Contagions, Congregations, and Constitutional Law: Reciprocity and Religious Freedom in the 1918 and 2020 Pandemics

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ABSTRACT

This article undertakes a comparison of legal restrictions on religious gatherings in the USA during the 1918 Spanish Flu pandemic and the COVID-19 pandemic. After contextualizing each pandemic within its legal, political, and social culture, the analysis distills prevailing principles between the two health crises and their approach to religious liberty. Evidence suggests that courts in both periods relied on proportionality and equality to resolve disputes between government bans on worship services and conscientious objectors. However, the experience of multiple local governments in 1918 and other nations in 2020 models a better way. Instead of using proportionality or equality, these state officials relied on reciprocity between government and religious groups. Their approach tended to produce fewer bans, lower case counts, and greater trust during the pandemic and offers a useful precedent for current US lawmakers managing the religious freedom concerns of COVID-19.

The pandemic of the last two years provides a rare opportunity in comparative law and religion to conduct a ‘robustness check’ on religious freedom.1 The Supreme Court’s decisions related to government restrictions on religion during the pandemic have rightly drawn attention from broad audiences. What is peculiar about these cases, however, is the lack of precedent modern federal courts must draw upon in forming their constitutional review of religious restrictions. Although the court does

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1 Here, I borrow from Professor Brett Scharffs who was the first I heard refer to COVID as a constitutional ‘stress test’. Brett Scharffs, ‘Reflections upon the Completion of the COVID-19 & FoRB Webinar Series’ (Talk About: Law and Religion Blog, 11 July 2020) <https://talkabout.iclrs.org/2020/07/11/brett-scharffs-reflections-upon-the-completion-of-the-covid-19-webinar-series/> accessed 27 December 2021.
have a somewhat related precedent in *Jacobson v Massachusetts*, this case concerned a very geographically limited health issue with a single conscientious objector. Notwithstanding the dearth of precedent, the Supreme Court has already issued decisions in five major cases that have involved state-wide orders affecting thousands of worshippers. These important developments in US constitutional law invite deeper study on how law and religion interact during a public health crisis.

With minimal guidance from precedent on constitutional rights during health crises, historical and comparative parallels can help elucidate methods to diminish effects of the virus while also protecting religious freedom. The government response and religious reaction to the 1918 pandemic provides a useful baseline for evaluating the 2020 pandemic and the restrictions it brought to religious gathering and worship. Furthermore, current practices in other areas of the world reveal patterns for protecting religious freedom during COVID-19. Both perspectives suggest that the concept of reciprocity is a powerful way to protect religious freedom while encouraging behaviour that mitigates the spread of the virus. This suggests that traditional notions of proportionality or equality may fixate on the wrong issues. Rather than government trying to find the right line to draw for balancing public health concerns with religious freedom, the focus shifts to instead allow religious groups to take the lead based on government guidance and health information. Importantly, this approach emphasizes collective responsibility to public health while still preserving individual religious freedom rights.

The article begins by describing the 1918 Spanish Flu and religious freedom in Section 1. Section 2 turns to COVID-19 and the state of religious freedom in that pandemic. Section 3 then compares several dimensions of the 1918 and 2020 pandemics in the USA. In Section 4, the article uses these observations from both pandemics to draw out and discuss the concept of reciprocity as witnessed in the USA in 1918 and countries outside the USA in the COVID-19 pandemic. Section 5 concludes with both opportunities and limitations of reciprocity as applied to pandemics and religious freedom.

### 1. SPANISH FLU AND RELIGIOUS FREEDOM

#### A. Government Response

During the ravage of the 1918 influenza, an estimated 675,000 Americans lost their lives in a country that then contained about 100 million people. That pandemic lasted just over 1 year in the USA after first appearing in early spring 1918. The following year witnessed three waves of the ‘Spanish Flu’ that ravaged the country. The cause of the 1918 influenza was a mystery. From the very onset of the virus, leading scientists in epidemiology were baffled at its tremendous rate of infection and high death toll. The scientific inability to control the virus at the beginning of the outbreak urged government action early in the fall of 1918.

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2 Josh Blackman, ‘The “Essential” Free Exercise Clause’ (2021) 44 Harvard Journal of Law and Public Policy 637.

3 *Roman Catholic Diocese of Brooklyn v Cuomo*, 141 S.Ct. 63 (2020) (per curiam); *Danville Christian Academy v Beshear*, 141 S.Ct. 527 (2020); *Calvary Chapel Dayton Valley v Sisolak*, 140 S.Ct. 2603 (2020); *South Bay United Pentecostal Church v Newsom*, 141 S.Ct. 716 (2021); *Tandon v Newsom*, 141 S.Ct. 1294 (2021) (per curiam).

4 ‘History of the 1918 Flu Pandemic’ (US Centers for Disease Control and Prevention) <https://www.cdc.gov/flu/pandemic-resources/1918-commemoration/1918-pandemic-history.htm> accessed 27 December 2021.
While most state and local governments synchronously commenced health regulations, there remained plenty of heterogeneity in the form those responses took. Those that took early measures were frantically followed by others that had responded far too slow. As one historian describes it, ‘Where city officials had at the beginning of the pandemic refused to act they now panicked and at last closed schools, theatres, churches and all public places of entertainment.’

As October hit, so did a wave of closure orders issued by state and local governments. This was particularly true when it came to the way government restricted religious worship. In general, nearly all state and local governments who issued public health orders included some degree of restriction on houses of worship. Yet again, the orders varied. On one end of the spectrum were absolute bans on gatherings of any kind. This was captured well in a statement from Dr Dowling, head of the State Board of Health in Louisiana during the 1918 pandemic. After hearing complaints from churches seeking relief from the harsh gathering bans, he replied, ‘There is no disposition to be unduly critical of the churches. I am in full sympathy with the contentions and desires of the church people, the business people, and the representatives of the laboring classes but an order is an order and should apply to all alike.’

Likewise, New York Commissioner of Public Safety Andrew Hamilton announced on 12 October that all churches, hotel lodges and saloons, ice cream parlours, and any civic or lodge meetings would be added to a closure order that had already restricted schools. He later added that the ban on other gatherings would not be lifted until the time that religious worshippers could begin meeting once again.

Other areas took note of the strong government response they were seeing throughout the country and decided on a more lenient treatment towards religion. In language that will be familiar to modern pandemic observers, the city of Chicago issued an order that declared, ‘religious activity is essential to the morale of the community’ and because of this ‘the commission specifically exempted churches from any general closing order.’ The Chicago health commissioner was also quick to encourage religious leaders to ‘minimize the danger of their services’ and offered guidelines about how long and how often religious gatherings should occur. The Cincinnati Commercial Tribune reported that churches in Newport, Ohio, were also

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5 Tom Quinn, *Flu: A Social History of Influenza* (New Holland 2008) 143.
6 Throughout this article, I commonly refer to claimants as ‘church’ or ‘churches’ because most religious organizations involved in tensions between religious freedom and pandemic have been churches. However, I intend to be inclusive of concerns from all religious groups whose worship was restricted. The same is true when using ‘congregation’.
7 ‘Small Number of New “Flu” Cases’ *New Orleans States* (New Orleans, 8 November 1918) 6 in *Influenza Encyclopedia* <http://hdl.handle.net/2027/spo.8490flu.0006.948> accessed 27 December 2021.
8 ‘Sweeping Closure Order to Prevent Further Spread of Spanish Influenza’ *Rochester-Times Union* (Rochester, 12 October 1918) 8 in *Influenza Encyclopedia* <http://hdl.handle.net/2027/spo.3690flu.0008.963> accessed 27 December 2021.
9 ‘Influenza Cases Fewer; Restrictions to Stand’ *Rochester-Times Union* (Rochester, 31 October 1918) 8 in *Influenza Encyclopedia* <http://hdl.handle.net/2027/spo.8000flu.0009.008> accessed 27 December 2021.
10 “Nonessential” crowds barred in epidemic war *Chicago Tribune* (Chicago, 17 October 1918) 13 in *Influenza Encyclopedia* <http://hdl.handle.net/2027/spo.7820flu.0012.287> accessed 27 December 2021.
11 ibid.
exempted from an order banning all public meetings. Even so, churches were restricted to one morning service a week. The Massachusetts Board of Health took an even looser approach, declaring theatres, moving picture houses, and dance halls as 'unnecessary assemblages', while allowing churches to decide for themselves. In general, most closure orders and gathering bans on religious gatherings commenced in late September or early October 1918 and were rescinded by early December of that same year.

B. Religious Reaction

Not only was there heterogeneity in the government response but also in the religious community’s reaction to government orders. Many religious leaders were among the leading supporters of the closure orders. In St Louis, Archbishop John J. Glennon urged his parishioners to hold services in their homes. Missouri religious leaders even issued a statement announcing their ‘cheerful compliance with the orders of the Board of Health’. In Nashville, Tennessee, observers noted how ‘[t]here has been a ready submission to every demand made on the people of Nashville to do what the authorities have prescribed. . . this spirit has been finely exemplified by the churches of the city.’ Faith leaders saw themselves as charged with a duty to protect not only their parishioners, but also the public good. Even when cities or states did not mandate their closure, many congregations enacted their own voluntary cancellations. They were also eager to offer personal ministering and other help to sick individuals both inside and outside their religious communities.

At the same time, closure orders left some dissatisfied with certain aspects of the government bans. Although this dissatisfaction was not limited to faith leaders and parishioners, they were generally the strongest and most united group against government gathering bans. Bishop Frederick F. Johnson was one religious leader who...
quickly lost patience with the government’s closure order. Among the clergy who had signed a letter expressing support for the closure order in St Louis, Johnson appeared again in the news just 19 days later protesting the government’s ban on worship services. In a strong appeal, Bishop Johnson questioned the necessity of restricting public worship when ‘stores and saloons are permitted to remain open with little or no regulation.’ In Johnson’s eyes, the disparity of treatment between churches and other public places was not justified.

C. Christian Scientists

The frustration voiced by Johnson was not an isolated incident. In fact, many religious groups went beyond popular protest to issuing formal legal challenges to the restrictions on religious worship. Although Catholic and Protestant groups were represented in these petitions, Christian Scientists were the group with the most consistent and vocal objections. In California, Michigan, New York, Oregon, and Washington, practitioners from the Church of Christ Scientist publicly came forward expressing their disapproval of public health orders impacting worship. From its beginnings in the 1870s in New England, the Christian Science movement was on a crash course with improvements in modern science. As described by one historian of medicine, ‘Christian Science was a form of mind cure whose appeal lay in its frank repudiation of traditional concepts of disease and of mainline medicine’s materialistic therapeutics.’

Traced to the basic teachings of Mary Baker Eddy, this new religious movement was motivated by healing that comes through faith in God rather than through the ‘arm of the flesh’. It is not surprising that Christian scientists and medical practitioners often found themselves diametrically opposed at the turn of the century. In particular, Christian Science ‘quickly gained the hostility of organized medicine as a result of the well-publicized claims of cures effected by its practitioners as well as because of the church’s considerable success around the country in gaining exemption

21 ‘Bishop Johnson in Interview Protests Closing of Churches’ St. Louis Globe Democrat (St Louis, 31 October 1918) 9 in Influenza Encyclopedia <http://hdl.handle.net/2027/spo.2290flu.0009.922> accessed 27 December 2021.
22 ‘Flu Closing Order Upheld’ Los Angeles Times (Los Angeles, 5 November 1918) 6–7 in Influenza Encyclopedia <http://hdl.handle.net/2027/spo.0170flu.0013.710> accessed 27 December 2021.
23 ibid.
24 ‘Blue Sunday Here with All Churches and Shows Closed’ Grand Rapids Herald (Grand Rapids, 20 October 1918) 11 in Influenza Encyclopedia <http://hdl.handle.net/2027/spo.3660flu.0004.663> accessed 27 December 2021.
25 ‘Buffalo Suffers Tight Quarantine Because of Plague’ Buffalo Express (Buffalo, 12 October 1918) 6 in Influenza Encyclopedia <http://hdl.handle.net/2027/spo.4630flu.0001.364> accessed 27 December 2021.
26 ‘Health Condition in Portland Almost Normal’ Oregon Daily Journal (Portland, 20 October 1918) 3 in Influenza Encyclopedia <http://hdl.handle.net/2027/spo.7800flu.0008.087> accessed 27 December 2021.
27 ‘Health Office Refuses Permit to Open Church’ Spokane Daily Chronicle (Spokane, 16 October 1918) 1 in Influenza Encyclopedia <http://hdl.handle.net/2027/spo.3000flu.0011.003> accessed 27 December 2021.
28 James H Cassedy, Medicine in America: A Short History (John Hopkins University Press 1991) 99–100.
for those practitioners from medical licensing laws.29 Nevertheless, the scientific community was itself still trying to persuade the broader community of its validity, and the Christian Science movement grew to almost 500 congregations by 1900.30

Among the first signs of friction between Christian Scientists and public health was a 1903 case in the Supreme Court of Pennsylvania.31 The First Church of Christ Scientist appealed for a charter of church incorporation but was denied. After clarifying the church’s mission to both ‘preach the Gospel’ and ‘heal the sick’, the Pennsylvania Supreme Court affirmed the denial of the charter. The opinion declared, ‘To secure the safety and protect the health of the public from the acts of incompetent persons, the law prescribes the qualifications of those who shall be allowed to attempt the cure or healing of disease.’32 The court further reasoned that Christian Science practice would be difficult to incorporate within a public health system that is ‘based upon the theory that disease is a reality’.33 This case provides a useful indicator of the shifting attitudes regarding science at the beginning of the 20th century. The Christian Science movement and organized medicine would remain in tension entering the Spanish Flu crisis in 1918.

As the pandemic picked up steam and closure orders covered most areas of the country, Christian Scientists advocated a message of faith over fear. In California, the Ninth Church of Christ Scientist openly opposed the health commissioner of Los Angeles by continuing to hold in-person worship services. They appealed both to constitutional privilege and ‘a great national need, when our healing prayers should be helped and not hindered.’34 In meeting together during the closure order, they were determined to make a test case that would not just protect themselves, but religious freedom for all. Their application to the Supreme Court of California was based on their view that the closure order was ‘discriminatory as between churches and assemblages in mercantile places, violating the California constitutional provisions relating to the right of freely assemble and to religious worship and to the fourteenth amendment to the federal Constitution.’35 The Court’s decision would determine whether or not to grant a writ of habeas corpus to a jailed Christian Scientist, H.P. Hitchcock, and thereby cast doubt on the constitutionality of the city’s enforcement of the closure order.

Fearing that granting the writ of habeas corpus would make enforcement of closure orders impossible, the California Supreme Court declined to intervene. Their hesitancy to do so, given the context of the time, is understandable. Beyond the unsettling implication of encouraging protest towards other health orders, the Court also faced large constitutional barriers that disadvantaged the church. The Christian Scientists had appealed to the California Constitution’s provisions relating to

29 ibid.
30 ibid.
31 Re First Church of Christ Scientist, 205 PA 543 (1903).
32 ibid 551.
33 ibid 549.
34 ‘Must Follow Health Rule Says Mayor’ Los Angeles Evening Herald (Los Angeles, 2 November 1918) 4 in Influenza Encyclopedia <http://hdl.handle.net/2027/spo.8340flu.0005.438> accessed 27 December 1918.
35 ‘Habeas Corpus Writ Refused’ The Christian Science Monitor (Boston, 9 November 1918) 9 in ProQuest Historical Newspapers accessed 26 February 2021.
freedom of religion\textsuperscript{36} and assembly as well as the US Constitution’s Fourteenth Amendment. While the specific legal arguments made by the church are not readily available, it is safe to say that their case’s appeal to the federal constitution would have been a monumental one. At this point, the ‘incorporation doctrine’ of the Fourteenth Amendment had not yet developed to the point of making the religious freedom protections of the First Amendment binding upon the states.\textsuperscript{37} Thus, states were at liberty to use their own standards on religious freedom questions. To adopt robust religious freedom protections to limit public health measures during a time of pandemic would have been a dramatic step for the California Supreme Court.

The foregoing analysis provides historical evidence on the state of religious freedom in the 1918 pandemic. In general, the clash between religious freedom and police powers of public health in 1918 was brief but palpable. Protest of closure orders often took the form of public opinion, but legal challenges were also present. When challenges from religious groups did come, they commonly referenced disparate treatment, highlighted the essential role of religion to society, or requested flexibility by allowing alternatives such as open-air services. Appendix Table A1 presents evidence from 48 cities across the USA and their pandemic response as it pertains to religion.

While generalization is difficult, several themes can be drawn from this sample. First, while bans on gatherings were common, they did not last very long.\textsuperscript{38} Outside the short shelf life of bans on public religious worship and gathering, there were also many places that provided alternative options for religious groups. These included allowing for open-air services, limits on the number of attendees, requirements for good ventilation, issuing guidance rather than legislative orders, and even exempting houses of worship completely. Many religious leaders reciprocated by showing support for state and local governments and offering to provide their buildings to care for the sick when needed.

Additionally, when religious leaders opposed orders, their most common complaint was disparate treatment of religious worship compared to limits on analogous secular activities. This led to popular protest by many denominations and several formal legal challenges, especially from Christian Scientists. These groups were often frustrated by the lack of restrictions on businesses, and particularly saloons, that were allowed to remain open as normal or given very lenient restrictions compared to houses of worship. Authorities commonly imposed restrictions on schools, theatres, movie houses, lodge meetings, dance halls, pool rooms, and any other ‘public amusements’ in ways that were comparable to restrictions on religious organizations. By contrast, saloons, along with soda fountains and ice cream parlours, were restricted in ways that resembled

\textsuperscript{36} The California Constitution’s language protecting freedom of religion in section looked essentially the same in 1918 as it does today: ‘Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State.’ California Constitution art I, s 4 (1974). See The California State Constitution: A Reference Guide (Grodin and others, eds, 1993).

\textsuperscript{37} See Akhil Reed Amar, ‘The Bill of Rights and the Fourteenth Amendment’ (1992) 101 Yale Law Journal 1193 (explaining the historical role of the Fourteenth Amendment in bringing about the ‘incorporation doctrine’).

\textsuperscript{38} The average ban length on worship services was about 27 days. See Appendix Table A1.
other businesses. These restrictions usually allowed operations to continue with daytime hours when crowding would be less likely to occur.

The religious freedom concerns of the 1918 pandemic presented novel challenges to believers and legislators. Few, if any, historical precedents could provide similar examples of such a compelling state interest directly conflicting with religious worship. The government response to Spanish Flu and the subsequent religious reaction indicates the importance of cooperation between the two. When religions were treated fairly or given the reasons for differences in treatment, they were more inclined to follow and even advocate government closure orders. Likewise, government leaders found relief to their suffering communities when believers stood together in compliance with state orders. The presence of symbiosis between religion and government in most, though not all, of 1918 America prevented a public health crisis from becoming a nationwide religious freedom crisis.

2. COVID-19 AND RELIGIOUS FREEDOM

These perspectives about the past offer significant points of reference with which to understand the present pandemic. In the year 2020, the COVID-19 coronavirus claimed over 468,000 lives with a US population of almost 330 million. This represents 0.142% mortality rate compared to the 0.675% mortality rate of the Spanish Flu. Although vaccines indicate a decline in the spread of COVID-19, the past 100 years of rapid scientific and technological growth make this large death toll in 2020 all the more sobering even if it remains below 1918’s final numbers. As these trends continue to develop, there remain lingering legal questions regarding religious freedom from this pandemic. In many ways, we are now beginning to see modern courts take up the appeals of both past and present worshippers regarding the balance between religious freedom and police powers in a pandemic.

After spreading throughout China from the end of December to the beginning of January, the COVID-19 coronavirus arrived in the USA on 21 January 2020. By the middle of March, lockdown orders began to be widespread throughout the country. The orders ranged in their severity for religious worship. About 1 month into the pandemic, 10 states issued bans on all religious gatherings, 25 states and the District of Columbia allowed religious gatherings to continue under restricted conditions, and the final 15 states allowed for religious gatherings without any limitations.

Within 2 months of the pandemic’s onset in the USA, a First Amendment challenge came before the Supreme Court on application for injunctive relief. The petitioners were the South Bay United Pentecostal Church located in Chula Vista, California. They filed suit against California Governor Gavin Newsom for his executive order which placed absolute bans on in-person church worship services while allowing non-essential businesses, liquor stores, and film studios to remain open.

In response to the church’s legal challenge, Governor Newsom pointed out that

39 ‘A Timeline of COVID-19 Developments in 2020’ American Journal of Managed Care (1 January 2021) <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020>.
40 Virginia Villa, ‘Most States Have Religious Exemptions to COVID-19 Social Distancing Rules’, Pew Research Center (27 April 2020) <https://www.pewresearch.org/fact-tank/2020/04/27/most-states-have-religious-exemptions-to-covid-19-social-distancing-rules/>.
41 Brief for Petitioner at 4, South Bay United Pentecostal Church v Newsom, 140 S.Ct. 1613 (2020).
granting religious groups emergency relief through injunction required 'significantly higher justification' where the facts were 'indisputably clear' than in a case seeking a normal, full review of the merits. The state further emphasized that new guidelines had been put into place that allowed for in-person worship to occur at 25% capacity, thereby concluding that there was no harm to redress. After receiving the petition at the end of May, the Supreme Court denied the church’s petition for an injunction. The Court’s decision came without a signed majority opinion, only an unspoken approval of California’s use of its police power. Three of the justices, Kavanaugh, Gorsuch, and Thomas, issued a dissenting opinion calling the order discriminatory in the way it treated churches compared to similar secular establishments. The Chief Justice wrote separately concluding the opposite.

The denial in South Bay was quickly followed by another case from Nevada. The petition was brought by Calvary Chapel, a Christian church in Dayton, Nevada, requesting the Court’s intervention on a 28 May order from Nevada Governor Steve Sisolak that restricted religious gatherings to no more than 50 people irrespective of facility size or precautions.46 While other states had similar restrictions on in-person worship services, the Nevada order drew strong criticism for what religious groups perceived as disparate treatment. Although houses of worship were limited to 50 people, in-person activities at casinos, restaurants, bowling alleys, and other places of indoor amusement were subject to a 50% capacity limit.47 The advocates for Calvary Chapel argued that, in some instances, this could mean casinos and houses of worship with capacity limits of 2000 individuals each would be allowed 1000 and 50, respectively, to enter their facilities.

After reviewing the petition for injunctive relief, the Supreme Court denied the application on 24 July 2020. Because this was simply a determination of whether to grant an injunction against Nevada, the Court’s decision did not include a majority opinion outlining its reasoning. As a result, lower courts were left to guess why the Supreme Court decided the way it did. The decision in Calvary Chapel created particular uncertainty about the application of the Supreme Court’s precedent in Jacobson v Massachusetts, a case from 1905 where a mandatory, local vaccination order was upheld as constitutional exercise of the police power against individual liberty. Nevada relied upon this precedent in their response to evidence justification for deference to police powers on public health issues, even at the expense of individual liberty. Calvary Chapel replied that the precedent in both Jacobson and South Bay could not be a 'blank check' for the governor to ignore fundamental freedoms to assemble and worship.

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42 Reply for Respondents at 13, South Bay United (ibid) (citing Respect Maine PAC v McKee, 562 US 996 (2010)).
43 ibid 13 (citing Lux v Rodrigues, 561 US 1306, 1307 (2010) (Roberts, CJ, in chambers)).
44 ibid 15.
45 ibid.
46 Calvary Chapel (n 3).
47 ibid.
48 Ibid i.
49 Jacobson v Massachusetts, 197 US 11 (1905).
50 Reply for Petitioners at 2, 11–12, Calvary Chapel (n 3).
51 ibid.
While these two cases represented setbacks to worship services, the pandemic continued to rage forward. As cases of COVID-19 began to climb early in the fall of 2020, the response of some states began to intensify commensurate with this troubling trend. The increased state regulation of public life quickly raised new religious freedom concerns from many religious groups. Around the same time, Justice Ruth Bader Ginsburg passed away leading into this second wave of the pandemic. Following the death of this nationally respected Justice, Judge Amy Coney Barrett was nominated and confirmed to fill her seat on the Court. Many observers took this as an ideological shift in the Supreme Court that would bode well for congregations attempting to make religious freedom claims against state executive pandemic restrictions.

As the next wave of the pandemic began taking its toll, another wave of religious freedom petitions was on its way to the Supreme Court. With a new justice on the Court and several more months of experience with the pandemic, the petitions were accompanied with a new hope from religious groups that their claims would be heard. The trailblazer among these legal challenges to the COVID-19 worship restrictions came from the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues. Once again, religious groups were challenging a governor’s executive order limiting in-person worship services. The order at issue was signed by New York Governor Andrew Cuomo on 6 October 2020 and created three color-coded zones of restrictions.52

The Roman Catholic Diocese and Orthodox synagogues argued that Cuomo’s executive order ‘singled out “houses of worship” for categorically different treatment’.53 They cited how in orange zones, houses of worship are required to limit in-person services to ‘the lesser of 33% maximum capacity or 25 people’, whereas almost all commercial enterprises ‘may remain open in orange zones without capacity limitations’.54 Noting that houses of worship are limited to this cap regardless of size of their meetinghouse, the petitioners ask for the same injunctive action against the state that religious groups in Nevada and California had just months earlier. On the other side, Governor Cuomo and the state relied on the Court’s previous decisions in South Bay and Calvary Chapel while emphasizing both the necessity and effectiveness of the state’s actions against the pandemic.55

To the surprise of some and the expectation of others, the Supreme Court granted the injunction against the state’s closure order. In a decision that created a momentous shift in the jurisprudence of pandemics and religious freedom, the Court produced five opinions on the issue. Justices Gorsuch and Kavanaugh each offered concurring remarks in favour of the Court’s decision to grant the petition. Justice Gorsuch concluded that ‘there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches,'56

52 The three zones were precautionary (yellow), moderate severity (orange), and most severe (red). ‘Executive Order No 202.68: Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency’ New York State Governor’s Office <https://www.governor.ny.gov/news/no-20268-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency/> (last updated 8 March 2021).
53 Brief for Petitioners at 12, Roman Catholic (n 3).
54 ibid.
55 Brief for Respondents, Roman Catholic (n 3).
synagogues, and mosques.\textsuperscript{56} Justice Sotomayor, joined by Justice Kagan, fired back that ‘Justices of this Court play a deadly game in second guessing the judgement of health officials about . . . a contagious virus.’\textsuperscript{57} Outside of the Court, public response further highlighted national division over the issue.\textsuperscript{58}

The Supreme Court’s decision in \textit{Diocese of Brooklyn} paved the way for other religious freedom arguments in the months that followed. Several cases with facts comparable to those in \textit{Diocese of Brooklyn} were remanded back to lower courts.\textsuperscript{59} Others brought novel challenges that merited their own consideration by the Supreme Court. One of these was a case dealing with a religious school in Kentucky that asked for temporary suspension of an executive order closing all schools in the state. Given the fast-approaching expiration of the order without any sign it would be renewed, the Court denied the school’s request.\textsuperscript{60} Justices Alito and Gorsuch both issued dissenting opinions, citing \textit{Diocese of Brooklyn} and the uncertainty of the pandemic as evidence to grant the school’s request and provide relief.\textsuperscript{61}

In addition to new cases coming before the Supreme Court, there were also new developments on the horizon for several older cases. Armed with the \textit{Diocese of Brooklyn} precedent, petitioners in both \textit{South Bay} and \textit{Calvary Chapel} turned again to the Supreme Court for relief. This time, the petitions would be based on the merits of each case as opposed to emergency injunctions requested in the summer. \textit{Calvary Chapel} fared no better the second time around after the Supreme Court denied its petition of certiorari to review the lower court decision.\textsuperscript{62} However, the \textit{South Bay} case became the pioneer case\textsuperscript{63} for other petitions against California’s executive orders. Due to their similarity with New York’s unconstitutional restrictions, petitioners in \textit{South Bay} brought their case again before the Supreme Court near the end of the year. On 5 February 2021, the Supreme Court found that the restrictions were discriminatory and therefore unconstitutional exercises of the state’s police power.\textsuperscript{64}

Like \textit{Diocese of Brooklyn}, the decision in \textit{South Bay} brought to light the opinion of the Court and clarified each Justice’s stance on religious freedom claims against

\begin{footnotesize}
\textsuperscript{56} Roman Catholic (n 3) (Gorsuch, J concurring at 7).
\textsuperscript{57} ibid (Sotomayor, J dissenting at 3).
\textsuperscript{58} cf Bret Stephens, ‘Thank You, Justice Gorsuch’ \textit{The New York Times} (New York, 30 November 2020) <https://www.nytimes.com/2020/11/30/opinion/cuomo-gorsuch-coronavirus.html> and Matt Ford, ‘An Epidemic of Arrogance on the Supreme Court’ \textit{The New Republic} (4 December 2020) <https://newrepublic.com/article/160445/gorsuch-coronavirus-pandemic-religious-freedom>.
\textsuperscript{59} Harvest Rock Church v Newsom, 141 S.Ct. 889 (2020) (remanded) (returning to the Supreme Court with \textit{South Bay} for a decision that required California to lift bans on churches); High Plains Harvest Church v Polis, 141 S.Ct. 527 (2020) (remanded); Robison v Murphy, 141 S.Ct. 972 (2020) (remanded).
\textsuperscript{60} See Amy Howe, ‘Citing Imminent Expiration, Justices Reject Christian School’s Request for Exemption from Kentucky’s In-Person School Closures’ SCOTUSblog (17 December 2020) <https://www.scotusblog.com/2020/12/citing-imminent-expiration-justices-reject-christian-schools-request-for-exemption-from-kentuckys-in-person-school-closures/>
\textsuperscript{61} Danville Christian (n 3) (Alito and Gorsuch, JJ, dissenting).
\textsuperscript{62} Petition for Writ of Certiorari, Calvary Chapel Dayton Valley v Sisolak (5 November 2020) (No 20-16169).
\textsuperscript{63} There were several other cases that made similar challenges to California’s treatment of churches during the pandemic. See \textit{Harvest Rock} (n 59).
\textsuperscript{64} South Bay (n 3) (granting relief to churches under California’s restrictions on worship).
\end{footnotesize}
worship service restrictions. The Court’s ruling was effectively six to three in favour of South Bay, but the four separate opinions reveal a much more nuanced decision. While six justices voted in favour of lifting the ban on indoor worship services, just three voted to allow singing, and only Justice Alito would prohibit a 25% capacity limit. The additional vote in favour of lifting the restrictions was Chief Justice Roberts who had dissented in Diocese of Brooklyn. In balancing claims between deference to public health officials and constitutional rights, the Chief concluded his short concurrence by stating, ‘Deference [to public health officials], though broad, has its limits.’ It was clear from the shift in tone that the protracted bans against religious worship were beginning to weigh on the Chief Justice and many others.

An extension of the South Bay decision trailed closely behind. After the Supreme Court ruled against California’s total ban on indoor worship, Santa Clara County issued county-level bans enforcing the same restrictions. These localized bans quickly drew rebuke from the Supreme Court. Within days of receiving worshippers’ petition against Santa Clara County, the Supreme Court granted the emergency injunction on 26 February 2021. The Court’s order declared, ‘[t]his outcome is clearly dictated by this Court’s decision in South Bay United Pentecostal Church v Newsom.’ Even though the county attorney assured the Court that worship restrictions would be adjusted within the coming weeks, his timeline did not satisfy their Free Exercise concerns.

The latest gloss to the Supreme Court’s COVID-19 religious freedom cases predictably came once again out of California. In Tandon v Newsom, the Court acted on another injunctive relief application from worshippers objecting to state restrictions on in-home Bible study and prayer meetings. The unsigned opinion of the Court took time to review principles from South Bay and Diocese of Brooklyn in the course of granting the emergency injunction on California’s orders. First, because COVID-19 restrictions were often subjectively established and fluidly changed, the Court reaffirmed that such restrictions were ‘not neutral and generally applicable’. Second, appropriate comparators to religious worship should be based on the health risks of gathering and not the purpose. Third, religious worship must be allowed the same freedom from regulation as the identified secular comparators when similar precautions are taken. Finally, emergency injunctions will not be denied simply because government officials declare that restrictions on worship will be lifted in the near future.

The dissent in Tandon scrutinized the Court’s application of the First Amendment as seeking to treat religion better than was required by the Free Exercise concerns.

65 ibid; see also Tom Goldstein, ‘Counting Votes in the South Bay Decision’ SCOTUSblog (Washington, 9 February 2021) <https://www.scotusblog.com/2021/02/counting-votes-in-the-south-bay-decision/>.
66 South Bay (n 3) (Roberts, CJ, concurring).
67 Gateway City Church v Newsom, 141 S.Ct. 1460 (2021) (per curiam).
68 ibid.
69 See Letter to Hon Scott Harris, Office of the County Counsel, County of Santa Clara (25 February 2021) <https://www.supremecourt.gov/DocketPDF/20/20A138/170114/20210225220817920_2021.02.25%20Gateway%20Letter%20-%20To%20File.pdf>.
70 Tandon (n 3).
71 ibid. (slip opinion, 1); see ss 3(B)(i) (discussing the importance of neutrality and general applicability under the precedent established in Employment Division v Smith).
Exercise Clause. Writing for Justices Breyer, Sotomayor, and herself, Justice Kagan explained that the facts of *Tandon* should have made the case an easy one. Because California banned all home gatherings (secular and religious) to three households or less, Kagan concluded that this blanket restriction has already satisfied the equal treatment needed to comply with the Free Exercise Clause. In her words, ‘California need not . . . treat at-home religious gatherings the same as hardware stores and hair salons.’72 This tension between what the Free Exercise Clause requires, whether non-discrimination or accommodation of religion, is highlighted in *Tandon* and continues to draw disagreement in other religious liberty contexts as well.73

In sum, the COVID-19 pandemic has unleashed a flurry of legal challenges pitting constitutional rights of religious freedom against the police powers of the state to protect public health. These claims were centred in California and New York, two of the states hit hardest by the pandemic, but similar petitions were also brought in many other states. While each case varied as to the facts, there is a striking similarity among the essence of each petition. Religious groups claimed that worship services were not receiving equal treatment with comparable secular activities under the terms of the closure orders. Some of these claims created difficulties for courts in determining which secular activities presented risks most similar to worship services. Like Nevada in *Calvary Chapel*, some state health officials considered casinos and restaurants less likely to spread the virus than religious worship while other states determined their risks to merit the same treatment. Initially, courts were quick to side with the state’s determination in order to ensure that officials had ample ability to control the virus. However, as the pandemic passed over half a year of restrictions, the tenor of judicial opinions began to tip in favour of religious claimants. Ebbs and flows of confirmed COVID-19 cases, a new Supreme Court Justice, and time each played a role in the winding progression of religious freedom claims in the 2020 pandemic.

3. POINTS OF COMPARISON

Historical analysis acknowledges religious freedom concerns arising in both the Spanish Flu and COVID-19 pandemic. Comparing and contrasting these concerns from each time period illuminates prevailing principles that distil into guidance for future jurisprudence and policy. This part begins by making absolute comparisons, qualifying those comparisons in light of relevant contextual differences, and then leads into concluding remarks with direction for the future.

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72 *Tandon* (n 3) (slip opinion, 1) (Kagan, J, dissenting).

73 cf Vikram David Amar and Alan E Brownstein, ‘Exploring the Meaning and Problems With the Supreme Court’s (Apparent) Adoption of a “Most Favored Nation” Approach to Protecting Religious Liberty Under the Free Exercise Clause: Part One in a Series’ *Verdict* (Montain View, 30 April 2021) <https://verdict.justia.com/2021/04/30/exploring-the-meaning-of-and-problems-with-the-supreme-courts-apparent-adoption-of-a-most-favored-nation-approach-to-protecting-religious-liberty-under-the-free-exercise-c/>; Jim Oleske, ‘Tandon Steals Fulton’s Thunder: The Most Important Free Exercise Decision since 1990’ *SCOTUSBlog* (Washington,15 April 2021) <https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/>. cf Douglas Laycock, ‘The Broader Implications of Masterpiece Cakeshop’ (2019) 2019 Brigham Young University Law Review 167.
A. Public Health Orders Restricting Worship Services

There are clear differences between the nature of restrictions on worship services when comparing 1918 and 2020. Generally, absolute state bans on worship services were more widespread in 1918 for much shorter periods of time. By contrast, the state restrictions on religion in 2020 were concentrated in a smaller portion of states that banned or restricted religious services for a significantly longer period of time. In both time periods, alternative forms of worship were typically made available to accommodate religious worship.

(i) Length

In general, the bans in 1918 appear to have been much shorter than those that began in 2020 and continued into 2021. The average length of a ban on worship services across 50 different US cities during the 1918 pandemic was about 27 days after which the executive order was either lifted or houses of worship were given an exemption. In a couple of rare cases, bans were ended and then reinstated, but these remained very brief. By contrast, bans in 2020 tended to last much longer when issued, but were not as widespread as the 1918 orders.74 For instance, although only 10 states had bans on gathering for worship services 1 month into the pandemic, the average length of those bans was 93 days. On the most extreme end, states like California and Washington banned worship services for over 200 days in either the entire state or the vast majority of the state. In both time periods, it was rare to see reoccurring bans. When they did occur, experience and exasperation with the virus had only increased, further raising public resistance to orders banning worship and other activities.

(ii) Depth/Breadth

Another dimension of restrictions on houses of worship was the extent to which they were restricted in both 1918 and 2020. During the Spanish Flu, the multi-week bans on religious gatherings were absolute, but they tended to be the only restrictions imposed. In some places, health authorities issued guidance, as opposed to orders, and allowed houses of worship to decide themselves whether to close.75 Others banned indoor meetings while encouraging outdoor or ‘open-air’ services, but these were more often the exception rather than the rule. For the most part, bans on gathering were enforced for the first few weeks of fall and then fell away to recommendations for masks and good hygiene.

In 2020, the situation was much more nuanced. Although total bans on gathering were initially the order of the day in many states, these fell to the wayside during the summer, and new restrictions filled their place in the fall. The later restrictions varied from bans on worship services with more than 10 individuals to allowing up to 75% of building capacity.76 The COVID-19 experience has also featured phased

74 See Appendix Table A2.
75 ‘New Cases of Epidemic 100; Three Deaths’ Rochester Democrat Chronicle (Rochester, 11 October 1918) 22 in Influenza Encyclopedia <http://hdl.handle.net/2027/spo.5870flu.0008.785> accessed 27 December 2021.
76 See ‘Return to Revised Phase 2 – Place of Worship’ Louisiana Office of the Governor Open Safely Plan <https://opensafely.la.gov/PublicLinks.aspx> accessed 27 December 2021.
reopening of houses of worship in some cities and states where higher risk activities are more severely limited. Similar to 1918, there has also been flexibility with drive-in services and open-air meetings. However, one of the most widespread alternatives for worship, school, and work in 2020 was unimaginable in 1918: online and virtual accessibility.

B. Legal Challenges

(i) Constitutional Framework

When Christian scientists made their appeal to the California Supreme Court for a writ of habeas corpus against their arrest in 1918, constitutional law protecting religious freedom was still in its infancy. At that time, denial of the writ of habeas corpus in the California Supreme Court essentially ended their path to relief. This was mostly because the US Constitution’s guarantee of free exercise of religion had not yet been applied to the states. The Free Exercise Clause would not be incorporated until 1940 in the case Cantwell v Connecticut.\(^{77}\) The extent of religious freedom in California for religious groups was limited to their own state constitution which specifically circumscribes acts in the name of religious liberty that are ‘inconsistent with the peace or safety of the State’.\(^{78}\) Once the appeal of the Christian Scientists failed at the California Supreme Court, their path to relief was essentially finished.

Since 1918, religious freedom protections have become more nationalized and, on balance, robust. After Cantwell, the Supreme Court relied many years on a proportionality standard that would hold until 1990. At that point, the Court’s pivot in Smith presumed laws as constitutional, even if they burdened religious free exercise, if they were otherwise ‘neutral’ and ‘generally applicable’.\(^{79}\) The test that arose out of Employment Division v Smith was controversial from the time it was released and continues to be so today.\(^{80}\) But even viewing Smith as a blow to religious freedom, the Religious Land Use and Institutionalized Persons Act\(^{81}\) and state versions of the Religious Freedom Restoration Act\(^{82}\) provide avenues to bolster the Free Exercise Clause unknown to 1918 US citizens.

 Though the precedent in Smith continues in force more than 30 years later, its ultimate fate remains uncertain, even in light of more recent Supreme Court Free Exercise Clause interpretations.\(^{83}\) However, it is clear that constitutional claims of religious freedom will continue to be made in the federal courts on questions presented by the current pandemic, unlike the short-lived challenges of 1918. The vast evolution in religious freedom jurisprudence between 1918 and the present day

77 Cantwell v Connecticut, 310 US 296 (1940).
78 California Constitution (n 36).
79 Employment Division v Smith, 494 US 827, 881 (1990).
80 cf Nelson Tebbe, ‘Smith in Theory and Practice’ (2011) 32 Cardozo Law Review 2055; Douglas Laycock and Steven Collis, ‘Generally Applicable Law and the Free Exercise of Religion’ (2016) 95 Nebraska Law Review 1.
81 42 USC s 2000cc (2006).
82 ‘State Religious Freedom Restoration Acts’ National Conference of State Legislatures (4 May 2017) <https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.
83 Fulton v City of Philadelphia, 141 S.Ct. 1868 (2021) (shortening the reach of Smith through narrowing the scope of generally applicable laws to exclude contracts that allow room for discretionary exceptions).
makes a significant difference in the way modern audiences should compare constitutional challenges in 1918 to those put forward in 2020. In particular, religious freedom was almost entirely a state issue in 1918. Since then, it has evolved to become an issue that is regularly taken up by the federal courts with the 2020 pandemic being no exception.

(ii) Analogous Secular Activities
A fascinating feature of both pandemics is the role of analogous secular activities in religious freedom challenges to public health restrictions. In both time periods, the places that observed the most protest and pushback from religious groups were blamed for treating religious worship worse than comparable secular activities. They argued that worship services should be treated at least as well, if not better, than analogous secular activities—even during a public health crisis.

While there was not a formal legal doctrine to compare religious and secular activities in 1918, the South Bay case in modern times provides a useful metric. In that case, the state of California contended that there were four reasons why houses of worship should be treated differently. California argued that worship services involve (i) large numbers of people mixing from different households; (ii) in close proximity; (iii) for extended periods of time; (iv) often with singing. All of these features of religious worship were taken to be aggravating factors for spreading the virus. These factors implicitly gave the Court a way to determine the relevant factors to identify secular activities most analogous to the risks of worship.

Applying the standard to both 1918 and 2020 provides intriguing insights. In 1918, a very common list of other public closures that followed worship services included schools, theatres, movie houses, lodge meetings, and any places of public amusement such as pool rooms and dance halls. Each of these activities generally seems to accord with the four South Bay standards. Of course, large singing groups would be unlikely in most gatherings, but almost all would bring different households in close proximity for an extended period of time. For the most part, houses of worship under bans in these areas were generally compliant. Although some protested that worship and prayers were needed now more than ever, public health officials were quick to point out that offering prayers did not require meeting together in large congregations.

When congregations did begin to voice their frustration at the state in 1918, it was frequently aimed at exceptions that were made for saloons. Based on South Bay’s criteria and the evaluation of clergy and parishioners during the time, saloons also brought large groups of people close together for extended periods of time just like worship services. However, because alcohol was regarded for its medicinal value in the pandemic, there seemed to be a way to claim that a saloon’s function was necessary for the public. Deciding whether saloons were more like an essential business or non-essential gathering space became a tough call for health officials. Many local governments decided to suspend saloon business with worship services and all other public gatherings. Others placed them under similar restrictions as businesses, only limiting their hours of operation. And still others turned to alternative provisions

84 South Bay United (n 3) (Gorsuch, J statement).
such as allowing customers to buy products from the saloon but not to congregate inside.

When it came to the latter two types of rules, faith leaders and parishioners were more likely to express dissatisfaction with state orders. Their disapproval either resulted from laws that facially distinguished houses of worship from saloons and similar activities or enforcement that tended to be more lenient on one group compared to the other. An example of disparity on the face of the law was evident in the ban in New Orleans where saloons and ice cream parlours were exempted from closure.85 Protests from clergy were quick to follow. Archbishop Shaw was among the most vocal against New Orleans’ order declaring:

We are told that our churches are closed because they draw crowds. . . we are told by those who know that it is not so much numbers as it is proximity of those who are in a crowd . . . It matters not apparently as far as the public health is concerned that the stores are crowded, the cars congested, and the saloons and restaurants doing business as usual.86

Other faith leaders expressed similar frustration when laws were facially neutral, but enforcement appeared dubious. Rev AM Bailey of the First Baptist Church in St Paul, Minnesota, expressed a common sentiment in this regard. After taking his complaints against the saloons to the police, Rev Bailey remarked, ‘I can’t understand why churches are closed and saloons are allowed to remain open. Nearly every saloon in the city is open. In one case, I entered a saloon through the front door and men were lined three deep at the bar.’87 Although it came after the closure of houses of worship, St Paul did close saloons for a time even though enforcement was less than perfect.

It is also useful to understand the social function of saloons in context of 1918. Although saloons might be considered similar to modern-day bars, 20th century historian Jon Kingsdale has noted that saloons ‘did a great deal more than simply dispense liquor’.88 He goes on to explain, ‘The alcoholic “stimulation” – the neurological effects of alcohol are actually depressant, producing a diminution of inhibitions and thus a reduction in reserve and distance in social gatherings—cannot readily be distinguished from the social aspects of the saloon.’89 Saloons performed a wide variety of functions including ‘furnishing the cities’ only public toilets, providing teamsters with watering troughs, cashing checks and lending money to customers, in addition to serving as the

85 ‘All Shows, Churches Are Ordered Closed to Fight the Epidemic’ New Orleans Times-Picayune (New Orleans, 10 October 1918) 10 in Influenza Encyclopedia <http://hdl.handle.net/2027/spo.4000flu.0007.004> accessed 27 December 2021.
86 ‘Protest Against Closing of Churches’ New Orleans Times-Picayune (New Orleans, 28 October 1918) 6 in Influenza Encyclopedia <http://hdl.handle.net/2027/spo.7600flu.0007.067> accessed 27 December 2021.
87 ‘Charge Saloons Violate Flu “Lid”’ St. Paul Daily News (St Paul, 13 November 1918) 1 in Influenza Encyclopedia <http://hdl.handle.net/2027/spo.7910flu.0010.197> accessed 27 December 2021.
88 Jon M Kingsdale, ‘The “Poor Man’s Club”: Social Functions of the Urban Working Class Saloon’ (1973) 25 American Quarterly 473.
89 ibid.
political and recreational focus of the workingman. In its most encompassing function the saloon served many workingmen as a second home.\textsuperscript{90}

Even more important than the way they catered to the working class, saloons were also centres of political action for the wealthy and famous. Kingsdale explains how ‘Saloons provided politicians a means to contact and organize workingmen, and the political machine sold favours to saloons,’ which ultimately made them ‘an excellent base for organizing the vote.’\textsuperscript{91} In sum, ‘[s]aloons fitted the needs of the machine politician perfectly’, a fact that reasonably added to church’s scepticism of saloon exemptions to closure orders.\textsuperscript{92} In an era steeped in political corruption, it is up for debate as to whether state officials could broker such deal.\textsuperscript{93} In any case, the saloons exemptions tended to aggravate church leaders who felt their religious practice should be as readily recognized as saloon activity in the eyes of the state.

With all this in mind, the saloon/house of worship debate provides a useful case study for modern day conflicts between public health and religious freedom. In Nevada, California, and New York, each legal challenge was just as much, if not more, about discriminatory treatment towards houses of worship as it was the absolute limits placed upon them. In those three states, the qualms of believers were centred in specific areas of public life that the state appeared to elevate above religious worship. Nevada’s casinos, New York’s liquor stores and bike shops, and California’s film studios were all perceived to merit preferred treatment to houses of worship. It was not the initial bans that drew the most backlash, but the reopening plans or restriction extensions that prioritized some secular activities over religious practice.

\textit{(iii) Legal Culture}

A final area to consider in evaluating constitutional claims from 1918 and 2020 is the legal culture of each time period. A unique feature in 20th century American constitutional law was the rise of public interest advocacy.\textsuperscript{94} In countries that rely upon majoritarian institutions like the USA, the traditional path to justice for minority groups is quite bleak. As the USA more fully embraced norms of equality under the law, constitutional law and the courts soon became the allies of minority rights. Although they would not be able to get a bill passed in Congress, they could use the Constitution to challenge laws that were discriminatory. The most prominent example of public interest advocacy in the courts was the work of the National Association for the Advancement of Colored People. Through strategically selecting plaintiffs and experiences that would lend themselves to crafting the best case, public interest advocacy firms have become a powerful force for enacting social change in the courts.

\textsuperscript{90} ibid 476.
\textsuperscript{91} ibid 482–83.
\textsuperscript{92} ibid.
\textsuperscript{93} See John M Barry, \textit{The Great Influenza: The Story of the Deadliest Pandemic in History} (Penguin Random House, 2004) (describing throughout the book the corruption occurring in Philadelphia and other cities during the pandemic).
\textsuperscript{94} See Edgar S Cahn and Jean Camper Cahn, ‘Power to the People or the Profession? The Public Interest in Public Interest Law’ (1970) 79 Yale Law Journal 1005.
In 1918, public interest law firms were almost non-existent. When the Christian Scientists in California brought their case, they were lucky enough to have a member of their congregation who was a well-respected attorney. In today’s world, there are multiple public interest firms whose sole practice is to defend clients with religious freedom claims; and even large, corporate law firms may also have an appellate advocacy branch that allows partners and associates to represent clients in constitutional rights cases. Keeping in mind the meteoric rise of public interest law firms helps further clarify why despite so much protest there was little change in the law in 1918.

C. Health Knowledge
Another area of comparison worth highlighting is the status of public health knowledge. In many ways, the 1918 pandemic became a jumping off point for significant advancements in public health. Unfortunately, these advances had to come through the crucible of the Spanish Flu where health professionals struggled to understand the disease even years later. Due to the novel and unprecedented nature of the public health challenge, many doctors disagreed about causes and therefore methods to treat and prevent Spanish Flu. On top of this, there were also coordination difficulties between public health officials and state authorities. The 1918 pandemic required high levels of cooperation that could easily stretch the capacities of individuals and infrastructures beyond the breaking point.95

In the few instances where policy did not seem to line up, the public turned critical of health authorities. One man in Utah’s Deseret News went so far as to caricature his doctor as clueless on how to treat the disease. In a satirical piece, the patient gives an exasperated cry to his (one hopes) hypothetical doctor: ‘I sent for you to cure me of this dreadful flu; I’ve taken all your pills and dope, and now I’m nearly shorn of hope; I’m worse than when you first began to pump me full of Valley Tan.’96 Public confidence further declined in one city after viewing contradictory death statistics where health authorities reported ‘a decrease in deaths, while numbers reported by hospitals or mortuaries would present conflicting information the following day, with an increase in deaths’.97

Reports of mistaken health policy or well-respected doctors disagreeing only stirred further doubt in the minds of believers concerning the necessity of worship restrictions. Bishop William T. Russell of Charleston, South Carolina, is one among a handful of church leaders who appealed to prominent health officials in asking for the worship service ban to be removed. In one editorial Bishop Russell authored, he cites Dr Llewyn Barker of Johns Hopkins University as support that “the approved convictions of the medical world” are against the policy [banning worship services] which has been pursued in South Carolina.98 Many, like Bishop Russell, respected

95 See John M Barry, The Great Influenza (Penguin Press 2020) (providing an in-depth look at the medical history before, during, and after the Spanish Flu).

96 Walt Mason, ‘Baffled Science’ Deseret Evening News (Salt Lake City, 19 December 1918) 8 in Influenza Encyclopedia <https://quod.lib.umich.edu/f/flu/2450flu.0010.542/1/-baffled-science?page=root;size=200;view=image> accessed 27 December 2021.

97 Debra E Blakely, Mass Mediated Disease: A Case Study Analysis of Three Flu Pandemics and Public Health Policy (Lexington Books 2006) 155.

98 ‘An Interesting Issue’ Charleston News and Courier (Charleston, 5 November 1918) 4 in Influenza Encyclopedia <http://hdl.handle.net/2027/spo.8170flu.0001.718> accessed 27 December 2021.
health officials to the point that they would employ both faith and reason to challenge decisions of the state.

This trend has largely carried through into 2020 where the pandemic has brought health institutions under increased scrutiny of the public. As it relates to religion, there are still some like the Christian Scientists who view trust in modern medicine as a lack of faith in God. However, a substantial portion of religious leaders in 2020 look much more like Bishop Russell, relying upon both science and faith to navigate the challenges of the pandemic. In both pandemics, the overwhelming response of religious groups was deference to public health authorities. Only in situations where they saw disparate treatment, extensive bans, or contradiction in health policy did religious leaders turn to protest and litigation.

4. RECIPROCITY AS A MODEL FOR PANDEMIC POLICIES AFFECTING RELIGIOUS FREEDOM

According to recent literature on behavioural science and public policy, these pandemic trends of interaction between government and religion should not take us by surprise. The fact that religious leaders and groups resist public health guidance when it appears unfair tracks closely to the results we would expect under the theory of reciprocity. As opposed to public choice theory, reciprocity theory assumes individuals and groups to be emotional and moral reciprocators acting on mutual trust rather than wealth maximizers who only act on incentives. This means that ‘the willingness of individuals to make costly contributions to collective goods is highly conditional on their perception that others are willing to do so.’

Empirical studies suggest reciprocity plays out in many areas of life. Workers that receive more generous compensation from a firm will tend to reciprocate with greater effort on the job. People tend to benefit more from environmental resources when they conscientiously conserve nature’s bounty. And when tax policy signals evasion is high, individuals are more likely to cheat on their taxes to avoid being taken advantage of. Recent reciprocity literature has sought to develop a policy framework that more fully accounts for reciprocity in government decisions. Some key features include establishing an initial policy of trust from government to civil society, strive for fairness rather than equity, and begin by building trust on a localized level.

99 Dan M Kahan, ‘The Logic of Reciprocity: Trust, Collective Action, and Law’ (2003) 102 Michigan Law Review 71, 74. Some of the earliest works on reciprocity in society can be traced to Adam Smith’s writings in The Theory of Moral Sentiments. See Adam Smith, Theory of Moral Sentiments (first published 1759, G Bell & Sons 1892) 112.

100 George Akerlof, ‘Labor Contracts as Partial Gift Exchange’ (1982) 97 Quarterly Journal of Economics 543, 552.

101 Sibyl Diver and others, ‘Recognizing “Reciprocal Relations” to Restore Community Access to Land and Water’ (2019) 13 International Journal of the Commons 400.

102 Cécile Bazart and Aurélie Bonein, ‘Reciprocal Relationships in Tax Compliance Decisions’ (2014) 40 Journal of Economic Psychology 83.

103 Adam Oliver, Reciprocity and the Art of Behavioural Public Policy (Cambridge University Press 2019) 91.

104 Kahan (n 99) 77, 88.

105 Armin Falk and Urs Fischbacher, ‘A Theory of Reciprocity’ (2001) CESifo Working Paper No 457 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=203115>.

106 Oliver (n 103) 111–27.
As applied to government policy on religious gatherings during a pandemic, reciprocity seems to be both descriptively accurate and normatively compelling. In both pandemics, most (though not all) religious groups gave initial deference to health authorities and government officials. It was only after states failed to reciprocate that deference, usually through perceived unfairness between religion and analogous secular activities, that religious leaders began to complain. The common thread in religious freedom jurisprudence has been attempts at proportionality—balancing the weight of restriction against the severity of the threat. Yet, given the unique nature of pandemics, neither traditional strict scrutiny nor the *Smith* test lend themselves well to addressing religious freedom concerns of this kind.107 Some sitting Supreme Court Justices have even begun to point out the inadequacy of the current approaches which often turn on finding the most appropriate comparators to religious worship. Justice Alito pointed out the difficulty in identifying accurate comparisons as a 'hotly contested' decision, often evading broad agreement.108 Furthermore, the volatile nature of pandemics, as demonstrated by the mootness issues in the 2020 cases, demonstrates how quickly conditions can change. These factors illustrate the need for a flexible model of pandemic legislation affecting religious freedom.

Although courts have reflexively reverted to an equality norm or proportionality standard, reciprocity presents a better way. In both 1918 and 2020, the root cause of religious backlash came from a lack of reciprocation from state to religion. Human rights are predicated on duties that the church and state each owe one another in times of crisis. While a religious group's duty to the state is maintaining public health, the state also has a duty to maintain space for religious exercise. In most scenarios, each duty is mutually exclusive where both can be accomplished simultaneously. In rare instances like pandemics, each duty overlaps resulting in tension between the rights that flow from those duties. When this is the case, the religious group is in a superior position to tailor broad public health guidance to its specific worship and practices. The state substitutes proportionality for reciprocity by allowing religious groups to balance worship practices with state guidance.

Two examples from 1918 exemplify the virtue of reciprocity over proportionality. San Francisco has frequently been named as the city with the most effective government response to the Spanish Flu.109 When it came to their closure order, they did not ban worship services. Instead, the city officials turned the issue over to religious leaders while providing guidance that 'services and socials be either discontinued during the epidemic or held in open air.'110 The result of the pandemic's effects on the city is illuminating:

In San Francisco, people felt a sense of control. Instead of paralyzing fear found in too many other communities, it seemed to inspire. Historian Alfred

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107 See W Cole Durham, Jr, 'Coronavirus, the Compelling State Interest in Health, and Religious Autonomy' (*Talk About: Law and Religion Blog*, 2 October 2020) <https://talkabout.iclrs.org/2020/10/02/coronavirus-the-compelling-state-interest-in-health-and-religious-autonomy/>.  
108 *Fulton* (n 83) (slip opinion, 69–71) (Alito J, concurring).  
109 *Barry* (n 93) 374–75.  
110 'San Francisco, California' *Influenza Encyclopedia* <https://www.influenzaarchive.org/cities/city-sanfrancisco.html#> accessed 27 December 2021.
Crosby has provided a picture of the city under siege, and his picture shows citizens behaving with heroism, anxious and fearful but accepting their duty.\(^{111}\)

Although there were certainly other elements that contributed to San Francisco’s success with the pandemic, the broad discretion allowed to religious groups did not damage the city’s efforts.

Another city that followed San Francisco’s model was Boston, Massachusetts. The Massachusetts Board of Health issued a swift order at the end of September 1918 but ‘did not think church closures were warranted’.\(^{112}\) Following this guidance, local health authorities in Boston ‘recommended houses of worship to close for the next ten days; the decision was ultimately left to the clergy.’\(^{113}\) The way religious groups responded in Boston is particularly instructive. The vast majority of congregations in the Greater Boston area ‘instantly, almost, complied with the request of the health authorities’.\(^{114}\) Those who refused to comply were subsequently ‘frowned upon’ by the rest of the religious community.\(^{115}\)

During the same time Boston officials allowed congregations to gather for worship, the local government in Worcester issued a ban on gathering for religious services.\(^{116}\) The order divided clergy throughout the city and further ignited protest as worshippers realized that saloons were exempted from the ban.\(^{117}\) One interesting avenue for comparison between Worcester and Boston is to survey the data on Spanish Flu deaths in Suffolk County (where Boston is located) compared to Worcester County. Using a database of family history records including death certificates from 1918, researchers have constructed a dataset of individuals who died from the 1918 pandemic.\(^{118}\) While the project is ongoing, data have recently been completed for the state of Massachusetts, broken down by county. Based on their data, Worcester and Suffolk sit at polar opposite ends of the spectrum. Suffolk County recorded the lowest percentage of deaths in the state for the dataset (0.1973%) while Worcester County had the highest (1.2087%). The death rate in Worcester County based on these estimates was over six times greater than Suffolk County.

\(^{111}\) Barry (n 93) 375 (emphasis added).

\(^{112}\) Boston, Massachusetts (n 14).

\(^{113}\) ibid.

\(^{114}\) ‘Asks That Churches Be Closed’ Boston Post (Boston, 5 October 1918) 11 in Influenza Encyclopedia <https://quod.lib.umich.edu/cgi/t/text/idx/tiflu/6210flu.0001.126/2--asks-that-churches-be-closed?page=root;rgn=subject;size=400;view=image;q1=church+closure> accessed 27 December 2021.

\(^{115}\) ibid.

\(^{116}\) ‘Worcester, Massachusetts’ Influenza Encyclopedia <https://www.influenzaarchive.org/cities/city-worcester.html#> accessed 27 December 2021.

\(^{117}\) See ‘Plan No Drastic Anti-Grip Move’ Worcester Evening Post (Worcester, 13 December 1918) 2 <http://hdl.handle.net/2027/spo.9900flu.0012.099>; ‘Fear Influenza Is Paying City a Second Visit’ Worcester Evening Post (18 December 1918) 2 <http://hdl.handle.net/2027/spo.0010flu.0012.100>; ‘Physicians Report 54 New Cases’ Worcester Daily Telegram (Worcester, 19 December 1918) 24 <http://hdl.handle.net/2027/spo.3420flu.0012.243>; ‘West Side of the City Full of Influenza’ Worcester Evening Post (Worcester, 31 December 1918) 1 <http://hdl.handle.net/2027/spo.6010flu.0012.106>.

\(^{118}\) ‘Families of the 1918 Pandemic’ Brigham Young University <https://pandemic.familytech.byu.edu/> accessed 27 December 2021.
Importantly, this by no means establishes a causal relationship between exempted churches from closure and decreased death rates from the pandemic. In fact, other statistics even conclude that Boston’s city death rate was higher than Worcester’s. It may be that Worcester contained a population more susceptible to the Spanish Flu or that the dataset’s sample is insufficient to capture a complete picture. Although the ultimate numbers may require better records and numerous control variables to substantiate firm judgments, it is worth considering how the perceptions and responses of religious leaders in the two cities differed. In Boston, the religious authorities rallied together in what appeared to be a unified effort to stem the pandemic’s spread. In Worcester, the clergy were far more divided against one another and the government and lacked the feeling of unity described in Boston.

Another benefit that flows from reciprocity is mutual trust between religious and government leaders. When religious groups did not perceive discriminatory treatment in the government’s orders, they would naturally spend less time trying to vindicate their rights and more time stopping the virus. Returning to Massachusetts, the city of Fall River is an excellent example of this principle. Fall River leaders took a course similar to Boston and decided to request, but not require, the closure of churches. Like Boston, many Fall River congregations voluntarily ceased services at the request of the city, while those who decided to continue were careful to take necessary precautions such as limiting attendance. But outside of doing their part to mitigate the spread, churches in this community were also proactively aiding the government in fighting the Spanish Flu. Outside of ministering to their congregations, religious leaders made Bishop Stang Day Nursery and St Patrick’s Day Nursery available to serve as temporary hospitals for the sick.

The situation in 1918 Chicago is another useful case of reciprocity. Chicago city officials determined that religious gatherings could continue to occur, but clergy were encouraged to ‘keep services short and their buildings well ventilated’. As a result of the city’s flexible treatment of religious gatherings, faith-based initiatives to fight the virus flourished in the city. One church that carefully followed city guidelines served as a soup brigade throughout the week to ‘help families where there was influenza’. The work of religious groups was a salutary boon to Chicago throughout the crisis, especially when considering the lack of a formal government welfare programmes to provide assistance. The benefit of religion to Chicago’s pandemic was clear. ‘At a time when charity and volunteer work was practically the only safety

119 See ‘New Haven, Connecticut’ Influenza Encyclopedia <https://www.influenzaarchive.org/cities/city-newhaven.html#> accessed 27 December 2021.
120 ‘Fall River, Massachusetts’ Influenza Encyclopedia <https://www.influenzaarchive.org/cities/city-fallriver.html#> accessed 27 December 2021.
121 ‘To Be No Let Up in Restrictions’ Fall River Evening Herald (Fall River, 17 October 1918) 1 in Influenza Encyclopedia <http://hdl.handle.net/2027/spo.1140flu.0004.411> accessed 27 December 2021.
122 ibid.
123 ‘Chicago, Illinois’ Influenza Encyclopedia <https://www.influenzaarchive.org/cities/city-chicago.html#> accessed 27 December 2021.
124 ‘Churches Open, But Influenza Reduces Crowds’ Chicago Tribune (21 October 1918) 11 <http://hdl.handle.net/2027/spo.8030flu.0012.308>.

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net, churches and synagogues were major centres and organizers of aid, and many did their best to alleviate as much of the ancillary suffering as they could.\textsuperscript{125}

Observers of the COVID-19 pandemic have witnessed similar effects. In addition to providing emergency hospital sites, today's US religious leaders have also been vital to disseminating accurate information about the pandemic, vaccinations, and supporting mental wellness during a time of isolation.\textsuperscript{126} Underlying the aid of these faith-based organizations has been reliance on governmental respect for constitutional space. Reciprocity continues to play a vital role in the way people of faith can respond to overwhelming needs present in pandemics.

This principle of reciprocity extends beyond US borders to other nations grappling with religious freedom concerns within a public health crisis. Just as the literature indicates, reciprocity can either build or erode trust between government and civil society actors. The beginning of the 2020 pandemic was met with many religious leaders of different faiths calling for vigilance and responsibility from believers to help 'flatten the curve'. The Church of England carefully issued guidance specific to their forms of worship in accordance with government orders and adjusted according to current guidelines.\textsuperscript{127} Even in times of lockdown early in 2021, England allowed for communal worship, but many local parishes made their own choice to remain closed.\textsuperscript{128} Late in 2021, Scotland put restrictions on social gatherings to begin the day after Christmas but allowed houses of worship to remain open.\textsuperscript{129} Nonetheless, the Scotland's Catholic bishops decided against gathering for the Sunday Mass obligation until the public health situation improves.

France has also experienced salutary effects from reciprocity. In late May 2020, the court opinion of the \textit{Conseil d'Etat} (the highest legal court in France) 'qualified the prohibition of religious activities as “disproportionate” leading the government to allow religious services to resume.\textsuperscript{130} The Minister of Interior explained that while

\textsuperscript{125} 'Chicago, Illinois' Influenza Encyclopedia <https://www.influenzaarchive.org/cities/city-chicago.html#> accessed 27 December 2021.

\textsuperscript{126} Katherine Marshall, 'What Religion Can Offer in the Response to COVID-19' \textit{World Politics Review} (26 May 2020) <https://www.worldpoliticsreview.com/insights/28789/religion-and-covid-19-faith-during-a-pandemic>; 'Religious Responses and Engagement on COVID-19 Vaccines' Berkeley Center for Religion, Peace and World Affairs (18 December 2020) <https://berkleycenter.georgetown.edu/publications/religious-responses-and-engagement-on-covid-19-vaccines>. See Megan Pacer, 'A Look Inside the Hospital’s Alternate COVID-19 Care Site’ \textit{Homer News} (8 April 2020) <https://www.homernews.com/news/a-look-inside-the-hospitals-alternate-covid-19-care-site/> (explaining how a local Christian community in Alaska became a critical care site for COVID-19 patients).

\textsuperscript{127} See 'Coronavirus (COVID-19) Guidance' (\textit{The Church of England}, 9 December 2021) <https://www.churchofengland.org/sites/default/files/2021-12/COVID%20Guidance%20v2.3_1.pdf>.

\textsuperscript{128} Harriet Sherwood, 'Thousands of Churches in England Opt to Close over Covid Fears' \textit{The Guardian} (17 January 2021) <https://www.theguardian.com/world/2021/jan/17/thousands-of-churches-in-england-opt-to-close-over-covid-fears>.

\textsuperscript{129} Charles Collins, 'English Cardinal: Don’t Close Churches Again over COVID' \textit{Cruix} (27 December 2021) <https://cruixnow.com/church-in-uk-and-ireland/2021/12/english-cardinal-dont-close-churches-again-over-covid>.

\textsuperscript{130} Cécile Chambraud, 'Coronavirus: The Resumption of Religious Celebrations Allowed' \textit{Le Monde} (23 May 2020) <https://www.lemonde.fr/societe/article/2020/05/23/coronavirus-reprise-imminente-des-celebrations-religieuses_6040502_3224.html> (English tr). See also Décret n° 2020-618 du 22 mai 2020 complétant le décret n° 2020-548 du 11 mai 2020 prescrivant les mesures générales nécessaires pour faire face à l’épidémie de covid-19 dans le cadre de l’état d’urgence sanitaire (Decree no 2020-618
social distancing and masks are still required, ‘it is up to the authorities of each denomination to establish recommendations adapted to the specificities of each ritual practice.’131 With this easing of restrictions just prior to the Eid al-Fitr, Muslim leaders still encouraged believers to stay home and issued guidance to local mosques until services could be restarted.

In Southeast Asia, Indonesia’s response stands out as a reflection of reciprocity between Muslim organizations and the state. In most instances, local or regional Muslim leaders have taken more stringent pandemic restrictions than the government. This has likely been even more effective since many local religious leaders ‘enjoy greater credibility among the population than state institutions and officials’.132 Although initially criticized for their lack of stringent government measures, Indonesia appears to have emerged faring better than most in the region even though it remains the fourth most populated country in the world.133 By contrast, Malaysia and other nations in the region have struggled to build similar trust after religious groups were tied to large outbreaks and stigmatized, thus making them resistant to government measures.134

In Central America, Panama’s government response also strove for reciprocity between government and religion. After months of lockdown, Panama government leaders partnered with faith communities to create the ‘Charter of Faith’—a pandemic pact to establish communication between the Ministry of Health and religious groups to combat COVID-19.135 As restrictions have eased, the Church of Scientology Mission of Panama is putting to use training on sanitation protocols to disinfect Catholic, Evangelical, and Baha’i places of worship.136 While no one is claiming that reciprocity has directly reduced the case count in Panama or many of the previously mentioned places, the strong relations between faith and government leaders has produced evidence of mitigating many of the indirect effects of the pandemic.

of 22 May 2020 supplementing decree no 2020-548 of 11 May 2020 prescribing the general measures necessary to deal with the epidemic of covid-19 within the framework of the state of health emergency) Légrifrance <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041903745/>.
131 Chambraud ibid.
132 Alexander Arifianto and Jonathan Chen, ‘An Uneasy Partnership? Islam and the COVID-19 Response in Indonesia’ (LSE Religion and Global Society Blog, 5 May 2020) <https://blogs.lse.ac.uk/religionglobal/society/2020/05/an-uneasy-partnership-islam-and-the-covid-19-response-in-indonesia/>. See also ‘MUI Issues Fatwa, Implementing “Social Distancing” for Islamic Worship’ The Jakarta Post (Jakarta, 17 March 2020) <https://www.thejakartapost.com/news/2020/03/17/mui-issues-fatwa-implementing-social-distancing-for-islamic-worship.html>.
133 ‘Indonesia’ (Reuters COVID-19 Tracker, 30 December 2021) <https://graphics.reuters.com/world-coronavirus-tracker-and-maps/countries-and-territories/indonesia/>.
134 Hannah Beech, “‘None of Us Have a Fear of Corona’: The Faithful at an Outbreak’s Center’ New York Times (20 March 2020) <https://www.nytimes.com/2020/03/20/world/asia/coronavirus-malaysia-muslims-outbreak.html>.
135 James Blears, ‘Church and State in Panama Working Together to Fight Covid-19’ Vatican News (8 August 2020) <https://www.vaticannews.va/en/church-news/2020-08/church-and-state-in-panama-working-together-to-fight-covid-19.html>.
136 ‘The Panama Scientology Volunteer Ministers and Their Interfaith Pandemic Help’ Church of Scientology International (2 November 2021) <https://www.prnewswire.com/news-releases/the-panama-scientology-volunteer-ministers-and-their-interfaith-pandemic-help-301412600.html>.
Other countries manifest a more complicated interaction of law, religion, and trust in the pandemic. The case of Russia is interesting because the state and Russian Orthodox Church (ROC) have long enjoyed reciprocal benefits from one another. Based on ROC doctrine, the state is considered the ‘body’ of the nation and the ROC is the ‘soul’.137 Yet, the pandemic seems to have strained trust between the two. At the beginning, Patriarch Kirill, senior cleric of the ROC, put forward guidelines to reduce the spread of the virus while still practicing their faith.138 As the pandemic worsened, however, Russian leaders took more dramatic measures to suspend worship services which caused many believers ‘genuine surprise and anger’.139 The tensions from early in the pandemic are now exacting a high cost on Russia as leaders look to overcome vaccine scepticism.140 Observers have concluded that ROC support of the vaccine may begin rebuilding trust with state leaders, but others question whether the pandemic has already fractured the ROC in a way that limits how much trust can be rebuilt.141

In addition to Russia, both Gabon and South Korea demonstrate how reciprocity can break down trust rather than build it up. Gabonese religious leaders called government measures a ‘double standard’ citing lighter constraints on supermarkets and schools than houses of worship.142 The case of South Korea is perhaps more well known after the country’s outbreak was traced to the Shincheonji church. More recently, a religious facility in a small Korean town was closed after nearly half of the 427 residents tested positive for COVID-19.143 Perhaps, learning from the stigma created from naming the Shincheonji church as a super-spreader at the beginning of the pandemic, government leaders have not released the name of the church. After

137 Mikhail Antonov, ‘Russian Orthodox Symphonia in the Time of Coronavirus’ Talk About: Law and Religion (24 July 2020) <https://talkabout.iclrs.org/2020/07/24/russian-orthodox-symphonia-in-the-time-of-coronavirus/>.

138 ‘Instructions to the Abbots of Parishes and Farmsteads, Hegumens and Abbesses of Monasteries of the Moscow Diocese in Connection with the Spread of the Coronavirus Infection’ (Russian Orthodox Church, 17 March 2020) <http://www.patriarchia.ru/db/text/5608418.html> (English tr).

139 Andrew Higgins, ‘A “Breakdown of Trust”: Pandemic Corrodes Church-State Ties in Russia’ The New York Times (5 May 2020) <https://www.nytimes.com/2020/05/05/world/europe/russia-orthodox-church-coronavirus.html>.

140 See Felix Light, ‘Russian Vaccine Skeptics Oppose Covid Passes’ The Moscow Times (29 November 2021) <https://www.themoscowtimes.com/2021/11/29/russian-vaccine-skeptics-oppose-covid-passes-a75695>; ‘Russia Faces Up to Huge Death Toll and Vaccine Skepticism’ The Moscow Times (29 December 2021) <https://www.themoscowtimes.com/2021/12/25/russia-faces-up-to-huge-covid-death-toll-and-vaccine-skepticism-a75867>.

141 cf Nikolas K Gvosdev, ‘Cracks in Russian Church-State Relations during the Covid-19 Pandemic’ Berkley Forum (19 August 2021) <https://berkleycenter.georgetown.edu/responses/cracks-in-russian-church-state-relations-during-the-covid-19-pandemic>; Pantelis Kalaitzidis, ‘Russian Orthodoxy and the Endangered “Symphonia” Model in the Age of COVID-19’ Berkley Forum (1 September 2021) <https://berkleycenter.georgetown.edu/responses/russian-orthodoxy-and-the-endangered-symphonia-model-in-the-age-of-covid-19>.

142 Carolina Chauvet, ‘In Gabon, Christians’ Slingshot of Anti-Covid measures’ Jeuneafrique (21 October 2020) <https://www.jeuneafrique.com/1060859/societe/au-gabon-la-fronde-des-chretiens-face-aux-mesures-anti-covid/?utm_source=twitter.com&utm_medium=social&utm_content=jeune_afrique&utm_campaign=post_articles_twitter_21_10_2020>.

143 John Yoon, ‘At Least 210 Coronavirus Cases Are Linked to a South Korean Religious Settlement’ The New York Times (23 November 2021) <https://www.nytimes.com/2021/11/23/world/asia/south-korea-covid-religious-settlement.html>.
South Korea’s President Moon Jae blamed two waves of infections on Christian worshippers, many Christian churches have resisted gathering bans, testing, and other government regulations on religion.\textsuperscript{144} In a country where nearly one-quarter of all Koreans are Christian, this is a frayed relationship that continues to hamper government efforts to halt the virus.

Although the concept of reciprocity fails to account for the entirety of church–state relations in the pandemic, it does provide a useful metric that explains much of what we see in the USA and many other parts of the globe. Beyond a description of religious freedom in COVID-19, reciprocity further suggests a useful alternative to proportionality tests and equality comparisons in the courts that seem ill-fitted to the extremities of a pandemic. Reciprocity steers parties away from litigation and towards cooperation. Such cooperation will likely produce second-order benefits such as greater vaccination rates, higher compliance with mask and social distancing recommendations, and more accurate information shared with a broader portion of the population.

5. CONCLUSION: OPPORTUNITIES AND LIMITATIONS OF RECIPROCITY, RELIGIOUS FREEDOM, AND COVID-19

This comparison between the 1918 and 2020 pandemics highlights a continuous religious freedom narrative. While 1918 restrictions were shorter, broader, and more intense, 2020s were longer, concentrated, and far more litigious. In both cases, religious protest was present when houses of worship were treated differently under the law than activities that appeared to create similar spreading risks. In 2020, due to shifts in the law and society, there were far more legal challenges, particularly at the federal level, than in 1918.

A common theme between both pandemics is the idea of reciprocity between government and religion. In most communities where deference was given to churches, the religious community responded with either postponing their worship services or adjusting them to decrease the risk of spreading the virus. Those who objected to health guidelines were usually in the minority. Under reciprocity, religious and government leaders built greater trust while evading protest and litigation that only exacerbated an already precarious pandemic. As for the dissenters, when it was clear that treatment towards them was unjustified based on appropriate comparators, the Constitution has required government leaders to return to their position of deference. Beyond proportionality and equality, reciprocity strengthened relations between government and religion that were salutary in overcoming other challenges presented by the pandemic. Furthermore, it reinforces a rhetoric of rights as tied to duty and obligation to community rather than just individual entitlement.

Even though reciprocity is a powerful concept for religious freedom in pandemic times, it remains limited. One obvious drawback is the extent that majority or popular religions have greater access to policymakers. Minority faiths may be left behind or overlooked even when policy is trying to involve and account for religion in a

\textsuperscript{144} Min Joo Kim, ‘Churches Have become South Korea’s Coronavirus Battleground’ The Washington Post (17 September 2021) <https://www.washingtonpost.com/world/asia_pacific/churches-coronavirus-south-korea-religion/2020/09/17/6ea63912-f6fd-11ea-85f7-5941188a98cd_story.html>.
pandemic. Furthermore, emergency situations often rely on making decisions with very limited information. While providing appropriate deference to religion ex post may be appealing to some policymakers, the reality of doing so ex ante may be more challenging. Additionally, there will always be outliers that flout public health or safety measures due to personal convictions or objections. Reciprocity should not be taken to the extreme as an endorsement of allowing churches to determine their own rules during a pandemic. Instead, reciprocity prompts government action to begin by deferring to religious groups before attempting to draw lines that may manifest unfairness. Evidence in this article suggests that most religious groups will respond with measures that are both cognizant of public health circumstances and narrowly tailored to allow appropriate religious exercise. If faith communities fail to reasonably satisfy their obligations to keep others safe, the state may still have a place for restricting some religious practices. But this remains the backup rule rather than the default.\textsuperscript{145}

John Fabian Witt recently remarked that ‘[h]istorically, the law of epidemics has prompted Americans to make choices about basic values. People who know their history make better choices.’\textsuperscript{146} One value choice this analysis presents is between duties and rights shared between religious communities and the government. Both history and the present moment challenge church and state to elevate human obligations to match the emphasis that has typically been placed on human rights. As religious freedom concerns arise and trust becomes increasingly strained, laws prioritizing reciprocity should precede attempts at proportionality or equality. Whether in peace or pandemic, courts and communities can and should still choose to protect fundamental rights so long as they recognize the responsibilities from which those rights find meaning.

\textsuperscript{145} Much like a rational basis test, deference would be granted to religious groups based on the policies they established unless those policies largely deviated from public health guidance.

\textsuperscript{146} John Fabian Witt, \textit{American Contagions} (Yale University Press 2020) 2.
Appendix

Table A1 Summary of Closure Orders and Gathering Bans on Houses of Worship in the 1918 Pandemic

| City        | Length (days) | Other things closed (not comprehensive)                                      | Nature of restriction and protests (if any)                      |
|-------------|---------------|-------------------------------------------------------------------------------|------------------------------------------------------------------|
| Albany      | 33            | Schools, theatres, movie houses, libraries                                    | Ban                                                              |
| Atlanta     | 19            | Schools, libraries, theatres, dance halls, movie houses.                      | Ban                                                              |
| Baltimore   | 15            | Poolrooms, theatres, restricted business hours.                               | Initially a ban that became a restriction on hours when services could be held. |
|             |               | Saloons not restricted due to medicinal value of liquor                       |                                                                  |
| Birmingham  | 23            | Movie houses, theatres, pool rooms, side shows, street fairs, carnivals, public meetings, courts also adjourned | Ban                                                              |
| Boston      | Did not order closure, left as a recommendation for 10 days                 | Saloons, schools, pool halls, theatres, moving picture houses     | Left it up to churches to decide (not very restrictive)           |
| Buffalo     | 21            | Saloons, movie houses, theatres, schools, 5 and 10 stores                     | Technically allowed open-air alternative                           |
| Cambridge   | 9             | Pool halls, bowling alleys, ice cream parlour, auction rooms, schools        | Ban                                                              |
| Charleston  | 32            | Public and private schools, theatres, movie houses, social gatherings, or meetings | Ban                                                              |
| Chicago     | No closure order on churches                                               | Theatres, movie houses, night schools, and lodge meetings          | None                                                             |
| Cincinnati  | 37            | Schools, theatres, movie houses (Saloons not included because unable to distinguish from restaurants) | Ban                                                              |
Table A1 (continued)

| City            | Length (days) | Other things closed (not comprehensive)                                                                                                                                                                                                 | Nature of restriction and protests (if any) |
|-----------------|---------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------|
| Cleveland       | 31            | Theatres, movie houses, dance halls, night school. Saloons, poolrooms, and cabarets not included because not seen as gathering places                                                                                                      | Ban                                        |
| Dallas          | 20            | Schools and public gatherings                                                                                                                                                                                                                                                                   | Ban. Petitions started a couple of weeks later |
| Dayton          | 25            | Saloons, soda fountains, pool rooms, schools, theatres                                                                                                                                                                                | Open-air church allowed                    |
| Denver          | 35            | Schools, clubs, lodges, pool halls, bowling alleys, movie houses, theatres, reading rooms, Red Cross work rooms, public indoor funerals, and any buildings that were poorly ventilated                                                                 | Ban. A few weeks after the ban was lifted, required to wear face masks at church |
| Des Moines      | 18            | Schools, places of amusement and congregation                                                                                                                                                                                           | Ban                                        |
| Detroit         | 20            | Theatres, movies, lodge meetings, political gatherings                                                                                                                                                                               | Ban                                        |
| Fall River      | 24            | Restrictions on saloons. Schools, movie houses, theatres, and public assemblies                                                                                                                                                      | Request to close, but no official ban. Saloons made people upset over the disparity |
| Grand Rapids    | 18            | Theatres, movie houses, lodges, pool and billiard halls                                                                                                                                                                               | Ban. Christian reformed churches particularly upset |
| Indianapolis    | 24            | Theatres, movie houses, schools                                                                                                                                                                                                       | Ban on gatherings of five or more people |
| Kansas City     | 29 total (two bans) | Loan mass meetings, schools, saloons, and cabarets                                                                                                                                                                                     | Ban. No gatherings above 20 people. No music at hotels, cabarets and restaurants |

(Continued)
| City         | Length (days) | Other things closed (not comprehensive)                                                                 | Nature of restriction and protests (if any)                                      |
|-------------|--------------|------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------|
| Los Angeles | 52           | Ban on filming mob scenes or crowd gathering to watch scenes being filmed. Also, public funerals, movie houses, theatres, pool rooms | Ban. Lots of protest throughout the city from churches                             |
| Louisville  | 30           | Schools and places of public amusement                                                               | Ban. Churches allowed to open for individual prayer and meditation               |
| Milwaukee   | 59           | Schools, public amusements, public gatherings                                                        | Ban. Disparity between church and saloon closure upset the clergy, but then relaxed these measures to allow meetings under certain conditions |
| Minneapolis | 35           | Theatres, movie houses, dance halls, pool, and billiard halls                                        | Ban                                                                              |
| Nashville   | 24           | Schools, theatres, movie houses, and other non-essential entertainment venues                          | Initially didn’t outright ban churches, but then ministers basically agreed to close |
| New Haven   | No official closing order | Only applied to dances and parties                                                                      | None                                                                             |
| New Orleans | 52           | Schools, theatres, movie houses, but saloons, soda fountains, and ice cream parlours, and restaurants allowed to remain open | Ban                                                                              |
| New York    | 24           | Hotel lodges, saloons, ice cream parlours, civic meetings                                              | Ban                                                                              |
| Newark      | 16           | Theatres, dance halls, saloons, soda fountains                                                     | Ban                                                                              |
| Oakland     | 23           | Public amusements, schools, movie houses, and theatres                                                | Allowed open air services                                                        |

(Continued)
| City           | Length (days) | Other things closed (not comprehensive)                                                                 | Nature of restriction and protests (if any)                  |
|---------------|--------------|---------------------------------------------------------------------------------------------------------|------------------------------------------------------------|
| Omaha         | 28           | Schools, movie houses, theatres                                                                        | Ban                                                        |
| Philadelphia  | 27           | Saloons, hotel and club bars, cafés, schools, theatres, poolrooms, dance halls                         | Ban                                                        |
| Pittsburgh    | 31           | Saloons, theatres, movie houses, schools                                                               | Initially limits on attendance, then only allowed for private worship |
| Portland      | 36           | Schools, theatres, dance halls, parades                                                                | Ban. Christian Scientist petition, churches support mask wearing, some wanted another ban |
| Providence    | No official closing order | Schools, theatres, movie houses, dance halls                                                          | Churches still allowed to hold services once a week        |
| Richmond      | 28           | Drugstore soda fountains, ice cream parlours, theatres, movie houses, schools                          | Ban                                                        |
| Rochester     | 26           | Soda fountains, ice cream parlours, saloons, hotel bars, lodge, and civic association meetings         | Ban                                                        |
| Salt Lake City| 58           | Schools, theatres, movie houses, dance halls                                                          | Ban                                                        |
| San Antonio   | 26 (first closure order) 11 (second closure order) | Schools, lodges, theatres                                                                             | Ban. Theatre managers protest second closure order          |
| San Francisco | No official closure order | Schools, lodge meetings, dances                                                                         | Recommendation to dismiss services or hold them open air    |
| Seattle       | 36           | Theatres, poolrooms, libraries, entertainment in cafes and restaurants, business hours restriction      | Ban                                                        |
| Spokane       | 41           | Theatres, schools, dance halls, pool rooms, conventions, public funerals                                | Ban on indoor meetings. Christian Scientist petition. Later measures |
Table A1 (continued)

| City          | Length (days) | Other things closed (not comprehensive)                                                                 | Nature of restriction and protests (if any)                                                                 |
|--------------|--------------|--------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------|
| St Louis     | 40           | Schools, theatres, movie houses, pool halls, business hours restriction                                   | Ban.                                                                                  |
| St Paul      | 42           | Schools, movie houses, theatres, dance halls, pool and billiard halls, soda fountains, saloons, cafes    | Ban. City council comments that, in the future, church services should be allowed to continue but 'reduced to the lowest number possible' |
| Syracuse     | 18           | Schools, theatres, dance halls, skating rinks, libraries, public funerals                                | Ban.                                                                                  |
| Toledo       | 17           | Saloons, theatres, public libraries, poolrooms, theatres, movie houses, dance halls, soda fountains, public funerals, business restrictions | Ban. Saloons and retailers complained about the order                                                      |
| Washington DC | 28           | Theatres, movie houses, schools, playgrounds, business hour restrictions. Department stores, poolrooms, and bowling alleys allowed to remain open | Outdoor services allowed. Church leaders petitioned the city for reopening                                |
| Worcester    | 18           | Schools, soda fountains, saloons (later added), slot machine parlours, bowling alleys, public auctions, pool halls | Ban (churches not initially banned, only added later). Swedish protestants petition why churches are closed but saloons remained open |

*All information comes from the compilation of city essays in the Influenza Encyclopedia referenced throughout the article.*
| State      | Length                  | Other things closed (not comprehensive) | Nature of restriction and protests (if any) |
|------------|-------------------------|-----------------------------------------|---------------------------------------------|
| Alaska     | 28 (28 March to 24 April)| Weddings, funerals, graduations, schools | Initially a ban, then restricted to 50 people or 50% capacity whichever is smaller and then allowed in-person services |
| California | 215 (19 March to 25 May, 28 August to 23 January) | Stay-at-home order that prohibits leaving the home for anything other than maintaining continuity of critical federal infrastructure (health and government workers, food distribution, supply chain, etc.) | First period reflected a de jure total ban while the state’s stay at home order was in place. The ban on churches during the second period was de facto although a very small portion of counties allowed churches to meet at 25% capacity |
| Idaho      | 51 (25 March to 16 May)  | Bars, gyms, hair salons, entertainment venues, restaurants (except for drive-thru) | Banned until state transitioned into stage 2 where 10 or less could gather for worship |
| Illinois   | 70 (20 March to 29 May)  | Public amusements, concert halls, bowling alleys. Essential services like government, food distribution, and construction are exempted. | Ban until religious exercise is granted an exemption |
| Minnesota  | 73 (14 March to 26 May)  | Bars, gyms, theatres, amusement parks, and restaurants | Ban on services, changed to restrictions limited to no more than 10 people |

(Continued)
| State       | Length                  | Other things closed (not comprehensive) | Nature of restriction and protests (if any)                                                                 |
|------------|-------------------------|-----------------------------------------|------------------------------------------------------------------------------------------------------------|
| Montana    | 31 (26 Mar to 26 April) | Health clubs, bars, casinos, movie theatres, public schools | Ban on worship services, outside essential classification. However, churches are allowed to perform humanitarian work such as providing food and shelter for the homeless |
| New Jersey | 80 (21 March to 9 June) | Casino, gyms, movie theatres             | Worship services initially banned with other indoor activities and then later placed in the same category as political protest. Has jumped between 25% and 35% capacity limits |
| New York   | 59 (23 March to 21 May) | Schools, gyms, fitness classes, movie theatres, casino | Ban on all gatherings is changed to a ban on gatherings over 10 people                                      |
| Vermont    | 76 (24 March to 1 June) | School, retail, dining, recreation       | Ban until restrictions lifted to allow 10 individuals to gather for worship                                   |
| Washington | 247 (13 March to 15 November) | Guided tours, gyms, salons, retail clothing stores, theatres, auditoriums | On 31 May 2020, churches were allowed to hold drive-in services. Ban continues until 15 November            |

*All information originates from a useful compilation of executive orders put together by the Council of State Governments. See COVID-19 Resources for State Leaders: Executive Orders, The Council of State Governments <https://web.csg.org/covid19/executive-orders/> accessed 27 December 2021.*