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978-1-107-01244-8 - Challenges to Religious Liberty in the Twenty-First Century

Edited by Gerard V. Bradley

Frontmatter

[More information](#)

Challenges to Religious Liberty in the Twenty-First Century

Almost everyone today affirms the importance and merit of religious liberty. But religious liberty is being challenged by new questions (for example, use of the *niqab* or church adoption services for same-sex couples) and new forces (such as globalization and Islamism). Combined, these make the meaning of religious liberty in the twenty-first century uncertain. This collection of chapters by ten of the world's leading scholars on religious liberty addresses these issues. The book is arranged around five specific challenges to religious liberty today: an "originalist" interpretation of the First Amendment religion clauses, the state's responsibility to prevent coercion and intimidation of believers by others within the same faith community, the traditional right of conscientious objection, the distinctive problems presented by globalization, and the United States' moral responsibility to promote worldwide religious liberty.

Gerard V. Bradley has been a professor of law at the University of Notre Dame since 1992. He was previously a professor of law at the University of Illinois. Professor Bradley is a coeditor of *The American Journal of Jurisprudence* and author of *Church-State Relations in America*. He has been a senior Fellow at the Witherspoon Institute and a research Fellow at the Hoover Institution of Stanford University.

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Frontmatter

[More information](#)

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Frontmatter

[More information](#)

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GERARD V. BRADLEY

University of Notre Dame



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Frontmatter

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Cambridge University Press

978-1-107-01244-8 - Challenges to Religious Liberty in the Twenty-First Century

Edited by Gerard V. Bradley

Frontmatter

[More information](#)

Contents

<i>List of Contributors</i>	page vii
<i>Introduction</i>	ix
PART I. “ORIGINALIST” JURISPRUDENCE OF THE RELIGION CLAUSES IN THE TWENTY-FIRST CENTURY	
1. The Establishment Clause and the “Problem of the Church” <i>Steven D. Smith</i>	3
2. Dueling Clios: Stevens and Scalia on the Original Meaning of the Establishment Clause <i>Gerard V. Bradley</i>	25
PART II. COERCION OR MANIPULATION OF RELIGIOUS BELIEFS AND PRACTICES: STATES’ BASIC RESPONSIBILITIES	
3. Coercion and Religious Exercises <i>Kent Greenawalt</i>	49
4. Religious Freedom and (and in) Institutions <i>Richard W. Garnett</i>	71
PART III. UNDERSTANDING THE TRADITIONAL RIGHT OF “CONSCIENTIOUS OBJECTION”: THE NEW CENTURY’S GREATEST CHALLENGES	
5. Free Exercise, Religious Conscience, and the Common Good <i>Christopher Wolfe</i>	93
6. Conscience, Religion, and the State <i>Christopher Tollefsen</i>	111

Cambridge University Press

978-1-107-01244-8 - Challenges to Religious Liberty in the Twenty-First Century

Edited by Gerard V. Bradley

Frontmatter

[More information](#)

vi

*Contents*PART IV. THE UNIQUE AND UNPRECEDENTED CHALLENGES
OF GLOBALIZATION TO RELIGIOUS LIBERTY

7. Globalization and the Free Exercise of Religion Worldwide 139
José Casanova
8. The Irony of a Globalizing Future: Economics, Technology,
Identity, and Religious Liberty 152
William Inboden

PART V. THE UNITED STATES' BASIC MORAL RESPONSIBILITIES
TO PROMOTE RELIGIOUS LIBERTY ABROAD

9. A Foreign Policy of Religious Freedom: Theoretical and
Evidentiary Foundations 175
Daniel Philpott
10. International Religious Freedom and Moral Responsibility 193
Thomas Farr
- Index* 209

Cambridge University Press

978-1-107-01244-8 - Challenges to Religious Liberty in the Twenty-First Century

Edited by Gerard V. Bradley

Frontmatter

[More information](#)

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Cambridge University Press

978-1-107-01244-8 - Challenges to Religious Liberty in the Twenty-First Century

Edited by Gerard V. Bradley

Frontmatter

[More information](#)

viii

Contributors

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Cambridge University Press

978-1-107-01244-8 - Challenges to Religious Liberty in the Twenty-First Century

Edited by Gerard V. Bradley

Frontmatter

[More information](#)

Introduction

Challenges to religious liberty appear in news headlines daily. Some report spectacular armed conflict (within states or across borders) in which religion is an accelerant. The Middle East and Africa suffer most acutely from this plague. Others involve smaller-scale attacks on discrete religious minorities, which the local governments are unable, or unwilling, to forestall. Nigeria, Sudan, India, Iraq, and Egypt – among other countries – are guilty of this delict. The wrong is often compounded by the state’s nonchalance about punishing the attackers, fostering a culture of intimidation even when the guns are put down.

The assassination of Salman Taseer, the Punjab governor who conspicuously opposed Pakistan’s blasphemy laws, is a complex example of all these challenges. Pakistan is distressed by festering, religion-tipped armed conflict within and without its boundaries, and the government appears largely unable (or unwilling) to pacify it. Because Taseer’s assassin acted (in his view) to protect Islam from a contemnor, some Pakistanis loudly celebrated the murder. Many more were cowed into silence. When finally the killer was sentenced to death himself (according to *New York Times*, “a rare glimmer of hope from Pakistan”),¹ the courtroom was ransacked, and the judge – at the time of this writing – is hiding for his life.

Such sanguinary events are partly the uncomplicated effects of incompetent or corrupt police and of poorly designed or beleaguered political institutions. Sometimes the corrective is just a matter of amassing

¹ Editors, “Justice in Pakistan,” *New York Times* (October 3, 2011), www.nytimes.com/2011/10/04/opinion/justice-in-pakistan.html.

Cambridge University Press

978-1-107-01244-8 - Challenges to Religious Liberty in the Twenty-First Century

Edited by Gerard V. Bradley

Frontmatter

[More information](#)

superior force and aiming it at the problem. But it is usually more than that, and sometimes it is not a question of power at all. One key variable is the belligerence of the relevant religions and their respective stances toward the rights of the Other. But here we begin to circle back to the design of political institutions, the content of law, and political courage. Constitutions that entrench guarantees of religious liberty call for laws that protect it, and together they can foster a culture of respect for the religious freedom of everybody.

The litmus test of such a regime is not the murder of a Governor Taseer. Every place has its fanatics, and it is impossible to prevent all murderous acts. The test is what happens afterward. It is not the irruption of *force majeure*, but how it is handled, that counts. Does all respectable opinion condemn violations of religious liberty, especially violent ones? Do the public authorities confidently and without cowering perform their duty? Does the spectacular headline occasion a reaffirmation among religious leaders of *their* commitment to religious liberty for everyone?

Establishing a regime of religious liberty surely requires political power. All the power in the world, however, will not produce that regime unless a critical mass of people *believe* in religious liberty, value it greatly, and are willing to make sacrifices – and maybe some enemies – for it. But people can only believe in religious liberty if they know what it is, and they will not fight for it unless they believe it to be compelling, and even true. So at the root of today's spectacular headlines are (also) failures of understanding, of sound reasoning, of conscientious affirmation, and then of courageous action. These failures pertain to the meaning of religious liberty and to the manifold ways – prosaic as well as spectacular – in which it is challenged in the twenty-first century.

The headlines therefore point to a host of deeper and broader problems. There also are plenty of stories about laws that restrict religious “proselytism” and conversion, laws that define and punish religious “defamation” and “blasphemy” (and of concerted efforts to expand these restrictions to additional countries), efforts to penalize (in various ways) religious groups for violating new standards of nondiscrimination in relation to sexual orientation, the increasing intrusion of state administrators into the internal affairs of religious organizations, the proper scope of “conscience protection” for religious health care and charitable entities working on government contracts, and controversies concerning the *hijab*, the *niqab*, and the *burka*. All these movements seem to be expanding in reach and vigor and have occasioned a lively debate about the meaning of religious liberty.

Cambridge University Press

978-1-107-01244-8 - Challenges to Religious Liberty in the Twenty-First Century

Edited by Gerard V. Bradley

Frontmatter

[More information](#)*Introduction*

xi

No country is exempt from all these challenges. Many governments are severely tested on several of these fronts. The United States is especially challenged today by “conscience protection” in health care and by trying to find an accommodation between the emerging same-sex equality orthodoxy and religious groups’ rightful autonomy. Even where anti-proselytization laws, for example, are a nonstarter – as they are in the United States – their presence elsewhere presents a challenge to American diplomacy and foreign aid programs, as well as to the international organizations of which America is a member.

According to such sober measures as the U.S. Department of State’s annual Report on International Religious Freedom and the Pew Forum on religion and public life, more than two-thirds of the world’s people live in countries with “high” restrictions on religious freedom. These findings are not only troubling; they point to a paradox. Almost no one – leader or follower, religious or political – *says* that they favor restricting religious freedom. Almost everyone *says* that they favor religious freedom, and all the leading international documents continue to affirm it. One scholar articulates the paradox in these words: “Though there is widespread rhetorical endorsement of ‘religious freedom,’ this endorsement masks deep disagreement and confusion about the nature, foundations, and practical demands of religious freedom. Just as almost everyone claims they support ‘democracy’ – even the ‘Democratic’ People’s Republic of (North) Korea – almost everyone claims to be on the side of religious freedom.”²

Today’s verbal consensus is the fruit of the late twentieth-century human-rights revolution, a movement midwived by what we might call a hermeneutic of universality. The new century’s challenge is a resurgent pluralism, a hermeneutic of difference. The new pluralism extends beyond different understandings of religious liberty itself. It includes incompatible definitions of many norms that explain and buttress religious liberty, norms such as “noninterference,” “autonomy,” “equality,” and “neutrality.” The great twenty-first-century challenges to religious liberty are concocted in legislative chambers and in army barracks, and they exact their toll on the street, at the church, and in the home. But these challenges arise centrally from what people think and believe is sound, needed, true.

Take the case of antiproselytizing laws as an illustration. They are a corollary of anticonversion strictures and are often supplemented by

² Timothy Shah, “Why Religious Freedom? Why Now? Defending an Embattled Human Right,” working title, unpublished manuscript in author’s possession.

Cambridge University Press

978-1-107-01244-8 - Challenges to Religious Liberty in the Twenty-First Century

Edited by Gerard V. Bradley

Frontmatter

[More information](#)

laws against blasphemy and apostasy. Together, these restrictions form a coherent matrix of ideas, a composite that is defended not as a (perhaps) regrettable incursion on religious liberty, but as “religious liberty.” The new constellation of interlocking notions is justified by, first, *autonomy*, defined as a “community’s right to be left alone to its traditions,”³ at least where a “stance on non-interference is central to those traditions.”⁴ Tracing this new challenge, John Witte asks, “How does the state balance one community’s right to another person’s or community’s right to be left alone to its traditions?” Tom Farr frames the question in terms of a “right to persuade by peaceful witness” “balanced” against a “right of communities to defend their respective identities.”⁵

The new matrix is sometimes justified, second, by appeal to norms of *equality* among religions. Some say that “evangelical” religions (Islam and Christianity) have an unfair advantage in recruiting members when compared to religions that do not have a missionary impetus (think of Buddhism and Hinduism). Besides, these evangelicals hold that each of their faiths is uniquely true. Thus scholars argue that “since ancestral practices are considered to be the common inheritance that holds a community together, any denunciation of them as false religion and idolatry is viewed as an attempt to destroy the social fabric.” Seen from this vantage point, “conversions disintegrate communities and families by drawing individuals away from these ancestral traditions.”⁶

The third justification is *neutrality*. John Witte asks, “How does one craft a legal rule that respects Orthodox, Hindu, Jewish or Traditional groups that tie religious identity not to voluntary choice, but to birth, caste, blood and soil, language and ethnicity, sites and sights of divinity?”⁷ The authors of an essay in Rosalind Hackett’s recent collection, *Proselytization Revisited*, assert that “it seems *logically impossible* to interpret the principle of religious freedom in a way that is neutral between religions like Islam and Christianity and the traditions of Hindus, Buddhists and Jains” (their emphasis).⁸

³ John Witte, “Soul Wars: New Battles, New Norms,” *Review of Faith and International Affairs* (Spring 2007):13, 14.

⁴ Sarah Claerhout and Jakob DeRoover, “Conversion of the World: Proselytization in India and the Universalization of Christianity,” in *Proselytization Revisited: Rights Talk, Free Markets, and Culture Wars*, ed. Rosalind I. J. Hackett (London: Equinox, 2008), 68.

⁵ Thomas Farr, “Introduction,” in *Proselytism and Religious Freedom in the 21st Century*, Berkley Center report (March 3, 2010).

⁶ Claerhout and DeRoover, “Conversion.”

⁷ Witte, “Soul Wars.”

⁸ Claerhout and DeRoover, “Conversion,” 68–9.

Cambridge University Press

978-1-107-01244-8 - Challenges to Religious Liberty in the Twenty-First Century

Edited by Gerard V. Bradley

Frontmatter

[More information](#)*Introduction*

xiii

In contrast, the matrix version of “religious liberty” has never had much traction on American thought or practice, even though Americans, too, have long valued religious *autonomy*, *equality*, and *neutrality*. There were a few blasphemy prosecutions in America during the first half of the nineteenth century. However, they were meant to vindicate public order and public morality. They were not justified as protections of religious liberty.⁹ The thinking behind the occasional prosecution back then is, in any event, gone and is not going to reappear. One reason is that Americans have always understood their religious commitments to be more tentative and subject to revision than those tempted to support anti-proselytizing laws believe religion to be. A deeper-than-elsewhere commitment to *individual* freedom of religion further explains Americans’ disinterest in restrictive laws. Overarching constitutional commitments to freedom of expression (including religious expression) have contributed to a culture of robust theological disputation, a milieu incompatible with the restrictions of the matrix. Moreover, America’s critical culture owes a lot to the traditions of inquiry, argument, and evidence internal to the Christianity that has been paramount in the American religious experience. Transcending all these contributory factors is an important and unbreakable connection between the nature of religious freedom and the pursuit of religious truth. For the restless pursuit of truth tames any temptation to leave believers in the undisturbed possession of their traditions, whatever they happen to be.

Today’s challenges to religious liberty call for more than tougher police and more savvy politicians. Serious engagement with new ideas, creative thinking about emerging practical problems, and a critical reappropriation of philosophical foundations are *all* in order. To fill precisely this order, the Witherspoon Institute, of Princeton, New Jersey, convened in April 2009 a consultation of leading scholars to confront these and other needed tasks. Their inquiry was structured as a series of five questions. Two scholars prepared substantial responses to each of the five queries, and their papers served to focus a sustained discussion of each question by the whole assembly. This book is the fruit of that consultation.

The scholars’ method was largely philosophical and political-scientific, with substantial attention to matters of constitutional law as well. The scope of their inquiry was commensurate with the problem: It was global. Three of the five questions had no geographical identifier at all. Two referred

⁹ See generally Gerard Bradley, “Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism,” *Hofstra Law Review* 20 (Winter 1991): 245–310, 275–7.

Cambridge University Press

978-1-107-01244-8 - Challenges to Religious Liberty in the Twenty-First Century

Edited by Gerard V. Bradley

Frontmatter

[More information](#)

explicitly to the United States, but only one of them was specific to the law and experience of that country. This more specific question was, moreover, foundational. The question concerned the sources and methodology for interpreting the First Amendment of the U.S. Constitution. It revolved around the lodestar of American constitutional debate, which is the viability of “originalism” as an interpretive theory. The aim of this part of the consultation papers was to explore the possibility of bringing today’s judicial interpretation of the First Amendment into living touch with the constitutional text and the circumstances of its composition and approval.

This first set of essays is not only historical and legal. They also engage constitutional law from theological and philosophical perspectives. These two essays are authored by Steven D. Smith and the editor.

The second pair of authors – Kent Greenawalt and Richard W. Garnett – took up perhaps the most delicate question addressed in this book. Their attention was focused on the proper scope of government efforts to protect believers from coercion and pressure by nongovernmental actors, including the believers’ coreligionists. We rightly think of religious liberty as a civil right and thus conceptualize it as a bimodal relation between public authority – especially its coercive power – and the believer. But this civil right is in turn based on a natural human right to immunity from coercion, intimidation, and interference. This natural right can obviously be menaced by nonstate forces as well as by the government. What should the government do to protect believers from these sorts of pressures? When can it rightly use force to stymie the putative liberty of the group to define itself in order to protect the claimed liberty of a member (or recent defector) to define *herself*?

An immediate but imperfect grasp of the question can be gained by thinking of “cults.” The most dramatic example of the issue involves violent reprisals for apostasy. More subtle is such conduct as “shunning” wayward community members or defectors, the application of nondiscrimination norms to churches’ hiring decisions, and the civil law’s action (if any) when a divorcing Jewish husband refuses his wife a *get*, so that she cannot remarry within the faith. Limited civil-law recognition of church rules, including Sharia law, is part of this problem.

The question examined in Chapters 3 and 4 also can be usefully, albeit still imperfectly, seen as overlapping with the perennial concern about an acidic individualism latent within religious liberty. Abdullahi Ahmed An-Na’im has argued elsewhere that the proselytization question involves an individualistic conception of freedom of religion, which “cannot adequately address the concerns of communities about proselytization

Cambridge University Press

978-1-107-01244-8 - Challenges to Religious Liberty in the Twenty-First Century

Edited by Gerard V. Bradley

Frontmatter

[More information](#)*Introduction*

xv

and its consequences.” What’s needed (he says) is a “dynamic and creative understanding of *collective* rights.”¹⁰ In American constitutional doctrine – the central reference point of these two chapters – these communal concerns are referred to as the problem of “church autonomy.”

The most urgent challenge to religious freedom in the United States today is surely *conscience protection*. (It is likely so in Australia and in the United Kingdom as well.) The state’s ever-expanding regulatory reach is one reason why; the government’s writ is simply going farther than it has ever gone before. There is another factor that feeds this expanding problem, however: the upending of traditional sexual morality and the consequent revolution in moral attitudes toward sterilization, contraception, and abortion. In years past, it was typically a religiously scrupulous patient (or parent of a patient) – a Christian Scientist or a Jehovah’s Witness, perhaps – who sought legal immunity from the administration of unremarkable and all but universally accepted medical procedures. In years past, too, there was a flourishing legal culture of granting generous relief to persons and institutions that, because of religious or moral convictions, could not conscientiously undertake certain duties. Back then, the law tracked mainstream medical or social-service practice, and it all harmonized with common morality. Exceptions could be and routinely were made for the occasional minority sectarian.

The urgency of conscience protection has grown precisely as the common morality has boiled off. As this core moral tradition evaporates, the great religious traditions that used to be in harmony with the moral underpinnings of society’s law have found their adherents marginalized in a growing number of situations, including, most notably, health care and family services. Our understanding of what to do about these problems is complicated by the rights-bearer on the other side. Today, conscience protection is not sought typically from burdensome state administrative standards. It is all too often relief sought from laws that are held to guarantee the personal rights of others, such as those of women seeking access to contraception or abortion.

One issue cluster has arisen most precipitously. It pivots on the remarkable – and remarkably swift – turnaround in legal attitudes toward homosexual and lesbian behavior. The English experience is the best illustration here. In 1988, Parliament prohibited local governments

¹⁰ Rosalind I. J. Hackett, “Revisiting Proselytization in the Twenty-First Century,” in *Proselytization Revisited: Rights Talk, Free Markets, and Culture Wars*, ed. Rosalind I. J. Hackett (London: Equinox, 2008), 3.

Cambridge University Press

978-1-107-01244-8 - Challenges to Religious Liberty in the Twenty-First Century

Edited by Gerard V. Bradley

Frontmatter

[More information](#)

from doing anything to “intentionally promote homosexuality” or “to promote the teaching in any [government-]maintained school of the acceptability of homosexuality as a pretended family relationship.” This law was repealed in 2000. The Sexual Orientation Regulations of 2003 included an exception for “employment for purposes of an organized religion.” The exception applied where the employer used sexual orientation as a criterion “to comply with the doctrines of the religion,” or “because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s followers.” The exception was immediately attacked as invalid in court proceedings brought by some teachers’ unions. The judgment of the High Court upheld the validity of the exception.

It was a hollow victory for religious freedom. The unions secured from the government in the course of litigation, and then from the Court itself, a limiting interpretation of the statutory exception: It had no application to schools or to almost all other religious employers. The High Court determined that “employment for the purposes of organized religion clearly [is limited to] a job, such as a minister of religion, involving work for a church, synagogue, or mosque.”¹¹ Even work for a synagogue or church or mosque itself was exempted only if either the faith’s doctrines or the strongly held convictions of its members *required* that an applicant be denied.

The authors of Chapters 5 and 6 – Christopher Wolfe and Christopher Tollefsen – seek to supply the philosophical and constitutional framework for understanding and resolving “conscience protection.”

The fourth question is taken up by José Casanova and William Inboden. The question is this: What are the unique challenges that globalization presents to religious liberty? Now, globalization is itself a complex and cross-cutting phenomenon; it combines centripetal pressures – internationalism, economic integration, and interdependence – with the centrifugal force of proliferating pluralism, especially with regard to religion and, most acutely, the meaning of religious liberty itself. One incontestable feature of globalization, however, is the rise and proliferation of transnational organizations – multinational corporations, nongovernmental organizations (NGOs), international agreements and laws, the United Nations, and cross-border religious movements, among others – that

¹¹ See *R. (Amicus) v. Secretary of State for Trade and Industry* [2004] EWHC 860 (Queen’s Bench Division [Administrative Court]) para. 104.

Cambridge University Press

978-1-107-01244-8 - Challenges to Religious Liberty in the Twenty-First Century

Edited by Gerard V. Bradley

Frontmatter

[More information](#)*Introduction*

xvii

limit the sovereignty of the nation-state. Thus the major concern of this book – what should be the law of any nation-state that takes seriously its obligation to protect and promote religious liberty? – has to be supplemented by a special look at globalization’s peculiar effects. This story is most complicated and a bit surprising. As Will Inboden says in these pages, globalization “is neither an unmitigated threat [to] nor a utopian guarantor” of religious liberty. Globalization is rather “an ambivalent and ironic source of both challenges and opportunities.” The relationship between globalization and religious liberty is, Inboden asserts, “not linear and unidirectional but rather reciprocal and even dialectical.”

Finally, Daniel Philpott and Thomas Farr take up the question, What are the United States’ basic moral responsibilities to promote religious liberty abroad? These two scholars found their remarks on the undeniable resiliency of religion as an important, autonomous force in world affairs. Both make painfully clear that the U.S. foreign policy establishment has a lot of work to do to get up to speed. For way too long, the operational assumption of American foreign policy was that religion was irrelevant to the tasks at hand, that it was strictly a private matter.

The reasons for this now unsustainable blind spot are many. To some extent, America’s policy makers unreflectingly reflected their own biases about how religion *should* behave in the United States. (They were wrong about that, too; American religion has stubbornly refused to stay quietly in hearth and home.) Their naïveté was buttressed by scholars who predicted the inevitable secularization of the modern world, a view since refuted by the facts on the ground and repudiated by its leading lights, including Peter Berger. A certain *realpolitik* made privatization of religion an axiom. And America’s diplomats seem to have thought that they could do business with the secularized elites of even intensely religious countries, leaving to *them* the job of keeping their pious masses at bay. This assumption has already been falsified in Iran, Iraq, Afghanistan, Turkey, and elsewhere. Egypt, India, and Indonesia may soon put the assumption to further test.

Farr and Philpott take accurate measure of how religion figures in the world’s political affairs, and they take up the normative task, too, of identifying the great power’s *moral* responsibilities to promote religious liberty.

Cambridge University Press

978-1-107-01244-8 - Challenges to Religious Liberty in the Twenty-First Century

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Frontmatter

[More information](#)
