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Shall These Bones Live? Property, Pluralism, and the Constitution of Evangelical Reform

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COMPTON, JOHN W. 2014. *The Evangelical Origins of the Living Constitution*. Cambridge, MA: Harvard University Press. Pp. 261. $45.00 cloth.

The Supreme Court of the New Deal era transformed the US Constitution, making the Constitution's original protection of property rights give way to democratically popular regulations. In The Evangelical Origins of the Living Constitution *(2014), John W. Compton argues that twentieth-century progressives turned the Court toward this "living" interpretation of the Constitution by relying on legislative methods and judicial precedents created by nineteenth-century evangelicals. Evangelical reformers accomplished national prohibition of liquor and lotteries, but their regulations destroyed property rights that were legally valid and socially acceptable at the inauguration of the Constitution. Courts ultimately acquiesced in these novel economic proscriptions because of overwhelming majoritarian sentiment driven by evangelical populism. Relying on a recent literature of law and religion, Compton alters conventional accounts of the US constitutional tradition of protecting property. This essay reverses the path of analysis and argues that evangelical concerns with constitutional property rights challenge standard accounts of law and religion in US history. Rather than a simplistic imposition of moralism, evangelical reform was derived from antislavery liberalism. The legal and religious pluralism that had impeded antislavery, however, also hindered prohibition and spurred evangelicals to seek federal remedies to national sins. Thus national prohibition, no less than New Deal constitutionalism, centered on the US dilemma of how to wield illiberal regulations to safeguard liberalism.*

INTRODUCTION

Near the end of his long life, the Supreme Court Justice Oliver Wendell Holmes Jr. wrote to his friend Harold Laski that it was "amusing to see in the law how in a century what was thought natural and wholesome may become anathema—like rum and the lottery—but they generally are argued about as if the present view was an eternal truth." The sentiment serves a dual purpose in John W. Compton's *The Evangelical Origins of the Living Constitution*. The content of the observation is a useful artifact of empirical observation: in the course of the

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nineteenth century—in the course of Holmes's own life—good property secured by contracts protected by the Constitution had become an abatable nuisance, and the influential jurist recognized as much and regularly commented on this revolution in social morality in his jurisprudence (177). The tone of historicist irony likewise gives Compton a structuring theme for his work. Present defenders of various constitutional orthodoxies, he promises, will find their forerunners in unlikely places.

As was often the case, Holmes's choice of words was no accident. The theologically laden term *anathema* gestured toward the religious reformers who Holmes believed had refashioned the Constitution and with it, the manner in which it ought to be interpreted. In tracing the story of religious reform through the jurisprudence of Holmes and into the New Deal era, Compton brings recent work in the field of law and religion to bear on a subject usually considered beyond that field's purview: the New Deal transformation of economic rights and regulation.

After reviewing the important contributions Compton's analysis makes to constitutional history, this essay will reverse that course of analysis and consider how Compton's focus on evangelicals and property rights reorients the study of US law and religion. Histories of the First Amendment have tended to offer simplistic accounts of evangelical moralistic coercion through law, but a history of constitutional property protections challenges these accounts and reveals how evangelicals have engaged in a common US struggle to secure certain freedoms by outlawing others. Just as *freedom from* slavery abolished the *freedom to own* slaves, evangelicals sought to free Americans from certain addictions by proscribing the commerce that trafficked in temptation.

In making this argument, this essay joins two literatures of pluralism rarely studied together for US history: *religious* pluralism and *legal* pluralism. Compton's emphasis on evangelical concerns over the legal definition of property, commerce, and federalism can help us appreciate the extent to which evangelicals operated their own autonomous legal orders, legalities that were threatened by the rise of religious pluralism and fears of secession. Central of course to nineteenth-century concerns about property and secession was the problem of slavery. This essay accordingly brings antislavery thought from the periphery of Compton's study and shows its centrality to evangelical understandings of moralism and liberalism. In their quest to secure free agency for individuals, evangelicals decided they could restore life to the dry bones of a federal Constitution that had once protected immorality and bondage.

The Present View

As with any religious orthodoxy, the positions one might take on constitutional interpretation are many, and the political valances of those positions are not always clear.[1] As matter of convenience, originalism and living constitutionalism

1. Originalism finds adherents among evangelical and Catholic conservatives (George 1998; McConnell 1998), but also among liberal progressives (Amar 2000). Reva Siegel argues that a living constitution approach, frequently associated with liberal and left-wing theorists, has lately found favor with conservatives arguing about the meaning of the Second Amendment (Siegel 2008). Similar complex alliances have shifted around other approaches to constitutional interpretation that emphasize pragmatism, autonomous individualism, or judicial restraint (Feldman 2010).

usually define the polar positions in scholarly and popular literature, as they do in Compton's narrative. Adherents of the former insist the original meaning underlying the constitutional text is relatively certain and that any contemporary interpretation of the text should remain consistent with this original meaning (unless, of course, formal processes are undertaken to amend the text itself). Living constitutionalists meanwhile hold to some nexus of beliefs that, as Compton summarizes it, "the will of democratic majorities should be afforded greater weight in constitutional adjudication; that the ideals of the Founding generation should not be permitted to bar the moral progress of future generations; and that the meaning of constitutional concepts should be updated to reflect advances in scientific knowledge" (15). Interpreting the Constitution by the latter strategy, one might find oneself permitting actions the original framers and readers clearly understood the text to forbid.

As presidential campaigns and judicial confirmation battles since the 1980s have made clear, originalism today is often the favored method of political conservatives, particularly socially conservative evangelical Christians. A 2011 Pew Research Center survey that Compton cites reported that 88 percent of "staunch[ly] conservative," religiously devout Americans thought originalism was the normatively correct approach to constitutional interpretation. Living constitutionalism, meanwhile, has tended to find strongest support among the descendants both of New Deal liberals and champions of autonomous individualism, that is, those who approve of constitutional changes like the rise of the administrative state or of privacy rights that gained judicial recognition without textual amendments to the Constitution (183). But to Compton, the present view is not the eternal truth. In fact, he argues, the earliest US proponents of a living constitution were politically active evangelicals whose views on social mores—about alcohol, gambling, sex, and the welfare of children—closely align with the most conservative of their contemporary counterparts. And from these evangelicals Holmes (certainly no friend to religion himself) and the proponents of the New Deal order inherited their understanding of constitutional change.

Since the George W. Bush Administration, scholars have paid increasing attention to the formation of the Religious Right and its attempts to reorient the US judiciary toward originalism (Schulman and Zelizer 2008). Compton focuses rather on the influence of evangelicalism on constitutional theory a century earlier, from the early nineteenth century to the constitutional triumphs of the New Deal, and argues an evangelical "morals revolution" ultimately changed both the meaning of the Constitution and the major method of its interpretation.

Rum and the Lottery

Although antebellum evangelicals directed their reform efforts at numerous perceived social evils, from slavery to Sabbath breaking, poverty to prostitution, Compton gives almost exclusive focus to the two singled out by Holmes: liquor and lottery prohibition. Unlike penalties for blasphemy, Sabbath breaking, and sexual deviance—for which there was a long common law tradition of vice regulation—

Compton argues that drinking and gambling were relatively unregulated and socially unproblematic *at the time of the founding*. Indeed, lotteries helped build many a church edifice in the colonies and early republic, while quaffing alcohol preceded baseball as America's pastime. At the turn the nineteenth century, liquor and lotteries were regulated industries, but not in ways distinct from other lawful industries. One needed a license to sell alcohol, but once acquired, both the license and the stock of liquor it secured were private property, protected from public seizure.[2] Likewise, after the Marshall Court decided that corporate charters were contracts that state legislatures could not retract (*Dartmouth College v. Woodward*), so too lottery grants created obligations that states could not impair, per the Contracts Clause of the Constitution.[3] The legitimate prohibition of liquor or lotteries after the formation of the republic, Compton concludes, thus required either an amendment to these problematic texts or the abandonment of the original meanings of property, due process, and contractual rights.

As his study of judicial doctrine proceeds, Compton reveals the extent to which liquor and lottery regulations encountered other problems stemming from the constitutional text, particularly the Commerce Clause and the US structure of federalism instantiated in the Tenth Amendment.[4] As freights of alcohol or packets of lottery tickets crossed state lines for sale, they became articles of interstate commerce protected by the federal government from purely local "police" concerns, a constitutional obstacle that blasphemy laws or school Bible-reading provisions never had to confront.

Of course, the fight against slavery sprang from a similar morals revolution that sought to redefine what the nation's founders had considered protected property and a legitimate interstate trade in commodified persons. Compton does not engage with the history of antislavery evangelicalism because the destruction of slavery involved "*formal amendments*" to the Constitution's text, not "shifts in constitutional doctrine and interpretive methodology" (13).[5] As the moral dilemma of antislavery constitutionalism has become well-trodden ground in legal scholarship (Cover 1984), Compton brings antislavery into his narrative only when it reinforces the saliency of his observations that, for instance, economically disruptive morals reform was unpopular in the antebellum South (35), antebellum jurists were particularly anxious about tampering with constitutional categories of property and

2. Although states in the antebellum period were not bound by the Fifth Amendment ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation" [Amend. V.]), most states had constitutional clauses and a jurisprudence of due process that created similar requirements.

3. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts" (Art. I, sec. 10, cl. 1).

4. "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes" (Art. I, sec. 8, cl. 3). "The powers not delegated to the United States by the Constitution, [such as the police power] are reserved to the States respectively, or to the people" (Amend. X).

5. The Eighteenth Amendment, prohibiting the manufacture, transport, and sale of "intoxicating liquors," was added to the Constitution *after* the Supreme Court held prohibition policies at both the state and national level were constitutional. Ironically, the formal textual change was supposed to entrench prohibition as a national policy (Hamm 1995).

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interstate commerce (12), and therefore the Republican ascendancy marked a significant turning point in moral reform (74–78).

Like Compton, the architects of twentieth-century jurisprudence also set antislavery aside. As Holmes's bemused comments to Laski illustrate, adherents of pragmatism, sociological jurisprudence, and legal realism pointed specifically to liquor and lotteries as a singular type of moral and legal revolution. For some, like Holmes, the eradication of slavery was within living memory, yet they cited "rum and the lottery" as the important precedents that changed the course of constitutional development. In adopting the outlook of his subjects, Compton's narrow focus allows us a keen view of a world that has become lost to us, a world where the eradication of notorious vice seemed within reach, if only the troubling textual strictures of a bygone era could be set aside.

Nevertheless, the question remains as to why some reforms could be accommodated with constitutional interpretation but the abolition of slavery could not. After further examining Compton's narrative and the tenets of evangelical constitutionalism, I shall return to this question.

WHAT WAS THOUGHT NATURAL AND WHOLESOME MAY BECOME ANATHEMA

To understand how evangelicals succeeded against originalism, one must engage in a bit of originalism—at least its descriptive side. What *did* the framers and the ratifying public hope to achieve, and how did they understand and distinguish between categories of commerce and morality, federal property protections and local police powers? Compton answers that in 1789 the new Constitution established a "commercial republic" that subordinated "traditional moral and religious purposes to the worldly goals of protecting property and promoting economic development" (19). Remarkable for its time, the Constitution made no appeals to divine sanction, while its key promoters, such as James Madison, assumed that across a large republic, a national moral consensus would be impossible to achieve beyond a limited goal of "material prosperity and procedural consensus" (20). Though some framers were more than conventionally religious, Compton argues that as a group the founders agreed that national politics was not the ground on which to decide questions of morality.

This vision was plausible in 1789, Compton maintains, because US religious adherence was at its nadir. The intense moral regulation of Puritan New England had collapsed by the late eighteenth century. Only laws that served the market economy (such as those against theft) were zealously enforced. Well might Madison guess that the squabbling of small religious factions would cancel each other out before reaching the national level. Having just warred over disestablishment, Baptists, Presbyterians, and Congregationalists remained highly distrustful of one another, while the Episcopal Church suffered from rejection of all things British and watched its membership defect to the fledgling Methodist denomination. Church membership may have fallen as low as 10 percent of the population, its

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lowest level in US history.[6] When the federalists contended that the United States would never achieve a national moral standard beyond the protection of property and commerce, few challenged that consensus.

Within a half century, the federalist vision was obsolete. By 1830, what Americans at the time called the Great Revival was reaching its zenith. Church membership rose, and the cultural influence of Protestant Christianity became even more pervasive. As the historian Mark Noll puts it, "the people of the United States were each hearing several more times the number of Methodist sermons each year than they received pieces of mail" (2005, 201). Most important for Compton's purposes, evangelical denominations began working together to form benevolence associations, some of which—such as the American Tract Society and American Bible Society—numbered among the largest corporations in the United States. As Compton summarizes, "American Protestants were, by the middle decades of the nineteenth century, unified by a set of broadly shared theological convictions as well as an interlocking network of ecumenical associations dedicated to the eradication of . . . national sins" (29).

While Compton understands the effects that a booming population and the upheavals of a rapidly developing market economy must have exerted on the Revival, he contends that change in what he terms the "religious sphere" was mostly spurred by religious institutions and theology itself. Compton believes that a key doctrine for those who found success in the new free market of disestablishment was perfectionism, a theology that insisted every believer could (and, indeed, was obligated to) progress in sanctification and fully eradicate vice from his or her life (31–32).

To the Revival's most famous preachers Charles Finney and Lyman Beecher, formerly tolerable activities were now censured for their tendency toward abuse, particularly drinking and gambling. This popular shift in mores, Compton argues, likewise brought the US legal order under evangelical suspicion. Evangelicals found it irksome that governments seemed content with regulating vice rather than eradicating it, and they scoffed at the idea that property rights could protect the instrumentalities of vice. Compton argues that many evangelicals embraced legislative politics to bring the government into line with perfectionist theology, encouraged by Beecher's maxim that the "science of self-government" was "the science of perfect government" (32, 35).[7]

The predominance of nineteenth-century morals regulation is well known, so the tension between the commercial constitution and evangelical mores seems at first unremarkable. Legal historians often treat morals legislation as an amusing

6. Compton's figures rely on Finke and Stark (2005). Religious demography is notoriously difficult to calculate, especially for the eighteenth century. Patricia Bonomi and Peter Eisenstadt's study (1982) concluded that church adherence (not necessarily membership) hovered above 56 percent of the population to the end of the century. As Bonomi and Eisenstadt made clear, however, such numbers cannot tell us about "the quality or intensity of eighteenth-century religious experience," which may well have approached the nadir that Compton describes (275).

7. On this point Compton's account elides an important distinction between Christian communities and society at large. Perfectionism concerned the *Christian's* duty—empowered by spiritual grace, which was the unique possession of evangelized Christians—to forsake sin. How perfectionism could become the duty of all members of society remains unexplained. I shall return to this question below.

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exception to the judiciary's rigidly formalistic adherence to the property rules that supported a commercial economy. Lawrence Friedman has written that "free enterprise in liquor, lottery tickets, gambling, and sex never appealed much to nineteenth-century judges" (2005, 269). Such accounts contend that so long as it occurred within the narrow class of "public morals," pervasive government regulation that overrode individual rights presented what William Novak calls an "easy case": public morality almost always won, and the legitimacy of the legal order was never open to question because of this (Novak 1996, 149). In many ways, Compton concedes, these accounts are correct. Where reformers sought to strengthen existing regulatory frameworks against traditionally proscribed activities—such as prostitution—they encountered few difficulties.

The problem, however, was that evangelicals were now creating vices where none existed before. In the founding era alone, at least 200 churches had funded their building programs through lottery drawings, while Americans of all denominations quaffed seven gallons of hard liquor a year (compared to less than two gallons today with much less alcoholic content) (198; Howe 2007, 167). By the 1840s, both drinking and gambling declined thanks to the evangelicals' crusades, but falling popularity did not change their status as lawful activities, supported by the full apparatus of property, contract, and procedural protections of state and national constitutions. Thus, with certain regulations, Compton contends, the victory of public morality over individual rights has a more politically contentious history than might be expected. Moreover, Compton's survey of case law finds that morals regulation was hardly a nineteenth-century blind spot cleared up in a post-Victorian age. Nineteenth-century judges also recognized that interpreting the Constitution to permit radical liquor and lottery regulations might open doors that could not be closed, and whenever their faithfulness to constitutional tradition weakened, legal academics regularly called them out.

Compton begins his survey of attempted reform with the evangelicals' innovative liquor proscriptions. One attempt at prohibition that became popular across the 1830s was the no-license pledge. Since the official who granted liquor licenses stood for election, reformers in an increasing number of localities were able to extract pledges that if elected, the candidate would grant no new licenses. The scheme found favor with the influential Massachusetts jurist Lemuel Shaw because it did not significantly disrupt the existing structure of regulation (it merely caused the number of licenses issued to decrease), but even this half measure was repudiated by judges in other jurisdictions, especially in the South (54–63).

Denying new licenses did not achieve prohibition because states had already granted licenses that would not expire. Shaw's opinion rested on this distinction. Whereas no man had a property interest in a license he had not yet been granted, a license that had been granted was vested property: it could be used, transferred, or destroyed at the pleasure of the individual rights-holder. Any state interference with such property had to satisfy constitutional demands of due process. Compton demonstrates that in the 1850s, when evangelical reformers attempted to assault this system with their famous Maine Laws, state judges—including Shaw—staunchly defended vested property rights in liquor.

The original Maine Law defined liquor as a noxious substance, making exceptions for medicinal or industrial uses. Any three citizens could obtain a search warrant and summarily destroy illicit liquor. A number of procedural hurdles greeted those objecting to the seizure of their property, including stiffly increased filing fees in the courts. Maine Laws were important—and successful—precedents to Prohibition, but Compton warns us to pay closer attention to chronology. When judges first confronted these laws in the 1850s, they struck them down with unanimous horror. In some states, such as Maine itself and Shaw's Massachusetts, courts objected on grounds of due process. If medicinal liquor was allowable, then illegality inhered not in the object itself but in the intent of the user—and the Constitution required that criminal intent be established in court before a jury (63–67). Some states went further and refused to see how good property could become noxious hazard overnight. "[L]iquors are property," the New Hampshire court flatly declared. "Legislation cannot change the nature of things" (*Advisory Opinion* 1855).

Lottery prohibition encountered similar difficulties, but on a different constitutional ground. Two major Supreme Court precedents demanded antebellum judges consider lottery grants under the protection of the Constitution's Contracts Clause. In the 1810 landmark decision *Fletcher v. Peck*, the Court had held that state legislatures could not repudiate their own contracts, even when (as in the massive, fraudulent land sale at issue) the contract was morally repugnant. In 1819, *Dartmouth College* held that the grant of a corporate charter, by imposing mutual obligations on both the corporation and the state, functioned as a contract that bound future legislatures.[8] In the antebellum period no state revoked a vested lottery grant, and judges struck down even indirect reforms—such as an increased $10 fee on each drawing. Thus, up into the 1850s, "in both cases [of liquor and lottery regulation], antebellum judges displayed a clear preference for settled property rights and traditional patterns of authority" (58).

Judicial decisions took a sudden turn in the mid-1850s, for which Compton credits "the collapse of the Jacksonian party system" (75–76). If the founders had hoped to keep "local morality" out of national politics, the newly formed Republican Party dedicated itself to the opposite proposition, finding national politics an appropriate arena for advancing America's moral development.[9] Neither Whigs nor Democrats had taken a firm stand on prohibition, but the early Republican coalition of northern evangelicals and nativists pushed the party leadership to endorse prohibition, prompting an equally strong Democratic opposition. After the formation of the national Republican Party, Compton charts the fascinating reversal of

8. After *Dartmouth*, states wrote reservation clauses into charters, providing future legislatures the power to amend, but Compton finds that few of these reservation clauses ever made it into lottery grants (39).

9. Compton's view of the Republican Party is shared by the "post-Revisionist" historians who contend that the Republican Party was strongly united from its inception on the immorality of slavery (countering the "Revisionist" view of Lincoln and the Republicans as reluctant emancipators forced toward antislavery only at the end of the Civil War). The Republican platform itself committed the party to making "morality"—of slavery, polygamy, and the liquor trade most of all—central concerns for national politics (Oakes 2014).

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judicial decisions on the Maine Laws. The unanimous logic of the early opinions suddenly appeared only in dissents, then disappeared entirely by 1860.

The doctrinal shift occurred when state judiciaries reformulated the relationship between property rights and the states' police power. In early antebellum jurisprudence, judges treated the police power as naturally and necessarily limited by vested rights in property. However, by the end of the 1850s, many northern courts had reversed the equation and spoke of property rights as naturally limited by near absolute police power.

This reversal was key to the liquor decisions, since the Maine Laws rendered a formerly valid type of property a noxious substance, a nuisance per se that could be abated with summary destruction. "[W]hile the major antebellum jurists regularly acknowledged that the state could, in some instances, destroy property through summary proceedings and without compensating the owner," Compton writes, "they consistently characterized this power as consisting of a series of narrow, common-law-based exceptions to the general rule of inviolable property rights" (79). From Blackstone's *Commentaries* (1760s) to the 1830s, the list of nuisances per se remained constant and did not include alcohol.[10] Early Maine Law decisions followed a familiar pattern: they began by recognizing that liquor was good property, then proceeded to examine whether the Maine Law procedures duly protected property rights. After Republican ascendancy, Compton finds an equally discernable pattern that followed a different logical course.

A typical case was Vermont's *Lincoln v. Smith* (1855). It cited no Maine Law decisions from the 1850s, and instead of opening with the question of whether the liquor at issue had been vested property, the court reasoned from social contract theory that rights-bearing individuals necessarily give up some of their natural rights upon entering civil society. The court then proceeded to list the traditional subjects of nuisance abatement, not as fixed exceptions to the rule of inviolable property, but as open-ended illustrations of how expansive a state's police power could be (81–83). In fact, it was the ability of the police power to expand beyond traditional categories that became its defining characteristic. As a Rhode Island court reasoned, police regulations were made by positive law "and changed by it according to our changing circumstances" (*State v. Paul* 1858).[11] No longer, Compton concludes, did it seem that "the primary function of a written constitution was to insulate preexisting property rights from the whims of fluctuating democratic majorities" (85).

In a survey of northern and midwestern states that ruled on Maine Laws in the late 1850s, Compton finds that states that upheld the law (Vermont, Iowa, Connecticut, Rhode Island, and Delaware) had strong Republican majorities and, in most cases, an elected judiciary subject to short terms. That is, judges who upheld Maine Laws owed their positions to the people who had drafted and supported the regulations (76). Maine Laws continued to be struck down in a minority of

10. Specifically, nuisances per se included the manufacture or storage of gunpowder, obscene prints, gambling materials, diseased substances, or property used in the commission of felonies.

11. The Rhode Island case is particularly interesting, since *a federal court* had struck down the state's Maine Law in 1853. After the legislature reenacted a substantially similar law with the exact same summary destruction and ex parte enforcement procedures, the state supreme court upheld the law, reasoning that alcohol regulation was best left to the legislature and not to the courts (*State v. Paul* 1858).

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northern states where Democrats retained control of the bench (New York, Indiana, and Michigan), and split decisions followed party lines.

Compton's point is not that partisan positioning fully determined legal doctrine, but that the morals revolution had become so pervasive that a younger generation of judges thought it obvious that sovereign states could restrain the liquor trade. Despite judicial resistance, more states passed Maine Laws, and liquor consumption fell below 1.8 gallons per capita. Compton concludes that judges now automatically inquired "whether the 'natural' or 'abstract' rights of property were compatible with the pressing policy goal of curbing the liquor traffic" (85).

Far fewer court battles developed over the prohibition of lotteries because reformers merely allowed grants to expire while they ratified constitutional amendments to prohibit any others. By 1850, over half the states had such bans (36–37). In postbellum Mississippi, a cash-strapped legislature resorted to lottery grants to raise revenue, but the Republican Reconstruction government later revoked the grant. The reviewing court duly cited *Dartmouth* but then *upheld* the state's power to revoke its own contract, following the same line of reasoning as the Republicans' liquor cases: rights of contract were never absolute and always subject to the police power. Presaging a living Constitution argument, the court concluded that rights "granted for a use harmless and innocent at the time" could be revoked if "experience shall show that the use is prejudicial to the public" (*Moore v. State* 1873).[12]

After the Civil War, various states—often under intense lobbying by manufacturers and distributors—repealed their Maine Laws or reintroduced lottery grants. Evangelicals mobilized through national organizations such as the Women's Christian Temperance Union and the Anti-Saloon League to secure federal entrenchment for their reforms.[13] Compton insists that the Supreme Court "attempted—to a much greater extent than had the state judiciaries—to minimize the doctrinal impact of liquor and lottery reform," but in each case the Court ultimately exhibited "a familiar three-stage pattern of judicial resistance, followed by accommodation, and—ultimately—doctrinal incoherence"—an incoherence widely noted by leading academic commentators (93, 121).

With regard to lottery grants, as late as 1877, the Court affirmed that the *Dartmouth College* interpretation of the Contracts Clause brooked no exceptions,[14] but

12. To hold otherwise, the court reasoned, "would deprive the state of the power to right herself by repealing any reckless legislation whose certain tendency is to corrupt the fountain of public morals" (the opinion never mentioned the contrary Supreme Court holding in *Fletcher v. Peck*).

13. Federal courts had occasionally ruled on Maine Laws in exercising their diversity jurisdiction (refer to the previous note for one example); those decisions usually went no higher than the district level. The one time the US Supreme Court gave serious consideration to liquor prohibition was in the 1847 *License Cases*, which upheld novel licensing regulations but warned states that otherwise valid police regulations could not impede interstate commerce. In later decades, this stance would become known as the "original package" doctrine: local license and retail regulations could not be applied to out-of-state shipments of commodities that were transferred in-state in their original packaging.

14. That year Justice Stephen Field, the leading architect of economic due process on the Court, upheld Alabama's revocation of a lottery grant, but only on the technical ground that no valid contract had yet formed between the parties. Field continued the *Dartmouth College* tradition, but he expressed uneasiness at the idea that one legislature could bind a future legislature on the issues related to public morality (in Compton, 95). Three years later, the Court turned Field's apprehension into a point of law.

three years later, the Court upheld Mississippi's revocation of its lottery grant, unanimously holding that no state "can bargain away the public health or the public morals." The Court bolstered its arguments with democratic support, noting that "the will of the people" had been "authoritatively expressed" through lottery bans across all the states (*Stone v. Mississippi* 1880). In subsequent years, the Court struggled to clarify which police power regulations joined lottery bans as exceptions to the Contracts Clause.[15] Hoping to guide perplexed lawyers, one commentator advised it was clear "that the court will always nominally adhere to the doctrine of the [*Dartmouth*] case, and yet that they will not apply it in cases ... where the result would be unreasonable from the point of view of the general public" (102).

Compton outlines a similar development as state-level constitutional prohibitions of liquor became increasingly popular. The Fifth Amendment requirement that prohibition of "traditionally lawful economic activities" demanded just compensation seemed so clear that even the devout evangelical reformer Judge David Brewer held in 1886 that a state could not prohibit the liquor trade without compensating those whose property had lost its value (111–12). Nevertheless, the following year, the Supreme Court upheld prohibition without requiring compensation. Vast majorities had come to view liquor as a noxious substance, and the Court could not, "without usurping the legislative function, override the will of the people" (*Mugler v. Kansas*). Academic treatises and journals largely sided with the dissent, criticizing the Court for essentially allowing legislatures—"the omnipotent half plus one" as a professor sneered in the *Yale Law Journal*—to define the extent of the police power for themselves (116–18).

The evangelical triumph over traditional constitutional understandings ultimately altered the American structure of federalism entrenched in the Commerce Clause and the Tenth Amendment, a structure that presented a problematic asymmetry to reformers. The Constitution of the commercial republic gave the federal government the power to regulate commerce between the states but accorded it no police power. States exercised the police power but were, per the Court's jurisprudence, preempted from regulating interstate commerce. In the 1870s, the liquor and lottery industries were turning this structural chiasm to their advantage. Having bought off the Louisiana legislature to gain a valid grant, the self-styled "Last Legal Lottery in America" earned $30 million a year selling tickets in states that forbade gambling. Liquor distributors evaded local prohibition laws in similar fashion (97–98). When Iowa attempted to criminalize the transportation of alcohol by common carriers within its borders, the Supreme Court struck down the measure. Under the Commerce Clause, states could not encumber the right to transport and sell interstate commercial goods (121–24).

The Iowa decision infuriated the evangelical press, which likened the decision to the infamous *Dred Scott*. Once again the Court seemed to be overriding enlightened, democratic laws in the service of a morally degenerate property regime.

15. The Court held that tax provisions in railroad charters and monopoly grants to utility companies were governed by the Contracts Clause, then that antimonopoly regulations were indeed an exception (100–02). Contradicting the literal text of the clause, the Court even ruled that state police power could override validly formed private contracts, citing the logic of the lottery decisions.

Iowans ignored the decision and continued to penalize railroad shippers of alcohol. Congress responded swiftly with the Wilson Act, a peculiar exercise of its commerce power that decreed that liquor shipments were subject to police regulations of the states in which they ultimately arrived. That is, Congress turned the logic of the Commerce Clause on its head, using the provision not to safeguard uniform regulations across a national market, but to effect the opposite (123–24). The Court nevertheless upheld the Wilson Act in 1891.

The Court's capitulation on liquor regulation raised a problem that would not be resolved until the New Deal. Could the meaning of *commerce* change over time, and were large electoral majorities an indication of such a shift? The Court reasoned in its accommodation to the Wilson Act that Congress could "divest" liquor of its commercial character, subjecting it to the police power of the states. However, by such logic, Congress could define its own powers and might move anything in or out of the category of "commerce."[16]

Eight years later, lottery regulation pushed the Court further. Unable to ban imports of Louisiana lottery tickets at the state level, reformers lobbied Congress for legislation forbidding the interstate transport of lottery tickets. The highly popular measure passed without even a roll-call vote, but it posed a serious problem for the Court. Court precedent held that lottery tickets were not "commercial," and the transportation ban clearly had no commercial aim other than the regulation of public morality. Nevertheless, after three reargaments a divided Court in the landmark *Champion v. Ames* (1903), permitted the congressional shift of categories. Lotteries had "become offensive to the entire people of the Nation," wrote Justice Harlan. The states were virtually united in their opposition to gambling, yet they faced a problem that only national institutions could resolve. "We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end," Harlan concluded.

What is striking about Compton's story of *Champion* is how closely it prefigures the story of the New Deal living constitution as told by scholars such as Bruce Ackerman. A problem with the national economy could not be solved at the state level, so a set of constitutionally dubious reforms favored by a large majority of citizens in a large majority of states were passed through Congress. The Supreme Court at first struck down these measures but eventually relented and adjusted its interpretation of the Constitution (Ackerman 2000).

Having arrived at the living constitution model, Compton's final chapter demonstrates how the Progressive architects of the New Deal relied on *Champion* and similar "morals" decisions. In the early twentieth century the Court applied *Champion* to uphold federal regulations of prostitution (Mann Act) and the liquor trade (Webb-Kenyon Act). When lottery precedents ultimately ran headlong into economic due process rights, the Court sought to draw the line at labor relations, most notably in the child labor case *Hammer v. Dagenhart* (1918), in which the Court struck down congressional bans on the transport of goods manufactured with child

16. The famous 1895 decision *E.C. Knight* reversed course, holding that antitrust regulation could not reach sugar manufacturers because "manufacturing" was not "commerce."

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labor.[17] The Court's test, subjected to the same criticisms as Contracts Clause jurisprudence, reasoned that the commerce power could not bar interstate transportation of items not "inherently harmful" in themselves. Paper lottery tickets met this test; clothing manufactured by children did not (131–32).

The Court's attempts to cabin the reach of the liquor and lottery precedents provoked trenchant dissents from Oliver Wendell Holmes Jr., who sat on the Court from 1902 to 1932. Holmes's insistence that courts should not allow ancient constitutional categories to stand in the way of legislative policy making is well known. Little remembered is how frequently Holmes used liquor and lottery precedents to argue that the Court was already accustomed to allowing majoritarianism to trump constitutional literalism. In his first majority opinion for the Court, Holmes dismissed a liberty of contract argument, reasoning that if the Fourteenth Amendment did not prohibit regulation of lotteries, it did not bar the regulation of stock sales on margin—both activities "had been lawful when the Fourteenth Amendment became law" but had since been outlawed by democratic legislatures (137).

Likewise, in every major dissent against the Court's jurisprudence on economic due process, Holmes appealed to the liquor and lottery precedents to charge his colleagues with hypocrisy, including the *Hammer* case and *Lochner v. New York* (1905). In a favorite citation for later Progressives, Holmes concluded in a 1927 case:

> The truth seems to be that ... the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it. Lotteries were thought useful adjuncts of the state a century or so ago; now they are believed to be immoral and they have been stopped. Wine has been thought good for man from the time of the Apostles until recent years. But when public opinion changed it did not need the Eighteenth Amendment, notwithstanding the Fourteenth, to enable a state to say that the business should end. What has happened to lotteries and wine might happen to theaters in some moral storm of the future, not because theaters were devoted to a public use, but because people had come to think that way. (*Tyson & Brother v. Banton* 1927, 446)

Though Compton believes Progressives tended to caricature the Court, Holmes's reasoning about the liquor and lottery precedents helped their arguments gain credibility with the public. Roscoe Pound, Morris Cohen, and Ray Brown all relied on this reasoning to attack the idea that judges merely applied a text with a stable meaning predetermined by the founders (147–50). Though commentators customarily referred to the liquor and lottery cases as "morals regulations," the scholar Theodore Cousens, following Holmes, argued that any subject of economic due process such as child labor or oppressive wage scales could just as plausibly be cast as "morals regulation." By 1937, these academic critiques had filtered through popular

17. From the Civil War to the New Deal, economic due process doctrines held that constitutional requirements for "due process of law" included not only procedural protections but also absolute substantive rights of private property and freedom of contract with which states could never interfere (no matter what procedures they used) (Cushman 1998).

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discourse to the point that *Time* magazine published a mocking review of the Court's jurisprudence that classified kidnapping as "commerce" but child labor as not (161–64).

As the Court gradually reversed its economic due process decisions in the New Deal era, liquor and lotteries made regular appearances in government briefs and majority opinions. In 1934, the Court upheld a state moratorium on mortgage foreclosures, as well as a price-fixing measure in another state, in part because the liquor and lottery cases proved that "neither property rights nor contract rights are absolute" against the public interest (*Nebbia v. New York* 1934). Despite the drama associated with Franklin Roosevelt's court-packing plan and the "switch in time" that upheld key New Deal regulations in 1937, Compton argues the Court's shift became clear earlier in the year when it unanimously approved a federal act prohibiting shipment of convict-made goods that reformers had consciously modeled on liquor prohibition.[18] Consistency with the morals precedents prompted the justices to reposition rights of property and contract within a nationally regulated economy.[19]

Compton is careful not to "suggest that the demise of the traditional federal system resulted solely from the early-twentieth-century Court's accommodation of federal morals legislation" (175). Many other factors of political economy and judicial personnel influenced the course of reform, and briefs and opinions included with *Champion* a myriad of other arguments that followed a try-anything approach. Nevertheless, Compton insists, it was "no accident that virtually every argument for an expansive conception of the commerce power advanced during the New Deal period began by quoting … *Champion v. Ames*" and thus the liquor and lottery precedents deserve a more central account in our narratives of constitutional change (176).

In that narrative, Compton concludes, twentieth-century Progressives must appear less innovative and revolutionary than commonly thought. Reasoning that the Constitution aimed "*not* to protect established property rights or ancient jurisdictional boundaries, but rather to provide for the wellbeing of the present generation of Americans," the Progressives merely followed legal and cultural practices that evangelical reformers had developed decades earlier (135). Living constitutionalism was a product not of an academic, Europhile elite, but of America's own populist religionists who had used the theory to advance a marvelous array of

18. Within two months of Roosevelt's announced plan to add up to seven new justices to the Supreme Court, Justice Owen Roberts continually voted to uphold New Deal programs, whereas he had typically cast his vote against Democratic legislation the previous term. The apparent political expediency of Roberts's jurisprudence was immediately encapsulated by the play on a common expression as "the switch in time that saved the Nine." The political expediency interpretation has since been vigorously rebutted (Cushman 1998).

19. Compton rounds off his account by showing how the Court made the same constitutional accommodations to majoritarian economic regulations that it had previously made to majoritarian regulations of liquor and lotteries. The *Champion* line of development found its ultimate triumph in *Darby v. United States* (1941). Discarding its traditional federalism jurisprudence, the Court declared the Tenth Amendment "a truism" and held that the Commerce Clause enabled the federal government to regulate any activity that had a "substantial effect" on commerce, a definition that included many regulations formerly regarded as police powers (173–74).

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previously unthinkable reforms. "Not only did the idea of an organic fundamental law comport with the world that progressive thinkers hoped to bring into being," Compton concludes, "it also helped to explain the world they had known" (180).

The People's Welfare, and the People's Constitution

Compton shows a strong appreciation for the work of William Novak and Bruce Ackerman, two scholars he adopts as his conversation partners throughout. Like them, Compton portrays an American tradition of flexible, discretionary constitutionalism that served the needs of a regulatory state (Novak 1996; Ackerman 2000). However, Compton's originalism—premised on the erection of a commercial republic that would protect fixed categories of property, contract, and commerce—selects a different point of departure and argues that the regulatory tradition had to be worked out over time from tools not readily available at the American founding. Compton thus asks us to rethink two of the most influential histories of US constitutionalism of the last generation.

Novak's *The People's Welfare* made the case that if any theory qualified as the original understanding of government powers in the United States, it was the principle *salus populi suprema lex est*—the welfare of the people is the supreme law. Novak documented an impressive array of nineteenth-century regulations of public health, safety, and, especially, morality, that all trumped rights of private property when challenged in the courts.

It was only after mid-century, Novak argued, that the inviolability of private property gained greater recognition, and the Maine Laws marked a key turning point after which judges more zealously protected a private sphere of rights from public invasion.[20] Uneasy about summary and ex parte procedures to seize and destroy alcohol, mid-nineteenth-century judges declared certain protections of private property to be, as a matter of law, beyond the reach of legislation in the public's interest ("substantive" due process). Judges had long been comfortable with similar abatement of nuisances in the public interest, but what was novel about the Maine Laws was the level of government at which reformers pursued their ends. Rather than seeking local, discretionary standards, prohibitionists achieved stringent statewide legislation. This new kind of public power triggered an equal and opposite reaction among the judiciary, which set out to expand protections for private rights. Modern liberalism, founded on "new ideas about privacy and personal freedom," became an unintended consequence of reforming communal morality (188–89).

Compton agrees with Novak's principle but reconsiders which were the "new ideas" in the antebellum era. He contends that absolute protections for private property did not arise in the 1850s but at the drafting of the commercial republic's Constitution. Longstanding local police regulations were not necessarily overruled—even as they were subsumed under a federal government that protected

20. Novak concluded his chapter on morals regulation with the question: "Why do we find the earliest, definitive statements of both substantive due process and the inalienable police power in cases involving intoxicants?" Incidentally, the footnote includes two lottery cases as well (1996, 189).

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property and contract rights—but *novel prohibitions* of formerly acceptable practices squarely confronted constitutional prohibitions with no recourse to arguments from history or tradition.[21] Compton's survey shows that in liquor and lottery cases, arguments for the police power accordingly lost most of the time—until they won, reformulated not on the basis of historical fidelity but on the principle that a majority of citizens had become morally enlightened. Compton thus focuses our attention on an aberration within the universe Novak compellingly illustrated. The triumph of morals regulation over private property rights might usually have been "the easy case" that Novak described (Novak 1996, 149), but the easy case became a hard one when the morality of popular majorities overwrote older definitions of property.

Attending to popular majorities, Ackerman argued that in reviewing any legislation, the Supreme Court had to distinguish between periods of "normal" lawmaking and "higher" lawmaking, the two patterns of what he called "dualist democracy" (Ackerman 2000). As the legislative results of normal lawmaking tended to be horse-trading compromises that barely satisfied any majority, the Court should not hesitate to strike them down when they ran afoul of the considered judgment of the American people enshrined in the Constitution and landmark interpretations. When, however, a statute was the product of longstanding and widespread deliberation, evidenced by multiple electoral victories—a "constitutional moment"—then the Court should abandon its normal law-making functions and accommodate interpretation to new realities envisioned by the deliberative majority. Such a constitutional moment occurred during the New Deal when the Court rightly resisted early transformative legislation, testing the seriousness of Roosevelt's new electoral coalitions, but then legitimately changed course, accepting those same transformations without forcing a formal Article V amendment.

Initially, Compton seems to identify another hitherto unappreciated constitutional moment when judges first struck down legislation that ran contrary to accepted constitutional understandings, then accommodated democratic majorities who endorsed the morals revolution. However, Compton finds his story troubling for the dualist democracy model because if liquor and lottery regulation marked a constitutional moment, it was a "moment" that lasted from the 1830s to the 1930s, converging and overlapping with other moments during Reconstruction and the New Deal (Compton 2004, 181–82).

A leading virtue of Ackerman's model was its answer to the common charge against a living constitution that, unmoored from a fixed textual meaning, it could mean whatever a judge wanted it to mean, mocking the rule of law.[22] Ackerman's formal requirements for higher lawmaking offered a principle of limitation so

21. The different interpretations of the liquor decisions become clearer when one considers the other "morals" case each author studies. Novak focuses on the regulation of prostitution—a prohibited activity from well before the eighteenth century; Compton focuses on the prohibition of lotteries—an acceptable social practice from the eighteenth century.

22. For instance, McConnell: "Taken to its logical conclusion," living constitutionalism turns the Constitution into "only a makeweight: what gives force to our conclusions is simply our beliefs about what is good, just, and efficient; . . . it instructs us to disregard the Constitution whenever we disagree with it" (1998, 1129).

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that the universe of legitimate meanings behind a text was relatively bounded and clear. However, if Compton's narrative raises the implication that the "constitutional moment" itself is in the eye of the beholder, these boundaries erode—normal lawmaking and higher lawmaking become historically indistinguishable. The New Deal transformation, after all, formed a discrete 1930s moment only if one distinguishes moral regulations from economic ones—drinking is one thing, child labor quite another. However, to many evangelicals—and then to many Progressives—that distinction was neither clear nor clearly implied by the Constitution. Many New Dealers, Compton shows, essentially argued that there was no need for higher lawmaking, since that work had already been achieved. When the Court's accommodation to child labor reform arrived, the justices agreed that liquor and lottery cases had already accomplished the doctrinal revolution.

Compton thus embraces Ackerman's version of living constitutionalism as a useful description of the aims and means of evangelical reform, but in the final lines of the book, Compton praises recent theories of "popular constitutionalism" for offering better explanations of how constitutional meaning changes over time. A contemporary variant of the living constitutionalism project, popular constitutionalism tends to downplay the importance of judicial doctrine and instead gives serious attention to the worldviews of broad social movements whose arguments come before the courts only after being developed and articulated elsewhere. Judges affirm democratic values not by requiring political formalities, but by recognizing and employing broad-based popular understandings of the Constitution on their own terms. Once again, meaning is not entirely indeterminate, as boundaries are set by the assumptions and appeals ordinary Americans make in their public arguments (Kramer 2006).

The Evangelical Origins of the Living Constitution successfully holds together both a commitment to popular constitutionalism and a careful analysis of legal doctrine. One could object here and there to Compton's doctrinal interpretations—a number of liquor and lottery decisions did not necessarily contradict the "original" Constitution so much as early Marshall Court jurisprudence, which may not be the same thing[23]—but Compton's overall interpretation is compelling, illustrating in case after case how explicit arguments from democratic majoritarianism shifted judicial doctrine away from a longstanding tradition of protecting vested rights of property. The work adds important dimensions to some of the most influential scholarly conversations about US constitutionalism from the last generation. If a constitutional revolution occurred during the New Deal, Compton helps us see that it was not the origination of a new theory of interpretation, but the triumph of one longstanding American tradition over another.

23. It not entirely clear, for instance, that the text of the Contracts Clause or its "original" widely held interpretation (that it forbid debt relief) had anything to do with lottery grants, nor that the Commerce Clause necessarily preempted state regulation of interstate commodities that had not been directly regulated by Congress (the so-called dormant interpretation of the Commerce Clause).

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THE CONSTITUTION OF EVANGELICAL REFORM

Somewhat surprisingly, Compton restricts his closing remarks to these scholarly conversations over the history of constitutional regulation. He allows only his arresting title to alert modern evangelicals to the irony that they may be battling a creature of their own making. Compton's respectful tone and refusal to sneer is admirable and perhaps an implicit recognition that the history of legislative motivations can be complicated. Yet further commentary on this point might have been helpful.

In particular, if the living constitution model arose earlier than conventional accounts suppose, readers are left to wonder what difference it makes that the model came from *evangelicals*, rather than, say, from trade federations or political parties. Compton succeeds at revising conventional accounts of US constitutionalism by bringing into the conversation a literature developed by Steven Green (2010), Sarah Barringer Gordon (2010), David Sehat (2010), and Michael Young (2006). These works encourage scholars to take evangelicalism seriously as a historical force that successfully altered US law, often by portraying evangelical social movements that sought to impose their moralism on others. However, Compton brings this literature into a domain where it generally has not been before: the constitutional law of property, contracts, and commerce.

This new context challenges us to rethink simple explanations about the coercive moralism of evangelical movements. As Christians who placed serious emphasis on individual moral freedom, many evangelicals struggled to work out a system of property rights and relations that could secure moral freedom for all. Their efforts continually ran them into conflict with state and federal property rules that instead appeared to protect types of moral slavery, whether that enslavement was to vice, dissipation, or the literal slavery of southern chattel bondage. The varieties of US religious and legal pluralism that had at first fostered evangelical growth now created enclaves where moral slavery could not be abolished without federal intervention.

Thus, for Compton's account, it matters that the main actors were evangelicals, and it matters that the object of reform was property law. If we shift attention from where Compton has placed it in the constitutional literature, however, we can see that his account also provides the resources to recraft standard narratives of law and religion in the United States. Rather than a story of straightforward moralistic coercion by majoritarian rule, we can instead trace a narrative of how many evangelicals struggled to protect freedom by coercing the agents of unfreedom, securing liberalism with occasional illiberal regulation. In this regard, evangelicals differed little from contemporary Progressives. Recent work on Reconstruction, for instance, has helped illustrate how an enormously coercive military government was required to secure the most basic freedoms of the Thirteenth and Fourteenth Amendments (Downs 2015; Summers 2015). Evangelicals, too, sought to balance illiberal proscription with greater gains to freedom, but to many evangelicals, the slavery that they targeted adhered not just in chattel bondage, but in the dissipations of drink, dice, and sex.

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Evangelical Constitutionalism

We can begin this alternate narrative of law and religion where Compton ends, with the value of popular constitutionalism as a method for legal history. Paradoxically, Compton's commitment to the popular constitutionalism model leads him to miss some of that method's potential advantages. As a method, popular constitutionalism invites unconventional or deviant voices to weigh in on constitutional meaning undisciplined by formal judicial discourse and precedent (which is, after all, only a narrow genre of US rhetoric). The danger, however, is that popular constitutionalism might become just as formal (and formulaic) a method as those it seeks to replace—that is, social movement plus mobilization over time yields constitutional change, with judicial accommodation as a catalyst. The reduction of weird or multivalent discourses to "social movement" may, in fact, lop off the interesting and relevant features of alternative constitutionalisms and obscure important questions.

Such is the tendency of Compton's treatment of evangelicals.[24] Compton relies heavily on Michael Young's important sociological study *Bearing Witness Against Sin*, which argues that sociologists should take seriously antebellum evangelical reform as America's first national social movement (2006). By labeling evangelicals a *social movement* Young sought to raise their significance and relevance for sociological study. Transferred to the legal context, however, Young's thesis diminishes evangelicals to the opening term of the popular constitutionalism formula. Having declared evangelicals a social movement, Compton's narrative quickly leaves them behind and proceeds to the study of confrontation and accommodation of evangelical reform in the courts. In the only chapter that makes evangelicalism its main topic, secondary works like Young's largely frame and describe this world. Only a few evangelicals speak through primary sources: Lyman Beecher, Charles Finney, Justin Edwards, and Albert Barnes—all New School Presbyterians, a marvelously narrow segment of nineteenth-century evangelicalism.[25]

Nevertheless, by emphasizing evangelicals' role in reframing the Constitution of America's commercial republic, Compton has provided valuable tools and an intriguing direction for the study of evangelical constitutionalism. To take Compton's methodological commitments further, what might more sustained attention to evangelical constitutionalism reveal about alternative approaches to constitutional law? What is left out when we too quickly reduce evangelicalism to a "social movement" whose function in constitutional politics we think we already understand?

24. For purposes of this essay, I will follow Compton (who follows Noll) in admitting that "'evangelical' is notoriously difficult to define" but usefully focuses on Christians who emphasize (1) individual conversion, (2) the ultimate authority of the Bible, (3) the necessity of Christ's death on the cross as the means of human reconciliation, and (4) activism of all believers in preaching the gospel to others and obeying it before others (186 n.5; Noll 2002).

25. Compton's introduction also mentions the Baptist abolitionist William Lloyd Garrison, the Disciple of Christ prohibitionist Carrey Nation (whose portrait fills the book's cover), and the New England Congregationalist Henry W. Blair. The New School Presbyterians were among the smallest evangelical denominations, with membership far behind that of the Methodists or Baptists all through the revivals. Prolific publishers, the New Schoolers enjoyed outsized influence as professional theologians and church leaders (Holifield 2003).

Property and the Religious Foundations of Legal Pluralism

As Compton's story illustrates, one can begin with a first principle of evangelical constitutionalism that *religion* and *property* were not separate domains of human concern. J. Willard Hurst, a pioneer of US legal history, set a new path for analysis by making it his aim "to understand the law not so much as it may appear to philosophers, but more as it had meaning for workaday people and was shaped by them to their wants and visions" (1956, 5). Frequently, observers have assumed that legal concerns of workaday religion involve quintessentially church-going activities or the display of scriptures in contested public squares (Gordon 2010; Green 2010).

Breaking with this assumption, Compton's study reveals how a leading concern of workaday religion among US evangelicals was the definition, possession, and deployment of property. For them, criticizing the dominant property regime was a not an argument from the religious sphere trotted out to some secular public square; to suggest as much would, in evangelical framing, have been a category mistake. "There are *moral* nuisances as well as *physical*," wrote the Presbyterian Albert Barnes. "A man has no more right to employ his property so that, in all probability . . . it will scatter discord and woe through a community, than he has to set up a tannery or a tallow-chandlery in a neighborhood" (1852, 13). As all property, government, and standards of morality ultimately belonged to the Christian God, no distinction could be drawn between *religion* (a word originally meaning "obligation") and property *law*.

Scholars of religion have long become comfortable with the observation that "lived religion" frequently extends beyond institutionalized rituals and official theologies, crisscrossing the various domains that Enlightenment (and even Protestant) thought attempts to separate into private religion and secular commerce (Hall 2009). However, this insight has yet to penetrate deeply into legal scholarship or jurisprudence. Even as recently as the litigation over religious rights of for-profit corporations, judges and justices have assumed the separation of these domains as a matter of natural logic. "General business corporations," held the Third Circuit, "do not pray, worship, observe sacraments or take other religiously-motivated actions," and therefore do not "exercise religion" (*Conestoga Wood* 2013). Justice Ginsburg wrote in a widely noted dissent that "religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill" (*Burwell v. Hobby Lobby Stores* 2014). Of course, the movement from an individual to a corporate level of analysis is a slippery problem, but the strict dichotomy between the pursuit of profit and the pursuit of religion in these official pronouncements would be jarring to contemporary scholars of religion and, more important to our purpose, would have been unthinkable to many nineteenth-century Americans (Sullivan 2007).

Historians have sometimes adopted similar theological assumptions. In a work arguing that nineteenth-century moral regulation gave rise to a de facto Protestant establishment, David Sehat concludes that "[p]roponents of the moral establishment yoked religion to morals and enshrined them in law" (2010, 285). Such a summary makes sense only if one assumes *religion* is inherently unyoked from *morals* or *law* in the first place, a view that might have appealed to some elite founders but that very few contemporaries believed, especially not evangelicals. Recently, historians

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of religion and law have paid greater attention to the way nineteenth-century churches thought about—and litigated over—property. They have found that in numerous cases, especially in the antebellum period, the theological identity of various churches was hopelessly intertwined with "legal" notions of corporate identity and proprietorship, so much so that state courts frequently had to pick a winning theology as they granted a church's property to its most "orthodox" faction (Gordon 2014; Perry 2015). Distinguishing between categories of law and religion, private and public, establishment and exercise would be hopeless in these cases, as it would be with the materials Compton presents.

Based on this first principle, it would be entirely appropriate to construct—as Compton has—a religious history of the Constitution in the nineteenth century that said nothing about the First Amendment and barely referenced its core concerns with *establishment* or *free exercise*. Instead, the most far-reaching religious controversies (in terms of broad-based public awareness and long-term doctrinal influence) centered on the Contracts Clause, the Commerce Clause, and even the Postal Clause (more on that below); that is, the defining features of a national market economy.[26]

Thus, not only was *workaday religion* deeply involved with property, it was deeply involved with the *workaday law* of property, the distinctions between vested rights and expected interests, property taken for public use or uncompensated abatable nuisances. In all these choices, evangelical theology proffered determinate answers, and the First Amendment's concerns with the institutional divisions between church and state seemed irrelevant to evangelical concerns over the use and abuse of property.[27] Instead, the vested rights of property and a police power to promote public welfare provided the language in which "religious," "moral," and "legal" concerns commingled and found practical, if temporary, resolutions.[28]

Operating through a paradigm of private property and public order, in which theology and law intertwined, antebellum evangelicals exhibited a striking penchant for operating their own self-contained legal orders. "Legal pluralism," a condition in which multiple normative domains—churches, guilds, cities, states, or more

26. Mark McGarvie makes a related argument that "the legal basis for separating church and state" is not the First Amendment but the Contracts Clause, which presupposed the existence of a private sphere protected from government interference where churches could be confined (2005). McGarvie traces this logic of private contract through the early republic, culminating in a fine-grained study of the *Dartmouth College* case, which he argues effectively rendered churches as private entities unable to wield or be subjected to public governance. McGarvie's conclusion that the early republic represented a high water mark for liberalism, which gradually receded under "communitarian" evangelical moral regulation, provides an interesting contrast for Compton's study, which focuses much more on property rights that tend to cut across public and private divisions, liberal and communitarian values.

27. Philip Hamburger argues that (outside of anti-Catholic politics) most nineteenth-century Americans saw "a necessary and valuable moral connection between religion and government" (2009, 480). Even to proponents of disestablishment, "separation of church and state" was not the goal, he argues. Hamburger's study of how Protestants reacted to Catholic legal autonomy provides a useful and detailed study of the rising fortune of the separation ideal, but does not investigate the ways Protestants themselves operated relatively autonomous legal orders, an important point for a rounded picture of evangelical constitutionalism.

28. The religion clauses of the First Amendment were not unique in this regard. In her study of pornography and obscenity regulation in nineteenth-century New York, Donna Dennis has shown how property rights and federal regulations of commerce and the mails were far more relevant categories of constitutional law both to pornographers and their evangelical censors than free speech or free press (2009).

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nebulous communities—exercise overlapping law-like jurisdiction alongside and in spite of the presence of "official" institutions has most often been seen as a key attribute of early modern Europe or colonial America (Berman 1983; Tomlins and Mann 2001). One of the foremost theorists of legal pluralism in the early American republic, Christopher Tomlins, suggested but did not pursue the notion that "evangelical Christianity" formed one of the major political discourses competing with "law" and "police" (Tomlins 1993, 25). More recently, scholars have begun to explore the ways evangelical institutions operated as relatively autonomous legal orders.

The most striking evidence comes from antebellum Baptists. Jeffrey Perry and Curtis Johnson have shown how monthly Baptist discipline sessions functioned like civil courts: presiding elders resolved claims between members—including contract and property disputes—assessed fines for petty crimes, and mediated reconciliation (Johnson 2014; Perry 2015). In a number of communities, even nonmembers preferred to have their claims heard by a local Baptist church rather than the territorial courts of the federal government. Baptist associations published and circulated their own precedents, creating their own version of common law. Perry concludes that "although legal historians have argued that by the time of American Independence law became rooted in state institutions, multiple legal systems continued to operate in ... Baptist Churches" (2015, 130).

Though records of disciplinary proceedings are most extensive for Baptists, there is evidence that Presbyterians and Methodists—especially in frontier regions—could be just as autonomous and juridical (Perry 2015, 136). The Methodist *Book of Discipline*—as ubiquitous within that denomination as the Bible itself—functioned as a quasi-statute book, complete with a procedure code regulating trials and appeals. As with the Baptists, Methodist discipline showed no discernable distinction between spiritual and temporal regulation. Gossip was a triable offense, but so to was trading goods for which federal duties had not been paid (*Book of Discipline* 1816, 65, 96, 100–03).

Congregationalists and eastern Presbyterians, descendants of a Puritanism that expected local magistrates to enforce church-defined norms, did not develop their own juridical structures and discipline to the same extent. Nevertheless, as the leaders of the "benevolent empire," which boasted the largest corporations in the United States, these evangelicals operated administrative bureaucracies that rivaled the size and revenues of local governments yet operated with little state oversight (Nord 2001).

Given their robust legal autonomy, many antebellum evangelicals argued that church discipline was the only legitimate mechanism for most kinds of social regulation and reform. Evangelicals not only maintained their own juridical systems, they expected members to grant exclusive allegiance to these systems. Thus, case studies show how churches frequently sanctioned members for "going to law" against one another instead of arbitrating within the church; in one instance, the Baptists even disciplined a member for becoming a lawyer! (Johnson 2014). In many communities, for all but the most serious crimes, the common law was supposed to be off-limits to those following the law of Christ.

The most famous Baptist defense of this ideal was the 1830 US Senate Report on Post Office Memorials. Under its plenary power to regulate post offices, Congress ordered post offices to open on Sunday for at least an hour, though post masters could accommodate local worship schedules. The availability of the post office for social gatherings where liquor could be distributed or purchased provoked the ire of many temperance reformers, who petitioned Congress to close the post offices on Sunday. Senator Richard Mentor Johnson responded with a classic statement of Baptist political theory: the federal government would take no theological position on the holiness of any particular day.[29] If temperance reformers wished to sanctify a Sabbath, their best means would be to evangelize those they wanted the law to punish and bring them instead under the discipline of the church; then "the evil of which they complain will cease of itself, without any exertion of the strong arm of civil power" (Sunday Mails 1830, 231).

American Baptists are well known for being early and articulate defenders of "the separation of church and state" (a principle reaffirmed several times in Johnson's short report). On this point of moral reform, however, Baptists were not unique among their evangelical contemporaries. The Congregationalist minister Parsons Cooke advocated that "the word of life held forth by the ministry . . . is the instrument of reform." Democratically enacted legislation could not compel any reform worthy of the name, and even parachurch moral societies were dissatisfying, "as if it were forgotten that the church is a *moral society*, capable of doing all the duties proposed by such societies, and that if she were what she should be, she would need no other, and could devise no better" (1839, 29). Even the Presbyterian Lyman Beecher, perhaps the most politically active evangelical of his time, prioritized church discipline over legislative action in his temperance lectures (as Compton notes, 52). A hallmark of evangelical constitutionalism, then, was its priority of the local church constitution over the federal document calling itself the capital-c Constitution.

In the search for an evangelical "social movement," one can easily miss the significance of these evangelical social structures that constituted alternative legalities. Recall Sehat's formulation that "[p]roponents of the moral establishment yoked religion to morals and enshrined them in law" (2010, 285). Sehat captures the social movement model well: something begins in the realm of "the social," then mobilizes politically with hopes of one day altering "the law." However, the presupposition that federal and state regulation mediated by state-licensed lawyers is "the law" with which social actors are most concerned leads us astray in the case of antebellum evangelical Christianity.

Refocusing on evangelical legality gives central importance to a question social movement literature tends to brush aside. Why did many evangelicals ultimately abandon their alternate legalities exclusively to pursue national politics? In a well-known episode of antislavery fervor, William Lloyd Garrison—an evangelical

29. If, as is now commonly supposed, the Senate report was ghostwritten by Obadiah Smith, the Baptist connection is all the stronger. Richard Mentor Johnson was a devout Baptist layman; Smith was a Baptist minister.

Baptist[30]—publicly burned the Constitution, declaring it "a covenant with death and an agreement with hell" (Howe 2007, 651). Given evangelicals' ardent commitment to operating alternative legal orders to the Constitution, why, over time, did Garrison's action come to be seen as eccentric rather than the normal and obvious action for evangelicals to take against a Constitution that obstructed moral reformation? Why did they instead choose to work within America's constitutional order, making a living constitution out of dry bones?[31]

The problem is often framed as a turn from moral suasion to legal coercion, with the reasons for the turn a matter of obvious convenience. "Despite an early commitment to moral suasion," Novak wrote, reformers soon turned instead to legislation (153). "Beecher's efforts to attack the demand side of the liquor traffic [through moral suasion and church discipline] were, to put it mildly, less than successful," Compton quips (52). Both say nothing further about the abandonment of "moral suasion." Their logic relies on a narrative compellingly articulated by Sehat, who argues that Protestants lost their formal, constitutional state establishments but used morals legislation to regain "religious control over U.S. society through law" (2010, 290). Thus, political expediency explains the turn: legislation could reach further and operate more effectively than could moral suasion, so evangelicals embraced national legislation despite their lip service to American liberal values.

By revealing just how successful evangelicals were at legislative politics, however, Compton challenges us to give a more sophisticated account of the fortunes of moral suasion in the United States. After all, democratic politics, in many instances no less than moral suasion, required people to persuade one another either to compromise short-term interests for the sake of other interests, or to reimagine their own interests entirely. As Compton notes, the vast majorities that passed this legislation were constructed by many who had dissented against formal religious establishments. Why then did these particular regulations find acceptance among evangelical dissenters while other "moral" concerns did not? Following Compton's intuition that evangelicals were centrally concerned with the definition and possession of property can help untangle these questions, though it squarely raises a problem Compton wished to set aside—the problem of slavery.

Moral Suasion and Moral Enslavement

Already it should be apparent than in antebellum evangelicalism, *legal coercion* and *moral suasion* were not conceptually distinct opposites. It would be simplistic to read the frequent appeals to evangelization as mere moral suasion. Membership in a

30. Some historians suppose, based on Garrison's later anticlericalism and frustration with other evangelicals, that Garrison by the 1830s had repudiated Christianity to become a freethinker (Sehat 2010). Anticlericalism and combativeness were hardly inconsistent with evangelical devotion, however: Charles Finney adroitly combined all three. Accordingly, Caleb McDaniel concludes in a recent work that "Garrison gradually lost his respect for northern denominations and clergymen. . . . But Garrison never lost the central religious faith that animated him in the temperance and peace movements of the late 1820s: God wanted servants like him to remove the sins of the people" (2013, 113).

31. The allusion is to Ezekiel 37, by way of T. S. Eliot.

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church entailed community surveillance and extensive disciplinary regulations designed to rid one (or one's household) of sinful habits and restore one's place in the community. Moreover, the varieties of Calvinist theology descending from eighteenth-century theologians insisted that membership in a church was not itself a matter of moral suasion. Divine sovereign grace moved in mysterious fashion to bring the elect into a holy community notwithstanding the impulses of an individual's depraved will. The conviction of the majority of Revolution-era evangelicals, Calvinism had to decline or be transformed for a category of "moral suasion" even to make sense.

In the course of the Great Revival, Calvinism did indeed decline and change. Compton's search for a theological explanation of change in the "religious sphere" is laudable, but his emphasis on perfectionism somewhat confuses the situation. The doctrine of Christian perfection had many formulations in the antebellum era, from perfect love for God to (the most relevant, for Compton's purposes) Charles Finney's formulation of perfect obedience to all moral laws. Even accounting for this diversity, historians of theology such as Brooks Holifield have shown how perfection was not a widely accepted doctrine, nor, importantly, did any theologian believe that perfection was possible outside the Christian community. Even Finney, who supposed that unredeemed sinners *could* obey moral laws, argued that they never *would* until evangelized for Christ (2003, 269–72, 366–67). Allowing for the ways popular usage can amend official theologies, it remains difficult to see how perfectionism, premised as it was on evangelization, could become the controlling motive for large majorities to enact society-wide legislation. Compton's focus on Finney and co-Presbyterian Lyman Beecher is valuable, however, because these self-professed Calvinists were among the most influential to declare that "the doctrine of the entire depravity of man is not inconsistent with free-agency" (Beecher 1827, 30). The rising number of non-Calvinists, Methodists in particular, agreed that "free-agency" deserved more esteem than eighteenth-century Calvinists like Jonathan Edwards had granted it. As historian of US religion Mark Noll summarizes: "The most common traditional position [of the eighteenth-century] emphasized the power of God and his lordship over all humanity exercised directly . . . for his providential purpose. The more American tendency was to depict God as a benevolent, reasonable facilitator of human happiness who ruled the universe by creating moral structures, establishing moral laws, and ordaining moral consequences to govern the lives of God's human subjects" (2002, 266). It was within this universe of theology that moral suasion became a real possibility.[32]

That possibility, however, raised for antebellum evangelicals the question of which conditions might override a person's moral agency. What were the limits of free-agency and, thus, of moral suasion? Protestants from Calvin to Edwards would have found the question wrongheaded. The bondage of the will (a title of numerous Protestant tracts on the subject) was a universal human condition, as true of the

32. Calvinists, of course, had a theory of criminal deterrence, one which supposed that criminal penalties were one of the means the all-determining God sovereignly employed to move men's wills against destructive actions. Laws were thus a means of divine grace, not the grounds for independent moral choice (Holifield 2003).

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saintliest church deacon as of the most refractory town drunk. Sin was pervasive; humans could not overcome any particular class of sins by their own agency, and no particular sin created more bondage than another. But under the new revivalistic paradigm of free-agency, even ardent Calvinists supposed that if by *internal* agency humans could normally respond to revival preaching, there might exist *external* conditions that hindered this moral response.

For leading evangelicals, especially in the North, slavery was the paradigmatic opposite of moral free-agency. As evangelicals could not even reach slaves without slaveholders' permission, nothing more starkly illustrated the external conditions that could inhibit the moral transformation of the soul. An 1835 report of the Presbyterian Synod of Kentucky succinctly moved through the logic of property and moral bondage: a slave "has no right to himself. His flesh is bought and sold. He is subject to the will of an absolute master. The rights of conscience are ever destroyed. The master may prevent his slaves from worshipping God" (Robinson 1852, 55). Their different constitutional histories notwithstanding, the logic of evangelical antislavery undergirded other reforms.

Indeed, antislavery helps make sense of *which* other evangelical reforms succeeded through national legislation. Lacking our modern vocabulary of addiction, evangelicals mobilized most successfully against vices that seemed evocative of slavery. For Beecher, the chief of these vices was drunkenness. Moral suasion did not apply to intemperance, because free-agency did not obtain. "[I]t may be as certain that an intemperate man will drink to excess, when he has opportunity," Beecher proclaimed, "as if the liquid were poured down his throat by irresistible power" (1827, 6). With close readings of evangelical reform literature, Michael Young and Richard Hamm show repeatedly how evangelicals understood intemperance, gambling, and prostitution to be moral equivalents of chattel slavery (Hamm 1995, 30–31, 124; Young 2006). In Young's summary of evangelical reform, "chattel slavery and intemperance equally robbed individuals of that freedom [to willingly respond to God]. It enslaved them to the desires of man, placing an obstacle between man and God" (2006, 167).

To the antislavery evangelical, adultery and blasphemy were no less evil than intemperance, but these sins seemed to be a perversion of moral agency, not an absence of it: poor choices, but proof at least of the possibility of choosing. Accordingly, legislative regulation of these sins lapsed across the nineteenth century, their jurisdiction transferred to the realm of moral suasion (Green 2010). The paradigmatic importance of slavery may also indicate why abolitionism followed a different constitutional path from temperance. Bruce Dorsey notes that evangelicals recognized that intemperance—unlike chattel slavery—was a type of slavery to which free white men might succumb. By defining temperance as the opposite of slavery, reformers made temperance a marker of freedom, whiteness, and manliness (2006, 121–24). These were the same qualities demanded of voters, making prohibition an easy fit for democratic majoritarianism, while abolition required military compulsion and textual amendment.

Thus, dividing nineteenth-century Americans into camps of "liberals" and "moral establishmentarians" (Sehat 2010), or "liberals" and "communitarians" (McGarvie 2005), may help illuminate, as Sehat says, America's coercive

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"preference given to Christianity in the past" though at the cost of overlooking the varieties of thought about what liberalism required. If, as Sehat defines it, liberalism fundamentally stands for "the self-determination of the individual" (2010, 287), Sehat's most notorious moral establishmentarians and McGarvie's communitarians imagined they were pursuing almost exactly that.

Sabbatarism provides a useful example of the shift from eighteenth-century establishment to nineteenth-century moral reformation. In the heyday of Puritanism, sabbatarian regulations required monetary support of a local church, mandated church attendance, and penalized various forms of recreational activity on Sunday. But by the late nineteenth century, sabbatarian regulations typically required only the cessation of commerce (Green 2010). How one observed the Sabbath became a matter of moral suasion. Nevertheless, as a precondition of that moral choice, workers and businessmen alike had to have the day *free*. A coercive economic regulation from the perspective of employers, Sunday closing laws appeared to evangelicals as a necessary freedom.[33]

Compton adopts the latest law and religion studies as his point of departure into a study of property rights and constitutional law. That very focus, however, if given sustained attention within antebellum evangelical thought, invites reconsideration of common premises in law and religion scholarship. At the level of popular constitutionalism, many evangelicals did not conceive of separate categories of private religion and public laws of property. By understanding a variety of vices in terms of chattel slavery, their views on individual liberty and moral suasion were not so obviously contradictory and opposed to a monolithic American liberalism as often supposed. If certain evangelicals seemed to be leading liberals in their antislavery thought, one should be cautious about dismissing them as "establishmentarians" for their views on drinking, gambling, and prostitution. Freedom and coercion mixed in both domains, and on the same reasoning.

From Legal Pluralism to Religious Pluralism

With the decline and marginalization of traditional Calvinism, many evangelicals came to view freedom from chattel slavery, alcohol, gambling, and sexual addiction as a requirement of American liberty. That development alone, however, does not fully explain why these evangelicals turned so ardently toward legislative reform. Granted that evangelizing the enslaved had become nearly impossible, one option remained open outside of official legal mechanisms: the conversion of slave owners and traders.

Parsons Cooke promoted this strategy in an 1839 lecture delivered at Andover. Prior to any Maine Laws, Cooke believed evangelization of moderate drinkers (those not yet subject to liquor's enslavement) and traffickers of liquor (the moral equivalent of slave traders) reformed "men's practice, [by] converting the sinners at

33. Even Richard Mentor Johnson's Senate report approved of this logic. The objection was that some moral reformers were trying to go beyond freeing up the day by limiting the places people could congregate and procure liquor.

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our doors." But he thought antislavery societies were taking the wrong approach by intentionally provoking distant slaveholders rather than moving among them and seeking to graciously convert them to the gospel, which would ultimately result in the emancipation and evangelization of their slaves. Thus, even among those most concerned about the reality of moral enslavement, evangelization and the "action and discipline of the churches" remained the major means of reform (1839, 29).

Even as he lectured, Cooke realized his position was becoming less popular, and his exemplar of voluntary temperance morphed into the Maine Laws a decade later. What turned the evangelical appeal from church discipline toward social legislation and common law enforcement? Why, that is, did evangelical legal pluralism decline?

One answer is that religious pluralism rose. In his study of Baptist discipline, Jeffrey Perry shows that increasing appeals from the Disciples of Christ, whose "no creed but the Bible" approach undercut Baptist disciplinary practices as so many man-made traditions, drew away enough members that Baptists stopped the practice in order to compete for survival in the West (Perry 2015). Methodists made a similar calculation in the early days of the republic. On the brink of excommunicating all slaveholders in 1784, the church drew back for fear of losing too many members to rival denominations. Thenceforth, the *Book of Discipline* declared slavery a "great evil" but did not forbid it among the laity (Heyrman 1997). Compton relates a similar Methodist capitulation to retailers of alcohol in 1790 (25).

Although the Constitution did not require disestablishment in the states (the First Amendment applied only to the federal government), its protection of property and corporate status for any religious sect without regard to theology or morality allowed varieties of Christianity that legitimated slavery (or drinking, etc.) to compete with those that did not. Thus, evangelicals came to fear what most US politicians of the era also feared: that arguing the morality of a property regime too strongly might provoke a secession. Then all moral and political influence would be lost. That nightmare was realized across the antebellum era, and not just at the level of local schism. In 1844, the Baptist Convention divided into northern and southern institutions over the question of slavery. The Methodist Episcopal denomination did the same later that year. Presbyterians, already formally divided over questions of revival theology, divided and realigned again over slavery in 1857 (Noll 2002). National schisms made it clear that evangelization would not emancipate slaves. The South, after all, had become evangelized, but by varieties of the gospel that combined major tenets of Christian orthodoxy with the legitimation of slavery.

Evangelicals thus encountered a recurring problem of US constitutionalism: in the context of a national economy where goods constantly circulated, crossing jurisdictional boundaries, a constitutional order fundamentally founded on the protection of property could not be neutral toward property pluralism. Compton eloquently observes that "with the emergence of evangelicalism as America's dominant religious persuasion, it became suddenly clear that the nation's fundamental law harbored substantive social commitments" belying its seeming procedural neutrality (42). James Oakes's recent study of emancipation illustrates this well. South Carolina law allowed people to hold other humans as property; Massachusetts law

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did not; the Constitution could protect the property rights and local sovereignty of both states, *so long as slaves never crossed any borders*. The robust transportation networks that supported a booming cotton and textile trade, however, meant that slaves inevitably crossed jurisdictional boundaries. Even apart from the Fugitive Slave Clause,[34] the Constitution's Commerce Clause, Takings Clause, and Tenth Amendment principles of federalism required the federal government to take a position: the nationally regarded principle would either be slavery or antislavery; one state's law of property would be fully protected, another's curbed (Oakes 2014).

Accordingly, when the Supreme Court declared that one state's policy (whether that of Louisiana on lotteries or that of Illinois on liquor) created a national commodity that all other states had to respect, regardless of their own classifications of noxious property, postbellum evangelicals were not hallucinating when they saw *Dred Scott* arising from its grave. As with slavery, the national economy belied the claim that the federal government could neutrally tolerate property pluralism at the local level. If lottery tickets were good property somewhere, they were good property everywhere. Michael Young's sociological study shows that as the implications of a national commercial economy became clear to evangelicals, their politics increasingly hardened on the position that toleration of noxious property could mean nothing else but complicity with sin (2006). The Presbyterian revivalist Charles Finney argued that only after property pluralism emerged with northern emancipation did "men generally understand the relations of slavery to the national government. The *startling fact* is but too apparent that our Union is virtually a slaveholding state." And now that the national principle of slavery was clear, Christians could not "go on in the same course of sustaining the system, without the greatest guilt" (1852, 1).

The evangelical entrance into national politics thus coincided with the decline of legal pluralism. Christopher Tomlins and Laura Edwards have written about northern and southern legal culture, finding in both instances the rise of a unified, professionalized legal order across the nineteenth century that integrated legal institutions into a smooth hierarchy and rested on a monolithic discourse of property rights (Tomlins 1993; Edwards 2009). This survey of evangelical constitutionalism shows how the conditions of religious pluralism in the United States moved evangelicals in a similar direction. At the local level, religious competition threatened legally pluralist evangelicals with the loss of their property. Conversions often led to schisms, raising questions over which faction ultimately owned contested property. Increasingly, evangelicals turned to state tribunals to adjudicate these questions, abandoning the distinctive ways they had formerly operated shadow civil states (Gordon 2014; Perry 2015). With the federal Constitution's assertion of a monopoly on the protection of property, contracts, and commerce, national politics became the site at which the actual definition of property would be decided, and increasingly evangelicals stopped contesting this presumption, accepting and navigating this federal claim on their own terms. Religious and legal pluralism in the

34. "No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due" (Art. IV, sec. 2, cl. 3).

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United States thus exhibited a chiastic relationship: as one expanded, the other declined.

At the intersection of legal and religious pluralism lay the law of property, which sustained religious pluralism. In the era of establishment, only official churches held property securely in their own name under a corporate charter (Gordon 2014). As disestablishment granted corporate status to all religious societies, it gave them what Presbyterian Albert Barnes called a "protecting shield" of state legitimation and secure property rights. But, Barnes argued, "God never instituted a government on the earth with a view to its throwing a protecting shield over vice and immorality" (Barnes 1852, 9). When dram shops, gambling rings, brothels, and slave markets asserted property rights, they turned a virtuous instrument of religious freedom toward moral enslavement. At the national level, property pluralism forced the federal state to make moral choices, and evangelicals readily entered politics to ensure it made the right ones.

CONCLUSION

Compton's study of evangelicals who were fundamentally concerned with the meaning of property helps introduce us to a world of law and religion in US history that typical approaches have tended to obscure. To see this world in its vibrancy, one must move past categories of establishment and free exercise, or at least question what establishment and free exercise meant for religious actors who were as equally concerned with their ability to incorporate and transact over property as they were with their ability to administer sacraments. In this world, dissenters against religious establishment were hardly individualistic libertarians but were ardent builders of their own legal societies that, like Augustine's *City of God*, were never quite comfortably at home in their political surroundings.

Such an outlook places evangelicals near the center of US constitutional history. Their controversies over what can only anachronistically be sidelined as "morals legislation" formed and reformed the central dilemma of a Constitution that could not protect both property and property pluralism at the same time. Drinking, gambling, prostitution—all raised the same fundamental question as slavery in the nineteenth century and civil rights in the twentieth: Would the national government favor freedom or unfreedom, morality or vice, enlightenment or conservatism? Current debates over the recognition of homosexual marriage or of religious proprietors' rights to discriminate among the customers they serve stem from this intrinsic feature of the Constitution, which protects property rights and relations without defining them. The national politics that emerges almost by default to give a definitive answer to this dilemma has a history that runs from the drafting of the Constitution to the present day.

As the legal scholar Robert Cover observed thirty years ago, the legal expressions of a normative society might follow an insular "perfectionist community" model or a "redemptive model." One thrives on legal pluralism, relying on freedom from an overbearing coercive state to build the kingdom of God on its own terms. The other overrides pluralism in order to free society's slaves that they might be

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redeemed for the kingdom. Cover implied that both models, though pursuing opposite visions, were equally lawful, equally concerned with freedom, and equally a part of the American tradition (Cover 1983).[35] Compton provides the materials to tell a story of evangelicals shifting from one paradigm to the other across the nineteenth century. If evangelical discourse surrounding this movement is given careful attention, one should hesitate before characterizing this as a turn from liberalism to illiberalism; instead, one finds yet another episode in the controversy over the meaning of American freedom—and American slavery.

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35. Cover's main illustration of the first was the Amish community; of the second, the civil rights revolution.

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