

## TRANSFORMING RELIGIOUS LIBERTIES

### *A New Theory of Religious Rights for National and International Legal Systems*

Religious liberties are at the center of many debates on how liberal democratic societies can accommodate diversity. This book considers the interaction between law and religion from a broad international, comparative and jurisprudential perspective and proposes a new theoretical approach to religious liberty that both transcends and transforms current approaches to religious rights. Not only does the discussion draw on the work of a range of legal and political philosophers including John Rawls, Ronald Dworkin and John Finnis, it also tests the validity of the various proposals against actual “hard cases” derived from multiple jurisdictions. In so doing, the analysis overcomes longstanding challenges to existing religious rights regimes and identifies a new theoretical paradigm that specifically addresses the challenges associated with religiously pluralist societies. Through this type of interdisciplinary analysis, the book identifies a religio-legal system that both religious and non-religious people can support.

Professor S.I. Strong has taught at the Universities of Oxford and Cambridge in the United Kingdom as well as Georgetown Law Center and the University of Missouri in the United States. Professor Strong has written over 100 books and articles which have been translated into Spanish, Portuguese, French, Russian and Chinese, and has won numerous awards for scholarly writing, including Cambridge’s esteemed Yorke Prize. Professor Strong is a former U.S. Supreme Court Fellow and holds a D.Phil. from Oxford, a Ph.D. from Cambridge and a J.D. from Duke, in addition to other degrees.

# Transforming Religious Liberties

A NEW THEORY OF RELIGIOUS RIGHTS  
FOR NATIONAL AND INTERNATIONAL  
LEGAL SYSTEMS

S.I. STRONG



CAMBRIDGE  
UNIVERSITY PRESS

Cambridge University Press  
 978-1-107-17933-2 — Transforming Religious Liberties  
 S. I. Strong  
 Frontmatter  
[More Information](#)

## CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom  
 One Liberty Plaza, 20th Floor, New York, NY 10006, USA  
 477 Williamstown Road, Port Melbourne, VIC 3207, Australia  
 4843/24, 2nd Floor, Ansari Road, Daryaganj, Delhi – 110002, India  
 79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

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[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107179332](http://www.cambridge.org/9781107179332)

DOI: 10.1017/9781316832097

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First published 2018

Printed in the United States of America by Sheridan Books, Inc.

*A catalogue record for this publication is available from the British Library.*

### *Library of Congress Cataloging-in-Publication Data*

NAMES: Strong, Stacie, author.

TITLE: Transforming religious liberties : a new theory of religious rights for national and international legal systems / S.I. Strong, University of Missouri, Columbia.

DESCRIPTION: New York : Cambridge University Press, 2017.

IDENTIFIERS: LCCN 2017034823 | ISBN 9781107179332

SUBJECTS: LCSH: Freedom of religion. | Religion and state. | Religious minorities – Legal status, laws, etc.

CLASSIFICATION: LCC K3258 .S77 2017 | DDC 342.08/52–dc23

LC record available at <https://lccn.loc.gov/2017034823>

ISBN 978-1-107-17933-2 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Cambridge University Press  
978-1-107-17933-2 — Transforming Religious Liberties  
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*Dedicated to the memory of María Antolina Morales*

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## Acknowledgments

This book is based on a doctoral dissertation completed at the University of Cambridge in 2002 and awarded the Yorke Prize in 2003. Winning the Yorke Prize was particularly gratifying, given the complexity of the subject matter, and provided a strong incentive to continue to work on the jurisprudential issues surrounding religious rights at both the national and international levels.

This task has become even more important in light of recent events regarding the relationship between law and religion and the proper scope of religious liberty. Over the last fifteen years, numerous countries have struggled to identify how best to respond to the challenge of religious pluralism. Although the debate about the need for and nature of religious liberty is not new, many of the enactments of the early twenty-first century fail to appreciate the historical, theoretical and interdisciplinary nature of religious rights and thus seem likely to create or perpetuate precisely the type of conflicts the promulgating entities say they wish to avoid.

In his book, *Foreordained Failure*, Steven Smith wrote that “if our present unsatisfactory condition is the product of inquiries and ways of thinking that [are] doomed from the start, then merely pursuing *those* inquiries and persisting more assiduously in *those* ways of thinking will only preserve, and perhaps even aggravate, our current confusion” about religious liberty.<sup>1</sup> Numerous authorities have described why religious beliefs and practices deserve protection, both for the benefit of religious believers and for society at large, and this book does not seek to address those types of concerns. Instead, this book takes the discussion to the next level by providing a new theoretical framework for the analysis and implementation of religious

<sup>1</sup> STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 16 (1995).

rights. The material contained herein not only incorporates historical, contemporary and interdisciplinary elements but also tests various philosophical perspectives in a practical matrix generated from an international and comparative constitutional legal analysis.

Although this book addresses contemporary challenges in the area of law and religion, the jurisprudential foundation is built on my doctoral research at Cambridge. As a result, I want to explicitly recognize a debt of gratitude to those who helped me during that time, including my supervisor, Dr. Stephanie Palmer, and my interim supervisor, Prof. Trevor Allan, as well as my internal and external examiners, Prof. Matthew Kramer, Prof. Susan Marks and Prof. Anthony Bradney. I also wish to thank Dr. Rosy Thornton, Dr. Elizabeth Emerson and Alexandra Talbot (*née* Stearn) for their support and assistance during my years at Cambridge and Prof. Simon Whittaker for his understanding while I completed my doctorate while simultaneously serving as a Lecturer in Law at St. John's College at the University of Oxford. Finally, I would also like to acknowledge the support of the University of Missouri Law School Foundation and the New Hall (now Murray Edwards College) Small Aid Fund in providing research funding at various points during the drafting of this text, as well as the assistance of the many excellent librarians at Cambridge, Oxford and Missouri.

This text has consciously adopted a highly theoretical perspective that is also interdisciplinary, international and comparative in nature. As a result, there will doubtless be issues that are inadequately explained for some readers and overly detailed for others. I hope these errors and omissions will be forgiven, since in this text, as in all other things, I have sought to achieve a balance.

The law discussed herein was correct as of February 1, 2017.

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## Abbreviations

A.C.	Law Reports, Appeal Cases
Afr. Hum. Rts. L.J.	African Human Rights Law Journal
All E.R.	All England Law Reports
Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Int'l L.	American Journal of International Law
Am. J. Jurisprudence	American Journal of Jurisprudence
Am. J. Legal Hist.	American Journal of Legal History
Antitrust L.J.	Antitrust Law Journal
Arab Charter	Arab Charter on Human Rights
Ariz. L. Rev.	Arizona Law Review
Ariz. St. L.J.	Arizona State Law Journal
Atl.	The Atlantic
BBC News Mag.	British Broadcasting Corporation News Magazine
B.H.R.C.	Butterworths Human Rights Cases
Boston Rev.	Boston Review
Brook. J. Int'l L.	Brooklyn Journal of International Law
Buff. Hum. Rts. L. Rev.	Buffalo Human Rights Law Review
B.U. Int'l L.J.	Boston University International Law Journal
B.Y.U. L. Rev.	Brigham Young University Law Review
Cairo Declaration	Cairo Declaration on Human Rights in Islam
Cal. Health & Safety Code	California Health & Safety Code
Cal. L. Rev.	California Law Review
Camb. Int'l & Comp. L.J.	Cambridge International and Comparative Law Journal
Camb. L.J.	Cambridge Law Journal

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Cambrian L. Rev.	Cambrian Law Review
Can. J.L. & Jurisprudence	Canadian Journal of Law & Jurisprudence
Cap. U. L. Rev.	Capital University Law Review
Cardozo L. Rev.	Cardozo Law Review
Cardozo L. Rev. De Novo	Cardozo Law Review De Novo
Case W. Res. J. Int'l L.	Case Western Reserve Journal of International Law
Case W. Res. L. Rev.	Case Western Reserve Law Review
C.E.T.S.	Council of Europe Treaty Series
Ch.	Law Reports, Chancery Division
Chi. J. Int'l L.	Chicago Journal of International Law
Chi.-Kent L. Rev.	Chicago-Kent Law Review
CJEU	Court of Justice of the European Union
Clev. St. L. Rev.	Cleveland State Law Review
C.M.L.R.	Common Market Law Reports
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Colum. L. Rev.	Columbia Law Review
Col. Rev. Stat.	Colorado Revised Statutes
Company Law.	Company Lawyer
Comp. Lab. L. Rev.	Comparative Labor Law Review
Conn. J. Int'l L.	Connecticut Journal of International Law
Conn. L. Rev.	Connecticut Law Review
Contemp. Issues Irish L. & Pol.	Contemporary Issues in Irish Law and Politics
Cork Online L. Rev.	Cork Online Law Review
Cornell Int'l L.J.	Cornell International Law Journal
Cornell L. Rev.	Cornell Law Review
Cox Crim. Cases	Cox's Criminal Cases
Declaration on Discrimination	Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief
D.L.R. (4th)	Dominion Law Reports 4th
Duke J. Comp. & Int'l L.	Duke Journal of Comparative & International Law
DePaul L. Rev.	DePaul Law Review
Ecc. L.J.	Ecclesiastical Law Journal
Emory Int'l L.J.	Emory International Law Journal

Emory L.J.	Emory Law Journal
E.T.S.	European Treaty Series
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
Eur. Comm'n H.R. Dec. & Rep.	Decisions and Reports of the European Commission of Human Rights
Eur. H.R. Rep.	European Human Rights Reports
Eur. Hum. Rts. L. Rev.	European Human Rights Law Review
Eur. L.J.	European Law Journal
Eur. L. Rev.	European Law Review
European Commission	European Commission of Human Rights
European Convention	European Convention on Human Rights and Fundamental Freedoms
European Court	European Court of Human Rights
EWCA	England and Wales Court of Appeal neutral citation
EWHC	England and Wales High Court neutral citation
F.2d	Federal Reports 2d Series
F.3d	Federal Reports 3d Series
Fam.	Law Reports, Family Division
Fed. Appx.	Federal Appendix
Federalist Soc'y Rev.	Federalist Society Review
Fed. Prac. & Proc. Civ.	Federal Practice & Procedure, Federal Rules of Civil Procedure
Fed. R. Civ. P.	Federal Rules of Civil Procedure
FIU L. Rev.	Florida International University Law Review
Fla. J. Int'l L.	Florida Journal of International Law
Fla. St. U. L. Rev.	Florida State University Law Review
Fletcher F. World Aff.	Fletcher Forum of World Affairs
F.L.R.	Family Law Reports
Fordham Int'l L.J.	Fordham International Law Journal
Fordham L. Rev.	Fordham Law Review
F. Supp. 2d	Federal Supplement 2d Series
F. Supp. 3d	Federal Supplement 3d Series
Geo. J. Int'l L.	Georgetown Journal of International Law

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Geo. J.L. & Pub. Pol'y	Georgetown Journal of Law & Public Policy
Geo. Wash. Int'l L. Rev.	George Washington International Law Review
Geo. Wash. L. Rev.	George Washington Law Review
Harv. Hum. Rts. J.	Harvard Human Rights Journal
Harv. L. Rev.	Harvard Law Review
Harv. L. Rev. F.	Harvard Law Review Forum
Hastings L.J.	Hastings Law Journal
Hastings Race & Poverty L.J.	Hastings Race and Poverty Law Journal
Hum. Rts. L.J.	Human Rights Law Journal
Hous. J. Int'l L.	Houston Journal of International Law
Hous. L. Rev.	Houston Law Review
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant of Economic, Social and Cultural Rights
IESC	Irish Supreme Court neutral citation
Ind. L.J.	Indiana Law Journal
Ind. L.J. Supp.	Indiana Law Journal Supplement
Int'l & Comp. L. Q.	International & Comparative Law Quarterly
Iowa L. Rev.	Iowa Law Review
I.R.	Irish Reports
I.R.L.R.	Industrial Relations Law Reports
J. Church & St.	Journal of Church and State
J. Contemp. Legal Issues	Journal of Contemporary Legal Issues
J.L. & Religion	Journal of Law and Religion
J. Legal Prof.	Journal of the Legal Profession
J. Risk & Uncertainty	Journal of Risk and Uncertainty
J. Marshall Rev. Intell. Prop. L.	John Marshall Review of Intellectual Property Law
Juridical Rev.	Juridical Review
L. & Ethics Hum. Rts.	Law & Ethics of Human Rights
La. L. Rev.	Louisiana Law Review
Loy. L.A. L. Rev.	Loyola of Los Angeles Law Review
Md. J. Int'l L.	Maryland Journal of International Law

Md. L. Rev.	Maryland Law Review
Mich. J. Gender & L.	Michigan Journal of Gender & Law
Mich. J. Int'l L.	Michigan Journal of International Law
Mich. L. Rev.	Michigan Law Review
Mich. St. L. Rev.	Michigan State Law Review
Minn. L. Rev.	Minnesota Law Review
Mod. L. Rev.	Modern Law Review
New L.J.	New Law Journal
NIQB	Northern Ireland Queen's Bench Division neutral citation
Notre Dame J.L. Ethics & Pub. Pol'y	Notre Dame Journal of Law, Ethics & Public Policy
Notre Dame L. Rev.	Notre Dame Law Review
Nw. U. L. Rev.	Northwestern University Law Review
N.Y. Times	New York Times
N.Y.U. J. Int'l L. & Pol.	New York University Journal of International Law and Politics
N.Y.U. L. Rev.	New York University Law Review
N.Z. U. L. Rev.	New Zealand University Law Review
Ohio St. J. on Disp. Resol.	Ohio State Journal on Dispute Resolution
O.J.	Official Journal of the European Union
Okla. L. Rev.	Oklahoma Law Review
Or. Rev. Stat.	Oregon Revised Statutes
Oxford J. Legal Stud.	Oxford Journal of Legal Studies
P.3d	Pacific Reporter 3d
Pac. Rim L. & Pol'y	Pacific Rim Law & Policy Journal
Penn. St. L. Rev.	Penn State Law Review
Pepp. L. Rev.	Pepperdine Law Review
Pol. Theory	Political Theory
Proceedings Nat'l Academy Sci. of U.S.A.	Proceedings of the National Academy of Science of the United States of America
Pub. L.	Public Law
Q.B.	Law Reports, Queen's Bench Division
Quinnipiac Health L.J.	Quinnipiac Health Law Journal
Rev. Litig.	Review of Litigation
RFRA	Religious Freedom Restoration Act
RLUIPA	Religious Land Use and Institutionalized Person Act

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Roger Williams U. L. Rev.	Roger Williams University Law Review
Rutgers J.L. & Religion	Rutgers Journal of Law & Religion
Rutgers L. Rev.	Rutgers Law Review
S. Afr. J. Hum. Rts.	South African Journal on Human Rights
San Diego L. Rev.	San Diego Law Review
S. Cal. L. Rev.	Southern California Law Review
S. Ct.	Supreme Court Reporter
S. Dak. L. Rev.	South Dakota Law Review
S. Ill. U. L.J.	Southern Illinois University Law Journal
Stat.	United States Statutes
Sup. Ct. Rev.	Supreme Court Review
Sw. L. Rev.	Southwestern University Law Review
T.C.A.	Tennessee Code Annotated
Tex. J. Int'l L.	Texas Journal of International Law
TEU	Treaty on European Union (Maastricht Treaty)
TFEU	Consolidated Version of the Treaty on the Functioning of the European Union
Theoretical Inquiries L.	Theoretical Inquiries in Law
T.S.	Treaty Series
Tul. Eur. & Civ. L. F.	Tulane European & Civil Law Forum
U. Balt. L. Rev.	University of Baltimore Law Review
U.C. Davis L. Rev.	University of California Davis Law Review
U. Chi. L. Rev.	University of Chicago Law Review
U. Chi. L. Rev. Dialogue	University of Chicago Law Review Dialogue
UCLA J. Islamic & Near E. L.	UCLA Journal of Islamic and Near Eastern Law
UIDHR	Universal Islamic Declaration of Human Rights
U. Ill. L. Rev.	University of Illinois Law Review
UKAIT	United Kingdom Asylum and Immigration Tribunal neutral citation
UKHL	United Kingdom House of Lords neutral citation

UKIAT	United Kingdom Immigration Appeal Tribunal neutral citation
UKSC	United Kingdom Supreme Court neutral citation
U.N. Charter	United Nations Charter
UNESCO	United Nations Education, Scientific and Cultural Organization
Universal Declaration	Universal Declaration of Human Rights
U.N.T.S.	United Nations Treaty Series
U. Pa. J. Int'l L.	University of Pennsylvania Journal of International Law
U. Pa. L. Rev.	University of Pennsylvania Law Review
U. Rich. L. Rev.	University of Richmond Law Review
U.S.	United States Reports
U.S.C.	United States Code
Utah L. Rev.	Utah Law Review
U. Toronto L.J.	University of Toronto Law Journal
Va. J. Int'l L.	Virginia Journal of International Law
Va. L. Rev.	Virginia Law Review
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
Victoria U. Wellington L. Rev.	Victoria University of Wellington Law Review
Vill. L. Rev.	Villanova Law Review
Vt. L. Rev.	Vermont Law Review
Vt. Stat. Ann.	Vermont Statutes Annotated
Wake Forest J.L. & Pol'y	Wake Forest Journal of Law & Policy
Wash. & Lee L. Rev.	Washington and Lee Law Review
Wash. Post	Washington Post
Wash. Rev. Code	Washington Revised Code
Wis. Int'l L.J.	Wisconsin International Law Journal
Wis. L. Rev.	Wisconsin Law Review
Wm. & Mary Bill Rts. J.	William & Mary Bill of Rights Journal
Wm. & Mary J. Women & L.	William & Mary Journal of Women & the Law
Wm. & Mary L. Rev.	William & Mary Law Review
Wm. Mitchell L. Rev.	William Mitchell Law Review
WL	Westlaw



Wolfenden Report	Report of the Committee on Homosexual Offences and Prostitution
Yale Hm. Rts. & Dev. L.J.	Yale Human Rights & Development Law Journal
Yale J.L. & Human.	Yale Journal of Law & the Humanities
Yale L.J.	Yale Law Journal