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,* 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”—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. 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.”

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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.” Almost? Well, for Skeel there are “a handful of other areas—most notably Catholic scholarship informed by . . . the long tradition of natural law theory.” 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.” Dearth? Well, yes, because all of these are for Skeel “limited areas,” and they seemingly do not qualify under Skeel’s definition of Christian legal scholarship. Hence there is a “strange absence of a rich body of Christian legal scholarship throughout the entire twentieth century.”

That would be strange, if it were true; it would be amazing, but it is not the case. Nevertheless, Ted Olsen reads Skeel’s article and declares that Skeel has “chronicle[d] the scandal of the Christian legal mind.” 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.” Never mind the hundreds of articles and books, not only in the areas Skeel identifies and then minimizes

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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.
12 Skeel, supra note 1, at 1480.
(natural law theory,\textsuperscript{15} church and state relations,\textsuperscript{14} human rights,\textsuperscript{15} Christian lawyering,\textsuperscript{16} and Christian legal history\textsuperscript{17}), but also on the
topics of religious sources of law, the relationship between religion and law, justice studies, tax, legal ethics, the abortion debate,
ON RHETORICAL INVENTION


family law, education, criminal law, equality, contract law, corporate law, immigration law, war, environmental law, Catholic


Social Teaching, the judiciary, torts, the death penalty, pluralism studies, scripture studies, science, feminist jurisprudence, alter-
native dispute resolution, economics, and Christian legal theory. There are some bibliographical sources available, and one could


See generally, e.g., Stephen M. Bainbridge, Law and Economics: An Apologia, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, supra note 13, at 208; George É. 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).

See generally, e.g., MICHAEL D. BEATY ET AL., CHRISTIAN THEISM AND MORAL PHILOSOPHY (1998); William S. Brehbaker 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,” 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”?

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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’”—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 Oklahoma\(^{53}\) 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 ascendance 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.


\(^{54}\) See A Symposium on Law and Christianity, 10 VAND. L. REV. 879 (1957).
fluence of Christianity in politics, Skeel will deem such efforts “im-
portant but quite narrow.” On the other hand, Skeel views public
choice theory, about which he has written, 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 lead-
ers such as James Dobson or Chuck Colson, through church net-
works 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.

Without denying the influence of public choice theory, one wonders
why this interesting project is so much more important—more “ro-
 bust,” “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 pub-
clic choice theory) of untouched areas with obvious relevance for
Christian scholars, he begins to look narrow and provincial—the tra-
dition of drawing on “philosophy, history, or both” in natural law,
human rights, legal ethics, First Amendment, and legal history scho-
larship is too “cloistered” for Skeel in comparison with the “vast re-
cent literature on public choice and comparative institutional anal-
ysis” that awaits robust engagement.

As Skeel continues his analysis, he properly identifies the cultur-
al hostility to religious perspectives and the “wages of evangelical anti-
intellectualism.” 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, (ii) the “genuine Christian legal scholarship” in
Christian lawyering and ethics, (iii) the “magnetic attraction” of
church-state issues for Christian legal scholars, 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
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.
Each category, however, is downplayed by Skeel—“theologically informed natural law scholarship” has been supposedly absent from legal scholarship until very recently; the number of Christian scholars reflecting on ethics is “small,” church-state issues are too “obvious,” and Christian legal history is “more influential with historians than with legal scholars.” 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.” 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. 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.” 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. In any event, this “genre is too thin . . . to constitute a category” for Skeel, 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. 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.” These are unsupported accusations reflecting limited bibliographical research and a strikingly arrogant attitude.

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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,* Skeel defiantly states that he fully stands by the assessment in *The Unbearable Lightness.* 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. 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. Skeel cites his own work with William J. Stuntz as two of the five examples of these encouraging trends. 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. 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. Skeel’s first example is the use of Abraham Kuyper as a starting point. Kuyper, according to Skeel, developed “a normative Christian theory of the proper role of law generally.” 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.” While I agree that the suggestion of a “limited role for the state . . . has obvious implications for legal doctrine” and that Kuyper was

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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,” 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.

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. 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. 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.” Only one article, by Robert Cochran, is offered as an example.

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. 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

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85 Id. at 1508.
86 Id. at 1508–09.
87 Skeel, supra note 1, at 1508–09 nn.130–31.
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. 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), the sole other “prominent[]” figure (Steven Smith), and “the two leading Christian legal theorists” (Michael Perry and Kent Greenawalt), 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 Brewbaker—a bibliography of their scholarship alone would be imposing. But he fails to mention many more scholars with multiple publications in the

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93 Skeel, supra note 1, at 1499.

94 Id. at 1499 n.95.

95 Id. at 1500 & n.100.

field.\textsuperscript{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?\textsuperscript{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 inspi-
tional, and just as important for Christian legal theory as is sphere so-
vereignty. 99

In conclusion, I should mention three qualifications to my ar-
gument 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 ar-
ticles applying the gospel of Jesus Christ, other than in a few spe-
cialized 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
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, 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.

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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).