American Exceptionalism And/In Affirmative Action

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In Students for Fair Admissions *("*SFFA*"), the Supreme Court invalidated race-based admissions programs at Harvard and the University of North Carolina. Not surprisingly, the Court split along ideological lines, and its decision reflected the Justices' known policy preferences. But the decision also revealed the Justices' distinct views on American exceptionalism—that is, their beliefs about whether and how America is different, superior, and chosen for a special role.*

Previous research has shown that American exceptionalism affects the Supreme Court's analysis of constitutional issues. It has also shown that the Court articulates its American exceptionalist commitments in two modes: accomplished exceptionalism, which is triumphant and self-celebratory, and aspirational exceptionalism, which is self-critical and cautionary. In this Article, I expand on that previous work by considering whether, how, and when both modes of American exceptionalism have shaped the Supreme Court's affirmative action jurisprudence. Using close readings and discourse analysis, I analyze the Court's exceptionalism in five landmark affirmative action cases. My analysis reveals that the Court's affirmative action case law draws heavily on the tropes and themes of American exceptionalism. It also suggests that the Court uses exceptionalism somewhat predictably: Pro-affirmative action justices typically rely on aspirational exceptionalism, while anti-affirmative action justices use the accomplished mode. Finally, and most surprisingly, my analysis reveals that in SFFA*, the Court invoked a new mode of exceptionalism—one that is not quite accomplished, not quite aspirational, but somewhere between the two.*

These findings have important implications. They indicate that exceptionalism affects the Court's substantive analysis: Exceptionalism is not a rhetorical device that the Court invokes at random, but rather a worldview that—like ideology or method of constitutional interpretation—

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shapes the way Justices approach legal issues. My findings also suggest that there are more modes of exceptionalism than have previously been identified. If exceptionalism does, in fact, affect the way the Court makes its decisions, future researchers should attend to these multiple modes.

INTRODUCTION

In 2014, a nonprofit group called Students for Fair Admissions ("SFFA") filed two lawsuits challenging the use of race in university admissions. In one suit, against Harvard College, SFFA alleged that Harvard's admission policies violate Title VI of the Civil Rights Act[1] by favoring white, Black, and Hispanic applicants over similarly qualified Asian American applicants.[2] In the other, against the University of North Carolina ("UNC"), the group alleged that UNC's race-conscious admissions policies violate the Fourteenth Amendment's Equal Protection Clause.[3] In both cases, SFFA urged that the challenged admissions practices did not satisfy strict scrutiny, the standard for race-based classifications articulated in *Richmond v. J.A. Croson Co.*[4] and *Adarand Constructors, Inc. v. Peña*.[5] SFFA also requested that the courts overrule *Grutter v. Bollinger*—a 2003 case which held that student body diversity "is a compelling [governmental] interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities."[6]

Throughout the Court's 2022–2023 term, legal scholars and other commentators anxiously speculated about the *SFFA* result. Some predicted that ideology would drive the outcome—that the Court's conservative majority would overturn *Grutter* and prohibit future use of race-based

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1. Title VI prohibits entities that receive federal funding from discriminating on the basis of race. 42 U.S.C. § 2000d.

2. Students for Fair Admissions, Inc. v. President of Harvard Coll., 397 F. Supp. 3d 126 (Mass. Dist. Ct. 2019).

3. Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 585, 585 (M.D.N.C. 2021). Specifically, the lawsuit alleged that UNC does not use race as an admission "plus factor"—which would be permissible under *Grutter v. Bollinger*, 539 U.S. 306 (2003)—but rather as "the defining feature" of a student's application. Complaint at 4, Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021). The lawsuit also alleged that UNC's use of race was not narrowly tailored, as required by *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), because race-neutral alternatives would serve the university's diversity interests equally well. *Id.* at 22.

4. Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments).

5. Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (clarifying that *Croson*'s strict-scrutiny requirement applies to federal programs).

6. Grutter v. Bollinger, 539 U.S. 306, 322 (2003). As explained above in *Richmond*, race-based classifications are subject to strict scrutiny, which requires a compelling governmental interest and means narrowly tailored to promote that interest. 488 U.S. at 472. In recognizing diversity as a compelling governmental interest, the *Grutter* court held that in the context of university admissions, the first prong of strict scrutiny will always be satisfied. 539 U.S. at 322.

admissions.[7] Others thought the Justices' views on *stare decisis* would rule the day: If a nearly identical Court had overturned *Roe v. Wade* and *Planned Parenthood v. Casey*, perhaps the Court was poised to overturn *Grutter*, as well. Still others guessed that the Court's racial composition and policy preferences might affect its decision. When the Court decided *Grutter*, its membership was predominately white.[8] Since then, the Court's membership has changed to include two Black justices (Justice Thomas and Justice Jackson) and one Hispanic justice (Justice Sotomayor). Though these Justices do not espouse the same views on race-based admissions,[9] commentators wondered how a more diverse Court would approach the issues in *SFFA*.

On June 28, 2023, a 6-3 Court ruled that race-conscious admissions policies at both Harvard and UNC violated the Fourteenth Amendment's Equal Protection Clause.[10] The decision was not surprising, and in many ways, it aligned with commentators' predictions. As many had expected, the Court divided along ideological lines: The six conservative Justices (Roberts, Thomas, Alito, Gorsuch, Kavanaugh, and Barrett) joined the majority, while the three liberal Justices (Sotomayor, Kagan, and Jackson) dissented. And predictably, the same six Justices who had voted to overturn *Roe* also voted to invalidate the challenged admissions policies.[11] The *SFFA* decision also

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7. *See, e.g.*, Amy Howe, *Affirmative Action Appears in Jeopardy After Marathon Arguments*, SCOTUSBLOG (Oct. 31, 2022, 7:44 PM), https://www.scotusblog.com/2022/10/affirmative-action-appears-in-jeopardy-after-marathon-arguments/ [https://perma.cc/CPK6-XVLD] ("[D]uring [the] nearly five hours of oral arguments . . . , the court's conservative majority signaled that it could be ready . . . to end the use of race in college admissions.").

8. Justice Thomas was the only African American—and the only minority—on the *Grutter* Court.

9. Justice Thomas was one of four dissenting justices in *Grutter*. 539 U.S. at 346. In his concurrence-in-part, he "contest[ed] the notion that the Law School's discrimination benefits those admitted as a result of it" and argued that the challenged admissions policy was a "façade" that would "never address"—and might, in fact, exacerbate—"the problems facing 'underrepresented minorities.'" *Id.* at 371–72 (Thomas, J., concurring in part). Justice Sotomayor, by contrast, has proudly described herself as "a perfect affirmative action baby." Tiana Headley, *Ivy-Educated Thomas and Sotomayor Divide on Affirmative Action*, BLOOMBERG LAW (Oct. 29, 2022, 5:12 AM), https://news.bloomberglaw.com/us-law-week/ivy-educated-thomas-and-sotomayor-divide-on-affirmative-action.

10. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 228 (2023).

11. Justices Alito, Thomas, Gorsuch, Kavanaugh, and Barrett joined the majority opinion in *Dobbs*, and Chief Justice Roberts concurred in the judgment. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 223 (2022). These same six Justices comprised the *SFFA* majority. *Students for Fair Admissions, Inc.*, 600 U.S. at 189. Though the *SFFA* majority did not explicitly say that it was overruling *Grutter*, Justice Thomas noted in his concurrence that "[t]he Court's

tracked the Justices' known policy preferences. Justice Thomas, who has long opposed affirmative action, voted to end the use of race in college admissions; Justices Jackson and Sotomayor, who have vocally supported race-based admissions policies, dissented.[12]

But there was something else at work in the *SFFA* opinion, as well. In addition to ideologies, policy preferences, and *stare decisis*, the Justices' opinions revealed and reflected their distinctive views on American exceptionalism—that is, their beliefs about whether and how America is different, superior, and chosen to perform some special role. In *Grutter*, Justice O'Connor famously said that although race-based admissions were permissible *then*, the Court expected that "[twenty-five] years from now, the use of racial preferences will no longer be necessary to further the interest [in a diverse student body]."[13] Nearly twenty years later, *SFFA* required the Court to determine whether America had achieved that aspiration. Thus, while *SFFA* was not explicit about America's special status, the issues it presented naturally and necessarily required the Court to reflect on America's excellence (or lack thereof). And the Court's decision did not only address whether diversity was a compelling interest or whether *stare decisis* dictated (or allowed) a particular outcome. It also contemplated whether America has become the place Justice O'Connor envisioned—a place where "racial preferences [are] no longer . . . necessary"—or whether there remains work to do.[14]

American exceptionalism—the belief that America is different, superior, and chosen to perform a unique role in global affairs—exists in multiple modes.[15] One mode, which I call accomplished exceptionalism, is triumphant, self-celebratory, and certain. Another, which I call aspirational exceptionalism, is reflective, self-critical, and contingent. In previous work, I have shown that the Supreme Court regularly uses both accomplished and aspirational exceptionalism in its decisions.[16] I have also demonstrated that the Court engages with these modes in somewhat predictable ways. In decisions upholding broad exercises of government power, the Court seems

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opinion rightly makes it clear that *Grutter* is, for all intents and purposes, overruled." *Id.* at 285 (Thomas, J., concurring in part).

12. *See supra* note 9 and accompanying text.

13. *Grutter*, 539 U.S. at 343.

14. *Id.*

15. *See* Lucy Williams, *American Exceptionalism as/in Constitutional Interpretation*, 57 GA. L. REV. 1071, 1076–77 (2023) [hereinafter *American Exceptionalism*]; *see also* Lucy Williams, *Blasting Reproach and All-Pervading Light: Frederick Douglass's Aspirational American Exceptionalism*, 9 AM. POL. THOUGHT 369 (2020) [hereinafter *Blasting Reproach*].

16. *American Exceptionalism*, *supra* note 15, at 1079.

to favor the more conservative (small "c"), self-celebratory accomplished mode. This was true in the recent *Brnovich* decision, where the Court used accomplished exceptionalist rhetoric to uphold an Arizona law that allegedly made it difficult for minority voters to cast ballots.[17] By contrast, in decisions that affirm the rights of individuals vis-à-vis the government, the Supreme Court seems more likely to draw on the aspirational mode. This was true in both *Cohen v. California* and *Texas v. Johnson*—cases where the Court's aspirational exceptionalist posture led it to conclude that two convictions (one for fighting words, one for flag burning) violated the First Amendment.[18]

But what of cases where individual liberties and governmental power are not so easily separated? In many legal contexts, like free speech or voting rights, the cases that reach the Supreme Court pit individuals against the government: An individual claims some liberty that the government, through a law or criminal punishment, has restricted. But in other situations, the Court must adjudicate conflicting claims of individual liberties or resolve clashes between different branches of government. In such cases, it is difficult to classify the Court's decisions as either pro-government or pro-individual liberties. It is also difficult to predict whether or how exceptionalism might affect the Court's analysis. If the Court uses accomplished exceptionalism to uphold exercises of governmental power, and if it uses aspirational exceptionalism to protect individual rights, which mode—if either—does it use when the contest is not so black and white?

In this Article, I explore this open question by considering whether and how American exceptionalism shapes the Court's affirmative action jurisprudence. Affirmative action is a fruitful testing ground for several reasons. First, affirmative action is a profoundly aspirational concept. It exists to address the historical and present-day effects of racial inequality. It also has a contingent, future-oriented goal—namely, helping the nation progress toward a better, more egalitarian society. Affirmative action thus embodies the key features of an aspirational exceptionalist outlook: It is attentive to the country's flaws but committed to a flawless future. Because of this, affirmative action provides natural and obvious opportunities for the Court to engage with exceptionalist themes.

Second, affirmative action cases do not present a clear contest between individual liberties and governmental power. In affirmative action cases, challengers typically argue that race-conscious programs violate the Fourteenth Amendment's guarantee of equal protection. The government

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17. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2343–44 (2021); *see also American Exceptionalism*, *supra* note 15, at 1121–28.

18. *American Exceptionalism*, *supra* note 15, at 1116, 1119.

generally defends its affirmative action programs using the same rationale, insisting that race-conscious policies are necessary to protect equal protection. Because of this, affirmative action decisions are never obviously pro-government or pro-individual liberties. Studying exceptionalism in the affirmative action context thus provides opportunities to identify new patterns in and applications of the Court's exceptionalist rhetoric.

Affirmative action also provides opportunities to explore exceptionalism's rhetorical and strategic uses. Affirmative action is a deeply politicized issue, and opinions about affirmative action often track closely with political ideology. Because of this, the vote breakdowns in affirmative action cases have historically been predictable: Conservative Justices vote against affirmative action, while liberal Justices support it.[19] In other contexts, where majority opinions include both liberal and conservative Justices, there is reason to think that exceptionalism—rather than ideology—might in fact drive the Court's analysis.[20] But in affirmative action cases, where the vote breakdowns are more straightforwardly ideological, exceptionalism's function may be more rhetorical than outcome-determinative. Affirmative action caselaw thus offers opportunities to consider whether and how Justices use exceptionalism rhetorically to defend and legitimize their substantive analyses.

Finally, affirmative action cases illustrate the current and ongoing stakes of the Court's engagement with exceptionalism. *SFFA* was one of the most hotly-contested and eagerly-anticipated cases of the 2022–2023 term. And because affirmative action naturally raises questions about America's past,

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19. Martin-Quinn scores estimate each Justice's position on an ideological spectrum, with negative scores reflecting more liberal ideologies. *Project Description*, MARTIN-QUINN SCORES, https://mqscores.lsa.umich.edu/index.php [https://perma.cc/KAZ4-9HRC]. These scores reveal how partisan the Court's affirmative action jurisprudence has been.

In 2003, when the Court decided *Grutter*, the five most liberal Justices on the Court were Stevens (-2.903), Ginsburg (-1.757), Souter (-1.662), Breyer (-1.232), and O'Connor (0.224). *Measures*, MARTIN-QUINN SCORES, https://mqscores.lsa.umich.edu/measures.php [https://perma.cc/C4CD-MUD3] (click "justices.xls" under "THE 2021 JUSTICE DATA FILES"). Predictably, these five Justices voted to uphold the University's affirmative action policy. *Id.* The Court's four most conservative Justices that term were Kennedy (0.768), Rehnquist (1.397), Scalia (2.916), and Thomas (3.915). *Id.* These four dissented. *Id.*

In 2016, when the Court decided *Fisher*, the Court's most liberal Justices were Sotomayor (-3.462), Ginsburg (-2.784), Breyer (-1.575), and Kennedy (-.045). Kagan (-.612) was also in this group, but she did not participate in the decision. *Id.* All four voted to uphold the policy. The most conservative Justices were Roberts (.354), Alito (1.889), and Thomas (3.205). All three would have found the University's policy unconstitutional. *Id.*

20. *See, e.g.*, Cohen v. California, 403 U.S. 15, 26 (1971) (overturning the conviction of a man who wore an explicit jacket into a courthouse); Texas v. Johnson, 491 U.S. 397, 420 (1989) (overturning the conviction of a man who burned an American flag).

its flaws, and its potential, the *SFFA* decision necessarily engaged with exceptionalist themes. *SFFA*—and the affirmative action context more generally—thus provide a timely and concrete example of the role of American exceptionalism in Supreme Court decision making.

This Article proceeds in four parts. In Part I, I define and describe two modes of American exceptionalism: accomplished and aspirational. I explain the defining rhetorical tropes of each mode, and I provide brief examples to show how the Supreme Court has invoked each mode in other legal contexts. In Part II, I provide a general overview and history of affirmative action in the United States. In Part III, I use close readings and discourse analysis to trace the Court's use of accomplished and aspirational exceptionalism in five affirmative action cases: *Regents of the University of California v. Bakke*, *City of Richmond v. J.A. Croson Co.*, *Grutter v. Bollinger*, *Fisher v. University of Texas*, and *SFFA v. President and Fellows of Harvard College*.

In Part IV, I describe the patterns my analysis reveals. First, I observe that the Court generally invokes exceptionalism in predictable ways: It uses the aspirational mode in cases upholding race-based preferences, and it uses the accomplished mode in cases that limit or invalidate affirmative action policies. This clear pattern suggests that in affirmative action cases, as in other areas of constitutional law, exceptionalism has analytic effects, guiding and constraining the Justices' substantive legal analyses. Second, I find that on one unusual occasion, a Justice uses the aspirational mode to *oppose* affirmative action. This supports the conclusion that American exceptionalism has rhetorical effects as well: Sometimes, justices might invoke it to defend and justify decisions they reach for other substantive reasons. Finally, and most importantly, I observe that in *SFFA*, Justice Roberts and Justice Thomas invoke a mode of exceptionalism that is neither fully accomplished nor fully aspirational. I call this new mode "protective exceptionalism," because it believes America *is* great but worries that the country's excellence is always in jeopardy. The *SFFA* Court likely did not invent protective exceptionalism, but I have not previously observed it in my analysis of Supreme Court rhetoric. The *SFFA* majority and concurring opinions thus prompt avenues for future research: Clearly, exceptionalism affects Supreme Court decisions in more nuanced ways than scholars have previously appreciated.

I. TWO MODES OF EXCEPTIONALISM

American exceptionalism—the belief that America is different, superior, and chosen to perform a unique role in global affairs—is a defining concept

in American politics and political culture.[21] At least since John Winthrop's description of America as a "city on a hill,"[22] Americans have understood themselves as a part of a special, chosen, and divinely-sanctioned endeavor.[23] This sense of special chosenness has shaped many of America's domestic and international policies.[24] It has also shaped the national psyche, influencing the way Americans think and speak about themselves.

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21. American exceptionalism is a contested concept, and few scholars agree about its proper definition and meaning. Some scholars understand exceptionalism as an empirical claim of difference: America is exceptional because it is different than or distinct from other countries. *See, e.g.*, Louis Hartz, *The Liberal Tradition in America*, 49 AM. POL. SCI. REV. 1155 (1955); Gur Bligh, *Extremism in the Electoral Arena: Challenging the Myth of American Exceptionalism*, 2008 BYU L. REV. 1367 (2008) (challenging the notion that America's election speech laws are uniquely or exceptionally unrestrictive); Saul Levmore, *Parental Leave and American Exceptionalism*, 58 CASE W. RESERVE L. REV. 203 (2007) (explaining how 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 (2012) (describing and explaining America's unique hostility to national healthcare); Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 1, 4 (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 (2014) (highlighting the "distinctively American" features of America's October 2013 governmental shutdown). Others use the term exceptionalism to describe how America engages with other nations. *See*, *e.g.*, *American Exceptionalism and Human Rights*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 7–8 (Michael Ignatieff ed., 2005) (arguing that American exceptionalism causes the United States 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, Egypt, Morocco, Jordan, and Uzbekistan").

In this paper, I define exceptionalism as the normative worldview that treats America as different, superior, and chosen to perform a unique role in global affairs. For a more detailed discussion of how and why I adopt this definition, see *American Exceptionalism*, *supra* note 15.

22. Ronald Reagan, U.S. President, *Farewell Address to the Nation*, NAT'L ARCHIVES (Jan. 11, 1989), https://www.reaganlibrary.gov/archives/speech/farewell-address-nation [https://perma.cc/3UH3-LSA9].

23. *See, e.g.*, SACVAN BERCOVITCH, THE AMERICAN JEREMIAD (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 [https://perma.cc/GG2Q-WPHM] (describing early colonial efforts as a "cause between God and us" and "a commission," and arguing that America's puritan colonists were "entered into a covenant with Him for this work").

24. *See* DEBORAH L. MADSEN, AMERICAN EXCEPTIONALISM 70–145 (1998) (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, 43–55 (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).

In contemporary American society, exceptionalism is often equated with (or, perhaps, reduced to) patriotism. When Americans display unwavering pride for and devotion to America, they are said to be exceptionalists. And when they criticize or disavow their country's politics, they are accused of lacking both patriotism and exceptionalist commitments.[25] In common usage, then, exceptionalism generally refers to a triumphant, uncritical, and self-celebratory attitude. Individuals who believe that America is always and unconditionally chosen, superior, and excellent are exceptionalists. Individuals who criticize or equivocate are not.

But American exceptionalism is not so singular. As any parent or coach understands, believing in someone's potential sometimes involves tough love, candid feedback, and honest critique. And as James Baldwin once observed, true devotion is not simply "the infantile . . . sense of being made happy[,] but . . . the tough and universal sense of quest and daring growth."[26] Because American exceptionalism is an expression of love and commitment, it, like Baldwin's "true love," can involve "tough" requests for development and growth. And because it articulates a belief in America's potential for excellence, exceptionalism sometimes requires pushing, prodding, and reprimanding. To be sure, American exceptionalism can be warm, celebratory, and affirming. But it can also be the bold, brave, and critical type of love which, in Baldwin's words, "reveal[s] the beloved to himself and, with that revelation, . . . make[s] freedom real."[27]

In short, there are many ways to enact American exceptionalism. In my previous work, I have identified two.[28] On one end of the spectrum is the traditional, hyper-patriotic, celebratory ethos that most Americans associate

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25. In a 2009 press conference, for example, Barack 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." Barack Obama, U.S. President, *News Conference by President Obama*, THE WHITE HOUSE, https://obamawhitehouse.archives.gov/the-press-office/news-conference-president-obama-4042009 [https://perma.cc/SH8S-F35E]. Immediately, critics accused him of "marginaliz[ing] his own country"; "rob[bing] the word, and the idea of American exceptionalism, of any meaning"; and endorsing the "profoundly mistaken view [that] there is nothing unique about the United States." Robert Farley, *Obama and 'American Exceptionalism,'* FACTCHECK.ORG (Feb. 12, 2015) (quoting Sean Hannity), https://www.factcheck.org/2015/02/obama-and-american-exceptionalism/ [https://perma.cc/282Y-RTQE]; 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 [https://perma.cc/D9P6-S5HP]; *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.

26. JAMES BALDWIN, THE FIRE NEXT TIME 95 (1992).

27. JAMES BALDWIN, THE PRICE OF THE TICKET: COLLECTED NONFICTION 76 (1985).

28. *American Exceptionalism*, *supra* note 15, at 1078.

with the idea of exceptionalism. I call this mode "accomplished exceptionalism," because it views America's greatness as an already-accomplished fact. On the other end is a more self-critical, reflective, and forward-looking mode that is attentive to—and critical of—America's flaws. I call this mode "aspirational exceptionalism," because it views American excellence as a contingent possibility rather than a certain guarantee.

The accomplished and aspirational modes are each characterized by a defining set of rhetorical tropes.[29] The accomplished mode recounts history selectively, and it emphasizes America's successes while downplaying failures. It uses language of praise, self-promotion, and celebration, and it avoids criticism or critique. Accomplished exceptionalism deflects attention from America's cleavages and instead suggests that the country shares common goals. It also generally uses the indicative mood ("America *is*") to present American greatness as an already-established fact.[30]

The aspirational mode, by contrast, is typically expressed using the conditional mood ("America *could* be great"). It does not fixate on past triumphs but instead highlights America's failures and difficult moments. It also emphasizes areas for improvement, drawing attention to the ways America can and must be better. Unlike the gentle, self-celebratory, and comforting accomplished mode, aspirational exceptionalism uses harsh, jarring, and self-critical language to boldly condemn America's flaws and advocate for reform.[31] And because its outlook is contingent—America's excellence is possible, but not guaranteed—it uses warning and admonition to push the country toward its exceptional potential.

The accomplished and aspirational modes are both commonplace in America's political culture, and America's political rhetoric is replete with examples of each.[32] George W. Bush's remarks following September 11, 2001, provide one example. In that speech, Bush adopted all the tropes of accomplished exceptionalism. He emphasized America's superlative,

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29. *Id.* at 1079.

30. For a more thorough discussion of accomplished exceptionalism and its tropes, see *Blasting Reproach*, *supra* note 15, at 373–75.

31. For a more thorough discussion of aspirational exceptionalism and its tropes, see *id.* at 375–88.

32. *See, e.g.*, Reagan, *supra* note 22 (using accomplished language by describing America as a "shining city on a hill"); Barack Obama, U.S. President, *Remarks by the President at Sandy Hook Interfaith Prayer Vigil*, THE WHITE HOUSE (Dec. 16, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/12/16/remarks-president-sandy-hook-interfaith-prayer-vigil [https://perma.cc/DHJ2-HKX2] (using aspirational language by condemning the Nation's "inaction" after an "endless series of deadly shootings"). For more examples, see *American Exceptionalism*, *supra* note 15, at 1081–98.

unparalleled excellence by describing the country as "the brightest beacon for freedom and opportunity in the world."[33] He also celebrated America's strengths—its "daring" and "caring" citizens and its resilient economy[34]—and he diverted attention from the country's shortcomings by instead emphasizing the "evil, despicable acts" of America's enemies.[35] Bush described America as a unified, symbiotic whole, suggesting that "Americans from every walk of life unite in our resolve for justice and peace."[36] He also described America's exceptional status as something fixed, assured, and unbreakable. "Terrorist attacks," he said confidently, "can shake the foundations of our biggest buildings but [they] cannot touch the foundation of America [or] dent the steel of American resolve."[37] And because "America has stood down enemies before"—that is, because it has *already* accomplished excellence—"we will do so [again] this time."[38]

By contrast, Martin Luther King Jr.'s "I Have a Dream" speech illustrates the aspirational exceptionalist mode. Throughout the speech, King articulates his pride in and commitment to America's exceptional ideals.[39] But unlike an accomplished exceptionalist, King also boldly condemns the many ways America has fallen short. King does not celebrate America's triumph over slavery, for instance, but instead emphasizes that even "100 years [after the Emancipation Proclamation, the Negro still is not free."[40] He also boldly accuses America of "default[ing]" on the promises of the Declaration.[41]

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33. George W. Bush, U.S. President, *Statement by the President in His Address to the Nation*, THE WHITE HOUSE (Sept. 11, 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html [https://perma.cc/7VBG-SYVY].

34. *Id.* ("The functions of our government continue without interruption. Federal agencies . . . will be open for business tomorrow. Our financial institutions remain strong, and the American economy will be open for business, as well.").

35. *Id.*

36. *Id.*

37. *Id.* Bush also confidently asserted that "no one . . . will keep [America's] light from shining." *Id.*

38. *Id.*

39. He praises, for example, the Constitution and the Declaration of Independence, calling them a "promissory note . . . that all men—yes, Black men as well as white men—would be guaranteed the unalienable rights of life, liberty and the pursuit of happiness." *Read Martin Luther King Jr.'s 'I Have a Dream' Speech in its Entirety*, NAT'L PUB. RADIO (Jan. 16, 2023), https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety [https://perma.cc/M4UY-FL6K].

40. *Id.* King similarly urges that Black Americans are "still sadly crippled by the manacles of segregation and the chains of discrimination." *Id.*

41. *Id.* In King's words, "It is obvious today that America has defaulted on this promissory note [i.e., the promise that all Americans will enjoy equal rights] insofar as her citizens of color

Despite these harsh and jarring critiques, though, King expresses sincere hope "that *one day* this nation will rise up and live out the true meaning of its creed."[42] But he also emphasizes that his vision is aspirational, not guaranteed. If citizens recognize the "fierce urgency of now" and "make the pledge that we shall always march ahead," America might achieve an "invigorating autumn of freedom and equality."[43] But if not, King predicts there "will [be] a rude awakening," and "the whirlwinds of revolt will continue to shake the foundations of our nation."[44]

Bush and King's speeches provide two examples of exceptionalism in political speech. But accomplished and aspirational exceptionalism are commonplace in judicial rhetoric, too.[45] Like America's politicians and public figures, the Supreme Court regularly engages with exceptionalist themes, framing its analyses as dictated by America's unique role, status, and responsibility.[46] The Court also articulates its exceptionalism using both the accomplished and aspirational modes.[47]

Brnovich v. Democratic National Committee illustrates the Court's engagement with exceptionalism.[48] In that case, the Court upheld a voting law that had been challenged as violating the Voting Rights Act ("VRA").[49] In doing so, the Court invoked many of the tropes of accomplished exceptionalism. For example, the majority began with a rosy and selective account of the VRA's history—it briefly acknowledged America's history of voting discrimination but ultimately characterized "rules . . . hinder[ing] minority groups from voting" as a problem that was "*previously* widespread."[50] The opinion also did not ask how America could be better, but instead celebrated how the country currently *is*.[51] Though the majority

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are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked insufficient funds." *Id.*

42. *Id.* (emphasis added).

43. *Id.*

44. *Id.*

45. *See American Exceptionalism*, *supra* note 15, at 1096–99.

46. *Id.*

47. *Id.*

48. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021). For a more thorough analysis of the exceptionalist tropes in *Brnovich*, see *American Exceptionalism*, *supra* note 15, at 1121–28.

49. *Id.* at 2330.

50. *Brnovich*, 141 S. Ct. at 2333 (emphasis added).

51. *See, e.g.*, *id.* at 2341 (declining to impose a "strict 'necessity requirement'" when evaluating voting regulation because "such a tight fit would have the effect of invalidating a great many neutral voting regulations with long pedigrees that are reasonable means of pursuing legitimate interests").

acknowledged that "the threat [of voting discrimination] has [not] been eliminated," it also insisted that the VRA should not "deprive the States of their authority" to draft voting legislation.[52] It also suggested that invalidating the Arizona law would undermine the VRA's delicate federal/state balance and that there would be "nothing democratic about" altering the status quo in that way.[53] In short, the accomplished majority believed America has already achieved a satisfactory voting rights scheme. Because of this, it saw no need for further intervention.

The dissenters, by contrast, adopted an aspirational exceptionalist posture. Unlike the majority, they willingly discussed America's flaws and failures—its history of disenfranchisement, the "coordinated intimidation and violence"[54] it directed at Black voters, and its continued "efforts to suppress the minority vote."[55] But they also emphasized the country's potential for progress, improvement, and excellence. They celebrated the VRA as "represent[ing] the best of America,"[56] and they insisted that, if interpreted and applied strictly, the nation might yet achieve the democracy and equality that "Congress hoped for [the VRA] to achieve."[57] But in true aspirational fashion, they also warned that this exceptional future is contingent—one that will only become reality if the country honestly confronts the "obstacles to that vision [that] remain today."[58]

Brnovich is not the only case where accomplished and aspirational exceptionalism inform the Court's analysis. In fact, in many of its most famous and high-profile constitutional decisions, the Court invokes accomplished and aspirational themes. My previous research identifies some preliminary patterns in how and when this occurs.[59] Specifically, in decisions upholding broad exercises of government power, the Court favors the accomplished mode,[60] but in decisions that affirm the rights of individuals vis-à-vis the government, it is more likely to draw on the aspirational mode.[61]

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52. *Id.* at 2343.
53. *Id.*
54. *Id.* at 2352 (Kagan, J., dissenting) (internal quotations omitted).
55. *Id.* at 2353.
56. *Id.* at 2350.
57. *Id.* at 2372.
58. *Id.*
59. *See generally American Exceptionalism*, *supra* note 15.
60. This was true in the recent *Brnovich* decision, where the Court used accomplished exceptionalist rhetoric to uphold an Arizona law that supposedly made it difficult for minority voters to cast ballots. *Id.* at 1078, 1121–28.
61. This was true in both *Cohen v. California* and *Texas v. Johnson*—cases where the Court's aspirational exceptionalist posture led it to conclude that two defendants' convictions

My past research also suggests that Justices might use the aspirational and accomplished modes strategically—not to *guide* their legal analyses, necessarily, but to defend them.[62]

In what follows, I extend these findings by considering how exceptionalism operates—both rhetorically and analytically—in the Court's affirmative action cases. My previous work has focused on cases that present clear conflicts between individual liberties and governmental authority.[63] In the affirmative action context, that line is not so neat. Typically, the parties challenging an affirmative action program argue that the program violates their individual rights—most often, their right to equal protection.[64] But the governmental actor (generally a university or governmental contractor) also claims to act in the name of equal protection, and it often insists that its race-conscious programs are necessary to ensure that historically underrepresented groups are able to contribute to the diversity and general "character" of the institution.[65] Because of this, affirmative action is rarely a neat contest between individual rightsholders and the government-as-sovereign. Instead, it presents disputes between two groups (the individuals harmed by an affirmative action policy, and the individuals whose interests are served by the government's program) who both have and claim rights to equal protection. Affirmative action cases thus provide opportunities to study how exceptionalism operates when the line between individual liberties and governmental power is not so readily drawn.

(one for fighting words, one for flag burning) violated the First Amendment. *Id.* at 1078, 1114–15, 1117–19.

62. Imagine, for instance, that for ideological reasons, a Justice felt compelled to author a particularly progressive or aggressive decision. That Justice might use aspirational exceptionalist rhetoric to legitimize their holding: Because the country is not yet where it might be, they might argue, the Court must act boldly to narrow the gap between reality and ideals. Similarly, a Justice writing a conservative (small-c) decision might deploy accomplished exceptionalism to defend their non-intervention: If the country is already excellent, then the Court's only responsibility is to defer to elected branches and implement what "We the People" have already enacted. In either case, Justices may deploy exceptionalism as a rhetorical device to legitimize their decisions, ward off accusations of overreach, and overcome the counter-majoritarian difficulty.

63. In First Amendment cases, for example, the Court often must determine whether a statute prohibiting speech infringes on an individual's First Amendment rights. And in criminal procedure cases, the Court often considers whether a police officer or other governmental actor has violated an individual's right to be free from unreasonable search and seizure, to avoid self-incrimination, and so on. *See generally American Exceptionalism*, *supra* note 15.

64. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 270 (1978); Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

65. *See, e.g.*, *Grutter*, 539 U.S. at 316 (citing the government's argument that "[b]y enrolling a '"critical mass" of underrepresented minority students,' the Law School seeks to 'ensure their ability to make unique contributions to the character of the Law School'").

To study the role of exceptionalism in affirmative action case law, I use a qualitative research method called discourse analysis. Discourse analysis begins from the assumption that language is "a social practice that shapes the social world."[66] It believes "language is *invested*" and that language is not "neutral tool[s] for transmitting a message" but rather units that "constitute a particular way of talking about and understanding the world."[67] The purpose of discourse analysis is to understand how speakers use this invested language to "construct particular versions of reality, social identities and social relations."[68] Discourse analysis thus analyzes a speaker or text's linguistic features (grammar, wording, syntax, voice, etc.), "explor[es] patterns in and across the statements,"[69] and identifies the social and political effects of a speaker's rhetorical choices.[70]

In the following sections, I use this research method to study five leading affirmative action cases. Four of these—*Bakke*, *Grutter*, *Fisher*, and *SFFA*—address affirmative action in university admissions. One—*Croson*—deals with affirmative action in government contracting. My analysis reveals that American exceptionalism is central to each of these landmark decisions. It also shows that the Court invokes aspirational exceptionalism when affirming or upholding race-based preferences but prefers the accomplished mode when rejecting. Finally, my analysis reveals a new mode of exceptionalism—

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66. MARIANNE JØRGENSEN & LOUISE PHILLIPS, DISCOURSE ANALYSIS AS THEORY AND METHOD 18 (2002).

67. RESEARCH METHODS FOR ENGLISH STUDIES 93 (Gabriele Griffin ed., 2d ed. 2013) (emphasis in original) (internal quotations omitted).

68. JØRGENSEN & PHILLIPS, *supra* note 66, at 83.

69. *Id.* at 21.

70. As Jørgensen & Phillips explain,

> For the discourse analyst, the purpose of research is not to get 'behind' the discourse, to find out what people *really* mean when they say this or that, or to discover the reality behind the discourse. The starting point is that reality can never be reached outside discourses and so it is discourse itself that has become the object of analysis. In discourse analytical research, the primary exercise is not to sort out which of the statements about the world in the research material are right and which are wrong (although a critical evaluation can be carried out at a later stage in the analysis). On the contrary, the analyst has to work with what has actually been said or written, exploring patterns in and across the statements and identifying the social consequences of different discursive representations of reality.

Id. (emphasis in original).

For excellent summaries of discourse analysis as a method, see *id.*; BARBARA JOHNSTONE, DISCOURSE ANALYSIS (3d ed. 2017); RESEARCH METHODS FOR ENGLISH STUDIES, *supra* note 67.

one that is neither accomplished nor aspirational—that features prominently in the Court's *SFFA* opinion.

II. A BRIEF HISTORY OF AFFIRMATIVE ACTION

Sketched broadly, the term "affirmative action" describes policies, programs, and practices designed to benefit historically disadvantaged racial and ethnic groups.[71] Such policies and programs are not new. Following the Civil War, "Congress . . . repeatedly enacted statutes allocating special benefits to blacks on the express basis of race."[72] Among other things, these bills created the Bureau of Freedmen's Affairs, a federal body tasked with "overseeing the enforcement of all laws 'in any way concerning freedmen.'"[73] These bills also authorized the government to provide clothing, food, land, and legal support to recently freed slaves.[74] As Eric Schnapper notes, the sponsors of these early "affirmative action" laws insisted that such legislation was necessary "not because these people are negroes, but because they are men who have been for generations despoiled of their rights."[75] But

71. There is some debate surrounding what, exactly, qualifies as "affirmative action." Some scholars argue that "affirmative action" simply describes "plans to safeguard equal opportunity, to protect against discrimination, to advertise positions openly, and to create scholarship programs to ensure recruitment from specific groups." Tom L. Beauchamp, *In Defense of Affirmative Action*, 2 J. ETHICS 143, 144–45 (1998). Others understand "affirmative action" to refer to policies that give clear preferential treatment to disadvantaged groups—priority contracts, quotas, etc. *See* Justin Marion, *How Costly Is Affirmative Action? Government Contracting and California's Proposition 209*, 91 REV. ECON & STAT. 503, 503 (2009). In this Article, I use the term generally to describe any policy that intentionally addresses discrimination through race-conscious measures. *See* Cohen v. Brown Univ., 101 F.3d 155, 170 (1st Cir. 1996) ("True affirmative action cases have historically involved a voluntary undertaking to remedy discrimination (as in a program implemented by a governmental body, or by a private employer or institution), by means of specific group-based preferences or numerical goals, and a specific timetable for achieving those goals."). For readers interested in the debate about what qualifies as affirmative action, I recommend Beauchamp, *supra* note 71, at 144 and CARL COHEN & JAMES P. STERBA, AFFIRMATIVE ACTION AND RACIAL PREFERENCE: A DEBATE (2003).

72. Jeb Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 427 (1997). For an excellent history of these and other early race-conscious measures, see Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 UNIV. VA. L. REV. 753, 755–83 (1985) (describing Reconstruction-era laws designed to benefit freed slaves); Shawn Woodhouse, *The Historical Development of Affirmative Action: An Aggregated Analysis*, 26 W.J. BLACK STUD. 155, 155–56 (2002) (describing reconstruction-era legislation designed to aid freed slaves).

73. Schnapper, *supra* note 72, at 755.

74. *Id.*

75. CONG. GLOBE, 38th Cong., 1st Sess. 2800 (1864) (statement of Senator Sumner) (quoting Secretary of War Stanton's recommendation for the bill) (quoted in Schnapper, *supra* note 72, at 758). For an excellent summary of early congressional debates surrounding the proto-affirmative action policies of the Reconstruction era, see Schnapper, *supra* note 72, at 755–83.

opponents wondered "why the freedmen of African descent should become these marked objects of special legislation, to the detriment of the unfortunate whites[?]."[76] In short, like their contemporary counterparts, early race-conscious measures generated significant controversy and debate.[77]

The proto-affirmative action programs of the Reconstruction-era did not last long. By the late 1800s, most were largely defunct.[78] But in the 1940s, the executive branch began implementing policies and programs that breathed new life into affirmative action.[79] The first of these came in 1941, when President Roosevelt issued an executive order prohibiting racial discrimination in the defense industry.[80] Roosevelt's order established a "Committee on Fair Employment Practice"—the first post-Reconstruction body tasked with "receiv[ing] and investigat[ing] complaints of discrimination."[81] It also created an affirmative "duty [for] employers . . . to provide for the full and equitable participation of all workers in defense industries."[82] Twenty years later, President Kennedy issued a separate executive order which established the Committee on Equal Employment Opportunity.[83] Kennedy's order identified a "plain and *positive* obligation of the United States Government to promote and ensure equal opportunity," and it directed government contractors to "take *affirmative action* to ensure that applicants are employed . . . without regard to their race, creed, color, or national origin."[84]

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76. H.R. REP. NO. 2, 38th Cong., 1st Sess. 2–4 (1864) (quoted in Schnapper, *supra* note 72, at 756).

77. *Id.* at 756.

78. Woodhouse identifies three legal and political developments that effectively ended Reconstruction-era affirmative action: (1) the 1877 removal of federal protection; (2) the Supreme Court's decision in *The Civil Rights Cases* (1883), which struck down the Civil Rights Act of 1875; and (3) the Court's holding in *Plessy v. Ferguson* (1896) that "separate but equal" facilities do not offend the constitution. Woodhouse, *supra* note 72, at 156.

79. For a general history, see Curtis Stokes et al., *The Language of Affirmative Action: History, Public Policy and Liberalism*, 33 BLACK SCHOLAR 14 (2003); Woodhouse, *supra* note 72, at 156–57.

80. Exec. Order No. 8802, 3 C.F.R. 957 (1938–1943). The order specifically stated, "Whereas it is the policy of the United States to encourage full participation in the national defense program by all citizens of the United States, . . . there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin." *Id.*

81. *Id.*

82. *Id.* In 1943, Roosevelt issued a second executive order (No. 9346) to extend the scope and coverage of Executive Order 8802. *See* Woodhouse, *supra* note 72, at 157.

83. Exec. Order No. 10,925, 3 C.F.R. 449 (1961–1963).

84. *Id.* (emphasis added). The Order also instructed the Committee to "consider and recommend additional *affirmative steps* which should be taken by executive departments and agencies to realize . . . the national policy of nondiscrimination." *Id.* (emphasis added). Scholars

By 1964, affirmative action had supporters in Congress, as well. On July 9, Congress passed the Civil Rights Act of 1964, which outlawed segregation in businesses and public places and prohibited discrimination in hiring.[85] The Act also contained two provisions that provided "[t]he basic statutory framework for affirmative action in employment and education."[86] The first, Title VII, created "a comprehensive code of equal employment opportunity regulations" that applied to public and private employers of at least fifteen employees.[87] The second, Title VI, provided that "[n]o person in the United States shall, on the ground of race, color, or national origin, . . . be subject[] to discrimination under any program or activity receiving Federal financial assistance."[88]

In 1965, President Johnson supplemented the Civil Rights Act with yet another executive order, which prohibited discrimination by federal employers and required federal contractors to "take affirmative action to ensure that applicants are employed . . . without regard to their race, color, religion, sex, sexual orientation, gender, identity, or national origin."[89] Executive agencies also codified "official approval of affirmative action remedies" through new federal regulations.[90] For instance, the Department of Justice promulgated regulations governing the Department's role in enforcing Title VI.[91] And the Department of Education's Office of Civil

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largely agree that Kennedy was the first to use the term "affirmative action." *See* Stokes et al., *supra* note 79, at 15 ("Kennedy's Executive Order . . . is believed to represent the first public use of the phrase 'affirmative action.'"); Hugh Davis Graham, *The Origins of Affirmative Action: Civil Rights and the Regulatory State*, 523 ANNALS AM. ACAD. POL. & SOC. SCI. 50, 50–62, 53–54 (1992).

85. 42 U.S.C. § 2000a et seq.

86. CHARLES V. DALE, CONG. RSCH. SERV., RS22256, FEDERAL AFFIRMATIVE ACTION LAW: A BRIEF HISTORY 1 (2005). Importantly, Title VII did not require employers to adopt affirmative action policies. Instead, it authorized courts to provide monetary and injunctive relief to remedy past discrimination. *See also* Graham, *supra* note 84, at 55–56 (describing legislative debates over whether Title VII allowed employers to main racial quotas and discussing legislative compromises that "confine[d] [Title VII of] the Civil Rights Act to nondiscrimination").

87. DALE, *supra* note 86, at 1.

88. 42 U.S.C. § 2000d.

89. Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965), *as amended*, Sec. 202(1). As interpreted and applied today, Executive Order 11,246 requires written affirmative action plans from any employer of more than fifty employees and from contractors with federal contracts greater than $50,000. *See* DALE, *supra* note 86, at 1; Woodhouse, *supra* note 72, at 157.

90. DALE, *supra* note 86, at 1.

91. *See* Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964, 31 Fed. Reg. 5292, 5292 (Apr. 2, 1966) (requiring "prompt and vigorous enforcement of Title VI" and detailing sanctions for Title VI violations); Coordination of Enforcement of Nondiscrimination in Federally Assisted Programs, 41 Fed. Reg. 52669, 52669–70 (Dec. 1, 1976) (requiring federal agencies to issue regulations implementing Title VI).

Rights issued regulations requiring Title VI schools and colleges "to take affirmative action to overcome the effects of past discrimination and to encourage affirmative action '[e]ven in the absence of such prior discrimination.'"[92]

The Supreme Court also played an important role in reviving and perpetuating affirmative action policies. In *Brown v. Board of Education II*,[93] the Court tasked district courts with an affirmative duty to "enter such orders and decrees . . . as are necessary and proper to admit [the petitioners] to public schools on a racial nondiscriminatory basis with all deliberate speed."[94] And in 1968, it struck down a school district's "freedom-of-choice" desegregation plan, holding that the plan did not satisfy the school's "affirmative duty"—required by both the Fourteenth Amendment and the Court's holdings in *Brown v. Board of Education I* and *II*—"to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[95] In later cases, the Court assigned school districts an "affirmative duty to desegregate"[96] and held that when "school authorities fail[ed]," federal district courts had "broad power to fashion . . . remed[ies] that will assure a unitary school system."[97] The Court also allowed district courts to adopt loose "racial balances or racial quotas,"[98] to order bussing to achieve racial balance, and to implement "affirmative action in the form of remedial altering of attendance zones."[99]

By the late 1970s, affirmative action was firmly established federal policy. But in the landmark 1978 case *Regents of the University of California v. Bakke*, the Supreme Court began retreating from its earlier endorsement of affirmative action policies. In *Bakke*, a fractured Court said that public universities may not use racial quotas as part of their admissions programs.[100]

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92. DALE, *supra* note 86, at 1 (quoting 34 C.F.R. § 100.3(b)(6)(ii) (2004)).

93. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955). The Court first heard *Brown v. Board of Education* in 1954. 347 U.S. 483 (1954). The Court held that racial segregation in schools violates the Fourteenth Amendment's Equal Protection Clause, but it requested additional argument regarding how it should formulate decrees to implement its decision. *Id.* at 495. In *Brown II*, it addressed the question of implementation. *Brown II*, 349 U.S. at 299.

94. *Brown II*, 349 U.S. at 301.

95. Green v. Cnty. Sch. Bd., 391 U.S. 430, 437–48 (1968).

96. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1970); *see also* Keyes v. Sch. Dist., 413 U.S. 189, 200 (1973) (emphasizing that "where plaintiffs prove that a current condition of segregated schooling exists . . . the State automatically assumes an affirmative duty to 'effectuate a transition to a racially nondiscriminatory school system'").

97. *Swann*, 402 U.S. at 16.

98. *Id.* at 22–25.

99. *Id.* at 27–29.

100. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

It suggested, however, that universities could consider race as "one element in a range of factors" if that consideration "[did] not insulate [an applicant] from comparison with all the other candidates for the available seats."[101] Though the Court ultimately held that race-based affirmative action programs do not necessarily offend the Constitution, its rejection of strict racial quotas signaled a new skepticism of race-conscious policies.

The Court continued to refine its affirmative action doctrines throughout the 1980s, 1990s, and early 2000s. In the 1989 case *City of Richmond v. J.A. Croson Co.*, it clearly established that affirmative action policies must satisfy strict scrutiny.[102] In *Adarand Constructors v. Peña*, it clarified that strict scrutiny applies regardless of whether an affirmative action program is federal, state, or local.[103] In *Grutter v. Bollinger*, it held that public universities have a compelling governmental interest in obtaining a diverse student body, and it upheld a race-conscious admissions policy that was narrowly tailored to promote that interest.[104] And in *Gratz v. Bollinger* (decided the same day as *Grutter*), the Court noted that while universities could consider race while contemplating "*each* characteristic of a particular applicant," they could not "automatically distribute[] 20 points to every

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101. *Id.* at 314.

102. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–500 (1989) (striking down a city plan that required city construction contractors to give at least thirty percent of subcontracts to minority businesses). In *Korematsu v. United States*, the Court had held that *harmful* racial classifications were subject to strict scrutiny. 323 U.S. 214, 216 (1944) ("[A]ll 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."). Until *Croson*, though, the Court had not firmly established whether the same strict scrutiny also applied to policies and programs *benefitting* racial minorities. *See* DALE, *supra* note 86, at 4. In *Croson*, the Court held that strict scrutiny applies whenever a program or law draws race-based classifications. "There is simply no way," the Court explained,

> of determining what [racial] classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. . . . [S]trict scrutiny is [necessary] to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool . . . [and to] ensure[] that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Croson, 488 U.S. at 493.

103. Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (applying strict scrutiny to a program that incentivized contracts with minority-owned small businesses).

104. Grutter v. Bollinger, 539 U.S. 306, 328 (2003) ("Today, we hold that the Law School has a compelling interest in attaining a diverse student body."); Gratz v. Bollinger, 539 U.S. 244, 275.

single applicant from an 'underrepresented minority group.'"[105] The Court affirmed both *Grutter* and *Gratz* in *Fisher v. University of Texas* (2015), holding that the University of Texas could, under strict scrutiny, use race as a factor in its admissions decision.[106] And then, in *Students for Fair Admissions v. President and Fellows of Harvard College*,[107] it held that race-based admissions policies at Harvard and UNC violated the Fourteenth Amendment's Equal Protection Clause.[108]

In short, affirmative action programs have been part of America's policy and legal landscape at least since Reconstruction. But over time, the Court has moved from endorsement (pre-*Bakke*), to caution (*Bakke*, *Croson*, and *Adarand*), to conditional endorsement (*Grutter*, *Gratz*, and *Fisher*), to disapproval (*SFFA*). In the following sections, I consider how the Court's exceptionalism has shaped this trajectory.

III. EXCEPTIONALISM IN AFFIRMATIVE ACTION JURISPRUDENCE

Though affirmative action laws and policies date back to at least the 1860s, the Supreme Court did not squarely address the constitutionality of race-based preferences until nearly 100 years after Reconstruction. Its first true affirmative action decision came in the 1978 case *Regents of the University*

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105. *Gratz*, 539 U.S. at 275 (invalidating a race-based admissions policy that automatically awarded points to applicants to underrepresented minorities). The *Gratz* Court concluded that the automatic-bonus admissions system failed strict scrutiny's second prong because it was "not narrowly tailored to achieve respondents' asserted compelling interest in diversity." *Id.* at 275. Because of that, the Court did not explicitly reference or endorse *Grutter*'s holding that racial diversity is a compelling governmental interest. *Id.*

106. Fisher v. Univ. of Tex., 570 U.S. 297, 314–15 (2013).

107. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

108. Some commentators have argued that *SFFA* ended affirmative action. *See, e.g.*, Zach Montague, *Rejection of Affirmative Action Draws Strong Reactions From Right and Left*, N.Y. TIMES (June 29, 2023), https://www.nytimes.com/live/2023/06/29/us/affirmative-action-supreme-court (characterizing *SFFA* as "strik[ing] down race-conscious college admissions); Mark Walsh, *Supreme Court Ends Affirmative Action in College Admissions in Decision Watched by K-12*, EDUC. WK. (June 29, 2023), https://www.edweek.org/policy-politics/supreme-court-ends-affirmative-action-in-college-admissions-in-decision-watched-by-k-12/2023/06 [https://perma.cc/RYG5-FDBG] ("The U.S. Supreme Court on Thursday struck down affirmative action in college admissions."). But as others have noted, the actual holding in *SFFA* was narrower than it may seem. *See, e.g.*, Jonathan Feingold, *After SFFA v. Harvard, Universities Must Hold the Line*, OXFORD HUM. RTS. HUB (Aug. 10, 2023), https://ohrh.law.ox.ac.uk/after-sffa-v-harvard-universities-must-hold-the-line [https://perma.cc/KN5U-ZEZ6] (describing "the decision's surprisingly narrow scope" and explaining how universities may still consider race in admissions policies and other institutional decisions).

of California v. Bakke.[109] Since then, the Court has heard at least twenty-eight cases[110] involving challenges to policies that grant race-based privileges. Most of these cases have arisen in one of two contexts: university admissions or government contracting.

In this Part, I use close reading and discourse analysis to consider whether and how American exceptionalism has shaped this case law. I focus my efforts on five of the Court's most prominent and pivotal decisions. The first, *Bakke*, involved a challenge to a university admissions policy.[111] It established that racial preferences do not necessarily offend the Constitution but held that strict racial quotas are impermissible.[112] The second, *City of Richmond v. J.A. Croson*, involved a challenge to a racial set-aside for government contracts.[113] It struck down the set-aside and established that all race-based preferences must satisfy strict scrutiny.[114] The third, *Grutter v. Bollinger*, upheld the use of race as a factor in a university's holistic admissions review.[115] The fourth, *Fisher v. University of Texas*, did the same.[116] And *SFFA*, the Court's most recent affirmative action decision, struck down two race-conscious admissions policies and severely cabined the use of race in university admissions.[117]

My analysis reveals that the Court generally uses aspirational exceptionalism when affirming or upholding race-based preferences. But in cases that reject or restrict affirmative action programs, the Court prefers the accomplished mode instead. These patterns suggest that exceptionalism may affect the Court's substantive legal analysis: The justices' preference for affirmative or accomplished exceptionalism, it seems, primes them to apply the law in predictable ways.

My analysis also shows that the *SFFA* majority departed from exceptionalist precedent in a surprising and unexpected way. Unlike previous Courts, which opposed affirmative action using accomplished exceptionalist rhetoric, the *SFFA* majority did not opine in either aspirational or

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109. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

110. For a comprehensive list of the Court's affirmative action decisions, see *Cases – Affirmative Action*, OYEZ, https://www.oyez.org/issues/155 [https://perma.cc/SVN2-EZ7V].

111. *Bakke*, 438 U.S. 265.

112. *Id.* at 289.

113. City of Richmond v. J.A. Croson, 488 U.S. 469 (1989).

114. *Id.* at 507–08.

115. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

116. Fisher v. Univ. of Tex., 570 U.S. 297, 314–15 (2013).

117. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230–31 (2023). For different readings of the scope and implications of the *SFFA* decision, see *supra* note 108 and accompanying text.

accomplished terms. Instead, it invoked and rejected tropes and features of *both* exceptionalist modes and, in doing so, pioneered a new mode of exceptionalism. In this Part, I describe the rhetorical features of the *SFFA* Court's novel exceptionalist outlook. In the next Part, I discuss the implications and significance of its new exceptionalist mode.

A. Regents of the University of California v. Bakke *(1978)*

In the early 1970s, the Medical School at the University of California at Davis developed a special admissions program to increase the number of disadvantaged and minority students in its entering classes.[118] Under the Medical School's regular admissions program, applicants who did not have at least a 2.5 GPA were automatically rejected.[119] The remaining applicants were admitted based on a "benchmark score"—a numerical ranking calculated using applicants' interviews, GPA, MCAT scores, letters of recommendation, and extracurricular activities.[120] Under the special admissions program, applicants could indicate on their application forms whether they were "economically and/or educationally disadvantaged" or members of a "minority group."[121] If they so indicated, the applicants' files were passed to a special committee, which assigned a separate benchmark score and made admission recommendations.[122] Applicants who applied under the special program were not compared against general applicants, and they did not have to satisfy the 2.5 minimum GPA requirement.[123]

The Medical School reserved sixteen seats in each incoming class for special-program applicants, and it accepted the special committee's admissions recommendations until it filled that quota.[124] Between 1971 and 1974, the Medical School admitted sixty-three minority students under the special admissions program—nearly fifty percent more than the forty-four minority students it accepted under the general admissions program. During that same period, a number of white students also designated on their

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118. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 272 (1978).

119. *Id.* at 273.

120. *Id.* at 274.

121. The 1973 application form used the "economic disadvantage" language, whereas the 1974 application used "minority group." *Id.*

122. *Id.*

123. *Id.* at 275.

124. *See id.* at 476 n.6.

applications that they were "economically and/or educationally disadvantaged,"[125] but none of those students received an admissions offer.[126]

In 1973, Allan Bakke, a white male, applied to the Medical School under the general admissions program.[127] He received an interview and earned a benchmark score of 468 (out of a possible 500).[128] Though Bakke's application was strong—his interviewer described him as "a very desirable applicant"[129]—he was not admitted because his benchmark score fell just shy of the 470 required for general admission that year. Bakke also was not considered for a special admissions seat, even though the special committee had four vacancies when Bakke applied.[130]

In 1974, Bakke re-applied.[131] Again, he received a strong benchmark score: 549 out of 600.[132] Again, he was rejected.[133] That year, the Medical School admitted special-program applicants with lower benchmark scores and weaker admissions profiles than Bakke's.[134] But because Bakke's application was not strong enough compared to other general admissions candidates, he did not receive an offer.[135]

After his second rejection, Bakke filed a lawsuit against the University of California at Davis, arguing that the Medical School's special admissions program discriminated on the basis of race in violation of the Fourteenth Amendment's Equal Protection Clause.[136] The California Supreme Court held that the Medical School's admissions program was unconstitutional, enjoined the school from considering race in its admissions process, and directed the trial court to order Bakke's admission.[137] The Supreme Court

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125. *Id.* at 274.

126. In fact, the special admissions committee acknowledged that it did not consider "disadvantaged" special applicants who were not members of a designated minority group. *Id.* at 421 n.1.

127. *Id.* at 276.

128. *Id.*

129. *Id.*

130. Bakke applied late in the 1973 admissions cycle, and by the time the Medical School received his application, it was not admitting any general applicants who received a benchmark score below 470. *Id.*

131. *Id.* at 277.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 277–78. Bakke also alleged violations of the California Constitution and Title VI of the Civil Rights Act of 1964, but at the Supreme Court, he and the University of California at Davis focused exclusively on the Equal Protection issue. *Id.* at 271.

137. *Id.* at 272.

agreed that Bakke must be admitted, but reversed the California Supreme Court's decision that race may not be used in admissions decisions.[138]

The *Bakke* Court did not produce a majority opinion, and its analysis was deeply splintered. Although a majority of the Court thought that Bakke should be admitted to the Medical School, the Justices did not agree as to why. Four (Burger, Stewart, Rehnquist, and Stevens) believed Bakke should be admitted because the Medical School's admissions program violated Title VI.[139] One (Powell) believed Bakke should be admitted because the admissions program did not satisfy strict scrutiny and therefore violated the Fourteenth Amendment.[140] The Court also split on the issue of whether race-conscious admissions programs are constitutionally permissible generally. Four (Brennan, White, Marshall, and Blackmun) argued that race-conscious admissions programs are constitutionally permissible.[141] Four (Stevens, Burger, Stewart, and Rehnquist) did not reach the constitutional question because they determined that such admissions programs are squarely prohibited by Title VI.[142] And one (Powell) "supported the general principle that race-conscious affirmative action programs do not violate the [F]ourteenth [A]mendment or Title VI" but held that "the University of California's use of a fixed number of separate minority admissions was impermissible."[143]

These messy and conflicting opinions disagreed about the applicable law and relevant standards. But together, they established that (1) all racial classifications, including those that benefit minorities, should be subject to some form of heightened scrutiny,[144] (2) ethnic and racial diversity is "one element in a range of factors a university may properly consider in attaining the goal of a heterogeneous body,"[145] and (3) strict racial quotas are

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138. *Id.* at 320.

139. *Id.* at 412.

140. *Id.* at 319–20 (holding that the admissions program was not narrowly tailored to achieve a compelling governmental interest).

141. *Id.* at 325.

142. *Id.* at 411 ("It is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate . . . .").

143. Robert A. Bohrer, *Bakke, Weber, and Fullilove: Benign Discrimination and Congressional Power To Enforce the Fourteenth Amendment*, 56 IND. L.J. 473, 506 (1981); *see also Bakke*, 438 U.S. at 301–04.

144. *Bakke*, 438 U.S. at 291 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."); *id.* at 359 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (suggesting that remedial racial classifications should be subject to intermediate scrutiny).

145. *Id.* at 314.

constitutionally impermissible.[146] Ultimately, then, the Court ruled both for and against the Medical School: against because it held that the School's racial quota was impermissible, but for because it held that the School *could* use race in admissions if it did so in a more narrowly tailored way.

Because some members of the Court would have resolved Bakke's appeal under Title VI, only five Justices (Powell, Brennan, White, Marshall, and Blackmun) considered the constitutional issue of whether race-based admissions are permissible under the Fourteenth Amendment.[147] Interestingly, these five Justices fell on different ends of the ideological spectrum: Two (Marshall and Brennan) had solidly left-of-center Martin-Quinn scores,[148] two (White and Blackmun) had relatively centrist scores,[149] and one was right-of-center (Powell).[150] But despite their diverse ideological views, all five Justices assessed the constitutionality of race-based admissions through an aspirational exceptionalist lens.

This aspirational perspective is evident in their candid and honest discussion of history. Throughout their opinions, Justices Powell, Brennan, White, Marshall, and Blackmun squarely confront America's "habit of discrimination."[151] They do not celebrate America's founding principles of liberty and equality but instead emphasize that "the Framers of our Constitution . . . openly compromised [the] principle of equality with its antithesis: slavery."[152] And instead of praising the Constitution, as an accomplished exceptionalist might, they lament that the original, unamended Constitution made "protection of slavery . . . explicit . . . [by treating] a slave as . . . equivalent to three-fifths of a person."[153] The Justices emphasize the ways "individual States . . . established the machinery to protect the system of slavery through the promulgation of the Slave Codes."[154] They also note, with regret, that even after the Civil War, emancipated slaves "did not [enjoy] citizenship or equality in any meaningful way."[155]

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146. *Id.* at 315, 320.

147. *See id.* at 411–12, 421.

148. For the 1978 term, Marshall's estimated Martin-Quinn score is -3.053 and Brennan's is -2.571. *See Measures*, *supra* note 19 (under "THE 2021 JUSTICE DATA FILES").

149. White's 1978 score is -0.054. *Id.* Blackmun's is 0.145. *Id.*

150. Powell's score is 0.828. *Id.*

151. *Bakke*, 438 U.S. at 371 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

152. *Id.* at 326.

153. *Id.* at 389 (Marshall, J., concurring in part).

154. *Id.*

155. *Id.* at 390.

The Justices also willingly acknowledge the ways the government (including the Court) has contributed to America's racial woes—how "[t]he combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War."[156] The Justices also suggest that even the seemingly-triumphant moments in America's struggle with racism—the moments when the Court and the government *tried* to act—were not, in fact, great victories. The Fourteenth Amendment promised equal protection, but it "was early turned against those whom it was intended to set free, condemning them to a 'separate but equal' status before the law."[157] And even after cases like *Brown v. Board of Education*, "inequality was not eliminated with 'all deliberate speed,'" and courts "were forced to remind school boards of their obligation to eliminate racial discrimination root and branch."[158]

In short, the Justices do not describe a history of freedom and equality but rather a "cultural tradition of race prejudice cultivated by centuries of legal slavery and segregation."[159] They also suggest that that same cultural tradition persists into the present. Justice Marshall, for instance, candidly acknowledges that "[m]easured by any benchmark of comfort or achievement, meaningful equality *remains* a distant dream for the Negro."[160] He cites statistics showing that Black Americans have lower household incomes, shorter life expectancies, and fewer work opportunities than white Americans.[161] He also laments that "a glance at our docket and at dockets of lower courts will show that *even today* officially sanctioned discrimination is not a thing of the past."[162] Marshall uses present perfect—a verb tense used to describe past actions that continue into the present—to claim that "[t]he

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156. *Id.*; *see also id.* at 401 ("[H]ad the Court been willing in 1896, in *Plessy v. Ferguson*, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978.").

157. *Id.* at 326 (Brennan, White, Marshall, and Blackmun, J.J., concurring in part and dissenting in part).

158. *Id.* at 327; *see also id.* at 403 (Blackmun, J., concurring in part) (expressing "earnest hope that the time will come when an 'affirmative action' program is unnecessary," but lamenting that "the story of *Brown v. Board of Education*, decided almost a quarter of a century ago, suggests that that hope is a slim one" (citation omitted)); *id.* at 394 (Marshall, J., concurring in part) (noting that "decisions [like *Brown* and *Sweatt v. Painter*] did not automatically end segregation, nor did they move Negroes from a position of legal inferiority to one of equality" because "[t]he legacy of years of slavery and . . . second-class citizenship . . . could not be so easily eliminated").

159. *Id.* at 371 (Brennan, White, Marshall, and Blackmun, J.J., concurring in part and dissenting in part).

160. *Id.* at 395 (Marshall, J., concurring in part) (emphasis added).

161. *Id.*

162. *Id.* at 327 (Brennan, White, Marshall, and Blackmun, J.J., concurring in part and dissenting in part) (emphasis added).

dream of America as the great melting pot *has not been realized* for the Negro . . . because . . . he never even made it into the pot."[163] Justice Brennan similarly acknowledges that "many 'created equal' have been treated *within our lifetimes* as inferior both by the law and by their fellow citizens."[164]

In true aspirational fashion, the Justices suggest that "candor requires"[165] them to account for these "ugly feature[s] of history."[166] They also transparently admit that their honest account of history affects their legal analyses. Justice Marshall, for instance, cites his aspirational view of history to defend his conclusion that "a university [may] consider the race of an applicant in making admissions decisions":[167] "I do not believe," he writes, "that anyone can *truly* look into America's past and still find that a remedy for the effects of that past is impermissible."[168] Justice Powell likewise cites America's "lengthy and tragic history" of racism to explain why race-based classifications should be subject to strict scrutiny when gender classifications are not.[169] (Racial classifications, he argues, have a sordid history "that gender-based classifications do not share.")[170]

In short, the Justices' aspirational orientation toward history informs their approach to the substantive legal issues in the case. Because America has a "legacy of slavery and racial discrimination," the Justices insist that *all* racial classifications—even those that benefit minorities—must be subject to heightened scrutiny.[171] And because they recognize that "the racism of our society has been . . . pervasive,"[172] they believe "we now must permit the institutions of this society to give consideration to race in making decisions about who will hold . . . positions of influence, affluence, and prestige."[173]

The *Bakke* Court also reveals its aspirational orientation through its caustic, critical tone. The Justices boldly condemn early American colonists,

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163. *Id.* at 400–01 (Marshall, J., concurring in part) (emphasis added).

164. *Id.* at 327 (Brennan, White, Marshall, and Blackmun, J.J., concurring in part and dissenting in part) (emphasis added).

165. *Id.* at 326.

166. *Id.* at 403 (Blackmun, J., concurring in part).

167. *Id.* at 387 (Marshall, J., concurring in part).

168. *Id.* at 402 (emphasis added).

169. *Id.* at 303 (opinion of Powell, J.).

170. *Id.*

171. *Id.* at 294 (suggesting that strict scrutiny should apply); *id.* at 359 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (suggesting that remedial racial classifications should be subject to intermediate scrutiny).

172. *Id.* at 400 (Marshall, J., concurring in part)*; see also id.* at 395 ("The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment.").

173. *Id.* at 401.

explaining that even as the colonists "embarked on a course to secure their own freedom and equality, they ensured perpetuation of [a] system that deprived a whole race of those rights."[174] They lambast the early settlers' slaveholding practices, which "brutalized and dehumanized both master and slave."[175] They even criticize the Constitution, because it treated slaves as partial persons,[176] legalized the migration and importation of slaves,[177] and provided that escaped slaves must be returned to their masters.[178] For the aspirational *Bakke* Court, nothing—not history, not the framers, not even the Constitution itself—is too sacred to criticize. On the contrary, even the Nation's most revered and honored artifacts are the objects of scathing aspirational critique.

Finally, the Justices demonstrate their aspirational commitments through a contingent, future-oriented outlook. The Justices express "earnest hope that the time will come when an 'affirmative action' program is unnecessary and is, in truth, only a relic of the past."[179] They also profess faith that America "will reach a stage of maturity where action along this line is no longer necessary" and when "discrimination . . . will be an ugly feature of history that is instructive but that is behind us."[180] But notwithstanding this hope, the Justices do not think a discrimination-free future is America's only, inevitable destiny. Instead, they present this vision as a possibility contingent on the Court's (and America's) willingness to make broad, difficult changes. Justice Powell, for instance, acknowledges that the Court "has embarked upon the crucial mission of interpreting the Equal Protection Clause . . . [to] confront[] a legacy of slavery and racial discrimination."[181] But because America has not yet overcome its racist history, Justice Powell insists that "claims that law must be 'color-blind' or that the datum of race is no longer relevant to public policy must be seen as *aspiration* rather than as description of reality."[182] Justice Marshall likewise warns that America's potential for perfection is contingent on its choices and actions. "*If* we are ever to become

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174. *Id.* at 388–89.

175. *Id.* at 388.

176. *Id.* at 389; *see* U.S. CONST. art. I, § 2, cl. 3.

177. *Bakke*, 438 U.S. at 389 (Marshall, J., concurring in part); *see* U.S. CONST. art. I, § 9, cl. 1.

178. *Bakke*, 438 U.S. at 389 (Marshall, J., concurring in part); *see* U.S. CONST. art. IV, § 2, cl. 3.

179. *Bakke*, 438 U.S. at 403 (Blackmun, J., concurring in part).

180. *Id.*

181. *Id.* at 293–94 (opinion of Powell, J.).

182. *Id.* at 327 (Brennan, White, Marshall, and Blackmun, J.J., concurring in part and dissenting in part) (emphasis added).

a fully integrated society," Marshall explains, "we must be willing to take steps to open those doors."[183] But "[t]o fail to do so," Marshall warns, "is to ensure that America will forever remain a divided society."[184]

Though the *Bakke* Court's analysis is splintered and fractured, a clear, aspirational exceptionalist thread runs throughout. The Justices disagree about whether and to what extent the Constitution permits race-based classifications, and the five who reach the constitutional question have diverse ideological views. But all five adopt a candid, honest orientation toward history. They all use bold, caustic criticism to condemn America's flaws. They all acknowledge the factions and fissures that divide American society. And they all express a firm—but contingent—faith in America's exceptional potential.

This aspirational exceptionalism seems to function analytically, and not just rhetorically. Because the Justices who approve the use of race-based classifications are liberals and conservatives alike, ideology or judicial philosophy cannot be the primary factors driving their analyses. It seems possible, then, that their views on exceptionalism shape their approach to the legal issues in the case. Because they are candid and critical about America's history of racial discrimination, the Justices insist that all racial classifications must be subject to the strictest judicial scrutiny. And because they believe that America's potential for excellence is dependent on persistent, ongoing remedial efforts, they accept that universities may constitutionally use race as a factor in admissions decisions. In short, the *Bakke* Court's aspirational exceptionalism not only provides rhetorical support for the Justices' analyses; it might even dictate them.

B. City of Richmond v. J.A. Croson Co. *(1988)*

Ten years after *Bakke*, the Supreme Court assessed the constitutionality of race-based preferences in a different context: government contracting. *City of Richmond v. J.A. Croson Company* involved a challenge to Richmond, Virginia's "Minority Business Utilization Plan"—a city ordinance that required any city prime contractor to subcontract at least thirty percent of its contract dollars to Minority Business Enterprises ("MBE"s).[185] Richmond adopted the ordinance in part because of a study showing that minority businesses received a disproportionately low number of the city's prime

183. *Id.* at 401–02 (Marshall, J., concurring in part) (emphasis added).
184. *Id.* at 396.
185. 488 U.S. 469, 477 (1989); RICHMOND, VA., CITY CODE § 12-156(a) (1985).

contracts.[186] The ordinance was designed to remediate this discrepancy, and it explicitly stated that it was meant "for the purpose of promoting wider participation by minority business enterprises in the construction of public projects."[187]

The Richmond ordinance defined eligible MBEs as any businesses—whether in Richmond or elsewhere—that were majority-owned by "citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."[188] It exempted prime contractors from its requirements only if the contractor could demonstrate "that every feasible attempt ha[d] been made to comply," and "that sufficient, relevant, qualified Minority Business Enterprises . . . [were] unavailable or unwilling to participate in the contract to enable meeting the 30% MBE goal."[189] The ordinance also required prime-contract bidders to submit the names of the MBEs they would use if they won the contract as part of the bidding process.[190]

In fall of 1983, J.A. Croson Company ("Croson") bid on a contract to install plumbing fixtures at the Richmond City jail.[191] Before submitting its bid, Croson contacted several MBEs about supplying the required fixtures, but none wanted the job.[192] Eventually, a local MBE called Continental Metal Hose ("Continental") agreed to participate, but it was unable to obtain a quote for the required fixtures before Croson's bidding deadline.[193]

Because Croson did not have a quote from Continental when it submitted its bid, Croson also submitted a request for an exemption, explaining that the MBEs it had contacted were unresponsive and/or "unqualified."[194] Shortly after, Continental obtained a quote for the required fixtures, but the quote was significantly higher than what Croson had included in its city bid.[195] Continental contacted the City to explain that it was willing to supply the

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186. The study "indicated that, while the general population of Richmond was 50% black, only 0.67% of the city's prime construction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983. It was also established that a variety of contractors' associations, whose representatives appeared in opposition to the ordinance, had virtually no minority businesses within their membership." *Id.* at 479–80.

187. *Id.* at 478 (quoting RICHMOND, VA., CITY CODE § 12-158(a) (1985)).

188. *Id.* (quoting RICHMOND, VA., CITY CODE § 12-23 (1985)).

189. *Id.* at 478–79 (quoting RICHMOND, VA., CITY CODE § 12-157(d) (1985)).

190. *Id.* at 479.

191. *Id.* at 481.

192. *Id.* at 482.

193. *Id.*

194. *Id.*

195. *Id.* Continental's bid would have raised the total project cost by more than seven thousand dollars. *Id.* at 483.

fixtures in Croson's bid.[196] Because of this, the City denied Croson's waiver request and directed Croson that it had ten days to submit a list of the MBEs it would use if it were awarded the contract.[197]

Croson responded with a letter explaining why it could not use Continental: Continental's bid would significantly raise the cost of the project and was subject to credit approval.[198] Croson also requested permission to raise the price of its bid.[199] The City denied the request, denied the exemption, and informed Croson that, although Croson had been the sole bidder on the project, the City would be seeking new bids.[200]

Croson sued the City, arguing that the thirty percent set-aside requirement "promote[d] discrimination based on race" in violation of the Fourteenth Amendment's Equal Protection Clause.[201] The Fourth Circuit agreed and invalidated the ordinance.[202] The Supreme Court affirmed the Fourth Circuit's decision, holding that the ordinance failed both prongs of strict scrutiny and was therefore unconstitutional under the Fourteenth Amendment's Equal Protection Clause.[203]

Unlike *Bakke*, which bears the tropes of aspirational exceptionalism, the *Croson* majority opinion is distinctly accomplished. This accomplished perspective is evident in the majority's discussion (or lack thereof) of America's problems and past. Whereas the *Bakke* plurality candidly described America's "habit of discrimination,"[204] the *Croson* Court spends little time discussing the country's struggles with inequality and racial hostility. In fact, in several places, it denies that any such struggles exist. The

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196. *Id.* at 483.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. J.A. Croson Co. v. City of Richmond, 779 F.2d 181, 186 (4th Cir. 1985).

202. Initially, both the District Court and the Fourth Circuit upheld the City's plan. *See* J.A. Croson Co. v. City of Richmond, 84-0021-R (E.D. Va. 1984); J.A. Croson Co. v. City of Richmond, 779 F.2d 181, 186 (4th Cir. 1985). While the case was pending in the Supreme Court, however, the Court issued a decision that clarified the standard of review. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 268, 274 (1986) (holding that "[s]ocietal discrimination, without more, is too amorphous a basis for . . . imposing a racially classified remedy," and that remedial racial classifications are only permissible with "some showing of prior discrimination *by the governmental unit involved*" (emphasis added)). The Court thus vacated and remanded "for further consideration in light of *Wygant*." J.A. Croson Co. v. City of Richmond, 478 U.S. 1016 (1986). On remand, the Fourth Circuit invalidated the Richmond ordinance. J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1356 (4th Cir. 1987).

203. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989).

204. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 371 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

Court insists, for example, that "[t]here is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry."[205] It also dismisses Richmond's argument "that white prime contractors . . . will not hire minority firms" as an "unsupported assumption."[206] The Court accuses the dissenters of using evidence that "does little to define the scope of any injury to minority contractors in Richmond."[207] It also insists that "[t]here is *absolutely no evidence* of past discrimination against" non-black minority groups and that "none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry."[208]

In the rare moments when the Court *does* acknowledge America's troubled past, it intentionally downplays that history. Sometimes, the Court does this grammatically—by burying its description of racism in a prefatory, subordinate clause: "*While there is no doubt that the sorry history of . . . discrimination in this country has contributed to a lack of opportunities for black entrepreneurs* [subordinate clause], *this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts* [independent clause]."[209] Elsewhere, it does this by diluting problematic facts with descriptions of other positive or race-neutral phenomena. For example, the Court acknowledges the possibility of "the exclusion of blacks from skilled construction trade unions and training programs."[210] But immediately after, it lists a "host of nonracial factors which . . . [likewise] face a member of *any* racial group attempting to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record."[211] The Court also emphasizes the relatively privileged position of Blacks in Richmond, reminding that "blacks constitute approximately 50% of the population" and that "[f]ive of the nine seats on the city council are held by blacks."[212]

The Court also shows an accomplished exceptionalist aversion to criticism. Unlike aspirational exceptionalists, who believe that "candor

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205. *Croson*, 488 U.S. at 500.
206. *Id.* at 502.
207. *Id.* at 505.
208. *Id.* at 505–06.
209. *Id.* at 499 (emphasis added).
210. *Id.* at 498.
211. *Id.* at 498–99 (emphasis added).
212. *Id.* at 495.

requires"[213] criticism and critique, the *Croson* majority prefers a gentler, less cynical approach. For instance, when faced with statistics indicating a "disparity between the number of prime contracts awarded to minority firms and the minority population of . . . Richmond," the Court insists that "there are numerous explanations for the dearth of minority participation, including . . . both black and white career . . . choices."[214] The Court likewise reminds that "when special qualifications are required to fill particular jobs, comparisons to the general population . . . may have little probative value."[215] It boldly suggests that "[b]lacks may be disproportionately attracted to industries other than construction."[216] The Court could easily marshal Richmond's unfavorable contracting statistics to critique, condemn, or criticize the country, but instead it reads the data as generously and favorably as possible. It gives America's past and the present practices the benefit of every doubt, and instead of crediting Richmond's concerns, it repeatedly reminds the city that its "generalized assertion[s] . . . [of] past discrimination"[217] are "too amorphous a basis for imposing a racially classified remedy."[218]

Finally, the majority reveals its accomplished exceptionalism in its triumphant, victorious attitude. Because the Court repeatedly downplays America's past and present wrongs, it also believes that America has little need to improve or progress. Naturally, then, the Court does not see policies like Richmond's as "relief" (in fact, the Court puts that word in scare quotes), but rather as threats to America's already-accomplished excellence.[219] The Court makes this clear by warning that Richmond's set-aside "has no logical stopping point"[220]—something that is only concerning because the Court senses no problems in need of correction. The Court also worries that the policy could be used to "justify a preference of any size or duration"[221]—a feature that is only problematic because, in the Court's view, the battle has already been won. The Court's triumphant, accomplished attitude thus leads

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213. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 326 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

214. *Croson*, 488 U.S. at 501, 503.

215. *Id.* at 502 (quoting Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 309 n.13 (1977)).

216. *Id.* at 503.

217. *Id.* at 498.

218. *Id.* at 497. Elsewhere, the Court insists that evidence of discrimination in the national construction industry has "little probative value in establishing identified discrimination" in Richmond. *Id.* at 500.

219. *Id.* at 498.

220. *Id.* (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986)).

221. *Id.* at 505.

it to view Richmond's policy as a danger to the already-secured "dream of a Nation of equal citizens in a society where race is irrelevant."[222] If America had wrongs to correct, affirmative action's infinite aspirational potential would pose no threat. But because the country is already exceptional, the majority worries that affirmative action policies will usher in a dangerous era where racial equality "would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs."[223]

The majority's accomplished exceptionalism is evident in its rhetoric, but its accomplished outlook also shapes its legal analysis. Because the Court is reluctant to recognize America's past wrongs, it holds that Richmond "has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race."[224] And because it prefers to view America as "a Nation of equal citizens . . . where race is irrelevant to personal opportunity and achievement," it concludes that the thirty percent set-aside is not narrowly tailored to any compelling governmental end.[225] The majority does not accept Richmond's portrait of a racially imbalanced construction industry but instead insists there is "no evidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case."[226] It thus concludes that Richmond has "failed to identify the need for remedial action" and that "its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause."[227]

The dissenters recognize how the Court's accomplished exceptionalism affects its legal conclusions. Indeed, they lament that "[t]he majority's [accomplished] refusal to recognize [evidence of racial discrimination] infects its entire analysis of this case."[228] The dissenters thus reject both the majority's holding and its accomplished exceptionalist outlook, opting for an aspirational exceptionalist approach instead.

The dissenters' aspirational exceptionalism is immediately evident. In the first line of his opinion, Justice Marshall writes, "It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst."[229] Nearly every word of this simple opening sentence is laden with aspirational exceptionalist

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222. *Id.*
223. *Id.* at 506.
224. *Id.* at 505.
225. *Id.* at 505–06.
226. *Id.* at 510.
227. *Id.* at 511.
228. *Id.* at 530 (Marshall, J., dissenting).
229. *Id.* at 528.

meaning. Marshall's mention of "racial progress" communicates his aspirational exceptionalist belief that America has something to progress *from*—i.e., that it has not yet achieved excellence—and that its progress is contingent and continuing. His deliberate decision to identify Richmond as "the former capital of the Confederacy" rather than use the city's proper name shows his eagerness to foreground and draw attention to America's difficult, flawed past. And his present-tense description of "the effects of racial discrimination in [Richmond's] midst" shows that, like all aspirational exceptionalists, Marshall will identify and critique the country's present flaws, as well. Marshall could have opened his opinion differently—like the majority, he could have begun with a description of the legal issue or the standard of review.[230] That he instead opts for a thoroughly aspirational introduction sends an unmistakable message: His exceptionalism is different than the majority's, and his exceptionalism will shape his reading of the case.

The aspirational perspective that colors Marshall's opening line informs every aspect of his dissent. It is particularly evident in Marshall's attention to America's past and present flaws. Unlike the majority, which is reluctant to engage with America's troubled history, Marshall eagerly highlights evidence of past discrimination. Indeed, Marshall spends at least fourteen pages of his thirty-three-page dissent describing the "rich trove"[231] of "abundant evidence"[232] that "discrimination in the Nation's construction industry had seriously impaired the competitive position of businesses owned or controlled by members of minority groups."[233] Marshall candidly describes Richmond's history of "acts of discrimination, including, but not limited to, the deliberate diminution of black residents' voting rights, resistance to school desegregation, and publicly sanctioned housing discrimination."[234] He highlights evidence of "the exclusionary history of the local construction industry."[235] He laments "the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society."[236] He also emphasizes

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230. The majority's opening line reads, "In this case, we confront once again the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society." *Id.* at 476–77 (majority opinion).

231. *Id.* at 530 (Marshall, J., dissenting).

232. *Id.* at 532.

233. *Id.* at 530. Marshall's description of America's flaws is thoroughgoing, but it is particularly prominent on pages 530–35 and 540–49 of his opinion.

234. *Id.* at 544.

235. *Id.* at 534.

236. *Id.* at 552.

that "not a single person who testified before the city council denied that discrimination in Richmond's construction industry had been widespread."[237] The accomplished majority eagerly downplayed or dismissed this same data. Marshall, by contrast, uses an aspirational exceptionalist spotlight to search it out and expose it.

Marshall also reveals his aspirational exceptionalism by condemning the majority's selective, uncritical approach. According to Marshall, "the majority[] tellingly"—and intentionally—"elides" the fact that "[t]he members of the Richmond City Council were well aware of . . . exhaustive" evidence of racism and discrimination.[238] Marshall also accuses the majority of "downplay[ing]"[239] proof of discrimination in the construction industry, "clos[ing] its eyes to [the] constitutional history and social reality" of racial inequality,[240] and generally "tak[ing] an exceedingly myopic view."[241] For Marshall, who eagerly and voluntarily wrestles with America's weaknesses, "the majority's critique shows an unwillingness to come to grips with why construction-contracting in Richmond is essentially a whites-only enterprise."[242] The majority's accomplished orientation prevented it from "com[ing] to grips" with that unpleasant reality.[243] But if the Court had truly *seen* the facts—if it had "view[ed] Richmond's local evidence of discrimination against the backdrop of systematic nationwide racial discrimination"—the "case [would have been] readily"—and differently—"resolved."[244]

In addition to exposing America's flaws—and critiquing the majority for neglecting them—Marshall also adopts the aspirational mode's caustic, harsh tone. He describes Richmond's history of racial discrimination as "disgraceful"[245] and "sordid."[246] He condemns the City's "long years [of]

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237. *Id.* at 534–35.
238. *Id.* at 533–34.
239. *Id.* at 530.
240. *Id.* at 558.
241. *Id.* at 530.
242. *Id.* at 541.
243. *Id.*
244. *Id.* at 535.
245. *Id.* at 529 ("I find deep irony in second-guessing Richmond's judgment on this point. As much as any municipality in the United States, Richmond knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city's disgraceful history of public and private racial discrimination."); *see also id.* at 544 ("Numerous decisions of federal courts chronicle this disgraceful recent history.").
246. *Id.* at 545 ("The sordid history of Virginia's, and Richmond's attempts to circumvent, defeat, and nullify the holding of *Brown I* has been recorded in the opinions of this and other

multifarious acts of discrimination."[247] He intentionally uses words that connote pathology, illness, and disease: Richmond has been "infected"[248] with "pervasive" inequality that "scar[s] our society."[249] And his descriptions of Richmond—"apartheid of the races"[250] and "ghetto patterns"[251]—suggest the City is comparable to the world's most blatantly racist and evil regimes. The accomplished majority shies away from rhetoric of this sort, favoring neutral, optimistic descriptors instead. Marshall, by contrast, embraces aspirational exceptionalism's caustic tone and uses strong, biting language to communicate his criticisms.

Marshall also refuses to give Richmond's white population the benefit of any doubt. The accomplished majority goes out of its way to interpret data and statistics in the most generous light possible: It notes the statistical discrepancy between Richmond's population and its contracting numbers, but it offers benign explanations for why minorities are so underrepresented in contracting.[252] Marshall, by contrast, interprets the statistical disparity as "proof . . . that minority-owned businesses have received virtually no city contracting dollars" and that "discrimination has been widespread in the local construction industry."[253] Marshall also lambasts the majority's "disingenuous approach of . . . concluding that no *single* piece of evidence . . . , 'standing alone,' suffices to prove past discrimination," because "items of evidence do not, of course, 'stan[d] alone' or exist in alien juxtaposition."[254] Marshall condemns the majority for "trivializ[ing] . . . the testimony of Richmond's leaders."[255] And where the accomplished majority downplays the disparity between white and minority contracts,[256] Marshall goes out of his way to stress it, emphasizing that "[t]here are roughly equal numbers of minorities and nonminorities in Richmond—yet minority-owned businesses receive *one-seventy-fifth* of the public contracting funds."[257]

Finally, Marshall adopts the aspirational mode's contingent-yet-hopeful outlook. Unlike the majority, which "regards racial discrimination as largely

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courts, and need not be repeated in detail here." (quoting Bradley v. Sch. Bd. of Richmond, 462 F.2d 1058, 1075 (4th Cir. 1972) (Winter, J., dissenting))).

247. *Id.* at 544.
248. *Id.* at 546.
249. *Id.* at 552.
250. *Id.* at 545.
251. *Id.*
252. *See id.* at 501.
253. *Id.* at 529.
254. *Id.* at 541.
255. *Id.* at 543.
256. *Id.* at 530.
257. *Id.* at 542.

a phenomenon of the past," Marshall "do[es] not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges."[258] And whereas accomplished exceptionalism believes America's excellent future is always already assured, Marshall thinks it is never guaranteed. Marshall does not see progress as inevitable—in fact, he argues that the Court's decision "marks a deliberate and giant step backward."[259] He also thinks the Court has made it harder for America to reach its yet-unattained potential: "The majority's unnecessary pronouncements,"[260] he argues, may "scuttle" and "imperil" cities' "effort[s] to surmount [their] discriminatory past"[261] and "will inevitably discourage or prevent governmental entities . . . from acting to rectify the scourge of past discrimination."[262] If the accomplished majority thinks the Nation has achieved—or at least has come close to reaching—its "dream of a . . . society where race is irrelevant,"[263] Marshall and his fellow dissenters worry that "[t]he battle against pernicious racial discrimination or its effects is nowhere near won."[264] But they also express an aspirational hope that, with some concerted effort, the country may yet become exceptional: "[T]he Court today regresses," Justice Blackmun laments, "[but] I am confident . . . that, given time, it one day again will do its best to fulfill the great promises of the Constitution's Preamble and of the guarantees embodied in the Bill of Rights—a fulfillment that would make this Nation very special."[265]

The majority's accomplished exceptionalism informed its legal conclusions. The dissenters' aspirational perspective does the same. Because the dissenters recognize the prevalence and persistence of past discrimination, they would hold that Richmond has a compelling interest in eradicating that discrimination. And because they see America's excellence as contingent, fragile, and yet-unattained, they would recognize a second compelling interest—one the majority ignored—in "ensuring that the government does not reflect and reinforce . . . private discrimination" in its administration of future contracts.[266] Aspirational exceptionalism thus leads the dissenters to conclude that the set-aside satisfies strict scrutiny.

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258. *Id.* at 552.
259. *Id.* at 529.
260. *Id.*
261. *Id.* at 561.
262. *Id.* at 529.
263. *Id.* at 505 (majority opinion).
264. *Id.* at 561 (Marshall, J., dissenting).
265. *Id.* at 562 (Blackmun, J., dissenting).
266. *Id.* at 538 (Marshall, J., dissenting).

The dissenters' aspirational outlook also animates their call for a lower, more lenient standard of review. As explained above, the accomplished majority assesses Richmond's set-aside using strict scrutiny. The dissenters believe the majority does this because it "regards racial discrimination as largely a phenomenon of the past" and believes "government bodies need no longer preoccupy themselves with rectifying racial injustice."[267] The dissenters do not share this perspective. Because of this, they endorse a different standard of review. Informed by their aspiration beliefs that racism "continues to scar our society"[268] and that "the consideration of race is relevant to remedying [its] continuing effects,"[269] the dissenters argue that "racial classifications for remedial purposes . . . should not be subjected to conventional 'strict scrutiny.'"[270] Instead, they propose an intermediate standard of review—one that requires remedial classifications to be "substantially related" to "important governmental objectives"[271]—that would give the government more leeway "to rectify the scourge of past discrimination."[272]

C. Grutter v. Bollinger *(2003)*[273]

The Court returned to the issue of race-based admissions preferences in *Grutter v. Bollinger*. After the *Bakke* Court held that universities may use race as one factor in a holistic admissions review,[274] the University of Michigan's Law School ("the Law School") adopted an admissions policy that considered several "soft variables," including racial and ethnic diversity.[275] The Law School was candid that it hoped to include "groups which have been historically discriminated against," but it did not limit its

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267. *Id.* at 552.

268. *Id.*

269. *Id.* (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

270. *Id.*

271. *Id.* at 535.

272. *Id.* at 529.

273. A substantially similar version of this Section was originally published in Lucy Williams, *American Exceptionalism as/in Constitutional Interpretation*, 57 GA. L. REV. 1071, 1106–11 (2023) and is reprinted with permission.

274. As discussed in Section III.A, above, *Bakke* established that universities may use race as one factor in a holistic admissions review. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978) (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").

275. Grutter v. Bollinger, 539 U.S. 306, 315–16 (2003) (describing the Law School's admissions policy).

definition of diversity to "racial and ethnic status."[276] Instead, the Law School's policy 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."[277]

After learning that she had been rejected from the Law School, Barbara Grutter, a white student, filed a lawsuit challenging the Law School's admissions policy.[278] Her suit 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.[279] The district court issued an injunction to prevent the Law School from using race in its admissions decisions.[280] The Sixth Circuit reversed and vacated the injunction.[281] In a 5-4 decision, the Supreme Court affirmed the Sixth Circuit.[282]

Because the Law School's admissions policy involved a racial classification, the Court reviewed it using strict scrutiny.[283] In doing so, the Court emphasized the importance of the compelling governmental interest prong. 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. The Court granted certiorari to resolve that circuit split.[284]

The Court ultimately concluded that classroom diversity qualified as a compelling governmental interest.[285] In doing so, it adopted an aspirational exceptionalist orientation. This orientation is particularly evident in the majority's forward-looking and contingent outlook. Where accomplished exceptionalism would insist that America's greatness is certain and assured, the majority instead views America as a country that *might*—but also might not—become excellent. And because it adopts this contingent view, it is

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276. *Id.* at 316.
277. *Id.*
278. *Id.* at 316–17.
279. *Id.* at 317.
280. *Id.* at 321.
281. *Id.*
282. *Id.* at 343–44.
283. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978); *see also supra* text accompanying note 144.
284. *Grutter*, 539 U.S. at 322 ("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." (citation omitted)).
285. *Id.* at 343.

eager to identify resources that could help the country achieve its unfulfilled potential.

Racial diversity is one such resource. If America hopes to be excellent, the Court argues, it is critical that *all* citizens—regardless of race—be equipped with "the skills needed in today's increasingly global marketplace."[286] It is also crucial that the "path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[287] 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.[288] Indeed, without racial diversity, the country might not survive to see its exceptional future, because "a highly qualified, racially diverse officer corps . . . is essential to . . . national security."[289] In short, the majority's contingent, aspirational perspective prepares it to recognize a compelling governmental interest in racially diverse universities. In the Court's words, "*if* the dream of one Nation, indivisible, is to be realized," the "effective participation by members of all racial and ethnic groups . . . is essential."[290]

Justice Ginsburg (concurring) also believes diversity is a compelling governmental interest. And not surprisingly, she, too, adopts an aspirational exceptionalist perspective. This orientation is apparent from her candid acknowledgement of America's flaws. Ginsburg emphatically argues that "conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land."[291] She supports this assertion with statistical evidence of racial disparities in education. Ginsburg's 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."[292] It also shows that minority students "encounter markedly inadequate and unequal educational opportunities."[293] These statistics are uncomfortable, and they do not portray America in a favorable light. But Ginsburg's aspirational orientation compels acknowledgment of hard truths, and she presents this evidence candidly and unflinchingly.

The majority and Ginsburg also demonstrate their aspirational exceptionalism by expressing sincere hope in America's future. Though all

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286. *Id.* at 330.
287. *Id.* at 332.
288. *Id.* at 330.
289. *Id.* at 331.
290. *Id.* at 332 (emphasis added).
291. *Id.* at 345 (Ginsburg, J., concurring).
292. *Id.*
293. *Id.* at 346.

emphasize America's contingent and unattained greatness, both the majority and Justice Ginsburg believe that eventual excellence is possible. The majority articulates this hope by lauding the Law School's commitment to "terminate its race-conscious admissions program as soon as practicable."[294] "We expect," it opines optimistically, "that 25 years from now, the use of racial preferences will no longer be necessary."[295] Ginsburg likewise "hope[s], but [does] 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."[296] These optimistic predictions suggest that, despite their criticisms and contingent outlooks, both Ginsburg and the majority have faith in America's potential. They are not critical because they dislike America, but because they hope that bold admonition will help the country fulfill exceptional potential.

Justice Thomas concurs in the outcome, but he rejects the Court's conclusion that racial diversity qualifies as a compelling governmental interest.[297] His rationale is deeply accomplished. Though Thomas acknowledges racial inequality in America's universities, he does not dwell on the detail of that disparity. He also refuses to consider whether America's unequal educational institutions stem from broader social or historical injustices.[298] If the Law School struggles with racial equality, he reasons, it is because the Law School "of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially disproportionate results."[299] The problem, in other words, is not America's, but the university's. Justice Thomas's reluctance to explore more problematic possibilities is consistent with the accomplished mode's self-celebratory, amnesiac posture. If America is always, already great, then surely educational inequality stems from schools' elite preferences and not from any deeper social problems.

Thomas also demonstrates his accomplished exceptionalism by downplaying the issue of race entirely. Instead of asking whether racial diversity might serve compelling governmental interests, Thomas questions

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294. *Id.* at 343 (majority opinion).

295. *Id.*

296. *Id.* at 346 (Ginsburg, J., concurring).

297. *Id.* at 350–52 (Thomas, J., concurring in part). 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. Because their analyses are largely technical, they do not draw heavily on exceptionalist themes, and I do not discuss them here.

298. *Id.* at 350.

299. *Id.*

the Law School's sincerity.[300] He does not accept that the Law School adopted race-conscious admissions measures to promote equality.[301] Instead, he suggests that the Law School implemented affirmative action to further its *real* interest in "offering a marginally superior education while maintaining an elite institution."[302] This redirection has an accomplished flavor. To decide if promoting diversity qualifies as a compelling governmental interest, Thomas would have to conduct a hard, searching inquiry into America's history of racial discrimination. Such inquiry 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. Instead of addressing the thorny question of racial inequality, he reframes the case entirely. The *true* issue, he argues, is not race, but whether the University of Michigan has a compelling governmental interest in providing an elite legal education.[303] And that issue is easily resolved: There is no such compelling interest.

Finally, 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. Thomas adopts this posture. Instead of asking 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."[304] He also quotes Frederick Douglass (who, ironically, was himself an aspirational exceptionalist[305]) to argue that the best way to help African Americans is to "[d]o nothing with us!"[306] Thomas does not see a need for judicial intervention, because the Constitution will "mean[] the same thing today as it will in 300 months."[307] And because he believes things are already good enough, he believes that policies like the Law School's will only "harm . . . [their] test subjects."[308]

Thomas's accomplished outlook guides his substantive legal analysis. Because he prefers to avoid America's historical or present flaws, he naturally sees little need for remedial or corrective efforts. And because he thinks America has already achieved its exceptional potential, he does not believe the government has any compelling interest in promoting racial

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300. *Id.* at 355.
301. *Id.*
302. *Id.* at 356.
303. *Id.*
304. *Id.* at 350.
305. *See Blasting Reproach*, *supra* note 15, at 379–88.
306. *Grutter*, 539 U.S. at 349.
307. *Id.* at 351.
308. *Id.* at 373.

diversity. For the majority, the opposite is true. Unlike Thomas, the aspirational exceptionalist majority candidly confronts America's past and ongoing wrongs. It also thinks that America has work to do if it hopes to become excellent. These aspirational beliefs prepare the majority to recognize a compelling interest in racial diversity: If "the current reality" in America is one of deep-rooted disparity, and if America's excellence remains unobtained, then it is crucial that government take steps to promote diversity in its universities.

D. Fisher v. University of Texas at Austin *(2016)*

In 1996, the Fifth Circuit heard a challenge to the admissions policy at the University of Texas at Austin ("the University"). Up to that point, the University had given explicit preference to racial minorities in admissions decisions.[309] The Fifth Circuit held that this race-conscious admission policy was unconstitutional.[310] It also held that "the use of race to achieve a diverse student body . . . simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny"[311]—that is, that any race-based classification violates the Equal Protection Clause.

After the Fifth Circuit's decision, the University modified its admissions policy to consider student test scores, GPA, leadership, activities, and other "special characteristics," but to omit any consideration of race.[312] The Texas Legislature also passed legislation that guaranteed admission at a state university to any student who graduated in the top ten percent of their class (the "Top Ten Percent Law").[313]

When the Supreme Court held in *Grutter* that universities *may* consider race as part of a holistic review, the University again revised its admissions policy.[314] Under the new policy, the University filled seventy-five percent of its seats with students who qualified for admission under the Top Ten Percent Law.[315] It filled the remaining twenty-five percent using a holistic review process.[316] As the first step in this process, a group of specially trained readers assigned each applicant two scores. The first, the Academic Index ("AI"),

309. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

310. *Id.* at 962 (holding that "the University of Texas School of Law may not use race as a factor in deciding which applicants to admit").

311. *Id.* at 948.

312. Fisher v. Univ. of Tex. at Austin (*Fisher II*), 579 U.S. 365, 371 (2016).

313. TEX. EDUC. CODE ANN. § 51.803 (West 2023); *see Fisher II*, 579 U.S. at 371–72.

314. *Fisher II*, 579 U.S. at 372–73.

315. *Id.* at 373.

316. *Id.*

was based on the applicant's test scores and high school GPA.[317] The second, the Personal Achievement Index ("PAI"), reflected, among other things, applicants' socioeconomic status, language, family status, SAT score relative to the average SAT score at the students' high school, leadership experience, community service, and race.[318] Once PAI and AI scores had been assigned, a separate group of admissions officers set a PAI/AI cutoff and admitted any students whose scores exceeded that cutoff.[319]

The admissions officers who made final admissions decisions only knew applicants' raw PAI/AI scores; they did not know how those scores had been calculated. The University's final admissions decisions were thus race-blind: Though an applicant's race was a part of the PAI calculation, it was not something admissions officers knew or considered when deciding whether to admit an applicant. [320]

In 2008, Abigail Fisher, a white woman, applied for admission to the University.[321] She did not qualify for a seat under the Top Ten Percent Law, so her application went to holistic AI/PAI review.[322] Fisher was not admitted[323] and filed a lawsuit alleging that the use of race in the PAI calculation violated her rights under the Equal Protection Clause.[324]

The district court and Fifth Circuit ruled for the University, and Fisher appealed to the Supreme Court, which held that the Fifth Circuit had erroneously applied a good-faith standard to assess the University's policy.[325] The Supreme Court thus remanded, directing the Fifth Circuit to re-consider the case using the correct legal standard ("*Fisher I*").[326] On remand, the Fifth Circuit again ruled for the University, and Fisher again appealed.[327] In a 4-3 decision, the Supreme Court affirmed ("*Fisher II*").[328]

The majority's *Fisher II* opinion focuses primarily on the "narrow question before it: whether, drawing all reasonable inferences in her favor,

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317. *Id.* at 371, 373.

318. *Id.* at 371, 373–74.

319. *Id.* at 374.

320. In the Supreme Court's words, "Race enter[ed] the admissions process . . . at one stage and one stage only—the calculation of the PA[I]." *Id.*

321. Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. 297, 304 (2013).

322. *Id.* at 305–07.

323. *Id.*

324. *Id.*

325. *Id.* at 299; *Fisher II*, 579 U.S. at 375–76.

326. *Fisher I,* 570 U.S. at 314.

327. *Fisher II*, 579 U.S. at 388–89.

328. *Id.* The *Fisher II* Court had only eight members because Justice Gorsuch had not yet been confirmed. Justice Kagan recused herself because she had been involved with the case as Solicitor General.

[Ms. Fisher] has shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected."[329] To resolve this issue, the Court applies strict scrutiny, as *Croson*, *Bakke*, and *Grutter* require.[330] The resulting analysis is hyper-technical and hyper-legal. Unlike in *Bakke* and *Grutter*, the *Fisher II* Court does not say much about America's exceptional status, and it does not muse about the country's values, potential, or ideals. Instead, it simply considers whether the University has a compelling interest to justify its use of race and whether the race-based admissions process is necessary (narrowly tailored) to promote that interest.

But if the majority's opinion is not explicitly exceptionalist, it nonetheless bears the unmistakable hallmarks of an aspirational exceptionalist worldview. For instance, when addressing Fisher's claim that "the University has not articulated its compelling interest,"[331] the majority accepts the University's assertion that a racially diverse student body will help "destr[oy] stereotypes," "promot[e] cross-racial understanding," and "cultivat[e] a set of leaders with legitimacy in the eyes of the citizenry."[332] In doing so, the Court reveals its aspirational awareness of America's shortcomings—after all, if America had already triumphed over racism, as an accomplished exceptionalist might claim, there would be no need to destroy stereotypes to improve race relations. The Court also reveals its aspirational orientation by stating that "it remains an *enduring* challenge to . . . reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity."[333] An accomplished exceptionalist Court might have celebrated the country's progress toward exceptionalism, but for the aspirational *Fisher II* majority, the challenge is ongoing.

The majority also reveals its aspirational orientation through its contingent outlook. Though the majority acknowledges some progress—the University's holistic review has "had a meaningful, if still limited, effect on . . . diversity"[334]—it also recognizes that the Nation has not yet achieved its "constitutional promise."[335] And so, the majority urges public universities—and the Nation more broadly—to strike a "sensitive balance."[336] The Court urges that universities must "continue to . . . scrutinize

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329. *Id.* at 380.

330. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003).

331. *Fisher II*, 579 U.S. at 380.

332. *Id.* at 381–82.

333. *Id.* at 388 (emphasis added).

334. *Id.* at 384.

335. *Id.* at 388.

336. *Id.*

the fairness of [their policies]" and must "assess whether changing demographics have undermined the need for a race-conscious policy."[337] It also insists that institutions of higher learning must act as "laboratories for experimentation," and must fulfill their "ongoing obligation to engage in constant deliberation and continued reflection" about how to best promote equality and fairness.[338] In short, the country's work is contingent, fragile (or "sensitive," as the Court describes it), and ongoing—an unattained but attainable horizon that the Nation must consistently strive to meet.

Ultimately, it is strict scrutiny, not American exceptionalism, that animates the majority's analysis. But the Court still engages with exceptionalist themes, and it articulates its decision in an aspirational exceptionalist register. In places, it seems that this aspirational orientation affects the Court's substantive legal analysis: The Court seems to recognize the University's stated interests as compelling in part because it believes, aspirationally, that the flawed-but-perfectible country still has work to do.

But if nothing else, the Court's exceptionalism serves an important rhetorical function. The University's race-conscious policy is both progressive and aspirational: It seeks, through affirmative, proactive steps, to nudge America toward a future of racial equality. It is also, ultimately, a *policy*, and policy is an area where judges are reluctant to tread. The Court's decision to uphold the policy thus makes the Court particularly vulnerable to accusations of activism and overreach. And aspirational exceptionalism gives the Court a rhetorical tool to diffuse those concerns. Affirmative action programs may be inherently progressive, but if America is not yet where it can and should be, then the Court does not overstep by upholding a forward-looking program. And though policy is generally best left to other branches of government, the Court can—and perhaps must—step in when those branches repeatedly fail to act. Acknowledging America's past failures and identifying its potential for future growth thus softens and contextualizes the Court's decision.

From an exceptionalist perspective, Justice Alito's dissenting opinion is more surprising. Alito firmly believes that the University's affirmative action policy is unconstitutional. But surprisingly, he, too, seems to adopt an aspirational exceptionalist orientation. Unlike the dissenters in *Grutter*, who downplayed the need for remedial racial action, Alito is aspirationally attentive to America's history of racial injustice. He seems to share the majority's concerns about persistent racial discrimination and inequality. But

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337. *Id.*
338. *Id.*

while the majority's aspirational outlook led it to endorse the University's program, Alito's aspirational perspective leads him to apply strict scrutiny rigorously. Because America has had problems with racial inequality in the past, and because those problems continue to infect the present, Alito believes the Court must carefully scrutinize *all* racial classifications—even those ostensibly intended to secure a more equal, exceptional future. And because the University's racial classification system cannot survive this heightened scrutiny, it is necessarily unconstitutional.

Because he is an ideological conservative, and because he ultimately votes against the University's policy, one might expect Alito to adopt the accomplished mode's rosy, self-celebratory view of the past. Instead, his account of history is deeply aspirational—attentive to the many ways the country and the Court have fallen short. Alito acknowledges America's painful racial past by condemning *Plessy v. Ferguson*—one of the Court's most notorious decisions on race.[339] He also cites at least eight precedent cases that emphasize the "moral imperative of racial neutrality."[340] Among these are *Hirabayashi v. United States* and other cases where the Court (in)famously addressed the constitutionality of racially discriminatory policies. By citing these cases and endorsing their holdings, Alito implicitly acknowledges America's long battle against racial inequality. He also explicitly suggests that this "history should teach greater humility" and that racial classifications are never truly "benign."[341]

Alito also draws attention to historical patterns of discrimination that the majority has overlooked. Rather than focus on discrimination against Black and Hispanic students, Alito identifies a "long history of discrimination against Asian Americans, especially in education."[342] He even cites instances where the Court has been complicit in this discrimination, including a 1927 case where the Supreme Court held that "a 9-year-old Chinese-American girl

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339. Alito paraphrases *Plessy*'s infamous separate-but-equal verbiage to lament that "[b]y accepting [statistical evidence] as proof that UT satisfied strict scrutiny, the majority moves us from separate but equal to unequal but benign." *Id.* at 412–13 (Alito, J., dissenting). His condemnation of *Plessy* is thus also a critique of the majority.

340. *Id.* at 399 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 518 (1989)); Miller v. Johnson, 515 U.S. 900 (1995); Rice v. Cayetano, 528 U.S. 495 (2000); Hirabayashi v. United States, 320 U.S. 81 (1943); *Fisher I*, 570 U.S. 297, 309–10 (2013); Grutter v. Bollinger, 539 U.S. 306, 388 (2003); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Gratz v. Bollinger, 539 U.S. 244 (2003); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

341. *Fisher II*, 579 U.S. at 412–13.

342. *Id.* at 412.

could be denied entry to a 'white' school because she was 'a member of the Mongolian or yellow race.'"[343]

Alito also demonstrates his aspirational orientation by honestly confronting America's present failures. Though he acknowledges that the University's holistic, race-neutral approach has yielded "lauded results"—an admission the majority does not make—Alito also observes that "African-American and Hispanic students . . . are often trapped in inferior public schools."[344] He identifies "troubling . . . discrimination against individuals of Asian descent in UT admissions."[345] And he warns that when it comes to racial classifications, the label "'benign' . . . reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable."[346] An accomplished exceptionalist might, at most, admit that racial discrimination was a problem in the past. Alito, however, takes the majority's same aspirational tack and candidly acknowledges that America continues to perpetuate racial injustice.

Alito is also attentive to America's diverse factions and fissures. Unlike accomplished exceptionalists, who tend to present the country as a unified, singular whole, Alito emphasizes America's diversity—both within and among racial groups. He cites census data showing a dramatic increase in individuals who describe themselves as members of multiple races,[347] and he offers statistical evidence suggesting that a large percentage of ethnic minorities marry spouses from different racial and ethnic groups.[348] Alito also argues that "both the favored and the disfavored groups [of the University's admissions program] are broad and consist of students from enormously diverse backgrounds."[349] He notes that "students labeled 'Asian American' . . . include 'individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian, and other backgrounds.'"[350] "It would be ludicrous," he argues, "to suggest that all of these students have similar backgrounds and similar ideas and experiences to share."[351]

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343. *Id.* (quoting Gong Lum v. Rice, 275 U.S. 78, 81–82 (1927)).

344. *Id.* at 394.

345. *Id.* at 412. Alito argues that despite the University's efforts to increase diversity, "classroom diversity [is still] lacking for students classified as Asian-Americans." *Id.* at 410.

346. *Id.* at 412 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 610 (1990) (O'Connor, J., dissenting)).

347. *Id.* at 414.

348. *Id.* at 414–15 ("A recent survey reported that 26% of Hispanics and 28% of Asian-Americans marry a spouse of a different race or ethnicity.").

349. *Id.* at 413.

350. *Id.* at 414.

351. *Id.*

Alito thus shares the majority's aspirational exceptionalist outlook: He uses bold, critical language to assess the past, critique the present, and call for a better future. But while the majority's aspirational orientation informs (or, at the very least, supports) its decision to uphold the University's admissions program, Alito's exceptionalism leads him to the opposite conclusion. Because he recognizes how racial classifications have harmed America in the past, Alito firmly insists that the Court must *strictly* apply strict scrutiny to assess racial classifications in the present.[352] And because he is wary of perpetuating or exacerbating America's current inequalities, he demands "presumptive skepticism of all racial classifications."[353] Alito's aspirational orientation thus compels him to "pin down the goals that [the University's] process is designed to achieve" and "'ensure that' [the] admissions process is narrowly tailored."[354] And when he undertakes this analysis, Alito concludes that "UT has failed to explain 'with clarity' why it needs a race-conscious policy and how it will know when its goals have been met."[355] Because of this, Alito believes "the narrow tailoring analysis cannot be meaningfully conducted."[356] Alito would thus strike down the University's policy—not because its goals are not "laudable,"[357] but because he is unable to perform the "careful"[358] and "undeniably rigorous"[359] judicial scrutiny that his aspirational outlook demands.[360]

E. Students for Fair Admissions v. President and Fellows of Harvard College *(2023)*

Students for Fair Admissions involved a challenge to the admissions programs at Harvard and UNC. When the case began, both universities used

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352. *See id.* at 404 ("The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989)).

353. *Id.* at 404–05.

354. *Id.*

355. *Id.* at 402–03.

356. *Id.* at 403.

357. *Id.*

358. *Id.* at 402.

359. *Id.* at 431.

360. Alito says this explicitly throughout his dissent. *See, e.g.*, *id.* at 402 ("Indeed, without knowing in reasonably specific terms what critical mass is or how it can be measured, a reviewing court cannot conduct the requisite 'careful judicial inquiry' into whether the use of race was necessary."); *id.* at 401 ("UT has failed to define its interest in using racial preferences with clarity. As a result, the narrow tailoring inquiry is impossible, and UT cannot satisfy strict scrutiny.").

race in their admissions decisions. At Harvard, each applicant received an initial, "overall rating," which reflected the applicant's "academic, extracurricular, athletic, school support, personal, and overall" qualifications.[361] This rating could and did "take an applicant's race into account."[362] After subcommittee review (which also considered race), applications went to a full committee, which "discuss[ed] the relative breakdown of applicants by race" with the "goal" of "mak[ing] sure that Harvard [did] not have a dramatic drop-off in minority admissions from the prior class."[363] The full committee tentatively decided who to admit and placed some applicants on a "lop list."[364] The committee then considered four factors—"legacy status, recruited athlete status, financial aid eligibility, and race"—to decide which of the "lop list" applicants to cut.[365]

UNC used a similar process. Each UNC application was reviewed by readers who were "required to consider race and ethnicity . . . as one factor."[366] Those readers then recommended or discouraged admission, and "[i]n making that decision," readers could "offer . . . a 'plus' based on [an applicant's] race."[367] Though readers' recommendations were, "in most cases, 'provisionally final,'" applications were next reviewed by a committee that made final admissions decisions.[368] Like the initial readers, that committee considered applicants' race as part of its determination.[369]

In 2014, a non-profit called Students for Fair Admissions ("SFFA") filed lawsuits against Harvard and UNC, arguing that the universities' admissions policies were unconstitutional under the Equal Protection Clause.[370] In both cases, the district courts upheld the challenged policies.[371] In the Harvard case, the First Circuit affirmed.[372] The Supreme Court granted certiorari while

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361. Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 194 (2023).

362. *Id.*

363. *Id.*

364. *Id.* at 195.

365. *Id.*

366. *Id.*

367. *Id.* at 196.

368. *Id.*

369. *Id.*

370. Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 586–87 (M.D.N.C. 2021), *rev'd sub nom.* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

371. *See id.*

372. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 204 (1st Cir. 2020), *rev'd*, 600 U.S. 181 (2023).

the UNC appeal was pending.[373] On June 29, 2023, the Supreme Court reversed the lower courts' decisions and held, 6-3, that Harvard's and UNC's admissions policies were unconstitutional under the Fourteenth Amendment.[374]

The Court's 6-3 decision was not unexpected. Indeed, many Court-watchers had predicted that "the Court's conservative majority . . . could be ready now, 19 years after *Grutter*, to end the use of race in college admissions."[375] But while the decision was not surprising, the Court's exceptionalism was. As in previous affirmative action cases, the Court invoked exceptionalist themes to guide and defend its decision. But unlike in prior cases, its exceptionalism was not easily classified.

Take, for example, the majority's discussion of America's past. As I have illustrated above, accomplished exceptionalism typically emphasizes America's triumphs while skimming over—or dismissing entirely—its weaknesses or flaws.[376] Aspirational exceptionalism, by contrast, is attentive to America's many shortcomings and failures.[377] The *SFFA* majority does a little bit of both. In the early pages of his majority opinion, Chief Justice Roberts describes the country's "fail[ure] to live up to the [Equal Protection] Clause's core commitments."[378] He notes that "segregation was in many parts of the Nation a regrettable norm."[379] He even confesses that "[t]his Court played its own role in that ignoble history."[380] These candid admissions have an aspirational exceptionalist flavor. But Roberts' honest engagement with America's past flaws is short lived—only three pages of the forty-two-page opinion.[381] And instead of belaboring the country's sordid past, as a true aspirational exceptionalist would, Roberts quickly pivots to a more laudatory account of the country's victory over racial inequality. Though he readily concedes America's pre-1950s flaws, Roberts also suggests that *Brown v. Board of Education* "set [America] firmly on the path of invalidating all . . . racial discrimination."[382] Put differently, Roberts presents *Brown* as the "culmination" of America's battle against racial inequality—the moment when America finally accomplished its exceptional potential. Since that

373. Students for Fair Admissions, Inc. v. Univ. of N.C., 142 S. Ct. 896 (2022).
374. *Students for Fair Admissions, Inc.*, 600 U.S. at 230.
375. *See* Howe, *supra* note 7.
376. *See supra* Part I.
377. *See supra* Part I.
378. *Students for Fair Admissions, Inc.*, 600 U.S. at 202–03.
379. *Id.* at 203.
380. *Id.*
381. *Id.* at 201–03.
382. *Id.* at 203–04.

decision, Roberts argues, the Court has "continued to vindicate the Constitution's pledge of racial equality."[383] The country may have been lost once, but it is now exceptionally committed to "do[ing] away with all governmentally imposed discrimination based on race."[384]

The majority also alternates between contingent and assured outlooks. In places, Justice Roberts takes the aspirational view that America's excellence is insecure. He notes, for instance, that the "transcendent aims of the Equal Protection Clause"[385] were threatened by "state-mandated segregation."[386] He acknowledges that courts "labored . . . for over half a century"[387] to make good on the Fourteenth Amendment's promises. And he suggests that "[t]he aspirations of . . . the Equal Protection Clause" were "[v]irtually strangled in [their] infancy" and "remain[ed] for too long only that—aspirations."[388] These statements reveal that, at least at some level, Roberts sees America's excellence as contingent: It was never a foregone conclusion, and on many occasions, it was in jeopardy.

Elsewhere, though, Roberts endorses the accomplished perspective that America has already achieved excellence. He does not accept the aspirational view that America must continue striving for racial equality; instead, he insists that "[a]t some point, . . . [racial preferences] must end."[389] He also suggests that further striving will make things worse, not better, and that "enshrining . . . racial preferences" could threaten and "offend [America's] fundamental equal protection principle."[390] That Roberts sees no need for affirmative action suggests that for him, America has already achieved its excellent potential. If America were not yet great, continued striving might be in order. But since it has already reached its exceptional pinnacle, there is nowhere to go but down.

In short, Roberts recognizes that America's excellence has not always been secure (an aspirational view), but he simultaneously suggests that America has now achieved greatness (an accomplished view). His

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383. *Id.* at 203, 205.

384. *Id.* at 206 (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984)).

385. *Id.* at 202.

386. *Id.* at 203.

387. *Id.* (quoting Brown v. Bd. of Educ., 347 U.S. 483, 491 (1954)).

388. *Id.* (third brackets added) (quoting Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 381 (1949)).

389. *Id.* at 212. ("[A]ll race-conscious admissions programs must have a termination point; they must have reasonable durational limits; they must be limited in time; they must have sunset provisions; they must have a logical endpoint; their deviation from the norm of equal treatment must be a temporary matter." (internal quotations omitted)).

390. *Id.*

exceptionalism only gets more complicated from there. Though Roberts endorses the accomplished idea that America is presently excellent, he does not believe that status is always-already guaranteed. Instead, he warns that "[p]ermitting 'past societal discrimination' to 'serve as the basis for rigid racial preferences . . . would shutter . . . the dream of a Nation of equal citizens.'"[391] And he suggests that programs like Harvard and UNC's "'effectively assure[] . . . that the ultimate goal of eliminating' race as a criterion 'will never be achieved.'"[392] Roberts may be confident about America's current status, but he is not confident that the country will *maintain* its exceptional excellence. He is thus aspirational about America's past (greatness has not always been certain), accomplished about its present (America is great now), and aspirational about its future (further greatness is not guaranteed).

The *SFFA* majority opinion is thus neither fully aspirational nor fully accomplished. Roberts does not deny America's past flaws as accomplished exceptionalism would, but he also does not belabor them as aspirational exceptionalism might. And though he articulates an accomplished belief that America has achieved excellence, he also recognizes that the country's exceptional status is always already insecure. In some ways, then, the opinion is aspirational: It is attentive to America's history of racial injustice, and it shares aspirational exceptionalism's concern that America's excellence is contingent and vulnerable. But in other ways, it is accomplished: It suggests that America is already excellent, and it is skeptical about affirmative action precisely because it believes race-conscious programs unnecessarily strive for something the country has already achieved.

Justice Thomas, too, opines in hybrid exceptionalist terms.[393] Like the majority, he concedes America's past shortcomings. He admits that America's "commitment to [the] equality principle has ebbed and flowed over time," and he confesses the Court "for[sook] [that] principle for decades."[394] He acknowledges that "the institution of slavery persisted for nearly a century,"[395] that cases like *Plessy* "ossif[ied] the segregationist view," and that "Jim Crow laws prohibit[ed] blacks from entering or utilizing public facilities."[396] And he condemns these realities as "pernicious,"

391. *Id.* at 226–27.
392. *Id.* at 224 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989)).
393. *Id.* at 231 (Thomas, J., concurring).
394. *Id.*
395. *Id.* at 263–64.
396. *Id.* at 264.

"flaw[ed]," and "antithetical to the notion that all men . . . are born equal."[397] But Thomas's aspirational candor only goes so far. Though he admits to America's past failures, Thomas spills much more ink discussing its "second founding,"[398] its "landmark Civil Rights Act,"[399] and its *Brown v. Board of Education*-like triumphs.[400] He also suggests that these glorious moments remedied America's flaws by "[bringing those] flaws into bold relief and encourag[ing] the Nation to finally make good on the equality promise."[401] Thomas's treatment of the past is thus both aspirational and accomplished: It acknowledges America's shortcomings but also celebrates the country's noble efforts to "rightly reverse[] course."[402]

Like the majority, Thomas also oscillates between accomplished confidence and aspirational uncertainty. Though he acknowledges America's previous failings, he suggests the Country is great now. Hence, he uses the past tense—a verb tense used to communicate actions that are finished and complete—to say that the Fourteenth Amendment "instilled in our Nation's Constitution a new birth of freedom."[403] And he chooses the present tense—a tense for actions that currently or habitually exist—to say that "[t]oday, . . . the Constitution prevails."[404] Thomas also confidently asserts that the Court's precedent "place[s] [the] principle [that all classification by race is unconstitutional] beyond question."[405] And he insists that "today's youth simply are not responsible for instituting the segregation of the 20th century": *That* evil, and others like it, are squarely in the past.[406] Though America's commitment to racial equality has historically been unstable, Thomas maintains that today the debate is settled and done. And though earlier generations of Americans failed to fulfill the Constitution's

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397. *Id.*

398. *Id.* at 263–64. For instance, Thomas only briefly mentions the Civil War before turning his attention to a long description of the Reconstruction Amendments. *See id.* at 232–42. He spends one sentence discussing Black Codes but immediately follows that sentence with three paragraphs about the Civil Rights Act of 1875. *See id.* at 243–44. He also discusses the *Plessy* opinion and Jim Crow in two paragraphs, but balances those with a celebratory account of *Brown v. Board of Education*, where the Court "rightly reversed course." *Id.* at 264–65.

399. *Id.* at 233.

400. *Id.* at 263–64.

401. *Id.* at 263.

402. *Id.* at 264.

403. *Id.* at 240.

404. *Id.* at 232.

405. *Id.* at 265.

406. *Id.* at 273.

exceptional promises, he insists that "[o]ur nation should not punish today's youth for the sins of the past."[407]

But despite his accomplished confidence, Thomas also articulates an aspirational concern that the country's now-established exceptionalism may be at risk. The threat? Programs like Harvard's and UNC's. Thomas warns that "these policies appear to be leading to a world in which everyone is defined by their skin color," which is "*exactly* the kind of factionalism that the Constitution was meant to safeguard against."[408] He also cautions that if the government is allowed to "level the racial playing field . . . innocents [would] suffer race-based injuries."[409] To avoid jeopardizing America's excellence in this way, Thomas insists that the country "must adhere to the promise of equality under the law declared by the Declaration of Independence and codified by the Fourteenth Amendment."[410] It must also "remain ever vigilant against *all* forms of racial discrimination" because "[t]he stakes are simply too high to gamble."[411]

Thomas thus shares the majority's hybrid accomplished-but-aspirational perspective. He acknowledges that America has failed in the past, and he is "painfully aware of the social and economic ravages which have befallen [his] race" (aspirational).[412] But he also believes America has since "ma[de] good"[413] on its exceptional potential and that it has largely overcome its "great failure"—namely, "slavery and its progeny" (accomplished).[414] At the same time, though, Thomas thinks America's flaws "have not been confined to the past" (aspirational), and he warns that America's present exceptionalism is up for "gamble" (aspirational).[415] He also expresses his "enduring hope that this country will live up to its principles" (aspirational).[416] In short, Thomas does not believe America is always already great, but he also does not believe it must aspire toward greatness. Instead, he thinks that America has worked hard to overcome challenges, that it has presently achieved excellence, and that its exceptionalism remains under threat.

This mixed exceptionalism has consequences for both the majority and Thomas's substantive legal analyses. Because these Justices think America

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407. *Id.* at 274.
408. *Id.* at 276.
409. *Id.* at 278.
410. *Id.* at 266.
411. *Id.* at 268.
412. *Id.* at 287.
413. *Id.* at 263.
414. *Id.* at 286.
415. *Id.* at 268.
416. *Id.* at 287.

has overcome its troubled past, they believe "race-conscious college admissions are plainly not necessary to serve . . . the interests of blacks."[417] And because they think America's present greatness might be threatened by further meddling, they are more concerned about the possibility of future harm than about resolving old and (in their view) already-redressed injuries.[418] The Justices' hybrid aspirational-accomplished views thus lead them to conclude that the universities' admissions policies fail strict scrutiny. If "the solution to our Nation's racial problems [was already] announced in the second founding," then the government has no compelling interest in pursuing racially diverse student bodies.[419] And if the challenged admissions policies employ "the same naked racism upon which segregation itself was built,"[420] then they clearly lack "a meaningful connection between the means they employ and the goals they pursue."[421]

The dissenters, not surprisingly, take a straightforward aspirational exceptionalist approach. Justices Sotomayor and Jackson both provide candid, honest discussions of the country's past failures. They critique their "endemically segregated society,"[422] condemn the Court for "facilit[ating] stereotyping,"[423] and lament that "America[] was structured around the profitable institution [of] slavery."[424] They are equally critical of America's present practices, and they eagerly identify ways America continues to fall short of its ideals. Justice Jackson highlights the "[g]ulf-sized race-based gaps [that] exist"—present tense—"with respect to the health, wealth, and well-being of American citizens."[425] Justice Sotomayor likewise reminds that "entrenched racial inequality remains a reality today,"[426] and she chastises the majority for "presuppos[ing] that segregation is a sin of the past."[427] Both

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417. *Id.* at 286.

418. *See, e.g.*, *id.* at 275 ("Far from advancing the cause of improved race relations in our Nation, affirmative action highlights our racial differences with pernicious effect. In fact, recent history reveals a disturbing pattern: Affirmative action policies appear to have prolonged the asserted need for racial discrimination."); *see also id.* at 266–81 (describing the harmful effects of affirmative action policies); *id.* at 217–20 (majority opinion).

419. *Id.* at 278 (Thomas, J., concurring); *see also id.* at 252–56 (refuting the proposition that racial diversity yields any specific educational benefits); *id.* at 213–17 (majority opinion) (rejecting the argument that the educational benefits of diversity are a compelling government interest).

420. *Id.* at 277 (Thomas, J., concurring).

421. *Id.* at 256.

422. *Id.* at 318 (Sotomayor, J., dissenting).

423. *Id.* at 365 (Jackson, J., dissenting).

424. *Id.* at 319 (Sotomayor, J., dissenting).

425. *Id.* at 384 (Jackson, J., dissenting).

426. *Id.* at 334 (Sotomayor, J., dissenting).

427. *Id.* at 377.

Justices use statistics to show patterns of ongoing racial segregation and discrimination.[428] Both also boldly assert that "society remains 'inherently unequal'"[429] and that "the race-based gaps that first developed centuries ago . . . still exist today."[430]

Like other aspirational exceptionalists, both Justices Sotomayor and Jackson believe they have a duty to identify and condemn these problems. Sotomayor accuses the Court of "revisionist history"[431] and claims that "[t]he majority . . . turn[s] a blind eye to [the reality of racial inequality]."[432] Jackson similarly laments the majority's "ostrich-like"[433] perspective: "[If] a page of history is worth a volume of logic," she argues, "[m]any chapters of America's history appear necessary, given the opinions that . . . the majority have issued in this case."[434] Neither Sotomayor nor Jackson enjoys their revelatory responsibilities—as Sotomayor says, "These may be uncomfortable truths."[435] Still, both feel aspirational obligation to expose and critique, because "[t]he only way out of this morass—for all of us—is to stare at racial disparity unblinkingly."[436]

The dissenters also adopt aspirational exceptionalism's contingent outlook. Justice Sotomayor describes the United States as an "experiment,"[437] a trial that could either succeed or fail. She also calls emancipation "a movement and not a 'single event,'"[438] and she characterizes "[e]quality [as] an ongoing project."[439] These descriptions suggest that she does not believe America's progress or exceptionalism is assured. Instead, it is something that is ongoing, unfolding, and uncertain. Justice Jackson likewise emphasizes America's contingent potential for excellence. She worries, for instance, that the Court's decision "will delay the day that every American has an equal opportunity to thrive"[440]—a worry she would not feel if she believed America

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428. *See id.* at 338–41; *id.* at 390–97 (Jackson, J., dissenting).

429. *Id.* at 337 (Sotomayor, J., dissenting) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954)).

430. *Id.* at 393 (Jackson, J., dissenting).

431. *Id.* at 330 (Sotomayor, J., dissenting).

432. *Id.* at 341.

433. *Id.* at 408 (Jackson, J., dissenting).

434. *Id.* at 386.

435. *Id.* at 341 (Sotomayor, J., dissenting).

436. *Id.* at 408 (Jackson, J., dissenting). Sotomayor similarly argues that "[e]quality requires acknowledgement of inequality" and "[i]gnoring race will not equalize a society that is racially unequal." *Id.* at 334 (Sotomayor, J., dissenting).

437. *Id.* at 319 (Sotomayor, J., dissenting).

438. *Id.* at 320, 370.

439. *Id.* at 319, 370.

440. *Id.* at 403 (Jackson, J., dissenting).

was certain to be great. She is also concerned that "[e]very moment [racial] gaps persist is a moment in which this great country falls short of actualizing . . . its foundational principles."[441] Clearly, Jackson believes America can and does fail. And she worries about its shortcomings precisely because she believes America's destiny hangs in the balance.

Because the dissenters see America's exceptionalism as contingent, they also issue a set of aspirational warnings. Justice Sotomayor cautions that "the consequences of [the majority's] decision will be destructive"[442] and that eliminating affirmative action programs "exacerbates segregation and diminishes the inclusivity of our Nation's institutions."[443] She further warns of the "dangerous consequences of an America where . . . leadership does not reflect the diversity of the People,"[444] and she predicts that prohibiting race-conscious admissions policies may eventually lead to "[a] system of government that . . . cannot withstand scrutiny 'in the eyes of the citizenry.'"[445] Jackson offers similar cautions. The Court's decision, she counsels, "will inevitably widen [the] gap [between races], not narrow it."[446] And "[i]f the colleges of this country are required to ignore a thing that matters, . . . [i]t will take *longer* for racism to leave us."[447]

Despite these aspirational critiques and warnings, the dissenters ultimately express an aspirational hope in America's potential. Jackson hopes that if "this Court . . . get[s] out of the way," universities like Harvard and UNC will "continue moving this country forward" and "toward full achievement of our Nation's founding promises."[448] Sotomayor similarly believes that "[i]nstitutions can and do change [if] societal and legal changes force them to live up to their highest ideals."[449] The country may have not have achieved its exceptional potential yet, but it *has* made progress: "[A]ffirmative action in higher education 'has worked and is continuing to work.'"[450] And "[n]otwithstanding this Court's actions, . . . society's progress toward equality cannot be permanently halted."[451] Justices Sotomayor and Jackson

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441. *Id.* at 384.
442. *Id.* at 377 (Sotomayor, J., dissenting).
443. *Id.* at 383.
444. *Id.* at 382.
445. *Id.* (quoting Grutter v. Bollinger, 539 U.S. 306, 332 (2003)).
446. *Id.* at 403 (Jackson, J., dissenting).
447. *Id.* at 408.
448. *Id.* at 407.
449. *Id.* at 341 (Sotomayor, J., dissenting).
450. *Id.* at 377 (quoting Shelby Cnty. v. Holder, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting)).
451. *Id.* at 384.

both lament that "the Court has stripped out almost all uses of race in college admissions," but they urge universities to "continue to use all available tools to meet society's needs for diversity in education."[452] They also predict that *if* Americans "do what evidence and experts tell us is required to level the playing field and march forward together,"[453] "'the arc of the moral universe' will bend toward racial justice."[454]

The dissenters' unmistakable aspirational exceptionalism clearly guides their substantive analyses. Because they are attentive to past and present flaws, they recognize an ongoing, compelling interest in achieving racial diversity. And because they think America has not yet achieved its promise of equal liberty and opportunity for all, they see race-conscious measures as a narrowly tailored way of furthering the government's goals. The majority, which thinks America is already great, sees no need for this continued effort—in fact, it predicts that using race in admissions will jeopardize what the country has already accomplished. The dissenters, by contrast, are aspirationally aware that "racial discrimination persists in our society," and "[i]t is precisely because [of that awareness]" that they conclude "the use of race in college admissions to achieve racially diverse classes is critical."[455]

IV. IMPLICATIONS

The foregoing analysis reveals that American exceptionalism is and has been central to the Supreme Court's affirmative action jurisprudence. In each of the cases I analyze, the Court relies heavily on American exceptionalist rhetoric. And, as in other areas of law, the Court's exceptionalism seems to guide and influence its substantive legal conclusions.

My analysis also reveals some general patterns in the Court's use of exceptionalism in affirmative action cases. In previous research, I found that the Court favors accomplished exceptionalism in decisions upholding broad exercises of government power and uses the aspirational mode in decisions that affirm the rights of individuals vis-à-vis the government.[456] In the affirmative action context, though, there is no clear government-versus-individual contest; in fact, in most affirmative action cases, the government claims to be acting *in pursuit* of individual liberties. Still, my analysis

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452. *Id.*

453. *Id.* at 408 (Jackson, J., dissenting).

454. *Id.* at 384 (Sotomayor, J., dissenting) (quoting Martin Luther King Jr., Our God is Marching On! (Mar. 25, 1965)).

455. *Id.* at 375.

456. *American Exceptionalism*, *supra* note 15, at 1078.

suggests that even in this unusual context, the Court uses exceptionalism predictably. When Justices on the Court endorse the use of race-based preferences (*Bakke*, *Grutter*, *Fisher*, and the dissents in *Croson* and *SFFA*), they draw heavily on the aspirational mode. By contrast, with only one exception (Alito's dissent in *Fisher*), the Justices who oppose affirmative action generally used the accomplished mode, or something like it (*Croson* and the *Grutter* dissent). These patterns are not surprising. Affirmative action is a profoundly aspirational concept, so it makes sense that Justices who endorse the aspirational worldview would be open to the need for race-based preferences, while accomplished Justices would not.

These clear trends support my working hypothesis that the Court's views on exceptionalism shape the way it approaches and analyzes legal issues. If the justices only used exceptionalism rhetorically—to add flourish or flare to conclusions they reached via other analytic means—exceptionalist tropes would not be so central and prominent in their opinions. Justices might sprinkle exceptionalism here and there, but they would not craft entire opinions from exceptionalist cloth. This is not what I observe. As my analysis has shown, justices use exceptionalism at every step of their reasoning—in their introductions, in their description of the legal issues, in their strict scrutiny analyses, and in their policy arguments. Their consistent and regular reliance on exceptionalist tropes suggests that exceptionalism likely performs an important analytic function.

But while my analysis indicates that exceptionalism guides and shapes the Court's reasoning, it also suggests that there are times when the Court does, in fact, invoke exceptionalism for rhetorical effect. This was likely the case in Justice Alito's *Fisher* dissent. In *Fisher*, both the majority and Alito relied heavily on aspirational exceptionalist tropes. But whereas the majority's aspirational outlook led it to affirm the challenged admissions policy, Alito's aspirational exceptionalism led him to argue against it. This curious result suggests that exceptionalism serves a rhetorical function, as well. If exceptionalism were always and only analytic, we would expect all aspirational justices to reach the same conclusions on all legal issues. That Alito and the majority used the same exceptionalist outlook to reach diametrically opposed results suggests that some or all of them may have been using exceptionalism to legitimize and justify decisions they reached through other analytic means.

Finally, and most importantly, my analysis identifies a new mode of American exceptionalism. In previous work, I have focused only on the accomplished and aspirational modes. But in *SFFA*, the majority and Justice Thomas did not use either. Instead, they articulated a hybrid exceptionalist mode that drew on both aspirational and accomplished tropes. Both the

majority and Justice Thomas acknowledged that America has not always been perfect, but neither were as harshly critical of the past as true aspirational exceptionalists would have been. They also argued that America has overcome its flaws and has fulfilled its exceptional potential, but neither accepted the accomplished position that America will always, inevitably, be great. Instead, the majority and Justice Thomas suggested that America is currently exceptional, but that it can and will be undermined if race-based preferences continue. In short, the Court is aspirational (though mildly) in its orientation toward the past, accomplished in its assessment of the present, and aspirational in its fears for the future.

I call this new, hybrid mode "protective exceptionalism," because it views America's greatness as something that has already been achieved but that requires vigilant, ongoing protection. Protective exceptionalism is not triumphant about the past: It does not suggest that America has always been perfect. But it also does not share the aspirational mode's hyper-critical outlook, and it does not hyper-fixate on past flaws. Instead, the protective mode suggests America has largely overcome its problems. And though it acknowledges a thorny past, it believes that the country has fulfilled its exceptionalism. The protective mode does not, however, believe this excellence is guaranteed or assured, and it does not discuss the future using accomplished exceptionalism's confident, certain tone. Rather, it shares the aspirational mode's contingent outlook, and it warns that America's present exceptionalism needs constant, vigilant protection.

Though I have not previously recognized or theorized protective exceptionalism, it is unlikely that the *SFFA* Court pioneered the protective mode. My findings thus prompt a number of questions for further research. Where else has the Court used protective exceptionalism, and how has it, like the accomplished and aspirational modes, affected the Court's constitutional analyses? Are there patterns in the Court's use of protective exceptionalism? Does it predictably yield particular outcomes or results? Might it help explain unusual voting blocs or judicial coalitions? And are there other exceptionalist modes like it—unstudied and untheorized, but affecting the Court's jurisprudence nonetheless? Here, as in my previous work, my findings indicate that American exceptionalism plays a role in judicial decision making. But clearly, there is more to that exceptionalism than meets the eye.

V. CONCLUSION

This Article demonstrates that American exceptionalism is central to the Supreme Court's affirmative action jurisprudence. It shows that the Court routinely invokes exceptionalist themes in its affirmative action cases. It also

shows that the Court engages with exceptionalism in patterned, predictable ways. Specifically, members of the Court who oppose affirmative action tend to opine in accomplished exceptionalist terms. Justices who support race-conscious policies, by contrast, generally adopt aspirational exceptionalist outlooks.

These patterns support the conclusion that American exceptionalism has both rhetorical and analytic effects. In some cases, exceptionalism may be a rhetorical tool that judges use to justify and legitimize decisions they have reached using other analytic tools. But in other cases—like the cases I analyze here—it appears to guide and influence the way the Court approaches legal issues. Scholars, commentators, and lawyers should be aware of these effects, because exceptionalism—whether accomplished, aspirational, or the newly-identified protective mode—may have more legal significance than they expect.