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From Eternity to Here: In Search of the  
Origins of Secularism

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# From Eternity to Here: In Search of the Origins of Secularism

Nomi Stolzenberg

## Abstract

This article puts forth a hypothesis about the theological origins of liberalism and secularism that offers an alternative to standard accounts of the intellectual origins/theological foundations of liberalism and of political theology which see the two as separate and mutually exclusive. On my hypothesis, the emergency theory of the state associated with political theology and the liberal theory of the state are (or were at their point of origin) the same thing. The hypothesis is that the theory that the state must be secular (and must be founded on principles of due process and religious pluralism, which come to be associated with liberalism) derives from a particular tradition of thought which itself derives from the theological doctrine of divine accommodation, versions of which are found in both Christian and Jewish sources. Building on the work of Amos Funkenstein and others who have shown how modern scientific thought derives from this “secularist theology,” I propose that modern political and legal thought does, too. More specifically, I aim to show how the liberal theory of the state derived from theological propositions about the divinely authorized need to suspend divine law and replace it with human legal institutions that accommodate to human needs and imperfections, including the limitations of the human mind. I thereby propose an answer to the mystery of how Christianity became, in Samuel Moyn’s words, “terrestrialized,” that is, how it “birthed liberalism” and secularism, which locates that birthplace in the doctrine of divine accommodation and the theological tradition of accommodationist thought.

## From Eternity to Here: In Search of the Origins of Secularism

Nomi Maya Stolzenberg

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### 1. The Puzzle

For many years, scholars have been circling around the question of liberalism’s religious origins and the related question of the religious foundations of secular government and secular law. As stated in a recent book review by Sam Moyn, “Did Christianity Invent Liberalism?,” the historical question at this point is not so much *whether* Christianity “invented” liberalism, but “how this happened.”<sup>1</sup> Moyn posed this question apropos the publication of one of the more recent contributions to the burgeoning literature on liberalism’s Christian roots, Lawrence Siedentop’s, Inventing the Individual.<sup>2</sup> “Having introduced the puzzle of the relationship between Christianity and liberalism,” Moyn says, “Siedentop does not know how to solve it.” The puzzle, as Moyn frames it, is to “explain how, against its original purposes, the Gospel’s message was brought down to earth.”<sup>3</sup> “Like many others,” Moyn observes of Siedentop, “he insists that something about the content of Christianity must have been decisive in making modern beliefs possible.” But, he goes on to observe, “you need an argument to show this happened” and “Siedentop

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<sup>1</sup> <https://bostonreview.net/books-ideas/samuel-moyn-larry-siedentop-christianity-liberalism-history>

<sup>2</sup> Lawrence Siedentop, *INVENTING THE INDIVIDUAL: THE ORIGINS OF WESTERN LIBERALISM* (2014).

<sup>3</sup> Moyn, fn 1 *supra*.

doesn't really have one." In short, he concludes, Siedentop "has no real theory of how Christianity birthed liberalism."<sup>4</sup> Nor, he suggests, does anyone else.

## 2. The Hypothesis

I think I have a solution to this puzzle. My hypothesis is that the answer to the puzzle can be found in the tradition of thought that evolved out of the doctrine of divine accommodation which was the common property of Judaism and Christianity<sup>5</sup> from the time of their first encounters with classical rhetoric,<sup>6</sup> whence the hermeneutic principle of accommodation was derived. As I explain in the section on "Sources" below, this idea is hardly original; other scholars can justly take credit for the discovery of the doctrine of divine accommodation at the root of modern political ideas.<sup>7</sup> My hypothesis is derived from this important body of work on the doctrine of divine accommodation. But it is also based on other scholarship on the derivation of modern political thought from theological principles, in particular, twentieth century and contemporary scholarship on "political theology." Although the more familiar ways of discussing political theology do not connect it to the doctrine of divine accommodation, the core features of political theology as it has been conceptualized are nonetheless assimilable to that doctrine's logical

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<sup>4</sup> Id.

<sup>5</sup> On Islam

<sup>6</sup> On the classical principle of accommodation, see KATHY EDEN, *HERMENEUTICS AND THE RHETORICAL TRADITION: CHAPTERS IN THE ANCIENT LEGACY AND ITS HUMANIST RECEPTION* (1997).

<sup>7</sup> See Stephen D. Benin, *The Cunning of God and Divine Accommodation*, 45 *J. Hist. Ideas* 179 (1984); AMOS FUNKENSTEIN, *THEOLOGY AND THE SCIENTIFIC IMAGINATION FROM THE MIDDLE AGES TO THE SEVENTEENTH CENTURY* (1986); STEPHEN D. BENIN, *THE FOOTPRINTS OF GOD: DIVINE ACCOMMODATION IN JEWISH AND CHRISTIAN THOUGHT* (1993); EDEN, *supra* fn 6; Daniel Stolzenberg, *John Spencer and the Perils of Sacred Philology*, 214 *J. Past & Present* 129 (2012).

structure and core ideas. Or to put it the other way around, the core ideas in the doctrine of divine accommodation are assimilable to the logic of the state of emergency associated with political theology. That connection (one might even say equation) between the logic of emergency law and the logic of divine accommodation requires further spelling out. Part of my hypothesis (the historical part) is that the connection between emergency law and the principle of accommodation *was* spelled out—and then later left aside—in a tradition of political theory that was derived from the doctrine of divine accommodation over the course of many centuries. Reconstructing the evolution of this intellectual tradition, as it underwent continuing elaboration and revision producing many different theories about how government should relate to different beliefs and how law should be administered, is an important project that has yet to be undertaken in systematic way.

What makes the hypothesis plausible even without that historical confirmation (and what makes that historical investigation worth undertaking) is the presence of a distinctive picture of law that can be discerned in even the earliest iterations of the doctrine of divine accommodation, which recurs in later applications and formulations of political theory. In this picture, secular law is viewed as a divine accommodation to the state of emergency that would exist in the absence of the institution of secular law. This is a conception of law that is at once a description of what secular law is, an explanation of why it is necessary, and a theologically grounded justification for its institution.

This recurring picture of secular law was implicit in the foundational principles of the doctrine of divine accommodation even before they underwent systematic development into full-blown political and legal philosophies. Those foundational principles included:

- (1) "God adjusted his acts in history to the capacity of men to receive and perceive them."<sup>8</sup>
- (2) "The Scriptures are adjusted to the capacity of mankind of to receive and perceive them."<sup>9</sup>
- (3) "The law was given to all in a language to be understood by all."<sup>10</sup>

As the third of these propositions makes explicit, the doctrine of divine accommodation was, from the beginning, concerned with law and tied to a very particular view of it. Less a static concept than a dynamic set of ideas that could be combined and recombined in different ways, the conception of law embedded in the doctrine of divine accommodation was the product of an ongoing argument about how God's law could be followed given the existence of disagreement, and lack of certainty, about what the content of God's law is. That argument began from the premise that divine law (and God) exists. From that premise (combined with other premises about God's nature), the argument worked its way through a series of logical steps to the conclusion that, in the here and now of the temporal world, divine law has to be suspended and replaced by law created by human beings. The

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<sup>8</sup> Funkenstein, at 213, 222.

<sup>9</sup> Id. at 214. Otherwise put, "The Scripture speaks in the language of everyday man." Id. at 215.

<sup>10</sup> Funkenstein at 214.

doctrine of divine accommodation thus generated a theological argument for the necessity of secular law.

So conceived, secular law has a complex and paradoxical relationship to the divine law from which it derived. On the one hand, it was understood to be precisely not divine law, but rather, an anthropological “manmade” artifact, authored by human beings who occupy the positions of legislators and enforcers of the law governing a particular society and/or a product of human societies and cultures that differed over time and place. As such, secular law was understood (a) to be independent from, (b) to deviate from and, (c) in some instances, actually to violate the requirements of sacred law.

On the other hand, secular law was thought to be reflective of the divine law in at least two different ways. First, although the idea of divine accommodation to the limits of human understanding allowed for human error in the knowledge of God (the need to accommodate human error being the doctrine’s core idea), to say that human understanding of God’s law is imperfect is not the same as saying it is nonexistent. The flip side of the belief that human law is an *imperfect* reflection of God’s law is a belief that it *is* a reflection of God’s law. The picture of law as an imperfect reflection of God’s law was traditionally combined with the further idea (another core principle of accommodationist thought) that human societies were implanted with a mysterious capacity to increase their understanding of God’s law over time.<sup>11</sup> Together, these notions of partial but imperfect understanding of God’s law and teleological progress towards a more perfect understanding reflected a

<sup>11</sup> On divine cunning see Benin, Funkenstein.

belief in the possibility (and aspiration) of human law being and becoming ever more congruent with the divine law in terms of its content, even if it was humanly authored and therefore subject to error.

This idea of an overlap and eventual convergence between the content of divine and secular law was one way in which human law could be said to “reflect” divine law even as it deviated from it. But that stood in tension with the second way in which the doctrine imagined human law to “reflect” the divine law, which had to do with its understanding of non-divine human law as being divinely authorized, if not exactly divinely authored. Here, human law became even more distant from divine law, as the doctrine posited that God himself authorized the suspension of His law and its replacement by manmade laws and legal institutions. On this view, divine law truly was hidden, and consequently, human law truly was autonomous of it. Such an essentially humanist conception (we might as well name this birthplace of humanism, not just liberalism) could have only the most tenuous connection to divine law, even if such a human-centered view of historical and legal agency was thought to be a part of the grand divine design.

The reasoning that produced this radically destabilizing conclusion went as follows. Like human law, divine law has two parts: substantive and procedural. The substantive laws are the behavioral commandments, the positive and negative injunctions, the shalts and shalt nots. The procedural laws are the rules of evidence and other procedural safeguards that judges must follow before they can draw a conclusion about whether the substantive law has been violated. What led to the invocation of the doctrine of divine accommodation in this line of argument, in a

very roundabout way, was a series of propositions that began with the observation that adhering to the sacred law of *procedure* made it practically impossible for human legal actors to secure any convictions for violations of the substantive principles of the law. Human beings could never satisfy the stringent procedural safeguards and evidentiary rules embodied in biblical law because of the limitations of human cognition that make erroneous factual judgments inevitable. According to this line of thought, the whole point of biblical procedural standards (like the two witness rule and the cautionary requirement)<sup>12</sup> is to make sure that human legal institutions do not result in wrongful convictions. If human legal institutions are bound to produce wrongful convictions—if the occasional wrongful conviction is unavoidable—and if the sacred law is intended to prevent *any* wrongful convictions, it stands to reason that the only way to make sure that erroneous judgments never occur is by making sure that trials never result in convictions. This outcome was understood to be the *raison d'être* of the sacred rules of procedure by those who followed this line of reasoning.

But the belief that divine law was by design inherently un-enforceable (by human beings) generated a profound puzzle for devout thinkers. Why would God permit crimes to be committed with impunity, with people left to suffer violence and wrongdoing at other people's hands without any redress? More fundamentally, *would* God's will be so perverse? Unlike the first question to which the doctrine of divine accommodation was addressed, which concerned the function of the procedural rules of sacred law, this was not an issue of epistemology (how do

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<sup>12</sup> See Stone.

people know things and is God's law knowable by human beings?), but rather, the basic issue of theodicy: would God let bad things happen to good people? More specifically, would God want human beings to suffer at the hands of others without resorting to any effective means of law enforcement to restrain the human impulse to commit evil acts? To some, the answer was yes. Theological quietists justified this position by denying the premise that following the procedural rules of divine law that prevent human beings from enforcing the law produces a world in which crimes are committed with impunity and the law is never enforced. Their refutation of this premise lay in the widely accepted "fact" (that is, the religious belief then taken as fact) that the law does get enforced and everyone does meet their just deserts—in the afterlife. In this view, God and God alone is the law enforcer (executor and judge as well as the legislator of the law), because God alone can be a perfect law enforcer. Such a purist refusal to tolerate (or, we might say, accommodate) even the slightest imperfection in the enforcement of the law counseled an extreme political quietism that appealed to a certain strain of radical skepticism which viewed human knowledge as so hopelessly fallible that it is worse for human beings to try alleged wrongdoers than to do nothing at all.<sup>13</sup>

Adherents of the doctrine of divine accommodation rejected this extreme form of skepticism and do-nothingism. Just as they thought that the imperfect nature of human law's reflection of the divine did not imply a total lack of reflection of divine law, so too their acceptance of the imperfect nature of human cognition did not

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<sup>13</sup> On the philosophies of doing nothing developed by radical skeptics, see Richard Popkin, *THE HISTORY OF SCEPTICISM: FROM SAVANAROLA TO BAYLE* (1979).

imply a total rejection of human beings' ability to attain factual and moral knowledge. To the contrary, although the doctrine of divine accommodation was motivated by a skeptical view of human beings' capacity for knowledge that emphasized their cognitive fallibility, this was a version of fallibilism that parted company from the more radical anti-rationalist forms of skepticism underlying quietism. The doctrine of divine accommodation reflected an essentially pragmatic version of rationalism according to which human beings have the capacity for reason and, with that, for a certain kind of knowledge—not the knowledge of absolute truths, which were acknowledged to be inaccessible to human beings, but *probable* truths to which human reason does have access and which supply an adequate foundation for human judgments.

This probabilistic version of rationalism (i.e., pragmatism), which spoke to the doctrine's epistemological concerns, was coupled with the doctrine's similarly non-fatalistic position on theodicy. To the quietist proposition that it was God's will for people to suffer patiently and wait for justice to be done until after they died, the doctrine of divine accommodation countered that a benevolent God could not possibly have intended for human beings to live in the world of chaos and violence that would result in the absence of effective law enforcement institutions on earth. They rejected the ideal of Christ-like martyrdom that religious quietists embraced as an untenable demand to impose on ordinary human beings that could not possibly be the will of God.

That left open the question of what God's will was. If enforcing God's law through human legal and political institutions is impossible given the inherent

defects of human cognition, and if the posture of radical quietism is not the will of the God, then what does God will human beings and societies to do about wrongdoers and wrongdoing? While quietism was ruled out by the doctrine of divine accommodation, so too was the traditional way of refuting the quietist prescriptions of the radical skeptics, which was to deny the premise that all human judgment is fallible by positing the existence of an infallible human authority through whom God's law flows. If such a divinely ordained infallible human authority could be found to exist, then the problem of fallible human judgment would go away, and then there would be no dilemma about whether to set up legal institutions capable of rendering judgments to resolve. The only issue would be establishing the existence and identity of the infallible authority on earth, a problem customarily "solved" through the usual combination of (religious) faith and (political) fiat.

This belief in an infallible human authority in whom God's law is perfectly revealed (and through whom His will is perfectly implemented and enforced) is the foundation of the various traditional schools of political thought that have been the focus of most modern scholarship on political theology.<sup>14</sup> But it forms no part of the equally venerable (though less well-recognized and always contested) tradition of political theology that evolved out of the doctrine of divine accommodation. To the contrary, the doctrine of divine accommodation arose only when the belief in the kind of all-knowing *humanus ex machina* that rescues such "conservative" political

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<sup>14</sup> See, e.g., Ernst Kantorowitz, *THE KING'S TWO BODIES* (1957); Carl Schmitt, *POLITICAL THEOLOGY: FOUR CHAPTERS OF THE CONCEPT OF SOVEREIGNTY* (1934).

theologies was ruled out. Like the radical skeptics/quietists (whose other positions they rejected), the adherents of the doctrine of accommodation recognized that *all* human beings' judgments are fallible. Why God made human beings with cognitive faculties so faulty that they were always subject to error—why God, being all powerful, had not just instilled in human beings (or at least in one of them) perfect knowledge of His law—these were questions that proponents of the doctrine pondered but determined no mere mortal could answer. *That* he had done so was the accommodationist tradition's foundational premise. Combined with the further premise what God creates God approves, it followed that God approved of our faulty cognitive faculties and accommodated them.

The obvious anachronisms in the biblical text, its abundant anthropomorphisms and the disturbing traces of polytheistic beliefs and practices (most troublingly, sacrifice) were thus explained as God's accommodations to the limited capacity of the Israelites to understand and accept monotheism at the time of its first revelation.<sup>15</sup> "God adjusted his acts in history to the capacity of men to receive and perceive them."<sup>16</sup> Because the Israelites were embedded in a polytheistic culture, they could not accept all of monotheism right away; they had to be brought around to shed the vestiges of their polytheistic practices and beliefs gradually. By gradually weaning the Israelites off of paganism, He moved them toward monotheism—but not all at once. These were the first postulations of the doctrine of divine accommodation, produced by applying the classical principle of

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<sup>15</sup> Funkenstein and Eden.

<sup>16</sup> Funkenstein, at 213, 222.

accommodation (a principle of hermeneutics developed by the ancient Greeks originally addressed to secular texts) to the “embarrassments” of the biblical text. These postulations went hand in hand with the development of the view that God, for His inscrutable reasons, preferred this evolutionary approach to simply implanting correct knowledge of His law in the human mind. In other words, God chose to create a world in which different peoples held different beliefs, some if not all of which had to be in error. The conclusion in short was that God deliberately allowed for human error. More than that, it was postulated that erroneous human beliefs served as God’s chosen vehicle through which to gradually advance humanity toward a less erroneous understanding of His law. Thus the doctrine of divine accommodation attached itself to the view that human knowledge is evolutionary and always bound by its historical and cultural context. That was coupled with the view that God approves of the coexistence of diverse beliefs about religion and law. And that in turn was coupled with the belief that the inherently limited and errant nature of any particular belief-system (and human knowledge more generally) is acceptable to God. Far from prohibiting us from acting (and judging) on our imperfect knowledge, God *accommodates* Himself to our imperfect versions of legal and religious knowledge. This was the essential lesson of the doctrine of divine accommodation.

The doctrine of divine accommodation thus steered the proverbial middle course between the polar positions of extreme skepticism, on the one hand, and belief in an infallible religious and legal authority, on the other. Against both of these extreme (though historically commonplace) views, the doctrine of divine

accommodation posited the existence of a faculty of human reason that was fallible but nonetheless adequate to the task of preventing that world from falling into the state of chaos, violence and disorder (which, it was understood, would be the inevitable result if law was not enforced until mortal life was over). What alibied the adequacy of this imperfect knowledge and law—which plainly was *inadequate* from the standpoint of sacred law as it inevitably produced wrongful convictions, wrongfully *and sinfully* depriving people of liberty and life—was the belief that it was God’s will to accommodate His law to our cognitive imperfections and to our human need for safety and protection. “The Scriptures are adjusted to the capacity of mankind of to receive and perceive them.”<sup>17</sup> “The law was given to all in a language to be understood by all.”<sup>18</sup> These propositions were understood by their adherents to imply that the faulty understandings and applications of God’s law that human law necessarily embodied were not just acceptable to God, but somehow a part of His divine plan.

The paradoxical conclusion of this line of reasoning was that divine law authorizes its own suspension. Divine law authorizes the substitution of divine law with defective human law as an accommodation to the limitations of human cognition that make it impossible for human beings to know and enforce God’s law. In order for human beings to be able to enforce law, it is necessary for them to construct legal systems with less stringent standards of evidence and procedural safeguards than those prescribed in the bible (i.e., by God). And that, according to

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<sup>17</sup> Id. at 214. Otherwise put, “The Scripture speaks in the language of everyday man.” Id. at 215.

<sup>18</sup> Funkenstein at 214.

the doctrine of divine accommodation, is precisely what secular law is: a humanly designed and instituted system of law with procedural standards that are less stringent than those prescribed by divine law, permitting effective law enforcement here on earth.

This line of argument readily explains how Christianity—and Judaism—as Moyn puts it, became “terrestrialized”<sup>19</sup> and “birthed” secularism. Less obvious is how these religious traditions “birthed liberalism” via this same line of argument. That the conception of law that evolved out of the doctrine of divine accommodation represents the (or at least a) birthplace of liberalism is a counterintuitive claim given our received notions of liberalism and conservatism and their supposedly antithetical relationship. Because the conception of law that grew out of the theory of divine accommodation contains a number of plainly illiberal elements—most notably, its reliance on the logic of the state of emergency—it is hard to see its liberal elements. The presence of emergency logic would seem to negate the liberal character of the law that is posited by the doctrine of divine accommodation. And even without explicitly being tied to the logic of the state of emergency, the idea that what is needed (and divinely authorized) is an institution capable of *enforcing* the law and establishing order reflects a statist philosophy that seems fundamentally at odds with liberalism. Indeed, when we look at the actual historical development of the accommodationist tradition of thought, we see that many of the specific theories formulated on the basis of its principles epitomize conservative political philosophy, which is conventionally taken to be *ipso facto* anti-liberal. In short, a number of

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<sup>19</sup> Moyn, *supra* note 1.

quintessentially “conservative” ideas seem clearly to be present in the doctrine, to wit, its statism and its emergency theory of the state (these may be one and the same thing), not to mention its theological foundations (which may be reconcilable with liberalism but how has yet to be explained). Conversely, recognizably liberal ideas seem to be absent, at least I have yet to demonstrate the presence of any liberal political ideas—and were I to do so, it would remain to be explained how such liberal elements of the doctrine could coexist with the illiberal elements identified above.

But an explanation of the liberal character of this doctrine’s conception of law (and of the state required to enforce such law), and an explanation of how that liberal character is reconciled with the illiberal elements of this conception of law, is precisely what I mean to propose. Nothing I have said yet demonstrates its liberal character. The foregoing might be seen as demonstrating the liberal character of the *God* who accommodates human law, but that is not the same as demonstrating the liberal character of the law that He accommodates. There are recognizably liberal traits ascribed to the God of divine accommodation, in particular, the idea that this is a God who accepts differences of belief, who indeed *made* people have different beliefs, and has decided to accommodate those different beliefs by allowing different peoples to have different legal systems. This is also a God who cares about due process, although His willingness to compromise those standards for the sake of law on order on earth for the duration of earthly time complicates, if not undermines, the doctrine’s characterization of God as committed to due process.

But even if this God is viewed as committed to religious tolerance, cultural and legal

pluralism, and due process, it by no means automatically follow that He wants human beings and governments to act with tolerance towards people with different beliefs or to respect the rights of due process. Indeed, as we have seen, the doctrine holds that it is part of the divine plan to suspend those rights; the same might hold of the divine commitment to pluralism. Just because God wants there to be different peoples with different religions and different legal systems does not necessarily mean that he wants each legal system to tolerate differences of belief within its own jurisdiction. The doctrine of divine accommodation is not, after all, an *imago dei* doctrine, according to which human rulers are required to imitate the divine attitude of tolerance toward errant/different beliefs. Or at least such a version of the *imago dei* was not a fixed part of the doctrine. Instead, theologians and political theorists puzzled for centuries over what the doctrine of divine accommodation required rulers to do with regard to subjects who held different (presumptively errant) religious beliefs and with regard to judges who could not reach judgments without suspending the sacred rules of procedure but who could not help reaching incorrect judgments when they replaced those rules. In some historical periods, thinkers working from the principles of the doctrine of divine accommodation concluded that human governments were intended (by God) to emulate His accommodating attitude toward religious and other kinds of difference, and to observe due process, even if not as strict a form of process as required by the bible. But other thinkers, in other periods of time (and sometimes in the same period of time) drew quite opposite conclusions about what divine accommodation required.

As the doctrine's argument about the need to relax the standards of due process

makes clear, it was entirely possible to interpret it in a way that justified illiberal state policies both with respect to issues of religious tolerance and with respect to issues of due process. Indeed, there was little in the way of political theory and competing models of government that such a temporizing doctrine could not justify as a necessary (and therefore divinely ordained) accommodation to the need for law and order.

Yet another, related way of justifying illiberal policies was to present them as part of the evolutionary mission of moving errant believers towards correct belief. Thus the Holy Roman Empire was depicted as the agent through which God had chosen to convert people with false beliefs and thereby bring the evolutionary process of knowledge formation to its teleological endpoint.<sup>20</sup> As this example shows, both as a logical matter and as a historical matter, the doctrine admitted of various interpretations, including many of a decidedly conservative illiberal nature.

But the doctrine also admitted of more liberal interpretations. If illiberal policies and theories of government could logically be derived from its premises, so too could liberal policies and theories of government. More than that, the dialectical nature of the theory combined with the belief that God accommodated human needs and differences to create a kind of propulsive force that moved the theory in an ever more liberal, humanist direction. The same idea of divine cunning which imagined that human societies were evolving through a divinely ordained yet human process toward greater understanding of the divine that some used to justify a religiously intolerant inquisitorial missionizing state could just as well—or, arguably, better—

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<sup>20</sup> See Funkenstein.

be used to justify a liberal state. Even if such liberal policies such as protecting rights to due process and freedom of belief were not logically required, they were certainly logically permitted by the fundamental precepts of the doctrine. And it was increasingly hard to justify the refusal of human beings and governments to accommodate “errant” (i.e., different) beliefs in the face of a picture of a benevolent merciful God who accommodated Himself to human error and difference. (Here the *imago dei* makes its appearance). It was similarly difficult to justify a complete forfeiture of the rights of due process in the face of a view of sacred law that was highly protective of such rights. Even if the theory of the state of emergency that justified relaxing those standards was persuasive, it by no means followed that those standards had to be completely abandoned. To the contrary, there was every reason—given the belief that sacred law protected due process and that wrongful convictions were a sin—to crank up the standards of evidence and procedural rules that provided safeguards against wrongful convictions, not to the point where the law became completely unenforceable, but to achieve the appropriate “balance” between the competing interests of protecting people from private violence and protecting the accused from state violence, *both* of which were viewed as sanctioned by God.

Finally, in addition to liberal policies of pluralism and process, secularism itself represented a liberal policy that was built in to the accommodationist picture of law. Though the separation of secular law from religious law that was dictated by the doctrine could be, and was, institutionalized in many different ways, many of which would not be recognizable today as liberal or secularist, the insistence that the law

of the state could not be mistaken for or equated with canon law or Jewish law *by definition* and *by divine design* was a constant challenge to those who claimed that political rulers had religious authority, or that religious authorities had authority over political rulers or that the law of the state was the law of God. True, even the Holy Roman Empire could claim to abide by this principle of separation between the “two kingdoms” as could many other regimes that violate our sense of a liberal state. But even if it has to be conceded that the doctrine of divine accommodation could be used to justify the most illiberal inquisitorial intolerant forms of government, it also has to be recognized that it created a continual pressure to question the sufficiency of any regime’s instantiation of the principles it purported to realize (namely, the principles of divine accommodation.) What the doctrine justified as (merely) adequate—and adequacy, not perfection, was all that the doctrine ever justified—could always be re-characterized as *inadequate* from the ever-available theological standard of perfection. (At least it remained available until the dialectic of humanism threw its theological ladder away.) The dialectical nature of the theory provided a ratchet that was always available for, and indeed encouraged the development of, internal critique. Whether that ratchet moved in the direction of more due process (or pluralism or humanism or separation of state from religion) or less was in theory debatable since no one knew for sure which of these policies was closer to God. As the theory of divine accommodation and divine cunning would have it, God, having left the scene of human activity, had left it to fallible human agents to figure things out for themselves. But while that would seem to allow for the theory to evolve in either a conservative or a liberal direction, the

principle of fallibilism itself, like the cognate principles of the doctrine of divine accommodation (pragmatism, probabilism, pluralism, process and accommodation of human differences and needs), propels the dialectic to unfold in a liberal and ultimately humanist (post-liberal?) direction rather than its opposite.

Liberalism, so construed, never becomes detached from the statist theory of emergency law, bearing out the critique of liberalism, which maintains, correctly, that liberal regimes are regimes of power that are inherently repressive. But it does, as it were, *liberalize* the state of emergency, imbuing it with qualities, such as the rule of law, due process, and various policies of pluralism and accommodation of difference, that belie the proposition that the permanent state of emergency negates the rule of law and renders liberalism an illusion.

All of this would not be so hard to see were it not for the fact that liberal political theory has been torn asunder from the principles of accommodation and emergency law in which it was originally hatched, and the further fact the principles of accommodation and emergency law have been torn asunder from each other. The division of the principle of accommodation from the emergency theory of the state and their respective migrations into separate corners of the academy has made it almost impossible to see how the principle of accommodation liberalizes the theory of the emergency state. That is the key claim of this hypothesis: The emergency theory of the state and the accommodationist theory of secular law were originally two halves of one whole.<sup>21</sup> Together they provided the ligaments connecting

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<sup>21</sup> Whether or not there are other versions of emergency political theory that are not implicitly connected to the logic of divine accommodation and whether or not my construction of the theory of the law produced by the doctrine of divine

Christianity and Judaism to liberalism, secularism and humanism—and to statism, law enforcement, the state of exception and executive power as well. The presence of the latter elements might seem to negate the liberal character of the accommodationist conception of law. But that is only because the logic of the state of emergency has become detached from the logic of accommodation and we no longer understand how the two are integrally related and mutually inform one another. As a result of their having become separated from each other, the logic of the state of emergency has come to be viewed as inherently anti-liberal and committed to the negation of the rule of law, due process rights and liberalism more generally. The conclusion then drawn is that if accommodationist theory is revealed to be an emergency theory, it too must be anti-liberal. But once we put the two halves back together, we can see that the law of transitivity can—and, in point of historical fact, did—just as well work the other way. There is, after all, no more reason to assume that the statist logic of emergency cancels out the liberal nature of the state depicted in the doctrine of divine accommodation than to suppose that the principle of accommodation cancels out the illiberal nature of the emergency state that it depicts. The logical possibility—and historical actuality—of the latter outcome (the principle of accommodation serving to liberalize the emergency state and accommodate it to “normal life,” thereby turning it into normal law) is what I hypothesize we will find when we reconstruct conceptual logic and historical development of the theory of divine accommodation.

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accommodation is the only version or whether there are alternative versions of law derived from that doctrine which are not connected to emergency theories of politics are further questions that needs to be explored

According to this hypothesis, the principle of accommodation served to liberalize the emergency state by infusing it with the values of pluralism, procedural justice and church-state separation. Secular law, depicted in the doctrine of divine accommodation as not just *a* regime of emergency law but as the *Ur*-emergency law, was also, by that token, depicted as *normal* law, as the law that accommodates normal human needs and is adapted to ordinary conditions. Thus the law that has been constituted per the logic of the state of emergency becomes, through its perduration and accommodation to normal life, normal law, liberal law.

### The Challenge

I offer the above hypothesis as a potentially illuminating example of the methodological questions and challenges that arise when we bring law together with intellectual history, in particular, the history of Jewish (and Christian) thought. It is, as it currently stand, no more than a hypothesis. I certainly have not proven it to my own or anyone else's satisfaction. But the interesting methodological questions are: What would it take prove (or disprove) it? And how can we know in advance if it's worth the time and effort that would be required to do that? What kind of effort would it take? What kind of hypothesis is this? A historical hypothesis about the intellectual origins and evolution of liberal political theory—a study in the history of political ideas? A philosophical hypothesis about how the concepts of due process, pluralism, probablism, fallibilism, secularism, liberalism and the state of emergency fit together? A combination of both? If so, how do the historical and conceptual claims relate to one another? What kind of historical claims and what kind of conceptual claims are these? Is there any good reason to think any of these

claims will be borne out? On what is the hypothesis is based? And, assuming it is confirmed, so what? What is the value of establishing that liberalism evolved out of the doctrine of divine accommodation; that the liberal theory of law that evolved out of that doctrine rests on an emergency theory of the secular state; that the logic of emergency and the principle of accommodation are intertwined? What is the point of all of this?

It goes without saying that I am not a historian. This is no doubt why I often get pushback when I float this hypothesis to historians. Understandably, historians tend to wince at the kind of broad brush “historical” claims advanced here which emphasize (supposed) points of similarity between wildly different ideas, ignoring the historical context, collapsing centuries, even millennia, to establish what may very well be false continuities. I freely confess that inasmuch as this proposed project is historical (or transhistorical) in nature, it is an unabashedly presentist form of history. Although I think the historical question of the origin of liberalism is an interesting question in its own right and I appreciate the kind of nuanced historical studies that pay careful attention to differences of time and place, my primary interest is not in where liberalism came from but what those origins tell us about law and liberalism today.

That said, if my historian friends and acquaintances balk at my “lawyers’ history,” my law colleagues tend to question my turn to history. Who cares about the origins of liberalism, religious or otherwise, unless those have origins have some implications today? What does it matter if its foundations were religious principles, never mind what religious principles they are? In the face of this challenge, I have to

concede a different problem. Although my instinct tells me that there are contemporary implications, I'm hard put to say exactly what they are. And I suspect I won't be able to work out the present implications until I do the work of reconstructing the theory of law that evolved out of the doctrine of divine accommodation. Which returns me to the question of how one decides if it is worth the effort. If the present-day "pay off" of doing this historical reconstruction cannot be determined until the historical reconstruction is done, how is one to determine if the likelihood of a pay-off makes the historical work worth doing? Especially given the monumental nature of the undertaking, and the limits of my training and abilities, this a serious challenge.

Yet I find myself increasingly convinced that the intellectual tradition that evolved out of the doctrine of divine accommodation was a, if not the primary or sole, pathway through which Christianity and Judaism were "terrestrialized" and interpreted in ways that argued for the necessity of secular and liberal law, eventually bringing forth the modern liberal secular state. How is one to explain such a belief in the absence of an airtight confirmation? What produces the historical and theoretical "hunches" that motivate our work and guide us toward scholarly projects that are seen to be worthwhile not only hindsight but also, more mysteriously, in foresight? Where do such foresight come from?

### The Sources

No doubt such "hunches" and "foresight" come from lots of different places. But in this particular case, I can say I came by my idea honestly, the old-fashioned way, by simply reading other people's work and noticing points of similarity, and points

of omission, in different fields of scholarship that often were not in direct conversation with one another but which seemed to be addressing the same topic.

The first of these is the scholarship on the principle of divine accommodation, most notably the work of Amos Funkenstein, the towering figure in the field, and the less well-known work of Kathy Eden, both of whom charted the evolution of the principle of accommodation from its origins in the ancient Greek tradition of classical rhetoric through its absorption into Christian (and, in Funkenstein's magisterial treatment, also Jewish) theology.<sup>22</sup> Their work suggests the value of widening the lens beyond the exclusively Christian framework that Moyn and others interrogate to include Jewish as well as Christian thought and attend to their parallels as well as their interactions.

Both Eden and Funkenstein describe a distinctive tradition of thought that evolved out of the theological doctrine of divine accommodation that gradually shed its theological character as it evolved into modern thought. They focus most of their attention on the sciences, scholarly academic disciplines, including Higher Biblical Criticism, modern hermeneutics, history, anthropology and the natural sciences. All of these are shown to have evolved out of the intellectual tradition that grew out of the humanist and secularist principles of the doctrine of divine accommodation.

What is largely though, tantalizingly, not entirely missing from both Eden and Funkenstein is a systematic focus on the theories of politics and law that evolved out of this intellectual tradition. Law is not entirely missing from their accounts for it is nestled at the core of the doctrine, and radiates out into every one of the sciences

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<sup>22</sup> See fn 1, *supra*.

they describe, each of which is shown to rest on the basic argument about the withdrawal from the world of divine law and the need to accommodate human needs. The result is that law is both everywhere and nowhere in these books, a pervasive presence that informs every single field of thought that they do discuss but a field of thought that merits sustained attention in its own right. Funkenstein does devote some pages to discussing the political theologies of, *inter alia*, Augustine and the legal science of Vico. But compared to his treatment the natural sciences and development of modern historicist and anthropological perspectives, political and legal theory receive scant attention.

This is true as well of the larger body of scholarship on the history of science to which Funkenstein's masterpiece makes an important contribution. The emergence of modern science and the science of probabilism were the subject of a number of important books published in the 1970s and 1980s, including Lorraine Daston's Classical Probability in the Enlightenment<sup>23</sup> and Ian Hacking's The Emergence of Probability.<sup>24</sup> But here again, law as a general idea pervades the overlapping theological and scientific theories that are the subject of these book's analysis, yet fails to be analyzed as a field of practice and theory in its own right. The notable exception to this is Barbara Shapiro's Probability and Certainty in Seventeenth-

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<sup>23</sup> Lorraine Daston, CLASSICAL PROBABILITY AND THE ENLIGHTENMENT (Princeton, 1988).

<sup>24</sup> Ian Hacking, THE EMERGENCE OF PROBABILITY (Cambridge, 1975). Other notable contributions include Henry G. Van Leuwen,, THE PROBLEM OF CERTAINTY IN ENGLISH THOUGHT, 1630-1690 (1963); L. Jonathan Cohen, THE PROBABLE AND THE PROVABLE (Oxford, 1977); Barbara Shapiro, PROBABILITY AND CERTAINTY IN SEVENTEENTH-CENTURY ENGLAND (PRINCETON, 1883); Steven Shapin & Simon Shaffer, LEVIATHAN AND THE AIR PUMP (Princeton, 1983). 1983).

Ceuntry Europe<sup>25</sup> which explicitly focuses on law and legal theories, in particular, on how the development of more and less liberal standards of proof was tied to emergent theories of scientific probability. The usefulness of this book serves to highlight the value of the still woefully underdeveloped project of drawing out the connections among probabilism, pluralism, legal proceduralism and the principle of divine accommodation. Although the literature on probabilism by and large neglects the doctrine of divine accommodation and likewise does not examine the emergency theory of secular law/the state. Nor does it grapple specifically or extensively with the political theory of liberalism. But it does make clear, even though it does not systematically analyze, the crossovers between legal practices and theories of knowledge and the emergent science of probabilism and it reinforces the analysis of the pragmatic and probabilistic components of law developed (or at least suggested) in the scholarship on the doctrine of divine accommodation.

Similarly, while Funkenstein and Eden highlight the role of the principle of accommodation, what is missing from their analyses are explicit discussions of either liberalism or the emergency theory of politics. Their work describes the principle of accommodation (along with cognate theological principles) as the font of secularism, in particular secular science, and humanism. But it does not clearly draw out the connections between the accommodationist theory of law to the liberal tradition of political theory and the emergency school of political theology, perhaps

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<sup>25</sup> Barbara Shapiro, *BEYOND REASONABLE DOUBT AND PROBABLE CAUSE* (URY ENGLAND (U.C. Press, 1991).

because those authors did not see any connection to liberalism or to emergency theories of politics, or perhaps because those subjects simply lay beyond the horizons of their projects.

Those links begin to come through in other works on the doctrine of accommodation, in particular, works in the field of Jewish studies that are specifically focused on the political theories and conceptions of law that were derived from that doctrine. Stephen Benin's work on "The Footprints of God" and "The 'Cunning of God'" and Suzanne Stone's work on "Legal Pluralism in Jewish Law" are exemplars. Unlike Funkenstein and Eden, these are works that are specifically focused on the political and legal theories that were developed, here by the rabbis, from the doctrine of divine accommodation. Stone draws particular attention to the concern with rights of due process and her work shows how a certain tradition of rabbinic thought simultaneously espoused the logic of emergency law and implicitly rested on the idea that it was both necessary—and, paradoxically, divinely authorized—to accommodate to human needs by suspending the divine law with its impossibly strict procedural standards.

It is impossible to read these works without noticing the resonance with the applications of the principle of divine accommodation described by Funkenstein and Eden. Stone and Benin's work thus help to fill in some of the gaps in Funkenstein and Eden, calling our attention to a body of thought focused specifically on questions about legal procedure, legal pluralism, the power of judges and the relationship of religion to the state. Read side by side with Funkenstein, this work helps us to see how ideas that Funkenstein presents as descriptive propositions

about the character of different governments and systems, like the idea of legal pluralism that he attributes to Vico's theory of history, also constituted theories about how governments *should* be arranged in relationship to cultural and religious differences. If none of this work goes all the way in describing the evolution of liberal theories of law and government out of the doctrine of divine accommodation, they certainly begin to bridge the gap. Stone's work in particular draws strong connections between the emergency theory of law embraced the rabbis and liberal legal policies such as the principle of separation between religion and state and principles of procedural justice.<sup>26</sup> Menachem Lorberbaum's work on "Secularizing the Political in Medieval Jewish Thought"<sup>27</sup> draws out similar lines of thought. Less clear in this body of work is how or whether the logic of emergency law is connected to the principle of divine accommodation and how secularism is related to liberalism. Whereas in Funkenstein and Eden, the focus is on the role played by the doctrine of divine accommodation in producing theories of secularism and legal and cultural pluralism while the reliance of those theories on the logic of the state of emergency remains implicit, in Lorberbaum and Stone we find the inverse: here it is the idea of emergency power that is explicitly analyzed as the font of secularism, while the idea that God *accommodates* that need reflecting the principle of divine accommodation remains largely implicit.

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<sup>26</sup> Suzanne Last Stone, "Sinaitic and Noahide Law: Legal Pluralism in Jewish Law," 12 *Cardozo L. Rev.* 1157 (1991).

<sup>27</sup> Menachem Lorberbaum, *POLITICS AND THE LIMITS OF LAW: SECULARIZING POLITICAL MEDIEVAL JEWISH THOUGHT* (Stanford, 2001).

Neither one of these bodies of scholarship, one of which is squarely in the field of Jewish thought, the other of which traverses Christian and Jewish thought, by itself supports the hypothesis that the law of divine accommodation and the law of emergency authorized by God are interrelated. But together, these two bodies of scholarship supplement one another to produce the sense that emergency theories and divine accommodation theories are ligaments of the same thing. The specific character of that “thing” remains somewhat obscure. Clearly, secular law, a secularist conception of the law and the state and some version of the principle of separation between religion and the law of state are central features of this thing. It also clearly involves concerns as well as hopes attached to the probabilistic nature of human knowledge, which in turn are related to concerns about legal procedure. Finally, an interest in pluralism—religious pluralism, cultural pluralism and legal pluralism, pluralism of beliefs—is revealed and shown to be built into the ancient sensitivity to differences in historical context underlying the very first applications of the principle of divine accommodation, out of which the argument for secular law arose.

### The Aspiration

None of this secondary literature in any way settles the questions that need to be addressed in order to confirm or disconfirm, frame or reframe, my hypothesis. But it does make me increasingly convinced that the doctrine of divine accommodation and the logic of the state of emergency are intertwined and that they constitute a, if not the, birthplace of secularism and (more tentatively) liberalism. It also makes me think that by recovering this intertwined logic we might gain new insights into

the nature of liberalism particularly with regard to its relationship to statism and to emergency theories of politics (perhaps not so mutually exclusive.) That in turn could provide new insights into the relationship of emergency theories of politics to liberal values and the rule of law (also perhaps not as antithetical as we think). My strong belief is that the reconstruction of logical possibilities from historical actualities will lead to the reconceptualization of both liberalism and political theology, showing the former to be a species of the latter and hence (as critics of liberalism always have said) fundamentally a statist political philosophy but also showing the latter to not necessarily preclude (and perhaps even to require) liberal regimes of rights and the rule of law. (What it would take to accomplish such a reconstruction is another story.)

In short, liberalism and “conservative” conceptions of political theology may well be revealed to be two different faces of the things, a proposition that surely has some interesting implications for contemporary debates. (What they are is yet another story.) Identifying the bridge between the two being the principle of accommodation which explains *why* God justifies suspending His law and instituting a law based on emergency powers—and why that original divine authorization for human agency to take the place of divine agency has led to a conception of humanism and human legal autonomy from which the theological underpinnings have fallen away. In other words it shows how and why Christianity and Judaism were “terrestrialized.” That in turn might give us insight into how to understand and apply the principles of accommodation (e.g., of religious differences and of

physical and mental differences or cultural differences) that are being invoked today.

Finally, besides possibly leading to revisionist understandings of the liberal political tradition and political theology and the possible equation between them, besides producing insight into the logical possibilities and requirements of fundamental concepts like accommodation and pluralism, recovering the old usages of these concepts may help to depolarize contemporary discourse. Secularists and religious traditionalists have become increasingly polarized, but oddly, despite their mutual incomprehension, they share a common picture of traditional religious beliefs about law and politics, which is to say both find incomprehensible the idea that traditional Christianity and Judaism could, with a self-consistent logic, justify (indeed demand) the institution of legal institutions run by the state that were *secular* (acknowledging that the state should not try to enforce religious law), *humanist* (acknowledging that human beings are the agents, authors and enforcers of the law) and *liberal* (recognizing that in the face of this human, all too human, exercise of power, the same recognition of human fallibility that makes divine law impossible for human beings to follow also makes it imperative to tolerate differences of belief and adhere to standards of due process.

This is not to say that I would expect folks on the conservative religious side to change their minds in the face of the presentation of this alternative tradition of political theology. Unlike most liberal secularists, who are wholly unfamiliar with the ideas and philosophies discussed here, fundamentalist Christians and conservative Catholics have long recognized “secular humanism” as the enemy and

their roundup of the usual suspects who authored the doctrines of secular humanism tracks the canon of writers in the tradition of divine accommodation.<sup>28</sup> While some religious conservatives might well be moved by the excavation of an alternative tradition of theology of equally long pedigree to switch to that brand of faith, reason alone won't persuade them, not because they are impervious reason but because the choice of which theological tradition to favor is not a matter that is dictated by logic. The fundamentalist opponents of secularism and humanism (at least the intellectual leaders) are perfectly well aware of their association with the doctrine of divine cunning. But what the humanist ideas that the doctrine of divine accommodation defends as the cunning of God, moving us closer to the truth, are just as readily characterized, as they are by fundamentalists, as the cunning of the Devil, who disguises his ploys in the language of humanist liberal religion and secular discourse. There is no reason to expect that fundamentalists who understand the development of humanism as the plot of a cunning supernatural agent will be persuaded to come around to the belief that that the agent is not the devil, but God.

From my fellow liberal secularists, however, I expect more, if only because they, unlike the conservative opponents of secular humanism, have no acquaintance with this tradition of thought or rather, they do not have comparable understanding of its origins and its reliance on a dialectical logic of "cunning," according to which supernatural powers work through human agency. I would like to think that developing the awareness of traditional religious arguments for liberalism,

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<sup>28</sup> See Richard, "The Battle for the American Mind."

secularism and pluralism might alter the attitudes of some liberal secularists who today have trouble even conceiving of the possibility of religious fellow travelers whose ideas are rooted in traditional theological doctrines. Likewise, they may benefit from the awareness that their own beliefs are rooted in traditional theology and religious ideas. Such an appreciation may indeed have a salutary effect on contemporary discourse—though I wouldn't get my hopes up.

That, however, is not my main aspiration. Although I confess to the “irenic temperament” that Funkenstein said was the psychological mark of proponents of the doctrine of divine accommodation, I am not so naïve as to think that either that such a change in attitude on the part of (nonreligious) liberal secularists would be produced by an abstruse piece of intellectual history and legal theory. Nor do I think that should such an attitude be forthcoming, that alone would resolve our “culture war” conflicts or lead to greater mutual understanding (though it certainly might help.)

My main aspiration is to gain a clearer sense of how secularism, liberalism, pluralism, emergency theory, and the principle of accommodation logically fit together and what each principle separately, and those that interlock with each other, logically permit and entail. As a logical matter, it is easy enough to see how secularism could emerge from a belief that secular law, enforced by a secular state, is a necessary (divine) accommodation to what would otherwise be a permanent (within the confines of temporal time) state of emergency. As we have seen, secular law from this point of view is essentially the Ur-emergency law, the duration of which is coincident with the duration of temporal time. The doctrine of divine

accommodation thus makes sense of the otherwise obscure proposition that the state of emergency that justifies the institution of emergency law is “permanent.” It provides a (theological) perspective from which the “permanence” of the state of emergency is both explained and contained. It does this by adopting an essentially dualistic theological standpoint that simultaneously reminds us that from the perspective of sacred time, the view from eternity, the duration of secular time is temporary while positing that God accommodates to the human perspective of the temporal world. From the human temporal perspective, the conditions that create the state of emergency, which are simply the conditions of human nature including its inherently faulty cognitive and perceptual apparatus combined with the human propensity to do evil, are indeed permanent. From the perspective of sacred time, those conditions are temporary, succeeded by the experience of eternity. The state of emergency which justifies the suspension of divine law and its procedural standards is thus only “permanent” from the limited human point of view. But that is the point of view that the doctrine of divine accommodation says God accommodates.

The principle of divine accommodation thus completes the justification for imposing the state of emergency, which otherwise remains incomplete and unexplained. Conversely, the logic of emergency law explains how the principle of divine accommodation moves law from the realm of the sacred into the earthly realm and reshapes it in the process.

Without the benefit of reconstructing this logic, such a plainly statist political philosophy, which justifies the sacrifice of rights of due process for the sake of law

and order, would be seem to be a quintessentially illiberal, if not anti-liberal, philosophy, in keeping with the Schmittian proposition that the conditions of a permanent state of emergency negate the rule of law and render the liberal theory of law an illusion. Like the conception of political theology put forward by Schmitt, the accommodationist theory espouses the theory that a state capable of enforcing law unhampered by due process principles that are impossible to meet is a necessary (and divinely authorized) response to a *permanent* state of emergency.

In order to see the inherently liberal character of the conception of secular law produced by the doctrine of divine accommodation, it is necessary to break down its essential characteristics, the better to see how they fit together and understand how what seem like paradoxical combinations of elements are connected to one another. My hypothesis has isolated five characteristics.

- (1) The theory of law produced by the doctrine of divine accommodation is a theological theory of law, grounded in a belief in the existence of God and divinely authored law; its principles about how legal and political institutions should be constituted are derived from traditional theological principles and doctrines.
- (2) It is a secularist theory that argues that secular law is a necessity and legitimate human authorship and human enforcement of the law.
- (3) It is an emergency theory that follows the logic of emergency law, justifying the suspension of the strict due process standards of “the” law.
- (4) It is a liberal theory (or at least a proto-liberal theory), revolving around three liberal concerns, namely (i) due process rights; (ii) cultural pluralism

and tolerance for diverse beliefs; (iii) separation of church and state; although the theory admits of different opinions regarding whether, or how, human systems of government should mimic God's tolerance and acceptance of different and errant beliefs; God's refusal to countenance wrongful convictions; and God's authorization of the separation of human legal institutions from divine law, the belief in God's commitment to these three beliefs remains a constant goad to reconsider whether the established institutions and arrangements of political and religious authority comport with these beliefs about God's nature.

(5) It is a dialectical theory, which sees human societies, legal systems and theories of law and politics as containing a built-in propulsive force moving them toward ever more perfect realizations of its principles (which is to say it is taken as a given that every existing theory and system will always be an imperfect realization subject to internal critique.)

The tradition's conception of law is thus both theological and secularist, a seeming paradox that is readily resolved by tracking the logical lines of argument according to which the need for secular law is derived from theological propositions.

We can also clearly now how this conception of law could be both liberal and reliant upon the logic of the emergency state and emergency law. This second paradox will which requires further explication and exploration. The accommodationist argument figures secular law as the ur-emergency law, the law that is ushered in when the divine law is suspended, as it necessarily is when human beings are not capable of applying divine law, which is simply to say, always. It does not follow

from this point of agreement with the Schmittian construction of political theology that there is no rule of law and that the liberal belief in due process (and other liberal values) is “an illusion,” negated by the necessity of emergency law. What does follow is what I hope to explore in further work investigating this hypothesis.