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THE IDEOLOGY BEHIND *BROWN V. BOARD OF EDUCATION*: POLITICAL PARTIES AND "JURISPRUDENTIAL BUNDLING"

STUART CHINN†

ABSTRACT

Brown encompassed the start of a transformative period of political change, where the federal judiciary and Congress succeeded in dismantling Jim Crow. Yet, the question of why *Brown* occurred, when it did, continues to lack a satisfying answer despite all of the scholarly commentary devoted to it.

This paper illuminates a set of ideological influences behind the *Brown* ruling that help explain why the Court took the direction that it did, when the opportunity to do so arose. My claim is that the result in *Brown* might be partly understood as emanating from certain core elements of American political party ideology. These four elements were (a) the acceptance of a "class political" ideal, or the belief that law and public policies should promote the interests of certain social groups; (b) a commitment to federal governmental statism, or the use of federal governmental power to promote desirable social goals; (c) the acceptance of a non-southern orientation toward class politics; and (d) a principled acceptance of the Supreme Court fulfilling, at times, a "rationalizing" function with respect to established legal doctrines.

These four ideas were core components of New Deal Democratic Party ideology that, I argue, provided a conceptual foundation for both the *Brown* decision in 1954 and the New Deal Democratic commitment to a form of economic liberalism in the 1930s. These four ideological elements thus allowed New Deal economic liberalism to be "jurisprudentially bundled" with racial liberalism among the *Brown* Court members.

After laying out these four ideological elements, I discuss several significant implications that stem from illuminating the links between these two historical periods. The most important implication is my proposal of "jurisprudential bundling" as a general theory of judicial behavior and constitutional development. The paper concludes by suggesting,

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more broadly, how ideas are capable of exerting autonomous influence upon the development of constitutional doctrine.

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INTRODUCTION

Brown v. Board of Education[1] marked the beginning of a federal judicial and congressional dismantling of Jim Crow, a system of social relations that had been facilitated and validated in a number of significant Supreme Court rulings decades before. Rather than following behind the actions of the elected branches, the Court in 1954 occupied a "vanguard role" in this social transformation.[2] Thus, notwithstanding some prior leftward movement in the doctrine,[3] the *Brown* ruling is rightly viewed as a critical juncture in American constitutional development. Yet, despite the extensive literature devoted to it, *Brown* remains in some ways the most enduring oddity in twentieth-century constitutional development. The question of why a decision like this occurred when it did continues to lack a satisfying answer, despite all of the scholarly commentary devoted to it.

1. 347 U.S. 483 (1954).
2. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 343 (2004).
3. *See, e.g.*, McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 641–42 (1950); *see also* Sweatt v. Painter, 339 U.S. 629, 631–32, 635–36 (1950).

We have learned that the *Brown* ruling can be explained by, among other things, elements of the litigation strategy chosen by the NAACP;[4] an increase in the political power of African-Americans due to their northward migration out of the South and a fortuitous (for them) set of emergent partisan alignments;[5] greater sympathy for African-Americans in elite and mass white public opinion;[6] presidential-institutional influences upon the Court;[7] and U.S. foreign policy considerations in countering Soviet propaganda on American racism in Third World nations.[8] Each of these explanations is indeed valuable in illuminating different pieces of the *Brown* puzzle. Each illuminates how *Brown* might be understood as a response to discrete political and institutional circumstances, and each plausibly demonstrates some degree of congruence between *Brown* and "external" social and political forces upon the Court. Still, what remains either unexamined or under-theorized in each of these explanations is another facet of the ruling: how *Brown* might have been understood within broader political party themes and political ideals by the Justices themselves.

The absence of greater in-depth examination on this point is conspicuous, given that such political party-focused analyses have long been at the center of scholarly examinations of judicial behavior and legal development. Indeed, the task of linking political party commitments to shifts in legal doctrine is the core concern of "appointments" theories of judicial behavior in which, as the label implies, a changed composition on the Court is seen to drive major doctrinal shifts.[9] When, for example, left-leaning Presidents and left-leaning Senators are able to appoint a number of more left-leaning Justices, presumably we should expect constitutional doctrine to shift to the left as well. The appointments thesis has much to commend it including not only its simplicity, but also its identification of the institutional link between broader political, institutional, and social changes on the one hand, and actual changes in the doctrine on the other. For this reason, it is able to convincingly explain many critical junctures in American constitutional history including the New Deal era transformations in Substantive Due Process and Commerce Clause jurisprudence. For this reason, the appointments thesis

4. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 290–94, 553–55 (1975); *see also* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 160–63 (1987).

5. *See* DAVID KAROL, PARTY POSITION CHANGE IN AMERICAN POLITICS: COALITION MANAGEMENT 103–06 (2009); KLARMAN, *supra* note 2, at 100–02.

6. KLARMAN, *supra* note 2, at 102, 309–10.

7. KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* 7–8 (2004).

8. MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 100, 104–07 (2000).

9. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–68 (2001); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284–86 (1957).

remains one of the dominant general theories of judicial behavior and legal development.

However, there is perhaps an equally conspicuous reason why party-ideological and appointments analyses of *Brown* have been underemphasized as well. With respect to the transformative change contemplated in the *Brown* ruling, the appointments thesis strikingly fails to satisfy. There is strong, overlapping scholarly agreement that neither Roosevelt nor Truman primarily selected their Supreme Court appointees because of a nominee's support for racial equality.[10] The same holds true for Eisenhower's appointment of Chief Justice Earl Warren.[11] Given that five of the Supreme Court Justices participating in the *Brown* decision were FDR appointees,[12] this shortcoming focuses our attention specifically on the appointments calculus of Franklin Roosevelt. Given the fact that, as McMahon states, "there is no clear evidence that FDR nominated jurists with a specific desire to advance African American rights,"[13] what are we to make of the *Brown* decision from the standpoint of party ideology and appointments?

Changes in African-American political power, changes in mass and elite opinion, and urgent foreign policy considerations certainly made a decision like *Brown* more plausible in the mid-1950s by offering new motives and opportunities for the Court to move more directly against Jim Crow. However, given the absence of direct presidential consideration of the race issue in making the *Brown* Court appointments and the absence of any established, clearly defined broader "political regime" on the race issue in the early 1950s,[14] *how* these new motives and opportunities were interpreted, conceptualized, and rationalized within the array of party ideological commitments present on that Court is not apparent. Or at the very least, the connections between these motives and opportuni-

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10. *See, e.g.*, HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 160, 181–82 (1999). To be sure, a nominee's relative liberalism and concern for less fortunate social groups did factor into appointments calculations, at least for FDR. *Id.* at 160–61. As such, race possibly factored into these appointments, but only to the extent that it was ancillary to more central New Deal concerns such as a concern for allowing governmental regulation and a liberal concerned with aiding less fortunate social classes. *See id.*; MCMAHON, *supra* note 7, at 73, 142–43. On how a concern for less fortunate social classes arose as a positive factor in FDR's appointments considerations, see also Robert Harrison, *The Breakup of the Roosevelt Supreme Court: The Contribution of History and Biography*, 2 LAW & HIST. REV. 165, 173–74, 178–182, 186, 191, 195 (1984).

11. ABRAHAM, *supra* note 10, at 192–94.

12. *See id.* at 159–60.

13. MCMAHON, *supra* note 7, at 142. I should note, McMahon's book is devoted to offering an explanation of how the *Brown* decision was the result of a broader presidential strategy by FDR concerning the courts. I further discuss McMahon's argument below.

14. "Regime" theories of judicial behavior posit that many of the Court's actions are responsive to the interests and needs of the dominant governing regime. *See* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36–38, 41–44 (1993); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 583–85 (2005).

ties and party ideology is less apparent here than it is for, say, rulings by the post-New Deal Courts on federal economic regulation in the early 1940s—where the latter rulings issued by the Court were directly related to prior appointments considerations for a majority of that Court's members.

The goal of this paper is to illuminate a set of ideological influences behind the *Brown* ruling that might aid in explaining why the Court took the direction that it did, when the opportunity to do so arose. As discussed below, I speculate that these ideological influences operated on the *Brown* Court indirectly through the appointments mechanism. Thus judicial appointments dynamics factor into my account, albeit in a manner distinct from their typical application in the scholarly literature. The starting point for my own analysis is *Brown*'s unanimous ruling, and the fact that all nine Justices were appointed in the midst or near-immediate aftermath of the New Deal revolution. Further, with the exception of Chief Justice Warren himself, all of the Justices on the *Brown* Court were appointed by New Deal Democrats.[15] Given this noteworthy connection between the New Deal Democratic Party and the *Brown* Court composition, the natural suspicion arises that there might be some ideological connection between New Deal Democratic Party ideology, and the constitutional principles that animate the *Brown* decision.[16]

My general claim is that the result in *Brown* might be partly understood as emanating from certain core elements of American political party ideology. This is not to say the previously mentioned explanations for *Brown*'s outcome are incorrect or invalid. To the contrary, and as I elaborate on below, I view these broader political and institutional influences to be quite significant in operating in tandem with ideological forces to bring about the *Brown* result.[17] Most importantly, I believe party ideology provided a conceptual foundation from which the Supreme Court could interpret, conceptualize, and orient the new demands of African-American political power, newly emerging social beliefs from political elites and the masses, and emerging federal governmental imperatives to combat the negative image of American racism abroad. Crucially, party ideological commitments also provided a conceptual foundation

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15. *See* ABRAHAM, *supra* note 10, app. C at 380.

16. For another argument about *Brown* that attempts to link it to the New Deal "higher lawmaking" principle of federal governmental activism, see BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 108–09, 145–50 (1991).

17. *See infra* Part III.A. While I make no claim that these ideational links wholly determined *Brown*, I would also avoid any claim that the conception of minority civil rights contained within *Brown* was the only plausible outgrowth of these ideational elements in the post-New Deal era either. Indeed Goluboff discusses an alternative, more labor and economic-centric form of civil rights for racial minorities that ultimately failed to become as entrenched as the *Brown* regime for a variety of reasons; this alternative conception of civil rights that she illuminates would, of course, have also been consistent with the ideational elements discussed here. *See* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 1–15 (2007).

for the Court to begin to construct new doctrines of equality in the post-WWII era as well.

My specific claim is that there are four aspects of New Deal Democratic Party ideology that provided a conceptual foundation for *both* the *Brown* decision in 1954 and the New Deal Democratic commitment to a form of economic liberalism.[18] Thus, because New Deal era Supreme Court appointments were (of course) made with the latter themes in mind, an ideological basis was established with these appointments for not just New Deal economic liberalism, but *also* for a subsequent racial liberalism as well. These four ideological commitments were in turn, (a) an acceptance of "class politics"; (b) a commitment to federal governmental statism, or the use of federal governmental power to promote desirable social goals; (c) a (relatively) non-southern orientation to class politics; and (d) a principled acceptance of the Supreme Court fulfilling a "rationalizing" function with respect to revising established legal doctrines.

In fleshing out the ideological connections between the New Deal and *Brown*, this paper seeks to advance three distinct inquires. First, the argument seeks to illuminate another facet of the *Brown* ruling as an instance of constitutional development and to shed light on how the Justices themselves may have understood or situated their own actions at the more abstract level of party ideology. Certain ideas helped to facilitate the *Brown* result by providing a conceptual foundation upon which judges could interpret and understand broader political forces and events. Implied within this claim is a subsidiary claim: the ideas underlying *Brown* exerted sufficient force, and had sufficient substantive content, that judicial actors were able to converge on their meaning and application in the discrete circumstance of school desegregation in 1954.[19]

Second, the argument also seeks to illuminate the broader connections between the New Deal and the subsequent "rights revolution" of the mid to late-twentieth century. There is a common belief that New Deal progressivism had something to do with the Court's notable protection of noneconomic rights in the 1950s and 1960s. Indicative of this belief is the fact that scholars have often turned to Footnote Four of

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18. By saying that there was a New Deal commitment to "economic liberalism," I mean this in only a relative sense compared to the policies that preceded the New Deal. As others have noted, there were certainly limits to the liberalism that emerged from the New Deal. *See* ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 3–4, 7–10 (1st Vintage Books ed. 1996). I would offer the same qualification for my use of the term "racial liberalism" as well.

19. Thus the structural influence of these ideas on legal development is suggested, in part, by the unanimity of the *Brown* ruling, and the prevalence of these ideas within equal protection doctrine in subsequent decades. For another account of how political ideas interact with changes in legal doctrine, though with a greater focus on the presidency than my account, see Robert L. Tsai, *Reconsidering* Gobitis*: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363, 377–78 (2008).

United States v. Carolene Products Co.[20]—authored by then-Associate Justice Stone in 1938—as a historical explanation and justification for much of the Court's subsequent work in the post-New Deal era.[21] While Footnote Four is a valuable start and while its themes are consistent with the ideological themes I highlight, I believe the connections between these two historical eras might be illuminated in greater depth and specificity by focusing on party-ideological links.

Third, and finally, by focusing on this single case study of the New Deal and *Brown*, I also hope to offer a preliminary analysis of "jurisprudential bundling" as a distinct theory of judicial behavior and constitutional development. The dynamic, stated simply, is that if two bodies of doctrine are linked firmly enough by a common set of ideological presumptions, judicial appointments made with any eye to changing doctrine in one area of the law will have consequences for the other body of doctrine. In this sense, those two bodies of law could be described as "bundled," at least with respect to judicial appointments considerations.[22] As will be implied from the discussion below, a significant amount of constitutional development fails to be captured within a conventional appointments-centered analysis. Though the argument offered here might be reconciled with that and other well-known theories of judicial behavior, I would assert that a focus on party ideologies and jurisprudential bundling in their own right may point toward more fruitful avenues in the study of judicial behavior and legal development.

After laying out the four ideological elements in Part I, in Part II I will then discuss in greater detail how those ideas intersected with the decision making in the *Brown* ruling. Finally, in Part III, I will discuss several conceptual and historical implications that stem from illuminating the ideological connections between New Deal economic liberalism and the *Brown* decision.

I. FOUR ELEMENTS OF AMERICAN POLITICAL PARTY IDEOLOGY

My primary task in this Part is to identify and flesh out four ideological elements that link New Deal Democratic Party ideology and the *Brown* ruling. In explicating these ideological elements, it will be apparent that their origins lie largely before the New Deal itself. Thus, what gave the New Deal its distinct ideological orientation was not so much the articulation of wholly original ideas, but more the combination of

20. 304 U.S. 144, 145, 152 n.4 (1938).

21. As Powe states it, "Footnote Four is the principal justification offered for the role of the Supreme Court in post-New Deal American politics." L.A. Powe, Jr., *Does Footnote Four Describe?*, 11 CONST. COMMENT. 197, 213 (1994). Ultimately, however, Powe is much more measured in his evaluation of the descriptive power of Footnote Four. *Id.* at 197.

22. Thus, I use the term "jurisprudential" in line with conventional definitions of the word: "[j]udicial precedents considered collectively" and "[a] system, body, or division of law." BLACK'S LAW DICTIONARY 858 (7th ed. 1999).

already-present ideas that had been reshaped in new and significant ways. In thus highlighting some of the ideological roots of the New Deal, a notable continuity emerges between the *Brown* ruling and these older party-ideological elements.

A. Class Politics: Conflicting Classes in Society and the Governmental Promotion of Class Interests

By "class," I refer to enduring societal differentiations in the American polity according to any number of social characteristics including not just economic class, but also differentiation by race, gender, profession, or various other social characteristics or particular special interests. In emphasizing this component of American party ideology, my focus is less on any particular dimension of societal differentiation and more on the recognition of differentiation itself.

An ideological commitment to class politics has two main components. The first is a recognition and acceptance of *enduring* and *conflicting* class interests in society. Beyond just the mere recognition of social differentiations, a class political vision recognizes that such class differentiations could be quite permanent and entrenched. For example, while Republican free-labor ideologies may have conceived of different economic classes, they also envisioned a degree of fluidity to one's membership in a particular economic or professional class that, in part, precluded that party's ideological affinity with a class political vision.[23] In addition, a class political vision was also informed by recognition and acceptance of the fact that class interests may be in conflict; it was not informed by harmonious visions of society, where benefits accruing to one class would reliably and automatically filter to others. The second element of a class political vision lies in the proper governmental response to such conflicting interests. Rather than ignoring them or leaving them to be mediated by market forces or status quo arrangements, a class political view endorsed the notion of certain class interests being promoted and protected through law and public policy.

Such themes are apparent in the *Brown* ruling. The ruling recognized the centrality of racial identity in American politics, and that racial differentiations were more durable, more persistent, and laden with more social meaning than many other sorts of social distinctions. Further, and consistent with *Carolene*'s Footnote Four[24] notions of constitutional and democratic fairness (which I discuss below), the *Brown* ruling recognized persistent political disabilities attached to African-American identity that demanded federal judicial intervention against Jim Crow in the South.

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23. *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 15–17, 20 (1995).

24. 304 U.S. at 152 n.4.

And yet, through American political history there has been an ambivalence, if not an outright antipathy at times, towards a vision of class politics. The recognition of entrenched class differentiations and the construction of policy and jurisprudential visions around such differentiations is largely absent from much of nineteenth century party ideology. For example, the Whig Party's programmatic vision of an economy aided and promoted by governmental policies such as a national bank, the tariff, and governmental subsidies[25] was pitched as a program that carried benefits for all portions of American society.[26] Further, the "Whigs insisted that there was no such thing as class conflict, that the different economic classes . . . were interdependent, and [that] . . . class membership was fluid."[27]

Likewise, the Republicans of the Gilded Age were seen at the time, and are still seen, as the party of business and corporate interests.[28] Yet, at least in their party ideology, they appealed to "labor" in general—which, in theory, would encompass not only business elites, but also industrial labor and agrarian workers as well.[29] And they saw their preferred policies as having a correspondingly positive effect on all sectors of society.[30] In this, the Gilded Age Republicans were drawing upon the free-labor ideology of their pre-Civil War roots in orienting their programmatic vision around a very broadly defined conception of labor and a harmony of interests between distinct economic classes.[31]

To the extent a robust notion of class existed in nineteenth century party ideology, one might look toward Jacksonian Democratic ideology. The Jacksonian focus on checking and opposing what they viewed as entrenched economic and political elites—a pernicious social class—was one of the cornerstones of this party ideology.[32] Still, the Jacksonians were not spokesmen for a vision of continual class competition and conflict either. A truly competitive pluralism was not accepted as an inescapable fact for them, nor were persistent class differentiations a component of the Jacksonian-preferred form of society. As commentators on Jacksonian party ideology have noted, most of their appeals were to "the people" at large, and not to any particular, or permanently marked-out classes. The Jacksonian normative vision was one of a society that, if kept free of the corruption of economic and political elites, could be a

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25. DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 583–84 (2007).

26. LEWIS L. GOULD, GRAND OLD PARTY: A HISTORY OF THE REPUBLICANS 11 (2003).

27. HOWE, *supra* note 25, at 544; *see also* SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 486 (2005) (discussing the Whig belief in class harmony).

28. JOHN GERRING, PARTY IDEOLOGIES IN AMERICA, 1828–1996, at 117 (1998) (discussing the pro-business reputation of Gilded Age Republicans).

29. *See id.* at 60, 62–64.

30. *Id.* at 74; GOULD, *supra* note 26, at 91–92.

31. FONER, *supra* note 23, at 15, 19–21.

32. HOWE, *supra* note 25, at 380–81, 501, 582; WILENTZ, *supra* note 27, at 513–14; JULES WITCOVER, PARTY OF THE PEOPLE: A HISTORY OF THE DEMOCRATS 138–39 (2003).

relatively classless, egalitarian constitutional order (at least for white males).[33]

Jacksonian era themes of an aversion to special classes or interests played an extremely prominent role in American legal thought. In the jurisprudential context, such ideas enjoyed a longer shelf life than the Jacksonians themselves. As Gillman has argued, the notion of rejecting legislation that "was designed to advance the special or partial interests of particular groups or classes" informed and drove the economic rights decisions of the Court during the *Lochner* era—more so, he argues, than any sort of judicial commitment to an "unrestrained free-market" ideology.[34]

Even in the context of race, a similar ambivalence to recognizing entrenched differentiations—and constructing policy upon those terms—was present in the nineteenth century. Reconstruction Republicans passed a host of constitutional and legislative enactments aimed largely (though not entirely) at benefiting African-Americans. In this, there was certainly a class ideological component. Yet for many Republicans, the purpose of such measures was to raise the freedmen to a level of formal civil and political equality with white males so that special legal protections would not be needed going forward.

For example, for some portion of Republicans, this was one of the strongest motives for enacting the Fifteenth Amendment. Its passing at the close of Reconstruction was seen as a low-hassle, less federally intrusive means of consolidating the gains of Reconstruction for the freedmen, since with the right to vote, they would supposedly be capable of fending for themselves.[35] Likewise, Justice Bradley expressed a similar sentiment in his majority opinion in the *Civil Rights Cases*,[36] where the Court struck down the equality of public accommodations provisions of the Civil Rights Act of 1875.[37] As Justice Bradley stated toward reaching this conclusion:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he

33. *See* GERRING, *supra* note 28, at 196 (noting that Jacksonian Democrats spoke of the people at large, rather than referencing a subset of "ordinary Americans" as did Bryan or Truman (internal quotation marks omitted)); WILENTZ, *supra* note 27, at 516–17; WITCOVER, note 32, at 139 (discussing economic elites as a "cancer on the body politic"). In practice, of course, the Jacksonian coalition was composed of farmers, southern planters, and the wage-earning constituencies in the North. HOWE, *supra* note 25, at 544–45.

34. HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 10 (1993).

35. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 448–49 (1988); WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 162 (1965).

36. 109 U.S. 3 (1883).

37. *Id.* at 25–26.

> takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[38]

One could argue, however, that *Brown*, like some of the Republican Party sentiment in the Reconstruction Era, recognized class-differences based upon race, but did so with the goal or purpose of ultimately reaching a society that would be color-blind. Such an argument, however, minimizes at least three notable divergences between *Brown* and some Reconstruction Republican sentiment. First, the notion of equality presented in *Brown* was more robust and more cognizant of inherent class-differences; Chief Justice Warren's opinion pressed for a conception of substantive equality that went far beyond where the median Republican voter would have preferred in the 1860s. Second, and relatedly, specific language in the opinion—namely, Chief Justice Warren's reference to how segregation affected African-American children in a way such that it "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone"[39]—evoked class politics in a direct manner that was absent in the Fourteenth and Fifteenth Amendments, which were characterized by more formalistic equality concerns.[40] Finally, the particular judicial solicitude for African-Americans as a group that is hinted at in *Brown* was confirmed and repeatedly demonstrated in the Court's subsequent desegregation and Equal Protection cases, where racial classifications assumed a special status in the doctrine that allowed for vigorous judicial protection of racial minorities.[41]

As a matter of party ideology, *Brown*'s recognition of persistent class differentiation, and its endorsement of beneficial class-specific legal rules and policies, probably stems from the Populists and Progressive Era Democrats.[42] Within the appeals to reform that emanated from the

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38. *Id.* at 25.

39. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

40. With respect to the motives behind the Fourteenth Amendment specifically, the limited Republican concern with class was reflected in their concern with protecting *both* African-Americans and Northern or Republican whites against southern persecution—as indicated by the general equality guarantees in the text. *See* FONER, *supra* note 35, at 257–58. The Reconstruction Republican concern with a more generalizable notion of equality was present in the passage of the Civil Rights Act of 1866 as well. *See id.* at 243–47, 250–51; MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863–1869, at 163–65 (1974).

41. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 213–14 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 9–11, 27–28 (1971); Green v. Cnty. Sch. Bd., 391 U.S. 430, 441–42 (1968); Loving v. Virginia, 388 U.S. 1, 12 (1967).

42. This is not to say that all Progressives employed a class-based perspective on politics. As Sidney Milkis notes in describing the ideology of Theodore Roosevelt and the Progressive Party in the 1912 election, they displayed—for the most part—an aversion to class politics and hoped to transcend class differences. *See* SIDNEY M. MILKIS, THEODORE ROOSEVELT, THE PROGRESSIVE PARTY, AND THE TRANSFORMATION OF AMERICAN DEMOCRACY 189, 211, 247, 258 (2009); *see also* OTIS L. GRAHAM, JR., AN ENCORE FOR REFORM: THE OLD PROGRESSIVES AND THE NEW DEAL 37–

Democratic Party under the leadership of William Jennings Bryan and Woodrow Wilson, there was clearly a concern about how certain economic classes had been negatively impacted by American industry and economic elites.[43] Further, by the time of WWI, and especially in the post-WWI era, Progressive intellectuals had also moved toward a more supportive stance of factional politics in their support of labor interests.[44] And this very same strain of thought was central to New Deal party ideology. It undergirded the passage of, among other things, the Wagner Act, which was premised upon the recognition of labor as a distinct social class worthy of federal governmental protection and called for congressional oversight of labor relations in order for free market forces to operate upon a more rational and orderly basis.[45]

During the New Deal era, the most noteworthy judicial statement that reflected a class political sentiment, and that also explicitly emphasized race as a significant social class, was Justice Stone's Footnote Four in *Carolene Products*.[46] The footnote explicitly contemplated the possible need for sustained judicial intervention in defense of "discrete and insular" minorities.[47] Presumably, the need for such judicial intervention was due to the durability of certain social cleavages and the possibility of those cleavages freezing certain social groups out of the interplay of pluralistic politics. Bixby has emphasized the significance of certain political events in the late 1930s—particularly the rise of fascism in Europe—as being enormously consequential in driving the emergence of a new

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38 (1967); MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920, at 134–35, 138 (2003). Milkis links this ambivalence to a similar Progressive Party ambivalence on the issue of African-American rights at the time. MILKIS, *supra* at 166, 176, 211. In this, perhaps, Theodore Roosevelt and the Progressive Party demonstrated a continuity with then-prevailing Republican Party ideological aversion to class politics. *See infra* notes 28–31. Graham sees the ambivalence of the Theodore Roosevelt Progressives toward class politics as a significant point of distinction between their ideological outlook, and that of the later New Deal. GRAHAM, *supra* at 38, 69–70, 180–81.

43. *See* MICHAEL KAZIN, A GODLY HERO: THE LIFE OF WILLIAM JENNINGS BRYAN, at xviii–xix, 45 (2006) (discussing Bryan's views on the moral obligations of government). Hence, as Gerring notes, the party ideology of the Democrats from 1896 through the mid-twentieth century employed class themes—though based on economic differences—that were more prominent relative to the old Jacksonian appeals to the broader polity. GERRING, *supra* note 28, at 196–97.

44. Yet, it should be emphasized that these intellectuals supported factional politics in the service of a larger, familiar pre-WWI Progressive goal of a more communal, above-faction political order. *See* MARC STEARS, DEMANDING DEMOCRACY: AMERICAN RADICALS IN SEARCH OF A NEW POLITICS 48–55, 63 (2010).

45. Gerring does argue that even though the Democrats of this era engaged in class politics, they still sometimes refused to fully admit that they were doing so. GERRING, *supra* note 28, at 196–98.

46. 304 U.S. 144, 152 n.4 (1938). In light of Footnote Four's anticipation of the new ways that class political ideas would be applied by the judiciary nearly twenty years later in the mid-20th century rights revolution, Bixby locates the beginnings of a shift in jurisprudential thinking about classes or groups at the earlier post-New Deal period of 1935–1945. David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at* United States v. Classic, 90 YALE L.J. 741, 743 (1981). During this time, he argues, the Court began to evidence a new concern with protecting classes defined by racial, religious and ethnic identity. *Id.* at 761–79.

47. *Carolene*, 304 U.S. at 152 n.4.

judicial solicitude for racial minorities in the post-New Deal era.[48] While he is undoubtedly correct, it is also worth emphasizing that the class political themes present in *Brown* and Footnote Four have a lineage that extends back to before the 1930s.[49] Footnote Four and the emergence of a tentative concern for racial minorities during the post-New Deal era also clearly drew upon a background understanding of persistent social differentiation that, by 1938, had been well established in progressive political ideologies.

As a final point, the mere recognition of entrenched and conflicting social divisions in American society does not necessarily take one all the way to the outcome in *Brown*. The Populists and Progressives of the late nineteenth and early twentieth centuries were also cognizant of social divisions, but their elaboration on these divisions led to a focus on *economic* cleavages rather than racial ones.[50] Further, to the extent that they did focus on racial cleavages, it led many of them to accept prevailing notions of racial inegalitarianism that sat diametrically opposed to the anti-discrimination norms present in *Brown*.[51]

Thus, the mere endorsement of a class political vision was insufficient to dictate the outcome of *Brown*. Rather, the judicial recognition of class differentiation was a necessary component of the *Brown* result, where the Court singled out a particular social group for "special" legal protections that went beyond the formal legal equality embodied within Jim Crow "separate but equal" laws.[52] While the Reconstruction Amendments aimed to place the freedman on an equal footing with whites with respect to *formal* civil and political equality, *Brown*, and especially the subsequent judicial statements on school desegregation in the late 1960s and early 1970s, clearly aimed to do more.[53] The judicial

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48. *See* Bixby, *supra* note 46, at 753–59, 763–64.

49. Though he is less inclined to emphasize these ideological continuities, Bixby also nods to this point. *See id.* at 761, 778.

50. While the Populists perhaps did not promote a version of class politics as stark as what would appear in mid-twentieth century politics, they did recognize the existence of distinct economic classes and oriented their policy proposals toward those that would favor agrarians and other "producing" and laboring classes. *See* LAWRENCE GOODWYN, THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA 85–86, 90–92, 107–10, 172–73, 211–12 (1978); *see also* MICHAEL KAZIN, THE POPULIST PERSUASION: AN AMERICAN HISTORY 34–35 (1995); CHARLES POSTEL, THE POPULIST VISION 224–25 (2007).

51. POSTEL, *supra* note 50, at 18–19, 174, 176, 202. Yet Postel also notes how the role of the populists in facilitating greater political competition also led to "cracks open[ing] in the walls of racial oppression." *Id.* at 202. For a discussion on the racial policies of the southern Democrats of the Progressive Era, see KAZIN, *supra* note 43, at 149. *See also* DAVID SARASOHN, THE PARTY OF REFORM: DEMOCRATS IN THE PROGRESSIVE ERA 17–21 (1989).

52. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).

53. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973) ("[A] finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a . . . . prima facie case of unlawful segregative design on the part of school authorities, [which] shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions."); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) (holding that broad and flexible judicial authority may be invoked where schools fail in their affirmative obligation to convert segregated schools to a unitary system); Green v. Cnty.

acceptance of persistent class differentiations also underlay the Court's elaboration on Footnote Four themes in subsequent decades, with its protection for other "disfavored" social groups beyond the racial context, in the gender[54] and sexual orientation[55] contexts.

B. A Commitment to Federal Governmental Statism

Brown's reliance on an ideological commitment to federal governmental statism is hard to miss, and hard to dispute. The *Brown* Court, whether fully consciously or not, was building upon Reconstruction era notions (in both the Reconstruction Amendments, and especially the Reconstruction era civil rights statutes) that saw racial discrimination at the local and state governmental level as appropriate for federal correction. Implicit in this view of federal governmental statism, as applied to race, was the notion that social conventions should not be allowed to reign simply because they were well-established, contrary to Justice Brown's statement on the matter in *Plessy v. Ferguson*.[56] Likewise, *Brown* also indicated that local governmental norms should not be allowed to trump federal norms when it came to race—an idea contrary to the views of southern Democrats and more conservative northerners in the post-Reconstruction era, and to the views of southern Democrats in the New Deal era.

The concept of federal statism was an ideological commitment with relatively clear roots in nineteenth century party politics. In contrast to their ambivalence toward class ideologies,[57] the Whig and Republican Parties, at least relative to the Democratic Party, were favorably disposed to harnessing federal governmental power towards the promotion of public policy goals. The Whig program was centrally based upon the need for federal governmental intervention into economic affairs,[58] and the Gilded Age Republicans, though identified with a strain of laissez-faire in some policy contexts, promoted a very federal governmental-friendly

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Sch. Bd., 391 U.S. 430, 441 (1968) (holding that New Kent School Board's plan allowing students to choose which public school to attend was not a sufficient step to effectuate a transition to a unitary system mandated under *Brown*).

54. *See* Craig v. Boren, 429 U.S. 190, 199–200 (1976). In his dissent Chief Justice Burger stated "[t]hough today's decision does not go so far as to make gender-based classifications 'suspect,' it makes gender a disfavored classification." *Id.* at 217 (Burger, C.J., dissenting). *See also* Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion) (holding that classifications based upon sex are inherently suspect and subjected to strict judicial scrutiny).

55. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (refusing to uphold a "law that singled out homosexuals 'for disfavored legal status'"); Romer v. Evans, 517 U.S. 620, 635 (1996) (holding Colorado amendment that prohibited any legislative, executive, and judicial action designed to protect homosexuals violated Equal Protection Clause).

56. 163 U.S. 537, 550–51 (1896). Notably, Jim Crow segregation was hardly an age-old custom by 1896. The assertion that a flux in southern race relations persisted into the 1880s is the "Woodward Thesis." *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 82–83 (Commemorative ed. 2002).

57. *See supra* notes 25–31 and accompanying text.

58. HOWE, *supra* note 25, at 583–84, 612, 835. *See also* GOULD, *supra* note 26, at 11; WILENTZ, *supra* note 27, at 492.

vision of economic nationalism.[59] Gilded Age Republicans sought to use federal governmental authority to promote the construction of the railroads, the construction of internal improvements, and to aid domestic production through a commitment to the tariff.[60] In addition, Bensel notes that the economic/regulatory decisions of Republican appointees on the Supreme Court during the Gilded Age dovetailed quite nicely with this vision of economic nationalism, since as a consequence of these rulings the Court was able to create a national market unencumbered by antagonistic regulations implemented at the state level.[61] To the Gilded Age Republicans, the benefits of this economic nationalistic vision were meant to accrue to all sectors of American society.[62]

In contrast, since Jefferson, the Democrats were historically the party of skepticism toward federal governmental power.[63] The Jacksonians favored a weaker federal government and a more open market economy since they were inclined to think the federal government would inevitably be subject to the control of special economic and political interests.[64] In contrast to the Republican commitment to the tariff, which was arguably the central defining feature of that party through the Gilded Age,[65] the Democrats were long the party of free trade and tariff reform.[66] Further, in the post-Civil War years, the Democrats were the party of greater skepticism toward federal governmental intrusion in the South.

However, near the turn of the century, the Democrats began to exhibit a changed perspective on the benefits of federal governmental intervention. A positive stance on federal governmental statism can be traced running from William Jennings Bryan, extending through Wilson, and finding its culmination in FDR's New Deal.[67] And that same commitment was apparent in some civil rights rulings by the Court in the decades immediately preceding *Brown*. In the Court's attack on white primaries in *Smith v. Allwright*[68] and *Terry v. Adams*,[69] and in the Court's

59. GERRING, *supra* note 28, at 65–66, 68–69, 83; GOULD, *supra* note 26, at 485–86.

60. GOULD, *supra* note 26, at 83–84, 138, 485–86.

61. RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900, at 7–8, 321–36 (2000).

62. GERRING, *supra* note 28, at 74; GOULD, *supra* note 26, at 91–92, 486.

63. GERRING, *supra* note 28, at 166–71; *see also* WITCOVER, *supra* note 32, at 67, 86–87. Jefferson did become friendlier to the exercise of federal governmental power, however, once in office, and later in life. *See* WITCOVER, *supra* note 32, at 91–93; HOWE, *supra* note 25, at 83–84; WILENTZ, *supra* note 27, at 135–36.

64. GERRING, *supra* note 28, at 171–72; HOWE, *supra* note 25, at 380–81, 501, 582–83, 835; WILENTZ, *supra* note 27, at 438. The prominent exception to this anti-federal governmental statism, as Howe notes, was the Jacksonian interest in utilizing federal governmental power for national territorial expansion. HOWE, *supra* note 25, at 583, 707–08.

65. GOULD, *supra* note 26, at 90–91. On the tariff serving as the key linchpin of the Republican coalition during the Gilded Age, see BENSEL, *supra* note 61, at 8–10.

66. GERRING, *supra* note 28, at 167.

67. *See id.* at 204–08, 224–30; *see also* KAZIN, *supra* note 43, at xviii–xix, 45–46 (2006) (discussing Bryan).

68. 321 U.S. 649 (1944).

69. 345 U.S. 461 (1953).

ruling against racially restrictive covenants in *Shelley v. Kraemer*,[70] for example, a new jurisprudential view of society could be gleaned even in the 1940s. In this jurisprudential view, the zones of "private" activity that were free of federal oversight—but where racial discrimination might occur—were clearly shrinking.[71] Thus, the commitment to federal statism marks another point of continuity between *Brown* and the New Deal.

C. A Relative Non-Southern Orientation to Class Politics

Though this point may be largely implicit in the preceding sections, a third ideological element also joins the New Deal and *Brown*; beyond their common acceptance of class politics, both also embodied, at least in part, the promotion of particular class or group interests that aligned with the sympathies of the non-southern wing of the New Deal and post-New Deal Democratic Party. This ideological characteristic was relatively more subdued during the New Deal. But from at least 1928 through to the early 1950s, a broader, incremental, relative shift of the Democratic Party away from its historic southern base underlay the electoral composition and the ideological orientation of the Democratic Party during both the New Deal and the rights revolution of the mid-twentieth century. Thus, there is a common sectional slant to both historical contexts; within the class political visions of each period, the concept of class was becoming relatively less moored to the southern constituencies that had historically been privileged by the Democratic Party. Rather than focusing on only southern agrarians, the New Deal and post-New Deal Party also conceived of a form of class politics prominently centered around groups such as organized labor[72] and racial minorities.

This ideological element is not, strictly speaking, a wholly distinct element. More accurately, the relative, non-southern sectional outlook of the New Deal and the *Brown* Court is a description or an elaboration on the class differentiation idea. Further, among the various ideological elements discussed in this Part, it is the one that is most directly tied to the dynamics of partisan politics. By way of fleshing it out, the remainder of this section offers a brief historical overview of two related political developments from the late nineteenth century to the middle of the twentieth century: (a) the declining importance of the South for Democratic presidential nominees and (b) the changing, and increasingly less-southern, conceptions of class reflected in Democratic legislative efforts

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70. 334 U.S. 1 (1948).

71. *See Terry*, 345 U.S. at 469–71; *Shelley*, 334 U.S. at 20–21; *Allwright*, 321 U.S. at 664–67.

72. As Katznelson, Geiger, Kryder, and Farhang discuss, in addition to their antipathy to African-American interests in the New Deal and post-New Deal eras, the southern wing of the Democratic Party also had an increasingly hostile orientation to labor interests in the 1940s. Ira Katznelson, Kim Geiger & Daniel Kryder, *Limiting Liberalism: The Southern Veto in Congress, 1933–1950*, 108 POL. SCI. Q. 283, 285–86, 288–89, 292–94, 297–99 (1993); Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 STUD. AM. POL. DEV. 1, 7, 21 (2005).

during this time. These political developments reflect, in turn, two more general points: first, a "dynamic" political understanding of class politics within the Democratic Party, as the favored classes within this ideology changed over time. Second, and, equally importantly, these political developments also illuminate the continuity or durability of the *grammar* of class politics within the Democratic Party.

A rather conventional periodization of the post-Civil War Democratic Party locates key break-points in its orientation during these presidential elections: 1876, 1896, 1912, 1920, and 1932. A plausible starting point is 1876, since it effectively marked the culmination of "Redemption" within the former Confederate states.[73] From 1876 to 1896, the Democratic Party was a relatively competitive national force, winning two presidential elections with Cleveland in 1884 and 1892.[74] Its political power stemmed from the "solid" and very reliable South[75] and support from several states in the Northeast[76]—the most important of which was New York. As a simple and somewhat crude marker for gauging the relative influence of the South on the Democratic Party at a given moment in time, consider the percentage of electoral votes garnered by a Democratic presidential candidate from the southern states. In examining the five presidential elections during this span of years, the average percentage of electoral votes contributed by the southern states was 51.1%.[77]

A notable shift occurred, however, with Bryan's ascendency in 1896 to the first of his three presidential nominations (the other two were in 1900 and 1908). From 1896 to 1908, the Democratic Party became unmistakably more southern. The average percentage of electoral votes contributed by the South across those four presidential elections rose to 73.9%[78]—a product of the South's extreme reliability for the Democrats and a likely consequence of the declining influence of the northeastern wing of the party.[79]

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73. The consequences of the highly disputed 1876 elections were not sorted out, however, until early 1877. FONER, *supra* note 35, at 580–82.

74. CQ PRESS, PRESIDENTIAL ELECTIONS, 1789–2004, at 218, 220 (2005) [hereinafter PRESIDENTIAL ELECTIONS]. All references to presidential elections and electoral vote totals in this paragraph and for the remainder of this section are drawn from PRESIDENTIAL ELECTIONS, *supra* at 216–34.

75. In referring to "the South," I am following one scholarly convention of applying this term to the eleven states of the ex-Confederacy: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. For an example of one prominent work that follows this convention, see V.O. KEY, JR. WITH ASSISTANCE OF ALEXANDER HEARD, SOUTHERN POLITICS: IN STATE AND NATION 7 (1949). There is, however, some scholarly variation in which states are included under the heading of "the South." *See, e.g.*, Katznelson, Geiger & Kryder, *supra* note 72, at 284 n.3.

76. LEWIS L. GOULD, REFORM AND REGULATION: AMERICAN POLITICS, 1900–1916, at 8 (1978).

77. *See* PRESIDENTIAL ELECTIONS, *supra* note 74.

78. *See id.*

79. *See* ELIZABETH SANDERS, ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877–1917, at 160 (1999); WITCOVER, *supra* note 32, at 286–87.

In addition, Bryan's ascendency also marked a noteworthy shift in the Democratic Party's approach to class politics and federal governmental statism. Notwithstanding the party's nomination of the more conservative Alton Parker in 1904, Bryan's emphatic representation of southern and western rural interests in 1896 elevated a new set of radical, Populist or agrarian-inspired ideas to the spiritual and intellectual center of the Democratic Party in the Progressive Era.[80] The party of states' rights in the nineteenth century suddenly and conspicuously found ideological space for a form of federal governmental statism,[81] symbolized in more extreme fashion by Bryan's endorsement of government ownership of the railroads in 1906.[82] The party unabashedly endorsed a vision of class politics anchored in the interests of agrarians,[83] and secondarily concerned with the interests of northern labor constituencies as well.[84]

In the early Progressive Era, this ideological orientation was most strongly reflected in persistent calls by the Democrats to expand the Interstate Commerce Commission's authority[85] and in legislative achievements toward this goal—undertakings that benefitted southern and western agrarian–shippers. Prominent examples include the Hepburn Act of 1906,[86] and the Mann-Elkins Act of 1910,[87] where southern Democratic support for regulation was particularly strong. With respect to the latter, Sanders' conclusion after analyzing the various votes surrounding the Mann-Elkins bill and amendments is that:

> These votes clearly reveal the sectional locus of the reform drive . . . . Democratic support for expanding the scope of regulation and maintaining or strengthening antitrust prohibitions was nearly unanimous. On the typical strengthening amendment, sixteen to eighteen Democratic votes, all but two or three coming from periphery [southern and western] senators, constituted the bulk of the reform vote. To that base would be added the votes of four or five diverse-area Republicans and seven or eight periphery Republicans. This was the hard core of the reform group in the Senate.[88]

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80. SANDERS, *supra* note 79, at 154–58, 412–13; SARASOHN, *supra* note 51, at x–xi, xiv.

81. *See* SARASOHN, *supra* note 51, at x; Dewey W. Grantham, *The Contours of Southern Progressivism*, 86 AM. HIST. REV. 1035, 1041, 1045–46 (1981); Anne Firor Scott, *A Progressive Wind from the South, 1906–1913*, 29 J. S. HIST. 53, 58–59, 69 (1963).

82. KAZIN, *supra* note 43, at 145–48; SANDERS, *supra* note 79, at 211; SARASOHN, *supra* note 51, at 23.

83. SANDERS, *supra* note 79, at 4, 118, 131, 139, 412–13; Grantham, *supra* note 81, at 1041; Arthur S. Link, *The Progressive Movement in the South, 1870–1914*, 23 N.C. HIST. REV. 172, 173 (1946); Scott, *supra* note 81, at 54.

84. SANDERS, *supra* note 79, at 97–98; SARASOHN, *supra* note 51, at xi, 18.

85. SANDERS, *supra* note 79, at 198–99.

86. Hepburn Act of 1906, ch. 3591, 34 Stat. 584 (1906); SANDERS, *supra* note 79, at 199–202; SARASOHN, *supra* note 51, at 3–10; Scott, *supra* note 81, at 55–57.

87. Mann-Elkins Act of 1910, ch. 309, 36 Stat. 539 (1910); SANDERS, *supra* note 79, at 203–08; SARASOHN, *supra* note 51, at 77–80.

88. SANDERS, *supra* note 79, at 205–06. It is noteworthy, however, that provision for a new Commerce Court in the bill—which could potentially counteract the regulations imposed by the

Wilson's ascendency to the presidency in 1912 marked a new high for this agrarian-inspired progressivism and indicated its broader electoral appeal. The average percentage of electoral votes contributed by the South during the 1912 and 1916 presidential elections was only 37.3%.[89] While maintaining his southern base, Wilson also recaptured the northeastern votes that had departed from the Democrats with Bryan's nomination in 1896 (although Wilson would also lose these votes in his 1916 reelection), and won in the Mid-West, Mountain-West, and West.

Passage of legislation such as the Underwood Tariff (1913),[90] which included an income tax,[91] the Federal Reserve Act (1913),[92] a more progressive income tax—relative to the 1913 tax—in the Revenue Act of 1916,[93] and the Federal Farm Loan Act (1916),[94] marks a clear line of continuity between the Democrats of the Wilson era and the agrarian ideology of Bryan. Wilson's decidedly conservative outlook on race also spoke well for him to the southern core of the party.[95]

In addition, however, the party's adoption of a more progressive outlook and rhetoric on economic-related reforms also aided the Democrats in appealing to labor and other left-leaning progressive constituencies.[96] Legislative achievements during Wilson's tenure reflecting such outreach included limiting of the federal injunction for labor disputes in the Clayton Act (1914),[97] the Seamen's Act (1915),[98] worker's compensation for federal employees in 1916,[99] and the Adamson Act (1916) providing for maximum hours for railroad workers.[100] These legislative achievements in the labor context underscored the expansiveness of the

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Interstate Commerce Commission—apparently led to most Democrats not voting in support of the bill on the final vote. *Id.* at 208–09.

89. *See* PRESIDENTIAL ELECTIONS, *supra* note 74.

90. Underwood Tariff Act of 1913, ch. 16, 38 Stat. 114 (1913).

91. SANDERS, *supra* note 79, at 226–30; SARASOHN, *supra* note 51, at 181.

92. Federal Reserve Act of 1913, ch. 6, 38 Stat. 251 (1913); SANDERS, *supra* note 79, at 256–59.

93. Revenue Act of 1916, ch. 463, 39 Stat. 756 (1916); SANDERS, *supra* note 79, at 230–31; SARASOHN, *supra* note 51, at 187.

94. Federal Farm Loan Act, ch. 245, 39 Stat. 360 (1916); SANDERS, *supra* note 79, at 260–61; SARASOHN, *supra* note 51, at 186–87.

95. SARASOHN, *supra* note 51, at 170–72; Stephen Skowronek, *The Reassociation of Ideas and Purposes: Racism, Liberalism, and the American Political Tradition*, 100 AM. POL. SCI. REV. 385, 391 (2006).

96. SARASOHN, *supra* note 51, at 22, 26–27, 205–07, 225–27.

97. Clayton Act, ch. 323, § 20, 38 Stat. 730, 738 (1914); SANDERS, *supra* note 79, at 344–45, 359.

98. Seamen's Act of 1915, ch. 153, 38 Stat. 1164 (1915); SANDERS, *supra* note 79, at 353–55, 365–67.

99. SANDERS, *supra* note 79, at 376–77; SARASOHN, *supra* note 51, at 187–88.

100. Adamson Act, ch. 436, 39 Stat. 721 (1916); SANDERS, *supra* note 79, at 379–82; SARASOHN, *supra* note 51, at 188–89.

Democrats' agrarian ideology and foreshadowed future, more dramatic changes in the progressive ideologies of the party.[101]

While Wilson's turn to some of these progressive measures may have been instrumental and belated,[102] these sorts of reforms were wholly consistent and conversant with the broader party's ideological preoccupation with class politics and federal governmental statism (at least on economic matters).[103] Sarasohn states that:

> Certainly, Wilson was a key progressive leader, but he also had the advantage of having determined progressive followers, who sometimes had to wait for their leader to catch up with them. Wilson's leftward shift in 1916, like similar shifts he made in 1910 and 1912, was toward positions already held by the rest of his party.[104]

Following Wilson's two terms, the Democratic Party's electoral vote totals collapsed almost entirely to its southern base in 1920, 1924, and 1928—a region that was itself somewhat unreliable for the Democrats—and accordingly, they lost badly.[105] The average percentage of electoral votes contributed by the South during these three presidential elections was a conspicuously high 85.4%.[106] Notwithstanding these percentages, a more contextual examination of the period also suggests that with the 1928 election, the northern, urban wing of the Democratic Party—defined by labor, immigrant, and eventually African-American constituencies—was gaining in strength.[107]

Building upon the expansion of the urban Democratic vote with Al Smith's candidacy in 1928,[108] FDR's election in 1932 marked the emergence of a new, broad-based Democratic coalition that proved to be very durable. FDR's coalition was essentially the same one, geographically, that had elected Wilson—though with slightly more Midwestern support. From 1932 to Truman's election in 1948, the percentage of electoral votes contributed by the South to the electoral vote totals of the Democratic nominee in these elections reached its lowest point at 23.7% (in

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101. For a full list of the many legislative items, enacted from 1910-1916, that Sanders deems the "agrarian statist agenda" see SANDERS, *supra* note 79, at 174 tbl.II.1. It should be noted, however, that in terms of electoral support, labor was a fickle partner for the Democrats during this period, though it was helpful to Wilson in winning Ohio and California in his reelection in 1916. *Id.* at 77–78; SARASOHN, *supra* note 51, at 22, 26–27, 54–55, 89, 205–06, 225–27.

102. On Wilson's belated shift on the Federal Farm Loan Act, see SARASOHN, *supra* note 51, at 122, 184–86. On his lack of involvement in the income tax in the Revenue Act of 1916, see *id.* at 144, 187.

103. SARASOHN, *supra* note 51, at xvi, 167, 189.

104. *Id.* at 189.

105. *See* PRESIDENTIAL ELECTIONS, *supra* note 74.

106. *Id.*

107. DAVID BURNER, THE POLITICS OF PROVINCIALISM: THE DEMOCRATIC PARTY IN TRANSITION, 1918–1932, at xi, 79–80, 251–52 (1967).

108. *Id.* at 228–31, 242–43; DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945, at 102 (1999).

1936) and never exceeded 29.4% (in 1944).[109] As early as FDR's reelection in 1936, he could seriously contemplate making urban constituencies such as labor, immigrants, and African-Americans the base of a transformed Democratic Party.[110] Although the effort ultimately failed, it is no surprise in light of these electoral dynamics that Roosevelt attempted to purge conservative Democrats, several from the South, in 1938.[111]

In addition to these shifts in the electoral supports of the Democratic Party, the beginnings of a de-southernization of the party could also be gleaned, if only faintly, in the changing shape of public policy that emerged from the New Deal. Several key points of continuity did exist between the early New Deal and early Southern Progressivism. The New Deal era conception of class encompassed the agrarian interests at the heart of Populism and Southern Progressivism, as evidenced by the focus on relief for rural interests in the form of the Agricultural Adjustment Act in 1933.[112] And largely in alignment with ideology of Southern Progressivism, the programs of the New Deal posed little challenge to the racial hierarchy of the South. This was underscored by the absence of any civil rights legislation during FDR's terms, FDR's ambivalence on federal anti-lynching legislation in 1938,[113] and the exclusionary contours and administration of key New Deal programs.[114]

Yet, furthering trends that might have been glimpsed as early as Wilson's tenure, the New Deal and post-New Deal deployment of class politics was colored by a heightened significance of northern, urban constituencies—sometimes in opposition to the preferences of southern Democrats. This was reflected by labor legislation in the National Industrial Recovery Act's § 7(a),[115] the Wagner Act,[116] and the Fair Labor Standards Act[117]—the latter of which garnered conservative southern Democratic opposition.[118] It was also reflected in social welfare legisla-

109. *See* PRESIDENTIAL ELECTIONS, *supra* note 74.

110. KENNEDY, *supra* note 108, at 341–42; *see* WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932–1940, at 184–85 (1963).

111. *See* KENNEDY, *supra* note 108, at 348–49; LEUCHTENBURG, *supra* note 110, at 266–68; Richard Polenberg, *The Decline of the New Deal, 1937–1940*, *in* 1 THE NEW DEAL 246, 258 (John Braeman, Robert H. Bremner & David Brody eds., 1975).

112. KENNEDY, *supra* note 108, at 141–44; LEUCHTENBURG, *supra* note 110, at 51–52.

113. KENNEDY, *supra* note 108, at 342–43; LEUCHTENBURG, *supra* note 110, at 185–86.

114. With respect to the last point, the most notable example was the Social Security Act of 1935, where explicit limits on the Act's coverage with respect to old-age insurance worked to the marked disadvantage of racial minorities. *See* KENNEDY, *supra* note 108, at 269; ROBERT C. LIEBERMAN, SHIFTING THE COLOR LINE 7–8 (1998).

115. National Industrial Recovery Act, ch. 90, sec. 7(a), 48 Stat. 195, 198 (1933); KENNEDY, *supra* note 108, at 151; LEUCHTENBURG, *supra* note 110, at 57–58.

116. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151 (2012)); LEUCHTENBURG, *supra* note 110, at 150–52.

117. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. § 201 (2012)).

118. KENNEDY, *supra* note 108, at 344–45; LEUCHTENBURG, *supra* note 110, at 262–63.

tion like the Social Security Act,[119] and public works programs—both of which were identified with the interests of urban Democrats.[120]

More transformatively, the New Deal conception of class was also inching its way toward inclusion of African-Americans as a preferred class—a development that embodied a clear break with the southern progressive roots of class politics. Even during the New Deal, the inclusion of African-Americans within some relief programs, their symbolic inclusion within the governing coalition,[121] FDR's (grudging) executive order prohibiting racial discrimination against defense industry and government workers, and his creation in that same order of the Fair Employment Practices Committee (FEPC) all pointed to the growing political significance of this northern constituency.[122] A Civil Liberties Unit was also very notably created within the Department of Justice during FDR's second term in 1939, which intervened on behalf of minority rights in the South.[123]

These developments continued with Truman's administration, which recognized the political significance of the northern African-American vote.[124] The inclusion of African-Americans within the ambit of Democratic class political concerns was demonstrated by Truman's executive orders to desegregate the armed forces and to prohibit racial discrimination in federal employment, his advocacy of a permanent FEPC, his appointment of a special committee on civil rights (which issued the "To Secure These Rights" report), and by Truman's request for a robust package of civil rights legislation in 1948.[125] His Department of Justice also intervened as *amicus curiae* in key civil rights cases[126] such as *Shelley v. Kraemer*,[127] *Sweatt v. Painter*,[128] and *McLaurin v. Oklahoma State Regents for Higher Education*.[129] Thus even if the Democratic Party held fast to the concept or ideology of class politics, its conceptions of class were clearly shifting.

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119. Social Security Act of 1935, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. ch. 7 (2012)).

120. KENNEDY, *supra* note 108, at 99, 128, 264–65; LEUCHTENBURG, *supra* note 110, at 131–33.

121. LEUCHTENBURG, *supra* note 110, at 186 (referencing the inclusion of African-Americans within some relief programs); KLARMAN, *supra* note 2, at 110–11 (referencing the symbolic inclusion of African-Americans).

122. KENNEDY, *supra* note 108, at 766–68.

123. GOLUBOFF, *supra* note 17, at 111, 114–21, 126–31; MCMAHON, *supra* note 7, at 144–47.

124. ALONZO L. HAMBY, BEYOND THE NEW DEAL: HARRY S. TRUMAN AND AMERICAN LIBERALISM 188 (1973); JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974, at 148–49, 151 (1996).

125. HAMBY, *supra* note 124, at 188–90, 247, 342–44; MCMAHON, *supra* note 7, at 178; PATTERSON, *supra* note 124, at 149–51.

126. DUDZIAK, *supra* note 8, at 91–92, 94–96; MCMAHON, *supra* note 7, at 188, 193–94.

127. 334 U.S. 1 (1948).

128. 339 U.S. 629 (1950).

129. 339 U.S. 637 (1950).

And yet, by the late 1940s and early 1950s, this shift was unmistakably only partial—hence the initial puzzle posed by the occurrence of *Brown*. Durable and intense southern opposition to African-American rights prompted Truman's ambivalence on the civil rights platform in the 1948 election, influenced Truman against introducing an omnibus civil rights bill in 1948, and ensured the lack of success for the creation of a permanent FEPC in 1949 and 1951.[130] While the heart and soul of the Democratic Party was no longer in the South by the mid-twentieth century, southern Democrats would remain a powerful force to be reckoned with for decades to come, as evidenced by the fights over civil rights legislation up until the 1960s.

In sum, the changing orientation of the Democratic Party from the late nineteenth century to the post-New Deal reflects one discontinuity and one continuity. The discontinuity was a marked de-southernization of the party, and the continuity was the persistence of a grammar of class politics. The ideological continuity—when combined with the political developments that had reduced the partisan influence of the South—subsequently allowed a new vision of class politics to emerge that resonated with the newer elements of the New Deal coalition. The intersection of these two political developments thus gave rise to a concept of persistent class differentiation that allowed the *Brown* Court and the Northern elements of the New Deal coalition to conceptualize class along racial as well as economic lines—in marked opposition to the orientation of their ideological forebears from the South.[131]

Emphasizing the significance of this sectional slant on class politics in Democratic Party ideology is informative for *Brown* in two specific ways. First, and most obviously, it indicates how a Court composed of Democratic appointees (with the exception of Chief Justice Warren) could have mounted an assault on perhaps *the* core component of southern regional identity in school segregation. Though Justices Black, Reed, and Clark were all at least nominally southern Democrats (as well as Chief Justice Vinson, who participated in deliberations on *Brown* in 1952), by the early 1950s, they were affiliated with a political party that was quite different from the one that had existed more than a decade before. Second, a focus on sectional themes also helps to explain the timing of *Brown* as well. As the New Deal coalition grew to be increasingly non-southern in the decades following the New Deal, this trend

130. HAMBY, *supra* note 125, at 214, 243–44, 344–46, 445–46; PATTERSON, *supra* note 124, at 150–51.

131. With regard to subsequent decades, Powe views the Warren Court as aligned with mid-20th century Democratic (i.e., Kennedy and Johnson) liberalism. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 489, 494 (2000). In line with the argument in this section, he sees most of that Court's work as an assault on the sectionally distinctive value system of the South. *Id.* at 490–93. Powe does note a couple of exceptions to this sectional interpretation of the Warren Court's work, however—the most prominent being the Court's cases on contraception and obscenity that emanated from, and targeted, areas of urban Catholic dominance. *Id.* at 491–92.

aids in explaining why *Brown* occurred at the time that it did, and not a decade or more earlier.[132]

D. Judicial Rationalization of the Law

A fourth connection between New Deal Democratic Party ideology and the *Brown* Court was a principled acceptance, within both, of at least the possibility of the Supreme Court fulfilling a "rationalizing" function with respect to established legal doctrines. Under this rationalizing function, (a) the Court could, under certain conditions, appropriately take the initiative to (b) revise or discard established legal doctrines to make the law better reflect changing social facts and social values.[133]

Consider the "b" element first: the notion of the government acting as an agent to rationalize social, economic, and political life extended at least to the Progressive Era, and was a dominant theme of the New Deal programmatic reforms themselves.[134] The emergence of a commitment to judicial rationalization in the post-New Deal era owed much to these political developments. Yet, as an intellectual matter, this idea was specifically rooted in the ideas of progressive era legal thinkers and the legal realists—the latter of which were, in turn, formulated as critiques of late nineteenth and early twentieth century legal formalism.[135]

To briefly summarize this background, within the jurisprudential vision of legal formalism, the lodestars for legitimate legal reasoning were appeals to general principles and clearly defined legal categories.[136] So long as these elements structured legal analysis, the belief was that they would help maintain a posture of neutrality for the judiciary and the state, and prevent the judiciary from falling into the trap of results-oriented modes of reasoning.[137] Contrary to this view, the legal realists and earlier Progressive legal thinkers critiqued formalism as being de-

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132. KLARMAN, *supra* note 2, at 310–11 (reflecting skepticism that a *Brown*-like ruling could have happened even ten years before *Brown*).

133. Relatedly, on this point, Powe has also asserted that the Court in the post-New Deal era was "combining with the Federal Government and Northern elites to create a set of national norms, eradicating in the process that which was different or backward." Powe, *supra* note 21, at 197. *See also* POWE, *supra* note 131, at 489–94.

134. In summing up the New Deal, David Kennedy states:

> Roosevelt's dream was the old progressive dream of wringing order out of chaos, seeking mastery rather than accepting drift, imparting to ordinary Americans at least some measure of the kind of predictability to their lives that was the birthright of the Roosevelts and the class of patrician squires to which they belonged.

KENNEDY, *supra* note 108, at 247.

135. Legal realism, at the very least, converged with New Deal programmatic aims in sharing a common critique of the pre-New Deal legal order. BRINKLEY, *supra* note 18, at 108–10; *see also* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 3, 188 (1992).

136. *See* HORWITZ, *supra* note 135, at 16–17; WILLIAM M. WIECEK, THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, at 14 (2006) [hereinafter WIECEK, MODERN CONSTITUTION].

137. HORWITZ, *supra* note 135, at 16–17, 20, 199; WIECEK, MODERN CONSTITUTION, *supra* note 136, at 15; WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937, at 4–7 (1998) [hereinafter WIECEK, LOST WORLD].

tached from social reality and advocated the opposite—a mode of legal reasoning that could be responsive to social facts and that could be instrumentalist (i.e., evaluated by the results that followed from the legal rules themselves).[138]

The legal realist advocacy for a more instrumentalist form of legal reasoning ultimately influenced, in one form or another, a significant portion of post-New Deal constitutional jurisprudence.[139] And in hindsight, perhaps this should not be too surprising. Once legal reasoning was divorced from any supposed anchor in either natural law or fundamental legal concepts in the post-New Deal era,[140] the attractiveness of other anchors for legal reasoning that were external to the law itself—such as social facts and social values—must have increased. And once the door was opened to this latter perspective, it in turn allowed for corollary views to emerge such as thinking of the law as more malleable, as more policy-like in orientation,[141] and as subject to a relatively greater degree of legitimate revision by state actors—ideological commitments that spoke to a judicial rationalizing function.

That this rationalizing perspective ultimately served progressive goals in both the economic sphere during the New Deal and in the realm of southern race relations decades later is also unremarkable. In the same way that industrialization and a changing economy created enormous disconnect between social conditions and the economic doctrines of the legal formalists,[142] changing social facts and values likewise opened an increasing disconnect between social reality and the doctrines of Jim Crow.[143] One committed to the tenets of legal realism would thus be inclined toward revision of the law in both cases.

To be sure, the formalists themselves were not uniformly hostile to judicial revision of the law and were hardly defenders of rigid stare decisis; their goal of a greater systemization of the law was often aided by

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138. *See* HORWITZ, *supra* note 135, at 187–90, 194–95, 209; WIECEK, LOST WORLD, *supra* note 137, at 192–93, 199–200.

139. ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 275–77 (1982) (discussing legal instrumentalism generally); WIECEK, MODERN CONSTITUTION, *supra* note 136, at 46–47. *See generally* BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW (2006); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 952–65 (1987) (connecting the rise of instrumentalist legal reasoning in the New Deal era to the subsequent proliferation of balancing tests in constitutional law).

140. WIECEK, LOST WORLD, *supra* note 137, at 89–92.

141. *See generally* Karen Orren & Stephen Skowronek, The Policy State: A Developmental Synthesis 6–7 (Aug. 17, 2011) (unpublished manuscript) (on file with author). Orren and Skowronek further define "policy" as a distinctive mode of governance which encompasses "the commitment to [both] a goal or designated course of action, made authoritatively on behalf of a given entity or collectivity, and to guidelines rationally aimed at its accomplishment." *Id.* at 6. The authors further assert that policy modes of thought in governance are "unified in the sense that they share the theme of the future: commitment, long- or short-term goals, problem-solving, change in direction." *Id.* at 7.

142. *See* HORWITZ, *supra* note 135, at 4, 30.

143. *See infra* notes 174–181 and accompanying text.

discarding "bad" precedents.[144] Doctrinal revision was plausibly compatible with both legal formalism and post-New Deal jurisprudence. Where they diverged, however, was in their respective bases or justifications for doctrinal revision. The goal for a post-New Deal era actor in revising the doctrine was not to clarify or purify general legal principles, but was instead a rationalizing goal. Revisions in the doctrine would be driven or anchored in considerations of how changing social values and facts compelled or made more attractive corresponding changes in legal rules.

One who was even somewhat sympathetic to these tenets of legal realism could easily be led to a corollary endorsement for a more energetic judiciary—as the institution which might undertake such revisions. Prominent examples of just such a perspective on the Stone Court would be Chief Justice Stone himself, along with Justices Rutledge and Murphy.[145] Still, to credit the orientation of the post-New Deal Court as wholly an offshoot of only legal realism might be oversimplifying.

This returns us to the "a" component in the initial paragraph above: commitment to at least a conditional form of *judicial* initiative in revising the law. Even if legal realism called for greater rationality in the law, this did not, on its own, necessarily demand that the judiciary itself be the institutional actor that was responsible for the rationalizing function (as Justice Frankfurter argued, for example). Thus, the acceptance, at least some of the time, of judicial initiative in this rationalizing task among the post-New Deal Court speaks to a point distinct and separate from the goal of merely desiring greater rationalization of the law.

Finding evidence of a judicial-rationalizing impulse during the New Deal itself is not terribly difficult. A precedent was established by the New Deal Democrats in utilizing the Court to dismantle an intricate, embedded body of doctrine rooted in the Supreme Court's interpretation of the Due Process Clauses and the Commerce Clause. The consequence of this choice during the 1930s and 1940s was that the New Deal transformation was ratified through "transformative judicial opinions" rather than through Article V constitutional amendment.[146] Regardless of what the particular motivations may have been for the Justices voting in the majority in these cases, and even if these judicial rulings may have been seen or justified by some as a return to valid, pre-*Lochner* precedents,[147] the lesson could hardly have been lost on future Justices that these transformative rulings encompassed a dramatic revision of prevailing consti-

144. *See* WIECEK, LOST WORLD, *supra* note 137, at 12, 93.

145. WIECEK, MODERN CONSTITUTION, *supra* note 136, at 8–9, 53, 57, 103, 111–14.

146. BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 269 (1998) (emphasis omitted). For a discussion on the institutional design implications of this method of constitutional transformation, see *id.* at 403–18.

147. *See* Morton J. Horwitz, *History and Theory*, 96 YALE L.J. 1825, 1829 (1987); *see also* Harrison, *supra* note 10, at 204–05.

tutional doctrine.[148] By harnessing the Court's authority to the goal of dismantling and repudiating core elements of the old, pre-New Deal constitutional order, a potential precedent was set for future Supreme Courts to similarly undertake transformative revisions with respect to other very well-established constitutional doctrines. Though I discuss it in more detail in the next Part, such an impulse is apparent in the wholesale dismantling of prior doctrine with the *Brown* ruling.[149]

Finally, in the same way that a commitment to judicial-rationalization might be usefully distinguished from legal realism, the former might also be usefully distinguished from a categorical commitment to "judicial activism." Judicial initiative of any kind is of course a form of judicial activism. Yet, to assert that a judicial-rationalizing impulse underlay New Deal Democratic ideology and *Brown* is not to claim that a judicial activist impulse was a categorical commitment within the *Brown* Court or among New Deal Democrats. Rather than exhibiting uniform views on the matter, the New Deal appointees as a group—most notably Justice Frankfurter and Justice Black—exhibited very well-known divisions with respect to their broad views on the uses and justifications for judicial review.[150] Indeed, the distinction between a commitment to judicial rationalizing and a categorical commitment to judicial activism is at least partly indicated by how Justice Frankfurter and Justice Black—the only "systematic thinkers" on the Court in 1945–1950 according to Wiecek[151]—strongly diverged on the judicial activism dimension while nevertheless converging in actions and arguments that also spoke to the appropriateness, at certain times, of the judiciary revising and rationalizing the law. Let me conclude this section by briefly discussing both Justice Black and Justice Frankfurter's jurisprudential philosophy and the receptivity of both to judicial rationalizing of the law.

In the case of Justice Black, his articulated judicial philosophy was not explicitly tied to any rationalizing judicial function. For him the basis for interpretation for a judge was simply and only the constitutional text and original intent.[152] At least explicitly, this was a philosophy that aspired to a form of judicial restraint, in foreclosing judicial policy-making impulses and in forcing judicial interpretations to stick closely to democratically validated legal commands.[153] Yet the irony of this philosophy is that it nevertheless encompassed a potentially expansive judicial au-

148. *See, e.g.*, Wickard v. Fillburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

149. *See infra* Part II.

150. *See infra* notes 152–61 and accompanying text.

151. WIECEK, MODERN CONSTITUTION, *supra* note 136, at 440–41.

152. *See* MELVIN I. UROFSKY, DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941–1953, at 88 (1997); WIECEK, MODERN CONSTITUTION, *supra* note 136, at 77–78.

153. *See* UROFSKY, *supra* note 152, at 88; WIECEK, MODERN CONSTITUTION, *supra* note 136, at 77–78.

thority; a judge working in this mold would feel little hesitation in revising or discarding established judicial precedents, if such precedents cut against that judge's interpretation of text or intent.[154] Thus, even if a Justice Black-inspired judge felt himself or herself confined to only text and intent, the power that such a judge could wield within the confines of textual and historical interpretation could allow for an extremely "energetic" form of judging.

Combine this judicial philosophy with Justice Black's strong populist political leanings—informed by the political context of his native Alabama—and it is easy to see how his actions, if not his explicit arguments, ultimately led him to judicial results that reflected a rationalizing impulse. Justice Black's worldview was informed by class political concerns of societal segmentation and the oppression of the common people by elites.[155] Such fears informed his views as a New Deal politician, of course, and they informed his receptivity to federal governmental statist solutions on economic matters. Furthermore, such political leanings also informed his receptivity to protecting civil liberties in cases where he viewed state power as functioning in an oppressive manner against individuals.[156] While Justice Black's explicit judicial philosophy did not necessarily contemplate a strong rationalizing role for the federal judiciary, his chosen constitutional methodology, combined with his sympathy for class political themes, led him to judicial outcomes that were strongly protective of individual rights and that had the clear effect of revising and discarding much constitutional doctrine that was simply incongruent with emergent social and political views.[157]

Similarly, Justice Frankfurter's judicial philosophy also sits oddly at first glance with a view of the Court as a rationalizing agent, given his intellectual and doctrinal prominence among the FDR appointees as an advocate of judicial restraint. Ideally for Justice Frankfurter, *judicial* rationalization of the law would be a less common occurrence, due to his strong philosophical preference for having the legislature stand out as the primary actor responsible for revising the law toward the goal of social reform.[158]

The more cautious judicial role envisioned by Justice Frankfurter did not stem from any legal formalist beliefs in a broad, categorical,

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154. MARK SILVERSTEIN, CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISION MAKING 130 (1984); UROFSKY, *supra* note 152, at 17–18, 88, 214–16; WIECEK, MODERN CONSTITUTION, *supra* note 136, at 77–78.

155. SILVERSTEIN, *supra* note 154, at 91, 93–95; UROFSKY, *supra* note 152, at 17–18; WIECEK, MODERN CONSTITUTION, *supra* note 136, at 72–73, 488.

156. SILVERSTEIN, *supra* note 154, at 91–92, 126, 130; WIECEK, MODERN CONSTITUTION, *supra* note 136, at 76, 488–90.

157. UROFSKY, *supra* note 152, at 86; WIECEK, MODERN CONSTITUTION, *supra* note 136, at 80–81.

158. SILVERSTEIN, *supra* note 154, at 83; UROFSKY, *supra* note 152, at 91–92; WIECEK, MODERN CONSTITUTION, *supra* note 136, at 84–85, 87.

timelessness to the law itself. To the contrary, he believed in the legal realist tenets that the law should be responsive to changing social needs.[159] Rather, his preference for judicial restraint stemmed from a well-worked-out theory of institutional roles and legal process. This also implied, however, that when the "proper" conditions were met for him—i.e., when legislation failed a rationality test and when judging took place in the proper, disinterested manner—Justice Frankfurter endorsed the notion of judges revising the doctrine in allowing for adaptations over time.[160] This aspect of his thought appears most prominently, if only implicitly, in the context of incorporation. Contrary to Justice Black's endorsement of "total incorporation," Justice Frankfurter's "fundamental fairness" approach inescapably encompassed the granting of tremendous discretion to judges to determine what particular rights to enforce against the states under the Fourteenth Amendment's Due Process Clause (though Justice Frankfurter claimed that this discretion would be constrained by adherence to judicial norms).[161] In the proper context then, Justice Frankfurter's philosophy of judging and the judicial role could indeed be quite hospitable to a rationalizing function for the Court.

II. IDEOLOGY AND THE JUDICIAL DELIBERATIONS ON *BROWN*

With these four ideological themes in mind, let us return to the *Brown* ruling for a closer look at the substance and timing of this decision. The various primary sources illuminating the Court's deliberations on *Brown* in both 1952 and 1953 have been closely examined and commented on by a number of scholars. In light of the subsequent commentary, it seems fair to say the deliberations are subject to at least a limited range of interpretations with different areas of emphasis. Most secondary accounts, however, have emphasized the severe divisions among the Court members on the *Brown* case in their 1952 conference. Such interpretations, in turn, allow for greater emphasis—whether intended or

159. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."); *see also* SILVERSTEIN, *supra* note 154, at 66–67, 143; WIECEK, MODERN CONSTITUTION, *supra* note 136, at 88, 478–79. Though to be sure, Justice Frankfurter endorsed a kind of adaptation within the law that would be consistent with certain core, enduring constitutional principles. SILVERSTEIN, *supra* note 154, at 71, 88–89.

160. SILVERSTEIN, *supra* note 154, at 55; WIECEK, MODERN CONSTITUTION, *supra* note 136, at 476, 482.

161. SILVERSTEIN, *supra* note 154, at 158–59; UROFSKY, *supra* note 152, at 91–92; WIECEK, MODERN CONSTITUTION, *supra* note 136, at 469–70, 495, 508–10, 514–16, 518–19. Justice Frankfurter believed that judicial discretion could be limited under his approach. Adamson v. California, 332 U.S. 46, 68 (1947) (Frankfurter, J., concurring) ("But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the State court under review.") *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964).

not—on individual personalities and maneuvering on the Court.[162] I would place emphasis, however, on another theme that is apparent in the deliberations[163] and that generally underlies the secondary accounts as well: the presence of a quasi-gravitational pull on the Court towards overruling *Plessy*. It is the presence of such an underlying influence that is most suggestive of deeper, structural forces at work in this particular ruling. And such a force was noticeably at work for the two FDR appointees most closely identified with a judicial restraint sensibility, and for whom the *Brown* litigation posed particular difficulties: Justice Jackson and Justice Frankfurter.

Under the conventional interpretation of events surrounding the *Brown* decision, the Justices—aside from Justice Reed—converged to overrule Jim Crow only in the subsequent 1953 conference after Chief Justice Warren had joined the Court.[164] Kluger notes that in the aftermath of the earlier 1952 conference, when Chief Justice Vinson was still on the Court, Justice Frankfurter thought the Court stood at a 5–4 majority in favor of reversing *Plessy*'s separate-but-equal rule; Justice Burton speculated that there was a 6–3 majority in favor of reversing; and Justice Jackson put the split among the Court somewhere between 5–4 to 7–2 in favor of reversing.[165] Additionally, Justice Douglas speculated that the votes in 1952 would have been 5–4 in favor of upholding segregated schooling in the states; and 5–4 in favor of discarding segregated schooling in the District of Columbia—with Justice Frankfurter the swing vote.[166]

Still, in light of the Court's subsequent unanimity on *Brown* (aided perhaps by Chief Justice Vinson's departure from the Court) and in light of the Court's earlier unanimous rulings against segregation in the higher education context in *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents*, one could plausibly wonder about the reliability of these conference notes for ascertaining the true preferences of the various Justices. That is, perhaps some of the Justices' qualms about reversing *Plessy* may have been overstated.

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162. Perhaps in sympathy with my interpretation, Tushnet notes how his interpretation of the *Brown* deliberations is driven, in part, by a critical reevaluation of Justice Frankfurter's importance and influence in the deliberations. *See* Mark Tushnet with Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1883–84, 1894, 1920–21, 1929–30 (1991).

163. My own examination of the conference deliberations is based upon an edited version of the Justices' notes presented in THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 644–71 (Del Dickson ed., 2001) [hereinafter COURT IN CONFERENCE].

164. KLARMAN, *supra* note 2, at 294–95, 300–01; KLUGER, *supra* note 4, at 682–85; BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 77, 88–89 (1983); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 36, 39–40 (1979).

165. KLUGER, *supra* note 4, at 614.

166. Justice Douglas' speculation of the vote count is mentioned in a memo dated May 17, 1954, that is reprinted in COURT IN CONFERENCE, *supra* note 163, at 660–61. *See also* KLARMAN, *supra* note 2, at 300–01.

Further, one might wonder how exactly these conference sentiments and speculative vote tallies would have translated into a judicial opinion immediately after the 1952 conference deliberations. There seems to be a relatively clear convergence among scholars on Justice Reed's skepticism towards overruling *Plessy*.[167] But with respect to the remaining Justices, the task might be more difficult to separate their respective sentiments on the substantive merits of the case from the distinct question about how the Court should proceed on the segregation issue.

To this end, in Mark Tushnet's interpretation of the Court's deliberations in 1952, he asserts that with the exception of Justice Reed, all of the Justices "had indicated a willingness to 'go along' with a desegregation decision that allowed for gradual compliance."[168] And Tushnet argues that even Justice Reed's stance had left an opening to such a result in 1952. The stark divisions among the Justices were not so much about the substantive result, he argues, but rather about "how to justify the result."[169]

One who is inclined toward Tushnet's interpretation need not wholly reject or dismiss the alternative interpretations of a highly divided Court in 1952; Tushnet may be read to merely emphasize those areas where there was emerging agreement on the Court.[170] And more generally, it should not be surprising that different take-away themes might be extracted from the earlier 1952 conference deliberations. At this early stage of the Court's deliberations, when the universe of potential judicial decisions remained relatively open and unconstrained, there were a greater number of ways in which the diverse sets of preferences among the Justices might be mapped out and reflected in a judicial opinion or opinions. To take the example of Chief Justice Vinson, even if he may have been leaning toward upholding *Plessy* in some form in 1952, such a preference might still have lost out in his internal calculations in favor of an alternative choice—a conditional preference to overrule *Plessy*, if a majority of the Court was inclined to do so. And such a majority may very well have existed, independent of Chief Justice Vinson after the 1952 conference deliberations.[171]

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167. *See, e.g.*, KLARMAN, *supra* note 2, at 294–95, 300; KLUGER, *supra* note 4, at 598–99.

168. Tushnet, *supra* note 162, at 1907.

169. *Id.* at 1907–09. The authors also argue that this convergence was arguably a little stronger by the 1953 conference deliberations as well. *Id.* at 1912–1914, 1930. The article is now part of Chapters 13, 14, and 15 in MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994).

170. Thus, in commenting on Kluger's assertion that Chief Justice Vinson was not prepared to reverse *Plessy*, Tushnet says that with respect to his own alternative interpretation of Chief Justice Vinson, "there is not much difference, aside from emphasis, between Kluger's cautious conclusion and my own." Tushnet, *supra* note 162, at 1904 n.172.

171. Justices Frankfurter, Jackson, and Burton thought there was at least a bare majority for reversing *Plessy* in 1952, though Klarman expresses a qualified skepticism on this point. KLARMAN, *supra* note 2, at 301–02.

A. Structural Influences in the Brown *Deliberations*

One general theme does emerge from most of these secondary accounts that is pressed most emphatically in the Tushnet interpretation; at least by the early 1950s, it was becoming clear that Jim Crow faced an increasingly uncertain fate in the federal judiciary. Thus, it was apparent even in the 1952 deliberations that among the five Justices who were not among the very clear votes to overrule *Plessy*—each hinted at an awareness of the infirmities of Jim Crow either as a normative matter or as a pragmatic matter.[172]

To the extent the segregation issue continued to confront the Court in the absence of prior resolution by the elected branches during these years, the Court's recognition of the growing infirmities of Jim Crow increased the odds that the federal judiciary would actually initiate a direct assault on Jim Crow.[173] This basic theme, in turn, strongly suggests a structural explanation for the *Brown* outcome. But beyond mentioning this more elementary point, I would suggest an additional point: that the structural dynamic present in these deliberations was clearly ideological in nature.

By way of supporting the latter point, consider in particular the votes of Justice Jackson and Justice Frankfurter. Their participation in the *Brown* deliberations is of interest for our purposes, since these were two FDR appointees who were deeply, philosophically inclined toward judicial restraint and who converged on similar concerns about judicial caution in this case. Notwithstanding such philosophical concerns, however, their votes were apparently driven at least in part by fidelity to class political themes and an endorsement of judicial rationalization.

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172. The five Justices were Frankfurter, Jackson, Vinson, Reed, and Clark. The ambivalence of Justices Frankfurter and Jackson was obvious in 1952. Chief Justice Vinson expressed various and significant reservations about immediate desegregation in his comments, and included the line—subsequent to his recounting of some of those reservations—that "[b]oldness is essential, but wisdom is indispensable." COURT IN CONFERENCE, *supra* note 163, at 647 (quoting Justice Clark's notes). This line suggests perhaps that Vinson was open to the idea of a desegregation ruling. *See id.* at 647 n.41; Tushnet, *supra* note 162, at 1902–04. Kluger, however, is somewhat more skeptical on Vinson's openness to such a ruling. *See* KLUGER, *supra* note 4, at 593. Justice Clark's comments do not express a strong position either way, but his endorsement of giving "the lower courts the opportunity to withhold relief in light of troubles" suggests at least his consideration of a desegregation result. COURT IN CONFERENCE, *supra* note 163, at 653; KLARMAN, *supra* note 2, at 297. Finally, even Justice Reed, the most consistent opponent to desegregation across the *Brown* deliberations, registered the view that "[s]egregation is gradually disappearing." COURT IN CONFERENCE, *supra* note 163, at 649. This is a point he would repeat in the 1953 conference deliberations as well. *Id.* at 656.

173. Klarman concurs with this point, though he emphasizes that an anti-*Plessy* ruling was not inevitable in 1954. KLARMAN, *supra* note 2, at 310–11. See Graber, *supra* note 14, at 63–64, for a discussion on the absence of legislative resolution on segregation prior to *Brown*.

B. Justice Jackson

In the case of Justice Jackson's ambivalence during the *Brown* deliberations,[174] at least part of what ultimately moved him to the side of desegregation was precisely his recognition of the incongruities and infirmities of Jim Crow within the broader legal and political structure. As he stated in a draft opinion, written in early 1954,[175] he was:

> [P]redisposed to the conclusion that segregation . . . has outlived whatever justification it may have had. The practice seems marked for early extinction. Whatever we might say today, within a generation [*Plessy*] will be outlawed by decision of this Court because of the forces of mortality and replacement which operate upon it.[176]

Hence, by 1954, Justice Jackson felt, as others on the Court undoubtedly felt as well, that segregation's eventual end was inevitable.

These observations dovetailed with his ultimate conclusion of overruling *Plessy* because the underlying factual assumptions of Jim Crow had eroded by that date.[177] Regardless of whether social conditions in the pre-*Brown* era may or may not have justified a regime of racial segregation, it was abundantly clear to Justice Jackson that such a regime could not be justified by the mid-twentieth century.[178] To quote from Schwartz's reproduction of the draft opinion (language in quotes are Justice Jackson's text):

> "Negro progress under segregation has been spectacular and, tested by the pace of history, his rise is one of the swiftest and most dramatic advances in the annals of man. It is that, indeed, which has enabled him to outgrow the system and to overcome the presumptions on which it was based."
>
> . . . "The handicap of inheritance and environment has been too widely overcome today to warrant these earlier presumptions based on race alone." Black advances, the draft went on, "require me to say that mere possession of colored blood, in whole or in part, no longer

174. Different scholars have characterized this ambivalence in different, though important ways. *See* KLARMAN, *supra* note 2, at 300, 303; KLUGER, *supra* note 4, at 609–11; Tushnet, *supra* note 162, at 1878–80, 1896, 1907, 1911–12. The interpretation most inclined toward characterizing Justice Jackson as opposed to *Plessy* is probably Schwartz, who argues that Justice Jackson was never inclined to uphold *Plessy* during these deliberations. "Despite Chief Justice Rehnquist's contrary assertion, Justice Jackson's actions during the *Brown* decision process indicate that he did not 'think *Plessy v. Ferguson* was right and should be re-affirmed.' What did concern Jackson was the question of how a proper opinion striking down segregation could be written." Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the* Brown *Case*, 1988 SUP. CT. REV. 245, 250 (1988) (footnotes omitted) (quoting Chief Justice Rehnquist's memorandum on *Brown*). Also crucial for Justice Jackson was the enforcement question. *Id.*

175. Schwartz asserts that Justice Jackson indeed viewed this draft opinion "seriously as a potential concurring opinion." Schwartz, *supra* note 174, at 264.

176. *Id.* at 255 (internal quotation mark omitted); Tushnet, *supra* note 162, at 1915.

177. Tushnet, *supra* note 162, at 1889, 1907, 1915–17.

178. Schwartz, *supra* note 174, at 261–62.

> affords a reasonable basis for a classification for education purposes and that each individual must be rated on his own merit."[179]

Because of these changed conditions, and because constitutional interpretation should be responsive to these changes, he concluded that segregated public education should be held unconstitutional:[180]

> "It is neither novel nor radical doctrine," Jackson affirmed, "that statutes once held constitutional may become invalid by reason of changing conditions, and those held to be good in one state of facts may be held to be bad in another. A multitude of cases, going back far into judicial history, attest to this doctrine."[181]

C. Justice Frankfurter

Similarly, Justice Frankfurter's concerns about judicial modesty translated into a strong preference for judicial gradualism with respect to a desegregation remedy. But most of the secondary accounts agree there was never a substantial possibility that Justice Frankfurter would vote to uphold *Plessy*.[182] Justice Frankfurter counted himself among a five vote majority in favor of overruling *Plessy* after the 1952 conference.[183] The primary concern for Justice Frankfurter was apparently to find the proper and most strategically sound manner of actually doing so with respect to the remedy question.[184]

Justice Frankfurter's relatively consistent position on overturning *Plessy*, combined with his consistent pro-civil rights votes in earlier equal protection cases involving African-Americans,[185] suggests the ideological pull of both class political ideals and the notion of the Court as a rationalizing agent—notwithstanding his explicit commitment to judicial restraint.[186] More substantial support for this view stems from a memo Justice Frankfurter wrote subsequent to the Court's conference deliberations in 1953, where he gave explicit voice to such rationalizing considerations in critiquing Jim Crow:

> Equally so [a judge] cannot write into our Constitution a belief in the Negro's natural inferiority or his personal belief in the desirability of segregating white and colored children during their most formative years. To attribute such a view to science, as is sometimes done, is to

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179. *Id.* at 262.
180. *Id.* at 263.
181. *Id.*
182. KLUGER, *supra* note 4, at 684; SCHWARTZ, *supra* note 174, at 76–77; Tushnet, *supra* note 162, at 1872, 1893, 1918. Klarman might be more cautious or skeptical on this point, however. *See* KLARMAN, *supra* note 2, at 301–03.
183. KLUGER, *supra* note 4, at 614.
184. *Id.* at 602–04, 618; Tushnet, *supra* note 162, at 1873, 1918, 1923, 1925–26.
185. MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 131–32 (1991).
186. *See infra* note 158 and accompanying text.

> reject the very basis of science, namely, the process of reaching verifiable conclusions. The abstract and absolutist claims both for and against segregation have been falsified by experience, especially the great changes in the relations between white and colored people since the first World War.[187]

Justice Frankfurter's memo, while also giving voice to judicial restraint concerns, concluded on a note emphasizing a dynamic judicial interpretation of the Equal Protection Clause: "Law must respond to transformation of views as well as to that of outward circumstances. The effect of changes in men's feelings for what is right and just is equally relevant in determining whether a discrimination denies the equal protection of the laws."[188]

The prospect of validating Jim Crow legal doctrines simply because of the pull of established precedent was likely not a real option for Justice Frankfurter; by the early 1950s at least, given the increasing social and political incongruity of Jim Crow, doing such a thing would have undermined any role for the Court as a rationalizing agent within the broader polity. Judicial actions upholding Jim Crow would have stamped the latter with federal judicial approval.[189]

In examining these dynamics behind the *Brown* decision then, it is instructive that the two most intellectually prominent advocates of judicial restraint among the FDR appointees somehow reached a point by the early 1950s where it became increasingly implausible that they would *not* initiate an assault on Jim Crow. That such a judicial outcome became increasingly plausible, though perhaps not imperative, by this time suggests certain ideological structures had become so accepted and prominent that they could ultimately outweigh the more explicit commitment of both Justices to judicial restraint.

III. JURISPRUDENTIAL BUNDLING AND OTHER IMPLICATIONS

Assuming I have successfully made my case for certain ideological linkages between the New Deal and *Brown*, several implications follow from this finding. First, and most obviously, I am suggesting these four ideological elements help account for *Brown* as a matter of legal and political development. I am suggesting the influence of these ideological elements on *Brown* substantially stems from the appointments mechanism—since these core ideas were components of the very New Deal principles that dictated the appointments of almost all members of the *Brown* Court. Thus in a sense, my argument is an elaboration on an ap-

187. KLUGER, *supra* note 4, at 684 (quoting an undated memorandum from Justice Frankfurter, found in the Frankfurter Papers at Harvard University) (internal quotation mark omitted).

188. *Id.* at 685 (quoting an undated memorandum from Justice Frankfurter, found in the Frankfurter Papers at Harvard University) (internal quotation mark omitted).

189. Tushnet, *supra* note 162, at 1872–75.

pointments theory of judicial behavior, though my focus is on a second-order consequence of the appointments mechanism. Judicial appointments processes driven by liberal economic goals had the effect of not only selecting judges sympathetic to the New Deal economic reforms, but also the ancillary effect of selecting judges who would be receptive to racially egalitarian goals as well.[190]

The claim is that these four ideological elements provided, at some level, a conceptual or ideational structure within which discrete political, institutional, and social forces might have been interpreted, filtered, and translated into judicial actions and justifications. These ideological elements provided a fundamental or more abstract view of society, governmental authority, and the judicial role that speak to how the *Brown* Court understood its own actions.

A second implication of the preceding Parts regards how we might view *Brown* in the broader stream of American constitutional development. While its direct assault on Jim Crow undoubtedly constitutes a critical juncture in constitutional development, there is also much about the ruling that speaks to continuities. Perhaps this is not terribly surprising, given that on its surface *Brown* sought to interpret and apply the commands of the Equal Protection Clause—a constitutional commitment enshrined nearly a hundred years before *Brown*. Yet, the argument in the preceding Parts suggests the continuities between the *Brown* outcome and prior ideological commitments are broader than a mere connection between the 1950s and the Reconstruction Amendments. Rather, the ideological continuities embedded in *Brown* bear connections to policy domains beyond those of race (such as labor) and to political constituencies that likely would not have been sympathetic to the ending of segregated public schooling (such as the Populists). Third, and related to the preceding point, these four ideological links between the New Deal and *Brown* also point to continuities between New Deal era progressive thought and the subsequent rights revolution that began with *Brown*—and that would also ultimately extend to subsequent jurisprudential advances toward equality in other contexts including gender and sexual orientation.

A. Jurisprudential Bundling

A final implication of the preceding Parts points to a broader claim: that in the judicial context, certain ideological structures may have sufficient internal clarity and cohesion that we might attribute some degree of

190. Describing my argument as a variation on the appointments mechanism is somewhat more attenuated in the context of my third ideational consideration: the northern-sectional outlook. In one sense, this idea was indeed present in New Deal era judicial appointments calculations. Yet, in another sense, the content of a northern-sectional outlook undoubtedly changed in a more Northern direction through the 1940s and 1950s. In this latter sense, this ideational component can be understood as, in part, a post-appointments dynamic as well.

independent influence to the ideas themselves in shaping judicial actions and arguments. Stated in more general terms, the juxtaposition of the New Deal appointments with the outcome of *Brown* presents this situation: a clear majority of the Court—indeed nearly the entire Court in this case—were appointed because they all, at minimum, fulfilled a precondition of being faithful to some set of legal and political principles (P_A) at a point in time, (T_1). P_A was sufficiently definite, coherent, and politically entrenched such that one might say it encompassed a distinct legal and political regime within some set of policy area(s). Subsequent to these appointments, however, this same set of judicial appointees noticeably and consistently converged upon a distinct set of principles (P_B) at (T_2).

We can confidently say that these latter principles were not a clear item for consideration in the prior appointments. Further, in the time between T_1 and T_2, there were no additional judicial appointments made with P_B being an item of concern for either the President or the confirming Senate. There was likewise no extra-legal regime change in support of P_B either, such that we might suspect a judicial "switch-in-time" analogous, arguably, to the Court's capitulation to the New Deal in *West Coast Hotel Co. v. Parrish*[191] or *NLRB v. Jones & Laughlin Steel Corp.*[192] The phenomenon that emerges, prompting inquiry, is whether the judicial convergence on P_A has anything to tell us about the subsequent judicial convergence on P_B?

Traditional theories of judicial behavior and appointments offer little help here, in finding a link between P_A and P_B and/or in explaining the subsequent judicial convergence at P_B—given the conditions stated above. As a result and not surprisingly, most historical explanations of *Brown*—a case that fits this template—bypass any ambition to find a link between the two instances of judicial convergence. As noted before, the scholarly emphasis in explaining *Brown* has instead been on discrete events, significant social and institutional forces, and particular judicial personalities that may have affected legal development in the period of time subsequent to T_1, but prior to T_2.[193]

Building upon the preceding Parts, however, I would propose a more general theory of "jurisprudential bundling" that is capable of illuminating how these two moments of judicial convergence might be linked through a common ideological structure. In addition, it is also capable of illuminating how intervening events, occurring between T_1

191. 300 U.S. 379, 398–400 (1937).

192. 301 U.S. 1, 47–49 (1937).

193. *See supra* notes 4–8, 162 and accompanying text. More generally, Epstein et al. have emphasized the possibility of legal change without membership changes to the Court by focusing on the dynamic of "ideological drift," or the possibility of shifts within a particular Justice's ideological orientation. Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1485–87 (2007).

and T_2, may interact with this common ideological structure and exert an influence on the judicial convergence upon P_B.

To return to the case of *Brown*, the ideological continuities between the New Deal and the post-WWII transformation in race and constitutional equal protection suggests that there might have been, at least in this particular historical period, some kind of basic ideological affinity between racial and economic liberalism.[194] If that is indeed the case, we can conceive of how the four ideological elements noted in Part I allowed economic and racial liberalism to be bundled such that a Justice's endorsement of the former had positive implications for that same Justice's approach to the latter.

Further, while my more specific claim is to suggest the existence of a jurisprudential bundling of economic and racial liberalism for the post-New Deal Court, a focus on the broader possibilities for ideological bundling suggests a more general role for ideas in the judicial context. Most tend to accept the claim of appointments-theorists of judicial behavior that at least some of the time, in clear-cut cases, certain ideas will find their way into Court rulings if those ideas have been selected for in the nomination and confirmation process.

My argument suggests there may be, in general, a second dimension to such theories of judicial behavior and legal development. Certain ideas may indeed influence the Court if they have been directly examined during the appointments process. But beyond that, secondary ideas that have been bundled with the ideas and principles directly considered may also end up influencing legal development as well. Thus, coherent ideological structures—if validated by the polity through the appointments process—can influence and help dictate judicial actions across a range of issues that presidents and senators, without the benefit of perfect foresight, are unable to address during the initial appointment of a Justice.

This is not to claim that the result in *Brown* was wholly determined by ideological factors. After all, the aforementioned elements of party ideology were present among the Democrats in various forms, sometimes for decades prior to the *Brown* ruling, without any analogous dismantling of Jim Crow. At the same time, there were also elements of Democratic Party ideology in the first half of the twentieth century, discussed above, that pressed in a decidedly *anti*-egalitarian direction.[195] Why the Court both seized on these four particular ideological strands as opposed to others and utilized these ideas towards a racially egalitarian result in

194. Though my argument is limited to the jurisprudential context, Eric Schickler's recent work on New Deal era public opinion polls suggests that a positive correlation between the two can be found in that context as well. *See* Eric Schickler, New Deal Liberalism and Racial Liberalism in the Mass Public, 1937–1968, 11 PERSP. ON POL. 75, 76–78 (2013).

195. *See supra* notes 72, 113–14, 130.

1954, demands an explanation that necessarily must lie beyond ideological dynamics.

Though this argument has been largely implicit in the preceding sections, I view the jurisprudential bundling dynamic as both shaped by broader political and social effects and constitutive of legal and political developments. With regard to the influence of broader political and social forces—such as the NAACP's litigation strategy, changing electoral dynamics, changes in public opinion, presidential-institutional influences upon the Court, foreign policy considerations—these political conditions were crucial to driving legal developments like *Brown* for at least two reasons. First, they helped dictate the emergence of certain party ideological elements as themes of concern and importance for political and judicial elites. That is, these conditions helped determine which strands of party ideology would become attractive or politically viable to important political and judicial actors at that moment in time.

Second, these political conditions also helped determine which institutional venues would emerge as attractive or convenient forums for the promotion of certain policy objectives. In the case of *Brown*, for example, the continuing influence of Southern Democrats in the elected branches—an important political condition at the time—helped to make the Court a relatively more attractive forum for racially egalitarian policy objectives. Accordingly, in such a context where political conditions facilitated a greater policy-making role for the Court, there was a corresponding importance to those ideas that were central to prior judicial appointments, that aligned with emergent political and social forces and that were susceptible to further elaboration into other policy domains via a bundling dynamic.

Yet, even if external forces help facilitate a given instance of jurisprudential bundling, the ideas themselves also influence political development. External forces may provide openings for the Court to act, but those forces do not necessarily explain why the Court itself will or will not seize certain opportunities. Jurisprudential bundling, I suspect, provides the answer to this question. Bundling provides a supplemental judicial motive to seize such opportunities to shape political and legal development, and it provides a set of foundational principles within which judges may justify their actions, both to themselves and others, in a manner consistent with the judicial role. In short, the ideas at play with jurisprudential bundling provide a means for judges to justify and understand their own actions within a broader framework of political principles that, due to certain supportive political conditions, are viewed at the time as attractive and legitimate principles.[196]

196. In thinking about how to understand the *Brown* Court along the dimensions of judicial activism or deference, Kevin McMahon emphasizes that the key element of New Deal Democrat

Thus, if a wide array of political circumstances sympathetic to minority rights in the early 1950s had been absent, I am indeed skeptical that the above-noted ideological elements would still have been powerful enough to prompt a judicial assault on Jim Crow. Rather, my claim is that given political circumstances in the 1950s, the Court was presented with a set of party-ideological themes that resonated with judicial elites and enough political actors that allowed for jurisprudential bundling to occur and helped effect and legally justify an outcome such as the *Brown* ruling.

Further, while it is certainly conceivable that Jim Crow could have been upheld by the Court at some point in the post-New Deal years, there is little doubt that such an outcome would have been seen as more inconsistent than consistent with broader political forces and the broader jurisprudential orientation of the Court during those years.[197] For the Court, the gravitational pull of the ideological commitments from the New Deal era onward clearly pressed in the opposite direction. Stated more broadly then, my claim is also that ideological structures—if they are sufficiently coherent and anchored to broadly-agreed-upon legal and political outcomes by the Justices—may generally be capable of exerting some degree of a gravitational pull toward those legal outcomes and principles that possess greater consistency with the ideological structure.

B. General Definition of Jurisprudential Bundling

With the preceding points on the table, let me state a more general definition of jurisprudential bundling: bundling occurs when a set of principles has a strong enough bearing on two (or more) doctrinal areas such that the judicial endorsement of those common principles will have consequences for doctrinal shifts in both bodies of doctrine.

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ideology that had bearing on the Supreme Court and the judicial role was *not* an ideal of judicial impotence. Rather, the Roosevelt administration was most interested in appointing Supreme Court Justices who would exhibit deference to presidential ambitions. Thus, when Roosevelt and Truman subsequently decided to pursue racial equality with more zeal, they would be able to count on having appointees on the Court who would be willing to act energetically on behalf of those presidential ambitions. MCMAHON, *supra* note 7, at 13–14, 17, 20–21, 142–43. That said, McMahon is also careful not to overreach in claiming a sole, direct causal relationship between Roosevelt's appointment considerations and the *Brown* result. *Id.* at 142. While he chooses to emphasize the efficacy of presidential-institutional strategies and actions in the development of civil rights law and the occurrence of *Brown*, he is careful to acknowledge the relevance of other factors in this development as well. *Id.* at 4, 8. In terms of where my argument diverges from McMahon's, while I see his argument as quite plausible, I see my own argument as addressing one set of influences upon the judiciary more internal to that institution, which operated alongside the powerful influences he discusses that were established by presidential actions. As such, again, the argument here offers relatively more emphasis on both the element of judicial initiative in the *Brown* decision, and how the Court understood its own actions within established ideological structures.

197. I qualify this assertion because one notable principle would indeed have rationalized the New Deal with a pro-Jim Crow result quite well: the principle of judicial restraint, which both Justices Frankfurter and Jackson struggled with in their deliberations on *Brown*. *See supra* Part II.B–C.

In articulating this definition, bundling has a clear relationship to two other well-known kinds of judicial behavior: analogical reasoning and "constitutional borrowing." Briefly defined, when employed by judges, analogical reasoning occurs when the similarity of legally relevant facts or characteristics between Case A and Case B accordingly influences a judge to apply the legal reasoning and conclusions of Case A to Case B.[198] A related, yet distinct, judicial action is constitutional borrowing which Tebbe and Tsai describe as follows:

> A person engages in borrowing when, in the course of trying to persuade someone to adopt a reading of the Constitution, that person draws on one domain of constitutional knowledge in order to interpret, bolster, or otherwise illuminate another domain. It is, in other words, an interpretative practice characterized by a deliberate effort to bridge disparate constitutional fields for persuasive ends.[199]

Similar to both kinds of legal reasoning or judicial behavior, bundling is a phenomenon that emphasizes the structural connections between at least two legal contexts, or two relatively well-defined and distinct doctrinal areas. Indeed, one might even say that bundling, borrowing, and analogical reasoning—when evaluated descriptively—converge at least superficially on a basic notion of inter-doctrinal continuity and coherence. Furthermore, I am also inclined to suspect these dynamics can quite often converge and overlap in a particular instance of inter-doctrinal dynamics.[200]

Still, in some crucial respects bundling might be usefully distinguished from borrowing and analogical reasoning as well. Most importantly, the ideological dynamic at work with jurisprudential bundling is not one where an idea migrates from one case to another or where a legal principle migrates from one doctrinal context to another. Bundling

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198. *See, e.g.*, Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 501–502 (1948); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 745 (1993). For normative defenses of analogical reasoning in the law, see *id.*, at 767–90, and Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1186–87 (1999).

199. Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 463 (2010) (footnote omitted).

200. Arguably, the Court's gender equality rulings in the 1970s might be such an instance of the convergence of analogical reasoning and jurisprudential bundling. Siegel notes that the Court's gender equality rulings in the 1970s represent a doctrinal shift that cannot easily be explained by appointments-centered or regime-centered theories of constitutional change. *See* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1336 (2006). She subsequently attributes this instance of legal development to the influence of constitutional cultural mechanisms. *See id.* Others, however, attribute these doctrinal shifts to the Court engaging in analogical reasoning between the race and gender contexts. *See, e.g.*, Bruce Ackerman, *Interpreting the Women's Movement*, 94 CALIF. L. REV. 1421, 1430–36 (2006). If the race-gender analogy was at work here, perhaps these gender equality rulings were influenced, in turn, by the same four ideological commitments discussed above that were implicated in the transformative change symbolized by *Brown*. For an extremely detailed historical analysis of the race-gender analogy, as deployed by feminist legal advocates, see generally SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011).

of the kind seen in *Brown* is an instance where an initial set of ideas or principles ultimately had an impact in multiple doctrinal areas. That is to say, the shift in *Brown*—the P_2 shift—was less the product of the New Deal case itself—P_1—and more the product of the four ideological commitments articulated in Part I that underlay *both* doctrinal shifts.

How do we know this to be the case with *Brown*? Why could not the source of the P_2 shift have been the result of P_1 itself? The text of the *Brown* opinion, along with what we know about the conference deliberations surrounding *Brown*, makes it quite clear that no explicit or near-explicit borrowing from the New Deal economic cases occurred. This was not a clear case of the kind of strategic or purposive idea appropriation by judges that Tebbe and Tsai describe in the context of constitutional borrowing.[201] Furthermore, no clear analogizing between the race context and the economic/labor context is apparent in *Brown* or its deliberations that might suggest this ruling was the product of judicial analogical reasoning either. Noting the latter point is hardly surprising, of course. I will say more about this in a subsequent section, but more than half a century of Democratic Party ideology had been premised upon the notion that economic and labor matters were distinct—and thus not analogous—to racial matters.[202]

My claim then is that an inter-doctrinal relationship did exist between the New Deal doctrinal shift on economic matters and the shift on racial equality in *Brown*, but this relationship is something distinct from either borrowing or analogical reasoning. It is certainly a structural relationship that is less apparent on the surface, and this is due, I believe, to how the common ideological links between these two doctrinal shifts were more submerged, abstract, basic, and foundational. The dynamic with bundling is thus more idea-driven as opposed to strategic actor-driven. Still, when a bundling dynamic is at work, it seems plausible that it might also manifest itself in an instance of analogical reasoning or borrowing. Indeed, we might speculate that a bundling dynamic may be at work when, within a particular doctrinal area, certain kinds of analogical connections or a particular form of borrowing is consistently and reliably made by judges. A jurisprudential bundling dynamic might constitute a structural force that is so powerful that a particular form of analogical reasoning or a particular instance of borrowing reliably and consistently becomes almost unquestionably attractive, or "reasonable," or "on the wall" (as opposed to off of it)[203] to some significant portion of the legal academic and professional elite.

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201. *See* Tebbe & Tsai, *supra* note 199, at 464.

202. *See infra* Part III.E.

203. *See* Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1444–47 (2001).

C. The Relative Insignificance of Ideas?

Having stated my general claims on bundling, let me conclude this Part with three potential critiques in the next three sections—each of which will hopefully aid in further illuminating the concept and how it bears on the case of the New Deal and *Brown*. The first critique concerns possible skepticism about emphasizing the role of ideas in the legal developments represented by *Brown*. Given the broad and varying set of causal influences upon that particular ruling, why should we expect ideological frameworks to matter at all?

More pointedly, it is also noteworthy that the ideological themes of class politics and a rationalizing Court had arguably been joined within Democratic Party ideology decades before the 1950s. If I am correct about their influence on the outcome in *Brown*, one might ask why a ruling striking down segregated schooling did not happen sooner. Indeed, perhaps the more important causal forces here were nothing more complicated than changing social and political values in the aftermath of the New Deal—changes perhaps as simple as increasing sympathy among whites for racial minorities. These types of causal forces would also have the virtue of illuminating why *Brown* happened in 1954, and not a decade or two earlier.[204]

As I have previously noted, intervening events and changes in social trends, such as greater sympathy among white elites for minority rights, undoubtedly played a key causal role in influencing the *Brown* ruling. More generally, such social-cultural forces will likely play some kind of causal role in most important constitutional developments as well.[205] Still, a focus on jurisprudential bundling—and the ideological frameworks that underlie instances of bundling—is worthy of our attention for at least one key reason: to the extent that events or social trends can drive *doctrinal* change, the influence of such intervening events or broader social developments must often be mediated or influenced by how those events or developments interact with well-established conceptual and ideational categories employed by judges. That is, even if changing popular attitudes on a given issue appear to be crucial in driving a particular instance of doctrinal change, such attitudes must often be first linked to broader political and legal worldviews before they can be formulated in new doctrines that judges and portions of the broader legal elite will find plausible and acceptable.

Consider that for a Supreme Court Justice in 1954 inclined to sympathize with minority rights, before such a sympathy could actually be

204. Scholars like Klarman have emphasized the importance of changing social and political values, particularly among social and political elites, in influencing judicial decisions. And he has indeed emphasized the significance of changed, more sympathetic white attitudes toward African Americans as a crucial influence in the *Brown* ruling. KLARMAN, *supra* note 2, at 308–10.

205. *See id.*; Siegel, *supra* note 200, at 1418–19.

employed by this Justice toward legally justifying an attack on Jim Crow, one presumes this person would have to possess—at least at some level of understanding—a belief about the basic framework of American society and its primary ills (are there entrenched social classes or are they more fluid?), and how those ills might be corrected by the state (should they be corrected? by the state or federal governments?). More significantly, a judge would also need to possess a basic notion about what judicial power entails in relation to both the elected branches and to prior established legal doctrines (when can the judiciary move ahead of the elected branches? when can doctrine be discarded?). It is precisely such basic ideological assumptions that are furnished by the elements of New Deal party ideology noted above.

In addition, a focus on ideological frameworks also has value for tracking and providing theoretical coherence to the array of intervening events and social trends that may be relevant in a particular instance of legal development. This is one implication of the discussion on a non-southern sectional slant on class politics in Part I—where I argued that the content of that particular ideological commitment was substantially informed by partisan developments. Again, the importance of these partisan trends lies to an important degree with how they influenced and reshaped a deeper ideological conception of class within the Democratic Party.

D. Possibilities for Ideological Influences in the Judicial Context

Assuming one agrees that ideological frameworks are worthy of attention in a historical examination of *Brown*, a second, and closely related critique arises; perhaps the frameworks themselves are wholly epiphenomenal and are nothing more than a reflection of broader social, political, and institutional forces. If that is the case, even if ideological frameworks can be identified in the background context of *Brown*, do they merit examination on their own terms? Or should an examination of ideas ultimately be an examination of ideas-as-politics through other means?

Though I deal with a more specific form of this critique in the next section, in its broader form, this critique grows out of the skepticism some scholars of party politics and coalition-building express toward the view that position-bundling in electoral politics is necessarily linked to ideological dynamics themselves. To the contrary, they tend to credit such bundling more to the interests of party elites in cobbling together various electoral constituencies for the purpose of winning elections.[206] Admittedly, such critiques do make sense when one is confronted with conspicuous odd couples in American party politics such as the familiar

206. *See* DAVID KAROL, PARTY POSITION CHANGE IN AMERICAN POLITICS: COALITION MANAGEMENT 15 (2009).

example of southern Democrats joining with African-American voters in the New Deal coalition, and social conservatives and libertarians joining together in the modern Republican Party.

Yet, even if ideologically-driven bundling may prompt skepticism in the realm of electoral politics and in the creation of party ideologies, at least one consideration suggests that forces more internal to the ideas themselves may have a greater role to play in the judicial context: electoral coalition management is simply not a concern for Supreme Court Justices. If bundling occurs with respect to jurisprudential concerns, and if we understand Supreme Court Justices to be engaging in their tasks in good faith, principled ways (and not, say, deciding every case with a base partisan concern toward making the road to electoral victory marginally easier for their party of choice in the next election), some other dynamic must be at work to bring about ideological convergences of the type seen in *Brown*.

Finally, one might critique my argument by proposing that it is instead basic partisan considerations driving legal development, rather than ideas, by emphasizing informal social-cultural mechanisms. The argument might be this: perhaps Justices adopt—*subsequent* to their appointment—partisan-driven changes in their preferred party ideology for the purpose of staying aligned with friends and peer groups that the Justices self-identify with.[207] In this way, ideological-bundling on the Court would be linked, if only indirectly, to partisan-driven position-bundling in the electoral arena.

To some extent, it seems possible that such a dynamic could have played a role with some of the Justices on the *Brown* Court. Further, such a dynamic, though not wholly ideological in nature, could be encompassed within my own argument that the *Brown* ruling was motivated in part by a less-southern sectional outlook that did change, to a degree, subsequent to some of the *Brown* Court appointments. That said, I am skeptical that such a dynamic can wholly account for *Brown* or that it can wholly displace any role for the ideas themselves in influencing judicial behavior. At most, this sort of dynamic might account for a growing sympathy for African-American rights on the Court, given the growing importance of African-American voters for Democratic Party electoral success. However, this dynamic might not as easily account for the Court's willingness to move first on the civil rights issue, nor would it necessarily account for the Court's willingness to overcome the pull of stare decisis and initiate a very dramatic reversal on established constitutional doctrine.

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207. *See* Schickler, *supra* note 194, at 85–87 (suggesting the possibility of this sort of dynamic occurring for partisan-bundling in the electorate).

E. The Juxtaposition of Economic and Racial Liberalism and the Possibility of Ideological Transformation

A more specific form of the ideas-are-epiphenomenal critique might be restated as follows: to the extent that I am claiming an ideological affinity of sorts between racial and economic liberalism, the Populists and multiple generations of southern Democrats suggest the opposite conclusion. Indeed, the political ideologies of both were, in a significant way, premised upon the *differentiation* between, or "unbundling" of, racial and economic liberalism. William Jennings Bryan himself is the perfect example of this unbundling, with his liberalism on the latter, and his concession to Jim Crow on the former.[208] Similarly, Katznelson, et al.'s examination of congressional roll call votes offers support for another historical example of the unbundling of the two issues, with respect to the New Deal and post-New Deal era southern Democrats.[209] They note a strong convergence between southern and non-southern Democrats on matters related to federal statism on economic affairs, while also noting two prominent points of divergence between these two wings of the Democratic Party with respect to matters of race and (after a time) on labor as well.[210] In light of the quite striking historical juxtaposition of the Progressive Era southern Democrats to the *Brown* Court, this suggests that conceptions of class and federal governmental statism are particularly malleable in relation to broader political forces. At least with respect to these particular ideas, this suggests that perhaps the ideas ultimately possess little autonomous influence.

Substantively unpacking the status of economic and racial liberalism from the late nineteenth century to the mid-twentieth century is a major task that requires much greater in-depth examination elsewhere. At least for the present argument, I think a sufficient justification for treating these ideas on their own terms might be drawn from arguments presented above regarding the framing or mediating influence of conceptual frameworks and the relative autonomy of such frameworks, *in the judicial context*. Having said that, let me conclude on a mildly speculative note on how, even with the example of the Populists and the progressive southern Democrats in mind, an analytical space might still be carved out for the relative autonomy of more liberal racial and economic ideas.

As a preliminary point, it is hard to dispute the fact that basic political forces are much of the reason why more liberal racial and economic ideologies were bundled together in the post-New Deal Democratic Party and why they were unbundled for the southern Democrats in the decades before. Indeed, this is a point of relative emphasis in the preceding argu-

208. *See* KAZIN, *supra* note 43, at 93–94; SANDERS, *supra* note 79, at 156–57; SARASOHN, *supra* note 51, at 18–19.

209. Katznelson, Geiger & Kryder, *supra* note 72, at 285–86, 288, 292–94, 299.

210. *Id.*

ment in Part I and my discussion of the gradually less-southern orientation of conceptions of class in the Democratic Party.[211] One crucial distinction between the ideological context of *Brown* and the ideological context of the populists and Progressive Era southern Democrats is precisely that the southern Democrats and the Populists still fundamentally conceived of class politics in economic and regional terms due to their southern-sectional biases.[212] Approaching class political ideals freed from those biases, post-New Deal Democratic Party ideology was capable of generating more racially progressive outcomes that ultimately gained momentum in the middle of the twentieth century. Quite clearly then, abstract political ideas such as "class" or "equality" or "democracy" can be described as somewhat-unfilled vessels that are given content by strategic political actors.

In these respects the ideological dynamics underlying class speak to related arguments put forth separately by Balkin and Skowronek. Balkin, for his part, has emphasized a dynamic of "ideological drift" where legal theories or principles may acquire new political valences and new political meanings when actors deploy them in new contexts.[213] An example of this dynamic at work would be the notion of the "colorblind" constitutional view of racial equality; as Balkin recounts, this concept was deployed as a progressive critique of Jim Crow in Justice Harlan's dissent in *Plessy v. Ferguson*, but in the modern legal context, it is more often used by those considered to be on the right of the political spectrum.[214]

Relatedly, the evolution of class politics within the Democratic Party speaks to an ideological dynamic Skowronek has examined in the context of the political thought of Woodrow Wilson. Specifically, he traces how Wilson creatively and cleverly appropriated ideas such as "nationalism" and "democracy" in the service of a broader political outlook that aligned well with Wilson's sympathies toward southern racial hierarchy.[215] Further, and even more directly tied to the preceding discussion, Skowronek discusses how these ideas developed by Wilson later came to be appropriated by defenders of modern American liberalism.[216] Skowronek refers to this phenomenon as the re-association of ideas with different programmatic purposes.[217]

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211. *See supra* Part I.C.

212. *See supra* notes 41–44, 79–103 and accompanying text.

213. J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 871 (1993).

214. *Id.* at 871; *see* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Balkin notes that the phenomenon of drift might be understood in either of two senses: first, an idea's meaning or valence may change as a consequence of the idea having a different political consequence in a different context. Separately, an idea's meaning or valence may change as a consequence of the idea's content changing within a new context. Balkin, *supra* note 213, at 871–72.

215. Skowronek, *supra* note 95, at 393–95.

216. *Id.* at 388–89, 398–99.

217. *See id.* at 398–400.

Both Balkin and Skowronek are attentive to how the political meaning and valence of ideas is subject to the pull of broader social and political forces. Yet, both theories are also attentive to a qualified kind of autonomy that ideas enjoy as well, and that justify an examination of ideas on their own terms. Balkin emphasizes that even if the meaning of ideas is constituted by political actors, ideas also function to constitute political actors as well—in shaping what those actors will find to be reasonable or unreasonable.[218] Likewise, Skowronek emphasizes how the "re[-]association of ideas and purposes" can be an enormously consequential act of ideological appropriation, where genuinely new facets of the American political tradition may be created.[219] As Skowronek states in reference to Wilson:

> Staking a reactionary cause on democratic principles may be a purely instrumental act, but it is not for that an inconsequential one. The vocabulary of democracy can be constitutive in its own right. To the extent that the ideational foundation of the cause shifts, new meanings will be generated, meanings with implications that will reflect back on principles and causes alike.[220]

Likewise, the juxtaposition of earlier southern Democrats to the *Brown* Court is particularly instructive for illuminating how even if ideas are politically influenced at their inception and afterward, the ideas may still exert an autonomous force in the form of the logic and grammar that develops and emanates from the concept itself. Consider a preliminary point: the initial irony aside, it is perhaps not at all surprising that Populists and southern Democrats in the Progressive Era would be joined to New Deal era Democrats in embracing notions of class politics or, in certain contexts, federal statism as well. (And, one might assume that the former would probably have few reservations about a judiciary willing to approach the law in more instrumental, pragmatic terms too—at least with respect to economic matters.) These ideas are, at their root, ultimately about protecting the rights and advancing the interests of minority groups through state power, and as such, will always be attractive ideological tools for those on the margins, or who fear being on the margins, of social and political power—but who have sufficient political clout to articulate their grievances in mainstream political discourse. It is no surprise then that such ideas (though only applied to white men) would be so strongly embraced in the South, where fears of sectional oppression have historically run high. More significantly, it is no surprise that such ideas would be attractive to the Populists at the turn of the century seeking progressive goals of economic reform. And finally, it should be of no

218. Balkin, *supra* note 213, at 877–80.
219. Skowronek, *supra* note 95, at 385–86, 388, 398–400.
220. *Id.* at 399.

surprise that such ideas would prove equally useful and powerful in the service of progressive goals for racial minority rights.

I would propose that there is perhaps something in the conceptual structure of class differentiation, and how that concept has been deployed over time, that speaks to both the political influence of new partisan alignments *and* the autonomous influence of the concept itself. How such a transformation in the concept of class occurs over time is, of course, primarily a function of political party dynamics. For an idea to undergo such a transformation within a political party's ideology, there must be a change or shift in the relative power of that party's core constituencies in order to destabilize accepted meanings and understandings of the concept. In addition, there must also be an element of continuity among these party constituencies as well, so that the party's grammar and basic concepts are maintained, even as they are deployed toward new purposes. These are the most obvious "political" elements involved in a transformational shift in a party's ideological commitments, and they speak to the influence of external political forces upon the content of political ideas.

Yet, the consistent deployment of the concept of class on behalf of well-defined "outsider" constituencies within the Democratic Party over time speaks to the attractiveness and influence of the concept and its rhetorical structure to those affiliated with that party as well. And for the present argument with respect to *Brown*, the very long-running status of the concept of class and its rhetorical structure within the Democratic Party raises the suspicion that the familiarity of the concept to the largely Democratic appointees of the *Brown* Court may have aided that outcome, in some manner.

That is, when one considers the increasing judicial sympathy for racial minorities in the constitutional doctrine that culminates in *Brown*[221]—sympathies that occurred ahead of the elected branches and without the benefit of a decisive, contemporaneous political regime change on racial matters—one suspects that Democratic judicial appointees, long comfortable with the grammar of class politics, may have consequently found it more plausible, and relatively less troubling, being in the vanguard on the dismantling of Jim Crow. Even if the rights revolution encompassed a major redefinition of which classes were worthy of state protection, the enterprise of employing state power to protect certain, disfavored classes had been an idea central to the Democratic Party for at least a half-century by the time *Brown* was decided. Drawing on

221. Just with respect to cases in the education context, see, for example, McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637, 641–42 (1950); Sweatt v. Painter, 339 U.S. 629, 634–636 (1950); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 349–50 (1938).

Balkin's point, the concept of class was constitutive in how these particular political actors perceived, ordered, and responded to their context.[222]

Finally, the significance of the bundling of racial and economic liberalism for members of the *Brown* Court stems not just from the immediate consequence of the *Brown* ruling, but from the new grammar and ideology that followed from it. In the same manner that Skowronek views Woodrow Wilson's appropriation and reformulation of key components of the American political tradition as a deeply creative act, something similar might be said regarding the reconceptualization of class in the 1930s that culminated in the *Brown* decision.[223] The grammar of the Populists and southern Democrats of the Progressive Era, once shed of its distinctive regional affiliation with the South, has become the dominant grammar of modern equal protection and social status.

CONCLUSION

In illuminating a shared ideological foundation between *Brown* and the New Deal, this Article pursues three core goals. First, it sheds light on the ideological factors behind the *Brown* ruling, one of the oddest cases in constitutional development. Second, it highlights the strong but less-than-obvious ideological linkages between the New Deal and the mid-twentieth century Rights Revolution. Third, the Article's investigation of jurisprudential bundling offers an initial and focused examination of how party ideologies, broader political developments, and Supreme Court appointments dynamics intersect and allow for ideas to influence the development of constitutional doctrine.

222. *Cf.* Balkin, *supra* note 213, at 871–72 (examining the concept of ideological drift).

223. *Cf.* Skowronek, *supra* note 95, at 398–400 (examining the process of how racist and liberal ideas became mutually constitutive in arguments set forth by Woodrow Wilson and John C. Calhoun).