EXCEPTIONALISM EVERYWHERE: A (LEGAL) FIELD GUIDE TO STRUCTURAL INEQUALITY

Alice Ristroph*

In the first two decades of the twenty-first century, American legal scholars have discovered exceptionalism everywhere: family law exceptionalism, tax law exceptionalism, bankruptcy exceptionalism, immigration exceptionalism, criminal law exceptionalism, and more. For several of these fields, the charge is that the field is not operating in accordance with some background conception of "normal" law—legal authority is allocated to the wrong institutions, or institutions are using the wrong methodologies to make legal decisions. In other instances, the challenge is to legal taxonomy itself, a claim that a given legal field is defined by a constructed and contestable category or classification. A survey of these various lines of exceptionalist argument helps illuminate two important dimensions of contemporary legal thought: skepticism toward (or outright abandonment of) classic accounts of the rule of law, and new efforts to understand law as one of the structures that preserves and reinforces inequality.

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* Professor of Law and Dean's Research Scholar, Brooklyn Law School. For helpful responses to drafts of this project, many thanks to Vincent Chiao, Darren Rosenblum, and workshop participants at University of Toronto Faculty of Law, Brooklyn Law School, Pace University School of Law, and Chicago-Kent College of Law.

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INTRODUCTION

Tax law claims to be special, fundamentally unlike other fields of law, so much so that scholars speak regularly of "tax exceptionalism."[1] Patent law is similarly prone to "exceptionalism,"[2] and the same label is applied to bankruptcy law,[3] antitrust law,[4] foreign relations law,[5] immigration law,[6] veterans law,[7] election

1. *See generally, e.g.*, Alice Abreu & Richard K. Greenstein, *Tax: Different, Not Exceptional*, 71 ADMIN. L. REV. 663 (2019); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006); Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221 (2014); James M. Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067 (2015).

2. *See, e.g.*, David O. Taylor, *Formalism and Antiformalism in Patent Law Adjudication: Rules and Standards*, 46 CONN. L. REV. 415, 463–80 (2013) (discussing "patent law exceptionalism").

3. *See generally, e.g.*, Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925 (2022).

4. *See, e.g.*, Justin (Gus) Hurwitz, *Administrative Antitrust*, 21 GEO. MASON L. REV. 1191, 1191 (2014) ("Antitrust is a peculiar area of law, one that has long been treated as exceptional by the courts.").

5. *See, e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 461 (1998) (discussing "foreign affairs exceptionalism"); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1906–19 (2015) ("[F]oreign relations exceptionalism defined foreign relations law for most of the twentieth century.").

6. *See generally, e.g.*, David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017).

7. *See generally, e.g.*, Michael J. Wishnie, *"A Boy Gets into Trouble": Service Members, Civil Rights, and Veterans' Law Exceptionalism*, 97 B.U. L. REV. 1709 (2017).

law,[8] federal Indian law,[9] and family law.[10] Criminal law may be the latest, and largest, field to be diagnosed with exceptionalism.[11] And exceptionalism is usually a *diagnosis* in the large and growing array of legal scholarship that deploys that term. Applied to individual persons, "exceptional" might seem a compliment.[12] Applied to fields of law, "exceptionalism" is most often a critique that entails identifying a pathological belief in imagined specialness and recommending a corrective return to uniformity.[13]

Of course, "American exceptionalism" has been invoked (and often criticized) for a century or more.[14] It may be that Americans, including American legal scholars, simply like to talk about exceptionalism, even if only to say that it doesn't really exist.[15] If so, exceptionalism may simply be a trendy label, a term that draws attention (and helps law professors place articles) but does not bear much

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8. *See generally, e.g.*, Heather K. Gerken, *Election Law Exceptionalism? A Bird's Eye View of the Symposium*, 82 B.U. L. REV. 737 (2002). As discussed below, when scholars wear the label of exceptionalism with pride, as Gerken does, they often equate "exceptionalism" with "distinctiveness." For more on the difference between exceptionalism and distinctiveness, see *infra* Part I.

9. *See generally, e.g.*, Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005) [hereinafter Frickey, *(Native) American Exceptionalism*]. "Federal Indian law" is the term typically used to describe federal law concerning Indigenous peoples, and I follow scholars in that field in using that label in this Article. *See* Philip P. Frickey, *Scholarship, Pedagogy, and Federal Indian Law*, 87 MICH. L. REV. 1199, 1200 n.7 (1989) ("'[F]ederal Indian law' . . . is the conventional name for the field, [and] I will use it even though it perpetuates a misnomer relating to Christopher Columbus's geographical confusion.").

10. *See generally, e.g.*, Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753 (2010).

11. *See generally, e.g.*, Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381 (2022). *See also* Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1953–55 (2019) (describing various types of "criminal law exceptionalism").

12. Even as applied to persons, "exceptional" can have either positive or negative connotations. *See* Zanita E. Fenton, *Being Exceptional*, 75 STUD. L. POL. & SOC'Y 79, 88 (2018) ("While 'exceptional' commonly is used as a compliment, it may also serve to denigrate for perceived arrogance or superiority, or merely for the fact of deviation from the believed norm.").

13. Unsurprisingly, this generalization about scholarly analyses of exceptionalism is itself subject to exceptions. A few scholars identify the "exceptionalism" of a field in an ostensibly neutral or even favorable light. *See, e.g.*, Frickey, *(Native) American Exceptionalism*, *supra* note 9; Taylor, *supra* note 2.

14. *See* Anu Bradford & Eric Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT'L L.J. 1, 4 (2011) (describing "a long line of literature on 'American exceptionalism'"). On the early twentieth-century origins of the specific phrase "American exceptionalism," see *infra* Section I.A.

15. *See* Bradford & Posner, *supra* note 14, at 5 ("The American stance toward international law is not distinctive or exceptional—or put differently, the United States is no more exceptional than any other powerful country.").

content.[16] Another possibility is a version of the Lake Wobegon effect: a tendency for everyone to see themselves as exceptional.[17] If academics are both vain and eager to point out vanity in others, scholars in various fields may believe their own fields to be unique even as they see other fields making unwarranted boasts of uniqueness. Without dismissing the possible influence of trendiness and vanity among scholars, this Article argues that the proliferation of claims of exceptionalism can teach us something more interesting. By looking closely at charges of exceptionalism across a number of different legal fields, we can identify patterns of disillusionment that highlight, in various contexts, American law's failure to live up to its promises of equality.

This Article examines claims that an entire field of law—such as tax, patent, immigration, or family—is exceptional in comparison to other legal fields. Of course, even to identify a "field" of law is to suggest that there exists a meaningful distinction between the given field and the rest of law. A claim of distinctiveness is not necessarily a claim of exceptionalism, however; a claim of distinctiveness does not necessarily assert anything about a supposed norm. For example, each human has distinctive fingerprints, but my particular pattern of swirls and loops is probably not exceptional. If my fingerprints featured straight lines intersecting at sharp angles, they would be not only distinctive but also exceptional.[18] Alternatively, if the skin on my fingertips were perfectly smooth with no lines at all, I might be said to lack fingerprints altogether—which is not the same as having exceptional fingerprints. A claim of exceptionalism involves both comparison and contrast.[19] It involves the identification of a broad category, an assertion about what is normal within that category, and an assertion that a particular token of the larger category deviates from the norm and yet remains within the category. For these reasons, claims of exceptionalism in law are potentially illuminating windows into the conceptions of law that inform contemporary scholarly discourse.

Other scholars have noted in passing the proliferation of claims of "exceptionalism" across different fields, but this Article offers close scrutiny of many different strands of exceptionalist critique with the aim to identify recurring

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16. *See* Abreu & Greenstein, *supra* note 1, at 664 (arguing that the concept of exceptionalism is "analytically empty"). In student-edited law reviews, the exceptionalism articles keep coming. *See generally, e.g.*, Christina Koningisor, *Police Secrecy Exceptionalism*, 123 COLUM. L. REV. 615 (2023); Eric Ruben, *Self-Defense Exceptionalism and the Immunization of Private Violence*, 96 S. CAL. L. REV. 509 (2023); Timothy Zick, *Second Amendment Exceptionalism: Public Expression and Public Carry*, 102 TEX. L. REV. 1 (2023). Of course, to note the proliferation of the phrase is not to endorse the suggestion that the phrase is meaningless.

17. The particular phrase comes from Garrison Keillor's radio segments about the fictional town of Lake Wobegon, "where all the men are strong, all the women good-looking, and all the children above average." But it names a cognitive bias that has been documented often in an array of fields. *See, e.g.*, Nan L. Maxwell & Jane S. Lopus, *The Lake Wobegon Effect in Student Self-Reported Data*, 84 AM. ECON. REV. 201, 201 (1994).

18. For more on the difference between distinctive and exceptional, and on ways of defining a "field" of law, see *infra* Part I.

19. Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 753 (2002) ("The concept of exceptionalism is comparative by definition.").

themes.[20] Even in a hyper-specialized world—*especially* in a hyper-specialized world—there is value in exiting our disciplinary silos and conducting a broader survey.[21] In the claims of exceptionalism addressed here, both the norm (law in general) and the exception (a given field of law) are typically characterized *as law*, and yet the departure from normal law to exceptionalist law is often criticized. The discovery of so much exceptionalism within the law, rather than outside it, seems an opportunity to reappraise some basic questions about legal theory and practice. If law, in one field after another, is failing to meet our expectations, is this a sign that all these fields of law are in need of reform? Or is it perhaps a sign that our expectations—our accounts of "normal" law—are themselves in need of adjustment?

Put differently, discussions of exceptionalism across different fields reflect and help illuminate some recurring disputes about what law is (normally) like. Central to these disputes, sometimes as a target of critique and sometimes as a still-unrealized aspiration, is a classic depiction of the rule of law as an alternative to the rule of man.[22] In this classic account, law is neutral and unbiased, serving as the very structure in which equality may be realized. The phrase "no one is above the law" reflects this egalitarian commitment. Presumably, no one is to be subordinated by the law, either. In contrast to the rule of man, which is likely to reflect the biases and self-preferences that characterize most humans, the rule of law promises equal treatment.[23] Indeed, the rule of law will purportedly correct or constrain the biases, self-preferences, and other weaknesses of human decision-makers.[24] And yet, as critical theorists have long argued, the distance between the rule of law and the rule of humans is ever so much shorter than we might like to believe.[25] In charging one field after another with unwarranted pretensions of exceptionalism, scholars have

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20. *See* Wishnie, *supra* note 7, at 1713–15 (noting "the jurisprudence of exceptionalism" in tax, immigration, and family law).

21. "We live in an era of hyper-specialization. Professionals across a spectrum of fields focus on mastering and practicing in narrow subspecialities." Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 847 (2012).

22. *See, e.g.*, Richard Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 2–3 (1997) ("[A]ny account should begin with the familiar contrast between 'the Rule of Law' and 'the rule of men [sic].'").

23. Some scholars trace the concept of the rule of law to the ancient Greek term isonomia, meaning "equality of laws to all manner of persons." E. THOMAS SULLIVAN & TONI MASSARO, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW 6 (2013).

24. For example, this was a central theme of Justice Antonin Scalia's vision of the rule of law, in which concrete rules and specific interpretive methods—textualism and originalism—would constrain the tendencies of human judges to aggrandize their own power. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). *See also* DAVID KAIRYS, *Introduction* to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1, 2 (3d ed. 1998) ("[G]overnment of law, not people, promises . . . to remove the human element from that enormous array of decisions and issues we turn over to judges . . . by deferring to a 'higher' source, so that we may be . . . free of ourselves.").

25. *See* KAIRYS, *supra* note 24, at 14 ("Judges are often the unknowing objects, as well as among the staunchest supporters, of the myths about law and legal reasoning. . . . [T]hey tend to immerse themselves in legal materials and legal reasoning, often in a state of denial about their own discretion and power to make choices."). *Cf.* Ristroph, *supra* note 11, at 1988–90 (discussing the contrast between the rule of law and the rule of humans).

brought to the surface an array of concerns about the presence of human frailty and inequality within the law. Implicit (and occasionally explicit) in the discourses of exceptionalism is a depiction of *law as a human practice* rather than a depersonalized mechanism that humans may use to overcome their own weaknesses. Moreover, claims of exceptionalism are usually protestations of inequality: an allegation of a double standard or other inconsistency that privileges someone and burdens someone else.

In some respects, we have been here before. The two conceptions of law crudely sketched here—law as neutral, depersonalized, and egalitarian, versus law as a human practice that can be used to perpetuate inequality—have been the subject of scholarly debates for a century or more.[26] Recent scholarly critiques of exceptionalism echo these earlier debates, perhaps unwittingly in some instances.[27] But the continuities need attention, especially if they have been mistaken for novel critiques. Indeed, a failure to realize that we have been here before might impede our efforts to get someplace else.

To see where we are and how it relates to where we have been, this Article identifies two themes common to concerns about exceptionalism across different legal fields. First, critiques of exceptionalism frequently identify a purportedly atypical allocation of decision-making authority or legal methodology, rather than focusing on the content of rules in the given field. Exceptionalist jurisprudence thus focuses on decisions and decision-makers, illuminating a view of law in which human actors are central. Second, among the most important decisions that we humans make are classification decisions: decisions about what constitutes a like case or an unlike one. Power lies in the identification of a situation as like or unlike. More precisely, power lies with *the agent* who can determine that a situation is like or unlike.[28] But classification decisions are not always made by individuals; in fact, each human learns to think (and think about law) through categories and classifications that were constructed prior to that human's own arrival on earth. Classifications structure our understanding of the world, including our understanding of what constitutes equality. Discussions of exceptionalism—and the related discourses of "normalization" and "assimilation"—are efforts to scrutinize, evaluate, or reinscribe the categories through which we understand law and (in)equality.[29] They are projects of knowledge creation that deserve our attention.

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26. Consider this summary of a major theme in legal historian Morton Horwitz's extensive work on American legal thought: "The formalist view of the rule of law, Horwitz chided, always conceals inequalities of wealth and power under a façade of formal equality. . . ." Robert Gordon, *Morton Horwitz and His Critics: A Conflict of Narratives*, 37 TULSA L. REV. 915, 922 (2002).

27. *See infra* Part IV.

28. *See* Frederick Schauer, *On Treating Unlike Cases Alike*, 33 CONST. COMM. 437, 449 (2018) (criticizing the phrase "treat like cases alike" on the grounds that "it invites those who accept it or follow it to imagine that they are identifying likenesses rather than creating them").

29. Here one might think of philosopher Miranda Fricker's work on epistemic injustice, one form of which is hermeneutical injustice. With these terms, Fricker draws attention to ways in which injustice is manifested and preserved through the categories in

The remainder of this Article proceeds in four parts and a conclusion. Part I examines the terms "exceptionalism" and "legal taxonomy," the latter referring to the division of law into discrete fields. This Part considers the possible objection that to define a distinct field of law is always, necessarily, to make a claim of exceptionalism. An explanation of why the objection fails helps identify more clearly the components of exceptionalist argument. Part II examines claims of exceptionalism in several different fields, tracing a common concern about the allocation of decision-making power and the interpretive methods that might constrain human decision-makers. The claims of exceptionalism examined in Part II take for granted that the field in question is in fact an appropriately defined field, but they argue that within the field, the wrong allocations of power or the wrong legal methodologies are operating. In contrast, three additional forms of exceptionalist critique examined in Part III each scrutinize the parameters of a given legal field. Each of these strands of exceptionalist critique identifies ways in which the definition of a field of law can itself affect judgments about what constitutes (in)equality. Part IV draws together lessons from the various lines of exceptionalist critique. I argue that the focus on decision-making and decision-makers challenges the ever-resilient conception of the rule of law as neutral and depersonalized. And the critique of legal taxonomies helps us understand the way legal categories themselves can operate to structure human thinking to render inequality non-cognizable. In both respects, exceptionalist jurisprudence provides an opportunity to confront (again) the humanity, including the human weaknesses, of law.

I. DRAWING LINES

This Article examines scholarly identifications of "exceptionalism" in a number of different fields of law. For the inquiry to be worthwhile, we need an idea of what constitutes "exceptionalism" and an idea of what constitutes a field of law. In particular, we may want some reassurance at the outset that exceptionalism is not simply the necessary consequence of drawing lines within the broad category of law. In other words, is every field of law exceptional by definition?

This Part will answer that question in the negative. To do so, it first offers a more detailed account of "exceptionalism" as the term is most often used by scholars in various disciplines. As explained in Section I.A below, a claim of exceptionalism typically involves or implies a claim about what is normal as well as a claim of commensurability between the norm and the exception. Moreover, exceptionalism is often both belief and practice: a way of thinking that then generates specific practices associated with that way of thinking. After these elaborations of the concept of exceptionalism, this Part then turns to the topic of legal taxonomy, or the subdivision of law into different fields. Section I.B identifies two standard criteria used to identify a discrete legal field: the use of a specific legal form, such as a contract, patent, or copyright; and the subject matter of regulation, such as health, natural resources, or Indigenous tribes. Once we understand the term "exceptionalism" and the basic principles of legal taxonomy, it becomes clear that

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which we think and interpret our experiences. MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 1 (2017) ("[H]ermeneutical injustice occurs . . . when a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their social experiences.").

"exceptionalism" is not a necessary implication of legal taxonomy itself. Instead, claims of legal exceptionalism in the early decades of the twenty-first century reveal, on one hand, broad assumptions about what is "normal" law and, on the other hand, more targeted resistance to particular choices by legal taxonomers. Both strands of exceptionalist thought merit additional investigation.

A. Exceptionalism: Norm, Commensurability, and Belief

Human speech is often imprecise, and there are many instances in which "exceptional" is used as a synonym for special, distinctive, or unusual, especially when one wants to connote superiority.[30] Because this Article examines scholarly analyses of "exceptionalism," I focus on a somewhat more exacting use of the term than is found in most of these inquiries. For scholars attentive to the concept, "'exceptionalism' signifies that something—be it a nation, group, religion, discipline, ideology, etc.—in some respect deviates from the norm and is perhaps superior to the comparables."[31] Thus, a claim of exceptionalism requires us to identify some relevant category (such as nations or religions), identify a specific member of that category, and then make a claim that the specific member deviates from a norm *but still belongs to the category*. Deviation and commensurability are both important to the concept of exceptionalism. A peach that grows to the size of a house is exceptional among peaches, and also exceptional within the broader category of fruit. In contrast, a steak is not an exceptional fruit, though it certainly departs from many norms attributed to fruit. Instead, a steak is simply not a fruit at all, as that category is usually defined.[32]

These dual claims of norm-deviation and commensurability help demonstrate that a claim of exceptionalism is not merely a claim of distinctiveness. A claim of exceptionalism posits departure from a norm; a claim of distinctiveness posits only non-identity with other specimens. Human fingerprints were my earlier illustration: fingerprints are supposedly unique, so any given person's fingerprints may be distinguished from everyone else's.[33] But even if distinctive, fingerprints also have certain generally shared traits, such as loops and swirls rather than straight lines and sharp angles. If my fingerprints have those shared traits, they are

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30. *See generally, e.g.*, Gerken, *supra* note 8.

31. Helge Dedek & Henry Coomes, *Exceptionalism*, *in* THE ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW (Smits et al. eds., 3d ed., forthcoming 2023).

32. We need categories to think, but we often take these categories for granted. And, as the philosophical literature on category mistakes reveals, we do not always share the same understandings of the categories through which we think and speak. *See* GILBERT RYLE, THE CONCEPT OF MIND 6 (60th Anniversary ed., 2009) (Hutchinson University Library, 1949) (introducing the concept of a category mistake). For this reason, it's important to be precise about our categories. A claim of exceptionalism should invite the question, exceptional in relation to what norm? It's not necessarily a mistake to compare apples to oranges if one is trying to assemble the most colorful fruit basket.

33. Some have questioned whether all fingerprints are in fact unique. *See* Sue Russell, *Why Fingerprints Aren't the Proof We Thought They Were*, PACIFIC STANDARD, https://psmag.com/news/why-fingerprints-arent-proof-47079 [https://perma.cc/9W65-UGXS] (May 3, 2017). But whatever the empirical reality, the common understanding of fingerprints as all distinctive is a useful illustration of the difference between claims of distinctiveness and claims of exceptionalism.

unexceptional even though they are distinctive.[34] To identify a member of a broader category as exceptional is, again, to posit a norm and to claim that the specific member has deviated from that norm. This feature of the concept of exceptionalism will prove important in the remainder of this Article, for it allows us to use claims of exceptionalism in legal scholarship to track ideas about "normal" law.

It may also be worth emphasizing a subtle difference between exceptionality and exceptionalism. With the suffix "-ity," the speaker may simply seek to describe an unusual characteristic that deviates from a norm. But the suffix "-ism" is often used to name human beliefs or belief systems and a set of practices associated with those beliefs: liberalism, capitalism, and so forth.[35] A claim of exceptionality is often just a descriptive claim about the properties of a given object or entity. A claim of exceptionalism is often a claim about the way people think—and how that way of thinking affects their actions. This difference will also prove important later in this Article. Many legal scholars identify "exceptionalism" as a mode of thinking that affects adjudication and practice in a given field, but these same scholars often deny the actual exceptionality of that field.[36]

American exceptionalism, a belief system premised on a claim of exceptionality, merits brief attention here. For many observers, American exceptionalism is a kind of "messianic cultural tradition" that celebrates a supposedly unique set of values and practices that make the United States superior to all other nations.[37] In a sprawling and diverse literature on American exceptionalism, the links between claims of exceptionalism and rationalizations of inequality are often evident.[38] To emphasize again, a claim of exceptionalism is

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34. Though the point may make heads swirl, one could say that distinctiveness is a feature of the "normal" fingerprint. If, say, members of one family were discovered to all share identical fingerprints, that very feature of their fingerprints would render the family exceptional in the rest of humanity.

35. *See* Dedek & Coomes, *supra* note 31. *See also* Alice Ristroph, *The Wages of Criminal Law Exceptionalism*, 17 CRIM. L. & PHIL. 5, 5–6 (2023) [hereinafter Ristroph, *The Wages*].

36. *See infra* Part II.

37. *See* Dedek & Coomes, *supra* note 31 (quoting Michael Ignatieff, *Introduction* to AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (2005)). The precise term appears to have originated in twentieth-century arguments between American and Soviet Communists. *See generally* William Z. Foster, *Marxism and American "Exceptionalism,"* 26 POL. AFFS. 794 (1947). The American Communists argued that rapid economic growth in the United States was likely to delay a proletarian revolution in that country. *Id.* The Soviets scorned these claims of "American exceptionalism," but as of this writing, the revolution has yet to come. The Communist origins of the phrase "American exceptionalism" can be seen in *United States v. Flynn*, 130 F. Supp. 412 (S.D.N.Y. 1955), one of the first instances of the phrase in the Westlaw database. In reviewing the Smith Act convictions of multiple defendants for allegedly advocating the violent destruction of the U.S. government, the district court discusses evidence of the teaching of "American exceptionalism," defined as "the theory that, in America, the working class and the capitalists could live together." *Flynn*, 130 F. Supp. at 418.

38. For a brief but thoughtful survey of studies of American exceptionalism, see Lucy Williams, *American Exceptionalism as/in Constitutional Interpretation*, 57 GA. L. REV.

often a claim about the way people think and the way that mode of thinking—especially a belief in one's own exceptionality—subsequently affects one's practices.[39]

So far, this Section has focused on *exceptionalism* rather than the underlying concept of an *exception*. Two distinct bodies of work on exceptions merit brief mention, although the constraints of this Article do not permit a full mining of these areas of inquiry. The first body of work concerns emergency powers, with an emergency cast as "the exception" that occasions a departure from the rule of law. For example, the American government's response to terrorist attacks on September 11, 2001, involved arguably exceptionalist claims of emergency power that critics saw as a fundamental threat to the rule of law; subsequent attacks in other democracies were followed by similar assertions of executive power and similar critiques.[40] "Sovereign is he who decides on the exception," the German theorist Carl Schmitt had claimed decades earlier, not long before joining and serving the Nazi party.[41] Sovereignty, as Schmitt defined it, is the power both to decide which cases counted as exceptions (to otherwise applicable law) and to decide what to do in those cases.[42]

A Schmittian dichotomy between law and exception colored many discussions of executive emergency powers and the prospects for modern democracies more generally for several years after 2001.[43] Many of the purportedly

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1071, 1080–86 (2023). As Williams notes, claims of American exceptionalism are often used to explain why the United States has (or should have) powers that other nations do not, or to exempt the United States from moral or legal constraints applicable to other nations. *See id.* at 1085.

39. *See generally, e.g.*, AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL CULTURE, 1800-1877 (2017). As her title suggests, Kessler argues that exceptionalism was invented rather than observed. The invented notion of America as exceptional fueled the development of legal practices that have "led to a world in which differences in the disputants' wealth and power are all too easily reflected in outcomes—and indeed, in the ability to obtain access to a forum in the first place." *Id.* at 354.

40. *See generally* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003).

41. CARL SCHMITT, POL. THEOLOGY 5 (George Schwab trans., 2005). Less pithily, Schmitt elaborated that "[t]he exception . . . is not codified in the existing legal order" and "it cannot be circumscribed factually and made to conform to a preformed law." *Id.* at 6. Schmitt has been the theorist most often associated with a law/exception dichotomy in discussions of emergency power, but Thomas Poole identifies a more liberal version of that dichotomy in John Locke's theory of executive prerogative. *See generally* Thomas Poole, *Constitutional Exceptionalism and the Common Law*, 7 INT'L J. CON. L. 247 (2009).

42. *See* WILLIAM E. SCHEUERMAN, BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW 21–22 (1994) (quoting SCHMITT, *supra* note 41, at 7) ("[I]f the sovereign alone 'decides whether there is an extreme emergency as well as what must be done to eliminate it,' he or she must also have the power to determine when a situation of normalcy exists.").

43. *See generally, e.g.*, GIORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Attell trans., 2005). Agamben and other commentators have viewed the resurgence of Schmittian thought and Schmittian modes of governance as a grave threat. *See, e.g.*, SCHEUERMAN, *supra*

lawless acts of the executive branch after 2001 were ultimately challenged in American courts.[44] Some of those courts denied the executive the powers it had claimed, and for the most part, the executive branch seemed to bow to judicially imposed constraints.[45] Perhaps the executive merely got better at cloaking its assertions of power in the façade of law; perhaps the reports and fears of "national security exceptionalism" were exaggerated.[46] Whether either or both of these explanations has merit, with the passage of time (and the tenure of a still more controversial President Donald Trump), President George W. Bush's administration now seems somewhat less lawless than it once did. The emergency-as-exception literature offers some insights useful to this Article, especially insofar as it links a claim of an exception to an exercise of power. But this Article is not primarily concerned with emergencies or with exceptions as departures from law; its inquiry is claims of exceptionalism fully *within* what we recognize as law.

A different legal literature on exceptions addresses a particular legal structure in which a given legal rule is deemed inapplicable in specified circumstances. Here, the counterpart to exception is a specific *rule* rather than a general system of *law*. Examples include doctrinal exceptions to constitutional protections for speech and affirmative defenses as exceptions to general criminal prohibitions.[47] Some works in this area conceptualize a purported exception as just a condition (sometimes implicit, sometimes explicit) of the underlying rule, so that "there is no logical distinction between exceptions and what they are exceptions to."[48] Under this argument, purported "exceptions" are indeed law, but they are not

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note 42, at 245–47. However, some defenders of expansive executive emergency powers have embraced Schmitt, confident that Schmitt's ideas contained a genius extractable from his particular historical affiliations. *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 38 (2007) ("Our procedure is to extract the marrow from Schmitt and then throw away the bones for the professional exegetes to gnaw."). For further discussion of Schmitt and his legacy in legal thought, see *infra* Part IV.

44. *See generally, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008); Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

45. *See Boumediene*, 553 U.S. at 779–87 (setting forth minimal due process requirements applicable to detainees).

46. On the former possibility, see DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 42 (2006) (describing a "grey hole" as "a legal space in which there are some legal constraints on executive action – it is not a lawless void – but the constraints are so insubstantial that they pretty well permit government to do as it pleases"); Jameel Jaffer, *Introduction* to THE DRONE MEMOS: TARGETED KILLING, SOCIETY, AND THE LAW (2016) (analyzing the legal memos that President Barack Obama's Administration used to authorize extrajudicial assassinations). *See generally* Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103 (2017); Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566 (2016). On the second possibility, see Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 226 ("[T]here is nothing *sui generis* about the behavior of courts in instances of national security exigency, or at least . . . the thesis of exceptionalism is overstated.").

47. *See generally* Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871 (1991).

48. *Id.* at 872. For a similar argument concerning criminal law, see Glanville Williams, *The Logic of Exceptions*, 47 CAMBRIDGE L.J. 261, 262 (1988). Williams denies "a distinction between the offence and the exception," arguing that "[r]ationally regarded, an

distinctive vis-à-vis the rest of legal rules. Contrast this to the most Schmittian account of emergency power, where the exception is defined outside of the law altogether; law itself is the norm against which the emergency exception departs. The emergency exception is certainly distinctive, but it does not fall within the zone we have demarcated as "law."[49] In different ways, then, these two literatures on exception—states of emergency and departures from specific rules—have essentially denied the existence of exceptions as distinctive legal phenomena.[50]

For legal theorists to study exceptions to specific legal rules, they need some understanding of what counts as a legal rule and what counts as an exception.[51] (Of course, theorizing exceptions may itself lead to a revised understanding of what counts as one.) Similarly, studies of "the exception" as a departure from law rest upon some understanding of what counts as law in general. But the concept of a legal field is not as extensively theorized as the concept of a rule or the concept of law in general. Do we have a clear enough conception of what constitutes a legal field to be able to ask whether any given field is exceptional? In answering this question, we confront again the possibility that some degree of exceptionalism may be intrinsic to the very idea of a legal field.

B. Legal Taxonomy: The Law of the Horse, and the Pond

This Section examines the division of the general category "law" into subsections called legal "fields." This division is often called legal taxonomy, and an understanding of legal taxonomy helps clarify what is at stake when a given field is labeled "exceptional."[52]

'exception' merely states the limits of the offence. A person whose act falls within the exception does not commit the offence." *Id.* For a very different account of affirmative defenses that are of interest to this Article for other reasons, see Thorburn, *infra* note 217.

49. Put differently, the phenomenon described by some as "legal exceptionalism" may be more accurately labeled "extralegal exceptionalism." *See, e.g.*, Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 738 n.137 (2006) (describing Schmitt's work as addressing "legal exceptionalism").

50. Scholars of emergency power might deny that a Schmittian exception is in fact legal, while Schauer and other theorists of exceptions deny that exceptions can be meaningfully distinguished from rules. Both schools of thought recognize the great power that resides in declaring exceptions, but they disagree about whether to characterize that power as legal. Without citing Schmitt, Schauer conjures a Schmittian emphasis on exceptions as a site of power: "Much of the picture of a legal system, and much that makes some legal systems different from others . . . hinges on the power to create exceptions, for that power turns out to be the power both to change rules and to avoid their constraints." Schauer, *supra* note 47, at 873.

51. Rule: "Any person who intentionally causes the death of another human being, with malice aforethought, is guilty of murder." Exception: "A person otherwise guilty of murder is not guilty if he is legally insane." Of course, Schauer or others might say that there is just one rule here: "Any person who intentionally causes the death of another, with malice aforethought, is guilty of murder, provided that he is sane."

52. *See generally, e.g.*, Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221 (2010); Emily Sherwin, *Legal Positivism and the Taxonomy of Private Law*, *in* STRUCTURE AND JUSTIFICATION IN PRIVATE LAW: ESSAYS FOR PETER BIRKS (2008); Stephen A. Smith, *Taking Law Seriously*, 50 U. TORONTO L.J. 241 (2000).

Discussions of legal taxonomy, or the delineation of legal fields, often recall Judge Frank Easterbrook's proclamation at a conference on the law of cyberspace that the conference topic made little more sense than "[t]he Law of the Horse."[53] There are certainly laws applicable to horses, Easterbrook acknowledged: legal questions arise concerning the sale of horses, injuries inflicted on or by horses, and horse competitions, to name just a few examples. But according to Easterbrook, anyone interested in such legal questions should simply "take courses in property, torts, commercial transactions, and the like."[54] Easterbrook was making a curricular point about the appropriate subject matter and boundaries of a law school course, but he was also making larger conceptual claims. He argued that "'Law and . . . ' courses should be limited to subjects that could illuminate the entire law," and he urged that "the best way to learn the law applicable to specialized endeavors is to study general rules." Easterbrook's argument made implicit assumptions that there is a coherent account of "the entire law," that law in its entirety is characterized by "general rules," and that we already know enough about "the entire law" to be capable of assessing whether any purported new field of inquiry will be illuminating. He also assumed, or rather asserted, that "property, tort, commercial transactions, and the like" are subcategories of law that do teach general rules which in turn illuminate law in its entirety.[55] Thus, whether we embrace a new field of law or sneer at it, assumptions about the broader category ("the entire law") and what is "normal" in that category pervade the project of legal taxonomy.[56]

A quarter-century later, there's some reason to think that Easterbrook was mistaken to scoff at "The Law of Cyberspace" as a field of law, though perhaps we

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53. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207 (1996). Though Easterbrook popularized the phrase "the law of the horse," he noted that he borrowed it from Karl Llewellyn, the architect of the Uniform Commercial Code. Llewellyn argued in favor of general rules for all commercial transactions (which could be modified or opted out of) rather than an array of idiosyncratic practices that varied by trade, or by the object of the transaction. *See id.* at 214 (first citing Karl Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939); and then citing Karl Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873 (1939)).

54. Easterbrook, *supra* note 53, at 208.

55. *Id.* at 207.

56. Questions of legal taxonomy—of how to carve up law and of the wisdom of our categories—run throughout legal theory but do not always use the specific term "taxonomy." A small, specialized literature does address that specific terminology. *See generally, e.g.*, Aagaard, *supra* note 52; Sherwin, *supra* note 52; Smith, *supra* note 52. Also of interest is the literature on "lumping and splitting," which is sometimes characterized as a study of "configurations" rather than categorizations or taxonomy. *See generally* LEE ANNE FENNELL, SLICES AND LUMPS, DIVISION AND AGGREGATION IN LAW AND LIFE (2019). *See also* Christina A. Klein, *Groundwater Exceptionalism: The Disconnect Between Law and Science*, 71 EMORY L.J. 487, 491 (2022) (citing Glenn Branch, *Whence Lumpers and Splitters?*, NAT'L CTR. FOR SCI. EDUC. (Dec. 2, 2014), https://ncse.ngo/whence-lumpers-and-splitters [https://perma.cc/HY2X-M62U]) ("Many disciplines face a tension between *lumping* and *splitting*. If the subjects of study are lumped into an unwieldy whole, then important nuances go undetected. But if the subjects are split into subcategories, then researchers must ensure the categories are meaningful and do not generate counterproductive complexity.").

would now be more likely to refer to laws of cybersecurity or "internet law."[57] How do we identify these subcategories, and how do we evaluate the categories we've chosen? When academics are the legal taxonomers, we may worry about the undue influence of academic vanities.[58] Professional pressures to specialize and distinguish oneself may lead legal academics to identify ever more new fields of law, each more special than the last.[59] Might exceptionalism simply be the necessary implication of categorization? Put differently, as soon as we identify a field as distinct, are we necessarily claiming that it is exceptional?

Two general classificatory principles seem to shape most efforts at legal taxonomy. First, law is often subdivided according to a particular *legal form*: contract, patent, tax, and copyright law are all fields defined by their focus on a device of law's own creation—a contract, a patent, and so on. Second, law is also frequently subdivided by the *subject matter* of regulation: health law, veterans law, oil and gas law, and federal Indian law are all fields defined by the topic of regulation rather than the use of a specific legal form.[60] Some fields purport to be defined by

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57. As Ryan Calo notes, Easterbrook's denial of the field's existence is now part of the lore that defines the field. *See* Ryan Calo, *Robotics and the Lessons of Cyberlaw*, 103 CALIF. L. REV. 513, 551–52 (2015).

58. Easterbrook actually charged "dilettantism" rather than vanity, but he also thought to caution his audience that "no one at this Symposium is going to win a Nobel Prize any time soon." Easterbrook, *supra* note 53, at 207.

59. In a tribute to a colleague who "avoided the sedate security of what scholars call a 'field,'" Thurman Arnold offered a vivid sketch of scholarly jealousy:

> The queer country of scholarship has been mapped out in little irregular patches of domain, staked out and appropriated by different groups with names derived from Latin and Greek sources. It is all right for the neighbors to get together now and then for a housewarming or for a cooperative effort in which the resources of their respective principalities are joined for the common good. But when one man crosses to his neighbor's domain to make maps with sketches of the fortifications, as if he contemplated changing the boundaries, he is greeted with suspicion and alarm. Scholarship has its own capitalistic system and thousands of earnest and industrious men are dependent on it for both prestige and income. They do not want their separate properties taken away without due process.

Thurman Arnold, *The Jurisprudence of Edward S. Robinson*, 46 YALE L.J. 1282, 1282 (1937). Almost a century later, scholars may still be possessive of their fields, but they are often also eager to renovate. A recent article declares "prison law" to be a neglected field, then promptly seeks to demonstrate the incoherence of that field. Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 526–27 (2021) (describing "American prison law" as "an unusual, understudied field of constitutional law founded on the idea that imprisonment changes the meaning of rights"); *see also id.* at 566 ("[I]t should be clear that prison law is characterized by incoherence."). Ultimately, though they assert that "'the prison' is a myth," Driver and Kaufman call not for the end of "prison law" but for still more hyper-specialization. *See id.* at 567, 575–76. *See also* Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 302, 302 (2022).

60. In a thoughtful effort to theorize legal taxonomy itself, Todd Aagaard identifies "substantive topic" (such as labor law or environmental law); "aspect of the legal process" (such as statutory interpretation or remedies); "institutional actor" (such as

both form and subject matter. Criminal law seems to define and use a distinctive legal form, but it is also often said to govern a unique subject matter.[61] Depending on whether one believes that there exists a coherent, prelegal conception of property or civil wrongs, property law and tort law may also bridge the form/subject-matter divide.[62]

Like law itself, legal taxonomies are human constructs. Thus, the extent to which a given subject matter is understood to define a distinctive field of regulation varies over time and place. There is often an instrumentalist approach to the taxonomy: is it *useful* (at this time) to isolate and examine the laws regulating a given subject matter?[63] The law of the horse is now amusing because contemporary law doesn't, so far as anyone has noticed, regulate horses markedly differently than other items that can generate legal disputes. But to borrow an example from Fred Schauer, replace horse with securities and the joke disappears.[64] Of course, as Schauer points out, securities are themselves a creation of law, like patents and contracts, and so it may seem unsurprising that the law of securities would involve distinct rules.[65] It is not impossible, though, that objects like horses that preexist law might be singled out by law for distinctive treatment. Consider one of the most influential law review articles of all time alongside one of the most obscure—both by the same pair of authors. The year before Samuel Warren and Louis Brandeis published *The Right to Privacy* in the *Harvard Law Review*, they published an article

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administrative law or federal courts); and "methodological approach" (such as law and economics) as standard criteria to define legal fields. Aagaard, *supra* note 52, at 237–38. I would classify both his second and third categories as fields defined by a specific legal form or set of forms.

61. Both of these claims are contestable. We generally view a criminal statute and a criminal sanction as distinct from a civil prohibition or civil sanction, but a large body of scholarship struggles to state the precise nature of this distinction. Moreover, as I have discussed elsewhere, the claim that criminal law governs a distinctive and limited subject matter is not easily supported by empirical evidence; criminal prohibitions can be found regarding almost any topic where law exists at all. *See* Ristroph, *supra* note 11, at 1950. Notwithstanding the empirical realities, it is common to hear the claim that criminal law is or should be limited to a distinctive (distinctively harmful or distinctively wrongful) subset of human action. *See id.* at 1954.

62. Here "essentialism," not exceptionalism, may be the key term. *See* Katrina M. Wyman, *The New Essentialism in Property*, 9 J. LEGAL ANALYSIS 183, 184–87, 184 n.6 (2017) (quoting THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 18 (2017)) (describing as "essentialist" scholarship that seeks "'to uncover the single true definition of property as a legal concept'" and that resists the idea that property is whatever positive law defines it to be).

63. *See, e.g.*, Calo, *supra* note 57, 550 (arguing that "robotics" should be understood as a separate legal field if "it is sensible to examine the technology separately in the first place").

64. Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773, 777 (1998).

65. *Id.* at 777–78. Lee Anne Fennell distinguishes between "jurisdictional units" and "natural units." Lee Anne Fennell, *Go Configure*, U. CHI. L. REV. ONLINE at *iii (March 30, 2020). Presumably, a security would be a jurisdictional unit while a horse is a natural one. *See id.*

called *The Law of Ponds* in the same august journal.[66] More than a century later, *The Right to Privacy* is the second-most cited law review article of all time and credited as the foundation of a new field of law; *The Law of Ponds* is cited only as an exemplar of obscurity.[67] But circa 1890, there was as much, or perhaps even more, a law of ponds as a law of privacy.[68] Neither a pond nor privacy is (wholly) a legal creation, but either may be afforded distinctive treatment by law. What law treats as distinctive may vary with place and time—and with the arguments that scholars and jurists make for distinctive treatment.

In any case, as noted in the previous Section, a claim of distinctiveness is not necessarily tantamount to a claim of exceptionalism. But even if exceptionalism is not a necessary result of any effort to identify a distinct field of law, understanding the principles of legal taxonomy can help us evaluate claims of exceptionalism. This Section has identified two general classificatory principles: the legal form and the subject matter of regulation. Some of the fields recently charged with (or praised for) exceptionalism are defined by subject matter, such as immigration, federal Indian law, or family law. Others are defined by legal form, such as tax law, patent law, and constitutional law. Once we are attentive to the principles of classification, we will be better equipped to examine a specific charge of exceptionalism and to determine how, if at all, the classificatory principle and the exceptionalist critique relate to one another. Some claims of exceptionalism are not the inevitable result of choices by taxonomers, but we will have to look more closely at the specific

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66. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 207–08 (1890); Samuel D. Warren & Louis D. Brandeis, *The Law of Ponds*, 3 HARV. L. REV. 1, 2 (1889). I am grateful to Schauer's *Prediction and Particularity* article, *supra* note 64, both for its insightful analysis of legal categorizations and for alerting me to the law of ponds.

67. *See* Fred R. Shapiro & Michelle Pearse, *The Most Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012); Emily Sherwin, *Legal Taxonomy*, 15 LEGAL THEORY 25, 27–28 (2009) [hereinafter Sherwin, *Legal Taxonomy*] (citing *The Right to Privacy* as a "well-known" "contribution[] to the taxonomy of law"); *see also* Schauer, *Prediction and Particularity*, *supra* note 64, at 778 (characterizing *The Law of Ponds* as "unsurprisingly forgotten").

68. *The Law of Ponds* was at least the third ponds article in the first three volumes of the *Harvard Law Review*. *See* Thos. M. Stetson, *Great Ponds*, 2 HARV. L. REV. 316, 330 (1889); *see generally* Samuel D. Warren, Jr. & Louis D. Brandeis, *The Watuppa Pond Cases*, 2 HARV. L. REV. 195 (1888). I should emphasize that in the late nineteenth century, legal scholarship was quite different from what it is today, and an article highly focused on a few specific cases, perhaps in a single jurisdiction, was much more common. *See, e.g.*, Loran L. Lewis, Jr., *The Law of Icy Sidewalks in New York State*, 6 YALE L.J. 258, 258 (1897) (noting, with due seriousness, that "the law bearing on this subject from a state of uncertainty has become fixed and certain"). It should also be noted that the authors of the various ponds articles (Thomas Stetson, Louis Brandeis, and Samuel Warren) were practitioners re-arguing on the pages of a law journal a set of issues—the property rights of mill-owners—that they had recently litigated in Massachusetts state court. Neither of these details undermines the observation that in another place and time, the law of ponds was a genuine subject of inquiry and not a joke. Today, the law of ponds is gone, but "water law" is recognized by many as a field—and sometimes criticized for its own forms of exceptionalism. *See* Christina A. Klein, *Groundwater Exceptionalism: The Disconnect Between Law and Science*, 71 EMORY L.J. 487, 491 (2022).

exceptionalist critiques to see that.[69] Other claims of exceptionalism do challenge underlying taxonomies, as we will see.[70] Again, attention to the principles of classification helps clarify and evaluate a claim of exceptionalism in a given field.

One last note on taxonomy: I think we can dismiss the possibility that claims of exceptionalism are only academic vanities or expressions of a specialist's desire to be special. This is because, as will become clear below, the great majority of exceptionalist claims are critical: tax scholars (mostly) criticize tax exceptionalism, patent scholars criticize patent exceptionalism, and so on.[71] It may be that everyone thinks his or her own field is special, but it also seems to be the case that nearly everyone longs to be normal.

II. THE USUAL WAYS OF BEING EXCEPTIONAL

This Article is itself premised on a classification that may seem questionable: it groups together an array of arguments about different fields of law, made by specialists in those different fields—and on what unifying principle? Each of the arguments examined here uses the label "exceptionalism," but that could be mere coincidence of terminology. Exceptionalism seems, by definition, to resist generalizations. The aim of this Part and the next is to investigate commonalities (while acknowledging differences) across the various forms of exceptionalism identified by legal scholars. In this Part, I show how claims of exceptionalism in several different fields are focused on the allocation and exercise of decision-making power—and the distributive consequences of those allocations of power. That is, what is purportedly "exceptional" about each of several different fields is the identity or the methodology (or both) of the actor or institution empowered to make key legal decisions. Across different fields, scholars vary as to who they think the "normal" decision-maker should be—an administrative agency, specialist court, generalist court, or otherwise. But a common thread in these studies of exceptionalism is the worry that when a field allocates decisional power to the wrong decision-maker, the consequence will be that law implements and preserves some form of inequality. The focus on decisions rather than rules may suggest a subtle shift in background understandings of "normal" law. Notwithstanding the aspirational conception of law as depersonalized and neutral, scholars may be increasingly attentive to the reality that legal outcomes are determined more by human decision-makers than by impersonal rules.

A. Who Decides, and How?

Tax law, too often neglected by legal theorists, makes a useful initial example—if only to defeat the charge of mere terminological coincidence. The article now often credited with introducing a critique of "tax exceptionalism" does not use that exact phrase; instead, the author, Paul Caron, used the phrase "tax

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69. For example, critics of patent exceptionalism or tax exceptionalism are in no way urging the abandonment of taxes or patents as distinctive legal forms. They are instead identifying ways in which decisions about these legal forms are made differently from other legal decisions and arguing that the distinctive legal form does not warrant this different mode of decision-making. *See infra* Part II.

70. *See infra* Part III.

71. *See infra* Part II.

myopia" to describe "the myth that tax law is fundamentally different from other areas of law."[72] Specifically, Caron examined "the allocation of legislative, executive, and judicial power" with regard to tax law.[73] He noted that courts and commentators emphasized the complexity of tax statutes to argue that different principles of statutory interpretation should apply in this realm, though some argued for more attention to legislative history and some for less attention.[74] In Caron's account, both lines of argument had led courts and commentators to fail to appreciate important developments in statutory interpretation that had occurred outside of tax law.[75]

Tax exceptionalism also extended to the perennial question of appropriate judicial deference to administrative agencies. At the time Caron wrote, the U.S. Supreme Court's decision in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, which established a two-step inquiry to determine judicial deference to agencies,[76] had not been formally applied to agency decisions concerning taxes and revenue.[77] This second form of exceptionalism drew increasing attention—and may have generated the specific term "tax exceptionalism"—until the Supreme Court announced in 2011 that *Chevron* did apply in the tax context after all.[78] This decision led some scholars to proclaim "the death of tax exceptionalism," though others continue to identify, and a rare few continue to defend, ongoing tax exceptionalism.[79]

In possible tension with a conception of law as collections of rules, recent claims of tax exceptionalism are not focused primarily on the content or the relative determinacy of rules regarding taxation.[80] Instead, the characteristics of the field that

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72. Paul Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 518, 531 (1994).

73. *Id.* at 518–19.

74. *See, e.g.*, *id.* at 532–38.

75. *See generally id.* at 538–54.

76. 467 U.S. 837, 842–43 (1984).

77. *See generally* Hickman, *supra* note 1.

78. *See* Mayo Foundation v. United States, 562 U.S. 44, 56 (2011) ("We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations."). For an overview and critique of pre-*Mayo* administrative law decisions related to tax, see Hickman, *supra* note 1.

79. *Compare* Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 222 (2014) ("The death of tax exceptionalism is perhaps best exemplified by the Supreme Court's 2011 decision in *Mayo Foundation* . . . ."), *with* James M. Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067, 1069 (2015) ("[T]ax exceptionalism seems likely to remain alive and well . . . ."), *and* Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?*, 63 DUKE L.J. 1897, 1919 (2014) ("[T]ax law is special—at least in the sense that every legal specialty is special, but also in the stronger sense of being more special than the average specialty.").

80. As noted above, Paul Caron is often credited with identifying "tax exceptionalism" in 1994, though he used the different phrase "tax myopia." *See supra* notes 72–75 and accompanying text. Caron did base his claims in part on the content of rules—the complexity of tax statutes—but also emphasized the allocation of power across different institutions. *See id.* More recent discussions of tax exceptionalism are even more explicitly focused on allocations of decision-making power. *See* Hickman, supra note 1; Puckett, *supra* note 79.

are highlighted as "exceptional" are the allocation of power among, and the methodology of, key legal decision-makers. Questions of *Chevron* deference and judicial review of agency decisions are questions about who decides or whose decisions matter most—specialized agencies or generalist courts. And since the appropriate form of judicial review is sometimes resolved by reference to underlying legislation, worries about (or praise for) tax exceptionalism are based upon a different allocation of decision-making authority among legislatures, courts, and agencies in the specific realm of tax law.[81] Tax exceptionalism is also a matter of methodology: courts purportedly do (and according to some commentators, should) apply different methods of statutory interpretation to tax statutes.[82] To be sure, some commentators rationalize the different decision-making authority by referring to purported differences in content; some defenders of tax exceptionalism point to the complexity of tax law as the rationale for this distinctive treatment.[83] But the label "tax exceptionalism" has arisen to highlight features of decision-making rather than the content, or even the complexity, of substantive tax law.

A similar focus on the allocation of decision-making authority (with particular attention to *Chevron* deference) and the methodology of the decision-maker characterizes claims of exceptionalism in several other fields. "Antitrust has long been treated as an exceptional area of law," and a key feature of antitrust exceptionalism has been judicial refusals to defer to agencies.[84] Claims of "patent exceptionalism" are also claims that patent law features an atypical allocation of decision-making authority, with regard both to courts vis-à-vis administrative agencies and also to the Federal Circuit, a specialized court created by Congress to hear patent appeals, vis-à-vis generalist courts.[85] The Federal Circuit, in turn, is

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81. James Puckett argues that even since the Court has formally extended *Chevron* analysis to tax decisions, an array of "structural" provisions, including features of the tax code, preserve tax exceptionalism—and this may sometimes benefit taxpayers. Puckett, *supra* note 79, at 1073–74.

82. Interestingly, this form of tax exceptionalism (atypical statutory interpretation methods) is not unique to the United States. A comparative study finds that the United Kingdom, France, and the United States all employ different approaches to statutory interpretation in the tax context than each country uses in other contexts, though the three countries differ from one another in their particular approaches to tax statutes. *See* Steven A. Dean, Lawrence Solan & Lukasz Stankiewicz, *Text, Intent, and Taxation in the United States, the United Kingdom, and France*, *in* THE ROUTLEDGE COMPANION TO TAX AVOIDANCE RESEARCH 139 (2018).

83. *See* Zelenak, *supra* note 79, at 1906–08.

84. Hurwitz, *supra* note 4, at 1248. As with tax exceptionalism, the owl of Minerva flies at dusk: scholars have documented exceptionalism at its moment of decline. Hurwitz argues that "the era of antitrust exceptionalism is drawing to a close." *Id.*

85. *See, e.g.*, Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791, 1816 (2013) ("[T]he Federal Circuit's jurisdictional decisions illustrate what has been termed patent law or Federal Circuit 'exceptionalism,' referring to the Federal Circuit's tendency to insist that general legal principles, such as jurisdictional standards, do not apply in patent cases because patent law is 'different.'"). And here again, the discourse of exceptionalism seems to have proliferated at the very moment of exceptionalism's decline. *See* Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413, 1416 (2016) (arguing that "the Supreme Court's recent patent jurisprudence

charged with using different interpretive methodologies than generalist courts.[86] Similarly, one line of critique of "bankruptcy exceptionalism" identifies the Bankruptcy Code as "one of the few major federal civil statutory regimes administered almost exclusively through adjudication in the courts—not through a federal regulatory agency."[87] Because gaps in any statutory framework give "residual policymaking power" to those who administer and enforce the statute, Congress's choice to place bankruptcy administration in (specialized) federal courts constitutes a delegation of policymaking power to the judiciary.[88] To the critics of bankruptcy exceptionalism, that delegation of power should flow from Congress to agencies instead of from Congress to courts.[89]

Studies of exceptionalism are focused not only on *who* decides but also on *how*, i.e., whether the field of law under scrutiny uses the same legal methodologies as other fields. In a critique of "bankruptcy exceptionalism" that departs from the agency-focused argument described in the previous paragraph, Jonathan Seymour has focused on the distinctive methods of bankruptcy courts, which are specialist courts in the federal system.[90] Seymour argues that, under the mantra that "the bankruptcy court is a court of equity," bankruptcy judges have often embraced "atextual remedies or practices" and followed a bankruptcy-specific set of norms.[91] "Practical" considerations, or a perceived need to "do justice," often displace the most obvious readings of relevant statutes. "For all the complexity of the Bankruptcy Code, bankruptcy is a realm of unwritten law."[92]

As several of the preceding examples illustrate, claims of exceptionalism are especially prevalent in administrative law, "which necessarily reflects the interaction between agency-specific law . . . and generally applicable law, such as the Administrative Procedure Act."[93] According to some commentators, the coherence of administrative law as a field "presumes the existence of a body of generally applicable legal principles and doctrines concerning administrative agencies," and that presumption is threatened by "agency-specific precedents" that

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reflects a project of eliminating 'patent exceptionalism' and assimilating patent doctrine to general legal principles").

86. *See generally* Gugliuzza, *supra* note 85.

87. Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 386 (2012).

88. *Id.* at 387.

89. *Id.* at 389 ("[C]ourts are ill equipped to set bankruptcy policy and the locus of bankruptcy policymaking should be shifted to an administrative agency with substantive rulemaking powers.").

90. Seymour, *supra* note 3, at 1926 ("Bankruptcy judges view their task of adjudication differently than other judges in the courts of the United States.").

91. *Id.* at 1928–29. Seymour examines the concept of equity in bankruptcy law specifically, but equity is associated with exceptionalism in other contexts. *See generally* Maggie Blackhawk, *Equity Outside the Courts*, 120 COLUM. L. REV. 2037 (2020) (identifying, and defending, legislative and agency reliance on "equity" to create exceptions to general laws).

92. Seymour, *supra* note 3, at 1930 (citing DOUGLAS BAIRD, THE UNWRITTEN LAW OF CORPORATE REORGANIZATIONS, at ix–xiv (2022)).

93. Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 500 (2011).

apply purportedly trans-substantive rules differently from one agency to another.[94] One scholar has gone so far as to proclaim that in administrative law, exceptionalism *is* the norm.[95]

But lest "exceptionalism" seem a complaint specific to administrative law scholars critiquing insufficient deference to agencies or mourning the integrity of their own field, consider now foreign affairs or foreign relations exceptionalism, defined as "the belief that legal issues arising from foreign relations are functionally, doctrinally, and even methodologically distinct from those arising in domestic policy."[96] Although the view that foreign relations *are* exceptional is often traced back to a 1936 opinion by Justice George Sutherland, the "exceptionalism" label came into favor much more recently.[97] Once again, the label exceptionalism is deployed to mark a shift in decision-making authority from some baseline norm, but the primary shift here is not to or from administrative agencies, most of which were in their infancy when the view now labeled foreign relations exceptionalism was first articulated.[98] Instead, foreign relations exceptionalism, especially in the view of its early champion Justice George Sutherland, focuses on presidential power vis-à-vis other government actors and federal power vis-à-vis the states.[99] On matters of foreign relations, Sutherland argued, the federal government and the president in particular have inherent powers derived from the very concept of sovereignty.[100] Unlike domestic law, where power is allocated by the Constitution, foreign relations powers as envisioned by Sutherland exist independent of the constitutional text.[101] Over time, foreign relations exceptionalism produced distinctive judicial deference to presidential decisions related to foreign affairs and made courts more likely to invalidate state laws found to intrude too much into foreign policy.[102]

"Immigration exceptionalism" is also concerned with reallocations of decision-making authority away from ordinary constitutional baselines. David Rubenstein and Pratheepan Gulasekaram have identified a wide array of departures from mainstream constitutional doctrines in cases involving immigration policy.[103] When confronted with claims that federal immigration policy violates an individual right protected by the Constitution, courts depart from usual standards of scrutiny in

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94. *Id.*

95. *See generally* Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351 (2020); Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 DUKE L.J. 1749 (2020).

96. Sitaraman & Wuerth, *supra* note 5, at 1899.

97. *See* Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1096–97 (1999) (defining the term "foreign affairs exceptionalism," and tracing the origins of the view to *United States v. Curtiss-Wright Exp. Co.*, 299 U.S. 304 (1936)).

98. Some defenders of foreign relations exceptionalism have argued that deference to agencies is an area where courts have been exceptional in the wrong direction—by refusing to defer to executive agencies as much as they should. *See generally, e.g.*, Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007).

99. *Curtiss-Wright Exp. Corp.*, 299 U.S. at 318–19.

100. *Id.* at 319.

101. *Id.* at 318.

102. *See generally* Sitaraman & Wuerth, *supra* note 5.

103. *See generally* Rubenstein & Gulasekaram, *supra* note 6.

favor of an "extremely lax and forgiving" review of federal policy.[104] With regard to federalism claims (related to the allocation of power between the states and the federal government) or separation of powers claims (related to the allocation of power between different branches of the federal government), federal courts have again taken idiosyncratic approaches in immigration cases. As Rubenstein and Gulasekaram observe, scholars and advocates treat exceptionalism as "a means to ends," sometimes invoking it and sometimes decrying it.[105]

Immigration exceptionalism is a claim about the *constitutional* analysis of immigration issues against the backdrop of the rest of constitutional law. Scholars have made similar claims about constitutional analysis involving issues of drug crime or national security, identifying "national security exceptionalism" and "drug exceptionalism" across different areas of constitutional doctrine.[106] Still more broadly, constitutional law itself is arguably exceptional in comparison to statutory or common law.[107] A 2016 debate over "constitutional exceptionalism" found several commentators in agreement that judges use a distinctive set of interpretive methods with regard to the federal Constitution, though the commentators disagreed about whether this exceptionalism was normatively defensible.[108] For example, the specific text of the document matters less for the Constitution than for statutes, while the enactment history matters more for the Constitution.[109] In this instance, the manifestation of exceptionalism lies primarily in the methodology of decision-making (specifically, the interpretive methods) rather than in the allocation of decision-making authority. That is, judges are the only interpreters under scrutiny, and the exceptionalism question is whether judges use different methods to interpret

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104. *Id.* at 594.

105. *Id.* at 591. Commentators have similarly noted "opportunistic" invocations of foreign affairs exceptionalism. *See* Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 555–56 (1999).

106. *See generally, e.g.*, Alan K. Chen, *Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 FORDHAM L. REV. 379 (2017); Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753 (2002). Thomas Poole uses the phrase "constitutional exceptionalism" to describe these types of deviations from background constitutional norms. Poole, *supra* note 41. Poole's usage should not be confused with the "constitutional exceptionalism" identified by Christopher Serkin and Nelson Tebbe, which refers to the way constitutional law is itself different from non-constitutional law. Christopher Serkin & Nelson Tebbe, *Just Law*, 102 CORNELL L. REV. 1707 (2017).

107. *See* Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701, 702 (2016) (identifying and critiquing "the practice of constitutional exceptionalism"). Because this Article is focused on claims that a given field is exceptional in comparison to other fields, I set aside a different kind of "constitutional exceptionalism" that depicts American constitutional law as exceptional not in relation to other types of law but to constitutional law in other nations. *See generally* Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391 (2008); Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641 (2014).

108. Serkin & Tebbe, *supra* note 106, at 1707. *See generally* Richard Primus, *The Constitutional Constant*, 102 CORNELL L. REV. 1691 (2017); Kevin Stack, *The Inference from Authority to Interpretive Method in Constitutional and Statutory Domains*, 102 CORNELL L. REV. 1667 (2017).

109. Serkin & Tebbe, *Is the Constitution Special?*, *supra* note 107.

the Constitution than they use to interpret statutes and common law. Notably, though, constitutional exceptionalism within judicial chambers may have the effect of expanding judicial power and leaving other political actors, as well as ordinary citizens, with less power over fundamental political issues.[110] The next Section considers more generally the question of who (beyond the privileged decision-maker) wins or loses when a given field is treated as "exceptional."

B. Who Wins or Loses?

For all the emphasis on courts, the American legal system has long involved an array of different institutions of legal decision-making—agencies, executive branch officials, legislatures, and even within the judiciary, both generalist and specialized courts. When critics find a field "exceptional" for dividing up the decision-making power in a supposedly atypical way, what is at stake? Sometimes, the worry may be about making the best use of expertise, or it may be a more general concern with efficiency.[111] Sometimes, the concern is adherence to constitutional principle.[112] Without necessarily ruling out any of those reasons to care about purported exceptionalism, several of the studies discussed in the previous Section identify a somewhat different concern underlying their critiques: inequality, or the distributional consequences of the given field's exceptionalism.[113]

We could start again with tax exceptionalism, which was the first example in the previous Section. Aside from a general preference for consistency, why does it matter whether tax regulations are subject to the same form of judicial review as other types of law? It may make a significant difference to the distribution of wealth, including the allocation of public welfare benefits. Professor Kristin Hickman, herself a leading critic of tax exceptionalism, notes that exceptionalism in this field is often explained or defended with an emphasis on the important and purportedly unique task of revenue-raising.[114] But, Hickman observes, the federal income tax system is frequently used for a number of functions other than raising revenue, including the administration of "an increasingly wide variety of government assistance programs," such as health care programs, home-buying assistance, and

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110. *See* Primus, *supra* note 108, at 1700–02; Serkin & Tebbe, *supra* note 106, at 1714–15; Kevin Stack, *The Constitutional Ratchet Effect*, 102 CORNELL L. REV. 1702, 1704–05 (2017).

111. *See generally, e.g.*, Lee, *supra* note 85 (discussing patent exceptionalism).

112. *See* Jonathan Lipson, *Debt and Democracy: Toward a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 611 (2008) ("The theme that emerges from a broader analysis of constitutional problems in bankruptcy is 'bankruptcy exceptionalism.'"); Rubenstein & Gulasekaram, *supra* note 6.

113. To be sure, a charge of exceptionalism is nearly always a claim of inequality in the basic sense that the purportedly "exceptional" person or thing is alleged to be treated differently than others in the same category. This Section considers more complex relationships between exceptionalism and inequality, in which the allegedly atypical structure or methods of a given legal field end up privileging or disadvantaging particular groups of people.

114. Kristin Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1720–21 (2014).

aid to low-income families.[115] With regard to such programs, the revenue-raising rationale for tax exceptionalism may not apply, and standard features of administrative law, such as pre-enforcement review, may be appropriate.[116] Hickman reserves judgment on whether the tax system can continue to serve all the various functions that have been thrust upon it, but her key argument for my purposes is that the "exceptionalism" arguably warranted by revenue-collection goals does not serve well the redistributive programs now administered through tax law.[117]

A similar concern with distributional consequences informs Professor Jonathan Seymour's recent critique of bankruptcy exceptionalism.[118] The fluidity of decision-making by bankruptcy courts, the reliance on unwritten norms, and the tendency to adopt novel remedies as a matter of perceived necessity combine to give disproportionate power to the most sophisticated litigants—typically, corporations and their specialist attorneys.[119] Seymour illustrates the point by examining the recent bankruptcy court order (later reversed by an anti-exceptionalist generalist court) that would have shielded the Sackler family from all civil liability related to the opioid addiction and deaths linked to Sackler-owned Purdue Pharma.[120] This order is but one example of Seymour's larger claim that "at least where uncorrected on appeal, bankruptcy exceptionalism has distributional consequences."[121]

As a last example, consider immigration exceptionalism, which involves departures from baseline constitutional norms when immigration policy is at stake. It may seem intuitively obvious that these departures will have profound consequences for the legal, social, and economic standing of immigrants, and scholars of immigration exceptionalism do identify some of those consequences.[122] Less obvious is the mixed bag that immigration exceptionalism turns out to be: sometimes the distributive consequences of exceptionalism disadvantage immigrants, but sometimes advocates for immigrants find it advantageous to invoke

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115. *Id.* at 1722 (quoting Brief of Former IRS Commissioners, Loving v. Internal Revenue Service (D.C. Cir. Apr. 5, 2013)).

116. *Id.* at 1760 ("[T]he IRS's cultural orientation toward raising revenue and collecting taxes may risk undermining the effectiveness of programs and provisions aimed at alleviating poverty and providing financial support to working families.").

117. *See id.* at 1761.

118. *See generally* Seymour, *supra* note 90.

119. *Id.* at 1964 ("Bankruptcy is, by its very nature, a competitive process in which litigants fight over distributional issues. . . . Bankruptcy exceptionalism expands the playing field for such contexts by substituting the primacy of written rules for a more flexible and creative adjudicatory methodology . . . . [S]ophisticated repeat litigants . . . are the parties best placed to take advantage of increased room to maneuver in the bankruptcy space . . . .").

120. *See id.* at 1974–78. At the time of this writing, the Supreme Court has stayed the settlement pending further review. *See* Harrington v. Purdue Pharma, No. 23-124, 2023 WL 5116031, at *1 (Aug. 10, 2023).

121. Seymour, *supra* note 3, at 1974.

122. Rubenstein & Gulasekaram, *supra* note 6, at 585–86; *see also* Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to* Korematsu *to the Muslim Travel Ban Cases*, 68 CASE WESTERN L. REV. 1183, 1202–09 (2018) (describing practices of exclusion and discrimination as "non-doctrinal consequences of immigration exceptionalism").

exceptionalism.[123] Immigration exceptionalism thus raises a broader theme to which we will return in Parts III and IV: though critiques of "exceptionalism" often seem to assume that general and uniform laws are, by virtue of their generality and uniformity, egalitarian, the reality may be more complex. Apparent exceptionalism is sometimes the product of an effort to remedy inequality rather than an effort to preserve it.[124]

C. Exceptionalism and the New Normal

Several of the fields I have mentioned so far—tax, antitrust, patent, and foreign relations—are arguably in the twilight of exceptionalism, at least per some commentators. Recent discussions of these forms of exceptionalism have emphasized a contemporary turn toward assimilation and normalization.[125] These latter two terms are used to describe greater regularity in structures of decision-making authority across fields: the uniform applicability of *Chevron* deference to all agency decisions, uniform approaches to statutory interpretation, or uniform standards of judicial review for presidential actions whether related to domestic or foreign policy.[126] Notably, with regard to administrative law in particular, assimilation is not universally celebrated or equated with "normalization." A school of American legal thought views the administrative state as itself an illegitimate departure from rule of law norms because administrative agencies exercise lawmaking and adjudicative powers alongside traditional executive branch enforcement powers.[127] Whether we "normalize" a field of law or instead decrease its claim to legitimacy when we increase the power of administrative agencies depends on one's view of what counts as law. The point is simply that the discourse of exceptionalism (and normalization) can reveal underlying assumptions about law itself.

Across the scholarly discourses of exceptionalism examined so far, and indeed even among the critics of the administrative state, there is much more attention to the allocation and methods of decision-making authority, and the distributive consequences of different decisional structures, than to the content or determinacy of specific rules. A focus on *rules* and a focus on *decisions* are two different ways of thinking about law, though they are not necessarily mutually

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123. Rubenstein & Gulasekaram, *supra* note 6, at 592 (presenting "a new set of considerations about whether and how to ring the exceptionalism bell").

124. *See infra* Parts III and IV; *see also* Maggie Blackhawk, *supra* note 91, at 2077 ("Law becomes more fractured in a context where previously marginalized groups gain more power."). The contest between color-blind laws and race-conscious affirmative action is one ready example of this dynamic.

125. *See generally* Hurwitz, *supra* note 4 ("normalization" of antitrust jurisprudence); Lee, *supra* note 85 ("assimilation" of patent law); Sitaraman & Wuerth, *supra* note 5 ("normalization" of foreign relations law).

126. *See generally* Seymour, *supra* note 3.

127. *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (answering the titular question in the affirmative). *See also* Gillian E. Metzger, *Foreword, 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017) (describing, and rejecting, claims that the administrative state is unconstitutional). Aspects of this debate echo earlier arguments about whether the growth of the administrative state threatens the rule of law, as discussed in Part IV.

exclusive; indeed, one of the main supposed virtues of determinate rules is their ability to constrain decision-makers.[128] Without overstating the significance of the difference between a focus on rules and a focus on decision-makers, we might observe from this overview of exceptionalism that contemporary legal scholarship has been notably attentive to political institutions and the decisions made within them. More specifically, scholars concerned with "exceptionalism" are concerned with the precise ways in which power is distributed across different government actors and the ways that these distributions of power then shape the distribution of wealth and other resources among ordinary people. This way of thinking connects law to structural inequality—it sees law as itself one of the structures that may preserve or even exacerbate inequality.

I will return to these themes in Part IV, which identifies several lessons that might be drawn from this survey of exceptionalism in different legal fields. Before we can fully appreciate those lessons, however, the next Part takes up a slightly different, and potentially more radical, strand of exceptionalist critique worthy of our attention. To varying degrees, studies of "exceptionalism" in federal Indian law, family law, and criminal law take aim not simply at the allocations of power or methodologies used within those fields but at the fields themselves: these exceptionalist critiques involve challenges to prevailing legal taxonomies.

III. "NATURAL" EXCEPTIONALISM

"A foolish consistency is the hobgoblin of little minds," Ralph Waldo Emerson wrote; the aphorism still provides a ready sound bite for jurists more than a century later.[129] Unfortunately, the many references to Emerson's hobgoblin have not generated much guidance on how to distinguish a foolish consistency from a non-foolish one. Consistency in law is understood to be a matter of treating *like* cases alike, not a matter of treating *all* cases alike.[130] Thus, much turns on our initial classificatory choices: which cases are like cases?[131] The exceptionalist critiques examined in the previous Part take for granted mainstream legal taxonomies: they accept that there are distinct fields properly called tax law, patent law, immigration law, and so forth. The type of exceptionalist critique we have seen so far accepts the prevailing legal taxonomy but argues that the method or structure of legal decision-making in a given field is an unwarranted deviation from some background norm. Using this approach, tax law, patent law, immigration law, and so forth are unlike enough to be recognized as distinct fields, but still sufficiently like one another that

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128. *See infra* Part IV.

129. *See, e.g.*, United States v. Foster, 674 F.3d 391, 403 (4th Cir. 2012); RALPH WALDO EMERSON, *Self-Reliance*, *in* ESSAYS: FIRST SERIES § II (1841).

130. *See generally* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

131. Or somewhat more cynically, we might say that legal decision-makers sometimes classify cases as like or unlike based upon their prior instincts about whether the cases should yield similar outcomes. Law can go only so far in specifying the criteria for likeness in advance. Moreover, generalist legal rules often isolate a discrete set of purportedly relevant factors, but in ignoring other factors, they guarantee that some like cases will be treated differently and some unalike cases will be treated the same. *See* Frederick Schauer, *The Generality of Law*, 107 W. VA. L. REV. 217, 230 (2004).

we should seek more consistency across these fields.[132] So the exceptionalist critiques go, but they, like Emerson's quip, do not provide an independent basis to determine when consistency is foolish and when it is not.

In the hope of gaining some leverage on that question, this Part examines a potentially more radical kind of exceptionalist critique. As noted in Part II, some fields of law are defined with reference to a distinctive legal form or instrument: a patent, a copyright, a tax, a contract. Others are defined with reference to the subject matter of regulation—typically, some entity or phenomenon that is not itself a creation of law, such as health or natural resources. What if a legal field purports to regulate some extra-legal entity, but in fact constructs our very understanding of the entity under regulation? In scholarship on "family law exceptionalism,"[133] "Native American exceptionalism,"[134] and "criminal law exceptionalism,"[135] exceptionalism is invoked to raise questions about underlying classificatory choices—that is, questions about the categories through which we understand law. In this type of critique, existing legal taxonomies themselves fall under scrutiny. Is the Indigenous tribe a *sui generis* category, or should the federal government relate to tribes as it does to sovereign foreign nations? Is "family" a *sui generis* category? Is there some identifiable set of actions, or people, properly labeled "criminal," or is criminality itself a construct of law?

In the works examined below, exceptionalism itself is not inevitably a target of critique. Neither consistency nor inconsistency is presumed foolish; instead, the question concerns the way our concepts produce the perception of consistency or inconsistency, and ultimately, the way our categories produce normative conclusions and distributive outcomes. Humans cannot think without categories, and yet categories themselves can operate as hobgoblins of big and little minds alike.

A. The Family: Natural or Legal?

Families may be paradigms of either consistency or exceptionalism, per Tolstoy.[136] But in the legal world, the family is definitely special. Or so the law claims, but that claim is scrutinized by a strand of exceptionalist jurisprudence that has generated extensive scholarship—and even its own acronym, "FLE."[137] As defined by Janet Halley, one of the leading investigators in this line of inquiry, FLE refers to "the construction of the legal order to render the family and its law distinctive, special, other, exceptional."[138] More precisely, Halley and others have argued that family law emerged a distinct field only in the nineteenth century and only in opposition to a particular account of "the law of obligations," or laws

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132. *See supra* Part I.

133. *See generally, e.g.*, Halley & Rittich, *supra* note 10.

134. *See, e.g.*, Frickey, *(Native) American Exceptionalism*, *supra* note 9.

135. *See, e.g.*, Ristroph, *supra* note 11, at 1953–55.

136. "All happy families are alike, but each unhappy family is unhappy in its own way." LEO TOLSTOY, ANNA KARENINA 1 (Richard Pevear & Larissa Volokhonsky trans., 2006) (1877).

137. Halley & Rittich, *supra* note 10, at 754 (introducing the acronym FLE).

138. Janet Halley, *What Is Family Law? A Genealogy Part I*, 23 YALE J. L. & HUMAN. 1, 3 (2011) [hereinafter Halley, *What is Family Law I*].

regarding market and contract.[139] Much earlier, intimate relationships, material subsistence, and property were all encompassed in the sphere labeled by the ancient Greeks as the *oikos*—the term that gives us the modern English word economy.[140] Today, though, family law is distinguished from contract law or the law of markets along several dimensions. Family law is "the domain of status" to contract's domain of will or volition.[141] Family law is supposedly uniquely imbued with normativity and morality; contract law is purportedly free of such encumbrances and shaped by individualistic choice.[142] Family law is a sphere of altruism and dependency; contract law is a realm of independent and self-interested agents.[143] Notably, much of the literature on FLE is explicitly comparative, documenting ideas that have traveled across national boundaries. Indeed, several scholars link FLE to colonialism, globalization, and development policy.[144]

The conceptual separation of family from market "is not ideologically innocent," the critics argue.[145] Among other effects, the conceptualization of family law as exceptional obscures many of the distributive consequences of both family law and other fields. "[T]he family and family law are hidden but crucial mechanisms for the distribution of social goods of an immense variety of kinds: material resources like money, jobs, nutrition; symbolic resources like prestige and degradation; psychic resources like affectional ties . . . ."[146] A wide variety of laws regulate the family as a distributive mechanism, often relying on it as "a private welfare system," but many of those regulations are invisible to family law conceived in exceptionalist terms.[147] Thus, an explicit aim of FLE scholarship is an effort to identify and illuminate previously unnoticed distributive consequences of law—which may in turn help us reassess judgments about coercion and freedom.[148]

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139. *See* Halley & Rittich, *supra* note 10, at 753; *see also* Duncan Kennedy, *Savigny's Family/Patrimony Distinction and Its Place in the Global Genealogy of Classical Legal Thought*, 58 AM. J. COMP. L. 811, 812 (2010). Though the particular term "family law exceptionalism" began to appear frequently around 2007 and later, several aspects of the FLE critique (without using the term exceptionalism) were set forth in an influential 1983 article by Frances Olsen. *See generally* Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

140. *See* Mark E. Brandon, *Home on the Range: Family and Constitutionalism in American Constitutional Settlement*, 52 EMORY L.J. 645, 661 (2003).

141. Halley & Rittich, *supra* note 10, at 757.

142. *Id.* at 757–58.

143. *Id.*

144. *See* Halley, *What Is Family Law I*, *supra* note 138, at 4. *See generally* Kerry Rittich, *Black Sites: Locating the Family and Family Law in Development*, 58 AM. J. COMP. L. 1023 (2010); Chantal Thomas, *Migrant Domestic Workers in Egypt: A Case Study of the Economic Family in Global Context*, 58 AM. J. COMP. L. 987 (2010).

145. Halley, *What Is Family Law I*, *supra* note 138, at 95.

146. *Id.* at 5.

147. Janet Halley, *What Is Family Law? A Genealogy Part II*, 23 YALE J. L. & HUMAN. 189, 290 (2011) [hereinafter Halley, *What is Family Law II*].

148. In this regard, FLE scholarship follows (explicitly) Robert Hale. *See generally* Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

Thus, in contrast to the exceptionalist critiques discussed in Part II of this Article, FLE scholarship is not framed primarily as a critique of the allocation of decision-making authority across legal actors and institutions, though it certainly could provide the foundation for such a critique. Instead, FLE scholarship targets a prevailing taxonomy: it targets the way that family law is defined as a field. It argues that various dimensions of property law, trusts and estates, tax law, employment law, contract law, and citizenship and immigration law both regulate and rely on families, and any effort to understand the effect of law on families must take note of these many points of interaction. Moreover, various sites of inequality in these other fields are made to disappear from view by the suggestion that families are an exceptional category properly subject to unique treatment.[149] FLE scholarship highlights family law—and in some instances, "the family" itself—as an invented category, a human artifact, and seeks to show the effects of this particular construction.[150]

Many of those effects are troubling, Janet Halley argues. FLE enables "the state's ruthless use of family law duties of support to divest itself of responsibility for human subsistence."[151] It enables a law of family privacy that has in fact been arbitrary and inconsistent, and it "obscures distribution by class."[152] Halley and other scholars seek to make visible distributive consequences that FLE has obscured, but Halley is cautious in rejecting FLE wholesale, noting that "it has been useful for many progressive projects."[153] Like every form of exceptionalism, FLE is a kind of inconsistency, but there is no easy way to determine whether seeking more consistency would be foolish.

B. The Tribe: Natural or Legal?

A somewhat similar scrutiny of legal categories, and a similarly nuanced and cautious evaluation of exceptionalism, can be found in Philip Frickey's study of the federal government's regulation of Indigenous tribes in the United States.[154] Here, "Native American exceptionalism" begins with the legal conception of the tribe itself. American law has long framed the Indigenous tribe as *sui generis*, a "domestic dependent nation" neither foreign nor fully integrated into the United States.[155] Tribes are recognized to have a kind of sovereignty, but it is clearly far less than the sovereignty of a foreign nation.[156] In the federal government's legal

149. *See* Halley, *What Is Family Law II*, *supra* note 147, at 290.

150. *See* Brenda Cossman, *Marriage As? A Reply to* Marriage as Punishment, 112 COLUM. L. REV. SIDEBAR 220, 221 (2012) (describing FLE scholarship as "deconstruct[ing] the artificial dichotomies created by law's disciplinary boundaries: public/private, criminal/family, and status/contract"); Maria Rosaria Marella, *Critical Family Law*, 19 AM. U. J. GENDER SOC. POL'Y & L. 721, 737–39 (2011) (noting law's historical role in constructing the category "family").

151. Halley, *What Is Family Law II*, *supra* note 147, at 289.

152. *Id.* at 289–91.

153. *Id.* at 288.

154. *See generally* Frickey, *(Native) American Exceptionalism*, *supra* note 9.

155. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

156. Questions about the nature and scope of tribal sovereignty, as well as tribal subjection (to the federal government), have arisen frequently with regard to criminal

framework, tribes remain quasi-sovereign and quasi-subject, "wards" and "dependents" existing vis-à-vis the rest of the country in a "condition . . . perhaps unlike that of any other two people in existence."[157]

From this conception of the tribe as itself unlike any other legal or political entity, the Supreme Court developed a jurisprudence that Frickey labels "Native American exceptionalism"—a series of contradictory and seemingly unprincipled decisions widely viewed as incoherent, including by the Court itself.[158] The doctrines of federal Indian law "deviate from general principles of American law,"[159] including but not limited to the principle that Congress has only the powers enumerated in the Constitution and can regulate only pursuant to those enumerated powers.[160] For much of the nineteenth century, the Supreme Court viewed Congress to possess an unenumerated "plenary authority over the tribal relations of the Indians"; as a "political" (and extra-constitutional) power, Congress's authority was "not subject to be controlled by the judicial department of the government."[161] Over the course of the twentieth century, the Court retained the idea that the federal legislature had plenary authority over Indian affairs, but it also increasingly began to exercise judicial review over legislation in this area. The Constitution provides no explicit basis for this judicial review (or, again, the legislation under review). Some of the decisions introduce new forms of exceptionalism, such as a different approach to treaty interpretation in the federal Indian law context and "a unique form

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prosecutions. In the eyes of federal courts, sovereignty lies in the power to punish. Courts have determined that tribes may punish their own members, and when they do so, they exercise a retained sovereignty rather than any power delegated to them by U.S. law, and so they are not bound by federal constitutional constraints. Talton v. Mayes, 163 U.S. 376, 384 (1896). But the U.S. federal government may also punish tribal members for serious crimes that take place on reservations, even though Congress is presumably a body of enumerated powers, and no constitutional provision grants it the power to criminalize conduct by tribal members on tribal land. United States v. Kagama, 118 U.S. 375, 385 (1886) (upholding the Major Crimes Act).

157. *Cherokee Nation*, 30 U.S. at 16–17.

158. Frickey, *(Native) American Exceptionalism*, *supra* note 9, at 433.

159. *Id.* at 436.

160. *Kagama*, 118 U.S. at 385 (upholding the Major Crimes Act). At the time *Kagama* was decided, the Supreme Court had a narrow view of what counted as "commerce," and it rejected the argument that federal criminalization of noneconomic activity on tribal land was a valid exercise of Congress's Article I power to regulate commerce with Indian tribes. *Id.* at 378–79. Instead, the Court emphasized the "weakness and helplessness" of tribes, and found federal power to arise by necessity:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government the [federal] government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

Id. at 384–85.

161. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

of rational basis review" to uphold an employment preference for tribal members at the Bureau of Indian Affairs.[162]

Notably, in tracing the evolutions in federal Indian law over the twentieth century, Frickey emphasizes shifts in the allocation of decision-making authority from a world of unfettered legislative prerogative to one of increasing judicial authority.[163] This attention to decision-makers is reminiscent of the various exceptionalist arguments examined in Part II of this Article, each of which used the label exceptionalism to describe a purportedly atypical distribution of decision-making authority or an atypical decision-making methodology. Again, these inquiries into allocations of decisional authority are a contrast to legal theory's longtime focus on rules, such as debates over rules versus standards or analyses of the (in)determinacy of rules. But those redistributions of decisional authority are not themselves the source of what Frickey identifies as Native American exceptionalism. Rather, he focuses on an exceptionalism that arises from the concept of the tribe itself.

The story of Native American exceptionalism does not attack the underlying parameters of the field, as does the critique of family law exceptionalism. But it does argue that the field is plagued by confusion over how best to classify the subject matter of regulation—the tribe. With the language of wardship and dependency, federal courts have evoked the paradigm of colonialism even as they tried to avoid it.[164] In other words, here exceptionalism may represent a deliberate effort to resist one specific perception of continuity—that is, the continuities between federal rule over Native tribes and imperial rule over subjugated colonies. Frickey argues that the exceptionalism of federal Indian law functioned as "a [m]ediating [d]evice": it allowed a colonial structure to persist while moderating (or masking) it with the apparatus of "a legalistic, more normatively attractive approach."[165] More recently, Maggie Blackhawk and other scholars have questioned whether federal Indian law is as "exceptional" as once thought, arguing that the colonial power exerted over Indigenous tribes has in fact shaped public law in far-ranging ways.[166] Whether we view the tribe itself or the federal government's treatment of tribes as exceptional, there are ideological and distributive consequences to the categories we use.[167]

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162. Frickey, *(Native) American Exceptionalism*, *supra* note 9, at 447 (discussing Morton v. Mancari, 417 U.S. 535 (1974)).

163. *Id.* at 454 (characterizing Supreme Court opinions as "decisional law" that "abandoned the old allocation of institutional responsibilities"). "[T]he Court aggrandized a power to act in the absence of clear congressional directives—a dormant plenary power over Indian affairs, if you will." *Id.*

164. Thus, Frickey described federal doctrine as "a common law for our age of colonialism." Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 58 (1999).

165. Frickey, *(Native) American Exceptionalism*, *supra* note 9, at 443.

166. Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1794–98 (2019) [hereinafter Blackhawk, *Federal Indian Law*].

167. Frickey, *(Native) American Exceptionalism*, *supra* note 9, at 487–89. *See also* Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional*

It is not clear, though, that exceptionalism is worse than "normalization" in this area of law, even for those uncomfortable with colonialism and committed to tribal sovereignty. In 2005, Frickey suggested that the Supreme Court was increasingly swayed by "the seduction of coherence" and ready to abandon exceptionalist precedents.[168] To get rid of exceptionalism, the Court was likely to move toward greater subordination of tribes rather than greater sovereignty, Frickey worried, noting "a newfound willingness of Justices to engage in case-by-case adjudication that almost always dismisses tribal prerogatives as inconsistent with the broader legal landscape."[169] Exceptionalism may be used to obfuscate, and for Frickey, one function of Native American exceptionalism was the obfuscation of ongoing colonialism. But *assimilation* can also serve to obfuscate—or to subjugate.[170] Today, there is continuing disagreement whether tribal sovereignty would be better protected by abandoning exceptionalism or reinforcing it.[171]

C. The Criminal: Natural or Legal?

The exceptionality of criminal law may seem as obvious as the civil-criminal distinction, which turns out to be not obvious at all. For decades, courts and scholars have both assumed the existence of a clear distinction between civil and criminal law and struggled mightily when it becomes necessary to specify the precise difference.[172] For example, courts have employed different and sometimes conflicting standards to determine when a state-imposed burden becomes

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Minimum, 69 STAN. L. REV. 491, 500 (2017) (explicitly defending "a form of American Indian law exceptionalism" as necessary to remedy prior racialized injustices). Arguably, the Supreme Court endorsed this form of exceptionalism to the benefit of Indigenous tribes in Haaland v. Brackeen, 599 U.S. 255, 280 (2023) (upholding the Indian Child Welfare Act).

168. Frickey, *(Native) American Exceptionalism*, *supra* note 9, at 435 (citing Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 698 (2000)).

169. *Id.* at 460.

170. Maggie Blackhawk has contrasted the "exceptionalist" strands of federal Indian law with American law's "integrationist" approach toward other minorities and has suggested that federal Indian law may provide a better model for the pursuit of equality through public law. *See* Blackhawk, *Federal Indian Law*, *supra* note 166, at 1798.

171. The Supreme Court's strongest current proponent of Native American exceptionalism, Justice Neil Gorsuch, embraces an exceptionalist view in the service of protecting the sovereignty of Indigenous tribes. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2460 (2020) (interpreting early treaties to establish a "reservation" for Creek Nation in much of Oklahoma, and thus to prevent the state of Oklahoma from prosecuting its own criminal laws in that territory); Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1013 (2019) (employing (arguably) Native American exceptionalism to interpret a treaty with the Yakama Tribe to exempt the tribe from state fuel taxes). The Supreme Court's recent rejection of a constitutional challenge to the Indian Child Welfare Act arguably pitted one form of exceptionalism against another, rejecting family law exceptionalism in favor of federal Indian law exceptionalism. *See Brackeen*, 599 U.S. at 277 ("Family law is no exception. . . . [T]here is no family law carveout to the Indian affairs power.").

172. *See, e.g.*, Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Divide*, 85 GEO. L.J. 775, 782 (1997) (addressing "the destabilization of the criminal-civil distinction" with the observation that "[t]o speak of the 'destabilization' of anything is to imply that there was a time of stability. In the case of the criminal-civil distinction, this would be a somewhat misleading implication.").

"punishment" for purposes of the federal Constitution.[173] Notwithstanding the doctrinal ambiguities, criminal law just seems different to many scholars and lay observers.

In an effort to identify the ideas about criminal law that shaped American penal policy as the prison population exploded in the latter half of the twentieth century, my prior work has examined three variants of "criminal law exceptionalism."[174] First, burdens exceptionalism is the claim that criminal law imposes unique (and uniquely severe) burdens.[175] These burdens include both exercises of physical force and a distinctive social stigma. Violence may underlie all forms of law, as Robert Cover famously observed, but criminal law resorts to it so quickly that we can identify a difference in kind rather than simply one of degree.[176] Second, subject-matter exceptionalism is the claim that criminal law is used to regulate exceptionally harmful or wrongful activities.[177] This form of exceptionalism has fostered the idea that "crime" is a natural, or pre-legal, category—a set of actions so terrible that law must respond to them. Finally, operational exceptionalism is the claim that criminal law operates differently from other fields, such as by demanding more determinacy and foreclosing discretion that may be permissible elsewhere.[178]

Exceptionalism, as a belief system, does not necessarily correspond to actual exceptionality as a property of laws or practices.[179] "Burdens exceptionalism can be exaggerated, but there is nonetheless good reason to see criminal law's impositions of physical force and social stigma as distinctive."[180] In contrast, I have argued, "[c]laims of subject-matter and operational exceptionalism . . . are contradicted by empirical realities."[181] States use criminal law across a wide range of activities, including many that are also regulated by civil law, and some of them are not particularly harmful.[182] And criminal law features as much—if not more—indeterminacy and opportunity for official discretion as any other area of law. Nevertheless, criminal law exceptionalism as a belief system persists, and there are good reasons to believe that it has helped fuel and preserve mass incarceration.[183] Exceptionalism has made it difficult to even consider replacing criminal laws with

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173. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 361 (1997) (quoting Allen v. Illinois, 478 U.S. 364, 368 (1986)) ("[A] 'civil label is not always dispositive.'"); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164–70 (1963) (determining that an involuntary denaturalization provision was "essentially penal in character"). *See generally* Raff Donelson, *Cruel and Unusual What? Toward a Unified Definition of Punishment*, 9 WASH. U. JUR. REV. 1, 16–28 (2016) (reviewing Supreme Court's murky jurisprudence of "punishment").

174. Ristroph, *supra* note 11, at 1953–54.

175. *Id.*

176. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

177. Ristroph, *supra* note 11, at 1954.

178. *Id.*

179. *See supra* Section II.A.

180. Ristroph, *supra* note 11, at 1954.

181. *Id.*

182. *Id.*; *see also* Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563, 566 (2018) [hereinafter Ristroph, *Farewell*].

183. *See* Ristroph, *supra* note 11, at 1954–55; Ristroph, *The Wages*, *supra* note 35, at 7.

other ones, for it comes to seem obvious that criminal law serves functions that could not be fulfilled in any other way.[184] And exceptionalism has shielded criminal law from the force of some critiques made about law in general, such as the inevitability of discretion and the inevitable influence of biases on the exercise of discretion. Perhaps most importantly, criminal law exceptionalism has sustained continued expansions of criminal law even in the face of growing evidence of its disproportionate racial and socioeconomic impact. Even as the aggregate numbers of persons convicted and imprisoned grew in the late decades of the twentieth century, and even as racial disparities in those populations drew more and more attention, the exceptionalist paradigm facilitated the rationalization of these outcomes as the product of patterns in individual wrongdoing.[185]

The kinds of criminal law exceptionalism identified in my prior work valorize and celebrate criminal law; this "salutary" exceptionalism may serve as an obstacle to abolitionist argument.[186] Recently, Professor Benjamin Levin identified a different form of criminal law exceptionalism that seems to underlie many contemporary critiques of American criminal law, including abolitionist arguments.[187] This more critical form of exceptionalism sees criminal law as "uniquely problematic," and it targets criminal legal institutions for abolition on the grounds that they are criminal.[188] This line of argument is troubling, Levin asserts, not because we shouldn't seek abolition of criminal law but because abolishing criminal law may not be enough. If race and class disparities now evident in policing and punishment practices are in fact manifestations of problems that lie beyond specific criminal legal provisions, abolitionist efforts may end up simply preserving existing forms of subordination and inequalities under new, civil labels.[189] Levin worries that some measures advocated by criminal law abolitionists, such as extensive civil regulations or disciplinary measures by private actors, will simply replicate the subordination and extreme inequality now associated with criminal legal interventions.[190]

Both forms of criminal law exceptionalism—the belief that criminal law is uniquely necessary and important, and the belief that criminal law is uniquely terrible—are subject to critiques concerned with inequality. The question is whether exceptionalist thinking, even in its abolitionist form, may impede efforts to mitigate

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184. Ristroph, *supra* note 11, at 1993–96.

185. *Id.* at 1996–2000.

186. *See* Ristroph, *The Wages*, *supra* note 35, at 11 ("I suspect that the emergence of abolitionism, as a radical critique of criminal law, *outside* the realm of criminal law theory is one more consequence of criminal law exceptionalism. Within criminal theory—among people whose professional existence is devoted to reflection about criminal law—the dominant accounts of what criminal law *is* make it almost impossible to contemplate a world without criminal law.").

187. *See* Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1402–08 (2022).

188. *Id.* at 1402.

189. *Cf. id.* at 1446 ("Framing criminal law as uniquely problematic risks legitimating inequity, injustice, and subordination in non-criminal legal institutions.").

190. *Id.* at 1409–24.

existing inequality.[191] As I have suggested previously, criminal law exceptionalism is dangerous because it reifies and reinforces "crime" and "criminal" as *sui generis* categories.[192] If, in fact, "crime" is just a legal construct used to rationalize inequality, it should be possible to get rid of it. At the same time, if "criminal" is but one of many legal constructs that can be used to rationalize inequality, then getting rid of "criminal" will not be sufficient to address the grave racial, social, and economic inequalities presently reinforced through criminal law.

Against the arguments for the "de-exceptionalization" of criminal law noted above, others would argue that criminal law exceptionalism remains instrumentally valuable.[193] Indeed, as Levin concedes, a series of exceptionalist claims have been used, with some success, to advocate against a variety of severe sentences: the death penalty is exceptional and so should be limited or abolished; life without parole is exceptional and so should be limited or abolished.[194] Similarly, the prior two Sections noted that "Native American exceptionalism" and "family law exceptionalism" may sometimes be instrumentally valuable for advocates, and studies of "immigration exceptionalism" have made the same point.[195] This Article has not sought to weigh the costs and benefits of any given claim of exceptionalism. Instead, the question is what can be learned from the proliferation of exceptionalist claims across disparate areas of law.

In legal scholarship, these discourses of family law exceptionalism, Native American exceptionalism, and most recently, criminal law exceptionalism have been used to illustrate ways in which some of law's key categories, categories that structure legal thought itself, are themselves the product of contestable decisions. These lines of critique seek to make clear that legal categories we take for granted are not in fact the dictates of logic or nature. Moreover, these lines of critique highlight ways in which inequality can be masked, or preserved, by the construction of a purportedly "exceptional" category. But it is not clear that the solution lies in simply abandoning the categories shown to be constructed. There is no single or simple lesson about when and why to preserve exceptionalism, or when and why to critique it. Instead, this Part has shown that perceptions of exceptionalism present opportunities to examine the categories we usually take for granted. We will still have to decide which inconsistencies are foolish and where the hobgoblins lie. But the very claim of exceptionalism can alert us to the possibility that our existing classifications may not be serving us well.

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191. As Levin notes, some abolitionist critiques make deontological arguments about "the fundamental inhumanity of cages and state violence," but Levin's work is focused on a slightly different set of "left critiques of the criminal system that focus on the distributive consequences of criminal law and the criminal system's role in creating and sustaining racial and socioeconomic inequality." *Id.* at 1440.

192. *See* Ristroph, *The Wages*, *supra* note 35; Ristroph, *Farewell*, *supra* note 182, at 609–17 (arguing that the categories "felon" and "criminal" are both legal constructs that rationalize inequality).

193. Levin, *supra* note 187, at 1389.

194. *See id.* at 1443–44.

195. *See supra* Sections III.A–B; *see also supra* Section III.C.

IV. DECISIONS, DISCRETION, AND DISTRIBUTION

The previous two Parts have not offered a general theory of idiosyncrasy, a project probably doomed to failure, but they have identified some common themes across claims of exceptionalism in several different areas of law. In one strand of exceptionalist argument, the focus is on a purportedly atypical allocation of decision-making authority among legislatures, generalist or specialized courts, and executive agencies. The focus in these arguments is the identity of decision-makers rather than the content or determinacy of rules. A related strand of exceptionalism focuses on atypical methods of decision-making, such as different interpretive methods for tax statutes or for the federal Constitution itself. Finally, and at the deepest level of critique, some exceptionalist critiques raise questions about legal taxonomy: they seek to illuminate the constructed and contingent character of seemingly natural or obvious categories and the ways that our categories may obscure power differentials or other inequalities. This Part draws these themes together to argue that across more and less radical studies of exceptionalism, the focus on decisions and the scrutiny of legal taxonomies each manifests resistance to a depersonalized conception of law as self-enforcing rules. To some degree, this resistance is a reprise of earlier critical legal theories, but it is useful to see the specific ways in which we are reprising earlier worries about exceptionalism and the rule of law. Contemporary scholars have discovered (or rediscovered) that when we track law's decisions, or its allocation of decisional authority, we cannot avoid attention to decision-makers, who are inevitably human beings. This means that legal scholars must grapple with the realities of human decision-making, including the ways in which it is affected by the legal categories we take for granted, such as "criminal." Law does often discipline human decision-making, I shall suggest, but not necessarily in the ways that jurists and theorists have hoped. The construction of legal categories, which will help determine what we see as normal and what we see as exceptional, is part of the "structural" work that can preserve—or challenge—inequality.

A. The Rule of Law as the Decisions of Humans

The wide literature on "the rule of law" contains many internal debates, but there is considerable agreement that the rule of law is to be contrasted with the rule of man (or men, or persons).[196] Individual human beings will, of course, populate legal institutions and implement the laws, but if the rule of law fulfills its promises, the identity and whims of those specific individuals will not determine outcomes. In

196. "The government of the United States has been emphatically termed a government of laws, and not of men." Marbury v. Madison, 5. U.S. (1 Cranch) 137, 163 (1803). Margaret Radin pointed out that "the rule of law, not of individuals" might better capture present aspirations than the "rule of law / rule of men" formulation, but she also cautioned "we must not forget that when the ideal developed, and during most of its long history, it was inconceivable that any individuals who were not 'men' could be a part of political life." Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 781 n.1 (1989).

this sense, the rule of law is a depersonalized, or impersonal, ideal.[197] No man is above the law, we say, but we also assume that no man is behind the law as the puppeteer or pilot. In the most extreme form of this depersonalized vision, the rule of law is a system in which human officials are interchangeable cogs rather than agents with the discretion and power to choose outcomes.[198] Different rule-of-law theories may rely on different methods to eliminate the variations that would be produced by individual personalities, but the aim is to erase those variations.[199]

Informed by this conception of the rule of law, a great deal of legal scholarship examines ways in which law can and does constrain human decision-makers, with a particular focus on *judges*. Studies of the (in)determinacy of legal rules are efforts to understand this issue; similarly, many theories of interpretive methods are efforts to show how decision-making is in fact constrained or efforts to devise new constraints.[200] Thus, it would be inaccurate to say that rule-of-law theories have been unconcerned with decisions—they have been very concerned with judicial decisions, so much so that the phrase "decisional law" is often used to describe case law.[201] And proponents of the rule of law have been concerned—indeed, deeply troubled in many instances—by executive decision-making. Many commentators have examined executive discretion, such as that held by law enforcement officials and administrative agencies, as a threat to the rule of law, though with differing conclusions about how much discretion the rule of law can tolerate.[202]

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197. *See, e.g.*, Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 679–89 (1995) (describing and defending a view of the rule of law as "impersonal"). Perhaps unsurprisingly, those who defend this vision often use the term "impersonal," which may suggest that no individual person with subjective preferences ("whims," in Dorf's terminology) was ever part of legal decision-making. I prefer the term *depersonalized* to *impersonal* to highlight the extent to which this conception of the rule of law has removed from our view the fact that legal decisions are, inevitably and inescapably, made by persons.

198. One manifestation of the depersonalized vision of law is the formulation of many familiar legal principles in the passive voice, without any clear agent. "Like cases should be treated alike"—but who is to do the treating? "Nor shall any person be deprived of life, liberty, or property without due process of law"—but by whom? Of course, the Fifth Amendment Due Process Clause just quoted is understood to be directed at the federal government, and the Fourteenth Amendment Due Process Clause did add an agent and use the active voice: "nor shall any State deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1. The point remains that legal theorists, and sometimes legal drafters, use the passive voice very often with the effect of obscuring the human agents of law. *See* Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 1017, 1041 (2014).

199. *See, e.g.*, Fallon, *supra* note 22, at 5 (identifying four strands of rule of law theories).

200. RONALD DWORKIN, LAW'S EMPIRE 45–86 (1986).

201. *See, e.g.*, Dorf, *supra* note 197, at 715.

202. *See, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 3 (1969) ("Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness."); HAMBURGER, *supra* note 127; FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 74 (50th Anniversary ed. 1994) (describing the delegated exercise of discretion as the "power to make with the force of law . . . arbitrary decisions"); H.L.A. Hart, *Discretion*, 127 HARV.

Decisions, on this account, need to be (and can be) constrained and regulated by law. The rule of law ideal thus rejects *decisionism*, at least as articulated by Carl Schmitt with the claim that a sovereign necessarily possesses decision-making authority that cannot be constrained by rules, laws, or indeed by anything.[203] Recall the emergency exceptionalism discussed in Part I: the claim that emergencies require extra-legal decision-making, including the extra-legal decision that an emergency exists. Such a view threatens to swallow law altogether.[204] In the presence of indeterminate or under-determinate rules, but against the "nothingness" of decisionism, scholars have explored other factors that might constrain decision-making, including but not limited to interpretive methods, moral principles, or cost–benefit analysis and other principles of economic rationality.[205] Against these various efforts to rescue the rule of law, critical legal theorists have suggested that, inevitably, "radical indeterminacy constitutes the very core of all legal experience."[206]

It is thus not new for legal theory to study decisions rather than (or in addition to) rules, but the exceptionalist arguments surveyed in this Article reveal some important lessons. Most generally, they suggest a relative shift in emphasis that places more scrutiny on the allocation of decision-making authority, and this shift, in turn, brings more attention to specific and specialized decision-makers. Of course, legal argument has long involved claims about the appropriate distribution of decisional authority, as evidenced by frequent invocations of "institutional competence." But arguments for greater agency authority in fields such as tax, patent, antitrust, and bankruptcy are in many ways inconsistent with traditional concepts of institutional competence that allot law-making power to the legislature, interpretive and adjudicative power to the judiciary, and enforcement power to the executive. The development of the administrative state has already disrupted that allocation of authority in many respects, and the exceptionalist claims of Part II

L. REV. 652, 652–53 (2013) (alluding to how Hart's essay was drafted in 1956 but discovered and published about two decades after Hart's death).

203. Using the term "antinomianism" rather than decisionism (but equating the two), Duncan Kennedy has characterized this view as "the idea that 'you can never rely on the law.'" Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147, 1158 (2001). "[A]s moral and political actors we make choices that cannot be justified according to the available principles that are supposed to govern that particular kind of choice, because it is 'in the nature' of the principles that they either contradict each other or 'run out' just when we need (and want) them most to tell us what to do." *Id.*

204. For Schmitt, this was simply a reality to be recognized. He traced sovereignty to "the moment of the decision, to a pure decision not based on reason and discussion and not justifying itself, that is, to an absolute decision created out of nothingness." SCHMITT, *supra* note 41, at 66. In the passage just quoted, Schmitt is discussing the work of Joseph de Maistre, but Schmitt traced decisionism more generally to Thomas Hobbes, "the classical representative of the decisionist type." *Id.* at 33. Schmitt's reading of Hobbes neglects Hobbes's particular use of concepts of natural law and natural right, but the point is not crucial to this Article. *See* DYZENHAUS, *supra* note 46, at 223–34; Alice Ristroph, *Sovereignty and Subversion*, 101 VA. L. REV. 1029, 1045–53 (2015) (discussing Hobbes in relation to "natural law").

205. *See generally, e.g.*, RICHARD A. POSNER, OVERCOMING LAW (1995).

206. SCHEUERMAN, *supra* note 42, at 246 (characterizing arguments by critical legal studies scholars including Mark Kelman, Duncan Kennedy, and Roberto Unger).

illustrate that the administrative state has in fact changed (at least some thinkers') conceptions of law itself.[207] The claim that tax law (or antitrust, or bankruptcy) is exceptional, a departure from "ordinary" law, is based on the observation that in this field, judges claim the primary power of interpretation rather than deferring to agency interpretations. In other words, deference to the interpretations of experts in subject-matter specific agencies is the new normal, against which interpretation and adjudication by generalist courts is the exception.[208] One might say that the new normal is snowflake law, invoking the colloquial belief that no two snowflakes are alike. Like the proverbial snowflake, each area of regulation is special, requiring subject-matter expertise and specialized decision-makers.[209] There is thus a bit of a paradox in some claims of exceptionalism: by decrying the "exceptionalism" that denies decision-making authority to agencies in various fields, commentators also decry generalist courts and call for a different kind of snowflake law, a world in which specialized agencies have greater power in their areas of expertise.[210]

The observation that the administrative state may challenge or undermine classic conceptions of the rule of law is not a new one. Indeed, that conflict "has been the object of a heated debate" for decades.[211] Well before Philip Hamburger, Neil Gorsuch, and others levied their critiques of the powers allocated to contemporary administrative agencies, an earlier generation of legal theorists asked whether administrative exceptionalism was a central and regrettable feature of the development of a capitalist, liberal state.[212] A detailed examination of the Frankfurt School theorists and their American interlocutors is beyond the scope of this Article, but it is worth noting that modern critics of exceptionalism might find it profitable to revisit those earlier works.

Some claims of exceptionalism surveyed in Part II were not focused on administrative law, but they too were concerned with allocations of decision-making authority and with specific interpretive methods as a possible constraint on decision-

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207. Though he is not writing about exceptionalism, Kevin Stack illustrates the (re)personalization of law in his effort to reconcile rule of law ideals with the administrative state. The first principle of Stack's "administrative jurisprudence" is authorization but more specifically, the principle that "authorization is personal to the officeholder rather than an impersonal vesting of power in the government as a whole. The idea is that each officer vested with legal authority has a responsibility to reach an independent judgment about what the statute requires, a judgment not to be supplanted by that of superiors." Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1988 (2015).

208. *See* Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1616 (2019).

209. And snowflake law may require that even when agency decisions come before generalist courts, those courts should themselves rely on different bodies of law for different agencies. *See* Levy & Glicksman, *supra* note 93, at 579.

210. *See supra* Part II.

211. SCHEUERMAN, *supra* note 42, at 1.

212. *See* HAMBURGER, *supra* note 127. On William Scheuerman's account, capitalist democracies have increasingly embraced both vague and indeterminate laws and highly specific administrative decisions, each of which threatens the rule of law. SCHEUERMAN, *supra* note 42, at 1. Scheuerman finds redemptive potential in the legal theories of the Frankfurt School, and in particular, the responses by Franz Neumann and Otto Kirchheimer to the provocations of Carl Schmitt.

making. Foreign relations exceptionalism and immigration exceptionalism, as presented by scholars, both involve reallocations of decision-making authority away from ordinary constitutional baselines.[213] Constitutional exceptionalism examines distinctive interpretive methods used by judges with regard to the Constitution. It is not primarily focused on which actors have decision-making authority but nonetheless raises the concern that the use of these distinctive methods effectively transfers power to the judiciary and away from ordinary citizens and other public officials.[214]

B. Discretion and (New?) Ways to Discipline It

Legal scholars may find important insights in the focus on decision-making that spans these exceptionalist studies. First, expertise (technical, subject-matter expertise rather than general legal expertise) emerges as a possible constraint or guiding principle for decision-making that might render the administrative state compatible with the rule of law.[215] This is hardly a consensus position—again, a strand of American legal thought is deeply critical of the administrative state. Without taking sides in the debate over the legality of the administrative state, I want to relate the idea of agency expertise as a constraint on decision-making to a broader array of arguments that I'll call "deliberative discretion" arguments.[216] These arguments recognize the prevalence and importance of discretionary decision-making authority but seek to discipline discretion by focusing on the decision-maker's deliberative processes and the reasons that underlie her ultimate decision. Because deliberation is itself a human faculty, this line of thought centers the human decision-maker *qua* human. For example, a burgeoning literature applies fiduciary norms that originated in private law to public officials, arguing that as fiduciaries to the public, officials are bound to deliberate in certain ways and act only for certain kinds of reasons.[217] Fiduciary theories often emphasize expertise as a reason to allocate authority to a fiduciary.[218] Even when they do not specifically invoke fiduciary theory, expertise arguments for agency authority fall within the broader

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213. *See supra* Part II.

214. *See id.*

215. *See* Lee, *supra* note 85, at 1461–66.

216. I have not seen this term in wide use. The term "bounded discretion" appears often in legal literature, but that term does not itself specify which boundaries limit the discretion in question. *See generally, e.g.*, Cary Coglianese & Christopher S. Yoo, *The Bounds of Executive Discretion in the Regulatory State*, 164 U. PA. L. REV. 1587 (2016); Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631 (2005).

217. *See generally, e.g.*, EVAN FOX-DECENT, SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY (2011); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1822 (2016). With careful attention to the allocation of decision-making authority that is in many ways consonant with my themes here, Malcolm Thorburn uses a fiduciary-inspired approach to explain the justification defenses available to *private* individuals in criminal law. Malcom Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070, 1116 (2008) ("Whenever someone makes a decision about when it is justified to interfere with another's interests, the law requires (at least) that her decision be based on the right sorts of reasons and that it be the result of the right sort of deliberation.").

218. *See* Criddle, *supra* note 217, at 134–35.

category of deliberative discretion arguments insofar as they legitimize discretion on the premise, or condition, that it is exercised for the right reasons.

Compare this defense of discretion to the depersonalized theory of the rule of law, in which the individual human decision-maker is sufficiently constrained so as to lack control over outcomes. In contrast, in fiduciary theories of law, the very recognition of discretion is a recognition that the decision-maker will have some control over outcomes; it is a recognition that law cannot be depersonalized. The human decision-maker will leave her fingerprints on legal outcomes, so to speak, but we should be comfortable with that reality if we are reassured about what went on inside of her head—about what she considered, how she weighed various factors, and which reasons ultimately led her to decide in one way or another.[219] This is unmistakably *human* decision-making, and it can certainly go awry (as when a fiduciary acts to benefit herself), but it can also go well and be consistent with the rule of law. Discretion can be bounded, if not eliminated. On this vision of the rule of law, bounded discretion is appropriately deliberative, appropriately reasoned discretion.[220]

We cannot and should not abandon the effort to discipline discretion, but we must also acknowledge that the portrait of human decision-making described in the previous paragraph is remarkably optimistic. It does not acknowledge that the rationality that is supposed to bind discretion is itself bounded, as we have learned from a large and still growing body of empirical research.[221] Thanks to an explosion of popular literature that brings this scholarly empirical research to mainstream audiences, we are increasingly on a first-name basis with our various irrationalities: confirmation bias; the availability heuristic; hindsight bias; optimism bias; anchoring effects; attribution error; motivated reasoning; and unconscious or implicit bias based on race, gender, or other stereotypes.[222] We greet these biases with familiarity when we see them in other people's arguments or decisions, but each of us is less likely to notice them when they show up in our own minds. One aspiration of deliberative processes is to overcome these biases, but it often doesn't work.[223] Humans may just not be good decision-makers in many instances, even if they deliberate faithfully and believe themselves to be acting on the right reasons. It appears that awareness of bias is of only limited use in countering or overcoming it. Specialized knowledge, including the expertise that ostensibly warrants grants of

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219. *See* Leib & Galoob, *supra* note 217, at 1829 (noting that fiduciary norms "can bear upon what goes on inside people's head by demanding that we have or form certain attitudes and that we think or deliberate in certain ways") (internal quotation marks omitted).

220. *See* Criddle, *supra* note 217, at 117 (referring to "bounded agency discretion").

221. The most influential introduction of the scientific research to legal audiences may be Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

222. There exists an extensive academic literature on cognitive biases, but the subject also has generated a number of popular books that have reached best-seller lists, including two by Nobel laureates. *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); RICHARD H. THALER, MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS (2015).

223. On strategies for structuring decision-making to overcome biases and the limits of these strategies, see generally STEVEN JOHNSON, FARSIGHTED: HOW WE MAKE THE DECISIONS THAT MATTER MOST (2018).

authority to administrative agencies, can itself become the source of biases known as silo effects.[224] Even as legal theorists begin to recognize bounded rationality in those who are subject to legal decisions, they are less likely to view bounded rationality as a characteristic of those who make legal decisions.[225] But the evidence suggests that we are all subject to these limitations on our rationality—even this author, and even this reader.

It is more accurate to say that we are boundedly rational rather than that we are simply irrational (or so I hope, but that could be optimism bias). But a more personalized understanding of law—that is, one that recognizes the centrality of human decision-makers and is more attentive to the realities of human decision-making—creates the opportunity and the necessity for legal theory to grapple more extensively with bounded rationality. Our theories, positive and normative, must recognize the bounded rationality of legal decision-makers, and indeed, the bounded rationality of legal theorists themselves. This raises a question: what if the very perception of exceptionalism in fields of law is itself the product of cognitive biases (anchoring and framing effects, distinction bias, and so forth)?

It may be, but the value of this cross-field study of exceptionalism is not that it alerts us to the fact of an exception. It alerts us, first, to a possible change in what is understood as normal, and second, to the need to be attentive to ways in which understandings of normality, or exceptionalism, are themselves constructed. The first lesson draws attention to a conception of law that emphasizes human decision-makers and their methods, as I have discussed above. The second lesson is drawn from the forms of exceptionalism discussed in Part III. Each of those studies of exceptionalism raised questions about law's subcategories—"family law" or "criminal law"—as distinct fields, or the concept of a "domestic dependent nation"

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224. Levy & Glicksman, *supra* note 93, at 510–15. Note the subtitle of the 2015 book that may have brought the term "silo effect" to the mainstream: GILLIAN TETT, THE SILO EFFECT: THE PERIL OF EXPERTISE AND THE PROMISE OF BREAKING DOWN BARRIERS (2015).

225. For example, Avery Katz identifies this asymmetry in Melvin Eisenberg's contract theory:

> While Eisenberg is highly confident in judges' capacity to exercise wise judgment under conditions of complexity and uncertainly, he is skeptical that ordinary contracting parties can do the same. Throughout his manuscript, he appeals to bounded rationality, cognitive heuristics, and limits on the availability of information as reasons to distrust parties' ex ante decisionmaking . . . . While cognitive biases and excess optimism are well-documented empirical phenomena, there is no reason to think that judges and other public officials are immune to them.

Avery W. Katz, *Contract Theory—Who Needs It?*, 81 U. CHI. L. REV. 2043, 2057–58 (2014) (reviewing, pre-publication, MELVIN A. EISENBERG, FOUNDATIONAL PRINCIPLES OF CONTRACT LAW (2018)). *See generally* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006) (describing various areas of substantive law, including consumer safety law, intellectual property law, and agency law, that are designed to counteract various cognitive biases of those subject to the law); *id.* at 233–34 (acknowledging briefly at the end of the article "the important fact that legal policy makers and administrators, including those who seek to engage in debiasing through law or other corrective strategies, will often suffer from bounded rationality themselves," but not pursuing the implications of that fact).

as a *sui generis* category to describe Indigenous tribes in the United States. These categories, once they are established, discipline legal decision-making and legal thought. Indeed, they shape our perceptions of normal and exceptional, natural and unnatural, freedom and coercion, equal and unequal, and just and unjust.[226] And the categories are themselves contingent and constructed and thus contestable. Exceptionalist jurisprudence is a kind of study in legal taxonomy, but it is one that resists the suggestion that taxonomy can be purely analytical or "normatively inert."[227] It resists Frank Easterbrook's suggestion that humans have access to an *a priori* conception of "the entire law" which they can then use to evaluate the merits or weaknesses of a proposed legal taxonomy.[228] Exceptionalist jurisprudence scrutinizes law's claims to grandeur and depersonalization, drawing attention to law's contradictions and inconsistencies, its normative presuppositions, its bounded rationality, and its inevitably all-too-human character.[229]

As I have suggested, the second strand of exceptionalist jurisprudence is potentially more radical than the first; it certainly takes a more critical posture. The first strand, addressed in Part II, reflects and perhaps encourages a different conception of "normal" law, a conception more focused on human decision-making than classic accounts of the rule of law as an escape from the rule of man. The second strand, discussed in Part III, offers no overarching answer to the question, *what is*

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226. *Cf.* Paul Schiff Berman, *The Cultural Life of Capital Punishment: Surveying the Benefits of a Cultural Analysis of Law*, 102 COLUM. L. REV. 1129, 1171 (2002) (reviewing AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION (2001)) (calling for attention to "the subtle ways in which law operates to construct our understanding of the world and what we take to be the 'natural' order of things"). Police search doctrine provides an example of this dynamic. Courts have long said that the Fourth Amendment to the U.S. Constitution includes a "warrant requirement" for police searches that is subject to various exceptions. The "exceptions" are so broad and so numerous that the vast majority of searches are conducted without a warrant, but courts still speak of a warrant requirement and exceptions to it, and so do most criminal procedure scholars. But from the perspective of property, housing, and land use law, it is the fact that warrants are still required for most searches of private homes that should be seen as exceptional. *See* Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 913–14 (2010).

227. *See* Sherwin, *Legal Taxonomy*, *supra* note 67, at 34 ("A formal scheme of legal classification is normatively inert.").

228. Easterbrook, *supra* note 53, at 207.

229. One critic of tax exceptionalism calls for "a more realistic (if less exalted) vision" that "abandons the claim to logical grandeur that characterizes so much of the field." Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677, 723 (1996). Tax law—like other types of law, the author claims—is in fact "the product of practical compromises between conflicting statutory purposes and contradictory real-world demands." *Id.* Emily Sherwin makes a similar point concerning what might be called torts essentialism, or the effort to give "a unified theory of tort law" that gives meaning to the field. Emily Sherwin, *Interpreting Tort Law*, 39 FLA. ST. U. L. REV. 227, 236–38 (2011). Sherwin writes, "[t]ort law is not a natural phenomenon that might be expected to conform to a single motivating principle, or even a coherent set of principles; rather it is a human artifact, produced by many decision-makers over a long period of time." *Id.* at 241. True enough, but the same could be said of any other legal field, a point that Sherwin does not seem to appreciate. *See id.* ("*Perhaps more than any other field of law*, it is an amalgamation of ad hoc rules . . . .") (emphasis added).

law, but instead questions the categories that we use to build our larger conceptions, and indeed, to distribute power, wealth, and other goods. Both of these intellectual efforts are worth the attention of legal theorists.

CONCLUSION

One could read studies of exceptionalism as a pattern of disillusionment—repeated discoveries, in one field after another, that power and authority have been allocated in a purportedly atypical way, with inegalitarian consequences. And one could react to this disillusionment with despair, for although some individual scholars recommend cures for exceptionalism, their various proposals seem to contradict one another: more power for generalist courts, specialized ones, or neither? More power for agencies, or less? Should discretion be shifted from the executive branch to the courts or vice versa? Should we rein in power from private parties and empower more public regulation, or should we shrink the (carceral) state by empowering private entities to address issues previously treated as criminal?

All the same, despair and disillusionment are the wrong lessons to take from this survey of legal exceptionalisms. True, there is no simple or uniform institutional solution to the problems identified across so many areas of law. We have discovered that our familiar institutional forms do not, in fact, solve the fundamental problem that legal decisions must be made by humans, and humans are flawed decision-makers likely to be influenced by the power structures and ideological assumptions that underlie law and legal categories. But this discovery itself is an achievement; another word for disillusionment is enlightenment. Legal professionals trained to think of law as a guarantor of equality may have been slow to identify law as a structure of inequality, but there is now an effort to resist our fundamental assumptions about what law is and how it operates. Enlightenment is key to that resistance, and to the hope that law could become something different.