Routledge
Taylor & Francis Group

Critical Review of International Social and Political Philosophy

ISSN: 1369-8230 (Print) 1743-8772 (Online) Journal homepage: http://www.tandfonline.com/loi/fcri20

On Liberalism's Religion

Jean L. Cohen

To cite this article: Jean L. Cohen (2018): On Liberalism's Religion, Critical Review of International Social and Political Philosophy, DOI: 10.1080/13698230.2018.1487233

To link to this article: https://doi.org/10.1080/13698230.2018.1487233

Published online: 22 Jun 2018.

CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY
https://doi.org/10.1080/13698230.2018.1487233

Routledge
Taylor & Francis Group

ARTICLE

On *Liberalism's Religion*

Jean L. Cohen

Department of Political Science, Columbia University

ABSTRACT

This chapter addresses two crucial issues raised by Laborde's superb *Liberalism's Religion*. The first pertains to where the liberal democratic modern state draws the line between the self-governing prerogatives of religious nomos communities and their regulation by the civil law; the second pertains to the prerogative of the state to do the relevant line drawing. Theorists concerned with religious freedom focus on the first set of questions under the rubric of 'accommodation.' The issue is unfair discrimination. I focus on Laborde's approach to the second. This is again an important issue due to the recent revival of jurisdictional political pluralism: an approach that challenges the supremacy of the civil law and of the authority of the sovereign state over domestic religious authorities. I suggest more work must be done to parry those challenges.

KEYWORDS Religious freedom; accommodation; jurisdiction; legal supremacy; sovereignty

Introduction

Liberalism's Religion is an important addition to contemporary debates over religion, secularism, liberalism, and the state. The 21st century is witnessing a new round of these debates in which some of the foundational assumptions of earlier rounds – such as the unique character of religion and the comprehensive sovereignty of the state – are now being contested. Laborde's volume engages with two important new ways of addressing this problematic: the critical religion approach of the Foucauldian-Assadian school, and the liberal egalitarian approach of the neo-Rawlsians.[1] She lucidly identifies the 'critical religion' challenge to secularism and to liberalism, and cogently analyzes the various liberal egalitarian responses. While her own approach is a version of liberal egalitarianism, it takes seriously the critical religion challenge more than most liberals do while improving upon and offering a distinctive version of the egalitarian approach. Her alternative engages with the ethical, epistemic and legal-political theoretical versions of the latter, with the aim of delivering a universal normative theory of minimal secularism – i.e. one that is intrinsic to political egalitarian liberalism. Indeed her core intuition, which I share, is that liberal-egalitarian democratic ideals are not restricted to their western historical context of

CONTACT Jean L. Cohen jlc5@columbia.edu

emergence but, if properly construed, have trans-cultural value (pp. 26–30 and pp. 113–159).[2] Genesis, she rightly argues, is not identical to justification and thus the mere fact that certain norms, principles or even institutions emerged in a particular context or epoch does not make them irredeemably particular. Nor is their emergence elsewhere invariably a sign of illegitimate colonial imposition. What matters is their justification not their genesis. With this basic move, Laborde puts to rest much of the critical religionists' critique of liberalism insofar as they tend to conflate the philosophical and justificatory levels with historical forms and patterns of emergence.

Indeed I think the point must be also made regarding social structure. Liberal democracy and the political or minimal secularism it presupposes has structural presuppositions – differentiation among the spheres of society – and it is this that opens up the question of how the differentiated domains do or should interrelate: the quintessential question regarding religion and the state (Cohen, 2015, 2016). Differentiation is not identical to strict separation or 'no' relation between the political and the religious. We all know the stories about secularization, differentiation, the emergence of the modern sovereign state in the West, the 'Westphalian' version of establishment, and the contentious state-religion relations all this triggered. But genesis is not identical to structure. The power constellations, struggles, strategies and projects surrounding the genesis of the modern state do not 'reveal' its structure or logic: these require a distinct analysis. Nor do they show that the sovereign state is irrevocably western, Christian or secular, its Western genesis and its imposition elsewhere through colonial, imperial and then post-colonial developments notwithstanding. I have in my own writings following Bhargava, constructed an ideal type of 'political secularism' that is close to Laborde's idea of minimal secularism, insofar as both assume structural differentiation, focus on appropriate modes of interrelation of the state and religion, as well as issues of normative justification from a liberal democratic perspective.[3] I too am convinced that political or minimal secularism is intrinsic to liberal constitutional democracy albeit as a necessary though hardly a sufficient condition.

These analytic distinctions are central to the Laborde's approach to religion-state relations, namely, normative political theory. Her question is not whether secularism or the separation of state, politics and religion is intrinsically liberal, the obvious examples of myriad authoritarian secular political regimes is ample proof to the contrary. Rather the question is whether a philosophically defensible normative ideal of liberal democracy must be secular and in what way (pp. 113–159). Because the critical religionists reject normative political theory in general and liberalism in particular, construing both as part and parcel of modern (and contemporary) forms of governmentality – strategies of power to produce and govern docile bodies and souls–the very question animating Laborde's work is ruled out as either naive or disingenuous. But as Laborde cleverly shows, the critical religionists' approach, insofar as it is critical, relies on

normative commitments about which it is not forthcoming and typically fails to offer an alternative to the institutional forms and political relations it genealogically uncovers and critiques. The prime example is the analysis of the sovereign state, as perforce western, secularizing, and arbitrarily interventionist regarding, and even producing the very category of religion in its liberal or illiberal variants.[4] Laborde nicely pinpoints the core difference in methodological approaches: Foucauldian critical religionists construe secularization – the shift of areas traditionally regulated by religious authorities and norms into the ambit of the state – as a new mode of governmentality that produces subjects, and religion itself as objects of regulation toward which the state, whatever its political regime, cannot be neutral. From the perspective of normative, liberal-democratic theory, these developments, and the regulation of domains including the family, education, health, welfare, sexuality by the civil law – means that they are now sites for the pursuit of interpersonal liberal justice (p. 108). But the normative liberal reading does not imply that empirical or historical state policies are progressive, impartial or neutral per se: rather the point is that education, family, sexuality, gender relations are no longer immune from the constitutional principles of personal freedom, and equal liberty for all (Cohen 2002). While each of these approaches perforce screen out the concerns of the other, Laborde's text shows that one must be reflective about this and see that each can play an important analytic role. I concur that normative philosophical analysis has the advantage that it can make its normative commitments clear and has no hesitation in proposing political alternatives, while the critical religionists, as good Foucauldians, are unable or unwilling to do so for this would entail abandoning their methodological orientation.

This comment focuses on an issue also raised by a third approach to religion and the state that Laborde also engages with which she labels, following Schwartzman and Schragger, 'religious institutionalism' (Schragger & Schwartzman, 2016). In my own work I have referred to it alternatively as 'religious integralism' and 'jurisdictional political pluralism' (Cohen, 2017a). At issue is state sovereignty, and the two distinct levels on which it is engaged by religious institutionalists (and by critical religionists). The first pertains to where and how the state draws the line between the autonomy, the self-governing prerogatives of religious nomos communities and their regulation by the civil law; the second pertains to the prerogative of the state to do the relevant line drawing. The first is about questions of justice and accommodation and the line between the right and the good. Laborde addresses this through her disaggregation method and her theory of minimal secularism as required by liberal principles. The second is about jurisdiction and sovereignty: issues of legitimacy, supremacy and meta-jurisdictional prerogatives ascribed to the state as the supreme and authoritative

instance that does the line drawing and determines the competences of all other associations on its territory.

I briefly address both issues and raise some questions regarding Laborde's approach to each.

Minimal secularism and liberalism: matters of justice

Defining minimal secularism is part of identifying the core criteria for a state to qualify as liberal with respect to the regulation of religion. Laborde applies her 'disaggregation strategy' to the concept of religion and to the different liberal values minimal secularism helps sustain, so as to articulate a universal minimal secularism that meets liberal desiderata. Her analysis of the three normative criteria of minimal secularism regarding what she calls the *justifiable*, the *limited* and the *inclusive* state each pertain to a distinct feature of a disaggregated concept/assessment of religion: religion as *non-accessible*, religion as *comprehensive* and religion as *divisive* (pp. 113–159). In making these distinctions, Laborde clarifies what on her view violates liberal legitimacy and the minimal secularism it requires. She argues that liberal legitimacy requires that reasons given by state officials to justify law and public policy must be accessible; practices of recognition and rights distribution must be non-divisive; and equal personal liberty must be guaranteed. Accordingly, those features of religion (or non-religious analogues) that are non-accessible, divisive, or comprehensive must not be accommodated, invoked or institutionalized by the state if it is to meet the basic requirements of liberal legitimacy (pp. 113–159). I quite agree with Laborde that accessibility of justificatory reasons for laws and policies is the correct criterion and that liberals must defend liberalism in substantive terms as the morally correct theory (that insists on the equal liberty and equal status of every individual). I also agree that philosophical liberalism itself provides the necessary normative criteria for inclusiveness in and limits on the liberal state.

Regarding the idea of the limited state and the issue of comprehensiveness, the liberal principle is that practices pertaining to personal ethics should not be coercively enforced on individuals. Liberal minimal secularism entails that the state does not intrusively regulate the ethics of the self (Foucault) or violate what Dworkin called individual ethical integrity and independence.[5] Liberalism is weakly perfectionist, rooted in a thin conception of the good and the ethically salient freedom it protects is the individual's freedom to live by her own conception of ethics…with appropriate provisos regarding harms to and the rights of others (pp. 144–145). Accordingly, liberalism provides internal limits to the civil polity, in the form of negative liberties and basic rights, in tune with the principles of equal liberty and equal concern and respect for all individuals. The egalitarian liberalism Laborde supports merges civil (non-perfectionist) republicanism with political liberalism: such that rights and

obligations follow from what is entailed by participating in a fair system of cooperation by those with different worldviews, conceptions of the good or religions. On this hybrid approach, there is no baseline of maximal pre-political freedom against which each law must be justified in relation to a compelling state interest (the liberal-libertarian view). Neither is there a pro tanto freedom to practice religion without regard for the overall framework in which peoples' opportunities are fairly structured. On the liberal egalitarian-civil republican view, the civil polity provides a fair framework for sharing the benefits and burdens of a common life and thus legitimately regulates the exercise of the rights and liberties accordingly. Indeed.

However, I have some reservations regarding the way Laborde parses the issue of divisiveness and inclusion. The liberal principles at issue are civic equality, inclusiveness and equality of treatment. The relevant feature of religion Laborde highlights is whether it is divisive or not. Laborde leaves aside the 'easy question' of unequal rights arguing that no constitutional theocracy or 'religious democracy' that fails to grant equal rights to minority citizens meets basic criteria of liberal legitimacy (p. 132). She focuses instead on the tricky question of state endorsements in the form of symbolic establishments that tend to make religious identity a part of civic identity and the problems of exclusion and expressive inequality this raises. She is right that this is an analytically distinct concern from issues of distributive justice. It is tricky because not all endorsements are discriminatory, some are benign, and the task is to develop criteria for distinguishing among them. Laborde suggests that symbolic religious establishment is problematic when it tightly associates state citizenship with a collective religious identity that is politically divisive in an unreasonable and intractable way (pp. 135–136). Divisiveness is key: insofar as the state associates itself closely with the symbols of a particular religious identity it turns adherents of other religions or religious identities, recognized or not, into minorities and symbolically at least, into second-class citizens. If a religious identity is part of a deep fault line of social and political division the state should not endorse its symbols or establish it in any way. Indeed doing so constructs and/or politicizes religious difference. Yet the majority of the world's people live under regimes that are what Hirschl calls constitutional theocracies – where a religion is formally enshrined in the state or where religious affiliation is a pillar of collective political identity.[6] Laborde's concern, in part, is to show that her model of minimal secularism can pertain to some of these regimes *and*, pace Hirschl, that one should not label all regimes that do not separate religion and the state as theocratic or as perforce illiberal (p. 151).

This intuition fits with my own efforts to articulate an ideal type of political secularism that would allow us to place different regimes on a spectrum, the two ends of which are theocracy and coercive establishment (Cohen, 2016). By 'theocracy' I mean a system in which the ultimate political decision-making

power is in the hands of clerics; by 'coercive establishment,' I mean that political elites rather than clerics rule and establish one religion as true, as a constituent part of national identity (who we are), and enforce adherence to what it deems appropriate religious practice and doctrines, while excluding or punishing practitioners of other religions. Between the two extremes is a wide range of more or less legitimate state religion relations from a liberal perspective. There is indeed no single regime of separation or interrelation that is required by liberalism (or democracy). Yet I don't find the way Laborde deploys her criterion of political divisiveness to be fully convincing.

Laborde argues that a liberal democratic state cannot define itself as Hindu, Jewish or Muslim in contexts where such identities have become deep fault lines of political division, as in India, Israel, Egypt. She is also aware that so-called 'religious differences' are often created and instrumentalized by the state (p. 137). She knows that religious identities can function as markers of social vulnerability, exclusion and domination and that symbolic establishment can render religious identities salient in ways that affirm and consolidate boundaries between dominant and dominated groups. The wrong of official endorsement of the majority religion is indeed that it makes minority status relevant, negatively, to civic status (p. 137). And it matters whether state-endorsed symbols are politically divisive. But *all* religious identities are divisive if politicized and made part of the identity of the polity, for those who do not belong and even possibly for those who do, yet don't practice, or who disagree with the state's use of religious symbols, or who oppose state symbolic appropriation and/or codification of religion as tantamount to cooptation and corruption of the religious quality of norms and practices. This would apply to 'Divinitia' an ideal type constructed by Laborde in her text, insofar as the state symbolically recognizes one religion albeit not in a way that infringes on the equal citizenship of non-adherents (p. 151). Laborde argues that Divinitia is compatible with her understanding of minimal secularism and with liberal legitimacy. But this seems to undercut her position on symbolic establishment, which stresses inclusiveness because it perforce renders religion a salient mode of sociopolitical belonging. When a state identifies with a religion, when it enshrines it as 'a' or 'the' source of law in its constitution (hoping to sacralise the constitution itself), when it enforces what it takes to be its tenets in its courts for church members or allows religious courts to do the enforcing regarding certain domains (typically family law and education), even if it does not breach the accessibility condition or personal liberty directly and accords equivalent rights to other religious groups, it nonetheless privileges one religion and lays the groundwork for inequality, exclusions, resentments, divisiveness and for inflammatory identity politics. Indeed, if these sorts of symbolic establishment are not divisive at time 1, politically endorsing a majority religion invites divisiveness down the line at time 2, by rendering religious identity politically salient, by

inviting the wrong kind of majoritarian politics: i.e. quasi-racialized, substantive conceptions of religious belonging blurred with civic identity and law making on that basis – and by implicitly casting even legally recognized minority religions as other, and inferior. Given path dependence and a particular constellation of forces, many states that in the past endorsed a particular religion continue to establish it symbolically, under the premise that the endorsements are now benign and establishment, vestigial. But state endorsement of religion is never innocent and stands as an open invitation to exclusionary religious nationalism.

Pragmatically it may not be appropriate to take down long-standing religious symbols from say, public buildings and lands especially if no one is objecting to them, or to undo other endorsements of religion or religions in a given constellation. But it is important not to underestimate the power of the symbolic, especially of religious symbols as markers of identity, inclusion and exclusion. Indeed, one has to ask what work the terms, 'Christian,' 'Hindu,' 'Jewish,' 'Muslim' are doing in the labels: Christian democracy, Jewish democracy, Muslim democracy, Hindu democracy or Christian state, Hindu state, Jewish state, Muslim state? I fear that symbolic endorsement of this sort is inevitably divisive insofar as it invites the construal of other religious and non-religious people as so substantively different than the national religious majority that they could never really become 'one of us' or belong – something quite different then, say, shifting political ideological majorities made up of cross-cutting and shifting alliances.

I realize, of course, that Laborde does not propose or advocate symbolic establishment. Moreover, she and I probably agree that there is no point in insisting on the abolition of all extant forms of state symbolic establishments of religion, if they are not deemed divisive at this time. This is a pragmatic issue: it may be more divisive to undo old symbolic establishments like religious monuments on public land, or Sunday closing laws, especially if no one objects to them and provisions are made for religious minorities to celebrate their own holidays (pp. 148–149). In a secularizing society, they may be considered vestigial and benign historical artifacts. But I would argue strongly against any new symbolic establishments, and against inscribing a religion in the constitution as a source of law or as a part of the national identity of a polity. I also caution against defending old symbolic establishments as normatively unproblematic, like large crosses in the public square, or at the entrance to a town, or Court, once a minority religious group indicates that their presence turns them into second-class citizens. Such symbolic establishments are always available for mobilizations in the form of 'restorative' religious populists who invokes them as proof that non-adherents are really, ultimately 'other' and to demand that 'we' 'take our country back' from alien groups and the elites coddling them, even in quite secular societies. In short, divisiveness is a helpful criterion for distinguishing between benign and discriminatory forms of state recognition of religion but I argue that symbolic establishment and recognition

that privileges one religion as the national religion is necessarily divisive. This inevitably will run afoul of Laborde's inclusiveness principle.

Now I am aware that Laborde generally prefers equalizing down instead of equalizing up when it comes to 'vestigial,' allegedly benign establishments such as Anglicanism in Great Britain or Protestantism in Denmark (p. 231). The old compromises and arrangements are strained when new religious groups enter the arena and I quite agree with the anti-corporatist, anti-multiple establishment approach. I think that dis-establishment is better than multiple-establishment from a liberal egalitarian point of view because there are always some religious groups left out of the corporate recognition structure. Moreover, the regulation of religious self-regulation fits perfectly well with a disestablishment regime since the latter, in a liberal constitutional democracy, does not entail strict separation but, rather, calls for regulation of self-regulation, in the right way (Cohen, 2012a). Thus regarding symbolic establishment, the point is not that we have to ferret out all path dependent historical endorsements but a. that new ones should be avoided, b. those that are contested as exclusionary should for liberal reasons of inclusiveness and non discrimination, be dropped and c., those that are not defensible from the perspective of democratic justice should be abolished.[7] The path of disestablishment taken by Norway and Sweden in this regard is the right one from a principled egalitarian liberal perspective.

Let me make one last point on minimal secularism and nonestablishment. Laborde is right, the principle of democratic legitimacy explains why citizens accept the imposition of laws that from their point of view seem unjust and it also explains why different states may opt for one or another reasonable conception of justice and be deemed in compliance with basic liberal principles (pp. 151–-152). She draws the conclusion that it is as legitimate for countries with secularized majorities to have laws that reflect their preferences as it is for countries with religious majorities to do the same and she takes liberals to task for not conceding this point. On her concept of minimal secularism, state-religion arrangements can permissibly be sensitive to the religious make up of societies without breach of liberal legitimacy. Indeed. But she insists on symmetry: religious citizens must accept the secular state as reasonable and secular citizens must accept the legitimacy of 'liberal religious states' such as 'Divinitia' as we have seen (p. 151). However I don't find the analogy between the two majorities intuitively convincing although the devil is, to be sure, in the details. Like Laborde, my preferred conception of justice is closer to the progressive arrangements of Secularia, Laborde's model for a liberal constitutional democracy (p. 152). Moreover, I prefer that politically secular liberal constitutional democracies do not enshrine the word 'secular' in their constitutions for that can invite a divisive form of religious identity politics – the U.S, Constitution took the right path on that score. Given the assumption that Divinitia would symbolically recognize one religion, ideal-typically in its Constitutional documents, and would proclaim some laws as

religiously inspired (typically the established religion being deemed 'a' or 'the' source the law) even if the justification of those laws is accessible and does not infringe on the personal liberty of non-adherents, I think, as already indicated, that danger of linking civil-religious identities is far greater here. I also have my doubts about Divinitia's liberal, minimally secular credentials in light of its the 3rd through 5th features. These include the proviso that the state may have restrictive laws about abortion, euthanasia, and other practices in bio-ethics, and that religious groups enjoy extended rights of collective autonomy in the name of freedom of association (p. 151). These are in my view too broad and vague. Much depends on what the restrictions these are, who decides their limits and conditions, whether or not they violate principles of gender equality, and other anti-discriminatory norms. What kind of restrictive laws about abortion are acceptable, and how do they differ from regulations in Secularia? Since in Secularia there can be very fine tuned regulations, say of second and third term abortion to protect women's health and with respect to fetal viability, one wonders what further restrictions Divinitia could enact that do not trespass on women's rights or treat then as second class citizens. Additionally, one wonders whether under the heading of bioethical practices, Divinitia could legislate or permit restrictions on the availability, say, of contraception to women? What about refusals to acknowledge same sex unions and so forth? Without more specificity it seems likely that such laws would indeed infringe on the personal liberty and basic rights of non-adherents.

In short, I fear the effort to be even handed risks throwing women under the bus because religious arguments about abortion, contraception, and many other practices in bio ethics, typically entail assumptions endorsing gender hierarchy. Without further elaboration, I am not yet convinced by the construction of the two types of polities – Secularia and Divinitia–as both being sufficiently minimally secular and thus compatible with liberal principles that entail the equal status, rights, opportunity and voice of all individuals regardless of gender or sexuality or sexual orientation. Indeed religious groups could enjoy extended rights of collective autonomy in the name of freedom of association in Secularia while they should be subject to antidiscrimination norms at the very least if they receive state funding, tax exemptions, and provide services to the general public. Nor am I convinced that symbolic recognition/establishment of one religion can avoid infringing on the civic standing of the minorities that are, in part, *produced* by such recognition with the unavoidable consequence that they are not really considered full members of the political community.

Sovereignty: matters of jurisdiction and legitimacy

I turn to the second and deeper issue regarding liberal legitimacy – namely its presumption of the sovereignty of the secular state. In her chapter on state

sovereignty and freedom of association, Laborde takes up the issue that I myself have spilt much ink over, namely that of sovereignty, jurisdiction and pluralism as it pertains to religious associations.[8] Laborde rightly notes that state sovereignty provides the frame for liberal neutrality and public reason and while it is constrained by liberal principles of justice, it does not derive from them. Put differently, the liberal non-theocratic state concerns itself with interpersonal relations between free and equal persons and hence with matters of justice and not with the private sphere of the good, even though it does not rule out all appeals to the good in politics (p. 150 and Chapter 3). The question of what pertains to the public domain of justice and what pertains to private domain of the good, i.e. of what are deemed to be self regarding matters of personal ethical integrity and what issues or practices involve public interpersonal justice and thus are legitimately regulated by the state is complex, contested, and the lines are hard to draw. Moreover, the boundaries are not stable. As we know, matters formerly deemed private under the doctrine of entity privacy pertaining to 'the family' – that framed relations between husband and wife, child rearing and so forth as matters of personal ethics–are now seen as involving interpersonal relations where grave injustices can occur and which the civil law must regulate. Thus, the relevant line drawing pertains to a different level of analysis than choosing among different conceptions of justice for the public sphere or the basic structure. It entails the key question of which instance gets to do the line drawing and hence to determine what is a matter of public justice and what is not. The meta-jurisdictional question of the competence to decide competences (what German constitutional theorists call *Kompetenz Kompetenz*) and the meta-jurisdictional authority to delimit the scope of jurisdiction and regulate the scope of autonomy enjoyed by the various nomos communities or associations within a particular territory are at the core of the sovereignty problematic.

As I have argued elsewhere, liberal democracy assumes the comprehensive reach of the civil law (internally limited by liberal, constitutionalist and democratic principles) and the authority of the liberal democratic polity to do the line drawing (Cohen, 2017b). The democratic constitutional state has meta-jurisdictional sovereignty, i.e. the competence to determine competences and to impose the supremacy of civil law, including regulation of autonomous self-regulating civil society associations in the territory (Cohen, 2017a, 2017b). But I have also argued that this fundamental presupposition – of liberal justice, democracy, and of political or minimal secularism – is precisely what is being challenged by jurisdictional pluralists, by some religious institutionalists and to some extent also by the critical religionists (along with certain versions of cosmopolitanism, neoliberal economic ideologists, religious fundamentalists and so forth) (Cohen, forthcoming). Thus what has been taken as a given now has to be justified, again. In my own work I foreground this challenge and the jurisdictional sovereignty question

as the most ultimate regarding the relation of religious organizations and the state. So of course I think Laborde is right, egalitarian liberals must face the sovereignty question again and provide normative justification for the supremacy of the authority and civil law of the liberal democratic polity over internal contenders.

Laborde and I both argue that democratic procedures are the only fair way to solve disagreements about the scope of religious autonomy and that political or minimal secularism entail the principle of democratic sovereignty. Liberal egalitarianism relies on presumption of the sovereign secular democratic state, the comprehensive scope of the civil law and its role and supremacy in deciding the boundary and scope of religious autonomy (pp. 161–164).[9] Laborde rightly asserts that state sovereignty provides the background condition or frame within which liberal neutrality and consideration of matters of justice first arise and can be adjudicated. Liberalism presupposes this supremacy of the civil and political. Indeed state secularism precedes neutrality historically and logically.

Laborde is also right that neither liberal neutrality nor public reason can provide the normative justification for state sovereignty. In other words, meta-jurisdictional sovereignty – the prerogative to authoritatively determine the respective spheres of the public/political and the religious, does not derive from liberal neutrality. Based on a distinction between legitimacy and justice, which I endorse, Laborde notes that the former pertains to the justification of the territorial state and its sovereignty, while the latter pertains to interpersonal morality and the norms of the basic structure it establishes and regulates. This distinction allows us to see why different states may justifiably opt for distinct but reasonable conceptions of justice. Moreover it is democratic legitimacy that renders a law legitimate even to those who think it is unjust. Indeed Laborde goes so far as to argue that a sovereign state is legitimate only if it pursues a recognizably liberal conception of justice *and* does so democratically. Accordingly state sovereignty must be limited by liberal democratic principles. For her, and for me, democratic legitimacy is at the core of any normative justification of state sovereignty.

Working with this presumption, Laborde bases the normative justification of state sovereignty on two ideas: first, that an authoritative and stable resolution of conflicts of justice require a final ultimate source of sovereignty: if we are not equally subject to a legitimate authority able to authoritatively delimit and enforce our equal rights of freedom, including associational freedom, we remain vulnerable to the arbitrary will of the powerful (p. 161). Second, democratic states represent the interests of individuals qua individuals regardless of their contingent identities, features, and memberships. While they can be members of many groups, 'their *paramount* interests as free and equal citizens must be represented by a universal-membership association' (p. 162). Thus, the democratic polity must have meta-jurisdictional sovereignty over all other

associations and the competence to determine their competence. So minimal secularism presupposes the autonomy of human from divine power and is intimately connected to the modern state form (p. 163). The radicalism of liberalism lies in the fact that it assumes the primacy of the political – the democratic polity's prerogative to decisively fix and enforce through state law, the terms of the social contract – and in the primacy of the identity of individuals as citizens over their identity as believers when these conflict. 'Citizenship trumps religious commitment' (p. 163). Secular liberalism, in short, assumes that reasonable individuals have a higher order interest in living under political justice on this earth rather than in living by the word of God – the full truth as they see it' (p. 163).

But as Laborde herself notes this is hardly a trivial assumption (p. 163). Indeed, it is precisely what those whom I call jurisdictional political pluralists, some religious institutionalists and some critical religionists object to. Her focus in this chapter is on the religious institutionalist arguments for 'church autonomy.'[10] Her strategy in rebutting the critique of 'monist' state sovereignty is two-fold. First, she follows me in arguing that the religious institutionalists misconstrue state sovereignty, wrongly arguing that it is absolute and arbitrary even in a liberal democratic polity and mistakenly concluding that the state has no legitimacy or normative claim to trespass on what religious institutions take to be their jurisdictional domain (p. 167, Cohen 2017a). Indeed, we also agree that the conflation by the critical religionists of liberal democratic with authoritarian states by virtue of both being sovereign and secular is normatively misleading and conceptually confused. I argue that such an approach deprives us of the very possibility of distinguishing between theocratic and politically secular states or between the latter and illiberal states that establish and privilege a single religion and oppress its members (Cohen, forthcoming). Finally, we agree that the liberal democratic state's internal sovereignty is limited by liberal democratic principles and thus it does not act *ultra vires* when it regulates religious or other associations accordingly, or when it determines what pertains to public justice, and delimits the scope of autonomy of religious and other associations, so long as it does so democratically in light of a recognizably liberal conception of justice. In short, as Laborde correctly insists, states, not churches, have *Kompetenz-Kompetenz* – the authority to determine their own spheres of competences, as well as those of other institutions: religious associations do not have this meta-jurisdictional competence (p. 165). Churches may not unilaterally determine the rights and duties of their members as citizens or of other citizens (p. 170).

But as already indicated, jurisdictional pluralists, certain religious institutionalists and the critical religionists do not accept these non-trivial assumptions.[11] They do not accept the primacy of the political or what they call monistic sovereignty whether it is liberal democratic or not (Cohen, 2017a, 2017b). They

challenge the idea of the priority of the civil citizen role and its obligations over that religious citizen's obligations to their religious commitments, community, and their god. They reject the state's claim to comprehensive and supreme meta-jurisdictional sovereignty as unacceptable state monism. This is why I refer to them as jurisdictional pluralists. Indeed strong jurisdictional political pluralists and some religious institutionalists speak of two equal and conflicting citizen roles involving two conflicting sovereigns and communities: the civil and the religious (McConnell, 2000; Smith, 2016). Muniz-Fraticelli insists on 'external' limits to state sovereignty posed by independent religious associations, and together with Abner Greene and others, consistently rejects its 'monist' claims, while Steven Smith does quite a lot to resurrect the two-world view and legal pluralism concerning the fundamental autonomy of religious and secular power, also advancing the claim that there is no exclusive sovereignty of the state (Muniz-Fraticelli 2014; Greene, 2012).[12] On these jurisdictional pluralist versions of religious institutionalism, the civil law of the state has no comprehensive reach, public power has no primacy, and churches (religious associations) share meta-jurisdictional authority with the state.

I have subjected these claims to critical analysis (Cohen, 2017b). Indeed these arguments mesh with the critical religionists' critique of the sovereign secular state's structural privatization of religion insofar as the state claims the political for itself, appropriates substantive jurisdictional/political domains from what formerly was regulated by religious norms and authorities (morals, welfare, family law, sexuality, education) and reduces the religious domain to a narrow range of concerns which are still not immune to state oversight (Mahmood, 2016). It is precisely what they call state secularism – the meta-prerogative of the state to draw jurisdictional and competence lines – that they deem unacceptable (*ultra vires*) (p. 166). While they are coy about the institutional and normative implications of their critique, the critical religionists' objection to the public/private distinction, to secularization and to the alleged relegation of religion to the private sphere and/or its reduction to a conception of the good seems to imply either an integralist or a jurisdictional pluralist alternative. They and the religionist institutionalists I mentioned above both challenge the idea that the secular state provides a fair framework for the coexistence of religious and non-religious citizens, regardless of whether it is minimally or politically secular or liberal-democratic. The hegemony and legitimacy of the sovereign secular state is challenged, not accepted. The disagreements are not about different conceptions of justice the state should institutionalize or where it should draw the line between the right and the good. Rather they are foundational in Quong's sense – they seem to go all the way down to the most basic assumptions about forms of life (religious/tribal/communal vs. civil, individualist, associational), societal structure (segmental pluralism vs. cross cutting cleavages), sources of legitimacy (theological vs. democratic), and ultimate sources of law (religious texts

or we the people) (Quong, 2011, pp. 204–212). They do not, in short, accept the premise or frame within which different conceptions of justice can emerge and be contested: their disagreement pertains to legitimacy, not simply to conceptions of justice, and to the very distinction between the right and the good, private and public, state and religion. There may be no common ground or shared reasons to resort to, if it is the hegemonic idea of the democratic sovereign and the egalitarian liberal premises this entails, that is being challenged.

Enter Laborde's second strategy: that of deflation. Here she follows the path developed by Schwartzman and Schragger (regarding Supreme Court decisions) in interpreting jurisdictional autonomy talk by the religious institutionalists as rhetorical – as a device to emphasize the normative force of rightful claims on behalf of churches and the religious to accommodation within and by, not over and against, the liberal democratic state (Schragger & Schwartzman, 2016). She cites those (few) passages in the work of Steven Smith and Muniz-Fraticelli where they seem to concede that the claims to jurisdiction they have articulated, can be rephrased in the liberal language of rights (Chapter 5). Accordingly, the 'live question' is not who defers but whether to defer; the state must 'internalize' the external limit imposed by the existence of a competing authority, although it need not defer to reasons of persons qua members of association over reasons qua citizens. The idea is to reinterpret legitimacy and jurisdictional questions back into conflicts about conceptions of liberal justice and to move us onto the issues involved in the bulk of accommodation cases facing courts in liberal democracies. I understand and sympathize with this move.

Indeed Laborde refers to my critique of the efforts of the religious institutionalists (jurisdictional pluralists) to frame accommodation demands in terms of questions of jurisdiction rather than justice, and asserts her preference for replacing religious institutionalists talk of lack of jurisdiction with talk about injustice of state interference when it comes to, say appointment of clergy or determination of religious doctrine (note 2 p. 293, and pp. 169–170). The difference is that for the former any interference is pro tanto suspect and illegitimate (*ultra vires*) while for Laborde, beyond gross violations of human rights (including freedom of association) there can be reasonable disagreement about the justice of state intervention. Most cases discussed by the religious institutionalists concern justice in this sense not legitimacy or jurisdiction. I too reject the jurisdictional claims of the religionists. I too reject their translation of matters of justice into jurisdictional questions and I too reject the presumption of a domain of liberty prior to and outside of the civil polity and beyond the scope of civil law. But those who are serious about making jurisdictional claims ultimately reject, despite recent disclaimers, the translation of what they see as religious questions into matters of liberal justice for the sovereign state to decide. Indeed, we

know the key areas over which the contestation occurs: family law, gender relations, education, sexuality – and it is precisely secularization in the sense of the large scale transfer of coercive power from the church and divinely appointed authorities to the sovereign civil state regarding these, that is at issue. Whether something is a matter of justice or jurisdiction in short is what is being contested by religious jurisdictional pluralists and theocrats and the point is to make state sovereignty appear as *ultra vires* when it regulates religious associations or matters of family law, sexuality, education in ways that conflict with religious dogma, or commitments.

So, I am uneasy with Laborde's rather quick dismissal of the jurisdictional challenge. After all, the bulk of the talk of the pluralists and some key religious institutionalists is about jurisdiction, and their invocation of legal and political pluralism, their critiques of state sovereignty, their denial of its comprehensive scope, their resurrection of medieval models of plural sovereignty and their talk of another, higher sovereign to whom the religious individual and the state owes deference and whose domain is an 'external' limit to the state, is pervasive in their writings, and hardly a mere rhetorical flourish. In today's context it is also quite dangerous. Challenges to state sovereignty and to the regulatory reach, primacy and authority of public civil institutions and civil law on every level, national regional and supranational, are proliferating. These challenges come from global finance, neoliberal transnational corporate economic actors and from the politicized corporate religious actors. Liberal democracy everywhere is under siege: not only the flawed empirical institutional arrangements in each country but also the fundamental normative principles as well. We cannot assume that achievements on the normative and institutional level of constitutional democracies aren't threatened. They are. The stakes of the struggle are the identification of which areas of social life are justice-apt, who decides this meta-jurisdictional question, and not only which theory of justice is the best one within a clearly hegemonic liberal democratic politically secular polity. So I take the revival of jurisdictional political pluralist discourse by some prominent religious institutionalists very seriously indeed. This is not to deny that there are religious institutionalists like Douglas Laycock, who argue for church autonomy and the ministerial exception without making a jurisdictional pluralist claim, but as a matter of justice. Nevertheless, I think we need more from Laborde on the jurisdictional question because I doubt it will go away and I fear that those who do not accept the core intuition behind the notion of liberal democratic state sovereignty (the primacy of civil law) are quite serious about their projects. Indeed, too many insist that the issue of 'church autonomy' cannot be treated as a matter of associational freedom, but rather regard it as unique, involving deeper issues the prerogatives of ordinary voluntary associations.

That said, Laborde is right to try to devise a liberal theory of associational freedom to address those accommodation/exemption issues that can be handled within the liberal democratic frame. She applies her disaggregating 'interpretive approach' to the general puzzle of collective religious exemptions, identifying two key interests or criteria that independently may justify exemptions and when they come together, special treatment for religious groups. In tune with her egalitarian-liberal orientation and interpretive approach, she does not treat religious associations as unique. Rather she notes that all voluntary associations have a strong interest in *coherence* (the ability to live by their own standards, purposes and commitments) and of some of them, have a special claim to special *competence* (to interpret their own standards, purposes and commitments). I have only a few minor points to make here.

Laborde rightly rejects the now dominant approach in the U.S. that has constitutionalized 'the ministerial exception' for churches, according them immunity to an ever widening array of anti-discrimination labor laws and shielding them from legal scrutiny in the employment of those it labels ministers (p. 177). I concur with the thrust of her method of disaggregation aimed at specifying the values and interests at stake. But I am uneasy with the coherence idea for the following reasons. First, it is difficult to apply. As we know, the core and periphery of religious doctrine changes over time. Coherence interests refer to the association's members' ability to live by their group's standards, purposes and commitments – they entail ethical integrity on the level of the group. But there can be disagreements within a religious group regarding which elements of doctrine and practice are central or peripheral to the group's core religious identity. Such disputes raise questions regarding which sub group of members is the appropriate one to determine the kinds of coherence interests the group has. It may be nearly impossible to identify precisely the ethos of large diverse religions such as 'Judaism' or 'Christianity' or 'Islam'; indeed these are frequently, if not always contested. If male privilege in kinship relations, marriage, inheritance, divorce, child custody is deemed central to the coherence of say Islam, or Orthodox Judaism, or fundamentalist Christianity, and to the solidarity that constitutes the religious community, should the state defer?

I understand that Laborde sees coherence interests as providing a pro tanto claim for accommodation and that exemptions should be denied if there are weightier countervailing reasons. She does not deem the criterion of coherence to be a sufficient condition for granting exemptions. India after it achieved independence provides a compelling example of weighty countervailing reasons: the fact that caste restrictions regarding untouchables in the temples were deemed to be core doctrine of Hinduism, did not deter the liberal social democratic state from developing policies geared toward ending these injustices and indeed challenging caste based rules of labor and interaction altogether. Certainly, Laborde would not hesitate in supporting these policies and would

not endorse exemptions to equality principles in such a case. Interestingly, today, the alleged centrality of caste to Hinduism is now being contested by historians, and by political theorists (Dirks, 2001; Mantena, 2010). So coherence is, as indicated, hard to pin down as is the centrality or peripheral nature of actions or practices to the ethical requirements of a religion.

It is important to note that Laborde's argument about the moral force of exemption claims does not reside in their compatibility with communal traditions or in the goal of maintaining coherence with the groups' ethical commitments and actions. Rather the moral force lies in their importance to individual ethical integrity and the value the individual herself gives to communal membership (p. 213). I accept that individual ethical integrity is an important ideal for everyone not only for the religious, and being forced to violate it by the State without good reasons is an injustice. But one person's ethical integrity may entail another's subordination. With respect to the freedom of association, and the ethical integrity at issue of adherents, the idea is that endorsement by the individual member of the association's proclaimed ethical norms is indeed 'free.' The presumption is that membership in and endorsement of the group's values is voluntary. But, given that socialization into religion is typically primary socialization and thus involuntary – i.e. membership is ascribed (by parents) to children and exit for adults can thus very hard (costing community and family belonging), given that e.g. gender injustice is learned at an early age and tends to bleed into other domains if it has religious sanction, I have doubts about the coherence principle with regard to such issues. I ask whether religious groups can really be treated as voluntary associations like others and I wonder whether, at the very least, we should withhold state support from religious institutions that perpetrate invidious gender discrimination – I have in mind tax exemptions and other privileges, if we take gender justice seriously. The state should not be made complicit with group norms that breach liberal principles of equality and non-discrimination even if it permits such groups to exist. To be sure this stand depends, in Laborde's theory, on whether we deem assertions about and practices that entail the subordination of women to be morally abhorrent or merely morally ambivalent (pp. 214–217).[13]

Whatever the answer, Laborde's excellent book and especially her disaggregation strategy puts us on the right path and calls upon us to follow her lead and reflect seriously and cogently on these issues.

Notes

1. In the first group, among others, are Asad (2003), Cavanaugh (2009), Danchin (2011; 2015), Hurd (2015) and Mahmood (2005; 2016). The neo-Rawlsian egalitarian liberals include, among others, Eisgruber and Sager (2007) and Dworkin (2013).
2. Unless otherwise specified, all page references are to Laborde (2017).
3. Cohen (2016). I prefer the term political secularism because it evokes political liberalism yet doesn't entail that society must be irreligious just because the state is.

4. For my critique of this, see Cohen (forthcoming).
5. Dworkin (2013). See the discussion in Laborde (pp. 44–82 and 145–146).
6. Hirschl (2010). Hirschl does not adequately distinguish between theocracy and establishment, in my view. See Below.
7. We are quite close on this issue (p. 231).
8. For an early attempt see Cohen (2012a).
9. Political liberalism can also secured in a federation. Just what sovereignty regime is entailed for the public power in a state or federal polity depends on the sovereignty regime in place in the international community. Comprehensiveness of civil law need not mean exclusivity, e.g. in Europe, European law also has efficacy within each sovereign state. I speak of the state because that is the context in which religion: state issues arise but of course they arise in no state federations as well as e.g. in the EU. On this see Cohen (2012b).
10. For her discussion of the ambiguities in the critical religion theorists' 'debunking' of the sovereign line drawing prerogative see p. 166 where she points out that it is unclear whether the believe states draw the line unjustly or undemocratically or whether they have no pro tanto legitimacy to do so in the first place or to define what is a harm, or fair opportunity and so on.
11. I place Victor Muniz-Fracticelli (2014) and Abner S. Greene (2012) in the category of strong jurisdictional pluralists who challenge these assumptions. Steven D. Smith (2010) and Michel McConnell (2000) are among the religious institutionalists who challenge these assumptions as well.. Others like David Laycock and Christopher Lund have been much more circumspect, arguing for church autonomy and the ministerial exception as a matter of justice not of sovereignty. They do not challenge the sovereignty of the state.
12. See my discussion: Cohen (2017a).
13. I deem the subordination of women to be morally abhorrent and there should be no state complicity with it.

Disclosure statement

No potential conflict of interest was reported by the author.

Notes on contributor

Jean L. Cohen is the Nell and Herbert Singer Professor of Political Theory and Contemporary Civilization in the Department of Political Science at Columbia University, New York City, USA. Her most recent book publications include: *Globalization and Sovereignty* (Cambridge, 2012); the co-edited volume, *Religion, Secularism and Constitutional Democracy* (Columbia University Press, 2016) and the co-edited volume, *Forms of Pluralism and Democratic Constitutionalism*, (Columbia University Press, forthcoming 2018). She currently serves as co-editor in Chief of *Constellations*.

References

Asad, T. (2003). *Formations of the secular*. Stanford University Press, Stanford, Califoria.

Cavanaugh, W. (2009). *The myth of religious violence*. Oxford University Press,Oxford, Great Britain

Cohen, J. L. (2002). *Regulating intimacy*. Princeton, New Jersey: Princeton University Press.

Cohen, J. L. (2012a). The politics and risks of the new legal pluralism in the domain of intimacy. *ICON*, *10*(2), 380–397.

Cohen, J. L. (2012b). *Globalization and sovereignty*. Cambridge University Press, Cambridge, Great Britain

Cohen, J. L. (2016). Rethinking political secularism and the american model of constitutional dualism. In J. L. Cohen & C. Laborde (Eds.), *Religion, secularism and constitutional democracy* (pp. 113–156). Columbia University Press, New York, USA

Cohen, J. L. (2017a). Sovereignty, the corporate religious and jurisdictional political pluralism. In C. Laborde & A. Bardon (Eds.), *Religion in liberal political philosophy* (pp. 83–102). Oxford: Oxford University Press.

Cohen, J. L., forthcoming. On the genealogy and legitimacy of the politically secular state. *Constellations*. retrieved from https://ssrn.com/abstract=2874535.

Cohen, J.L., 2015. Freedom of religion, Inc. *Netherlands Journal of Legal Philosophy 44* (3),169–211.

Cohen, J.L., 2017b. Sovereignty, the corporate religious and jurisdictional political pluralism. *Theoretical Inquiries in Law 18*(2),547–575.

Danchin, P. (2011). Islam in the secular nomos of the European court of human rights. *Michigan Journal of International Law*, 32, 240-252

Danchin, P., et al (2015). Religious freedom in the panopticon of enlightenment rationality. In W. F. Sullivan, Elizabeth Shakman Hurd, Saba Mahmood, Peter G. Danchin, (Eds), *Politics of religious freedom*. The University of Chicago Press. Chicago, Illinois

Dirks, D. (2001). *Castes of mind*. Princeton University Press. Princeton, New Jersey

Dworkin, R. (2013). *Religion without god*. Harvard University Press.Cambridge, Massachusetts

Eisgruber, C., & Sager, L. (2007). *Religious freedom and the constitution*. Harvard University Press.Cambridge, Massachusetts

Greene, A. (2012). *Against obligation*. Harvard University Press.Cambridge, Massachusetts

Hirschl, R. (2010). *Constitutional theocracy*. Harvard University Press.Cambridge, Massachusett

Hurd, E. S. (2015). *Beyond religious freedom*. Princeton University Press.PrincetonNew Jersey

Laborde, C. (2017). *Liberalism's Religion*. Harvard University Press. Cambridge, Massachusetts

Mahmood, S. (2005). *The politics of piety*. Princeton University Press. Princeton, New Jersey

Mahmood, S. (2016). *Religious difference in a secular age*. Princeton University Press.

Mantena, K. (2010). *Alibis of empire*. Princeton University Press. Princeton, New Jersey

McConnell, M. (2000). Believers as equal citizens. In N. L. Rosenblum (Ed.), *Obligations of citizenship and the demands of faith* (pp. 90–110). Princeton University Press. Princeton, New Jersey

Muñiz-Fraticelli, V. (2014). *The structure of pluralism*. Oxford University Press.Oxford, Great Britain

Quong, J. (2011). *Liberalism without perfection*. Oxford University Press.Oxford, Great Britain

Schragger, R., & Schwartzman, M. (2016). Some realism about corporate rights. In M. Schwartzman, C. Flanders, & Z. Robinson (Eds), *The Rise of corporate religious liberty* (pp. 345–374). Oxford University Press.Oxford, Great Britain

Smith, S. D. (2010). *The disenchantment of secular discourse*. Harvard University Press. Cambridge, Massachusetts

Smith, S. D. (2016). The jurisdictional conception of church autonomy. In M. Schwartzman, C. Flanders, & Z. Robinson (Eds), *The rise of corporate Religious Liberty* (pp. 19–38). Oxford University Press. Oxford,Great Britain