



Reports

Dennis P. Petri

Religious freedom in the United States

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for Religious Freedom



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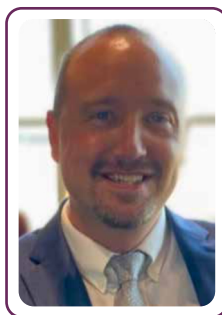
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On the surface, religious freedom is widespread in America and is based on a broad social consensus. Although a notion of religious freedom is intricately linked with the foundation of the American republic, its contemporary meaning is both unique and contested. It is unique because the twin “Establishment” and “Free Exercise” clauses in the First Amendment have created a distinctly American religious policy, although this is frequently challenged through litigation and self-serving political reinterpretations. Moreover, the mainstream perception about religious freedom is not shared equally by African Americans and other minorities. In this chapter, the author first offers a historiography of religious freedom in the US political system and its main points of contention. Second, he reviews some contemporary domestic controversies surrounding religious freedom, including the equal treatment of religious worldviews and the politicization of this right as a result of the radicalism of Christian nationalism. He also discusses subnational religious freedom issues such as the remnants of anti-Catholic amendments in state constitutions, state-level sharia law bans, and local county LGBTQ+ equality ordinances involving religion. Finally, he describes how religious freedom has become institutionalized as a foreign policy priority that enjoys broad bipartisan support, although its impact remains unclear.

Keywords: *religious freedom; First Amendment; Establishment clause; Free Exercise clause; government restrictions; social hostilities; subnational religious freedom; Christian nationalism; religious foreign policy*

Introduction

A review of the academic literature and policy documents reveals little consensus regarding the conceptualization and operationalization of religious freedom, or about the proper methodology to measure it. In this respect, Matthias Koenig (2017) speaks of a “polyphony of religious freedom,” referring to the plurality of uses of this concept in different legal traditions throughout history, a point also made by Joustra (2018) and Fox (2019b). Looking only at restrictions on religious freedom that originate within the state, Jonathan Fox distinguishes up to six different understandings of religious freedom (Fox 2019b). Fox observes that no country in the world, not even established Western democracies including the United States, meets the zero-tolerance standard under any of the six conceptions of religious freedom he operationalized, because no country fails to support or enforce religion in at least some small way (Fox 2019b).

Religious freedom issues in the USA are minor, but they are not non-existent. In fact, a closer look at this matter reveals there are significant nuances to be observed, especially when considering the differences between the national and the subnational levels, restrictions by state and non-state actors, as well as the way in which religious freedom has been affirmed and reinterpreted by US Supreme Court jurisprudence. Religious freedom is also at the heart of significant controversies within American society which shape its experience both domestically and in foreign policy.

In this chapter, I first offer a historiography of religious freedom in the US political system and its main points of contention. Second, I review some contemporary domestic controversies surrounding religious freedom, including the equal treatment of religious worldviews and the politicization of this right as a result of the radicalism of Christian nationalism. I also discuss subnational religious freedom issues such as the remnants of anti-Catholic amendments in state constitutions, state-level sharia law bans, and local county LGBTQ+ equality ordinances involving religion. Finally, I describe how religious freedom has become institutionalized as a foreign policy priority that enjoys broad bipartisan support, although its impact remains unclear.

Religious freedom in the US political system

The First Amendment created a distinctly American religious policy, although this policy is frequently challenged through litigation and self-serving political reinterpretations. This section examines the historical origins, legal interpretations, policy implications and societal discrimination.

Historical origins of religious freedom

On the surface, religious freedom is widespread in America and is based on a broad social consensus. Although a notion of religious freedom is intricately linked with the foundation of the American republic, its contemporary meaning is both unique and contested. When it became an independent country, the United States had the opportunity to start with a largely clean slate as it shaped its political institutions. Regarding the role of religion in the public sphere, it did not have to deal with the complex historical burden of intricate relations between religion and politics that had characterized European countries. As a result, the United States developed a unique policy on religion, which has many merits but also several important nuances (Hertzke 2015; Waldman 2019).

Undoubtedly, the protection of religious freedom was one of the most important priorities for the members of the Convention of 1787 that drafted the United States Constitution (Witte, Nichols & Garnett 2022). The framers strongly believed that religious freedom could be best guaranteed through a form of separation of church and state in which the state was to take a neutral posture toward religious worldviews,¹ with no power to influence citizens' religious preferences and refraining from any form of governmental interference in religious autonomy (Fischer 2011). Most of the framers, who were federalists, also believed that religious matters, to the extent that they warranted any form of public regulation at all, should be dealt with at the state level (Eisgruber & Zeisberg

¹ Even though the framers advocated for state neutrality toward religion, they were not necessarily neutral toward the role of religion in society. They felt that no specific religious group—Protestantism, Catholicism, Judaism, or deism—should control the state, but it is unlikely many of them were neutral about religion and atheism. John Adams famously said: “Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.” The framers also did not prohibit state-level establishment of religion, which continued in Connecticut until 1818 and in Massachusetts until 1833.

2006). Moreover, because the constitutional text had to be ratified by the states, a process that would end up taking three years, the framers were cautious not to include politically controversial issues, including religion. As a result, the original constitutional text was largely silent about religion. The only exception is the “religious clause” in article six, which proscribes religious tests as a qualification for federal office (Legal Information Institute n.d.).

Even though the constitutional text was eventually ratified in 1790, its silence on religious matters led to criticism from devout religious people for different reasons. Some Americans expected religion to have a visible public role, while others were concerned that the Constitution did not include any provision to explicitly prohibit state support of religion, as existed in some American colonies before independence as well as in the European countries they or their ancestors migrated from. Many Americans were concerned to prevent the religion-based persecution they or their forefathers had experienced in Europe, particularly in the 17th century (Library of Congress n.d.). There may, of course, also have been self-serving reasons to argue for religious freedom, as some groups wanted to ensure their right to convert people to their own denomination (see Koenig 2017).

To address these concerns, Congress adopted the First Amendment to the Constitution in September 1789 (ratified in 1791), which included the twin “Establishment” and “Free Exercise” clauses. The former prohibits the federal government from establishing a national religion or showing preference towards any particular religious belief system; the latter ensures an individual’s right to practice their religious convictions without any hindrance.

Legal reinterpretations of religious freedom

The practical meaning of the Establishment clause in the First Amendment is that the United States does not have an official religion. Despite the constitutional “separation of church and state”—this exact phrase does not appear in the constitution—in the United States, public expressions of religiosity are extremely common. Unlike other secular countries such as Mexico, France, or Turkey, US political culture is not just neutral but also favorable to religion (Kuru 2009). This creates a paradox between the neutral nature of the state and the fact that politicians regularly use religious rhetoric (Casanova 2009). For these reasons, Jonathan Fox characterizes the relationship between religion and politics in the USA as “accommodation,” which he defines as “official separation of church and state and the state has a benevolent or neutral attitude toward religion in general” (Fox 2014).

The First Amendment does not require absolute separation of church and state, but rather a balance between respecting religious diversity and maintaining civic unity. Some critics argue that the presence of religious rhetoric in the public space violates the principle of religious freedom and undermines pluralism (Esbeck 1990; Kuru 2009). In fact, Americans have debated for centuries where to draw the line between religion and government (Fox 2018). Among the controversial issues are the role of religious symbols on public property (such as

crosses, nativity scenes, and Ten Commandments monuments); the extent to which public schools can accommodate and promote religious activities such as prayer, Bible reading, and creationism; and the relationship between religious organizations and government funding such as vouchers for private schools, church tax exemptions, and subsidies for social services.

US Supreme Court rulings have interpreted the First Amendment in various nuanced ways. It's hard to identify a coherent line of jurisprudence on most of these matters (see Cookson 2001; Kende 2010). The Supreme Court has ruled on several cases involving religious symbols, sometimes allowing them and sometimes not. It has generally prohibited teacher-led or school-sponsored religious exercises but has allowed some forms of student-initiated or voluntary religious expression. For example, *Engel v. Vitale* (1962) struck down state-sponsored prayer in public schools and indicated that the Establishment Clause forbids any official religious exercise in public education. The Supreme Court has upheld some forms of government aid to religious entities but has also imposed limits to prevent government favoritism of religion. On other matters, the Supreme Court has been more resolute. *Lemon v. Kurtzman* (1971) not only invalidated state laws that provided financial aid to religious schools but also established a three-part test for determining whether a law violates the Establishment Clause (Ignagni 1993).

The Free Exercise clause complements the Establishment clause and provides robust protection of religious freedom. One implication of the Free Exercise clause is there is no requirement for religious groups to register with the federal government. However, religious groups are required to register with the Internal Revenue Service to obtain tax-exempt status. In addition, some states may require religious groups to register in order to solicit donations or conduct certain other activities.

The Free Exercise clause also implies that the level of interference of the state in religious autonomy is very minimal. In some cases, attempts to interfere with religious autonomy have been challenged and struck down in court as violations of religious freedom. This is illustrated by the *Hosanna-Tabor v. EEOC* (2012) and *Our Lady of Guadalupe School v. Morrissey* (2020) cases, in which the Supreme Court affirmed the right of religious organizations to select their leaders.

Nevertheless, religious groups are still subject to certain regulations and restrictions. In some limited circumstances, the government can place restrictions on religious institutions, such as if they pose a clear and present danger to public safety or they engage in illegal activities. A landmark case in this regard was *Reynolds v. United States* (1879), in which the Supreme Court upheld the federal law banning polygamy and said that the Free Exercise clause does not protect criminal activity based on religious belief. Religious groups must also comply with local government laws related to zoning, building codes, and public safety. The COVID-19 pandemic also raised tensions between government restrictions on the collective dimension of freedom of worship, although most observers and religious groups agreed that the restrictions were reasonable and justified and that public health concerns should take precedence over religious freedom (see Haynes 2021).

As a general rule, restrictions must be limited and cannot be based solely on religion. This is not so evident in the case of religious organizations that are not directly connected to churches, such as schools, universities, hospitals, charities, social agencies, and media organizations. Debates are ongoing over whether these organizations can impose restrictions on staff members to enforce their religious mission and beliefs, including moral standards. Courts have generally upheld these restrictions, recognizing that codes of conduct encompassing sexual ethics are permissible. The Supreme Court's ruling in *Burwell v. Hobby Lobby Stores* (2014) further extended religious freedom claims to "closely held" for-profit corporations. I will come back to this issue below when I discuss the controversy around secularism.

The First Amendment encompasses not only religious freedom but also other human rights that intersect with it, such as freedom of expression and assembly. The protection of freedom of expression is very wide in the USA, with the result that there is no possibility of censoring religious speech, even when it is blatantly discriminatory. This is very different from European countries, for example, where hate speech legislation and anti-discrimination legislation have effectively banned some forms of religious speech, a restriction that would be unthinkable in the United States (see Johnson, Thomas, & Kelling 2020; Coleman 2012).

In US jurisprudence, there is tension between the Free Exercise and Establishment clauses (Barner-Barry 2005; Garry 2004; Pfeffer 1981). The tension arises when government action aimed at accommodating religious beliefs or practices is seen as favoring one particular religion. For example, allowing prayer in public schools—which has essentially been outlawed since the 1960s—may be seen as respecting the right to free exercise of religious students, but it is also a violation of the establishment rights of non-religious students. Conversely, the banning of religious signs on public property can be seen as respecting the Establishment clause, but also as a violation of the rights of religious citizens to express their beliefs in public. The Supreme Court has struggled to balance these two aspects of religious freedom and to find a consistent and coherent framework for resolving cases that involve these two clauses. The Court has used different tests and standards over time, such as the Lemon test mentioned earlier, but these tests have often been criticized as vague (Ignagni 1993).

One more legal development of importance is the Religious Freedom Restoration Act (RFRA) of 1993. This federal law sought to protect religious expression from government interference. It states that the government cannot substantially burden a person's exercise of religion unless it has a compelling interest and uses the least restrictive means to achieve it (Alstyne & William 1996). The law was a response to a 1990 Supreme Court decision (*Employment Division v. Smith*) that caused much outrage (Dhooge 2018). Some critics of RFRA argue that it is unconstitutional and creates a privilege for religious believers and organizations (see Alstyne & William 1996; Lupu 1998). They claim that RFRA can be used to justify discrimination (see Gasper 2015; Conkle 2006). Supporters of RFRA, on the contrary, say it is necessary to protect against government interference in religion.

Religious policy

Against the historical and legal background of religious freedom presented above, let's now turn to US religious policy. Largely thanks to the robust legal provisions in the US Constitution, the structural restrictions on religious freedom are minor, as is shown by the Religion and State dataset (Fox, 2008, 2014, 2015, 2016, 2019a; Fox, Finke & Mataic, 2018), which is arguably the most comprehensive instrument to describe religious policy. Based on the most recent data available (2014), the US state engages in restrictions of religious freedom in only a few areas (nine variables in total), and it generally does so only rarely and in a mild form:

- Restrictions on building, leasing, repairing, and/or maintaining places of worship.
- Restricted access of minority clergy to jails compared to the majority religion.
- Restricted access of minority clergy to military bases compared to the majority religion.
- State surveillance of minority religious activities not placed on the activities of the majority.
- Restrictions on clergy/religious organizations engaging in public political speech (other than sermons) or propaganda or on political activity in or by religious institutions.
- Other restrictions on activities during religious holidays, the Sabbath or its equivalent ("blue laws").
- Government funding of religious primary/secondary schools or religious education programs in non-public schools.
- Government funding of religious charitable organizations including hospitals.
- Official government positions/salaries/other funding for clergy excluding salaries of teachers.

In sum, government restrictions on religious freedom in the USA are not non-existent, but they are uncommon and mild compared to other Western democracies. However, the Muslim minority in the USA has faced more challenges in exercising their religious rights. I will return to this point in the next section.

In the USA, religious policy is mainly a state prerogative, but its general parameters are determined by the constitutional provisions and Supreme Court jurisprudence. However, the presidential administration in office can put different accents on it, both domestically and internationally. I will only refer to domestic religious policy here, but will come back to international freedom policy in the final section. The Trump administration, besides packing the US Supreme Court with three conservative justices, systematically prioritized religious freedom above other human rights, in particular equality and sexual rights (Haynes 2020). A major focus of his presidency was the implementation of religious exemptions from anti-discrimination laws, particularly in health care and education. Trump also created the Conscience and Religious Freedom Division within the Office of Civil Rights within the Department of Health and Human Services

to expand conscientious objection in health care (Johnson 2019). Shortly after his inauguration, Trump also implemented the “travel ban,” which aimed at restricting immigration from Muslim countries.

The Biden administration is generally considered to have taken a more balanced approach to religious policy. On his first day in office, he overturned Trump’s discriminatory immigration order. He also reversed many of the religious exemptions that he considered discriminatory to LGBTQ+ people (Kramer, Runyan & Micks et al. 2021). Moreover, Biden has issued legislation to protect sacred lands for Indigenous communities and to fighting white supremacist violence through hate crime legislation (Siddiqi, Graves-Fitzsimmons & Falcón 2022).

Societal religious discrimination

The previous section focused on government restrictions on religious freedom, which are relatively low. Whilst comparatively low as well, the restrictions on religious freedom by non-state actors—societal discrimination—have been increasing in recent years. The Religion and State dataset’s societal module, which was added in 2017 (Fox, Finke & Mataic, 2018), reveals various forms of societal discrimination against minority religions in the USA. Some of these forms are economic, such as discrimination in the workplace or organized boycotts of businesses owned by or serving religious minorities. Some are related to media and politics, such as anti-religious propaganda or rhetoric in private media outlets or political campaigns. Some are related to property and space, such as vandalism of religious property or property owned by religious minorities, anti-religious graffiti, or obstruction of building, opening, or renting places of worship or other religious sites. Some are related to expression and communication, such as publication of materials against religious minorities or harassment or verbal attacks on them. Some are related to violence and security, such as threats or acts of physical violence against religious minorities due to their religion, lethal violence against them, or arson, bombing, or concerted attacks against their property. These forms of societal discrimination show that religious freedom in the USA is affected not only by government restrictions, but also by non-state actors who may have different motives and agendas.

Among Christians, both the Protestant majority and the Catholic minority have suffered from hostile attitudes, including hateful statements in mainstream private media and also vandalism against church property, and even several physical attacks against church buildings (for example the First Baptist Church shooting of Texas in 2017, the Emanuel African Methodist Episcopal Church shooting of 2015 in South Carolina, and the New Life Church shooting of 2007 in Colorado). There are also some sporadic reports of anti-religious graffiti targeting the Hindu minority. The majority of incidents of societal discrimination, however, affect Jews and Muslims.

Jews have been subjected to anti-religious propaganda and rhetoric in mainstream private media and political campaigns. They have also suffered vandalism of their religious property, such as places of worship, community centers,

schools, and cemeteries, as well as their other property, such as businesses or homes. Anti-religious graffiti has also been used to target Jews. Moreover, Jews have faced harassment, threats, and physical violence from other members of society because of their religious affiliation. In some cases, this violence has been lethal, as in 2009 and 2014. Additionally, Jews have been victims of arson, bombing, or concerted attacks against their religious property in 2011 and against their other property in 2012.

Antisemitism has been decried by the Anti-Defamation League (2023), which has also reported a significant increase in antisemitic incidents in a 2022 report, with the most prominent increase in incidents targeting Jewish institutions. The report highlights the role of white supremacist activity in the increase in antisemitic incidents.

Muslims in the USA have faced various forms of societal discrimination that affect their economic, social, and religious rights. The RAS dataset reports instances of societal economic discrimination against Muslims in the workplace, such as: denial of employment, promotion, or accommodation based on their religion; organized boycotts of businesses owned by Muslims or denial of access to businesses, stores, restaurants, or places of entertainment for Muslims; anti-Muslim propaganda, statements, articles, or shows in mainstream private media that spread stereotypes, misinformation, or hatred against Muslims; vandalism against Muslim property, including places of worship, community centers, schools, and cemeteries, as well as other property owned by Muslims that is clearly targeted due to their religious affiliation. There were also some efforts to prevent Muslims from building, opening, or renting places of worship or other religious sites, such as mosques or Islamic centers. The dataset further reports harassment of Muslims that does not reach the level of violence, such as verbal attacks, insults, or intimidation, threats or acts of physical violence against individual Muslims that are clearly motivated by their religion, and lethal violence against any member of minority religions due to their religious affiliation, such as the Chapel Hill shooting of 2014 that killed three Muslim students.

The 2021 hate crime statistics of the Federal Bureau of Investigation (2022) reported a total of 1,164 anti-religious offenses, the majority of which were categorized as anti-Jewish (362), followed by anti-Christian (267, including all mainstream denominations and marginal Christian groups), anti-Sikh (229), and anti-Islamic (134). The majority of these offenses were related to vandalism of religious property, but also various forms of intimidation and personal assaults. The 2021 figures are slightly lower than those of the year before—the 2020 hate crime statistics reported 1,481 anti-religious offenses—but also confirm trends reported by the RAS societal module and the Pew Social Hostilities Index (Pew Research Center 2019).

Contemporary domestic controversies

The RAS project is arguably the most sophisticated religious freedom dataset, but its findings are echoed by other data collection instruments such as the Pew Global Restrictions on Religion and the religious freedom question in the

Varieties of Democracy dataset. This being said, there are some subtleties that are not detected by religious freedom datasets: domestic controversies and subnational religious freedom. I will deal with the former here and will address the latter in the next section. The three main domestic controversies around religious freedom in the United States I discuss are the equal treatment of religious worldviews; secularism and the role of religion in public life and government; and the politicization of religious freedom as a result of the radicalism of Christian nationalism.

The equal treatment of religious worldviews

The first controversy revolves around the question of whether all religious worldviews and practices should be given equal treatment under the law. Even though the First Amendment and all relevant laws and jurisprudence guarantee equal treatment of religious groups, in reality some groups are treated differently. This has particularly been the case with Islam as a result of Islamophobia and negative stereotypes that surged after the 9/11 terrorist attacks, leading to legal discrimination and unequal treatment in various aspects of life. The measures taken against Muslim groups, although minor, are significant enough to raise concerns. They do not directly target Muslims but find justification in arguments related to national security, which in practice restrict the religious freedom of Islamic communities (see Fox 2018).

The RAS data show that Muslims in the USA encountered more restrictions after the September 11 terror attacks. They had some obstacles in acquiring or maintaining places of worship. They also underwent more state surveillance of their religious activities than other faiths (Fox & Akbaba 2015). A notable example was the case of Domineque Ray, a Muslim inmate executed by Alabama in 2019 without his imam by his side. He had asked for his imam to replace the Christian chaplain offered by the prison, but Alabama denied his request. Ray's lawyers claimed that this policy violated his religious freedom and the Establishment clause of the First Amendment. A federal appeals court agreed and stopped the execution, but the Supreme Court reversed the decision by a 5–4 vote and allowed the execution to go ahead, seemingly ignoring Ray's religious rights and valuing a quick death over constitutional principles (Lithwick 2019).

This trend could be explained by “securitization theory,” which suggests that when a group or issue, such as a religious minority, is seen as a security threat, it becomes subject to extra restrictions, which could lead to religious discrimination (Nussbaum 2013; Cesari 2013; Buijs 2009; Jayasuriya 2002; Mabee 2007).

Secularism

The second controversy is mainly centered around the calls for neutrality in the public space—i.e., secularism—because of the changes that American society has experienced in recent decades. Christian dominance has been challenged by both secularization and the increase in religious diversity (Johnson 2008;

Ross 2023).² Some conservative religious groups belonging to Christianity, Islam, Judaism, and Scientology believe that their beliefs and practices are being excluded from the public sphere, or increasingly treated with hostility or disdain, in particular concerning ethical matters such as abortion rights, LGBTQ+ rights, and assisted suicide (Rosik & Smith 2009; Cowan 2016; Brown 2007; Turco 2023). Some conservative religious groups also believe that anti-discrimination laws infringe on their religious freedom to practice their faith according to their conscience and convictions. They argue that these laws force them to violate their beliefs by accepting or endorsing behaviors or identities that they consider sinful or immoral, such as same-sex marriage, abortion, or transgender rights (Stewart & Schaer 2019; Perry, Schnabel & Grubbs 2021; Wilkins, Wellman, Toosi et al. 2022).

Two cases related to the conflict between LGBTQ+ and religious rights illustrate this phenomenon. The first involved Kim Davis, a county clerk in Kentucky who refused to issue marriage licenses for same-sex couples based on her religious beliefs after the US Supreme Court legalized same-sex marriage nationwide in 2015. Davis claimed that doing so would go against her Christian faith and therefore violate her religious freedom. She was sued by several couples who were denied licenses, and a federal judge ordered her to comply with the law or face charges of contempt of court. Davis defied the order and was jailed for five days until her deputies began issuing licenses without her name on them. She was released on the condition that she would not interfere with her deputies' work. Davis continued to challenge the court order and sought to have her name removed from all marriage licenses in her county. She also appealed the contempt ruling and the denial of her request for immunity from lawsuits. She received support from some conservative politicians and activists who portrayed her as a martyr for religious freedom, but others accused her of violating her oath of office and discriminating against same-sex couples. Her case attracted national and international media attention and sparked debates over the balance between religious liberty and civil rights. The saga came to an end in 2018, when Davis lost her bid for re-election as county clerk to one of the men whose marriage she had refused to recognize. She also lost her appeals in the federal courts, which upheld the contempt of court ruling and the denial of immunity. In 2022, a federal judge ruled that Davis had violated the constitutional rights of the same-sex couples who sued her, and that a jury would decide how much damages to award them (Diaz 2022).

The second example is *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), which involved a baker who refused to make wedding cakes for same-sex couples based on his religious objections to homosexuality. The Supreme Court ruled in favor of the baker, stating that the Colorado Civil Rights Commission had shown hostility toward his religious beliefs. The owner of the cakeshop is currently embroiled in another legal controversy, this time over his

² The degree to which US society has secularized is questionable. Using the concept of “believing without belonging,” sociologist Grace Davie (1994) challenges the notion that developing nations are always secularizing and finds that the USA is not secularizing to the extent Europe is.

refusal to make a birthday cake celebrating a gender transition (Associated Press 2023).

Even though both cases had different outcomes, they highlight the tension between religious and secular values, in particular in the case of the rights of sexual minorities. Anti-discrimination legislation is a complex issue, and its impact on religious freedom cannot easily be proven. On the one hand, the broad religious exemptions that have been upheld by the US Supreme Court presented above could actually thwart their original intention, as some legal scholars have argued (McCrudden 2018; Gray 2022). On the other hand, there also is evidence of experiences of discrimination against conservative Christians in various professional and educational settings (Hyers & Hyers 2008; Moulin 2016).

It is not evident, however, that the promotion of secular values constitutes a violation of religious freedom per se, as some conservative religious groups claim. Secularism would be anti-religious only when government measures to prevent discrimination against sexual minorities undermine the freedom and authority of religious institutions and make them more vulnerable to state regulation and interference (Jelen 2006; Eisenstein 2009; Fox 2015; Sarkissian 2015; Juergensmeyer 2017).

Whether secularism and gender issues will end up reducing religious freedom will likely remain an open question for the coming years. Scholars such as José Casanova (1994), Jonathan Fox (2016), Erin Wilson (2017), or Paul Marshall (2018) have expressed that there is reason for concern. Others, however, view the promotion of religious freedom by certain groups as enabling discrimination and bigotry, especially on issues related to sexuality and gender. In this regard, a particularly contentious statement was made by Martin R. Castro, then chairman of the US Commission on Civil Rights, in 2016. He declared: “The phrases ‘religious liberty’ and ‘religious freedom’ will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance.”

The politicization of religious freedom

As discussed above, the concerns about secularism are not unfounded and are shared by well-regarded academics. It is important to observe, however, that not all religious groups are equally concerned about secularization and secularism (see Rosik & Smith 2009; Hyers & Hyers 2008; Moulin 2016). In fact, as Tracy Fessenden (2007) has argued, most concerns are echoed by a minority strain of conservative Christianity that holds to a “simplified narrative of secularization,” and employs this narrative to strengthen its hold of American public life (Brown 2007). This group, which should not be amalgamated with Christianity in general, and only represents a small subset of it, is often referred to as “Christian nationalism.”

This brings us to the third controversy, which has gained more attention in recent years due to political developments, in particular around the presidency of Donald J. Trump. The politicization of religious freedom has been linked to

Christian nationalism, which seeks political power by framing the conflict as one between Christianity and secular society. This approach draws on the rhetoric of rights, freedoms, and equalities used by the Christian Right in the USA (Haynes 2021). Christian nationalism is a political ideology that seeks to merge American identity with a particular version of Christianity, often white and conservative. Christian nationalists believe that America was founded as a Christian nation and should be governed by Christian principles and values. They also tend to view themselves as the true patriots and defenders of the nation against perceived enemies, such as secularists, liberals, immigrants, Muslims, LGBTQ+ people, and racial minorities. It has also been defined as “the identification of a nation-state, race or political party and its candidates with the Christian faith or church in such a way that the two identities are equated” (Johnson 2021).

Even they only represent a small subset of Christianity in the USA and more generally of Trump supporters, Christian nationalists have contributed to the politicization of religious freedom by using it as a tool to advance their agenda and justify their opposition to civil rights and social justice movements. However, by doing so, Christian nationalists are not only violating the Free Exercise and Establishment clauses, but also undermining the true meaning and purpose of religious freedom (Juergensmeyer 1998).

Politicization of religious freedom is also at play outside Christianity. Hindus for Human Rights, a USA-based human rights advocacy group, while recognizing there have been a few anti-Hindu hate crimes in the USA, contests the use of the concept of “Hinduphobia,” arguing that it is being used as a cover for violence against Muslims and Christians in India. The group rejects the idea of a systematic “Hinduphobia” and emphasizes the importance of condemning hate crimes against all communities (Rajagopal 2023).

Speaking on behalf of the African American community, Dent and Walker (2021) argue that religious freedom has also been used to justify the enslavement of Africans and the forced conversion of Native Americans, to suppress African American cultural practices and beliefs such as the use of African languages and spiritual practices, and later to justify segregationist policies and the denial of voting rights. The *Reynolds v. United States* case cited above not only upheld anti-polygamy laws but also had implications for African American religious practices such as hoodoo and voodoo, for example. Because of their history of discrimination, African Americans have developed a unique understanding of freedom that emphasizes social justice and equality, but they are also cautious in their support for religious freedom because of concerns about how it can be used to justify discrimination.

Subnational religious freedom

As Klocek and Petri (2023) have argued, existing global datasets, which focus on country-level measures, often overlook or obscure local variation and dynamics that affect religious freedom in different contexts. They illustrate this point by drawing on original fieldwork in Latin America, a region generally portrayed as having low levels of religious freedom violations, but where they

observe significant subnational variation and patterns that are missed by global datasets. Even though there are huge differences between Latin American countries and the USA regarding religious policy as well as on many other issues, the similarity between the two is that the seemingly positive religious freedom record when considering the country as a whole may conceal religious freedom violations at the subnational level.

Among other things, Klocek and Petri argue that subnational variation tends to occur more often in federal states that devolve significant regulatory powers to local governments. This is the case in the USA, where religious policy is essentially a state prerogative. Subnational variation in religious freedom occurs in anti-Catholic provisions, sharia law bans, and same-sex bans.

The anti-religious use of anti-Catholic provisions

Protestant activists used to promote government favoritism of their denomination in the USA by opposing Catholicism until the 1960s, but this practice has declined since then. A legacy of that era is the “Blaine amendments” in state constitutions, named after a 19th-century anti-Catholic senator, James Blaine, who failed to pass a federal amendment against Catholicism. However, many states adopted similar laws that prohibited any financial aid, directly or indirectly, to religious schools, so that religious students could not receive scholarships, tuition assistance, or other benefits available to non-religious private school students. Although these laws originated from the Catholic–Protestant divide, they are now used to disadvantage various forms of religious expression while favoring comparable forms of secular activity or education (Rainey 2009; Goldenziel 2005; Ravitch 2005).

The 2020 victory in the US Supreme Court case of *Espinoza v. Montana Department of Revenue* dealt a serious blow to this agenda. It rejected Montana’s attempt to deny state tax credits to religious private schools but not secular schools. The issue remains contentious. Under the US legal system, the true scope of a Supreme Court precedent is determined by litigating similar matters, such as in *Carson v. Makin*, where Maine denied tuition payments sent directly to religious schools (rather than the student or parent) while providing those payments to non-religious schools. Here, the appellate court ruled in favor of the state, saying that the *Espinoza* case did not apply.

In the *Carson* case, the US Supreme Court ruled 6–3 in favor of the plaintiffs in 2022, who were parents of students who wanted to use their tuition assistance to attend religious schools in Maine, overruling the Maine decision. The Court held that Maine’s “nonsectarian” requirement for the tuition assistance program discriminated against religious schools and violated the Free Exercise clause of the First Amendment. The Court rejected the argument that the state had a compelling interest in maintaining the separation of church and state and ensuring that public funds were not used to teach religious doctrines. The Court also distinguished this case from previous cases that upheld similar restrictions on direct aid to religious schools, such as *Locke v. Davey* (2004), by finding that Maine’s program was not neutral and generally available to all students, but

rather excluded a category of schools based on their religious character. The dissenting opinions argued that the Court's decision departed from the long-standing principle of the separation of church and state and eroded the distinction between direct and indirect aid to religious schools. They also warned that the decision would have far-reaching consequences for other state programs that limit funding to nonsectarian schools or institutions.

Sharia law bans

Some states in the USA have passed laws or ballot measures that ban the use of foreign laws, including sharia law, in their courts. These laws are often motivated by anti-Muslim sentiments and fears that sharia law will undermine American values and rights, in line with securitization theory explained above. It could be argued that these laws are unnecessary and unconstitutional, as the US Constitution already prohibits the establishment of any religion by the state and protects the free exercise of religion by individuals (Fallon 2013; Hummel 2020; Kim 2014).

Seven states (Alabama, Arizona, Kansas, Louisiana, North Carolina, South Dakota, and Tennessee) have passed some kind of law or measure that prohibits the state's courts from considering foreign, international, or religious law. Some of these laws specifically mention sharia law as a target, while others use more general terms. However, these laws have been challenged or struck down by federal courts on the grounds that they violate the First Amendment's Establishment clause and Free Exercise clause, as well as the Equal Protection clause and the Due Process clause of the Fourteenth Amendment.

According to some scholars, these laws are also ineffective and harmful, as they create confusion and uncertainty for judges and lawyers who deal with cases involving foreign or religious elements. For example, these laws may affect the recognition and enforcement of foreign judgments, contracts, marriages, divorces, adoptions, wills, trusts, and other legal documents that are based on foreign or religious laws. They may also infringe on the rights and interests of religious minorities who seek to practice their faith in accordance with their own laws and customs. Moreover, they may fuel discrimination and hostility against Muslims and other religious groups who are perceived as threats to American identity and values (see Fallon 2013; Hummel 2020; Kim 2014).

The bans on sharia law were a response to a few unsuccessful attempts to accommodate this law within US civil law as well as some unsubstantiated reports of alleged Islamic indoctrination in public schools. On a voluntary basis, under the umbrella of arbitration or mediation, Muslims living in the USA can put personal matters, such as marital disputes, inheritance issues, or business contracts, in front of a tribunal made up of leaders of their faith, similar to what other religious groups, such as Catholics, Jews, Lutherans, or Baptists, have done for decades. Muslims living in the USA may also seek to follow sharia law in matters of family law, such as marriage, divorce, child custody, or adoption. Such arrangements are not legally binding unless they comply with the state laws that govern family law. Finally, Muslims living in the USA may also seek to

follow sharia law in matters of financial transactions, such as banking, lending, investing, or insurance. Such transactions are not exempt from the regulations and taxes that apply to all financial activities in the USA.

Same-sex bans

Some states have passed laws based on the federal Religious Freedom Restoration Act of 1993 (discussed above), which was enacted to protect the religious liberty of individuals from laws that burden their exercise of religion. The Supreme Court ruled in 1997 that RFRA was not applicable to the states, so 21 states have passed their own RFRAs that apply to their state and local governments. These laws require that religious freedom can be limited only by the least restrictive means of furthering a compelling government interest. Some states have also passed anti-discrimination ordinances to protect LGBTQ+ rights along with RFRAs.

Several states have attempted to implement amendments that prohibit the legal recognition of same-sex unions, such as marriage or civil unions, in US state constitutions. They are also referred to by proponents as “defense of marriage amendments” or “marriage protection amendments.” Thirty-one US state constitutional amendments banning legal recognition of same-sex unions have been adopted. However, these amendments were invalidated by the US Supreme Court's decision in *Obergefell v. Hodges* (2015), which legalized same-sex marriage nationwide and ruled that such bans violate the Fourteenth Amendment.

Also, some state laws or policies restrict same-sex couples from rights and benefits that are granted to opposite-sex couples, such as adoption, foster care, health insurance, inheritance, parental rights, and tax exemptions. These laws or policies may be based on religious or moral objections, or on concerns about the welfare of children or the preservation of traditional family values. However, these laws or policies are also vulnerable to challenges on constitutional grounds, such as the Equal Protection clause or the Due Process clause of the Fourteenth Amendment. For example, in 2017, the US Supreme Court ruled in *Pavan v. Smith* that Arkansas must list both spouses on the birth certificates of children born to married same-sex couples.

In the absence of federal or state nondiscrimination protections for LGBTQ+ people, some municipalities have adopted so-called local nondiscrimination ordinances that prohibit discrimination based on sexual orientation and/or gender identity in private employment, housing, and/or public accommodation. However, some states have laws that prevent the passage or enforcement of such local ordinances, or that allow the use of religious beliefs to exempt individuals or businesses from complying with them.

Religious freedom as a foreign policy priority

Religious freedom has become institutionalized as a foreign policy priority that enjoys broad bipartisan support, although its impact remains unclear. One

landmark in this regard was the adoption of the International Religious Freedom Act (IRFA) in 1998. The passage of the IRFA was the result of aggressive lobbying by David Horowitz, who led a broad interfaith coalition of opinion leaders and religious representatives including key Jewish leaders such as Rabbi David Saperstein, the Dalai Lama and other Tibetan Buddhists, Baha'is, the US Catholic Bishops Conference, and various Evangelical activists (Hertzke 2004). IRFA created an Office of International Religious Freedom within the Department of State, headed by an Ambassador of Religious Freedom with the mandate to produce an annual "International Religious Freedom Report" on all countries of the world. It also created the US Commission on International Religious Freedom, an independent, bipartisan, federal government entity tasked with monitoring the status of freedom of religion or belief outside the United States and providing policy recommendations to the President, the Secretary of State, and Congress.

As a result of the IRFA, the United States made religious freedom an explicit foreign policy priority (Birdsall 2016; Snyder 2018; Klocek 2019; Perez 2019). The presidential administrations since 1998 have had different emphases. The Clinton administration focused on the institutionalization of the IRFA, using different approaches; Bush and Obama both engaged directly with faith-based organizations; and the Trump administration aggressively promoted Judeo-Christian ideology through the launch of three new initiatives: the Commission on Unalienable Rights, the annual Ministerial to Advance International Religious Freedom, and the International Religious Freedom Alliance (Haynes 2020). He also changed the direction and resources to development aid (Klocek 2019:87-91). Biden has confirmed the commitment of the USA to international religious freedom, but has emphasized that it should be considered within the broader human rights agenda. He has also diversified the membership of various religious affairs functions (Siddiqi, Graves-Fitzsimmons & Falcón 2022).

Koenig claims that US activities and other unilateral attempts to promote religious freedom have "whiffs of missionary ambitions," which risk undermining the legitimacy of the multilateral human rights system (2017). In the same vein, Zellman and Fox (2022) argue that the promotion of religious freedom by the United States is ineffective because it is biased towards Christianity and neglects other religions, a point also made by Haynes (2020). Whilst the perception of a misuse of religious freedom policy by conservative Christians seems to be widely shared, it must be observed that these Christians have no influence in the current Biden administration. Moreover, conservative Christians and Muslims are objecting that the USA is trying to push a particular view on LGBTQ+ issues through its international religious freedom agenda (Herrington 2021; Perry, Schnabel & Grubbs 2021; Hancock 2017). Whatever may be the case, the politicization of religious freedom at the domestic level is clearly visible.

It is not without significance that the US government is mandated to do its own religious freedom research (Perez 2019; Klocek 2019). Of course, such institutional mechanisms cannot prevent blind spots from appearing, but they do help to keep public institutions focused on religious concerns. This being said,

religious freedom research has not had the impact on policy it could have. Klocek (2019) warns that calls to include religious freedom in the programming of federal agencies do not always lead to structural responses or are insufficiently informed by data. He observes that policymakers do not always follow the most recent and accurate data available, nor are they always sensitive to the nuances of this data. An important need highlighted by the Closing the Gap program of United States Institute of Peace—United States Agency for International Development is the integration of religious freedom in development planning (Klocek & Bledsoe 2022).

Perez (2019) signals the key importance of educating the general public about the existence of international religious policies to ensure ongoing support for them. Wallace (2019) cautions that although US foreign policy may have espoused religious freedom, its diplomats have also overlooked the religious implications of the Belt and Road Initiative. Zellman and Fox (2022) assert that scholars and practitioners of US foreign policy have not taken religion seriously as a policy tool.

Concluding remarks

Religious freedom can be considered as a defining element of the US political system ever since the founding of the country. Indeed, there is a broad consensus about the importance of religious freedom in American society, both in domestic and foreign policy, although there is ongoing debate about what religious freedom actually means. This ongoing debate takes place within political and judicial institutions, and more broadly within society. There also is a notable tension between the states and the federal government on matters related to religious policy. Because of all of this, the Supreme Court has played an important role in shaping the understanding of religious freedom and the practical scope of the First Amendment.

Among Western democracies, the USA imposes only minor restrictions on religious freedom. However, there are obstacles faced by Muslims, both at the federal and the subnational levels, to exercise their religious rights under the guise of national security, as well as the alarming societal discrimination against minority religions, including acts of violence and discrimination, whether caused by white supremacists or other types of terrorists.

Secularism is among the most controversial issues surrounding religious freedom in the USA. The generally favorable attitude towards religion has often been at odds with the non-religious nature of the state. On top of this, tensions arise at the subnational, federal, and foreign policy level when attempting to strike a balance between religious freedom and other rights, thereby giving rise to concerns about discrimination against religious and other categories of minorities. Any attempt to regulate this matter, however, inevitably interferes with the autonomy of religious institutions, which will make this a hot issue for years to come.

The USA has taken upon itself the exporting of its model of religious freedom to the world, often with great merit. Even though the country has made religious freedom a foreign policy priority, criticisms have emerged regarding its impact, potential biases, and perceived missionary motives. These criticisms reflect the domestic controversies that surround religious freedom.

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