Georgia Law Review

Volume 57 | Number 3 Article 4

7-12-2023

American Exceptionalism as/in Constitutional Interpretation

Lucy Williams

American Exceptionalism as/in Constitutional Interpretation

Cover Page Footnote

J.D., Ph.D., Associate Professor, J. Reuben Clark Law School, Brigham Young University.

Special thanks to David Moore, Lisa Grow, Justin Collings, and Brigham Daniels. Thanks also to the participants at the Jack Miller Center's 2021 Lincoln Symposium (especially Connor Ewing and Ilan Wurman), the participants at the Jack Miller Center's Tocqueville Lecture Series, the participants at the 2022 Midwestern Political Science Association meeting, and my colleagues at the J. Reuben Clark Law School.

AMERICAN EXCEPTIONALISM AS/IN CONSTITUTIONAL INTERPRETATION

Lucy Williams[*]

American exceptionalism—the idea that America is superior, chosen, and tasked with a unique mission—is a foundational part of America's political culture. Its themes regularly appear in political speeches, at campaign rallies, and at national celebrations. But exceptionalism also appears frequently in another, less obvious place: Supreme Court opinions. Scholars and pundits routinely scour these opinions to identify the jurisprudential theories and political leanings that drive case outcomes. But as yet, legal scholars have paid little attention to the exceptionalist themes in the Court's case law. Some legal scholars study the ways American constitutional law is distinctive, or exceptional, when compared to law in other countries, and many are eager to predict and explain the Supreme Court's behavior. But few analyze exceptionalism as a judicial ideology or worldview, and none consider whether exceptionalist commitments influence the Court's decisions.

In this Article, I respond to this key omission by offering the first systematic study of American exceptionalism and Supreme Court jurisprudence. I argue that American exceptionalism is a powerful and important feature of Supreme Court decision making. Through close reading and rhetorical discourse analysis of five landmark Supreme Court decisions, I demonstrate that the Court frequently invokes and deploys exceptionalist themes when interpreting the Constitution.

This Article also reveals that the Court relies on two distinct modes of exceptionalist rhetoric. The first, which I call accomplished exceptionalism, is self-celebratory and assumes that America will always be great. The second, which I call

[*] J.D., Ph.D., Associate Professor, J. Reuben Clark Law School, Brigham Young University. Special thanks to David Moore, Lisa Grow, Justin Collings, and Brigham Daniels. Thanks also to the participants at the Jack Miller Center's 2021 Lincoln Symposium (especially Connor Ewing and Ilan Wurman), the participants at the Jack Miller Center's Tocqueville Lecture Series, the participants at the 2022 Midwestern Political Science Association meeting, and my colleagues at the J. Reuben Clark Law School.

aspirational exceptionalism, is self-critical and treats American greatness as a contingent possibility. The Court's invocation of these modes is not random but instead correlates closely with the outcome in a case. Specifically, in cases upholding exercises of government power, the Court favors accomplished exceptionalism, but in cases affirming individual rights claims, it relies on the aspirational mode.

These findings have important implications. The correlation between exceptionalism and case outcomes suggests that exceptionalism might have a causal effect on judicial decision making—that it, like judges' ideology or theories of statutory interpretation, might drive the Court to reach particular results. If this is so, exceptionalism has been hiding in plain sight—as neglected as it is ubiquitous—as an element in Supreme Court decision making. It is past time for scholars to give exceptionalism the same attention they have given to other outcome-determinative phenomena.

TABLE OF CONTENTS

I. INTRODUCTION

In July 2021, the Supreme Court decided *Brnovich v. Democratic National Committee*.[1] The case involved a Voting Rights Act challenge to two provisions of Arizona voting law: one that required Arizonians to vote in their assigned precincts, and one that restricted ballot collection by certain third parties.[2] The Democratic National Committee argued that these provisions violated the Voting Rights Act of 1965[3] (VRA) by "adversely and disparately affect[ing] Arizona's American Indian, Hispanic, and African American citizens."[4] Arizona insisted that its laws did not deprive plaintiffs of equal or open access to political processes and therefore did not run afoul of VRA § 2.[5]

When *Brnovich* issued, voting was a tender and divisive topic. Just months earlier, America's voters had participated in a polarized and contentious presidential election, and because of the global COVID-19 pandemic, a record number had used mail-in ballots and early voting procedures.[6] The massive surge in mail-in and absentee ballots delayed results on election night and made the race appear much closer than it actually was.[7] This, in turn,

---

[1] 141 S. Ct. 2321 (2021).

[2] *See id*. at 2330 (outlining the issues presented by Arizona's law).

[3] 52 U.S.C. § 10301.

[4] *Brnovich*, 141 S. Ct. at 2334.

[5] Brief for Appellee at 59–60, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (No. 18-15845), 2018 WL 3461796.

[6] According to one study, nearly forty-six percent of 2020 voters used absentee or mail-in ballots—an increase of twenty-one percent from 2016. By contrast, only twenty-eight percent of 2020's voters cast their ballots in-person—more than fifty percent fewer than the sixty percent who voted in person in 2016. Nathaniel Rakich & Jasmine Mithani, *What Absentee Voting Looked Like in All 50 States*, FIVE THIRTY-EIGHT (Feb. 9, 2021), https://fivethirtyeight.com/features/what-absentee-voting-looked-like-in-all-50-states/.

[7] Pre-election polls showed that Democratic voters were significantly more likely to vote by mail than Republicans. *See* Harry Enten, *Trump Is Creating an Untraditional Partisan Divide on Vote by Mail*, CNN (July 27, 2020, 3:00 PM), https://www.cnn.com/2020/07/27/politics/vote-by-mail-partisan-divide-analysis/index.html ("Mainly, Democrats are going to cast a lot more votes by mail than Republicans."); Laura Bronner, Anna Wiederkehr & Nathaniel Rakich, *What Blue and Red "Shifts" Looked Like in Every State*, FIVE THIRTY-EIGHT (Nov. 12, 2020), https://fivethirtyeight.com/features/where-we-saw-red-and-blue-mirages-on-election-night/ ("[A]bsentee voters are disproportionately likely to be Democrats."). Because of this, the election night results in many parts of the country skewed Republican, creating the illusion that Trump held a commanding lead. *See* Bronner et al., *supra* note 7 (noting that the difference in Republican versus Democrat

prompted then-President Trump to challenge the legitimacy of the election results.[8] In the weeks following the election, Trump and his supporters initiated more than sixty lawsuits seeking to overturn the "rigged" election, insisting that some states had manipulated mail-in, early voting, and absentee ballots to alter the outcome.[9] They also publicly decried the election process, refused to concede the result, and insisted that the race was tainted by widespread voting fraud.[10]

Against this socio-political backdrop, *Brnovich* took on added significance. On its face, the case presented a discrete and narrow set of legal questions—specific challenges to two provisions of Arizona's voting laws. But it also raised broader questions about race, voting access, and the controversial voting procedures (mail-in and absentee) that had drawn so much attention during the 2020 election.[11] The Court's judgment would affect the way Arizonians could (or could not) cast ballots on election day.[12] But it would also send a broader message about the complicated relationship(s) between voting, elections, and equality in America.[13]

---

absentee ballots led "many real-time observers to conclude [that] the presidential race was closer than it actually was").

[8] *See* David Cohen, *Trump Edges Closer to Conceding the Election, Then Backs Off*, POLITICO (Nov. 15, 2020, 8:35 AM), https://www.politico.com/news/2020/11/15/trump-biden-inching-toward-concession-436575 (discussing Trump's assertion that the election was rigged).

[9] *See* William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 5:01 AM), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/ (summarizing the election lawsuits).

[10] *See id.* (describing how Trump, his lawyers, and his supporters filed lawsuits and "made repeated allegations of election fraud in the news and social media").

[11] *See* Brnovich*: A Significant Blow to Our Freedom to Vote*, LEAGUE OF WOMEN VOTERS (Sept. 2, 2021) [hereinafter *A Significant Blow*], https://www.lwv.org/blog/brnovich-significant-blow-our-freedom-vote (discussing *Brnovich*'s effects on voting).

[12] *See* Derek Muller, Brnovich, *Election-law Tradeoffs, and the Limited Role of the Courts*, SCOTUSBLOG (July 6, 2021, 11:14 AM), https://www.scotusblog.com/2021/07/brnovich-election-law-tradeoffs-and-the-limited-role-of-the-courts/ (discussing the holding and implications of *Brnovich*).

[13] *See A Significant Blow*, *supra* note 11 ("The Court's ruling today is a devastating blow to our democracy and will clear the way for states to pass discriminatory laws, put up barriers to voting, and chase problems that do not exist." (quoting League of Women Voters of the United States CEO Virginia Kase Solomón)).

On July 1, 2021, the Court upheld both challenged provisions.[14] As many commentators observed, the decision highlighted the Justices' differing approaches to statutory interpretation: while the majority focused narrowly on the VRA's text and syntax, the dissenters "read [the VRA] broadly" and considered its history and context.[15] But the case also revealed something more: the Justices' different attitudes toward American exceptionalism. In their analyses, both the majority and the dissenters invoked images of America's greatness. But where the majority treated American excellence as an accomplished fact, the dissenters presented it as something delicate and contingent—a distinctive possibility, but one that could be undone if Americans abandoned the delicate statutory schema that held it in place.[16] The Justices' final positions reflected these divergent views. Because Justice Kagan and the other dissenters saw exceptionalism as something always already at risk, they insisted that "the vitality of Section 2 . . . matter[ed] more than ever."[17] The majority, by contrast, was so assured of America's already-exceptional status that it read the VRA narrowly and dismissed Justice Kagan's view that the statute "still ha[d] much to do."[18]

Brnovich was not the first Supreme Court case to engage with notions of American greatness, and it was not the first time that exceptionalist themes made their way into the Court's decisions.[19] Indeed, American exceptionalism—the belief or worldview that treats America as superior, chosen, and tasked with a unique

---

[14] *Brnovich*, 141. S. Ct. at 2321.

[15] *Id.* at 2361 (Kagan, J., dissenting). For analyses of the Court's statutory interpretation in *Brnovich*, see, for example, Nicholas Stephanopolus, *Opinion: The Supreme Court Showcased Its "Textualist" Double Standard on Voting Rights*, WASH. POST (July 1, 2021, 7:28 PM), https://www.washingtonpost.com/opinions/2021/07/01/supreme-court-alito-voting-rights-act/ (critiquing the majority's inconsistent approach to statutory interpretation); Hans von Spakovsky, *The Supreme Court Gets It Right on Section 2*, SCOTUSBLOG (July 7, 2021, 11:16 AM), https://www.scotusblog.com/2021/07/the-supreme-court-gets-it-right-on-section-2/ (arguing that the text of § 2 dictated the *Brnovich* outcome).

[16] *Compare Brnovich*, 141 S. Ct. at 2342–43 (arguing that the dissent's interpretation is unnecessary and oversteps State interests), *with id.* at 2373 (Kagan, J., dissenting) (warning that weakening the VRA could result in voter suppression).

[17] *Brnovich*, 141 S. Ct. at 2356 (Kagan, J., dissenting).

[18] *Id.*

[19] *See infra* Part III (discussing prior Supreme Court decisions that invoke exceptionalist themes).

mission[20]—has been an enduring and defining part of America's political and legal discourse since the founding.[21] Despite this, legal scholars have not paid much attention to whether or how the Supreme Court invokes and engages with exceptionalist themes. Some comparative scholars study ways American law is exceptional when compared to the law of other countries, but for the most part, these scholars treat exceptionalism as a descriptive phenomenon rather than a normative or ideological one.[22] Other legal scholars ignore exceptionalism entirely. Thus, when legal academics try to predict what will happen in a Supreme Court case, or when they offer analysis after the fact, they do not comment on how the Court invokes exceptionalism as an ideology or worldview. They consider, instead, the Court's ideological makeup,[23] the Justices' policy preferences,[24] Justices' theories of statutory and constitutional interpretation, the effects of public opinion,[25] the participation of amici curiae,[26] and other similar factors.[27] But they do not consider

---

[20] *See infra* note 65 and accompanying text (defining exceptionalism).

[21] *See infra* notes 31–33 and accompanying text (discussing the prevalence of exceptionalism both before and during the founding era).

[22] *See infra* notes 41–44, 61–63 and accompanying text.

[23] *See, e.g.*, LAWRENCE BAUM, IDEOLOGY IN THE SUPREME COURT (2017) (considering how Justices' ideologies affect judicial decisions); Frank B. Cross, *The Ideology of Supreme Court Opinions and Citations*, 97 IOWA L. REV. 693, 730–36 (2012) (using the ideological leaning of case language and citations to classify Supreme Court opinions as conservative or liberal).

[24] *See generally* JEFFREY SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) (arguing that Justices' policy preferences and ideological views influence their decision making).

[25] *See, e.g.*, William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169, 184–96 (1996) (considering whether and how changes in public opinion affect Supreme Court decisions).

[26] *See* Kevin G. Buckler, *Supreme Court Outcomes in Criminal Justice Cases (1994–2012 Terms): An Examination of Status Differential and Amici Curiae Effects*, 26 CRIM. J. POL'Y REV. 773, 773 (2015) (analyzing the effects of amici curiae participation on case outcomes and arguing that "greater levels of aggregate amici curiae participation . . . significantly reduce[s] the likelihood of a case outcome that favors the government").

[27] *See, e.g.*, Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1163 (2004) (testing the predictive power of a statistical model that includes six variables: (1) circuit of origin, (2) substantive legal issue, (3) type of petitioner, (4) type of respondent, (5) ideological direction of lower court ruling, and (6) whether case presents a constitutional issue); Timothy R. Johnson, James. F. Spriggs II & Paul J. Wahlbeck, *Oral Advocacy Before the United States Supreme Court: Does it Affect the Justices' Decisions?*, 85 WASH. U. L. REV. 457, 465–502 (2007) (considering the

whether the Court's views toward exceptionalism might shape its perspective on the legal issues in a given case.

In this Article, I address this surprising gap by providing the first systematic study of the Supreme Court's engagement with American exceptionalism. Through close reading and discourse analysis of five landmark Supreme Court cases, I consider whether, when, and how the Court engages with the notion that America is exceptional. I also consider whether the Court's views toward exceptionalism influence its legal reasoning. My analysis yields three significant contributions. First, I find that the Court regularly engages with exceptionalist themes: just as it invokes canons of construction or theories of constitutional interpretation, it often frames its analyses as dictated by America's unique role, status, and responsibility. Second, I find that the Court deploys at least two different *modes* of exceptionalism. Sometimes, it uses what I call accomplished exceptionalism: a view of America that is celebratory, backward-looking, and self-congratulatory. Other times, it uses what I call aspirational exceptionalism: a perspective that is self-critical, forward-looking, and progressive. Finally, and perhaps most importantly, I observe that these modes are strongly correlated with different case outcomes. Specifically, the Court tends to rely on accomplished exceptionalism when upholding broad exercises of governmental power. But when affirming the rights of individuals vis-à-vis the government, it is more likely to draw on the aspirational mode.

These findings have important implications. Although the rhetoric of American exceptionalism permeates Supreme Court decisions, until now, it has been largely unstudied. Because of this, the legal academy has neglected an important feature of the Court's decisions. At the very least, exceptionalism serves an important legitimizing function by allowing courts to present their decisions as patriotic holdings dictated by America's exceptional status. But the correlation between exceptionalism and case outcomes also suggests the possibility that there is a *causal* relationship between exceptionalism and judicial decision making. If certain types of decisions routinely feature a particular mode of exceptionalism, then perhaps exceptionalism, like political ideology or theory of

---

effects of oral argument on case outcomes); *see generally* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998) (considering how strategic and institutional factors affect Justices' decisions).

statutory interpretation, drives the Court to reach particular results. Exceptionalism might even qualify as a variant of what Philip Bobbitt calls "ethical argument"—a mode of constitutional interpretation which "deriv[es] rules from those moral commitments of the American ethos . . . reflected in the Constitution"[28] and answers constitutional questions by considering the demands of "the character, or *ethos*, of the American polity."[29]

Given the potential effects and long-time presence of exceptionalism, it is past time for legal scholars to stop ignoring the Supreme Court's exceptionalism. Even if exceptionalism is just a stylistic device, it nonetheless deserves attention as one of the many ways courts establish legitimacy and overcome the counter-majoritarian difficulty. And if exceptionalism actually shapes judicial decision making, then it deserves the same attention that scholars give to other outcome-determinative phenomena. Such attention will enhance the field in significant ways. It will improve legal scholarship by providing a deeper understanding of why and how the Supreme Court makes its decisions. It will help Justices and judges be more cautious about exceptionalism as a potential source of judicial bias. And it will prepare practitioners to craft persuasive arguments that are more attuned to judges' exceptionalist sensitivities.

With these important implications in mind, this Article proceeds in three parts. In Part II, I provide the background and theoretical framework for my analysis. I begin with a discussion of what, exactly, American exceptionalism entails. I then distinguish between two modes of exceptionalism: the accomplished mode, which is backward-looking and self-celebratory, and the aspirational mode, which is forward-looking and self-critical. I describe the rhetorical tropes and features of each mode and provide examples of how both appear in American politics and popular culture.

In Part III, I consider how these modes of exceptionalism appear in Supreme Court jurisprudence. Through close reading and discourse analysis, I trace the Court's use of accomplished and aspirational exceptionalism in five landmark cases on race, speech, and voting. My analysis shows that exceptionalism features prominently in many of the Court's most well-known cases. It also

---

[28] PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 13, 20 (1991).

[29] PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 94 (1982).

reveals that the Court's exceptionalism varies across contexts: in cases upholding exercises of individual liberty, the Court favors aspirational exceptionalism, but in cases upholding governmental limitations on individual rights, it favors the accomplished mode.

In Part IV, I discuss why my findings matter. My analysis indicates that exceptionalism is a significant but overlooked element of Supreme Court decisions. It also suggests the possibility that exceptionalism shapes and influences the Court's decision making. Accordingly, I argue that Supreme Court scholars, judges, and practitioners should be more deliberate and methodical about studying the Court's exceptionalist orientations.

II. WHAT IS AMERICAN EXCEPTIONALISM?[30]

American exceptionalism is one of the most enduring concepts in American politics. In the pre-founding era, America's early colonists viewed themselves as a part of a special, chosen, and divinely sanctioned endeavor.[31] The founding era likewise believed that "America [would] be a model of democratic government and the envy of all the nations of the earth."[32] As America matured, this same sense of special chosenness fueled manifest destiny, inspired interventionism, and shaped other domestic and international

[30] This section expands on and borrows from my previously published work on exceptionalism. *See* Lucy Williams, *Blasting Reproach and All-Pervading Light: Frederick Douglass's Aspirational American Exceptionalism*, 9 AM. POL. THOUGHT 369, 373–78 (2020) (discussing accomplished and aspirational exceptionalism generally).

[31] *See, e.g.*, SACVAN BERCOVITCH, THE AMERICAN JEREMIAD 3, 7–9, 33, 39–40 (1978) (identifying exceptionalist themes in early Puritan writings); JOHN WINTHROP, A MODEL OF CHRISTIAN CHARITY (1630), https://www.winthropsociety.com/a-model-of-christian-charity (describing early colonial efforts as a "cause between God and us" and "a commission," and stating that America's puritan colonists were "entered into a covenant with Him for this work").

[32] DEBORAH L. MADSEN, AMERICAN EXCEPTIONALISM 37 (1998) (describing the exceptionalist sentiments in Benjamin Franklin's autobiography); *see also* Daniel Bell, *The "Hegelian Secret": Civil Society and American Exceptionalism, in* IS AMERICA DIFFERENT? A NEW LOOK AT AMERICAN EXCEPTIONALISM 46, 56 (Byron E. Shafer ed., 1991) (comparing Jefferson's and Franklin's views of exceptionalism); Steven G. Calabresi, *A Shining City on a Hill: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1355–59 (2006) (describing how "[t]he Framers' discussions of the drafting and ratification of the Constitution . . . reflected religious exceptionalist influence"); Jack P. Greene, *Notes and Documents: William Knox's Explanation for the American Revolution*, 30 WM. & MARY Q. 293, 295 (1973) (noting one prominent revolutionary-era British official's view that the colonies were repositories of democracy).

policies.[33] When Ronald Reagan famously paraphrased John Winthrop's description of America as a "city on a hill,"[34] he reiterated an exceptionalist ideology that would become a foundational part of America's political lexicon. Even today, that ideology shapes the way Americans think and speak about themselves.

Because exceptionalism is "the cultural foundation on which the edifice of American politics and government has been built,"[35] it is a common topic of political and social scientific research. Since the 1940s and 1950s, scholars in political science and history have contemplated what "exceptionalism" means—whether it is an empirical fact, an ideological commitment, or something else.[36] They have researched the features—both positive and negative—that make America distinctive and great.[37] They have explored the ways American exceptionalism shapes America's national identity and affects its relationships with neighbors abroad. And they have celebrated and critiqued the normative implications of the exceptionalist worldview.[38] The existing academic literature is

---

[33] *See* MADSEN, *supra* note 32, at 70–145 (arguing that exceptionalist assumptions animated manifest destiny, westward expansion, and nineteenth-century annexation efforts); Natsu Taylor Saito, *Human Rights, American Exceptionalism, and the Stories We Tell*, 23 EMORY INT'L L. REV. 41, 48–55 (2009) (discussing the relationship between American exceptionalism and colonialism, manifest destiny, the Monroe Doctrine, the Roosevelt Corollary, and foreign policy decisions post-World War I and II).

[34] Ronald Reagan, U.S. President, Farewell Address to the Nation (Jan. 11, 1989) (transcript available at https://www.reaganlibrary.gov/archives/speech/farewell-address-nation).

[35] RICHARD JOHNSON, U.S. FOREIGN POLICY: DOMESTIC ROOTS AND INTERNATIONAL IMPACT 34 (2021).

[36] See generally, for example, the excellent collection of essays on exceptionalism in 1 AM. POL. THOUGHT (2012).

[37] *See generally id.* (collecting essays on exceptionalism); LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955) (arguing that America is exceptional because of its lack of any viable socialist movement); SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD (1996) (discussing America's economy, religion, welfare systems, race relations, crime rates, unions, and other unique features); Byron E. Shafer, *Preface to* IS AMERICA DIFFERENT? A NEW LOOK AT AMERICAN EXCEPTIONALISM, *supra* note 32, at v (highlighting the ways America's public policy, higher education, economy, and other features compare to those in other countries).

[38] *See, e.g.*, MADSEN, *supra* note 32, at 1 (arguing that "American exceptionalism . . . is the single most powerful agent in a series of arguments that have been fought down the centuries concerning the identity of America and Americans"); Donald E. Pease, *Exceptionalism*, *in* KEYWORDS FOR AMERICAN CULTURAL STUDIES 108, 109 (Bruce Burgett & Glenn Hendler eds. 2007) (describing exceptionalism as an "ideal assigned responsibility for defining, supporting,

enormous in scope, analyzing exceptionalism's tropes and themes and effects from the pre-founding era to the present.[39] And though the first scholarly research on exceptionalism emerged more than eighty years ago, the conversation shows no indication of waning: in the last ten years alone, social scientists have published more than 15,000 works on the subject.[40]

A. DEFINITIONAL AMBIGUITIES

Aside from their shared use of the "exceptionalism" label, however, most studies of exceptionalism have little in common. The available literature addresses remarkably different phenomena. Some studies explore the ways the U.S. is empirically different than other countries.[41] Others use the term exceptionalism to describe or assess the way America engages with the rest of the world.[42] Others

---

and developing the U.S. national identity"); JEFFREY D. SACHS, A NEW FOREIGN POLICY: BEYOND AMERICAN EXCEPTIONALISM 2–3 (2018) (arguing that American exceptionalism has generated a dangerous "America first" mentality and advocating for a foreign policy not grounded in exceptionalist beliefs).

[39] *See, e.g.*, DANIEL T. RODGERS, AS A CITY ON A HILL: THE STORY OF AMERICA'S MOST FAMOUS LAY SERMON 252 (2018) (linking American exceptionalism to John Winthrop's 1630 "Model of Christian Charity" and arguing that "seventeenth-century New England Puritans and the twentieth-century term 'exceptionalism' were locked in tight embrace").

[40] At the time of this writing, a JSTOR search for pieces on "American exceptionalism" published between 2011 and 2021 produced 15,557 results.

[41] *See generally* HARTZ, *supra* note 37 (focusing on America's liberal tradition and lack of a socialist movement); *see, e.g.*, Gur Bligh, *Extremism in the Electoral Arena: Challenging the Myth of American Exceptionalism*, 2008 BYU L. REV. 1367, 1371 (challenging the notion that America's election speech laws are uniquely or exceptionally unrestrictive); Saul Levmore, *Parental Leave and American Exceptionalism*, 58 CASE W. RES. L. REV. 203, 203 (2007) (describing how and why America's parental leave policies differ from leave policies in other countries); Jeremy Rabkin, *American Exceptionalism and the Healthcare Reform Debate*, 35 HARV. J.L. & PUB. POL'Y 153, 154 (2012) (describing and explaining America's unique hostility to national healthcare); Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 101 (2002) (considering "[w]hy the U.S. is different from its European friends and allies in its use of capital punishment"); Katharine G. Young, *American Exceptionalism and Government Shutdowns: A Comparative Constitutional Reflection on the 2013 Lapse in Appropriations*, 94 B.U. L. REV. 991, 992 (2014) (describing the "peculiarly American" features of America's October 2013 governmental shutdown).

[42] *See, e.g.*, Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights, in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 7–8 (Michael Ignatieff ed., 2005) (arguing that American exceptionalism causes the U.S. to "judge[] its friends by standards different from those it uses for its enemies" as when it "condemns [human rights] abuses by hostile regimes—Iran and North Korea, for example—while excusing abuses by such allies as Israel,

focus on America's exceptional flaws—its high crime rates,[43] its habit of disregarding well-established international rules,[44] and so on. And still others use exceptionalism to describe a normative mindset, ideology, or world view. Scholars also approach their studies of exceptionalism using a variety of different methods. Those who view exceptionalism as a descriptive concept often employ empirical methods to gauge exactly how different America is from other countries. Those who understand exceptionalism as an ideological concept are more likely to use interpretive methods and engage in normative critique.[45]

This diversity in methods and approaches stems, in part, from the fact that scholars of exceptionalism do not agree on what the term actually means.[46] For some, American exceptionalism signifies

---

Egypt, Morocco, Jordan, and Uzbekistan"); SACHS, *supra* note 38, at xi (describing "the need to revamp American foreign policy"); David P. Fidler, *Outside the Wire: American Exceptionalism and Counterinsurgency*, 37 WM. MITCHELL L. REV. 5251–53 (2011) (arguing that American exceptionalism has hindered America's ability to lead successful counterinsurgency campaigns); Walter F. Mondale, *American Exceptionalism*, *Global Security, and Human Dignity: The Great Challenge of the 21st Century*, 3 U. ST. THOMAS L.J. 169, 170–71 (2005) (arguing that the "hubristic ideas of American exceptionalism" have motivated "brusque" foreign policy decisions); Claes G. Ryn, *Unleashing the Will to Power: Neo-Jacobian Exceptionalism as a Justification for American Global Supremacy*, 3 U. ST. THOMAS L.J. 211, 212 (2005) (arguing that the Bush administration used American exceptionalism to "justif[y] a vast expansion of American might and the removal of obstacles to the triumph of the putative American cause").

[43] *See* Calabresi, *supra* note 32, at 1375 (arguing that America's high crime rates and punitive criminal justice system are "dark undersides of American individualism").

[44] *See* Ignatieff, *supra* note 42, at 3 (arguing that America uses its perceived exceptional status to exempt itself from treaties, to demand exceptions to international rights conventions, and to justify noncompliance with international agreements); Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 STAN. L. REV. 1479, 1485 (2003) (arguing that American exceptionalism has led the U.S. to adhere to double standards regarding international rules).

[45] *Compare* Richard Rose, *Is American Public Policy Exceptional?*, *in* IS AMERICA DIFFERENT? A NEW LOOK AT AMERICAN EXCEPTIONALISM, *supra* note 32, at 187, 194, 196 (using descriptive statistics to compare GDP and public expenditures in America and other Organisation for Economic Co-operation and Development countries), *and* Martin Trow, *American Higher Education: "Exceptional" or just Different?*, *in* IS AMERICA DIFFERENT? A NEW LOOK AT AMERICAN EXCEPTIONALISM, *supra* note 32, at 138–86 (using descriptive statistics to compare American higher education with other systems of higher education), *with* LIPSET, *supra* note 37, at 28 (considering the benefits and pitfalls of American exceptionalism).

[46] *See* Koh, *supra* note 44, at 1482 ("[T]he term 'American exceptionalism' has been used far too loosely and without meaningful nuance. When we talk about American exceptionalism, what, precisely, do we mean?").

nothing more than American *distinctiveness*. On this view, America might be exceptional because it has a distinctive political, religious, or legal culture which has grown "out of its peculiar social, political, and economic history."[47] It might be exceptional because of its unique social egalitarianism[48] or its unusual civil litigation rules and procedures.[49] Or it might be exceptional for negative reasons, like its high divorce rates[50] or poor human rights record.[51] Scholars who equate exceptionalism with distinctiveness generally assume exceptionalism has no normative component, and they do not use the term as an assessment of the country's value or worth. Instead, they use exceptionalism descriptively: America is exceptional simply because it is different.

As Byron Shafer notes, though, "all societies, observed closely enough, are distinctive."[52] The exceptionalism-as-difference approach is thus problematic because "it does not necessarily make the *American* element consequential."[53] Sensing this, some scholars argue that American exceptionalism requires more than empirical difference. Some, like Godfrey Hodgson, argue that exceptionalism

---

[47] *Id.* at 1483. For examples of this understanding of exceptionalism, see LIPSET, *supra* note 37 (examining American exceptionalism in the contexts of American "status, statism, economic and welfare policy, trade unionism, politics, race relations, religion, crime, political participation, and economic behavior"); HARTZ, *supra* note 37, at 284 (considering how American exceptionalism affected America's response to communism); Calabresi, *supra* note 32, at 1373 ("[T]he distinctively American faith in liberty, religious freedom, and patriotism has caused the United States to become really quite different from all the other nations of the world. Not only does the United States differ from the nations of Western Europe, including Great Britain from which it sprang, but it is also exceptional among the countries of the New World, differing markedly from the nations of Central and South America and even from its northern cousin Canada.").

[48] *See* Calabresi, *supra* note 32, at 1378 (noting that America's belief in egalitarianism and equal opportunity sets it apart from other countries).

[49] *See* Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 278 (2002) ("[T]he well-documented idiosyncrasies of American culture are reflected in the procedural rules that govern civil litigation.").

[50] *See* Calabresi, *supra* note 32, at 1376 (citing research suggesting American individualism has deteriorated the nuclear family structure, thereby increasing divorce rates).

[51] *See* Carmen G. Gonzalez, *Environmental Racism, American Exceptionalism, and Cold War Human Rights*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 281, 285 (2017) ("American exceptionalism established the foundation for U.S. disengagement with international human rights law."); *see also* Saito, *supra* note 33, at 55 (arguing that American exceptionalism has hindered the progress "of a truly 'universal' human rights paradigm").

[52] Shafer, *supra* note 37, at vi.

[53] *Id.*

necessarily involves a belief in America's specialness or superiority.[54] Some, like Patrick J. Deneen, equate exceptionalism with the "exemplarist view of America as a beacon to other nations."[55] And some believe that exceptionalism requires a sense of calling or mission, "something Americans think this country has been called on to do."[56] David P. Fidler, for instance, argues that exceptionalism entails a belief that America's unique features "give[] [it] the right and responsibility to act internationally to advance both [its] power and principles."[57] Nathaniel Cadle and Carl J. Bon Tempo similarly argue, respectively, that exceptionalism involves a sense of duty "to reshape the world in the mold of western civilization"[58] and "to bring [its] political and economic institutions and ideals to the less advanced and pitiable world."[59]

Other scholars approach exceptionalism from a different angle entirely. Rather than define exceptionalism as a claim of difference, mission, or superiority, they associate it with a particular behavior or set of behaviors. Michael Ignatieff, for example, reduces exceptionalism to three different phenomena: exemptionalism (the tendency to exempt itself from or refuse to comply with international conventions and treaties), double standards (the practice of judging America and its allies by more permissive criteria than its enemies), and legal isolationism (denying foreign

---

[54] *See* GODFREY HODGSON, THE MYTH OF AMERICAN EXCEPTIONALISM 10 (2009) (defining exceptionalism as "the idea that the United States is not just the richest and most powerful . . . but is also politically and morally exceptional").

[55] Patrick J. Deneen, *Cities of Man on a Hill*, 1 AM. POL. THOUGHT 29, 40 (2012). Deneen identifies four types of American exceptionalism: communal perfectionism, liberal isolationism, liberal expansionism, and global communalism. *Id.* at 33. America-as-exemplar is a defining feature only of the first two. *Id.* at 33–34.

[56] James W. Ceaser, *The Origins and Character of American Exceptionalism*, 1 AM. POL. THOUGHT 3, 8–9 (2012).

[57] *See* Fidler, *supra* note, 42 at 5260 (arguing that American exceptionalism has hindered America's ability to lead successful counterinsurgency campaigns).

[58] Nathaniel Cadle, *America as "World-Salvation": Josiah Strong, W.E.B. Du Bois, and the Global Rhetoric of American Exceptionalism*, *in* AMERICAN EXCEPTIONALISMS: FROM WINTHROP TO WINFREY 125, 127 (Sylvia Söderlind & James Taylor Carson eds., 2011) (quoting WALTER LAFEBER, THE NEW EMPIRE: AN INTERPRETATION OF AMERICAN EXPANSION, 1860–1898, at 76–77 (1963)).

[59] Carl J. Bon Tempo, *American Exceptionalism and Immigration Debates in the Modern United States*, *in* AMERICAN EXCEPTIONALISMS: FROM WINTHROP TO WINFREY, *supra* note 58, at 147, 150.

law's authority as a guide for domestic decisions).[60] And in the legal academy, scholars have equated exceptionalism with legal isolationism, arguing that the idea that "the U.S. system of government is sufficiently distinct from other national practices and international rules to render foreign rules irrelevant to constitutional analysis."[61] Unlike those who define exceptionalism more broadly,[62] these scholars are not interested in the various ways that America is different, superior, or distinctive. Instead, they focus on whether, when, and why American courts rely (or do not rely) on sources of foreign law.[63]

B. TWO MODES OF EXCEPTIONALISM: ACCOMPLISHED AND ASPIRATIONAL

Despite this definitional dissensus, some common threads emerge. With a few exceptions, most scholars agree that exceptionalism entails at least one of three core commitments: (1) a claim of distinctiveness, (2) a belief that America is chosen or superior, and (3) a belief in some mission that only America can perform.[64] Following these scholars, I define exceptionalism as the worldview that treats America as different, superior, and chosen to perform a unique role in global affairs.[65] This definition departs

---

[60] *See* Ignatieff, *supra* note 42, at 3–9 (identifying three features of American exceptionalism: exemptionalism, double standards, and legal isolationism).

[61] *See* Sarah H. Cleveland, *Foreign Authority, American Exceptionalism, and the* Dred Scott *Case*, 82 CHI.-KENT L. REV. 393, 393–94 (2007) (explaining some legal scholars' approaches to exceptionalism).

[62] *See, e.g.*, *supra* section II.A.

[63] *See* Cleveland, *supra* note 61, at 396 (highlighting the Supreme Court's use of foreign law in the *Dred Scott* decision); *see also* Calabresi, *supra* note 32, at 1410–12 (arguing that the Supreme Court should stop its longstanding practice of relying on foreign law); Vicki C. Jackson, *Constitutional Law and Transnational Comparisons: The* Youngstown *Decision and American Exceptionalism*, 30 HARV. J.L. & PUB. POL'Y 191, 193, 214 (2006) (arguing that the Supreme Court does and should use non-binding foreign law in its constitutional jurisprudence); Charles J. Reid, Jr., *Edward Douglass White's Use of Roman and Canon Law: A Study in the Supreme Court's Use of Foreign Legal Citations*, 3 U. ST. THOMAS L.J. 281, 281, 284 (2005) (describing ongoing debates about whether the Supreme Court should rely on foreign legal sources and analyzing Chief Justice Edward White's use of foreign law).

[64] *See* Williams, *supra* note 30, at 372 (outlining the three fundamental commitments of exceptionalism).

[65] *Id.* This definition is far from perfect, and scholars invested in the definitional debate surrounding exceptionalism will be quick to identify its shortcomings. I have chosen it not

somewhat from the existing legal literature which, as described above, largely treats exceptionalism as either a descriptive fact or a mindset linked to legal isolationism. Instead, my definition emphasizes exceptionalism's normative components and stresses the ways exceptionalism operates as an ideology or worldview.

Defining exceptionalism as a normative worldview eliminates some of the term's definitional ambiguity. But even still, exceptionalism is nuanced and variegated. There are many ways for a person to enact a belief in America's distinctiveness, superiority, and chosenness—from proudly flying the American flag to championing international intervention to boldly advocating for domestic reform. There are also many ways for individuals to express and articulate an exceptionalist outlook.[66] In short, there are multiple exceptionalist modes, and though all share the same core commitments, each enacts and articulates those commitments differently.

In a previous article, I identified and defined two specific exceptionalist modes, which I call accomplished exceptionalism and aspirational exceptionalism.[67] As that article explained, the accomplished mode is generally backward-looking and self-celebratory and assumes that America is and always has been different, superior, and chosen to fulfill a unique mission.[68] When expressed in language, this mode deploys a particular set of rhetorical tropes. First, the accomplished mode uses the indicative mood ("America *is*") to present American greatness as an established fact.[69] Second, it recounts history selectively, emphasizing America's successes but downplaying its failures.[70] Third, accomplished exceptionalism uses language of self-promotion and celebration: it praises the country but rarely offers critique.[71] Finally, it uses words and phrases that reflect and promote unity: it

---

because it is flawless, but because it reflects much of the existing literature and adequately captures the normative, ideological dimensions of exceptionalism that I hope to study.

[66] *See, e.g.*, *id.* at 373–79 (describing two approaches to exceptionalism).

[67] For my original definition and discussion of these modes, see *id.* at 373–78 (providing definitions and discussions of accomplished exceptionalism and aspirational exceptionalism).

[68] *Id.* at 373.

[69] *Id.*

[70] *See id.* (describing accomplished exceptionalism as "historically amnesiac").

[71] *See id.* ("[A]ccomplished exceptionalism is self-satisfied, praising the nation for a job well done and leaving its audience comfortably content with the country's status in the world.").

deflects attention from America's cleavages and instead suggests that the country shares common goals.[72]

Aspirational exceptionalism, by contrast, is forward-looking and self-critical.[73] Unlike the accomplished mode, it does not believe that America is always already excellent. Instead, it views American greatness as a contingent and yet-unachieved possibility.[74] When expressed through language, the aspirational mode draws on its own set of distinctive rhetorical tropes.[75] First, it uses the language of condition and possibility to emphasize America's excellence as a yet-unattained prospect, not an accomplished fact.[76] And where accomplished exceptionalism ignores America's problems, the aspirational mode ignores America's progress. Second, aspirational exceptionalism offers a more candid description of the past, presenting America's failures alongside its glorious moments.[77] Third, it adopts a harsh, jarring, and self-critical tone to boldly condemn America's flaws.[78] Finally, it highlights America's cleavages and uses language that acknowledges diverse interests and groups.[79]

C. EXCEPTIONALIST RHETORIC IN POLITICS AND PUBLIC CULTURE

In contemporary America, exceptionalist rhetoric abounds. Leaders use exceptionalist tropes to reassure citizens in wartime and after national crises.[80] Voters search for exceptionalist cues to

---

[72] *See id*. (explaining that accomplished exceptionalism "portrays the nation as a united, monolithic whole"). For a more thorough discussion of accomplished exceptionalism and its tropes, see *id.* at 373–75 (providing examples of accomplished exceptionalism with quotes).

[73] *See id.* at 375 (describing aspirational exceptionalism as "[s]elf-critical and attentive to history, . . . [and] willing (even eager) to explore how America can be better").

[74] *See id.* (explaining that aspirational exceptionalism views American greatness as a goal, not a guarantee).

[75] *See id.* (describing the rhetorical tropes associated with aspirational exceptionalism).

[76] *See id.* at 376 (highlighting the use of conditional language in aspirational exceptionalism).

[77] *See id.* ("[A]spirational exceptionalism usually includes . . . a transparent account of America's shortcoming and flaws.").

[78] *See id.* (describing aspirational exceptionalism's approach as "raw and unpleasant").

[79] *See id.* (describing America's cleavages and fractures). For a more thorough discussion of aspirational exceptionalism and its tropes, see *id.* at 375–88.

[80] *See, e.g.*, George W. Bush, President of the United States, Address to Joint Session of Congress at U.S. Capitol (Sept. 20, 2001) (proclaiming that "the entire world has seen for itself the state of the union, and it is strong" during a post September 11, 2001 congressional session).

determine which candidates are best suited to carry out public responsibilities.[81] At all levels of government, politicians invoke exceptionalism to prove they are committed to their country and worthy of its public offices.[82] And political candidates routinely attack their opponents' exceptionalist commitments by suggesting—both implicitly and explicitly—that an insufficiently exceptionalist rival is unsuited for leadership.[83] As James Ceaser notes, exceptionalist rhetoric is "ubiquitous, appearing in political speeches, newspaper columns, and blogospheric rants."[84] Put more pithily, "[e]xceptionalism has gone viral."[85]

Because exceptionalism is a, if not *the*, lingua franca of contemporary American politics, it is easy to find examples of exceptionalist rhetoric. In what follows, I provide several examples to illustrate how America's politicians and public leaders invoke both the aspirational and accomplished modes.

1. America's Accomplished Rhetoric. Accomplished exceptionalism—the more celebratory, triumphant, and self-congratulatory of the two modes—is particularly well-suited for situations when speakers need to reassure an audience, rally supporters, or activate patriotic sentiments.[86] Because of this, it frequently appears in campaign and electoral settings. During the 2012 presidential election, for instance, Republican candidate Mitt Romney invoked the accomplished mode when he insisted that "America has been"—present perfect tense—"one of the greatest forces for good the world has ever known," and when he emphasized the country's "duty" to share its exceptional prosperity with "all corners of the earth."[87] He also modeled the accomplished mode's aversion to criticism when he promised that he would "never

---

[81] *See* Williams, *supra* note 30, at 374 (explaining how politicians use accomplished tropes to "appeal to voters and rally supporters").

[82] *See id.* (describing how "[c]andidates routinely" rely on exceptionalist rhetoric).

[83] *See id.* (describing how presidential candidate Marco Rubio used exceptionalist rhetoric to condemn Barack Obama).

[84] Ceaser, *supra* note 56, at 2.

[85] *Id.*

[86] *See id.* at 373 ("[A]ccomplished exceptionalism promotes feelings of national pride, inspires admiration, and reinforces a utopian portrait of the nation's past.").

[87] Mitt Romney, Speech to Clinton Global Initiative (Sep. 25, 2012) (transcript available at https://www.politico.com/story/2012/09/mitt-romney-speech-to-clinton-global-initiative-text-video-081656).

apologize for America."[88] In 2016, Democratic candidate Hillary Clinton likewise channeled accomplished exceptionalism by arguing that "the United States *is*"—indicative mood—"an exceptional nation."[89] Eschewing the possibility that America has lost or could ever lose its exceptional character, she insisted that "we are *still* Lincoln's last, best hope of Earth" and "*still* Reagan's shining city on a hill."[90] She also described America as "indispensable"—not a country that *could* "be a force for peace and progress," but one that always and already is.[91]

Accomplished exceptionalism also appears in speeches delivered at moments of national significance: at the beginning or end of a presidency, on important national holidays, and so on. Consider, for example, Ronald Reagan's farewell address. The speech is perhaps best remembered for Reagan's description of America as a "shining city on a hill,"[92] an exceptionalist catch phrase borrowed from Puritan minister and early American colonist John Winthrop.[93] But it also demonstrates Reagan's accomplished leanings. Like all accomplished exceptionalists, Reagan prioritized celebration over critique.[94] Though he recalled the "great tradition of warnings in Presidential farewells," Reagan offered only praise of America's "new patriotism" and the "resurgence of national pride."[95] He also illustrated the accomplished mode's historical amnesia by recounting only America's most laudatory moments.[96] Reagan ignored the country's internal conflicts and instead insisted that America is "teeming with people of all kinds living in harmony and peace."[97] He also claimed to have witnessed America's excellence

[88] *Id.*

[89] Hillary Clinton, Address at the American Legion's National Convention (Aug. 31, 2016) (transcript available at https://time.com/4474619/read-hillary-clinton-american-legion-speech/) (emphasis added).

[90] *Id.* (emphasis added).

[91] *Id.*

[92] Reagan, *supra* note 34 (describing America as "a tall, proud city built on rocks stronger than the ocean").

[93] *See id.* (noting that John Winthrop famously used the phrase during a sermon he gave during his voyage to America).

[94] *See* Williams, *supra* note 30, at 375 (noting that Reagan's farewell speech "shie[d] away from the opportunity to admonish or critique").

[95] Reagan, *supra* note 34.

[96] *See, e.g.*, *id.* (recognizing "the Pilgrims, . . . Jimmy Doolittle, and . . . those 30 seconds over Tokyo" as important moments in American history).

[97] *Id.*

"all [his] political life," suggesting that the country's exceptionalism is constant, unchanging, and perhaps unchangeable.[98] His tone was self-celebratory, and he concluded with the accomplished assessment that "all in all, [America is] not bad, not bad at all."[99]

Political leaders also use the accomplished mode in moments of national grief and commemoration. On the evening of September 11, 2001, for example, George W. Bush described America as "the brightest beacon for freedom and opportunity in the world."[100] He also emphasized America's perpetual and unquestionable excellence, arguing that "[t]errorist attacks can shake the foundations of our biggest buildings, but they cannot touch the foundation of America," "cannot dent the steel of American resolve," and cannot "keep [America's] light from shining."[101] Barack Obama similarly channeled the accomplished mode on Veteran's Day in 2012, when he confidently declared that "America is and always will be the greatest nation on Earth."[102]

Accomplished exceptionalism appears in other contexts, as well: at Fourth of July celebrations, at international sporting competitions, and on anniversaries of significant historical events.[103] Indeed, it is so commonplace that many audiences have become habituated to its assuring, comforting tropes.[104] Because of this, the accomplished mode is, for many Americans, not *a* type of exceptionalism, but *the* type—the only acceptable and appropriate way to articulate a belief in American greatness. And so, when orators speak in other exceptionalist registers, or when their praise

---

[98] *Id.*

[99] *See id.* (celebrating America as "stronger," "freer," and "left . . . in good hands" following Reagan's eight-year presidency). For my previous analysis of Reagan's farewell address, see Williams, *supra* note 30, at 375 (analyzing the accomplished exceptionalist tropes in Reagan's farewell speech).

[100] Address to the Nation on the Terrorist Attacks, 2 PUB. PAPERS 1099, 1099 (Sept. 11, 2001).

[101] *Id.*

[102] Remarks at a Veterans Day Ceremony in Arlington, Virginia, 2012 DAILY COMP. PRES. DOC. 3 (Nov. 11, 2012).

[103] *See, e.g.*, Jack Healy, Jess Bidgood & Alan Blinder, *A Patriotic Fourth: What Does That Mean Now?*, N.Y. TIMES (July 3, 2017), https://www.nytimes.com/2017/07/03/us/july-fourth-patriotism.html (interviewing Americans who discuss "how far" the country has come and how "a lot of people don't have what we have").

[104] *See, e.g.*, Stephen M. Walt, *The Myth of American Exceptionalism*, FOREIGN POL'Y MAG. (Oct. 11, 2011) ("The idea that the United States is uniquely virtuous may be comforting to Americans . . . .").

is less fulsome than is typical of the accomplished mode, they are often accused of lacking exceptionalist commitments. Such was true for Barack Obama. In a 2009 press conference, Obama said, "I am very proud of my country . . . [but that] does not lessen my interest in . . . recognizing that we're not always going to be right."[105] Immediately, critics accused him of "marginaliz[ing] his own country";[106] "rob[bing] the word, and the idea of American exceptionalism, of any meaning";[107] and endorsing the "profoundly mistaken view, [that] there is nothing unique about the United States."[108] The incident illustrates the power and prevalence of the accomplished mode. On one occasion, Obama spoke without accomplished exceptionalism's superlative confidence. Because of that, many Americans concluded that he was not an exceptionalist at all.

2. America's Aspirational Rhetoric. Because aspirational exceptionalism is more caustic, harsh, and critical than its accomplished counterpart, it is not well-suited for the rhetorical situations just described. The aspirational mode is attentive to America's flaws, so it is not effective in situations where audiences expect uncritical national celebration, including patriotic celebrations and international sporting events. It is critical and biting and is therefore a poor fit for rhetorical situations that require comfort or assurance—moments of national grief or tragedy, for example. The aspirational mode boldly decries America's shortcomings, so it does not work well when speakers must prove their patriotic commitments or demonstrate their unwavering fidelity to the U.S., such as at rallies and in campaign speeches. It is also uncommon in rhetorical situations where audiences seek or expect praise, commemoration, or more "traditional" patriotic rhetoric.

Instead, the aspirational mode's bold, self-critical, and ameliorative tropes are best suited for situations when speakers want to challenge the status quo, critique existing institutions, or

---

[105] The President's News Conference in Strasbourg, 1 PUB. PAPERS 433, 437 (Apr. 4, 2009).

[106] Robert Farley, *Obama and "American Exceptionalism,"* FACTCHECK.ORG (Feb. 12, 2015) (quoting Sean Hannity), https://www.factcheck.org/2015/02/obama-and-american-exceptionalism/.

[107] James Kirchick, *Squanderer in Chief*, L.A. TIMES (Apr. 28, 2009, 12:00 AM), https://www.latimes.com/archives/la-xpm-2009-apr-28-oe-kirchick28-story.html.

[108] *Text of Mitt Romney's Speech on Foreign Policy at the Citadel*, WALL ST. J. (Oct. 7, 2011, 11:25 AM), https://www.wsj.com/articles/BL-WB-31530.

call for change. Indeed, some of the best examples of America's aspirational exceptionalist tradition come from the mouths, pens, and bodies of the country's boldest critics and deepest apologists. In the 1800s, for instance, abolitionist and social reformer Frederick Douglass routinely voiced stern, aspirational critiques of American slavery—a system he called "fiendish and shocking,"[109] "revolting,"[110] and "inhuman, disgraceful, and scandalous."[111] But he also embodied the aspirational mode's hopeful, ameliorative orientation by consistently affirming his loyalty to and hope for America's potential progress. His persistent criticism, combined with his repeated insistence that he "[did] not despair of this country,"[112] perfectly exemplified the aspirational exceptionalist mode.[113]

Other American apologists likewise embody aspirational exceptionalism's critical-yet-hopeful orientation. In the 1960s, James Baldwin became known for his bold, biting criticism of America's racial inequality.[114] But each time he offered a bleak assessment of the country's present or past, he also insisted that "it [was] perfectly possible to tap the energy of the country" and "change and save ourselves."[115] Baldwin's forceful denunciations were thus motivated by aspirational love, "in the tough and universal sense of quest and daring of growth."[116] In his own aspirational words, "I love America more than any other country in the world, and, exactly for this reason, I insist on the right to criticize her perpetually."[117]

---

[109] FREDERICK DOUGLASS, *What to the Slave Is the Fourth of July*, *reprinted in* THE ESSENTIAL DOUGLASS: SELECTED WRITINGS AND SPEECHES 50, 61 (Nicholas Buccola ed., 2016).

[110] *Id.* at 60.

[111] *Id.* at 62. Douglass recognized his critical posture: he characterized his own rhetoric as "stern rebuke" and "blasting reproach." *Id.* at 59.

[112] *Id.* at 70.

[113] For further discussion of Douglass's aspirational American exceptionalism, see Williams, *supra* 30, at 373.

[114] *See* Eddie S. Glaude, Jr., *James Baldwin Insisted We Tell the Truth About This Country. The Truth Is, We've Been Here Before*, TIME (June 25, 2020), https://time.com/5859214/james-baldwin-racism/ (describing James Baldwin's influence on American perspectives).

[115] James Baldwin, *We Can Change the Country* (1963), *in* THE CROSS OF REDEMPTION: UNCOLLECTED WRITINGS 51 (Randall Kenan ed., 2010).

[116] JAMES BALDWIN, THE FIRE NEXT TIME 109 (1963).

[117] JAMES BALDWIN, NOTES OF A NATIVE SON 9 (1984).

Contemporary figures likewise adopt the aspirational mode to call for or inspire change. In 2016, for instance, NFL quarterback Colin Kaepernick made national news when he opted to sit during pre-game national anthems.[118] Like all aspirational exceptionalists, Kaepernick intended to critique America and expose its flaws and shortcomings.[119] But he also maintained the aspirational mode's hopeful, ameliorative posture by insisting that "love [was] at the root of [his] resistance."[120] Like Douglass and Baldwin before him, Kaepernick repeatedly stated that he was motivated by a sincere desire to "unify this country" and "really effect change."[121] He also promised to stand again as soon as America began "representing people the way that it's supposed to"[122]—an indication that, like other aspirational exceptionalists, he actually believed in the country's potential for progress.

Although candidates and elected officials typically use the more comforting and celebratory accomplished mode, they too sometimes adopt aspirational exceptionalist tropes. This is particularly true in moments of domestic conflict, or when the public is dissatisfied with the status quo. Barack Obama provides an example. During his presidency, Obama gave dozens of memorial speeches commemorating victims of natural disaster, war, mass shootings,

---

[118] *See* Merrit Kennedy, *49ers Quarterback Sits out National Anthem to Protest Oppression of Minorities*, NPR (Aug. 27, 2016), https://www.npr.org/sections/thetwo-way/2016/08/27/491636683/49ers-quarterback-sits-out-national-anthem-to-protest-oppression-of-minorities (describing how Kaepernick remained seated to protest the treatment of African Americans and minorities in the U.S.).

[119] When asked why he chose to sit during the national anthem, Kaepernick responded, "I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color." Steve Wyche, *Colin Kaepernick Explains Why He Sat During National Anthem*, NFL (Aug. 27, 2016), https://www.nfl.com/news/colin-kaepernick-explains-why-he-sat-during-national-anthem-0ap3000000691077. In a separate interview, he added, "People don't realize what's really going on in this country. . . . This is something that has to be said, it has to be brought to the forefront of everyone's attention." Nick Wagoner, *Transcript of Colin Kaepernick's Comments About Sitting During National Anthem*, ESPN (Aug. 28, 2016), http://www.espn.com/blog/san-francisco-49ers/post/_/id/18957/transcript-of-colin-kaepernicks-comments-about-sitting-during-national-anthem.

[120] Taige Jensen & Japhet Weeks, *Colin Kaepernick: "Love is at the Root of Our Resistance,"* N.Y. TIMES (May 4, 2018), https://www.nytimes.com/video/opinion/100000005875893/colin-kaepernick-love-is-at-the-root-of-our-resistance.html.

[121] Wagoner, *supra* note 119.

[122] *Id.*

and other tragic events.[123] Typically, these speeches adhered to accomplished convention.[124] But midway through his presidency, Obama shifted tone. On December 12, a lone shooter killed twenty-six people (twenty of them school children between ages six and seven) at Sandy Hook Elementary School.[125] Two days later, Obama delivered a memorial speech that was thoroughly aspirational. Rather than offer an idealized, comforting portrait of the U.S., he drew attention to the "endless series of deadly shootings" that plagued the country.[126] And instead of celebrating his country's triumphs, he exposed—and condemned—its inexcusable "inaction."[127] Obama also encouraged his audience to think critically about whether America could "truly say, as a nation, that we are meeting our obligations," and he boldly proposed that "if we're honest with ourselves . . . we're not doing enough."[128]

But though he was critical and self-reflective, Obama retained an aspirational hope in America's future and potential. Like Douglass, Baldwin, Kaepernick, and other aspirational exceptionalists, Obama insisted in spite of his criticisms that "we can do better than this."[129] He also admitted that "we will make mistakes,"[130] but he nonetheless encouraged citizens to "find the strength to carry on."[131] If he condemned America's shortcomings, he did so only to push the nation toward a better and brighter future. And so, despite his lamentations and critiques, he concluded with the aspirational hope

---

[123] For a discussion of Obama's funereal rhetoric, see generally Lucy Williams, *Grieving Critically: Barack Obama and the Counter-Eulogy*, 75 POL. RES. Q. 307 (2021).

[124] Obama regularly asserted America's unequivocal greatness and often made accomplished claims like: "[Americans] need not look to the past for greatness, because it is before our very eyes." Barack Obama, Remarks by the President at Memorial Service at Fort Hood (Nov. 10, 2009) (transcript available at https://www.presidency.ucsb.edu/documents/remarks-memorial-service-fort-hood-texas).

[125] Richard Esposito, Candace Smith & Christina Ng, *20 Children Died in Newtown, Conn., School Massacre*, CNN (Dec. 14, 2012, 10:19 A.M.), https://abcnews.go.com/US/twenty-children-died-newtown-connecticut-school-shooting/story?id=17973836.

[126] *See* Barack Obama, Remarks by the President at Sandy Hook Interfaith Prayer Vigil (Dec. 16, 2012) (transcript available at https://obamawhitehouse.archives.gov/the-press-office/2012/12/16/remarks-president-sandy-hook-interfaith-prayer-vigil) (calling attention to deadly shootings that have happened throughout the U.S.).

[127] *Id.*

[128] *Id.*

[129] *See id.* (contending that the U.S. can do a better job at a preventing deadly shootings).

[130] *Id.*

[131] *Id.*

that America could one day become "worthy of [the victims'] memory."[132]

Because aspirational exceptionalism is harsh and unsettling, it is not always well received. When Colin Kaepernick began his protests, critics accused him of being "disrespectful"[133] and "whiny."[134] And Baldwin's characteristic vitriol led some of his contemporaries to conclude that he led "a coterie of America-haters."[135] Still, the aspirational exceptionalist mode expresses a firm commitment to America's special features.[136] Though it is often dismissed as unpatriotic, it is firmly committed to the notion that America has the potential for unparalleled excellence. And as the foregoing has shown, it features prominently in American rhetoric, particularly in moments that call for change and social critique.

III. THE SUPREME COURT'S AMERICAN EXCEPTIONALISM

As the previous discussion demonstrates, aspirational and accomplished rhetoric is commonplace in American politics and political culture. Because of this, Americans listen for, respond to, and strategically deploy exceptionalist cues. Citizens reward (i.e., vote for) candidates who seem sufficiently exceptionalist, and they

---

[132] *See id.* ("For those of us who remain, let us find the strength to carry on, and make our country worthy of their memory.").

[133] Of Kaepernick's gesture, former NFL player and CBS Sports analyst Boomer Esiason said, "[I]t's an embarrassment and it's about as disrespectful as any athlete has ever been." Ryan Wilson, *Esiason on Kaepernick Sitting: "It's About as Disrespectful as Any Athlete Has Ever Been,"* CBS SPORTS (Aug. 31, 2016, 8:57 AM), https://www.cbssports.com/nfl/news/esiason-on-kaepernick-sitting-its-about-as-disrespectful-as-any-athlete-has-ever-been/.

[134] *See* Talia Jane, *What Did Tomi Lahren Say About Colin Kaepernick*, MIC (Dec. 2, 2016), https://www.mic.com/articles/160973/what-did-tomi-lahren-say-about-colin-kaepernick (detailing how Tomi Lahern "call[ed] Kaepernick a 'whiny, indulgent, attention-seeking cry baby'").

[135] The quote is from William F. Buckley, Jr., who opposed Baldwin in a 1965 debate. NICHOLAS BUCCOLA, *What William F. Buckley Jr. Did Not Understand About James Baldwin: On Baldwin's Politics of Freedom*, *in* A POLITICAL COMPANION TO JAMES BALDWIN 116, 119 (Susan J. McWilliams ed., 2017). After the debate, Buckley accused Baldwin of believing that "Western Civilization ha[d] failed him and his people, [and] that we ought to throw it over." *Id.* Buckley further suggested that "Mr. Baldwin's indictment of our society . . . is total" and insisted that Baldwin and his extremist followers ought to "be ghettoized in the corners of fanaticism." *Id.* For further discussion, see *id.*

[136] *See supra* note 73 and accompanying text.

applaud speeches that are articulated in exceptionalist registers.[137] Meanwhile, candidates and public officials curry favor with the public by invoking exceptionalism's themes.[138] Though many listeners may not be able to distinguish between various types of exceptionalism, few would be surprised to learn that rhetorical actors use the accomplished and aspirational modes carefully and intentionally. This is particularly true because American citizens expect public figures to be partisan and strategic. Our leaders are dependent on votes and public favor, so we are neither surprised nor disappointed when they deploy the available means of persuasion—exceptionalism included—to obtain their desired outcomes.[139]

But if American audiences are aware of the exceptionalist rhetoric of candidates, politicians, and fellow citizens, we are less attentive to its role in the legal and judicial systems.[140] This is particularly true at the Supreme Court level.[141] Legal scholars have paid surprisingly little attention to whether and how the Court engages with the exceptionalist tradition, and the existing literature on legal exceptionalism is small—a few hundred articles, at most.[142] For the most part, existing research treats exceptionalism as a descriptive or empirical fact—something that can be measured and studied by observing the ways America's legal

---

[137] *See* Ceaser, *supra* note 56, at 4 (noting that conservative politicians believe American voters support candidates who advance exceptionalist themes).

[138] *See id*. at 3 (analyzing speeches by American politicians who deployed themes of exceptionalism).

[139] *See* Jason Edwards, *Contemporary Conservative Constructions of American Exceptionalism*, 1 J. CONTEMP. RHETORIC 40, 40 (2011) (noting that President Obama's endorsement of exceptionalism "received praise from many press circles").

[140] *See id.* at 40–54 (considering how conservative legislators employ exceptionalist strategies but omitting any discussion of exceptionalism in American courts); *see generally* Saito, *supra* note 33 (studying exceptionalism in terms of human rights).

[141] *See supra* note 22 and accompanying text (explaining how legal scholars are not attentive to the Supreme Court's engagement with American exceptionalism).

[142] The following article studies exceptionalism on the Supreme Court: Rachel Lopez, *The Judicial Expansion of American Exceptionalism*, 6 DUKE F.L. & SOC. CHANGE 1, 4 (2014) (explaining how legal scholars are not attentive to the Supreme Court's engagement with American exceptionalism). However, this Article is one of only a few articles studying how exceptionalism influences the Supreme Court. *See* lexisnexis.com (last visited Mar. 1, 2023) (searching "exceptionalism" /p "influence!" /s "supreme court" and only returning twenty-nine secondary materials with most being irrelevant to the topic at hand).

system is different from other countries.[143] Some of this research analyzes exceptionalism's effects on international relations and foreign policy, but very little considers how exceptionalism affects domestic law.[144] And none attends to exceptionalism's rhetorical or ideological dimensions. Only a few studies consider how American exceptionalism might operate as an ideology or world view.[145] None consider whether Supreme Court Justices, like America's politicians and public figures, speak and opine in exceptionalist registers. And none explore whether or how exceptionalism shapes judicial decision making.[146]

In this section, I fill this gap by analyzing exceptionalist rhetoric in several prominent Supreme Court cases. Using close reading and discourse analysis, I show that American exceptionalism features prominently in the Court's opinions and that the Court invokes exceptionalist themes and tropes as part of its substantive legal analyses. I also reveal that the Court uses different modes of exceptionalism in different contexts and that its choice of aspirational or accomplished exceptionalism is highly correlated with case outcomes. These findings suggest that American exceptionalism is an important feature of Supreme Court decision making. At the very least, the Court seems to use exceptionalism rhetorically—to appeal to patriotic sentiments, or to justify its decisions as mandated by the country's unique status. But the Court's exceptionalism is also tightly bound up with its substantive legal discussions, and its choice of exceptionalism—accomplished or aspirational—seems related to whether it affirms government

---

[143] *See* Paul J. Kaplan, *American Exceptionalism and Racialized Inequality in American Capital Punishment Review*, 31 LAW & SOC. INQ. 149–59 (2006) (considering how American exceptionalism has affected America's approach to capital punishment).

[144] *See* Sabrina Safrin, *The Un-Exceptionalism of U.S. Exceptionalism*, 41 VAND. J. TRANSNAT'L L. 1307, 1309 n.2 (2008) ("Most of the recent literature focuses on legal exceptionalism, sometimes, in the U.S. domestic context but generally with an international or comparative component.").

[145] *See, e.g.*, Brendon O'Connor, Lloyd Cox & Danny, The Ideology of American Exceptionalism: American Nationalism's Nom de Plum, J. POL. IDEOLOGIES, at 1–2 (2022) (analyzing American exceptionalism as an ideology).

[146] *See* Lopez, *supra* note 142, at 1–29 (lacking any examination of how exceptionalism influences the Justices' thinking); Koh, *supra* note 44, at 1479–1526 (arguing that the Supreme Court has occasionally espoused the "exceptionalist" view that "the practices of foreign countries are irrelevant to U.S. constitutional interpretation," but not considering how accomplished or aspirational exceptionalism affect Justices' decision making.)

power or sustains exercises of individual rights.[147] This suggests the possibility that the Court's exceptionalism is not just rhetorical, but also causal—an outlook that shapes and guides the way the Justices approach substantive legal issues.

To introduce exceptionalism as a force in constitutional interpretation, I have chosen five prominent cases from three substantive areas of law: race and affirmative action, speech and expression, and voting. Cases in these areas routinely raise fundamental questions about the identities, rights, and procedures that make America unique and (potentially) exceptional. They thus invite—if not require—the Court to engage with exceptionalism, and they provide compelling examples of how exceptionalism features in the Court's analyses.

A. EXCEPTIONALISM AND RACE: *KOREMATSU V. UNITED STATES* AND *GRUTTER V. BOLLINGER*

I begin with analyses of *Korematsu v. United States* and *Grutter v. Bollinger*—two Supreme Court cases addressing issues related to race. *Korematsu* infamously upheld a World War II executive order that specifically targeted individuals of Japanese ancestry.[148] As my analysis shows, the majority relied heavily on accomplished exceptionalism; the dissenters, by contrast, approached the case from an aspirational exceptionalist angle. In *Grutter v. Bollinger*, a closely divided Court upheld a university policy that used race as a factor in admissions decisions.[149] There, the Justices who voted to uphold the policy argued from an aspirational exceptionalist perspective. The Justices who would have struck down the policy, however, opined in accomplished exceptionalist terms.

My analyses of *Korematsu* and *Grutter* begin to illustrate the prevalence and significance of the Supreme Court's exceptionalism. The cases originated in different historical contexts: one in the midst of a world war and one in a period of relative tranquility. They

---

[147] *See generally* Korematsu v. United States, 323 U.S. 214 (1944) (affirming the government's power and denying individual right claims when the Court undertook an accomplished view of exceptionalism); Cohen v. California, 403 U.S. 15 (1971) (affirming the individual right of freedom of speech when the Court undertook an aspirational view of exceptionalism).

[148] *Korematsu*, 323 U.S. at 218–19.

[149] Grutter v. Bollinger, 539 U.S. 306, 345 (2003).

raised different issues—national security and domestic education policy, respectively—and they were presented to entirely different Courts. One case (*Korematsu*) is now anti-canon; the other (*Grutter*) remains good law. But despite these differences, both draw heavily on the two modes of American exceptionalism. The prevalence of exceptionalism in these two cases suggests that American exceptionalism is an important factor in Supreme Court decision making and that Justices consider exceptionalist themes when conducting their legal analyses. The cases also provide preliminary evidence of the correlation between exceptionalism and case outcomes: in *Korematsu*, a case affirming a broad exercise of governmental power against a claim of individual right, the Court favors accomplished exceptionalism, but in *Grutter*, a case affirming the individual equality rights of minority and disadvantaged students, it favors the aspirational mode.

1. Korematsu v. United States *(1944).* Shortly after the attack on Pearl Harbor, President Franklin D. Roosevelt issued Executive Order 9066, which authorized the U.S. military "to prescribe military areas . . . from which any or all persons may be excluded."[150] Pursuant to this order, military leaders designated much of the west coast a military area and ordered all Japanese Americans living there to move into government camps.[151] Fred Toyosaburo Korematsu, an American citizen of Japanese descent, refused to leave the military zone and was caught, arrested, and convicted for violating the military order.[152] He appealed his conviction to the U.S. Supreme Court, arguing that the order violated the Fifth Amendment's guarantees of procedural and substantive due process and the equal protection guarantees implicit in due process of law.[153]

In a 6-3 decision, the Supreme Court affirmed Korematsu's conviction and upheld the exclusion order.[154] Several factors might explain the majority's holding. The outcome may have stemmed, in part, from the majority's policy of deference to military officials in

---

[150] Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

[151] *See Korematsu*, 323 U.S. at 217 ("[The executive order] subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p. m. to 6 a. m.").

[152] *Id.* at 215–16.

[153] *Id.* at 235 (Roberts, J., dissenting); *id.* at 243 (Jackson, J. dissenting).

[154] *See id.* at 224 (majority opinion) ("We cannot . . . say that at that time [the exclusion order and Korematsu's conviction] were unjustified.").

times of war—a policy it announced eighteen months earlier in *United States v. Hirabayashi* and reaffirmed in the *Korematsu* opinion.[155] It may also demonstrate the majority's commitment to stare decisis, because "[t]he *Hirabayashi* conviction and [the *Korematsu*] one rest[ed] on the same . . . Congressional Act and the same basic executive and military orders."[156] The holding may also reflect the majority's commitment to a particular mode of constitutional and statutory interpretation. In *Hirabayashi*, the Court had held that Executive Order 9066 and the laws enacted pursuant to it were valid exercises of congressional and executive power.[157] In *Korematsu*, the Court likewise opined, "[W]e are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area."[158]

But there was something else at work as well. In addition to policy preferences, stare decisis, and methods of statutory and constitutional interpretation, the majority's opinion reflects an accomplished exceptionalist worldview. This exceptionalist commitment is evident in the majority's self-celebratory tone. When describing the Japanese Empire, the Court uses words with highly negative connotations: "disloyal,"[159] "menace,"[160] "hostile forces,"[161] "threatened danger,"[162] "peril,"[163] etc. When describing America, by

---

[155] *See id.* at 220 ("Here, as in the *Hirabayashi* case, 'we cannot reject as unfounded the judgment of the military authorities and of Congress . . . .'" (quoting Hirabayashi v. United States, 320 U.S. 81, 99 (1943))).

[156] *Id.* at 217. The dissenters, of course, disagreed. Justice Owen Roberts, for instance, argued that *Hirabayashi* did not dictate the result in *Korematsu*, because unlike *Hirabayashi*, *Korematsu* was "not a case of keeping people off the streets at night," but rather a "case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry." *Id.* at 225–26 (Roberts, J., dissenting). Justice Jackson likewise challenged the majority's assertion that "[it was] bound to uphold the conviction of *Korematsu* because we upheld one in *Hirabayashi*." *Id.* at 246 (Jackson, J., dissenting). "In that case," Justice Jackson explained, "we were urged to consider only that curfew feature . . . . The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding." *Id.* at 246–47.

[157] *See* Hirabayashi v. United States, 320 U.S. 81, 104–05 (1943) (resolving a challenge to a curfew order enacted pursuant to Executive Order 9066).

[158] *Korematsu*, 323 U.S. at 217–18 (majority opinion).

[159] *Id.* at 218.

[160] *Id.*

[161] *Id.* at 220.

[162] *Id.* at 200.

[163] *Id.* at 220.

contrast, it chooses words of reverence and respect. The Court repeatedly emphasizes the validity[164] and propriety[165] of America's actions. It also celebrates the military authorities who bear the heavy "responsibility of defending our shores,"[166] and who bravely and correctly "apprehend[ed] . . . the gravest imminent danger."[167] The Court emphasizes the honor and difficulty of the "war-making branches,"[168] reminding its audience that "the need for action was great, and time was short."[169] It also takes great pains to praise America's institutions, procedures, and formal bodies as if to prove that, even in wartime, America is a nation of stability, reason, and order.[170]

The Court also shows an accomplished aversion to self-reflection and self-critique. Throughout the opinion, the majority does not critique or even question its coordinate political branches. Instead, it pays them extreme deference, claiming that it "*cannot* reject as unfounded the judgment of the military authorities and of Congress."[171] This extreme deference shows that, in true accomplished fashion, the majority prioritizes the continuity of existing institutions above all else.[172] The Court's unfailing confidence in and commitment to the executive and legislative branches also reveals its accomplished belief that the American government is always and already trustworthy, honorable, and infallible.[173]

The *Korematsu* Court also reveals its accomplished exceptionalism by characterizing the American citizenry as a united

---

[164] *See id.* at 223 ("[T]he order under which petitioner was convicted was valid.").

[165] *See id.* at 223–24 ("We cannot . . . now say that at that time these actions were unjustified.").

[166] *Id* at 218.

[167] *Id.*

[168] *Id.*

[169] *Id.* at 223–24.

[170] For example, the Court provides a lengthy description of the exclusion order and the officers who passed and executed it. *Id.* at 216–17. The Court also emphasizes the important and separate responsibilities of other governmental bodies, and it makes great efforts to express its trust in (and deference to) its coordinate political branches. *Id.* at 216–17, 223.

[171] *Id.* at 218 (emphasis added).

[172] *Id.*

[173] Consider, for example, the faith and confidence the Court expresses in the following quote: "We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such person could not readily be isolated and separately dealt with." *Id.*

and homogeneous whole. Rather than acknowledge that the Japanese exclusion order has a disproportionate and discriminatory effect on Japanese Americans, the Court recites clichés about how "citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier."[174] The Court also notes that "all citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure," and it suggests that the exclusion order is a simple burden that all American citizens must share.[175] This claim fits neatly within the accomplished rhetorical repertoire and shows that, like all accomplished exceptionalists, the majority aims to preserve the illusion of national unity and homogeneity despite evidence to the contrary.

The majority's accomplished orientation is also evident in its amnesiac and Panglossian perspective. Toward the end of its opinion, the majority insists that its holding is not, as it may seem, intolerant or racist. To do this, it skews facts to create the impression that things are rosier than they actually are. For example, the Court rejects the most obvious (and racialized) interpretation of the situation and instead insists that "Korematsu was not excluded from the Military Area because of hostility to him or his race."[176] The Court also rejects the clear similarities between Japanese internment and Nazi concentration camps and argues that it is "unjustifiable to call [Japanese relocation centers] concentration camps with all the ugly connotations that term implies."[177] According to the Court, Korematsu's case is straightforward and involves "nothing but an exclusion order."[178] And any observers who "cast the case into outlines of racial prejudice" have either confused or misinterpreted the facts.[179]

The dissenters, by contrast, take an aspirational exceptionalist tack. Unlike the majority, which uncritically celebrates the government's actions, the dissenters highlight the clumsiness of the government's approach. They note, for instance, that Korematsu "faced . . . two diametrically contradictory orders."[180] They also

---

[174] *Id.* at 219.

[175] *See id.* (describing the effects of war on a country's citizens).

[176] *Id.* at 223.

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.* at 232 (Roberts, J., dissenting).

criticize the military officials' judgment, arguing that the exclusion order was a "*semi*-military conclusion[] drawn from an unwarranted use of circumstantial evidence."[181] Rather than express confidence in the government's valid apprehension of danger, the dissenters accuse officials of relying on "misinformation, half-truths, and insinuations."[182] They also suggest that the government's "plea of military necessity . . . has neither substance nor support,"[183] and they accuse the government of prioritizing "racial and sociological considerations" rather than "strictly military considerations."[184] Unlike the majority, which describes America's leaders as honorable and valiant, the dissenters foreground the government's fallibility. And they boldly insist that in this situation, their leaders have failed badly.[185]

The dissenters also highlight the fissures and divisions that affect American society. Instead of suggesting, as the majority does, that all citizens bear the burdens of war equally, the dissenting Justices note that Japanese Americans "for years have been [targeted] by people with racial and economic prejudices."[186] They also note that Korematsu's behavior was criminal only because of his ancestry. "Had Korematsu been one of four," Justice Jackson writes, "the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors . . . only Korematsu's presence would have violated the order."[187] Far from unified, the dissenter's America is instead a place where "[t]he difference between . . . innocence and . . . crime . . . result[s], not from anything [a person] [does], [says], or [thinks], . . . but only in that he was born of different racial stock."[188]

Most significantly, the dissenters candidly confront the country's failings and flaws. Unlike the majority, which downplays the implications of the exclusion order, the dissenters train their

---

[181] *Id.* at 237 (Murphy, J., dissenting) (emphasis added).

[182] *Id.* at 239.

[183] *Id.* at 234.

[184] *Id.* at 240.

[185] *See, e.g.*, *id.* at 235 (arguing that "[i]t is difficult to believe that reason, logic or experience could be marshalled in support of" military justifications for Japanese internment).

[186] *Id.* at 239.

[187] *Id.* at 243 (Jackson, J., dissenting).

[188] *Id.*

attention on the "stark realities" of the situation.[189] They condemn the exclusionary order as "obvious racial discrimination"[190] and accuse the majority of "legaliz[ing] racism"[191] and "fall[ing] into the ugly abyss of racism."[192] They also challenge the majority's rose-lensed, romanticized approach and insist that the majority has "set up a figmentary and artificial situation instead of addressing [them]selves to the actualities of the case."[193] The majority's accomplished exceptionalism may have led it to bury its head in the sand, but "[w]e," the aspirational dissenters, "cannot shut our eyes."[194]

Finally, the dissenters embody the aspirational mode's posture of progress and potential. Rather than assume that America is already and perpetually excellent, the dissenters see America as a yet-unproven "experiment."[195] They also view American citizens as "heirs," but not yet guaranteed inheritors, of the nation's promise and potential.[196] This aspirational orientation shapes the dissenter's approach. Because they view America's potential as contingent, they acknowledge that their rulings have "generative power" and might change the course of American society—either for better or for worse.[197] They also recognize that constitutional errors "lie[] about like . . . loaded weapon[s]" and that "every repetition" of an erroneous holding "imbeds that [problematic] principle more deeply in our law and thinking and expands it to new purposes."[198] Courts and legislatures and presidents can and do err, the dissenters think, and if the Court "review[s] and approve[s]" those errors, "that passing incident becomes the doctrine of the Constitution."[199] And so, the dissenters see it as their aspirational duty not to automatically defer to Congress's well-formed military judgments, but to correct the country when it strays.

---

[189] *Id.* at 233 (Roberts, J., dissenting).
[190] *Id.* at 234 (Murphy J., dissenting).
[191] *Id.* at 242.
[192] *Id.* at 233.
[193] *Id.* at 232 (Roberts, J., dissenting).
[194] *Id.*
[195] *Id.* at 242 (Murphy, J., dissenting).
[196] *Id.*
[197] *Id.* at 246 (Jackson, J., dissenting).
[198] *Id.*
[199] *Id.*

2. Grutter v. Bollinger *(2003).* In the 1978 case *Regents of the University of California v. Bakke*, the Supreme Court held that universities may not adopt admissions policies that use strict racial quotas or set asides.[200] The *Bakke* decision indicated, however, that universities may use race as one factor in a holistic admissions review.[201] In response to this holding, a number of universities adjusted their admissions policies to consider race more holistically.[202]

In *Grutter v. Bollinger*, the Court considered a challenge to one such policy.[203] The University of Michigan Law School (the Law School) had adopted an admissions policy that considered, among other things "soft variables" including various forms of diversity.[204] Though the Law School emphasized its commitment to include "groups which have been historically discriminated against," it did not limit its definition of diversity to "racial and ethnic status."[205] Instead, the Law School aimed to "guide admissions officers in producing classes both diverse and academically outstanding . . . who promise to continue the tradition of outstanding contribution . . . to the legal profession."[206]

Barbara Grutter, a white student, challenged the policy after she was denied admission to the Law School.[207] Her lawsuit alleged that the policy gave minority groups an advantage in the admissions process and therefore violated the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[208] The district court agreed and issued an injunction to prevent the Law School from using race

---

[200] *See* 438 U.S. 265, 319–20 (1978) (holding that the race-based admissions program disregarded the "individual's rights as guaranteed by the Fourteenth Amendment" and does not "promote a substantial state interest").

[201] *See id.* at 318 (holding that "[n]o . . . facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process").

[202] *See, e.g.*, Mario L. Barnes, *We Will Turn Back?: On Why* Regents of the University of California v. Bakke *Makes the Case for Adopting More Radically Race-Conscious Admissions Policies*, 52 U.C. DAVIS L. REV. 2265, 2276 n.36 (2019) (discussing changes to a race-conscious holistic review processes at universities like the University of Texas).

[203] 539 U.S. 306 (2003).

[204] *See id.* at 315–16 (describing the law school's admissions policy).

[205] *Id.* at 316.

[206] *Id.* (quotations omitted).

[207] *Id.* at 316.

[208] *Id.* at 317.

in its admissions decisions.[209] The Sixth Circuit reversed and vacated the injunction.[210] In a 5-4 decision, the Supreme Court affirmed the Sixth Circuit.[211]

Because the Law School's admission policy involved a racial classification, the Court reviewed it using strict scrutiny.[212] In doing so, the Court emphasized the importance of the compelling governmental interest prong.[213] The Law School had claimed that its race-based admissions policy was necessary to further the school's compelling interest in a diverse student body, but the Courts of Appeals were divided as to whether diversity could satisfy strict scrutiny's compelling governmental interest requirement.[214] The Supreme Court granted certiorari to resolve that circuit split.[215]

The Court ultimately concluded that classroom diversity qualified as a compelling governmental interest.[216] It articulated this conclusion in aspirational language. This aspirational orientation is particularly evident in the majority's forward-looking and contingent outlook. Unlike accomplished exceptionalism, which might celebrate America's past progress and success, the majority insists that the country's potential for excellence is yet unattained.[217] And because it adopts this contingent view of American excellence, it searches for resources that might help the country achieve its unfulfilled potential. Racial diversity is one such resource.[218] Because America is not yet excellent, the Court argues,

---

[209] *Id.* at 321.

[210] *Id.* at 306.

[211] *Id.* at 321.

[212] That is, it considered whether the policy served a compelling governmental interest and was narrowly tailored to promote that interest. *Id.* at 326. *Korematsu* established that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect [and] courts must subject them to the most rigid scrutiny." Korematsu v. United States, 323 U.S. 214, 216 (1994).

[213] *See Grutter*, 539 U.S. at 327–33 (considering whether the government has a compelling governmental interest in attaining diverse student bodies at public universities).

[214] *See id.* at 322 (citing conflicting decisions about whether attaining student body diversity qualifies as a compelling state interest).

[215] *See id.* ("We granted certiorari to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities.").

[216] *Id.* at 328.

[217] *See id.* at 330 (arguing that students can only develop the skills necessary for success if they are exposed to diversity).

[218] *See id.* (describing the benefits of a diverse student body in an educational setting).

it is essential that *all* citizens—regardless of race—be equipped with "the skills needed in today's increasingly global marketplace."[219] It is also crucial that "path to leadership . . . be visibly open to talented and qualified individuals of every race and ethnicity."[220] Citizens must have diverse educational experiences because without "exposure to widely diverse people, cultures, ideas, and viewpoints," Americans cannot succeed in a competitive global workforce.[221] Indeed, without racial diversity, the country might not even survive to see its exceptional future, because "a highly qualified, racially diverse officer corps is essential to national security."[222] In short, the majority sees racial diversity as a compelling governmental interest precisely because it views American greatness contingently: "[I]f the dream of one Nation, indivisible, is to be realized," the majority argues, "[e]ffective participation by members of all racial and ethnic groups is essential."[223]

Justice Ginsburg's concurrence likewise identifies diversity as a compelling governmental interest, and it, too, is aspirational in tone. But unlike the majority, which betrays its aspirational outlook by emphasizing America's yet-unattained greatness, Justice Ginsburg displays her aspirational orientation through candid criticism and critique. Rather than pretend that America's racial problems are solved, she emphatically argues that "conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land."[224] She supports this assertion by providing statistical evidence of racial disparities in education.[225] Her data indicates that the vast majority of African-American and Hispanic students attend schools that "lag far behind others measured by the educational resources available to them."[226] It also suggests that minority students "encounter markedly inadequate

[219] *Id.*

[220] *Id.* at 332.

[221] *Id.* at 330.

[222] *Id.* at 331.

[223] *Id.* at 332.

[224] *Id.* at 345 (Ginsburg, J., concurring).

[225] *See id.* ("As to public education, data for the years 2000–2001 show that 71.6% of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body.").

[226] *Id.*

and unequal educational opportunities."[227] These candid, critical observations reveal Justice Ginsburg's aspirational orientation: she does not hide from unpleasant realities, nor does she suggest that America has achieved its potential for unity and equality. They also prepare her to recognize racial equality as a compelling governmental interest: because "the current reality" in America is one of deep-rooted disparity,[228] it is crucial that government take steps to promote racial equality in its universities.

The majority and Justice Ginsburg also demonstrate their aspirational exceptionalism by expressing sincere hope in America's future. As discussed above, the majority emphasizes that America's greatness is contingent and unattained. Justice Ginsburg likewise suggests that racial inequality "imped[es] realization of our highest values and ideals."[229] Despite this, both the majority and Justice Ginsburg believe that eventual excellence is possible. The majority articulates this hope by noting with approval the Law School's commitment to "terminate its race-conscious admissions program as soon as practicable."[230] "We expect," it opines optimistically, "that 25 years from now, the use of racial preferences will no longer be necessary."[231] Justice Ginsburg shares this hopeful outlook, but her perspective is more conditional. "[O]ne may hope," she writes, "but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."[232] These optimistic predictions reveal the aspirational motivations behind the Court's criticisms and contingent outlook. The Court is not critical because it does not believe in America's greatness. Rather, it boldly demands progress because it believes the country might yet fulfill its exceptional potential.

Justice Thomas concurs in the outcome, but he rejects the majority's conclusion that racial diversity qualifies as a compelling governmental interest.[233] His rationale is deeply accomplished.

---

[227] *Id.* at 346.

[228] *See id.* ("[I]t remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities.").

[229] *Id.* at 345.

[230] *Id.* at 343 (majority opinion).

[231] *Id.*

[232] *Id.* at 346 (Ginsburg, J., concurring).

[233] *See id.* at 354–55 (Thomas, J., concurring in part and dissenting in part) (arguing that "[a]ttaining 'diversity,' whatever it means, is the mechanism by which the Law School obtains

Throughout his opinion, Justice Thomas minimizes, glosses over, and conceals America's shortcomings. He acknowledges the racial inequality in America's universities,[234] but unlike Justice Ginsburg, he does not dwell on the detail of that disparity. He also does not explore the possibility that educational inequalities flow from deeper social problems or historical injustices. Instead, he proposes an easier solution: racial disparities exist at the Law School because "of its own choosing, and for its own purposes, [it] maintains an exclusionary admissions system that it knows produces racially disproportionate results."[235] Justice Thomas's reluctance to explore more problematic possibilities is consistent with the accomplished mode's self-celebratory, amnesiac posture.[236] If America is always, already great, then educational inequality surely stems from schools' elite admissions standards and not from any deeper social problems.

Justice Thomas also demonstrates his accomplished exceptionalism by downplaying the issue of race. Rather than consider whether racial diversity might serve compelling governmental interests, Justice Thomas questions whether the Law School is actually concerned with equality at all.[237] In his view, the admissions policy is not meant to promote equality, but is instead designed to further the Law School's *real* interest in "offering a marginally superior education while maintaining an elite institution."[238] This redirection has an accomplished flavor. Deciding if racial inequality qualifies as a compelling governmental interest would almost certainly require hard, searching judicial inquiry, and possibly admissions of fault. Such inquiry and

---

educational benefits, not an end of itself"). The *Grutter* dissenters focus on the issue of narrow tailoring—whether the law school's policy is effective, and whether there are less restrictive alternatives available. *See, e.g.*, *id.* at 379 (Rehnquist, J., dissenting) ("I do not believe, however, that the University of Michigan Law School's means are narrowly tailored to the interest it asserts."). Because their analyses are largely technical, they do not draw heavily on exceptionalist themes, and I do not discuss them here.

[234] *See id.* at 350 (Thomas, J., concurring in part and dissenting in part) ("[I] share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan.").

[235] *Id.*

[236] *See supra* note 67–72 and accompanying text.

[237] *See Grutter*, 539 U.S. at 354 ("I seek to define with precision the interest being asserted by the Law School before determining whether that interest is so compelling as to justify racial discrimination.").

[238] *Id.* at 356.

acknowledgement would disrupt the accomplished mode's preference for self-celebration and its impulse to preserve the status quo. And so, Justice Thomas flips the script. Rather than address the thorny question of racial inequality, he reframes the case entirely.[239] In his view, the issue here is not race but rather whether the University of Michigan has a compelling governmental interest in providing an elite legal education.[240] Thus reframed, the case requires no searching inquiry and no admission of fault. It is easy to resolve—there is no compelling interest in providing elite education[241]—and far more palatable for an accomplished exceptionalist.

Finally, Justice Thomas reveals his accomplished orientation through his strong preference for the status quo. Because accomplished exceptionalism eschews self-criticism and avoids admission of fault, it generally insists that the way things are is good enough. Justice Thomas adopts this posture. Rather than consider whether America still has work to do to advance racial equality, he insists that "blacks can achieve in every avenue of American life without the meddling of university administrators."[242] He quotes Frederick Douglass to argue that the best way to help African Americans is to "[d]o nothing with us!"[243] And he suggests that judicial innovation is unnecessary because the Constitution "means the same thing today as it will in 300 months."[244] This accomplished preference for the way things are colors Justice Thomas's views of the university's race-based admissions policies. After all, if things are already good enough, then policies designed to help can only "visit[] . . . harm . . . upon [their] test subjects."[245]

B. EXCEPTIONALISM AND SPEECH: *COHEN V. CALIFORNIA* AND *TEXAS V. JOHNSON*

The Court's use of exceptionalism is not limited to cases involving race but also extends to other constitutional contexts. This section

---

[239] *Id.* at 354.

[240] *Id.* at 356.

[241] *See id.* at 358 ("Michigan has no compelling interest in having a law school at all, much less an *elite* one.").

[242] *Id.* at 350.

[243] *Id.* at 349.

[244] *Id.* at 351.

[245] *Id.* at 373.

considers whether and how the Court uses exceptionalism in two First Amendment free speech cases. In the first case, *Cohen v. California*, the Supreme Court overturned the conviction of a man who wore an explicit jacket into a courthouse.[246] In the second, *Texas v. Johnson*, the Court overturned the conviction of a man who burned an American flag.[247]

Cohen and *Johnson* show that the Court's exceptionalism is often tightly bound up with its legal reasoning. In both cases, the prosecuted party violated or threatened a symbol of American identity (by cursing in a courthouse and burning the flag, respectively). In both cases, then, the Court had to address questions of First Amendment doctrine *and* questions about patriotism, reverence, and national pride. Unsurprisingly, the resulting opinions are rife with exceptionalist themes, and in both cases, it is difficult to separate the Justices' substantive legal arguments from their exceptionalist commitments. *Cohen* and *Johnson* thus show that the Supreme Court's exceptionalism is more than rhetorical or stylistic flourish: in some instances, it seems, exceptionalist and legal reasoning work hand-in-hand.

Cohen and *Johnson* are significant for two additional reasons. First, the cases support the proposition that case outcomes and exceptionalist orientations are often correlated, because in both cases, an aspirational exceptionalist majority affirmed claims of individual rights.[248] Second, the cases shed light on the relationship between ideology and exceptionalism. In both *Johnson* and *Cohen*, the Court did not split along ideological lines. Rather, a mix of conservative and liberal Justices signed on to an overtly aspirational exceptionalist majority opinion. This suggests that the exceptionalist modes are not reducible to or commensurate with ideology. Though accomplished exceptionalism has conservative features, it is not always the worldview of all conservatives. Indeed, in both *Cohen* and *Johnson*, some of the Court's conservative Justices adopt distinctly aspirational views.

---

[246] Cohen v. California, 403 U.S. 15, 15 (1971).

[247] Texas v. Johnson, 491 U.S. 397, 397 (1989).

[248] *See Cohen*, 403 U.S. at 24 (asserting that "governmental bodies may not prescribe the form or content of individual expression"); *Johnson*, 491 U.S. at 418 (holding that "[w]e decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment").

1. Cohen v. California *(1971).* On April 26, 1968, Paul Robert Cohen entered a Los Angeles County Courthouse wearing a jacket that said, "F--- the Draft."[249] He was promptly arrested for violating California Penal Code § 415, which prohibited "disturbing the peace . . . by offensive conduct."[250] Cohen was not loud, violent, or resistant, and he testified that he wore the jacket solely "as a means of informing the public of the depth of his feelings against the Vietnam War and the draft."[251] Despite this, the Court of Appeals affirmed Cohen's conviction. Because the jacket might have provoked others to respond violently, the Court of Appeals reasoned, the words "F--- the Draft" were unprotected—and therefore punishable—speech.[252] In a 5-4 opinion, the Supreme Court reversed, holding that Cohen's conduct was protected by the First Amendment.[253]

Cohen provides an interesting case study of the Court's exceptionalism. The central issue in the case—whether Cohen's vulgar critique enjoyed First Amendment protection—was a straightforward question of constitutional law.[254] But the issue of Cohen's speech was also tightly bound up with questions of patriotism, exceptionalism, and dissent. Does the Constitution protect individuals who use its guarantees to condemn America and its policies?[255] Do the guarantees of the First Amendment extend to someone who, in a public courthouse, decries the government? And does unpatriotic expression—language that disparages and critiques—enjoy the same constitutional protection as speech that celebrates and praises the country? In a way, Cohen and his jacket personified the spirit of aspirational exceptionalism: they were tangible, visual representations of the aspirational mode's critical-yet-ameliorative ethos.[256] The case thus invited exceptionalist analysis.

---

[249] *Cohen*, 403 U.S. at 16.

[250] *Id.*

[251] *Id.* at 16, 17.

[252] *Id.* at 17.

[253] *See id.* at 26 ("The only 'conduct' which the State sought to punish is the fact of communication . . . .").

[254] *Id.* at 18.

[255] *See id.* at 26 (arguing that speech may be unfairly targeted because "governments might seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views").

[256] *See supra* text accompanying note 109.

The exceptionalism in *Cohen* tracks the pattern I have described elsewhere: the Justices who ruled in favor of Cohen's individual rights claim relied on aspirational exceptionalist reasoning, while the Justices who would have denied Cohen's claim favored the accomplished exceptionalist mode. The case also provides useful information about the relationship between exceptionalism and ideology. The *Cohen* court split 5-4, but not along ideological lines: the five-member majority included both liberal Justices (Douglas, Brennan, and Marshall) and conservatives (Harlan and Stewart), and the dissent included one liberal (Black), two centrists (White, a center-conservative, and Blackmun, a center-liberal), and a conservative (Burger).[257] This curious split shows that exceptionalist views and ideological views do not always align. It also suggests that that at least in this case, exceptionalism may influence the Justices' legal positions more than ideology.

In ruling for Cohen, the majority adopts an aspirational exceptionalist posture. This orientation is perhaps most evident in the majority's celebration of criticism and critique. Unlike an accomplished exceptionalist Court, which might have condemned Cohen's speech as "only verbal tumult, discord, and even offensive utterance,"[258] the majority celebrates Cohen's gesture as an important—if unpleasant—part of America's constitutional political culture. It emphasizes that criticism is a "necessary side effect[] of the broader enduring values which the process of open debate permits [America] to achieve."[259] And it insists that "[i]n [speech] otherwise might seem . . . trifling and annoying," America's "fundamental"—and exceptional—"values are truly implicated."[260] For the aspirational majority, Cohen's criticism is not problematic, but rather evidence of, and an opportunity to enact, the democratic values that make the U.S. exceptional. Indeed, if America's "air [is] at times. . . filled with verbal cacophony," such noise is "not a sign of [America's] weakness but of strength."[261]

---

[257] These ideologies are based on the Justices' respective judicial common space scores (JCS). *See* Lee Epstein, Andrew D. Martin, Jeffrey A. Segal & Chad Westerland, *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 303–04 (2007) (using a "Judicial Common Space" score, updated through 2022, to measure judicial policy leanings across time).

[258] *Cohen*, 403 U.S. at 24–25.

[259] *Id.* at 25.

[260] *Id.*

[261] *Id.*

The aspirational majority also acknowledges and embraces America's internal divisions. Instead of ignoring or downplaying fissures, as accomplished exceptionalism would, the majority celebrates America as a "diverse and populous" country.[262] It candidly acknowledges that Cohen's speech might be polarizing and offensive—an "annoying instance of individual distasteful abuse of a privilege."[263] And it admits that "[t]here may be some persons [in America] with . . . lawless and violent proclivities."[264] An accomplished Court would be less willing to acknowledge these potential problems and divisions, but for the *Cohen* majority, fissure is a fact to be acknowledged, not a failure to be fixed.[265] This aspirational perspective provides one basis for the majority's holding: if conflict is not aberrant, then avoiding division "is an insufficient base upon which . . . to force persons who wish to ventilate their dissident views into avoiding particular forms of expression."[266]

Finally, the majority displays its aspirational orientation by emphasizing America's potential for progress and growth. The majority's America is not perfect, nor is it quiet or peaceful or calm. But it is a nation with robust constitutional values and a strong commitment to "the premise of individual dignity and choice."[267] These values are enshrined in the nation's "constitutional backdrop,"[268] facilitated through its freedoms, and safeguarded by its laws and its courts. If the country remains true to its constitutional culture—even when that means tolerating "the simple public display . . . of this single four-letter expletive"[269]—then it may, perhaps, "produce a *more* capable citizenry and a *more* perfect polity."[270] But this quest for perfection is contingent, not assured, and it could be derailed if the state is too timid to safeguard America's exceptional freedoms.

---

[262] *Id.* at 24.

[263] *Id.* at 25.

[264] *Id.* at 23.

[265] *See id.* at 24 (explaining that differences and divisions within society should not "empower a majority to silence dissidents").

[266] *Id.* at 23.

[267] *Id.* at 24.

[268] *Id.*

[269] *Id.* at 26.

[270] *Id.* at 24 (emphasis added).

The *Cohen* dissent is short—only five paragraphs long.[271] It mostly argues from precedent, insisting that Cohen's language is squarely punishable under the fighting words doctrine articulated in *Chaplinsky v. New Hampshire*.[272] But even in this brief opinion, the dissenters show that their view of exceptionalism is accomplished. Unlike the majority, which celebrates Cohen's conduct as vibrant evidence of America's exceptional free culture, the dissenters dismiss it as an "absurd and immature antic."[273] Indeed, they are so eager to reject Cohen's criticisms that they strip them of communicative status altogether, calling the actions "mainly conduct and little speech."[274] In emphasizing the Court's prior precedent, the dissenters also suggest that in *Chaplinsky*, Justice Murphy—a "known champion of First Amendment freedoms"—"wrote for a unanimous bench" and provided a legal framework that clearly governed Cohen's claim.[275] The point is as accomplished as it clear. With the Court's help, America has already accomplished all that can be done in the area of fighting words and offensive speech. The governing rules came from the pen of a "champion of First Amendment freedoms," so they cannot possibly be wrong.[276] The status quo is more than adequate. And "[a]s a consequence, this Court's agonizing over First Amendment values seem [*sic*] misplaced and unnecessary."[277] Why refine the law, the dissenters imply, if the existing legal framework has *already* helped the nation achieve greatness?

2. Texas v. Johnson *(1989).* In *Cohen*, the Court used exceptionalism to resolve an issue involving visible, written speech, but exceptionalism plays a role in cases involving other types of speech as well. In 1984, Gary Lee Johnson burned an American flag at the Republican National Convention in Dallas, Texas.[278] He was promptly convicted under a Texas statute that prohibited desecration of state flags, national flags, and other "venerated

---

[271] *Id.* at 27–28 (Blackmun, J., dissenting).

[272] *See* 315 U.S. 568 (1942) (holding that words which "tend to incite an immediate breach of the peace" by provoking the hearer to retaliation are constitutionally unprotected "fighting words").

[273] *Cohen*, 403 U.S. at 27.

[274] *Id.*

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] Texas v. Johnson, 491 U.S. 397, 399 (1989).

objects."[279] Johnson challenged the Texas statute, arguing that it was unconstitutional both on its face and as applied to him.[280] The Texas Court of Criminal Appeals reversed the conviction, holding that the Texas statute criminalized constitutionally protected speech.[281] The Supreme Court agreed and, in a 5-4 decision, affirmed.

Like *Cohen*, *Johnson* simultaneously raised both legal and exceptionalist issues. *Johnson*'s legal issues centered on the flag—a symbolic representation of exceptionalism. To resolve *Johnson*'s legal disputes, then, the Justices could not simply sift through First Amendment legal doctrines. They also had to contemplate what makes America excellent, how to enact that commitment, and what to do with individuals who do not espouse exceptionalist views. Unsurprisingly, exceptionalism features prominently in the Court's analysis.

Johnson also shares *Cohen*'s curious ideological breakdown. The *Johnson* Court ultimately split 5-4, but as in *Cohen*, it did not divide along partisan lines. Rather, Justices Brennan, Marshall, and Blackmum (liberals) and Scalia and Kennedy (conservatives) formed the majority, with Justices Rehnquist and O'Connor (conservatives), White (center-conservative), and Stevens (liberal) dissenting.[282] As in *Cohen,* this unusual split puts the Justices' respective exceptionalist views in sharp relief and shows that exceptionalism and ideology do not always align. It also provides strong evidence that in some instances, exceptionalism might inform judicial decision making as much as—if not more than—ideology.

Like other opinions upholding individual rights claims, the *Johnson* majority opinion is distinctly aspirational. Whereas accomplished exceptionalism is generally uncomfortable with self-critique, the majority goes out of its way to "tolerat[e] . . . criticism."[283] And though it does not levy critiques of its own, it

---

[279] *See* TEX. PENAL CODE ANN. § 42.09(a)(3) (1989) (providing that desecrating a state or national flag is a misdemeanor offense).

[280] *See* Brief for Respondent at 12–34, Texas v. Johnson, 491 U.S. 397 (1989) (No. 88-155), 1989 WL 1127778, at *12 (arguing that the Texas statute is unconstitutional).

[281] *See* Johnson v. State, 755 S.W.2d. 92, 97 (Tex. Crim. App. 1988) (en banc) (holding that the state law "may not be used to punish acts of flag desecration when such conduct falls within the protections of the First Amendment").

[282] *See supra* note 257 and accompanying text.

[283] *Johnson*, 491 U.S. at 419.

zealously defends those who, like Johnson, challenge or question governmental policy. The majority celebrates and safeguards Johnson's right to express "opinions which are defiant or contemptuous,"[284] even when those opinions are directed at patriotic symbols. It even suggests that "criticism such as Johnson's is a sign and source of our strength"—a feature of, rather than a threat to, America's greatness.[285]

The majority also readily recognizes and acknowledges the fissions and fractures within society. Unlike accomplished exceptionalism, which would dismiss or downplay dissident voices, the majority reminds its audience of the conflict in Vietnam,[286] the "bombardment . . . at Fort McHenry,"[287] and other moments of national division and weakness. And though it acknowledges the value of unity, it insists that "compulsion" is not "a permissible means for its achievement."[288] The majority acknowledges that citizens can have different opinions, and it celebrates "the constitutionally guaranteed freedom to be intellectually diverse or even contrary."[289] It also suggests that the "high purpose" of free speech is best served "when it induces . . . unrest, creates dissatisfaction . . . , or even stirs people to anger."[290] The majority embraces "odious and destructive" ideas and insists that all voices—even those that cause discord and division—must be allowed to compete "in the marketplace of ideas."[291] And whereas accomplished exceptionalism would disavow conflict and disagreement, the majority instead insists that society "expose . . . falsehood and fallacies" through discussion.[292]

The majority also adopts aspirational exceptionalism's contingent, forward-looking tone. Rather than speak of America's present greatness, it emphasizes the potential and "high purpose"[293]

---

[284] *Id.* at 414 (quoting Street v. New York, 394 U.S. 576, 593 (1969)).

[285] *Id.* at 419.

[286] *See id.* at 417 (stating that a proviso "which leaves Americans free to praise the war in Vietnam but can send [others] to prison for opposing it, cannot survive in a country which has the First Amendment").

[287] *Id.* at 419.

[288] *Id.* at 418 (quoting Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943)).

[289] *Id.* at 414 (quoting Street v. New York, 394 U.S. 576, 593 (1969)).

[290] *Id.* at 408–09 (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

[291] *Id.* at 418.

[292] *Id.* at 419 (quoting Whitney v. California, 274 U.S. 357, 377 (1927)).

[293] *Id.* at 408.

of the country's "bedrock principle[s]."[294] And instead of suggesting that America is always excellent, it acknowledges that the country could, theoretically, make mistakes.[295] The Court warns, for instance, that an improper response to flag burning might "dilute the freedom that [the flag] represents." [296] It also praises "the Nation's resilience"—a tacit acknowledgement that the country has faced, and will again face, phases where it is less-than-perfect.[297] But even as it acknowledges the country's contingent excellence, the majority expresses a firm aspirational faith in America's grand future. "We are fortified," the majority writes, "by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires."[298] On the contrary, if the country zealously affirms (and reaffirms) "the principles of freedom and inclusiveness that the flag best reflects," the majority predicts that "the flag's deservedly cherished place in our community will be strengthened, not weakened."[299]

The dissenters do not share the majority's aspirational orientation. Instead, they view the case through the uncritical, assured, and backward-looking lens of accomplished exceptionalism. Their accomplished outlook is evident in their approach to critique. Unlike the majority, which embraces and protects criticism, the dissenters express disapproval for "the disrespectful public burning of the flag"[300] And unlike the majority, which would protect critical speech even when the result is "painful,"[301] the dissenters suggest that some things—the American flag being one—are too sacred to be critiqued. The dissenters

---

[294] *Id.* at 414. Justice Kennedy's concurring opinion similarly emphasizes the promise and potential of America's principles. He writes, "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right . . . . And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision." *Id.* at 420–21 (Kennedy, J., concurring).

[295] This is perhaps most explicit in Justice Kennedy's concurring opinion, where he acknowledges that the Court sometimes has to assess the constitutionality of statutes that are "flawed or incomplete." *Id.* at 420.

[296] *Id.* at 419–20 (majority opinion).

[297] *Id.* at 419.

[298] *Id.* at 418.

[299] *Id* at 419.

[300] *Id.* at 434 (Rehnquist, J., dissenting).

[301] *Id.* at 421 (majority opinion).

condemn the majority for treating the flag as "just another symbol, about which . . . opinions pro and con [must] be tolerated."[302] And though they acknowledge that the First Amendment creates space for certain types of criticism, they would prefer that those criticisms remain mild and private (Johnson could, they propose, "make any verbal denunciation of the flag," and could even "burn the flag in private"!).[303]

The dissenters' accomplished exceptionalism is also evident in their laudatory, backward-looking orientation. Unlike the majority, which highlights potential for future progress, the dissenters focus their attention squarely on a rose-colored past. They begin with the reminder that "[f]or more than 200 years, the American flag has occupied a unique position as the symbol of our Nation."[304] They then emphasize the flag's prominent, sacred status by providing a long account of America's most triumphant moments. They note that "[a]t the time of the American Revolution, the flag served to unify the Thirteen Colonies."[305] They likewise remind that during the bleakest moments of the War of 1812, the flag inspired discouraged Francis Scott Key to pen the national anthem.[306] The flag motivated troops during the Civil War[307] and consecrated the sacrifices of the "thousands of . . . countrymen [who] died on foreign soil" during World Wars I and II.[308] It boosted morale during the Korean and Vietnam wars,[309] and has, "throughout more than 200 years of our history, . . . come to be the visible symbol embodying our nation."[310]

This lengthy historical overview is consistent with the accomplished mode's backward-looking orientation. It also reflects accomplished exceptionalism's penchant for self-praise. Aside from one brief mention of "our Nation's most tragic conflict" (the Civil War),[311] the dissenters omit moments of disgrace, failure, or division. Instead, they emphasize only the "great stories" from

[302] *Id.* at 435 (Rehnquist, J., dissenting).
[303] *Id.* at 430–31.
[304] *Id.* at 422.
[305] *Id.*
[306] *Id.* at 423.
[307] *Id.* at 424–25.
[308] *Id.* at 425–26.
[309] *Id.* at 426.
[310] *Id.* at 429.
[311] *Id.* at 423.

country's bravest, most glorious past.[312] They also augment their history using poetry and song—an unorthodox approach to legal analysis, but a rhetorical technique perfectly suited to the romanticized, accomplished mode.[313] Through this selective, idealized remembrance, the dissenters present America as nation that has already achieved its exceptionalism. The majority's America may be provisionally great, but the dissenters' is always and already so—a perpetually "indestructible union, composed of indestructible states."[314]

C. EXCEPTIONALISM AND VOTING: *BRNOVICH V. DEMOCRATIC NATIONAL COMMITTEE*

The same exceptionalist themes that shape the Court's decisions on race and speech also appear in cases on voting rights. This section considers how the Supreme Court invoked exceptionalism in the 2021 case *Brnovich v. Democratic National Committee*.[315] As explained in the introduction, *Brnovich* upheld two voting laws that allegedly disadvantaged minority voters.[316] As I discuss below, the *Brnovich* majority and the dissenters disagreed largely because they took different views of America's exceptional role. *Brnovich* thus provides a strong and recent example of how exceptionalism features in Supreme Court decision making. It also provides further evidence of the correlation between exceptionalism and case outcome: as in other cases, the majority, which ruled for the government, opined in accomplished terms, while the dissenters, who believed the challenged voting laws violated individual rights, argued from an aspirational posture.

Brnovich involved a challenge to two provisions of Arizona voting law: one that requires in-person voters to vote in the precincts to

---

[312] *Id.* at 424.

[313] Rather than describe "the first skirmishes of the Revolutionary War" in their own words, the dissenters quote four lines of Ralph Waldo Emerson's "Concord Hymn." *Id.* at 422. And after explaining the history behind Francis Scott Key's "Star-Spangled Banner," they quote eight lines of the song. *Id.* at 423. The dissenters also quote nearly two full pages of John Greenleaf Whittier's "Barbara Frietchie," which recounts "[o]ne of the great stories of the Civil War." *Id.* at 424–25.

[314] *Id.* at 424 (quoting Texas v. White, 74 Wall. 700, 725 (1869)).

[315] 141 S. Ct. 2321 (2021).

[316] *See supra* notes 1–15 and accompanying text.

which they are assigned,[317] and one that makes it a crime for non-designated persons to collect early ballots.[318] The Democratic National Committee (DNC) argued that these provisions "disproportionately burden[] minority voters"[319] in violation of § 2 of the VRA, which prohibits any voting "standard, practice, or procedure" that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color."[320] The DNC also claimed that the ballot collection provision was enacted with discriminatory intent, in violation of the VRA and the Fourteenth and Fifteenth Amendments.[321] The Court rejected the DNC's arguments and upheld both provisions.

On first read, the majority's opinion is not strikingly exceptional. Unlike the other cases I have analyzed, the *Brnovich* majority opinion says little about America's identity, values, or exceptional promise and potential. Instead, it prioritizes statutory and textual arguments about the history, grammar, and syntax of the VRA.[322] But though the majority relies primarily on statutory interpretation,[323] it still subtly engages with exceptionalist themes. And as in other cases where the Court has upheld government power against individual rights claims, the majority's exceptionalist orientation is largely accomplished, emphasizing America's current greatness and downplaying any need for further change.

The majority's accomplished orientation is perhaps most evident in its description of the VRA's history and enactment. The opinion begins with a short account of the events that prompted the Act's passage.[324] Its account is decidedly rose-colored. Although the

---

[317] ARIZ. REV. STAT. ANN. § 16-122 (2016). The requirement only applies to voters in counties that use the precinct system. *Id.*

[318] *See* H.R. 2023, 52d Leg., 2d Reg. Sess. (Ariz. 2016) (amending the relevant Arizona statute); ARIZ. REV. STAT. ANN. § 16-1005(H)–(I) (1996) (providing rules for early ballot collection). Under the statute, the individuals designated to collect ballots are (1) postal workers; (2) election officials; and (3) voters' caregivers, family members, or household members. ARIZ. REV. STAT. ANN. § 16-1005(H)–(I).

[319] Brief for Petitioner at 18, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (No. 18-15845), 2018 WL 3304233.

[320] 52 U.S.C. § 10301(a).

[321] Brief for Petitioner, *supra* note 319, at 16.

[322] *See Brnovich*, 141 S. Ct. at 2330–33 (discussing the VRA's passage and subsequent amendments).

[323] *See id.* at 2336–40 (considering how to interpret the language of § 2 of the VRA).

[324] *Id.* at 2330–31.

majority acknowledges the problems that prompted the Act,[325] it does not dwell on America's history of voting inequality. Instead, it focuses on the processes and procedures that led to the Act itself. In the majority's re-telling, the VRA is a "landmark"[326] law that heroically "address[ed] [the country's] entrenched [voting discrimination] problem."[327] The original version of the law was not perfect, but it was refined through years of judicial interpretation and hotly-contested legislative revisions.[328] The amended VRA has not eliminated all discriminatory voting practices, but it "ha[s] achieved a large measure of success in combating the previously widespread practice of using . . . rules to hinder minority groups from voting."[329] It also symbolizes much that is good about the American constitutional system: well-intentioned legislation made better through years of judicial revision and legislative compromise.[330]

The majority's history is thus quite celebratory. In typical accomplished fashion, it says as little as possible about America's flaws. And when it must confront unsavory facts, it re-frames them to support its idealized narrative.[331] Though the majority does not describe America as a perfect country, it carefully employs America's obvious flaws to illustrate that the American *system* operates perfectly—that American courts work unflaggingly to interpret laws correctly, that Congress diligently and nobly compromises to improve legislation, and so on.[332] The majority also does not view the VRA's many iterations as proof that the Act was (at least originally) deeply flawed, but rather as evidence that the system—with its intentional checks and balances—has functioned as it should.[333]

---

[325] It admits, for example, that "[d]espite the ratification of the Fifteenth Amendment, the right of African-Americans to vote was heavily suppressed for nearly a century." *Id.* at 2330.

[326] *Id.*

[327] *Id.* at 2331.

[328] *Id.* at 2331–32.

[329] *Id.* at 2333.

[330] *Id.* at 2331–32.

[331] *See id.* at 2330 (describing the VRA as "an effort to achieve at long last what the Fifteenth Amendment had sought to bring about 95 years earlier: an end to the denial of the right to vote based on race").

[332] *See id.* at 2331–32 (describing the Court's attempts to interpret § 2 and describing the legislature's responses).

[333] *Id.*

The majority also reveals its accomplished orientation through its emphases and omissions. Unlike aspirational exceptionalism, which draws attention to and highlights the nation's flaws, the majority seems eager to skim past them. It does not, for instance, dwell on America's history of discriminatory voting practices. And though it mentions things like "poll taxes, literacy tests, property qualifications, 'white primar[ies],' and 'grandfather clause[s],'" it does not explain what those are.[334] The majority explicitly dismisses the relevance of America's racial history, stating, "The dissent['s] . . . historical background . . . does not tell us how to decide these cases."[335] It emphasizes the Act's words, grammatical construction, and syntax but grants little attention to the historical context(s) that may have shaped them.

The majority also de-emphasizes the alleged effects of Arizona's challenged voting provisions. Much like the *Korematsu* majority, which characterized Japanese internment as an ordinary responsibility of citizenship,[336] the *Brnovich* majority suggests that the disproportionate effects of Arizona's challenged voting provisions are normal because it is "virtually impossible for a State to devise rules that do not have *some* disparate impact."[337] It also downplays the severity of any disproportionate effects, suggesting that any burden imposed on minority voters is "unremarkable,"[338] "modest,"[339] and "small."[340]

The majority also reveals its accomplished orientation by celebrating and championing the status quo. It initially acknowledges that "no one suggests that discrimination in voting has been extirpated or that the threat has been eliminated."[341] But unlike an aspirational court, which might discuss the magnitude of the threat or consider how it might be eliminated, the majority quickly articulates its reluctance to upset the country's delicate and hard-earned federal-state balance. Invalidating Arizona's voting

---

[334] *Id.* at 2330 (alteration in original) (citation omitted).

[335] *Id.* at 2341.

[336] *See* Korematsu v. United States, 323 U.S. 214, 219 (1944) ("Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier.").

[337] *Brnovich*, 141 S. Ct. at 2343 (emphasis added).

[338] *Id.* at 2344.

[339] *Id.*

[340] *See id.* ("[T]he racial disparity in burdens allegedly caused by the out-of-precinct policy is small in absolute terms.").

[341] *Id.* at 2343.

laws would, it argues, disrupt that balance by "depriv[ing] the States of their authority" to craft appropriate voting laws.[342] It would also "undo . . . the compromise that was reached between the House and Senate when § 2 was amended in 1982."[343] Discriminatory voting practices might threaten American values, but for the majority, upsetting the country's delicate federal-state balance would be worse. "[T]here is nothing democratic about . . . a wholesale transfer of the authority to set voting rules from the States to the federal courts,"[344] it warns. Peace, in other words, is more important than progress.

To read the majority's opinion is to encounter a deeply accomplished portrait of America. Once the country had significant racial tension, but now it has compromise—a delicate balance between House and Senate and between the federal government and states. It also has a statute—the product of America's unique constitutional system—which, if interpreted conservatively and clinically, is adequate to meet the day's challenges. There may still be road bumps, but where they exist (as they might in Arizona), they are minor and unremarkable. And those bumps certainly do not warrant an expansive or novel interpretation of the VRA because such an interpretation would only upset the country's hard-earned status quo.

In the opening lines of their dissent, Justices Kagan, Breyer, and Sotomayor express disagreement with the majority's method of statutory interpretation: "[T]his is not," they assert, "how the Court is supposed to interpret and apply statutes."[345] But they also make clear that their disagreement is about exceptionalism and not just statutory interpretation. "[An] ordinary critique" of the majority's statutory reading, they argue, "woefully undersells the problem," because what is *really* "tragic here is that the Court has (yet again) rewritten—in order to weaken—a statute that stands as a monument to America's greatness, and protects against its basest impulses. What is tragic is that the Court has damaged a statute designed to bring about 'the end of discrimination in voting.'"[346] What is tragic, in other words, is that the majority sees America's

---

[342] *Id.*

[343] *Id.* at 2341.

[344] *Id.* at 2343.

[345] *Id.* at 2351 (Kagan, J., dissenting).

[346] *Id.*

greatness as settled and accomplished. For the dissenters, it is anything but.

The dissenters respond with a thoroughly aspirational rebuttal. Unlike the accomplished majority, which identifies, but ultimately breezes past, the country's voting rights ills, the dissent spends nearly ten pages recounting the many ways America has failed to provide equal voting access for its citizens. They remind readers that "for most of the Nation's first century," the glorious ideals of the Declaration of Independence "ran to white men only."[347] They describe the Civil War and the "blood spilled" for racial equality.[348] And they describe the "hard-fought battle over ratification" of the Fifteenth Amendment.[349] The dissenters also note that as triumphant as the Fifteenth Amendment may have seemed at first, its guarantees "quickly became dead letters."[350] Black citizens faced a "dizzying array of methods"[351] designed to prevent them from voting, including poll taxes, registration requirements, literacy tests, and even "coordinated intimidation and violence."[352] And "[d]ecade after decade after decade, election rules blocked African Americans—and in some [s]tates, Hispanics and Native Americans too—from making use of the ballot."[353] The dissent cites shocking evidence—statistical, textual, and social—to illustrate the prevalence and magnitude of anti-Black hostilities.[354] It also gives vivid descriptions of more contemporary examples of racial inequality, including civil rights marches where "protesters were beaten, knocked unconscious, and bloodied."[355]

The dissenters also emphasize that "efforts to suppress the minority vote continue."[356] The majority, they argue, "hails the 'good

---

[347] *Id.* at 2352.

[348] *Id.*

[349] *Id.*

[350] *Id.* (quoting Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 2003, 2007 (1999)).

[351] *Id.*

[352] *Id.* (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 218–19 (2009) (Thomas, J., concurring in judgment in part and dissenting in part)).

[353] *Id.*

[354] For example, the dissent quotes a Virginia representative who stated that his goal was "to disfranchise every negro that [he] could disfranchise." *Id.* (alteration in original) (quoting ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 113 (2000)).

[355] *Id.* at 2353.

[356] *Id.* at 2354.

news' that legislative efforts . . . shifted . . . from vote denial to vote dilution . . . [a]nd then . . . moves on to other matters, as though the Voting Rights Act no longer has a problem to address."[357] The dissenters are not so sure. They lament that the Court's past decisions have limited and narrowed the VRA, and they cite a number of "new barriers to voting" that states have implemented "[i]n recent months."[358] They are particularly concerned about the barriers posed by the challenged Arizona laws. Where the majority groups the laws' effects alongside other minor inconveniences, like a trip to the Department of Motor Vehicles,[359] the dissent provides nearly eleven pages of statistics and charts to demonstrate that effects "the majority labels [as] 'marginal[]' [are] anything but."[360] "In the majority's alternate [and accomplished] world, the [Arizona voting laws are] just a 'usual burden[] of voting' for everyone,"[361] but in the dissenters' aspirational view, the dangers are significant, vivid, and real.

In short, the dissenters eschew the majority's accomplished outlook and adopt a more candid, critical, and aspirational approach. Where the majority characterizes voting inequality as a problem that, if not eliminated, is at least fading, the dissent stresses that "the problem of voting discrimination has become worse."[362] And while the majority would prefer to view history selectively and romantically, the dissent confronts history candidly, warts and all.

But the dissenters' perspective is not all doom and gloom. If they insist on digging up America's "deep fault[s],"[363] they do so because they genuinely believe that "[n]o one can understand the Voting Rights Act"—and, by extension, no one can interpret or apply it correctly—"without recognizing what led Congress to enact it, and what Congress wanted to change."[364] The VRA and its attendant history "reminds us of the worst of America," because it shows that

---

[357] *Id.*

[358] *Id.* at 2356.

[359] *Id.* at 2344 (majority opinion) (quoting Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 198 (2008)).

[360] *Id.* at 2367 (Kagan, J., dissenting).

[361] *Id.* at 2371–72.

[362] *Id.* at 2354.

[363] *Id.* at 2372.

[364] *Id.* at 2354 n.1.

the country has fallen far short of its values and ideals.[365] But the statute also "represents the best of America,"[366] because it contains a "monumental" promise for what the country could yet become.[367] If courts and Congress are honest about "what Congress hoped for [the VRA] to achieve, and what obstacles to that vision remain today,"[368] America might yet make good on its promises of democracy and equality. But this shining, exceptional future is contingent, not assured, and it will require a far more expansive and progressive reading of the VRA than the one the majority offers.

IV. IMPLICATIONS

According to Richard Johnson, American exceptionalism "is the cultural foundation on which the edifice of American politics and government has been built," and "few actors or institutions operate on a different set of core assumptions."[369] The foregoing analysis reveals, for the first time, that this is true even at the Supreme Court. The Court's written opinions routinely draw on and incorporate the rhetoric of American exceptionalism. Sometimes, this rhetoric is accomplished: backward-looking, self-congratulatory, and assured.[370] Other times, it is aspirational: forward-looking, self-critical, and contingent.[371] But regardless of its form, exceptionalism often informs the Court's approach to and interpretation of substantive legal issues.

Until now, legal scholars have paid little attention to these exceptionalist patterns. In predictive and post-hoc analyses, Court watchers frequently emphasize the Justices' political leanings, voting records, and judicial philosophies. They study the Court's gender and ideological composition, the demographic characteristics of advocates, and the strategic considerations that might influence the Court's rulings. And they parse its decisions through the lenses of federalism, separation of powers, and theories of constitutional and statutory interpretation. But in all this discussion, scholars

---

[365] *Id.* at 2350.

[366] *Id.*

[367] *Id.* at 2372.

[368] *Id.*

[369] RICHARD JOHNSON, U.S. FOREIGN POLICY: DOMESTIC ROOTS AND INTERNATIONAL IMPACT 34 (2021).

[370] *See supra* section II.B.

[371] *See supra* section II.B.

have not yet identified exceptionalism as a force that might shape the Court's behavior. They also have not studied the Court's exceptionalist rhetoric or contemplated the underlying assumptions that rhetoric might reflect.

This Article has begun to fill that gap by identifying patterns in when and how the Court invokes exceptionalism. These findings are themselves significant because they reveal a gap in the otherwise vast scholarship on Supreme Court decision making, a gap tied to an idea that is as old as the notion of America. These findings are also significant because of the opportunities they create for additional research. Future researchers could begin by testing further the correlation proposed in this Article: whether the Court favors accomplished exceptionalism when upholding exercises of government power and aspirational exceptionalism when ruling for individual rights. Scholars could find ways to quantify and measure exceptionalist orientations and could include exceptionalism as a variable in empirical analyses of Court behavior. Scholars could also approach the subject historically and consider whether and how the Court's exceptionalist attitudes have changed over time. Alternatively, they could explore individual Justices' exceptionalist orientations.

Scholars might also study exceptionalism's rhetorical and stylistic effects. Justices are sophisticated users of language, and we must presume that when they use words, they do so intentionally. If that is so, then scholars ought to consider when and why Justices choose to opine in exceptionalist registers. Perhaps Justices choose exceptionalist modes because those modes reflect their underlying ideologies or worldviews. But Justices might also adopt exceptionalist language for strategic rhetorical reasons. For example, it may be that aspirational Justices invoke exceptionalism to defend aggressive decisions. Because the country is not yet where it might be, their exceptionalism implies, they must narrow the gap between reality and ideals. Similarly, accomplished Justices might deploy exceptionalism to defend their non-intervention: if the country is already excellent, then Justices behave well when they simply implement what We the People have already enacted. In either case, Justices may deploy exceptionalism as a rhetorical device to legitimize their decisions and overcome the countermajoritarian difficulty and dead hand dilemma. These possibilities deserve further academic attention.

Future researchers might also consider whether and how exceptionalism operates in other areas of the law. Is exceptionalism evident in lower courts' decisions and rulings? Is it a factor in congressional lawmaking? Do legislators' exceptionalist orientations influence their decisions to draft and support bills? Legal scholars should address these and other possibilities.

Additional study of exceptionalism's role in the law will yield important results. Attending to exceptionalism will help academics better understand how and why the Court reaches its decisions. Studying exceptionalism could also help practitioners who must craft arguments that appeal to Justices' unique exceptionalist sensibilities. Appreciating the relationship(s) between exceptionalism and Supreme Court decision making might prompt new lines of questioning at judicial confirmation hearings: in addition to asking about a nominee's theory of constitutional interpretation, for instance, senators might question prospective Justices about their views on exceptionalism. It could also help judges become more attentive to the way(s) exceptionalism might improperly influence or bias their views. In short, this Article's incorporation of exceptionalism into the study of Supreme Court jurisprudence and lawmaking introduces a host of questions for further scholarly study.

V. CONCLUSION

The foregoing analysis demonstrates that American exceptionalism is prevalent not just in America's politics and civic culture, but also in its law. Indeed, the Supreme Court, the country's most prominent and prestigious legal body, routinely employs exceptionalist themes when rendering constitutional decisions. My analysis uncovers that the Court's exceptionalism takes two general forms: aspirational and accomplished. It also suggests a pattern in the Court's usage: the Court favors accomplished exceptionalism when upholding broad exercises of government power (*e.g.*, *Korematsu*, *Brnovich*) but invokes aspirational exceptionalism when upholding individual rights claims (*e.g.*, *Cohen*, *Johnson*).[372] Exceptionalism might also feature more prominently in cases where the Court is asked to interpret and address questions about America's identity, values, and traditions.

[372] *See supra* sections II.B, III.B–C.

In *Brnovich*, for instance, the Justices disagreed about whether and how the VRA's history should affect their interpretation of its scope.[373] Exceptionalism was at the heart of this disagreement. It may be that the Justices' views on exceptionalism are similarly pivotal (and perhaps even outcome-determinative) in other cases where the Court must engage deeply with questions of history, identity, and tradition.

Until now, scholars have paid little attention to the relationship between law and exceptionalism. My analysis suggests that ignoring exceptionalism leaves us blind to a substantively meaningful and formative dimension of the Court's behavior. Future researchers should attend to this dimension because a deeper understanding of exceptionalism will enhance our judicial system, our legal practice, and our academic understanding of the Court's reasoning and holdings on questions relating to America's core identity.

[373] *See supra* section III.C.