

Religious Freedom and Minority Rights under the Biden Administration

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Abstract: Libert  religiosa e diritti delle minoranze sotto l'amministrazione Biden. – The Trump Administration privileged the concerns of a select group of conservative white Christians, harmed religious minorities and weakened the separation of Church and state enshrined in the First Amendment's Establishment Clause. Since Day One of his presidency, when he repealed the "Muslim ban", Joe Biden demonstrated his intention to take a dramatically different approach to religious freedom and to Church/State relations. In a nutshell, his agenda pursues the protection of religious freedom for all, and particularly for vulnerable minorities; the restoration of the separation between State and religion; and the advancement of international religious freedom as a fundamental and interdependent human right.

In the following pages, I first provide a brief analysis of the roots of the policies pursued by the Trump administration in the field of religion. Next, I present an overview of the most salient actions implemented by the Biden administration to pursue its agenda. I then analyze the discrepancies between such actions and the current US Supreme Court's judicial trend in the field of religion. Finally, I provide an evaluation of the overall state of religious freedom and Church/State relations and I identify the potential challenges that lie ahead.

Keywords: religious freedom; separation of church and state; supreme court; religious exemptions; fundamentalism.

235

1. Introduction: Religious Freedom as "First among Rights"?

One of the signature marks of the Trump administration was the suppression of minority religious freedom and the weaponization of fundamentalist Christianity, particularly against sexual and reproductive rights.

Under Trump, this sectarian vision of religious freedom was conceptualized as a structural element of the United States' constitutional tradition. Indeed, in 2019, then U.S. Secretary of State Mike Pompeo launched a "Commission on Unalienable Rights," to introduce "reforms of human rights discourse where it has departed from our nation's founding principles of natural law and natural rights".¹ Pompeo decried the merger

¹ National Archives, Federal Register, A Notice by the [State Department](#) on [05/30/2019](#): Department of State Commission on Unalienable Rights, available at: <https://www.federalregister.gov/documents/2019/05/30/2019->

between “unalienable,” or God-given, and man-made (*ad hoc*) rights, a dichotomy that contradicts the fundamental tenet of human rights law, that all rights are universal and equal, interdependent and interrelated.² In July 2020, the Commission released a Draft report,³ which suggests how American international human rights policy should better reflect what the Commission characterizes as the nation’s founding principles: protestantism, civic republicanism and classical liberalism. In this light, not all rights are equally fundamental: to the contrary, property rights and religious liberty are supposedly “foremost” among human rights, while social and economic rights are not “compatible [with the American founding principles] when they induce dependence on the state, and when, by expanding state power, they curtail freedom — from the rights of property and religious liberty to those of individuals to form and maintain families and communities.”⁴

This conceptualization of rights, which coalesces libertarian interests set against government intervention and religious interests rigidly opposed to promotion of sexual and reproductive rights, is deeply rooted in the culture of the American religious right. One of its most prominent figures is Robert George, a Catholic professor at Princeton University who is regarded as one of the most influential American conservative intellectuals. George embodies the ever-closer alliance between ultra-conservative Catholics and Evangelicals, in which the former, who have been traditionally excluded from political circuits, culturally support the latter,⁵ that are politically savvy, but vehemently anti-intellectual.⁶ Among his many initiatives, George was responsible for drafting a document signed in 2009 by over 150 religious authorities -Evangelicals, Catholics, Mormons and Orthodox-, entitled the “Manhattan Declaration: A Call of Christian Conscience.”⁷ The Declaration focuses on the defense of three principles: prenatal life, exclusively heterosexual marriage and *religious freedom*. The latter is defined in these terms: “... [N]o person of faith must be prevented from worshiping God according to the dictates of conscience, nor from expressing their deep religious convictions freely and publicly.” The Declaration refers to the “weakening of conscientious objection clauses,” and

[11300/departement-of-state-commission-on-unalienable-rights](https://www.state.gov/wp-content/uploads/2020/07/Draft-Report-of-the-Commission-on-Unalienable-Rights.pdf) (last accessed November 18, 2022).

² “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”. Art. 5, Vienna Declaration and Programme of Action (Adopted by the World Conference on Human Rights in Vienna on 25 June 1993), available at:

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> (last accessed November 18, 2022).

³ Report of the Commission on Unalienable Rights available at: <https://www.state.gov/wp-content/uploads/2020/07/Draft-Report-of-the-Commission-on-Unalienable-Rights.pdf> (last accessed November 18, 2022).

⁴ *Ibid.*

⁵ J. Lemaitre Ripoll, *By reason alone: Catholicism, constitutions, and sex in the Americas*, in 10 *International Journal of Constitutional Law*, 493-511 (2012).

⁶ R. Hofstadter, *Anti-Intellectualism in American Life*, New York, 1962, 55 *et seq.*

⁷ Manhattan Declaration, <http://demoss.com/newsrooms/manhattandclaration/backgroud/manhattan-declaration-signers> (last accessed November 18, 2022).

the “use of anti-discrimination law to compel religious institutions, businesses and service providers to choose between complying with activities they judge to be deeply immoral or going out of business,” and openly calls for civil disobedience: “No earthly power, cultural or political, will reduce us to silence or acquiescence. Through the ages, Christianity has taught us that civil disobedience is not only permitted, but sometimes required.”⁸

The principles of the Manhattan Declaration guided the Trump Administration’s action in the field of religious freedom and church/State relations, which resulted in an unprecedented expansion of the privileges of conservative Christians. As we will see in the following pages, *de facto*, the Trump government action used religion to “create a license to discriminate across the country.”⁹

Under the Biden Administration things radically changed. The Pompeo Commission was dismantled, its draft report disregarded, and important steps were taken to reverse Trump’s actions in the field of religious freedom. Thus, for example, on March 30, 2021, Secretary of State Blinken announced that there is no “hierarchy” among rights and pledged his commitment to sexual and reproductive rights.¹⁰ Moreover, he reversed the Trump Administration’s repeal of sections on reproductive rights from the annual human rights reports on foreign countries issued by the State Department. President Biden rejoined the U.N. Human Rights Council, which the Trump administration had left. At a U.N. Security Council meeting in March 2021, U.S. Ambassador Linda Thomas-Greenfield committed U.S. support for collective action “to achieve justice and dignity for these religious and ethnic minority communities.”¹¹

The legacy of “Religious Freedom as First among Rights” however, is not likely to quietly disappear. In his only term, Trump reshaped the federal judiciary for decades to come.¹² Not only did he appoint three conservative Supreme Court justices, but over 200 judges to the federal bench – “including nearly as many powerful federal appeals court judges as Barack

⁸ *Ibid.*

⁹ ACLU, *Connecting the Dots: Reviewing the Trump Administration Efforts to Create a License to Discriminate across the Country*, February 2021, available at: https://www.aclu.org/sites/default/files/field_document/aclu_connecting-the-dots_fact_sheet_2021-4.pdf (last visited: November 17, 2022).

¹⁰ A. J. Blinken, *Secretary Antony J. Blinken On Release of the 2020 Country Reports on Human Rights Practices*, March 30, 2021, available at <https://www.state.gov/secretary-antony-j-blinken-on-release-of-the-2020-country-reports-on-human-rights-practices/> (last accessed November 18, 2022).

¹¹ U.S. Mission to the United Nations, *Remarks by Ambassador Linda Thomas-Greenfield at a UN Security Council Arrria-Formula Meeting on Religion, Belief, and Conflict*, March 19, 2021, available at <https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-at-a-un-security-council-arria-formula-meeting-on-religion-belief-and-conflict/> (last accessed November 18th 2022).

¹² J. Gramlich, *How Trump compares with other recent presidents in appointing federal judges*, in Pew Research center, January 13, 2021, available at <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> ((last accessed November 18, 2022).

Obama appointed” during his two terms.¹³ Compared to other recent Presidents, including Republican ones, Trump appointed a smaller share of women and of non-White federal judges. Today, over a quarter of active federal judges are Trump appointees.¹⁴ The discrepancy between the government and the courts in the field of religious freedom is thus likely to pose a fundamental challenge in the years to come.

2. Limiting Religiously Motivated Exemptions to the Application of General Laws

As it was previously mentioned, the Trump administration dramatically expanded religious exemptions to the application of anti-discrimination law that protects women and sexual minorities.

The Administration’s actions included, but were by no means limited to: broadening the right of medical facilities to refuse to provide services and information to patients on religious grounds;¹⁵ repealing rules that prohibited discrimination on the ground of reproductive choices and transgender status in access to health services;¹⁶ crystallizing the right of religious employers to provide insurance coverage for contraceptives to their employees;¹⁷ permitting federally funded foster care agencies to discriminate against families on the ground of religion;¹⁸ submitting briefs before the Supreme Court arguing for the right of businesses to discriminate against their customers on the ground of sexual orientation;¹⁹ requiring public universities to exempt religious student associations that receive university funding and recognition, from nondiscrimination provisions that apply to other student associations (“free inquiry rule”);²⁰ and authorizing federal contractors to discriminate on the ground of sex, gender and sexual orientation.²¹

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ DEPARTMENT OF HEALTH AND HUMAN SERVICES Office of the Secretary 45 CFR Part 88 RIN 0945-AA10 Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, Federal Register / Vol. 84, No. 98 / Tuesday, May 21, 2018. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

¹⁶ Centers for Medicare & Medicaid Services (CMS); Office for Civil Rights (OCR), Office of the Secretary, Department of Health and Human Services (HHS), August 18, 2020.

¹⁷ Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act. A Rule by the Internal Revenue Service, the Employee Benefits Security Administration, and the Health and Human Services Department on 11/15/2018.

¹⁸ Health and Human Services Grants Regulation A Rule by the Health and Human Services Department on 01/12/2021.

¹⁹ *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ____ (2018).

²⁰ DEPARTMENT OF EDUCATION Office of the Secretary 34 CFR Parts 75 and 76 Office for Civil Rights 34 CFR Part 106 Office of Postsecondary Education 34 CFR Parts 606, 607, 608, and 60, Federal Register / Vol. 85, No. 185 / Wednesday, September 23, 2020.

²¹ Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption

A Rule by the Federal Contract Compliance Programs Office on 12/09/2020.

These forms of religious exemptions do not easily compare to traditional forms of conscientious objection –such as the refusal to serve in the army–, in that they involve claims that are interventionist and intrusive, as opposed to claims aimed at withdrawal and absence from discrete areas of mainstream collective undertakings. Moreover, traditional conscience claims mainly involved “discrete and insular minorities”,²² such as Jehovah witnesses, who hold peripheral and often unpopular views. To the opposite, today’s exemptions are claimed by powerful actors, that participate in the political process, and that hold mainstream traditional religious views, which are directly implicated in the marginalization of women and LGBTQ+ persons. Another crucial difference between traditional conscientious objection and today’s claims to religious exemptions is that the former did not inflict any harm on third parties, or it did to a minimal extent. Thus, one could hold that the refusal of a few individuals to join the army may increase the chances of non-objecting individuals to die in a war. Such chances, however, would increase by an irrelevant percentage. To the contrary, today’s claims have grave repercussions of a variety of rights of large segments of the population. These include the right to health, the right not to be discriminated against in the workplace, in education, in access to services, as well as the rights to privacy and dignity.

The Biden Administration adopted a number of initiatives to reverse or mitigate the applicability of religiously motivated exemptions. The Office for Civil Rights enforces Section 1557 of the Affordable Care Act (“Obamacare”), prohibiting discrimination on the ground of race, color, national origin, age, disability, or sex (including pregnancy, sexual orientation, gender identity, and sex characteristics), in covered health programs or activities. The Biden Administration also repealed the aforementioned rule, adopted under Trump that expanded religiously based exemption for federal contractors to comply with anti-discrimination law and allowed them to hire people who hold their religious beliefs. Moreover, in 2021, the Administration issued new Guidance in the field of conscientious objection, with the purpose of applying the same amendments that have been so far interpreted to protect only health care providers who refused to provide abortion-related services, also to providers who offer such services, and who are often ostracized and discriminated against.²³ Finally, President Biden announced his intention to rescind the “inquiry rule,” which, as mentioned above, privileged religious students’ clubs in public universities.²⁴

Finally, the Biden Administration has introduced what could become the most effective means to counter religiously based discrimination on the ground of, broadly speaking, gender: the Equality Act,²⁵ which would amend

²² *United States v. Carolene Products Company*, 304 U.S. 144 (1938).

²³ US. Department of health and human Services, “Guidance on Nondiscrimination Protections under the Church Amendments” <https://www.hhs.gov/conscience/conscience-protections/guidance-church-amendments-protections/index.html> (last accessed November 17, 2022).

²⁴ The proposal has been pending with the Federal Office of Management and Budget: <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=1840-AD72> (last visited November 18, 2022).

²⁵ H.R. 5 – 117th Congress (2021-2022).

the Civil Rights Act of 1964. The Equality Act, which has been passed by the House of Representatives in 2021 and presently awaits approval by the Senate, would “prohibit discrimination on the basis of sex, gender identity, and sexual orientation” in key areas, including public accommodations and facilities, education, federal funding, employment, housing, credit, and the jury system.” Unsurprisingly, the bill has been opposed by fundamentalist Christian organizations, many with strong ties to Trump,²⁶ accusing it to “threaten America’s fundamental liberties,” as well as “the equal treatment of women and upend the bedrock understanding of male and female in law and culture”.²⁷

3. Protecting the Religious Freedom and Sacred Land of Indigenous Americans

The Trump Administration frontally attacked the religious freedom of Native Americans. In some cases, indigenous American sacred sites have been damaged as an indirect consequence of the Trump administration anti-immigration policies. Thus, for example, parts of the Organ Pipe Cactus National Monument in South Arizona were blasted in the process of building the wall on the border with Mexico.²⁸

Most damages, however, occurred through actions aimed at exploiting indigenous sacred lands. Oak Flat, a parcel of land in Arizona which Western Apache regard as a blessed place, has been protected from mining activities by the federal government since 1955. The site contains important indigenous archeological sites, burial grounds, and has hosted religious ceremonies since centuries. One of the last initiatives of the Trump Administration was to set in motion the transfer of Oak Flat to two international mining behemoths. Following a tug-of-war with the tribes, in 2021 the Biden Administration temporarily stopped the start of the mining project and started a new round of consultations with the tribes’ representatives.²⁹

²⁶ Various conservative Christian lobbies, which routinely provide pro bono services, submit amicus briefs, and represent clients before domestic and international, had ties with Trump and/or his Administration. The chief counsel of the American Center for Law and Justice (ACLJ), for example, is Jay Sekulow, a prominent member of the Trump’s legal team, who served as lead outside counsel for Trump’s impeachment trial before the United States Senate. Kerry Kupec, the top spokesperson at the Department of Justice, was previously the Director for Legal Communications in another extreme Christian right wing organization, Alliance Defending Freedom (ADF).

²⁷ Alliance Defending Freedom, “Here’s how the Equality Act Threatens Your Freedom,” February 10, 2021, <https://adflegal.org/article/heres-how-equality-act-threatens-your-freedom> (last visited November 18, 2022).

²⁸ Executive Order 13767, signed by President Trump in 2017, formally directed the U.S. government to begin wall construction along the U.S.–Mexico border using existing federal funding.

²⁹ Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, January 26th, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/> (last accessed November 19th, 2022).

In 2021, the Biden Administration also reinstated proclamation 9558 to reestablish the Bears Ears National Monument,³⁰ in South-Eastern Utah, which former President Obama had adopted in 2016 to protect the sacred land of various tribes, including Hopi, Navajo, Zuni and Ute. Bears Ears soon “became a focus of the Trump administration’s anti-environmental fervor”,³¹ and in 2017 the President signed a new proclamation which slashed the land of approximately 85% and replaced it with two noncontiguous monuments “units.” Many lawsuits followed, but while they were pending President Biden immediately issued an executive order to review the dismantling of Indian monuments by the Trump Administration.³² The Biden Administration restored other Native National Monuments, namely Grand Staircase Escalante, Northern Canyons and Seamounts, as a step to at once strengthen environmental protection and respect the religious and cultural freedoms of Native Americans.

These efforts and actions not only honor the duties of the federal government to protect Indian Tribes, but also testify to a new understanding of the *rationale* of protecting the environment, that goes beyond issues of public health, and integrates indigenous, non-Western approaches to the relationship between humans and nature.

4. Outlawing Present and Future Discrimination in the Entry of Immigrants, Asylum-Seekers and Nonimmigrants Based on Religion

Rescinding the Immigration and Nationality Act (“Muslim Ban”)³³ on Day One of his administration, signaled President Biden’s aim to halt religiously based discrimination in the country’s immigration system.

Executive Orders 13769 and 1380 had been signed by Trump in 2017, banning individuals from certain Muslim-majority countries from entry into

³⁰ DCPD-201600875 - Proclamation 9558-Establishment of the Bears Ears National Monument, 2016, <https://www.govinfo.gov/app/details/DCPD-201600875> (last accessed November 19, 2022).

³¹ <https://www.nrdc.org/court-battles/nrdc-et-v-trump-bears-ears>

³² Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, January 20, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/> (last accessed November 19th, 2022).

³³ Executive Order 13769, superseded by Executive Order 13780, *Protecting the Nation from Foreign Terrorist Entry into the United States*, lowered the number of refugees to be admitted into the United States, suspended the U.S. Refugee Admissions Program (USRAP) for 120 days, suspended the entry of Syrian refugees indefinitely, directed some cabinet secretaries to suspend entry of those whose countries do not meet adjudication standards under U.S. immigration law for 90 days, and included exceptions on a case-by-case basis. The Department of Homeland Security (DHS) listed these countries as Iran, Libya, Somalia, Sudan, Syria, Yemen (as well as, initially but not subsequently, Iraq). More than 700 travelers were detained, and up to 60,000 visas were “provisionally revoked”. The Supreme Court upheld the third Executive Order (Presidential Proclamation 9645) and its accompanying travel ban in *Trump v. Hawaii*, 585 U.S. ____ (2018). President Joe Biden revoked Executive Order 13780 and its related proclamations with Presidential Proclamation 10141.

the United States. While the district and circuit courts did not sanction the ban, the Supreme Court upheld it in *Trump v Hawaii*, a 5-4 decision, holding that the President has broad authority to suspend the entry of non-citizens into the country and that the Muslim Ban did not exceed any textual limit on the President's authority. According to the majority, the fact that five of the seven targeted nations have a Muslim majority, "does not support an inference of religious hostility".³⁴ Justice Sotomayor, writing for the minority, disagreed, noting that: "Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications."

Under the Biden Administration, to preempt further attempts to discriminate among immigrants and asylum seekers of the ground of religion, a bill was introduced, H.R. 1333, the National Origin-Based Antidiscrimination for Nonimmigrants (NO BAN) Act. The bill, which passed in the House of Representatives, imposes limitations on the authority of the President to suspend or restrict aliens from entering the United States. It also prohibits religious discrimination in various immigration-related decisions, such as whether to issue an immigrant or nonimmigrant visa, unless there is a statutory basis for such discrimination.³⁵

5. Countering White Supremacist Violence and Hate Crimes against Religious Minorities

During the Trump Administration, white supremacist violence against religious minorities grew exponentially.³⁶

Unsurprisingly, the Government's zeal in enacting and defending the Muslim ban in court triggered Islamophobic attacks throughout the country.³⁷ Trump himself engaged in racist discourses against Muslims on multiple occasions, including retweeting Islamophobic materials on official government channels.³⁸ Various officials of the Trump Administration openly disparaged Islam. Ironically, these include Mark Kevin Lloyd, the U.S. Agency for International Development (USAID) religious freedom adviser, who referred to Islam as a "barbaric cult" which is "violent in its

³⁴ *Trump v Hawaii*, 585 U.S. ____ (2018).

³⁵ H.R.1333 — 117th Congress (2021-2022), <https://www.congress.gov/bill/117th-congress/house-bill/1333> (last visited November 19, 2022).

³⁶ *Reimagining Rights & Responsibilities in the United States: Hate Crimes*, Carr Center for Human Rights Policy Harvard Kennedy School, Harvard University February, 22, 2021, available at https://carrcenter.hks.harvard.edu/files/cchr/files/hate_crimes.pdf (last accessed November 18th, 2022).

³⁷ Institute for Social Policy and Understanding.

³⁸ On November 29, 2017, Trump retweeted three anti-Islamic videos posted by a far-right British politician, and on January 13, 2020, trump retweeted a doctored image of House Speaker Nancy Pelosi wearing a hijab and of Democratic Senator Chuck Schumer wearing a turban. See **G. Graves-Fitzsimmons et al.**, *How the Trump Administration Has Harmed Faith Communities*, in CAP, September 21, 2020, available at: <https://www.americanprogress.org/article/trump-administration-harmed-faith-communities/> (last accessed November 18th, 2022).

doctrine and practice;³⁹ and Secretary of State Mike Pompeo, the mind behind “Religious Freedom as First among Rights,” according to whom “The threat to America is from people who deeply believe that Islam is the way and the light and the only answer.”⁴⁰ Former Deputy Assistant to the President Sebastian Gorka maintained that 98 percent of terrorists are Muslims.

Anti-Semitism and antisemitic attacks also dramatically rose under Trump. Trump himself sided with antisemitic actors and movements in various occasions, including when he tweeted in support of a rally attended by neo-Nazis in January 2020, and when he infamously defended the “very fine people” who participated in the “Unite the Right” in Charlottesville, Virginia, chanting violent antisemitic slogans. In 2021 more than 2,700 anti-Semitic incidents of assault, harassment and vandalism were reported to the Anti-Defamation League, an all-time high in the United States since 1979, when hate crimes began to be tracked.⁴¹

To address this worrisome escalation of hate crimes against religious minorities, in 2021, the Biden Administration adopted the National Strategy for Countering Domestic Terrorism, with the aim to better understand, prevent and prosecute racially and religiously motivated crimes.⁴² Biden also signed into law the COVID-19 Hate Crimes Act, which improves how hate crimes are reported by law enforcement to help better protect religious communities, by modernizing the federal hate crimes reporting system and encouraging state and local law enforcement to report hate crimes statistics to the federal government.

6. The US Supreme Court, Secularism and Freedom of Religion

While the Biden Administration pursued an agenda focused on re-establishing Church/State separation, on widening the scope of minority religious freedom, and on protecting sexual and reproductive rights from fundamentalist Christianity, the Supreme Court took a very different turn. Thanks to appointment of three conservative Christian justices by Trump, the new course in the Court’s jurisprudence clearly showcases a tendency to weaken the Establishment Clause, and to strengthen majority religion at the detriment of secularism and minority rights.

³⁹ E. Steck, A. Kaczynski, *USAID religious adviser appointee made harsh anti-Islam comments and warned of violence if Tea Party failed in 2010 elections*, in CNN, July 6, 2020, available at: <https://www.cnn.com/2020/07/06/politics/kfile-usaid-mark-kevin-loyd/index.html> (last accessed November 18th, 2022).

⁴⁰ T. Gjelten, *Trump’s National Security And State Department Picks Alarm American Muslims*, in NPR, Available at: <https://www.npr.org/2018/04/06/599856473/trump-and-muslims-a-warming-abroad-a-cooling-at-home> (last visited December 20, 2022).

⁴¹ Anti Defamation League Report 2021, available at: <https://www.adl.org/resources/press-release/adl-audit-finds-antisemitic-incidents-united-states-reached-all-time-high> (last accessed November 18, 2022).

⁴² National Strategy for Countering Domestic Terrorism, available at: <https://int.nyt.com/data/documenttools/biden-s-strategy-for-combating-domestic-extremism/22ddf1f2f328e688/full.pdf> (last accessed November 18, 2022).

In several cases, the court decided against government officials who acted to protect the principle of Church/State separation enshrined in the First Amendment.

In June 2022, for example, in *Carson v Makin*, the Court decided that if a state uses taxpayer money to pay for students attending nonreligious private schools, it must also use taxpayer funds to pay for attendance at religious schools, thus invalidating provisions in 37 state constitutions that ban the direct or indirect use of taxpayer money in religious schools. The circumstances of the case are significant. In Maine, a rural state, more than half of school districts have no public high school. The state contracts with nearby high schools in other districts and with nonsectarian private schools to accommodate children who live in areas with no public schools. This arrangement was challenged by Christian parents arguing that the state should also provide for their children's tuition at private religious schools where the curriculum is "biblically base," with religion "integrated through all content areas." The 6-3 majority held that the program operates to "identify and exclude otherwise eligible schools on the basis of their religious exercise." Justice Bryer, in his dissenting opinion, noted that "never previously held what the Court holds today, namely, that a State must (not may) use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public-school education." Further concerns were raised by Justice Sotomayor, who wrote a separate dissenting opinion, noting that "Today the court leads us to a place where separation of church and state becomes a constitutional violation."⁴³

In the case of *Kennedy v. Bremerton School District*, also decided in June 2022, the Supreme Court sided, 6-3, with a Christian public-school football coach who prayed with his players while on duty. Ignoring well established precedents, the Court's majority held that the free exercise and free speech clauses protect an individual engaging in religious expression: "The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike." On the other hand, Justice Sotomayor held in her dissenting opinion that the majority's decision rejects "longstanding concerns" surrounding government endorsement of religion," and that "Official-led prayer strikes at the core of our constitutional protections for the religious liberty of students and their parents, as embodied in both the Establishment Clause and the Free Exercise Clause of the First Amendment."⁴⁴

The Court decided other landmark cases which, despite not constituting a direct challenge to the First Amendment, have grave repercussions on Church/State relations, as well as on religious freedom. One of such cases is *Dobbs v Jackson*,⁴⁵ which overturned *Roe v Wade*,⁴⁶ one of the principal targets of the religious right since decades. In *Dobbs* the Court held that the Constitution does not mention the right to abortion and that the latter is neither deeply rooted in the nation's history, nor an

⁴³ *Carson v Makin* 596 U.S. ____ (2022).

⁴⁴ *Kennedy v Bremerton School District* 597 U.S. ____ (2022).

⁴⁵ *Dobbs v Jackson* 597 U.S. ____ (2022).

⁴⁶ *Roe v Wade* 410 U.S. 113 (1973).

essential component of “ordered liberty.” Such arguments, however, conceal the impact of the forces behind the decision: the Christian right wing social movements that “led consecutive Republican presidents to appoint anti-abortion justices and that then drove the abortion issue through the Supreme Court’s open door”.⁴⁷ While the Court’s majority presented the reasoning in *Dobbs* as the result of its originalist interpretation of the Constitution, it constructed abortion, since the opening paragraph, as a “profound moral issue,” assuming “its moral gravity as singular and self-evident,”⁴⁸ and thus disregarding the different moral standards applicable to abortion conflicts and the profoundly different views held by Americans on this issue.

Fundamental rights have moral content. Both the right to terminate a pregnancy and the prohibition against a abortion based on the right to life or personhood of the fetus are steeply embedded in morality. Moreover, constitutional adjudication in many cases inevitably raise moral questions and call for answers that require making moral judgments or that at least have significant moral implications.⁴⁹ In such cases, judges cannot avoid the role of moral arbiter and risk being attacked on fairness or legitimacy grounds. Ultimately, and especially in cases such as abortion, where the moral split in society is particularly deep, judges will likely not be able to avoid charges of unfairness or of having imposed contestable moral prescriptions illegitimately. There are, however, ways to mitigate this danger. In the first place, if a court has built a solid reputation of professionalism and fairness over time, occasional embrace of contestable moral positions may do little damage to institutional authority and legitimacy and may even dampen the animosity of those who embrace a contrary moral position. In the second place, judges can adopt moral pluralism as the morality of judging. Moral pluralism generally commands making room for coexistence of as many diverse conceptions of the good as is compatible with the polity’s maintenance of equal conditions of respect for each proponent of a particular conception and for that proponent’s pursuit of her own conception. That entails of course certain limitations to the extent that the pursuit of one conception requires interfering with, or thwarting, the pursuit of another such conception. In the particular case of judges, moral pluralism requires that contested moral issues which must be decided in the course of adjudication be treated according to the pluralist ethos. That means that within the constraints imposed by relevant fundamental rights norms, the judge should try to accommodate all competing and conflicting conceptions of the good implicated in the constitutional dispute that she must adjudicate. The judicial tool that seems best suited for this purpose is the principle of proportionality and the practice of judicial balancing associated with it. Indeed, by engaging in

⁴⁷ L. Greenhouse, *Religious Doctrine, Not the Constitution, Drove the Dobbs Decision*, in *The New York Times*, 22 June 2022, <https://www.nytimes.com/2022/07/22/opinion/abortion-religion-supreme-court.html> (last accessed November 18, 2022).

⁴⁸ *Ibid.*

⁴⁹ The following passage is excerpted from a chapter by S. Mancini, M. Rosenfeld, *The judge as Moral Arbiter? The Case of Abortion*, in A. Sajo, R. Uitz (eds.), *Constitutional Topography: Constitutions and Values*, The Hague, 2010, 299-316.

proportionality analysis and judicial balancing the judge is often likely to narrow the scope of morally contestable judicial decision-making. Moreover, whatever morally contestable elements remain after application of proportionality and judicial balancing are both inevitable and the minimum without which the judge would abdicate her moral and institutional role as a constitutional adjudicator.

In the light of such observations, the *Dobbs* decision is particularly problematic. In the first place, public confidence in the Supreme Court has recently sunk to a historic low, together with its reputation of professionalism and fairness. A survey conducted in August 2022 by the Annenberg Public Policy Center found that “53% of U.S. adults disapprove of how the court handles its job. The survey also reveals a chasm between the qualities the American people say they value most in judges, such as fairness and impartiality, and the traits they perceive in Supreme Court justices”.⁵⁰ Importantly, trust in the Court is clearly “driven by party: 70% of Republicans but only 32% of Democrats have a great deal/fair amount of trust in the court”.⁵¹

In the second place, the *Dobbs* decision did not incorporate any proportionality analysis. It is true that, unlike their European and Canadian counterparts, United States courts do not systematically embrace proportionality in constitutional law.⁵² “Yet some areas of U.S. constitutional law embrace proportionality as a principle, ... or contain other elements of the structured proportionality review”.⁵² Justice Alito’s opinion in *Dobbs* entirely relies on an originalist interpretation of the constitution. Originalism, however, is by no means a value-neutral doctrine of constitutional interpretation, and by using originalism, courts are not likely to narrow the scope of morally contestable judicial decision-making. Indeed, it has convincingly been pointed out that *Dobbs* conveniently employed highly selective claims about America’s “history and traditions”.⁵³

Finally, the Court’s decision in *Dobbs* does not conform to moral pluralism. The Court’s reasoning is rooted in traditional Christian morality, which it assumes as universal, thus marginalizing non-conservative Christian conceptions and moving further away from separation of church and state. Indeed, many religions do not share the Catholic Church and conservative Protestant views about abortion. In Judaism and Islam, for example, abortion is morally acceptable and even required in some instances. Numerous progressive religious organizations, including protestant churches, as well as some Catholic organizations, are openly pro-choice.

The implications of the *Dobbs* decision for religious freedom are thus significant. After *Dobbs*, states are free to criminalize abortions at any stage, without exceptions. Thus, a Jew or a Muslim, or a pro-choice Christian who

⁵⁰ *Over Half of Americans Disapprove of Supreme Court as Trust Plummet*, available at <https://www.asc.upenn.edu/news-events/news/over-half-americans-disapprove-supreme-court-trust-plummet> (last accessed December 20, 2022).

⁵¹ *Ibid.*

⁵² V. Jackson, *Constitutional Law in an Age of Proportionality*, in 124 *The Yale Law Journal* 8, 3094 (2015).

⁵³ R. B. Siegel, *Memory Games: Dobbs’s Originalism As Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance* (August 9, 2022), in *Texas Law Review*, Forthcoming.

has or performs an abortion in accordance with their religious precepts, would face criminal conviction. Unsurprisingly, as states increasingly restrict or entirely ban access to abortion, there has been a proliferation of lawsuits by religious minorities challenging abortion bans across the countries. In Ohio, a Jewish congregation joined the ACLU is filing a suit challenging the state's abortion ban.⁵⁴ In Texas, Ohio, and Indiana, lawsuits have been filed by the Satanist temple,⁵⁵ a non-theistic religious organization that promotes equal religious rights and personal sovereignty against tyrannical authority. In Florida, three reformed rabbis, a Unitarian Universalist minister, a United Church of Christ reverend, an Episcopal Church priest and a Buddhist lama, filed lawsuits challenging a recent law which greatly restricts access to abortion, on the ground that it impermissibly infringes on religious liberty, because it creates "substantial" burdens on individuals' ability to practice their faith, and creates a "potential" burden on religious leaders to advise their members. As one of the rabbis who initiate the lawsuits put it: "The First Amendment, which is the first one that they enacted, upon which all other freedoms are based, was designed to prevent the exact type of thing that we see now: the merger of a radical fundamentalist type of Christianity with the state... This law criminalizes the practice of Judaism".⁵⁶

7. Concluding Remarks

The striking discrepancy between the actions and policies of the Biden Administration and the Supreme court's decisions in the field of religious freedom and of Church/State relations raises major concerns. Indeed, the dramatically divergent views on religion espoused by the Biden Administration and by the Court testifies to the crystallization of the culture wars within US institutions and to the increasingly divisive role of religion in American law and politics. The results of midterm elections in November 2022 make it possible for the Biden Administration to further pursue its agenda, widening the scope of minority religious freedom and countering the challenges to the separation of Church and State posed by politicized fundamentalist Christianity. The composition of the Supreme Court, and of the federal judiciary more broadly, on the other hand, is unlikely to change

⁵⁴ M. Trau, *Jewish community to join ACLU, abortion providers in lawsuit against Ohio's six-week abortion ban* (July 12, 2022), in *Ohio Capital Journal*, , available at <https://ohiocapitaljournal.com/2022/07/12/jewish-community-to-join-aclu-abortion-providers-in-lawsuit-against-ohios-six-week-abortion-ban/> (last visited December 20, 2022).

⁵⁵ See the organization's website: <https://thesatanictemple.com/> (last accessed December 20, 2022).

⁵⁶ M. Carlisle, A. Abrams, *Does Religious Freedom Protect a Right to an Abortion? One Rabbi's Mission to Find Out*, in *Time*, July 7, 2022, available at: <https://time.com/6194804/abortion-religious-freedom-judaism-florida/> (last visited December 20, 2022).

in the near future, setting the ground for further clashes. This scenario would expose a dark side of the counter-majoritarian difficulty, whereby courts would not protect discrete and insular minorities, but, rather, reinforce powerful political forces that are displeased with the outcome of the political process.

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