H-Net Reviews
in the Humanities & Social Sciences

Sarah Barringer Gordon. *The Spirit of the Law: Religious Voices and the Constitution in Modern America.* Cambridge: Belknap Press of Harvard University Press, 2010. Illustrations. x + 316 pp. $29.95 (cloth), ISBN 978-0-674-04654-2.

Reviewed by Norman Rosenberg (Macalester College)
Published on H-Law (May, 2012)
Commissioned by Ethan Zadoff

Free Exercise across a New Constitutional Landscape

The Spirit of the Law joins the flood of other scholarly volumes, journal articles, and academic-affiliated Web sites that advance interdisciplinary work in law and religion. This work, by Sarah Barringer Gordon, Arlin M. Adams Professor of Law at the University of Pennsylvania and a historical consultant to Public Broadcasting Service's (PBS) recent God in America series, proceeds on several tracks.[1] Five chapter-length essays focus on how different religious groups have inspired and sustained legal-constitutional activism. These chapters use a time-tested First Amendment frame: heroic individuals and groups acting on their fervent commitment to fundamental principles. Activist efforts also advance broader causes. Most important, they help bring the promise of the First Amendment's Free Exercise clause to all persons of faith and nurture "creativity and diversity in [American] religious life" (p. 213).

This volume begins by invoking Montesquieu, the Apostle Paul, and the Prophet Jeremiah as it envisions the "sprit" that drives religious-legal expression helping to "cut through technicalities to the essence" of American law. "In religious terms, the spirit is a driving force–law is the result rather than the source of its power." In addition, the " 'religious voice' reminds *its hearers* of considerations that lie outside the secular purview of law" (p. ix, emphasis mine). A legally protected, vibrant religious realm, in short, can uplift the work done in law's own expansive empire.[2]

The book surveys three "distinct constitutional landscapes" (p. 5). The earliest of these, running roughly from the 1770s to about 1840, revolved around religious-legal struggles, at the local and state levels, that involved campaigns aimed at disestablishment and, more broadly, at staking out the "metes and bounds of religious liberty in America" (p. 6). *The Spirit of the Law* devotes more space to a second religious-constitutional landscape generally in place by the early 1840s. By then, religious activities in harmony with dominant views of social and cultural order, as shored up by state police power, could seek some constitutional protection. But whenever policing institutions saw "liberty" of religion veering toward "licentiousness," as in many everyday activities of the Salvation Army, they usually sought to rein in religious expression. Such restrictions proved "infuriating" to people of faith since "the language of the Constitution itself–the religion clauses–was *so clearly aimed* at preventing just such injustices" (p. 8, emphasis mine). Judges did consider cases involving religious-liberty claims, but their rulings rarely acknowledged that the arguments of "religious folk were somehow genuinely different, deeper, sounding in the most resonant tones of constitutional law" (p. 9). By the 1940s, though, these "deeper" voices increasingly gained a hearing–not only among religious activists but within legal and political communities as well.

Most of the activism highlighted in Gordon's study takes place in this third landscape, a "new constitutional world." Rather than accepting protection from "only

by the rights that every citizen had to personal liberty and political participation," religious activists imagined and, then, helped create a constitutional terrain genuinely "hospitable to the claims of faith and religious practice" (pp. 3, 213). The people who staked out this new constitutional landscape discovered that "cooperation across faith traditions in attacks on one or another" and alliance building meant stronger bonds within–and brought greater toleration from without. "When Americans do religion in law, they … understand themselves to have sacred rights and generally recognize that others do, too" (p. 216).

The book features a diverse, but not entirely unfamiliar, group of heroes. They include members of the Salvation Army who ministered to souls oftentimes cast adrift by other religious organizations; Jehovah's Witnesses who denounced what they considered state-sponsored idolatry, such as the Pledge of Allegiance; adherents of the Nation of Islam who battled for prisoners' rights and other "liberation" causes; women evangelicals, often inspired and supported by Beverley LaHaye, who waged a "holy war" to vanquish "secularist" assaults against their vision of a Christian nation; and the heterogeneous coalition of religious crusaders, particularly women from progressive Jewish congregations, who crusaded, especially in Massachusetts between the 1970s and 2007, for legalization of same-sex marriages. A chapter covering the years from 1940 to 1965 deals with a number of groups–including Protestants and Other Americans United for Separation of Church and State (POAUP) and Americans United for Separation of Church and State (AU)–that worked, early on, within the new constitutional world. Such issues as mandatory prayer in public schools and state aid to parochial ones became religious-legal flash points.

Recognizing that "technical constitutionalism" required continual injections of spirit, religious activists, as early as the 1840s, began relying on "a very different animal," "popular constitutionalism" (p. 7). Most extensively developed in Larry Kramer's *The People Themselves: Popular Constitutionalism and Judicial Review* (2004), the idea of a popular constitutionalism provides Gordon's book with a concept with which to link religious spirit to the world of law. People involved in faith work understood that the "spirit of the law–the glorious promises of the [Constitution's] religion clauses–*must* shield them from oppression." In short, "they *knew* that the Constitution shielded them, no matter what the letter of the law dictated" (pp. 7-8, emphasis in original).

Often noisy, even rancorous, activists also dramatized the case for seeing toleration for their religious practices as central to expanding the boundaries of American democracy itself. The "chilly atmosphere of the old constitutional world," dominated by its "technically schooled judiciary," confronted the presumably warmer, and certainly more emotive, realm of popular constitutionalism (p. 9). By the late nineteenth century, the travails of street preachers, such as Jail Bird Smith, known for his fiery preaching and numerous arrests, encouraged the Salvation Army to create its own legal department. Jehovah's Witnesses subsequently followed this example. After publication of Gordon's book, the daughter of the leader of Wichita's Westboro Baptist Church successfully shepherded the controversial group's First Amendment case through the U.S. Supreme Court, *Snyder v. Phelps* (2011).

The Spirit of the Law emphasizes that this new constitutional landscape has always been–and remains–contested terrain. Near the era's beginning in 1943, for instance, Justice Felix Frankfurter's famous dissent (in one of a series of Jehovah's Witnesses cases, *West Virginia State Board of Education v. Barnette* [1943]) argued that only a theocratic state measured the "validity of secular laws" by their "conformity to religious doctrine." If the Supreme Court ruled to exempt a student of faith from a mandatory flag salute in a public school, the Supreme Court would be heading down a dangerous path, Frankfurter cautioned his fellow justices. By rejecting a recent 1940 opinion in a virtually similar case (*Minersville School District v. Gobitis* [1940]), the Court would inevitably sacrifice stability in the law on behalf of a foolish errand: trying to define "religion" for constitutional purposes and then resolve what would surely be a myriad of religiously grounded First Amendment claims. Although the Court's majority ignored his warning, "Frankfurter's prescience was remarkable" (p. 46). In time, the Court did confront religious-legal conundrums that defied the best efforts of constitutional technicians to create stable definitions, chart clear courses, or craft coherent doctrines.

The Spirit of the Law thus emphasizes that activism inspired by religious faith and expressed through popular constitutionalism hardly moved in a single direction. Tensions and ironies, consequently, punctuate both the general themes and individual stories of this book. The immense body of litigation involving the "intolerance" of Jehovah's Witnesses, for example, overlapped with a growing spirit of religious "tolerance" that ultimately seemed to affect the religious practices of the Witnesses

themselves. And LaHaye failed to predict that her Christian crusade would encounter other "religious organizations [that] would nurture and give voice to so much of the 'homosexual agenda,' calling committed same-sex relationships holy" (p. 168).

More important, though, the Frankfurter approach, despite its insights into matters of technical legalism, lacked faith in the resultant religious-constitutional dynamic that would distinguish the new constitutional world. *The Spirit of the Law* judges several generations of religious practice and constitutional advocacy to have been of "immense" value to the entire nation. The new constitutional world zealously protected–and, thus, its citizens benefited from–the practice of religious faith.

A kind of muted triumphalism (or, perhaps, a "dose of American exceptionalism"), then, ultimately emerges from *The Spirit of the Law*. Indeed, the "real lesson, and the real value of the new constitutional world" appears to be that the failure of experts in technical law to find the "tool to sculpt a more reliable jurisprudence" has not been a serious problem. Rather, the continual tension between the claims inspired by the "popular constitutionalism among religious folk" and "the niceties of legal doctrine" by the legally learned have sowed a kind of hybrid, "lived constitutionalism" (p. 212). It, in turn, has enriched a landscape that has continued to produce generally good religious-constitutional results over the course of roughly seventy years.

Gordon's study turns cautionary, however, when acknowledging the fears of religious activists who worry about legal technicians pruning back the unsymmetrical growth of the modern constitutional landscape. From a new constitutional world perspective, the Supreme Court did take, for example, a huge doctrinal step backward when deciding *Employment Division v. Smith* in 1990. By invoking the nineteenth-century doctrine that religiously neutral and uniformly applied laws do not raise constitutional issues under the Free Exercise clause, the Court could allow "the law of religion" to be "restricted in the interest of government flexibility and efficiency." There are, then, signs that the new world "that brought believers to law and law to believers" might come "under siege" (p. 209).

The book's individual chapters, engagingly written and smoothly integrated, tell parallel stories about religiously inspired efforts to create the new constitutional world. The one on Jehovah's Witnesses has been told, albeit differently than here, more often those about the work of the Nation of Islam and the push to legalize same-sex marriage in Massachusetts. The chapter entitled "The Almighty and the Dollar" (because of the problem of state financing for activities tied to religious groups) deals with the earliest controversies that shaped the new constitutional world and seems more diffuse than the others but offers keen insights into the emerging religious-legal topography. That on the evangelical women, in contrast, focuses primarily on the work of LaHaye and her Concerned Women for America (CWA) as they "demonstrated how timeless biblical truths could be expressed in new ways" (p. 135). Although LaHaye's group did undertake much of the early litigation work for evangelical women, the relationship between its efforts and those of the larger conservative legal movement is noted more than explored, let alone critically dissected (p. 266n10). Here James Davison Hunter's *To Change the World: The Irony, Tragedy, & Possibility of Christianity in the Late Modern World* (2010), published at about the same time as *The Spirit of the Law*, might offer an interesting, comparative, and certainly far more critical perspective on Christian political and legal work.

What would seem a central claim of the book–that robust protection for religious expression both fulfills the command of the First Amendment and enriches democratic life–seems addressed to all-or-nothing critics of religion, such as Richard Dawkins and Christopher Hitchens. (Both make a brief appearance in the voluminous footnotes, nearly eighty pages at the end of Gordon's volume.) But other critical works, such as Daniel C. Dennett's *Breaking the Spell*, would agree with at least some of *The Spirit the Law*'s specific claims. The Dennett book acknowledges, for instance, that the Nation of Islam's role "in bringing hope, honor, and, self-respect to the otherwise shattered lives of so many inmates in our prisons" ranks among the kind of religious expression that merits nothing but praise.[3]

Other critical questions about the larger implications of this new constitutional world occur, as well. During the course of a supportive commentary on Steven H. Shiffrin's *The Religious Left and Church-State Relations* (2009), for example, Bernadette Meyler wonders whether religious people really do speak from some special position when commenting on church-state issues.[4] In a related vein, Dennett's book asks how "we *all* keep the cloak of religious respectability from being used to shelter the lunatic excesses" of other "people of faith? " (p. 300). Similarly, much of the early commentary on the Westboro Baptist Church case seems to focus on its "free speech" implications, a shift that enables commentators to set aside, except for familiar hosannas about tolerating

the intolerant, the precise kind of religious "spirit" at issue in this case.[5] Dennett's volume also can remind us that the specific move made in *The Spirit of the Law*, privileging religious "spirit" over "technical jurisprudence," seems another version of a familiar maneuver in the new constitutional world: to align whatever suggests "spirituality" with a higher realm and, then, associate whatever suggests "materialism" or the like with a less sublime domain.[6]

Although I feel somewhat ungenerous in wanting more from a book with so many, and such a broad range, of sources, *The Spirit of the Law* might still have related religious elements within the new constitutional world in broader, more interactive ways. Even in a study of religious-legal history, for example, it seems jarring to find "Progressivism" limited to "the word most closely associated with the political aspects" of an apparently broader, interfaith religious "movement" spearheaded by liberal Protestants that "generated a broad mandate for social intervention in the name of divine justice" (pp. 35-36). I have a similar reaction to the notion that "religious pluralism" became "as much a New Deal project as more technocratic economic programs" (p. 33). The analysis in Robert L. Tsai's extended article on the role of New Deal luminaries on the flag-salute cases of the early 1940s seems to merit more space than it receives in Gordon's chapter "Fighting Idolatry."[7] This seems especially the case when the hardly surprising advocacy by members of Jehovah's Witnesses for their own cause receives so much attention.

Perhaps most important, Gordon's discussion of recent "spiritual" work by right-leaning religious movements raises numerous questions about relationships between "religion and law" that go beyond Free Exercise issues and "popular constitutionalism." Beverley and Tim LaHaye are not simply religious activists, and their version of constitutionalism surely does not spring *solely* from their faith. Similarly, to suggest that historians have failed sufficiently to counterpoise the role of Christian conservatives in "antifeminist and antigay movements beginning in the 1970s" with that of "religious progressives in leading the opposing forces" seems a dubious equivalency. More broadly, the counteroffensive against the larger legal-constitutional edifice that began to take shape in the 1930s and 1940s, as such works as Paul Pierson's and Jacob Hacker's *Winner-Take-All Politics: How Washington Made the Rich Richer–and Turned Its Back on the Middle Class* (2010) suggest, springs from a complex coalition that has mobilized cultural-political, as well as religious, traditions. How much of a value do at least some of these traditions place on "toleration" for difference–especially on issues, such as financial-taxation policies and climate change, where religiously inspired "spirit" clashes with "technical" expertise? [8]

A strongly argued book such as this–especially because it ambitiously tracks between the general and the specific–should engage and provoke a wide readership. *The Spirit of the Law* provides fresh insights and may help to reframe old questions even as it prompts new ones.

Notes

[1]. The Web site for this series, the full title of which is God in America: Inside the Tumultuous 400-year History of the Intersection of Religion and Public Life, contains an extensive interview with Gordon.See `http://www.pbs.org/godinamerica/interviews/sarah-gordon.html`. Taking a strict constructionist view of the maxim (in English), "there is nothing outside the text," I have not referenced material from the interview in this review.

[2]. On the problems of distinguishing between the realms of "religion" and "law," however, see Pierre Schlag, "The De-differentiation Problem," *Continental Philosophy Review* 42 (2009): 35.

[3]. Daniel C. Dennett, *Breaking the Spell: Religion as a Natural Phenomenon* (New York: Viking, 2006), 327.

[4]. Bernadette Meyler, "Constitutional Commitments and Religious Identity," *Cornell Journal of Law & Public Policy* 19 (2010): 751, 758-759. See also Steven H. Shiffrin, "The Religious Left and Church-State Relations: A Response to Kent Greenawalt and Bernie Meyler," *Cornell Journal of Law & Public Policy* 19 (2010): 761; and Brian Tamanaha, "Are the Moral Beliefs of Religious Believers Sturdier Than the Moral Beliefs of Atheists? (A Response to Michael Perry on Religion and Human Rights)," `http://balkin.blogspot.com/search?~q=a+reply+to+michael+perry`.

[5]. See, however, Clark West, "Is Hell a Matter of Public Concern? A Theological Response to Snyder v. Phelps," `http://www.religiousleftlaw.com/2011/03/is-hell-a-matter-of-public-concern-a-theological-response-to-snyder-v-phelps.html`.

[6]. Dennett, *Breaking the Spell*, 304.

[7]. Robert L. Tsai, "Reconsidering Gobitis: An Exercise in Presidential Leadership," *Washington University Law Review* 86 (2008): 363.

[8]. See, for example, John Sides, "You Want More Epistemic Closure? Global Warming (Again) and Evolution," http://themonkeycage.org/2011/03/you_want_more_epistemic_closur/.

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Citation: Norman Rosenberg. Review of Gordon, Sarah Barringer, *The Spirit of the Law: Religious Voices and the Constitution in Modern America*. H-Law, H-Net Reviews. May, 2012.

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