational setting combines with the protection of public health, gaining a significant weight in a balancing process.[244] Even in cases concerning adults the protection of public health is a compelling state interest. However, the compelling nature of the interest should be assessed taking into account multiple factors which can have an impact on the final decision: the efficacy and safety of vaccines, a cost/benefit analysis of new vaccines, their predictable side-effects and the existence of unknown long-term effects, the level of public health risk, the seriousness of the disease and its communicable nature, the degree of scientific evidence, the existence of a crisis of the healthcare system, the availability of alternative remedies to reduce the spread of a disease, the severity of the burden imposed on conscientious objectors for non-compliance with the vaccination mandate.

However, in the ECtHR approach, we cannot underestimate that the proportionality analysis is often mitigated by the recognition of a margin of appreciation to states. The extent of the margin of appreciation accorded can make all the difference between a strong and a weak analysis of proportionality, affecting the approach to the necessity standard. In the first case, the court would adopt a «balance ad hoc», and the balance between conflicting interests would give significant weight to the specific circumstances of the case concerned (i.e. the outbreak of a health emergency); in the second case, the court would adopt a «categorical balance», which emphasizes abstract public interests, giving marginal relevance to the circumstances of the case concerned and definitively weakening the effectiveness of the balancing process.[245] In the *Vavřička* case, the court acknowledged that mandatory vaccination could protect the rights of the others and relied on the duty of civic solidarity which should render a duty to vaccinate «not disproportionate» in order to reach herd immunity and to protect those vulnerable individuals who cannot be vaccinated for medical reasons[246]. In the case concerned civic solidarity is «evoked» as a «secondary» aim within a proportionality analysis[247].

However, such an argument would give rise to concern if it were given determinant weight. On this point, there is a risk of an alarming expansion of

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[244] Rubenstein Reiss, D., «Vaccine Mandates and Religion», in *The Judge's Book*, 6 (2022), p. 74.

[245] Tulkens, F., «Questioni teoriche e metodologiche sulla natura e l'oggetto delle sentenze della corte europea dei diritti dell'uomo», in Mazzola, R., (ed.), *Diritto e religione in Europa*, Il Mulino, Bologna, 2012, pp. 93-94.

[246] Nugraha, I. Y., Montero Regules, J., Vrancken M., «*Vavřička* and Others v. Czech Republic…», p. 584.

[247] Leigh, I., «Vaccination, Conscientious Objection…», pp. 10-15.

the scope of the legitimate aims («public order»; «protection of the rights of others») that would justify restrictions on religious freedom.[248] We cannot underestimate that in judgments concerning religious attire the ECtHR has given significant relevance to certain «sociological» factors to justify restrictions to religious freedom, and to mask skepticism toward minority religious practices.[249] Where the Court accorded a broad margin of appreciation to member States, holding that they are better placed to decide on the merits of case, it adopts a deferential approach toward domestic decisions. However, where the «intensity of review» is lowered, the risk is to «underforce Conventional rights» as a negligible «evidentiary burden» on the government to demonstrate the necessity of the restriction is imposed.[250] In the case of vaccines, the *Vavřička* case shows the risk that the ECtHR takes decisions based on general arguments as the «effectiveness of vaccines» and the «vital importance of mass vaccination», underestimating the factual circumstances of the case.[251] So, the key issue is whether and to what extent the Strasbourg court will accord a margin of appreciation to states or whether the court will engage in a serious analysis of proportionality.

On this point, the proportionality analysis could glean useful insights from the US non-discrimination standard (equality standard), which requires that religious activities are not subject to disparate treatment compared to analogous secular activities. Not only should the regulation of religious freedom in the ECHR framework be grounded in article 9 ECHR but also in article 14, which implies a right of not being subject to discrimination in the enjoyment of the rights guaranteed under the Convention and is violated where states provide a disparate treatment to persons in analogous situations without providing an objective and reasonable justification. Many European commentators complained that the Strasbourg Court often focused its analysis on article 9 ECHR, underestimating the relevance of article 14 ECHR, as an additional tool aimed at boosting protection of religious freedom.[252] The hesitancy of the Court to

[248] BREMS, E., «Skullcap in the Courtroom: a Rare Case of Mandatory Accommodation of Islamic Religious Practice», in *Strasbourg Observers*, December 11 (2017), «https://strasbourgobservers.com/2017/12/11/skullcap-in-the-courtroom-a-rare-case-of-mandatory-accommodation-of-islamic-religious-practice/».

[249] HUNTER-HENIN, M., «Living Together in an Age of Religious Diversity: Lessons from Baby Loup and SAS», in *Oxford Journal of Law and Religion,* 4(1) 2014, pp. 94-118.

[250] TSARAPATSANIS, D., «The Margin of Appreciation Doctrine: A Low Level Institutional View», in *Legal Studies* 35(4) (2015), pp. 675-676.

[251] ALEKSEENKO, A., «Implications for COVID-19 Vaccination...», p. 84.

[252] VANBELLINGEN, L., «L'Accommodement raisonable de la religion dans le secteur public: analyse de cadre juridique belge au regard de l'experience canadienne», in *Revue Interdisciplinaire d'Études Juridiques*, 75 (2015), pp. 193-230.

emphasize the link between the two provisions, is due to the fact that an analysis under article 9 in conjunction with article 14 will imply a more pervasive scrutiny of church-state regimes. However, a more incisive application of an equality test into the proportionality analysis could be a powerful game-changer to prevent religious discrimination wherever religion suffers a disparate treatment compared to other similarly situated interests. In this view, the «vertical» protection of religious freedom, which guarantees a right to live in accordance with a given set of beliefs, would be enhanced through the «horizontal» dimension of the anti-discrimination safeguard, which implies that believers must not be discriminated in their access to goods and services because of their convictions.[253] In this way, the Court would prevent the majority narratives from prevailing in the public discourse and would improve the status of religious minorities in a pluralistic society, where such minorities should enjoy equal participation[254].

c) *The need for new partnerships between religious and public actors*

The clash between vaccine mandates and conscientious objections seems to be a «new catch-22»[255], giving rise to an increasing judicialization of the conflict between the rule of law and claims for religious exemptions and urging a change of perspective in states' dealing with religion. However, lawmakers could limit the rise of conflicts *ex ante*, identifying solutions aimed at reconciling religious freedom and public interests, and limiting an adjudication *ex post* of legal challenges. Governments are charged with the task to protect public health. It goes without saying that public measures which have an impact on individual freedom should respond to legitimate and reasonable reasons of pursuing a relevant public goal and should comply with the standard of proportionality, in order to reach a striking balance between the achievement of the public interest and the safeguarding of individual rights. However, a preliminary requirement is that public decisions are founded on legislative authority and are endowed with proper clearness, accessibility and transparency. So reasonable steps should be taken to engage all the social actors involved and those affected by the enforcement of mandatory vaccination in the public discourse. In the

[253] Trispiotis, I., «Mandatory Vaccination, Religious Freedom, and Discrimination», p. 17.

[254] Collings, J., Hall Barclay, S., «Taking Justification Seriously…», p. 518; Henrard, K., «Tailoring State Obligations Regarding "The Right of Equal Treatment" in Times of Fluctuating Super-Diversity: A Turn to Relative Vulnerability?», in *Gdańskie Studia Prawnicze*, 2 (2019), p. 132.

[255] Madera, A., «COVID-19 Vaccines v. Conscientious Objections in the Workplace…».

Vavřička case, the ECtHR gave relevant weight to the suitability of the political decision-making, its transparency, openness and availability of proper room for participation of social actors.[256] Where legislative changes concern «sensitive moral or ethical issues» they should preceded by «extensive social and parliamentary debate».[257] This implies a serious reconsideration of the role of religious communities within the «network of social actors» and the opening of «new channels of communication» between public and religious actors, as religious cooperation could mean a lot to mitigate dystopic situations generated by the COVID-19 health crisis, even in secularized landscapes[258].

An influential scholar of law and religion underlined that the lesson we can learn from the pandemic is that the role of religion in post-secular societies can go beyond being perceived as a problem and move forward to being considered a solution.[259] Indeed, during the pandemic, evidence has shown that religion can be a factor of risk which could increase the spread of the contagion but also a powerful resource to combat the health crisis. Religious communities have implemented forms of horizontal and vertical cooperation with a view to giving a giving a vital contribution to the management of the crisis. As «civil society agents» they have adopted various strategies to cope with the health crisis and mitigate its implications.[260] In some cases churches self-enforced restrictive measures, internalizing precautionary measures and provided hygiene devices to worshippers. The health crisis emphasized the inner ability of religious communities to adjust their religious tenets and practices to guarantee their spiritual assistance in times of crisis and to avoid their faithful facing conflicts of loyalty between religious imperatives and compliance with secular law. Furthermore, religious leaders provided a significant contribution in educating their adherents on the risks coming from the infection and disseminating correct information about the most appropriate precautionary measures to reduce the

[256] *Vavřička v. Czech Republic*, §§ 297-298.

[257] *Vavřička v. Czech Republic*, *§ 279 and §§ 297-298.*

[258] MADERA, A., «The State's Attitude toward Religious Communities in a Health Crisis: Pursuing Toward New Interpretative Approaches», in *Christianity - World - Politics*, 26 (2022), pp. 304-318; MARTÍNEZ-TORRÓN, J., «COVID-19 y libertad religiosa: ¿problemas nuevos o soluciones antiguas?», in MARTÍNEZ-TORRÓN, J., RODRIGO LARA, B., *COVID-19 y libertad religiosa,* Iustel, Madrid, 2020, p. 30.

[259] MARTÍNEZ-TORRÓN, J., «COVID-19 and Religious Freedom: Some Comparative Perspectives», in A. MADERA (ed.), *The Crisis of Religious Freedom in the Age of COVID-19 Pandemic*, MDPI, Basel, 2021, pp. 51-66.

[260] YENDELL, A., HIDALGO, O., HILLENBRAND, C., *The Role of Religious Actors in the COVID-19 Pandemic: A Theory-Based Empirical Analysis with Policy Recommendations for Action*, 2021, Edition Kultur und Außenpolitik, Stuttgart, p. 6.

spread of the contagion. [261] It goes without saying that churches have kept their traditional commitment of carrying out their pastoral and charitable activities during the health crisis, especially providing primary goods and services to the most vulnerable classes of individuals. Indeed, in many cases, not only was their assistance provided to their faithful but had a multi-religious and inclusive nature, as it was extended to all needy people, regardless of their religious adherence[262].

As «governments' partners», religious communities developed various kinds of interplay with political actors to manage the pandemic successfully [263]. During the acute response to the COVID-19, some European governments involved religious communities (and even secular-philosophical organizations) in the decisional processes (Belgium)[264], judicial boards solicited such an involvement, regardless of the model of church-state relations adopted at a state level (France)[265], and advisory boards and task forces composed of various religious and public actors and health authorities were established (Ukraine). Indeed, in various legal systems church and state actors negotiated the safest measures that had to be adopted to allow the resumption of religious activities, opening new courses in church-state relationships (Italy)[266]. In this way, faith communities gained a key role of «mediators» of state measures, allowing a reconciliation of their faithful's religious needs with public health concerns.[267] In the same way, in the US context, houses of worship were given the possibility to have access to pandemic relief from the federal government to alleviate the economic impact of lockdown orders, on equal terms with other charitable secular undertakings, as an acknowledgement of their important charitable

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[261] Madera, A., «The Implications of the COVID-19 Pandemic on Religious Exercise: Preliminary Remarks», in A. Madera (ed.), *The Crisis of Religious Freedom in the Age of COVID-19 Pandemic*, MDPI, Basel, 2021, pp. 1-11.

[262] Yendell, A., Hidalgo, O., Hillenbrand, C., *The Role of Religious Actors in the COVID-19 Pandemic…*, p. 39.

[263] Ibid., p. 7; Madera, A., «The Implications of the COVID-19 Pandemic…», pp. 1-11.

[264] Christians, L.-L. , Overbeeke, A., «El Derecho belga sobre los grupos religiosos frente al desafío de la crisis sanitaria del COVID-19. Normativa de crisis entre viejos reflejos y nuevas realidades», in Martínez-Torrón, J., Rodrigo Lara, B., *COVID-19 y libertad religiosa,* Iustel, Madrid, 2020, pp. 97-118.

[265] Fornerod, A., 2021. «Freedom of Worship During a Public Health State of Emergency in France» in A. Madera (ed.), *The Crisis of Religious Freedom in the Age of COVID-19 Pandemic*, MDPI, Basel, 2021, pp. 67-76.

[266] Lo Giacco, M. L. (2020), «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*, 12 (2020), pp. 107-114.

[267] Yendell, A., Hidalgo, O., Hillenbrand, C., *The Role of Religious Actors…*, p. 41.

work[268]. In certain geographical contexts, they replaced a government's tasks, playing a compensatory role of defective state action and becoming key actors in fighting against discrimination[269].

In a subsequent phase of the pandemic, provided that the roll-out and mass distribution of vaccines has demonstrated to be an essential device in stopping the spread of COVID-19 and reaching herd immunization, religious organizations have played a pivotal role in facing the new immunization challenge. In various cases, religious authorities have given a significant contribution in combating vaccination reluctance, prejudices and skepticism, conveyed evidence-based information and encouraged their adherents to undergo vaccination.[270] Although certain religious groups have manifested their opposition to the use of vaccines, mainstream religious communities have actively promoted their implementation, with a view to actively participating in the shared goal of protecting public health. As an example, the Catholic Church has hosted immunization clinics and has gone so far as to impose penalties on its employees who refused vaccination without «proven health reasons».[271] Furthermore, multi-faith initiatives have been developed to promote vaccination and reduce vaccine hesitancy, where religious leaders and practitioners have worked constructively in the pursuit of an equal vaccine delivery[272]. Especially, the engagement of faith communities has been a key element to facilitate immunization acceptance and combat vaccine reluctance in low-income countries «influencing caretaker beliefs and values, impacting access to resources that facilitate immunization uptake, communicating immunization messages and conducting mobilization, and providing routine immunizations in hard-to-reach areas or humanitarian settings»[273].

In such a broad perspective, religious cooperation cannot be minimized only to a mere church-state institutional cooperation; instead, it implies «chal-

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[268] CHOPKO, M., «The Constitutionality of Providing Public Fund for U. S. Houses of Worship During the Coronavirus» in A. MADERA (ed.), *The Crisis of Religious Freedom in the Age of COVID-19 Pandemic*, MDPI, Basel, 2021, pp. 27-38.

[269] HOLDEN, C. (ed.), *A Guide for Dealing with COVID-19*, Kaiicid, Vienna, 2021; MADERA, A., «The State's Attitude toward Religious Communities…», pp. 304-318.

[270] SISTI, L. G., BUONSENSO, G., MOSCATO, U., MALORNI, W., «COVID-19 and Religion: Evidence and Implications for Future Public Health Challenges», *The European Journal of Public Health*, 32 (2022), p. 322.

[271] MADERA, A., «COVID-19 Vaccines v. Conscientious Objections in the Workplace…».

[272] YENDELL, A., HIDALGO, O., HILLENBRAND, C., *The Role of Religious Actors…*, p. 61.

[273] MELILLO, S., FOUNTAIN, D., BORMET, M., AND O'BRIEN C. (2021), «Effects of Faith Actor Engagement in the Uptake and Coverage of Immunization in Low-and-Middle-Income Countries», in *Christian Journal of Global Health*, 9.1 (2022), p. 9.

lenging stereotypes»[274] with a view to implementing a broader constructive dialogue[275]. In legal contexts where the collective dimension of religious freedom is granted proper constitutional protection, a responsible use of that freedom is strongly required.[276] This implies that faith communities cannot be mere passive recipients of religious accommodation but should give their effective contribution in the search of solutions aimed at reconciling competing interests, even if this requires some adaptation of their teachings and traditions. On the other hand, cooperation has demonstrated the advantages it could offer if it were the ordinary approach governing church-state interplay.[277] In this way, religious reactions against measures affecting their faithful would be mitigated, as faith communities would pro-actively participate in determining them, allowing the burden on religion provoked by facially neutral measures to be taken into account in advance and alleviated.[278] During the health emergency, such a church-state cooperation has been more fruitful where structures and «channels of communication» were established beforehand, as the pre-existence of relations of respect and mutual trust are vital for a successful synergic action: this implies that cooperation should not be limited to emergency situations and should be implemented irrespective of and moving beyond times of crisis, in order to build a «smart framework» equipped with strong «structures, mechanisms and institutions», aimed at establishing systematic and continuous dialogue and mutual trust and negotiating common strategies to face old and new challenges emerging in democratic societies (i.e. ecological transition, financial crisis, etc.), with a long-term perspective[279].

So, an open dialogue with various social actors can be a driving force to depolarize the conflict between competing values. However, all stakeholders should be involved in the decisional processes, in order to prevent legislative choices merely meeting the majority views.[280] This implies that in a multi-reli-

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[274] Ventura, M., «Concluding Remarks», Conference on «Religious Freedom Before, During and After COVID-19 between Europe and the Member States, November 26 2021, https://www.units.it/news/religious-freedom-during-and-after-covid-19-between-europe-and-member-states (28 December 2021).

[275] Kroesbergen-Kamps., J., «Horizontal and Vertical Dimensions in Zambian Sermons about the COVID-19 Pandemic», in *Journal of Religion in Africa*, 49 (2019), pp. 73-99.

[276] Carmella, C., «Responsible Freedom under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Goood», in *West Virginia Law Review*, 110 (2007), p. 403.

[277] Herbert, D., *Religion and Civil Society. Rethinking Public Religion in the Contemporary World*, Routledge, London and New York, 2016, p. 100 ff.

[278] Yendell, A., Hidalgo, O., Hillenbrand, C., *The Role of Religious Actors…*, p. 101.

[279] Ibid., p. 18 and p. 101, Martínez-Torrón, J., «COVID-19...», pp. 51-66.

[280] Casuscelli, G., «Gli "effetti secondari" (ma non troppo) della pandemia sul diritto ecclesiastico italiano e le sue fonti», in *Stato, Chiese E Pluralismo Confessionale*», 8 (2021), pp. 1-16.

gious democratic society state governments should guarantee fair participation of all religious communities, as a selective dialogue with certain privileged religious partners risks marginalizing further minorities and exacerbating conflicts[281].

Certain legal experiences show that an effective vertical and horizontal cooperation, with a view to implementing concerted action, could be a new path where all as social actors contribute to negotiate conflicts, and to build a more inclusive society founded on inclusiveness. Although governments could take advantage of churches as powerful channels to pursue shared goals, such a cooperation implies shared knowledge: so religious leaders should be equipped with detailed information about the COVID-19 vaccine, its development process and the logics underlying their use, scientific evidence of their safety and ethical sustainability.[282] In this view, the building of trust and cooperation between public and religious actors could be a game-changer to prevent the polarization of conflict and to build «a new path of solidarity»[283] where all social actors can cooperate constructively in the pursuit of shared goals[284].

[281] YENDELL, A., HIDALGO, O., HILLENBRAND, C., *The Role of Religious Actors…*, p. 42.

[282] MADERA, A., «COVID-19 Vaccines v. Conscientious Objections in the Workplace…».

[283] CAESARI, J., «COVID-19 and Religion: Between Nationalism and Communal Responsibility», in *Politics Today*, June 8 (2020), «https://politicstoday.org/covid-19-and-religion-between-nationalism-and-communal-responsibility/».

[284] MADERA, A., «The Implications of the COVID-19 Pandemic…», p. 6.