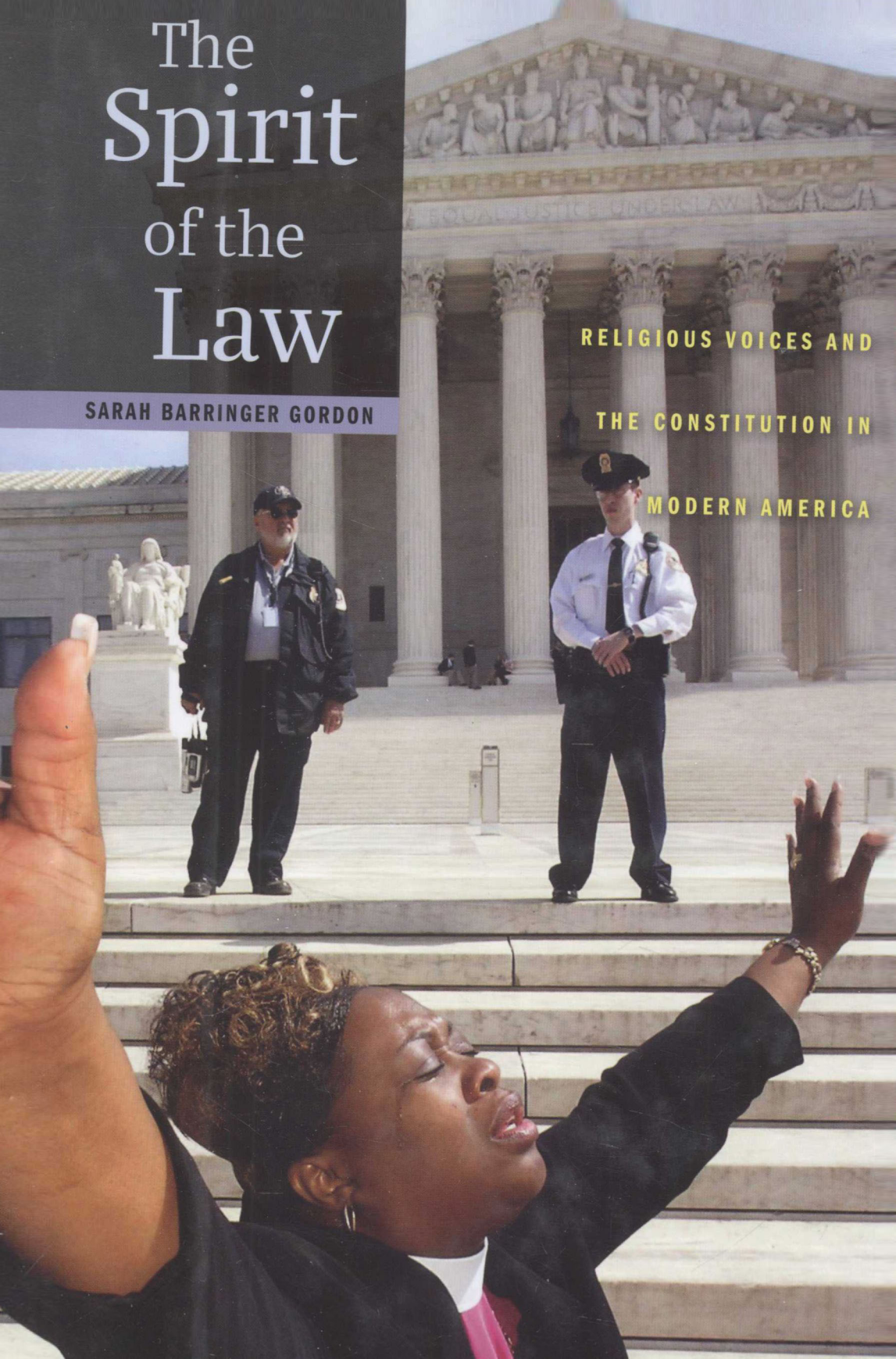
The Spirit of the Law

SARAH BARRINGER GORDON

RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA



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To T.V.A.O., kind father, wise counselor, gentle man

Preface

When American lawyers talk about "the spirit of the law," they refer to the higher goals of any legislation or legal rule—the praiseworthy motives that animate the law. They are trying to cut through technicalities to the essence. Often, they refer to the spirit in contrast to "the letter of the law." The gap between the law on the books and the achievement of loftier goals can be palpable. Usually, if the letter of the law dictates a result, then technicality rather than spirit rules. The phrase is common in the lawyer's lexicon, and this is not the first book to use the term as its title: in 1748, for instance, Charles de Secondat, baron de Montesquieu, published *De l'esprit des lois*.

Many lawyers do not know, however, that the phrase itself is biblical in origin. The tension between letter and spirit is far older and has deeper roots than any one legal system—or even any one religion. Paul's second letter to the Corinthians in the New Testament exhorted Christians to beware the letter of the law, "for the written law condemns to death, but the Spirit gives life" (2 Cor. 3:6, Revised Standard Version). The prophet Jeremiah spoke of the law written "on the heart" that forged a people of God (Jer. 31:33). This covenant is truly spirit-filled law in the eyes of God's people. It is internal, transformative.

In religious terms, the spirit is a driving force—law is the result rather than the source of its power. The spirit is prior; higher than earthbound systems. The "religious voice" reminds its hearers of considerations that lie outside the secular purview of law. For them, lawyers are the "lay" population. To those committed to secular law, by

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CHAPTER 1

The New Constitutional World

An Introduction

Late in the first decade of the twenty-first century, a Massachusetts rabbi reflected on her decision to become an activist ten years earlier. "The religious voice," Devon Lerner said, "has trouble getting heard." But she had something she wanted to say. After rabbinical training at Hebrew Union College in Cincinnati and service to congregations in Atlanta and Richmond, she moved north in search of a community that would nurture her long-standing commitment to interfaith work. Eventually she became one of the first members of an ecumenical group of clergy, all of whom belonged to progressive religious denominations. For eight years, Lerner worked first as a volunteer and then as the full-time executive director of the organization, which litigated and lobbied in favor of same-sex marriage in Massachusetts. She looked back on this experience as both exhilarating and exhausting. As she described it, "I entered naively, thinking about separation of church and state, as though it would be an actual protection."[1]

Deciding where religion ends and government begins has never been easy or straightforward. Yet Americans are committed to the protection of religious freedom. After all, the First Amendment to the United States Constitution opens with the importance of religion: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These commands (known as the religion clauses) have inspired and infuriated Americans ever since they took effect in 1791. But for the past seventy years, religiously inspired Americans like Devon Lerner have had a new place to be heard—they could claim the protections of the religion clauses in courts.

There are many ways to describe how Rabbi Lerner came to law and what she learned there; any version of the central story traces how this new venue has drawn countless thousands to take legal stands themselves or to come together in like-minded communities. These were not "social movements," at least not in the sense that scholars generally use the term.[2] Rabbi Lerner was just one among many who have navigated between religious and legal life, for many divergent reasons and causes. Fundamentally, however, hers was a religious undertaking. She came because she spoke for interests outside the secular, she said, defending convictions that deserved to be heard but that struggled for an audience. The experience was often traumatic; it required courage and tenacity, as Lerner acknowledged, to "keep a principled stand." Her own principles were grounded in progressive Judaism, overlapping sometimes but not always with progressive political agendas. She will appear again toward the end of this book. For now it is most important to appreciate that Rabbi Lerner came to constitutional law through her religious commitments, rather than through politics or another secular motivation.

The lay constitutionalism of Lerner and those who shared her perspective was powerful, but it was a popular understanding. The more technical dimensions are the particular province of courts and legislatures. The tension between popular and technical constitutionalism reflected the difference between the spirit and the letter of the law. On both sides of the divide, friction and frustration animated encounters between popular and technical arguments and tactics. The uncertainty of the outcome—the dread of defeat and the hope for victory—meant that the journey to law was dangerous. Defeat at the hands of the technical law could be devastating. As many of the spirit-filled learned, however, even victory carried risks.

The group Rabbi Lerner worked with was successful, so much so that they disbanded in 2007, saying that their work had been done. After years of struggle and controversy (even secular supporters who shared their fundamental legal goals "were afraid of religious voices," Lerner recalled), Massachusetts law finally allowed them the freedom to practice their faiths by legalizing same-sex marriage. Religion, in this sense, was protected and nurtured through legal action that eventually provided the space for progressive groups to engage in the kinds

of practice and ritual they believed their commitments demanded. Groups of clergy in other states around the country copied their model. Such groups were evidence that the appeal of advocacy to vindicate faith remained strong. Yet the backlash against same-sex marriage even within liberal denominations showed that dissension traveled alongside legal activism.

Rabbi Lerner and others who appear in this book were not sophisticated legal actors but motivated believers who came to law to defend their understanding of their own religious traditions. In other words, they emerged from a religious space with a felt mandate to right a constitutional wrong. They found a complicated legal world that required new navigational tools and strategies; and in the end for Lerner it was a mixed experience, even though her group made substantial progress in law. Like other religious actors who have come to law, she found herself battling those of other faiths who opposed her claims, as well as crafting a coherent community within her own organization. She learned, as religious litigants have learned for the past seventy years, that law and legal rights do not mirror or often even recognize religious arguments or beliefs, and vice versa. Her own understanding of the ways law and religion interact will never be the same.

A century ago, Rabbi Lerner would have encountered a very different legal regime. In that old world, religious voices were even more sharply circumscribed. That world was not always unsympathetic, but religious actors, especially those whose faith led them in less-traveled directions, were protected only by the rights that every citizen had to personal liberty and political participation. In general, religion was not a special concern of courts, certainly not the federal courts; there was no nationally recognized right to religious liberty. That vanished world stands in contrast to the constitutional landscape that Rabbi Lerner encountered. Like others in the modern era, Lerner's experience was sculpted by a constitutional world that first emerged in the mid-twentieth century.

This new world was not always friendly, either. But it was created by the desire to give national scope to religious freedom—to apply the religion clauses of the U.S. Constitution to every level of government, state and local as well as federal. In other words, the new constitutional world protected spiritual life through law, starting in the 1940s. The

gift has been a complicated and partial one, honored as much in the breach as in actual practice. Yet it changed many things about religious life in America, as well as changing law and legal analysis.

This book explores the erosion of the older world and the contours of the new terrain and those who have populated it. As it has occurred over decades and in waves, rather than at one moment, the unfolding relationship between religious life and legal commands is evident to the historian in ways that elude those who study the present. The mutual involvement of religious life and legal arenas also is missing in the work of those who study the development of legal doctrine or a particular angle of legal controversy, and those who focus on denominational, social, or other aspects of religious history. Paying attention to law in the same depth as religion is crucial, because attention to only one obscures the long dance of interaction. Indeed, one or another facet of the stories told in the pages that follow may be familiar to scholars of religion or law—but the richer and more textured world described here can be appreciated only when seen from more than one vantage point.

This book's central argument also depends on appreciating small- as well as large-bore change. It begins with the big transformation; that is, with the collapse of the old world, exploring the stresses and pressures of a regime that was powered by state law, but that came under increasing scrutiny by the 1930s. The new constitutional world that was invoked through Supreme Court cases "incorporating" the Constitution's religion clauses and applying them for the first time against the states did not emerge fully formed. The process of molding and remodeling the new landscape unfolded over succeeding decades, and has never been complete or even satisfying to many of those who participated in its construction. These accretions and alterations are the subject of the chapters that follow. Always, they involved the collision of religious voices and legal doctrines; often, religious life every bit as much as law was changed by the encounter of spirit and letter.

Taking these encounters seriously means reevaluating the trajectory of American national life. Put in terms that historians use, the periodization of religion and law in American history challenges those who would argue for a "long" nineteenth century or even a narrative that is

keyed fundamentally to political or social or military events. In the world I describe, tectonic forces tend to be legal and religious. This new constitutional world was influenced by other factors but generally followed the shifts of doctrine and practice in those two fields more closely than, say, presidential elections.

The hard labor of building the new world fell primarily on believers and religious practitioners, who attempted to construct an environment in which legal standards protected the mandates of their faith. The power to invoke the religion clauses is relatively new, however. Attempts were made well before the new constitutional world came into being in the mid-twentieth century. In that sense, the aspirations of those who appear in *The Spirit of the Law* are not entirely unique in American history. Yet their religious voices helped expand the idea of religious freedom, and embedded it deep in the fiber of American society. However imperfectly, the letter of the law now protects spiritual concepts in a regime dedicated to religious liberty. These basic—even sacred—national rights are available to all Americans and binding on all levels of government.

This is an important and fundamental change that involved undoing a long-standing legal framework and erecting new structures in its place. Nor was this the first such innovation—there are three distinct constitutional landscapes in this American history. The first period began roughly with the American Revolution in the mid-1770s and ended by the 1840s. This period was unstable but also foundational, and the states rather than the national government did the heavy lifting. This was a period of undoing, teasing apart links between religious and political institutions that were old and rusty. Yet disentangling old relationships was difficult and often controversial. Deep divisions over the place of religion in public life characterized this era, which began with widespread religious establishments in both northern and southern colonies and the new states.

When the Constitution was drafted in 1787, six of the original thirteen states had religious establishments. That is, these states had a variety of means for imparting religion to their inhabitants, usually through a tax-supported system of church support. Virginia had disestablished only two years earlier. By 1833, the final state (Massachusetts) disestablished, completing a process that officially separated religious institutions from political ones, but by no means separated religion from pol-

itics.[3] The process of disestablishment was different in each state, but all faced the question of the ongoing role of religion in a newly secularized political order.[4] What did this new arrangement mean? Enlightenment-era elites, especially the rationalist wing of the founding generation, played vital roles in debates over such questions. Thomas Jefferson, just to name the most outspoken of these (mostly southern) gentlemen, argued long and hard that religious authority should have no place in government.[5] But he lost.

Despite the Constitution's ban on "laws respecting an establishment of religion, or prohibiting the free exercise thereof" laid down by the Founders, there was little agreement about what that meant. Equally important, the small and distant national government rarely trod on religious toes. Instead, local conflicts were more common and weightier. For conflicts between religious and secular authority, state interpretation gradually delineated the metes and bounds of religious liberty in America. As they wrestled with such questions, state officials, especially state judges, created the second constitutional world incrementally. In state jurisprudence, religion was both acknowledged as essential to social and political stability, and subject to the constraints imposed on all citizens in the interest of order.

Leading state judges and treatise writers explained that the goal of disestablishment was not to eliminate religion from public life, but to eliminate "competition between Christian sects."[6] The "general Christianity" they saw as key to a democratic society was not terribly specific, but it was vitally important.[7] The punishment of blasphemers, swearing of oaths on the Bible, Sunday legislation, and more all survived disestablishment intact, even invigorated. In Massachusetts, formal disestablishment in 1833 was followed in 1834 by a major blasphemy opinion from the highest state court, assuring the citizens of the commonwealth that religious toleration did not mean that all manner of bad behavior must now escape punishment.[8]

By 1840, the second constitutional period was broadly in place. It was clear that more seemly manifestations of religious life were (often) protected by a regime of liberty, but that the abuse of liberty—frequently called "licentiousness"—was subject to very different treatment in the interests of order and discipline.[9] The "police power" of the states maintained social order by punishing the loudest and least orderly dissenters (blasphemers, especially, but also the many

groups that experimented with new sexual practices in God's name). State discipline also frequently silenced those who clamored too loudly for recognition in public places and came to the attention of officials.[10]

This was the way it was for a long time. The states decided questions of religion and law; those who claimed that the Constitution's own protection for religious liberty should extend to the citizens of the states had another thing coming. In real life, on the ground, the national government was mostly irrelevant. In two key cases in the 1830s and '40s, the Supreme Court held what experts had long known: that the protections of the Bill of Rights (including the First Amendment) did not extend to disputes between individuals and states.[11] This was a lawyer's resolution, framed in terms of jurisdiction and custom instead of constitutional innovation.

Technical constitutionalism, therefore, was decided against widespread application of the U.S. Constitution's religion clauses. On the rare occasion that the Constitution was in play, federal courts followed rather than led. The states developed the ground rules, and when the Supreme Court issued its first opinions on religion late in the century, in polygamy cases, it integrated essential features of state doctrine into its decisions. Federal courts punished sexual deviance in ways that replicated the states' impatience with licentiousness.[12] This settlement endured for about a hundred years, into the mid-twentieth century. It was a powerful as well as a long-lasting resolution of the major questions unleashed in the early national period. Yet this resolution—however appealing as a technical matter—existed in tension with the far less stable interpretive structures of the lay public.

Popular constitutionalism was a very different animal.[13] Despite learned lessons in law from commentators and judges, religious dissenters insisted that the Constitution should protect them. Especially among those who opposed the Protestant majorities in the states, the idea that they were subject to the tender mercies of state law was an outrage. The spirit of the law—the glorious promises of the religion clauses—*must* shield them from oppression, they argued. Their understanding of religious freedom was not shackled to dry, technical limitations. Instead, they *knew* that the Constitution shielded them, no mat-

ter what the letter of the law dictated. Joseph Smith, the founder, president, and first prophet of the Church of Jesus Christ of Latter-day Saints—commonly called the Mormon Church—petitioned the national government to intervene to protect him and his followers against state officials in Ohio, Illinois, and Missouri (in an escalating war of words between Mormons and local officials, the governor of Missouri declared in 1838 that Mormons must be "exterminated, or driven from the State if necessary for the public peace").[14]

Predictably, Smith met an unresponsive wall of technical constitutionalism, which dictated that the national government had no power to interfere in disputes with the states. The rejection filled him with disgust. For the Constitution to be properly interpreted and enforced, he was convinced, he would have to become the U.S. president. Thus began one of the most remarkable presidential candidacies in American history. It was terminated by Smith's assassination in 1844, but not before he had been crowned as "King and Ruler of Israel" in the Mormon settlement of Nauvoo, Illinois.[15] The harsh lesson in the limits of national power in the old constitutional world was replicated many times. Even so, popular belief in the essential rightness of the Constitution survived.[16]

The conviction that—somehow—the Constitution could only be rightly understood as protecting them endured among religious groups throughout the nineteenth century, despite the settlement that was so widely accepted as a matter of law. Religious groups and individuals who claimed constitutional rights not recognized in law tapped into a powerful alternative interpretation of the Constitution that was not confined to legal language or the division between state and federal jurisdictions.[17] These constitutional interpreters were galvanized by the enormous potential they were convinced coursed through the magnificent phrases of the religion clauses. *They* had a constitutional right to freedom of religion that no official hierarchy could deny them.[18] And yet, they learned, they had no legal right outside the boundaries that states allowed for such freedom. It was infuriating, because the language of the Constitution itself—the religion clauses—was so clearly aimed at preventing just such injustices. These popular arguments and the religious voices that made them were not successful, but they were extraordinarily hard to kill.

Claims to constitutional protection were heard in the courts, some-

times sympathetically, but without a sense that the claims of religious folk were somehow genuinely different, deeper, sounding in the most resonant tones of constitutional law. An example from late in the nineteenth century illustrates how far this popular constitutionalism ranged from its technical variety—and it shows how rights claimed under the auspices of the popular constitutional vision could sometimes find support through other technical means. Raucous and inventive religious actors have often been interesting and courageous, even foolishly so. Yet toleration of noise and enthusiasm was a central pillar of a vibrant democracy in the nineteenth century—within limits, of course, but nonetheless with a beneficent respect for the people out of doors.[19] No voice was more creative—and few were louder—than the Salvation Army's. The Army's legal tactics and the results of its strategy illustrate the stubborn vitality of popular constitutionalism, in the chilly atmosphere of the old constitutional world. Its example also highlights the frustrating qualities of arguing constitutional rights before a technically schooled judiciary, even when it was sympathetic.

In 1885, Salvation Army lieutenant Lizzie Franks was arrested in Portland, Maine. Franks was a convert to the energetic and dedicated new group of evangelists. Their Christian fervor led them into poor neighborhoods, and often into the waiting arms of the law. Franks and twenty-one Salvation Army soldiers marched into the Portland police station, where they "spent the evening singing their songs and praying fervently."[20] Officer Franks and many other long-forgotten Salvationists populated jails around the country in the late 1880s, arrested for disturbing the peace with their loud drumming or for holding parades without proper permits. Often, they refused to pay fines rather than compromise their "principles." One obstreperous officer, known to the faithful as Jail Bird Smith for his many arrests, was praised in the Salvation Army press as a prisoner "for Jesus."[21] The Army's brand-new legal department was besieged with calls for help in defending the open-air work of Salvationists.[22]

Taking religion to the urban poor, as the Salvation Army was pledged to do, meant bringing the performance and excitement of a frontier revival meeting to city streets. Surreptitious or even open defiance of local authorities was common at such events, which com-

bined the saving mission with techniques familiar from popular entertainment.[23] A well-known figure called Joe the Turk sported vivid red trousers, an ornately beaded fez, and a tasseled jacket, and carried a trumpet that he played "loud enough to wake up the old devil."[24] According to one source, Joe was actually an Armenian, well over six feet tall, and built like a prizefighter.[25] The fearless Joe boasted that he had been jailed "fifty-seven times for Jesus" and even "stoned and beaten by mobs."[26]

However painful, the Salvation Army's legal victories were vitally important. Arrests across the country were part of the Army's popular appeal and its legal strategy, and they were Joe the Turk's most enduring contribution to the Army's success. He is widely credited in Salvationist histories for "breaking" police persecution of Salvation Army parades and street work.[27] When a municipality enacted noise and parade ordinances, the local Salvation Army corps would rush into the breach, "determined to march to prison or anywhere Jesus would call them."[28] An arrest record created common cause between Army officers and the unchurched poor who were their targets. It also sent a message to fellow Salvationists that the accused had now become "fully fledged" at the hands of the local constabulary.[29] Defiance of the law was invigorating, but vindication was even more valuable in the long term. The Salvationist strategy included appeals from convictions for open-air workers across the country. The peripatetic Joe the Turk appeared in several cases, with various last names, always claiming that the Constitution's protection of religious freedom demanded he be released, or his conviction reversed. Often, but not always, he and other members of the faith were successful.[30]

The Michigan Supreme Court held in 1886 that the city of Grand Rapids had exceeded its authority when it passed a law designed to get the Salvation Army off the streets. For two years, conceded the court, the city had been inundated by noise and parades. The Army had invaded the working-class neighborhoods of this industrial center, bringing with it boisterous drumming and a carnival atmosphere. The seventeen-person Army band included men and women, African-American tuba and bugle players, and was the first ever to be formally commissioned as an official Salvation Corps marching band.[31] Respectable persons were horrified; eventually the city council enacted an ordinance that prohibited parading without a license. The Salvation Army held a parade the day the ordinance went into effect, of course,