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BROWN, DEMOCRACY, AND FOOT VOTING

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INTRODUCTION

It is a privilege to participate in the *American Journal of Law and Equality* symposium on the 70th anniversary of *Brown v. Board of Education*.[1] *Brown* may well be the Supreme Court's most iconic decision.

But the privilege is also a burden. Much greater thinkers than I have written eloquently and insightfully about *Brown*, its meaning, and its legacy. Almost every aspect of the decision has been analyzed by scholars, jurists, and others. Coming up with a thesis on *Brown* that is both new and useful is a tall order indeed. But, as the saying goes, fools rush in where the wise fear to tread.[2] So I attempt the task, nonetheless.

In this article, I argue that traditional assessments of *Brown*'s relationship to democracy and popular control of government should be augmented by considering the ways it enhanced citizens' ability to vote with their feet as well as at the ballot box. This argument builds, in part, on my previous work on foot voting and democracy.[3] *Brown* played a valuable role in expanding foot-voting opportunities, and this has important implications for our understanding of the decision and its legacy.

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

2 The saying appears to be an adaptation of Alexander Pope's line: "Fools rush in where angels fear to tread." Alexander Pope, *An Essay on Criticism* (1711), POETRY FOUND., https://www.poetryfoundation.org/articles/69379/an-essay-on-criticism (last visited May 17, 2024).

3 *See* ILYA SOMIN, FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM (rev. ed. 2022) [hereinafter FREE TO MOVE]; Ilya Somin, *Foot Voting, Federalism, and Political Freedom, in* NOMOS LV: FEDERALISM AND SUBSIDIARITY 110 (James Fleming & Jacob Levy eds., 2014) [hereinafter *Foot Voting*].

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People can vote with their feet through international migration, by choosing which jurisdiction to live in within a federal system (if the decision is at least partly driven by variations in government policy), and by making choices in the private sector when it provides services traditionally associated with state and local government.[4] School segregation—and Jim Crow more generally—severely constrained at least the latter two types of foot voting.

Brown's connection to democracy has been much discussed and debated. On the face of things, there is an obvious tension between the idea that courts should defer to and promote democratic processes and the overturning of a public policy strongly supported by political majorities and legislation in a large part of the country. And it was not just any policy: school segregation—and racial segregation more generally—was a central element of the Jim Crow–era southern way of life. Less extensive, but still significant, segregationist policies existed in other parts of the country as well.[5]

For decades, these policies enjoyed broad public and elite support. While that support had begun to erode by the time *Brown* was decided in 1954, it continued to remain strong in the white South. The Supreme Court's ruling at the very least accelerated segregation's demise.

One obvious answer to the potential trade-off between democracy and judicial invalidation of segregation is that the defeat of such a great injustice was a legal and moral imperative sufficient to override democracy.[6] I do not disagree. But it is still important to consider whether and to what extent *Brown* was actually a sacrifice of democratic values at all. Even if the resulting analysis does not change our evaluation of *Brown*, it could affect our analysis of its implications for other issues.

In part I of this article, I briefly summarize the relationship between foot voting and ballot-box voting and how the former has important advantages over the latter as a mechanism of political choice. Relative to ballot-box voting, foot voting offers individuals and families greater opportunities to make decisive, well-informed choices. It also has special advantages for minority groups, including Blacks.

Part II considers traditional attempts to reconcile *Brown* and democracy through arguments that the decision was actually "representation reinforcing." While each of these arguments has its merits, they also have significant limitations. Among other things, they often do not apply well to the *Brown* case itself, which famously originated in a challenge to segregation in Topeka, Kansas,[7] a state in which—unlike in most of the South—Blacks

4 For a more detailed overview of these types of foot voting, see Somin, Free to Move 7–9, chs. 2–4.

5 *See, e.g.*, Davison Douglas, Jim Crow Moves North: The Battle over Northern School Segregation, 1865–1954 (2005); The Strange Career of Jim Crow North (Brian Purnell et al. eds., 2019).

6 For the classic statement of this view, see generally Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421 (1960).

7 The Kansas case was, of course, combined with others from southern Jim Crow states. *See, e.g.*, Richard Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality chs. 15–17 (1975) (describing how the cases came to be combined).

had long had the right to vote.[8] They also have difficulty handling segregation laws in situations where the minority groups targeted for exclusion are able to participate in the political process and make coalitions, but simply get outvoted or include pro-segregationist elements in their own ranks (a scenario that is not as far-fetched as it may seem).

Part III explains how expanding our assessment of *Brown* to include foot-voting opportunities plugs the major holes in traditional efforts to reconcile the decision and democratic choice. Among other things, the foot-voting rationale for *Brown* applies regardless of whether racial minorities have voting rights, regardless of whether segregation laws are motivated by benign or malevolent motives, and regardless of whether the targeted ethnic groups can form political coalitions with other groups. The impact is greater once we consider the implications of *Brown* for foot voting in contexts that go beyond schools.

In part IV, I discuss the implications of the foot-voting justification of *Brown* for judicial review of other policies that inhibit foot voting, particularly in cases where those policies have a history of illicit racial motivations. The most significant of these is exclusionary zoning. My reconceptualization of *Brown* does not definitively resolve the issue of how courts should handle these other issues. But it does strengthen the case for a nondeferential approach.

The analysis in this article is primarily relevant only to constitutional theories that emphasize the value of democracy and popular political choice. It has far less relevance to theories that mostly rely on other considerations, such as some versions of originalism that focus on nondemocratic justifications for the theory[9] and living-constitution theories that rest on nondemocratic moral foundations.[10]

But a wide range of constitutional theories do set great store by democracy and popular political choice.[11] The so-called "countermajoritarian difficulty" and attempts to resolve it have been a major focus of constitutional theory for decades.[12] For theories

8 *See*, *e.g.*, Randall Woods, *Integration, Exclusion, or Segregation? The "Color Line" in Kansas, 1878–1900*, 14 Western Hist. Q. 181, 185 (1983) (noting "blacks effectively enfranchised in 1870," when Kansas ratified the Fifteenth Amendment, and there were no effective subsequent attempts to disenfranchise them); Barbara Shelly, *How Kansas Voting Laws Came to Be*, The Journal: A Civics Magazine (Oct. 11, 2022), available at https://klcjournal.com/how-kansas-voting-laws-came-to-be/ (noting that "[a]fter the 15th Amendment was ratified in 1870, Black men in Kansas generally did not endure the discriminatory practices that became common in the South").

9 *See*, *e.g.*, Randy E. Barnett, Restoring the Lost Constitution (2004) (providing a defense of originalism emphasizing liberty and need for binding constraints on government).

10 *See*, *e.g.*, Ronald Dworkin, Law's Empire (1986) (providing a rights-based moral theory of interpretation).

11 For an overview of the role of democracy in various types of constitutional theory, see Larry Solum, *Legal Theory Lexicon: The Counter-Majoritarian Difficulty*, Legal Theory Blog (Dec. 26, 2021), https://lsolum.typepad.com/legaltheory/2021/12/legal-theory-lexicon-the-counter-majoritarian-difficulty.html.

12 The classic work is, of course, Alexander Bickel, The Least Dangerous Branch (rev. ed. 1986). For overviews of the history of debates over the topic, see Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 Nw. U. L. Rev. 933 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. Rev. 333 (1998).

concerned with such issues, the foot-voting rationale for *Brown* has obvious relevance and value.

I. FOOT VOTING AND BALLOT-BOX VOTING

Both constitutional theorists and many others tend to assume that ballot-box voting is the essence of political choice.[13] But ballot-box voting has two serious shortcomings that can be mitigated by giving citizens opportunities to "vote with their feet." These advantages of foot voting are more fully described in my book *Free to Move: Foot Voting, Migration, and Political Freedom*.[14] Here, I provide only a brief summary.[15]

The first is that individual ballot-box voters have little chance of controlling the policies they live under. The odds that an individual vote will make a meaningful difference are minuscule: about 1 in 60 million in a presidential election, for example.[16]

Effective freedom requires the ability to make a decisive choice. For example, a person does not have meaningful religious freedom if she has only a 1-in-60-million—or even a 1-in-a-million—chance of being able to determine which religion she wishes to practice. A 1-in-60-million chance of deciding what views you are allowed to express is not meaningful freedom of speech. What is true of freedom of speech and religion also applies to political freedom. A person with only an infinitesimal chance of affecting what kind of government policies they must live under has little or no genuine political choice.[17]

The near powerlessness of individual voters also incentivizes them to make little or no effort to become informed about political issues. Surveys consistently show that voters are

13 Most of the debate over the countermajoritarian difficulty in constitutional law is implicitly based on the assumption. *See*, *e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962). I have criticized the assumption in Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the "Central Obsession" of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004) and Ilya Somin, *How Judicial Review Can Help Empower People to Vote with Their Feet*, 29 GEO. MASON L. REV. 509 (2022) (symposium on "The Will of the People").

14 SOMIN, FREE TO MOVE, *supra* note 3, ch. 1. Foot voting is related to but distinct from Albert Hirschman's concept of "exit" and from Charles Tiebout's classic model of interjurisdictional choice. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970); Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 516 (1956). For a discussion of the differences, see SOMIN, FREE TO MOVE, *supra* note 3, at 8–9.

15 The summary is adapted from Ilya Somin, *Empowering Hispanics to Vote with Their Feet*, 61 HOUS. L. REV. 777 (2024) (Frankel symposium). These points are explored in more detail in SOMIN, FREE TO MOVE, *supra* note 3, ch. 1.

16 *See* Andrew Gelman et al., *What Is the Probability That Your Vote Will Make a Difference?*, 50 ECON. INQUIRY 321 (2012). For more detailed discussion of this and alternative methods of estimating the odds that a vote might be decisive, see ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER 75–79 (rev. ed. 2016).

17 *See* SOMIN, FREE TO MOVE, *supra* note 3, ch. 1 (developing this point in greater detail).

often ignorant about even basic aspects of the political system and government policy.[18] For example, in many polls, only about a third can even name the three branches of government: executive, legislative, and judicial.[19]

Some scholars argue that political ignorance is not much of a problem because voters can overcome its effects through some combination of information shortcuts—small bits of knowledge that substitute for larger bodies of information—and "miracles of aggregation, under which the electorate as a whole makes good decisions even if most individual voters have little knowledge.[20] Although shortcuts can be useful in some situations, I have criticized them—and miracles of aggregation—in detail elsewhere.[21] In many situations, the use of shortcuts actually makes the situation worse rather than better.

Voting is not the only mechanism of traditional political participation. Some can also try to influence government policy via lobbying, campaign contributions, and political activism. But opportunities for such participation beyond voting are highly unequal.[22] Even if access to such participation could somehow be equalized, we would still be left with the reality that each individual citizen would have only a minuscule chance of influencing policy outcomes. If participation beyond voting were fully equal, each individual participant would have no better odds of changing things by those mechanisms than they do by voting. In both cases, increasing the influence of some necessarily means diminishing that of others.[23]

Things are very different when people vote with their feet. When you decide what jurisdiction to live in, that is a decision you have real control over. That in turn creates strong incentives to seek out relevant information.[24] The same applies to private-sector choices and choices about international migration. Most people probably devote more time and effort to deciding what television set or smartphone to buy than to deciding who to vote for in any election. The reason for this is not that the television set is more

18 For extensive overviews, see, e.g., Somin, *supra* note 16, ch. 1; Rick Shenkman, Just How Stupid Are We? (2008); Jason Brennan, Democracy; A Guided Tour chs. 6–7 (2023); Jason Brennan, Against Democracy (2016); Michael X. Delli Carpini & Scott Keeter, What Americans Know About Politics and Why It Matters (1996); Scott Althaus, Collective Preferences in Democratic Politics (2003); Christopher Achen & Larry Bartels, Democracy for Realists (2016).

19 *See* Somin, supra *note* 16, at 20.

20 *See, e.g.*, Donald Wittman, The Myth of Democratic Failure (1995); Hélène Landemore, Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many (2013); James Stimson, A Macro Theory of Information Flow, Information and Democratic Processes (1990); James Surowiecki, The Wisdom of Crowds: Why the Many Are Smarter Than the Few ch. 12 (2004).

21 Somin, *supra* note 16, ch. 3.

22 For discussion of the implications of this inequality for political choice, see Somin, Free to Move, *supra* note 3, at 35–36.

23 *Id.* at 36.

24 For more detailed discussion of the relevant comparative incentives, see *id.*, ch. 1; Somin, *supra* note 16, ch. 5.

important than who governs the country but rather that the decision about the TV has real effects. Both basic economic theory and extensive empirical evidence show that foot voters seek out more information than ballot-box voters and do a better job of evaluating what they learn.[25]

Foot-voting opportunities are, obviously, constrained by moving costs. For example, some find it difficult or impossible to move because of job opportunities or family ties. But even if foot voting is not effective for everyone, it does still have important advantages in the many situations where it is available or can be made so. Moving costs can be reduced in various ways, such as by decentralizing powers to lower levels of government and to the private sector.[26] Moreover, moving-cost problems must be weighed against the even greater drawbacks to effective choice in ballot-box voting, where it is almost impossible for the individual voter to have a decisive impact.

Foot voting is not a complete panacea for inadequate political choice. But its availability can greatly improve the situation and give large numbers of people meaningful choices they would not have had otherwise. At the very least, it is often an extremely valuable complement to ballot-box voting that offsets key shortcomings of the latter.

II. TRADITIONAL ATTEMPTS TO RECONCILE *BROWN* AND DEMOCRACY

This article is far from the first work to address the relationship between *Brown* and democracy. There have been a variety of previous attempts to explain how the outcome in *Brown* is reconcilable with respect for popular control of government. But each has significant limitations.

The issue here is far from trivial. Racial segregation in education was not just any policy enacted through the democratic process. It enjoyed widespread support and was a central feature of the Jim Crow–era political and social system in the southern states.[27] Racial segregation was backed by strong political majorities in southern states, and even many northern whites were unwilling to support efforts to end it.[28] For legal and political theorists who hold that judicial deference to democracy is an important value but also believe

25 For an extensive overview, see Somin, *supra* note 16, ch. 5.

26 Somin, Free to Move, at 49–53; *see also* discussion of potential reforms to exclusionary zoning in part IV, *infra*.

27 For overviews, see, e.g., Jerrold M. Packard, American Nightmare: The History of Jim Crow chs. 3–5 (2003) (describing deeply rooted nature of the Jim Crow system); C. Vann Woodward, The Strange Career of Jim Crow ch. 3 (1957) (classic account of the origins of the Jim Crow system and widespread support for it among whites).

28 For a critique of claims that *Brown* merely reflected the views of a broad national majority, see Justin Driver, The Schoolhouse Gate: Public Education, the Supreme Court and the Battle for the American Mind 253–56 (2018) (noting strong support for segregation among southern whites and relative "apathy" on the subject among many northerners).

Brown is an iconic decision, reconciling the two is an important objective. Moreover, the basis for the reconciliation is likely to have significant implications for other cases. The reasoning that justifies *Brown* may also justify other judicially enforced constraints on democratic decision-making.

The most obvious way of squaring the circle here is by pointing out that school segregation emerged in the South in large part because the vast majority of southern Blacks were denied the vote for many decades.[29] Otherwise, they could have influenced policy on public schools—and much else.

On this view, *Brown* can be seen as merely restoring—at least in part—the state of affairs that would have existed had Blacks been able to participate in the political process by voting. In their important book *Originalism and the Good Constitution*, prominent originalist legal scholars John McGinnis and Michael Rappaport argue against the common view that originalism is incompatible with *Brown*. They emphasize that school segregation was in large part a consequence of violations of the Fifteenth Amendment, which bans racially discriminatory deprivations of voting rights—violations that the judiciary and the federal government as a whole generally failed to address for many years.[30]

What works for originalists could also apply to advocates of living-constitutionalist theories of interpretation that assign high value to democracy. They too can defend *Brown* on the grounds that it merely sought to create a state of affairs similar to that which would have existed in the absence of massive, prolonged disenfranchisement.

There is much truth to this argument. It is hard to deny that state government policies would have been much less harmful to southern Blacks if they had been able to vote. As a large proportion of the population in every southern state, Blacks would have been an important voting bloc that politicians would have had an incentive to cater to, at least to some substantial degree.[31] For that reason, *Brown* was, in part, a belated effort to offset the consequences of southern Blacks' longtime disenfranchisement.

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29 For an overview of the extent of Black disenfranchisement and how it meaningfully changed only after the enactment of the Voting Rights Act of 1965, see Chandler Davidson & Bernard Grofman, Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990 (1994); *cf.* V.O. Key, Southern Politics in State and Nation (1949) (classic account of Black disenfranchisement in the Jim Crow era).

30 John O. McGinnis & Michael Rappaport, Originalism and the Good Constitution 9–10, 108–11, 193–94, ch. 6 (2013). This is not the only possible originalist rationale for *Brown*. For other attempts, see, e.g., Randy Barnett & Evan D. Bernick, The Original Meaning of the 14th Amendment: Its Letter and Spirit 189–91 (2021); Michael W. McConnell, *Originalism and the Segregation Decisions*, 81 Va. L. Rev. 457 (1995); Steven Calabresi & Michael Perl, *Originalism and* Brown v. Board of Education, Michigan St. L. Rev. 429 (2014).

31 According to the 1950 census, Blacks were at least 12.7% of the population in every southern state. Minwuyelet Azimeraw, D.C. State Data Ctr, Black or African American Population in the United States, the Washington Primary Metropolitan Statistical Area (PMSA), and the District of Columbia from 1950 to 2010 (Aug. 2014), https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/Black%20Population%20in%20DC%20MSA%20and%20US%20-%20August%202014_2.pdf. The percentages ranged from 12.7% in Texas to 45.3% in Mississippi. *Id.*

But this justification for *Brown* also has crucial limitations. As already noted, it does not justify striking down school segregation laws in jurisdictions where Blacks *did* have the right to vote, including the state of Kansas, where the *Brown* case originated.[32] Because Blacks constituted only 3.8% of the population of the state as a whole[33] and only about 8% of that of the city of Topeka,[34] they were too small a constituency to forestall discriminatory policies catering to the preferences of the white majority.[35]

The same point applies to school segregation in northern and western states where Blacks also had the right to vote. While these policies were not as far-reaching as those in the South, they were still extensive; Black voting rights were not—by themselves—enough to prevent them.[36]

A democratic-theory rationale for *Brown* that doesn't apply to the *Brown* case itself, or to segregation outside the South generally, is clearly lacking. At the very least, it does not go far enough.

This difficulty might be mitigated by focusing not just on denial of the right to vote but on the prevalence of discriminatory attitudes that prevent a group from being fully integrated in the political process, even if its members do have the franchise. John Hart Ely's classic "representation-reinforcement" rationale for *Brown* and other rulings striking down segregation laws focuses on this factor.[37] He famously argued that judicial review should be used to protect minorities against discrimination in cases where "representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, thereby denying that minority the protection afforded other groups by a representative system."[38]

It seems obvious that such prejudice played an important role in the historic oppression of Blacks, as well as of some other racial and ethnic groups. And it is also clear it can potentially lead to oppressive policies even in situations where the minority in question is afforded voting rights.

The logic of the Ely argument suggests that racial segregation should be upheld by courts if the group targeted *does* have the ability to make normal political alliances but nonetheless loses out politically on the issue of racial segregation. While anti-Black racism remains a serious problem in the United States, this form of prejudice has declined

32 *See* KLUGER, *supra* note 7, chs. 15–17.

33 *Id.*

34 Mary L. Dudziak, *The Limits of Good Faith: Desegregation in Topeka, Kansas, 1950–1956*, 5 LAW & HIST. REV. 351, 367 (1987).

35 *See id.* at 366–67 (describing extensive segregation in various areas of government policy in 1950s Topeka).

36 For overviews, see *supra* note 5 and accompanying citations.

37 *See* ELY, *supra* note 13, ch. 4.

38 *Id.* at 103. For an updated recent version of this defense of *Brown*, see Nicholas Espiritu, *Education and Democracy from* Brown *to* Plyler, 96 ST. JOHN'S L. REV. 899, 900–08 (2022).

significantly since *Brown*. By the 1990s, white attitudes toward Blacks had changed so much that there was overwhelming majority support for equal treatment of the two groups and for nondiscrimination.[39]

By that time, Blacks also became a crucial part of the base of one of the two major parties: the Democrats.[40] This was most dramatically illustrated by the election and reelection of Barack Obama, the first-ever Black president. But it is also evident in the story of Joe Biden, the next Democratic president. To secure election, Biden promised to select a Black woman as his vice president (Kamala Harris) and appoint another one to the Supreme Court (ultimately, Justice Ketanji Brown Jackson).[41] Biden's victory in the 2020 Democratic primaries owed much to the support of Black voters, partly organized by prominent Black Rep. James Clyburn of South Carolina.[42]

None of this proves that racism has disappeared from the U.S. political system or that it doesn't influence voters. To the contrary, racial prejudice and conflict clearly continued in the Obama era and beyond.[43] But Blacks are no longer systematically excluded from political coalitions and deal-making as they were decades ago. To the contrary, they are a major part of the political coalition of one of the two major parties. The other, the Republicans, have periodically made efforts to win Blacks over, albeit with only modest success, at best.[44] In making such appeals, the GOP is to some degree hamstrung by remaining racism in parts of its white base and by white Republicans' skepticism of many measures aimed at helping the Black community.[45] Still, some political commentators argue that

39 For an overview of available survey data, see Howard Schuman et al., Racial Attitudes in America: Trends and Interpretation ch. 3 (1999).

40 *Cf.* Ismail K. White & Chryl N. Laird, Steadfast Democrats: How Social Forces Shape Black Political Behavior (2020) (describing growth and persistence of strong ties between Black voters and the Democratic Party).

41 *See, e.g.*, Andrew Chung, *Biden Vows to Nominate Black Woman to U.S. Supreme Court by End of February*, Reuters (Jan. 27, 2022), https://www.reuters.com/world/us/retiring-us-justice-breyer-appear-with-biden-white-house-2022-01-27/ (noting Biden was fulfilling his 2020 campaign promise).

42 *See* Deborah B. Berry & Ledyard King, *How Rep. Jim Clyburn, a South Carolina Icon, Helped Biden Score His Big Comeback*, USA Today (Feb. 29, 2020), https://www.greenvilleonline.com/story/news/politics/elections/2020/02/29/south-carolina-primary-how-clyburn-endorsement-helped-biden-win-big/4918362002/.

43 For an overview, see, e.g., Randall Kennedy, The Persistence of the Color Line: Racial Politics and the Obama Presidency (2012).

44 *See, e.g.*, Michael Fauntroy, Republicans and the Black Vote (2006) (chronicling decline of Black support for the GOP after civil rights movement and Republicans' largely unsuccessful efforts to address it); Leah W. Rigueur, The Loneliness of the Black Republican: Pragmatic Politics and the Pursuit of Power (2014) (discussing role of Black Republicans in the post–civil rights era); *cf.* Julia Manchester, *Republicans Stepping Up Appeals to Black Candidates, Voters*, The Hill (Mar. 20, 2022), https://thehill.com/homenews/campaign/598813-gop-stepping-up-appeals-to-black-candidates-voters/ (describing recent GOP efforts to appeal to Black voters).

45 *Cf.* Dan Balz, *Racial Attitudes Shifted over the Past Decade, Leaving the Two Parties Further Apart Than Ever*, Wash. Post (Nov. 13, 2021), https://www.washingtonpost.com/politics/racial-attitudes-shifted-over-the-past-decade-leaving-the-two-parties-further-apart-than-ever/2021/11/13/2857cbd6-4406-11ec-a3aa-0255edc02eb7_story.html (describing enormous partisan differences on racial issues).

recent polling data indicates Republicans have begun to make more inroads among Black voters.[46] If this turns out to be a real trend, it might further strengthen Blacks' position in the party system, as both parties might have stronger incentives to cater to a group that includes more potential swing voters.

Even if parties make more efforts to appeal to Black voters and competition for their support intensifies, that probably will not completely eliminate racism or the tensions between Blacks and elements of the GOP base. But if such continuing prejudice and partisan divisions are enough to classify Blacks as a group systematically disadvantaged by "simple hostility or a prejudiced refusal to recognize commonalities of interest,"[47] thereby justifying invalidating legislation on Ely's theory, then the same applies to a vast swath of government policies influenced by ignorance and prejudice of various kinds that may involve "hostility" and refusal to recognize common interests.

Most obviously, in our era of severe partisan polarization, both Democratic and Republican voters often have deep-seated hostility to partisans on the other side.[48] Such hostility and fear can easily prevent partisans from seeing commonalities and making bipartisan deals, especially in conjunction with widespread economic illiteracy that may lead voters to overlook or even decry potential win-win deals.[49] Yet it doesn't follow that Republicans in a blue state or Democrats in a red state qualify for special judicial protection, despite the fact that the state government will often ignore or undervalue their preferences and interests.

More generally, a vast range of ignorance and prejudice affects public opinion on many issues and impedes coalition-making and consideration of policy options.[50] If Ely's logic applies to the current situation of Black Americans, it likely also applies to many other situations where hostility and prejudice lead to policies that damage the interests of a wide range of groups.

Ely's reasoning also has difficulty handling situations where nationalist or separatist factions within a minority group actually support segregation and ally on that issue with

46 *See, e.g.*, John Burn-Murdoch, *American Politics Is Undergoing a Racial Realignment*, Fin. Times (Mar. 8, 2024), https://www.ft.com/content/a7607626-5491-48bd-aa56-5a10cbeeb768 (discussing data indicating such a shift); Perry Bacon, Jr., *Voters of Color Are Shifting Right: Are Democrats Doomed*?, Wash. Post (Mar. 19, 2024), https://www.washingtonpost.com/opinions/2024/03/19/black-latino-asian-voters-2024-presidential-election-republican/ (same).

47 Ely, *supra* note 13, at 103.

48 For an overview, see Alan I. Abramowitz & Steven W. Webster, *Negative Partisanship: Why Americans Dislike Parties but Behave Like Rabid Partisans*, 39 Advances in Pol. Psych. 119 (2018).

49 On how ignorance can lead self-interested voters to overlook mutually beneficially deals, *see* Somin, *supra* note 16, at 68–71. For an overview of widespread economic ignorance among voters, see Bryan D. Caplan, The Myth of the Rational Voter: Why Democracies Choose Bad Policies (rev. ed. 2008).

50 *See* Somin, *supra* note 16, ch. 1 (providing overview of the evidence).

segregationists from the majority group. This kind of scenario is more than just a purely theoretical possibility.

Some Black nationalists have a history of reaching out to white racist segregationists to explore areas of agreement in promoting racial separatism. Both Marcus Garvey (in the 1920s) and Malcolm X (in the 1960s) communicated with the Ku Klux Klan to explore potential common interests on this front.[51] For Malcolm X and the Nation of Islam (NOI) (of which X was then a leading member), the meeting "was the beginning of an uneasy alliance between the NOI and the Ku Klux Klan on shared goals of racial separation."[52] More recently, the famous Black legal scholar Derrick Bell argued that instead of requiring desegregation, the Supreme Court in *Brown* should have doubled down on "separate but equal," requiring state governments to provide fully equal support for Black and white schools without barring segregation.[53]

Views like those of Garvey, the NOI (which from 1978 to 2007 was under the leadership of the extreme Black nationalist Louis Farrakhan),[54] and Bell have always been a distinct minority within the Black American community. But one can imagine them growing in adverse circumstances and their advocates cooperating more successfully with white segregationist forces than Garvey and the NOI were ever able to do. If so, neither the Ely representation-reinforcement theory nor the exclusion-from-the-franchise rationale would be sufficient to justify judicial invalidation of resulting segregationist policies.

To be clear, one can still distinguish policies influenced by racial bigotry from those based on partisan bias or many other kinds of ignorance and prejudice on the ground that the former is more morally reprehensible than the latter. One key difference between race and partisan affiliation is that one is a largely immutable characteristic, while the other is at least largely a matter of choice.[55] A Democrat can become a Republican (or vice versa), but most Blacks cannot "pass" as white.

But such moral distinctions are distinct from considerations of democratic theory and political choice. If courts strike down racially discriminatory laws because they are especially morally odious, that is different than striking them down because they undermine democracy more than other types of discriminatory laws do.

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51 On Garvey's meeting with the KKK, see Colin Grant, Negro with a Hat: The Rise and Fall of Marcus Garvey (2010). On Malcolm X's, see Les Payne & Tara Payne, *'Well, What Do You Mean, We Can't Join the Klan?' Inside the Bizarre, Secret Meeting Between Malcolm X and the Ku Klux Klan*, Politico (Oct. 24, 2020), https://www.politico.com/news/magazine/2020/10/24/malcolm-x-biography-ku-klux-klan-meeting-431657.

52 Payne & Payne, *supra* note 51.

53 Derrick Bell, Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform (2005); Derrick Bell, *Dissenting Opinion, in* What Brown v. Board of Education Should Have Said (Jack Balkin ed., 2001).

54 On the ideology of Farrakhan and the Nation of Islam, see, e.g., Manning Marable, *Black Fundamentalism: Farrakhan and Conservative Black Nationalism*, 39 Race and Class 4 (1998).

55 *Cf.* Nicholas Serafin, *In Defense of Immutability*, 2020 BYU L. Rev. 275 (2020) (arguing for the importance of this as a factor in antidiscrimination law and legal theory).

In addition, if the rightness of *Brown* is dependent on the racist motives underlying segregation, that suggests the outcome would be different in a case where segregation laws were enacted out of more benign motives. For example, voters and legislators might genuinely believe that students of all races would be better off under segregation, a position advocated by some defenders of segregation in the immediate aftermath of *Brown*.[56] As we have seen, some Black ethno-nationalists advocated segregation for the purpose of maintaining Black political and cultural autonomy. One can easily imagine a system of segregation rationalized on such grounds, with support from ethnic particularists in both the majority and minority communities.

Another representation-reinforcement rationale for *Brown* can be found in the Court's decision itself: the idea that improving education increases citizens' political knowledge and enhances their ability to participate in the political process. As Chief Justice Earl Warren put it in his opinion for the Court, part of "the importance of education to our democratic society" is that "[i]t is the very foundation of good citizenship."[57] Inferior segregated education surely made it more difficult for Blacks to acquire political knowledge and become more effective voters and participants in the political process.

This is intuitively plausible. But it runs into evidence that massive increases in education quantity and quality largely failed to increase voter knowledge from the 1960s to the 1990s and beyond, including among Blacks.[58] While abolition of Jim Crow school segregation surely benefited Black students in other respects, it is not clear whether it led to significant improvements in civic knowledge or increased capacity for political participation (though the latter was surely enhanced by the elimination of barriers to Black voting).

This does not mean that large-scale increases in political knowledge through education are impossible.[59] But it at least suggests that any relationship between *Brown* and such increases is a highly contingent one. Desegregation may be more of a necessary than a sufficient prerequisite for such an achievement. And there are major structural barriers to the effective use of public education as a tool for increasing political knowledge, including governments' weak incentives to use it for that purpose.[60] The political knowledge and citizenship rationale for *Brown* is, therefore, highly questionable. At the very least, this is an area where we need more research before we conclude the evidence justifies the Court's hopes.

56 *See, e.g.*, James J. Kilpatrick, The Southern Case for School Segregation (1962) (work by a then-prominent conservative intellectual and columnist advocating this position).

57 Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

58 For a summary of the evidence and relevant citations, see Somin, *supra* note 16, at 198–200.

59 For a review of various strategies for increasing political knowledge, see Ilya Somin, *Top-Down and Bottom-Up Solutions to the Problem of Political Ignorance, in* The Epistemology of Democracy (Hana Samaržija & Quassim Cassam eds., 2023).

60 For more detailed discussion, see Somin, *supra* note 16, at 200–04.

In sum, as applied to the conditions of today, the Ely representation-reinforcement rationale for *Brown* either falls short or implies that a vast range of seemingly ordinary laws motivated by bias and ignorance are subject to invalidation. The narrower rationale focusing on Blacks' exclusion from the franchise is even more problematic, as it could not justify *Brown v. Board* itself, at least with respect to the actual case arising in Topeka, Kansas.

We might conclude that *Brown* was justified only in its own day, whereas segregationist legislation enacted today could potentially be upheld or at least not be considered inimical to democratic values. But that is a conclusion few judges or legal scholars would be willing to embrace.

As leading left-liberal constitutional theorist Jack Balkin put it, "[m]ost law professors agree that any serious normative theory of constitutional interpretation must be consistent with *Brown v. Board of Education* and show why the case was correctly decided."[61] I would add that the same point applies to the vast majority of judges and serious legal commentators outside academia. From the other side of the political spectrum, leading conservative legal scholar Steven Calabresi and his coauthor Michael Perl agree that "[a]ny theory of constitutional interpretation that is incapable of explaining and justifying *Brown* is *ipso facto* so flawed that that theory of interpretation must, therefore, be invalid."[62]

Admittedly, one could potentially discount *Brown* by endorsing revisionist arguments to the effect that the decision had little effect in actually combatting segregation.[63] Elsewhere, I have argued that such claims are wrong; while *Brown* fell far short of singlehandedly ending racial segregation in education, it did have a major impact, both directly and through its effects on the incentives of the political branches of government.[64] In any event, the revisionist critique has so far done little to upend *Brown's* status as an iconic decision that constitutional theory must account for.

Given *Brown*'s extraordinary status in constitutional thought, a theory that merely gives it a highly contingent endorsement that would no longer apply today would, in Calabresi and Perl's phrasing, still be "so flawed" that it "must . . . be invalid."[65] If we want to reconcile *Brown* and democracy-centric theories of judicial review, we need a different representation-reinforcement rationale for the decision.

61 Jack Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 Va. L. Rev. 1537, 1537 (2004).

62 Calabresi & Perl, *supra* note 30, at 429.

63 *See*, *e.g.*, Gerald Rosenberg, The Hollow Hope: Can the Courts Create Social Change? chs. 1–5 (1991) (arguing that *Brown* did little to advance civil rights and may even have retarded progress by stimulating a southern white backlash and by diverting Black activists away from political action that would have been more effective than litigation); Charles J. Ogletree, All Deliberate Speed: Reflections of the First Half Century of *Brown v. Board of Education* (2004) (arguing that *Brown* failed to effectively promote integration).

64 *See* David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 Yale L.J. 591, 645–56 (2004) (critiquing revisionist assessments of *Brown* and explaining why it had a significant impact).

65 Calabresi & Perl, *supra* note 30, at 429.

III. HOW STRIKING DOWN SEGREGATION PROMOTES FOOT VOTING

If traditional representation-reinforcement rationales for *Brown* fall short, foot voting can help fill the gap. In addition to its inherent injustice on other dimensions, racial segregation massively inhibits foot voting by those subject to it. This is most obviously true in the case of racially restrictive zoning, which directly prohibited targeted minority groups from acquiring housing and moving into majority-white areas—the kind of restriction the Supreme Court invalidated in *Buchanan v. Warley* in 1917.[66] But racial segregation in schooling also has a major exclusionary impact.

For obvious reasons, schooling is a near-necessity for families with children and a major factor in decisions about where people and live and work.[67] By locking Blacks out of the most desirable public schools in most parts of the South, Jim Crow educational segregation simultaneously severely constrained their foot-voting opportunities. Blacks unable to send their children to legally segregated schools in these areas also could not take advantage of the economic opportunities and public services there.

To be sure, Blacks living in such areas could potentially send their children to private schools. But segregationist state governments also sought to bar racial integration in private educational institutions, a practice upheld by the Supreme Court in *Berea College v. Kentucky* in 1908.[68]

Moreover, the widespread existence of "free" (at the point of consumption) public education tends to nearly wipe out low-cost private educational alternatives, since the latter cannot effectively compete with a price of zero. While we do not as yet have rigorous academic studies of this effect, it is a natural implication of basic economics. Economist Bryan Caplan has explained why:

> Picture a typical government service. The price: gratis. The quality: mediocre. Private competition, however, remains legal. Should we expect the private part of the market to look just as it would under laissez-faire?
>
> No way. Unless the government rations the free mediocre product, consumers have virtually no reason to ever pay for products of mediocre or lower quality out of their own pockets. At minimum, then, government's gratis products kill private

66 Buchanan v. Warley, 245 U.S. 60 (1917).

67 On the role of public schooling in residential decisions, see, e.g., Todd Ely & Paul Teske, *Implications of Public School Choice for Residential Location Decisions*, 51 URB. AFFS. REV. 355 (2014) (reviewing relevant literature and evidence); Lisa Barrow, *School Choice Through Relocation: Evidence from the Washington, D.C. Area*, 86 J. PUB. ECON. 155 (2002) (providing evidence that parents place high value on school quality in making residential choices).

68 Berea Coll. v. Kentucky, 211 U.S. 45 (1908). On the impact of *Berea College*, see David E. Bernstein, Plessy *versus* Lochner*: The Berea College Case*, 25 J. SUP. CT. HIST. 93 (2000).

> production of all products of equal or lower quality—a textbook case of predatory pricing.
>
> That's not all. Gratis production also effectively kills private provision of products of *moderately* higher-than-mediocre quality. After all, if you can get a C+ product for free, who wants to pay full price for a B- alternative? With gratis public provision, private providers must convince consumers that the *marginal* quality improvement is worth the *total* price of the product. A tall order.[69]

As Caplan goes on to explain, private schools in such scenarios do have strong incentives to provide options that are *greatly* superior to those in the public sector, but usually at a high cost.[70] That, of course, would be out of reach for the largely very poor Black population of the Jim Crow era.

While the extent of this effect requires study, it seems likely that it further constrained Black mobility in the era of segregation. Black families with children could not readily move to majority-white areas where they were denied access to both quality public schools and affordable private-sector alternatives.

The effects of school segregation were further reinforced by other segregationist policies, including those that promoted segregation at work, in other public services, and many other areas.[71] In combination, they effectively denied Blacks foot-voting opportunities in large regions where segregationist policies were prevalent. This effect enables the foot-voting rationale to justify invalidation of many other segregationist policies as well.

Admittedly, Blacks could and did vote with their feet by leaving the South and migrating to northern and western states with less-segregationist policies. Millions did exactly that, thereby significantly alleviating their plight.[72] But racial segregation nonetheless greatly constrained the foot-voting options of American Blacks, especially in the South, where most of them were born and raised.

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69 Bryan D. Caplan, *In Sync: How Business Responds to Gratis Government*, Libr. Econ. & Liberty (June 12, 2019), https://www.econlib.org/gratis-and-extravagance/.

70 *Id.*

71 For an overview and history of Jim Crow policies, see Jerrold M. Packard, American Nightmare: The History of Jim Crow (2003).

72 I have summarized this experience and its implications for the role of foot voting in American history in Ilya Somin, *Foot Voting Nation, in* Our National Narrative: The Search for a Unifying American Story 127–28 (Joshua Claybourn ed., 2019), and Ilya Somin, *Foot Voting, Political Ignorance and Constitutional Design*, 28 Soc. Phil. & Pol'y 202, 215–21 (2011); *see also* Isabel Wilkerson, The Warmth of Other Suns: The Epic Story of America's Great Migration (2020); William Cohen, At Freedom's Edge: Black Mobility and the Southern White Quest for Racial Control, 1861–1915 (1991); Florette Henri, Black Migration: Movement North 1900–1920 (1975); Daniel M. Johnson & Rex R. Campbell, Black Migration in America: A Social Demographic History (1981).

To the extent that foot voting is a crucial mechanism of political choice, as discussed in part I, segregation also deprived Blacks of a wide range of options permitted to other groups. However we look at it, large-scale racial segregation is a severe restriction of foot voting for the minority group targeted by it.

The foot-voting defense of *Brown* is robust against the limitations that bedevil other attempts to reconcile *Brown* and representation-reinforcement theory. Most obviously, it is *not* limited to situations where the minority group targeted for segregation is deprived of the right to vote at the ballot box. For reasons outlined in part I, even for citizens with fully equal ballot-box voting rights, foot voting is an important additional mechanism of political choice, one for which ballot-box voting is not an adequate substitute. Thus, any large-scale deprivation of foot-voting opportunities still qualifies as a severe constraint on political choice.

Much the same point applies to potential limitations of *Brown*'s validity to situations where the targeted minority group lacks meaningful opportunities to make political alliances.[73] Even if a given racial or ethnic group is no less able to make political coalitions than others, depriving its members of foot-voting opportunities will still severely constrain their ability to engage in political choice—at least if we recognize that ballot-box voting and resulting political deal-making is not a fully adequate substitute for foot voting.

John Hart Ely partly recognized this when he advocated that citizens must have the "right to relocate" so that people dissatisfied with policies in their current homes have the option of "exiting and relocating to a community whose values he or she finds more compatible."[74] This logic obviously applies to members of minority groups that are the object of irrational prejudice in their current location, as in the case of Blacks in the Jim Crow–era South. But it also applies to people dissatisfied for reasons other than being victims of prejudice.

Indeed, it applies even to Blacks—and members of other national minorities—who live in a jurisdiction where their group is actually the majority, but who disagree with the preferred policies of other group members. Such majority-minority jurisdictions can empower some minority group members, enabling them to "dissent by deciding."[75] But it can also disempower members of the same group who differ with majority sentiment in their community. For such people, too, foot voting can be an important mode of political choice. And racial segregation is a severe constraint on such foot-voting options—even if that segregation was the result of a political process where minority groups are not disadvantaged in seeking out political coalitions.

73 See discussion of this issue in part II, *supra*.

74 Ely, *supra* note 13, at 178–79.

75 Heather K. Gerken, *Dissenting by Deciding*, 57 Stan. L. Rev. 1745 (2005) (explicating this point in detail).

The foot-voting rationale for *Brown* applies even in situations where segregationist policies are not motivated by racism or other invidious prejudice.[76] Even if the policies are enacted with the best of intentions, they still severely constrict foot-voting options. That remains true even if they are enacted with the support of some members of the segregated minority; for example, if ethno-nationalists in that group support segregation as a tool for protecting the group's distinctive culture and promoting in-group solidarity. In this scenario, too, segregation still severely constrains foot voting and still therefore undermines political choice.

The foot-voting theory also works better than the increasing-political-knowledge rationale. While it is questionable whether *Brown* led to increases in voter knowledge through education,[77] much evidence indicates that foot-voting opportunities enhance the quality of decision-making relative to ballot-box voting.[78]

IV. BROADER IMPLICATIONS

The foot-voting rationale for *Brown* has implications that go beyond the issue of school segregation and even beyond other segregation laws discriminating on the basis of race and ethnicity. If foot-voting theory helps reconcile *Brown* and representation-reinforcement theories of judicial review, the same reasoning applies to other policies that severely impact foot voting, particularly that by Blacks and other historically disadvantaged minorities.

By far the most significant such policy is exclusionary zoning: regulatory restrictions that, in many parts of the country, severely restrict the construction of new housing, thereby making it difficult or impossible to build new housing in response to demand. That, in turn, cuts off millions of people from voting with their feet and "moving to opportunity," particularly the poor and minorities such as Blacks and Hispanics.[79]

In a recent study, economists Gilles Duranton and Diego Puga found that abolition of zoning-restrictions housing in seven major U.S. urban areas would increase per capita U.S.

76 See discussion of this possibility in part II, *supra*.

77 *See* part II, *supra*.

78 *See* discussion in part I and sources cited therein.

79 *See*, *e.g.*, Richard D. Kahlenberg, Excluded: How Snob Zoning, NIMBYism, and Class Bias Build the Walls We Don't See (2023); David Schleicher, *Stuck! The Law and the Economics of Residential Stability*, 127 Yale L.J. 78, 114–17 (2017). For recent overviews of the evidence, see Edward Pinto & Tobias Peter, *How Government Policy Made Housing Expensive and Scarce, and How Unleashing Market Forces Can Address It*, 25 CityScape 123 (2023); Joseph Gyourko et al., *The Local Residential Land Use Regulatory Environment Across U.S. Housing Markets: Evidence from a New Wharton Index*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 26573, 2019), https://www.nber.org/papers/w26573; Edward Glaeser, *Reforming Land Use Regulations*, Brookings Inst. (Apr. 24, 2017), https://www.brookings.edu/research/reforming-land-use-regulations/amp/.

output by almost 8%.[80] Such estimates are highly imperfect. But they give a sense of the enormous magnitude of the exclusionary effects of zoning restrictions.

Exclusionary zoning has historically been used to deliberately target Blacks and other minority groups.[81] In the aftermath of the Supreme Court's 1917 decision banning explicitly racial zoning,[82] facially neutral "zoning turned into a tool for directly segregating real estate economically by price point, consequently segregating real estate indirectly by race."[83] In many parts of the country, zoning rules barring the construction of low-cost multifamily housing were deliberately used to keep out Blacks, and sometimes other minorities, as well as the poor.[84] As leading historian and property law scholar Stuart Banner put it, "[f]rom the beginning, zoning was as much about excluding undesirable people as about excluding undesirable uses of land."[85]

Even today, exclusionary zoning continues to have a massive impact on minorities and the poor, as well as the broader economy. Of particular relevance to a discussion of *Brown* is that it has a major impact in blocking many Black families with children from moving to areas with better-quality and more integrated school districts.[86]

Where there is evidence of racial motivation, it may be possible to challenge exclusionary zoning on Equal Protection Clause grounds. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[87] the Supreme Court's leading precedent outlining standards for challenging facially neutral but racially motivated laws, was an unsuccessful effort to challenge exclusionary zoning in Illinois. But such challenges are extremely difficult in situations where the relevant zoning restrictions began decades ago and have since been reenacted and adjusted without direct evidence of racial motivations. *Arlington Heights* requires plaintiffs to provide evidence of discriminatory motivation.[88] Even if such evidence is available, the challenged law or regulation can be upheld if the government can show that it would have enacted the same policy even in the absence of an unconstitutional discriminatory motive.[89]

80 Gilles Duranton & Diego Puga, Urban Growth and Its Aggregate Implications (June 2023) (unpublished), https://diegopuga.org/papers/hcgrowth.pdf.

81 *See, e.g.*, Richard Rothstein, The Color of Law: The Forgotten History of How Our Government Segregated America (2017); Jessica Trounstine, Segregation by Design 85–100 (2018).

82 Buchanan v. Warley, 245 U.S. 60 (1917).

83 Pinto & Peter, *supra* note 79, at 127.

84 *Id.*; *see also* works cited in note 79; Stuart Banner, American Property: A History of How, Why, and What We Own 183–90 (2011).

85 Banner, *supra* note 84, at 190.

86 For recent overviews, see Glynnis Hagins, *Separate and Still Unequal: How Neighborhood Zoning Laws Keep U.S. Schools Segregated*, 51 J.L. & Educ. 1 (2022); Sara Zeimer, *Exclusionary Zoning, School Segregation, and Housing Segregation: An Investigation into a Modern Desegregation Case and Solutions to Housing Segregation*, 48 Hastings Const. L.Q. 205 (2020).

87 Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

88 *Id.* at 265–66 (requiring evidence of "a discriminatory purpose").

89 *Id.* at 270 n.21.

Elsewhere, Joshua Braver and I have argued that exclusionary zoning is unconstitutional under the Takings Clause of the Fifth Amendment,[90] which requires payment of "just compensation" when the government takes "private property."[91] Exclusionary restrictions on housing construction are, we contend, takings of private property for which compensation must be paid. State and local governments are unlikely to be willing to pay compensation to large numbers of property owners in areas where zoning rules severely restrict the types of housing they are allowed to build. Therefore, a ruling that such restrictions qualify as takings would likely lead to their abolition or, at least, severe curtailment.[92]

Striking down exclusionary zoning would likely require overruling or limiting *Euclid v. Ambler Realty*,[93] the 1926 Supreme Court decision holding that zoning is largely exempt from constitutional challenge under the Due Process Clause of the Fourteenth Amendment.[94] Here, I do not attempt to make anything approaching a comprehensive case for judicial invalidation of exclusionary zoning under the Takings Clause. Josh Braver and I have undertaken that task in our other forthcoming work, where we argue that this outcome is the right one under a range of different constitutional theories, both originalist and living constitutionalist.[95]

In this article, I merely connect this issue with the foot-voting rationale for *Brown*. If the latter is correct, it strengthens the case for using other constitutional provisions to strike down other laws that severely restrict foot-voting opportunities, particularly in cases where the exclusionary effects are large, have a history of racially discriminatory motivation, and disproportionately affect the poor, minorities, and the politically weak. The argument is even stronger if the people harmed largely lack representation in the political processes that generated the exclusionary laws.

All of these characteristics are amply present in the case of exclusionary zoning.[96] The people most harmed by zoning restrictions are those unable to move to the jurisdictions that enact them and therefore (in the vast majority of cases) unable to participate in the political process that leads to their enactment.[97] They cannot vote in local elections in

90 Joshua Braver & Ilya Somin, *The Constitutional Case Against Exclusionary Zoning*, Tex. L. Rev. (forthcoming).

91 U.S. Const. amend. V.

92 Braver & Somin, *supra* note 90, pt. I.

93 Euclid v. Ambler Realty, 272 U.S. 365 (1926).

94 For various alternative ways to overrule or limit *Euclid*, see Braver & Somin, *supra* note 90, § IV.A.

95 Braver & Somin, *supra* note 90, pts. II–III.

96 For more detailed discussion, see *id.* § III.A.

97 On the origins of this critique, see Morton J. Horwitz, The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy chs. 2, 5 (1992); Barbara Fried, The Progressive Assault on Laissez-Faire: Robert Hale and the First Law and Economics Movement (2001); James W. Ely, Jr., *The Progressive Era Assault on Individualism and Property Rights*, 29 Soc. Phil. & Pol'y 255 (2012). For my criticism of the progressive critique in the context of judicial review of limitations on the use of eminent domain to take private property, see Ilya Somin, The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain ch. 3 (rev. ed. 2016).

exclusionary jurisdictions, and rarely—if ever—do they have other ways of influencing zoning policies there.

This does not by itself prove that courts should invalidate exclusionary zoning laws. But it does strengthen the case for doing so from the standpoint of any constitutional theory that emphasizes representation reinforcement and promoting political choice. It also weakens—at least in this case—the standard objection that judicial protection of property rights is antidemocratic and a tool for protection of the wealthy at the expense of the poor. In this situation, it actually enhances the political freedom of the poor, minorities, and politically weak.[98] It can also help reverse policies that became entrenched at least in large part because of racism.

Curbing exclusionary zoning is not the only way in which judicial review can enhance foot-voting opportunities. Other examples include enforcing structural limits on federal power and protecting a number of individual rights that empower foot voters.[99] But it is one of the most dramatic and significant examples, and one with special relevance to *Brown*, due to the racist history of zoning laws and their continued impact on poor Blacks' opportunities, including opportunities to move to areas with higher-quality and more-integrated schools.

None of this necessarily suggests that courts should strike down all laws that might constrain mobility in some way. Competing considerations like text, original meaning, and other factors might counsel against it in many situations. But the case for invalidation is stronger when the laws in question systematically exclude huge numbers of people from large areas, as is the case with segregation laws and large-scale exclusionary zoning. And it is further strengthened if those excluded lack the ability to participate in the relevant political processes, if the exclusionary policies have a history of racist motivation, or some combination of both.

CONCLUSION

Brown v. Board of Education is one of the most widely admired and extensively analyzed decisions in the history of the Supreme Court. There is likewise a long history of attempts to reconcile *Brown* with deference to democracy and popular participation. But traditional representation-reinforcement justifications for *Brown* have significant limitations. They either are overstated, fail to apply to the *Brown* case itself, or only justify striking down racial segregation in relatively restricted historical circumstances that do not apply today.

98 Braver & Somin, *supra* note 90, § III.A.

99 For a survey of a variety of such possibilities, see Somin, *How Judicial Review Can Help Empower People to Vote with Their Feet*, *supra* note 13.

The alternative foot-voting rationale for *Brown* largely avoids these problems. It also has potentially significant implications for other situations where judicial review can help enhance foot-voting opportunities. At the very least, it can help broaden and deepen our understanding of the connection between *Brown* and democracy.