
LEFT-EVANGELICALISM AND THE CONSTITUTION

THE EVANGELICAL ORIGINS OF THE LIVING CONSTITUTION. By John W. Compton. Cambridge, Mass.: Harvard University Press. 2014. Pp. 272. \$45.00.

*Reviewed by Andrew Koppelman**

American constitutional law has, in many ways, abandoned the vision of the Framers. The original Constitution prohibits states from “impairing the Obligation of Contracts,”¹ but claims based on this provision, which was energetically enforced in the nineteenth century, today rarely succeed. Persons may not “be deprived of life, liberty, or property, without due process of law,”² but states can enact legislation that radically diminishes its value. The power to “regulate Commerce . . . among the several States”³ has nearly become a general federal police power.

This is a radical change from the law that prevailed until the early twentieth century. That law protected property, contract, and interstate transportation of goods from legislative interference, and sharply limited Congress’s power to regulate the interstate economy.

The transformation is often attributed to the New Deal, when judges appointed by Franklin Roosevelt are thought to have abruptly discarded all these rules. Professor John Compton’s important book, *The Evangelical Origins of the Living Constitution*, shows that the change started within a few decades of the founding. In response to pressure from evangelicals who wanted to ban alcoholic beverages and gambling, the Court relaxed the preexisting constitutional rules. The consequence was a growing doctrinal incoherence, with police powers that, once acknowledged, could not be limited in any sensible way. The New Deal judges were simply amputating doctrines that had already become gangrenous.

Compton’s narrative offers a new perspective on originalism. It shows the folly of trying to read into the Constitution ideas of the founding generation that are not in the text. A flexible Constitution, with constructed interpretive rules that are open to judicial revision in light of experience, is both more democratic and more consistent with the Constitution’s fundamental purposes. His story also shows why

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¹ U.S. CONST. art. I, § 10, cl. 1.

² *Id.* amend. V.

³ *Id.* art. I, § 8, cl. 3.

the American left should reconsider its hostility toward morals legislation and religiously motivated political action.

I. THE CRISIS OF THE OLD ORDER

The Constitution, Compton observes, was an essentially secular charter of free trade, designed to produce worldly peace and prosperity by restraining the capacity of states to interfere with vested property rights, interstate commerce, or contractual obligations. The religiosity of the Puritans had disappeared by the time of the American Revolution. The governing document that the Framers produced aimed not at godly purposes, but at its readers' self-interest (p. 19).

In the early nineteenth century, there was a religious revival. Church membership doubled between the founding and 1850. That growth was concentrated in the Methodist and Baptist denominations. Calvinist predestination was rejected in favor of a view that moral perfection was attainable in this life, and that moral regeneration would prepare the world for Christ's return. Protestants began to work together across denominational lines (pp. 29–35).

The most momentous consequence was that millions of Americans became opposed to slavery, which most Framers had either enthusiastically supported or regarded with indifference verging on mild distaste. Two other new targets of abolition would have surprised the Framers: drinking and gambling.

During this time, America saw its first alcohol prohibition laws. The movement against alcohol was reinforced by a rise in the social problems associated with liquor consumption, as demand rose and its price declined (p. 35). States also tried to abolish lotteries. Constitutional difficulties arose immediately: each of these measures raised distinct doctrinal issues. Begin with alcohol.

Any ban on alcohol would violate both vested property rights and the freedom to ship goods across state lines (at least in their original packages). And because many states had granted to private companies the right to operate lotteries, prohibition of them would interfere with obligations of contract. At first, courts enforced these limitations, thwarting these popular movements.

The collision between morals legislation and property rights is clearest in *Wynehamer v. People*,⁴ in which the New York Court of Appeals invalidated a prohibition of alcohol. The due process clause of the state constitution protects property rights, Judge Comstock ex-

⁴ 13 N.Y. 378 (1856). *Wynehamer* is discussed at pp. 77–78. Here I examine the case's reasoning in more detail than Compton does.

plained.⁵ Property rights include “the essential characteristics and attributes with which it is clothed by the laws of society,” and these necessarily “include the power of disposition and sale, as well as the right of private use and enjoyment.”⁶ A prohibition on the possession and sale of alcoholic beverages violates these rights. “It is certain that the legislature cannot totally annihilate commerce in any species of property, and so condemn the property itself to extinction.”⁷

Judge Comstock did not doubt the pernicious effects of alcohol. It can be “demonstrated with reasonable certainty[] that the abuses to which it is liable are so great, that the people of this state can dispense with its very existence, not only without injury to their aggregate interests, but with absolute benefit.”⁸ The trouble was that this was also true of “other descriptions of property.”⁹ If such arguments can annul vested property rights, “then there is no private right entirely safe, because there is no limitation upon the absolute discretion of the legislature, and the guarantees of the constitution are a mere waste of words.”¹⁰

There were, of course, longstanding categories of cases in which the state could destroy property through summary proceedings, without compensation. But alcohol prohibition “differed radically from existing police powers precedents in that it was not a response to an imminent physical threat, such as fire or epidemic; asserted a power that was not clearly recognized in the common law; and subjected property to summary abatement in an instance when no specific injury or malicious use of property was alleged” (p. 79). Contrast obscenity, a category that was deemed contraband from time immemorial. If the legislatures could freely add to those categories, then Judge Comstock was right: no property was safe.

The reasoning is nonetheless remarkable. The Framers of the New York Constitution did not intend to make policy regarding alcohol. But the court’s reasoning implies that they nonetheless tied the hands of subsequent generations. On the other hand, Judge Comstock was right about the doctrinal implications of allowing the law. His views were widely shared: nearly every state appellate decision involving alcohol prohibition laws between 1851 and 1854 invalidated one or more of the law’s provisions (p. 64).

⁵ The New York Constitution provided: “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.” N.Y. CONST. art. I, § 6 (1856), *quoted in Wynehamer*, 13 N.Y. at 383, 392.

⁶ *Wynehamer*, 13 N.Y. at 396.

⁷ *Id.* at 399.

⁸ *Id.* at 384.

⁹ *Id.*

¹⁰ *Id.* at 385.

After 1855, the judiciary abruptly began to split on the constitutional issues, with a number of judges sustaining new liquor laws. The root of the change was partisan realignment. Neither the Democrats nor the Whigs were willing to stake out clear positions on the liquor question, but the nascent Republicans were wholeheartedly dry, because party leaders thought that most anti-slavery voters also opposed the liquor traffic (pp. 76–77). “Naturally enough, many judges in states dominated by fusionist or Republican elements suddenly adopted an expansive view of the state’s police powers in cases involving liquor” (p. 77).

The new reasoning is evident in an 1855 Vermont Supreme Court decision upholding the seizure of a barrel of rum.¹¹ In the earlier decisions (which the Vermont court ignored, though they were widely available), Compton observes, traditional public nuisances such as diseased goods and obscene prints were “a list of exceptions to the otherwise sacrosanct rights of the property owner” (p. 81). The Vermont court, however, cited them to support a broad morals police power (p. 81). The critical test for the validity of a use of the police power “was not whether it was consistent with the traditional rights of property owners and criminal defendants, but whether the ‘evil’ in question was sufficiently serious to warrant the destruction of private property” (p. 82).

Even after the Civil War, however, the old assumptions about vested rights remained potent. The due process objection that the *Wynehamer* court had relied upon was read into the Fourteenth Amendment in *Bartemeyer v. Iowa*,¹² in which every member of the Supreme Court agreed, albeit in dicta, that liquor prohibition was a taking of property that required that liquor and brewery owners be compensated for their losses (pp. 106–09). On that basis, lower federal courts in 1885 and 1886 struck down state prohibition laws as violations of due process (pp. 111–13).

When the question was finally presented to the Supreme Court, however, the challenged prohibition statute was upheld. *Mugler v. Kansas*¹³ declared that liquor sale was a “noxious” use of property.¹⁴ The decision reserved to the judiciary the question of what was “noxious.” The principle by which a court could make that determination was not stated. As the dissent pointed out, the Court’s decision on that question was now unmoored from tradition and precedent (p. 116).

Gambling presented a different issue, arising out of the constitutional protection of contracts, rather than substantive due process

¹¹ *Lincoln v. Smith*, 27 Vt. 328 (1855) (discussed at pp. 79–82).

¹² 85 U.S. 129 (1873).

¹³ 123 U.S. 623 (1887) (discussed at pp. 113–18).

¹⁴ *Id.* at 661.

property rights. Lotteries were regarded, at the time of the framing, as “a perfectly legitimate mode of revenue generation, one used to fund the construction of countless capital-intensive projects from colleges and churches to bridges and canals” (p. 33). States typically enacted laws authorizing some private entity to conduct lottery drawings for a term of years or until a given sum of money had been raised (p. 39). By the late 1820s, there were hundreds of such grants (p. 39).

Any effort to abolish lotteries thus ran afoul of the Contracts Clause. The Supreme Court, in *Fletcher v. Peck*¹⁵ and *Dartmouth College v. Woodward*,¹⁶ had indicated that any agreement between a legislature and a private entity, under which rights had “vested,” could not be undone by a subsequent legislature. In *Fletcher*, Chief Justice John Marshall explicitly rejected an exception for considerations of morality: a legislature could not undo a corrupt land deal enacted by its predecessor.¹⁷ In 1827, New York Governor DeWitt Clinton vetoed on this basis a statute imposing high license fees on lottery ticket vendors. Courts reached similar conclusions (p. 41). Opponents of lotteries had to wait until the existing grants expired (p. 58).

The lottery issue arose anew after the Civil War, when Southern legislatures tried to abolish lotteries authorized by their Reconstruction-era predecessors. This time, however, the Contracts Clause obstacle was swept aside. The Mississippi Supreme Court in 1873 articulated for the first time the doctrine that certain police powers were “inalienable” and thus not capable of being bound by contract (pp. 86–88). Thus the path was laid toward the Supreme Court’s 1879 declaration that no state “can bargain away the public health or the public morals” (p. 96).¹⁸ In the nineteenth century, the Court cited the Contracts Clause in nearly half of the cases in which it struck down state laws.¹⁹ Now, however, the Clause had a police power exception of indeterminate scope.

The dormant commerce clause was a final obstacle to morals reform. State efforts to block the importation of immoral commodities were suspect. The absence of a federal police power — at this time, the Court was reading Congress’s enumerated powers very narrowly — meant that the federal government could not impede traffic in such commodities, either. The Supreme Court held that a state could not ban the importation of liquor,²⁰ and that the importer had a right

¹⁵ 10 U.S. 87 (1810).

¹⁶ 17 U.S. 518 (1819).

¹⁷ 10 U.S. at 130.

¹⁸ The author quotes *Stone v. Mississippi*, 101 U.S. 814, 819 (1879) (internal quotation marks omitted).

¹⁹ C. PETER MAGRATH, *YAZOO: THE CASE OF FLETCHER V. PECK* 101 (1966).

²⁰ *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465 (1888).

to sell it locally so long as it remained in its “original package” (pp. 121–22).²¹ “[D]ry states and counties soon found themselves inundated with imported liquor” (p. 122). Neither the states nor the federal government had the power to address the problem. The result was open lawlessness as dry states and counties ignored the Court and arrested purveyors of liquor. In response, Congress quickly enacted a statute that authorized states to ban imported liquor. The Court ignored the logic of its earlier rulings²² and upheld the law (pp. 123–25).²³ Lotteries presented a similar problem: they were banned in every state but Louisiana, but that state’s notoriously corrupt lottery was entitled to distribute its wares throughout the United States. The Court read the Commerce power with unprecedented breadth in order to uphold a federal ban on interstate shipment of lottery tickets.²⁴

The Court, in short, refashioned existing doctrine to accommodate evangelical social movements. But the newly revised law made no sense. “[A]t each of the three points where post-Revival mores intersected with traditional constitutional ideals — in the jurisprudence of the Contract Clause, due process, and the Commerce Clause — the Court’s accommodation of moral reform gave rise to embarrassing doctrinal tensions that were widely noticed by contemporary observers” (p. 93). Once the police power was expanded, why could it not reach monopolistic corporations and inhumane conditions of labor? If the state could use its morals power against liquor and gambling, why could it not enact maximum hour and minimum wage laws? Once Congress could prohibit interstate traffic in lottery tickets, why could it not deploy its commerce power against other evils, such as child labor? In each of these areas, the Court insisted on drawing a line, but the lines were widely perceived to be arbitrary.

Progressive critiques of the Court in the early twentieth century relied heavily on the liquor and lottery precedents to show that the doctrine was a mask for laissez-faire ideology. This aspect of the critique, Compton argues, “helps to explain why early-twentieth-century Americans found the progressives’ sometimes outlandish arguments regarding the indeterminacy of constitutional doctrine and the subjective nature of judging to be inherently *plausible*” (p. 134). Justice Oliver Wendell Holmes, the leader of this jurisprudential assault on the old order, repeatedly cited these precedents as evidence that “the legislature may forbid or restrict any business when it has a sufficient force

²¹ *Leisy v. Hardin*, 135 U.S. 100 (1890).

²² “[T]he Court had declared on numerous occasions that the underlying purpose of the Commerce Clause was to ensure that the buying, selling, and transportation of goods across state lines would be governed by uniform national standards” (pp. 123–24).

²³ *In re Rahrer*, 140 U.S. 545 (1891).

²⁴ *Champion v. Ames*, 188 U.S. 321 (1903).

of public opinion behind it” (p. 140).²⁵ Professor Robert Lee Hale cited prohibition as evidence that the public/private distinction on which traditional property protections rested was essentially meaningless (p. 150). “By the early 1930s, a significant swath of the legal community had reached the conclusion that the conceptual underpinnings of the due process and Contract Clauses were damaged beyond repair” (p. 153).

The Court increasingly seemed opportunistic in its interpretations of the Constitution. Harvard Professor Thomas Reed Powell declared that “[t]he holy name of states’ rights is easily forgotten when employers wish their laborers sober and unctuously invoked when they wish their laborers young” (p. 162).²⁶ The Court upheld the Mann Act prohibiting interstate transportation of prostitutes and the Federal Kidnapping Act as valid “commercial” regulations, while invalidating the National Industrial Recovery Act, the Agricultural Adjustment Act, and the Guffey Coal Act for exceeding the scope of the commerce power. One satirical writer, in a 1937 *Time* magazine article, explained that the commerce power, as understood by the Court, included everything except commerce. “For example, it would never do to presume that the United States Steel Corporation is engaged in interstate commerce” (pp. 164–65).²⁷

Thus, in the New Deal cases, the judges who announced broad judicial discretion were not fashioning law out of nothing. They were just reporting the news. Roosevelt Administration lawyers consistently cited the alcohol and gambling precedents in their briefs (pp. 165–76). So did the Court. For example, when *Home Building & Loan Association v. Blaisdell*²⁸ upheld against a Contracts Clause challenge a state moratorium on mortgage foreclosures, Compton observes that its declaration that the Clause had to be interpreted to reflect the community’s evolving needs “was less hermeneutical than factual” (p. 156). There was already a police power exception to the Contracts Clause, and it made no sense to prevent its exercise amid an unprecedented economic emergency. Similarly with the other New Deal cases: they reflected the consensus of the legal community that the old order was unworkable.

²⁵ The author quotes *Tyson & Brother-United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting).

²⁶ The author quotes Thomas Reed Powell, *Comment on Mr. Corwin’s Paper*, 19 AM. POL. SCI. REV. 305, 305 (1925) (alteration in original) (internal quotation mark omitted).

²⁷ The author quotes Thomas Cowan, *Ex Parte Snatch*, TIME, Mar. 15, 1937, at 36–37 (internal quotation mark omitted).

²⁸ 290 U.S. 398 (1934).

II. IMPLICATIONS

A. *Originalism and Construction*

Compton's narrative sheds light on familiar questions about originalist interpretation. The formalist courts of the early nineteenth century were carrying out the intentions of the Framers, who envisioned "a republic whose fundamental law would hinder efforts to interfere with settled property rights or restrict the flow of goods in interstate markets" (p. 2). But the rules that the courts used to protect gambling and alcohol do not themselves appear in the Constitution.²⁹ The effect of those rules, Professor Edward Corwin observed, was to create a constitutional "twilight zone" of commercial activity that neither the states nor the federal government could regulate (p. 161).

That raises an originalist difficulty. These rules are not, after all, part of the constitutional text, even if they do correspond with the views of the Framers. They are not necessarily the meaning of the text; they are constructions crafted by courts to implement the text. That was understood by their critics. The modern interpretation/construction distinction — now prominently propounded by Professors Lawrence Solum, Randy Barnett, and Jack Balkin³⁰ — was anticipated in 1909 by Professor Roscoe Pound, who argued that the Framers "laid down principles, not rules," and that when the text stated such principles, any rules announced by the courts were necessarily judge-made creations, appropriate candidates for adjustment to changing circumstances (p. 146).³¹ The Marshall Court's limitations on the legislative power were such creations, and they turned out to be (as Marshall wrote in another context, about a construction he rejected) "an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."³²

The basic purposes of the Constitution are thwarted by constructions of constitutional powers that leave some problems insoluble by anyone. At Philadelphia in 1787, the Convention resolved that Con-

²⁹ Nor could they legitimately be deemed responses to the specific historical evils to which the Constitution responds. On the relevance of those evils to originalist interpretation, see generally Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917 (2012).

³⁰ See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011); RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2005); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013); Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law & Legal Theory Research Papers Series, Working Paper No. 07-24, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 [<http://perma.cc/R3D5-Q4J9>].

³¹ The author quotes Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 467–68 (1909).

³² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

gress could “legislate in all cases . . . to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.”³³ This was then translated by the Committee of Detail into the present enumeration of powers in Article I, Section 8, which was accepted as a functional equivalent by the Convention without much discussion. Ambiguities in the enumeration should be resolved by reference to the general purpose of the Constitution. That purpose is revealed, not only by these then-secret deliberations, but by the widely shared understanding that the Articles of Confederation were defective, and had to be replaced, precisely because they created a state of affairs where some problems could be solved neither by the states nor by the federal government. Robert Stern observed in 1934 that “no hiatus between the powers of the state and federal governments to control commerce was intended to exist,”³⁴ and that the Framers did not intend that the people of the United States “be entirely unable to help themselves through any existing social or governmental agency.”³⁵ Justice Harlan, upholding the ban on interstate transportation of lottery tickets, relied on exactly the same logic: “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” (p. 130).³⁶ In short, the New Deal’s expansion of legislative powers itself has good originalist credentials.

It also has good democratic credentials. Professor Bruce Ackerman has famously argued that the New Deal transformation was ratified by what amounted to a national constitutional referendum in the election of 1936, which Franklin Roosevelt won in a landslide.³⁷ Compton observes that the transformation occurred more gradually: no single national plebiscite rejected the Marshall Court’s limitations on legislative powers, but the mobilization against newly immoral forms of property ratified a new conception of the constitutional regime (p. 182). The constructions that the Court ended up adopting reflected the views of generations of Americans.

Compton’s story shows that a construction of the Constitution that permanently entrenches vested rights is both undemocratic and non-

³³ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1911); see also 1 *id.* at 21 (Resolution VI of the Virginia Plan).

³⁴ Robert L. Stern, *The Commerce That Concerns More States Than One*, 47 HARV. L. REV. 1335, 1365 (1934).

³⁵ *Id.* at 1335. For modern elaborations of the same point, see generally my THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM 38–67 (2013); BALKIN, *supra* note 30, at 160–62; Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010).

³⁶ *Champion v. Ames*, 188 U.S. 321, 357–58 (1903).

³⁷ See 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 306–11 (1998).

sensical. The early nineteenth century courts' approach to the drug question held that only those substances that had been traditionally tolerated, such as alcohol, were protected. In 1886, a federal court upheld a state opium ban on just this basis: opium, unlike liquor, had no "place in the experience or habits of the people of this country, save among a few aliens" (p. 113).³⁸ That approach has the unfortunate effect of making earlier generations' decisions irreversible. The Court's modern Second Amendment jurisprudence, which (in a construction that is only tangentially related to the text) protects weapons "typically possessed by law-abiding citizens for lawful purposes,"³⁹ has exactly this effect, as Justice Breyer has pointed out: "if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so."⁴⁰

B. *Left-evangelicalism*

There's also a lesson here about morals regulation and the Constitution. Compton's title is intentionally shocking: the idea of the living constitution has become the province of the American left, much of which despises the evangelicals. Compton shows that the left owes the evangelicals a huge debt. One might respond that this signifies little: sooner or later the nation would have to break free of the Marshall Court's fetters, and it is mere coincidence that the evangelicals got there first. But this is only one of many debts that the political left owes to evangelicism.

The Social Gospel movement of the late nineteenth century fought alcoholism, sweatshops, decaying tenements, business monopolies, and foreign wars. Organized Catholics helped push the New Deal to the left.⁴¹ In the 1960s, many religious groups swung left on the most pressing issues: the civil rights movement and the Vietnam War.⁴² The most important effect of politically mobilized religion in American public life was the abolition of slavery. If history shows anything, it is that in this country the secular left can accomplish little without religious allies.⁴³ Attacks on religion in the name of the left, then, are

³⁸ The author quotes *Ex Parte Yung Jon*, 28 F. 308, 312 (D. Or. 1886) (internal quotation marks omitted).

³⁹ *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008).

⁴⁰ *Id.* at 721 (Breyer, J., dissenting).

⁴¹ See A. JAMES REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* 219–25 (1985).

⁴² See FRANK LAMBERT, *RELIGION IN AMERICA* 160–83 (2008); REICHLEY, *supra* note 41, at 246–54; ROBERT WUTHNOW, *THE RESTRUCTURING OF AMERICAN RELIGION* 218–22 (1988).

⁴³ The continuing existence of a large religious left is often overlooked. See SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE*

spectacularly counterproductive. Some atheists in contemporary America mistake a historical blip — the emergence of the religious right in the 1980s — for a permanent feature of the political world.⁴⁴

Liberal theorists tend to denounce morals laws, but when they do, they are often thinking of gay rights and abortion.⁴⁵ The morals laws that are actually cramming the prisons in contemporary America, however, are the drug laws.⁴⁶ The simplest answer is to get rid of those laws altogether,⁴⁷ but there are good reasons not to want heroin and methamphetamine to be available at the corner store.

Prohibition today has a bad name, but alcohol was associated with real abuses. The nineteenth-century saloon was very different from the modern bar. Saloons gave free drinks to teenagers, hoping to turn them into habitual alcoholics. They encouraged patrons to drink heavily, and on paydays to purchase drinks for everyone in the house. Many saloons were linked with prostitution, and contributed to the spread of syphilis.⁴⁸ After Prohibition was repealed, liquor manufacturers sought to improve their public image by consciously avoiding these practices.⁴⁹ Prohibition succeeded in permanently changing American culture.

One can understand the evils of the saloon in secular terms, though even then it is hard to articulate them without smuggling in some element of moralistic paternalism. Professor Mark Kleiman argues that even a liberal framework that seeks to maximize people's ability to control their own lives should have room in it for the regulation of "vice," which he defines as any "activity voluntarily engaged in that

CONSTITUTION IN MODERN AMERICA 184 (2010); STEVEN H. SHIFFRIN, *THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS* 1 (2009).

⁴⁴ With the triumph of the gay rights movement, there is some possibility that this particular political cleavage will abate. See ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 175–76 (2013).

⁴⁵ See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 291 (rev. ed. 1999); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 125–30, 240–58 (rev. ed. 1978).

⁴⁶ E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–2012*, at 6 (2013), available at <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf> [<http://perma.cc/7KAE-RAHR>] (25.4% of state admissions to prison for drug offenses in 2011, down from 32.1% in 2001); FED. BUREAU OF PRISONS, *INMATE STATISTICS: OFFENSES*, http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp [<http://perma.cc/FF9R-U7SB>] (48.8% of federal inmates incarcerated for drug offenses as of July 26, 2014).

⁴⁷ See, e.g., Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 *YALE L.J.* 2593, 2626 (1994) (reviewing STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* (1993)).

⁴⁸ MARK EDWARD LENDER & JAMES KIRBY MARTIN, *DRINKING IN AMERICA: A HISTORY* 103–107 (rev. ed. 1987).

⁴⁹ *Id.* at 173.

risks damage and threatens self-command.”⁵⁰ While vice legislation often reflects social prejudice and exhibits excesses of its own, there may sometimes be good reason to interfere with certain vices — most importantly, “that many of its participants regret their initial choice to adopt it.”⁵¹ The mechanisms by which vices lead to regret include addiction, intoxication, temporal myopia, irrationality in the management of risk, routine, and the effects of fashion (which takes the form both of peer pressure and of favorable word of mouth about new drugs whose harms are not yet understood).⁵² These mechanisms — which are present in gambling as well as drug consumption — confound the assumption of ordinary economic analysis that the consumer is a reliable judge of her own interests.

But this secular, economistic analysis isn’t how most Americans think about the social control of vice. More generally, the most potent counter to libertarianism is a discourse of social solidarity, and it is most commonly understood in religious terms. Secularists on the left — and they are disproportionately on the left⁵³ — need to stop endlessly debating fine points of theology.⁵⁴ They need to recognize who their friends are. The shock of Compton’s title is something we had better get used to.

The secular left, like the evangelical right, relies on moral ideals. Liberalism sometimes presents itself as what Professor Brian Barry called a “want-regarding theory,” which tries to satisfy people’s wants and goals, whatever they are.⁵⁵ This is contrasted with an “ideal-regarding theory,” which aims to achieve human excellence whether or not people subjectively happen to want it.⁵⁶ Some liberal theorists reject any reliance on ideal-regarding theory, with morals laws primarily in mind.⁵⁷ But without such reliance, it is hard to defend any kind of drug regulation. The notion of drug abuse, a notion that most liberals share, is parasitic on a belief in objective human goods that are imped-

⁵⁰ Mark A.R. Kleiman, *Neither Prohibition Nor Legalization: Grudging Toleration in Drug Control Policy*, 121 DAEDALUS 53, 55 (1992).

⁵¹ *Id.* at 59.

⁵² See MARK A.R. KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS 30–45 (1992).

⁵³ See PEW FORUM ON RELIGION & PUB. LIFE, “NONES” ON THE RISE: ONE-IN-FIVE ADULTS HAVE NO RELIGIOUS AFFILIATION 25 (2012), available at <http://www.pewforum.org/files/2012/10/NonesOnTheRise-full.pdf> [<http://perma.cc/4NPQ-XSYF>] (63% of religiously unaffiliated Americans identify as Democrats or lean Democratic).

⁵⁴ See Andrew Koppelman, *The Nonproblem of Fundamentalism*, 18 WM. & MARY BILL RTS. J. 915, 923 (2010).

⁵⁵ See BRIAN BARRY, POLITICAL ARGUMENT 38–39 (1965).

⁵⁶ See *id.* at 39–41.

⁵⁷ See, e.g., JOEL FEINBERG, 1 THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 65–70 (1984). But see Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1642–43 (2005).

ed by the excessive use of psychoactive drugs.⁵⁸ Almost nobody wants unrestricted sale of the nastiest ones, and so the left needs to reconsider its casual embrace of libertarian slogans.⁵⁹ Once it is recognized that both sides share ideals, a comparison of these may find some unexpected areas of overlap.⁶⁰

The most basic common ground between the evangelicals and the secular left, in Compton's historical account, is this: "even the most secular of twentieth-century progressives agreed with the nineteenth-century evangelicals on one critical point: the primary aim of the constitutional enterprise was *not* to protect established property rights or ancient jurisdictional boundaries, but rather to provide for the wellbeing of the present generation of Americans" (p. 135). That aspiration is one that religious and secular Americans can still share.

CONCLUSION

This is a fabulous book, engagingly written, concise, and convincing. It will change the way I teach introductory constitutional law. It will change the way we think about American constitutional history.

⁵⁸ If that conception of drug abuse were accepted, our regulatory regime would look very different. The law would not molest casual users whose lives are undamaged, while responding more effectively to actual harm. Andrew Koppelman, *Drug Policy and the Liberal Self*, 100 NW. U. L. REV. 279, 291 (2006).

⁵⁹ Or its sophisticated embrace of some of those slogans, which has been elaborated by some prominent theorists into a full-blown embrace of state neutrality toward contested conceptions of the good. See Andrew Koppelman, *The Fluidity of Neutrality*, 66 REV. POL. 633, 635 (2004).

⁶⁰ See generally Andrew Koppelman, *Naked Strong Evaluation*, 56 DISSENT 105 (2009) (reviewing CHARLES TAYLOR, *A SECULAR AGE* (2007)).