From Eternity to Here: Divine Accommodation and the Lost Language of Law

Nomi Stolzenberg*

*USC School of Law, nstolzenberg@law.usc.edu

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Abstract

This paper asserts that the discourse of religious accommodation has stopped making sense, and that the reason it has stopped making sense is because our terminology (including such terms as “religion,” ”accommodation,” and ”secularism”) is inherited from tradition of political theological discourse that has been forgotten: the theology of divine accommodation. The paper reconstructs the content of that tradition of political theology in broad strokes, arguing that the birthplace of secularism and the birthplace of liberalism both lie here and that, once we recognize that, a number of doctrinal and conceptual puzzles can be solved, including how to define religion, whether to characterize secular humanism as a religion, and whether to accept the broad (virtually boundless) conception of a right to religious accommodation now being promoted by religious conservatives. The answers proposed are that (a) religion, from the standpoint of this tradition of political theology, refers to beliefs about the content and source of the moral law, and is not contingent on continued belief in a deity; (b) secular humanism is a religion in this sense, and is indeed the religion promoted by accommodationist political theology; (c) the broad conception of a right to religious accommodation must be rejected for the same reasons that the ”religion” of secular humanism must be accepted. The paper further argues, as a matter of political theory/history of political thought, that locating the origins of liberalism and secularism in the tradition of divine accommodation reveals conservative political theology and liberal political theory to be one and the same. Finally, it underscores the centrality of law to the humanist tradition and the centrality of humanism to law.
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1. Chaos

As the second decade of the twenty-first century draws to a close, it is increasingly difficult to avoid the sense that the principle of accommodating religion is veering out of control. The problem goes beyond the granting of accommodations that rub many of us the wrong way because they carve out exemptions from laws we want to see enforced. The problem is that the conception of religious accommodation on which these claims rest is both practically unsustainable and theoretically unintelligible. We are in the presence here of not just political conflict, but a deeper kind of chaos, a mental chaos that exists at the level of ideas. Political conflict over religious exemptions is to be expected when the laws from which exemptions are sought are themselves contentious. Religious accommodation claims are being used today as a political strategy by groups seeking to reverse political defeats in the context of the ongoing culture war battles over gay rights and reproductive rights. There is nothing particularly puzzling about that. What is deeply puzzling is that nobody saw it coming. And what is frankly incoherent is the picture of religious freedom on which these claims are based. Ironically, that picture is shared by both sides of our increasingly polarized political debates.

As currently pictured, the right to religious freedom confers not only rights of conscience (the freedom of belief) and rights of conduct (the freedom to act in accord with one’s religious beliefs), but also, breathtakingly, rights of lawbreaking, the right not to follow the law (if it conflicts with your religious beliefs). That this amounts to nothing less than anarchism was recognized by the late Justice Antonin Scalia in a much-maligned opinion in 1990.¹ Addressing

¹ Employment Division v. Smith, 494 U.S. 872 (1990)
the issue of whether two Native Americans had a right to be exempt from regulations that penalized the use of peyote, Scalia made the obvious point that treating religion as an excuse not to follow the law is “in effect to permit every citizen to become a law unto himself.”²

Regardless of how one thinks the Native Americans’ claims should have been decided, (I happen to think they should have prevailed), one would think that this point by itself is unexceptionable. By definition, if people are granted the right not to follow the law when it conflicts with their beliefs, then the state devolves into a state of nature in which everyone is permitted to act in accord with their personal beliefs rather than the law, unless some meaningful limitations are placed on this right. But what looks like an unassailable point of logic today was treated in 1990, when the case was decided, as sheer hyperbole. That decision provoked a groundswell of intense political opposition, bringing civil libertarians together with religious and political conservatives to demand the passage of the federal Religious Freedom Restoration Act³ to “restore” precisely what Scalia had rejected: a version of religious accommodation so broad and unbounded that it really does amount to a right not to follow the law whenever the law contradicts a person’s religious beliefs.

This notion of religious freedom is now inscribed in other statutes and executive orders that equate religious freedom with the right not to follow government regulations that violate one’s beliefs. The only check placed on this broad right to disregard the law is the “compelling interest” standard, according to which a religious exemption can be denied if granting it would undermine the state’s ability to protect compelling interests.⁴ This limiting principle might seem to offer reassurance that accommodation is not tantamount to anarchy. But this test is

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² Smith, at 879 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).
deliberately designed to be extremely difficult for the state to meet. Taken at face value, it amounts to saying that so long as the state’s interests are anything less than compelling (and even very important state interests are deemed to be less than compelling), and so long as the state interest, even if it is compelling, can be pursued through other “less restrictive” means, then chaos in the form of law-breaking can reign.\(^5\)

The chaos created by laws and executive actions reflecting this logic is real. But, compounding the mystery of its meaning, it does not take the form of the kind of anarchy that these regulations expressly authorize. In practice, the granting (and claiming) of religious exemptions is highly selective. And, despite serious signs of disintegration, the power of the state today is in many ways stronger than ever, making it farcical to suggest it is on the verge of descending into anarchy, let alone that it is handing its power over to private citizens and authorizing its devolution into a state of nature, as a literal reading of the current doctrine of religious accommodation implies. No, the real chaos is reflected precisely in the gaps between what the doctrine says, how it is heard, and what it does. What that reflects is not political chaos (anarchy, the absence of effective of law-making by the state), but mental chaos (confusion, the absence of sense-making by people). The discourse of religious accommodation has, quite simply, stopped making sense.

This is a matter that goes beyond conservatives and progressives talking past each other. It is not that we lack a common language. We have a common language, which none of us understands. We all continue to use the words and concepts of an inherited discourse of religious accommodation without understanding what we are really saying.

How else to explain that, when they joined forces with conservatives to bring about the passage of RFRA, progressives didn’t perceive that it means what it says? How to explain that conservatives feel no compunction to defend themselves from the charge of anarchism, when they are explicitly claiming the right to disobey the law? There is a political puzzle here. (How did progressives become the party of law and order, and conservatives the party of anarchy?)

But that is embedded in, and muffled by, a deeper linguistic puzzle. The current discourse is the very opposite of euphemistic: it explicitly names and claims its taboo objective, but when it does so, the taboo nature of that objective dissolves, and the objective itself (to deny the state’s authority) becomes unseen.

A world in which people blithely endorse what is literally a principle of anarchy without acknowledging its anarchical character, and with no real intention of dismantling the state, is a symptom of a state of intellectual and cultural chaos in which a previously established understanding of religious accommodation has broken down. This is a state of chaos that has taken hold in the domain of thinking about the state and religion. The state may not be collapsing into chaos, but the doctrine pertaining to it has. Not just the precepts of the doctrine, but the basic conceptual components out of which those precepts are fashioned--“religion,” “free exercise of religion,” “burden,” “secularism”--all elude definition. Instead of guiding our collective thinking along shared channels of thought which point us towards aspects of human experience we all can recognize and agree we need to make decisions about, even if we disagree over what the decisions should be, these terms function as the vaguest of signifiers, pointing in multiple directions at once towards diverse phenomena we only dimly make out.

What has brought us to such a pass? A shorter story would trace the development of religious reactions to modernization in the realms of religion, politics, science, culture, and law.
It might begin with the Christian reaction to higher biblical criticism. It might focus on the origins of Christian fundamentalism in turn-of-the-twentieth century America, following the twists and turns of evangelical Protestants’ encounters with Catholics and the emergence of a political coalition between these two erstwhile theological enemies. It might document the events that catalyzed the formation of the American “Religious Right,” including the recognition of rights of gender and sexual equality and reproductive choice, and the school prayer decisions of the early 1960s, and Brown v. Board of Education. It might analyze the complicated forms of solidarity conservative Protestants and Catholics formed with Mormons and Orthodox Jews, and the introduction of Islamophobia into the Religious Right in the late twentieth century. It might tell the story of parallel developments in other countries in this same time period.

But I want to tell a longer story, about the deep sources of our religious and legal vocabulary, a story that begins in the medieval period with the encounter of Jewish and Christian thought with classical ideas. This is a story that goes back to the very origins of the idea of the secular and the early theories of secular science and secular law that it spawned. As it traces the evolution of the idea of secularism and secular law, it is a story that offers us a glimpse of the origins of liberalism as well.

The story of the origins of liberalism offered here differs from other accounts. For several decades now, scholars have been excavating the theological origins of liberalism. Other scholars, reviving the subject of political theology, purport to demonstrate that the modern liberal

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state is unable to escape its theological origins,\textsuperscript{7} and remains, despite its liberal secular pretenses, grounded in claims to sacred authority.

Despite their radically opposed outlooks, these two bodies of literature share the recognition that the modern state evolved out of theological (specifically, Christian) traditions of thought.\textsuperscript{8} Further, they are in agreement that liberalism is incompatible with older, theological understandings of the state, according to which the state’s authority (figured variously as emergency or divine authority) is antecedent to, and overrides, law. What they disagree about is not the essential dichotomy between liberalism and the emergency state (i.e., the state that overrides and suspends the rule of law), but the possibility of there being any alternative to the emergency state (i.e., a liberal state, governed by the rule of law). According to scholars of the history of liberalism, that is not only a possibility but an actuality. In their view, the newly acknowledged religious foundations of liberal political theory do not negate its liberal character, either because they function as a kind of intellectual scaffolding, thrown away once the edifice of the liberal state is constructed, or because the religious beliefs in which liberalism is grounded do not necessitate the exercise of supra-legal powers. Proponents of political theology dispute these contentions. They maintain that the religious frameworks out of which modern thought was built are not mere intellectual “scaffolding” but, rather, integral features of the modern state, and argue, further, that emergency powers are a necessary and permanent feature of sovereignty. Maintaining that the powers of the emergency state are by their nature sacred, and the state


always, of necessity, an emergency state, they draw the conclusion that the ideal of a liberal (secular) state subject to the rule of (secular) law is an illusion.

My account agrees with the basic proposition that modern political theory derives from traditional theological doctrines. But it proposes a different view of what the content of those doctrines is. Following the lead of the historian Amos Funkenstein, it identifies the theological doctrine of divine accommodation and the “secularist theology” which grew out of this and related doctrines as the intellectual source of modern political theory and secular law. This is an understanding of the origins of modern thought that has long been accepted by historians of science and religion, but which has received little attention from historians of political and legal thought, even though Funkenstein and others made it clear that the “sciences” that evolved out of secularist theology include the legal, political, and social sciences. Indeed, their work has shown that underlying all of these fields of academic study was a particular theory of law (a secularist theory of law) that grew out of the understanding of the need to accommodate humans’ inability to grasp divine law. That understanding, and its influence on the evolution of modern political thought, have yet to be integrated into the study of liberalism and the broader topic of religion’s relationship to law and the modern state.

Once the centrality of the principle of accommodation to the modern state’s theological foundations is recognized, a number of things fall into place. First, the accommodationist account provides an answer to the question which has dogged contemporary historians of liberalism, which is, to quote Samuel Moyn, not whether Christianity birthed liberalism, but,

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rather, “how this happened.”

Second, it offers an explanation of the nature of secularism which resolves the contradiction of a political theory (and conception of law) which is at once theological and secularist. Recovering the logic of divine accommodation reveals secularist theories of the state and political theology to be conjoined rather than opposing political philosophies. By the same token, it explains how secularist theories of law and the state generate liberal political doctrines which complement conservative political doctrines, rather than displacing them. It points up the inherently hierarchical nature of accommodation, which mirrors the inherently hierarchical (“conservative”) nature of the state, no matter how tolerant and otherwise liberal the state is. In so doing, it helps us to understand how current usages of the concept of religious accommodation, invoked in the name of defending religious tradition, ironically deviate from the original (religious) understanding of the principle.

The point of reconstructing the original understanding of religious accommodation is not to assist in a re-installation of older, religious worldviews. To the contrary, the logic of accommodation affirms the inevitability of a dialectical process of continual innovation both at the level of practice and at the level of the conceptual schema by which we understand, justify, and criticize our practices and institutions. More specifically, it affirms the inevitability of secularization. From the point of view of accommodationist thought, theology becomes secularism, political conservatism becomes liberalism, and liberalism eventually becomes superseded into yet another synthesis of conservative (law and order, jurispathic) and humanist (rights-affirming and life-affirming) impulses. But along the way, contradiction and confusion reign. Today, we are in a moment of heightened confusion that stands to be illuminated by reconstructing the logic of accommodation.

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Recovering that logic allows us to see that the words used in contemporary legal and popular discourse are relics of an archaic conceptual framework that once ordered our thinking but no longer does. Irreversible changes have been introduced into our concepts and practices which are irreconcilable with the old ways. But we have not yet arrived at a new intellectual synthesis that would charge the old words with new, coherent meaning. The words we have inherited from the older (theological) discourse of accommodation serve today as placeholders for replacement ideas, yet to be coherently formulated. Eventually, the contours of the doctrine of accommodation and the cognate principles of secular law will be reshaped. But that cannot happen until we recognize the current way of thinking about those principles no longer makes sense.

2. **Order**

In the beginning of the development of the accommodationist tradition there was chaos, to which philosophers responded by creating order and justifying it on the basis of a particular set of theological doctrines. More specifically, they were responding to the chaos created by the existence of human differences, including different beliefs about what the rules of order should be. The recognition of human differences and the need to accommodate them and the recognition of the need for order in the face of those differences are equally essential and inseparable elements of the accommodationist political philosophical tradition.

Before the principle of accommodation was deployed to imagine and justify particular forms of political order, it was used for a very different task: to explain away parts of the bible perceived by the safe-guarders of religious orthodoxy to be inconsistent with correct beliefs about the natural and supernatural world. These textual “embarrassments” included

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anachronisms, anthropomorphisms used in the description of God, and approving references to practices deemed to be abominations (such as animal sacrifice). All of these features of the biblical text cried out to the theologians for some kind of explanation.

Theologians found the explanation they were looking for in classical rhetoric, which formulated a principle of textual exegesis that allowed them to explain these features of the biblical text as “accommodations” that had been made to the needs and limitations of its first audience. The classical principle of accommodation had been developed first by Greek and Roman philosophers as a hermeneutic tool for interpreting written texts, such as contracts and wills. Coupled with the principle of equity, which elevated the “spirit” of a text over its “letter,” it held that effective orators and writers tailored their modes of expression to the ability of their audience to comprehend their words. Readers of texts were exhorted to base their interpretations on a reconstruction of the original context in which the text was produced.12

Implicit in this hermeneutical injunction lay a mundane proposition that bore radical implications. The idea that perceptions change over time and vary from place to place, and therefore texts should be viewed as products of a particular context,13 would eventually give rise to the modern study of history and anthropology and the percolation of those fields’ perspectives into the broader culture.14 But originally, it was simply a common sense approach to reconstructing an author’s intentions. Authors, the classical tradition maintained, know that in order to achieve their goal of being understood, they have to write in their audience’s language, which is to say, accommodate their words to their audience’s perspective. Recognizing that human beings’ understandings are filtered through their sense of what is already familiar to

12 Eden, 2-14, 102; Funkenstein, 213-15.
14 Ibid., 202-89.
them, the concept of accommodation functioned as an exegetical principle that admonished present-day readers of texts to interpret them in light of the modes of understanding that prevailed at the time they were written. At the same time, it counseled adjusting (i.e., accommodating) the original spirit of the text to the felt needs of the time.

These hermeneutical principles, first applied to secular texts, proved to be exceptionally useful for biblical interpreters seeking to defend the biblical text from the charge that it contained errors. As Funkenstein relates, “[m]edieval 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.” On the basis of this “exegetical topos,” there developed “various explanations of the less palatable and less understandable biblical precepts and institutions,” which the principle of accommodation justified as “the adjustment of God’s providence to the primitive mentality of the nascent Israel.”

This marriage of classical rhetoric with Christian and Jewish theology was extraordinarily fecund. Not only did the principle of accommodation continue to be used to defend religious texts and doctrines from critical assaults. It also became the basis for theorizing about the author of those texts. Applied to a text whose ostensible author was the supreme divine being, the principle of accommodation became much more than a method of exegesis; it became an account of the nature of the divine being Himself. If the author of the bible had accommodated His text to his audience, that implied that God Himself is accommodating. Out of that “doctrine of divine accommodation” all manner of theories about the supernatural and the natural world were spun. From the original postulate that “[t]he

15 Ibid., 214.
Scriptures are adjusted to the capacity of mankind of to receive and perceive them,” it was a logical inference that “God adjusted his acts in history to the capacity of men to receive and perceive them.” More specifically, “[t]he law was given to all in a language to be understood by all.”

At once a theory of God, of human nature, and of law, the doctrine of divine accommodation, postulating that God accommodated His law to the capacity (and the limits of the capacity) of human beings to understand it, became the foundation of a broad tradition of thought out of which modern secularist scientific and political thought evolved. Funkenstein concentrates on how this theoretical tradition was applied to explain conundrums of the natural world, bringing forth the “Scientific Revolution.” But he also relates how the principle of divine accommodation was applied to another conundrum that troubled religious and political leaders alike: how were human beings supposed to deal with false beliefs? More to the point, how were they supposed to deal with human beings who hold false beliefs? This was a political conundrum (what should political and religious leaders, as well as ordinary people, do with, or more menacingly, to, people with false beliefs?) and a scientific conundrum (what was it about human nature that made people hold false beliefs?), which led to much theorizing about the culturally-bound nature of human cognition and the evolutionary nature of human cultures. But at bottom was a religious conundrum: Why did God make people who hold false beliefs? After all, given the fundamental theological postulate of God’s omnipotence, He could have created perfect human beings, uniformly possessed of perfect knowledge of His law. The doctrine of divine accommodation did not provide an answer to this conundrum. But it did supply another

17 Funkenstein, 213-214, 222.
18 ibid., 18-201.
19 Ibid., 213-71.
postulate, namely, that God must have chosen to make human beings with faulty cognitive equipment and differing beliefs.\textsuperscript{20}

The political theories generated by this line of reflection were by no means uniformly “liberal” in nature if by that we mean abjuring political repression and demanding that governments respect freedom of belief and rights to due process. Eminently flexible, the principle of divine accommodation was used to justify the most intolerant and repressive regimes as well as tolerant and liberal ones. Nonetheless, the argument that it constitutes a liberal political tradition not only can be made. I contend it is only when we recognize that it grew out of the theological tradition of divine accommodation that we can clearly see liberalism for what it is: a statist theory that justifies the state’s exercise of emergency powers in the name of sacred principles of law. This is not to deny that liberalism also is a theory about how to deal with the frailty of human cognitive powers and the need to rein in the exercise of political power. But it is to insist upon the inseparability of conservative doctrines of law and order from the liberal doctrines of freedom and due process that grow out of the recognition of human cognitive frailty.

What holds these contradictory elements together is a particular logic that was the product of an ongoing argument about how God’s law could be followed given the existence of disagreement, and consequent lack of certainty, about what the content of God’s law is. Beginning from the premise that divine law (and God) exist, the argument invoked the doctrine of divine accommodation and 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 doctrine of divine accommodation thus generated a theological argument for the necessity of secular law.\textsuperscript{21}

\begin{thebibliography}{9}
\bibitem{footnote20} Ibid., 222-27.
\bibitem{footnote21} Ibid., 3-9, 346-63; Lorberbaum, \textit{Politics and the Limits of Law}.
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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, but rather, an anthropological “manmade” artifact. Authored by human beings, the product of human societies and cultures that differ over time and place, secular law was understood to deviate from and in fact violate the requirements of sacred law (as when judges execute punishments based on wrongful convictions.)

On the other hand, secular law was thought to reflect the divine will in two different ways. First, saying that human understanding of God’s law is imperfect is not the same as saying it is nonexistent. Moreover, it was posited by the doctrine that human beings and societies were implanted with a mysterious capacity to increase their understanding of God’s law over time. The core idea that emerged out of the original explications of the bible’s “embarrassments” was that God preferred for human understanding (and cultures) gradually to evolve. This idea of growing convergence between divine and secular law was one way human law could be said to reflect divine law even as it deviated from it.

That stood in tension with the second, more subversive way in which the doctrine imagined human law’s connection to divine will. On this view, divine law truly is hidden, rendering human beings the exclusive agents of their history and the exclusive source of authority in the “sublunar” world. In effect, the doctrine authorized (and held that God

23 Funkenstein, 211, 222-27.
24 Ibid., 204 (identifying the “strong sense of the absolute autonomy and spontaneity of human history” that developed).
authorized) the suspension of divine law and its replacement by the manmade law of mere
mortals. So conceived, secular law had an increasingly tenuous connection to divine law, even
as it was viewed as divinely ordained.25

This picture of law was the product of sustained thinking about two political puzzles. The first was the aforementioned question of how to behave toward people with different beliefs.26 In particular, differing beliefs about how people ought to behave posed a pressing political problem because such beliefs impel people to act in ways that people with other moral beliefs perceive to be immoral, blasphemous, and dangerous. It was therefore a matter of great urgency whether we should try to convert people to our own beliefs about how to behave, or get rid of people with different beliefs, or tolerate them. The principle of divine accommodation did not directly answer this pressing policy question. But it did supply an important basis for figuring out how to answer it by addressing a more basic question, namely, why did people have different beliefs and values? Building on the ideas developed in the context of applying the principle of accommodation to biblical exegesis, the answer arrived at was that the existence of different beliefs was part of God’s plan. God, on this account, accommodated His law to people’s different beliefs as an accommodation to the faulty cognitive equipment which He Himself had implanted in human beings (for inscrutable reasons human beings simply had to accept). The startling conclusion of this line of analysis was that God allowed people to be ruled by their mistaken beliefs about law, rather than expecting them to be governed by divine law. Further, the doctrine held, God allowed different groups of people to be ruled by different beliefs about the rules that should guide human behavior.

25 As Funkenstein sums up, “[i]t seems as though the secular theology of the seventeenth century was bound to dig its own grave, because it often stressed, however ambiguously, the self-sufficiency of the world and the autonomy of mankind.” Ibid., 346.
26 Ibid., 254, 265.
In addition to being a theory of legal pluralism, this was an essentially anti-theocratic theory of law, holding, in essence, that theocracy is impossible because no human being has access to divine law. “Religion” from this standpoint refers, not to divine truth, but rather and precisely to the inherently faulty beliefs that different groups of people or “nations” hold, in particular, beliefs about the content and source of law. As, more often than not, a deity was viewed as the author of the law, the terms religion and law were essentially synonymous. The principle of “religious accommodation” in this context was simply an expression of the recognition that different groups hold different beliefs about the source and content of law—and do so with God’s approval. It was not nations that were believed to be commanded to accommodate different beliefs in the first instance. It was God who was believed to accommodate different religious (i.e., legal) beliefs by separating them out into different legal systems or “nations”.27

The second political issue to which the doctrine was applied was the problem of law enforcement.28 The issue again was one of mistaken or faulty beliefs. But here it was not a matter of the beliefs about the content of the law that separated people into different “nations,” but rather, the beliefs arrived at by the people within a particular nation who were entrusted with applying and enforcing the law (i.e., legal authorities). The problem, in short, was wrongful conviction, erroneous legal judgments resulting from the same faulty cognitive equipment that produced the imperfect beliefs about the law that differentiated people into separate nations. In response to the problem of enforcing the law, the doctrine of divine accommodation was invoked

27 Vico is the exemplar of this line of thinking, which Funkenstein links to the idea of the invisible hand. (“From Vico to Marx, they [the theorists of the invisible hand] envision the subject of history—human society—as capable of generating all of its institutions, beliefs, and achievements of itself.” Ibid., 204.

to justify the institution of imperfect but effective legal institutions capable of protecting people from the perceived danger.

The justification given for allowing convictions to be rendered on the basis of mistaken beliefs essentially replicated the argument for accepting the existence of different religious belief systems (i.e., legal systems), but with one crucial embellishment: the distinction drawn between substantive and procedural law.\textsuperscript{29} Divine law, canon lawyers and rabbis observed, is made up of both substantive and procedural rules.\textsuperscript{30} And while the substantive commandments and the punishments for breaking those commandments were notoriously strict (an eye for an eye, etc.), so too were the rules of evidence and other procedural safeguards that biblical law said had to be followed before a judge could draw a conclusion about whether the substantive law has been violated. That cut against the strictness of biblical law. Indeed, adhering to the sacred law of \textit{procedure} was observed to make it virtually impossible for human legal actors to secure convictions for violations of the bible’s substantive law.

More than that, it was widely understood that the biblical procedural standards were intended to be impossible to satisfy. As proponents of the accommodationist theory of law enforcement saw it, the procedural law of the bible prevented the powers entrusted with the implementation of the substantive law from inadvertently violating it by ensuring that trials never resulted in convictions. This reflected the understanding that any rules of procedure which would permit human beings to reach verdicts would inevitably lead to erroneous judgments that violated the substantive sacred law.

This belief, that God had made divine law inherently unenforceable, generated a profound puzzle for devout thinkers. Why would God permit crimes to be committed with

\textsuperscript{29} See Stolzenberg, “Profanity of Law.”
\textsuperscript{30} See sources cited in note 22.
impunity, leaving people to suffer at the hands of others without any protection or redress? More fundamentally, would God have done so? This question went beyond the epistemological questions around which the doctrine of divine accommodation revolved to reach the fundamental issue of theodicy: Would a good God let bad things to happen to good people? More specifically, would God really want people to refrain from establishing effective means of law enforcement to rein in the human impulse toward aggression?

Some, theological quietists, said yes. This theological point of view addressed the problem of theodicy by denying that a world without effective legal and political institutions is a world in which crime is committed with impunity. According to the quietists, this was a false premise because the law would be enforced and everyone would meet their just deserts—in the afterlife.

Quietist theology reflects the view that human judgment is so hopelessly fallible that it is worse for human beings to try alleged wrongdoers than to do nothing at all. Accommodationist theology also rested on a deep skepticism about claims to infallible knowledge. But it tempered its skepticism with a more pragmatic view of human reason as adequate to the tasks of decision-making in the world. Against the quietist position that it was God’s will for people to suffer patiently and wait for justice to be done in the afterlife, accommodationist political theology held that a benevolent God could not possibly have intended for human beings to live in the world of chaos and violence that results from the absence of effective law enforcement institutions on earth. It rejected the ideal of Christ-like martyrdom that religious quietists embraced as an untenable demand to impose on ordinary human beings, which could not possibly be the will of God.

31 See Fraher, note 23; Stolzenberg, “Profanity of Law,” 43-44.
More fundamentally, accommodationist theology disputed the temporal standpoint from which the quietists measured the duration of the state of emergency that exists when effective institutions of law enforcement are absent. The quietists adopted the standpoint of eternity. The doctrine of divine accommodation was, at bottom, a rejection of the standpoint of eternity. Its most fundamental tenet was that God accommodates the standpoint of human beings embedded in the material, temporal world. From that standpoint, the duration of secular time is an eternity. The conclusion that followed from this was that the state of emergency created by humans’ inability to know and enforce the divine law is “permanent”—not, to be sure, permanent from the standpoint of eternity, from which all of mortal life is by definition temporary; but permanent from the standpoint of secular time, the human standpoint, which, the doctrine of divine accommodation maintains, is the relevant standpoint from which to judge the duration of injustice and human suffering.

The institution of secular law was thus justified as a necessary (and divinely sanctioned) response to a “permanent” state of emergency. In order for human beings to be able to enforce the law in the here and now, accommodationist political theology recognized, it is necessary for them to construct legal systems with less stringent standards of evidence and procedural safeguards than those prescribed in the bible. Secular law, on this account, is a species of emergency law. It is indeed the ur-emergency law; the law human beings author and execute via the establishment of effective albeit imperfect institutions of law enforcement; the law ushered in by virtue of the divine law authorizing its own suspension as an accommodation to human beings’ cognitive limitations combined with their need for physical protection. Secular law, so construed, is thus humanly authored and divinely sanctioned, imperfect but adequate for life in the material world.
3. The Problem of Liberalism

This account of political theology readily explains how Christianity (and Judaism) became “terrestrialized.” But the riddle of how Christianity and Judaism “birthed” liberalism remains to be explained. There are two serious challenges to the claim that it did. First, the political theory derived from the postulates of the theology of divine accommodation is undeniably a conservative political theory, a theory according to which a strong state, exercising emergency powers, is necessary to protect one group of people, those who deserve the state’s protection, from other people, who constitute threats. This is a tradition of political theory that exhibits all of the essential characteristics of Schmittian political theology: the friend/enemy binary, the emergency theory of politics, the belief that the state of emergency is permanent, the justification for the suspension of due process. It is, in short, a statist theory, falling into the long tradition of “dirty hands.”

Another challenge to the liberal nature of accommodationist political theology concerns its treatment of the question of religious accommodation. Accommodationist political theology did not require governments to accommodate different religious beliefs any more than it required governments to observe strict rules of judicial procedure. To say that God accommodates religious differences does not logically imply that God requires human beings or governments to do so. And while the belief that governments are commanded to tolerate different beliefs is logically consistent with the principle of divine accommodation, so too is the idea that human beings have been separated into different nations, each with their own law, within which the accommodation of religious differences is not required (indeed, might be prohibited). The principle of divine accommodation was sufficiently malleable that it could be used to justify

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religiously intolerant and oppressive regimes as well as liberal policies of religious tolerance and accommodation. Even the inquisitorial state, charged with task of converting other nations, was justified in terms of the theology of divine accommodation as the agent of the divine evolutionary plan to move errant believers towards correct belief. 33

But, as imagined and justified in the accommodationist tradition, the Christian inquisitorial state was not, strictly speaking, a theocracy. Theocracy depends upon the belief in the existence of an infallible human authority. By contrast, the two kingdoms theology of the Holy Roman Empire reflected the accommodationist belief in the unavailability of infallible human authorities and the consequent necessity of political dirty hands. That belief went hand in hand with the belief that secular, political authority and spiritual, religious authority belong to two separate spheres. 34 Of course, in practice, the line between this two kingdoms political theology, which was precisely anti-theocratic (i.e., secularist), and the political theology of theocracy often blurred. It is hard to justify a kingdom as divinely ordained without slipping into, and promoting, the belief that the leaders whose authority to rule is being justified are infallible. In theory, however, two kingdoms political theology was opposed to that belief. Its conception of separate religious and political spheres did not mean that religious authorities could not participate in secular government. Nor did it mean that political rulers could not involve themselves in the governance of the Church and claim the mantle of divine authority. But it did bespeak the recognition that what the mantle of divine authority cloaked was hardly divine, 35 and, further, that, when religious authorities participate in political governance and law enforcement, they themselves enter into the sphere of secular power and dirty hands.

33 See, e.g., the discussion of Eusebius’s justification of the Roman Empire as “predestined to evolve into the kingdom God.” Funkenstein, 256-58.
34 See ibid., 256-71.
35 Ibid., 259.
This early incarnation of the principle of separation between church and state was simply the logical implication of the core accommodationist tenet that divine law is unavailable in the temporal world and must be substituted by human systems of law. It did not necessarily imply that the state should accommodate different beliefs, only that it should respect the autonomy of the Church. But it was a recognizably liberal as well as secularist principle that stood at the foundation of the accommodationist political tradition.

But what makes this tradition the font of liberalism is the dialectical theory of history in which this original principle of separation between religious and secular law is embedded. The idea that human history unfolds dialectically was the logical outgrowth of the simultaneous insistence that human legal institutions are all fallible and that they are nevertheless necessary in order to meet basic human needs. The only conceivable escape routes out of the contradiction between these propositions were those posited respectively by the political theologies of theocracy and quietism: either deny the unavailability of an infallible human authority or submit to the unjust exercise of power. But both of these escape routes are precluded by the accommodationist theory of human needs, which rejects the existence of infallible human authorities and the principle of submission to unjust human authority. What follows from the rejection of these two alternative political theologies is the need to accept the coexistence of contradictory principles as an inherent feature of the human condition. That acceptance, however, was coupled in with a belief (first formulated in terms of a belief in divine “cunning”\textsuperscript{36}) in the existence of an irrepressible human impulse to resolve the contradictions that undermine justice by searching for ever “more perfect” syntheses of our contradictory human needs.

Insisting on the impossibility of a perfect conclusive resolution, accommodationist theology

conceives of history as a series of necessarily imperfect, but progressively more perfect, attempts to resolve the contradictions, each of which gives way to the next as the contradictions inherent in each established system inevitably rise to the surface, giving rise to their subsequent critique and eventual replacement with a new set of political arrangements. As the tension between the theory’s justification for suspending strict rules of due process and its awareness of human cognitive error mounts, more liberal doctrines of due process are demanded. As the contradiction between the picture of an accommodating God and human practices of religious intolerance becomes too great to bear, more liberal policies of religious accommodation are adopted and implemented, within the state as well as within religious communities.

Locating accommodationist thought in the terrain of dialectical humanism explains how what begins as a theological doctrine evolves into a thoroughly secularist doctrine, according to which human beings prescribe and enforce the rules of morality. It likewise explains how the emergency theory of the state evolves in a liberal humanist direction. Of course, it is always debatable whether any particular reform is moving in a humanist, liberal or post-liberal, direction. If the doctrine of divine accommodation tells us anything it is that no one can say for sure what is a fulfillment, as opposed to a betrayal, of humanist ideals. What we can say is that such cognitive humility is a liberal precept that threads throughout the accommodationist tradition. It is out of the awareness of human cognitive deficiencies that this entire tradition of thought unspools. That provides a basis for concluding not only that this tradition of Christian and Jewish theology “birthed liberalism,” but also, that liberalism, so conceived, is inseparable from the doctrines of statism, emergency law, and dirty hands associated with conservative political theory. From this perspective, there is no dichotomy between the liberal state and the
emergency state. The liberal state is an emergency state, which is simply to say, a state, with force at its command.

The flip side of this conclusion is that the emergency state is a liberal state, which is to say, a state that accommodates to human needs, first by providing for law and order, and then by developing procedural mechanisms for limiting and correcting erroneous judgments and adopting substantive policies of accommodating differences of belief. Liberalism, on this view, is not incompatible with the older theological understanding of the state. It is a direct product of that theological understanding, which posits the necessity of its own secularization and dialectical unfolding as an always flawed incarnation of humanist ideals.

4. Humanism and the Lost Language of Law

What do we gain by recovering this lost logic of dialectical humanism and accommodationist political theology from which contemporary liberalism has grown estranged? For one thing, it demonstrates the common root and ongoing linkages between law and the humanities. As scholars like Amos Funkenstein have shown, the natural and the human sciences and the theory and the practice of the secular liberal law are fruits of the same tree: the philosophy of humanism, which derived from the theology of divine accommodation.

Understanding the conceptual framework in which the concepts of religion, accommodation and secularism were first developed also helps to resolve some of the knottier problems of contemporary legal doctrine. Once we recapture what the term “religion” refers to in this conceptual framework, many doctrinal difficulties that have long plagued this area of law melt away. For example, the question of how (or whether) to distinguish “nonreligious” from “religious” beliefs is readily resolved once we recognize that religion is defined with respect to the principle of accommodation as the beliefs about the source and content of the rules of
conduct that govern human behavior that different groups of people hold. Because this
definition is not contingent on a continued belief that the source of those rules is divine, it
follows that all moral convictions are properly classified as religious convictions. By the same
token, accommodationist political thought (aka dialectical or secular humanism) understands
itself to be a religion. Like other religions, secular humanism constitutes a humanly authored
system of beliefs about the source of legal authority and the principles that should determine the
content of the law.

This might seem to bolster the conservative case for adopting an expansive conception of
religious accommodation (and rejecting the “religion” of secular humanism). But in fact these
definitions of religion and secularism are tied to a conception of religious accommodation which
undermines that cause. The argument for religious accommodation, which evolved out of the
doctrine of divine accommodation, depends upon the same set of propositions that justify the
institution of the state whose task is to impose law and order by enforcing a particular vision of
law. The twinned beliefs, that human judgment is fallible, yet societies must be ruled by fallible
judgments about the content and application of the law, demand a state capable of enforcing the
law as well as accommodating different beliefs. From this point of view, accommodation is an
obligation that must be overridden, not only when the state’s countervailing interests are
compelling, but whenever granting an accommodation undermines its ability to enforce its law.

The principle of religious accommodation was originally a religious doctrine about the
need for religious people to accommodate different religions. It reflected the understanding that,
contra theological quietism, it was neither possible nor desirable to live a life of spiritual purity,
uncontaminated by contact with people with different beliefs. Over time, the doctrine became
secularized. But it always was tethered to the belief in the necessity of a secular state that
exercises power for the sake of maintaining order. Granting religious accommodations is an act of power. And receiving a religious accommodation, no less than granting one, necessarily entails dirty hands. To hold otherwise, and insist upon the right not to be associated in any way with “immoral” beliefs, is to reject the logic of accommodation.

One can, of course, reject this logic. Modern-day heirs of theological quietism and theocratic political theology do just that. Since their aim is to undermine the authority of the secular state and the “false” religion of secular humanism that undergirds it, there is no reason not to prise the principle of religious accommodation apart from the principles of statism and secularism in which it was historically embedded. But defenders of the secular state cannot afford to lose sight of the logic of accommodation which binds the secular state, the emergency state, and the liberal state together. The old way of understanding how these fit together may no longer be available. But without a new way of conceiving of their relationship, which acknowledges their interdependence, no version of religious accommodation will survive and nor will the secular state.

Further Reading


