“A SHINING CITY ON A HILL”: AMERICAN EXCEPTIONALISM AND THE SUPREME COURT’S PRACTICE OF RELYING ON FOREIGN LAW

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INTRODUCTION

For wee must consider that wee shall be as a city upon a hill. The eyes of all people are upon us. Soe that if wee shall deale falsely with our God in this worke wee haue undertaken, and soe cause him to withdraue his present help from us, wee shall be made a story and a by-word through the world.¹

And how stands the city on this winter night? . . . After 200 years, two centuries, she still stands strong and true on the granite ridge, and her glow has held steady no matter what storm. And she’s still a beacon, still a magnet for all who must have freedom, for all the pilgrims from all the lost places who are hurtling through the darkness, toward home.²

This is a tale of two cultures. The first culture is that of the United States Supreme Court and the lawyerly elite. In that culture, it is not only socially acceptable for the Court and law professors to rely on foreign law in deciding American cases, it is obligatory that they do so. Operating within the confines of this elite culture, the Justices have cited foreign law to strike down unconstitutional laws since at least the time of Chief Justice Warren’s famous 1958 plurality opinion in Trop v. Dulles.³ More strikingly, the Court has relied on foreign law in deciding U.S. constitutional cases since Dred Scott v. Sanford⁴ and arguably since the Marshall Court era. The Supreme Court’s all-encompassing practice of relying on foreign law is reflected in some of the most famous and consequential Supreme Court cases in American history concerning such important areas of jurisprudence as federalism, separation of powers, criminal law, criminal procedure, and even economic liberty. In the

² President Ronald Reagan, Farewell Address to the Nation, 2 PUB. PAPERS 1718, 1722 (Jan. 11, 1989) [hereinafter Reagan, Farewell Address].
⁴ 60 U.S. (19 How.) 393 (1856).
elite culture of the U.S. Supreme Court, referring to foreign law to determine the scope of U.S. constitutional rights is commonplace.5

The other culture that this Article will discuss is the popular culture of the vast majority of American citizens, as shaped by those citizens’ political leaders and opinion elites. In this second culture, there is a decidedly different view of the relationship between the United States and foreign legal systems. American popular culture overwhelmingly rejects the idea that the United States has a lot to learn from foreign legal systems, including even those of countries to which we are closely related like the United Kingdom and Canada.6 Most Americans think instead that the United States is an exceptional country that differs sharply from the rest of the world and that must therefore have its own laws and Constitution. I will show that this idea – that America is an exceptional nation, with an exceptional people and an exceptional role to play in the world – is deeply rooted in American history. American mass culture is thus sharply at odds with the Supreme Court’s elite lawyerly culture on the issue of whether U.S. courts have a lot to learn from foreign law.

Moreover, I will show that not only do Americans think of the United States as an exceptional country, but it has actually become an exceptional country as it has attracted immigrants with a unique constellation of ideological beliefs. Americans are more individualistic, more religious, more patriotic, more egalitarian, and more hostile to unions and Marxism than are the people of any other advanced democracy. This positive account of the ways in which the United States truly is exceptional will call into question the practicality and wisdom of our Supreme Court imposing foreign ideas about law on us. As Justice Scalia said about efforts to import British law into U.S. constitutional law, “[i]t is beyond comprehension why we should look, for that purpose, to a

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5 For commentary favorable to this trend, see Vicki C. Jackson, Constitutional Comparisons: Convergence, Resistance, Engagement, 119 Harv. L. Rev. 109, 109-12 (2005) (characterizing the Supreme Court’s recent practice of referring to foreign sources of law as a return to earlier practice and arguing that “the Constitution can best be viewed as a site of engagement with the transnational, informed but not controlled by consideration of other nations’ legal norms and the questions they put to interpreters of our specifically national constitution”). For important critical commentary, see John O. McGinnis, Foreign to Our Constitution, 100 NW. U. L. Rev. 303, 306-09 (2006) (arguing that “foreign and international law should not generally be used as legal authority in constitutional interpretation” because of its tendency to frustrate democratic norms); Joan L. Larsen, Importing Constitutional Norms from a “Wider Civilization”: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 Ohio St. L.J. 1283, 1284-87 (2004) (expressing alarm at the Supreme Court’s recent practice of citing to foreign sources of law without offering adequate justification or discussion).

country that has developed, in the centuries since the Revolutionary War – and with increasing speed since the United Kingdom’s recent submission to the jurisprudence of European courts dominated by continental jurists – a legal, political, and social culture quite different from our own.\textsuperscript{7}

This tale of two cultures – an elite lawyerly culture that favors things foreign and a popular culture that dislikes them – poses a special challenge for law professors like Tom Merrill and David Strauss, who believe that the Supreme Court ought to be a conventionalist, Burkan common law court that interprets the Constitution according to current day consensus.\textsuperscript{8} If the Court follows either its own precedent, or any of the many other hints in its caselaw, it simply must consider foreign law in deciding U.S. constitutional law cases. The caselaw tradition is much too deeply rooted for a common law Burkan follower of precedent to ignore. On the other hand, following precedent and borrowing foreign law to decide cases on issues such as the constitutionality of sodomy laws or the execution of juvenile offenders goes against the wishes of the American people. American exceptionalists who believe that this country is, as Ronald Reagan said, a (Biblical) shining city on a hill will naturally rebel at the idea that their Constitution’s meaning should be shaped by the laws of secular France or Germany. What is a conventionalist, Burkan common law Justice to do?

I will argue that in situations like this one, where the elite lawyerly culture of the Supreme Court conflicts with the mass culture of most Americans as expressed over four hundred years, it is the mass culture that ought to govern the Court, assuming that the Court should look to anything beyond the text and original history of the Constitution.\textsuperscript{9} As I see it, the whole point of Professor Merrill’s conventionalism is to prevent the Court from acting as an engine of social change by imposing novel views and ideas on the American people. Professor Merrill has said that he believes such judicially driven social change raises concerns about the rule of law, judicial activism, and democratic theory.\textsuperscript{10} Therefore, even though the caselaw roots of judicial citation of foreign law are deep, I think a conventionalist ought to reject Supreme Court citation of foreign law on the grounds that: (1) the American people, whose Constitution is at issue, think America is an exceptional place, which by definition should have exceptional laws; and (2) America has in fact become an exceptional place to which it would not be appropriate to apply European or Canadian laws.


\textsuperscript{8} See discussion infra Part V.

\textsuperscript{9} I am a textualist and an originalist, but I think it is useful to engage in conversation with Burkan traditionalists about whether they should follow popular or elite lawyerly traditions.

This conundrum for conventionalists about whether the Court should follow the implications of its caselaw and doctrine or whether it should follow the traditions of the American people plays out in many other contexts as well. If the Supreme Court’s right to privacy doctrine was applied in a mechanical common law way, there is a good chance that laws against gay marriage, polygamy, or prostitution would fall even though such laws are deeply rooted in American tradition. I mean to suggest by writing this piece that it is a mistake for the Court to take its doctrine or caselaw too seriously when doing so puts it in tension with the longstanding beliefs and traditions of the American people. If we are going to be Burkes and apply tradition in American constitutional law, the tradition that ought to count is that of the American people and not the lawyerly, doctrinal tradition of the Justices of the Supreme Court.

Part I of this Article begins by sketching out the Court’s two centuries long practice of relying on foreign law to decide U.S. constitutional cases. I will show that this practice is much more deeply rooted in the Court’s caselaw than even Roe v. Wade\textsuperscript{11} or the caselaw of the New Deal. Part II will then turn to the American ideological tradition of proclaiming and believing that the United States is an exceptional country, different from every other country in the world. I will trace this popular tradition of American exceptionalism from its European and Puritan roots to the present day, relying on the prior scholarship of Deborah L. Madsen,\textsuperscript{12} Jack P. Greene,\textsuperscript{13} Anders Stephanson,\textsuperscript{14} James A. Morone,\textsuperscript{15} Jon Meacham,\textsuperscript{16} Michael and Jana Novak,\textsuperscript{17} Sacvan Bercovitch,\textsuperscript{18} and Ernest Lee Tuveson.\textsuperscript{19} Part III will briefly discuss some of the many ways in which the United States is in fact an exceptional country, as argued by Seymour Martin Lipset,\textsuperscript{20} John Micklethwait and Adrian Wooldridge.\textsuperscript{21}

\begin{thebibliography}{9}
\bibitem{11} 410 U.S. 113 (1973).
\bibitem{12} See generally Deborah L. Madsen, American Exceptionalism (1998). I seek here to build on Madsen’s superb scholarship, which I rely on heavily below. She and Jack P. Greene are my principal sources for the argument that America has had an ideology of exceptionalism for four centuries.
\bibitem{13} See generally Jack P. Greene, The Intellectual Construction of America: Exceptionalism and Identity from 1492 to 1800 (1993).
\bibitem{14} See generally Anders Stephanson, Manifest Destiny: American Expansionism and the Empire of Right (1995).
\bibitem{15} See generally James A. Morone, Hellfire Nation (2003).
\bibitem{16} See generally Jon Meacham, American Gospel (2006).
\bibitem{18} See generally Sacvan Bercovitch, The American Jeremiad (1978).
\bibitem{19} See generally Ernest Lee Tuveson, Redeemer Nation: The Idea of America’s Millennial Role (1968).
\bibitem{20} See generally Seymour Martin Lipset, American Exceptionalism: A Double-Edged Sword (1996).
\end{thebibliography}
Graham K. Wilson, Charles Lockhart, and Andrew Kohut and Bruce Stokes. I will discuss the evidence that Americans are much more individualistic, libertarian, religious, patriotic, moralistic, and opposed to unions and socialism than are Canadians or Europeans. I will suggest that this evidence that the United States is an outlier among the industrialized democracies of the Western World implies that America ought not to be governed by European or Canadian law. Part IV will show that the Constitution is the focal point of the American creed of exceptionalism. Here I build and rely on the path-breaking scholarship of Professor Sanford Levinson and Michael Kammen. The ferocious battles we have over the meaning of the Constitution and the confirmation of Supreme Court Justices can be explained by the fact that Americans see the Constitution as a quasi-religious creed that explicates America’s exceptional mission. The Constitution is not merely a law; for us, it is our state written book of common prayer. To control the meaning of the Constitution is nothing less than to control America’s exceptional mission in the world. Finally, in Part V, I will explain what I perceive to be the lessons of all of this for conventionalist, Burkean common law theory. I will suggest that such scholars ought to give much less weight to Supreme Court doctrine and much more to popular traditions than they might otherwise do.

The contribution I hope to make with this Article is not to identify the ideology of American exceptionalism, which Madsen, Greene, Stephanson, Morone, and many others have already done, or to discuss all the ways in which America is exceptional, which Lipset, Micklethwait and Wooldridge, Wilson, Lockhart, and Kohut and Stokes have already done. Rather, I seek to apply these scholars’ historical, sociological, and political science scholarship to law, and more specifically to the problem of Supreme Court reliance on foreign law. This application has striking implications for the important work of law professors like Sanford Levinson, Tom Merrill, Judith Resnik, Vicki Jackson, Fred Schauer, Carole Steiker, and Cass Sunstein, and the work of these law professors in turn has implications for the social science scholars. I seek with this Article to bring these two bodies of scholarship closer together.

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24 See generally Andrew Kohut & Bruce Stokes, America Against the World: How We Are Different and Why We Are Disliked (2006).
27 The only substantial book I was able to find that has already applied American exceptionalism to law is American Exceptionalism and Human Rights (Michael Ignatieff ed., 2005) [hereinafter American Exceptionalism]. This book is a collection of short chapters on specific legal issues and American exceptionalism; it does not address the subject in the comprehensive way I seek to do here.
I. THE SUPREME COURT AND FOREIGN SOURCES OF LAW: TWO CENTURIES OF PRACTICE

The Supreme Court’s practice of citing and relying on foreign law goes back two centuries and is far more deeply rooted in the Court’s caselaw than is the fabled and much discussed right to privacy, or even the New Deal. If precedent and caselaw count for anything in constitutional law, then the legitimacy of Supreme Court citation of foreign law is a long settled issue. I have recently summarized the Supreme Court’s practice of citing foreign law in a lengthy law review article co-written with Stephanie Dotson Zimdahl in the William and Mary Law Review. Anyone who wants an in-depth discussion of the caselaw will find it in that 166-page article. For everyone else’s benefit, I will provide a quick summary of our findings here.

The Court has cited foreign law since the start of the Marshall Court era, but the frequency of citation has picked up enormously in the modern post-1940 period. Moreover, until Trop v. Dulles, decided in 1958, the Court had only cited foreign law in the process of upholding federal or state laws. It was only starting with Trop that the Court began to cite foreign law as support for striking down laws. I will quickly summarize below the four main fifty-year periods of American history between 1804 and 2005 to show the Court’s practice in each period with respect to citing foreign law. Like a good common law conventionalist, I will begin with the most recent period of cases, on the assumption that following current consensus is all important, and I will then gradually work my way back through time to the distant era of the Founding.

Between 1940 and the present, the Supreme Court considered and relied on foreign law in at least seventeen cases. Seven of these cases were criminal law and procedure cases: Trop v. Dulles, Miranda v. Arizona, Coker v.

36 433 U.S. 584, 596 n.10 (1977) (noting international consensus against the use of the death penalty for rape).
37 458 U.S. 782, 796 n.22 (1982) (noting foreign views regarding the death penalty in felony murder cases).
38 487 U.S. 815, 830-31 (1988) (“The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views expressed . . . by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.”).
39 536 U.S. 304, 311, 316 n.21 (2002) (concluding that the death penalty could not be levied against the mentally handicapped after noting that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”).
40 543 U.S. 551, 578-79 (2005) (finding the death penalty for juvenile offenders unconstitutional after referring to an emerging international consensus that the execution of juvenile offenders constitutes disproportionate punishment).
41 410 U.S. 113, 136-38 (1973) (referring to English legislative and judicial developments to help support the proposition that statutory criminalization of abortion was largely a nineteenth and twentieth century phenomenon).
42 521 U.S. 702, 718 n.16 (1997) (noting actions by courts and legislatures in Canada, England, New Zealand, and Australia during the 1990s to prohibit assisted suicide).
45 342 U.S. 165, 169 (1952) (suggesting that American criminal procedure rules should be rooted in the “notions of justice of English-speaking peoples”).
46 361 U.S. 147, 166 (1959) (Frankfurter, J., concurring) (discussing debates in the House of Commons over obscenity provisions).
47 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring) (referencing English methods for ascertaining facts during the eighteenth century in passing as a method for interpreting the Due Process Clause of the Fourteenth Amendment).
48 338 U.S. 25, 29 (1949) (“When we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus [unlawfully] obtained, we must hesitate to treat this remedy as an essential ingredient of the [Fourth Amendment] right.”).
relied on foreign law in his dissent in *Printz v. United States*\(^{49}\) and in *Knight v. Florida*.\(^{50}\)

During the second fifty-year period, between 1890 and 1940, at least seven cases relied on foreign law: *Block v. Hirsh*,\(^{51}\) the *Selective Draft Law Cases*,\(^{52}\) *O’Malley v. Woodrough*,\(^{53}\) *United States v. Perkins*,\(^{54}\) *Palko v. Connecticut*,\(^{55}\) *Muller v. Oregon*,\(^{56}\) and *The Paquete Habana*.\(^{57}\) During the third fifty-year period, from 1840 to 1990, four famous opinions relied on foreign law: *Dred Scott v. Sandford*,\(^{58}\) *Reynolds v. United States*,\(^{59}\) *Hurtado v. California*,\(^{60}\) and two of the three *Legal Tender Cases*.\(^{61}\) Finally, from 1804 to 1840, seven majority opinions and one dissent relied on foreign law: *Murray v. Schooner Charming Betsy*,\(^{62}\) *Rose v. Himely*,\(^{63}\) *Brown v. United States*,\(^{64}\) *The Paquete Habana*.\(^{57}\)


\(^{50}\) 528 U.S. 459, 462-63 (1999) (Breyer, J., dissenting from denial of certiorari) (analyzing Jamaican interpretation of British laws addressing the length of time after sentencing within which a prisoner must be executed).

\(^{51}\) 256 U.S. 135, 140 (1921) (listing European nations with rent control statutes and holding rent control statutes constitutional).

\(^{52}\) 245 U.S. 366, 378-79 (1918) (surveying the list of countries requiring military service in times of need and specifically discussing such rules in England).

\(^{53}\) 307 U.S. 277, 281 n.8 (1939) (noting a decision by the Supreme Court of South Africa interpreting language taken from a clause of Article III, Section 1 of the U.S. Constitution).

\(^{54}\) 163 U.S. 625, 627 (1896) (discussing British taxation statutes during the reigns of Henry II and Henry VIII).

\(^{55}\) 302 U.S. 319, 326 n.3 (1937) (noting that there is no immunity from compulsory self-incrimination in many Continental European countries, and thus such a right is not “implicit in the concept of ordered liberty”).

\(^{56}\) 208 U.S. 412, 419 n.1 (1908) (noting foreign statutes regarding gender-based worker regulation).

\(^{57}\) 175 U.S. 677, 700 (1900) (“International law is part of our law . . . .”).

\(^{58}\) 60 U.S. (19 How.) 393 (1857). Five opinions in the decision, three concurring and two dissenting, reference foreign law.

\(^{59}\) 98 U.S. 145, 158-59 (1878) (contrasting the development of British and U.S. caselaw regarding testimony of absent witnesses).

\(^{60}\) 110 U.S. 516, 521-26 (1884) (interpreting due process in light of the language and interpretations given to parts of the *Magna Carta*).


\(^{62}\) 6 U.S. (2 Cranch) 64, 118 (1804) (stating that an Act of Congress should not be construed to violate the law of nations “if any other possible construction remains”).

\(^{63}\) 8 U.S. (4 Cranch) 241, 270-72 (1808) (analyzing British precedent on jurisdiction in foreign nations).

\(^{64}\) 12 U.S. (8 Cranch) 110, 124-25 (1814) (detailing views of famous foreign jurists on war powers).
It is indisputable that the Supreme Court’s practice of relying on foreign law is deeply rooted in our history and traditions. The Court’s reliance has been especially prominent in the last half-century since the Court’s landmark opinion in *Trop v. Dulles* in 1958. Given all the examples cited above, it appears that anyone professing to be a conventionalist or to follow constitutional common law would have to admit that the Court should consider and refer to foreign law. However, the balance of this Article will refute this idea. Perhaps the culture of the Supreme Court and the lawyerly elite sanctions or even requires Supreme Court reliance on foreign law, but there is another culture among ordinary Americans that holds that Americans are a special people, in a special land, on a special mission. As I demonstrate below, the Supreme Court should align itself with this second, mass culture, which looks dimly on American courts following foreign legal fashions and moods.

II. THE AMERICAN IDEOLOGY OF EXCEPTIONALISM: FOUR CENTURIES OF EXCEPTIONALIST RHETORIC AND SELF-DEFINITION

For almost four hundred years, Americans have defined the United States as an exceptional nation with an exceptional mission in the world. 71 This self-
definition is a part of the ideology of what it means to be an American, and it is quite literally un-American to think the United States is not a special place.\textsuperscript{72} Many scholars have recognized the important role that exceptionalism has played throughout many centuries in defining what it is to be American.\textsuperscript{73}

A. The Origins of American Exceptionalism in Europe and the American Colonies

Jack P. Greene, a leading colonial historian, makes the brilliant point that the intellectual construction of America as an exceptional place began in Europe, and thus American exceptionalism is originally a European idea.\textsuperscript{74} Greene notes that

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\textit{[t]hroughout the Middle Ages, Europeans had posited the existence of a place – for a time to the east, but mostly to the west of Europe – without the corruptions and disadvantages of the Old World. The discovery of America merely intensified this “nostalgia for the Golden Age and the Lost Paradise” and actually aroused new hope for their discovery somewhere on the western edge of the Atlantic.}\textsuperscript{75}

Twenty-four years after Columbus “discovered” America in 1492, Sir Thomas More wrote his enormously influential tract \textit{Utopia} about a place that he located in the Atlantic.\textsuperscript{76} “Through Jonathan Swift and beyond, utopian writers continued to identify the dream of a perfect society with America and to locate their fairylands, their New Atlantis, their City of the Sun in some place distant from Europe and in the vicinity of America.”\textsuperscript{77} Europeans came to see America as opening vast new possibilities for themselves, as well as institutions, assumes not only that the United States has been unlike other nations, but that it is exceptional in the sense of being exemplary (“a city upon a hill”), or a beacon among nations . . . .”

\textit{Id.} at 50-51.

\textsuperscript{72} As Seymour Martin Lipset observes, “In Europe, nationality is related to community, and thus one cannot become un-English or un-Swedish. Being an American, however, is an ideological commitment. It is not a matter of birth. Those who reject American values are un-American.” \textit{LIPSET, supra} note 20, at 31.

\textsuperscript{73} As Deborah L. Madsen notes, “American exceptionalism permeates every period of American history and is the single most powerful agent in a series of arguments that have been fought down the centuries concerning the identity of America and Americans.” \textit{MADSEN, supra} note 12, at 1. Another scholar, Jack P. Greene, says that there is “an extraordinarily large body of contemporary testimony from the sixteenth through the eighteenth century and beyond that did indeed see America as a special, and in many ways even an exceptional place.” \textit{GREENE, supra} note 13, at 6.

\textsuperscript{74} \textit{GREENE, supra} note 13, at 8-24.

\textsuperscript{75} \textit{Id.} at 25-26.

\textsuperscript{76} \textit{Id.} at 26.

\textsuperscript{77} \textit{Id.} at 28.
providing “exceptional opportunities for the mass conversion of souls to Christianity.”\textsuperscript{78}

The European conception of America as an exceptional place had a special resonance for Englishmen because, as Edmund S. Morgan writes, Englishmen possessed a special set of ideas about England and England’s place in the history of the world. . . . As the glory of Elizabeth’s reign mounted and her seamen defied the cohorts of [the papal] Antichrist all over the world, Englishmen persuaded themselves that they were a favored people, a people whom God had cast in a role paralleled only by that of the Jews before the coming of Christ. They believed they were the successors of Israel, an elect nation destined to lead the world back to God’s true religion and end the tyranny of [the papal] Antichrist.\textsuperscript{79}

English Protestants thought that John Wyclif and not Martin Luther had been the first prophet of the Reformation,\textsuperscript{80} and Morgan notes that “[w]hen God raised a mighty storm to help Elizabeth’s fleet throw back the armada of Antichristian invaders from Spain in 1588, some Englishmen could even read in the event a premonition of the millennium, when England would lead all nations to the Kingdom of God.”\textsuperscript{81} Anders Stephanson adds that “English Protestantism, early on, had developed a notion of England as not only spatially but also spiritually separate from the European continent, as the bastion of true religion and chief source of its expansion: a place divinely singled out for higher missions.”\textsuperscript{82} John Milton ultimately expressed the English Puritan vision in 1643 by describing England as “holding up, as from a Hill, the new Lampe of saving light to all Christendome.”\textsuperscript{83}

When King James I succeeded Queen Elizabeth on the English throne, however, many separatists and Puritans began to lose their faith in England as a redeemer nation. Thus, many immigrated to America and brought with them a very distinctive set of religious ideas.\textsuperscript{84} “The settlers, in William Haller’s words, felt they had inherited ‘the mantle of Israel, lost by England’s Stuart kings’; they also felt they were an exclusive band of saints, called by God into a church covenant that separated them from the mass of humanity.”\textsuperscript{85} Separatists and Puritans agreed that “[a] church must be formed out of visible saints, and it must sustain [its] sanctity by the exercise of discipline,

\textsuperscript{78} Id. at 30.
\textsuperscript{79} EDMUND S. MORGAN, ROGER WILLIAMS: THE CHURCH AND THE STATE 6-7 (1967).
\textsuperscript{80} Id. at 8.
\textsuperscript{81} Id. at 9.
\textsuperscript{82} STEPHANSON, supra note 14, at 3-4.
\textsuperscript{83} See BERCOVITCH, supra note 18, at 39.
\textsuperscript{84} See MORGAN, supra note 79, at 19.
\textsuperscript{85} BERCOVITCH, supra note 18, at 38.
admonishing members who fell into wickedness and excommunicating those who proved incorrigible.”

Given this English background, it is not surprising that the Puritans who formed the Massachusetts Bay colony with its headquarters in Boston believed they were a spiritual model for Europe and the world. As Deborah Madsen observes, the Puritans “were charged with a special spiritual and political destiny: to create in the New World a church and a society that would provide the model for all the nations of Europe as they struggled to reform themselves (a redeemer nation).” For many Puritans, America was their promised land – a New Israel. Despairing of reform in England, Morgan says the settlers brought with them to New England, and particularly to Massachusetts, the sense of a special mission that had formerly attached to England. England’s covenant with God had been jeopardized, if not forfeited, by the failure of her monarchs to press forward in the reforms so happily begun. Massachusetts, however, had taken up the cause and made its own covenant with God. In the eyes of its founders Massachusetts was at once a new Israel and a new England.

Stephanson agrees and says that the New World was the location of the millennium – a “place for the end . . . of history.”

Madsen shows that the vision of America as a new promised land animated early colonial leaders. William Bradford, leader of the Plymouth colony, wrote explicitly in these terms in his Of Plymouth Plantation when describing the Mayflower’s safe arrival at Cape Cod only to face a vast wilderness. Bradford believed that America was a new promised land deliberately placed by God between two vast oceans to be a home to a special people.

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86 MORGAN, supra note 79, at 19.
87 MADSEN, supra note 12, at 1-2. Madsen goes on to explain that [i]n this view, the New World is the last and best chance offered by God to a fallen humanity that has only to look to His exceptional new church for redemption. Thus, America and Americans are special, exceptional, because they are charged with saving the world from itself and, at the same time, America and Americans must sustain a high level of spiritual, political and moral commitment to this exceptional destiny – America must be as “a city upon a hill” exposed to the eyes of the world.

Id. at 2.

88 MORGAN, supra note 79, at 81.
89 STEPHANSON, supra note 14, at 10.

90 See MADSEN, supra note 12, at 17 (“Neither could they, as it were, go up to the top of Pisgah [the peak from which Moses saw Canaan] to view from this wilderness a more goodly country to feed their hopes; for which way soever they turned their eyes (save upward to the heavens) they could have little solace or content in respect of any outward objects.” (alteration in original) (quoting William Bradford, Of Plymouth Plantation, in THE PURITANS IN AMERICA 51, 57 (Alan Heimert & Andrew Delbanco eds., 1985))).

91 See id. at 17 (“Bradford certainly believed that God watched over the Plymouth settlers and that God motivated the migration.”).
vision also animated John Winthrop, the leader of the Massachusetts Bay colonists, who in his sermon *A Modell of Christian Charity* “describ[ed] the special destiny awaiting the community of saints as they voyaged to Massachusetts” and uttered the famous quote that appears at the beginning of this Article about Massachusetts becoming a city on a hill. Winthrop did not expect moral failure to overtake his colony and predicted that “[w]ee shall finde that the God of Israell is among us, when ten of us shall be able to resist a thousand of our enemies; when hee shall make us a prayse and glory.” After the colony was planted, Winthrop heard that some new immigrants were being diverted from New England to the West Indies by British ministers, he wrote the responsible minister in Westminster to “show[] his lordship, how evident it was, that God had chosen this country to plant his people in, and therefore how displeasing it would be to the Lord, and dangerous to himself, to hinder this work.”

America was thus going to be a New Jerusalem – a Godly light to all the nations of the world, and a reproach to the corrupt old nations and churches of Europe, which were destined to meet the same fate as Sodom and Gomorrah in the views of Bradford and Winthrop.

Bradford and Winthrop were obviously inspired by several Biblical passages. Consider the second book of Samuel, which reads “[a]nd I will provide a place for my people Israel and will plant them so that they can have a home of their own and no longer be disturbed.” This passage was important to the Puritans because it showed God’s commitment to planting Israel in its own land and suggested that God might plant the Puritans in a land all of their own as well. Even more important is a passage from Matthew, in which Jesus during his Sermon on the Mount exhorts his followers to do what Bradford and Winthrop prescribe, which is to try to be a light to all peoples – quite literally a shining city on a hill:

> You are the light of the world. A city on a hill cannot be hidden. Neither do people light a lamp and put it under a bowl. Instead they put it on its stand, and it gives light to everyone in the house. In the same way, let your light shine before men, that they may see your good deeds and praise your Father in heaven.

Winthrop and Bradford were trying to do quite literally what Jesus had commanded. Finally, the book of Revelation describes the New Jerusalem during the end times as being a shining city on a hill, showing that the creation

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92 *Id.* at 18.
93 *Winthrop, supra* note 1, at 68.
94 *See Madsen, supra* note 12, at 19.
95 2 *Samuel* 7:10 (New International).
96 *Bercovitch, supra* note 18, at 8-9 (explaining John Cotton’s use of this passage from the second book of Samuel to convey the idea that America “was the new promised land, reserved by God for His new chosen people”).
97 *Matthew* 5:14-16 (New International).
of such a city was what the elect of God ought to try to do. As we shall see below, the description in Revelation of the New Jerusalem bears striking similarities to the shining city on a hill described by President Ronald Reagan.

The Puritans saw the hand of God in all good and bad events around them. “When smallpox devastated the surrounding Indian population in the 1630s,” Stephanson observes, “John Winthrop could thus class it as a divine favor. ‘God hath consumed the natives with a miraculous plague,’ went the crisp verdict.” In describing Massachusetts, Morgan concludes that

[t]he mantle of Israel, lost by England’s Stuart kings, had descended on Massachusetts. The colony was not a theocracy in the usual sense of a rule by priests. But in the sense of a rule by God, through agents who steadily searched His Word and sought to apply it to every situation, Massachusetts aspired to be a theocracy.

Similarly, Deborah Madsen shows that the Puritans’ belief that they were forming a Godly nation led them to be especially vigilant in punishing any behavior that called into doubt the proposition that they were God’s elect and predestined for salvation. Puritan vigilance in punishing suspected witchcraft, the practice of Quakerism, and other sins should be understood in that light.

Many Puritan leaders became concerned that the Godly purpose of the emigration would come to be forgotten as a second and third generation of Americans succeeded the initial religiously motivated emigrants. A synod of clergymen in 1679 condemned the following Puritan sins:

- pride, strange apparel, and ornaments . . . sleeping in church; spoiled children . . . sinful heats and hatreds; drinking, debauchery, heinous breaches of the Seventh Commandment (adultery), and fornication; false hair, naked necks, naked arms, and . . . naked breasts; dancing, gaming,

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98 See Revelation 21:1-20 (describing the city of New Jerusalem descending from the heavens).
99 See infra notes 241-42 and accompanying text.
100 See MORGAN, supra note 79, at 82.
101 STEPHANSON, supra note 14, at 11.
102 MORGAN, supra note 79, at 84.
103 See MADSSEN, supra note 12, at 33-34.
104 See MORONE, supra note 15, at 83 (“New England accused at least 123 witches and executed 16 between 1647 and 1691 – before the panic in Salem Village. But nothing in New England ever approached the scope of the Salem Village trials – 144 accused, 19 hanged, 4 dead in prison, 1 pressed to death with stones.”).
105 See id. at 71 (observing that Puritans executed six Quakers, four of whom were hung and two of whom were whipped to death).
106 See MADSSEN, supra note 12, at 33-34.
107 See id.
sinful company, idleness; high prices... declining public schools, soaring lawsuits, [and] greedy business practices.\footnote{Morone, supra note 15, at 42.}

James Morone summarizes these concerns by quoting a Puritan source who allegedly stated that “[w]e have been forgetting the errand upon which the Lord sent us hither... [W]e are a perishing people if we reform not.”\footnote{See id.}

Sacvan Bercovitch explains that with the failure of Cromwell’s Protectorate in 1660, the Puritans felt isolated from England and worried that their “city set on a hill... had degenerated into another Sodom.”\footnote{Bercovitch, supra note 18, at 5.}

The failure of Cromwell’s Protectorate and the moral degeneration of the second and third generation of New England settlers gave rise to what Bercovitch calls the tradition of the Puritan jeremiad, which he argues remains central to America to the present day.\footnote{See id. at 176-210.}

Bercovitch explains that

\begin{quote}
[i]n Hebrew tradition [the] dual function [of the jeremiad] is something of a paradox. The chosen people had sinned and continued in sin, had been punished with exile and were being threatened with more severe punishments unless they reformed; but they remained chosen nonetheless, still the keepers of the ancient promise to Abraham.\footnote{Id. at 31.}
\end{quote}

Many Puritans viewed the disasters that befell the colonists as acts of God and as a call for reform. For example, the Reverend Increase Mather interpreted many of these disasters as divine warnings to the colonists to return to the straight and narrow path of their fathers.\footnote{See Madsen, supra note 12, at 34.}

Despite God’s punishment, however, many Puritans believed that they remained God’s chosen people. Madsen notes that the famous minister Cotton Mather, son of Increase Mather, “never retreated from his firm exceptionalist line of reasoning: that the exceptional destiny of New England had been under siege by the Devil, operating through his agents, to destroy God’s chosen people and their promised land.”\footnote{Id. at 34-35.}

As the second and third generations of immigrants passed away, complaints that the New England colonies were drifting away from their original religious mission led to a yearning for a return to the simpler days of the Founding.\footnote{See Greene, supra note 13, at 105-06.}

Greene observes that “[t]o an important degree, the many spiritual awakenings that occurred in several colonies between 1720 and 1770 exhibited a yearning for just such a return.”\footnote{Id. at 106.} Morone notes that
the apocalyptic version of the new world mission sprang up with each religious revival through the Puritan century and beyond: from John Cotton (in the first generation) to Increase Mather (the second) to Cotton Mather (third) to Jonathan Edwards and, with the Great Awakening, across the colonies and into American history.\textsuperscript{117} Morone adds that “[t]he Great Awakening marks the end of Puritan New England and the first stirring of Puritan America.”\textsuperscript{118} Bercovitch observes that Jonathan Edwards, a preacher and theologian, “inherited the concept of a new chosen people, and enlarged its constituency from saintly New England theocrats to newborn American saints.”\textsuperscript{119} According to Bercovitch, “[t]he Edwardsian concerts of prayer sought to awaken all prospective American saints, north and south, to the state of their souls, the shortcomings of their society, and the destiny of their New World Canaan.”\textsuperscript{120} “New Israel, New World, new heavens and new earth: it was the common vision of the time, and it derived, unmistakably, from Puritan New England.”\textsuperscript{121}

While most founders of New England shared this common vision, at least one – Roger Williams, the founder of Rhode Island – disagreed with the Puritan orthodoxy of Massachusetts and Connecticut. As Morgan powerfully explains:

To Williams the holy covenant that Winthrop claimed for Massachusetts was an unholy delusion. Winthrop and his fellow magistrates, in trying to reproduce the land of Canaan in New England, were ignoring the whole significance of Christ’s incarnation. Since the birth of Christ, God favored no people with a covenant, and so it was wrong for any state “to set up a civill and temporall Israel, to bound out new Earthly holy Lands of Canaan” by exercising authority over religion in God’s name. There was nothing special in God’s mind about England or New England or any other people or place in the world.\textsuperscript{122}

Roger Williams aside, however, there can be no question that the Founders of New England believed in a particularly ardent and religiously based form of American exceptionalism. As Alexis de Tocqueville was to say, “[t]he civilization of New England has been like those fires lit in the hills that, after having spread heat around them, still tinge the furthest reaches of the horizon with their light.”\textsuperscript{123} Bercovitch adds that “the New England orthodoxy succeeded, precisely through their commitment to the Puritan ideal, in

\textsuperscript{117} MORONE, supra note 15, at 45.
\textsuperscript{118} Id. at 101.
\textsuperscript{119} BERCOWITCH, supra note 18, at 105.
\textsuperscript{120} Id. at 106.
\textsuperscript{121} Id. at 113.
\textsuperscript{122} MORGAN, supra note 79, at 103 (footnote omitted).
\textsuperscript{123} ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 32 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835 & 1840).
transmitting a myth that remained central to the culture long after the theocracy had faded and New England itself had lost its national influence.” 124 The descendants of the Puritans were forced to “enlarge their ideal of New Israel into a vision that was so broad in its implications, and so specifically American in its application, that it could survive the failure of theocracy.” 125

B.  American Exceptionalism in the Founding Era

Ultimately, the religious fervor cooled, and the nature of the exceptionalist argument changed, but the idea of America as a special place with a special people called to a special mission was never to go away. Succeeding generations expressed their exceptionalist vision by recounting the legend of New England’s founding and viewed the entire continent as destined to fulfill a great role in history. 126 Critically, many second- and third-generation Americans thought that “the New World at large – not just New England but the entire continent – was destined for an errand in sacred history. Like Canaan of old, America was the child of prophecy and promise.” 127

American exceptionalism began to embrace secular ideals as well as religious ones in part as a result of the differing social structures in England and America. One great advantage of the American colonies over England was their lack of a class structure and social stratification. 128 As Jack Greene notes, “[w]idespread possession of landed property . . . turned the colonies into societies in which virtually ‘every [free] Male Inhabitant became a Freeholder, and by consequence entitled to a share in the Government of the Province.’” 129 Greene quotes philosopher Edmund Burke as saying that this led to “‘a love of freedom,’ a ‘fierce spirit of liberty,’ that, [Burke] posited, was ‘the predominating feature’ in the colonial character and ‘stronger . . . probably than in any other people of the earth.’” 130

The adoption of the ideals of property, equality, and happiness into American exceptionalism is reflected in a 1754 sermon by Reverend Jonathan Mayhew, who preached that Americans would experience divine favor “and that, being brought out of the house of bondage, they might be conducted into

124 BERCOVITCH, supra note 18, at 17.
125 Id. at 92.
126 See id. at 67. Successive generations of New Englanders “expressed their vision through the legend of New England’s golden age. . . . [The emigrants were elevated] into mythic tribal heroes – a race of giants in an age of miracles – imposing on the tiny, barren American strand of three decades before the archetypes of scriptural and classical antiquity.” Id.
127 Id. at 69.
128 See GREENE, supra note 13, at 109-10.
129 Id. at 110 (alterations in original) (quoting Jack P. Greene, Notes and Documents: William Knox’s Explanation for the American Revolution, 30 WM. & MARY Q. 293, 299 (1973)).
130 Id. at 116 (second alteration in original).
a good land, flowing with milk and honey; that they might there possess property, enjoy the blessing of equal laws, and be happy.” As Madsen points out, this new representation of the American mission is also echoed in “the terms of the Declaration of Independence: the possession of private property, equality before the law, and the freedom to pursue happiness.” The Declaration itself is, of course, full of reference to the Deity to whom it is in part addressed, talking of “the Laws of Nature and of Nature’s God,” saying that men are “endowed by their Creator with certain unalienable Rights,” appealing “to the Supreme Judge of the world for the rectitude of our intentions,” and concluding by professing “a firm reliance on the protection of divine Providence.”

Bercovitch also recognizes the non-religious aspects of American exceptionalism that emerged during this time:

[In fleeing the Old World, the [Puritan] emigrants were abandoning a bankrupt monarchical order to establish a new way of life, civic and economic as well as religious. It was to their cause of liberty, rather than to some Old World despot, that filial allegiance was due. . . . What the fathers began, the sons were bound to complete.]

As Bercovitch explains, “For the Puritans, the errand carried forward the biblical exodus; for Edwards, the revival brought to fruition the Puritan errand; for the Whig preachers, the Revolution unveiled the meaning of exodus, errand, and revival.” Describing the connection between the Puritan founding and the Revolution, Bercovitch quotes John Adams as saying that the motives behind the Revolution “ought to be traced back for Two Hundred Years, and sought in the history of the Country from the first Plantations. . . . This produced, in 1760 and 1761, AN AWAKENING and a REVIVAL of American Principles and Feelings, with an Enthusiasm which went on increasing till in 1775 it burst out in open violence.”

As Bercovitch observes, “Adams’s use of the Great Migration as precursor to the War of Independence is a significant testament to the secular-sacred typology developed through the eighteenth century.”

Bercovitch claims that Thomas Paine made reference to the same themes with


\[\text{Madsen, supra note 12, at 35.}\]

\[\text{Bercovitch, supra note 18, at 123.}\]

\[\text{Id. at 128.}\]

\[\text{Id. at 130-31 (alteration in original) (quoting The American Revolution: The Search for Meaning 11-12 (Richard J. Hooker ed., 1970)).}\]

\[\text{Id. at 131.}\]
his use of biblical precedents, his emphasis on providence, and above all the figural blueprint he presents for American exceptionalism, with due emphasis on the landmarks of early New England christianography: a fallen Old World (haboring Romish Antichrist), an Egyptian England (in bondage to a “hardened, sullen-tempered pharaoh”), and a New Canaan charged “by the design of Heaven” with “the cause of all mankind.”

The writings of Benjamin Franklin, a son of Boston, also relied on the idea of American exceptionalism and reflected the shift of exceptionalism toward more secular ideals. Madsen notes that Franklin’s *Autobiography* redefines exceptionalism, away from its religious origins as an errand into the wilderness where a grand and purified church would be established, peopled by the visible saints chosen by God, and awaiting the glorious end of time. Franklin represents the American errand as the creation of a secular state that is purified of the corruption of European politics and a social structure based on inherited title. It is the secular America that will be a model of democratic government and the envy of all the nations of the earth.

Madsen goes on to observe that Franklin powerfully redefined the Puritan mission: recasting the terms of success, where material prosperity assumed a prominence it had not had before, where the conditions of life for Americans were defined less in spiritual terms than earlier, where the collective salvation of the community was transformed into a form of government that would protect the rights of all citizens. What remained was the perception that America would continue to be judged by the other nations of the world to whom America would remain a model, a guide, a measure. And also a guardian of the inalienable rights of man, so recently enshrined in the Constitution . . . .

Franklin’s recasting of the Puritan mission in secular tones led the great Max Weber to point to Franklin as proof of the relationship between the Protestant ethic and the spirit of capitalism.

Daniel Bell offers a similar account of the Founding, observing that there were “[t]hose like Jefferson, who were deists, [and] saw America as God’s design worked out in a virgin, paradisaical land. But others, such as Franklin, more worldly and sceptical, saw none the less the possibility of the United

137 *Id.* at 121.
138 See Madsen, *supra* note 12, at 36 (“Benjamin Franklin also used the vocabulary of exceptionalism to represent his particular vision of the world and the infant American nation within it.”).
139 *Id.* at 36-37.
140 *Id.* at 37-38.
States being *exemplary*, and thus a hope for the future.”¹⁴² There existed, in
Bell’s view, the “belief, intertwined with the philosophical views of the
founding fathers, that ours would be the providential nation, the redeemer
nation, the one whose dedication to liberty and individual worth would be the
foundation of a new moral society.”¹⁴³ Building on this idea, Bell argues that
behind the social contract of the U.S. Constitution

lay a distinctive political culture. In the early years of the country’s
formation, there was a self-consciousness about being the first *new*
nation: not a new quasi-religious utopia as proclaimed in the French
Revolution, but of going back to the origins of government and founding
a new, free world; thus the expression on the Great Seal of the United
States: “Novus Ordo Seclorum”, a new order of the ages.¹⁴⁴

The political order called into being by the Revolution would thus be an
e example to all nations of how to do things – it would be, in John Winthrop’s
words, “a city upon a hill.”

Despite the shift toward a more secular American exceptionalism, its
religious underpinnings remained. Jon Meacham notes that “Franklin and
Jefferson played with the idea of America as a New Israel.”¹⁴⁵ Both Franklin
and Jefferson envisioned that the Great Seal of the United States would contain
a Biblical scene, portraying the deliverance of the Israelites from their bondage
in Egypt.¹⁴⁶ Meacham observes that

[the reverse side of the final seal (it is the image to the left on the back of
the dollar bill) depicts the “Eye of Providence” above an unfinished
pyramid with the words of the second motto: *Annuit Coeptis* – “God (or
Providence) has favored our undertakings.”¹⁴⁷

Obviously, the pyramid, with the eye of God above it, was meant to call to
mind God’s deliverance of the Israelites from their bondage in Egypt, as
Franklin and Jefferson originally proposed.¹⁴⁸ Religious symbolism and the
Puritan idea of the United States as a New Israel thus directly affected key
members of the Continental Congress that declared American independence.

The Framers’ discussions of the drafting and ratification of the Constitution
in 1787 also reflected religious exceptionalist influence. James Madison,
writing in *The Federalist*, said of the Constitution, “[i]t is impossible for the
man of pious reflection not to perceive in it a finger of that Almighty hand

¹⁴² Bell, *supra* note 71, at 56.
¹⁴³ Id.
¹⁴⁴ Id. at 62-63.
¹⁴⁶ Id. at 81.
¹⁴⁷ Id.
¹⁴⁸ Meacham writes that “Franklin and Jefferson had initially proposed designs evoking
the Israelites’ deliverance from Egypt, but in the end Congress chose a less sectarian
symbol.” Id. at 83.
which has so frequently and signally extended to our relief in the critical stages of the revolution.”  

149 Benjamin Franklin argued at the Philadelphia Convention that American failure meant that we would be “a reproach and a byword down to future ages.”  

150 Is it not striking that this is nearly identical to the language that John Winthrop used to describe the consequences of failure in *A Modell of Christian Charity*?  

151 John Adams made a similar point in his defense of the Constitution:  

“The people in America have now the best opportunity, and the greatest trust, in their hands, that Providence ever committed to so small a number, since the transgression of the first pair: if they betray their trust, their guilt will merit even greater punishment than other nations have suffered, and the indignation of heaven.”  

152 As Bercovitch argues, “[t]he motive of these Federalist Jeremiahs is transparent in the momentous choice they posed: on one side, apocalyptic disaster; on the other side, millennial glory earned through a process of taming, binding, curbing, restraint.”  

George Washington shared the view that God played a critical role in the founding and that the American cause was divinely favored. In their book *Washington’s God*, Michael and Jana Novak demonstrate that contrary to popular belief, Washington was not a Deist, but rather was a committed Christian who firmly believed that the hand of Divine Providence had guided him and the American experiment at every step during the Revolutionary War and the framing of the Constitution.  

154 Around 1789, Washington wrote to the Hebrew Congregation of Savannah:  

“May the same wonder-working Deity, who long since delivered the Hebrews from their Egyptian oppressors, [and] whose providential agency has lately been conspicuous, in establishing these United

150 See MEACHAM, supra note 16, at 89.  
151 See Winthrop, supra note 1, at 68.  
152 JOHN ADAMS, I A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, at x (photo. reprint 1979) (1797).  
153 BERCOVITCH, supra note 18, at 135-36. Madison, Franklin, and Adams were not the only ones to describe the influence of God in the framing of the Constitution. According to Meacham, Benjamin Rush believed “that ‘the hand of God was employed in this work, as that God had divided the Red Sea to give a passage to the children of Israel’ or had delivered ‘the ten commandments on Mount Sinai!’” MEACHAM, supra note 16, at 91. Ruth Bloch notes that even the Anti-Federalists felt a need to respond to the millennial fervor of the advocates of the Constitution, quoting one as deriding those who “promise us such extravagantly flattering advantages to arise from [the Constitution] as if it was accompanied with such miraculous divine energy as divided the Red Sea, and spoke with thunder on Mount Sinai.” RUTH H. BLOCH, VISIONARY REPUBLIC: MILLENNIAL THEMES IN AMERICAN THOUGHT, 1756-1800, at 113 (1985).  
154 See generally NOVAK & NOVAK, supra note 17.
States . . . make the inhabitants, of every denomination, participate in . . . the blessings of that people whose God is Jehovah.\textsuperscript{155}

Washington repeatedly credited God for the success of the Revolutionary War.\textsuperscript{156} For example, Washington wrote in 1783:

If my Conduct throughout the War has merited the confidence of my fellow Citizens, and has been instrumental in obtaining for my Country the blessings of Peace and Freedom, I owe it to that Supreme being who guides the hearts of all, who has so signaly interposed his aid in every Stage of the Contest and who has graciously been pleased to bestow on me the greatest of Earthly rewards: the approbation and affections of a free people.\textsuperscript{157}

The Novaks record 102 different names that Washington used in referring to God and to Divine Providence!\textsuperscript{158}

It is true that the text of the Constitution does not mention God or Jesus and that, as Professor David Seipp notes in his contribution to this symposium issue, there are no references to America as the New Israel in \textit{The Federalist}.\textsuperscript{159} Washington, Franklin, Hamilton, Madison, and Adams – as well as many others – all thought the hand of Divine Providence was at work in America, and Madison said as much in \textit{The Federalist}.\textsuperscript{160} The Great Seal of the United States and the inscriptions written on it make the same point as well.\textsuperscript{161} As the Novaks have rightly argued, the reason the Framers did not mention their faiths in the text of the Constitution is that they were rendering unto Caesar what was Caesar’s and unto God what was God’s.\textsuperscript{162} The words and actions of the Framers, as described extensively above, rebut the suggestion by some that the Framers were not men of faith. In fact, they were men of great faith, and their practice of non-sectarianism and tolerance simply

\begin{itemize}
  \item See \textit{id.} at vii.
  \item See \textit{id.} at 1, 63, 140, 173, 175, 243.
  \item See \textit{id.} at 1.
  \item See \textit{id.} at app. 2. If Washington had been a Deist, who did not think that the American experiment was an act of God, it seems unlikely that he would have referred to the Almighty in so many different ways. While it is true that Washington tried to stay above sectarian strife and so referred to God in abstract terms and rarely discussed his belief in Jesus, this is consistent with Washington’s Anglican faith, because Anglicans eschew public enthusiasm. \textit{Id.} at 12-13. As Washington’s close friend and associate Chief Justice John Marshall said, “Without making ostentatious professions of religion, [Washington] was a sincere believer in the Christian faith, and a truly devout man.” See \textit{id.} at 161.
  \item See \textit{The Federalist No. 37} (James Madison).
  \item See \textit{supra} notes 144-48 and accompanying text.
  \item See \textit{Novak & Novak}, \textit{supra} note 17, at 14 (quoting \textit{Mark} 12:17 and explaining that since many matters of government could be “couched in the language of Caesar,” there was “no need to clothe such matters in religious language”).
\end{itemize}
does not prove that they did not share the American belief that ours is a special
nation, with a special people, who have a special and unique calling.

Other leaders at the time of the Founding also believed in America’s special
mission in the world. For example, Greene quotes Thomas Pownall to
illustrate that many believed the blessings that had fallen on America “all
suggested that God had marked [Americans] out ‘as a chosen people’ with
special obligations to their posterity and to the rest of humanity.” Greene
also thought it significant that God had placed America “in a New World,
separate and removed far from the regions and wretched Polities of the Old
one.” Greene adds that many American and European writers concurred
that “America [is] an exceptional place and [that] Americans [are] an
exceptional people.” Greene quotes Noah Webster and other
“[p]ostrevolutionary American interpreters” as marveling that
“after the experience of four or five thousand years, and numberless
forms of government,” it “should . . . happen to be reserved for America
to discover the great secret,” a system of government that had “eluded all
form of inquiry” and had “no where been suffered to prevail but in
America.”

Greene also observes that “American interpreters following the Revolution had
no doubt that [America] would continue to offer a welcoming sanctuary for
refugees from [the Old W]orld, and the depiction of the United States as an
asylum for the oppressed became one of the most conspicuous features in the
emerging image of America.”

Anders Stephanson points out that even the
Deist Thomas Jefferson embraced the theme of biblical chosenness in his
second inaugural address when he “evok[ed] the providential hand that had led
‘our fathers, as Israel of old, from their native land and planted them in a
country flowing with all the necessaries and comforts of life.’”

The revolutionary period ended in a dramatic way, and many Americans at
the time thought its conclusion indicated that God was at work in supporting
the new American nation. As Seymour Martin Lipset notes,

On July 4, 1826, the fiftieth anniversary of the signing of the
Declaration of Independence and the date of the deaths of its authors and
advocates, second and third Presidents John Adams and Thomas
Jefferson, Americans felt that the hand of providence was on the young

163 Greene, supra note 13, at 160. Kohut and Stokes note that “[a]ccording to the best
estimates, 80 percent of northerners were ‘churched’ at the time of the American
Revolution, as were 56 percent of southerners.” Kohut & Stokes, supra note 24, at 95.
164 See Greene, supra note 13, at 160.
165 Id. at 167.
166 Id. at 170 (alteration in original) (footnote omitted).
167 Id. at 173.
168 Stephanson, supra note 14, at 5.
republic. How otherwise to explain these occurrences, when neither of these elderly statesmen knew what was transpiring with the other?169

C. American Exceptionalism in the Nineteenth Century

The ideology of American exceptionalism continued during the nineteenth century as the successors to Adams and Jefferson revitalized their faith and spread across the continent. Thus, in the early 1830s, “[e]vangelical fervor rolled across the United States” as the Second Great Awakening swept across the land,-lighting “the long fuse to the Civil War.”170 During this time, many came to believe that “God had selected America for the ‘moral and political emancipation of the world.’”171 James Morone quotes Lyman Beecher, one of the leaders of the Second Great Awakening, as predicting that “[n]ation after nation, cheered by our example, will follow in our footsteps till the whole earth is freed.”172 Meanwhile, many African Americans reacted to the evangelical Awakening by looking to the Exodus narrative of the Israelites’ escape from Egyptian slavery173 and predicting that God would punish America unless the country hastened to abolish slavery and repent for its sins.174 Sacvan Bercovitch quotes Henry Clay, who warned Americans in 1832 that “[i]t belongs to you . . . to decide whether [the] great blessings of Liberty and Union shall be preserved. . . . The eyes of all civilized nations are gazing upon us,”175 Bercovitch also quotes other American “jeremiads,” Charles Drake and Abram Maury, who urged their fellow citizens that

[i]f our experiment succeeds . . . “we will become a beacon . . . to the nations of the earth,” and “the genius of America, like the star in the east, will lead the earth’s people” to redemption. “But if we should become corrupt and unprincipled . . . no horoscope will be needed to forecast our destinies,” for then “the expiring cries of Liberty shall be heard in accents of agony, bewailing the fate of her last and loveliest abode.”176

Obviously, the exceptionalist vision of America remained alive in Jacksonian America.

Several scholars demonstrate that American intellectuals, including Emerson, Hawthorne, Thoreau, Whitman, and Melville, also adopted the

169 LIPSET, supra note 20, at 13.
170 MORONE, supra note 15, at 123.
171 Id. at 128.
172 See id.
173 See id. at 133.
174 See id. at 134.
175 See BERCOWITZ, supra note 18, at 150 (third and fourth alterations in original).
176 Id. (third and fourth alterations in original).
rhetoric of exceptionalism in the early- and mid-nineteenth century.\footnote{See Madsen, supra note 12, at 70-71. Bercovitch notes that one Melville novel “opens with a eulogy to the American Way (‘Out of some past Egypt we have come to this new Canaan; and from this new Canaan we press on to some Circassia’).” Bercovitch, supra note 18, at 28.} Deborah Madsen explains that

[w]here their Puritan (intellectual) ancestors had anticipated an exceptional destiny based upon the perfection of ecclesiastical institutions, nineteenth-century intellectuals anticipated the perfection of political, specifically democratic, institutions. The substance of the rhetoric had changed in the course of the eighteenth century, moving inexorably from religion to politics, but the nature of exceptionalist rhetoric remained essentially the same. America will now be the global champion of democracy and privileged guardian of political values.\footnote{Madsen, supra note 12, at 71.} Bercovitch observes that Melville’s novel, \textit{White Jacket}, contains this famous passage on our national destiny:

[W]e Americans are the peculiar, chosen people – the Israel of our time; we bear the ark of the liberties of the world. . . . God has predestinated, great things from our race; and great things we feel in our souls. . . . Long enough have we been skeptics with regard to ourselves, and doubted whether, indeed, the political Messiah had come. But he has come in us.\footnote{See Bercovitch, supra note 18, at 176-77 (second and third alterations in original).}

Another leading figure of the first half of the nineteenth century who voiced the notion that America had an exceptional role to play in the world was the senator and statesman Daniel Webster, who famously remarked: “Miracles do not cluster. That which has happened but once in six thousand years cannot be expected to happen often. Such a government, once gone, might leave a void, to be filled, for ages, with revolution and tumult, riot and despotism.”\footnote{Daniel Webster, Fourth of July Oration (July 4, 1802), in 15 The Writings and Speeches of Daniel Webster 513, 520 (1903).} Webster saw the creation of the United States as the result of Divine Providence, which produced a “miracle” that had occurred only once in six thousand years. The six thousand year time period is significant, for it roughly corresponds to the number of generations in the Bible from Adam and Eve to the early nineteenth century. Moreover, like the early New England Puritans, Webster prophesied dire consequences for the world if America should fail to accomplish its special mission.

The most striking example of nineteenth century American exceptionalism is found in the concept of Manifest Destiny. The phrase originated in an essay written by John L. O’Sullivan in 1845, in which he described “our manifest destiny to overspread the continent allotted by Providence for the free
development of our yearly multiplying millions." Madsen argues that the concept of Manifest Destiny required the United States to fight the Mexican War and acquire ever larger parts of the American West, because "[t]he acquisition of more land, then, was necessary to keep the American experiment in democracy going. This was the visible or 'manifest' destiny of the United States . . . ." It appeared to mid-nineteenth century American Protestants that just as God had made the promised land of New England available to the Puritans, he was now signaling that the nascent United States should settle the North American continent from sea to shining sea. This ideology had mixed consequences for those Native Americans, Mexicans, and bison that stood in the way. Madsen notes that Senator John Dix of New York described the process as follows:

"The aboriginal races, which occupy and overrun a portion of California and New Mexico, must there, as everywhere else, give way before the advancing wave of civilization, either to be overwhelmed by it, or to be driven upon perpetually contracting areas, where, from a diminution of their accustomed sources of subsistence, they must ultimately become extinct by force of an invincible law. We see the operation of this law in every portion of this continent. We have no power to control it, if we would. It is the behest of Providence that idleness, and ignorance, and barbarism, shall give way to industry, and knowledge, and civilization."

Anders Stephanson offers a similar account, arguing that American nationalism in the early nineteenth century "shared . . a sense of an entirely new kind of country, uniquely marked by social, economic, and spatial openness." He adds that the United States was viewed as "a sacred-secular project, a mission of world-historical significance in a designated continental setting of no determinate limits." Stephanson notes that O'Sullivan specifically warned against the "tendency to ape European models." Instead, "[t]he nation . . . was bound by nothing except its founding principles, the eternal and universal principles."

The middle of the nineteenth century also saw important new moral and social movements arise in America to perfect the country and save it from its sins. Puritan New England gave rise to William Lloyd Garrison and the powerful movement to abolish slavery. According to James Morone, Garrison reacted to Nat Turner's slave rebellion with these words: "Wo to this guilty

181 See MADSEN, supra note 12, at 89.
182 Id.
183 See BERCOVITCH, supra note 18, at 161-67.
184 See MADSEN, supra note 12, at 105 (alteration in original).
185 STEPHANSON, supra note 14, at 28.
186 Id.
187 Id. at 41.
188 Id. For additional discussion regarding the link between Manifest Destiny and American millenniamism, see TUVEISON, supra note 19, at 91-136.
land, unless she speedily repent of her evil doings! The blood of millions . . .
cries aloud for redress! Immediate Emancipation can alone save her from the
vengeance of heaven and cancel the debt of ages.” 189 The abolitionists
charged southern slaveholders with what had always been since the time of the
Puritans the “four great American trespasses: violence, intoxication, laziness,
and sexual depravity.” 190 Morone quotes one abolitionist who stated that
“[t]he slave states are Sodoms and almost every village family is a brothel.” 191

It thus appears that just as Puritan fervor was invoked against the threat of
witchcraft to their promised land, so too did the abolitionists rouse the
descendants of the Puritans against the corrupting evil of slavery. As Professor
Levinson has noted, the morally absolutist William Lloyd Garrison and his
followers famously said that the Constitution, in tolerating slavery, was a
“‘covenant with death’ and ‘agreement with hell’ [echoing] the prophet
Isaiah.” 192 James Morone also captures the Puritan moral fervor of the
abolitionist movement in his description of a large rally in Boston on July 4,
1854, protesting the arrest of Anthony Burns, an alleged fugitive slave:

When Garrison rose, he read the Fugitive Slave Act aloud, set a copy on
fire, and, following a formula from Deuteronomy, called out, “And let the
people say ‘Amen.’” The crowd responded. He repeated the procedure
with papers from Burns’s hearing. Then Garrison held up a copy of the
Constitution, read the pro-slavery passages, denounced this “Covenant
with death” and “agreement with hell” (quoting Isaiah), set alight the
Constitution, and prayed: “So perish all compromises with Tyranny! . . .
And let all the people say, ‘Amen.’” Shocked cries and hisses were
overwhelmed by the great mob of abolitionists roaring back, “Amen.” 193

American exceptionalism and the sin of slavery remained a major theme of
our leaders during the Civil War. Abraham Lincoln described the conflict in
strikingly exceptional terms. Jon Meacham notes that “[o]n the eve of the
Civil War, Lincoln . . . prayed that he would be able to lead what he called
God’s ‘almost chosen people.’” 194 Meacham adds that in Lincoln’s first
inaugural address, he “begged the nation for forbearance, asking for
‘intelligence, patriotism, Christianity, and a firm reliance on Him, who has
never yet forsaken this favored land.’” 195 Lincoln returned to the theme of
American exceptionalism in the Gettysburg Address, in which he said that

189 See Morone, supra note 15, at 136.
190 Id. at 145. Abolitionist literature described the physical suffering of many slaves, the
heavy drinking and drunken cruelty of their owners, the laziness of the slave owners, and
the sexual abuse of slaves by many of their owners. See id. at 145-55.
191 See id. at 151.
192 Levinson, supra note 25, at 66 (quoting Walter Merrill, Against Wind and Tide:
A Biography of Wm. Lloyd Garrison 205 (1963)).
193 Morone, supra note 15, at 207.
194 Meacham, supra note 16, at 27.
195 Id. at 115.
Union soldiers had died and were dying in huge numbers so that “government of the people, by the people, for the people, shall not perish from the earth.” Similarly, in his annual message to Congress a month before the Emancipation Proclamation became effective, Lincoln described the conflict by saying that “[w]e shall nobly save, or meanly lose, the last best, hope of earth.” Lincoln clearly saw the Civil War as not only a war about slavery or the preservation of the Union, but also a war about whether the exceptional American experiment in democracy and liberty would succeed.

James Morone notes that “[i]n an era rich with moral crusades and millennial dreams, the Civil War itself became the long-awaited American apocalypse.” He goes on to claim that Julia Ward Howe reflected the apocalyptic fervor when she reworked passages of the millennial scriptures into “The Battle Hymn of the Republic.” . . . On it went, four stanzas and a chorus from the Book of Revelation. The Bible’s most seething and delirious images summing up the Final Holy Battle – long prophesied, now come at last. Anders Stephanson adds that the North’s victory in the Civil War allowed it “to regain its destinarian footing.” He explains that there was a great deal of apocalyptic talk about Armageddon, about the eradication of sinful slavery as the final battle. The United States would be born again, “a mountain of holiness for the dissemination of light and purity to all nations,” as one Reverend in Philadelphia decreed. With the end in sight, the Unionist cause could be interpreted as divine vindication. Thus the Civil War revitalized confidence in the American mission, now properly national and northern. American exceptionalism and Puritan moral fervor burned bright during the Civil War and helped to carry the nation through its most troubled days. In the

197 MORONE, supra note 15, at 213.
198 Id. Morone explains:
Writing in a Union army camp, Howe gave the biblical images their now familiar form: “And the angel . . . gathered the vine of the earth, and cast it into the great wine press of the wrath of God” (Revelation 14:19) became “He is trampling out the vintage where the grapes of wrath are stored.” And “I saw a great white throne and him that sat on it. . . . And I saw the dead stand before God . . . and they were judged every man” (20:12-13) became “He is sifting out the hearts of men before the judgment seat.”
Id.; see also MEACHAM, supra note 16, at 123 (arguing that Julia Ward Howe’s hymn reflected the religious terms in which the debates over slavery and the Union were cast).
199 STEPHANSON, supra note 14, at 65.
200 Id.
minds of many, the Civil War became the ultimate apocalyptic crusade to
 purge the land of its grievous sins.201

The nineteenth century also saw two other great moral movements to
 improve America and again make it a shining city on a hill to inspire the
 world. First, the temperance movement sought and eventually obtained a
 prohibition on the sale of alcohol. This American social movement was again
 an attempt to purify the New Jerusalem founded by the Puritans.202 Morone
 notes that “[t]he fight against the saloons would return the United States to its
 appointed place – up on a hill, moral exemplar for all people.”203 Consider the
 following statement by the popular evangelist Billy Sunday in favor of
 prohibition:

The saloon is the sum of all villainies. It is worse than war or pestilence.
 It is the crime of crimes. It is the parent of crimes and the mother of sins.
 It is the appalling source of misery and crime in the land. And to license
 such an incarnate fiend of hell is the dirtiest, low-down, damnable
 business on top of this old earth. There is nothing to be compared to it.204

Support for Prohibition was so high that “[e]very state except Rhode Island
 and Connecticut [ratified] the Prohibition amendment.”205 Strikingly, once
 Prohibition was enacted, “[d]espite the folklore, drinking plummeted.”206 No
 other major Western nation that I am aware of has ever followed the example
 of the United States in conducting as radical a social experiment as Prohibition.

In addition, the nineteenth century gave rise to a powerful moral movement
 for women’s suffrage, which eventually succeeded in gaining women the
 Nineteenth Amendment and the right to vote in all federal and state elections.
 Abolitionists, advocates of temperance, and advocates of women’s suffrage
 were often one and the same group of people.207 The American spirit of moral
 reform associated with the women’s suffrage movement is well captured by the
 Seneca Falls Declaration of 1848. The Declaration is modeled on the
 Declaration of Independence, declares that all men and women are created
 equal, lists the grievances of women against men, and concludes by demanding
 that women be given the vote.208 There can be little doubt that nineteenth
 century America’s moral crusades grew out of the moral fervor that led to the
 founding of the country in the seventeenth and eighteenth centuries.

201 See Bercovitch, supra note 18, at 173-74.
202 See Morone, supra note 15, at 289 (discussing the temperance movement’s
 ideological kinship with both Puritan moralism and abolitionism).
203 Id. at 305.
204 Billy Sunday, The Evils of Alcohol (1913), in Prohibition 30, 30 (Dennis Nishi ed.,
 2003).
205 Morone, supra note 15, at 314.
206 Id. at 322-23.
207 See id. at 159-68, 242-47.
208 Paul Brest et al., Processes of Constitutional Decisionmaking: Cases and
 Materials 166-67 (5th ed. 2006).
The last half of the nineteenth century saw the emergence of another distinctly American icon: the Statue of Liberty. The statue is America’s answer to the Colossus of Rhodes, one of the seven wonders of the ancient world. The statue was first proposed by a French historian in 1865, the year the Thirteenth Amendment abolished slavery, and it was completed and dedicated in 1886. It was originally named “Liberty Enlightening the World,” a fitting name for the national icon of a country that had just abolished slavery and that saw itself, and was seen by others, as a shining city on a hill. It is striking that the statue holds aloft a torch or light at the harbor that is America’s front door. It is also striking that our national icon is called a statue of “liberty” and not a statue of “equality” or “fraternity.” That is, after all, what this country stands for.

The sense that Americans are a special people, in a special land, on a special mission is evident for all to see in the famous poem engraved on the Statue of Liberty’s base, which ends with the following words:

“Keep ancient lands, your storied pomp!” cries she  
With silent lips. “Give me your tired, your poor,  
Your huddled masses yearning to breathe free,  
The wretched refuse of your teeming shore.  
Send these, the homeless, tempest-tost to me,  
I lift my lamp beside the golden door!”

These words clearly evoke America’s biblical roots as a shining city on a hill and its exceptional mission as an exemplar of liberty and a refuge for those yearning for both freedom and economic opportunity. American exceptionalism was thus visibly and permanently put on public display when the Statue of Liberty was dedicated in 1886.

At the close of the nineteenth century, Frederick Jackson Turner wrote an influential essay entitled The Significance of the Frontier in American History. According to Madsen, Turner believed that “[i]t was from the experience of perennial rebirth, fluidity of social institutions, continual development and proximity to ‘the simplicity of primitive society’ that there arose the forces that dominate the American national character.” Madsen observes:

211 Madsen, supra note 12, at 123 (quoting Turner, supra note 210, at 3).
The process of self-transformation from corrupted European to perfected American has been central to New World mythology since the seventeenth century, as has the idea of discovering perfection through a return to primitive simplicity. Turner’s thesis offers historical justification for a concept of the West that is informed by the imperialist assumptions of the ideology of Manifest Destiny.212

Turner’s thesis certainly drew a huge amount of attention, which suggests that he captured something very important to the American psyche about the significance of the frontier and of the West.213

Madsen observes that the quintessentially American book and movie genre of the Western speaks today to the continuing powerful imagery of the civilization of the frontier and the creation of new shining cities upon hills.214 She tendentiously claims that “[t]he values celebrated in the Western include: territorial expansion, liberty, democratic levelling, national identity, the work ethic, racial (white) superiority, and violence (when used with restraint). The hero is often to be admired for his ability to control his anger, his capacity for violence, his own self.”215 Defenders of the Western would counter that it celebrates the triumph of civilization over savagery and brutality.

D. American Exceptionalism in the Twentieth Century

America’s Puritan moralistic crusades to perfect itself and to improve the fallen world continued into the twentieth century and much great good was accomplished because of them. The Spanish-American War was fought to end Old World Spain’s illegitimate colonial empire,216 and World War I was fought to, in Woodrow Wilson’s words, make the world “safe for democracy.” Meacham observes that Wilson, the son of a Presbyterian clergyman, brought “a missionary – his critics would say messianic – dimension to American life and policy.”217 Strikingly, Wilson said in speaking about World War I that it gave “America . . . the infinite privilege of fulfilling her destiny and saving the world.”218 World War II, the Cold War, and McCarthyism were all efforts to save the world from totalitarianism. McCarthy’s efforts were spearheaded by a

212 Id.
213 See Stephanson, supra note 14, at 74-75 (arguing that the closing of the frontier helped give way to a rebirth of American imperial expansion); id. at 80 (“God had given Anglo-Saxon civilization in general and the United States in particular a command: Christianize and civilize the world or face divine retribution.”).
214 See Madsen, supra note 12, at 123.
215 Id. at 124.
216 Anders Stephanson adds that the Spanish-American War in the Philippines was justified by some through a new form of the Manifest Destiny argument, whereby “the American mission was reconceived as a kind of civilizational imperialism under Anglo-Saxon impress.” Stephanson, supra note 14, at 67.
217 Meacham, supra note 16, at 150.
218 See Kohut & Stokes, supra note 24, at 14.
Committee with a distinctly moralistic and American name: “The House Committee on Un-American Activities.” As Morone observes, Henry Luce captured this spirit during World War II when he said that America had a “manifest duty” to be the “good Samaritan of the entire world,” because Americans were the “inheritors of all the great principles of Western Civilization – Justice, the love of Truth, the ideal of charity.” Morone adds that “World War II resurrected the city on a hill. The virtuous people – free from want (thanks to the combined efforts of government and industry) and free from fear (thanks to rising American might) – marched out to save the world.”

Recently, President George W. Bush described the War on Terror as being fought against an Axis of Evil. Even those Americans who have opposed President Bush’s War on Terror – and before it, opposed the Vietnam War – are and were every bit as moralistic as those in favor. They see the government of the Promised Land as having been corrupted by a military industrial complex, big business, or an ungodly need for oil, and they seek to purify America of such corruption. Both pro-war and anti-war movements in the United States have always had a distinctively moralistic outlook.

The early and mid-twentieth century saw the rise of another important moral movement, which first burst on the political scene in 1896 with the presidential campaign of William Jennings Bryan and ultimately achieved fruition with the presidencies of Woodrow Wilson, Franklin Roosevelt, and Lyndon Johnson. This movement preached a “social gospel” as an alternative to the Puritan focus on individual vices like alcoholism and sexual sin.

Thus, “American churches – Protestant, Catholic, and Jewish – all condemned the ‘unbrotherly . . . distribution of wealth’ and the ‘spirit of mammon’ that were routing the ‘eternal principles of God and justice.’” Politicians also embraced the social gospel movement. As Meacham reports, Theodore Roosevelt once famously said: “I am charged with being a preacher . . . . Well, I suppose I am. I have such a bully pulpit.” His cousin, Franklin Roosevelt explained that “[w]e call what we have been doing ‘human security’ and ‘social justice.’ In the last analysis all of those terms can be described by one word; and that is ‘Christianity.’” Meacham notes that

220 Morone, supra note 15, at 376.
221 See infra notes 315-316 and accompanying text.
224 See Meacham, supra note 16, at 145.
225 Informal, Extemporaneous Remarks to a Number of Visiting Protestant Ministers, Pub. Papers 74, 75 (Jan. 31, 1938).
Franklin Roosevelt referred to big businessmen as “money changers” and “alluded to Proverbs as he reassured the country” and sought “a renewed sense of the moral life.” Meacham also reports that Charles Peters, the founding editor of the Washington Monthly, claimed that “Roosevelt saw the New Deal as applied Christianity.”

Another moral movement – a crusade against communism – arose in the years between World War II and the Vietnam War. Morone reports that Life magazine wrote at this time that “[i]t seems pretty clear that Communism is Satan in action, to be resisted by all means at all times.” The spirit of the times was captured in 1954, when Congress and President Eisenhower approved legislation adding the words “under God” to the Pledge of Allegiance. This addition was motivated by the desire to “distinguish [America] from communist countries by acknowledging God’s role in American society.” Morone claims that

[The red scare took an honest fear – there were Communists, and the Soviet Union was an implacable enemy – and pushed it into the rhetorical frame of the Puritan jeremiad. Echoing the old sermons, the red scare imagined a “horrible army of devils” swarming across the land (not to mention the State Department).]

The connection between American exceptionalism and U.S. foreign policy during the Cold War is most evident in John F. Kennedy’s inaugural address, which perfectly captures the battle between good and evil that raged in those days. Kennedy said:

I have sworn before you and Almighty God the same solemn oath our forebears prescribed nearly a century and three quarters ago.

The world is very different now. For man holds in his mortal hands the power to abolish all forms of human poverty and all forms of human life. And yet the same revolutionary beliefs for which our forebears fought are still at issue around the globe – the belief that the rights of man come not from the generosity of the state but from the hand of God.

We dare not forget today that we are the heirs of that first revolution. Let the word go forth from this time and place, to friend and foe alike, that the torch has been passed to a new generation of Americans – born in this century, tempered by war, disciplined by a hard and bitter peace, proud of our ancient heritage – and unwilling to witness or permit the slow undoing of those human rights to which this nation has always been

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226 Meacham, supra note 16, at 155.
227 See id. at 156.
228 See Morone, supra note 15, at 380.
committed, and to which we are committed today at home and around the
world.

Let every nation know, whether it wishes us well or ill, that we shall
pay any price, bear any burden, meet any hardship, support any friend,
oppose any foe to assure the survival and the success of liberty.\footnote{Kennedy’s speech makes all the Puritan exceptionalist claims. He talks about
rights flowing to man from God, the unique commitment of Americans to
liberty since 1776, the torch (think here of the Statue of Liberty) being passed
to a new generation, and an apocalyptic battle between good and evil in which
America will pay any price to assure the success of liberty. What is so
striking, though, about Kennedy’s inaugural address is that it resonated so
much with ordinary, everyday Americans. It inspired generations of
Americans to join the Kennedy-created Peace Corps and travel the world as
missionaries of the American people.\footnote{Perhaps Kennedy’s inaugural address
is one of the most well remembered in American history because it captured
the extent to which Americans see themselves as a shining city on a hill. Indeed,
the end of his inaugural address, Kennedy charged America to not
only protect its own liberties but to project them in order to “truly light the
world.”} 232

The crusade for civil rights for African Americans represents another classic
American moral movement of the mid-twentieth century with exceptionalist
roots. This crusade, modeled on the abolitionist movement before it, led to the
elimination of segregation and apartheid in American public life. The prophet
of this movement was the American minister Martin Luther King, Jr. Consider
the following exceptionalist rhetoric from his famous \textit{I Have a Dream}
speech, given on the centennial of the signing of the Emancipation Proclamation:

\begin{quote}
So I say to you, my friends, that even though we must face the difficulties
of today and tomorrow, I still have a dream. \textit{It is a dream deeply rooted
in the American dream} that one day this nation will rise up and live out
the true meaning of its creed – we hold these truths to be self-evident, that
all men are created equal.\footnote{King also declared that “[w]hen the architects of our republic wrote the
magnificent words of the Constitution and the Declaration of Independence,
they were signing a promissory note to which every American was to fall}
\end{quote}
heir.”

King returned to this theme in his final speech, given on the eve of his assassination in Memphis, Tennessee, in which he praised the students who sat-in at lunch counters throughout the South during the 1960s for “standing up for the best in the American dream. And taking the whole nation back to those great wells of democracy which were dug deep by the Founding Fathers in the Declaration of Independence and the Constitution.”

King then closed his final speech with words that echo poignantly the words of William Bradford: “I’ve been to the mountaintop. . . . And I’ve looked over. And I’ve seen the promised land. . . . Mine eyes have seen the glory of the coming of the Lord.”

King, like William Bradford, had looked over America and had seen the promised land. But unlike Bradford, King gave his life trying to bring us there.

The moralism of the civil rights movement marked the end of the social gospel. Beginning in the 1970s, Americans moved back toward traditional morality, first with the election of born-again presidential candidate Jimmy Carter and then, more strikingly, with the conservative presidency of Ronald Reagan.

At the close of the twentieth century, President Ronald Reagan, arguably the most dominant politician of the last sixty years, explicitly adopted the American Puritans’ exceptionalist rhetoric, insisting that America is indeed a shining city on a hill. Reagan’s most famous speech on the subject was given in 1974, long before he was elected president. The speech is worth quoting at some length, because it is one of the most influential statements of American exceptionalism ever made.

You can call it mysticism if you want to, but I have always believed that there was some divine plan that placed this great continent between two oceans to be sought out by those who were possessed of an abiding love of freedom and a special kind of courage.

This was true of those who pioneered the great wilderness in the beginning of this country, as it also is true of those later immigrants who were willing to leave the land of their birth and come to a land where even the language was unknown to them. . . .

. . .

Now we are a nation of 211 million people with a pedigree that includes blood lines from every corner of the world. We have shed that American-melting-pot-blood in every corner of the world, usually in defense of someone’s freedom. . . . [Other countries have Constitutions

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235 Id. at 102.
236 Martin Luther King, Jr., I See the Promised Land (Apr. 3, 1968), in I HAVE A DREAM, supra note 234, at 193, 202.
237 Id. at 203.
238 See supra notes 90-91 and accompanying text.
239 See MORONE, supra note 15, at 445.
that] say, “Government grants you these rights” and our’s [sic] says, “you are born with these rights, they are yours by the grace of God, and no government on earth can take them from you.”

We cannot escape our destiny nor should we try to do so. The leadership of the free world was thrust upon us two centuries ago in that little hall in Philadelphia. In the days following World War II, when the economic strength and power of America was all that stood between the world and the return to the dark ages, Pope Pius XII said “the American people have a great genius for splendid and unselfish actions. Into the hands of America God has placed the destinies of an afflicted mankind.”

We are indeed, and we are today, the last best hope of man on earth. All the great themes of American exceptionalism are evident in this speech, which recognizes Americans as a special people, in a special land, with a special mission. Reagan returned to the “shining city on a hill” theme in the final paragraphs of his farewell address, emphasizing how central American exceptionalism was to Reagan’s worldview.

The past few days when I’ve been at that window upstairs, I’ve thought a bit of the “shining city upon a hill.” The phrase comes from John Winthrop, who wrote it to describe the America he imagined. What he imagined was important because he was an early Pilgrim, an early freedom man. He journeyed here on what today we’d call a little wooden boat; and like the other Pilgrims, he was looking for a home that would be free.

I’ve spoken of the shining city all my political life, but I don’t know if I ever quite communicated what I saw when I said it. But in my mind it was a tall, proud city built on rocks stronger than oceans, windswept, God-blessed, and teeming with people of all kinds living in harmony and peace; a city with free ports that hummed with commerce and creativity. And if there had to be city walls, the walls had doors and the doors were open to anyone with the will and the heart to get here. That’s how I saw it, and see it still.

And how stands the city on this winter night? More prosperous, more secure, and happier than it was 8 years ago. But more than that: After 200 years, two centuries, she still stands strong and true on the granite ridge, and her glow has held steady no matter what storm. And

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she’s still a beacon, still a magnet for all who must have freedom, for all
the pilgrims from all the lost places who are hurtling through the
darkness, toward home.  

How Ronald Reagan, who after all acted in many old Westerns, came to
admire Puritan John Winthrop is unclear, but what is clear is that American
exceptionalism played a key role in the rhetoric of our greatest leader of the
last half century.  Reagan’s vision of the shining city on a hill is strikingly
similar to St. John’s vision of the New Jerusalem, as described in the book of
Revelation.

Then I saw a new heaven and a new earth, for the first heaven and
the first earth had passed away, and there was no longer any sea.  I saw
the Holy City, the new Jerusalem, coming down out of heaven from God,
prepared as a bride beautifully dressed for her husband. . . .

. . . And he carried me away in the Spirit to a mountain great and
high, and showed me the Holy City, Jerusalem, coming down out of
heaven from God.  It shone with the glory of God, and its brilliance was
like that of a very precious jewel, like a jasper, clear as crystal. . . .

. . . The city does not need the sun or the moon to shine on it, for the
glory of God gives it light, and the Lamb is its lamp.  The nations will
walk by its light, and the kings of the earth will bring their splendor into
it.  On no day will its gates ever be shut, for there will be no night
there.  

The powerful Biblical image of the shining city on a hill clearly moved
President Reagan deeply, and it remains profoundly alive today.  During the
2000 presidential election campaign, for example, then Governor George W.
Bush insisted that “our nation is chosen by God and commissioned by history
to be [a] model to the world.”  It would be hard to state the essence of
American exceptionalism more succinctly.  In his second inaugural address,
Bush stated America’s exceptional moral mission as follows:

There is only one force of history that can break the reign of hatred and
resentment and expose the pretensions of tyrants . . . and that is the force
of human freedom.

We are led, by events and common sense, to one conclusion: The
survival of liberty in our land increasingly depends on the success of

241 Reagan, Farewell Address, supra note 2, at 1722.
243 See Todd S. Purdum & Alison Mitchell, McCain Renews Attack on Ads as Bush Talks
liberty in other lands. The best hope for peace in our world is the expansion of freedom in all the world.

America’s vital interests and our deepest beliefs are now one. . . .

So it is the policy of the United States to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world.244

As Jon Meacham concludes, “At every significant point in the four centuries since English settlers laid the foundations for the nation we know – at every significant point – American leaders and the great majority of the American people have explicitly said or acted as though they understood history in terms of this public religion.”245

In conclusion, Americans are a uniquely moralistic people. This moralism has its roots in the Puritans’ belief that New England was a land promised to them by God, that they were an elect group of believers predestined for salvation, and that their new civilization would become a light and a guide to all the nations of the earth. Remarkably, this core idea remains vibrantly alive four centuries later in the belief of many Americans that America is a special place with a special kind of people and a special role to play vis-à-vis the rest of the world. Although the Puritan vision of the shining city on a hill has been gradually shorn of its most sectarian Protestant claims over the last four hundred years, American exceptionalism remains a vital part of the ideology of what it means to be an American. One can approve or disapprove of the ideology of American exceptionalism as a normative matter, but one cannot deny that as a positive matter the ideology exists and has deep roots.

III. THE REALITY OF AMERICAN EXCEPTIONALISM: A SUMMARY OF SOME OF THE WAYS IN WHICH THE UNITED STATES HAS BECOME AN EXCEPTIONAL NATION

We saw in Part II above that Americans have believed for four centuries in an ideology of American exceptionalism. We will now see how the distinctively American faith in liberty, religious freedom, and patriotism has caused the United States to become really quite different from all the other nations of the world. Not only does the United States differ from the nations of Western Europe, including Great Britain from which it sprang, but it is also exceptional among the countries of the New World, differing markedly from the nations of Central and South America and even from its northern cousin Canada. Like it or not, Americans really are a special people with a special ideology that sets us apart from all the other peoples of the Old and New Worlds.

244 Second Inaugural Address, 41 WEEKLY COMP. PRES. DOC. 74, 74 (Jan. 20, 2005).
A. Observations of Foreign Travelers

The idea of American exceptionalism has been very popular in a body of writing that Seymour Martin Lipset describes as the “foreign traveler” literature: accounts of how the United States differs from Europe written by visiting Europeans. The most famous such account – and one of the first to describe the United States as exceptional – is Alexis de Tocqueville’s Democracy in America, based on his travels in the United States in the 1830s. Kohut and Stokes claim that Tocqueville describes “the essence of American exceptionalism” as being “a unique mixture of liberty, egalitarianism, individualism, populism, and laissez-faire values.” They add that he “found in Americans a feeling of superiority and even arrogance. ‘Do not lead an American to speak of Europe,’ he wrote. ‘He will ordinarily show great presumption and a rather silly pride’ by lecturing Europeans about liberty and freedom.”

Lipset notes that “[i]n his great book, Tocqueville is the first to refer to the United States as exceptional – that is, qualitatively different from all other countries. He is, therefore, the initiator of the writings on American exceptionalism.” Lipset goes on to emphasize that when Tocqueville and other foreign travelers “have used the term ‘exceptional’ to describe the United States, they have not meant, as some critics of the concept assume, that America is better than other countries or has a superior culture.” Unlike John Winthrop, Tocqueville did not see the United States as being in every way superior to the Old World. He just saw that it was very different.

Modern day Americans and Europeans agree with Tocqueville’s observation that the United States is exceptional. John Micklethwait and Adrian Wooldridge note polls showing that “[e]ighty-three percent of Americans and 79 percent of Europeans agreed that Europeans and Americans have different social and cultural values.” They claim that “America is different from Europe on many of the fundamental questions of life – such as patriotism, criminal justice and religiosity.”

246 Lipset, supra note 20, at 17.
248 Lipset, supra note 20, at 17-18.
249 Kohut & Stokes, supra note 24, at 43.
250 Id.
251 Lipset, supra note 20, at 18 (footnote omitted).
252 Id.
253 See id.
254 Micklethwait & Wooldridge, supra note 21, at 293-94.
255 Id. at 294.
B. The Ideology of Being an American

The first big area in which the United States is in fact exceptional is in the ideology of its citizens. In the words of Seymour Martin Lipset:

Born out of revolution, the United States is a country organized around an ideology which includes a set of dogmas about the nature of a good society. Americanism, as different people have pointed out, is an “ism” or ideology in the same way that communism or fascism or liberalism are isms. As G. K. Chesterton put it: “America is the only nation in the world that is founded on a creed. That creed is set forth with dogmatic and even theological lucidity in the Declaration of Independence . . . .”

[The American] ideology can be described in five words: liberty, egalitarianism, individualism, populism, and laissez-faire. The revolutionary ideology which became the American Creed is liberalism in its eighteenth- and nineteenth-century meanings, as distinct from conservative Toryism, statist communitarianism, mercantilism, and noblesse oblige dominant in monarchical, state-church-formed cultures.256

Graham Wilson agrees that the United States is to a unique degree a classically liberal society, and he credits this idea to Louis Hartz’s book, The Liberal Tradition in America.257 Micklethwait and Wooldridge add that “Americans are both more individualistic than continental Europeans and also more traditional.”258 In Lipset’s view, the rampant individualism of American culture is both a good and bad thing. It leads to creativity, self-reliance, and hard work to a degree that is the envy of other countries around the world.259 It also has, according to Lipset anyway, a dark underside.260

1. Crime and Divorce Rates

One of the dark undersides of American individualism is that we have an exceptionally high crime rate and an exceptionally punitive (and moralistic) criminal justice system.261 Lipset explains that “rates for all categories of crime are approximately three times higher [in America] than in other developed nations, and the differences have been

256 Lipset, supra note 20, at 31 (second alteration in original) (quoting G.K. Chesterton, What I Saw in America 7 (1922)).
257 See Wilson, supra note 22, at 4 (citing Louis Hartz, The Liberal Tradition in America (1955)).
258 Micklethwait & Woolridge, supra note 21, at 312.
259 Lipset, supra note 20, at 26, 55-58.
260 See id. at 26 (explaining that much of what people deplore about the United States, such as “moral decline” and “high crime or divorce rates” is actually “closely linked to American values which presumably they approve of, those which make for achievement and independence”).
261 See id. at 269.
growing.” The country’s lead is much greater for violent crimes. As of 1993, the male homicide rate was 12.4 per 100,000, contrasted to 1.6 for the European Union, and but 0.9 for Japan. . . . By the end of 1993, close to 1 million persons were in state and federal penitentiaries. The United States “had an incarceration rate more than 4 times that of Canada, and more than 5 times that of England and Wales.” Only Russia was higher.262

Just as rugged individualism sometimes veers over into violent criminal activity in the United States, Lipset claims that it also has led to a weakened family structure.263 “The United States is also ‘exceptional’ with regard to high rates of divorce and single-parent families. As David Popenoe notes, [the U.S.] ‘marital breakup rate is by far the highest among the advanced societies.’”264 Lipset has no doubt that “[t]he lead of the United States in divorce rates, which goes back to the nineteenth century, presumably reflects in part the strength of individualism.”265

2. Patriotism and Optimism

Another way in which American ideology is exceptional is that Americans are by far and away the most patriotic citizens of any major country in the world. Kohut and Stokes note that “[m]any more U.S. citizens say they are very proud of their nationality (71 percent) than the Spanish (51 percent), who are in turn prouder than the British, French, and Italians, and far prouder than the Germans (21 percent).”266 Lipset observes that

[opinion polls taken in the late 1980s and early 1990s in most European countries, Japan, and North America, find that Americans are invariably more positive – usually much more so – on items measuring [patriotism] than the citizens of the other industrialized democracies. They continue to believe in America and its superiority as a social system. As of the mid-1990s, 75 percent of American adults continue to say they are proud to be Americans. The corresponding percentages for other countries are: Britain, 54 percent; West Germany, 20 percent; and France, 35 percent.267 Micklethwait and Wooldridge report that “six in ten Americans believe that American culture is superior to other cultures, compared with three in ten

262 Id. at 46-47 (first alteration in original) (footnotes omitted).
263 See LIPSET, supra note 20, at 49-50.
264 Id. at 49.
265 Id. at 50; see also MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 118 (1987) (“American divorce rates in the ‘good old days,’ while low compared to what we are experiencing now, were at least double, and often triple or quadruple those of any European country.”).
266 KOHUT & STOKES, supra note 24, at 45.
267 LIPSET, supra note 20, at 51.
French people and four in ten Britons and Germans.”

Similarly, Kohut and Stokes note that “60 percent of Americans agreed with the broad statement ‘Our people are not perfect, but our culture is superior to others’ – a proportion almost twice that found in France (33 percent), somewhat more than in Britain and Germany, and approached only by neighboring Canada (49 percent).”

They add that “70 percent of Americans believe it is a good thing that U.S. ideas and customs are spreading around the world,” while citizens of other countries are much more ambivalent about this phenomenon. The rest of the world often seems to perceive the United States as being very jingoistic. That perception is grounded in reality. Americans are exceptional in their patriotism, just as they are exceptional in their commitment to rugged individualism.

Finally, Kohut and Stokes say that “Americans are more optimistic and happier than most people and consistently express more satisfaction with the way that their lives are going” than do the people of any other country in the world. “[Eighty-one] percent of adults were optimistic about what the twenty-first century held for them and their families . . . .” Similarly, Lipset reports that Americans “also show up as among the most optimistic people in Gallup Polls taken annually in thirty countries between 1976 and 1992.”

Kohut and Stokes quote Carnegie Endowment scholar Minxin Pei as saying that “American nationalism is triumphant rather than aggrieved” and that it “is forward looking, while nationalism in most other countries is the reverse. Those who believe in the superiority of American values and institutions do not dwell on their historical glories . . . . Instead, they look forward to even better times ahead . . . .” Pei says quite rightly that this gives “American nationalism . . . a missionary spirit and a short collective memory.”

C. Social Egalitarianism and Libertarian Economics

Another big area in which the United States is in reality an exceptional country is with respect to the economy. Lipset explains that America has a unique class structure because

the emphasis on egalitarian social relations, the absence of a demand that those lower in the social order give overt deference to their betters, and the stress on meritocracy, on equal opportunity for all to rise economically and socially, stemmed . . . from the twin facts that America

268 Micklethwait & Wooldridge, supra note 21, at 300.
269 Kohut & Stokes, supra note 24, at 44.
270 Id. at 46.
271 Id. at 56-57.
272 Id. at 85.
273 Lipset, supra note 20, at 51.
275 Id., quoted in Kohut & Stokes, supra note 24, at 12.
was formed as a new settler society and emphasized equality in formulating its national identity.\textsuperscript{276}

Americans put a strong emphasis on the attainment of wealth, and from the beginning fostered an egalitarian social structure by forbidding titles of nobility and addressing our national leader by the simple republican title: Mr. President.\textsuperscript{277} The idea that all of us are created equal and that America was and should remain a meritocracy is deeply rooted in our popular culture. Micklethwait and Wooldridge report that “[s]ocial mobility is higher in America than other countries, with 50 percent to 80 percent of the people in America’s bottom quintile pushing themselves out of that bracket within ten years.”\textsuperscript{278} Aaron Wildavsky argues that “what makes America special is the deeply embedded belief, accompanied by supporting institutions, that liberty and equality, the cultures of individualism and egalitarianism, are (or can be) mutually reinforcing. In America, if not elsewhere, equal opportunity and equal results may be made compatible.”\textsuperscript{279}

American social egalitarianism coexists with a very strong strain of libertarian belief and practice. Lipset observes that the United States has been “[f]rom the Revolution on . . . the laissez-faire country par excellence.”\textsuperscript{280} Micklethwait and Wooldridge add that “[i]f Americans are unusually hostile to government, they are also unusually enthusiastic about capitalism.”\textsuperscript{281} They claim that “it is much easier to go about the basic business of business – hiring, firing, investing, borrowing and even going bust – in America than in any other big developed country.”\textsuperscript{282} Lipset notes that whereas many Europeans viewed economic ambition as vulgar, Americans thought that hard work and economic success were the hallmarks of the elect.\textsuperscript{283} Kohut and Stokes report that “Americans surveyed in 1997 were twice as likely as most Europeans to believe that hard work brings a better life.”\textsuperscript{284} This spirit of libertarian individualism, combined with the teachings of Benjamin Franklin, among many others, about the importance of hard work, have made America “‘the richest and the most productive [country] in the world.’”\textsuperscript{285} Lipset observes

\begin{footnotesize}
\begin{enumerate}
\item LIPSET, supra note 20, at 53.
\item Id.\textsuperscript{277}
\item MICKLETHWAIT & WOOLDRIDGE, supra note 21, at 308.
\item Aaron Wildavsky, Resolved, that Individualism and Egalitarianism Be Made Compatible in America, in IS AMERICA DIFFERENT?, supra note 71, at 116, 118-19.
\item LIPSET, supra note 20, at 54.
\item MICKLETHWAIT & WOOLDRIDGE, supra note 21, at 305.
\item Id. at 306.
\item See LIPSET, supra note 20, at 54 (“Unlike the situation in many European countries, in which economic materialism was viewed . . . as conducive to vulgar behavior and immorality, in the United States hard work and economic ambition were perceived as the proper activity of a moral person.”).
\item KOHUT & STOKES, supra note 24, at 134.
\item LIPSET, supra note 20, at 55 (quoting writer and economist Sylvia Nasar).
\end{enumerate}
\end{footnotesize}
that the United States is a “world leader” in gross domestic product (GDP) and in productivity. Lipset goes on to observe that “[f]rom 1973 to 1987, 30 million jobs were created in the United States, while the Western European countries experienced a small decline. Japan and Australia also gained jobs over the period, but not nearly as fast.” Americans work harder than citizens of many other leading Western countries. France, for example, has a thirty-five hour work week, and it is common in Western Europe for many to take six weeks of vacation time a year.

There can be no question that economically the United States is clearly an exceptional, outlier country. Americans work harder, produce more, and are much more libertarian than Europeans or Canadians. Americans reward hard work and increased productivity much more than Europeans and Canadians do.

D. Religion

America is also a strikingly exceptional country when it comes to religion, which is one of the forces that drive us to work hard. Charles Lockhart notes that the founders of this country were for the most part religious dissenters who “shared a preference for more egalitarian, congregational forms of worship and social life than the relatively hierarchical forms practiced by the Church of England or Roman Catholicism.” Again, Benjamin Franklin is seen as a key transitional figure who recast America’s founding religion into a set of virtues of hard work that were congenial to capitalism. It is striking that Methodist founder John Wesley, whose sect later “became the largest single denomination in the United States . . . explicitly exhorted ‘all Christians to gain all they can, and to save all they can; that is, in effect, to grow rich.’” Lipset observes that as a result of their religious heritage, “Americans are more inclined to be workaholics than other industrialized populations.” He concludes that “[s]ince most of the Protestant sects are congregational, not hierarchical, they have fostered egalitarian, individualistic, and populist values.

286 Id. Lipset reports that during the early 1990s, the United States led “the Group of Seven major industrialized countries” in GDP, with “the GDP per head” at US$22,204 as compared to US$19,500 in second-place Germany. Id.

287 Id. at 57.


289 LOCKHART, supra note 23, at 8.


291 LIPSET, supra note 20, at 60 (quoting WEBER, supra note 141, at 175).

292 Id.
which are anti-elitist. Hence, the political ethos and the religious ethos have reinforced each other.”

America’s exceptional faith – or as Lipset sees it, religiosity – can be documented in opinion polls with respect to both beliefs and practices of behavior. Lipset notes that polls indicate Americans are the most churchgoing in Protestantism and the most fundamentalist in Christendom. One comparative survey shows 94 percent of Americans expressing faith in God, as compared with 70 percent of Britons and 67 percent of West Germans. In addition, 86 percent of Americans surveyed believe in heaven; 43 percent say they attend church services weekly. The corresponding numbers for British respondents are 54 percent accepting the existence of heaven and only 14 percent indicating they attend church weekly. . . . A remarkable 69 percent of Americans state they believe the Devil exists, as compared to one third of the British, one fifth of the French, 18 percent of the West Germans, 12 percent of the Swedes, and 43 percent of the Canadians. . . . Close to four fifths of Americans surveyed report that religion is very or quite important in their lives, while only 45 percent of Europeans (Germans, French, Britons, Italians, Austrians, and Dutch) on average give similar answers.

Micklethwait and Wooldridge report similar findings: “In America 95 percent of people believe in God, against 76 percent of Britons, 62 percent of the French and 52 percent of Swedes.” They compare American religiosity to levels found only in developing countries like Nigeria and Turkey, and say that “[n]owhere else do Evangelical Protestants carry such great weight.” Micklethwait and Wooldridge conclude that “America is a country of fundamentalists of all sorts, secular as well as religious, thanks to its constitutional tradition, its legal culture and perhaps its Puritan heritage.”

Andrew Greeley disagrees to some extent with Lipset and Micklethwait and Wooldridge; he argues that the other developed Western democracies are exceptionally secular just as much as the United States is exceptionally religious. Greeley notes that many countries, including Iran, Brazil, Poland, Croatia, and those in the Third World, are all just as religious as the United States, and he argues that it is the other advanced democracies that are the real

293 Id. at 61.
294 Id. at 60-62.
295 Id. at 61-62 (footnotes omitted).
296 Micklethwait & Wooldridge, supra note 21, at 310.
297 Id. at 313.
298 Id. at 310.
299 Id. at 311.
300 Andrew Greeley, American Exceptionalism: The Religious Phenomenon, in IS AMERICA DIFFERENT?, supra note 71, at 94, 105 (“A consideration of the rest of the world suggests not that North America is unique, but that Europe is.”).
The nations of Latin America, Africa, the Islamic World, and India are also very devout. Ultimately, the point is a semantic one since Greeley agrees that the United States is the most religious of the economically developed countries in the world. It might also be pointed out that many other parts of the developing world other than India, such as China and southern Asia, are not especially religious.

I think Lipset and Micklethwait and Wooldridge are clearly right that Americans are exceptionally religious, and Lipset is also right that present day Americans accept an exceptionalist creed similar to that discussed in Part II. Most present day Americans think America is a special country with a special people on a special mission in the world. Lipset, relying partly on the words of Robert Bellah, notes that “[t]he United States is seen as the new Israel. ‘Europe is Egypt; America the promised land. God has led his people to establish a new sort of social order that shall be a light unto all nations.’” Moreover, “[t]he strength of American religion shows no sign of diminishing. . . . ‘[C]hurch membership may have declined by about five percent [since the 1930s], while church attendance may actually be higher today than it was fifty years ago.’”

James Morone agrees with Lipset and Micklethwait and Wooldridge, noting that American religiosity is revealed by the fact that “[e]ighty-seven percent of Americans say adultery is ‘always wrong,’ . . . compared to just 48 percent of French.” He adds that only in America would “political candidates routinely assure the nation that they have, certainly, been born again.”

Kohut and Stokes reach the same conclusion that Americans are exceptionally religious and report the striking finding that “[a]bout the same number of

301 Id.
302 See Greeley, supra note 300, at 105, 114-15 (observing that the United States is more religious than secularized Europe but acknowledging some similarities in levels of religion in the United States, non-Anglican England, and Canada). Greeley reports that [m]ost of the lines one would draw on a graph of American religious behaviour through the years are straight lines: more than 95 per cent believe in God; 77 per cent believe in the divinity of Jesus; 72 per cent believe in life after death with certainty, while another 20 per cent are unsure; 70 per cent believe in hell, 67 per cent in angels, 50 per cent in the devil; 34 per cent belong to a church-related organization; a third have had some kind of intense religious experience; half pray at least once a day and a quarter pray more than once a day; a third have a great deal of confidence in religious leadership; more than half think of themselves as very religious. Id. at 99. These numbers broadly confirm the picture Lipset paints of Americans being a very religious people.
303 See supra note 256 and accompanying text.
304 LIPSET, supra note 20, at 64 (quoting ROBERT BELLAH, BEYOND BELIEF 175 (1970)).
305 Id. at 279 (quoting WILLIAM G. MAYER, THE CHANGING AMERICAN MIND 33 (1992)).
306 MORONE, supra note 15, at 23.
307 Id. at 37.
Americans say they believe in creationism as in evolution.\textsuperscript{308} They add that Americans “are closer to Muslims than to Europeans with respect to observance and commitment, as well as on attitudes of personal morality such as homosexuality.”\textsuperscript{309} Apparently, America has always been like this. Kohut and Stokes quote Tocqueville as saying: “Here and there in the midst of American society you meet with men full of a fanatical and almost wild spiritualism, which hardly exists in Europe. From time to time strange sects arise which endeavor to strike out extraordinary paths to eternal happiness. Religious insanity is very common in the United States.”\textsuperscript{310}

In sum, Tocqueville said it best when he claimed that “[t]here is no country in the world where the Christian religion retains a greater influence over the souls of men than in America.”\textsuperscript{311} This statement still rings true today.

E. A Moralistic Country

Americans have uniquely moralistic views, which are reflected in our foreign policy, political scandals, and criminal law enforcement. Lipset notes that “America is the most moralistic country in the developed world. That moralism flows in large part from the country’s unique Protestant sectarian and ideological commitments.”\textsuperscript{312} Lipset sees American moralism at work in “[t]he major divisive, religion-linked social controversies in America, abortion and gay rights, [which] are non-issues in all the industrialized European countries, including the Catholic ones (non-industrialized Ireland and Poland excepted). No one burns down abortion clinics in Europe, Australasia, or Japan.”\textsuperscript{313}

Lipset also claims that the unique devotion to religion in the United States leads to a very moralistic foreign policy and a tendency to believe that one’s opponents are in league with the Devil.\textsuperscript{314} He notes that “Protestant-inspired moralism not only has affected opposition to wars, it has determined the American style in foreign relations generally, including the ways we go to war. Support for a war is as moralistic as resistance to it.”\textsuperscript{315} American moralism was very evident on both the pro- and anti-war sides during the Cold War, the Vietnam War,\textsuperscript{316} and now during the War on Terror. Hence, according to Lipset, our unique insistence on not “recognizing” governments that are evil,
like that of Communist China or Cuba, and our policy of ending all wars with a
demand for unconditional surrender. 317

American faith and moralism are also evident in our political scandals and
desire to prosecute public officials. Europeans have long noted and taken
pleasure in the fact that American politicians are frequently burned at the stake
for sexual peccadilloes that would draw a yawn in Paris or Berlin. 318 But, it
could be argued, American faith and moralism do not always stop there.
Moralism, at times, extends to allegations of criminal misconduct as well.
Thus, former Democratic House Speaker Jim Wright was portrayed as a crook,
not a misguided hack. Bill Clinton was Satan himself, possibly even complicit
in the murder of his good friend Vince Foster. Tom DeLay and Karl Rove are
not honorable opponents to most contemporary Democrats; they are criminals.
President George W. Bush is not simply wrong about the war in Iraq, he is a
liar who misled the country into war to benefit Halliburton and the big oil
companies he and his father once worked for. And on and on it goes.

According to Lipset, quoting American Enterprise Institute scholar and
leading Democrat Norman Ornstein, moralism in criminal law is also evident in

“the reform-era creation of a Public Integrity Section in the Justice
Department, which defines its success by the volume of prosecution of
public officials.” As a result . . . between 1975 and 1989 “the number of
federal officials indicted on charges of public corruption increased by a
staggering 1,211 percent, whereas the number of non-federal public
officials indicted doubled during the same period.” 319

It seems highly unlikely that federal corruption increased by 1211 percent after
1975 while state corruption only doubled, but the urge to find public officials
to prosecute may have trumped the facts. The use of the highly moralistic and
dubious institution of the court-appointed special prosecutor between 1978 and
1999 similarly reflects Americans’ uniquely moralistic response to
misbehavior by public officials. The special prosecutor law led to a series of
prosecutorial witch hunts in the Iran-Contra and Whitewater affairs until in
1999, with the concurrence of both Democrats and Republicans, it was allowed
to go out of existence. 320

317 Id. at 65-66 (contrasting U.S. foreign policy of “non-recognition” and insistence on
“unconditional surrender” with other nations’ foreign policies).
318 See id. at 27.
319 Id. at 286 (quoting Norman J. Ornstein, Less Seems More: What To Do About
320 See generally Benjamin J. Priester et al., The Independent Counsel Statute: A Legal
History, LAW & CONTEMP. PROBS., Winter 1999, at 5 (examining the law generated by the
independent counsel statute); Christopher H. Schroeder, Foreword, LAW & CONTEMP.
PROBS., Winter 1999, at 1 (discussing the likely demise of the independent counsel statute).
American law is also unique in its “tendency to define all offenses as inherently evil and consequently to punish them harshly.”\textsuperscript{321} Micklethwait and Wooldridge note that “America has quadrupled its imprisonment rate in just thirty years. It now has 700 people in every 100,000 under lock and key, five times the proportion in Britain, the toughest sentencer in Western Europe.”\textsuperscript{322} They add that “[t]he most notable feature of America’s justice system is its unforgiving nature.”\textsuperscript{323} The American justice system makes fewer efforts to rehabilitate prisoners, has eliminated programs such as drug treatment, imposes mandatory sentences rather than utilizing “liberal” parole boards, and denies benefits to ex-convicts to an unmatched degree.\textsuperscript{324} James Q. Whitman concedes that “American harshness has something to do with the strength of its religious tradition, and especially . . . the presence of some distinctively fierce American Christian beliefs.”\textsuperscript{325} Nonetheless, Whitman claims that the key to American exceptionalism in criminal punishment is that our egalitarianism has caused us to impose equally low status punishments on all criminals while Europe has imposed equally high status punishments instead.\textsuperscript{326} This point is true, but I wonder if Whitman has not overly de-emphasized the importance of American religion.

1. Prohibition of Alcohol, Drugs, and Smoking

Another area of criminal law enforcement that reveals American moralism is the prohibition of the ingestion of alcohol and illegal drugs. The United States is the only industrialized Western democracy to experiment with the prohibition of alcohol – effectuated by passage of a constitutional amendment in a constitutional regime where such amendments are nearly impossible to pass.\textsuperscript{327} Even today, Micklethwait and Wooldridge report that “Americans are far more censorious than Europeans” with respect to alcohol.\textsuperscript{328} “During the 1980s most American states raised the drinking age from eighteen to twenty-one,” even though most Europeans give their teenage children wine at meals.\textsuperscript{329} Just as dramatic are the country’s current drug laws, which ban not


\textsuperscript{322} MICKLETHWAIT & WOOLDRIDGE, supra note 21, at 300; see also MORONE, supra note 15, at 3 (reporting that the United States has “3 percent of its population in jail or prison, on parole, or under probation”).

\textsuperscript{323} MICKLETHWAIT & WOOLDRIDGE, supra note 21, at 301.

\textsuperscript{324} Id.

\textsuperscript{325} WHITMAN, supra note 321, at 6.

\textsuperscript{326} See id. at 10-11.


\textsuperscript{328} MICKLETHWAIT & WOOLDRIDGE, supra note 21, at 302.

\textsuperscript{329} Id.
only heroin, cocaine, and various hallucinogens, but also marijuana even when used for medical purposes. These drug laws, which often impose prison sentences of twenty to thirty years, are by global standards extremely draconian. No other western democracy imprisons people so long for narcotics offenses. America’s ongoing war against drugs is as exceptional in our day as Prohibition was in the 1920s. Similarly exceptional is the moralistic crusade against smoking that Americans have undertaken in recent years. Micklethwait and Wooldridge report that “[n]o country treats smokers (or indeed tobacco companies) with such vindictiveness as the United States.”

2. American Moralism and the Paranoid Style

The periodic episodes of moral crusading that have characterized American history were famously described by Richard Hofstadter in his classic essay The Paranoid Style in American Politics. Hofstadter notes that “[a]lthough American political life has rarely been touched by the most acute varieties of class conflict, it has served again and again as an arena for uncommonly angry minds.” He adds that “[b]ehind such movements there is a style of mind, not always right-wing in its affiliations, that has a long and varied history. I call it the paranoid style simply because no other word adequately evokes the qualities of heated exaggeration, suspiciousness, and conspiratorial fantasy that I have in mind.” Hofstadter notes that this paranoid style “represents an old and recurrent mode of expression in our public life,” and he cites as examples McCarthyism in the 1950s, fear of a conspiracy of gold gamblers in the 1890s, fear of a Papal anti-American plot in the 1850s, and fear of the Jacobins in the 1790s. Other examples include “the anti-Masonic movement, the nativist and anti-Catholic movement,” fear of a slaveholders’ conspiracy by the abolitionists, alarm over Mormonism, populist fears of bankers and capitalists at the start of the twentieth century, and behavior by both white supremacists and black Muslims. Readers will recognize here the roots in American moralism, religion, and exceptionalism of the paranoid

331 MICKLETHWAIT & WOOLDRIDGE, supra note 21, at 302.
333 Id. at 3.
334 Id.
335 Id. at 6.
336 Id. at 7-9.
337 Id. at 9-23; see also ROBERT SINGH, THE FARRAKHAN PHENOMENON: RACE, REACTION, AND THE PARANOID STYLE IN AMERICAN POLITICS 156-89 (1997) (employing Hofstadter’s framework to analyze Louis Farrakhan’s leadership of the Nation of Islam).
F. Private Philanthropy

A more positive side effect of American moralism and religious faith is “the fact that the ‘expansion of philanthropy . . . has gone further . . . in the United States, than in any other part of the world.’” Lipset, relying partly on the words of an Englishman who visited the United States in the 1830s, observed:

“The separation of Church and State, and other causes, have given rise to a new species of social organization, before unknown in history. . . .”

Many communal functions which had been handled in Europe by the state or by state-financed churches were dealt with in nineteenth-century America by voluntary associations.

Various private institutions, “such as colleges and universities and hospitals, have been widely diffused in this country and are supported by the most extensive pattern of voluntary contributions in the world.” Micklethwait and Wooldridge note that “America has been much more inclined to let public work be covered by private philanthropy than Europe has,” as is evidenced by the creation here of “great universities like Stanford and Chicago; great galleries like the Getty and the Frick; [and] great medical research centers like Rockefeller University.” Lipset observes that religious beliefs often influence these charitable contributions. He adds that

[p]eople have been expected to be righteous, hardworking, and ambitious. Righteousness is to be rewarded both in the present and the hereafter, and the successful have an obligation to engage in good works and to share the bounty they have attained. A detailed study by Merle Curti of the history of American giving for overseas purposes stresses the role that “the doctrine of stewardship” played, the belief “that whatever of worldly means one has belongs to God, that the holder is only God’s steward and obligated to give to the poor, the distressed, and the needy. From many diaries, letters and other evidence it is clear that this factor was a dominant one in a great deal of giving.”


339 Id. (alteration in original) (footnote omitted).

340 Id. at 68.

341 Micklethwait & Wooldridge, supra note 21, at 328-29.

342 Lipset, supra note 20, at 68 (quoting Merle Curti, American Philanthropy Abroad 625 (1963)).
Ninety percent of all charitable giving in the United States “come[s] from individuals,” and “[s]eventy-two percent of American households gave charitable contributions in 1991.”

G. Small Public Sector

The flip side to this private philanthropy of Americans is that the United States has a strikingly small public sector and is the only major advanced democracy to lack a national health care system. In other words, socialism is really unpopular in the United States in an unusual way. Lipset stresses that with respect to welfare programs,

[i]t he United States is an outlier (exceptional) in practice as well as belief. Its taxes amount to a much lower proportion of GDP compared to European Community countries and Japan. While America collected 31 percent of its GDP in tax revenues in 1991, other countries such as Sweden (52%), Holland (48%), Belgium (40%), France (40%), and the United Kingdom (36%) were taxed at higher levels.

Micklethwait and Wooldridge make the same point and note that these figures are “even smaller when you remember that America spends so much more on defense than other countries: $1,138 per person in 2002 compared with $590 in Britain (and much less in most other European countries).” Charles Lockhart agrees and says that America provides considerably less money for its public sector than do the other “advanced industrial societies of Western Europe, North America and the Pacific rim,” and he notes that “the United States is well known for its fidelity to a Lockean conception of limited government.”

He adds that American taxes are much flatter across the range of income distributions and are therefore less redistributive than are taxes in other Western democracies. Kohut and Stokes say that Americans “are less strongly committed than other peoples to the concept that their government is responsible for taking care of those who cannot care for themselves,” and “are more action-oriented, individualistic in their behavior, and more opposed to the intrusions of government than Europeans and others.”

343 Id. at 71.
344 See id. at 71-75 (contrasting the limited role of the U.S. government in establishing social programs and redistributive policies with the active governments of other nations).
345 Id. at 73.
346 MICKLETHWAIT & WOOLDRIDGE, supra 21, at 303.
347 LOCKHART, supra note 23, at 1, 42.
348 Id. at 43.
349 See id.
350 KOHUT & STOKES, supra note 24, at 19.
351 Id. at 18.
Similarly, Lipset concludes that “[t]he United States continues to be exceptional among developed nations in the low level of support it provides for the poor through welfare, housing, and medical care policies.” He adds, however, the critically important point that “upward mobility into privileged occupations is also [much] more common [in the United States]. Thus America has more equality of opportunity into the elites and less equality of result than the rest of the developed world.” Graham K. Wilson agrees that the United States redistributes wealth less than other Western democracies, and points to the United States’ distinctive abolition of aid to families with dependent children in the 1997 Welfare Reform Act. Lipset claims that the United States has the highest poverty rate of any developed country – at “twice the average for all developed countries” – in part because the United States has a much smaller public sector than other Western democracies. It might be observed, however, that just as strikingly, most poor Americans would be considered wealthy in many countries. America is so much richer than other nations that our notion of what it means to be poor in America is itself exceptional.

Wilson accepts the numbers that show America’s total government outlays as a percentage of GDP are around 33.3%, compared with 43.4% for Great Britain and 66.2% for Sweden, but he challenges the idea that America is different from the rest of the world. He explains away the gap between the United States and other Western democracies as resulting from three special circumstances. First, he notes that “social expenditures in the United States have been lower in recent years than in Europe because of the greater success of the United States in avoiding high levels of unemployment,” which increase welfare costs. Second, he claims that “much of the contrast between the United States and Europe reflects a single policy decision, the refusal in the United States to create government funded national health insurance.” And finally, Wilson notes that “[t]he most serious objection to using government expenditures as a percentage of GDP as the measure of the size of government . . . is that naturally enough it measures only expenditures” and not tax allowances and regulations, which are major ways in which the U.S. government interferes in the market.

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352 Lipset, supra note 20, at 75.
353 Id. at 76.
354 See Wilson, supra note 22, at 75-77.
355 Lipset, supra note 20, at 73.
356 Wilson, supra note 22, at 62 tbl.4.1 (detailing total government outlays as a percentage of GDP for all Organization for Economic Cooperation and Development nations).
357 Id. at 64.
358 Id.
359 Id. at 64-65.
Wilson makes solid points that do call into question the extent to which the United States is different from other democracies in having a smaller government, but there are responses to be made to each of Wilson’s arguments. First, American unemployment and welfare expenses are arguably lower than Europe’s precisely because the United States has a smaller state sector. Unemployment rates in France and Germany are about twice as high as they are in the United States, and I think the reason why is that those countries’ economies are more socialistic. Second, the decision not to nationalize health care may explain a lot of the gulf between the size of the U.S. government compared to Britain’s, but it is a really big decision. The health care sector accounts for sixteen percent of the total size of the American economy, and Americans spend more on health care than do the citizens of any other country. The decision to keep this sector of the economy private is therefore an ideological decision. Third, the United States may intervene a lot in its economy through tax expenditures and regulations, but these are less intrusive methods of intervention than nationalizing the decisions involved, which is what other modern democracies have done. In sum, Wilson raises some important caveats to the conventional wisdom about government being much smaller in the United States than in other advanced democracies, but he does not succeed in calling the basic point into question. At most, Wilson’s arguments show that the gap between the United States and Britain and Sweden is not quite as big as it first appears. He does not succeed in showing that there is no gap at all.

**H. No Socialists, Anti-Union Sentiment, and a Large Conservative Movement**

The United States is also politically exceptional because it alone, of all the Western democracies, has never had a successful socialist party. Not only is
the United States exceptional in lacking a socialist party, the United States is also exceptionally hostile to unions and to organized labor.364 Union density in the United States has dropped sharply in the postwar period and “is declining to pre-1930s levels, or possibly lower.”365 The reason, according to Lipset, is that “from sociological and political points of view, the United States was too progressive, too egalitarian, too open, and too democratic to generate massive radical or revolutionary movements on a scale comparable to those of Europe.”366 Moreover, “[e]conomic and population growth and an open land frontier produced high rates of social mobility, a factor also stressed by Marx in the early 1850s.”367

The striking American hostility to socialism and unions is underlined, as Lipset notes, when one compares the United States with its neighbor to the north. “Canada resembles the rest of the industrial world in having socialist and trade union movements which are much stronger than those in the United States.”368 American unions are tiny by comparison and have commanded smaller and smaller percentages of the work force in recent years.369 These differences between the United States and Canada date back to the American Revolution, because “[t]he United States is the country of the revolution [and] Canada [is the country] of the counter-revolution.”370 During and after the revolution, a lot of Tory Monarchical Americans moved north to Canada and a lot of Canadian Whigs moved south to the United States.371 As a result, the two English-speaking neighbors sorted themselves out into a Tory statist society in Canada with an established Church of England and a Whig individualist society in the United States with Protestant sects predominating.372 The result today is that opinion polls show that “Canadians, at both elite and mass levels, are more supportive than Americans of state

themselves as the standard-bearers of the intellectual class, the theme of American exceptionalism is interwoven with the question first raised by Werner Sombart in 1906, ‘Why is there no Socialism in the United States?’”).

364 See LIPSET, supra note 20, at 96-105.
365 Id. at 99.
366 LIPSET, supra note 20, at 78. Similarly, Aaron Wildavsky asks, “Why has there been no socialism, no successful socialist party, no intense class conflict in America? The short answer is that Americans institutionalized beliefs that worked against such developments.” Wildavsky, supra note 279, at 136. Wildavsky especially emphasizes America’s individualism and its lack of class hierarchy. Id.
367 LIPSET, supra note 20, at 81.
368 Id. at 88.
369 See id. at 89 (“Starting in 1955 . . . American unions began to decline fairly steadily from around one third of the employed labor force to less than half that proportion, while the Canadian continued to grow from the 1960s to the 1980s.”).
370 Id. at 91.
371 See id.
372 Id.
intervention.” Differences in Canadian and American labor law thus “reflect differences in underlying values.”

Just as the United States is exceptional for its lack of a socialist movement, it is also exceptional in having a large and formidable conservative movement. No other Western democracy has a conservative movement comparable to the one in the United States. American conservatives are much more conservative than are British Tories, as Micklethwait and Wooldridge document at some length. There are burning conservative issues on the political agenda in the United States, like support for the death penalty and gun rights, which simply do not register on the political scale in Britain or in any other major democracy. Other examples of conservative political movements that are unique to the United States include the large pro-life movement and the property rights movement, which sprang up almost overnight in opposition to the Supreme Court’s recent decision in *Kelo v. City of New London.*

The United States is also exceptional with respect to our political institutions. American politics are in many respects unique. Ironically, given America’s youthful population and outlook, one of the ways in which America is exceptional is that it is “the world’s oldest republic, its oldest democracy and its oldest federal system. The country possesses the world’s oldest written constitution (1787); the Democratic Party has a good claim to being the world’s oldest political party [1800].” American politics are in a fundamental sense far more stable than the politics of France, which has had five republics, or Britain or Canada, which have experienced serious secessionist or devolutionary movements and big constitutional changes in the last twenty-five years. American political institutions are unique, as Charles Lockhart points out, in that they employ an eighteenth century system of checks and balances that makes active government much harder to sustain.

373 Id. at 92.
375 See MICKLETHWAIT & WOOLDRIDGE, supra note 21, at 334-38.
376 Id.
377 See id. at 8.
378 See id. at 308-12 (“The people who want to ban abortion in America may be in a minority, but they are a much bigger minority than in other countries . . . .”).
379 545 U.S. 469 (2005); see also Julia D. Mahoney, Kelo’s Legacy: Eminent Domain and the Future of Property Rights, 2005 SUP. CT. REV. 103, 104-05 (describing the “conflagration of outrage” sparked by *Kelo*).
380 MICKLETHWAIT & WOOLDRIDGE, supra note 21, at 315.
381 Id.
382 VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 1098-1102 (2d ed. 2006).
383 LOCKHART, supra note 23, at 6-7, 30; see also WILSON, supra note 22, at 103, 106.
They have also led to a society with a uniquely large number of lawyers who have a conservative influence on American public life. Having started out down this road of constitutionally limited government, Americans may have found themselves constrained by “path dependency” from moving in different, more activist directions.

I. Military and Foreign Affairs Power

The United States is also exceptional in the tremendous military power that it has along with the foreign policy clout that unrivaled military dominance brings. As Micklethwait and Wooldridge acknowledge, “America is the only country that can project military might globally.” The U.S. military is so preeminent that “America spends 40 percent (and rising) of the world’s total military expenditure.” Micklethwait and Wooldridge add that “[f]ifty-five percent of Americans ‘strongly agree’ that war is sometimes necessary to obtain justice; the figure in Europe is just 18 percent.” Kohut and Stokes report similar findings, noting that “[m]ore than three-fourths of all Americans believe that under some conditions war is justified to obtain justice; only about one in four Europeans agree.” Kohut and Stokes also note that 42 percent of Americans strongly agreed that “under some conditions, war is necessary to obtain justice.” In contrast, only 11 percent of Europeans held such strong sentiments. Another 36 percent of Americans, compared to 25 percent of Europeans, agreed “somewhat.”

Europeans support for resorting to war would have been even lower if only the opinions of continental Europeans were considered: Britons were three times as likely as the French, Germans, or Spanish to strongly believe that war is sometimes necessary. America is thus uniquely powerful and increasingly unilateralist in global affairs. No other country compares with it.

Micklethwait and Wooldridge note that “[w]hen Europeans think about American exceptionalism, the first thing they turn to is American foreign

384 See Andrew Moravcsik, The Paradox of U.S. Human Rights Policy, in AMERICAN EXCEPTIONALISM, supra note 27, at 147, 157-58 (acknowledging that “American elites are disproportionately composed of lawyers” and that lawyers often adopt “conservative positions”).

385 See LOCKHART, supra note 23, at 7 (“[O]nce a society starts building particular public institutions . . . or policies . . . it becomes increasingly difficult across time to effect institutional or policy change which breaks free of the initial path’s confining influence.”).

386 MICKLETHWAIT & WOOLDRIDGE, supra note 21, at 297.

387 Id. at 298.

388 Id.

389 KOHUT & STOKES, supra note 24, at 114.

390 Id. at 196-97.

They report that “[n]o other country supports Israel so adamantly or condemns Cuba so utterly.” Kohut and Stokes add that

“[m]ore concretely, Americans’ attitudes toward Israel are heavily influenced by religion. One in three Americans who sympathize with Israel said their sympathy for the Jewish state comes from their religious beliefs. Beyond sympathy, two in five Americans believed Israel was given to the Jewish people by God, and one in three said creation of the state of Israel is a step toward the Second Coming of Christ.

Some authors argue that the United States is as exceptional in its treatment of international human rights matters as it is in its exercises of military power. Michael Ignatieff has suggested that while the United States is a leader in the promotion of international human rights abroad, “it has also resisted complying with human rights standards at home or aligning its foreign policy with these standards abroad” to an unmatched degree, an assertion echoed by Yale Law Dean Harold Koh. The U.S. Constitution is partly responsible for this paradox, because it requires a two-thirds majority of the Senate “for ratification of international treaties, thus imposing a significantly higher bar to incorporation of international law than do other liberal democracies.” While this constitutional hurdle to the ratification of international human rights treaties alone makes the United States exceptional, America’s international preeminence and military power further set it apart from other nations.

### J. Demography

America is also unique in its demography. Micklethwait and Wooldridge point out that “America is perhaps the only advanced country with a young and growing population.” This is due to a much higher birthrate and immigration rate than is present in any other developed country. Micklethwait and Wooldridge note that

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392 MICKLETHWAIT & WOOLDRIDGE, supra note 21, at 295.
393 Id. at 296.
394 KOHUT & STOKES, supra note 24, at 114.
395 Michael Ignatieff, Introduction to AMERICAN EXCEPTIONALISM, supra note 27, at 1, 1.
396 See Harold Hongju Koh, America’s Jekyll-and-Hyde Exceptionalism, in AMERICAN EXCEPTIONALISM, supra note 27, at 111, 116-17, 119 (acknowledging America’s leadership in promoting international human rights but observing that the United States is exceptional in its use of a “double standard” in “propo[sing] that a different rule should apply to itself and its allies from the one that should apply to the rest of the world”).
398 MICKLETHWAIT & WOOLDRIDGE, supra note 21, at 299.
399 See id.
America, where the median age will remain about thirty-five for the next half-century, is bound to be more “youthful” in its approach to the world than Europe, where the median age will jump from thirty-eight to fifty-three, and Japan, where it will rise from forty-one to fifty-three.  

Graham Wilson adds that a key explanation of American exceptionalism is that “[t]he United States is a country created by immigration.”  

Charles Lockhart makes a similar point, saying that “[t]he openness of the United States to transforming migrants from other societies into citizens is relatively unusual.”  

Micklethwait and Wooldridge conclude that “[m]ost immigrants saw – and still see – America as a land of milk and honey compared with their old homelands. Most have embraced their new country with the enthusiasm of converts and followed the path of upward mobility . . . .”  

Not only is America unique compared to other Western democracies in terms of immigration, America is also unique in being a genuinely multiracial society with large African American, Asian American, and Hispanic minorities. Wilson quotes Lawrence Fuchs as saying rightly that “‘[n]o nation in history ha[s] been as successful as the United States in managing ethnic diversity.’”  

No other major Western democracy is as racially diverse as is the United States, and while the United States has made grievous mistakes in the past in mistreating racial minorities, no other Western democracy currently includes such minorities in its public life as much as the United States does. One need only contrast continental European failures to integrate Europe’s Islamic immigrants with American successes since 1964 in integrating racial minorities to see the vibrancy and uniqueness of the American model.  

Kohut and Stokes agree that Americans do a better job of integrating racial minorities than do other nations, explaining that “[o]n questions of ethnicity and ethnic minorities . . . Americans are more open-minded [than Europeans],” in part due to “the American embrace of the ‘melting pot.’” They add that “Americans for their part take an overwhelmingly positive view of the country’s two largest minorities: African-Americans and Hispanics. Nearly eight in ten say blacks have a good influence on the country and two-thirds say

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400 Id.  
401 WILSON, supra note 22, at 11.  
402 LOCKHART, supra note 23, at 2.  
403 MICKLETHWAIT & WOOLDRIDGE, supra note 21, at 330.  
404 Id. at 238-39.  
406 See WILSON, supra note 22, at 87-88, 91 (observing that although Americans have at times “depart[ed] from American ideals” in their treatment of immigrants, “Americans have indeed been mostly successful and principled practitioners of the politics of accommodation”).  
407 KOHUT & STOKES, supra note 24, at 51.
that about Hispanics." They also say that Americans and Canadians express a much more “positive view toward immigrants” than do the citizens of other advanced countries. Kohut and Stokes note that “[o]nly a third of Germans take such a positive view of the Turkish and Eastern European immigrants in their midst, and only half the French look positively on recent arrivals from North Africa.”

K. Geography

America is also geographically exceptional. Charles Lockhart points out the vital fact that America has always been geographically separated from significant military threats, which allowed the country to have a tiny army and federal government for the first 150 years of its existence. This fact must be related to the strength of laissez-faire in America, given that war often contributes to the health of the state by leading to enhanced executive and national power. Even today, terrorists seem to have a tougher time conducting operations in America than they do in Western Europe, which is geographically much more accessible. “[I]n comparison to many other societies the United States has had a relatively mild historical experience with both economic disasters such as famines and depressions and attacks by foreign powers or groups,” and this has helped keep the size of the public sector small. Kohut and Stokes add that “since 1814 [Americans] have not been invaded nor have they ever been conquered.” This is clearly one respect in which the United States is exceptional among nations.

America is also more diffuse than Europe. Micklethwait and Wooldridge report that in the United States, “[m]ore than half the population now lives in a suburb of some sort; by contrast, two-thirds of the population in Europe is categorized as urban.” This adds to the individualist ethos in the United States, as does the presence of more cars and much cheaper gasoline,

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408 Id. at 52.
409 Id.
410 Id. at 154.
411 LOCKHART, supra note 23, at 3. Similarly, England long had a minimalist state because the fact that it was an island made English defense more a matter of having a strong navy than of having a liberty-threatening standing army. STEPHANSON, supra note 14, at 22.
412 See LOCKHART, supra note 23, at 28-29 (examining the impact of events such as war and economic depression on the size of the public sector and strength of national government).
413 Id. at 28.
414 See id. at 28-29.
415 KOHUT & STOKES, supra note 24, at 64.
416 MICKLETHWAIT & WOOLDRIDGE, supra note 21, at 331.
417 See id.
418 See Green Car Congress, Per-Capita Car Ownership in China To Climb 67% by 2010 (May 24, 2006), http://www.greencarcongress.com/2006/05/percapita_car_o.html (stating
which facilitates driving and makes even American teenagers very independent. The suburban, driving culture of the United States is very different from the urban, mass-transit-using culture of Western Europe. Kohut and Stokes report that the American car culture is so strong that a "Newsweek poll taken shortly after the [September 11] terrorist attacks found that only 42 percent of Americans thought it very important that SUV owners be encouraged to switch to more fuel-efficient vehicles in order to reduce dependence on imported oil."\textsuperscript{419}

One of the things that made the United States exceptional historically was the frontier and the availability of cheap land to the west for anyone who wanted to claim it. There may no longer be a frontier in the United States, but the country is still underpopulated and is filled with wide open spaces compared to Western Europe, Japan, China, or India.\textsuperscript{420} I think this fact powerfully explains the continuing spirit of frontier individualism and libertarianism that is so characteristic of the United States.

L. Summary

In conclusion, as foreign travelers going back to Tocqueville have observed, America is an exceptional country. We have a unique ideology of individualism that makes us entrepreneurial but gives us high crime and divorce rates. We are more patriotic and optimistic than are people in other Western countries. We are socially egalitarian and economically libertarian compared to the rest of the world. We are more religious than any other developed country and therefore more moralistic. We are unique in the extent to which we have tried to prohibit alcohol, drugs, and smoking. We have exceptionally high rates of philanthropy but a small public sector. We are unique in lacking a socialist party, in having weak unions, and in having a strong conservative movement. We have exceptional military and foreign affairs powers. Our population is demographically unique. And we benefit from unique geographical advantages.

Seymour Martin Lipset rightly concludes his positive account of American exceptionalism by stressing that he does not view exceptionalism as being only a positive thing.\textsuperscript{421} "The American Creed is something of a double-edged sword: it fosters a high sense of personal responsibility, independent initiative, and voluntarism even as it also encourages self-serving behavior, atomism, and a disregard for communal good."\textsuperscript{422} Regardless of whether American exceptionalism is good or bad, the bottom line is that the United States really is

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\textsuperscript{419} Kohut & Stokes, supra note 24, at 89.

\textsuperscript{420} See Micklethwait & Wooldridge, supra note 21, at 329-30.

\textsuperscript{421} See Lipset, supra note 20, at 268.

\textsuperscript{422} Id.
a special place compared to other industrialized Western democracies. A country that is so obviously different from the nations of Western Europe, Canada, and Japan obviously cannot be governed by a Supreme Court that mechanically borrows Western European, Canadian, or Japanese ideas about constitutional law. There is no way the citizens of the New Jerusalem will ever consent to be governed that way, nor is there any reason why they should. According to Lipset, Frederick Douglass insisted that the goal of the United States was “to live up to ‘the genius of American institutions, to help fulfill its [the nation’s] sacred mission.’” That cannot be done by borrowing the judgments of the European Court of Human Rights.

IV. THE CONSTITUTION AS THE FOCAL POINT OF THE AMERICAN CREED OF EXCEPTIONALISM

We have seen that America has an ideology of exceptionalism and that this ideology has helped to produce a country that is in fact exceptional in many ways. It remains to link the ideology and reality of American exceptionalism with the beliefs of ordinary Americans about the Constitution and the Declaration of Independence as the founding texts of the American creed. Sanford Levinson and Michael Kammen first developed this idea in their important books *Constitutional Faith* and *A Machine That Would Go of Itself*, both published in the mid- to late-1980s. Levinson and Kammen both see the Constitution as the focal point of the American creed. They also both agree that America’s fights over what goes into the Constitution are battles to define the American creed or ideology. I think they are dead right on this point, and that one of the reasons we have such bitter fights over confirming Supreme Court nominees and theories of constitutional interpretation is that because every American knows these are fights to define the meaning of America’s ongoing creed.

Fights over the meaning of the Constitution can be seen as another example of American moralism. Only moralism can explain the quasi-religious wars we fight over the appointment of Supreme Court Justices. The fight over Robert Bork’s Supreme Court nomination in 1987 was one of the great brawls

423 See id. at 289.
424 Id. at 291 (alteration in original).
425 LEVINSON, supra note 25.
426 KAMMEN, supra note 26.
427 See id. at 68 (describing “the genesis and development of the constitution as a national symbol”); LEVINSON, supra note 25, at 16 (referring to Americans’ “ability to use [the Constitution] as the center of a genuine community of faith”).
428 See KAMMEN, supra note 26, at 94 (describing the Constitution as a symbol that “society regarded as culturally determinative”); LEVINSON, supra note 25, at 58 (explaining that “[t]he issues raised by constitutional interpretation . . . are obviously related to the ‘fit’ between the Constitution and morality”).
of the last forty years. The reason these battles occur is that both the left and right wing sides see control of the Court and interpretation of the Constitution as central to defining America’s exceptional moral mission in their own terms. He who controls the interpretation of the Constitution controls the meaning of the American creed, which is itself of religious dimensions.

The tendency of Americans to view defining the Constitution as central to defining America’s exceptional mission in the world also explains the sense of horror many feel when Justice Kennedy construes our exceptional Constitution with reference to foreign law. The whole point of being Americans for many of us is that we are not Europeans; we are a special people, in a special land, with a special mission. Kennedy’s borrowing of foreign law grates on the sensibilities of some of his fellow citizens and has led a few to call for his impeachment. Notwithstanding the Supreme Court’s long practice of citing foreign law in low visibility constitutional cases, it is startling to many Americans that the Supreme Court construes the Constitution with reference to foreign law when deciding hotly contested current moral and social issues.

A. The Constitution as the Ark of the Covenant

Both Sanford Levinson and Michael Kammen argue that Americans revere the Constitution as a kind of Ark of the Covenant of the New Israel that is America. Levinson quotes Anne Norton as describing

the Puritans in particular as “children of the covenant, of a long series of covenants between man and God, and man and man: God and Noah, God and Abraham, the new covenant of the New Testament, the Magna Carta, [and] the Mayflower Compact,” to which their descendants would add “the Constitution.”

Levinson observes that “[h]istorically intrinsic to the notion of covenant has been the notion of writing, which establishes the covenant.” A distinctive feature of constitutions is that, like the Ten Commandments, they are written down. Our Constitution may not be written in stone, but it is so hard to amend that it might as well be.

Levinson quotes Jefferson as commenting in 1816 that “[s]ome men look at constitutions with sanctimonious reverence and deem them like the ark of the

429 See MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) [hereinafter RIGHTS TALK] (describing Bork’s confirmation hearings as “the political event of the season”).

430 Calabresi & Zimdahl, supra note 6, at 752 n.25.

431 See LEVINSON, supra note 25, at 11 (alteration in original) (quoting ANNE NORTON, ALTERNATIVE AMERICANS: A READING OF ANTEBELLUM POLITICAL CULTURE 18 (1986)).

432 Id.
covenant, too sacred to be touched.”

Others too made similar observations later in our history. Thus, Levinson quotes Alexander Bickel, who discussed “the secular religion of the American republic,” in which “we find our visions of good and evil,” and he quotes Max Lerner, who said that “[e]very tribe... clings to something [in our case the Constitution] which it believes to possess supernatural powers, as an instrument for controlling unknown forces in a hostile universe.” The American tribe is no different.

Michael Kammen notes that in 1823, Supreme Court Justice William Johnson famously called the Constitution “the most wonderful instrument ever drawn by the hand of man.” As early as 1834, Congressman Caleb Cushing called the Constitution “our Ark of the Covenant.”

Similarly, in his inaugural address in 1837, Martin Van Buren described the Constitution as “a sacred instrument carefully and not easily framed.” Kammen reports further that “[s]choolbooks of that era often stated that the Constitution had been divinely inspired. Their authors could not refer to the Constitution without a choral vocabulary of ‘revered,’ ‘glorious,’ and ‘sacred.’” Indeed, Lance Banning has rightly said that “[t]he quick apotheosis of the American Constitution was a phenomenon without parallel in the western world.”

Levinson also captures the covenantal role of the Constitution in twentieth century America by pointing to Justice Felix Frankfurter’s observations about the significance of his own naturalization ceremony when he became an American citizen. Levinson quotes Frankfurter as saying that, with naturalization, he had “shed old loyalties and take[n] on the loyalty of American citizenship,” and that even though he had abandoned Judaism, “perhaps the feelings that underlie religious forms [for others] for me run into intensification of my feelings about American citizenship.” Frankfurter concludes tellingly by saying that “American citizenship implies entering upon a fellowship which binds people together by devotion to certain feelings

433 Id. at 9 (alteration in original) (quoting Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 10 THE WRITINGS OF THOMAS JEFFERSON 37, 42 (Paul Leicester Ford ed., 1899)).

434 Id. at 11 (quoting ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 24 (1975)).

435 Id. at 12 (quoting Max Lerner, Constitution and Court as Symbols, 46 YALE L.J. 1290, 1294 (1937)).

436 See KAMMEN, supra note 26, at 91.

437 See id. at xviii. Chief Justice Taft was to repeat this description in 1922. Id.

438 See id. at 61.

439 Id. at 3.


441 LEVINSON, supra note 25, at 3 (quoting FROM THE DIARIES OF FELIX FRANKFURTER 211 (Joseph P. Lash ed., 1975)).

442 Id. (alteration in original) (quoting FROM THE DIARIES OF FELIX FRANKFURTER, supra note 441, at 211).
and ideas and ideals summarized as a requirement that they be attached to the
principles of the Constitution.” This same sentiment was expressed
strikingly in 1968 by Whittle Johnson: “What, then, does it mean to be an
American? To be an American means to be a member of the ‘covenan
ting community’ in which the commitment to freedom under law, having
transcended the ‘natural’ bonds of race, religion, and class, itself takes on
transcendent importance.” Levinson correctly claims that “[t]he central
‘co ve nant’ of the community, from this perspective, is the Constitution.”
Levinson notes similar sentiments from neoconservative writer Irving Kristol
who, in Levinson’s words, has argued that the Constitution is “part of the holy
‘trinity’ of the American civil religion, along with the Declaration of
Independence and the Flag. Pledging faith in the Constitution, therefore,
presumably defines one as a ‘good American,’ a full member of our political
community.” Strikingly, as late as 1968, Hugo Black, a Supreme Court
Justice who was famous for carrying his pocket copy of the Constitution
everywhere he went, published a book called appropriately enough A
Constitutional Faith. I doubt that in many other countries a public official as
important as an American Supreme Court Justice would so equate fidelity to
a constitutional text with religious devotion.

B. Public Reverence for the Constitution

Both Sanford Levinson and Michael Kammen document the astonishing
public reverence for the Constitution that has grown up because of the
Constitution’s status as a ‘covenant.” That American constitutionalism is a
secular religion is revealed by the following stunning statement made by John
Quincy Adams on the fiftieth anniversary of the Constitution, which was
repeated by Warren Burger during the Constitution’s bicentennial: “Teach the
[Constitution’s] principles, teach them to your children, speak of them when
sitting in your home, speak of them when walking by the way, when lying
down and when rising up, write them upon the doorplate of your home and
upon your gates.” As Levinson notes, this statement obviously draws on
Deuteronomy 6:7-9, which in the liturgy of Judaism leads observant Jews to
this day to “place mezuzahs on the[ir] doorposts, containing within them the
She’m a” as a “confession of faith . . . with its affirmation of belief in the one
God who gave the Torah to the people of Israel.” Deuteronomy thus calls
on observant Jews to affirm their belief in the Old Testament just as John
Quincy Adams called on Americans to affirm their belief in the Constitution.

443 Id. (quoting FROM THE DIARIES OF FELIX FRANKFURTER, supra note 441, at 212).
444 Id. at 5.
445 Id. (footnote omitted).
446 HUGO L. BLACK, A CONSTITUTIONAL FAITH (1968).
447 See LEVINSON, supra note 25, at 12 (alteration in original).
448 Id.
Similarly, Kammen observes that in 1829, Supreme Court Justice Joseph Story said in his inaugural lecture on law at Harvard Law School that it was his goal “to fix in the minds of American youth a more devout enthusiasm for the constitution of their country.”450 Story followed up this lecture by publishing a three-volume commentary on the Constitution, a 650-page abridgment for use as a textbook in high schools and colleges, and later a “still more simplified version” for use in common schools.451 Finally, a fourth rendition was “aimed primarily at a lay audience.”452 Story hoped his Commentaries on the Constitution would build popular support for and knowledge of the document, and his writings had a huge effect.453 Story’s project is consistent with an effort to encourage public reverence for the Constitution of a kind already enjoyed by the Declaration of Independence.

Public reverence for the Constitution continued during the last half of the nineteenth century and into the twentieth century. Kammen writes that “[m]any interested observers note that there has been a ‘cult of the Constitution’ in the United States,” and claims that this cult became especially intense during the period between 1875 and 1900.454 The centennial of the Constitution’s writing and ratification became a special occasion for celebrating and reflecting on its virtues.455 There was a nationwide celebration, which Kammen reports solidified a sense that the Constitution was worthy of public reverence.456 In 1889, A. Lawrence Lowell, who later lectured at and served as President of Harvard, observed that

> for a long time the Constitution of the United States was the object of what has been called a fetish worship; that is, it was regarded as something peculiarly sacred, and received an unquestioned homage for reasons quite apart from any virtues of its own. The Constitution was to us what a king has often been to other nations. It was the symbol and pledge of our national existence, and the only object on which the people could expend their new-born loyalty.457

This view was evident in 1916 when the first proposals began to be made to celebrate September 17 – the anniversary of the day the Constitutional

450 See KAMMEN, supra note 26, at 79.
451 Id.
452 Id.
453 See id. (”More than any other American of the antebellum period, Story helped codify American constitutional law into a coherent and accessible system.”).
454 Id. at 22.
455 See id. at 138-43 (describing public responses to the centennial celebration in Philadelphia).
456 See id. at 154-55. Kammen quoted Senator Henry Cabot Lodge’s recollection of the celebration: “Through all the rejoicings of those days, in every spoken and in every written word, ran one unbroken strain of praise for the great instrument and of gratitude to the men who, in the exercise of the highest wisdom, had framed it and brought it forth.” Id. at 154.
457 See id. at 22-23.
Convention at Philadelphia adjourned – as Constitution Day. Kammen reports that “[t]he most ardent advocates of Constitution Day, at least at the outset, were elitists who feared a drift away from representative government toward uncontrolled democracy.” Ultimately, fear of Bolshevism was to play a role in the sanctification of the Constitution as well. The advocates of Constitution Day feared democracy in part because of “[p]opular ignorance of the meaning of the Constitution,” and thus several organizations, including the American Rights League and the Boy Scouts of America, began developing a “campaign of popular instruction.” By 1919, “the National Association for Constitutional Government published a Pocket Edition of the Constitution of the United States,” and a year later “some 50,000 copies had been distributed to schools, clubs, factories, major employers of workers, and various civic organizations.” Pocket copies of the Constitution were to become ubiquitous later in the twentieth century, which reflects the general public reverence for the text of the document. Kammen adds that

In 1924 Etta V. Leighton, civic secretary to the National Security League, prepared a 32-page pamphlet – really a catechism – containing a series of 115 questions and answers concerning the Constitution, followed by suggestions for reading, discussion, and debate. It was intended for schoolchildren aged twelve or thirteen to eighteen. During the mid 1920s, a series of annual lecturerships about the Constitution were set up and financed at a number of colleges and universities, furthering the trend of public reverence for the document. In addition, Justice George Sutherland was appointed to the Court, while saying on the record that the Constitution was a “divinely inspired instrument.” Huge public outpourings of interest attended such events as the publication of Albert J. Beveridge’s four-volume biography of Marshall in 1920 and of Charles Warren’s publication in 1922 of his series on The Supreme Court in United States History. In 1926 and 1927, “special broadcasts about the Constitution began to be heard on the radio,” and “[b]y the early 1930s such programs were commonplace, often reaching an audience of millions.”

458 See id. at 219-20.
459 Id. at 220.
460 See id. at 221.
461 See id. at 220.
462 Id. at 231.
463 Id.
464 Id. at 232.
465 See id. at 264.
466 Id. at 251.
467 Id. at 252.
Public reverence for the Constitution was also evident during the great constitutional crisis of the 1930s, when Thurman Arnold described the outlook of many Americans as follows:

The Constitution became for them a sort of abracadabra which would cure all disease. Copies of the Constitution, bound together with the Declaration of Independence and Lincoln’s Gettysburg Address, were distributed in cigar stores; essays on the Constitution were written by high-school students; incomprehensible speeches on the Constitution were made from every public platform to reverent audiences which knew approximately as much about the history and dialectic of that document as the masses in the Middle Ages knew about the Bible . . . . The American Liberty League was dedicated to Constitution worship. Like the Bible, the Constitution became the altar whenever our best people met together for tearful solemn purposes, regardless of the kind of organization. Teachers in many states were compelled to swear to support the Constitution.  

In 1937, the sesquicentennial of the Constitution was celebrated widely and publicly, notwithstanding the simultaneous occurrence of Franklin Roosevelt’s controversial court-packing plan. “[G]roups all along the ideological spectrum, ranging from the American Legion and the Sons of the American Revolution to the Workers Defense League, participated in the Sesquicentennial with genuine enthusiasm . . . .” By the 1930s, many Americans had come to regard proposals for constitutional change as being, as Thomas Reed Powell of Harvard put it, “impious.” The very idea of tampering with the Constitution became a sacrilegious act. In 1935, the Supreme Court’s magnificent temple-like building was completed and opened, and “the Supreme Court finally acquired a permanent home,” fitting in splendor for an institution that is the publicly recognized keeper of the American ark of the covenant.

Other evidence of the secular religion that surrounds the Constitution abounds. For example, the Constitution and the Declaration are publicly displayed in a national shrine under glass where millions go to see the original sacred texts. Surely, the National Archives is a national, modern day ark for our national covenant. Moreover, consider the building that the Supreme Court meets in, which is designed to look like a Greek temple with religious friezes and the words “Equal Justice Under Law” emblazoned across the front of it. Surely, that temple is a national, modern day St. Peter’s Basilica for the American secular religion. Is it any accident that when the Supreme Court

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468 See id. at 38.

469 See id. at 256, 292-300.

470 Id. at 308.

471 See id. at 315.

472 Id. at 266.
“hands down a ruling” (as God handed down the Ten Commandments), all the television networks display the facade of the Supreme Court building to show the sacred source of the new decree? And, as Levinson also points out, the writing of the Constitution in 1787 is popularly described as a “[m]iracle at Philadelphia.” Levinson notes that “[m]iracle” can, of course, have a secular meaning, but both the dictionary and our ordinary language evidence its decidedly sacred connotations. Indeed, Framer and signer of the Declaration of Independence Dr. Benjamin Rush that the Constitution was “the offspring of inspiration,” and that he was “perfectly satisfied that the Union of the States, in its form and adoption, is as much the work of a Divine Providence as any of the miracles recorded in the Old and New Testament were the effects of a divine power.”

The secular religion surrounding the Constitution also explains the propensity of most Americans to believe that they can read and interpret the written Constitution along with the Justices. Levinson argues that this belief has its roots in American Protestantism, with its emphasis on the primacy of the written scripture and its acknowledgment that individual interpretation of the scripture is legitimate. For Protestants, Levinson says, “Sola scriptura were the great watchwords; an authentic Christianity must be based on the Scriptures alone. ‘The BIBLE, I say, the BIBLE only, is the religion of Protestants,’ said a seventeenth-century reformer, describing The Religion of Protestants: A Safe Way to Salvation.” Similarly, most American Protestants became constitutional departmentalists. They believed all ordinary people and all the branches of government could independently interpret the text of the Constitution without the help of an intermediating priesthood of Supreme Court Justices. This remains a uniquely American belief, ironically opposed today by a few constitutional law professors who believe not in the right answer of the constitutional text, but in the right answerer of the Supreme Court (standing in for the Pope).

In sum, the American ideology of exceptionalism and the reality of American exceptionalism find their expression in a belief that the Constitution is the ark of the covenant of the New Israel. It is quite literally our holiest of holies, which all of us can read and interpret. Woe to any priesthood of Supreme Court Justices who would construe the American covenant with God in light of the laws of Germany or France!

473 See Levinson, supra note 25, at 13 (describing “the most important exhibit celebrating the Bicentennial,” which was titled “Miracle at Philadelphia”).

474 Id.

475 See id.

476 See id. at 18-27, 29-52 (examining differences between Protestantism and Roman Catholicism and applying the distinctions between the two to modes of constitutional interpretation).

477 Id. at 18.
C. **Constitutional Doctrine and American Exceptionalism**

I now turn away from the subject of the public history of what Kammen calls our fetish with the Constitution, to the subject of Supreme Court doctrine in a few areas of constitutional law. The question here is: how unique and exceptional is our constitutional law doctrine? Is the Constitution as it is applied in practice by the Supreme Court reflective of the notion that Americans are a special people, in a special place, with a special calling?

As one would expect, certain doctrines in American constitutional law explicitly reflect the extent to which America is an exceptional nation, different from any other. Frederick Schauer has written about the extent to which our Constitution is exceptional in its protections of freedom of speech and of the press.\(^\text{478}\) Schauer argues that U.S. First Amendment caselaw is exceptionally libertarian in its protection of hate speech,\(^\text{479}\) in defamation law,\(^\text{480}\) in allowing the press to comment on ongoing criminal prosecutions,\(^\text{481}\) and with respect to constitutional protection for commercial speech.\(^\text{482}\) Schauer says that “throughout virtually the entire range of freedom of speech and freedom of the press topics . . . the United States is an outlier.”\(^\text{483}\) Schauer shows the cultural and textual roots of this First Amendment exceptionalism and concludes that “American approaches to freedom of expression diverge dramatically from those accepted in most of the remainder of the open and democratic world.”\(^\text{484}\)

A second respect in which U.S. constitutional law is exceptional compared to the constitutional law of other Western democracies is with regard to capital punishment. As Carol Steiker points out, “capital punishment for ordinary crimes has at this point been abolished, either de jure or de facto, in every single Western industrialized nation except the United States.”\(^\text{485}\) Steiker also notes that the United States has an exceptionally higher homicide rate than do other Western democracies,\(^\text{486}\) and she suggests that American voters are more intensely pro–capital punishment than are voters in other Western countries.\(^\text{487}\) Steiker reviews a number of different explanations for America’s capital punishment exceptionalism, and she concludes that the most powerful factor was the historical accident of Richard Nixon’s narrow election victory in 1968.

\(^{478}\) See generally Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM, supra note 27, at 29.

\(^{479}\) See id. at 35.

\(^{480}\) See id. at 40.

\(^{481}\) See id. at 41.

\(^{482}\) See id. at 42.

\(^{483}\) Id. at 43.

\(^{484}\) Id. at 56.

\(^{485}\) Carol S. Steiker, *Capital Punishment and American Exceptionalism*, in AMERICAN EXCEPTIONALISM, supra note 27, at 57, 57.

\(^{486}\) Id. at 61.

\(^{487}\) See id. at 69.
over Hubert Humphrey and the “contingencies that helped Nixon to prevail,” as well as the four appointments Nixon subsequently made to the Supreme Court. Steiker concludes that “[w]e should thus most emphatically not assume that we are destined – owing to sociological facts about our murder rate or to political forces that currently predominate, or to anthropological observations about our culture – to continue to embrace capital punishment.”

Steiker is clearly right about the constitutional law impact of Nixon’s narrow victory over Humphrey in 1968, but I think she is too quick to assume that the United States is not fundamentally different from other Western democracies in its attitudes toward capital punishment and law and order. The fact is that Nixon won in 1968 because his pro–law and order arguments resonated with American voters, and they did so because Americans are unusually moralistic, as prior sections of this Article have shown.

A third respect in which American constitutional law differs radically from the constitutional law of other Western democracies is that it lacks guarantees of social and economic rights, such as a right to employment, health care, and vacation time. Cass Sunstein has written on this question and has considered why American constitutionalism is unique in this regard. Sunstein concludes that the key is again the accident of Nixon’s narrow victory over Humphrey in 1968. He claims that “with a modest shift in personnel, the Constitution would have been understood to create social and economic rights of the sort recognized in many modern constitutions, and indeed in the constitutions of some of the American states.” As Sunstein recognizes, however, the counter-argument is that the “very election attests to the strength of the cultural explanation – that Nixon’s election was a product of America’s distinctive culture, one that is hostile to social and economic rights.”

Sunstein is right that there are leftists in America who advocate big government solutions to problems, but America is different in that those leftists win a lot fewer elections here than they do in other Western countries. Again, American constitutionalism is exceptional in lacking guarantees of social and economic rights because American history and culture are far more hostile to those rights than are the history and culture of any other major

488 See id. at 86-89.
489 Id. at 89.
491 Id. at 108.
492 Id. at 92.
493 Id. at 108. Notably, the same argument applies to America’s rejection of Franklin Roosevelt’s call for an economic Bill of Rights. See id. at 110.
494 See id. at 110 (acknowledging an “emerging movement” in the 1970s to support an expansion of social and economic rights).
Western democracy. American constitutional law is exceptional because America is exceptional.

A fourth respect in which American constitutional law is exceptional is with regard to our establishment clause caselaw. The United States has the strictest rules separating church and state of any major Western democracy. England has an established church, and France, Germany, and Australia all provide government funds to religious schools. The United States, on the other hand, partly as a matter of federal constitutional law, and partly as a matter of state constitutional law, strictly limits the amount of government money that can go to religious groups. The U.S. Supreme Court also restricts prayer and the use of religious symbols by the government quite stringently. The Court’s doctrine is very libertarian and very Protestant. The idea that government should be separate from and neutral as to religious sects first developed in seventeenth century England and America, and reflected the variety of Protestant sects that rapidly grew up in both countries in the wake of the Reformation. Continental Europe, in contrast, was marked by established Catholic and Protestant churches, and to this day government there is more entangled with religion than it is in the fiercely libertarian and more religious United States. Establishment Clause caselaw and the strict separation of church and state thus mark another respect in which the United States is exceptional in its constitutional law doctrine.

A fifth respect in which American constitutional law is exceptional is with regard to criminal procedure rules. The United States is the only advanced democracy to employ an exclusionary rule whereby illegally obtained evidence of guilt cannot be used in court by the government. This rule dates back to the early twentieth century for the federal government and to the 1960s for the states. It is a strikingly libertarian, pro–criminal defendant rule. American criminal procedure law is also strikingly libertarian in having a rule against self incrimination, whereby criminal defendants cannot be compelled to testify in proceedings against themselves. No other Western democracy of which I am aware has such a rule.

A sixth respect in which American constitutional law is exceptional is with respect to abortion and divorce law, which Mary Ann Glendon has written about in her book Abortion and Divorce in Western Law. Glendon claims that “the United States, while participating generally in the overall trends that

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495 For a discussion of how different establishment clause doctrine is in Germany, see DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 244-69 (1994). For a discussion of public funding of religious schools in France, see JOHN BELL, FRENCH CONSTITUTIONAL LAW 151-57 (1992).

496 For a discussion of the ways in which criminal procedure differs in civil law countries from that used in the United States, see generally JOHN H. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY (1977). For a discussion of criminal procedure in England, see MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 627-54 (1994).

497 GLENDON, supra note 265.
have marked the recent transformation of Western family law, often occupies an extreme end of the spectrum when cross-national comparisons are made on specific issues.”

Glendon elaborates as follows:

When American abortion law is viewed in comparative perspective, it presents several unique features. Not only do we have less regulation of abortion in the interest of the fetus than any other Western nation, but we provide less public support for maternity and child raising. And, to a greater extent than in any other country, our courts have shut down the legislative process of bargaining, education, and persuasion on the abortion issue. Divorce law in the United States is also distinctive in a number of ways. Divorce is as readily available in most American states as it is anywhere, but we have been less diligent than most other countries in seeking to mitigate the economic casualties of divorce through public assistance or enforcement of private support obligations.

Glendon finds the causes of both phenomena in constitutional law. She denounces the Supreme Court’s radically libertarian right of privacy caselaw and urges a more moderate abortion caselaw than that embodied in Roe v. Wade. She also argues that the “Supreme Court has come close in Boddie v. Connecticut to sanctioning a constitutional right to divorce, and in Zablocki v. Redhail to establishing a constitutional right to marry successively as many spouses as one wishes.” Both American abortion and divorce law as promulgated by the Court are exceptionally libertarian and individualistic – a finding that is obviously of major interest given the themes of this Article.

First, with respect to abortion, Glendon observes that American law is more pro-abortion than is the law of “Austria, Denmark, Greece, Norway, and Sweden.” The United States is alone in this group... in forbidding any state regulation of abortion for the sake of preserving the fetus until viability... It is alone, too, in that even after viability, it does not require regulation to protect the fetus.” As a result, Glendon says that [t]oday, in order to find a country where the legal approach to abortion is as indifferent to unborn life as it is in the United States, we have to look to countries which are much less comparable to us politically, socially,

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498 Id. at 2.
499 Id.
500 See id. at 134 (emphasizing the U.S. Constitution’s unique emphasis on “the expressed rights to individual liberty and equal treatment” and its lack of explicit provisions for family protection).
501 See id. at 42-46.
503 Id. at 22.
504 Id.
culturally and economically, and where concern about population expansion overrides both women’s liberty and fetal life.\textsuperscript{505}

In no other country have constitutional courts gone as far in removing abortion law from regulation by the democratic process as in the United States.\textsuperscript{506}

In particular, Glendon compares the abortion decisions of the German Constitutional Court to the U.S. Supreme Court decision in \textit{Roe v. Wade}, highlighting the ways in which U.S. constitutional law is unique in its regulation of abortion. Glendon notes five big differences.\textsuperscript{507} First, the \textit{Roe} decision left the legislature with a lot less room to respond than did its German analogue.\textsuperscript{508} Second, the Court in \textit{Roe} and in the German case imagined the facts very differently, with the German court perceiving a clash of rights between a mother and a fetus, while the Supreme Court focused on a woman’s right to choose and conscientiously avoided calling a fetus a “person” for the purposes of the Fourteenth Amendment.\textsuperscript{509} Third, the \textit{Roe} decision was individualistic while the German decision was communitarian.\textsuperscript{510} Fourth, the two courts had very different views of the right to privacy. While the German “Federal Constitutional Court has emphasized the qualified nature of the right,” Glendon notes that “the right of privacy . . . has become one of the most absolute rights known to the American legal system.”\textsuperscript{511} Finally, the \textit{Roe} decision was a very rights-oriented decision, while the German abortion decision was much less rights oriented.\textsuperscript{512}

Glendon also sees a big difference in the way that American and German constitutional laws treat the subject of divorce. First, the United States treats divorce law as primarily a state matter, which is not subject to national legislation.\textsuperscript{513} In practice, this created a race to the bottom, with Nevada’s quickie divorce rules soon becoming the norm nationally and child custody payments becoming notoriously hard to obtain.\textsuperscript{514} Second, Glendon argues that U.S. divorce law is even more permissive than the divorce law of Sweden, which is one of the most permissive in Europe.\textsuperscript{515} This is so because it is less

\textsuperscript{505} \textit{Id.} at 24.
\textsuperscript{506} See \textit{id.} at 25.
\textsuperscript{507} See \textit{id.} at 33-39.
\textsuperscript{508} \textit{Id.} at 34.
\textsuperscript{509} See \textit{id.}
\textsuperscript{510} See \textit{id.} at 35 (“\textit{Roe} . . . embodies a view of society as a collection of separate autonomous individuals. The West German decision emphasizes the connections among the woman, developing life, and the larger community.” (footnote omitted)).
\textsuperscript{511} \textit{Id.} at 37-38.
\textsuperscript{512} \textit{Id.} at 38.
\textsuperscript{513} See \textit{id.} at 76.
\textsuperscript{514} See \textit{id.} at 76-77 (“As the number of states where divorce was readily available increased, it became harder and harder for any given state to maintain a significantly more restrictive policy than its neighbors.”).
\textsuperscript{515} \textit{Id.} at 75, 78.
certain that a breadwinner will be obligated to pay child support in the United States than in Sweden, because there is almost a constitutional right to remarry in the United States, and because the reformed U.S. divorce came to be known as “no-fault divorce” – a label which made divorce less socially sanctioned than in Sweden.\textsuperscript{516} Glendon concludes that “the United States appears unique among Western countries in its relative carelessness about assuring either public or private responsibility for the economic casualties of divorce.”\textsuperscript{517}

Glendon concludes that “it is striking that major changes in both divorce and abortion law during this period took place first in the United States and England, and that the changes took an extreme form in American law.”\textsuperscript{518} She explains that this in part results from the fact that “[i]n England and the United States the view that law is no more or less than a command backed up by organized coercion has been widely accepted. The idea that law might be educational, either in purpose or technique, is not popular among us.”\textsuperscript{519} Part of the reason, then, that American law is so exceptional is because we have accepted the teachings of Hobbes, Bentham, Austin, and Holmes in a way that they are not accepted in civil law Europe.\textsuperscript{520}

I am sympathetic to some of Glendon’s complaints about the doctrinal constitutional law residue of the Warren and Burger Courts, but I do not agree with her that this is a problem solely of recent origin. American individualism and libertarianism in constitutional law are plainly reflections of the ways in which America is exceptional, as is shown in this Article. The phenomenon Glendon bemoans is much more deeply rooted in American life than she seems to realize. It is in fact a reflection of the fact that the Constitution is our ark of the covenant and that ours is an exceptionally libertarian and individualist society. Glendon’s book is elegant and powerful, but she seems not to realize how deep some of the roots of the trends she deplores are.

V. A TALE OF TWO CULTURES

It is time to bring the very disparate strands of this Article together. The culture of the Supreme Court is highly sympathetic to reliance on foreign law. In fact, the Supreme Court has cited and relied on foreign law going back to the beginning of the nineteenth century in literally dozens and dozens of cases. The Court has relied on foreign law in a whole host of different areas: in federalism cases, in economic liberty cases, in substantive criminal law and criminal procedure cases, in determining the evolving meaning of the Eighth Amendment, and in controversial social issue substantive due process cases.

In stark contrast, the popular culture of the United States is extremely hostile to the idea that the meaning of our Constitution should be based in any way on

\textsuperscript{516} Id. at 78-80.
\textsuperscript{517} Id. at 105.
\textsuperscript{518} Id. at 112.
\textsuperscript{519} Id. at 7.
\textsuperscript{520} See id. at 114-25.
Many – although not all – Americans believe that Americans are a special people, in a special land, with a special mission. This is our national ideology, and to some degree it also reflects reality. Americans really are different from Europeans and Canadians, and for that fact many Americans are very grateful. The Constitution is the focal point of American exceptionalism: it is our holiest of holies, the ark of the covenant of the New Israel. Indeed, Americans’ focus on the sanctity of their Constitution could be criticized as bordering on idolatry. Supreme Court interpretation of the Constitution in substantive due process cases with reference to foreign law calls the whole 400-year-old American project into question. The popular culture of America and the elite culture of the Supreme Court sharply clash over whether foreign practice as to sodomy laws, for example, is relevant to American law.

This clash between elite and popular culture poses a special challenge for law professors like Columbia’s Thomas Merrill or the University of Chicago’s David Strauss, who believe that the Supreme Court ought to be guided by what Merrill calls Burkean conventionalism\textsuperscript{521} and what Strauss calls common law constitutionalism.\textsuperscript{522} Merrill thinks that the Court ought to do what is conventional; under no circumstances ought it to be an engine of social change.\textsuperscript{523} Moreover, Merrill has a fairly short time horizon in defining what precedents ought to be binding. He believes that \textit{Roe v. Wade} is now binding precedent, and he has said that the Supreme Court was wrong in the \textit{Apprendi} line of cases that call into question sentencing guidelines that are less than twenty years old.\textsuperscript{525} Strauss also exalts Supreme Court precedent over the constitutional text.\textsuperscript{526} He acknowledges, of course, that sometimes precedents get overruled, but he calls for this to happen only slowly and in a common law like way.\textsuperscript{527} The gradual erosion of \textit{Plessy v. Ferguson} and its displacement by \textit{Brown v. Board of Education} and \textit{Loving v. Virginia} are his models for the slow, incremental way in which constitutional change should occur.\textsuperscript{528}

I submit that Burkean conventionalism and common law constitutionalism will often founder as sources of guidance, because on many questions the convention in the Supreme Court’s caselaw and the conventions of popular

\textsuperscript{521} See Merrill, \textit{supra} note 10, at 509.
\textsuperscript{523} See Merrill, \textit{supra} note 10, at 522 (“[C]onventionalism basically shuts off the courts as an avenue for social change.”).
\textsuperscript{524} See \textit{id.} at 515-18, 521-23.
\textsuperscript{525} Interview with Thomas W. Merrill, Charles Keller Beekman Professor of Law, Columbia Law Sch. (2006).
\textsuperscript{526} See Strauss, \textit{supra} note 522, at 883-84.
\textsuperscript{527} See \textit{id.} at 895 (“[W]e should prefer evolutionary to revolutionary change.”).
\textsuperscript{528} See \textit{id.} at 902-03.
culture will be diametrically opposed. I will discuss the substantive due process caselaw to illustrate this tension. If the Court follows its own judicial conventions and precedents in such cases, it obviously ought to cite and rely on foreign law in *Lawrence v. Texas* as Justice Harlan did in his dissent in *Poe v. Ullman* and as the Court has done in many other major substantive due process cases. On the other hand, if the Court relies on the popular culture and seeks not to be an agent of social change, then it must refuse to cite and rely on foreign law. The problem with conventionalism as a theory of the judicial role is that it cannot tell us whether to follow the elite Supreme Court culture of Europhilia or the deep-seated popular culture of American exceptionalism. Whichever way the Court goes, someone will be mad and will say that the law has “changed.”

Nor would I submit is this problem unique to the issue of whether the Supreme Court ought to rely on foreign law. There are many other areas in which the elite culture of the Supreme Court’s caselaw points in the opposite direction from popular sentiment. For example, under the Supreme Court’s Establishment Clause caselaw and doctrine, a very good case can be made that the words “under God” in the Pledge of Allegiance are a forbidden governmental endorsement of religion. In the popular mass culture, however, a constitutional challenge to the Pledge triggers outrage. What is a conventionalist Court to do: follow the caselaw, or follow the actual living conventions of “We the People?” The Court’s abortion caselaw has for a long time implied that there might be a constitutional right to assisted suicide, polygamy, and prostitution. Public opinion revolts against those ideas. Again, what is a conventionalist Court to do: follow the caselaw or listen to the People?

I submit that precisely because the written Constitution is our ark of the covenant, our holiest of holies, it is simply unthinkable for the Court to follow obscure implications of caselaw when doing so outrages the public and violates the text and original meaning of the Constitution. I suspect that most references to foreign law, especially on highly sensitive moral and social issues, will tend to outrage the American public. This is why I think some conservatives responded to Justice Kennedy’s reliance on foreign law in *Lawrence v. Texas* by calling for his impeachment. The ideology and the reality of American exceptionalism are so fundamental to this country that even a 200-year-old line of caselaw must yield in their face. Conventionalists ought to resolve the conflict between the two cultures in favor of the mass culture and against the elite lawyerly culture. Anything else would run counter to the conventionalists’ commitment to opposing use of the Court as an instrument of social change. Michael Kammen offers a startlingly apt quotation here from Judge Charles Wyzanski:

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529 See *supra* notes 41-44 and accompanying text.
530 See Calabresi & Zimdahl, *supra* note 6, at 752 n.25.
There is always the risk . . . that persons start with the totally false assumption that the Constitution is the province of the lawyers. . . . Moreover, I think it is quite clear that there is a grave danger that if we think of the Constitution exclusively in terms of constitutional law, we shall lose some of its most important symbolic, as well as practical, values to our society.\footnote{See Kammen, supra note 26, at xx (alterations in original).}

Kammen adds that “American constitutional history [must] be regarded and written as much more than the running record of so-called major cases decided by the Supreme Court.”\footnote{Id. at 28.}

There is an easy way to amend the Court’s caselaw to accomplish conventionalist goals. The Supreme Court ought to confine its reliance on foreign law to Eighth Amendment Cruel and Unusual Punishment Clause cases, as it has so relied since \textit{Trop v. Dulles} in 1958.\footnote{See supra note 33 and accompanying text.} These are the only cases in which the Court has actually struck down American statutes while relying on foreign law, so these are the only precedents from the many discussed in Part I that clearly support the invalidation of American statutes based on foreign law. All the other cases discussed in Part I mention foreign law as one of many reasons to uphold statutes. I would dismiss the references in these other cases as dicta and keep Supreme Court reliance on foreign law confined to the Eighth Amendment area and to any analogous areas of caselaw where the Court is asked to make a determination of reasonableness.\footnote{The Fourth Amendment would seem to call for a similar assessment of reasonableness when it bars unreasonable searches and seizures.}

I have argued as much previously in an article in the \textit{Ohio State Law Journal}, and will not repeat that argument here. Even in Eighth Amendment cases, the Court ought to be far more sensitive to American exceptionalism than it has been when it decides to strike down federal or state statutes. I do not think, for example, that the death penalty ought to be generally struck down merely because it has been abolished in most other economically advanced countries. Thus, I think Justice O’Connor was right to dissent from the Court’s opinion striking down the juvenile death penalty as unconstitutional.\footnote{See \textit{Roper v. Simmons}, 543 U.S. 551, 605 (2005) (O’Connor, J., dissenting) (“At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus. The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.”); Calabresi & Zimdahl, supra note 6, at 867-68.}
American moralism discussed above. It could be argued that a drawback of American exceptionalism is that it sometimes leads to punitive moralism and outrage, which is frankly unbecoming to a country with religious and spiritual roots as deep as our own. Occasional reference to foreign law in Eighth Amendment cases might at least help make the United States a more temperate and balanced place in which to live without denying the country a chance to aspire to greater religious devotion than do the countries of Western Europe.

**CONCLUSION**

There are two objections to American exceptionalism that should be mentioned at this point and briefly refuted. First, it could be observed that exceptionalism is by no means unique to the United States. Ancient Athens and Rome, the British Empire, and less appealingly, Nazi Germany also had exceptionalist creeds. Most nations have a founding creed or story and that story becomes bound up in nationalist ideas about why that nation is superior to all others. Nationalism has justly acquired a bad name, so perhaps we should be very skeptical of American exceptionalism on the grounds that it is a form of nationalism.

This objection, however, fails because it overlooks the fact that American exceptionalism is not racist whereas the nationalist exceptionalism of Ancient Greece, Rome, the British Empire, and Nazi Germany were all explicitly racist. The ancient Greeks believed that their people and civilization were superior to all others and that non-Greeks were “barbarians,” a word that meant stutterers, because non-Greeks did not speak Greek. The ancient Romans believed Rome was divinely founded by the God Romulus and that their people were predestined to rule the known world through an empire. The foundations of the British Empire were also racist in that the Empire was ruled by Britons taking up what was called “the white man’s burden,” and power was not devolved on the native people over whom the Empire ruled. Even the American colonists were not allowed to participate in self-government. Nazi exceptionalism was notoriously racist and was premised on the idea of the superiority of the so-called Aryan race. All of these exceptionalisms exalted the racial stock of the nations in question and held those nations to be inherently superior to all others.

American exceptionalism in contrast, at least since the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, as well as the civil rights laws of the 1960s, is explicitly non-racist. It holds that America is a special country because any person of any race from anywhere in the world can become an American simply by believing in a certain set of ideas. Being an American is a function of what you believe and where your loyalties lie. It has nothing to do with your race, or where you were born, or who your parents or ancestors were. If you think the ideas of liberty, faith, and hard work that America is committed to are admirable, as I do, then being committed to those ideas must be admirable as well. In thinking that America and Americanism is admirable, one need not conclude that the United States is always right in
foreign policy disputes and other countries are always wrong. All one needs to believe to be an American exceptionalist is that, relatively speaking, this land is a beacon of liberty and hope to oppressed seekers of freedom from all over the world. Americans do not think we are better than everybody else, which is why we have never sought to be an empire. We do not want to rule over other people and tell them what to do. We want democracy, liberty, and respect for fundamental rights so that other countries can flourish the way America flourishes. When the United States and its allies won World War II, we did not subjugate Germany, Japan, and Italy. We turned them into free societies with democratic institutions. We did the same thing with the countries of Eastern and Central Europe after the communist regimes there fell.

American exceptionalism is thus absolutely exceptional among all the exceptionalisms of the world because of the belief that anyone of any race or nation can become an American just by believing in a set of ideas. Ours is a universal creed, and it is not predicated on the nationalist belief that we are superior because of who we are. Americans think America is superior because of what Americans believe. For this reason, Ronald Reagan was absolutely right to describe us as a beacon of freedom for the whole world. America has in fact created the freest, most socially egalitarian, and most racially integrated society in the world. Our people are exceptionally religious, hard-working, patriotic, and devoted to philanthropy. In short America is a good country that is committed to good values in a way that Ancient Greece, Rome, the British Empire, and Nazi Germany were not. To demean American exceptionalism by equating it with the belief systems of these other hateful regimes is just plain wrong. America is as plainly a good society as Nazi Germany was a bad society. While the United States has committed sins in our treatment of African Americans and Native Americans, we have worked very hard for a long time to rectify those sins. We are indeed, in the words of Abraham Lincoln and Ronald Reagan, “the last best hope of man on earth.”

A second objection that could be raised to American exceptionalism is that there is more than a little of the deadly sin of pride involved in proclaiming one’s people to be God’s elect, as Roger Williams pointed out. Ironically, the Puritans themselves were guilty of the sin of pride because they thought the churches they had founded in the New World were purer than the Church of England or the Catholic Church. It is only a short step from devotion, to pride in one’s devotion, to moralism against those who one thinks are less devout than oneself. From the Salem witch hunts up through the hysteria of the forces of political correctness on university campuses, many Americans have taken the step from believing we are a special people to the sin of self-righteous pride.

The first response to this objection is to remember Christ’s admonition that we should not judge lest we be judged, and that we should not try to remove

537 Reagan Remarks, supra note 240; see also supra note 196 and accompanying text.
538 See MORGAN, supra note 79, at 103.
the mote from the eye of our neighbor before removing the beam from our own eyes.\textsuperscript{539} It is admirable, in my view, to aspire to a life of religious devotion, but not if one’s own devotion manifests itself in a desire to punish other people who one thinks are less devout. Christ says it is the meek and the forgiving who shall inherit the earth and not the self-righteous,\textsuperscript{540} a point American exceptionalists and moralists need to remember.

Second, and more fundamentally, the idea that America is a special place, with a special people, and a special role to play in the world does not have to lead to the deadly sin of pride. One can think, as I do, that God calls individuals and sometimes nations to play a special role without becoming arrogant in the process. We all have callings both individually and as a group of people, but that does not mean we should be arrogant or dismissive of those with different callings. Fundamentally, I think the United States is not an arrogant or proud nation in the wrongful sense of the term pride. We have not sought to create an empire or to exalt our nationality over all the other nationalities of the world. We seek only to spread democracy and individual rights around the world. Where is the pride in doing that?

All of that being said, I would like to close with some strong words in defense of American moralism and exceptionalism. It is the United States of America, and its allies, that had the moral compass required to undertake the mission of defeating the Nazi and Communist totalitarian regimes during the last seventy years, and it is the United States that introduced the world to democracy and spread that system of government all over the world as its national mission. This moralism, when many Europeans were openly and covertly collaborating with and appeasing evil, was vital to successfully stopping the onslaught of a new dark age. And so I conclude, as Deborah Madsen does, by observing that a nation which learned the idea of American exceptionalism from Europeans ultimately gave freedom back to Europe as part of its special mission in the world.\textsuperscript{541} After four hundred years, American exceptionalism appears to have circled back on itself to rejuvenate the tired old lands of Europe and win them back again and again for the cause of freedom.

\textsuperscript{539} See Matthew 7:3 (New International).

\textsuperscript{540} See Matthew 5:5 (New International).

\textsuperscript{541} See Madsen, \textit{supra} note 12, at 166 (“[T]he Anglo-Saxon United States has spun the thread of exceptionalism across a continent and through four centuries of cultural development. Exceptionalism was the legacy of the Old World for the New, but exceptionalism \textit{is now} the legacy of the United States for us all.”).