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## Misreading the Judeo-Christian Tradition and the Law: A Response to Professor Smolin

### Cover Page Footnote

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## ARTICLES

### MISREADING THE JUDEO-CHRISTIAN TRADITION AND THE LAW: A RESPONSE TO PROFESSOR SMOLIN

*Samuel W. Calhoun\**

Professor Martin Marty, in discussing the religious dimensions of American constitutionalism (which he defines as “‘the constitutional thought of the founding period’”<sup>1</sup>), argues that two quite different religious traditions had pivotal roles.<sup>2</sup> The first—Enlightenment philosophy<sup>3</sup>—came to have dominance with respect to the formal ordering of society,<sup>4</sup> perhaps best exemplified by the text of the Constitution, which Marty says “is described best and simply as godless.”<sup>5</sup> The second—Biblical faith—operated chiefly in the “‘subterranean’ dimensions,”<sup>6</sup> where it contributed vitally “to the motivating, interpreting, and ordering of republican life.”<sup>7</sup>

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1. Marty, *On a Medial Moraine: Religious Dimensions of American Constitutionalism*, 39 EMORY L.J. 9, 12 (1990) (quoting 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 473 (L. Levy, K. Karst & D. Mahoney eds. 1986)).

2. *Id.* at 10.

3. While it might seem odd to refer to Enlightenment philosophy as a religion, Professor Marty relies upon Sidney Mead's assertion that the Enlightenment was “‘the religion of the Republic.’” *Id.* at 11 (quoting S. MEAD, *THE NATION WITH THE SOUL OF A CHURCH* 118 (1975)).

4. *Id.* at 11-12.

5. *Id.* at 13.

6. *Id.* at 15; *see also id.* at 13-14.

7. *Id.* at 17.

Because of these contributions,<sup>8</sup> most of the Framers, despite their desire that the Constitution be godless, also thought it desirable that the people themselves be godly.<sup>9</sup> Rather than attempting to coerce godliness, however, the Framers' "great innovation . . . was to render the possible contributions of particular sects and of biblical faith in general entirely *voluntary*."<sup>10</sup> Faith must "make its way through persuasion, for which 'free exercise' of religion was vital."<sup>11</sup>

Despite the fact that the "churches by and large accepted the persuasive or voluntary approach,"<sup>12</sup> Professor Marty points out that "[t]oday there are frequent expressions of discontent. . . . Many concerned citizens, disturbed over what they perceive to be the moral anarchy resulting from pluralism, would like to see the nation more homogenized."<sup>13</sup> Some argue that the Biblical tradition should be "somehow privileged (though not uniquely established)."<sup>14</sup> This view appears "in a 'Christian Reconstructionist' movement, in some legislative and judicial attacks on 'secular humanism' as a threat to Judeo-Christian faith and civilization, and more often in generalized rhetorical appeals which do not issue in specific legislative proposals."<sup>15</sup>

Professor David Smolin's article, *The Judeo-Christian Tradition and Self-Censorship in Legal Discourse*,<sup>16</sup> is a vivid example of the sentiment that Professor Marty describes. Initially, Professor Smolin states his purpose as "an attempt to demonstrate the necessity and legitimacy of discussing God, and the Judeo-Christian tradition, in American legal discourse."<sup>17</sup> He soon reveals, however, that his goal is quite different. Rather than merely seeking to establish the legitimacy of the Judeo-Christian tradition as a topic of discussion, he attempts to show the "authoritative nature" of that tradition in American legal dis-

8. According to Professor Marty, the Framers believed that Biblical faith (1) promoted "[c]ivic virtue in support of [the] rule of law," (2) provided collateral support for republican ideas, as the "Baptist . . . interest in 'soul liberty' " did for the Enlightenment doctrine of liberty, (3) supplied the basis for a "dimensionally profound" interpretation of "the ordered life of a constitutional republic," e.g., "the language of covenant and responsibility, of obedience to God, the giver of liberty and the supporter of government," and (4) served as "'the binding tie of cohesive sentiment' that [is] '[t]he ultimate foundation of a free society.'" *Id.* at 15-16 (quoting *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 596 (1939)).

9. *Id.* at 17.

10. *Id.*

11. *Id.*

12. *Id.* at 18-19: While I agree with Professor Marty with respect to matters of religious worship, examples in the area of conduct show that the church did not totally renounce the use of state coercion. See *infra* notes 94-96 and accompanying text.

13. Marty, *supra* note 1, at 19.

14. *Id.*

15. *Id.*

16. 13 U. DAYTON L. REV. 345 (1988).

17. *Id.* at 346.

course.<sup>18</sup> Professor Smolin believes that recognizing this authority in the realm of law is the proper way to combat the "lost sense of values" that permeates our culture.<sup>19</sup>

An initial difficulty in evaluating Professor Smolin's article is determining what he means when he speaks of "the authoritative nature of the Judeo-Christian tradition."<sup>20</sup> The phrase might mean something consistent with Professor Marty's contention that the Judeo-Christian tradition constitutes an important underpinning for our legal system. The words, however, more naturally suggest something much more active and chilling—that Judeo-Christian precepts should be enacted into law and thereby imposed upon all citizens, believer and nonbeliever alike.

This is not to say that Professor Smolin would interfere with freedom of worship. He explicitly denies this intent.<sup>21</sup> Much of Professor Smolin's language, however, just as explicitly reveals that he is urging an American legal system which would be, to a substantial degree, theocratic. He refers to applying "Christian norms in our legal system,"<sup>22</sup> to "an America governed under religious . . . principles,"<sup>23</sup> and to laws that reflect "the religious faith of the majority."<sup>24</sup> Such phrases might possibly mean something other than the meaning I attribute to them in this article, but this evaluation of Professor Smolin's ideas presupposes that my understanding is accurate.<sup>25</sup>

18. *Id.* at 347.

19. *Id.*

20. *Id.*

21. *Id.* at 411-12.

22. *Id.* at 363.

23. *Id.* at 413.

24. *Id.* at 414.

25. Professor Smolin's article contains what he calls a "warning" which might be thought to show that I have mistaken his meaning. He states:

[T]he acknowledgment of Christianity, as true and good, and of God and His revelation as the source of objective norms, would not itself avoid the difficult question of which true and good norms ought to be enforced through the particular mechanism of state-enforced law. . . . Clearly, not all objectively valid norms derivable from scripture can or should be enforced through law.

*Id.* at 367. This disclaimer does not persuade me to revise the opinion I have expressed. First, the statement that not all Scriptural norms "can or should be enforced through law" is not reassuring. This could refer to nothing more than the obvious point that many Biblical principles, such as the command not to covet, *Exodus* 20:17, are beyond the reach of man's law. Second, the overall tenor of Professor Smolin's article convinces me that theocracy is not a mischaracterization of his vision for America. In addition to the phrases quoted in the text, Professor Smolin refers to "the destructive and self-contradictory nature of reason and practice that denies the existence and governance of God." Smolin, *supra* note 16, at 365. He also states that "the proper use of the Judeo-Christian tradition in legal discourse would radically alter the current state of such discourse." *Id.* at 367. Finally, one of Professor Smolin's principal reasons for arguing that the Judeo-Christian tradition should be authoritative in legal discourse demonstrates that he in fact is arguing for a

The purpose of this article is to demonstrate that Professor Smolin's concept of the appropriate role of the Judeo-Christian tradition in American law is misguided. This article is not written with any hostility to that tradition. Like Professor Smolin,<sup>26</sup> I profess a belief in Reformed Christianity.<sup>27</sup> I therefore can appreciate the strength of his convictions and his boldness in openly premising his argument in his personal faith. I also empathize with the grave concerns he has about the state of American society. Nonetheless, I believe the path that Professor Smolin prescribes is the wrong path. I am especially compelled to write this response because of his statements to the effect that Christians who do not share his views have been captivated by a non-Christian world view.<sup>28</sup>

### I. PROFESSOR SMOLIN'S THESIS

The principal reason that Professor Smolin gives for acknowledging "the authoritative nature of the Judeo-Christian tradition in American legal discourse"<sup>29</sup> is to avoid tyranny. His first argument is theoretical: he asserts that a relativist system, i.e., a system not based on objective values, is "inherently tyrannical."<sup>30</sup> Professor Smolin's second argument states that "relativism . . . is not only tyrannical in principle, but . . . has produced, and is producing, real subjugation of actual persons in the specific context of twentieth-century American life."<sup>31</sup> The following is a summary of Professor Smolin's arguments.

#### A. *Relativism Is Tyrannical in Theory*

Professor Smolin's theoretical argument is presented by asking the reader to examine the position of persons or groups who lose particular conflicts within a society, "whether it be a conflict over goods and services, or a conflict concerning value choices."<sup>32</sup> Professor Smolin would characterize each loss as "a loss of freedom; the individual's or group's will has been frustrated."<sup>33</sup> If, however, prior consent to the rules for resolving conflicts has been given, "[t]he reply to the loser is that his or her loss is not an act of tyranny or domination because he or she at

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theocracy. See *infra* notes 39-41 and accompanying text.

26. Smolin, *supra* note 16, at 363, 411.

27. I thus share Professor Smolin's view that Christian norms "*are in fact true and good.*" *Id.* at 362.

28. *Id.* at 362, 416.

29. *Id.* at 347.

30. *Id.* at 347, 359.

31. *Id.* at 362.

32. *Id.* at 350.

33. *Id.*

some earlier time had freely consented to be bound by such rules.”<sup>34</sup>

The problem, Professor Smolin posits, is that consent is “contaminated by the circumstances of its procurement.”<sup>35</sup> The idea, for example, “that America has a social compact to which all have consented . . . cannot be taken too literally” because (1) the Constitution “was ratified and made binding over all Americans despite substantial and fervent opposition,” and (2) “subsequent generations were bound, so that our system creates the tyranny of one generation over all subsequent generations.”<sup>36</sup> Professor Smolin argues further that the “very concept of consent” is attended by “uncertainties, psychological and philosophical.”<sup>37</sup> He writes:

The value of a theory of consent is that it posits free acts, rather than forced acts, as the ultimate basis of conflict resolution. Yet many clearly believe persuasion to be merely the most insidious form of domination: that of one mind over another. . . . Arguably, anytime we “agree” with another human being, that person has, through force of will, personality, or intellect, dominated us.<sup>38</sup>

The absence of consent to the rules for resolving conflicts means that the loser can always claim that enforcement, “against his or her will, constituted an act of tyranny.”<sup>39</sup> The loser has “in one way or another been dominated and defeated through the force and will of the rulers and winners.”<sup>40</sup> A legal system based on objective values, however, is quite different. Here, one “can say to the loser: It was right that you lost. I, the ruler, I, the winner, have not defeated you, but rather this true moral principle, which objectively rules us both, has determined that you shall lose this particular conflict.”<sup>41</sup>

### *B. Relativism Is Tyrannical in Practice*

To bolster his theoretical argument regarding the tyrannical nature of relativism, Professor Smolin discusses two acts of tyranny which it has produced during “its relatively short period of dominance as a mode of legal discourse.”<sup>42</sup> The first is “the displacement in our legal

34. *Id.* at 353.

35. *Id.*

36. *Id.* at 354.

37. *Id.* at 355.

38. *Id.* at 355-56.

39. *See id.* at 353.

40. *Id.* at 359.

41. *Id.* at 359-60; *see id.* at 361-62. Professor Smolin makes it clear that he would look to the Judeo-Christian tradition as the source for these ruling objective norms. *See id.* at 362. Professor Smolin’s desire to grant coercive power to Judeo-Christian precepts inescapably demonstrates that what he really has in mind is a theocracy. *See supra* notes 21-25 and accompanying text.

42. Smolin, *supra* note 16, at 365.

system of the mode of thought dominant throughout our history with a mode of thought dominant among a minority class of intellectuals."<sup>43</sup> The second is "the legalization of the killing of the unborn."<sup>44</sup>

### 1. History

Professor Smolin's first empirical example of tyranny is premised in his view of American history: "given the historical and cultural centrality of the Judeo-Christian tradition and the supposedly democratic nature of our institutions, it is tyrannical for an elite group of intellectuals who hold disproportionate power to banish serious discussion and use of that tradition from legal discourse."<sup>45</sup>

To substantiate his historical claim, Professor Smolin first discusses the contribution of Puritanism to the American Revolution. The original New England concept of a people in covenant with God<sup>46</sup> was spread throughout the colonies by such events as the Great Awakening.<sup>47</sup> This was critical to the people's embrace during the Revolutionary period of Lockean principles concerning duties and rights: these ideas "were accepted and utilized because they coincided with the experience of the religiously motivated colonists in constructing and maintaining a Christian polity."<sup>48</sup> In short, "the people fought the Revolution for Protestant Christianity."<sup>49</sup>

Professor Smolin argues that "the covenantial view of American history" continued throughout the nineteenth century.<sup>50</sup> He describes this century as characterized by "a kind of millennial nationalism," as Christian Evangelicals "labored to bring about their dream of America as the apex of Christian civilization."<sup>51</sup> The Civil War was the test of "America's covenant with God."<sup>52</sup> Abraham Lincoln, in such speeches as the Gettysburg Address and his Second Inaugural, "restated . . . the Puritan and Evangelical theme of America as a redeemer nation, chosen by God to fulfill a special role in history"—to promote "realization of the principles contained in the Declaration of Independence, in

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43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 368.

47. *Id.* at 376-77 & n.82. The Great Awakening refers to a spiritual revival which took place during the 1730s and 40s. *Id.* at 375. This movement was a "revival of Reformed, Calvinistic Christianity." *Id.*

48. *Id.* at 378; *see also id.* at 368, 377.

49. *Id.* at 380.

50. *Id.* at 384 n.104. This was true even though Puritanism itself had fallen from a position of dominance to that of being "just one component of a broader vision of a Christian America." *Id.* at 381-82.

51. *Id.* at 382.

52. *Id.* at 380.



particular the principles of equality and inalienable rights."<sup>53</sup>

The twentieth century, according to Professor Smolin, presents an anomaly. On the one hand, the reliance by Dr. Martin Luther King, Jr. upon "Christian premises and imagery" demonstrates that Lincoln's religious premises retain vitality.<sup>54</sup> This is corroborated by recent polls showing "that Americans as a whole remain highly theistic in their beliefs."<sup>55</sup> Strangely, however, our society presents an "appearance of secularization."<sup>56</sup> Professor Smolin believes that this dichotomy results from a "cultural gap" between the American people and the "intellectual elite," the so-called New Class.<sup>57</sup> A "disproportionate percentage" of the latter, "particularly in the areas of higher education and mass communications—are hostile or indifferent to traditional theism."<sup>58</sup> These intellectuals, "[a]s propagators of cultural symbols," view the Judeo-Christian tradition as an obstacle to their power to shape society.<sup>59</sup> Some have consequently found it desirable "to ridicule, distort, ignore, and subdue theism's place in the hearts and minds of the people."<sup>60</sup> With respect to legal discourse in particular, Professor Smolin believes that New Class scholars have been engaged in "a silencing or censorship" of the Judeo-Christian tradition by a "general denial" of the tradition's legitimacy and by excluding adherents of the tradition from American law faculties.<sup>61</sup>

## 2. Abortion

Professor Smolin's second example of an act of tyranny resulting from legal relativism is the legalized killing of the unborn.<sup>62</sup> Professor Smolin is not surprised at this development. Once the Judeo-Christian concept of freedom and equality is replaced by "indeterminate, subjective conceptions of those terms," continuation of "Lincoln's march" toward those ideals is "likely to produce institutions as abominable as those, such as slavery, that the project was initially created specifically to avoid."<sup>63</sup> Mass abortion on demand, defended now by some even assuming the full humanness of the fetus,<sup>64</sup> is "the great crime against

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53. *Id.* at 384.

54. *Id.* at 385.

55. *Id.* at 387.

56. *Id.* at 390.

57. *Id.* at 388-89.

58. *Id.* at 388.

59. *Id.* at 390.

60. *Id.* Business elites, who also stand to gain "from the displacement of traditional Judeo-Christian values and symbols," have joined in the effort. *Id.*

61. *Id.* at 415.

62. *Id.* at 365.

63. *Id.* at 400.

64. *See id.* at 405-06.

humanity of the relativist, liberal establishment."<sup>65</sup>

## II. CRITIQUE

### A. *Professor Smolin's Theoretical Argument Is Not Persuasive*

Professor Smolin's theoretical argument concerning the tyrannical nature of relativism has two principal flaws. The first is his conclusion that it is impossible to give legitimacy to conflict-resolution rules through consent. The second is his view that a legal system based upon objective values avoids tyranny because it is the objective values themselves, rather than any human beings, that do the actual ruling.

#### 1. Consent Can Legitimate a Legal System

Professor Smolin's argument that consent cannot legitimate a legal system is at odds with a key element of our heritage as Americans—that the “consent of the governed” is the basis for legitimate government.<sup>66</sup> Professor Smolin asks, however, if Americans have truly given their consent.<sup>67</sup> The question prompts the following inquiry: in what way do citizens give their consent to abide by majority decisions of the legislative bodies whose laws affect their lives? No one asks for an agreement when citizens turn eighteen. Are Americans thus the victims of tyranny each time they are subjected to a law with which they disagree? The answer is no.

Americans have implicitly given their consent to the American system in several different ways. They manifest consent inwardly by agreeing mentally that the system is legitimate. They manifest consent outwardly by freely conforming their conduct to laws with which they might not agree. They also show consent through the electoral process. If they do not vote, they arguably manifest consent to the system through silent acquiescence. If they vote and their candidate loses, they manifest consent by not engaging in rebellion.<sup>68</sup> Lastly, continuing to

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65. *Id.* at 403.

66. The Declaration of Independence para. 2 (U.S. 1776).

67. Professor Smolin presents this question initially through his argument that the Constitution itself was not accepted by all Americans at the time and that the founding generation exercised tyranny over subsequent generations. *See supra* note 36 and accompanying text. I believe that the first point is negated by his quotation of Professor John Hart Ely's argument that the opponents of ratification “‘accepted the legitimacy of the majority's verdict.’” Smolin, *supra* note 16, at 354 n.35 (quoting J. ELY, *DEMOCRACY AND DISTRUST* 6 (1980)). The second point is negated by the numerous ways in which subsequent generations implicitly show their consent to rules which they did not initiate. *See infra* notes 68-69 and accompanying text.

68. There have, of course, been times in our history when this type of restraint was not shown, most notably in the months preceding the outbreak of the Civil War. As stated by the prominent Confederate General John B. Gordon, “[g]radually and naturally in [the] furnace of sectional debate, sectional ballots were crystallized into sectional bullets; and both sides came at last to the position formerly held by the great Troup of Georgia: ‘The argument is exhausted; we

live in the country arguably shows consent through acquiescence or ratification. Therefore, even when the majority passes laws with which some citizens disagree, those citizens have not been subjected to tyranny.<sup>69</sup>

Professor Smolin, of course, argues that even if someone persuades another to support the majority position, the one persuaded is still the victim of tyranny in that he has been dominated by another person.<sup>70</sup> While in extraordinary cases consent may be invalidated by domination,<sup>71</sup> Professor Smolin's argument that these circumstances include ordinary persuasion is an extreme view. What if, for example, Professor Smolin's article convinces a reader that his vision for the role of the Judeo-Christian tradition is correct? Few people would seriously contend that Professor Smolin had subjected the reader to tyranny by dominating his will.<sup>72</sup>

The conclusion is thus warranted that a legal system can obtain legitimacy through consent. This is not to say, of course, that a system which basically is legitimate may not on occasion evidence examples of illegitimacy.<sup>73</sup> It is also not argued here that consent guarantees that

stand to our guns.' " J. GORDON, REMINISCENCES OF THE CIVIL WAR 22-23 (1981).

69. I would give the same response to Professor Smolin's charge that I am subjected to minority tyranny in the form of Supreme Court decisions. Smolin, *supra* note 16, at 351-52. Since I have implicitly demonstrated my consent to the Constitution, which contemplates constitutional adjudication by the Court, the Court's power over my life is not tyrannical. *But see infra* note 73 (discussing circumstances in which a Supreme Court decision is tyrannical).

70. *See supra* text accompanying notes 38-39.

71. Examples in the law of contract include instances of duress and undue influence. *See* E. FARNSWORTH, CONTRACTS 267-71 (1982).

72. Elsewhere in his article Professor Smolin plainly demonstrates that he does not fully mean what he says about the impossibility of consent. In discussing the impact of "causative social factors" in determining behavior, Professor Smolin cautions that "human free agency" is an important factor as well. Smolin, *supra* note 16, at 393. To acknowledge the existence of "human free agency" is to acknowledge the possibility of genuine consent.

73. As an example of tyranny by the majority, consider the state governments in the South prior to the civil rights movement. As stated by the Reverend Martin Luther King, Jr.:

A law is unjust if it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law. . . . Throughout Alabama all sorts of devious methods are used to prevent Negroes from becoming registered voters. . . . Can any law enacted under such circumstances be considered democratically structured?

M.L. KING, JR., WHY WE CAN'T WAIT 83 (1964).

As an example of minority tyranny, consider the Supreme Court decision in *Roe v. Wade*, 410 U.S. 113 (1973). I agree with Justice White that *Roe* erroneously held that there is in the Constitution, as a fundamental liberty, the right to an abortion. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 785-94 (1986) (White, J., dissenting). According to Justice White, "decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation." *Id.* at 787. Since *Roe* was just such a decision, the Court there engaged "not in constitutional interpretation, but in the unrestrained imposition of its own, extraconstitutional value preferences." *Id.* at 794. Thus, *Roe* is the epitome of tyranny.

any particular decision is actually true or correct in an absolute sense.<sup>74</sup> Consent, however, can defeat the allegation of tyranny.

## 2. A System Based upon Objective Values Does Not Preclude Tyranny Because Human Implementation Is Required

As discussed earlier, Professor Smolin argues that the losers in conflicts occurring under objectively-based systems cannot complain that they have been dominated by other humans. Rather, the "true moral principle" determines the outcome.<sup>75</sup> This reasoning ignores the way things happen in the real world. Even assuming agreement on what the source of the governing principles should be,<sup>76</sup> a principle cannot rule (in the way that Professor Smolin uses that word) without human implementation.<sup>77</sup> The inevitable result is that some individual's or group's interpretation of the principle, rather than the principle itself, becomes the ruler. Not infrequently, these interpretations will misconstrue, if not defile, the principle. Consequently, losers have been dominated by humans just as much as would have occurred in a relativistic system.<sup>78</sup>

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74. As a Christian, I believe that a decision, even if based upon consensus, is true or correct in the absolute sense only to the extent that it conforms to God's will.

75. See *supra* notes 39-41 and accompanying text. Since the rule of principle precludes any charge of tyranny, Professor Smolin believes that even non-Christians should happily embrace a system based upon Judeo-Christian traditions. See Smolin, *supra* note 16, at 361-62, 366.

76. Professor Smolin, in choosing the Judeo-Christian tradition as the proper source, necessarily rejects other religions. But see Smolin, *supra* note 16, at 413 & n.199 (Professor Smolin suggests that Islam may be included, but at the same time states that he has not yet evaluated the issue.). Adherents of the excluded religions presumably would have a different idea as to what objective norms should rule. Professor Smolin, however, has no hesitation in subjecting such believers to a Judeo-Christian system:

[T]he final response to those of a culturally vulnerable religious faith is that they simply do not have the right to demand that the majority faiths abandon their desire to live in a society that reflects, in its laws and other public domains, the religious faith of the majority. The law has to reflect *someone's* value orientation; America has to mean *something*. The most appropriate place from which to draw these values and meanings is from the historically and culturally dominant beliefs of the people.

*Id.* at 414. Given my earlier argument that our democratic political system is legitimate, see *supra* notes 67-69 and accompanying text, it might be thought that I am compelled to agree with Professor Smolin. If only democratic theory were involved, I would in fact find it difficult to refute him. As I will show later, however, I believe that inherent in Christianity itself is a principle of self-restraint, which I call the non-imposition principle. See *infra* notes 109-13 and accompanying text. The non-imposition principle forbids Christians from exercising what would otherwise be legitimate majoritarian power.

77. God's principles do rule, in the absolute sense, without human intervention. For example, *Galatians* 6:7-8 (New International Version (NIV)) warns mankind: "Do not be deceived: God cannot be mocked. A man reaps what he sows. The one who sows to please his sinful nature, from that nature will reap destruction; the one who sows to please the Spirit, from the Spirit will reap eternal life." Professor Smolin, however, speaks of the attempt to implement God's principles through man-made law. This effort obviously requires man to take matters into his own hands.

78. Some may construe these thoughts as an indirect attack on the reliability of the primary

This criticism of Professor Smolin's argument can be substantiated from his own article. He advocates the rule of the Judeo-Christian tradition. What does this term mean? While Professor Smolin acknowledges that it "embraces a number of competing traditions," he concludes that the tradition contains a "common core . . . sufficient to provide a common content and common methodology in regard to American law."<sup>79</sup> This is difficult to accept because the term "Judeo-Christian" speaks of two religious traditions—Judaism and Christianity—that are fundamentally inconsistent. Jesus claimed to be the Messiah<sup>80</sup> and stated that faith in Him was the only path for sinful man to be restored to a relationship with God.<sup>81</sup> The Jewish leaders of the day believed that Jesus' claim constituted blasphemy.<sup>82</sup> They also rejected faith in Jesus as the path of salvation, instead seeking righteousness before God by observing the law.<sup>83</sup> The assumption that these two radically different perspectives would yield a common approach to law is problematical.<sup>84</sup> As conflicts inevitably arise, the more numerous Christians would presumably prevail, thereby belying Professor Smolin's notion of the rule of principle.<sup>85</sup>

Even if one speaks only of the Christian tradition, the fallacy of the idea that principle can rule unsullied by man is apparent. In view of statements made elsewhere in his article, it is surprising that Professor Smolin concludes otherwise. He acknowledges man's frequent distortion of God's call: "[t]he voice of God is often misheard; deeds done on His behalf are often merely reflections of human depravity."<sup>86</sup> In his account of conflicting responses by Christians to the civil rights movement, Professor Smolin also demonstrates an awareness of the fact that

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source of Jewish and Christian principles—the Bible. This is not the case. I believe the Bible to be "God-breathed," 2 *Timothy* 3:16 (NIV), and its normative rules to be "perfect," "altogether righteous," and "trustworthy." *Psalms* 19:7, :9 (NIV). Christians, however, acknowledge themselves to be sinners, a people who have fallen "short of the glory of God." *Romans* 3:23 (NIV). Thus, even when we try earnestly to let God's principles rule in our lives, we can never be confident of total success. It is bad enough if the consequences of our failures are confined to the spheres of our own lives. Under Professor Smolin's proposed legal system, those consequences would be inflicted upon all of society.

79. Smolin, *supra* note 16, at 410-11.

80. *Matthew* 16:13-17, 26:63-64 (NIV).

81. *John* 3:16-18, 14:6 (NIV).

82. *Matthew* 26:65 (NIV).

83. *Romans* 9:30-10:4 (NIV).

84. For a discussion of the profound impact that acceptance of the Christian Gospel should have upon one's attitude toward man's law, see Calhoun, *Conviction Without Imposition: A Response to Professor Greenawalt*, J. L. & RELIGION (accepted for publication, 1991).

85. For a discussion of why this dominance by the Christian majority would not be perfectly appropriate in our democracy, see *supra* note 76.

86. Smolin, *supra* note 16, at 409.

Christians can disagree about what Christianity requires.<sup>87</sup> These two examples aptly demonstrate that Professor Smolin's theoretical argument—basing a legal system upon objective values precludes tyranny—is misguided.

*B. Professor Smolin's Empirical Examples Do Not Support His Argument That Laws Should Be Based upon the Judeo-Christian Tradition*

Neither of Professor Smolin's empirical examples supports his contention that the Judeo-Christian tradition should rule through law. His argument that the tradition's rule is required to be faithful to our country's historically-dominant perspective is not persuasive. While there is historical evidence for Professor Smolin's view, he fails to ask a critical question: whether the use of law to implement faith-based precepts is consistent with Christianity. Professor Smolin's argument based upon the legalization of abortion also is not convincing.

1. Professor Smolin's Historical Argument Is Flawed

While Professor Smolin's conclusion that the American people "fought the Revolution for Protestant Christianity"<sup>88</sup> is too simplistic,<sup>89</sup> there can be no doubt that Christianity "substantially affected the character and strength of the movement for independence from England."<sup>90</sup> What is less clear, however, is how this supports Professor Smolin's thesis that Judeo-Christian precepts should be "authoritative" in legal discourse.

As previously discussed, Professor Marty contends that with respect to the formal ordering of American society, the Framers believed that Biblical faith should make its vital contribution through voluntary channels.<sup>91</sup> Professor Marty's view is supported by Professor Donald Lutz's explanation of why religion is explicitly mentioned only in the

87. *Id.* at 386. The civil rights movement is not the only time that Christians have been on opposite sides of important social issues. It happened on the slavery question, with Christians importantly involved both in the abolitionist movement, *see infra* text accompanying note 97, and in the defense of slavery. *See* Stringfellow, *A Scriptural View of Slavery*, in *SLAVERY DEFENDED* 86 (E. McKittrick ed. 1963). More recently, Christians have appeared on opposing sides in the abortion controversy.

88. Smolin, *supra* note 16, at 380.

89. There were many influences besides religion "at work on American political thought during the founding era." Lutz, *Religious Dimensions in the Development of American Constitutionalism*, 39 EMORY L.J. 21, 21 & n.1 (1990). Even if one focuses upon religion alone, Professor Smolin's statement cannot be substantiated. *See infra* note 90.

90. Fisher, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860*, 39 EMORY L.J. 65, 90 (1990). Professor Fisher shows, however, that "the ways in which [religious loyalties] intruded on politics defy generalization." *Id.* at 90-92.

91. Marty, *supra* note 1, at 17. *See supra* notes 1-11 and accompanying text.

first part of our national covenant—the Declaration<sup>92</sup>—but not in the second part—the Constitution:

We are a religious people, and our relationship to nature's God is an important part of what ties us together as a people. But because we comprise a diversity of sects, and because our concept of federal liberty requires that we not force individuals to be religious without their consent, we can commit ourselves to religion only in a general way, and only as part of the background to our politics.<sup>93</sup>

The arguments of Professors Marty and Lutz suggest that Professor Smolin has misconstrued the tradition in which he wishes to stand: the true American model is that Christian precepts be embraced voluntarily, not that they be imposed through law. The full historical record, however, reveals that this thesis itself would be a simplification.

It is true that by the late eighteenth century there was widespread rejection of state compulsion insofar as matters of religious worship were concerned.<sup>94</sup> There is also, however, undeniable evidence that state force in matters of faith was not eschewed altogether. Professor William Fisher writes:

[I]n every colony, statutory and common law lent assistance to religious belief or observance. Examples of such legal buttresses include the treatment of blasphemy as a crime, statutes forbidding work on Sundays, official thanksgiving and fast days, and the distribution of tax revenues to a limited set of Protestant denominations.<sup>95</sup>

Many of these examples of using law to promote religious concepts existed well into the nineteenth century.<sup>96</sup> Moreover, those Christian evangelicals who so radicalized the Northern abolitionist movement had no hesitation in seeking to use law to carry out their duty to be "God's instrument in establishing [a morally purified] society."<sup>97</sup>

In view of this significant part of our American heritage, using history to reject Professor Smolin's view concerning the authoritative-ness for law of the Judeo-Christian tradition is not a simple task. Professor Smolin himself, however, suggests one possibility. One can argue that by this point in the twentieth century secularization has occurred to such an extent that the old view of law as an embodiment of reli-

92. Lutz, *supra* note 89, at 36.

93. *Id.* at 40.

94. An example is the 1786 Statute of Virginia for Religious Freedom. See *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY* (M. Peterson & R. Vaughan, eds. 1988).

95. Fisher, *supra* note 90, at 84-85.

96. See *id.* at 108-11; Berman, *Religious Freedom and the Challenge of the Modern State*, 39 *EMORY L.J.* 149, 157 (1990).

97. Fisher, *supra* note 90, at 126.

gious premises<sup>98</sup> is now "part of American tradition the way that the flat earth theory is a part of Western tradition."<sup>99</sup> Professor Smolin offers two pieces of evidence to rebut this charge: (1) Dr. King's reliance upon "Christian premises and imagery" during the civil rights movement,<sup>100</sup> and (2) polls showing that Americans are still "highly theistic."<sup>101</sup>

The poll results are not as probative as Professor Smolin asserts. Belief in God, in and of itself, suggests nothing about one's view of the extent to which law should reflect religious precepts. Evaluation of Professor Smolin's reliance upon Dr. King's Christianity is much more complex.

Dr. King's Christian faith was undoubtedly indispensable to his role in the civil rights movement. He viewed himself as God's instrument to help establish God's kingdom here on earth,<sup>102</sup> which King believed to be the mission of true Christianity.<sup>103</sup> King's faith not only was a source of strength in harrowing situations,<sup>104</sup> but also provided the philosophical foundation for the method of nonviolent direct action which was the hallmark of the movement.<sup>105</sup> It would be incorrect, however, to say that Dr. King was motivated solely by his desire to implement Christian precepts. He also spoke with "eloquence and erudition about the promise of America and the aspiration of 'her citizens of color' to gain their full citizenship."<sup>106</sup> King consistently premised his call for racial justice on the twin pillars of God and the rights of an American citizen. This was eloquently expressed in his Letter From Birmingham Jail:

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98. I do not suggest that this view of law was ever uniformly held in America, even among Christians. An important example of a Christian who criticized many of the measures Professor Fisher describes as "legal buttresses" of "religious belief or observance," Fisher, *supra* note 90 at 84-85, was the prominent Baptist preacher John Leland. See Butterfield, *Elder John Leland, Jeffersonian Itinerant*, 62 AM. ANTIQUARIAN SOC'Y PROCEEDINGS 155 (1952).

99. Smolin, *supra* note 16, at 385.

100. *Id.*

101. *Id.* at 387.

102. See S. OATES, LET THE TRUMPET SOUND 73 (1982). Dr. King's self-concept recalls that of the Christian evangelicals during the abolitionist movement. See *supra* text accompanying note 97.

103. S. OATES, *supra* note 102, at 33. Dr. King believed that the Christian Gospel was social as well as personal. In a meeting with city leaders during the Montgomery bus boycott, he stated that "'[i]f one is truly devoted to the religion of Jesus he will seek to rid the earth of social evils.'" *Id.* at 81.

104. See M.L. KING, JR., *supra* note 73, at 74-75 (describing his confinement in a Birmingham jail); S. OATES, *supra* note 102, at 86-89 (describing King's response to death threats).

105. See M.L. KING, JR., *supra* note 73, at 35, 87. While it was "the love ethic of Jesus" which supplied the "spirit" that Dr. King needed, it was from Gandhi that he learned the specific method of "noncooperation with evil" which Dr. King viewed as "the only moral and practical way for oppressed people to struggle against social injustice." S. OATES, *supra* note 102, at 32.

106. S. OATES, *supra* note 102, at 97.



One day the South will know that when these disinherited children of God sat down at lunch counters, they were in reality standing up for what is best in the American dream and for the most sacred values in our Judeo-Christian heritage, thereby bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence.<sup>107</sup>

The fact that Dr. King's inspiration had two sources demonstrates that he does not provide clear-cut support for Professor Smolin's contention that the American tradition of granting authoritativeness in law to Christian precepts is still extant. Assume, however, that Dr. King's reliance upon our democratic institutions could be stripped away and that he could accurately be viewed as one whose sole goal was to see God's laws followed—a twentieth-century analogue of the nineteenth-century American who sought laws to criminalize blasphemy. Professor Smolin would say that such an assumption would substantiate his argument: we have a tradition of implementing Christianity through law and we should return to it. Professor Smolin accuses Christians who disagree with this prescription of having "been persuaded by the relativists."<sup>108</sup> Professor Smolin does not consider an alternative explanation: that Christians may refrain from seeking to implement their faith through law because they view such an effort as inconsistent with Christianity.

I am such a Christian. I believe that inherent in Christianity is the principle that the faith should not be imposed upon others by force of law. This non-imposition principle extends not only to belief, but also to conduct.<sup>109</sup> Human coercion can play no role in another's decision to become a Christian because that change can occur only through the work of the Holy Spirit.<sup>110</sup> Similarly, with respect to conduct, it is only

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107. M.L. KING, JR., *supra* note 73, at 94. The duality of Dr. King's motivation is incontrovertible. There are many other examples, including his electrifying speech to the initial mass meeting during the Montgomery bus boycott, S. OATES, *supra* note 102, at 70-71, and his agreement with President Kennedy's statement that the civil rights struggle confronted Americans "primarily with a moral issue . . . as old as the Scriptures and . . . as clear as the American Constitution." M.L. KING, JR., *supra* note 73, at 32.

108. Smolin, *supra* note 16, at 362; *see also id.* at 415.

109. At one point in his article, Professor Smolin says that the important question of what objective norms should be enforced "through law should be answered in terms of what the Judeo-Christian tradition itself says about the use, nature, and function of law." *Id.* at 367. While Professor Smolin purports to leave this evaluation to "another day," *id.*, I have already stated my opinion that his article promotes the idea of a theocracy. *See supra* text accompanying notes 20-25. The non-imposition principle is the fruit of my own effort to answer the question which Professor Smolin poses. This principle is fully articulated and defended in another article. *See Calhoun, supra* note 84.

110. *See John* 3:3-6 (NIV).

God's power that can achieve "what God principally seeks—a people who freely love him and demonstrate their love through obedience."<sup>111</sup> Using force to compel compliance with God's standards is harmful in that it promotes other sin, creates hostility to the faith and perpetuates the "cruel delusion," at odds with the Christian Gospel, that righteous conduct is the road to a restored relationship with God.<sup>112</sup>

The non-imposition principle obviously affects my evaluation of the tradition proffered by Professor Smolin. Christians in the past were wrong to the extent that they sought to impose their beliefs upon others through law. This is not to condemn all political activity by Christians. I criticize only such activity whose principal goal is to compel others to live according to Biblical standards. If the Christian can in good faith base his desire for a particular law on independent, secular grounds, he does not violate the non-imposition principle. This is true even if the law will at the same time implement a Christian precept.

How then would I evaluate Dr. King's actual—not assumed—posture? Since he had plainly-articulated and convincing secular justification for his goals, he did not act inconsistently with the non-imposition principle.<sup>113</sup> The fact that his pursuit of those goals undeniably was intensified by his Christian beliefs makes no difference. Dr. King stands as a preeminent example of the Christian activist. He does not, however, substantiate Professor Smolin's call for recognizing the general authority in law of the Judeo-Christian tradition. Without the constraint of the non-imposition principle, what Professor Smolin seeks is incompatible with Christianity.<sup>114</sup>

111. Calhoun, *supra* note 84.

112. *Id.*

113. The same can be said of those Christian abolitionists who, in good faith, based their attack on slavery upon secular as well as religious grounds. This dual justification would not have been unusual. According to Professor John Thomas, the "pioneer abolitionists" argued:

[S]lavery was a sin and a crime, a sin because it denied to the Negro the status of a human being, a crime because it violated the natural rights to life, liberty, and the pursuit of happiness guaranteed in the Declaration of Independence. These two beliefs—in the spiritual equality of all believers and the political equality of all Americans—served as the chief moral weapons in the attack on slavery.

Thomas, *The Abolitionist Crusade*, in *SLAVERY ATTACKED 1* (J. Thomas ed. 1965). This abolitionist perspective plainly foreshadows the approach of Dr. King. See *supra* notes 102-07 and accompanying text.

114. Professor Smolin's article contains language from which it might be argued that he would agree with the non-imposition principle. In considering whether his desired use of the Judeo-Christian tradition would violate the first amendment, Professor Smolin states:

Nearly every religious purpose, whether it be prohibiting abortion, promoting chastity, or feeding the poor, can be separated from its religious roots and presented as a secular motivation. The use of 'religious motivation' as a criteria for judicial review is inherently problematic. Christians, for example, are exhorted to do *everything* 'in the name of the Lord Jesus.' Does this require a court to invalidate every act of a legislature composed predominantly of believing Christians? How is a court to examine and characterize the motivation

## 2. Legalized Abortion Does Not Support Professor Smolin's Call for the Authoritativeness in Law of the Judeo-Christian Tradition

Professor Smolin cites legalized abortion as a second empirical example of tyranny produced by legal relativism. Since any secular ideology must be judged "in the light of the crimes [it] has committed and defended,"<sup>115</sup> the relativist, liberal establishment's responsibility for legalized abortion<sup>116</sup> demonstrates the need to restore the authoritativeness in law of the Judeo-Christian tradition. Evaluating Professor Smolin's conclusion requires several steps. One must first examine his presupposition that legalized abortion is a crime. If it is, one must determine if the relativist, liberal establishment is to blame. If so, the issue becomes whether the proper recourse is to restore the authority in law of the Judeo-Christian tradition.

Professor Smolin asks the reader simply to accept a key element in his charge that legalized abortion is a "crime against humanity"<sup>117</sup>—that abortion should be viewed as "the taking of innocent human life."<sup>118</sup> Many supporters of legalized abortion undoubtedly would contest this point. The issue cannot be fully explored here. Suffice it to say that convincing evidence exists to substantiate Professor Smolin's view.<sup>119</sup> What must be addressed, however, is his contention that blame for the crime of legalized abortion can be laid at the feet of liberalism.<sup>120</sup> Professor Smolin's conclusion is incorrect. This is not to

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in the hearts of religious believers without impermissibly becoming entangled in religious questions?

Smolin, *supra* note 16, at 409-10 (footnotes omitted) (quoting *Colossians* 3:17 (NIV)). This statement does not reassure me. Professor Smolin's argument relies upon the inappropriateness of a court's examination of the believer's heart. The non-imposition principle requires each believer to examine his own heart. Professor Smolin refers to religious purposes being "presented as a secular motivation." *Id.* at 410 (emphasis added). This phrase to me suggests disingenuousness on the part of the believer. The non-imposition principle requires the Christian, before seeking a law which implements faith-based precepts, to genuinely believe that secular considerations provide independent justification for the law.

115. *Id.* at 409.

116. *Id.* at 403.

117. *Id.*

118. *Id.* at 401.

119. The evidence includes the occurrence of live births during late second-trimester abortions, significant indications that fetuses experience pain as early as the end of the first trimester and the indisputable genetic uniqueness of each human embryo from conception. See Calhoun, *supra* note 84. I believe that many who do not view the unborn as human life have either negligently or willfully ignored this and other evidence which contradicts their view.

120. Smolin, *supra* note 16, at 403-05. I am aware that some have argued that a finding that the fetus is a human life does not compel the conclusion that abortion on demand is a crime. Professor Smolin, for example, discusses and rejects the position of Professor Laurence Tribe, who, even assuming that "'pre-viable fetuses [are] full human beings,'" defends the woman's right to abort. *Id.* at 405-06 (quoting L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1352-59 (2d ed. 1988)). My purpose in this article does not require me to evaluate arguments like that of Profes-

say that the current liberal establishment does not predominantly support legalized abortion. It does. Tragically, however, as Professor Smolin himself recognizes, these leaders are acting inconsistently with their own liberal tradition:

There is a sense in which the pro-life cause would naturally fit the establishment liberal agenda, for the cause seeks to protect a group whose members quite literally cannot protect themselves. Rarely before, moreover, has establishment liberalism been willing to carry the relativist agenda to the point of allowing one human being to physically injure or kill another; typically, the principle of relativism is halted at the point when direct harm to an innocent other is contemplated. American liberalism could still repent of its broad-based allegiance to mass abortion on demand, and recoup at least a good portion of its ideological consistency.<sup>121</sup>

Rather than calling for general legal implementation of Judeo-Christian precepts, thereby risking violation of the non-imposition principle, Christians should be working instead to help those liberals who support abortion to realize that they are violating their own principles.<sup>122</sup> This is not to imply that there are not many Christians who need to experience a similar realization. In fact, Randall Terry, founder of Operation Rescue, lays the blame for the continuation of legalized abortion squarely upon Christian apathy.<sup>123</sup>

Even those Christians who are active in the fight against legalized abortion have no basis for moral smugness. If many liberals have a blind spot on the abortion issue, Christians<sup>124</sup> in the past have had blind spots on other issues, such as the civil rights movement.<sup>125</sup> Liberals played a part in calling Christians back to the Christian tradition. Even though Professor Smolin believes that success is improbable,<sup>126</sup>

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sor Tribe. It is sufficient to say that I, with the exception of situations where the mother's life is endangered by continuation of the pregnancy, find such arguments unconvincing.

121. *Id.* at 406; *see id.* at 402-03.

122. This effort by Christians would not violate the non-imposition principle, as there are secular reasons for viewing the unborn as human life.

123. *See* R. TERRY, OPERATION RESCUE 144-46, 156, 159-60, 172-73, 215 (1988). Some of the apathy occurs among Biblically-conservative Protestants who should know better. Part, however, is attributable to the fall from orthodoxy of much of mainline Protestantism. This has many significant components, but includes, as Professor Smolin states, the fact that the "institutional leadership" of such churches have "placed virtually their entire moral capital behind the secular agenda of left-wing political groups." Smolin, *supra* note 16, at 387. I believe, consistent with Randall Terry's view, that what would most advance the fight against abortion would be the fidelity of both groups, conservative and mainline Protestant alike, to what the historic faith requires.

124. By speaking of "liberals" and "Christians," I do not mean to imply that liberals cannot be Christians.

125. *See* Smolin, *supra* note 16, at 386.

126. *Id.* at 406.

Christians should now attempt to reciprocate that important service.

Even if one accepts Professor Smolin's view that the liberal establishment is responsible for legalized abortion and his belief that any reform is improbable, the conclusion that the Judeo-Christian tradition should be authoritative in legal discourse is still unwarranted. According to the non-imposition principle, any across-the-board recognition of such authoritativeness would be incompatible with Christianity.<sup>127</sup> The Christian, appropriately to invoke the power of the state, must be sure that each law he seeks is supported by independent, secular grounds. This requires a case-by-case evaluation. Giving blanket legal authoritativeness to the Judeo-Christian tradition precludes this essential safeguard.

### III. CONCLUSION

This article has argued that Professor Smolin has not substantiated his contention that the Judeo-Christian tradition should be authoritative in legal discourse. This conclusion necessarily affects my evaluation of the ringing call to action with which Professor Smolin ends his article. Professor Smolin believes that "[t]oo many [Christian scholars] have been content to relegate their faiths to their private lives, while moving quietly and safely amongst their colleagues."<sup>128</sup> He calls us to "the work—despite prejudice, despite opposition."<sup>129</sup> He provides encouragement by reminding us that we are "on the winning side: the victory will be accomplished by God in the time, and with the means, that He has appointed."<sup>130</sup>

What I have argued, of course, is that God does not use man's law as His means of victory.<sup>131</sup> Therefore, the work of the Christian scholar is not, as Professor Smolin urges, to seek legal authoritativeness for the

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127. I am curious as to how Professor Smolin would react to this statement. I rely upon what I believe to be an objective principle which binds all Christians. Professor Smolin, however, presumably would argue that the non-imposition principle is not part of Christianity. See *supra* note 25. If most Christians happened to agree with me, would Professor Smolin, as the loser in this particular conflict, be willing to concede that I had not dominated him, but rather that he had lost due to a "true moral principle, which objectively rules us both"? See *supra* note 41 and accompanying text. I doubt it. He would more likely say that my view is a distortion of Christianity and that his loss was due to an imbalance of raw power. If I am correct in my assessment of Professor Smolin's reaction, the scenario I posit is a further indication that he should repudiate his argument that basing a legal system upon objective values precludes tyranny. See *supra* notes 86-87 and accompanying text.

128. Smolin, *supra* note 16, at 415.

129. *Id.*

130. *Id.* at 416.

131. At one point in his article Professor Smolin seems to recognize this: "The Christian life is a ceaseless struggle against the evil both within and without, but Christianity also teaches that ultimate victory is not achievable in this world or life, and is not achieved through human autonomy but rather through divine sovereignty." *Id.* at 391.

Judeo-Christian tradition. To the extent that Professor Smolin's criticism of Christian scholars reflects their failure to pursue his mistaken vision, I cannot agree with his critique.<sup>132</sup> I do, however, join Professor Smolin in calling Christian scholars to "the work," albeit of a different kind than his article encourages. The work I have in mind is the same work required of everyone who is a disciple of Jesus. First, Christians are called to an unabashed commitment to the Christian Gospel.<sup>133</sup> Underlying this emphasis is the basic truth that a transformed heart, not legal compulsion, is the path to obedience to the way of life which God commands. Second, Christians are called to lead a Christian life-style.<sup>134</sup> We cannot expect the world to take us seriously if our beliefs are not reflected in the way we live.

The lesson for today's Christian scholar is clear. First, we must obey Christ's command to be witnesses for the Gospel to our colleagues and students. The academic environment can indeed, as Professor Smolin states, be indifferent or hostile to Christianity. Difficulties, however, are no excuse for ignoring everyone's need for Jesus Christ.<sup>135</sup> Second, we must live a Christian life-style. This includes not only what might be called inner-directed elements, such as pursuing personal holiness, but also outer-directed ones: do our actions show forth the love of Christ to the world? We must strive for this in our response to public problems as well as in our personal relationships. Charles Colson argues that the former should involve us in efforts to bring "the Christian mind" to today's political and social issues."<sup>136</sup> I agree, so long as the Christian is faithful to the non-imposition principle. Colson, I believe, would not object to this constraint: "Christians must contend for truth; not simply by quoting Scripture, which our secular neighbors don't believe anyway, but by presenting persuasive arguments."<sup>137</sup>

My different view of how Christian scholars' efforts should be directed does not mean in the end that I consider the Christian ethic any less important for the American legal system than does Professor Smolin. I conclude by returning to Professor Marty's statement that the Framers believed a godly people to be vital to the success of our repub-

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132. I should state here that I consider myself very fortunate to be working at a law school which not only does not exclude Christians from the faculty, but at which several of my Christian colleagues definitely do not "relegate their faiths to their private lives." For Professor Smolin's contrary observations, see *supra* text accompanying note 61.

133. See *Matthew* 10:32-33, 28:18-20 (NIV); *Philippians* 1:27-28 (NIV).

134. See *Ephesians* 4:1 (NIV); *1 Peter* 1:14-16 (NIV).

135. The methodology for witnessing is a question beyond the scope of this article. I am convinced, however, that it is possible to be a bold exponent of the Gospel without acting in an obnoxious or otherwise inappropriate manner.

136. C. COLSON, *AGAINST THE NIGHT* 164 (1989).

137. *Id.* at 167.

lic.<sup>138</sup> The evidence that they held this belief is overwhelming.<sup>139</sup> As the godliness of our people declines, many have expressed grave concern over America's future. Professor Glenn Tinder worries that we may be "now living on moral savings accumulated over many centuries but no longer being replenished."<sup>140</sup> Professor Harold Berman warns that John Adams was right when he said that "the Constitution . . . 'was made only for a moral and religious people. It is wholly inadequate to the government of any other.'"<sup>141</sup> Charles Colson argues that "[t]he reigning god of relativism and the rampant egoism it fosters coarsen character, destroy any notion of community, weaken civility, promote intolerance, and threaten the disintegration of those very institutions necessary to the survival and success of ordered liberty."<sup>142</sup>

The warnings must be taken very seriously. A nation whose people reject God faces inevitable decline.<sup>143</sup> The return to godliness, however, cannot be based upon Professor Smolin's effort to empower Christian precepts with the force of law. The path instead is the ancient path of the disciple of Christ.<sup>144</sup>

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138. See Marty, *supra* note 1, at 17.

139. *Id.* at 16-18.

140. Tinder, *Can We Be Good Without God?*, ATLANTIC MONTHLY, Dec. 1989, at 69, 82.

141. Berman, *supra* note 96, at 163 (quoting 9 WORKS OF JOHN ADAMS 229 (1856)).

142. C. COLSON, *supra* note 136, at 108. Dr. Francis Schaeffer makes a similar point: Those of us from the Reformation countries have experienced a Christian consensus. (This does not mean that every individual was a Christian but that society was strongly influenced by Christian values). But my generation and the generations immediately preceding me made a bad choice, and so we now live in a post-Christian world. The choices of faith have been set aside and forgotten, and, accordingly, the confusion, sorrow and lawlessness . . . is occurring in our generation.

F. SCHAEFFER, JOSHUA AND THE FLOW OF BIBLICAL HISTORY 211 (1975).

143. Many may find this idea quaint and amusing. My response is to state that we are even now experiencing its tragic truth. Absent a renewed commitment to God, our descendants will experience the decline even more intensely.

144. In describing the basic work of the Christian as a commitment to proclaiming the Gospel and to living a Christian life-style, I am in agreement with Charles Colson's call that the church strive to be "communities of light exist[ing] . . . in accountable fellowships where the gospel is faithfully proclaimed and where members reach out in an effort to bring God's mercy and justice to those around them." C. COLSON, *supra* note 136, at 156. Mr. Colson in turn reflects the Apostle Paul's letter to the church at Philippi: "Do everything without complaining or arguing, so that you may become blameless and pure, children of God without fault in a crooked and depraved generation, in which you shine like stars in the universe, as you hold out the word of life

" *Philippians* 2:14-16 (NIV).

