The Sleep of Reason

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INTRODUCTION

A very strange thing is happening in legal academia. The left and the right have joined forces, and the center is under attack. What makes this so unusual is that law has traditionally been a field of centrists. The common law background, drummed into every first year law student, tends to leave lawyers with a taste for incremental rather than sudden change.[1] Further experience with the doctrine of *stare decisis* and the methods of legal reasoning only strengthens this tendency. Even those students who come in eager to change the world rarely survive more than a few years in practice before realizing the futility of hoping for radical decisions from judges who have spent a lifetime internalizing the careful and methodical pace of the common law. Some adjust; others go into politics, which may offer more hope of radical transformations. Apparently, however, the most unrepentant idealists have been gravitating toward academia, where they are now attacking legal centrism at its source.

This joinder of left and right against the center can be seen in a variety of contexts. Many radical feminists have made common cause with the "Moral Majority" in seeking to suppress pornography.[2] Proponents of hate speech regulations take a view of academic freedom that would not have been unfamiliar to Joseph McCarthy.[3] Several prominent progressive legal academics have adopted the tactics of Robert Bork by portraying their own political agendas as the intent of the Framers.[4] Traditional notions of affirmative action—that members of certain groups ought to be given the benefit of the doubt in close

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1. *See* Paul D. Carrington, *Hail! Langdell!*, 20 LAW & SOC. INQUIRY 691, 740-41 (1995).

2. *See, e.g.*, CATHARINE A. MACKINNON, ONLY WORDS (1993).

3. *See, e.g.*, MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993) [hereinafter WORDS THAT WOUND].

4. *Compare* BRUCE ACKERMAN, WE THE PEOPLE (1991) *with* Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918 (1992); *compare* ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994) *with* Suzanna Sherry, *Progressive Regression*, 47 STAN. L. REV. 1097 (1995); *compare* MICHAEL PERRY, THE CONSTITUTION IN THE COURTS (1994) *with* Suzanna Sherry, *An Originalist Understanding of Minimalism*, 88 NW. U. L. REV. 175 (1993).

cases—are opposed not only by conservatives trumpeting the value of color-blindness, but also by some critical race theorists who argue that affirmative action as currently practiced serves only to legitimize illegitimate credentials and to perpetuate stereotypes of inferiority.[5] But perhaps the oddest coupling of all is the attack on the whole Enlightenment tradition by both radical social constructivists on the left and conservative religionists on the right.

We all know the Enlightenment story, but this article recounts—and criticizes—the rather surprising ending that is currently in vogue. Once upon a time, reason replaced faith as the guiding epistemology. In response, religion became largely rational itself, questioning the sharp distinction between faith and reason.[6] Despite occasional upsurges, religiosity of the traditional, pre-Enlightenment, antirational kind gradually diminished in the Western world. Originally pure and acontextual, reason eventually came to encompass pragmatism or practical reason.[7] For good or ill, the reason and empiricism of the Enlightenment—modified and expanded by later thinkers—reigned supreme. Occasional critics were discounted as primitive, naive, or uneducated, and rarely gained a foothold in universities.[8]

The first ripple in this once uncontroversial ending came from French postmodernists, whose ideas were quickly adopted in the 1980s by legal academics on the left. Critical legal scholars, radical feminists, critical race theorists, and gay and lesbian theorists[9] began to attribute the Enlightenment epistemology to powerful straight white men, to suggest that others might have different and equally valid epistemologies, and to argue for a sort of epistemological pluralism. This approach has more recently been adopted by conservative scholars arguing that we ought to afford religion a more central place in our politics and culture. Enlightenment reason, they suggest, is just one of a number of alternative epistemologies, and there is no justification for privileging it over religious ways of knowing such as faith and revelation.

Nor is this all merely abstract philosophical speculation: both the radicals and

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5. *See, e.g.*, Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222 (1991) [hereinafter Delgado, *Role Model*]; Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1746 (1995) [hereinafter Delgado, *Rodrigo's Tenth*]; Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705.

6. *See, e.g.*, JAMES TURNER, WITHOUT GOD, WITHOUT CREED: THE ORIGINS OF UNBELIEF IN AMERICA (1985).

7. On the differences between practical reason and the more radical social constructivism, see *infra* Part IV. Practical reason, or at least an experiential or empirical component of reason, was likely part of the Enlightenment project from the beginning. *See, e.g.*, Louise M. Antony, *Quine As Feminist: The Radical Import of Naturalized Epistemology*, *in* A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 185, 196 (Louise M. Antony & Charlotte Witt eds., 1993) ("It was no part of Descartes's project (much less Kant's) to assert the self-sufficiency of reason.").

8. Marxism, which did gain a foothold in American universities, generally adhered to the canons of scientific rationality. Marxist attacks on the Enlightenment did not tend to question Enlightenment epistemology but only argued that the prevailing understanding of reality was incorrect and the result of false consciousness.

9. *See* William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 635 & n.141 (1994).

the religionists use their critique of the Enlightenment to advocate very real legal change. Questions of epistemology are thus made central to issues of public policy, and the question becomes what sort of epistemology we should use in governance. After first describing the surprising congruence between the left and the right, I will suggest in this article that our history, the basic structure of our government, and serious practical considerations all point to Enlightenment epistemology as the one best suited for public governance.

I. REASON

Before turning to the attacks on Enlightenment reason, I should briefly explain what I mean by the term. First, I mean to include pragmatism, or practical reason, within the definition: pure ratiocination is not the only form that reasoning can take. Practical reason, originally derived from Aristotle and currently enjoying a resurgence in American legal thought, involves not algorithms but judgment. Pragmatists rely on a congeries of sources for their judgments, including experience, observation, logic, learned patterns, and tradition. Thus, although reason generally refers to a cognitive process whose persuasiveness depends on consistency with the ordinary canons of the scientific method, a conclusion need not be shatterproof to be warranted.

I specifically do not mean to limit reason to a narrowly defined method of thought such as deductive logic or the scientific method. Thus, reason can incorporate what Anthony Kronman, following Alexander Bickel, calls "prudence."[10] What distinguishes reason from alternative epistemologies is its general reliance on basic logic and the evidence of the senses (augmented by scientific discoveries). Certain types of questions are always in order in response to a reasoned argument: "Doesn't that contradict what you said earlier?"; "Is that consistent with the evidence?"; and "If that's true, wouldn't it follow that . . . ?" Other responses are always out of order: "This must be true (or false) because the ultimate source of authority (God, the Bible, or some other source) says so"; and "I have faith that this is true regardless of its internal contradictions or its inconsistency with the evidence."

In some ways, it is easier to describe what reason is by explaining what it is not. To be reasonable, an argument need not depend solely on deductive reasoning, but it cannot be *illogical*. It need not be entirely provable by scientific experiment, but it cannot be *inconsistent* with everything science and the social sciences know about reality—until and unless that reality is experimentally proven wrong.[11] Reasoned appeals need not be fully successful, but if they

10. *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 21 (1993); Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1569-73 (1985). Kronman draws a distinction between "prudence" and "rationalist spirit," *id.* at 1605-07, but I do not mean to place reason solely on what he describes as the rationalist side of this distinction. The life of the law is *not* logic, but reason and logic are not equivalent.

11. This point is consistent with THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962). For all that it has been misused by legal scholars, Kuhn's book can be taken to make the point

convince no one except those who are already believers, they are probably flawed. Nor are common human emotions entirely excluded.[12] But neither appeals to power nor "strategic arguments designed to persuade [primarily] by their emotional effect on the listener" are consistent with reasoned argument.[13] Reason also stands on its own: neither the identity of the speaker nor her institutional role should be relevant to the persuasiveness of an argument.

Moreover, reasoned argument invites response and must therefore depend on a commonly shared perception of reality. Appeals to a perception of reality shared only by the faithful—those who have seen the light, as it were—cannot count as reasonable. Thus, both the popular slogan that "it's a Black thing, you wouldn't understand," and the Calvinist tenet that if one has not received the grace of God one cannot know truth, are concessions that reasoned argument has been abandoned. Attempts at conversion can count as reasoned argument, but only if they do not depend primarily on emotional manipulation. Thus, for me to persuade an unrepentant male chauvinist that gender equality is a good thing, I cannot appeal solely to his love for his mother, wife, and daughter, but I can make arguments about fairness and about consequences.[14] The former appeals may or may not be successful, but they do not count as reasoned arguments.

The lasting accomplishment of the Enlightenment, then, was its development of an epistemological method. That method was a repudiation of "the millennium of superstition, other-worldliness, mysticism, and dogma known as the Middle, or Dark, Ages."[15] Personal revelation and institutional power were no longer valid sources of authority. Instead, the human capacity to reason, in all its splendor, would control the future. As Justice Felix Frankfurter commented in a related context, "[w]hat mattered was excellence in your profession to which your father or your face was equally irrelevant."[16] It is this vision of

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that a paradigm shift cannot occur until there is enough evidence to make the shift credible under the ordinary canons of reason and science.

12. The line between reason and emotion may be fuzzy in any case. *See* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. (forthcoming 1996). But as Anthony Kronman points out, reason is necessary to distinguish good emotions from bad ones: "Reason is in command, stories contribute no independent moral insight of their own, and the most that they can do—an essential but limited function—is to energize the convictions of right reason, which come from outside their domain." Anthony T. Kronman, *Leontius' Tale*, *in* LAW'S STORIES (Peter Brooks & Paul Gewirtz eds., forthcoming 1996).

13. The quotation is from Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1846 (1988), discussing legal scholarship.

14. For further examples of the differences between reasoned and unreasoned argument, see *infra* text accompanying notes 124-28.

15. RALPH KETCHAM, FRAMED FOR POSTERITY: THE ENDURING PHILOSOPHY OF THE CONSTITUTION 21 (1993).

16. Quoted in G. Edward White, *Felix Frankfurter, the Old Boy Network, and the New Deal: The Placement of Elite Lawyers in Public Service in the 1930s*, *in* INTERVENTION AND DETACHMENT: ESSAYS IN LEGAL HISTORY AND JURISPRUDENCE 149, 154 (1994). Frankfurter was commenting on the Harvard Law School of his youth; the modern university arose to develop and exploit the human capacity for reasoned understanding. *See* J. Peter Byrne, *Academic Freedom: "A Special Concern of the First Amendment,"* 99 YALE L.J. 251, 269-72 (1989).

reason—independent of all other claims of authority, human or divine—as superior to other epistemological forms that is currently under attack.

II. THE CRITIQUE OF (IMPURE) REASON

A common thread in the recent attacks on the Enlightenment is that reason does not exist apart from its social and political hegemony. In other words, these critical and religious scholars claim that the Enlightenment was a fraud: it merely replaced one socially constructed view of reality with another, mistaking power for knowledge. As one critic puts it, "[t]he term 'reasonable' . . . serves the same performative function in Rawls's theory as that served by the term 'God' in dogmatic religious argument."[17] Once we have exposed reason as just another social construction, the argument goes, we can no longer privilege this one perception of reality and label others as inferior or deviant.

Social constructivism's core refusal to privilege the Enlightenment epistemology has penetrated many disciplines. For example, psychiatry professor Paul McHugh tells of a typical student reaction to his own characterization of a patient as delusional and schizophrenic:

> [The patient] stated that she was frightened because one of the NASA satellites had been preempted by the Freemasons to record her every movement. She believed that the satellite had been equipped to beam down an invisible, but powerful ray, forcing upon her blasphemous thoughts. . . .
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> With such a set of symptoms I felt safe in saying that she had an incapacitating mental disorder such as schizophrenia. . . . I noted that she was not afflicted by NASA or the Masons but by a delusion—an idiosyncratic, incorrigible, preoccupying false belief. . . .
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> A student shot up his hand. With disdain, he said, "That poor woman's beliefs would only be called false if you took a narrow view of them. You should consider them within her life of poverty, chaos, and neglect. Then you would see them differently. She developed thoughts about NASA and the Masons to make sense out of a frightening and perplexing world."[18]

This medical student's refusal to distinguish between the sane and the insane has an impeccable social constructivist pedigree. Michel Foucault, from whom many postmodernists in the American legal academy draw their inspiration, has criticized the very distinction between sanity and insanity as merely the way in which the self-declared "reasonable" subjugate alternative epistemologies.[19] The characterization of insanity, which we normally label deviant, as a valid alternative epistemology also has implications for religious epistemologies. John Garvey has compared religion with insanity, noting that "religious claimants . . . have a different understanding of reality than the one on which society

17. Paul F. Campos, *Secular Fundamentalism*, 94 COLUM. L. REV. 1814, 1817 (1994).

18. Paul R. McHugh, *What's The Story?*, 64 AM. SCHOLAR 191, 192 (1995).

19. *See* MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON at ix-x (Richard Howard trans., 1965).

is built."[20] To the extent that Garvey's characterization is accurate, social constructivism frees religious beliefs, no less than other perceptions of reality, from the marginal or deviant place to which the Enlightenment's hegemony has condemned them. Foucault himself may have recognized how his philosophy validated religious epistemologies.[21] Indeed, many critical and religious scholars now rely heavily on social constructivism to expose the weak foundations of the Enlightenment and to support the case for epistemological pluralism.

The heart of radical social constructivism is its denial that human knowledge is based on transcendent reality. The currently popular form of this denial is to suggest that claims of knowledge cannot be evaluated apart from the social roles—and, in particular, the race and gender—of those who claim to know.[22] The radical project is to expose "scientific rationality" as just one among many ways of knowing[23] and to demonstrate that intellectual authority derives solely from institutional authority.[24] The Enlightenment claim of reason as the universal solvent is therefore dismissed as merely mistaking a particular white male epistemology for a general truth. For example, Deborah Rhode notes that "knowledge is socially constructed rather than objectively determined."[25] Catharine MacKinnon rejects objectivity and scientific norms as "a specifically male approach to knowledge."[26] Richard Delgado rejects the primacy of "linear, rationalistic thought."[27] William Eskridge suggests that "truth is merely a

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20. John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 796 (1986); *see also* Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 842 (1992) ("Religious issues are so intractable because different people have fundamentally different perceptions of reality."). Garvey was not equating religion and insanity, but rather suggesting why religious believers might deserve special treatment by society. Nonetheless, his insight (and Laycock's) is useful in highlighting the fact that many religious epistemologies differ from the dominant secular epistemology of the Enlightenment.

21. *See* MICHEL FOUCAULT, POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977-1984, at 215 (Lawrence D. Kritzman ed., 1988) ("saluting" the Iranian revolution of the late 1970s).

22. Earlier Marxist attacks on knowledge as class-based also exist, but I will focus here primarily on race- and gender-based social constructivism.

23. *See, e.g.*, Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 976, 1028-44 (1991); Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 893-94 (1989); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 359 (1987).

24. *See, e.g.*, Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1342-43 (1984).

25. Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1555 (1993) (footnote omitted).

26. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 54 (1987); *see also* GENEVIEVE LLOYD, THE MAN OF REASON: "MALE" AND "FEMALE" IN WESTERN PHILOSOPHY (1984) (arguing that reason is male); Patricia Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 27 (1991); Finley, *supra* note 23, at 893-94 (calling legal reasoning and language male); Linda R. Hirshman, *Foreword: The Waning of the Middle Ages*, 69 CHI.-KENT L. REV. 293, 297-98 (1993) (arguing that in legal teaching, liberal concepts of free expression are often used to hide medieval orthodoxy about what counts as knowledge); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 806-07 (claiming that knowledge is necessarily a social construct).

27. Delgado, *Rodrigo's Tenth*, *supra* note 5, at 1721 (describing such thought as "what the victors impose").

language game that people play,"[28] and Charles Lawrence explores that language game and explains how "racist speech constructs the social reality that constrains the liberty of nonwhites because of their race."[29] John Calmore writes that "[c]ultural bias sets standards for performance in terms of the tendencies, skills, or attributes of white America."[30] Alex Johnson describes "the reality that the Euro-American male's perspective is the background norm or heuristic governing in the normal evaluative context."[31] Postmodernist legal scholars also believe that their attacks have been fatal to the Enlightenment project: many radical intellectuals are convinced that social constructivism and other postmodern philosophies have so undermined the ideas of the Enlightenment that reason has been successfully "displaced by an emphasis on the socially contingent and power-driven nature of conceptions of reality and the ubiquity of often incommensurable perspectives."[32]

With reason exposed as only the preferred methodology of a particular class and time, radical constructivists turn instead to the narrative and emotional functions of language.[33] Anecdotal evidence replaces scientific data, and telling stories becomes the equivalent of making rational arguments.[34] Thus, what people say becomes as important as what they can "prove," and the persuasiveness of any given claim rests as much on its noncognitive or emotional appeal as on whether it accords with the dictates of reason and common knowledge. Once the commonality of reason is rejected, knowledge is intensely personal,

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28. Eskridge, *supra* note 9, at 623.

29. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *in* WORDS THAT WOUND, *supra* note 3, at 53, 62; *see also* Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 819 (1994) (arguing that "society largely constructs social reality and . . . matters of race affect this construction").

30. John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2219 (1992).

31. Johnson, *supra* note 29, at 833-34. These quotations are meant to be representative rather than exhaustive. For overviews of the radical constructivist stance, see, e.g., Eskridge, *supra* note 9; Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853 (1995); Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313 (1992); Susan H. Williams, *Feminist Legal Epistemology*, 8 BERKELEY WOMEN'S L.J. 63 (1993).

32. Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061, 2076 (1992) (reviewing MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991)); *see also* Vivian Grosswald Curran, *Deconstruction, Structuralism, Antisemitism and the Law*, 36 B.C. L. REV. 1, 48 (1994) ("The twentieth century signalled the end of the Enlightenment belief in progress towards a perfectible, rational civilization.").

33. *See generally* Daniel A. Farber & Suzanna Sherry, *Legal Storytelling and Constitutional Law: The Medium and the Message*, *in* LAW'S STORIES, *supra* note 12.

34. *See generally* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (providing overview and evaluation of legal storytelling); Johnson, *supra* note 29 (defending narratives in legal scholarship); *see also* PAUL R. GROSS & NORMAN LEVITT, HIGHER SUPERSTITION: THE ACADEMIC LEFT AND ITS QUARRELS WITH SCIENCE 72 (1994) ("There is no knowledge, then; there are merely stories, 'narratives,' devised to satisfy the human need to make some sense of the world. . . . On this view, all knowledge projects are, like war, politics by other means.").

communicable only through what many radicals label "transformation."[35]

An identical criticism of Enlightenment rationality runs through the legal literature on religion. The new defenders of religion view faith as an alternative to Enlightenment rationality, and, like the radicals, contend that the epistemology of reason and empiricism is socially contingent rather than universal or superior.[36] Stephen Carter sympathetically describes the religious view of modern science:

> [T]he creationist parent will never be convinced that the war is between his or her religious belief on the one hand and scientific fact on the other. Rather, the war is between competing systems of discerning truth—and creationist parents, much like [scientists opposing the teaching of creationism], want to know why it is that the school has the right to teach their children lies.[37]

Frederick Gedicks notes that Enlightenment reason and empiricism are under sustained attack and agrees with the radicals that it was "built on a weak intellectual foundation."[38] Michael McConnell describes religious schools as "exemplars of an alternative understanding of knowledge."[39] Gedicks and Michael Perry both use the language of social constructivism to condemn the privileging of reason over faith: Gedicks describes it as "the exercise of contingent social power,"[40] and Perry warns us that "[n]o privileged standpoint exists from which to adjudicate among competing conceptions of rationality."[41]

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35. *See, e.g.*, Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 715 (1992); Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539, 543 (1991); Matsuda, *supra* note 23, at 335; Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 2 (1990); Steven L. Winter, *The Cognitive Dimension of the "Agon" Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2228 (1989).

36. An alternative schema opposes religion and postmodernism, viewing both liberal and postmodernist views as corrosive of the transcendent, objective truths of faith. *See* Nomi M. Stolzenberg, *"He Drew A Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 611 (1993) (noting that fundamentalist Christian parents who seek alternative education for their children view public schools' "cultivation of individual reason, objective judgment and rational, critical thought . . . as a form of indoctrination"). Indeed, the traditional view of most religious believers is that they do possess objective truth applicable to all. The academic defenders of broad religious freedom do not tend to take that approach, conceding, as they must, that government cannot simply accept the "truth" of religious beliefs. Thus, they argue instead that secular beliefs, no less than religious beliefs, are socially constructed.

37. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 176 (1993).

38. Frederick M. Gedicks, *The Religious, the Secular, and the Antithetical*, 20 CAP. U. L. REV. 113, 126 (1991) [hereinafter Gedicks, *Religious and Secular*]; *see also* Frederick M. Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 680 (1992) [hereinafter Gedicks, *Hostility*] (arguing that postmodernism has "fatally undermined" epistemological premises of Enlightenment).

39. Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, LAW & CONTEMP. PROBS., Summer 1990, at 303, 312.

40. Gedicks, *Hostility*, *supra* note 38, at 681; *see also id.* at 686 ("The allocation of creationism to the marginalized world of subjectivity, and evolution to the privileged world of objectivity, is merely the exercise of social power rather than a natural, value-neutral distinction.").

41. Michael J. Perry, *Comment on "The Limits of Rationality and the Place of Religious Convic-*

The similarities between the radicals and the religionists are striking. Compare Richard Delgado, a prominent critical race theorist, with Gedicks: Delgado asserts that "[merit] criteria . . . sound suspiciously like a description of me and the place where I stand."[42] Gedicks argues, in denying that evolution fits the empirical data better than creationism, " '[b]etter' simply means 'preferable' or 'more congenial,' as in 'my paradigm is better than yours.' "[43] Jeffrey Stout, defending Thomist epistemology as a viable alternative to Enlightenment reason, notes that "we lack . . . a good reason for preferring one conceptual scheme, with its standards of judgment, to another."[44] This sounds very much like Duncan Kennedy: "There are no meta-criteria of merit that determine which among culturally and ideologically specific research traditions or scholarly paradigms is 'better' or 'truer.' "[45] Radical feminist Lucinda Finley condemns as inherently male "[r]ationality, abstraction, [and] a preference for statistical and empirical proofs,"[46] while one sympathetic observer describes the dispute between fundamentalist parents and traditional school boards as a "disagreement . . . over whether to consider the cultivation of individual reason, objective judgment and rational, critical thought . . . as a form of indoctrination."[47] Michael Perry cautions us to be "skeptical of the distinction between nonrational judgments and rational ones,"[48] and Jane Baron—one of the defenders of the new storytelling movement—questions the distinction between "reason and analysis" and "emotive appeal."[49] Linda Hirshman's criticism of John Rawls—that he ignores feminist criticism of the rationalist and individualist epistemology of the liberal Enlightenment[50]—echoes the criticism of religious defenders Gary Leedes and David Smolin, who argue that Rawls ignores religious worldviews incompatible with liberalism and rationality.[51] William

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tions: Protecting Animals and the Environment," 27 WM. & MARY L. REV. 1067, 1067-68 (1986); *see also id.* at 1068 ("The liberal attempt to disqualify religious judgments or beliefs is an attempt to privilege a particular conception or range of conceptions of rationality, and thus liberalism is not at all as 'neutral' or 'impartial' as it aspires and advertises itself to be.").

42. Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1, 9 (1991).

43. Gedicks, *Hostility*, *supra* note 38, at 685-86.

44. JEFFREY STOUT, THE FLIGHT FROM AUTHORITY: RELIGION, MORALITY, AND THE QUEST FOR AUTONOMY 11 (1981).

45. Kennedy, *supra* note 5, at 733.

46. Finley, *supra* note 23, at 893.

47. Stolzenberg, *supra* note 36, at 611.

48. Perry, *supra* note 41, at 1067.

49. Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 277-85 (1994); *see also* Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 8 (1989); Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 47-48 (1988).

50. *See* Linda R. Hirshman, *Is the Original Position Inherently Male-Superior?*, 94 COLUM. L. REV. 1860 (1994); *see also* Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613 (1986).

51. *See* Gary C. Leedes, *Rawls's Excessively Secular Political Conception*, 27 U. RICH. L. REV. 1083 (1993); David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067 (1991).

Eskridge describes the human mind as inevitably tending to "create exploitive power arrangements" by "reflexively organiz[ing] the world through 'dividing practices' and 'scientific classifications' " that "arbitrarily demarcate winners and losers."[52] Gedicks makes a similar point: "The allocation of creationism to the marginalized world of subjectivity, and evolution to the privileged world of objectivity, is merely the exercise of social power rather than a natural, value-neutral distinction."[53]

Whether or not they use the language of social constructivism, the new religion scholars are necessarily aligned with the radicals by virtue of their attack on the rationality of the Enlightenment. Carter and McConnell, for example, tend to defend faith as a valid alternative to reason without directly suggesting that reality is socially constructed.[54] Others, like Douglas Laycock, implicitly argue for pluralism without actually discussing epistemological issues: Laycock would allow those with nonrational religious beliefs—such as the belief that one will be eternally damned if one works on the Sabbath—to avoid obligations that are imposed on the rest of us.[55] Because he presumably would not grant the same privilege to flat-earthers, racists, or the insane, Laycock necessarily accords the epistemology of faith as much respect as the epistemology of reason. But if religious faith is a valid alternative epistemology, then why not the different ways of knowing attributed to women and people of color? Moreover, both the feminine voice and the voice of color are, like faith, described as antirational.[56] Just as the radicals posit that knowledge is communicable only (or primarily) through emotive appeal and transformation, faith too is personal, acquired through an essentially noncognitive process. Thus, even the more moderate religionists are implicitly accepting the claims of social constructivism.

In their rejection of Enlightenment epistemology, both radicals and religionists make the validity of their beliefs untestable by conventional means. The methods of science and rational argument are of no avail in evaluating religious beliefs: "[t]he process by which one develops belief in a transcendent reality—acquires faith—is not, cannot be, a rational process, for the validity of the objects of one's faith cannot be observed or tested, nor can it be logically proven."[57] Nor can faith be rationally *disproved*, for while "incoherence, anomaly, and paradox *always* count as weaknesses in a scientific theory . . . this

52. Eskridge, *supra* note 9, at 635-36.

53. Gedicks, *Hostility*, *supra* note 38, at 686.

54. *See* CARTER, *supra* note 37; McConnell, *supra* note 39.

55. *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 [hereinafter Laycock, *Remnants*]; Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

56. For an overview of the literature on different ways of knowing, see Farber & Sherry, *supra* note 34, at 809-19.

57. Frederick M. Gedicks & Roger Hendrix, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579, 1604 (1987).

appears not to be the case for . . . traditional religious thought."[58] Thus, unlike replicable scientific truths and rational arguments based on human observation and experience, the validity of religious beliefs is uniquely personal, not shared except within the community of believers. As Kent Greenawalt puts it: "The truths that one person learns by making a leap of faith are not fully accessible to someone who has not made a similar leap, and generally accessible reasons are not powerful enough to induce a leap of faith."[59]

Similarly, many critical scholars tend to eschew empirical data[60] in favor of personal stories designed to create a "flash of recognition" in the reader.[61] These narratives provide an indispensable entry into "forms of knowledge that may not be generated or validated by scientific objectivity, through which we may nonetheless learn critical things about ourselves and our world."[62] The empathic reaction to personal narratives, like religious faith, cannot be induced by the cold language of reason. As Lucinda Finley puts it, "[t]here are some things that just cannot be said" in the language of reason.[63] And, like religious faith, the emotional content of neither the storyteller's narrative nor the reader's reaction can be disproved.[64] Some storytellers go so far as to deny that the stories themselves need be factually accurate: what counts is the faith they recount and inspire.[65] Finally, the rejection of Enlightenment epistemology, whether by social constructivists or faithful believers, "leaves no ground whatso-

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58. STOUT, *supra* note 44, at 105; *see also id.* at 106:

> What we might deem a 'paradox,' and therefore a *weakness*, traditional theology christens a 'mystery,' to be accepted on faith. So even *if* a given doctrine turns out to be a logical paradox, such that its intelligibility or comprehensibility must be taken on faith, a traditional theologian would not treat this as a potential obstacle to belief.

59. Kent Greenawalt, *Grounds for Political Judgment: The Status of Personal Experience and the Autonomy and Generality of Principles of Restraint*, 30 SAN DIEGO L. REV. 647, 649 (1993) (describing but not endorsing this view of religion).

60. *See* Finley, *supra* note 23, at 893 (arguing that "rationality, abstraction, [and] a preference for statistical and empirical proofs over experiential or anecdotal evidence" are inherently male).

61. Abrams, *supra* note 23, at 1002-03, 1023-24.

62. *Id.* at 1028.

63. Finley, *supra* note 23, at 903; *see also* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2415 (1989) (arguing that stories' "graphic qualit[ies] can stir imagination in ways in which more conventional discourse cannot"); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1577 (1987) (arguing that "more meanings will be available to legal discourse" using language of empathy rather than rationality).

64. On the difficulties of attempting to prove or disprove the factual aspects of stories, see Farber & Sherry, *supra* note 34, at 835-38.

65. *See, e.g.*, Abrams, *supra* note 23, at 1025 (stating that she "would not be particularly disturbed" if a narrative purporting to be nonfiction turned out to "not track the life experiences of [its] narrator[] in all particulars" or to be a composite); Stuart A. Clarke, *Color-Blind Prophets and Bootstrap Philosophies: Straw Men, Shell Games and Social Criticism*, 3 YALE J.L. & HUMAN. 83, 91 (1991) ("It is naive if not disingenuous to suggest that all that matters is the promotion of truth."); Johnson, *supra* note 29, at 816 & n.65 ("I think it is perfectly acceptable [in legal narratives] if that which is presented as the truth turns out not to be objectively true in the way in which that standard typically is viewed and used.").

ever for distinguishing reliable knowledge from superstition."[66] Indeed, as one advocate of increased dialogue with religious traditions has suggested, "superstition" is merely a category we use "to congratulate ourselves for being more rational than our ancestors and neighbors."[67]

Centrists have two possible responses—other than conversion—to this congruence of otherwise disparate attacks. The first is a smug complacency, which takes simultaneous attacks from both sides as an indication that one is successfully treading a careful and correct line through the center. The second, and, I believe, more appropriate response is to mount a defense. Why *should* we privilege secular notions of scientific rationality over alternative epistemologies that are indifferent to, or violative of, the ordinary canons of science? The remainder of this article attempts a partial answer to that question. In keeping with the pragmatist strategy of constructing a multifaceted argument, I explore in Part III a historical justification for privileging the Enlightenment and in Part IV a more practical one.

III. THE HISTORICAL CONSTITUTION

The legal issues explored by those who advocate epistemological pluralism are largely constitutional. The radicals address such contemporary questions as the constitutionality of laws regulating hate speech or pornography, the appropriate scope of and justifications for affirmative action, and the unconstitutionality of various forms of race discrimination.[68] The religionists focus on the proper interpretation of the religion clauses of the First Amendment.[69] While the epistemological attack on the Enlightenment is obviously broader than the specific constitutional issues on which the attackers focus, their epistemology finds its concrete form in constitutional interpretation. It is beyond the scope of this article to argue for or against specific interpretations of constitutional provisions. Nevertheless, because both critical and religionist scholars focus on constitutional outcomes, the soundness of their epistemological stance rests in part on its conformity to the Constitution. Just as we would reject as wrongheaded a political program that rested on aristocratic or monarchic assumptions, we should ask whether the Constitution rests on any particular epistemological

66. GROSS & LEVITT, *supra* note 34, at 45 (describing various postmodernist movements); *see* Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. CHI. LEGAL F. 123, 127-28 (equating religious education with Afrocentric curriculum that " 'argue[s] for witchcraft and magic (African) as legitimate alternatives to science and reason' ") (quoting Robert K. Fullinwider, *Multicultural Education*, 1991 U. CHI. LEGAL F. 75, 86-87).

67. JEFFREY STOUT, ETHICS AFTER BABEL: THE LANGUAGES OF MORALS AND THEIR DISCONTENTS 110-11 (1988).

68. For overviews of the radical epistemological discussions of these issues, see Farber & Sherry, *supra* note 33; Farber & Sherry, *supra* note 31.

69. *See, e.g.*, Gedicks, *Hostility*, *supra* note 38; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) [hereinafter McConnell, *Revisionism*]; Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1.

base. If, as I will suggest in this Part, our Constitution is in fact a thoroughly Enlightenment document, that counts as an argument (although not by any means a dispositive one) against those who would answer constitutional questions by relying on alternative epistemologies.

A. OUR ENLIGHTENMENT CONSTITUTION

We cannot know what was in the minds of the delegates to the Philadelphia Convention, the members of the First Congress, or the state ratifiers as they contemplated what eventually became the Constitution and the Bill of Rights. We can, and do, argue over the extent to which the historical evidence suggests one specific interpretation over another. That argument, especially when carried on by lawyers, tends to be superficial and not particularly enlightening.[70] The intentions, influences, and ideological currents in eighteenth-century America were at least as complex as their modern counterparts, and sorting them into a single "original meaning" for a broad and ambiguous clause is as implausible as specifying "the" epistemology of the late twentieth century—if we could do that, this article would be superfluous. Moreover, we are far enough removed from the ideologies and concerns of the founding generation that what they saw as consistent we may see as contradictory, and vice versa.

For those reasons and others,[71] I do not intend to engage here in an extended historical discussion. But even if focusing on the specific history of particular clauses tends to be fruitless, it may be illuminating to explore the broader epistemological context in which the Constitution was written and adopted—especially to the extent that this history is less controversial than the history of individual clauses or particular ideologies. While the founding generation did not have access to the postmodern insights that have led to the radical calls for epistemological pluralism, it did recognize religious faith as a potential alternative epistemology. As I have suggested, there are strong parallels between religious faith and the alternative nonrational epistemologies offered by the critical scholars. Thus, the founders' position on faith and reason is crucial to any understanding of the underlying epistemology of the Constitution.

Any overview of the epistemology of the founding generation will inevitably be broad and simplistic. Moreover, as historians have been demonstrating for the last several decades, serious differences existed among the different philosophies current at the time of the founding.[72] But to resolve the question posed by the epistemological challenges I am discussing, painting with a broad brush is

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70. For the most recent article substantiating such a charge, see Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995). Flaherty cites earlier articles in *id.* at 526-27 n.16.

71. For a general review of some of the problems with originalism, see DANIEL FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 373-97 (1990).

72. For an overview of the historical landscape, see, e.g., Suzanna Sherry, *The Intellectual Origins of the Constitution: A Lawyers' Guide to Contemporary Historical Scholarship*, 5 CONST. COMMENTARY 323 (1988); Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992).

not inappropriate. Despite the numerous differences between Madisonian liberals and Jeffersonian civic republicans, between the Federalists and the Anti-Federalists, between the committed democrats and those who were more mistrustful of popular sovereignty, virtually all of the Framers—and indeed the entire founding generation—shared a common background in the epistemology of the Enlightenment. That epistemology was based on reason and empiricism, specifically rejecting faith and revelation.

The Enlightenment—a twentieth-century word for a seventeenth- and eighteenth-century phenomenon[73]—was made up of many different thinkers with quite disparate political philosophies.[74] Nevertheless, they shared a common epistemology of rationalism and empiricism. In particular, they believed that the methods of scientific understanding should replace "claims to knowledge based on supernatural revelation, sheer authority, or abstruse speculation."[75] For Enlightenment thinkers, both the source of knowledge and its methods of verification were human rather than divine.[76]

Historians generally agree that the American Framers understood themselves to be participants in the European Enlightenment tradition and defined their work as an elaboration and extension of that thought.[77] One historian comments that "[t]he formation of government under the Constitution . . . was in a way a climax of the Enlightenment."[78] Despite the quite significant differences in their political philosophies, then, the founding generation placed their faith in reason rather than in revelation. Although this is not the place for an extended historical demonstration of the Enlightenment views of eighteenth-century Americans, their Enlightenment assumptions can be observed in everything from the

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73. *See, e.g.*, Harold J. Berman, *The Impact of the Enlightenment on American Constitutional Law*, 4 YALE J.L. & HUMAN. 311 (1992).

74. *See, e.g.*, PHILOSOPHERS OF THE ENLIGHTENMENT (Peter Gilmour ed., 1989); DONALD H. MEYER, THE DEMOCRATIC ENLIGHTENMENT (1976).

75. MEYER, *supra* note 74, at xiii; *see also* KETCHAM, *supra* note 15, at 21 ("[T]he Enlightenment drew its strength from the repudiation of what it regarded as the millennium of superstition, otherworldliness, mysticism, and dogma known as the Middle, or Dark, Ages, when Christianity reigned in Europe, as doctrine, as institution, and as ritual.").

76. As one scholar has noted, for all their differences "there is a common thread running through Enlightenment epistemologies": "a belief in the possibility of providing a *rational* justification of the processes by which human beings arrive at theories of the world." Antony, *supra* note 7, at 199. For general background on the Enlightenment supporting the broad statements in this paragraph, see generally HENRY F. MAY, THE ENLIGHTENMENT IN AMERICA (1976); MEYER, *supra* note 74; PHILOSOPHERS OF THE ENLIGHTENMENT, *supra* note 74; KETCHAM, *supra* note 15.

77. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); HENRY S. COMMAGER, THE EMPIRE OF REASON: HOW EUROPE IMAGINED AND AMERICA REALIZED THE ENLIGHTENMENT (1977); KETCHAM, *supra* note 15; MAY, *supra* note 76; FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985); DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (1989); MORTON G. WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION (1978); MORTON G. WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION (1987); GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969).

78. KETCHAM, *supra* note 15, at 24; *see also*, MAY, *supra* note 76, at 88 (stating that American Constitution was "both the culmination and the end of the Moderate English Enlightenment").

debates in the Philadelphia Convention,[79] to the substance and structure of the Constitution they produced,[80] to the debates over ratification[81] and the subsequent adoption of necessary amendments.[82] It seems virtually undisputed among

79. *See, e.g.*, Gouverneur Morris, July 2, 1787, JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 234 (Adrienne Koch ed., 1966) [hereinafter MADISON, NOTES] ("Reason tells us we are but men: and we are not to expect any particular interference of Heaven in our favor."); Gouverneur Morris, July 5, 1787, *id.* at 240 ("All that we can infer is that if the plan we recommend be reasonable & right; all who have reasonable minds and sound intentions will embrace it . . . ."); Hugh Williamson, June 28, 1787, *id.* at 204; (suggesting that "political truth [might] be grounded on mathematical demonstration"); James Wilson, June 7, 1787, *id.* at 85 (using scientific analogy to explain political theory); James Madison, June 8, 1787, *id.* at 89 (same); James Madison, July 5, 1787, *id.* at 239 ("The Convention ought to pursue a plan which would bear the test of examination, and which would be espoused & supported by the enlightened and impartial part of America."). *See generally* William E. Nelson, *Reason and Compromise in the Establishment of the Federal Constitution, 1787-1801*, 44 WM. & MARY Q. 458 (1987). There were even intra-Enlightenment debates between rationalists and empiricists. *Compare* Gouverneur Morris, August 9, 1787, MADISON, NOTES, *supra* at 421 ("[W]e should be governed as much by our reason, and as little by our feelings as possible.") *with* John Dickinson, August 13, 1787, *id.* at 447 ("Experience must be our only guide. Reason may mislead us.").

80. *See* Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 360-62 (1995); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 596 (1991) ("Constitutional propriety for secular privilege is supported by the Constitution's Preamble—it is Liberty's Blessings, not God's, that we are trying to secure 'to ourselves and our Posterity.' "); Nelson, *supra* note 79; Andrew Reck, *The Enlightenment in American Law II: The Constitution*, 44 REV. METAPHYSICS 729, 747-48 (1991).

81. *See, e.g.*, A (Maryland) Farmer, *Essay No. 5*, MARYLAND GAZETTE, Mar. 25, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 40 (Herbert J. Storing ed., 1981) [hereinafter COMPLETE ANTI-FEDERALIST] ("I have been long since firmly persuaded, that there are no hidden sources of moral agency beyond the reach of investigation [but] . . . [r]eligious and political prejudices . . . are forever arming the passions against the judgment."); Centinel, *Letter No. 3*, INDEPENDENT GAZETTEER (Phila.), Nov. 1787, *reprinted in* 2 COMPLETE ANTI-FEDERALIST, *supra* at 158 ("All who are friends to liberty are friends to reason."); *A Revolution Effected by Good Sense and Deliberation*, DAILY ADVERTISER (N.Y.), Sept. 24, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 13 (Library of America ed., 1993) [hereinafter THE DEBATE] ("Let [the present epoch] be stiled the reign of reason."); Letter from "The Federal Farmer" to "The Republican" (Nov. 8, 1787), *reprinted in* 1 THE DEBATE, *supra* at 248 ("[I]t is deliberate and thinking men, who must establish and secure governments . . . ."); Cato, *Letter No. 1*, N.Y. J., Sept. 27, 1787, *reprinted in* 1 THE DEBATE, *supra* at 32-33 ("Deliberate . . . on this new national government with coolness; analize [sic] it with criticism . . . [and] [b]eware of those who wish to influence your passions."); Cato, 1 *id.* at 33 (promising future essays based on "reason and truth"); Americanus (John Stevens, Jr.), *Essay No. 1*, DAILY ADVERTISER (N.Y.), Nov. 2, 1787, *reprinted in* 1 THE DEBATE, *supra* at 229 (basing conclusions on "reason and experience"); Brutus, *Letter No. 2*, N.Y. J., Nov. 1, 1787, *reprinted in* 2 COMPLETE ANTI-FEDERALIST, *supra* at 374 (noting that principle of corruption is "so evidently founded in the reason and nature of things"); A Newport Man, *Essay*, NEWPORT MERCURY, Mar. 1788, *reprinted in* 4 COMPLETE ANTI-FEDERALIST, *supra* at 251 (defining and relying on reason). *See generally* Nelson, *supra* note 79.

82. *See, e.g.*, Rep. Elbridge Gerry, Debate in the House of Representatives (July 21, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 97, 102 (Helen E. Veit et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS] ("[L]et our means, like our conclusions, be justified; let our constituents see, hear, and judge for themselves."); Rep. James Jackson, Debate in the House of Representatives (June 8, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* at 69, 89 (arguing that House should not proceed on the basis of "theoretical speculation" or "ignis fatuus" (fool's fire)); Rep. Elbridge Gerry, Debate in the House of Representatives (June 8,

historians that "the dominant, fresh, and creative intellectual energy behind the Constitution and the Bill of Rights was that of the eighteenth-century Enlightenment."[83]

This straightforward historical analysis is clouded—but not totally obscured—by our distance from the founding generation. The question of whether to privilege faith or reason would not have occurred to the founders for the simple reason that they did not see them as in conflict. They believed that religious belief could be (and indeed should be) supported by principles of reason.[84] Jefferson was perhaps the most rigorous in subjecting religious beliefs to the scrutiny of reason: in 1787, he advised his nephew to "[q]uestion with boldness even the existence of a God; because, if there be one, he must more approve of the homage of reason, than that of blindfolded fear."[85] There are, however, indications that the founders in general—like most Enlightenment thinkers—believed that any religious tenets that were contrary to reason should be rejected.[86] Thus, the widespread American adherence to Christianity in the eighteenth century does not undermine the conclusion that they relied primarily on secular reason, contradictory as that may seem to us today. To suggest that the founding generation subscribed to the epistemology of reason, then, should be considered uncontroversial[87] and should incline us at least slightly in the

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1789), *in* CREATING THE BILL OF RIGHTS, *supra* at 69, 91 ("Let us deal fairly and candidly with our constituents, and give the subject a full discussion."); Rep. Fisher Ames, Debate in the House of Representatives (Aug. 19, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* at 132, 133 (arguing in favor of what "experience has taught"); Rep. Thomas Hartley, Debate in The House of Representatives (Aug. 19, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* at 153, 154 (arguing against a provision protecting right to instruct representatives because instructions "will rather express the prejudices of party, than the dictates of reason and policy"); Rep. George Clymer, Debate in The House of Representatives (Aug. 17, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* at 150, 151 (arguing against right of instruction because it would turn Congress into "a passive machine instead of a deliberative body").

83. KETCHAM, *supra* note 15, at 25. One historian has explicitly extended this rejection of religious irrationalism to its modern counterpart. After quoting a typical modern radical statement about the individual and nonrational basis of truth, James Kloppenberg notes that "neither James Madison, Abraham Lincoln, John Dewey, Frederick Douglass, W.E.B. DuBois, Martin Luther King, Jr., Judith Sargent Murray, Harriet Beecher Stowe, nor Jane Addams would have endorsed" this view of truth. James T. Kloppenberg, *Review Essay*, 13 LAW & HIST. REV. 393, 410 (1995).

84. *See, e.g.*, RUTH H. BLOCH, VISIONARY REPUBLIC: MILLENNIAL THEMES IN AMERICAN THOUGHT 1756-1800, at 194 (1985); KETCHAM, *supra* note 15, at 13; DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 125-26 (1986); WOOD, *supra* note 77, at 5; Ruth H. Bloch, *Religion and Ideological Change in the American Revolution*, *in* RELIGION AND AMERICAN POLITICS FROM THE COLONIAL PERIOD TO THE 1980S, at 44, 51 (Mark A. Noll ed., 1990); Sanford Kessler, *Locke's Influence on Jefferson's "Bill for Establishing Religious Freedom,"* 25 J. CHURCH & ST. 231 (1983); Harry S. Stout, *Rhetoric and Reality in the Early Republic: The Case of the Federalist Clergy*, *in* RELIGION AND AMERICAN POLITICS FROM THE COLONIAL PERIOD TO THE 1980S, *supra* at 62, 65; Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 896-901 (1995).

85. Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 429, 431 (Adrienne Koch & William Peden eds., 1944).

86. *See* JOHN B. BURY, A HISTORY OF FREEDOM OF THOUGHT 127-28 (1913); RICHARDS, *supra* note 84, at 92-93; Gedicks, *Religious and Secular*, *supra* note 38, at 125.

87. It is, of course, not entirely uncontroversial. Michael McConnell has suggested that at least the religion clauses were inspired primarily by religious evangelists who did not accept the Enlightenment

direction of embracing the Enlightenment as a guide to interpreting the Constitution.

B. THE CONSTITUTION IN CONTEXT

Another way to approach the broad question of epistemological context is to ask what kind of polity the founders thought they were creating. An uncontroversial answer is that they intended to create—and did create—a constitutional democracy. But regardless of whether that democratic creation rested on a liberal or civic republican vision, it is undergirded by reason. Virtually every theory of the philosophy of the Constitution depends on a notion of public deliberation, which in turn depends on the idea of public reason.

As I noted earlier, historians have been arguing for several decades about the relative influences of civic republicanism and individualist liberalism on the founding generation.[88] For our purposes, however, the differences between civic republicanism and individualist liberalism are much less important than one underlying similarity: like the Enlightenment tradition itself, both philosophies give pride of place to the human capacity for reasoned deliberation, whether at the individual or government level. One major difference between liberalism and civic republicanism is what is to be reasoned *about*: civic republicans stress that a deliberative citizenry should choose substantive values for the community, while liberals remain skeptical of any values beyond those chosen by the individual. But both traditions insist that reasoned deliberation is a vital part of government.[89]

The liberal American emphasis on reasoned deliberation goes back at least to

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epistemology common to both secularists and traditional religions. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1437-43 (1990). The weight of opinion seems to be that "[a]s a historian, McConnell is a fine lawyer." Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 B.Y.U. L. REV. 117, 127; *see also* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1272-73 (1994); Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 142-47 (1990); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 917 (1992); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 401-02 (1989-90); *see also* Tushnet, *supra* at 124; Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367, 372 (1993-94). *But see* GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 121-23 (1987). The professional historians who have carefully examined the origins of the religion clauses tend either to eschew this sort of problem solving altogether, *see, e.g.*, THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 92-93 (1986), or to conclude that secularism was dominant. *See, e.g.*, LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986); WILLIAM L. MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC (1986). *But see* MARK D. HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965).

88. *See supra* note 72.

89. *Cf.* William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995) (stating that republicanism and liberalism share common goal of search for—perhaps unattainable—truth).

Locke and pervades the thought of the founding generation.[90] Even Madison, the quintessential liberal who placed his trust in the complicated machinery he set up to counter the dangers of interest groups, expected at least some parts of government to be deliberative and to use reason as a counterweight to the unthinking desires of the populace.[91] It is, moreover, difficult to imagine a heterogeneous liberal democracy that does not rest on reasoned deliberation, as the work of John Rawls has shown. Rawls—whether he is describing an ideal society or simply the prerequisites of a functioning liberal democracy—insists that policy formation[92] be based on what he calls "public reason": reasons that are publicly accessible and that "all citizens can reasonably be expected to endorse in the light of their common human reason."[93] Reason, in turn, is defined as "presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial."[94] Or, as Kent Greenawalt puts it, "a good liberal citizen should not adopt a political position that is clearly *irrational* according to common sense and scientific evidence."[95] Similarly, Lawrence Solum defines public reasons as "such basic tools of reasoning as logic and common sense, knowledge of uncontroversial facts and those established by science, and values that can be derived from the public political culture of society."[96] Amy Gutmann

90. *See, e.g.*, RICHARDS, *supra* note 84, at 127; WHITE, *supra* note 77, at 76.

91. *See, e.g.*, James Madison, June 26, 1787, MADISON, NOTES, *supra* note 79, at 193 (purpose of Senate is "to protect the people against the transient impression into which they themselves might be led"); *id.* ("[The Constitution should reflect the wishes of a] people deliberating in a temperate moment."); James Madison, June 5, 1787, MADISON, NOTES, *supra* note 79, at 68 (Senate should appoint judges because they are "sufficiently stable and independent to follow their deliberate judgments"); THE FEDERALIST NO. 49, at 348 (James Madison) (Edward G. Bourne ed., 1937) ("The *passions*, therefore, not the *reason*, of the public would sit in judgment. But it is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government.").

92. He is more certain that this limitation should apply to "questions of basic justice" than that it should apply to all political questions. *See* JOHN RAWLS, POLITICAL LIBERALISM 214 (1993).

93. *Id.* at 140; *see also* Amy Gutmann & Dennis Thompson, *Moral Conflict and Political Consensus*, 101 ETHICS 64, 70 (1990) (stating that religious appeals cannot count as moral reasons because they are not publicly accessible); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2193 (1990) ("Especially in democratic political contexts, choices must be justified through publicly articulable and acceptable reasons," not "undefended preferences.").

94. RAWLS, *supra* note 92, at 224.

95. Kent Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352, 382 (1985). Greenawalt considers religion *nonrational* rather than *irrational*, and therefore finds religious reasons acceptable in policy formation under certain circumstances. His distinction is peculiar, however, since he would find a belief that gray cats are more sacred than other cats to be *irrational* rather than *nonrational*. *Id.* at 402. I do not understand how a belief in the sacredness of gray cats is different from a belief in the divinity of Jesus or the literal authority of the Bible. *See* John H. Garvey, *A Comment on Religious Convictions and Lawmaking*, 84 MICH. L. REV. 1288, 1290-91 (1986).

96. Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083, 1091 (1990). Solum argues, nevertheless, that public debate ought to be "inclusionary" and open to religious as well as secular reasons. Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729, 748 (1993). He would exclude only "racist, sexist, and homophobic speech" from the public square. *Id.* at 752. Solum neither explains why such speech is any less worthy of inclusion than religious speech nor

and Dennis Thompson suggest that "[i]t cannot constitute a moral reason to appeal to an authority whose dictates are closed to reasonable interpretation."[97] Thus, according to Rawls and the many liberal constitutionalists who follow him, a liberal democracy, in order to meet its definitional requirements of placing sovereignty in free and equal citizens, must base its policies on reasons that are equally available to all citizens, whatever their underlying beliefs.

That eighteenth-century civic republicans valued reasoned deliberation hardly needs discussion. Only reason could sustain the English—and later American—republican claims of governmental violations of fundamental law. Thomas Jefferson, the patron saint of republicanism and the man who succeeded in temporarily resurrecting what many thought was a defeated ideology, devoted his life to reason.[98] It is not surprising that civic republicans emphasized reason: Aristotle, from whom they drew their ultimate inspirations, also saw rationality—or practical reason—as a virtue in citizens.[99] Again, it is difficult to envision a civic republican polity—at least a polity with any diversity of viewpoints—without an emphasis on reason. Certainly citizens cannot know how and when to put aside their private interests in the name of the public good—a core principle of civic republicanism—without appealing to a commonly shared perception of that public good. In a diverse society, no such perception can develop without reasoned discourse.

The role of rational deliberation also runs through the modern neo-republican literature, and is most prominent in the work of Cass Sunstein, Frank Michelman, and Bruce Ackerman.[100] Public dialogue, as a prerequisite to "considered judgment,"[101] is seen as the only legitimate method of formulating government policy. Public dialogue, of course, is only possible where the participants speak the same language, and in political discourse, speaking the same language is analogous to Rawls's "public reason."

Thus, as Edward Foley has pointed out, the Constitution embodies the

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resolves the question of what to do about racist, sexist, or homophobic religious beliefs. Abner Greene, who would exclude religious reasons from public debate and then compensate those excluded by giving them exemptions from laws to which they have a religious objection, similarly fails to explain why other excluded believers—such as racists—are not entitled to exemptions. *See* Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1640 (1993).

97. Gutmann & Thompson, *supra* note 93, at 70.

98. On Jefferson the republican, see generally LANCE BANNING, THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY (1978); on Jefferson and reason, see generally NOBLE E. CUNNINGHAM, JR., IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON (1987).

99. For further discussion, see Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329, 387-90 (1994).

100. *See, e.g.*, ACKERMAN, *supra* note 4, at 197-98; CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 24 (1993); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 47 (1986); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 45-48 (1985). *See generally* Galston, *supra* note 99.

101. The particular phrase is Ackerman's, *see* ACKERMAN, *supra* note 4, at 272, but the idea is common to all the neo-republicans.

"public reason" principle of John Rawls's *Political Liberalism*,[102] whether the Constitution is viewed as liberal, republican, or a bit of both. But history alone is not a sufficient basis on which to interpret the Constitution, or to privilege reason over faith. As Stephen Carter has noted, it is no answer to the claims of believers to say that "we already had the Enlightenment, and their side lost."[103] The founders' epistemology need not be ours. Thus, in order to make a persuasive case in favor of Enlightenment reason, I turn now to some of the implications of a regime of epistemological pluralism.

IV. THE SLEEP OF REASON

Critiques of rationality are not new. Indeed, intellectual history—to say nothing of the history of the United States—is filled with Romantics and other antiliberals who viewed the Enlightenment as a tragic mistake.[104] Twentieth-century American religious traditionalists are not the first to believe that "secular humanism . . . brings darkness and destruction on humanity."[105] Since the Enlightenment, however, the burden of proof has generally fallen on those who would deny the primacy of reason.[106] Thus, Stephen Carter justifiably complains that anyone who sincerely believes that the Book of Genesis provides a better explanation of human origins than evolutionary theory, or that God can heal diseases, is viewed as "stupid or fanatical,"[107] and as a "backward, irrational, illiberal fanatic[]—not too smart and not too deserving of respect."[108] Scott Idleman criticizes articles with a secularist cast for "beginning with often unstated conclusions about the intrinsic goodness of secular government."[109] But if both religionists and radicals are confident that the Enlightenment was a failure, it may be time to mount a defense. I do not intend to provide here an abstract philosophical defense, but merely one grounded in practical reason. What are the practical implications of accepting nonrational epistemologies as equally valid alternatives to the epistemology of reason in the public forum?

In order to make even such a limited defense, however, I must first confront

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102. Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963, 963 (1993) (locating commitment to reason specifically in Establishment Clause); *see also* Greene, *supra* note 96, at 1613.

103. CARTER, *supra* note 37, at 182.

104. *See generally* LOREN R. GRAHAM, BETWEEN SCIENCE AND VALUES (1981); GROSS & LEVITT, *supra* note 34; STEPHEN HOLMES, THE ANATOMY OF ANTILIBERALISM (1993) (critiquing antiliberal attacks on Enlightenment); LEO MARX, THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA (1964). The epistemological skepticism underlying social constructivism goes back even further, to the Greek skeptics. *See* Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 739 (1994).

105. HOLMES, *supra* note 104, at 63.

106. *See* STOUT, *supra* note 44, at 150-51.

107. CARTER, *supra* note 37, at 25.

108. *Id.* at 159.

109. Scott C. Idleman, *Ideology as Interpretation: A Reply to Professor Greene's Theory of the Religion Clauses*, 1994 U. ILL. L. REV. 337, 360.

the broad epistemological challenge: that truth—or intellectual authority—does not exist apart from the social and political hierarchies that create and sustain it. If the most radical social constructivists are right, and there is no such thing as truth or objectivity, defending the Enlightenment is like trying to collect water in a sieve. Fortunately, it is not necessary to resolve this philosophical dispute in order to proceed. First, the question I am addressing is not whether the Enlightenment reliance on reason and empiricism is in fact the only epistemology, but whether we ought to proceed as if it were, at least in the public arena. Even if there are multiple and contradictory truths, some may be better suited for public adoption than others. There is a difference between objective truth and justified beliefs, and suggesting that only beliefs informed by reason are justified does not take any stand on the existence or accessibility of objective truth.[110] Further, neither reason nor truth need be transcendent or objective to inform debate. As many scholars have recognized, postmodernism has not prevented us from acting as if truth exists.[111] Indeed, we can probably do no less: to act on the postmodern insights would be "like saying that, since philosophers are still debating Descartes' epistemology, one need not take notice of traffic signals in the meantime (since they might not really exist)."[112] Moreover, although it may be less relevant in "soft" disciplines like law, some truth does exist: "If there were no facts, surgeons couldn't operate, buildings would collapse, and airplanes wouldn't get off the ground."[113] Finally, as William Marshall has pointed out, the *search* for truth remains an important human enterprise even if objective truth does not exist, because "[t]he human imagination is compelled not only by truth but also by the *idea* of truth."[114] Similarly, even if there is no epistemology unconnected to power relationships, we tend to—and perhaps we must—behave as if there were. It remains only to give that epistemology content.

A variant on this most radical social constructivist position is that there is less difference between reason and the alternative epistemologies than meets the eye. Reason can no more assuredly lead us to truth or consensus than can faith.[115] As philosopher Jeffrey Stout puts it, those skeptical of reason argue that

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110. *See, e.g.*, Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 275 (1992); *see also* STOUT, *supra* note 67, at 86.

111. *See, e.g.*, Gedicks, *Religious and Secular*, *supra* note 38, at 135-36; Marshall, *supra* note 89, at 28.

112. Charles W. Collier, *Intellectual Authority and Institutional Authority*, 35 INQUIRY 145, 165 (1992).

113. CAMILLE PAGLIA, SEX, ART, AND AMERICAN CULTURE 231 (1992).

114. Marshall, *supra* note 89, at 30.

115. *See, e.g.*, CARTER, *supra* note 37, at 43; KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 25 (1988); Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763 (1993); Robert Audi, *Rationality and Religious Commitment*, *in* FAITH, REASON AND SKEPTICISM 50 (Marcus Mester ed., 1992); William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 845-47 (1993); Joseph Raz, *Facing Diversity: The Case of Epistemic Abstinence*, 19 PHIL. & PUB. AFF. 3, 39-43 (1990); Tom Stacy, *Reconciling Reason and Religion: On Dworkin and Religious Freedom*, 63 GEO. WASH. L. REV. 1, 55-56 (1994). For contrary views, see, e.g., Gedicks &

"there's a leap of faith or ultimately subjective element at the bottom of *everybody's* moral convictions."[116] This approach underestimates—and to some extent jeopardizes[117]—the breadth of common ground shared by those with apparently disparate moral views. For example, I imagine that even the most ardent participants on both sides of the rancorous debates on abortion and capital punishment agree that it is morally wrong to take the life of an innocent person, and no amount of reasoning will convince them otherwise. (The disagreements arise in how we ought to translate this moral principle into practice, but I will suggest in a moment that such disagreements can in fact be the subjects of reasoned discourse.) If we characterize this basic moral belief as a "leap of faith" and then consider anything derived from it as ultimately nonrational, we have essentially lost the ability to discuss law and policy.

Moreover, the skeptical approach adopts an overly cramped view of reason. Reason need not be either sterile or abstract. Those who jump from the premise that there are no absolute truths demonstrable by reason to the conclusion that reason is therefore no help at all (or no more help than other epistemologies) adopt the inaccurate view—common to such otherwise different thinkers as Robert Bork and Stanley Fish—that "if not the heavens, then the abyss."[118] There is a middle ground. Owen Fiss has described what he calls substantive rationality: "an intellectual process in which we deliberate about ends, about what is just or fair or equal."[119] Others have described a similar process as pragmatism or practical reason.[120] Pragmatist moral reasoning need not be foundationalist or purely inductive; it can draw on common experience and observation, and it can tolerate some amount of uncertainty. Nevertheless, moral reasoning, like legal reasoning, can be good or bad. It can contain inconsisten-

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Hendrix, *supra* note 57, at 1603-04; Greene, *supra* note 96, at 1631; Mark Tushnet, *Religion and Theories of Constitutional Interpretation*, 33 LOY. L. REV. 221, 240 (1987).

116. STOUT, *supra* note 67, at 14; *see also id.* at 13 (In the face of moral disagreement, "mustn't we abandon the traditional conception of moral judgment and reasoning as either objective or rational?").

117. *See id.* at 44 ("The danger [of skepticism] may be that our notion of moral competence will become so contested that we lose our ability to declare with confidence that Charles Manson (or a two-year-old child) simply fails to judge rightly in cases where all competent moral observers agree.").

118. *See* Nussbaum, *supra* note 104, at 730; *see also* GRAHAM, *supra* note 104, at 382 (noting that we now must live in middle range of science-value spectrum, recognizing erroneousness of value-free conception of science so prevalent in previous generation, and equal erroneousness of countering view that "all science is intrinsically value-laden"); STOUT, *supra* note 67, at 21 ("[T]here is a middle way between false unity and sheer chaos.").

119. Owen M. Fiss, *Response*, YALE J. CRITICISM, Spring 1992, at 213, 216; *see also* Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789 (1990); Gey, *supra* note 87, at 175 (noting that reason is not inevitably "sterile and bureaucratic").

120. *See generally* PRAGMATISM IN LAW AND SOCIETY (Michael Brint & William Weaver eds., 1992); STOUT, *supra* note 67; Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163; Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989). It is not coincidental that the quintessential American pragmatist, John Dewey, explicitly rejected the epistemology of religion in favor of the scientific method. *See, e.g.*, JOHN DEWEY, A COMMON FAITH 37-40 (1934).

cies and failures to notice logically necessary connections.[121] It can fit poorly with experience or with one's other beliefs, or have unpalatable implications.[122] It can be based on faulty premises, unchallenged only because of cognitive negligence.[123]

Participants in a rational dialogue who appear to disagree about fundamental matters can thus still proceed. Imagine a conversation about abortion:[124] one rational participant believes that a woman has a right to do what she will with her own body, the other that the fetus is a human life from the moment of conception. If one can determine that the prochoice participant supports such laws as those against prostitution or drug use, or requiring the use of motorcycle helmets or seat belts, one can perhaps persuade her that her moral reasoning on abortion is inconsistent and its conclusion therefore invalid. Similarly, if the prolife participant allows abortion in the case of rape or incest (but would not kill a live-born child for either of those reasons), or rejects charges of child neglect or endangerment for pregnant women who smoke, drink, or fail to take prenatal vitamins, he might be persuaded to rethink the moral foundations of his views. Once both these forms of reasoning are exposed as erroneous, the participants can begin a less starkly differentiated dialogue about line-drawing and the appropriate balance of needs and interests, much of which will depend on verifiable facts (medical as well as social). The participants may still reach an impasse, but it is much less likely because of their common commitment to the rational process.[125]

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121. For an elaboration of how moral reasoning can fail, see JUDITH JARVIS THOMPSON, THE REALM OF RIGHTS 24-29 (1990). *See also* DAVID LYONS, ETHICS AND THE RULE OF LAW 32 (1984) ("Moral positions can be discredited if they are internally inconsistent.").

122. Coherence with other beliefs is part of the pragmatist vision of reason. *See, e.g.*, LYONS, *supra* note 121, at 35; Charles Larmore, *Beyond Religion and Enlightenment*, 30 SAN DIEGO L. REV. 799, 812-13 (1993). Both coherence and adequate reasoning processes are necessary for us to deem a belief rational. *See* Raz, *supra* note 110, at 279-81.

123. *See* Raz, *supra* note 110, at 279-80 (noting that in addition to coherence, "we also can expect that a person should not be rash, or gullible, or prejudiced, or superstitious").

124. *See* Campos, *supra* note 17, at 1815:

> Moral claims at least appear to be in some fundamental sense subjective. One cannot, given the current epistemological obscurity of such claims, demonstrate that a woman's "right" to procreative autonomy is superior to an embryo's "right" not to be aborted; in the end, all such claims must have the flavor of arbitrary assertions.

See also Stacy, *supra* note 115, at 28-30 (suggesting that a religious, or "suprarational," view of abortion leads to unresolvable conflicts). David A.J. Richards suggests that the apparent difficulty of resolving abortion as a moral problem arises primarily from its novelty. Abortion is in a class of issues "posed by new circumstances of our industrial and technologically advanced civilization," but continued exposure and evolution may well make the moral questions more determinate and less inchoate. David A.J. Richards, Book Review, 23 GA. L. REV. 1189, 1192 (1989). Jeffrey Stout agrees, pointing out that the morality of abortion is more like "disagreement among cosmologists over the origin of the universe" than it is like agreement on the propositions taught in Physics 101: "It's not yet clear what, if anything, is going to settle these disagreements, although neither one seems impossible in principle to resolve by rational means." STOUT, *supra* note 67, at 42.

125. *See* THOMPSON, *supra* note 121, at 27-29. For other examples of how morality can be discussed rationally, see RICHARD A. POSNER, SEX AND REASON 221-23 (1992); STOUT, *supra* note 67, at 94-95.

If religion is injected into the discussion, however, the likelihood of impasse rises considerably. Sincerely held religious beliefs cannot be shaken by rational argument—that is the heart of faith. Because God's commands need not be rational, logical, or consistent, the response that abortion is contrary to God's will is essentially a conversation stopper. As Judith Jarvis Thompson points out: "Anyone who can say of a batch of fertilized eggs 'Those are children', and believe it to be a literal truth, must surely be immune to argument."[126] If one does not share the underlying faith, one is reduced to arguing about whether the believer has properly interpreted God's commands. That is a sterile argument indeed—focusing on authority rather than morality—and one which is particularly unlikely to succeed in the context of any religion that denies individual believers the right to dissent from authorized interpretations. Similarly, the radical appeal to emotion cannot be challenged: the only response to the claim that being "a woman of color" "influences [one participant's] view on abortion"[127] is that being something other than a woman of color—or even being a woman of color with experiences that might differ from those of the first participant—influences the view of the other participant. Just as a failure to convert limits the responses one can make to a statement of faith, emotive appeals may "function as an authoritarian conversation-ending move."[128] Reason, then, need not be Cartesian to differentiate itself from other epistemologies: it is possible to converse reasonably without either following a rigid logical sequence or reaching a defined answer, but reason, unlike some other epistemologies, rules certain conversational moves out of order.

The question thus comes down to whether we *ought* to privilege reason and empiricism over alternative ways of knowing. What, if anything, is wrong with a kind of epistemological pluralism that allows the different ways of knowing to coexist even in the public sphere? I suggest that there are major difficulties with epistemological pluralism. I want to make clear at the outset that I am specifically talking about the public arena. Alternative epistemologies—especially religious ones—may satisfy deep human needs, and for that reason alone should be tolerated as individual beliefs.[129] A problem arises only when those alternative epistemologies demand public recognition, support, or influence—in other words, when we are asked to subordinate reason to another, nonrational, epistemology in making public policy. In one sense, then, I am arguing for a scheme analogous to what one scholar has characterized as the eighteenth-century "schizophrenic conception of God": the rational "Divine Engineer" in public, and the warmer, more mystical "Heavenly Father" for "personal reli-

126. THOMPSON, *supra* note 121, at 293.

127. Johnson, *supra* note 29, at 819.

128. Gerald Torres, Re-Understanding the Voices Debate: Culture, Pluralism, and Law, Thomas Distinguished Lecture at the Yale Law School (Apr. 3, 1990), *quoted in* Farber & Sherry, *supra* note 34, at 829 n.120.

129. *See* Marshall, *supra* note 115, at 843, 861-63.

gious experience."[130] Thus, I am directly taking issue with Stephen Carter's complaint that the law treats religion as a hobby.[131] Similarly, I disagree with scholars such as Mary Coombs and Kathryn Abrams, who imply that legal scholarship relying on individual emotive appeals is no less scholarly than that relying on empiricism and rational argument.[132]

The primary problem with epistemological pluralism is that there is no way to resolve disputes between epistemologies except by recourse to power. In this, a regime of epistemological pluralism resembles the hostile religious pluralism—and religious warfare—that prevailed before the Enlightenment. The Enlightenment was in one sense a response to the absence of epistemological authority: "Incompatible appeals to authority seemed equally reasonable, and therefore equally suspect, as well as thoroughly useless as vehicles of rational persuasion."[133] Similarly, in the absence of an agreed epistemology, we cannot mediate between religious traditionalists and radical feminists; whether the traditional nuclear family is mandated or outlawed will depend on who has the most votes.[134] Indeed, despite their common epistemological claims, the radicals and the religionists are often in opposition to one another. Linda Hirshman, for example, claims that the recent religious revival is motivated by racism and sexism.[135] She is not alone; Frederick Gedicks notes that many postmodernists are as suspicious of religion as they are of reason.[136] Similarly, the established religions that rely most heavily on revelation, biblical literalism, and other nonrational forms of knowledge are often least willing to tolerate—much less endorse—the feminist and gay rights agendas urged by the radicals. At least some academic defenders of religious epistemologies simultaneously condemn the alternative epistemologies of radical feminists and critical race theorists.[137]

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130. *See* TURNER, *supra* note 6, at 59.

131. *See* Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 992-96.

132. *See* Coombs, *supra* note 35, at 714-15 & n.125; Abrams, *supra* note 23, at 1041-45, 1048-51 (discussing validity of feminist narrative scholarship); *see also* Johnson, *supra* note 29 (discussing validity of narrative and critical race theory scholarship).

133. STOUT, *supra* note 44, at 235.

134. For a stark example of the conflict between these two nonrational epistemologies, see Smolin, *supra* note 51, at 1094-95.

135. *See* Hirshman, *supra* note 50, at 1864-65.

136. *See* Gedicks, *Religious and Secular*, *supra* note 38, at 135; *see also* Michael W. McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post-modern Age*, 1993 B.Y.U. L. REV. 163, 188 (criticizing Tushnet for his failure, as a postmodernist, to escape the liberal view of religion).

137. *Compare* Alexander, *supra* note 115, at 774-75 (denying existence of any "epistemological divide" between reason and religion) *with* Larry Alexander, *What We Do, and Why We Do It*, 45 STAN. L. REV. 1885, 1890-96 (1993) (criticizing recent feminist and critical race theory scholarship for "fail[ing] the test for rational discourse"); *compare* CARTER, *supra* note 37 (advocating religious epistemological pluralism) *with* Stephen L. Carter, *Academic Tenure and "White Male" Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065 (1991) (suggesting that different cultural groups ought to be held to same academic standards because there are no significant epistemological differences between them).

There are exceptions on both sides. Some of the best scholars in both fields have noticed the affinity

Only the common language of reason allows us to persuade one another and perhaps to conclude that in some areas—such as family structure and private worship—individuals ought to be permitted to make their own choices.

Many of those who argue for epistemological pluralism implicitly recognize that public appeals must take a rational form, since their own arguments rely on reason rather than on revelation. Indeed, it is hard to see how epistemological pluralism can be supported except through appeals to reason. Social constructivists are subject to the obvious criticism that their arguments for epistemological pluralism are also socially constructed and thus necessarily a matter of power relations; why, then, should we accept those arguments unless our own lack of power forces us to?[138] For religionists, whose truths are God-given and therefore necessarily superior to any human truths, granting any other epistemology an equal status is a betrayal of God's omnipotence. Only reasoned argument, grounded in common experience about human needs and the best ways to satisfy them, can yield a conclusion that individualized epistemologies should be tolerated or even welcomed. Moreover, unless we would agree with the medical student who refused to reject even a schizophrenic epistemology as deviant, we also need a way to distinguish between acceptable and unacceptable epistemologies. Again, only empiricism and reasoned argument—about scientific likelihoods, about human happiness and suffering, about the adaptive usefulness of various beliefs—can allow us to draw such distinctions.

Some, however, have suggested that the historical era of the Enlightenment was unique, and that epistemological pluralism would, in the modern world, create little danger of internecine warfare.[139] This optimism overlooks one of the fundamental differences between rational and antirational epistemologies:

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and occasionally called for each side to welcome and tolerate the other. *See, e.g.*, CARTER, *supra* note 37, at 180 ("The demand for the teaching of scientific creationism . . . is much like the demand for what is described as a multicultural curriculum."); Gedicks, *Religious and Secular*, *supra* note 38, at 113 (stating that both religion and radicals question claims of Enlightenment reason and empiricism); Levinson, *supra* note 32, at 2062 (equating claims of exclusion from liberal hegemony made by religious believers, feminists, and critical race theorists); Sanford Levinson, *Some Reflections on Multiculturalism, "Equal Concern and Respect," and the Establishment Clause of the First Amendment*, 27 U. RICH. L. REV. 989, 995, 1005 (1993) (equating religious pluralism with multiculturalism); Lupu, *supra* note 80, at 584-85 (noting similarities between debates over creationism and Afrocentric curricula); McConnell, *supra* note 66, at 150-51 (suggesting that we should be as tolerant of particularist multiculturalism as we have been of religious pluralism); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 134-35 (1992) (noting that secular liberalism is under attack from both the left and right); Smolin, *supra* note 51, at 1073 (noting similar attacks on liberalism by evangelicals and radical legal scholars); Stolzenberg, *supra* note 36, at 664-66; Ruti Teitel, *Postmodernist Architectures in the Law of Religion*, 1993 B.Y.U. L. REV. 97, 99.

138. *Cf.* Alan R. Madry, *Analytic Deconstructionism? The Intellectual Voyeurism of Anthony D'Amato*, 63 FORDHAM L. REV. 1033, 1036 (1995) ("[Postmodernism] precludes any reasoned argument for change. After all, if there is no such thing as justice or righteousness, then the present arrangement is no worse than any alternative; 'worse' presupposes a standard.").

139. *See, e.g.*, Michael J. Perry, *Religious Morality and Political Choice: Further Thoughts—And Second Thoughts—On Love and Power*, 30 SAN DIEGO L. REV. 703, 714-15 (1993); Maimon Schwarzschild, *Religion and Public Debate in a Liberal Society: Always Oil and Water or Sometimes More Like Rum and Coca-Cola?*, 30 SAN DIEGO L. REV. 903, 914 (1993).

because the latter rest on faith rather than reason, they are likely to be impervious to persuasion and resistant to compromise.[140] Moreover, without the skeptical cast of mind fostered by Enlightenment epistemology, antirational epistemologies—especially religion, with its extrahuman source of authority—are likely to be conducive to particularly deep conviction. Deep conviction, in turn, is a breeding ground for exactly the religious wars of previous centuries:

> In *Abrams v. United States*, Justice Holmes argued that a logical result of deep conviction is intolerance. As Dean Bollinger has added, failing to attempt to silence what one believes to be false might be seen as a sign of weak conviction. . . . To the zealous adherent, intolerance and persecution become, in a sense, the measure of her commitment to her religious beliefs.[141]

Even in the United States, where religion has largely been domesticated (as Michael Perry puts it),[142] we have not been spared all of the violence associated with pre-Enlightenment religious wars. Although, as Perry points out, "[w]e are *not* the former Yugoslavia or India,"[143] the Branch Davidians, the World Trade Center bombers, the abortion clinic killings, and the growth of various organizations—on the left and the right, not all of them religious—that use irrational arguments to reject and resist the authority of government, by violence if necessary, should give us pause before abandoning the fruits of the Enlightenment.[144] Indeed, as one historian has pointed out:

> If we have now entered an era in which those on the right have been joined by some on the left in assailing reason as faulty because it does not correspond to the essential and incontestable truths they have come to know emotionally, or by virtue of their membership in particular groups, the prospects for deliberative democracy are bleak indeed. . . . If truth resides in difference and emotion, then war rather than persuasion is the only possible consequence of speaking such a truth to power.[145]

Even where violence is unlikely, the practical implications of epistemological pluralism are not likely to please the pluralists. For example, Gertrude Himmelfarb points out that different perspectives on history will inevitably conflict: "If the feminist historian can and should write history from her perspective . . . why should the black historian not do the same—even if such a history might 'marginalize' women? And why not the working-class historian, who might marginalize both women and blacks?"[146] Currently popular antirationalisms

140. *See* Eisgruber, *supra* note 80, at 372-73.
141. Marshall, *supra* note 115, at 862 (footnotes omitted).
142. *See* Perry, *supra* note 139, at 715.
143. *Id.*
144. *See* STOUT; *supra* note 67, at 223; Eisgruber, *supra* note 80, at 373.
145. Kloppenberg, *supra* note 83, at 410.
146. GERTRUDE HIMMELFARB, ON LOOKING INTO THE ABYSS: UNTIMELY THOUGHTS ON CULTURE AND

seem indeed to have little in common except their rejection of the Enlightenment. Try to imagine a public school curriculum designed jointly by Bob and Alice Mozert (the religious parents who objected to a standard public school curriculum as secular humanism)[147] and Stanley Fish, Duncan Kennedy, or William Eskridge. Find a single point of agreement—other than that the Enlightenment was a failure—between Michael McConnell and Catharine MacKinnon. Even allies within the multiculturalist wing of epistemological pluralism are on the brink of war: women are complaining about sexism within the NAACP,[148] federal laws requiring equality for women in college athletics are viewed as hurting black male athletes,[149] and feminists are themselves divided over whether to accord respect to non-Western cultures that practice female circumcision, a mutilation of female genitalia.[150]

The more radical of the social constructivists accept—and even embrace—the inevitable consequence of their theory that there is no knowledge, just power.[151] Their project is to expose and alter the hidden power relations. A few even remain epistemologically faithful by refusing to use reason in their scholarship at all, relying instead on "narratives" to communicate what are necessarily private and personal truths. Just as religious conversion cannot be prompted by reason (*pace* Pascal), this use of narratives is a nonrational attempt to transform beliefs.[152] But whether or not all epistemological pluralists explicitly recognize that their position leaves power as the only means of resolving disputes, it is an inevitable consequence of granting alternative epistemologies equal status.

None of the epistemological pluralists seem willing to confront the practical

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SOCIETY 154 (1994). She concludes: "For that matter, why not the traditional dead-white-male (or even live-white-male) historian, who might marginalize (who has, in fact, been accused of marginalizing) all other species?" *Id.*

147. *See* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) (requiring public school students to study basic reader series not unconstitutional burden under Free Exercise Clause), *cert. denied*, 484 U.S. 1066 (1988).

148. *See* Steven A. Holmes, *In Fighting Racism, Is Sexism Ignored?*, N.Y. TIMES, Sept. 11, 1994, § 4, at 3.

149. *See* Nolan Zavoral, *A Fight for Victories and Respect*, MINN. MONTHLY, Oct. 1992, at 52, 53 (interviewing Clem Haskins, University of Minnesota men's basketball coach).

150. *See, e.g.*, Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509 (1992) (discussing approaches within women's rights literature to issue of genital mutilation, concluding no approach "actively engages" women within cultures practicing genital mutilation); Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 191 (1992) (advocating "multicultural dialogue and a shared search for areas of overlap, shared concerns and values" in dealing with "culturally challenging practices" such as female genital mutilation); Hope Lewis, *Between* Irua *and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995); Bronwyn Winter, *Women, the Law, and Cultural Relativism in France: The Case of Excision*, 19 SIGNS 939, 960-66 (1994) (describing French feminist camp as divided between "protrial feminists," who favor criminalization of genital mutilation, and "cultural relativists," who reject criminalization as ethnocentric).

151. *See* Chantal Mouffe, *Democracy and Pluralism: A Critique of the Rationalist Approach*, 16 CARDOZO L. REV. 1533 (1995); *see also* GROSS & LEVITT, *supra* note 34, at 72 (stating that on the radical constructivist view, "all knowledge projects are, like war, politics by other means").

152. *See* Farber & Sherry, *supra* note 33.

implications of this reduction of knowledge to power.[153] Stephen Carter, for example, notes that the problem with creationism is not its epistemological pedigree but that, like the proposition that the earth is flat, it is "factually in error."[154] According to both religious and radical social constructivists, however, one cannot make the claim that any proposition is "factually in error" except from within a particular epistemological system. Thus, an epistemological pluralist like Carter should not be making such a statement at all, since he maintains that the rationalism and empiricism on which such "factual" claims are based are no more valid than an epistemology of faith and revelation that might lead to opposite conclusions. Similarly, many of the religious epistemological pluralists castigate Justice Scalia's opinion in *Employment Division, Department of Human Resources v. Smith*.[155] But Scalia's position instantiates the notion that only power can mediate between different epistemological systems: he is comfortable in "leaving accommodation to the political process" even though that will "place at a relative disadvantage those religious practices that are not widely engaged in."[156] The radical *cris de coeur* pleading for progressive changes in the law are similarly unpersuasive in the face of the current stolid conservatism of the American people: unless moved emotionally by the academic appeals—an unlikely scenario—there is no reason for either citizens or politicians to change their views. "For if ideas are mere reflections of the exercise of power, it becomes difficult to find a basis for criticizing social arrangements."[157] And if reason is not a universal epistemology that can mediate between the different beliefs, but only the belief system favored by the powerful, then whoever is in power will reify his own epistemology. That is the nature of the social constructivist critique.

One rather prosaic example may illustrate, close to home, the dangers of abandoning epistemological objectivity in favor of structures of power. Most academic journals use a blind reviewing system, in order to minimize institutional authority and maximize intellectual authority. They rely, in other words, as much as possible on objective standards rather than on hierarchies of power within academia.[158] Law reviews are an exception; those who select articles are fully aware of the identity, past scholarly achievements, and institutional affilia-

153. For a similar charge, see PETER DEWS, LOGICS OF DISINTEGRATION: POST-STRUCTURALIST THOUGHT AND THE CLAIMS OF CRITICAL THEORY at xv, 230 (1987) (claiming that postmodernist followers of Foucault have not recognized social constructivism's potential for totalitarianism).

154. CARTER, *supra* note 37, at 161-62.

155. 494 U.S. 872 (1990). For criticism, see, e.g., Laycock, *Remnants*, *supra* note 55; McConnell, *Revisionism*, *supra* note 69.

156. *Smith*, 494 U.S. at 890.

157. Farber & Sherry, *supra* note 31, at 879.

158. They nevertheless do not always succeed in eliminating bias. *See* Rebecca M. Blank, *The Effects of Double-Blind versus Single-Blind Reviewing: Experimental Evidence from the American Economic Review*, 81 AM. ECON. REV. 1041 (1991); Douglas P. Peters & Stephen J. Ceci, *Peer-Review Practices of Psychological Journals: The Fate of Published Articles, Submitted Again*, 5 BEHAVIORAL & BRAIN SCI. 187, 192-94 (1982) (suggesting authors' institutional affiliations and professional status may bias peer review of articles submitted to psychological journals).

tion of the authors who submit manuscripts. Because law reviews are therefore able to rely more heavily on these indicia of institutional authority, they provide us with a concrete example of the results when epistemological objectivity gives way to power. Those results are not encouraging, especially to those who would challenge the status quo. Unsurprisingly, prestigious law reviews disproportionately publish well-known authors, authors at well-known institutions, and authors at their own institutions.[159] If epistemological pluralists expect that abandoning reason and empiricism will favor their political agendas over those currently in favor, they are likely to be sorely disappointed.

The consequences of accepting epistemological pluralism go much deeper than making some epistemological pluralists look inconsistent or undermining attacks on the status quo, and are much more troubling than simply failing to fulfill the expectations of its proponents. If we cannot confidently assert that the earth is round or that evolution occurred, because those with a different epistemology present a counterargument that is valid in their world even if not in ours, then the same must be true of other scientific or historical statements. It is only the tools of the Enlightenment tradition that allow us to refute such unsupported claims as that virtually all of what we now consider the accomplishments of Western civilization was stolen from black Africans,[160] or that the tragic bombing of the Oklahoma City federal building was the work of agents of the United States government. It is only the acceptance of reason and empiricism as the epistemological standard that allows us to reject such pseudoscientific theories, currently fashionable in some quarters, as that melanin is "one of the strongest electromagnetic field forces in the universe" with the power to make its possessors intellectually superior,[161] or that Jewish doctors are injecting black babies with the AIDS virus.[162] Nor is it a defense that the modern alternative epistemologies advocated by radical and religious scholars do not always lead to such absurdity.[163] The point is that antirational epistemologies, unlike the principles of the Enlightenment, offer no weapons against a variety of intellectual and political atrocities. As Marvin Frankel points out, "[f]or most of Judaism's 5700-plus years, ... the great Western religions neither caused democracy to happen nor exhibited discomfort about its ab-

159. *See* Ira Mark Ellman, *A Comparison of Law Faculty Production in Leading Law Reviews*, 33 J. LEGAL EDUC. 681, 686 (1983).

160. *See* MARTIN BERNAL, BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSICAL CIVILIZATION (1987); CHEIKH ANTA DIOP, THE AFRICAN ORIGIN OF CIVILIZATION (Mercer Cook trans., 1974). For a scathing critique of this theory, see Mary Lefkowitz, *Not Out of Africa: The Origins of Greece and the Illustrations of Nerocentrists*, NEW REPUBLIC, Feb. 10, 1992, at 29.

161. *See* WILLIAM A. HENRY III, IN DEFENSE OF ELITISM 88 (1994) (quoting Dr. Patricia Newton, a psychiatrist at Johns Hopkins).

162. *See* LEONARD DINNERSTEIN, ANTISEMITISM IN AMERICA 221-22 (1994) (describing favorable reactions to 1988 statement by Chicago mayoral aide Steve Cokely); Arthur Hertzberg, *Is Anti-Semitism Dying Out?*, N.Y. REV. BOOKS, June 24, 1993, at 51-52 (describing prevalence of myth).

163. *See* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 740 (1992); McConnell, *supra* note 66, at 26-28.

sence."[164] Even today, the religious epistemologies that mandate discrimination against gays and lesbians are indistinguishable from those in the not too distant past that mandated discrimination against blacks.[165]

And if the melanin or AIDS myths are not sufficiently silly or frightening, there is a more horrific example of the beliefs that become acceptable when reason and empiricism are demoted as socially constructed epistemologies. Deborah Lipstadt notes that postmodern doctrines have allowed Holocaust denial theories to flourish and to be treated as "the other side," another "point of view," or a "different perspective":[166]

> [The postmodern doctrines of Fish and Rorty] fostered an atmosphere in which it became harder to say that an idea was beyond the pale of rational thought. At its most radical it contended that there was no bedrock thing such as experience. . . . [B]ecause deconstructionism argued that experience was relative and nothing was fixed, it created an atmosphere of permissiveness toward questioning the meaning of historical events and made it hard for its proponents to assert that there was anything "off limits" for this skeptical approach.[167]

Thus, those who deny that the Holocaust occurred are, in an epistemologically plural world, as entitled to demand public recognition of their beliefs as are the creationists, the Afrocentrists, and all the others who reject the epistemology of the Enlightenment. They can demand—and many defenders of epistemological pluralism, if not current case law, would support such demands from other groups—that textbooks should reflect the existence and potential soundness of denial theories; that if the public schools teach the Holocaust as a historical event, they must also teach that it may not have happened; that if parents object to their children being taught what they consider a historical fabrication, the

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164. Marvin E. Frankel, *Religion in Public Life: Reasons for Minimal Access*, 60 GEO. WASH. L. REV. 633, 637-38 (1992); *see also* POSNER, *supra* note 125, at 235-36 (examining crime rates and religiosity, and concluding that "[t]he combination in the United States of an extraordinarily high crime rate with an extraordinary degree of allegiance to Christian beliefs must make one question the pacifying effects of Christian zeal"); Eisgruber & Sager, *supra* note 87, at 1265 ("But while religion sponsors the highest forms of community, compassion, love, and sacrifice, one need only look around the world, or probe our own history, to recognize that it also sponsors discord, hate, intolerance, and violence.").

165. *See* Loving v. Virginia, 388 U.S. 1, 3 (1967):

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

(quoting from 1959 opinion by Virginia trial court judge).

166. DEBORAH E. LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY 1-2 (1993).

167. *Id.* at 18. Although Rorty is sometimes considered a pragmatist, he is also more radical than most pragmatists, and indeed his philosophy borders on social constructionism. *See, e.g.*, Eskridge, *supra* note 9, at 622-23.

children should be excused from history class; that if a state university funds student speech on historical topics generally it must also fund a group dedicated to denying the Holocaust. Lipstadt sees Holocaust denial as "a threat to all those who believe in the ultimate power of reason,"[168] but the converse is also true: the denial of the ultimate power of reason is a threat to those who would keep the memory of the Holocaust alive.

CONCLUSION

The Enlightenment was indeed aptly named. From the darkness that hid anti-Semitism and other forms of religious persecution, the denial of human freedom for the sake of protecting orthodoxy, the inadvertent cruelty of a nature that man could neither comprehend nor tame, and the deliberate unspeakable tortures committed by one religious regime after another, the Enlightenment burst forth and pointed us toward freedom and equality. We have not yet attained either, but we should be cautious before jettisoning the worldview that has brought us this far. The dangers that the epistemology of the Enlightenment gradually defeated remain very real, ready to reappear as soon as reason sleeps. Lest we fall prey to Goya's monsters, let us affirm that the Enlightenment project is not, in either sense of the word, finished—neither completed nor defeated.

168. LIPSTADT, *supra* note 166, at 20.