Political Theology with a Difference

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I. 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 people to condemn the subject and take it off the table of intellectual conversation forever. Even people who have only a nodding acquaintance with this episode in the annals of political thought know enough to dismiss Schmitt as a German political theorist who venerated authoritarianism, exalted political violence, derided liberalism, and explicitly lent the imprimatur of his theory of political theology to Hitler's Nazi ideology and 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 the subject found in many quarters of the academy. Notwithstanding the growing prominence of states of emergency around the world that have led many intellectuals to find the turn to Schmitt practically irresistible, there are many other academics, including ones who are receptive to

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1. On the debate about the nature and extent of Schmitt's Nazi sympathies, see, e.g., JOSEPH W. BENDERSKY, CARL SCHMITT: THEORIST FOR THE REICH (1983); DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR 85–101 (1997); RAPHAEL GROSS, CARL SCHMITT AND THE JEWS: THE "JEWISH QUESTION," THE HOLOCAUST, AND GERMAN LEGAL THEORY (Joel Golb trans., 2007); William E. Scheuermann, *After Legal Indeterminacy: Carl Schmitt and the National Socialist Legal Order, 1933–36*, 19 CARDOZO L. REV. 1743 (1998); William E. Scheuermann, *Legal Indeterminacy and the Origins of Nazi Legal Thought: The Case of Carl Schmitt*, 17 HIST. POL. THOUGHT 571 (1996).

other forms of radical critique, who vehemently resist Schmitt's theory that the state of emergency is the true nature of political sovereignty.[2]

For others, it is not its association with illiberal politics, but other apparent features of political theology that stand in the way of accepting or even engaging with it. 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]—many people 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-enchantment" is undoubtedly responsible for much of the resistance to political theology found among people otherwise drawn to radical critique.[5] If, as it is sensed, political theology is more than a history of ideas and actually puts forward claims about the nature of law and political sovereignty 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. The possibility that there might be differences between the theological politics of religious conservatives who call for the recognition that "this is a Christian nation" (or a Muslim, Jewish, or Hindu nation as the case may be)[6] and the

2. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (Mass. Inst. of Tech. trans., 1985) (1934).

3. *Id.* at 36.

4. Against this standard secularization thesis, a rising tide of scholarship has emerged contesting the proposition that the religious underpinnings that traditionally undergirded the social and political order have fallen away. *See* TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY (2003); PETER L. BERGER ET AL., THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS (Peter L. Berger ed., 1999); JOSÉ CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD (1994); CHARLES TAYLOR, A SECULAR AGE (2007). Related literature in the field of European intellectual history, devoted to debunking, or complicating, the standard opposition between religion and the Enlightenment, is analyzed in Jonathan Sheehan's excellent review essay, *Enlightenment, Religion, and the Enigma of Secularization*, 108 AM. HIST. REV. 1061 (2003). 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 to support either the standard secularization thesis or the emergent critique. My position, advanced in this Article, might be viewed as an attempt to forge a dialectical synthesis of the two.

5. *See* Yishai Blank, *The Reenchantment of Law*, 96 CORNELL L. REV. 633, 633–35 (2011).

6. For examples of the assertion that this is a Christian nation found in contemporary American conservative political discourse, see, e.g., DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, AND RELIGION (2d ed. 1997); DAVID BARTON, THE MYTH OF SEPARATION: WHAT IS THE CORRECT RELATIONSHIP BETWEEN CHURCH AND STATE? (3d ed. 1992); JERRY FALWELL, LISTEN, AMERICA! (1980); TIM LAHAYE, FAITH OF OUR FOUNDING FATHERS (1987). For discussion, see BENJAMIN HART, FAITH & FREEDOM: THE CHRISTIAN ROOTS OF AMERICAN LIBERTY (1988); John D. Inazu, *Between Liberalism and Theocracy*, 33 CAMPBELL L. REV. 591, 598 (2011). Regarding the many varieties of Islamic states and nation-states rooted in other faith

intellectual tradition of political theology of which Schmitt was the chief modern exponent is just too fine a point. For people of a certain sort of secularist sensibility, any intellectual project that harnesses theology for political ends or grounds government on theology is suspect, seeming as it does to offend their sense of the inviolability of the principle of separation between church and state.

This aversion to religion in politics is surely one reason that explains 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 of articles and books on political theology have poured out of the academy over the last decade,[7] and

traditions that have been envisaged and, in growing numbers of cases, actually established in contemporary times, see RAN HIRSCHL, CONSTITUTIONAL THEOCRACY (2010). Hirschl rightly notes that not all states that define themselves as Jewish, Islamic, etc., are, ipso facto, theocratic, and further recognizes that that the question of how to define theocracy and distinguish theocratic from non-theocratic forms of government is not an easy one. *Id.* at 2–6.

7. Writing in 2011 about the current revival of interest in Schmitt in his article, *Carl Schmitt and the Critique of Lawfare*, David Luban observes that "[a] Lexis search reveals five law review references to Schmitt 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." David Luban, *Carl Schmitt and the Critique of Lawfare*, 43 CASE W. RES. J. INT'L L. 457, 468 (2011). A more recent search on JSTOR unearthed over 600 results for the past ten years. Paul Kahn traces the revival of interest in Schmitt to the collapse of the Soviet Union in 1989. *See* PAUL W. KAHN, POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 6 (2011) ("Post-1989, Schmitt became a reference point for those who sought to develop a broadly antiliberal theory, free of the decades-old dispute between the communitarians and the liberals."). For just a small sampling of contemporary legal periodical literature discussing Schmitt's concept of political theology, in addition to the Scheuermann sources cited *supra* note 1, see Lior Barshack, *Constituent Power as Body: Outline of a Constitutional Theology*, 56 U. TORONTO L.J. 185, 185–86, 222 (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" and remaining rooted in "the quest for a theological, or semi-theological, understanding of constituent power";; Paul W. Kahn, *The Question of Sovereignty*, 40 STAN. J. INT'L L. 259, 263–64 (2004), drawing parallels between the understanding of the relationship of law to sovereignty in the modern international order and Schmitt's conception of political sovereignty; Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CAL. L. REV. 235, 238 (2007), asserting "parallels" between the Bush administration's "theory of Executive power" and the political theory of German constitutional theorist Carl Schmitt; Andrew Norris, *Sovereignty, Exception, and Norm*, 34 J.L. & SOC'Y 31, 31 (2007), critiquing Schmitt's conception of sovereignty; 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, 1003–04 (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; D.A. Jeremy Telman, *Should We Read Carl Schmitt Today?*, 19 BERKELEY J. INT'L. L. 127 (2001), reviewing the 1999 publication of the edited volume, GREGORIS ANANIADIS ET AL., THE CHALLENGE OF CARL SCHMITT (Chantal Mouffe ed., 1999); and *Symposium, Carl Schmitt: Legacy and Prospects: An International Conference in New York City*, 21 CARDOZO L. REV. 1469 (2000), collecting responses to Schmitt's work. For book length treatments (again, just a small sample), see, e.g., DYZENHAUS, *supra* note 1; DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY (2006); OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (2006); BONNIE HONIG, EMERGENCY POLITICS: PARADOX, LAW, DEMOCRACY (2009); EMERGENCIES AND THE LIMITS OF LEGALITY (Victor Ramraj ed., 2008); SOVEREIGNTY, EMERGENCY, LEGALITY (Austin Sarat ed., 2010).

for people who are generally allergic to intellectual fashions,[8] that by itself is enough 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 grew, I resolutely refrained from reading both his work and the works of Schmitt from which his theory of "the state of exception" derives.[9] When I did finally read Agamben, I was slow to perceive the connections with my own interests. Although I work on law and religion, I failed to appreciate how the liberal tradition of legal and political philosophy on which I work could be illuminated by the theory of the state of the exception or by political theology, more generally, except by way of critique and a study in contrasts. The only one of my projects where the connection to political theology was immediately apparent to me was one that was not, on the face of it, about either law and religion or liberalism. Rather, it was an exploration of the relationship between property and sovereignty that focused on the practice and the concept of "establishing facts on the ground."[10] The practices of converting de facto into de jure realities, commonly described as creating facts on the ground,[11] did seem to fit rather perfectly with Agamben and Schmitt's key idea that sovereignty is constituted through the declaration of "the exception."[12] Likewise, the political context to which the term "facts on the ground" is most commonly applied (Jewish settlement of the Occupied Territories) readily lent itself to the idea that the state of emergency is a permanent condition, the defining feature of modern political sovereignty and not its antithesis.[13]

This 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 broader interests, which lay in the area of the dilemmas of liberalism that arise in 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

8. *See, e.g.*, Steven Lubet, *Is Legal Theory Good for Anything?*, 1997 U. ILL. L. REV. 193.

9. GIORGIO AGAMBEN, STATE OF EXCEPTION: HOMO SACER II (Kevin Attell trans., 2005) [hereinafter AGAMBEN, STATE OF EXCEPTION]. Another work of Agamben's that excited scholarly attention in this period was GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (Daniel Heller-Roazen trans., 1995) [hereinafter AGAMBEN, HOMO SACER I]. Examples of legal scholarship reacting to these works include, inter alia, Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 EUR. J. INT'L L. 613 (2005); John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765 (2007); Charles R. Venator Santiago, *From the Insular Cases to Camp X-Ray: Agamben's State of Exception and United States Territorial Law*, 39 STUD. L., POL. & SOC'Y 15 (2006); Adam Thurschwell, *Specters of Nietzsche: Potential Futures for the Concept of the Political in Agamben and Derrida*, 24 CARDOZO L. REV. 1193 (2003).

10. *See* Nomi Maya Stolzenberg, *Facts on the Ground*, *in* PROPERTY AND COMMUNITY 107 (Gregory Alexander & Eduardo Penalver eds., 2010).

11. For a typical example of the usage of the term, see ALLISON B. HODGKINS, ISRAELI SETTLEMENT POLICE IN JERUSALEM: FACTS ON THE GROUND (1998).

12. *See* AGAMBEN, STATE OF EXCEPTION, *supra* note 9; SCHMITT, *supra* note 2.

13. *See* Stolzenberg, *supra* note 10, at 126–28.

interest to me were not the same. What I could not then see was how the theoretical framework of political theology might illuminate the concepts of liberal secularism and the conundrums involved in its confrontation with religion that I was interested in. And so I left the entire subject of political theology 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). Rather, I relate it because I hope to be able to overcome the resistance that I expect to find in others by explaining how I accidentally came upon a view of political theology that should be more attractive, or at the very least, more interesting, to those who share the common aversion to political theology's ostensible illiberalism and antisecularism. For it was only by stumbling upon political theology by accident, without intending to and without reading it through the lens of Schmitt and Agamben, that I came upon a conception of it that is compatible with, or perhaps even generative of secular and liberal conceptions of law and politics. Notwithstanding the fact that this version of political theology shares the fundamental characteristics of the emergency theory of politics that ostensibly divides political theology from liberalism, this is a version that merges with the political philosophy of liberalism.

Following Nancy Rosenblum (who elsewhere posited the existence of "another liberalism"),[14] we might call this conception "another political theology," or, perhaps even better, "political theology with a difference." It is political theology with a difference in two senses. First, it differs from the standard account of political theology inasmuch as it proposes a very different relationship to liberalism than one of mutual antagonism. Second, it contains (and 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.

This 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.[15] For

14. *See* NANCY L. ROSENBLUM, ANOTHER LIBERALISM: ROMANTICISM AND THE RECONSTRUCTION OF LIBERAL THOUGHT (1987).

15. 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., 2000). On the variety of usages to which the principle of accommodation could be put, including profoundly illiberal ones, see AMOS FUNKENSTEIN, THEOLOGY AND THE SCIENTIFIC IMAGINATION FROM THE MIDDLE AGES TO THE SEVENTEENTH CENTURY 253 (1986): "The systematic exploitation of this new figure of thought varied according to polemical or apologetic needs. At times it served to enhance apocalyptic expectations, at times to curb them; at times it served to stress the continuity of the old and new dispensation against Marcion and the agnostics, at times to stress, against Jews, their difference; it was later instrumental in the construction of a political theology, but was also instrumental in refuting any intrinsic link between

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 Greek tradition of classical rhetoric.[16] 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, corresponding to the evolution of early modern thought. In Funkenstein's account, it appears as the very origin of modern secularist thought—notwithstanding its essentially theological character. 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. It is not, I think, a terribly great leap to conclude that the origins of modern political doctrines of liberalism and secularism also trace back to this medieval and early modern doctrine (with its even older roots in the ancient tradition of classical rhetoric).

It is far more counterintuitive, and therefore much more controversial, to propose that the tradition of political theology associated with Schmitt likewise originates in the theological doctrine of accommodation. If both the conclusions proposed here hold true (that liberalism derives from the theological principle of accommodation and so does political theology), 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, of course, is perfectly consistent with the perspective of radical critical thought, which has always seen liberalism and secularism as containing their opposites.[17] Radical critique, which views

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Christianity and the Roman Empire." Funkenstein's subsequent discussion of the political theology constructed out of the doctrine of accommodation, focusing on Eusebius's argument for a universal, Christian monarchy (which served to justify the Holy Roman Empire and Augustine's theory of the earthly city and the city of God), demonstrates that what I have characterized as a fundamentally liberal principle (divine accommodation) could be used to justify illiberal forms of government just as well as liberal ones. The point is reinforced by Funkenstein's later discussion of Vico's links to Hobbes, with Vico's writings being a paradigmatic application of the doctrine of accommodation to human history. *Id.* at 280–83.

16. On this tradition's classical roots, see KATHY EDEN, HERMENEUTICS AND THE RHETORICAL TRADITION: CHAPTERS IN THE ANCIENT LEGACY AND ITS HUMANIST RECEPTION (1997). On its development in Christian and Jewish medieval and early modern thought, see FUNKENSTEIN, *supra* note 15. For further discussion of the doctrine of divine accommodation, see STEPHEN D. BENIN, THE FOOTPRINTS OF GOD: DIVINE ACCOMMODATION IN JEWISH AND CHRISTIAN THOUGHT (1993); Stephen D. Benin, *The Cunning of God and Divine Accommodation*, 45 J. HIST. IDEAS 179 (1984); Daniel Stolzenberg, *John Spencer and the Perils of Sacred Philology*, 214 J. PAST & PRESENT 129, 149 (2012), describing the "turn to the doctrine of divine accommodation" in the thought of John Spencer.

17. On the illiberalism of liberalism, see, e.g., HERBERT MARCUSE, REPRESSIVE TOLERANCE (1965); Stanley Fish, *Liberalism Doesn't Exist*, 1987 DUKE L.J. 997, 999 (1987). On the dependence of the secular state on what is variously described as religion, "the sacred," or hidden theological

liberalism as being riddled with contradictions, has traditionally focused on excavating the hidden illiberalism of liberalism. More recently, it has turned to revealing liberal secularism's hidden dependence on religion as well.[18] These critical perspectives are not difficult to mesh with the proposition that liberalism is rooted in an emergency theory of politics, which in turn is rooted in traditional theology.

The proposition that political theology is rooted in the protoliberal theological doctrine of accommodation likewise meshes fairly easily with the burgeoning literature on the theological roots of liberalism. This a relatively new school of historical scholarship, which insists upon the original, if not the ongoing, dependence of liberal principles on theological premises found in Christian (and Jewish) thought.[19] True, the theology that this literature purports to unearth is not "political theology" in the specialized sense of that term associated with Schmitt.[20] Neither radical critique nor the new literature on liberalism's religious foundations portrays the theology that undergirds liberalism as an *emergency* theology. The particular kind of theology hallowed in the conservative tradition of political-theological thought is viewed by most historians and critics of liberalism to be antithetical to liberalism. Nonetheless, the positions taken respectively by radical critics of liberal secularist thought and the new historians of liberalism's religious roots are fundamentally compatible with the first proposition advanced here, namely, that liberalism is grounded in the theological doctrine of accommodation.

If, as this Article contends, this doctrine is rightly seen as an emergency (i.e., a political) theology, then it follows that scholars are mistaken in their assumption that liberalism and political theology are mutually antagonistic. This assertion flies

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foundations, see, e.g., ASAD, *supra* note 4; EVE DARIAN-SMITH, RACE, RELIGION, RIGHTS: LANDMARKS IN THE HISTORY OF MODERN ANGLO-AMERICAN LAW (2010).

18. *See* ASAD, *supra* note 4; DARIAN-SMITH, *supra* note 17.

19. *See* JOHN DUNNE, THE POLITICAL THOUGHT OF JOHN LOCKE: AN HISTORICAL ACCOUNT OF THE ARGUMENT OF THE 'TWO TREATISES ON GOVERNMENT' (1969); JAMES R. MARTEL, SUBVERTING THE LEVIATHAN: READING THOMAS HOBBES AS A RADICAL DEMOCRAT 198–99 (2007); JEREMY WALDRON, GOD, LOCKE AND EQUALITY: CHRISTIAN FOUNDATIONS OF JOHN LOCKE'S POLITICAL THOUGHT (2002). For support for the specific idea that the commitment to secular government and law derives from theological doctrines, see Peter Fitzpatrick, *Legal Theology: Law, Modernity and the Sacred*, 32 SEATTLE U. L. REV. 321, 326 (2008): "What is forgotten . . . is the divine, indeed imperial, origin of secular political authority in the Occident."; John Witte, Jr., *That Serpentine Wall of Separation*, 101 MICH. L. REV. 1869 (2003), reviewing DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002), and discussing biblical and later theological foundations of the principle of separation between church and state; see also several articles by Stephen D. Smith, *infra* note 32.

20. 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 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. See *infra* p. 414 for an elaboration of my account of the defining features of political theology.

in the face of the prevailing view. Because of the deep-seated belief that political theology and liberalism are diametrically opposed philosophies, it is only to be expected that readers with expertise in the subject of political theology will strongly disagree with the version of political theology proposed in these pages. This is another form of resistance I am hoping to dispel with my autobiographical preface. Unlike the form of resistance discussed earlier (resistance to the very discussion of political theology), I expect to find this second form of resistance among people who, far from harboring an aversion to political theology, are, on the contrary, well acquainted with the subject. Accustomed as they are to viewing liberalism and political theology as philosophical opposites, they are unlikely to accept or even recognize the fusion of political theology and liberalism proposed here. I hope explaining the circuitous route that led to my discovery of a "different" political theology will soften this resistance as well.

Had I gone looking for this counterintuitive version of political theology, I never would have found it. Had I searched for it in the contemporary literature inspired by Agamben and Schmitt, I would not have come to the understanding I now have that political theology is a fundamentally secularist project, constituting the very font of modern secular and liberal thought.[21] 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 ingredients 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.[22] Had I not been looking for something altogether different, something which 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

21. I *would* have found support for the conception of political theology advanced in this Article in MENACHEM LORBERAUM, POLITICS AND THE LIMITS OF LAW: SECULARIZING THE POLITICAL IN MEDIEVAL JEWISH THOUGHT (2001), and Suzanne Last Stone, *Religion and State: Models of Separation from Within Jewish Law*, 6 INT'L. J. CONST'L LAW 631 (2008), had I had the sense to read those works at the time when I first began to make the connection between political theology and secularist political thought. But since I did not know I was looking for it, it was not until later that I read these two studies, both of which provide confirmation of the theological roots of secularist legal philosophy by tracing its emergence in medieval Jewish thought.

22. 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.

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 the rabbit hole, I chased the original idea of secularism only to find myself not in a wonderland but definitely in a kind of looking-glass world, where religion itself subscribes to secularism and liberalism is incubated in this secularist theology. Other concepts appear in this universe to be equally topsy-turvy from a contemporary standpoint. The conception of political theology that appears in this conceptual universe departs from the prevailing view that political theology and liberalism are diametrically opposed. It likewise departs from the prevailing view that political theology rejects the implicit secularism of modern political thought. It is a conception of politics and law which is simultaneously grounded in the principles of accommodation and emergency, and based on a theology that recognizes the necessity of separating law from religion and establishing a secular state.

This Article is just a preliminary report on what I found in this looking-glass world. It is not a complete account of that world. To do that would require reconceptualizing all of liberal thought as political-theological thought while, simultaneously, reconstructing all of political theology as a gloss on the doctrine of divine accommodation. Here I can only try to make the case that undertaking such a simultaneous reconstruction of liberalism and political theology would be a worthwhile project. I do so by attempting to demonstrate 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 that have already been produced by scattered bodies of literature that have yet to be synthesized and formed into a coherent narrative. The narrative proposed here synthesizes the following propositions: (1) the doctrine of divine accommodation led to the elaboration of a "secular theology," (as Funkenstein and others have shown);[23] (2) this secularist theology spawned the development of liberal, or more precisely, protoliberal, political and legal theories (on this point, the historical scholarship is more suggestive than conclusive);[24] (3) these theologically grounded political

23. *See* FUNKENSTEIN, *supra* note 15, at 3 (explaining how the "secular theology" that "emerged in the sixteenth and seventeenth centuries" was *secular*, not only "in that it was conceived by laymen for laymen," but "also in the sense that it was oriented toward the world, *ad seculum*," and further explaining that it was *theology* in that it "dealt with most classical theological issues—God, the Trinity, spirits, demons, salvation, the Eucharist"—and because it was "not confined to the few truths that the 'natural light' of reason can establish unaided by revelation"). The rest of this magisterial study develops the secularist character of this theological tradition rooted in the doctrine of divine accommodation in more detail. *Cf.* Stolzenberg, *supra* note 16, at 162 (tracing "a key argument in the Enlightenment attack on revealed religion to the apologetic scholarship of an Anglican clergyman," who invoked the theological doctrine of divine accommodation).

24. *See* FUNKENSTEIN, *supra* note 15, at 265 (explaining how the doctrine of divine accommodation was used to justify the diversity of religious movements); *id.* at 271 (describing the "serious attempt to define the scope of [human] autonomy, of 'the dignity of man'" that evolved out of the theological tradition of accommodation); *id.* at 279–89 (analyzing Vico's links to Hobbes and

theories contain all the essential ingredients of political theology (i.e., an emergency theory of politics and a theological approach to the subject of political and legal obligation)—even as they *simultaneously* bear the defining characteristics of a liberal theory of the state and law. If one accepts these three propositions (the first of which is a well-established historical claim, the second of which awaits further development, the latter of which might be the sole innovative leap of this Article), then there is a strong basis for adopting the revisionist views of political theology and liberalism proposed here.

Nonetheless, I should emphasize the tentativeness of the historical and theoretical claims I am making. I cannot claim with any certainty that the theological tradition that grows out of the doctrine of divine accommodation is *the* birthplace (or even *a* birthplace) of liberalism or secularist visions of law, as a point of fact. Nor can I simply assert that this theological tradition is properly classified as a political theology without acknowledging that this is a matter of interpretation. Since there is no settled consensus about what the defining characteristics of a political theology are, it is hard to say with certitude whether any intellectual tradition possesses these characteristics.[25] In recognition of the slipperiness of the term, all I can do is be clear about the definition of political theology to which this Article subscribes,[26] while recognizing that there are other ways of using and defining the term.

There are also multiple ways of characterizing the relationship between the revisionist version of political theology I offer and the standard version of political theology associated with Schmitt and Agamben. One possibility is that these are two distinct traditions of theologically grounded political thought—each bearing the essential hallmarks of political theology, each representing an alternative way of interpreting God's divine plan and its implications for human government within that shared political-theological framework, each existing on a separate, parallel track. A second possibility is 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.[27]

Spinoza and the emergence of a sense of human autonomy out of the principle of divine accommodation).

25. For example, the highly influential conception put forth by Ernst Kantorowicz does not equate political theology with an emergency theory of politics, and represents a much broader use of the term, albeit one associated with the specific medieval tradition which fused theology with the absolutist state and gave rise to the notion of the divine right of kings. *See* ERNST H. KANTOROWICZ, THE KINGS' TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY (1997). On the relationship between Kantorowicz's and Schmitt's definitions of political theology, see ALAIN BOUREAU, KANTOROWICZ: STORIES OF A HISTORIAN 104–06 (Stephen G. Nichols & Gabrielle Spiegel trans., 2001).

26. See *supra* note 22 and accompanying text.

27. LEO STRAUSS, PERSECUTION AND THE ART OF WRITING 142–201 (1952). For an argument against characterizing accommodationist theology as an esoteric philosophy in the Straussian mold, at least in one particular context (that of its employment by the seventeenth century biblical John Spencer in defense of the Church of England), see Stolzenberg, *supra* note 16, at 144–46.

On this view, the more familiar and unequivocally antiliberal version of political theology would be the exoteric tradition, while the less familiar, paradoxically liberal version of political theology offered here represents the less accessible, more intellectual, esoteric "heterodox truth"[28] of political theology that the exoteric version papers over. A third possibility is that these are not different strands of thought at all. Rather, they might represent the same body of thought viewed from different angles, each of which brings a different aspect of political theology to light (while hiding other aspects of political theology from full view). If this is correct, then there is no distinction between the two versions of political theology; they are, rather, paradoxically one and the same.

A full treatment of political theology's relationship to liberalism would answer the question of how the revisionist view of political theology proposed here relates to the more familiar view. The aims of this Article are more limited. All I try to do here is show that liberalism and political theology share a common root in the doctrine of divine accommodation and thereby make a prima facie case for their possible fusion.

This work is a part of an ongoing project of reconstructing the theological roots of our modern traditions of liberal, secular legal thought. Other scholars have taken the view that all significant concepts of the modern theory of the state are secularized theological concepts,[29] and still others have contested the dominant "secularization thesis," according to which secularism has steadily supplanted traditional religious faith, leaving religion to wither away.[30] 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 from which (I think) 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.[31] There are many components to this intellectual tradition, including (as the ultraconservative proponents of political theology maintain) an emergency theory of political sovereignty. What I am interested in exploring here is the possibility that the theological theory of this state of emergency has always been coupled with a principle of accommodation, which derives from the theological doctrine of

28. STRAUSS, *supra* note 27, at 24.

29. *See, e.g.*, AGAMBEN, HOMO SACER I, *supra* note 9, at 91–103; AGAMBEN, STATE OF EXCEPTION, *supra* note 9, at 57; KAHN, *supra* note 7, at 3–4; Blank, *supra* note 5, at 633–34; Kahn, *supra* note 7, at 260–61.

30. *See* sources cited *supra* note 4; DARIAN-SMITH, *supra* note 17.

31. *See* Nomi Maya Stolzenberg, *The Profanity of Law*, *in* LAW AND THE SACRED 29 (Austin Sarat et al. eds., 2007); Nomi Maya Stolzenberg, *Theses on Secularism*, 47 SAN DIEGO L. REV. 1041, 1056 (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, *supra* note 15, at 3–12.

divine accommodation. The remainder of this Article offers a description of the content of that doctrine and a brief overview of its evolving usages. It suggests that it is out of this ancient principle that modern notions of liberalism, pluralism, and religious and cultural accommodation emerge. Even if one does not accept this historical claim, the account below suggests the logical coherence of liberalism with the fundamental tenets of a theologically derived emergency theory of politics. This raises a conceptual possibility that should give pause to liberal critics of political theology and radical critics of liberalism alike.

II. 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 were to try to pack that history into one sentence, one might say the following:

> 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 is an ancient and theological concept, itself a product of the theologizing that the classical principle of accommodation underwent.

What this extremely condensed synopsis highlights is the alteration in the meaning of secularism that occurred over (a long, long) time. As others have observed,[32] the concept of secularism has itself been secularized, shorn of its original religious foundations. This makes it a challenge to regain a sense of the original meaning of either secularism or accommodation. For the two concepts 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 versa.

The virtue of the sort of ridiculously compressed history of the principle of accommodation offered here is that it makes these connections perspicuous. By

32. *See* TAYLOR, *supra* note 4; *see also* Stephen D. Smith, *How is America "Divided by God"?*, 27 MISS. C. L. REV. 141, 150 (2007); Stephen D. Smith, *Recovering (From) Enlightenment?*, 41 SAN DIEGO L. REV. 1263, 1276–77 (2004); Stephen D. Smith, *Separation and the Fanatic*, 85 VA. L. REV. 213, 223 (1999); Stephen D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 958–59 (1989); Stephen D. Smith, *The "Secular," the "Religious," and the "Moral": What Are We Talking About?*, 36 WAKE FOREST L. REV. 487, 502–03 (2001).

collapsing the time frame and speeding up the *longue durée*, the condensed version of the history of its evolution highlights the serial processes of theologization and secularization that the principle underwent. It shows that the concept of secularism was historically intertwined with the idea of (divine) accommodation and was itself first a theological concept, which was subsequently secularized.

To emphasize the successive phases of theologizing and secularization, we might reformulate the highlight reel version of this intellectual history to say:

> The principle of accommodation begins in antiquity, in the precincts of the law, courts, and the rhetorical manuals,[33] where it functions as principle of textual exegesis; it then travels through Christian patristic literature, where it develops into a principle of *biblical* exegesis; it 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, it is returned to its original domain as a principle of secular law, having accumulated along the way various substantive principles of equity and accommodation.

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 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"[34] of Christians and Jews, the principle ended up back in the precincts of secular law, having retained its original rhetorical commitments, yet 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, let us 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

33. EDEN, *supra* note 16, at 2.

34. Funkenstein's title refers to "the scientific imagination" (a term he coined). His book makes clear that the scientific imagination of the period was also, or part of, its theological imagination. *See* FUNKENSTEIN, *supra* note 15, at 11.

interpret legal documents (e.g., statutes, contracts, and wills). Applied to the interpretive challenges posed by textual ambiguities (such as 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 that exist between one moment, one situation, and another.

Just as orators were urged by grammarians to adjust (i.e., accommodate) their words to their audiences' 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. This interconnection is made clear in Kathy Eden's indispensable history of *Hermeneutics and the Rhetorical Tradition*, which describes Cicero and Quintilian, whose rhetorical manuals provided "the most comprehensive and detailed treatments of interpretation" in classical antiquity, as "[e]xpert[s] in the art of accommodation, as the *ars rhetorica* was frequently called."[35] Eden singles them out as philosophers who "recognized the accommodative nature of all interpretation founded upon this same art,"[36] explaining that, in the classical tradition, it is "[e]quity'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."[37] In this way, equity was linked to accommodation. Together, they 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.

Underlying this "art" was the recognition of "the infinite variety and variability of human circumstance."[38] As described by Eden, equity, in its outcome-focused role, "offers a necessary correction to the 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."[39] Accommodation was thus, from the very beginning, associated with the recognition of the variety

35. EDEN, supra note 16, at 2.
36. *Id.* (emphasis added).
37. *Id.* at 14.
38. *Id.* at 13.
39. *Id.* at 13 (emphasis added).

of human circumstances and the refusal to impose on that variety a rigidly uniform law.

Act Two: Theological Accommodation

The recognition of differences in historical circumstances played an equally important role in the next important station in the principle of accommodation's career where this principle of classical hermeneutics was integrated into Christian and Jewish thought. In the hands of Christian and Jewish theologians, the principles of accommodation and equity served, in the first instances, as hermeneutical tools for interpreting scripture, and, more particularly, for addressing a variety of challenges and "embarrassments"[40] 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 discoveries and empirical observations.

The classical tradition of rhetoric, in particular the principle of accommodation, was an effective tool for explaining away these various embarrassments and for reconciling the seeming inconsistencies within the text. It likewise served well as a tool for reconciling seeming inconsistencies between the text of the Bible and the findings of the then modern science. More broadly, it served to reconcile 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 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.[41]

This reasoning served first to explain away such theological embarrassments as the "prima facie anthropomorphism in the Bible."[42] ("The reason they are employed," per Maimonides, "is to accommodate the lesser capacity for abstraction of the masses. The law was given to all in a language to be understood by all.")[43] "Gradually," Funkenstein goes on to explain,

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40. FUNKENSTEIN, *supra* note 15, at 214 (describing the mindset of early biblical scholars for whom "the very original presence of prima facie anthropomorphism in the Bible was embarrassing and called for a justification" that the doctrine of accommodation supplied).

41. *Id.* at 213.

42. *Id.* at 214.

43. *Id.*

> [A]s 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 scientists—in the Middle Ages no less than today. But Scripture cannot be mistaken; rather, it speaks in the language of everyday man.[44]

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 and rhetoric of which it forms a core part) had a number of important, transformative effects. By Funkenstein's account, virtually all of modern scientific thought, including the social sciences as well as the physical sciences, can be traced to this fruitful synthesis of classical and religious thought.[45]

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 absorption into Christian and 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 its commitment to the principles of the rhetorical tradition.[46]

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

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44. *Id.* at 214–15.

45. 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.

Id. at 213. His own work takes a giant step in correcting this oversight, painstakingly tracing the evolution of that principle from a legal exegetical principle to a principle of biblical exegesis and then, in an ever-accelerating trajectory, to the birth of modern scientific theories.

46. For this reason, I concur wholeheartedly with Brook Thomas's position that the state of emergency is best understood through 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, *Reconstructing the Limits of Schmitt's Theory of Sovereignty: A Case for Law as Rhetoric, Not as Political Theology*, 4 U.C. IRVINE L. REV. 239 (2014). If my proposal is correct, then that is a 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. 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, *Anti-Anxiety Law: Winnicott and the Legal Fiction of Paternity*, 64 AM. IMAGO 339 (2007); Nomi Maya Stolzenberg, *Bentham's Theory of Legal Fictions—A "Curious Double Language,"* 11 CARDOZO STUD. L. & LITERATURE 223 (1999).

which it was 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. Together with the principle of equity, it provided readers of legal texts with tools for resolving ambiguities and preventing laws from having unjust results. Transferring those exegetical tools to the project of interpreting the biblical text precipitated 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 remain 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—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 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: "That God adjusted his acts in history to the capacity of men to receive and perceive them . . . ."[47] With the latter step, the principle of accommodation crossed over the boundaries of the field of textual interpretation into 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 perpetual 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 conduct greatly expanded the substantive purview of these twin principles. That substantive purview ultimately grew to include theories about the origins and nature of the physical world, theories of history, and theories about the proper form of the state. All of this, including theories about the state's relation to its subjects, its relation to God, to

47. FUNKENSTEIN, *supra* note 15, at 213, 222.

religion, to religious authorities, and to human diversity, was derived from the fundamental theological tenet that God "speak[s] the language of man."[48]

Ultimately, as Funkenstein's work shows, the propulsive force of the theologized principle of accommodation led it to escape the bounds of theology altogether, giving rise to the versions of secular scientific, political, and legal discourse with which we are familiar today. What is offered here is but a small part of that larger story: a brief outline of how the principle of divine accommodation gave rise to a theory of law and politics (a political theology), containing both principles of cultural and religious accommodation and an emergency rationale for the secular state, which together (I suggest) became the foundation of the modern liberal theory of the state.

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

The two main ideas proposed here are (1) that today's liberal doctrines of tolerance and pluralism and separation of church and state, and liberal 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 traveled by those medieval and early modern ruminations passed through the terrain of what is rightly called political theology. My basic contention is that it was through this 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 (i.e., integrated into Jewish and Christian theological thought) and subsequently de-theologized. 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.[49] But, she notes, the "Christianization of rhetorical interpretation-theory" occurred much earlier and "is Paul's doing" in the first instance, "not Augustine's"[50] (though Augustine's thought also marks a key moment in the "Christian appropriation of so-called classical culture").[51] Funkenstein's work covers some of the same Christian ground, 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 (producing the field of modern history and other social sciences) all take root here, in the fertile ground of secular theology. More specifically, they took root in religious reasoning about the implications of divine accommodation for understanding the natural world and man's position in it.

48. The precise quote here is: "The Scriptures speak the language of man." *Id.* at 213.
49. EDEN, *supra* note 16, at 2.
50. *Id.* at 56.
51. *Id.* at 41.

Of utmost importance for our story is the application of this body of theological reasoning to the questions of legal and political order. In addition to paving the way for 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 the political theories derived from the principle of accommodation were uniformly 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. 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) were rooted in the inherently liberal principle that differences among human beings—religious differences, cultural differences, and differences in their historical circumstances—are to be respected as part of God's plan.

At the heart of all of these different interpretations and applications of the principle 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"[52] and, by the same token, "that the Scriptures are adjusted to the capacity of mankind to receive and perceive them."[53] 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. Both the Christian and the Jewish reinterpretations of the classical principle of rhetoric turned it into a theological principle designed to illuminate the meaning of the Bible and God's design. That theologization of the principle of accommodation in turn paved the way for its subsequent modernization and secularization.

Indeed, although it is counterintuitive from a modern standpoint, what connects the older religious notion of accommodation to modern notions of secularism and liberalism is the essentially secularist outlook of the original theological version of the idea. Notwithstanding the multiple and often contradictory usages to which the principle was put and the great variety exhibited by the political theories derived from the principle of divine accommodation, what all those theories have in common is their shared belief in the inherently secular character of human government and law. This secularist character of

52. FUNKENSTEIN, *supra* note 15, at 222.
53. *Id.* at 213.

accommodationist political theologies is hard for modern readers to grasp because of the prevailing view that secularism and religious belief are conceptually dichotomous. It takes a heroic leap of the imagination to think our way out of the belief that theological views cannot be secularist and, conversely, that secularist institutions cannot be based on religious beliefs. 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, 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 naïveté 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 precise 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, sounds paradoxical. Yet this is exactly what I am claiming: 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. More than that, this political theology called 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 from this theological standpoint to *necessarily* deviate from the divine law. Indeed, secular regimes were understood to *violate* the divine law. Yet, according to the theological line of reasoning generated by the principle of divine accommodation,[54] such profane political regimes are a necessity that is divinely ordained.

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54. 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 Stolzenberg, *supra* note 31. That analysis was based, in turn, on the accounts of emergency theories of criminal law derived from canon law found in JOHN LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME (1977); Richard M. Fraher, *Conviction According to Conscience: The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof*, 7 L. & HIST. REV. 23 (1989); Richard M. Fraher, *Preventing Crime in the High Middle Ages: The Medieval Lawyers' Search for Deterrence*, *in* POPES, TEACHERS, AND CANON LAW IN THE MIDDLE AGES 212 (James Ross Sweeney & Stanley Chodorow eds., 1989); Richard M. Fraher, *The Theoretical*

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 emergency theory, as it were, emerges. It was only the apprehension that we all would be plunged into a state of emergency without the institution of effective (albeit imperfect) authorities that could, and did, serve to justify the creation of human 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: the situation in which crime goes unpunished, not precisely forever (its punishment is merely postponed until the afterlife) but, from the standpoint of human suffering, much too long. 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. Such a state of "perpetual" existential threat, (perpetual, that is, within the temporal bounds of the mortal world) was a state of emergency that surely 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, they reasoned, was to suspend the strict procedural canons of divine law (which tolerated no judicial error) and to replace that divine law with a species of what theologians candidly described as an emergency state, enforcing emergency law.[55]

This is how secular law was originally conceptualized: as 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, emergency law. *All* secular law, on this (theological) account, is emergency law. All states are emergency states. That is just what human legal and political authority is from the point of view of the theology of divine accommodation: emergency law, the law

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Justification for the New Criminal Law of the High Middle Ages: "Rei Publicae Interest, Ne Criina Remaneant Impunita," 1984 U. ILL. L. REV. 577, 592; and accounts of similar arguments for emergency law in Jewish law found in GIL GRAFF, SEPARATION OF CHURCH AND STATE: DINA DE-MALKHUTA DINA IN JEWISH LAW, 1750–1848 (1985); J. David Bleich, *Jewish Law and the State's Authority to Punish Crime*, 12 CARDOZO L. REV. 829, 831 (1991); Arnold Enker, *Aspects of Interaction Between the Torah Law, the King's Law, and the Noahide Law in Jewish Criminal Law*, 12 CARDOZO L. REV. 1137, 1148 (1991); Suzanne Last Stone, *Sinaitic and Noahide Law: Legal Pluralism in Jewish Law*, 12 CARDOZO L. REV. 1157 (1991). A more recent work that even more directly accords with the reading of Jewish emergency theology offered here is Oren Gross, *Violating Divine Law: Emergency Measures in Jewish Law*, *in* EXTRA-LEGAL POWER AND LEGITIMACY: PERSPECTIVES ON PREROGATIVE 52 (Clement Fatovic & Benjamin A. Kleinerman eds., 2013).

55. See *infra* note 60 and accompanying text.

that reflects and accommodates to the inability of human beings to follow and be governed by divine law, the law that replaces divine law, in other words—secular law.

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, that means 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—that is to say, secular law, the man-made law that reflects God's accommodation to human beings' needs and imperfections. Such law accommodates to the deficiencies of human beings—which make it impossible for them to follow, enforce, or even recognize the content of the divine law—while recognizing their need for safety and order. Although such law necessarily bears the defects of emergency law (reflecting its human, all too human nature), it is, according to this theological line of argument, *accepted* and *sanctioned* by God as a divine accommodation to human nature.

This vision of the state of emergency, rooted in the theology of divine accommodation, thus constitutes a radical challenge to the emergency theory associated with Schmitt. Schmitt (and his many followers) conceive of the state of emergency as a state of pure power unbounded by law. But the state of emergency envisaged by accommodationist theology 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 the sublunar world, i.e., secular law). At the same time, it challenges the naïve version of the rule of law with its understanding that the secular state, as an emergency regime, supplants the moral law with a harsher legal regime, subordinating human rights to the exercise of political power and "balancing" them against the state's needs as defined by the state. [56]

The full political-theoretical implications of this viewpoint were, of course, open 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 Schmittian 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 eventually constitutionalizing) liberal policies of tolerance, accommodation, and checks and balances *within* the state (the argument being that, precisely because human government is necessary, yet necessarily highly imperfect—indeed, profane—checks on the exercise of political power are necessary).

These were hardly the only ways to interpret the political implications of

56. To put it another way, "the morality of law," see LON L. FULLER, THE MORALITY OF LAW (1964), and what I have called "the profanity of the law" are one and the same. *See* Stolzenberg, *supra* note 31.

divine accommodation. As noted above, there were a great many different political theories that were spun out of the basic principles of accommodationist thought, many of which were of a decidedly antiliberal character. More to the point, 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";[57] and that liberal neutrality is "impossible"[58] or "imperial."[59] Reinserted into its original intellectual (theological) framework, these paradoxical aspects 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 thing.

To put it another way, the rule of law is the same thing as the state of exception (in which the divine law is suspended and replaced by secular law). This explains the illiberal features of the liberal state that generations of radical critics have relished exposing, as if they were revealing a dirty secret: its origination in violence and legal suspension, its essentially imperial character, and its ongoing willingness to suspend rights for the sake of protecting them. 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. Far from appearing paradoxical, from the standpoint of accommodationist political theology, all this is simply the logical and necessary consequence of the original suspension of divine law. The paradoxes of the limits of tolerance and the origination of law out of the suspension (or violation) of law all are seen to emanate from the originary paradox of political founding—not the founding of any particular sovereign state, but rather the establishment of secular law, per se.

To put it another way, it is simply a point of fact, from the point of view of accommodationist theology, that secular law originates when divine law is suspended *and violated* (yet it 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 Schmitt and Agamben's proposition that the state of emergency is indeed (always) permanent. (The emergency is life.) But if this perspective affirms the existence of a

57. Herbert Marcuse, *Repressive Tolerance*, *in* A CRITIQUE OF PURE TOLERANCE 81, 83 (Beacon Press 1965).

58. Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2314 (1997).

59. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 13 (1983).

permanent state of emergency, it also throws it into a new light, revealing it to be at once a state in which the law (divine law) is suspended and, *contra* Schmitt, a state of *law* (i.e., human, secular law). The state of emergency is thus shown to be a state of accommodation (i.e., a state that accommodates (to) human weaknesses and needs). It is at one and the same time a state of exception and a state of normalization, of adaptation to human circumstances, of law and order, normalcy—in short, the state of normal law.[60]

III. 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, it was only natural that the theorists and theologians who undertook to draw the implications of this doctrine for human conduct and knowledge exhibited a similar diversity in their opinions about the proper way to interpret that doctrine and its implications. As we have seen, the doctrine was applied to a great variety of domains and subject areas, including biblical exegesis (where a veritable "exegetical revolution" in the thirteenth century[61] 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);[62] the "New Science,"[63] which included history and the analysis of different human cultures alongside the natural sciences; and the subject here—politics and law. 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 beliefs, perceptions, and ways of understanding the world and interpreting the divine will.

Common to all of these intellectual endeavors, however, was a dawning 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 growing recognition and, more importantly, acceptance of the relative *autonomy* of the natural world,

60. 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.

61. FUNKENSTEIN, *supra* note 15, at 218–19.

62. *See* Stolzenberg, *supra* note 16.

63. FUNKENSTEIN, *supra* note 15, at 213.

including human history. As Funkenstein explicates, the notion of divine accommodation gave rise to a "strong sense of the absolute autonomy and spontaneity of human history."[64] Although this historicist sensibility was modern, it was born of the traditional (classical) insistence on the importance of *context* and reconstructing the *intentions of the author* to determining the meaning of a text. Rhetoric's insistence on contextualizing intent was built into the principle of accommodation, and that propelled the development of a humanist conception of the autonomy of human action. 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—and that this itself was part of God's plan.

Although such theories appeared to diminish the role of God, while simultaneously granting more and more autonomy and authority to the forces of physical nature, history, and human psychology, they grew out of sincere attempts to understand and reconcile the divine attributes of God. Thus, Funkenstein relates how a sense of the autonomy of human history originated in the attempt to explain 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. Being all-powerful, God could have caused the false beliefs of the primitive cultures in which He first revealed Himself to be replaced with the right doctrine of monotheism overnight. Instead, He chose to have human beings come to an ever fuller understanding of monotheism gradually, through a process of internal mental growth, facilitated by His adaptation (accommodation) to their existing beliefs and practices. This, according to the "secular theologians" described by Funkenstein, 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.[65] Why He did so surpassed human understanding; that He did so followed logically from the premises that God is all-powerful, all-knowing and good.

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. All of the natural sciences and the social sciences, in particular the modern fields of history, social thought, and economic thought, are traced by Funkenstein to the evolution of accommodationist thought. In perhaps his most fascinating chapter, on "Divine Providence and the Course of History," Funkenstein traces the dawning of modern historicism to the metamorphosis of divine providence and divine "cunning" into the "invisible hand" of history.[66] Most important for

64. *Id.* at 204.

65. *Id.* at 234–39; *see* EDEN, *supra* note 16; *cf.* Benin, *supra* note 16 (providing a historiography of divine accommodation and characterizing it as the "cunning of God").

66. FUNKENSTEIN, *supra* note 15, at 201 ("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

our purposes is the "legal science" that lay at the core of this historicist revolution.[67] Vico, whose work promoted the historicist revolution, was "an heir," Funkenstein tell us, "to the humanistic interpretation of Roman law,"[68] as well as to the tradition of humanistic philology that developed out of the application of the ancient traditions of textual criticism first to biblical and then to an ever-widening category of social texts. "It was a reaction," 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 écrit* and the adherents of the *coutumes* generated the insight that there could never be an ideal law valid for all times.[69]

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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 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 206. 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 Montesquieu 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. To take just one exemplar, "Vico's key terms . . . are 'harmony,' 'convenience,' 'correspondence,' or 'accommodation,'" terms used to encapsulate 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 (footnote omitted). "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: "[H]umanistic philology surpassed its ancient paradigms; and 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 of divine cunning and "providence" into the "invisible hand" of history is thoroughly discussed by Funkenstein. *Id.* at 202–13.

67. Although American legal scholars commonly associate the idea of law as a legal science with the pedagogic innovations that Christopher Columbus Langdell introduced to Harvard Law School in the 1870s, the idea of legal science goes back much earlier to thinkers such as Vico and Montesquieu, who first applied modern historical methods to the study of law, exploring the variety of legal systems and their relativity to different cultures. On the history of the notion of legal science, see M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEG. HIST. 95 (1986).

68. FUNKENSTEIN, *supra* note 15, at 211.

69. *Id.*

Thus, Vico simultaneously historicized law and placed law at the center of the study of society, using the tools of textual criticism that derived from the ancient tradition of rhetoric, foremost among them, the principle of accommodation.

The question of the nature of law was central to 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 and many different models of sovereignty. What these various political theories (or political theologies) 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 exemplified by Vico also motivated the articulation of different schools of social and economic thought and, most importantly, political thought. All of these theories 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 that was increasingly undeniable, but in principle, eradicable), but also, more fundamentally, with the *belief* that such diversity was not just acceptable to God, but was indeed part of the divine plan.

That said, it was far from obvious that human government was supposed to emulate God's embrace and accommodation of human differences. It did not follow automatically from the principle that *God* accommodated Himself to human variety and diverse beliefs that human societies were supposed to do so. The version of the *imago dei*, which held that people and governments should tolerate diversity because God tolerates diversity, was but one of several logical paths that could be followed out of the core idea of divine accommodation. Quite the opposite conclusion—that governments must not tolerate false beliefs—could be drawn from the principle of divine accommodation. Indeed, divine accommodation was such a malleable principle that it was consistent with all manner of political theories and models of government, from the relatively tolerant to the most illiberal.

Many political philosophers working in this tradition drew the intermediary conclusion that the religious and cultural differences that existed *between* societies represented the arrangement that God had chosen to accommodate different peoples with different beliefs. On this view, it was neither necessary nor right to accommodate differences *within* a single political system; on the contrary, each people was supposed to have its own government and law. On the more liberal end of the spectrum, there were accommodationist theorists who 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. And, at the opposite end of the spectrum, there were those who argued that the principle of divine accommodation demanded the establishment of a single monolithic universal system of belief and law. The idea

that such a system of government was commanded by a God who Himself tolerated religious differences may seem counterintuitive, but it followed logically from the idea that God only tolerated (accommodate) false beliefs *temporarily* in order to better facilitate the transition to the one true faith. Applying this view of divine "cunning" (the forerunner of the historical dialectic), which was commonly twinned the principle of divine accommodation, it was not difficult for Christian theologians to justify human institutions which blended religious and political authority (like the Inquisition or the Holy Roman Empire) as human agents of the divine tutelage under which human beings would shed their false primitive beliefs and progress toward the one, true way. These illiberal political theories followed from the teleological understanding of accommodation, according to which God's acceptance of different beliefs was an accommodation to human cognitive limitations and moral deficiencies that would, through God's cunning, progressively be overcome.

Accommodationist political theories thus ran the gamut from versions of legal pluralism (which prescribed religious and cultural pluralism among different political units, but not within each one) to anti-pluralist theories of Christian empire, with more liberal theories of cultural pluralism and tolerance of diversity within a single state in between. None of these radically different models of government and managing human diversity would be ruled out by reasoning from the principle of divine accommodation and indeed each and every one of these was at one point or another advanced and justified on the basis of that same principle.

But every political theory spun out of the principle of accommodation had to offer some kind of answer to the question of how human beings, and human governments, should relate to human diversity, given the premise, which lay at the foundation of all accommodationist theories, that God Himself accepted and accommodated Himself to human differences. Notwithstanding the fact that accommodationist thought produced justifications for the most illiberal forms of government as well as liberal policies of tolerance for diversity, it was always hard to reconcile the more imperialist elements of accommodationist theory with the abiding belief in divine accommodation to imperfect beliefs. With this same heritage came the companion idea 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.[70] That ancient idea of accommodation as equitable judgment would be carried like a germ into every political theory derived from the theological doctrine of divine accommodation. And no matter how illiberal or intolerant a given accommodationist political regime or political theory was, that ancient kernel of thought would persist,

70. EDEN, *supra* note 16, at 102.

goading others to develop better ways of realizing the foundational idea that human diversity was part of God's plan. In this way, even when it served to justify illiberal political arrangements, the tradition of political thought rooted in the doctrine of divine accommodation incubated ever more liberal principles of religious tolerance, pluralism, accommodation, and freedom of belief.

IV. CONCLUSION

This Article has made these basic assertions: first, that liberalism derives from the principle of divine accommodation; second, that the political logic derived from that principle was an emergency theory; and third, that the political theory of the liberal secular state is a political theology, bearing all of the hallmarks of political theology, to wit, an emergency theory of the state, a belief in the permanence of the state of emergency, and the derivation of these beliefs from theological principles. The secular state and the rule of law, on this account, were both conceived as necessary responses to the state of emergency that is produced by the inability of human beings to follow divine law. Such a theory brought liberal and illiberal, secular and religious elements together in a potent and unstable mix that lent itself to a variety of interpretations and reinterpretations, all of which were propelled by the effort to come to terms with the diversity of human beliefs, and which in turn propelled the development of liberal political theory.

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 contemporary liberalism. Beyond the insight it gives us into the contemporary practice and principle of accommodating religious beliefs, reconstructing the historical career of the concept of accommodation illuminates broader issues as well, including the modern state's secular nature, its liberal nature, the relationship between its secular and liberal natures, the nature of liberalism, and the conditions that at once necessitate and confound 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 helps us to better understand Robert Cover's dictum that liberal virtues are "imperial" as opposed to "paideic."[71] It 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 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

71. Cover, *supra* note 59, at 12.

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.[72]

To those who are skeptical of the reconciliation between political theology and liberal secularism proposed here and who remain committed to the reigning belief that political theology is unequivocally antiliberal and antisecular, I want to say: at least consider the possibility that the doctrine of divine accommodation is part of the canon of 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 for that refutation is. But if it cannot be refuted, then I hope that others will join me in trying 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.

72. In a similarly irenic spirit, others have proposed interpretations of political theology that incorporate the ethics of the neighbor. *See* KENNETH REINHARD, *Toward a Political Theology of the Neighbor*, *in* THE NEIGHBOR: THREE INQUIRIES IN POLITICAL THEOLOGY 11, 11–75 (2006).