Political Theology With a Difference

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1. Down the Rabbit Hole

There are a lot of reasons not to want to talk about political theology. For starters, its association with the archconservative political theorist Carl Schmitt and his dubious association with Hitler[1] are enough for many readers, most of whom have at best a nodding acquaintance with this episode in the annals of political thought, to forever condemn the subject and take it off the table of intellectual conversation. Even people who haven't read Schmitt and don't follow the contemporary dialogue about political theology[2]

[1] On the debate about the nature and extent of Schmitt's Nazi sympathies, see, e.g., Raphael Gross, Carl Schmitt and the Jews: The "Jewish Question," the Holocaust and German Legal Theory (tr. Joel Golb, U. Wisc. Press, 2007); J.W. Bendersky, Carl Schmitt: Theorist for the Reich; W.E. Scheuermann, "Legal Indeterminacy and the Origins of Nazi Thought: The Case of Carl Schmitt," 17 Hist. of Pol. Thought 571 (1996) and "After Legal Indeterminacy: Carl Schmitt and the National Socialist Legal Order, 1933-36," 19 Cardozo L. Rev. 1743 (1997-98); David Dyzenhaus, Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar (Oxford, 2007), 85-101.

[2] Just a small sampling of contemporary legal periodical literature discussing Schmitt's concept of political theology includes, in addition to Scheuermann, Cardozo L. J., *supra* note 1, David J. Luban, "Carl Schmitt and the Critique of Lawfare," Case W. Res. Int'l. L. (excavating the intellectual genealogy of the philosophical critique of humanitarian law); Christopher Kutz, "Torture, Necessity and Existential Politics," 95 Cal. L. Rev. 235 (2007)(asserting "parallels" between the Bush "Administration's claims of emergency power and exceptional justification, and the political theory of German constitutional theorist Carl Schmitt"); Andrew Norris, "Sovereignty, Exception, and Norm," 34 J. L. & Soc. 31 (2007)(critiquing Schmitt's conception of sovereignty); "David Dyzenhaus, "Cycles of Legality in Emergency Times," 18 Public Law Review 165 and "*Schmitt v. Dicey*: Are States of Emergency Inside or Outside the Legal Order?", 27 Cardozo L. Rev. 5 (2006); Lior Barshack,

of which he forms the fulcrum know enough to know that he was a German political theorist who venerated authoritarianism, exalted political violence, derided liberalism and explicitly lent the imprimatur of his theory to Hitler's Nazi ideology and his rise to dictatorial power. The malodor of fascism attached to political theology ever since has never been dispelled, and it accounts for much of the disinclination to engage with it notwithstanding the receptivity of the academy to other forms of radical critique and the evident

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"Constituent Power as Body: Outline of a Constitutional Theology," 56 U. Toronto L. J. 185 (2006)(criticizing Schmitt's conception of political theology for its commitment to an "immanent" as opposed to a "transcendent" account of sovereignty and proposing an "alternative political theology" that "secure[s] the transcendence of sovereignty," while "allow[ing] for diversity of opinion and pluralism" *id.* at 222, and remaining rooted in "the quest for a theological, or semi-theological, understanding of constituent power," *id.* at 186); Kim Lane Scheppele, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11," 6 U. Pa. J. Const. L. 1001(2004)(analyzing the Bush Administration's response to the events of 9/11 and comparing it to the response of America's European allies "through the lens of Carl Schmitt's writing on the state of exception"); Paul W. Kahn, "The Question of Sovereignty," 40 Stan. J. Int'l. L. 259 (2004), at 263-64 (drawing parallels between the understanding of the relationship of law to sovereignty in the modern international order and Schmitt's conception of political sovereignty); D.A. Jeremy Telman, "Should We Read Carl Schmitt Today?", 19 Berkeley J. Int'l. L. 127 (2001)(book review, discussing the 1999 publication of the edited volume, The Challenge of Carl Schmitt (Chantal Mouffe, ed., Verso Books, 1999); and the prescient pre-9/11 "Symposium: Carl Schmitt: Legacy and Prospects: An International Conference in New York City," Cardozo Law Review, Volume 21, Issues 5 & 6 (May, 2000). For book length treatments (again, just a small sample), see Paul Kahn, Political Theology: Four New Chapters on the Concept of Sovereignty (Columbia U. Press, 2011); Austin Sarat, ed., Sovereignty, Emergency, Legality (Cambridge U. Press, 2010) Bonnie Honig, Emergency Politics: Paradox, Law, Democracy (Princeton U. Press, 2009); Law in Times of Crisis: Emergency Powers in Theory and Practice (Oren Gross & Fionnuala Ni Aolain, eds., Cambridge U. Press, 2006); Victor Ramraj, ed., Emergencies and the Limits of Legality (Cambridge U. Press, 2008); David Dyzenhaus, The Constitution of Law: Legality in a Time of Emergency (Cambridge U. Press, 2006) and Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar (Oxford, 1997).

application of Schmitt's theory (that the state of emergency is the true nature of political sovereignty) to the multiplying states of emergency around the world.

To those for whom these associations with illiberal politics do not form an insuperable barrier, other apparent features of political theology stand in the way. Even if the precise meaning of the "theology" in political theology is obscure—and even though Schmitt's famous dictum that "all significant concepts of the modern theory of the state are secularized theological concepts"[3] seems to allow for the standard account of secularization, in which ideas and practices with religious origins gradually shed their original religious meaning[4]—people who identify as secularists tend to recoil from the sense, however dim, that political theology involves somehow staging a return of religion to the political scene (or denying that it ever departed). This association with religion and the intellectual project of "re-

[3] Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty (U. Chicago, 1985, 2005), 36.

[4] Against this standard "secularization thesis," a rising tide of scholarship has emerged contesting the proposition that in modern society, the religious underpinnings that traditionally undergirded the social and political order have fallen away. See Charles Taylor, A Secular Age (Harvard U. Press, 2007); Talal Asad, Formations of the Secular (Stanford U. Press, 2003); Peter Berger, ed., The Desecularization of the World: Resurgent Religion and World Politics (1999); Jose Casanova, Public Religions in the Modern World (U. Chicago Press, 1994). As much of the contemporary literature on political theology demonstrates, there is an ambiguity within the proposition that modern concepts are "secularized theological concepts," which permits Schmitt's (and other conceptions) of political theology to be read as supporting either the standard secularization thesis or the emergent critique. The position taken in this article might be viewed as an attempt to forge a dialectical synthesis of the two.

enchantment"[5] is no doubt one of the major reasons why many people, including those who are otherwise drawn to radical critiques of liberalism, resist talk about political theology.

If the claim of political theology were merely a genealogical one, about the historical sources from which contemporary liberal political concepts derive, then, as Paul Kahn nicely puts it, it would be "about as interesting and important as learning that English words have their origin in old Norse."[6] But if, as it is sensed, political theology is more than a history of ideas and actually puts forward claims about the nature of law, political sovereignty and liberalism of a trans-historical sort, with applicability to our own contemporary political situation, then the thought that it involves a denial of the secular character of government is more than a little off-putting to the many people who see no legitimate place for religion in political life. It is hard to see how political theology is not just another form of (or justification for) religion intruding into the political realm, and equally hard to get a grip on how it differs from the theologically-inflected politics found today all over the world, with ultra-conservatives of virtually every major faith calling for

[5] See Yishai Blank, "The Reenchantment of Law," 96 Cornell L. Rev. 633 (2011).
[6] Paul Kahn, Political Theology, *supra* note 2, p. 3.

the restoration of religion in public life and a recognition that "this is a Christian nation"[7] or an Islamic or Jewish or Hindu state,[8] as the case may be.

Without quite knowing what relationship to such religious fundamentalist politics "political theology" bears, secularists are understandably wary of its theological idiom, all the more so given its association after Schmitt with extremist forms of rightwing politics. The possibility that there might be differences between the theological politics of

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[7] Assertions that "this is a Christian nation" abound in contemporary American conservative political discourse. In addition to politicians and religious leaders, e.g., Timothy LeHaye, Faith of Our Founding Fathers (1987); Jerry Falwell, Listen, America! (1980), *cited in* John Inazu, Between Liberalism and Theocracy, 33 Campbell L. Rev. 591, fn. 32 (2011), the claim has been promoted by popular conservative book authors, *see, e.g*., David Barton, Original Intent: The Courts, The Constitution, and Religion (1996) and The Myth of Separation: What is the Correct Relationship Between Church and State? (3d ed. 1992); Benjamin Hart, Faith and Freedom: The Christian Roots of American Liberty (1988). Coming rather close to the position advanced in the works above, but stopping short of explicitly endorsing the proposition that "this is a Christian nation," Justice Scalia has argued that not just nondenominational professions of faith but denominationally specific (i.e., Christian) affirmations of faith have a proper place in the American public square. See *McCreary Cty v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 893-94 (2005)(arguing in dissent that a Ten Commandments display at a county courthouse is constitutional and criticizing the majority opinion for "appealing to the demonstrably false principle that the government cannot favor religion over irreligion" or "favor one religion over another." The latter principle (that government may *not* favor one religion over another), Justice Scalia maintains, "is indeed a valid principle where public aid or assistance to religion is concerned … or … free exercise of religion is at issue," but is not a valid principle when it comes to "public acknowledgment of the Creator."

[8] On the many varieties of Islamic states, Jewish states and nation-states rooted in other faith traditions that have been envisaged and, in growing numbers of cases, actually established in contemporary times, see Ran Hirschl, Constitutional Theocracy (Harv. U. Press, 2010). Hirschl rightly notes not all states that define themselves as, e.g., Jewish, Islamic, etc., are, ipso facto, theocratic, as that term is properly defined, and recognizes that that the question of how to define theocracy and distinguish theocratic from nontheocratic forms of government is not an easy one.

religious fundamentalists and the intellectual tradition of political theology of which Shmitt was the chief modern exponent is of little interest to people who are just sick and tired of religion "invading" politics. To them, it doesn't matter what the differences in content are between one theology and another. So long as theology is being harnessed for political ends and/or government is being grounded on theology, it offends the fundamental principle of separation between church and state on which liberty is thought to depend.

This typically liberal or "secularist" aversion to religion in politics surely is among the major reasons why many people are reluctant to get on the political theology bandwagon. The very fact that there is such a bandwagon is yet another. Hundreds if not thousands of articles and books on political theology have poured out of the academy over the last decade,[9] and for people with an aversion to theoretical fashions and High Theory in general, that by itself is good reason not to engage with the literature. I know because I was one of those people. Throughout the first half of the last decade, as the post-9/11 rumblings of scholarly interest in Giorgio Agamben

[9] See works cited in note 2, *supra*. Writing in 2011 about the current revival of interest in Schmitt in his article "Carl Schmitt and the Critique of Lawfare,"(*supra* note 2, p. 10), David Luban observes that "A Lexis search reveals five law review references between 1980 and 1990; 114 between 1990 and 2000; and 420 since 2000, with almost twice as many in the last five years as in the previous five." A more recent search on JSTOR unearthed over 600 results for the past 10 years. Paul Kahn traces the revival of interest in Schmitt to the collapse of the Soviet Union in 1989. See Kahn, Political Theology, *supra* note 2, at 6 ("Post-1989, Schmitt became a refernce point for those who sought to develop a broadly antiliberal theory, free of the decades-old dispute between the communitarians.")

grew,[10] I resolutely refrained from reading the works of Schmitt from which his theory of "the state of exception" derives, and the little bit of Agamben that I inevitably was exposed to failed to claim my interest. Of the various subjects on which I work, only one, the practice of "establishing facts on the ground,"[11] bore any (to me) obvious connection to the concepts discussed in the literature on political theology. Many of those concepts (for example, the ideas that sovereignty is constituted through the declaration of "the exception" and that a "permanent state of emergency" is the condition of modern political sovereignty) did seem aptly to characterize the practices described as "creating facts on the ground" in the Occupied Territories where the phrase is most commonly used, as well as in other contexts where that phrase is invoked.[12] That this was so gave me my first glimmer of insight into the possible utility of the theoretical framework in which these concepts were being elaborated. Nonetheless, that framework still seemed far afield from my interests, which lay in the area of the dilemmas of liberalism that arise in

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[10] The works of Agamben that excited the most scholarly attention in this period were his Homo Sacer: Sovereign Power and Bare Life (Stanford U. Press, 1995) and State of Exception: Homo Sacer II (U. Chicago Press, 2005). Examples of legal scholarship reacting to these works include, *inter alia*, John T. Parry, "Terrorism and the New Criminal Process," 15 Wm. & Mary Bill Rts. J. 765 (2007); Charles Santiago, "From the Insular Cases to Camp X-Ray: Agamben's State of Exception and United States Territorial Law," 15 Studies in Law, Politics and Society 54 (2006); Fleur Johns, "Guantanamo Bay and the Annihilation of the Exception," 16 Eur. J. Int'l. L. 613 (2005): Adam Thurschwell, "Spectres of Nietzsche: Potential Futures for the Concept of the Political in Agamben and Derrida," 24 Cardozo L. Rev. 1193 (2003).
[11] See Nomi Maya Stolzenberg, "Facts on the Ground," in Property and Community (Gregory Alexander & Eduardo Penalver, eds., Oxford U. Press, 2010), 107.
[12] *Id*.

modern societies characterized by religious and cultural pluralism, on the one hand, and religious fundamentalism, on the other. Even with my admittedly limited understanding of political theology, I could see that it and the fundamentalist theological politics of interest to me were not the same. What I could not then see was how the theoretical framework of political theology might illuminate the issues of liberal secularism that I was interested in. And so I left the entire subject to the side.

I am indulging in this bit of autobiographical confession not because I am proud of my previous resistance to learning about political theology, nor because I expect anyone to take an interest in my intellectual formation (or malformation), but rather, because I hope to overcome the resistance that I expect to find in others by relating how I came to the conception of political theology offered here—entirely by accident. As a result of stumbling upon it accidentally, without meaning to engage in a study of political theology at all, I came to view of it that is markedly from the prevailing view, which holds that political theology is unequivocally antagonistic to liberalism and secularism. The view of political theology proposed here should be more attractive, or at the very least more interesting, to those who share the common (but, I here suggest, mistaken) aversion to political theology's ostensible illiberalism and antisecularism.

Following Nancy Rosenblum (who earlier posited "another liberalism"),[13] we might call this view "another political theology," or perhaps, even better, "political theology with a difference." It is political theology with a difference both in the sense that it differs from the standard account of political theology (inasmuch as it proposes a very different relationship to liberalism than one of simple mutual antagonism), and in the further sense that it contains (indeed is rooted in) a philosophical doctrine that not only accepts, but valorizes human differences. It is, in short, a liberal conception of political theology, one that has at its core a principle of accommodation to human differences—to differences in historical and cultural circumstances and to differences in individual and group practices and beliefs.

Such a principle of accommodation is rightly seen as the root of liberalism, notwithstanding the fact that it has given rise to illiberal political practices and theories of government just as often as it has given rise to liberal ones.[14] For centuries, indeed millennia, this principle of accommodation was enshrined in Christian (and Jewish) theology, where it was formulated as the "doctrine of divine accommodation," which derived in turn from the principle of accommodation that was codified in the ancient

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[13] See Nancy L. Rosenblum, Another Liberalism: Romanticism and the Reconstruction of Liberal Thought (Harvard, 1987).

[14] On the centrality of the principle of accommodation to liberalism, see Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies (Nancy L. Rosenblum, ed., Princeton U. Press, 2000). On the usage of this fundamentally liberal principle to construct illiberal political theories, see pp. *infra*.

Greek tradition of classical rhetoric. As several remarkable books have shown, most notably, Amos Funkenstein's Theology and the Scientific Imagination From the Middle Ages to the Seventeenth Century and Kathy Eden's Hermeneutics and the Rhetorical Tradition: Chapters in the Ancient Legacy and Its Humanist Reception, the theological doctrine of divine accommodation had a long career that traces the evolution of much of medieval and early modern thought.[15] In Funkenstein's account, it appears as the very origin of modern secularist thought—notwithstanding its essentially theological character.[16] Although Funkenstein focused on the role of the doctrine of accommodation in the development of modern scientific and historical thought, he also showed its vital connection to early modern social and political theory; and it is not, I think, a terribly controversial proposition to maintain that the origins of modern political doctrines of liberalism and secularism can be traced back to this medieval and early modern doctrine (with its even older roots in the ancient tradition of classical rhetoric.)

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[15] See Amos Funkenstein, Theology and the Scientific Imagination From the Middle Ages to the Seventeenth Century (Princeton, 1986). Also see Kathy Eden, Hermeneutics and the Rhetorical Tradition: Chapters in the Ancient Legacy and Its Humanist Reception (Yale U. Press, 2005)(discussed in Section2.). For more discussion of the doctrine of divine accommodation, see Stephen Benin, The Footprints of God: Divine Accommodation in Jewish and Christian Thought (Albany 1993); Stephen Benin, "The Cunning of God and Divine Accommodation," J. History of Ideas (1984); Daniel Stolzenberg, "John Spencer and the Perils of Sacred Philology," 214 J. of Past & Present 129 (2012)(describing the "turn to the doctrine of divine accommodation" in the thought of John Spencer.)

[16] Accord D. Stolzenberg, *supra* note 15.

It is far more counterintuitive, and therefore much more controversial, to propose that the tradition of political theology likewise originates in the theological doctrine of accommodation. To say that amounts to saying that the intellectual tradition of political theology and the intellectual tradition from which modern liberalism derives are *the same thing*. This is perfectly consistent with the perspective of radical critical thought, which has always seen liberalism and secularism as containing their opposites.[17] It likewise can be meshed with the burgeoning literature on the theological roots of liberalism, which insists upon the original, if not the ongoing, dependence of liberal principles on theological premises found in Christian (and Jewish) thought.[18] True, the theology that this literature purports to unearth is not "political theology" in the technical sense of that term.[19] Both the literature

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[17] See sources cited in fn. , *infra*.

[18] *See* James R. Martel, Subverting the Leviathan: Reading Thomas Hobbes as a Radical Democrat (Columbia U. Press, 2007), Jeremy Waldron, God, Locke and Equality; John Dunne, The Political Thought of John Locke: An Historical Account of the Argument of the *Two Treatises on Government* (1969). For support for the specific idea that the commitment to secular government and law derives from theological doctrines, *see* Peter Fitzpatrick, "Law, Modernity and the Sacred," 32 Seattle U. L. Rev. 321 (2009), 326 ("What is forgotten is the divine, indeed imperial, origin of secular political authority in the Occident"); John Witte, Jr., "That Serpentine Wall of Separation," Mich. L. Rev. (2003)(book review, reviewing Daniel L. Dreisbach's Thomas Jefferson and the Wall of Separation Between Church and State (NYU Press, 2002) and Philip Hamburger's Separation of Church and State (Harvard. U. Press, 2002) and discussing biblical and later theological foundations of the principle of separation between church and state). Also see the works of Stephen D. Smith cited in fn. 28.

[19] There is no unified consensus view about the defining features of political theology that distinguish it from other political philosophies that are rooted in religious or theological principles, but I take some version of an emergency theory

on liberalism's religious foundations and the tradition of radical critique (which focuses on excavating the hidden illiberalism of liberalism, but lately has turned to revealing liberal secularism's hidden dependence on religion),[20] recognize liberalism's theological foundations, but neither commonly portrays the theology that undergirds liberalism as an *emergency* theology, the kind of theology hallowed in the conservative tradition of political-theological thought. Nonetheless, both these literatures are fundamentally compatible with the basic proposition advanced here, that liberalism is grounded in the theological doctrine of accommodation, a doctrine that, this Article contends, is rightly seen as an emergency (i.e., a political) theology.

But while the assertion that liberalism derives from (or just *is*) political theology coheres with the critiques of liberalism and secularism found in critical theory, it flies in the face of the conventional view of political theology that is shared by both its adepts and its skeptics, according to which political theology and liberalism are mutually antagonistic. Because of this deep-seated belief that political theology and liberalism are diametrically opposed, it is only to be expected that readers who are expert in the subject will strongly disagree with the version of political theology that I am proposing

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of politics to be an essential ingredient, and emergency theories are conspicuously lacking from most of the current accounts of the religious roots of liberalism. I elaborate my account of the defining features of political theology on p. 14, *infra*.

[20] See Asad, *supra* note 4; Eve Darian-Smith, Race, Religion, Rights: Landmarks in the History of Modern Anglo-American Law (Oxford U. Press, 2011).

here. This is yet another form of resistance that I am seeking to overcome by way of my account of my accidental encounter with political theology. Unlike the first form of resistance, which stems from an aversion to political theology's ostensible illiberalism and leads to a dismissal of the entire subject (as described above), this second form of resistance I expect to encounter among people who harbor no such aversion to political theology *tout court*, who are, on the contrary, well acquainted with the subject, adepts even, and are, for that very reason, unlikely to accept or even recognize the version of political theology proposed here.

For what I am proposing is a conception of political theology that departs from the prevailing understanding. It departs from the prevailing view that political theology is diametrically opposed to liberalism. And it departs from the prevailing view that political theology rejects the implicit secularism of modern political thought. Had I gone looking for this version of political theology, I never would have found it. Had I searched for it in the literature on political theology, as such, I would not have come to the understanding that political theology is a fundamentally secularist project, one which constitutes the very font of modern secular and liberal thought. It was only because I was looking for something else (to wit, the original meaning of secularism) that I came upon this theological tradition of political

thought, a tradition I only gradually came to recognize as containing all the essential ingredients of political theology.

These are, as I understand them: (1) an emergency theory of political sovereignty and the state; (2) an understanding of the vital role of the exception in any human legal system and the permanence of the state of emergency; and (3) a method of reasoning that derives these and other political and legal theoretical propositions from theological doctrines and religious beliefs.[21] Had I not been looking for something altogether different, something I did not expect to contain these basic building blocks of political-theological thought, I never would have come to political theology at all, let alone arrived at a conception of it as containing this unlikely combination of liberal and illiberal, religious and secularist ideas. I did not expect to find a single one of these elements when I embarked on a research project into the origins of the concept of secularism. Yet what I found, when I followed the research trail where it led, was a complex body of thought characterized by the presence of all three.

Not unlike Alice who followed the white rabbit down its hole, I chased the origins of the idea of secularism only to find myself, not in a wonderland,

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[21] The first two elements outlined above are what make a political theory an emergency theory of politics, or what is properly termed a *political* theology rather than another kind of theologically inspired theory about politics and law. The third element is what makes a political theory a *theology* or a theologically grounded theory of politics rather than a "secular" one, in the modern sense of that term.

but definitely in a kind of looking-glass world, where religion itself subscribes to secularism, where liberalism derives from this secularist theology, and every other fundamental concept is (from the standpoint of contemporary secular ways of thinking) equally backwards and self-contradictory. This article is a report on what I found there. It is not a complete account of the conceptual looking-glass world that I have come to think of as liberal political theology. To do that would require both reconceptualizing all of liberal thought as political-theological thought and reconstructing all of political theology as a gloss on the doctrine of divine accommodation. All I attempt to do here is to suggest that these would be worthwhile projects by demonstrating that liberalism is at bottom an emergency theory of politics that derives from the theological doctrine of divine accommodation.

All I really am proposing is that we connect the dots. It seems to me that if one accepts that the doctrine of divine accommodation led to the elaboration of a "secularist theology," as Funkenstein and others have maintained;[22] and if one accepts that this secularist theology spawned the development of liberal, or proto-liberal, political and legal theories, as these scholars also have maintained;[23] and if one accepts still further (in what might be the sole innovative leap of this paper) that these theologically-grounded political theories that are derived from the doctrine of divine

[22] See pp. , *infra*.
[23] See pp. , *infra*.

accommodation contain all the essential ingredients of political theory (i.e., an emergency theory of politics and a theological approach to the subject of political and legal obligation) *at the same time* as they continue to bear the defining characteristics of a liberal theory of the state and law; then it seems to me that there is a strong basis for accepting the revisionist views of political theology and liberalism proposed here.

I am not in a position to say whether this version of political theology is "correct," or whether the theological theories of politics that other scholars have shown to have been derived from the principle of accommodation are properly deemed to be within the canon of *political* theology, as opposed to representing other traditions of theological thought about secularism and politics which are unrelated to political theology in the proper sense of that term. Even if the version of political theology proposed here is accepted as a theoretically and historically accurate usage of that term, I can't say what the relationship between this alternative version of political theology and the conventional version is. It might be that the two versions of political theology—the conventional one, which sees liberalism and political theology as diametrically opposed, and the alternative one proposed here, which sees them as convergent and congruent—coexist as parallel but essentially separate and distinct traditions of theologically grounded political thought, both bearing the essential hallmarks of political theology, but each

representing an alternative way of interpreting God's divine plan and its implications for human government within that political-theological framework. Alternatively, it might be the case that these two different conceptions of political theology stand in the kind of relationship to one another that Leo Strauss famously described as the distinction between exoteric and esoteric traditions,[24] with the more familiar and unequivocally antiliberal version of political theology associated with Schmitt representing the exoteric tradition, and the less familiar, paradoxically liberal version of political theology offered here representing the less accessible, more intellectual, esoteric "truth" of political theology that the exoteric version papers over. Or maybe, just maybe, there is no distinction between the two, and they really are simply, paradoxically, one and the same.

I neither explore the question of the relationship of these two different versions of political theology to one another here, nor engage in a full exploration of political theology's relationship to liberalism, which would demand a complete reconceptualization of liberalism as well as of political theology. All I try to do here is to make at least a prima facie case for liberalism's fusion with political theology based on the assertion of their common root in the doctrine of divine accommodation.

[24] Leo Strauss, Persecution and the Art of Writing (U. Chicago Press, 1952).

This work is a part of a larger project of reconstructing the theological roots of our modern, liberal, secular legal tradition. Other scholars have taken the view that all significant concepts of the modern theory of the state are secularized theological concepts,[25] and still others have contested the dominant "secularization thesis," according to which secularism has steadily supplanted traditional religious faith, leaving religion to wither away.[26] My work subscribes to both of these two positions, but rather than viewing "political theology" as inherently illiberal, as most notable proponents of the concept do, I am interested in the arguments for liberalism—and for secularism—that are inherent in the theological tradition out of which our legal tradition derives. I have referred to this theological tradition elsewhere as "theological secularism" or "secularist theology" as it is a tradition of thought that derives the intellectual case for the necessity of secular law from theological premises.[27] There are many components to this intellectual tradition, including (as the ultra-conservative proponents of political theology maintain) an emergency theory of political sovereignty. But I am here interested in exploring the possibility that the theological theory of the state

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[25] See Schmitt, *supra* note 3, Kahn, *supra* note 2, Agamben, Blank, *supra* note 5, Agamben, *supra* note 10.
[26] See works cited in note 4 and Darian-Smith, *supra* note 19.
[27] See Nomi Maya Stolzenberg, "The Profanity of Law" in Law and the Sacred (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey, eds., Stanford U. Press, 2007); "Theses on Secularism," 47 San Diego L. Rev. 1041 (2010). My notion of secularist theology (or theological secularism) is related and indebted to, but not precisely the same as Funkenstein's conception of "secular theology." See Funkenstein, pp. 3-12.

of emergency has always been coupled with a principle of accommodation, derived from the theological doctrine of divine accommodation. The remainder of this article offers a description of the content of that doctrine and a brief overview of its evolving usages, suggesting that it is out of this ancient principle that our modern notions of liberalism, pluralism, and religious and cultural accommodation derive.

2. Accommodation: A Long History in Two Highlight Reels and Three Acts

It is no doubt a folly even to attempt to summarize the overall arc of the historical evolution of the principle of accommodation from its origins in the tradition of classical rhetoric through its absorption into Christian and rabbinic thought, where it becomes reformulated as the principle of *divine* accommodation, paving the way for its subsequent modernization and secularization. But if one were to attempt such a folly, and try (as only a rank amateur, like myself, might try) to pack that history into one sentence, one might say this:

The principle of accommodation begins in antiquity, travels through the patristic literature of the early Church Fathers, blossoms in medieval Christian theology (and a parallel track of Jewish thought), comes to full fruition with Renaissance Humanism, and undergoes the convulsions of the Protestant Reformation—whereupon it undergoes a further process of modernization and what one wants to call simply secularization were it not

for the fact that what this history reveals is precisely that secularism itself is an ancient, and in the first instance, a theological concept, itself a product of the theologizing that the classical principle of accommodation underwent.

The alteration in the meaning of secularism that occurs over time is a key point. As others have observed,[28] the concept of secularism has itself been secularized, shorn of its original religious foundations, making it a challenge to regain a sense of the original meaning of either secularism or accommodation, two concepts which have always, theologically, been intertwined. Only by recovering the original religious meaning of accommodation, can the concept of the secular be fully understood, and vice verse. The virtue of the sort of ridiculously compressed history of the principle of accommodation offered here is that it makes these points perspicuous. By collapsing the time frame and speeding up the *long duree*, we can see more clearly that the history of the evolution of that principle is a history of the theologization and subsequent secularization of the idea. More specifically, we can see that the concept of secularism was historically intertwined with the idea of (divine) accommodation and was itself first a theological concept, which was later secularized.

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[28] See Taylor, *supra* note 4. See also Stephen D. Smith, "How is America 'Divided By God'?", 27 Miss. C. L. Rev. 141, 150 (2007); "Recovering (from) Enlightenment?," 41 San Diego L. Rev. 1263, 1276-77 (2004); "The 'Secular,' the 'Religious,' and the 'Moral'" What Are We Talking About?", 36 Wake Forest L. Rev. 487, 502-03 (2001); "Separation and the Fanatic,"85 Va. L. Rev. 213, 223 (1999); "Separation and the 'Secular': Reconstructing the Disestablishment Decision," 67 Tex. L. Rev. 955 (1989);

Thus, to emphasize the successive phases of theologizing and secularization, we might reformulate the fast-forward one-sentence movie-reel version of this history to say:

The principle of accommodation begins, in antiquity, in the precincts of the law courts and the rhetorical manuals,[29] where it functions as principle of textual exegesis; it travels through Christian patristic literature, where it develops into a principle of *biblical* exegesis; is refined even further at the hand of medieval Christian and Jewish thinkers, who press it into various forms of religious (and scientific and political) service that go well beyond the domain of textual hermeneutics; and, finally, after its long sojourn in the precincts of religion, is returned to its original domain as a principle of secular law, only now no longer merely a principle of documentary construction, having accumulated along the way more and more substantive principles, including principles of equity (in a more modern idiom, principles of constitutional law or fundamental rights) that obligate public institutions (governments and "places of public accommodation") to accommodate people with religious (and other kinds of) differences.

This alternative version of the compressed history of the principle of accommodation highlights the fact that in its first incarnation, the principle was meant to guide lawyers in the proper way to interpret and make

[29] Eden, 2.

arguments about the meaning of a legal document without any reference to or concern with the gods. Later it came to be viewed as a principle about how God speaks to human beings and shapes human law to adjust to different cultures and accommodate human limitations and deficiencies. And eventually, after a long sojourn dwelling in the "theological imagination" of Christians and Jews, the principle ended up back in the precincts of secular law—having retained its original rhetorical commitments but having accumulated considerable religious residue along the way. The theoretical consequences of this journey into and out of the precincts of religious thought (and out of and back into law) were significant. In order to clarify those consequences, with particular reference to the religious/secular nature of liberal political thought, let's slow down the highlight reel just a little and take a closer look at each of this drama's main acts.

Act One: Classical Origins

The key thing to note about the first chapter in the long history of the unfolding of the principle of accommodation is that it originates as a principle of classical rhetoric in ancient Greece and Rome where it is twinned with the Aristotelian principle of equity. Accommodation and equity functioned in the classical tradition as exegetical principles, focused primarily on the proper way to interpret legal documents (statutes, contracts, wills). Applied to the interpretive challenges posed by textual ambiguities, words with multiple

meanings, and the gaps that arise between the written word and the intention of the author, the principles of equity and accommodation together counseled recognizing the differences in circumstances and context that exist between one moment, one situation and another.

Just as orators were urged by grammarians to adjust (accommodate) their words to their audience's capacity to achieve maximal persuasive effect, so too, the exegetes were urged by classical rhetoricians to use the understanding that authors adjust words to context to guide their interpretations of an author's text. This meant that interpretation was understood to be both a backwards (essentially historical) project of reconstructing the author's intent, based on the recognition of the context in which the author wrote, and on the other hand, a forward or present-oriented exercise in adjusting the law (or text) to the present circumstances so as to produce equitable outcomes.

The double charge of equity—signifying both consistency with the spirit of the author's intentions and consistency with the spirit of equitable justice—was thus, from the outset, completely intertwined with the principle of accommodation. As described by Kathy Eden in her indispensable history of Hermeneutics and the Rhetorical Tradition, Cicero and Quintilian, whose rhetorical manuals provided "the most comprehensive and detailed treatments of interpretation" in classical antiquity, were "[e]xperts in the art

of accommodation, as the *ars rhetorica* was frequently called," who "recognized the accommodative nature of all interpretation founded on this same art."[30] In the classical tradition, it is "equity's *accommodative* power—that is, its responsiveness to particular circumstances" that "renders it a formidable tool of rhetorical argument, insofar as rhetoric itself is first and foremost the art of accommodation."[31] In this way, equity was linked to accommodation, and both together served to link the backward/historical focus on the reconstruction of the author's real intentions (which, it was recognized, might deviate from the meaning of his words) to the forward-looking focus on producing just outcomes—that is, equitable judgments. Underlying this "art" was the recognition of "the infinite variety and variability of human circumstance."[32] Again as described Eden, equity, in its outcome-focused role, "offers a necessary corrective to law's generality by taking [this human variety and variability] into account"—in short, "surpass[ing] the law through its power to *accommodate* the individual case."[33]

Act Two: Theological Accommodation

The next important station in the principle of accommodation's career occurred when these principles of classical hermeneutics were integrated

[30] Kathy Eden, *supra* note 15, 2 (emphasis added).
[31] Eden, 14.
[32] Eden, 13.
[33] Eden, 13 (emphasis added).

into Christian and Jewish thought. Here they served, in the first instances, as hermeneutical tools for interpreting scripture, and, more particularly, for addressing a variety of challenges and "embarrassments"[34] posed by the words of the biblical text. These embarrassments included the abundant anthropomorphisms used to describe God, which were viewed as theologically incorrect; the presence of "abominations" such as animal sacrifice seemingly commanded by God; anachronisms; and, increasingly (but this was a problem from the earliest of times), the apparent inconsistencies between the biblical account of creation and the understanding of the physical world produced through scientific discovery and empirical observation.

The classical tradition of rhetoric, in particular the principle of accommodation, was an effective tool for explaining away these various embarrassments and reconciling the seeming inconsistencies within the text, as well as for reconciling seeming inconsistencies between the text of the Bible and the findings of "modern" science and, more broadly, reconciling revelation and reason. As Amos Funkenstein explained in his magisterial treatment of the subject,

> Medieval Jewish and Christian exegesis shared the hermeneutical principle of accommodation: the assumption that the Scriptures are adjusted to the capacity of mankind to receive and perceive them. Out

[34] Funkenstein, p.

> of this exegetical *topos* … grew various explanations of the less palatable and less understandable biblical precepts and institutions as the adjustment of God's providence to the primitive religious mentality of the nascent Israel.[35]

This reasoning served first "to explain away such theological embarrassments as the "prima facie anthropomorphism in the Bible." ("The reason they are employed," per Maimonides, "is to accommodate the lesser capacity for abstraction for the masses. The law was given to all in a language to be understood by all.")[36] "Gradually," Funkenstein goes on to explain,

> as the heuristic horizon of the principle broadened, it came to explain more than anthropomorphisms. Evidently the cosmology of the Bible differed from the last word of the scientists – in the Middle Ages no less than today. But Scripture cannot be mistaken; rather, it speaks in the language of everyday man.[37]

As this passage makes clear, a central concern, for which the classical principle of accommodation was deployed, was how to reconcile scientific discoveries with the Bible. The absorption into Christian and Jewish theological thinking of the principle of accommodation (and the broader tradition of classical hermeneutics/rhetoric of which it forms a core part) had a number of important, transformative effects. (This is a rather understated way of saying, per Funkenstein, that virtually all of modern scientific

[35] Funkenstein, 213.
[36] Funkenstein, 214.
[37] Funkenstein, 214-15.

understanding, including the fields of history and the other social sciences, as well as the physical sciences and modern political and legal thought, derive from this fruitful synthesis of classical and religious thought).[38]

It is equally important to stress, however, what was preserved throughout successive waves of transformation: The principle of accommodation begins *and remains* embedded in the tradition of classical rhetoric. Its subsequent Christianization (and absorption into rabbinic thought) does not deprive it of its original rhetorical character. Even when it is pressed into service to justify and explicate theological projects, including the project of political theology, it retains the commitment to the fundamental principles of the rhetorical tradition.[39]

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[38] Funkenstein remarks that "[o]ut of these explanations, or side by side with them, grew grand historical speculations, which saw in the whole of history an articulation of the adjustment of divine manifestations to the process of intellectual, moral, and even political advancement of mankind. It is astonishing that so little has been written about a principle that was so fundamental to the medieval reflections on God and mankind, nature and history." His own work takes a giant step in correcting this oversight, painstakingly tracing the evolution of that principle from a legal exegetical principle to principle of biblical exegesis and then, in an ever-accelerating trajectory, to the birth of modern scientific theories. See Funkenstein at .

[39] For this reason, I concur wholeheartedly with Brook Thomas's position that the state of emergency is best understood the lens of the tradition of classical rhetoric, but I disagree that this means we should reject the construction of the state of emergency as a product of political theology. See Brook Thomas [get citation]. If my view of the theological tradition that I have elsewhere called "theological secularism" and here to propose to view as "liberal political theology" is correct, then that is false choice. The tradition of political theology out of which our modern-day concepts of sovereignty and law are born was derived from the principle of accommodation, which carried with it all of the tropes and theoretical commitments of the tradition of classical rhetoric in which it was born. I do share Brook Thomas's belief about the centrality of legal fictions and metaphors to the theory (and practice) of politics that arises out of these rhetorical underpinnings.

What the theologization of the principle of accommodation did was not to erase its rhetorical origins and character, but rather to expand the domain to which the principles of rhetoric (equity and accommodation) were applied. As we have seen, the original principle of accommodation was strictly a principle of hermeneutics, an exegetical principle concerned chiefly with documentary construction, in particular, the construction (interpretation) of legal documents, such as statutes, contracts and wills. Transferring those exegetical tools to the project of interpreting the biblical text instigated a powerful cascade of effects, all of which were initiated by the (rhetorical) need to develop an account of the author's intentions. Such a project, when applied to God, could never remained confined to the realm of debates about proper methods of textual interpretation, since an account of God's intentions (in "writing" a particular passage of the Bible) could never be freed from more general theological (metaphysical, ontological, and epistemological) questions about the nature of God, the nature of the physical world, including the human world, and the relationship between them. What were God's plans for the (human) world? The rhetorical imperative to give an account of God's intentions qua author of the biblical text demanded an account of God's

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Without focusing specifically on political fictions, or tying the rhetorical understanding of legal fictions to the political theology of the emergency state, I have written about this in Nomi Maya Stolzenberg, "Bentham's Theory of Legal Fictions: A 'Curious Double Language'," 11 Cardozo Studies in Law and Literature 223 (1999) and "Anti-Anxiety Law: Winnicott and the Legal Fiction of Paternity," American Imago 64, 339 (2007). See also Kathy Eden's Poetic and Legal Fiction in the Aristotelian Tradition (Princeton, 1986).

designs that would be consistent with the exegesis being offered. Thus it was that the first application of the classical principle of accommodation to the biblical text—"that the Scriptures are adjusted to the capacity of mankind to receive and perceive them"—immediately yielded a second version of the principle of accommodation—"[t]hat God adjusted his acts in history to the capacity of men to receive and perceive them."[40] With that latter step, the principle of accommodation crossed over the boundaries of the field of textual intepretation into the boundaries of the much wider field of theological speculation about all aspects of God's creation.

The initial transformation achieved as a result of the Christianization of the principles of classical rhetoric was thus twofold: it was not merely that the practitioners of the art of accommodation (the *ars rhetorica*) had shifted the application of that principle from the secular domain of law to the religious domain of God's text (and God's law); it was also that, in doing so, they converted the principle of accommodation (and its companion, the principle of equity) into substantive and not merely exegetical principles. Already in the classical tradition the link had been made between equitable interpretation and equitable judgments—equity, that is, as a principle of exegesis and equity as a substantive principle of justice. But the move to give an account of God's plan, and its implications for human knowledge and

[40] Funkenstein, 222.

conduct, greatly expanded the substantive purview of the twin principles of equity and accommodation. That substantive purview would grow to include theories about the origins and nature of the physical world, theories of history, and theories about the proper form of the state—its relation to its subjects, its relation to God, to religion and religious authorities, and its relation to human diversity—all derived from the fundamental theological tenet that "God speaks the language of man."[41]

Ultimately, as Funkenstein's work shows, the propulsive force of the theologized principle of accommodation would lead it to escape the bounds of theology altogether, producing the versions of secular scientific, political and legal discourse with which we are familiar today. What is being offered here is but a small part of that larger story: the story of how the principle of divine accommodation gave rise to a theory of law and politics (a political theology, or what I prefer to call a secularist theology, or rather, a family of political theories/theologies) which produced, and continue to shape, the principle of religious accommodation and other fundamental liberal principles shape legal discourse today.

Act Three: Theological Secularism and The Emergence of Modern Political Thought

The two main contentions to be established in the following pages are (1) that today's liberal doctrines of tolerance and pluralism, and liberal

[41] Funkenstein,

political theories more generally, are direct descendants of medieval and early modern interpretations of the political implications of the theory of divine accommodation, and (2) that the intellectual route that was followed by those medieval and early modern ruminations on the principle of divine accommodation's political implications traveled through the terrain of what is rightly called political theology; it was through that route that accommodationist theorizing arrived at what we recognize as modern liberal political theory today.

There were many important stations in the process whereby the principle of accommodation was first "theologized" (integrated into Jewish and Christian theological thought) and subsequently de-theologized, or "secularized," too many to canvas here. Regarding the initial stages in the process of its theologization, Eden notes that "Erasmian hermeneutics is arguably the most influential and certainly the best known humanist rehabilitation of this ancient tradition" of rhetoric,[42] but "the Christianization of rhetorical interpretation-theory" occurred much earlier and "is Paul's doing," in the first instance, "not Augustine's"[43] (though Augustine's thought also marks a key moment in the "Christian appropriation of so-called classical culture.")[44] Funkenstein's work covers some of the same Christian ground

[42] Eden, 2.
[43] Eden, 56.
[44] Eden, 41.

but moves the story both outward (by demonstrating parallel developments in Jewish philosophy and rabbinic thought) and forward, demonstrating how the early modern "scientific revolution" and the emergence of historical and cultural awareness (and the fields of modern history and the social sciences) all take root here, in the fertile ground of "secular theology" and religious reasoning about the implications of divine accommodation for understanding the natural world, and man's position in it.

Of most importance here is the application of this body of theological reasoning to the questions of legal and political order. In addition to paving the way to modern forms of science and religious "unbelief," the theologization of the classical principles of accommodation and equity also paved the way for the emergence of modern political theory, beginning with the attempt to derive principles of human government and law from the principle of divine accommodation. The ultimate result of centuries of thinking about the political implications of the doctrine of divine accommodation was the emergence of modern liberal political theory.

This is by no means to say that all the political theories derived from the principle of accommodation were liberal in character, or that they necessarily prescribed liberal policies of tolerance or a liberal model of the state. To the contrary, there was no end to the variety and ingenuity of the political theories spun out of the principle of divine accommodation, and

many of these were of a decidedly illiberal character. Notwithstanding this variety, however, all accommodationist political theories (that is to say, all political theories derived from the theological principle of divine accommodation) had a number of key elements in common, rooting them in the fundamentally liberal principle that differences among human beings—religious differences, cultural differences, and difference in their historical circumstances—are to be respected as part of God's plan.

At the heart of all of the different interpretations and applications of the principle of accommodation to contemporary questions of science, religion and politics lay the medieval doctrine of divine accommodation, which held "[t]hat God adjusted his acts in history to the capacity of men to receive and perceive them"[45] and, by the same token, "that the Scriptures are adjusted to the capacity of mankind to receive and perceive them."[46] As we have seen, this doctrine represented the integration of the principle of accommodation inherited from classical rhetoric into Christian theology. A parallel incorporation of the principle of accommodation occurred in rabbinic thought. Together, these Christian and Jewish reinterpretations of the classical principle of rhetoric, which turned it into a theological principle designed to illuminate the meaning of the bible and God's design, paved the way for its subsequent modernization and secularization.

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[45] Funkenstein, 222.
[46] Funkenstein, 213.

Counterintuitively, what connects the older religious notion of accommodation to modern notions of secularism and liberalism is the secularist outlook of the original theological version of the idea. Notwithstanding the great variety of political theories developed by Christian and Jewish thinkers from the principle of divine accommodation, and the multiple and often contradictory usages to which the principle was put, what they all have in common is their shared belief in the inherently secular character of human public institutions and law. This secularist character of accommodationist political theologies is hard for modern readers to grasp because of the prevailing view that secularism and religious belief are conceptually dichotomous. Indeed, the belief that theological views cannot be secularist and, conversely, that secularist institutions cannot be based on religious beliefs is so prevalent that it takes a heroic leap of the imagination to think our way out of it. That is the leap this Article is trying to make.

According to the view of secularism that is prevalent today, if a theory of government or law (or science or history or anything else) is derived from religious beliefs and based on theological propositions, then it is, ipso facto, not secularist. All the more so if the theory purports to follow the will of God. In other words, theology and secularism are thought to be mutually exclusive. The principle of divine accommodation demonstrates the naïvete of this view. The theories that medieval (and, later, early modern) Christian and Jewish

thinkers derived from the application of the principle of divine accommodation were uniformly secularist in character in the specific sense that they were based on the premise of an unavoidable gap between human knowledge and the divine law and the consequent necessity for "man" to establish and follow secular authorities and law. To modern ears (and even to the premodern sensibility which I am here trying to reconstruct), there is obviously a deep irony in the idea that a theological perspective could be secularist. The idea that the necessity of secular government and law derives from theological principles, or, more concretely, that secular government and law are divinely ordained, seems paradoxical. Yet this is exactly what I want to claim: that the political theology constructed on the basis of the principle of divine accommodation was secularist in character, positing the coexistence of *separate* religious and political spheres (the forerunner of our modern principle of the separation of church and state) and calling for the recognition of the autonomy of the latter from the former. Out of this apprehension of the (relative) autonomy of human history came the commitment to the basic idea that the state and its law must be secular—secular in the very specific sense that they cannot be based upon or reflective of divine law.

More strongly put, secular regimes were understood to *necessarily* deviate from and, worse still, *violate* the divine law. Yet, according to the line of reasoning generated by the principle of divine accommodation (the

framework of theological reasoning outlined here),[47] such political regimes are divinely ordained. What could possibly explain—and justify—the creation of political and legal institutions that are not merely secular (i.e., independent of divine law) but actually profane (i.e., in violation of it)?

It is at this point in the line of argument derived from the doctrine of accommodation that we first encounter the central role of emergency theory. It was only the apprehension of the state of emergency into which the world would be plunged absent the institution of effective (albeit imperfect) secular authorities that could, and did, serve to justify (within the terms of theological discourse of accommodation here described) the creation of human

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[47] The following outline of the argument for secular law found in medieval and early modern Jewish and Christian theological thought is based on a more expansive analysis of that argument structure presented in N. Stolzenberg, "Profanity of Law," *supra* note 27. That analysis was based in turn on the accounts of emergency theories of criminal law derived from canon law found in Richard M. Fraher, "The Theoretical Justification for the New Criminal Law of the High Middle Ages: '*Rei Publicae Interest, Ne Criina Remaneant Impunita*,'" 3 U. Ill. L. Rev. 592 (1984); Fraher, "Conviction According to Conscience: The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof," 7 Law & Hist. Rev. 1 (1989); Fraher, "Preventing Crime in the High Middle Ages: The Medieval Lawyers' Search for Deterrence," in Popes, Teachers, and Canon Law in the Middle Ages (James Ross Sweeney & Stanley Chodorow, eds., Cornell, 1989) and John Langbein, Torture and the Law of Proof: Europe and England in the Ancien Regime (Chicago, 1977) and accounts of similar arguments for emergency law in Jewish law found in Suzanne Last Stone, "Sinaitic and Noahide Law: Legal Pluralism in Jewish Law," 12 Cardozo L. Rev. 1157 (1991); J. David Bleich, "Jewish Law and the State's Authority to Punish Crime," 12 Cardozo L. Rev. 831 (1991); Arnold Enker, "Aspects of Interaction Between the Torah Law, the King's Law and the Noahide Law in Jewish Criminal Law," 3 Cardozo L. Rev. 1148 (1991); Gil Graff, Separation of Church and State: Dina de-Malkhuta Dina in Jewish Law (U. Alabama Press, 1985). A more recent, as yet unpublished, work that even more directly accords with the reading of Jewish emergency theology offered here is Oren Gross, "Emergency Measures in Jewish Law," SSRN.

institutions so profane that they would inevitably *violate* the sacred rights protected by the divine law. The Christian and Jewish thinkers who elaborated this emergency theory of justification did not blink from the recognition that nothing less than "judicial murder" (i.e., wrongful convictions leading to capital punishment) results from the institution of human (i.e., secular) law. The only thing that could possibly justify such a violation of sacred law, according to them, was the need to avoid the even worse situation of anarchy that would otherwise exist, in which crime goes unpunished (or, more precisely, its punishment is postponed until the afterlife—perfect justice from the standpoint of eternity, but, from the standpoint of human suffering, much too late).[48]

Christians and Jews alike perceived that to adhere to a standard of justice so strict as to allow zero tolerance for judicial error would produce a world in which wrongdoers could act with impunity, resulting in a state of perpetual (within the temporal bounds of the mortal world) existential threat—a state of emergency, in other words, that surely, they reasoned, could not be God's design. Yet that was exactly what adherence to the strict procedural canons of biblical law required. The only way to respond to this state of emergency was to suspend the strict procedural canons of divine law (which tolerated no judicial error) and to replace the divine law with a

[48] See sources cited in note 47.

species of what was candidly described as an emergency state, enforcing emergency law.

Note that, from the standpoint of the line of reasoning here being described, this is what secular law is: emergency law, the imperfect law that exists when the perfect (divine) law cannot be applied (and therefore must be suspended) due to the threats to mortal life and security that would result from following its too stringent procedural safeguards. In other words, *all* secular law is emergency law. All states are emergency states. That is just what human legal and political authority (from the point of view of the theology of divine accommodation) is.

But if all secular law is emergency law, and if secular law is the law for human societies that the principle of divine accommodation ordains, then the state of emergency and the state of accommodation are one and the same. What looks from one point of view like the state of exception, a state of pure power unbounded by law, is, from another point of view, nothing more or less than ordinary law, secular law—i.e., human law, which reflects God's accommodation to human beings' needs (e.g., for safety and order) as well as to the deficiencies of human beings that make it impossible for them to follow, enforce, or even recognize the content of the divine law.

This vision of the state of emergency, rooted in the theology of divine accommodation, thus constitutes a challenge to the ultra-conservative view of

the state of emergency as a state of pure power unbounded by law. But at the same time, it also throws into question the naïve view of the rule of law as a state of pure morality devoid of power, politics, violence, and brute domination and force.[49] The state of emergency envisaged by accommodationist theology constitutes a challenge to the ultra-conservative for the simple reason that is not a state void of law; it is, rather, a state in which one legal regime (the law of the sacred) has been suspended and replaced by another (the law of sublunar world, i.e., secular law).

The full political-theoretical implications of this viewpoint were, of course, manifold and subject to competing interpretations. On the most minimalist interpretation, this equation of the state of emergency (characterized by the absence of divine law) with the state of accommodation (characterized by the presence of human law) implied, *contra* the Shmittian thesis, the existence of the rule of law. On a more maximalist interpretation, the equation of human law with a state of emergency would become the basis for implementing (and constitutionalizing) liberal policies of tolerance, accommodation and checks and balances *within* the state, the argument being that, since human government was necessary, yet highly imperfect—indeed,

[49] To put it another way, "the morality of law" (see Lon Fuller, The Morality of Law (New Haven, Yale U. Press, 1964) and what I have called "the profanity of the law" are one and the same. See Stolzenberg, "Profanity of Law," *supra* note 23.

profane—checks on the exercise of political power were necessary to minimize, if not prevent, its abuse.

This was hardly the only way to interpret the political implications of divine accommodation. As noted above, there were a great many different political theories were spun out of the basic principles of accommodationist thought and many were of a decidedly antiliberal character. More importantly, even the most liberal interpretations of the political requirements of the principle of accommodation had at their core elements of illiberalism that stood in tension with their liberal commitments. This, of course, is precisely what radical critics have always maintained: that liberalism is paradoxically illiberal; that tolerance is "repressive"; that tolerance is "repressive"[50]; that liberal neutrality is "impossible"[51] or "imperial."[52] Reinserted into its original intellectual (theological) framework, the paradoxical elements of liberalism look less like the revelations of radical critique (which takes as its mission the unearthing of the supposedly hidden, self-undermining characteristics of liberalism) and more like the logical, unhidden, implications of the theory's original insight: that liberal accommodation, secular law, and the state of emergency are all the same

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[50] Herbert Marcuse, "Repressive Tolerance," in Robert Paul Wolff, Barrington Moore, Jr., & Herbert Marcuse, A Critique of Pure Tolerance (Beacon Press, 1965).
[51] Stanley Fish, "Mission Impossible: Settling the Just Bounds Between Religion and State," 97 Columbia L. Rev. 2255 (1997).
[52] Robert Cover, "The Supreme Court, 1982 Term—Forword: Nomos and Narrative," 97 Harv. L. Rev. 4 (1983).

thing. Or to put it another way, the rule of law and the state of exception (in which the divine law is suspended and replaced by secular law) are the same thing. The emergency nature of the liberal state (its origination in violence and legal suspension, its essentially imperial character, and its ongoing willingness to suspend rights for the sake of protecting them), far from appearing paradoxical, is, from the standpoint of the secularist (political) theology described here, simply a restatement of the original suspension of divine law. From the standpoint of the framework of theological thought described here, the illiberalism of liberalism can be simply redescribed as the manifestation of the state of emergency to which the liberal state of accommodation is always attached.

More precisely, it is not that the limits of tolerance and the origins of law out of its suspension (or violation) are not paradoxes, but rather, that they all emanate from the fundamental, originary paradox of political founding—not the founding of any particular sovereign state, but rather the founding of secular law, per se. It is simply a point of fact, from the point of view of secularist theology, that secular law originates when divine law is suspended *and violated* (yet is itself divinely mandated and ordained). The theological story of divine withdrawal and accommodation to the limited perspective of human beings, precipitating imperfect but necessary and autonomous human legal responses to existential threats, affirms Shmitt and

Agamben's proposition that the state of emergency is indeed (always) permanent. (The fundamental emergency, from the standpoint of the theological standpoint examined here, is life itself; it therefore lasts as long as mortal life does). But it also throws that "permanent state of emergency" into a new light, revealing it to be at once a state in which "the" law is suspended and, *contra* Shmitt, a state of *law*. By the same token, it is a state of accommodation, a state that accommodates (to) human weaknesses and needs, which signifies at one and the same time a state of exception and a state of normalization, adaptation to the circumstances, normalcy, law, order.[53]

3. A Theology of Variety; Varieties of Accommodationist Thought

Given that the whole point of the doctrine of divine accommodation was to explain and justify the existence of human variety (cultural variety and religious variety, in particular, the variety of ways of interpreting God's word exhibited within and across human societies), it was only natural that the theorists and theologians who undertook to draw the implications of this doctrine for human conduct and knowledge themselves exhibited a similar

[53] From this standpoint, It is precisely because we are "perpetually" in an impure state ("perpetually" meaning for so long as we occupy the "sublunar" material and temporal realm) that the problem of accommodating different groups with different beliefs persists, with every proposed solution replicating the problem it was designed to solve. This is the paradox of pluralism made familiar by generations of critics of liberalism from both the left and the right. That problem can be recast as the animating principle of theory of divine accommodation, the central paradox around which all accommodationist political theories are formed.

diversity of opinions about the proper way to interpret that doctrine and its implications. The doctrine was applied by theologians (and other thinkers inspired by this theology) to a great variety of domains, including biblical exegesis (where a veritable "exegetical revolution" in the thirteenth century[54] ultimately led to the radical practices of modern biblical criticism); religious polemics (where Christians squared off against Jews, and various sects of Christians faced off against one another, culminating in the great squaring off of Protestantism against the Catholic Church and continuing into later religious controversies);[55] the "New Science,"[56] which embraced the science of history and the analysis of different human cultures alongside the natural sciences; as well as the subject here: politics and law. As has already been suggested, there was no single theory of politics and law derived from the theological principle of divine accommodation. The political theories developed out of that principle were multifarious—fittingly so, since the foundational premise of the principle was that human beings *differed* in their perceptions, in their ways of understanding the world and interpreting the divine will, in their beliefs.

Common to all of these intellectual endeavors, however, was a dawning *historicism*, the recognition, born of the traditional (classical) insistence on

[54] Funkenstein, 218-19.
[55] See D. Stolzenberg
[56] Funkenstein PAGE

the importance of *context* and reconstructing the *intentions of the author* to determining the meaning of a text. Rhetoric's insistence on contextualizing intent reflected a recognition of the fact that circumstances and, more particularly, human societies evolve and change over time, and that human beings' beliefs are never free of the imprint of their historical context. Along with that came a growing recognition and, more importantly, an acceptance of the relative *autonomy* of the natural world, including human history. More and more, the view took hold that human action was not (or not wholly) determined by God and was therefore explainable in terms of science and natural forces, be they the forces of physical nature, human psychology, or other historical forces—and that this itself was part of God's plan. As Funkenstein explicates, the notion of divine accommodation gave rise to a "strong sense of the absolute autonomy and spontaneity of human history."[57] Regarding such ancient practices as idolatry and animal sacrifice, abominations seemingly sanctioned in the Bible but (according to the religious thinking of the day) actually constituting a grotesque violation of God's law, the theologians observed that, being all-powerful, God could have caused the false beliefs of the primitive cultures in which He first revealed Himself to disappear (and be replaced with the right doctrine of monotheism) overnight. But, in his infinite wisdom, he chose instead to have human beings

[57] Funkenstein, 204.

gradually come to an ever fuller understanding of monotheism by themselves, through a process of internal mental growth, facilitated by His adaptation (accommodation) to their existing beliefs and practices. This was God's "cunning"—to allow for the autonomy of human action and the development of human knowledge in order to bring about a gradual fulfillment of His (hidden) divine plan).[58]

This basic idea, that God has made space not just for human variety but for human autonomy, propelled the development of many different areas of human inquiry, including both the natural sciences and the social sciences, in particular the modern field of history and social and economic thought. In perhaps his most fascinating chapter, on "Divine Providence and the Course of History," Funkenstein traces the dawning of the modern historicist sensibility to the metamorphosis of divine providence and divine "cunning" (the hidden hand of God) into the "invisible hand" of history.[59] Most

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[58] Funkenstein, Eden.

[59] Funkenstein, 204 ("A respectable family of explanations in social and economic thought since the seventeenth century is sometimes known by the name "invisible-hand" explanations, a term borrowed from Adam Smith. In many variations, we are taught how "private vices" turn, of themselves, into "publick virtues"; how the individual pursuit of self-interest contributes ipso facto to the common wealth and welfare. Spinoza based his political theory on this mechanism; Mandeville popularized it … Likewise since the seventeenth century, versions of the invisible-hand explanation were employed to illuminate the course of history, the evolution of society. …. Vico named this process "providence" and stressed time and again the oblique nature of its operation – unintended by individuals and unknown to them." Funkenstein goes on to show how "[t]he many versions of reason in history from Vico to Marx are only speculative byproducts of a profound revolution in historical thought in the sixteenth and seventeenth centuries, namely the discovery of history

important for our purposes, though, is the "legal science" that lay at the core of this historicist revolution. In addition to the tradition of humanistic philology that derived from the application of the ancient traditions of textual criticism first to biblical and then to an ever-widening category of social texts, Vico (to take the exemplar of the historicist revolution) "was also an heir … to the humanistic interpretation of Roman law."[60] "It was a reaction,"

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as *contextual reasoning*. A new concept of historical facts, and of the meaning of historical facts, emerged in the seventeenth century; a conception of every historical fact, be it a text, an institution, a monument, or an event, as meaningless in itself unless seen in its original context." Id. at 205-06. Most importantly, he explains that "The many versions of reason in history from Vico to Marx are only speculative byproducts of a profound revolution in historical thought in the sixteenth and seventeenth centuries, namely the discovery of history as *contextual reasoning*. A new concept of historical facts, and of the meaning of historical facts, emerged in the seventeenth century; a conception of every historical fact, be it a text, an institution, a monument, or an event, as meaningless in itself unless seen in its original context." Id. at 208. This, in turn, was less an innovation than a reconstruction of the ancient principle of accommodation. Funkenstein: "Again we wonder: how radical was this break, what precisely was new in this 'New Science?' Evidently, the ways of seeking signs for the divine providence working in history have changed; but 'harmony,' 'Correspondence,' 'Concordance' within historical periods [the various terms coined by the early theorists of modern history such as Vico and Montequieu to capture such ideas as "the spirit of the time"] were … not altogether alien to medieval historical reflection; we encounter them, in particular, in medieval notions of divine accommodation." Id. at 213-13. To take just one exemplar, "Vico's key terms … are 'harmony,' 'convenience,' 'correspondence,' or 'accommodation,' terms used to encapuslate the idea that "[a]ll human affairs of a society at a given phase correspond to and reflect each other; they form a harmonious whole and are shaped by the very same 'mode of the time.'" Id. at 209. "Not all of this was Vico's discovery. … Vico was an heir to generations of humanistic scholarship since the sixteenth century. Sixteenth-century philologists returned to the level once achieved by the ancients and surpassed it." Id. at 210. And again: "humanistic philology surpassed its ancient paradigms; it did so by moving from textual criticism and textual exegesis to the reconstruction of history." Id. at 211. The metamorphosis of this theological notion divine cunning and "providence" into the "invisible hand" of history is discussed in [citations needed].

[60] Funkenstein, 210.

Funkenstein explains,

> against the elevation of the *Corpus iuris civilis* to the status of a universal, inexhaustible paradigm of legal wisdom, as if it were an ideal law valid for all times. … The tedious dispute between the adherents of the *Loi ecrit* and the adherents of the *coutumes* generated the insight that there could never be ideal law valid for all times.[61]

The question of the nature of law, and its placement at the center of the study of society, was but part (albeit the central part) of a more general inquiry into the question of what mode of human government was demanded by the principle of divine accommodation. The effort to understand what the doctrine of divine accommodation required or permitted in the domain of human legal and political institutions yielded many different theories (political theories/political theologies) and many different models of sovereignty. What they had in common was that they all offered ways of responding to the diversity of human societies, religions and cultures. The same awareness of cultural, religious and legal pluralism that propelled the development of the new historical science motivated the articulation of different schools of social and economic thought, and, most importantly, political thought. All of them struggled to come to terms with human pluralism and variety—not just with the evident *fact* that human societies were encased in different cultures with different beliefs, an empirical situation which was (increasingly) undeniable but in principle eradicable, but

[61] Funkenstein, 211.

also, more fundamentally, with the *belief* (a quintessentially religious belief) that such diversity was not just acceptable to God, but was indeed part of the divine plan.

But it was far from obvious that human government was supposed to emulate God's embrace and accommodation of human differences. There was no automatic reason to think that in this particular regard, human society was supposed to be an *imago dei*. Indeed, the path to such a version of the *imago dei* (i.e., as God as tolerant of diversity, so should we be) was but one of several logical paths that could be followed out of the core idea of divine accommodation. After all, the teleological understanding of God's cunning was that His accommodation to different (false) beliefs was an accommodation to human cognitive limitations and moral deficiencies that would, through the cunning of history (i.e., divine providence), progressively be overcome. This was a view that was consistent with all manner of political theories and models of government, including the most illiberal ones alongside ones that would be recognized as forerunners of our liberal regimes today. Many drew the conclusion that the palpable religious and cultural differences that existed *between* societies represented the arrangement that God had chosen to accommodate different peoples with different beliefs—the model of legal pluralism as plural legal systems. On this view, there was no need, nor was it right, to accommodate differences within

a single political system; each people was supposed to have its own government and law.

Others, by no means the majority of accommodationist theorists, drew the conclusion that God intended for different beliefs (and different religions and conceptions of law) to be tolerated and accommodated *within* a sovereign state or single legal regime (the model of cultural pluralism). Some would even argue that the principle of divine accommodation demanded the establishment of a single monolithic universal system of belief and law, in which human institutions of religious and political authority would play the role of carrying out the divine tutelage under which human beings would shed their false primitive beliefs and "progress" toward the one, true way. None of these radically different models of government and managing human diversity would be ruled out (indeed each and every one of these was at one point or another advanced) by reasoning from the principle of divine accommodation.

Nonetheless, it was always hard to reconcile the more universalist models of politics and law, which sought to subsume all people under a single overarching system of values, with the abiding belief that "it is the task of the judge as the living interpreter of the lawmaker's intentions to accommodate the infinite variety and variability of human circumstances to a fixed and generalized set of rules," a belief that was rooted in the classical Aristotelian

conception of equity with which the principle of accommodation has always been twinned.[62] That ancient idea of accommodation as equitable judgment would persist in every political theory derived from the theological doctrine of divine accommodation. And no matter how illiberal or intolerant a given accommodationist political regime was, that kernel of thought would stubbornly remain, a tiny incubator of more liberal principles of religious tolerance, pluralism, accommodation, and freedom of belief.

4. Some Objections

If the arguments presented in this Article have been at all persuasive, then the assertion that liberalism derives from the principle of divine accommodation, and the further assertion, that the political logic derived from that principle was an emergency theory and hence a political theology, may seem obvious to the point of banality. But from the standpoint of contemporary ways of thinking about the relationship between political liberalism and religious theology, these propositions are deeply counterintuitive. Indeed, there is good reason to regard them as not just counterintuitive but wrong, based upon superficial resemblances and specious reasoning. How, after all, could there be any meaningful connection between the idea of *divine* accommodation, which is a matter of God's accommodation to the limitations and weaknesses of humankind, and the

[62] Eden, 102.

practices of religious and cultural accommodation that are taken to exemplify the ideals of liberalism and pluralism today? Besides the obvious difference in the personae (the agent of divine accommodation is God, the agent of religious accommodation is a human public institution, government or places of public accommodation; the grantees of divine accommodation are human societies writ large trying and failing to understand God's word, the grantees of religious accommodations are individual subjects or subordinates of public institutions who have "conscientious objections" to the institution's rules), the practices that go by the name "divine accommodation" and "religious accommodation" appear to differ so substantially from one another that only the rankest of category mistakes would treat them as like or continuous phenomena, either in the realm of practices or ideas.

Indeed, it seems far-fetched to think that there could be either a historical or conceptual connection between what was in the first instance a principle of textual (and more particularly, biblical) exegesis and a substantive regulatory principle, a principle of rights, that commands institutions to carve out exceptions and exemptions in order to accommodate people with religious objections to the institution's prevailing rules. Not only historically (I am drawing connections across literally thousands of years) but also conceptually, it is, to say the least, a stretch.

This article makes that stretch, seeking to defend the equation between the old idea of divine accommodation and the "new" idea of a right to religious accommodation, notwithstanding the undeniable dissimilarities between the two, beyond the name. Only after the original idea of accommodation is fully unpacked and its cognate principles stand revealed can we can begin to see the surprising connections that exist between medieval (and early modern) conceptions of God's accommodation to human limitations and the modern conception of religious (or cultural) accommodation as an obligation on the part of government (and other public institutions) to respect the right of a minority to follow its own beliefs. That is what this Article has tried to show.

Lest my analysis threaten to flatten all distinctions, and, ironically, erode the very difference between universalist and non-universalistic, liberal and illiberal, approaches to dealing with the fact of human pluralism, I want to emphasize again the enormous variety of political theories that were, over the centuries, generated by the principle of accommodation, some of which offered universalistic models of political organization and others of which did not. As much of an insight as (I hope) it is to recognize that all states are, in some very fundamental sense, emergency states, it would be fatuous to hold that all (emergency) states are the same. Much work has been done, and

bitter experiences of living under emergency regimes abound[63] to demonstrate the fatuousness of such a claim. The analysis here is meant, not to deny, but rather to offer a new (or rather, old) perspective from which to understand the difference between liberal political regimes in which the "rule of law" is observed and official and unofficial emergency regimes, which suspend the rule of law in ways that differentiate them from the former, "non-emergency" state in important and meaningful ways.

In addition to making a new kind of sense of the conventional distinction between "normal" legal states and emergency states in light of the theory of divine accommodation, I hope that the analysis offered here will help to propel the generation of a new approach to understanding the differences between universalism and cultural particularism, and between different models of cultural particularism (e.g., cultural pluralism vs. legal pluralism). Such a new approach would proceed from the recognition that all of these "isms" originated as ways of interpreting the requirements of the principle of divine accommodation for human societies and law, but ones that reflect radically different ideas about how, or even whether, human societies

[63] For one particularly moving evocation of what it is like to live under such conditions, I highly recommend Adina Hoffman's My Happiness Bears No Relation to Happiness, the biography of Palestinian poet Taha Muhammad Ali and a story of life under of Israeli military and emergency law. For a fascinating exploration of the dense thicket of legal rules and judicial institutions that support this particular military regime, see the recent Israeli documentary, *The Law in These Parts*. http://www.praxisfilms.org/films/the-law-in-these-parts. There are of course countless other examples of emergency regimes under which people have lived, and live today.

and governments should model divine accommodation themselves (e.g., by enacting policies of cultural accommodation and allowing for human variety within their own midst.)

Hopefully enough has been said at this point to convince the reader of a connection, not just a genealogical relation but a conceptual conception, between the theological principle of divine accommodation and the modern liberal doctrine of a right to religious accommodation (and other cognate liberal principles). But before the case for that connection can be nailed down, it is appropriate to step back and acknowledge the glaring differences that exist between the two. Indeed, the principle of divine accommodation was in the first instance an exegetical principle applied to interpret the Bible (and, more particularly, to rationalize its seeming inconsistencies), which does not, on the face of it, have anything to do with the question of whether what we interestingly refer today as "places of public accommodation" (governmental institutions, workplaces, public transportation services, schools and the like) are obliged to accommodate different beliefs. By contrast, the principle of religious accommodation today is not a principle of exegesis at all, but rather, a regulatory principle that demarcates the limits of the power of public institutions to regulate those who are subject to their rules. Unlike the classical principle of accommodation, developed by the rhetoricians and grammarians as a hermeneutical principle and subsequently

adapted by Christian and Jewish theologians to guide the interpretation of their sacred texts, the contemporary doctrine of accommodation is not meant to guide interpretation, either of religious or secular texts. Or rather, it guides interpretation (e.g., of the Constitution) only inasmuch as it asserts the existence of a limit on the regulatory power of the state and other public institutions obliging them to protect a substantive personal right (i.e., to accommodation.) Thus it is not just that the principle of divine of accommodation is a principle of and about the divine, a religious principle as opposed to a secular doctrine, which is what we take the modern doctrine of religious accommodation to be. It is also that the original principle of divine accommodation was an exegetical principle, whereas the modern doctrine of religious accommodation is only secondarily exegetical, it being in the first place a substantive proposition about the rights which principles of justice and equity demand.

In all of these ways, it would seem that "their accommodation" is not "our accommodation." And yet I have maintained that the two are one, or at least that there is an intimate connection between the two. I likewise am suggesting that current views (and confusions) about what the substantive doctrine of a right to legal accommodations demands are directly influenced not only by ancient principles of legal exegesis, but more specifically by the ideas about God's relationship to the limitations and consequent variability of

mankind that were encapsulated in the medieval theological doctrine of divine accommodation.

I have offered this historical reconstruction of the genealogy of an idea not for its own sake but because I believe it sheds light on the contemporary doctrine of religious accommodation and the dilemmas that surround and confound its application. Beyond the insight it gives us into the contemporary practice and principle of accommodating religious beliefs (and claims and challenges to the same), reconstructing the historical career of that concept illuminates broader issues as well, including the modern state's secular nature, its liberal nature, the relationship between its secular and liberal nature, the nature of liberalism, and the conditions that at once necessitate and confound—even undermine—religious and legal pluralism. Recovering the logic of the theological argument for accommodation, and seeing how that logic leads to an emergency theory of the state (all states), helps us to better understand Robert Cover's dictum that liberal virtues are "imperial" as opposed to "paideic,"[64] and thus helps us to gain deeper insight into the links between liberalism and conservatism, pluralism and empire, states of exception and states of law. At the same time, along with the larger edifice of secularist theology of which the doctrine of accommodation is a part, it provides us with a new (or rather, old, but long-forgotten) perspective on the

[64] Robert Cover, "Foreword: Nomos and Narrative," Harvard Law Review 97 (1983), 4.

relationship between religion and the state and the very meaning of secular government and law.

I have engaged in this reconstruction of the deep theological roots of modern (secular) political theory not for the sake of producing a more faithful historical account (either of the liberal political tradition or of the intellectual tradition of political theology), but rather, for the sake of attaining a better understanding of liberalism and its inherent relationship to the state of emergency, the exception, and to theological thought—in short, to all of the essential components of political theology. Both liberalism's relationship to political conservatism and its relationship to religion have been badly misconstrued. We may come to understand liberalism and its paradoxes better if we see how the fundamentally liberal doctrine of accommodation and the quintessentially conservative political theological doctrine of the state of emergency (or state of exception) have always been interrelated if not one and the same.[65]

To those who are skeptical of the reconciliation between political theology and liberal secularism proposed here, and committed to the reigning belief that it political theology is unequivocally antiliberal and antisecular, I want to say: at least consider the possibility that the doctrine of divine

[65] In a similarly irenic spirit, others have proposed interpretations of political theology that incorporate the ethics of the neighbor. See Slavov Zizek, Eric L. Santner & Kenneth Reinhard, The Neighbor: Three Inquiries in Political Theology (University of Chicago Press, 2006).

accommodation is part of the canon the political-theological thought. If so, then what are the implications for political and legal theory? What are the implications for liberalism, for political theology, and for the relationship between them? Perhaps the proposition that the theological doctrine of accommodation belongs in the canon of political theological thought can be refuted. If so, I would like to understand what the basis is for its refutation is. But if it cannot be refuted, then I hope that readers will join me in continuing to think through the implications of that doctrine's dual role in generating both the emergency theory of law and politics and the theory of liberalism that dominates our political thinking and political practices today.