

On the Rhetorical Invention of a Failed Project: A Critical Response to Skeel's Assessment of Christian Legal Scholarship

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The contentious title alone of Professor David A. Skeel's recent work, *The Unbearable Lightness of Christian Legal Scholarship*,¹ would likely not offend Christian legal scholars. Most of us would like to see an increase in careful and serious engagement of Christian thought in American law and politics. And even the first few pages of Skeel's paper—bemoaning the fact that the growth of theologically conservative influence on law and politics is not nearly matched by “profuse discussion in the scholarly literature”²—sounds right.

But then things start to go terribly wrong, as Skeel reports that scholarly legal literature reflecting “a Christian perspective on law or any particular legal issue . . . [e]ven in the 1980s and 1990s . . . remained remarkably thin,” that the scope of Christian scholarship is “shockingly narrow,” and that there is “almost no trace of the intellectual underpinnings of” conservative Christianity in politics.³ Before long, Skeel argues that there is an “absence of Christian legal scholarship,” though he somewhat tempers his conclusion by a later reference to “the relative absence of Christian legal scholarship.”⁴

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¹ David A. Skeel, Jr., *The Unbearable Lightness of Christian Legal Scholarship*, 57 EMORY L.J. 1471 (2008).

² *Id.* at 1475–76. Skeel's article focuses on theologically conservative Christians, including protestant evangelicals and theologically conservative Catholics, which is a bit troubling in light of his title—surely, the category of Christian legal scholarship includes publications by scholars who address legal issues from their Christian perspective but do not identify themselves as theologically conservative. Skeel recognizes this but opines that “the more theologically liberal mainline Protestants also have not produced a distinctive legal scholarship.” *Id.* at 1476 n.9.

³ *Id.* at 1476.

⁴ *Id.* at 1477–78.

Of course, there *is* a body of Christian legal scholarship. Skeel therefore tacks and authoritatively explains that most scholars “invariably” find themselves writing about the religion clauses—“the church-state literature is almost the only place one can find extensive Christian legal scholarship.”⁵ *Almost?* Well, for Skeel there are “a handful of other areas—most notably Catholic scholarship informed by . . . the long tradition of natural law theory.”⁶ *Extensive?* Well, yes, but there is nevertheless for Skeel a “dearth of Christian legal scholarship,” notwithstanding “important Christian legal scholarship,” including, in addition to church-state and natural law literature, works in “international human rights, Christian lawyering, and Christian legal history.”⁷ *Dearth?* Well, yes, because all of these are for Skeel “limited areas,”⁸ and they seemingly do not qualify under Skeel’s definition of Christian legal scholarship.⁹ Hence there is a “strange absence of a rich body of Christian legal scholarship throughout the entire twentieth century.”¹⁰

That *would* be strange, if it were true; it would be amazing, but it is not the case. Nevertheless, Ted Olson reads Skeel’s article and declares that Skeel has “chronicle[d] the scandal of the Christian legal mind.”¹¹ My argument is that this scandal was rhetorically constructed, because Skeel eliminates a lot of Christian scholarship in order to support his “unbearable lightness” thesis. He states that “[u]ntil very recently, legal scholars have stayed almost entirely on the sidelines,” seldom reflecting “on the relationship between Christianity and the secular law.”¹² Never mind the hundreds of articles and books, not only in the areas Skeel identifies and then minimizes

⁵ *Id.* at 1478.

⁶ *Id.*

⁷ Skeel, *supra* note 1, at 1479.

⁸ *Id.*

⁹ Christian legal scholarship must provide either a theory derived from scripture or tradition, or a “descriptive theory that explains some aspect of the influence of Christianity on law, or of law on Christianity”; and “must seriously engage the best secular scholarship treating the same issues.” *Id.* It is neither clear why these standards must be met, nor how all of the extensive, important scholarship that Skeel elides fails to meet these standards.

¹⁰ *Id.* at 1480.

¹¹ Ted Olson, *Hope for Christian Legal Scholarship*, CHRISTIANITY TODAY, Jan. 21, 2008, http://blog.christianitytoday.com/ctliveblog/archives/2008/01/hope_for_christ.html.

¹² Skeel, *supra* note 1, at 1480.

(natural law theory,¹³ church and state relations,¹⁴ human rights,¹⁵ Christian lawyering,¹⁶ and Christian legal history¹⁷), but also on the

¹³ See generally, e.g., Gary T. Amos, *Unalienable Rights: The Biblical Heritage*, 8 J. CHRISTIAN JURISPRUDENCE 9 (1990); Gerard V. Bradley, *Natural Law*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 277 (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001); Patrick McKinley Brennan, *The Contributions of Catholics to the Socio-Political Order*, 56 CATH. U. L. REV. 1221 (2007); Patrick McKinley Brennan, *Law, Natural Law, and Human Intelligence: Living the Correlation*, 55 CATH. U. L. REV. 731 (2006); Patrick McKinley Brennan, *Who's Responsible for the Natural Law? Comments on Thomas Berg's "John Courtney Murray and Reinhold Niebuhr: Natural Law and Christian Realism,"* 4 J. CATH. SOC. THOUGHT 29 (2007); R.H. Helmholz, *Natural Human Rights: The Perspective of Ius Commune*, 52 CATH. U. L. REV. 301 (2003); Philip E. Hesch & Christopher J. Grabarek, *Towards the Deconstruction of Relativism*, 6 ST. THOMAS L. REV. 349 (1994); Douglas Kmiec, *America's "Culture War"—The Sinister Denial of Virtue and the Decline of Natural Law*, 13 ST. LOUIS U. PUB. L. REV. 183 (1993); Raymond B. Marcin, *Natural Law, Homosexual Conduct, and the Public Policy Exception*, 32 CREIGHTON L. REV. 67 (1998); Kerry L. Morgan, *A Constitutional Presidency*, 7 J. CHRISTIAN JURISPRUDENCE 45 (1988); Joan Lockwood O'Donovan, *Law and Redemption: Political Judgment and the Church's Proclamation*, 36 PEPP. L. REV. 573 (2009); Andrew Phang, *American Jurisprudence Through Christian Eyes—Beyond the Nightmare and the Noble Dream*, 81 U. DET. MERCY L. REV. 867 (2004); C. Scott Pryor, *God's Bridle: John Calvin's Application of Natural Law*, 22 J.L. & RELIGION 225 (2006); Thurston Howard Reynolds II, *Natural Law Jurisprudence of the Sermon on the Law*, 31 OHIO N.U. L. REV. 231 (2005); Joseph Story, *Natural Law*, 7 J. CHRISTIAN JURISPRUDENCE 31 (1988); Gerald R. Thompson, *The Unalienable Right of Property: Examining the Fourth and Fifth Amendments*, 8 J. CHRISTIAN JURISPRUDENCE 189, 189–203 (1990); Herbert W. Titus, *The Law of Our Land*, 6 J. CHRISTIAN JURISPRUDENCE 57 (1987).

¹⁴ See generally, e.g., STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995); John Kuhn Bleimaier, *God, Man and the Law*, 39 CATH. LAW. 277 (2000); Robin W. Lovin, *Church and State in an Age of Globalization*, 52 DEPAUL L. REV. 1 (2002); Charles I. Lugosi, *The Rejection of Divine Law in American Jurisprudence: The Ten Commandments, Trivia, and the Stars and Stripes*, 83 U. DET. MERCY L. REV. 641 (2006); Michael Stokes Paulsen & Steffen N. Johnson, *Essay: Scalia's Sermonette*, 72 NOTRE DAME L. REV. 863 (1997); C. Scott Pryor & Glenn M. Hoshauer, *Puritan Revolution and the Law of Contracts*, 11 TEX. WESLEYAN L. REV. 291 (2005); Rousas J. Rushdoony, *The Private and Public Domains*, 71 NOTRE DAME L. REV. 631 (1996).

¹⁵ See generally, e.g., Martin Shupack, *The Churches and Human Rights: Catholic and Protestant Human Rights Views as Reflected in Church Statements*, 6 HARV. HUM. RTS. J. 127 (1993); Michelle L. Mack, Note, *Religious Human Rights and the International Human Rights Community: Finding Common Ground—Without Compromise*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 455 (1999).

¹⁶ See generally, e.g., John E. Acuff, *The Wrong Question*, 32 PEPP. L. REV. 545 (2005); Charles R. Ajalat, *Practice, Church, Life, and Society*, 27 TEX. TECH L. REV. 933 (1996); Joseph Allegretti, *Clients, Courts, and Calling: Rethinking the Practice of Law*, 32 PEPP. L. REV. 395 (2005); Joseph Allegretti, *A Lawyer's Miscellany: Scriptural Resources for Christian Lawyers*, 26 FORDHAM URB. L.J. 1183 (1999); Joseph G. Allegretti, *The Lawyer's Calling Revisited: Second Look or Second Thoughts?*, 75 ST. JOHN'S L. REV. 267 (2001); Thomas G. Bost & L. Timothy Perrin, *Practicing Law as a Christian: Restoration Movement Perspectives*, 32 PEPP. L. REV. 419 (2005); John M. Breen, *Baccalaureate Mass Reflection the Catholic Lawyer: Justice and the Incarnation*, 39 CATH. LAW. 269 (2000); John M. Breen, *The Catholic Lawyer: "Faith" in Three Parts*, 20 NOTRE DAME J.L. ETHICS & PUB.

topics of religious sources of law,¹⁸ the relationship between religion and law,¹⁹ justice studies,²⁰ tax,²¹ legal ethics,²² the abortion debate,²³

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¹⁷ See generally, e.g., JOHN WITTE JR., *GOD'S JOUST, GOD'S JUSTICE* (2006); Frank S. Alexander, *Constituting a People*, 39 EMORY L.J. 1 (1990); Meagan E. Costello, *Smashing the Tragic Illusion of Justice: The Reprehensibility of the Death Penalty in Virginia*, 41 CATH. LAW. 255 (2001); Marci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 293; Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 5.

¹⁸ See generally, e.g., JOHN WARWICK MONTGOMERY, *THE LAW ABOVE THE LAW: WHY THE LAW NEEDS BIBLICAL FOUNDATIONS, HOW LEGAL THOUGHT SUPPORTS CHRISTIAN TRUTH INCLUDING GREENLEAF'S TESTIMONY OF THE EVANGELISTS* (1975); Jeffrey Brauch & Robert Woods, *Faith, Learning and Justice in Alan Dershowitz's The Genesis of Justice: Toward a Proper Understanding of the Relationship Between the Bible and Modern Justice*, 36

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¹⁹ See generally, e.g., NORMAN ST. JOHN STEVAS, *LIFE, DEATH AND THE LAW: LAW AND CHRISTIAN MORALS IN ENGLAND AND THE UNITED STATES* (1961); Frank S. Alexander, *The Foundation of Law: Theology and Law*, 54 EMORY L.J. 325 (2005); Joseph Allegretti, *The Unity of Law and Religion: A Response to Ackroyd and Vining*, 53 MERCER L. REV. 1065 (2002); Robert F. Cochran, Jr., *Christian Traditions, Culture, and Law*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 242; John. J. Coughlin, *Law and Theology: Reflections on What It Means to Be Human from a Franciscan Perspective*, 74 ST. JOHN'S L. REV. 609 (2000); Richard F. Duncan, *On Liberty and Life in Babylon: A Pilgrim's Pragmatic Proposal*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 354; Timothy L. Hall, *Incendiaries of Commonwealths: Baptists and Law*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 340; Randy Lee, *Judaism and John Paul II: Coming to Grips with What Law Means in the Hands of God*, 45 J. CATH. LEGAL STUD. 415 (2006); Randy Lee, *Lessons to Be Learned, Lessons to Live Out: Catholicism at the Crossroads of Judaism and American Legalism*, 49 ST. LOUIS U. L.J. 367 (2005); William Joseph Wagner, *Christianity and the Civil Law: Secularity, Privacy and the Status of Objective Moral Norms*, 71 ST. JOHN'S L. REV. 515 (1997); Stephen P. Wink, *Something's Happening Here*, 27 TEX. TECH L. REV. 1393 (1996); John Witte, Jr., *Law and Religion: The Challenges of Christian Jurisprudence*, 2 U. ST. THOMAS L.J. 439 (2005); Paul J. Zwier, *Looking to "Ground Motives" for a Religious Foundation for Law*, 54 EMORY L.J. 357 (2005).

²⁰ See generally, e.g., Angela C. Carmella, *A Catholic View of Law and Justice*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 255; Timothy W. Floyd, *Lawyers and Prophetic Justice*, 58 MERCER L. REV. 513 (2007); Thomas L. Shaffer, *Should a Christian Lawyer Sign up for Simon's Practice of Justice?*, 51 STAN. L. REV. 903 (1999); Michael David Lopez, *What is Justice?*, 1999 BYU L. REV. 933 (reviewing DUNCAN B. FORRESTER, *CHRISTIAN JUSTICE AND PUBLIC POLICY* (1997)).

²¹ See generally, e.g., Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843 (2001); Adam S. Chodorow, *Biblical Tax Systems and the Case for Progressive Taxation*, 23 J.L. & RELIGION 51 (2008); Susan Pace Hamill, *An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics*, 25 VA. TAX REV. 671 (2006).

²² See generally, e.g., Joseph Allegretti, *The Theological Perspective: Lawyers, Clients, and Covenant: A Religious Perspective on Legal Practice and Ethics*, 66 FORDHAM L. REV. 1101 (1998); Joseph G. Allegretti, *Can Legal Ethics Be Christian?*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 453; Joseph G. Allegretti, *In a Dark Wood: Dante as a Spiritual Guide for Lawyers*, 17 ST. THOMAS L. REV. 875 (2005); Douglas A. Allen, *A Spiritual Look at Choosing a Legal Career*, 27 TEX. TECH L. REV. 977 (1996); David T. Ball, *Interfaith Legal Services: Taking Stock of a Faith-Based Pro Bono Initiative*, 72 UMKC L. REV. 301 (2003); Milner S. Ball, *Lawyers in Context: Moses, Brandeis and the A.B.A.*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321 (2000); Gordon J. Beggs, *Laboring Under the Sun: An Old Testament Perspective on the Legal Profession*, 28 PAC. L.J. 257 (1996); Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635 (1997); Teresa Stanton Collett, *Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation with Evil*, 66 FORDHAM L. REV. 1339 (1998); Marie A. Failing, *Propter Honoris Respectum: Is Tom*

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²³ See generally, e.g., ELIZABETH MENSCH & ALAN FREEMAN, *THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE?* (1993); John M. Breen, *Modesty and Moralism: Justice, Prudence, and Abortion—A Reply to Skeel & Stuntz*, 31 HARV. J.L. & PUB. POL'Y 219 (2008); Cynthia B. Cohen, *Protestant Perspectives on the Uses of the New Reproductive Technologies*, 30 FORDHAM URB. L.J. 135 (2002); Larry Cunningham, *Can a Catholic Lawyer Represent a Minor Seeking a Judicial Bypass for an Abortion? A Moral and Canon Law Analysis*, 44 J. CATH. LEGAL STUD. 379 (2005); John A. Eidsmoe, *A Biblical View of Abortion*, 4 J. CHRISTIAN JURISPRUDENCE 17 (1984); John Finnis, *Unjust Laws in a Democratic Society: Some Philosophical and Theological Reflections*, 71 NOTRE DAME L. REV. 595 (1996); Kathleen A. Cassidy Goodman, *The Mutation of Choice*, 28 ST. MARY'S L.J. 635 (1997); Charles I. Lugosi, *When Abortion Was a Crime: A Historical Perspective*, 83 U. DET. MERCY L. REV. 51 (2006); Michael W. McConnell, *Religion and the Search for a Principled Middle Ground on Abortion*, 92 MICH. L. REV. 1893 (1994); Paul S. McConnell, *The Unalienable Right to Life*, 8 J. CHRISTIAN JURISPRUDENCE 53 (1990); John T. Noonan, Jr., *Christian Tradition and the Control of Human Reproduction*, 4 J. CHRISTIAN JURISPRUDENCE 1 (1983); John J. O'Connor, *Human Rights, Human Lives*, 5 J. CHRISTIAN JURISPRUDENCE 27 (1984); Kurt A. Richardson, *Human Reproduction by Cloning in Theological Perspective*, 32 VAL. U. L. REV. 739 (1998); Val D. Ricks, *Abortion and Latter-Day Saint Experiences with Children and Law*, 1 MARGINS 523 (2001); Susan J. Stabile, *John Courtney Murray and the Abortion Debate*, 4 J. CATH. SOC. THOUGHT 87 (2007).

family law,²⁴ education,²⁵ criminal law,²⁶ equality,²⁷ contract law,²⁸ corporate law,²⁹ immigration law,³⁰ war,³¹ environmental law,³² Catholic

²⁴ See generally, e.g., Don S. Browning, *Linda McClain's The Place of Families and Contemporary Family Law: A Critique from Critical Familism*, 56 EMORY L.J. 1383 (2007); Don S. Browning, *Modern Law and Christian Jurisprudence on Marriage and Family*, 58 EMORY L.J. 31 (2008); Gary Chamberlain, *A Religious Argument for Same-Sex Marriage*, 2 SEATTLE J. SOC. JUST. 495 (2004); Dan Coats, *From Liberty to Dependence: Public Policy and the American Family*, 69 NOTRE DAME L. REV. 1027 (1994); Daniel A. Crane, A "Judeo-Christian" Argument for Privatizing Marriage, 27 CARDOZO L. REV. 1221 (2006); Marie A. Failing, *Gender, Justice, and the Left Hand of God: A Lutheran Perspective*, 9 S. CAL. REV. L. & WOMEN'S STUD. 45 (1999); Mark Garavaglia, *The Value of the Post-Modern Child: Property, Personhood, or Purgatory?*, 80 U. DET. MERCY L. REV. 1 (2002); Cyrene Grothaus-Day, *From Pipette to Cradle, From Immortality to Extinction*, 7 RUTGERS J.L. & RELIGION 2 (2005); Daniel Pollack, *Classical Religious Perspectives of Adoption Law*, 79 NOTRE DAME L. REV. 693 (2004); Robert E. Rhodes Jr., *On Law and Chastity*, 76 NOTRE DAME L. REV. 643 (2001); Victor C. Romero, *An "Other" Christian Perspective on Lawrence v. Texas*, 45 J. CATH. LEGAL STUD. 115 (2006); Herbert W. Titus, *Defining Marriage and the Family*, 3 WM. & MARY BILL RTS. J. 327 (1994); John W. Whitehead, *Judicial Schizophrenia: The Family and Education in a Secular Society*, 3 J. CHRISTIAN JURISPRUDENCE 49 (1982); John Witte, Jr., *God's Joust, God's Justice: An Illustration from the History of Marriage Law*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 406; John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019 (2001).

²⁵ See generally, e.g., Robert John Araujo, *Realizing a Mission: Teaching Justice as a "Right Relationship"*, 74 ST. JOHN'S L. REV. 591 (2000); Anthony Bevilacqua, Archbishop of Phila., Keynote Address at the St. John's Law Review Symposium on Law, Religion and the Public Good, in 75 ST. JOHN'S L. REV. 191 (2001); Jeffery A. Brauch, *It Sounded Great in the Glossy Brochure. So Where Is It? Carrying Out the Mission at a Mission Driven School*, 33 U. TOL. L. REV. 1 (2001); Lynne Buzzard, *Religiously Affiliated Law Schools: Macro-Dynamics in Contemporary Culture*, 78 MARQ. L. REV. 283 (1995); Lynne R. Buzzard, *A Christian Law School: Images and Vision*, 78 MARQ. L. REV. 267 (1995); Nicholas P. Cafardi, *Catholic Law Schools and Ex Corde Ecclesiae, or What Makes a Law School Catholic?*, 33 U. TOL. L. REV. 7 (2001); Joseph P. Daoust, *Legal Education in a Catholic University: Mission and Possibilities*, 78 U. DET. MERCY L. REV. 27 (2000); David K. DeWolf & Robert John Araujo, *And God's Justice Shall Become Ours: Reflections on the Teaching of Law in a Catholic University*, 11 REGENT U. L. REV. 37 (1998); Daniel Gordon, *Ex Corde Ecclesiae: The Conflict Created for American Catholic Law Schools*, 34 GONZ. L. REV. 125 (1998); Randy Lee, *Are Religiously-Affiliated Law Schools Obsolete in America?*, 74 ST. JOHN'S L. REV. 655 (2000); Peter Margulies, *Commitment, Craft, and the Golden Calf: Lessons in the Book of Exodus for Legal Education*, 74 ST. JOHN'S L. REV. 667 (2000); Edward J. Murphy, *The Sign of the Cross and Jurisprudence*, 71 NOTRE DAME L. REV. 577 (1996); Raymond C. O'Brien, *A Theological Method for Legal Education*, 5 J. CHRISTIAN JURISPRUDENCE 87 (1984); C. Scott Pryor, *Mission Possible: A Paradigm for Analysis of Contractual Impossibility at Regent University*, 74 ST. JOHN'S L. REV. 691 (2000); William Quigley, *Social Justice Panel: Seven Principles for Catholic Law Schools Serious About a Preferential Option for the Poor*, 1 U. ST. THOMAS L.J. 128 (2003); Mark Sargent, *An Alternative to the Sectarian Vision: The Role of the Dean in an Inclusive Catholic Law School*, 33 U. TOL. L. REV. 171 (2001); Mary C. Scarlato & Lynne Marie Kohm, *Integrating Religion, Faith, and Morality in Traditional Law School Courses*, 11 REGENT U. L. REV. 49 (1998); Thomas L. Shaffer, *On Being a Professional Elder*, 62 NOTRE DAME L. REV. 624 (1987); David M. Smolin, *Religion, Education, and the Theoretically Liberal State: Contrasting Evangelical and Secularist Perspectives*, 44 J. CATH. LEGAL STUD. 99 (2005); Ken-

neth A. Sprang, *Holistic Jurisprudence: Law Shaped by People of Faith*, 74 ST. JOHN'S L. REV. 753 (2000); Lee J. Strang, *The Role of the Christian Legal Scholar: The Call for a Modern St. Benedict*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 59 (2006); Herbert W. Titus, *Education—Caesar's or God's: A Constitutional Question of Jurisdiction*, 3 J. CHRISTIAN JURISPRUDENCE 101 (1982); Herbert W. Titus, *God, Evolution, Legal Education, and Law*, 1 J. CHRISTIAN JURISPRUDENCE 11 (1980); Dennis Turner, *Infusing Ethical, Moral, and Religious Values into a Law School Curriculum: A Modest Proposal*, 24 U. DAYTON L. REV. 283 (1999); Amelia Uelmen, *An Explicit Connection Between Faith and Justice in Catholic Education: Why Rock the Boat?*, 81 U. DET. MERCY L. REV. 921 (2004); Grace M. Walle, *Doing Justice: A Challenge for Catholic Law Schools*, 28 ST. MARY'S L.J. 625 (1997).

²⁶ See generally, e.g., GERALD AUSTIN MCHUGH, *CHRISTIAN FAITH AND CRIMINAL JUSTICE: TOWARD A CHRISTIAN RESPONSE TO CRIME AND PUNISHMENT* (1978); Anthony V. Alfieri, *Mercy Lawyers*, 82 N.C. L. REV. 1297 (2004); Jordan J. Ballor, *To Reform or Abolish? Christian Perspectives on Punishment, Prison, and Restorative Justice*, 6 AVE MARIA L. REV. 481 (2008); John J. Dilulio, Jr., *Catholic Social Teaching, Racial Reconciliation, and Criminal Justice*, 3 J. CATH. SOC. THOUGHT 121 (2006); Clifford S. Fishman, *The Mirror of Justice Lecture: "Old Testament Justice"*, 51 CATH. U. L. REV. 405 (2002); Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004); Stephen E. Henderson, *Hijacked from Both Sides—Why Religious Extremists and Religious Bigots Share an Interest in Preventing Academic Discourse on Criminal Jurisprudence Based on the First Principles of Christianity*, 37 IDAHO L. REV. 103 (2000).

²⁷ See generally, e.g., W. Burlette Carter, *What's Love Got to Do with It? Race Relations and the Second Great Commandment*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT*, *supra* note 13, at 133; Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, the Culture War, and Romer v. Evans*, 72 NOTRE DAME L. REV. 345 (1997); George P. Fletcher, *In God's Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV. 1608 (1999); José Roberto Juárez, Jr., *Hispanics, Catholicism, and the Legal Academy*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT*, *supra* note 13, at 163; Gerald R. Thompson, *Legal Equality: No Respector of Persons*, 7 J. CHRISTIAN JURISPRUDENCE 139 (1988).

²⁸ See generally, e.g., E. Allan Farnsworth, *Parables About Promises: Religious Ethics and Contract Enforceability*, 71 FORDHAM L. REV. 695 (2002); C. M.A. McCauliff, *A Historical Perspective on Anglo-American Contract Law*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT*, *supra* note 13, at 470; Scott Pryor, *Consideration in the Common Law of Contracts: A Biblical-Theological Critique*, 18 REGENT U. L. REV. 1 (2005); Scott Pryor, *Principled Pluralism and Contract Remedies*, 40 MCGEORGE L. REV. 723 (2009); Val D. Ricks, *Contract Law and Christian Conscience*, 2003 BYU L. REV. 993.

²⁹ See generally, e.g., Leo L. Clarke, Bruce P. Frohnen & Edward C. Lyons, *The Practical Soul of Business Ethics: The Corporate Manager's Dilemma and the Social Teachings of the Catholic Church*, 29 SEATTLE U. L. REV. 139 (2005); Scott Fitzgibbon, "True Human Community": *Catholic Social Thought, Aristotelean Ethics, and the Moral Order of the Business Company*, 45 ST. LOUIS U. L.J. 1243 (2001); Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U. L. REV. 1 (2006); Robert G. Kennedy, *Corporations, Common Goods, and Human Persons*, 4 AVE MARIA L. REV. 1 (2006); Susan J. Stabile, *Using Religion to Promote Corporate Responsibility*, 39 WAKE FOREST L. REV. 839 (2004); George G. Higgins, *Book Review*, 53 INDUS. & LAB. REL. REV. 165 (1999) (reviewing STEWART W. HERMAN, *DURABLE GOODS: A COVENANTAL ETHIC FOR MANAGEMENT AND EMPLOYEES* (1998)).

³⁰ See generally, e.g., Kathryn A. Lee, *The Religious Imagination, Empathy, and Hearing the "Other": Judge John T. Noonan, Jr. and Immigration*, 83 U. DET. MERCY L. REV. 923

Social Teaching,³³ the judiciary,³⁴ torts,³⁵ the death penalty,³⁶ pluralism studies,³⁷ scripture studies,³⁸ science,³⁹ feminist jurisprudence,⁴⁰ alter-

(2006); Elizabeth McCormick & Patrick McCormick, *Hospitality: How a Biblical Virtue Could Transform United States Immigration Policy*, 83 U. DET. MERCY L. REV. 857 (2006); Michael Scaperlanda, *Immigration and Evil: The Religious Challenge*, 83 U. DET. MERCY L. REV. 835 (2006); Marah Carter Stith, *Immigration Control: A Catholic Dilemma?*, 84 U. DET. MERCY L. REV. 73 (2007).

³¹ See generally, e.g., Darrell Cole, *Death Before Dishonor or Dishonor Before Death? Christian Just War, Terrorism, and Supreme Emergency*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 81 (2002); Michael J. Davidson, *War and the Doubtful Soldier*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 91 (2005); Thomas L. Shaffer, *Nuclear Weapons, Lethal Injection, and American Catholics: Faith Confronting American Civil Religion*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7 (2000).

³² See generally, e.g., W. Wade Berryhill, *Creation, Liberation, and Property: Virtues and Values Toward a Theocentric Earth Ethic*, 16 REGENT U. L. REV. 1 (2003); Harold Coward, *Religious Responses to the Population Sustainability Problematic: Implications for Law*, 27 ENVTL. L. 1169 (1997); Daryl Fisher-Ogden & Shelley Ross Saxer, *World Religions and Clean Water Laws*, 17 DUKE ENVTL. L. & POL'Y F. 63 (2006); John Copeland Nagle, *Christianity and Environmental Law*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 435.

³³ See generally, e.g., John J. Coughlin, *The Human Being, Catholic Social Teaching and the Law*, 1 J. CATH. SOC. THOUGHT 313 (2004); F. Giba-Matthews, *A Catholic Lawyer and the Church's Social Teaching*, 66 FORDHAM L. REV. 1541 (1998); Charles J. Reid, Jr., *The Three Antinomies of Modern Legal Positivism and Their Resolution in Christian Legal Thought*, 18 REGENT U. L. REV. 53 (2005); Vincent Rougeau, *Justice, Community and Solidarity: Rethinking Affirmative Action Through the Lens of Catholic Social Thought*, 1 J. CATH. SOC. THOUGHT 335 (2004); Lucia Ann Silecchia, *On Doing Justice and Walking Humbly With God: Catholic Social Thought on Law as a Tool for Building Justice*, 46 CATH. U. L. REV. 1163 (1997).

³⁴ See generally, e.g., Francis J. Beckwith, *Taking Theology Seriously: The Status of the Religious Beliefs of Judicial Nominees for the Federal Bench*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 455 (2006); Stephen L. Carter, *Introduction*, 27 TEX. TECH L. REV. 925 (1996); Timothy W. Floyd, *The Practice of Law as a Vocation or Calling*, 66 FORDHAM L. REV. 1405 (1998); Mark B. Greenlee, *Faith on the Bench: The Role of Religious Belief in the Criminal Sentencing Decisions of Judges*, 26 DAYTON L. REV. 1 (2000); Scott C. Idleman, *The Role of Religious Values in Decision Making*, 68 IND. L.J. 433 (1993); Thomas L. Shaffer, Book Review, 67 TEX. L. REV. 1327 (1989) (reviewing ROBERT A. BURT, *THE JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND* (1988)).

³⁵ See generally, e.g., Robert F. Cochran, Jr., *Tort Law and Intermediate Communities: Calvinist and Catholic Insights*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 486; Douglas H. Cook, *A Faith-Based Perspective on Tort Causation*, 16 U. ST. THOMAS L. REV. 455 (2004); Randy Lee, *Reflecting on Negligence Law and the Catholic Experience: Comparing Apples and Elephants*, 20 ST. THOMAS L. REV. 3 (2007); Randy Lee, *When Would Jesus Sue?: Tort Law in the Hands of Christ*, 81 U. DET. MERCY L. REV. 845 (2004).

³⁶ See generally, e.g., DALE S. RECINELLA, *THE BIBLICAL TRUTH ABOUT AMERICA'S DEATH PENALTY* (2004); Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325 (1996); Anthony V. Baker, "Through a Glass, Darkly . . .": *Christianity, Law, and Capital Execution in Twenty-First Century America*, 82 U. DET. MERCY L. REV. 521 (2005); Stephen B. Bright, *The Electric Chair and the Chain Gang: Choices and Challenges for America's Future*, 71 NOTRE

native dispute resolution,⁴¹ economics,⁴² and Christian legal theory!⁴³ There are some bibliographical sources available,⁴⁴ and one could

DAME L. REV. 845 (1996); Kimberly J. Cook, *Abortion, Capital Punishment, and the Politics of "God's Will,"* 9 WM. & MARY BILL RTS. J. 105 (2000); Timothy W. Floyd, "What's Going On?": *Christian Ethics and the Modern American Death Penalty*, 32 TEX. TECH L. REV. 931 (2001); Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541 (2003); Richard H. Hiers, *The Death Penalty and Due Process in Biblical Law*, 81 U. DET. MERCY L. REV. 751 (2004); Jill Jones, *The Christian Executioner: Reconciling "An Eye for an Eye" with "Turn the Other Cheek,"* 27 PEPP. L. REV. 127 (1999); James J. Megivern, *Our National Shame: The Death Penalty and the Disuse of Clemency*, 28 CAP. U. L. REV. 595 (2000); Mark Taylor, Inaugural Address at Princeton Theological Seminary: "The Executed God: The Way of the Cross in Lockdown America," in 1 RUTGERS J.L. & RELIGION 2 (1999); Gerald F. Uelman, *Catholic Jurors and the Death Penalty*, 44 J. CATH. LEGAL STUD. 355 (2005).

³⁷ See generally, e.g., ROBERT DESTRO & MICHAEL S. ARIENS, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY (1996); Randy Beck, *The City of God and the Cities of Men: A Response to Jason Carter*, 41 GA. L. REV. 113 (2006); Jason Carter, *Toward a Genuine Debate About Morals, Religion, Politics and Law: Why America Needs a Christian Response to the "Christian" Right*, 41 GA. L. REV. 69 (2006); David S. Caudill, *Pluralism and the Quality of Religious Discourse in Law and Politics*, 6 U. FLA. J.L. & PUB. POL'Y 135 (1994); Alfred J. Sciarrino, *Civil Rights: Religion in the Public Sphere*, 30 HOW. L.J. 1127 (1987); David M. Smolin, *Cracks in the Mirrored Prison: An Evangelical Critique of Secularist Academic and Judicial Myths Regarding the Relationship of Religion and American Politics*, 29 LOY. L.A. L. REV. 1487 (1996).

³⁸ See generally, e.g., Daniel Friedmann, *From the Trial of Adam and Eve to the Judgments of Solomon and Daniel*, 5 RUTGERS J.L. & RELIGION 3 (2003); Andrew R. Simmonds, *Measure for Measure: Two Misunderstood Principles of Damages, Exodus 21:22–25 "Life for Life, Eye for Eye" and Matthew 5:38–39 "Turn the Other Cheek,"* 17 ST. THOMAS L. REV. 123 (2004); Craig Stern, *Crime, Moral Luck, and the Sermon on the Mount*, 48 CATH. U. L. REV. 801 (1999).

³⁹ See generally, e.g., David S. Caudill, *Neo-Calvinism and Science: A Christian Perspective on Post-Daubert Law/Science Relations*, in FAITH AND LAW: HOW RELIGIOUS TRADITIONS FROM CALVINISM TO ISLAM VIEW AMERICAN LAW 34 (Robert F. Cochran, Jr., ed., 2008); James F. Childress, *Protestant Perspectives on Informed Consent (Particularly in Research Involving Human Participants)*, 30 FORDHAM URB. L.J. 187 (2002).

⁴⁰ See generally, e.g., Ruth Colker, *An Embodied Bisexual Perspective*, 7 YALE J.L. & HUMAN. 163 (1995); Teresa Stanton Collett, *Independence or Interdependence? A Christian Response to Liberal Feminists*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 178; Leslie Griffin, *Citizen-Soldiers Are Like Priests: Feminism in Law and Theology*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 194; Lynne Marie Kohm, *A Christian Perspective on Gender Equality*, 15 DUKE J. GENDER L. & POL'Y 339 (2008).

⁴¹ See generally, e.g., Joseph Allegretti, *A Christian Perspective on Alternative Dispute Resolution*, 28 FORDHAM URB. L.J. 997 (2001).

⁴² See generally, e.g., Stephen M. Bainbridge, *Law and Economics: An Apologia*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 208; George E. Garvey, *A Catholic Social Teaching Critique of Law and Economics*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 224; Mark A. Sargent, *Utility, the Good and Civil Happiness: A Catholic Critique of Law and Economics*, 44 J. CATH. LEGAL STUD. 35 (2005).

⁴³ See generally, e.g., MICHAEL D. BEATY ET AL., CHRISTIAN THEISM AND MORAL PHILOSOPHY (1998); William S. Brewbaker III, *Theory, Identity, Vocation: Three Models of*

easily write an article entitled *The Amazing Diversity of Christian Scholarship*. Indeed, when Skeel announces that “70% or more [of Christian legal scholarship] surely” involves philosophy, the religion clauses, “or some combination of the two,”⁴⁵ he must be engaging in what Llewellyn called “armchair estimates” (to contrast such reflections with empirical surveys).⁴⁶

But for Skeel, there is a vacuum, and the “most prominent exceptions” to this vacuum “are two recent books”: *Christian Perspectives on Legal Thought* and *The Teachings of Modern Christianity on Law, Politics, and Human Nature*.⁴⁷ Skeel dismisses the former as not developing “any particular thesis or set of theses about the relationship between Christianity and law.”⁴⁸ And the latter, in Skeel’s view, has “remarkably little to say about the kind of issues the term ‘law’ brings to mind for most of us.”⁴⁹ Who is “us”?

Christian Legal Scholarship, 39 SETON HALL L. REV. 17 (2009); Stephen L. Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 25; Elizabeth Mensch, *Christianity and the Roots of Liberalism*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 54; Michael J. Perry, *Catholicism, the Magisterium, and Moral Controversy: An Argument for Independent Judgment (With Particular Reference to Catholic Law Schools)*, 26 U. DAYTON L. REV. 293 (2001); H. Jefferson Powell, *The Earthly Peace of the Liberal Republic*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 73; Thomas L. Shaffer, *The Radical Reformation and the Jurisprudence of Forgiveness*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 321; Leslie Griffin, *The Trivialization of Religion*, 1994 WIS. L. REV. 1287 (reviewing STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993)).

⁴⁴ See generally, e.g., MICHAEL P. SCHUTT, LAW AND THE BIBLICAL TRADITION: SELECT BIBLIOGRAPHY FOR CHRISTIAN LAW STUDENTS (2004) (288 entries, including over 100 books and law review articles, as well as many historical sources), available at <http://www.regent.edu/acad/schlaw/crossgavel/docs/bibliography.pdf>; Christian Faith and Action Trust, Law in Christian Perspective, <http://homepages.ihug.co.nz/~faithact/BIB14.HTM> (last visited June 3, 2010) (twenty-eight entries); Robert W. Tuttle, Lawyers and Christian Ethics: A Bibliography, <https://www.elca.org/What-We-Believe/Social-Issues/Journal-of-Lutheran-Ethics/Issues/October-2001/Lawyers-and-Christian-Ethics-A-Bibliography.aspx> (last visited June 3, 2010) (160 entries, including thirty-two books, fifty-three law review articles, and six symposia).

⁴⁵ See David A. Skeel Jr., *The Paths of Christian Legal Scholarship*, 12 GREEN BAG 2D 169, 178 (2009).

⁴⁶ See, K.N. Llewellyn, *On Philosophy in American Law*, 82 U. PA. L. REV. 205, 212 (1934).

⁴⁷ Skeel, *supra* note 1, at 1480.

⁴⁸ *Id.* (discussing CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13).

⁴⁹ *Id.* at 1480–81 (discussing THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE (John Witte, Jr. & Frank S. Alexander eds., 2005)).

Skeel's evaluation of Christian scholarship borders on the ridiculous—what were the twenty-seven legal scholars in *Christian Perspectives on Legal Thought* doing if not developing a “particular thesis or set of theses about the relationship between Christianity and law?”⁵⁰ Skeel's minimalistic reading of that book's “lesson”—that “it is not clear whether there is any ‘there there’”⁵¹—can only be explained by his rhetorical need for a “vacuum.” And when *The Teachings of Modern Christianity* fails to offer Skeel his longed-for religious insights into “the proper scope of the criminal law or into the rise of administrative lawmaking,” or into “gay rights and gay marriage or gambling regulation,”⁵² one gets the impression that no one has ever thought about such matters. What about the *previous* scholarly record of the twenty-eight authors of essays in *Christian Perspectives on Legal Thought*? What about the *early* (1950s) symposia on law and Christianity at Oklahoma⁵³ and Vanderbilt?⁵⁴ More recently, what about the last nineteen volumes of *Regent University Law Review* (established in 1991), the *Journal of Christian Jurisprudence* (published from 1980–1990), the *Journal of Catholic Legal Studies* (published since 2005, the successor to *The Catholic Lawyer*, first published in 1926), and the articles on Christianity and law in *The Journal of Law and Religion* (initiated in 1982)? Did Skeel even do a bibliographic search of Christian legal scholarship (in books, and in legal and nonlegal journals) over the past few decades? He may have, but his “methodology” would have wiped out most of what he found. For example, if one writes about “[w]hat kinds of religious expression are permissible in the public square,” which is seemingly a crucial issue in light of the ascendancy and in-

⁵⁰ *Id.* at 1480. Skeel's criticism is misguided because the editors of the volume did not mean to suggest that there is a single “Christian” perspective, see *Introduction to CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT*, *supra* note 13, at xvii, xix, and indeed wanted to demonstrate “the diversity of attitudes, doctrines, and approaches found within the broader Christian community,” *id.* at xx. Part I of the volume suggests “how Christian perspectives on law might differ from, or complement, current modes of thinking.” CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 1. Part II presents four perspectives—synthesist, conversionist, separatist, and dualist—on the Christian understanding of law. *Id.* at 241. Part III offers six examples of Christian approaches to substantive areas of law. *Id.* at 405. Each article develops a thesis or set of theses about the relationship between Christianity and law, but I suppose Skeel means to say that the authors did not all agree, hence there is a “vacuum” only in terms of there being no single, unifying thesis.

⁵¹ Skeel, *supra* note 1, at 1481 (discussing CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13).

⁵² *Id.*

⁵³ See *A Symposium on Law and Christianity*, 12 OKLA. L. REV. 45 (1959).

⁵⁴ See *A Symposium on Law and Christianity*, 10 VAND. L. REV. 879 (1957).

fluence of Christianity in politics, Skeel will deem such efforts “important but quite narrow.”⁵⁵ On the other hand, Skeel views public choice theory, about which he has written,⁵⁶ as a very important area, with great promise for robust Christian Scholarship:

One might expect to find a rich legal literature using public choice and related scholarship to explore whether [the influence of Christians in law and politics] operates through opinion leaders such as James Dobson or Chuck Colson, through church networks or through other, nonchurch organizations; whether it is ideologically or economically driven; and whether the influence (or its absence) manifests itself differently on different issues. Once again, one does not.⁵⁷

Without denying the influence of public choice theory, one wonders why this interesting project is so much more important—more “robust,” “rich,” and “promising”—than all of the Christian scholarship that Skeel rejects as narrow, limited, and forgettable. When Skeel adds “immigration, debt relief and poverty” to the list (alongside public choice theory) of untouched areas with obvious relevance for Christian scholars, *he* begins to look narrow and provincial—the tradition of drawing on “philosophy, history, or both” in natural law, human rights, legal ethics, First Amendment, and legal history scholarship is too “cloistered” for Skeel in comparison with the “vast recent literature on public choice and comparative institutional analysis” that awaits robust engagement.⁵⁸

As Skeel continues his analysis, he properly identifies the cultural hostility to religious perspectives and the “wages of evangelical anti-intellectualism.”⁵⁹ One can imagine Skeel mounting an argument that acknowledges the efforts of numerous Christian scholars over the years, but that explains why they are not a dominant movement in legal academia. Indeed, Skeel acknowledges (i) the revitalization of natural law theory,⁶⁰ (ii) the “genuine Christian legal scholarship” in Christian lawyering and ethics,⁶¹ (iii) the “magnetic attraction” of church-state issues for Christian legal scholars,⁶² and (iv) the “habitat”

⁵⁵ Skeel, *supra* note 1, at 1478.

⁵⁶ David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 VAND. L. REV. 647 (1997) (book review).

⁵⁷ Skeel, *supra* note 1, at 1479.

⁵⁸ *Id.* at 1506.

⁵⁹ *Id.* at 1486–91.

⁶⁰ *Id.* at 1495–97.

⁶¹ *Id.* at 1497–99.

⁶² *Id.* at 1499–1501.

of legal history.⁶³ Each category, however, is downplayed by Skeel—“theologically informed natural law scholarship” has been supposedly absent from legal scholarship until very recently;⁶⁴ the number of Christian scholars reflecting on ethics is “small,”⁶⁵ church-state issues are too “obvious,”⁶⁶ and Christian legal history is “more influential with historians than with legal scholars.”⁶⁷ As to all the “articles that feature an identifiably Christian perspective but do not fit into” the above four categories, they unfortunately are not “the basis for a serious body of Christian legal scholarship.”⁶⁸ We wonder why, but Skeel only offers two examples, which he (for some reason) considers “the two most important kinds of articles” excluded from his survey.⁶⁹ First, there are articles that “use a Biblical passage or person to explore a legal issue,” which, according to Skeel, are “usually . . . inspired by the law and literature movement.”⁷⁰ Skeel’s only examples from this supposed “genre” include his own article on Saul and David and the “classic article” on the parable of the Prodigal Son, the latter of which is not, in Skeel’s view, Christian scholarship.⁷¹ In any event, this “genre is too thin . . . to constitute a category” for Skeel,⁷² but we do not know why, because Skeel does not seem to have surveyed the field of Christian scholarship. The second exclusion is the field of articles that challenge prominent movements in legal scholarship.⁷³ Skeel offers three examples of good work in this area, but dismisses the (unidentified) remainder as failing “to master the literature being critiqued,” and as failing to “develop a Christian theory of law against which the legal movement will be measured.”⁷⁴ These are unsupported accusations reflecting limited bibliographical research and a strikingly arrogant attitude.

⁶³ Skeel, *supra* note 1, at 1501.

⁶⁴ *Id.* at 1495.

⁶⁵ *Id.* at 1497.

⁶⁶ *Id.* at 1499.

⁶⁷ *Id.* at 1502.

⁶⁸ *Id.*

⁶⁹ Skeel, *supra* note 1, at 1502.

⁷⁰ *Id.*

⁷¹ *Id.* at 1502–03 & nn.110–11 (citing Robert A. Burt, *Constitutional Law and the Teachings of the Parables*, 93 YALE L.J. 455 (1984); David A. Skeel, Jr., *Saul and David, and Corporate Takeover Law*, in LITERATURE AND LEGAL PROBLEM SOLVING 151 (Paul Heald ed., 1998)).

⁷² *Id.* at 1503.

⁷³ *Id.*

⁷⁴ *Id.*

In a follow-up article entitled, *The Paths of Christian Legal Scholarship*,⁷⁵ which seems to be a response to critics of *The Unbearable Lightness*, Skeel defiantly states that he fully stands by the assessment in *The Unbearable Lightness*.⁷⁶ Skeel's focus changes somewhat to the absence of Christian legal scholarship in *elite* law journals; he refers to his survey that, of course, revealed only a handful of discernible Christian writings.⁷⁷ Then Skeel reports that he sees hope on the horizon, some promising directions, such as Christian sociological jurisprudence, historical retrieval, normative analyses, "nature of Christian influence on law," and, maybe, philosophy.⁷⁸ Skeel cites his own work with William J. Stuntz as two of the five examples of these encouraging trends.⁷⁹ But Skeel concedes that "[y]oung scholars in secular law schools still face significant disincentives" from conducting Christian scholarship *and* that it may be more difficult to place manuscripts in elite journals.⁸⁰ From my vantage point, it has always been difficult to place Christian scholarship in elite law journals, even for those with no disincentives. Perhaps that is why Skeel, to his surprise, did not find a lot of examples in his survey.

Returning to *The Unbearable Lightness* article, Skeel offers some examples of missed opportunities—"of roads not taken"—by Christian legal scholars.⁸¹ Skeel's first example is the use of Abraham Kuyper as a starting point.⁸² Kuyper, according to Skeel, developed "a normative Christian theory of the proper role of law generally."⁸³ Skeel then identifies Kuyper's notion of sphere sovereignty—the division of authority among separate domains such as family, church and government—as a "normative, Christian theory of politics and law."⁸⁴ While I agree that the suggestion of a "limited role for the state . . . has obvious implications for legal doctrine" and that Kuyper was

⁷⁵ Skeel, *supra* note 45.

⁷⁶ *Id.* at 174. Indeed, at the 2009 Seton Hall conference on religious legal theory, after the current paper was delivered, Skeel basically (in his keynote address) repeated the arguments in his "unbearable lightness" article. See David A. Skeel, Jr., Keynote Address at Seton Hall University School of Law Conference on Religious Legal Theory: The State of the Field (Nov. 12, 2009).

⁷⁷ Skeel, *supra* note 45, at 174 n.16.

⁷⁸ See *id.* at 174–77.

⁷⁹ See *id.* at 176 n.27.

⁸⁰ See *id.* at 181.

⁸¹ Skeel, *supra* note 1, at 1506.

⁸² *Id.* at 1506–07.

⁸³ *Id.* at 1506.

⁸⁴ *Id.* at 1507–08.

“[m]ore a visionary than a systematic scholar,”⁸⁵ it is *very* misleading to dismiss as insignificant the development of Kuyper’s theory among Neo-Calvinist scholars as Skeel does:

Subsequent Dutch theorists attempted to draw out its implications, and a few more recent theologians and historians have underscored its potential relevance for today. But the use of [Kuyper’s] work in contemporary American legal scholarship has tended to be more impressionistic than sustained, and Christian legal scholars have not employed it as a base camp for a sustained normative account.⁸⁶

The footnotes to this quotation are interesting because they first acknowledge Herman Dooyeweerd as Kuyper’s best-known follower, and then refer to Dooyeweerd’s modal philosophy, which distinguishes fourteen aspects of reality.⁸⁷ Skeel does not even mention that Dooyeweerd was a lawyer and a philosopher of law, and that he, far beyond Kuyper’s views, developed a systematic account of law and legal categories from a Christian perspective.⁸⁸ Next, the footnotes concede that “several recent articles drawing on Kuyper’s sphere sovereignty may foreshadow the kind of sustained treatment that the literature so far lacks.”⁸⁹ Only one article, by Robert Cochran, is offered as an example.⁹⁰

Skeel also mentions his own modest rule-of-law perspective and states that one might imagine other, very different Christian approaches both to the legal system generally and to particular legal issues.⁹¹ Skeel need not be so imaginative, however, as other approaches already exist, but Skeel’s rhetoric of dismissiveness already cleared these approaches off the table. Other Christian legal scholars have been, according to Skeel, working in scattered outposts and

⁸⁵ *Id.* at 1508.

⁸⁶ *Id.* at 1508–09.

⁸⁷ Skeel, *supra* note 1, at 1508–09 nn.130–31.

⁸⁸ See generally 1 HERMAN DOOYEWEERD, ENCYCLOPEDIA OF THE SCIENCE OF LAW (Alan M. Cameron ed., Robert D. Knudsen trans., 2002) (remaining four volumes of the *Encyclopedia Van Der Rechtswetenschap* have not yet been published in English); HERMAN DOOYEWEERD, ESSAYS IN LEGAL, SOCIAL, AND POLITICAL PHILOSOPHY (John Witte, Jr. et al. eds., Albert M. Wolfers et al. trans., 1997); Alan Cameron, *Implications of Dooyeweerd’s Encyclopedia of Legal Science*, in CONTEMPORARY REFLECTIONS ON THE PHILOSOPHY OF HERMAN DOOYEWEERD (D.F.M. Strauss & Michelle Botting eds., 2000).

⁸⁹ Skeel, *supra* note 1, at 1509 n.131.

⁹⁰ *Id.* (citing Robert F. Cochran, Jr., *Tort Law and Intermediate Communities: Calvinist and Catholic Insights*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 486).

⁹¹ See *id.* at 1509–14.

producing scholarship that is not important, true, genuine, rich, serious, sustained, or adequately informed. Skeel looks forward with hope, but he looks back with blinders on. Although this makes for an exciting argument for anyone not familiar with the Christian scholarly tradition, that tradition is not as remarkably thin, shockingly narrow, or vacuous as Skeel wants readers to believe.

Skeel writes in the voice of someone who surveyed the landscape of Christian legal scholarship, but he did not. To say that Harold Berman was, in the 1970s, one of the few legal scholars who saw that religion had contemporary significance for law is simply not true.⁹² And to limit a survey to six or eight leading law reviews is elitist and misleading, especially because Skeel is careful to explain, early in his analysis, why there might be a bias against Christian legal scholarship in elite law schools. Finding an absence there is hardly strange, surprising, or shocking.

Then there is Skeel's rhetorical habit of referring to the Keats-like "brightest star" (Mike McConnell),⁹³ the *sole* other "prominent[]" figure (Steven Smith),⁹⁴ and "the two leading Christian legal theorists" (Michael Perry and Kent Greenawalt),⁹⁵ which should leave readers wondering where everyone went. Skeel actually mentions Noonan, Finnis, Glendon, Robert P. George, Hittinger, Hartigan, Collett, Yoder, Hauerwas, Shaffer, Cochran, Allegretti, Milner S. Ball, Lesnick, Gerber, Uelmen, Tuttle, Berg, Stephen L. Carter, Smolin, Modak-Truran, Davison M. Douglas, Witte, Bainbridge, and Brewbaker⁹⁶—a bibliography of their scholarship alone would be imposing. But he fails to mention many more scholars with multiple publications in the

⁹² See generally, e.g., LYNN ROBERT BUZZARD, *CHRISTIAN PERSPECTIVES ON LAW AND JUSTICE* (1977); JOHN WARWICK MONTGOMERY, *THE LAW ABOVE THE LAW* (1975); THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT* (1981); Frank S. Alexander, *Validity and Function of Law: The Reformation Doctrine of Usus Legis*, 31 *MERCER L. REV.* 509 (1980); Milner S. Ball, *The Politics of God in the Maturation of the Law*, 4 *GA. L. REV.* 555 (1970); Michael D. Bayles, *Legislating Morality*, 22 *WAYNE L. REV.* 759 (1976); Richard John Neuhaus, *Law and the Rightness of Things*, 14 *VAL. U. L. REV.* 1 (1979); William Stringfellow, *Christianity, Poverty, and the Practice of Law*, 8 *CAP. U. L. REV.* 451 (1979); *supra* notes 53–54 and accompanying text (discussing symposia on law and Christianity in 1957 and 1959).

⁹³ Skeel, *supra* note 1, at 1499.

⁹⁴ *Id.* at 1499 n.95.

⁹⁵ *Id.* at 1500 & n.100.

⁹⁶ See *id.* at 1495–1504 & nn.81–85, 87–88, 93, 97–98, 105, 108, 114, 116.

field.⁹⁷ Even if Skeel is impliedly arguing that the others are not influential, his empirical metric is not clear.

When discussing the law and literature movement elsewhere, Skeel is just as limited in his representation of that field. He cites a highly dismissive article by Jane Baron, which is interesting not only because Skeel shares her style, but also one of her metrics—does law and literature have a single theory?⁹⁸ Hence Skeel's establishment of a "test" that must be met by Christian scholars to ensure uniformity in the enterprise.

Let us be clear: if Skeel is going to do a survey-type article to prove the relative absence of Christian legal scholarship, then he needs to consult the literature. And Skeel cannot escape that responsibility by defining Christian legal scholarship in a way that eliminates much of it or by using words like "informed" or "sustained treatment" to minimize the efforts of numerous Christian legal scholars. If the argument is that Christian scholarship does not meet Skeel's standard, then Skeel should make that argument and defend that standard. But Skeel should not pretend to do a survey. For example, as to scholarship inspired by Kuyper and neo-Calvinism, it is not only sphere sovereignty that Christian scholars have used. Dooyeweerd's critique of secular-faith systems is just as Kuyperian, just as inspira-

⁹⁷ In no particular order, and without being exhaustive, Lyman Johnson, Samuel Calhaun, Andrew McThenia, William Stringfellow, C. Scott Pryor, Lynn Buzzard, Frank S. Alexander, Timothy Hall, Doug Kmiec, Michael Perry, Patrick Brennan, Richard Garnett, Gerald V. Bradley, Elizabeth Mensch, Harold Vogel, John Whitehead, Randy Lee, George Fletcher, Ed Gaffney, Jack Sammons, Herbert Titus, Chris Wolfe, Philip Johnson, Michael Schutt, Jeff Brauch, Michael Beaty, Paul Zwier, Michael Bayles, Doug Sturm, Timothy Floyd, Thomas Morgan, and Paul Marshall.

⁹⁸ See David A. Skeel, Jr., *Lawrence Joseph and Law and Literature*, 77 U. CIN. L. REV. 921 (2009). Skeel adopts the characterization of the law and literature enterprise that Jane Baron presented in *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059 (1999). See Skeel, *supra*, at 926 n.30. For a critique of Professor Baron's negative evaluation of the law and literature movement, including her view that there is no movement (because of deep divisions), see David S. Caudill, *Law-and-Literature, Literature-and-Science, and Enhancing the Discourse of Law/Science Relations*, 27 J. LEGAL PROF. 1, 8–12 (2003). Skeel's presumptiveness in establishing a "simple test for Christian legal scholarship," with two criteria that "must" be satisfied seems obliquely related to his negative assessment of (unnamed) scholars engaged in Christian critiques of prominent legal movements for their failure to develop a Christian theory of law against which the prominent movement can be measured. Skeel, *supra* note 1, at 1503–04 ("The reason for exclusion can be summed up in the adage, 'it takes a theory to beat a theory.'").

tional, and just as important for Christian legal theory as is sphere sovereignty.⁹⁹

In conclusion, I should mention three qualifications to my argument that Skeel presents a misleading picture of the state of the field of Christian legal scholarship:

First, I am not arguing that Christian legal scholarship is a major force in American law and legal theory—it is not. Indeed, Robert Cochran, Michael McConnell, and Angela Carmella, nearly ten years ago, delivered an assessment that presaged Skeel’s report:

[T]here is a strange silence on the part of Jesus’ own followers. Where can one hear the expression of Christian perspectives on law and legal theory? There are . . . surprisingly few books or articles applying the gospel of Jesus Christ, other than in a few specialized areas like legal ethics and church-state law.¹⁰⁰

Agreeing with Cochran, Harold Berman at that time stated, “With rare exceptions, American legal scholars of Christian faith have not, during the past century, attempted to explain law in terms of their faith.”¹⁰¹ (On the other hand, Berman concedes that “in the 1980s and 1990s, a number of Christian legal scholars have come out of the closet,” and he mentions the Christian Legal Society, *The Journal of Law and Religion*, and the law and religion programs at some law schools—like Emory—as examples.¹⁰²) There is a bit of hyperbole in these assessments, both of them appearing at the outset of *Christian Perspectives on Legal Thought* in order to advertise the uniqueness of the project. More importantly, these assessments were made ten years ago, and were accompanied neither by the dismissiveness that characterizes Skeel’s representation of the field nor the pretense of doing a survey. A lot has happened in the last ten years.¹⁰³

⁹⁹ See generally, e.g., H.J. VAN ELKEMA HOMMES, MAJOR TRENDS IN THE HISTORY OF LEGAL PHILOSOPHY (1979); David S. Caudill, *A Calvinist Perspective on the Place of Faith in Legal Scholarship*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at 307; Paul Zwier, *Looking to “Ground Motives” for a Religious Foundation for Law*, 54 EMORY L.J. 357 (2005).

¹⁰⁰ *Introduction*, *supra* note 50, at xviii.

¹⁰¹ Harold Berman, *Foreword* to CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 13, at xi, xi.

¹⁰² *Id.* at xii.

¹⁰³ See *supra* notes 13–43 (citing numerous works published between 2000 and 2009).

Second, Skeel has suggested, in a public presentation of his “unbearable lightness” thesis,¹⁰⁴ that he was trying to be controversial, which implies some level of exaggeration to make a point. Yet for those readers who have not heard such mediating remarks, Skeel’s articles convey utter scholarly seriousness.

Third, and finally, this Essay does not engage most of the substantive historical analysis, theoretical proposals, or reports of recent developments, such as the debt-relief mechanisms in the International Religious Freedom Act of 1998, that appear in Skeel’s *Unbearable Lightness*. Rather, I have concerned myself with the packaging of his arguments—the rhetorical construction of a dearth or vacuum, the dismissive tone, and the authoritative voice that veils the bibliographic weaknesses of Skeel’s evaluation. In a word, Skeel’s contextualization of his presentation is misleading; it is as if he needed a crisis to add urgency to his substantive proposals and to render those proposals as solutions rather than as fairly conventional contributions to an ongoing discourse concerning Christianity and law.

¹⁰⁴ David A. Skeel, Jr., Keynote Address at Seton Hall University School of Law Conference on Religious Legal Theory: The State of the Field (Nov. 12, 2009).