Jean L. Cohen and Cécile Laborde (eds.)

This edited volume sets out to reflect anew upon the meaning and modalities of religious freedom, secularism and nonestablishment and their compatibility with the principles of constitutional democracy. Across four different sections, the volume tackles these issues from several disciplinary perspectives and empirical contexts, although the latter is almost exclusively taken from the US, the European Court of Human Rights (ECtHR) and a few countries in Western Europe. While there have been several studies conducted over the last decade on the notion and scope of religious freedom and secularism and their proper role within the constitutional order, the explicit emphasis on ‘basic liberal, republican and democratic principles’ as a benchmark for the relation between religion and state sets this volume apart from the majority of the literature in the field. Although other studies have reviewed these issues from comparable approaches, they have tended to do so from a more implicit normative basis, and the editors should be commended for their prompt and specific elucidation of the motives behind the collection of chapters from the very outset.

This clarity of purpose helps the reader connect the dots between the sometimes quite disparate contributions distributed across four thematic sections. In the section on freedom of religion or (!) human rights, contributors deal with the relation between secularism and the drafting of the religious freedom provisions of the Universal Declaration of Human Rights (UDHR) and the European Convention on Human Rights (ECHR), a theoretical debate on the borders between religious freedom and gender equality, the concept of universal jurisdiction in the fight against female genital mutilation (FGM) and the treatment of Islam and Christianity in the jurisprudence of the ECtHR. While these debates only vaguely relate to one another, they are all important and relevant to the overarching topic of the volume, as they all address in some way
or form the fundamental question of where religious freedom ends and equality rights begin. This inevitable question in any book on religious freedom is perhaps best answered by Anne Phillips, who lucidly responds in her chapter that ‘[j]udgement would be considerably easier if we could use a detector mechanism to identify coercion, if we could just ask people “Is this your choice or not?”’ (61).

The core question of boundaries between rights is also dealt with in the subsequent section on nonestablishments and freedom of religion, where one of the editors, Jean L. Cohen, introduces and elaborates on the “equal liberties” concept developed by Cristopher Eisgruber and Lawrence Sager as an alternative to a strict separationist interpretation of the relationship between church and state in US jurisprudence on the establishment clause. Much like Phillips, Cohen observes that any concept set to deal with the relation between religious and state institutions must be developed ‘[a]s an antidiscrimination standard, [which] must have as its referent the individual and apply directly to the person whose liberty and equality is at stake’ (141). To this end, Cohen observes, states should strike a balance between the self-regulation and top-down, state-driven regulation of religious associations, whose religious identity should neither disqualify them from doing charitable work, nor provide them with a shield to cloak otherwise illegal discrimination (143–144). Discussing Indian and British models of secularism respectively, Rajeev Bhargava and Tariq Modood offer different takes on this middle-of-the-road pragmatism, Bhargava with his notion of “principled distance”, allowing a certain degree of autonomy for religious communities, Modood with a more accommodationist approach, under which state-religion connections should be expanded from majority churches to cover minority religious communities as well.

In one of the more novel contributions to this section, Claudia E. Haupt suggests that the ECtHR may be moving towards a nonestablishment principle in its jurisprudence on the freedom of religion or belief, comparable to the doctrine on the establishment clause of the first amendment to the US constitution developed by the US Supreme Court. This claim runs counter to most accounts of the ECtHR’s jurisprudence on the relationship between religious organizations and state power, which has generally been considered to be beyond the scope of Article 9 of the Convention, most commonly dismissed under its frequent use of the “margin of appreciation” doctrine in cases involving religious freedom issues. Although Haupt stresses the differences between the 47 different European countries under the Court’s jurisdiction (228) and the ‘infancy’ and ‘nonlinear trajectory’ of its jurisprudence on nonestablishment (227), she nevertheless maintains that a doctrine based on nonestablishment principles is currently being developed by the ECtHR under the