MOVING FROM CAROLENE TO THE COMMERCE CLAUSE: A NEW APPROACH TO RACE FOR THE NEW AMERICAN FUTURE

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I. INTRODUCTION

> *Someday soon, surely much sooner than most people who filled out their Census forms last week realize, white Americans will become a minority group. Long before that day arrives, the presumption that the "typical" U.S. citizen is someone who traces his or her descent in a direct line to Europe will be part of the past.*[1]

The above quote is from a *TIME Magazine* article from April 9, 1990.[2] The cover of the issue—complete with a stylized flag replacing Old Glory's

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1 William A. Henry, *Beyond the Melting Pot*, TIME MAG., Apr. 9, 1990, *available at* http://content.time.com/time/magazine/article/0,9171,969770,00.html.

2 *Id.*

white stripes with black, brown, and yellow ones—asked, "What will the U.S. be like when whites are no longer the majority?"[3] The article predicted that by the year 2056, "the 'average' U.S. resident, as defined by Census statistics, will trace his or her descent to Africa, Asia, the Hispanic world, the Pacific Islands, Arabia—almost anywhere but white Europe."[4]

The prognostication featured in that 1990 *TIME Magazine* article, like most predictions, has proven to be both accurate and flawed. The article's assertion that at some point in the mid-21st century, the United States will become a "majority-minority" nation has not changed. What has changed is the time frame. Depending upon the source consulted, the United States will achieve majority-minority status in either 2050 or 2043.[5] Either way, the "browning of America" is occurring much faster than predicted. In theory, America is a "melting pot"[6]—a place where many different types of people come together in a mélange of cultures and languages, happily learning from one another. But melting pot theory, even to the extent it holds true, overlooks the fact that people of color—immigrant or otherwise—have often been legally excluded from full participation in American society. The tension between the mythologized America where everyone gets along despite racial differences and the reality that de jure segregation has only recently ended in this country begs the question: How will the law respond to the browning of America? Phrased differently, What, if any, legal changes will this demographic change portend? The focus of this particular Article is the potential impact these demographics will have on the Supreme Court's equal protection jurisprudence and the way racial advocates should advocate for racial change.

The Author asserts an argument in two parts. The first part of the argument asserts that the browning of America will impact the Supreme Court's equal protection jurisprudence. First, recent Supreme Court cases on race indicate that the Court will be hostile to continued strict scrutiny for

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3 *Id.*

4 *Id.*

5 *See infra* Part I.

6 *See generally* J. HECTOR ST. JOHN DE CREVECOEUR, LETTERS FROM AN AMERICAN FARMER (1793).

> [W]hence came all these people? They are a mixture of English, Scotch, Irish, French, Dutch, Germans, and Swedes. . . . What then is the American, this new man? He is either an European or the descendant of an European, hence that strange mixture of blood, which you will find in no other country. I could point out to you a family whose grandfather was an Englishman, whose wife was Dutch, whose son married a French woman, and whose present four sons have now four wives of different nations. He is an American, who, leaving behind him all his ancient prejudices and manners, receives new ones from the new mode of life he has embraced, the new government he obeys, and the new rank he holds. . . . The Americans were once scattered all over Europe; here they are incorporated into one of the finest systems of population which has ever appeared[.]

Id.

African Americans. When evaluating whether a group should be granted strict scrutiny review, the Court considers the discreteness and insularity of the class, whether the group has suffered a long history of discrimination, whether the interests of the group can or have been adequately protected through the political process, whether the trait is immutable, and whether the group's defining traits are relevant to the ability to contribute to society.[7] However, recent Supreme Court decisions have indicated that the Court may no longer interpret these factors in a way that favors African Americans. In other words, as the browning of America continues, the time where litigators can rely on the Supreme Court to automatically use the *United States v. Carolene Products Co.* factors in a manner that results in the application of strict scrutiny for African Americans will draw to an end.

The second part of the argument asserts that, as the Supreme Court Equal Protection suggests, racial justice advocates must seek new avenues of redress. This Article argues that rather than continue to travel the increasingly narrowed road of the Fourteenth Amendment, civil rights advocates should look to the Commerce Clause. While the Court has effortlessly ignored the racial complaints of non-whites under the Fourteenth Amendment, the effects of racism on the national economy cannot be overlooked so easily. Building upon Professor Derrick Bell's interest convergence theory, the Article asserts that when the non-white majority comes, the best course of action will be to convince whites that racism is against the nation's economic interests. Congress's ability to regulate these concerns under the commerce clause will then be discussed.

While the topic of this paper is not new, this writing's approach to the problem is. This writing is certainly not the first to explore the Court's apparent shift to a more conservative approach to racial issues. Nor is it the first to consider the Court's various interpretations of the *Carolene* standard. Most of the authors that have addressed this issue have considered ways to change the Court's approach to Fourteenth Amendment equal protection jurisprudence. However, this Article is the first to present two nuances.

First, this writing is novel because it is the first to consider the possibility that the Court could do away with strict scrutiny analysis where race is concerned. Many prior writings have considered *Carolene* analysis or suggested changes to the doctrine.[8] However, this is the first to consider that

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[7] *See* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 138–39 (2011).

[8] *See, e.g.*, Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 716 (1985) (arguing that *Carolene* is wrong because "the *Carolene* footnote suggests that, even in a world in which blacks voted no less frequently than whites, and in which election districts strictly conformed to the Court's reapportionment decisions, blacks would still possess, by virtue of their discreteness and insularity, a disproportionately small share of influence on legislative policy—a disproportion of such magnitude as to warrant the judicial conclusion that a fair democratic process would have generated outcomes systematically more favorable to minority interests");

the Court might change direction completely on the *Carolene* factors when race is involved.

Second, while many writers have acknowledged the Court's rightward drift on race, the solution here is different in scope and design. In a seminal article, Professor Neil Gotanda argued that the Court's "color-blind constitutionalism" was a flawed approach to racial equality and that "strict scrutiny should not be abandoned altogether, given its efficacy as a weapon against segregation in years past."[9] Rather, Gotanda argued that the Court's application of the doctrine should change. In particular, Professor Gotanda argued that the Court should consider race explicitly, engage in a discussion of white privilege, and address the subordination of non-whites.[10] This approach is emblematic of anti-subordination analysis, which, rather than ignoring history, is careful to examine it.[11] "For example, people of African descent in the United States are classified by their racial identity ('Black') and are disadvantaged by this group status. Anti-subordination principles urge equal protection doctrine to focus on the very groups whose statuses are harmed."[12]

This approach is seen in many of the articles that followed. Professor Darren Hutchinson has written that under his "inversion thesis," the Court is no longer the protector of vulnerable classes, and that the Court's application of anti-subordination principles can cure this defect.[13] Professors Eric Yamamoto, Carly Minner, and Karen Winter advocate a "contextual strict scrutiny" that takes "racial group history and current racial conditions into account, as they relate to the specific classification."[14] Professors Mario Barnes, Erwin

William N. Eskridge, Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L.J. 1, 2 (2010) (arguing that "political powerlessness is neither necessary nor sufficient for a classification to meet the Court's requirement for heightened scrutiny" and that "as a normative matter, political powerlessness ought not play a critical role in equal protection doctrine"); Olga Popov, *Towards a Theory of Underclass Review*, 43 STAN. L. REV. 1095, 1098 (1991) ("'Underclass review' is an elaboration, within the terms of Ely's representation-reinforcement theory, of Justice Blackmun's suggestion in his concurrence in *Plyler v. Doe* that a statute which has the effect of creating a 'discrete underclass' is inconsistent with the Equal Protection Clause and warrants heightened scrutiny even though no fundamental right or suspect classification is involved."); Strauss, *supra* note 7, at 139–40 (discussing the lack of clarity in the Court's application of the suspect classification factors).

9 Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 62–63 (1991).

10 *See id.* at 63–64.

11 *See* Abigail Nurse, *Anti-Subordination in the Equal Protection Clause: A Case Study*, 89 N.Y.U. L. REV. 293, 300 (2014) (noting that group history that includes discrimination or subordination is relevant to equal protection analysis).

12 *See id.* at 301.

13 Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 618–19.

14 Eric K. Yamamoto et al., *Contextual Strict Scrutiny*, 49 HOW. L.J. 241, 244 (2006).

Chemerinsky, and Trina Jones also advocate for the rejection of color-blindness.[15] Toward the end of the article, the authors state,

> If, for the . . . reasons set forth . . . post-racialism puts into question this fundamental assumption [that racism continues to be a problem in the United States], then what is the way forward for advocates of racial equality? We suggest that progressives might do well to . . . recognize that discrimination and equal protection are susceptible to varying interpretations depending upon time and place.[16]

The last sentence is key. The authors stated that "discrimination and equal protection are susceptible to varying interpretations depending upon time and place." This writing disagrees.

When it comes to race, one could argue that the Court is actually not susceptible to varying interpretations. Rather, one could argue that when it comes to race, the Court has been remarkably consistent. Certainly, the Court no longer explicitly implements the *Dred Scott* directive that a black man has no rights that a white man is bound to protect,[17] and has also abandoned the formal segregation endorsed in *Plessy v. Ferguson*.[18] Nonetheless, the Court has, for the most part, retained the racial status quo that protects white privilege. Professor Girardeau Spann explained the problem as such:

> Minorities have not only secured significant concessions from the representative branches, but the representative branches have typically done more than the Supreme Court to advance minority interests. In fact, the Supreme Court's civil rights performance has historically been so disappointing that it lends little, if any, support to the traditional model of judicial review. Rather, the Court's decisions serve more as a refutation than a validation of countermajoritarian judicial capacity.[19]

Put another way, while there have been a few moments where the Court helped to usher forth racial change, those times represent the exceptions rather than the rule.

So, again, the first part of the argument asserts that the browning of America will impact the Supreme Court's equal protection jurisprudence. Part I of this Article also provides a brief overview of equal protection jurisprudence and a summary of how the browning of America could impact this

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15 Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 998 (2010).

16 *Id.* at 999.

17 Dred Scott v. Sandford, 60 U.S. 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

18 163 U.S. 537 (1896).

19 Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 2000–01 (1990).

jurisprudence. The second part of the argument encourages civil rights advocates to look to the Commerce Clause as an alternative means of addressing racial justice. Part II will explain why the Commerce Clause is a better alternative for racial justice than the Fourteenth Amendment.

II. EQUAL PROTECTION ANALYSIS

This section of the Article will focus on the law as it is, and the law as it could be in 2050. First, Part II.A will provide an overview of the Court's current methodology for classifying groups. Second, Part II.B will discuss the Court's current statements with respect to classification. Finally, Part II.C will address the changes that may occur in equal protection jurisprudence due to the browning of America.

A. How the Court Classifies Groups

Equal protection analysis operates, in part, by categorizing groups. When a state actor discriminates against a group that merits a low level of protection, that regulation is constitutional as long as the regulation meets rational basis review.[20] To be unconstitutional, the plaintiff must prove that there is no legitimate reason for the differential treatment of the group and that the regulation bears no rational relationship to the state's purposes.[21] Classifications that trigger intermediate scrutiny require a showing on the part of the state actor that the law is substantially related to an important state interest.[22] Finally, classifications that generate the highest level of review—strict scrutiny—are valid only if the state can demonstrate that the law is narrowly tailored to a compelling state interest.[23]

As demonstrated above, as the level of scrutiny increases, the level of proof required to justify singling out a particular group, as well as the fit that must be shown between the regulation and the stated goal becomes more onerous. Therefore, the level of scrutiny matters. Because the level of scrutiny matters, the process the Court uses to determine which groups are entitled to which level of scrutiny also matters. Beginning in *Carolene*,[24] the Court stated that although rational basis review was appropriate for economic legislation,[25]

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20 McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

21 *Id.* at 425.

22 Craig v. Boren, 429 U.S. 190, 197 (1976).

23 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

24 United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

25 *See id.* at 152 ("[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless, in the light of the facts made known or generally assumed, it

such review might not be appropriate where "prejudice against discrete and insular minorities" had operated "seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[26] Under those circumstances, the Court noted that "a correspondingly more searching judicial inquiry" could be required.[27] While *Carolene* was the beginning of the Court's process, in later cases, the Court added to its analysis by considering whether the class at issue had "the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[28] The Court has also evaluated whether the classification is one that is relevant, or more precisely, if the group possesses real differences that necessitate protection or special treatment.[29]

In sum, then, when evaluating whether a group should be granted strict scrutiny review, the Court considers the discreteness and insularity of the class, whether the group has suffered a long history of discrimination, whether the interests of the group can or have been adequately protected through the political process, whether the trait is immutable, and whether the group's defining traits are relevant to the ability to contribute to society.[30]

Before proceeding, it may be helpful to define the terms used above. This may be somewhat difficult, as the federal courts have not always been consistent with the definition of terms. However, legal scholarship has attempted to fill in these gaps.[31] Scholars have defined groups as being discrete "if they are visible in a way that makes them 'relatively easy for others to identify.' A group is insular if they tend to interact with each other with 'great frequency in a variety of social contexts.'"[32] The history factor is generally evaluated through analogy. "Because of the lack of precise guidance in determining whether a group has the requisite history of discrimination, courts often decide discriminatory history by comparing the experience of the group to that of African-Americans or women."[33] Immutability has similarly defied precise definition. In general, though courts may differ, "immutability depends on whether the trait is easily changed."[34]

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is of such a character as to preclude the assumption that it rests upon some *rational basis* within the knowledge and experience of the legislators." (emphasis added)).

26 *Id.* at 152 n.4.

27 *Id.*

28 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

29 City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 449–50 (1985).

30 Strauss, *supra* note 7, at 138–39.

31 *See generally id.*

32 *See id.* at 149 (quoting Ackerman, *supra* note 8, at 726–29).

33 *See id.* at 151.

34 *See id.* at 162.

The political powerlessness prong is likely the one that has proven most difficult to define. According to Professor Strauss, despite the difficulty,

> [j]udges and scholars have suggested four possible approaches, used either separately or in combination, to assess power. These approaches consider (1) the group's ability to vote; (2) the pure numbers of the group; (3) the existence of favorable legislative enactments that might demonstrate political power; and (4) whether members of the group have achieved positions of power and authority.[35]

B. The Current Court's Statements Regarding the Carolene *Factors*

The Court's recent jurisprudence has given new interpretation to the *Carolene* factors. While the Court has not had much to say about immutability, the Court—or its justices—have had much to say about history, political powerlessness, discreteness, and insularity. In three primary cases, the Court or its justices have interpreted these factors in a narrow fashion. The primary cases are *Croson*, *Shelby County*, and *Schuette*. The cases and their impacts will be explained chronologically below.

In *City of Richmond v. J.A. Croson, Co.*, the Court applied strict scrutiny to preferences that *benefited* African Americans for the first time.[36] Part of Justice O'Connor's reasoning for this change was that the majority of the Richmond City Council was African American. She stated, in part, "Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case."[37] The effect—even if not the intent—was to punish African Americans for their increased political clout on the Richmond City Council.[38] The higher standard was applied, apparently, only because of this political majority. The clear implication is that the presence of the political majority of African Americans changes the calculus that is used to evaluate the problem.

The Court has also recently undermined the history part of the *Carolene* analysis. In *Shelby County, Alabama v. Holder*,[39] Chief Justice John Roberts acknowledged:

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35 *See id.* at 154.

36 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989).

37 *Id.* at 495–96.

38 *See* Heather K. Gerken, *The Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 50 (2010) ("In *Croson*, the Court relied on the great John Hart Ely to hold that a minority set-aside program was more constitutionally suspect because it had been enacted by a black-majority city council.").

39 133 S. Ct. 2612, 2629 (2013).

> It was in the South that slavery was upheld by law until uprooted by the Civil War, that the reign of Jim Crow denied African-Americans the most basic freedoms, and that state and local governments worked tirelessly to disenfranchise citizens on the basis of race. The Court invoked that history—rightly so—in sustaining the disparate coverage of the Voting Rights Act in 1966.[40]

Thus, Chief Justice Roberts gives a nod to the history of racialized barriers to voting. But the recognition of history ends there. Chief Justice Roberts continues to state:

> But history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the "current need[]" for a preclearance system that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.[41]

Rather than acknowledge that the overtly racialized barriers to voting have simply morphed into different "second-generation" barriers (a reality acknowledged by Justice Ginsburg in her dissent),[42] Chief Justice Roberts implied that the history was irrelevant. It happened, of course, but it has no relevance to current events or outcomes. By ignoring the history, Chief Justice Roberts strongly indicated that the Court will be hostile in the future to claims of the persistence of societal racism. Put another way, the Court feels that the nation is far enough removed from its overtly racist past to make that past a mere footnote to current racial concerns.

Finally, the Court—or at least some of its membership—has begun to signal hostility to the "discreteness" and "insularity" portion of the *Carolene* analysis. In *Schuette v. BAMN*, the Court considered a ballot initiative that banned affirmative action in the state of Michigan.[43] The Court held that the

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40 *Id.* at 2628.

41 *Id.* at 2628–29.

42 *See id.* at 2629.

43 Schuette v. Coal. to Defend Affirmative Action, Intregation & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN), 134 S. Ct. 1623, 1629 (2014).

initiative did not violate the Fourteenth Amendment.[44] In a concurrence joined by Justice Thomas, Justice Scalia wrote:

> The dissent trots out the old saw, derived from dictum in a footnote, that legislation motivated by "'prejudice against discrete and insular minorities'" merits "'more exacting judicial scrutiny.'" . . . The dissent does not argue, of course, that such "prejudice" produced § 26. Nor does it explain why certain racial minorities in Michigan qualify as "'insular,'" meaning that "other groups will not form coalitions with them—and, critically, not because of lack of common interests but because of 'prejudice.'" Nor does it even make the case that a group's "discreteness" and "insularity" are political *liabilities* rather than political *strengths*—a serious question . . . .[45]

In a footnote accompanying the above quote, Justice Scalia cited a law review article by Professor Bruce Ackerman. In the article, Ackerman states, "Other things being equal, 'discreteness and insularity' will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics."[46] In short, Justice Scalia would have the Court treat the discreteness and insularity of a group as a net positive, rather than a negative as the writers of *Carolene* intended.[47]

In sum, the Court appears to be willing to ignore or revise three of the key *Carolene* factors—history, discreteness, and political powerlessness—that it has used to establish strict scrutiny analysis. Thus, nothing other than stare decisis could reasonably keep the Court from changing its approach to these matters. The browning of America will likely speed up the process that the Court has already begun.

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44 *See id.* at 1638.

45 *Id.* at 1644–45 (Scalia, J., concurring in judgment) (emphasis in original) (citations omitted).

46 *Id.* at 1645 n.8.

47 While it is sometimes assumed that discreteness and insularity are a negative, this is not always the case. As Cass Sunstein has stated,

> [There is a] concern that certain groups are effectively "fenced out" of the pluralist process because they are unable to participate in political bargaining. Sometimes this disability is attributed to the "discreteness and insularity" of the excluded groups. The attribution is questionable, for discreteness and insularity may *increase rather than impair* the opportunities for the exercise of political power.

Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 34 (1985) (emphasis added).

C. How the Browning of America Will Impact the Court's Equal Protection Jurisprudence

As an introduction to this section, a brief explanation of how the factors have traditionally operated will be provided using *Korematsu v. United States*.[48] Assuming *Korematsu* was decided using the Court's current factors but the history and facts available in 1944, the decision would be an easy one. The Court could easily find that race is an unchanging, or difficult to change, characteristic and thus immutable. In addition, the history of discrimination and maltreatment would be evident, as the laws in effect at the time would have been evidence of unequal treatment. Most important are the two final factors. At the time, because of de jure segregation in the South and de facto (and sometimes de jure) segregation in the North, most non-whites lived in separate areas, and were therefore discrete and insular.[49] Moreover, there were very few people of color in the United States Congress in the pre-World War II era.[50] For all of these reasons, on the 1940s record, the Court would have little difficulty finding that non-whites should be treated as a separate class deserving of strict scrutiny. However, in light of the Court decisions discussed in Subsection B as well as political and demographic shifts, it is unlikely that the current Court—or even a future one—would reach a similar conclusion for two reasons.

First, non-whites now have more political clout. The 1960s brought forth major pieces of legislation to protect people of color, including the Civil Rights Act of 1964,[51] the Voting Rights Act of 1965,[52] and the Fair Housing Act of 1968.[53] Moreover, African Americans and Latinos now have increased influence in the electoral process.[54] While the prime example of the newfound political power is likely embodied in the election of President Barack Obama as

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48 323 U.S. 214 (1944).

49 For further exploration of this topic, see Douglas Massey, *Residential Racial Segregation and Neighborhood Conditions in US Metropolitan Areas*, *in* AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 391 (2001), *available at* http://www.asu.edu/courses/aph294/total-readings/massey%20--%20residentialsegregation.pdf. In discussing the work of earlier demographers, Massey notes that blacks and whites were "distinctly segregated" in the early 20th century. *See id.* at 392.

50 The official website of the U.S. House of Representatives indicates that in the 80-year period between 1869 and 1949, only 24 African Americans served in the House. *See Black Americans in Congress*, U.S. HOUSE OF REPRESENTATIVES, http://history.house.gov/People/Search?filter=1 (last visited Mar. 12, 2015).

51 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C.A. § 2000(a) (West 2014)).

52 Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

53 Fair Housing Act, 42 U.S.C.A. §§ 3609–3619 (2015).

54 For a further discussion, see *infra* Part II.

the first African American president,[55] African Americans have made gains in electoral offices at many levels.[56] While there were less than 1,500 African American elected officials in 1970, by 1998, that number had increased to 8,830.[57] In contrast to the *Korematsu* era, it is clear that people of color have gained access to political office. Moreover, many of the barriers to voting that existed in the 1940s have been removed.[58]

Second, in addition to the changes in political participation, many are convinced that America's history of racial apartheid is no longer relevant. Ironically, this historical reluctance is based, in part, on civil rights advancements listed above. Many persons believe that because African Americans have made extraordinary social progress in the past 60 years, racism is a thing of the past. Indeed, professor, author, and social commentator Shelby Steele, a noted black conservative,[59] wrote in 2008:

> Obama's post-racial idealism told whites the one thing they most wanted to hear: America had essentially contained the evil of racism to the point at which it was no longer a serious barrier to black advancement. . . . Of course, it is true that white America has made great progress in curbing racism over the last 40 years. It is exactly because America has made such dramatic racial progress that whites today chafe so under the racist stigma.[60]

The import of Steele's words is a cruel irony. The more racial progress that is made, the more likely whites (and other Americans) are to feel that the history of racial discrimination is just that—history. For these persons, America's racial past is in the past, and any failure of upward mobility on the part of African Americans or other groups of color is a fault of character—not structural racism.

In light of these new facts, this writing predicts that the Supreme Court will, in the near future, change or alter its strict scrutiny jurisprudence. Although the Court will continue to recognize race as an immutable characteristic and will continue to recognize its relevance, the Court will seize

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55 *President Barack Obama*, WHITE HOUSE, http://www.whitehouse.gov/administration/president-obama (last visited Mar. 12, 2015).

56 *See Black Elected Officials by Office, and by Region and State*, ALLCOUNTIES.ORG, http://www.allcountries.org/uscensus/473_black_elected_officials_by_office_and.html (last visited Mar. 12, 2015).

57 *Id.*

58 *See* Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013).

59 *Shelby Steele*, HOOVER INST., http://www.hoover.org/profiles/shelby-steele (last visited Mar. 12, 2015).

60 Shelby Steele, *Obama's Post Racial Promise*, L.A. TIMES (Nov. 5, 2008), http://www.latimes.com/news/opinion/opinionla/la-oe-steele5-2008nov05-story.html#page=1.

upon the gains of the past 60 years to argue: (1) African Americans are no longer politically powerless and (2) the history of legal subjugation that African Americans have endured is no longer present. With these arguments at the fore, the Court will eventually conclude that there is no longer a need to apply strict scrutiny to laws that discriminate against African Americans and other racial minorities.

III. AN ALTERNATIVE APPROACH—THE COMMERCE CLAUSE

The previous section outlined why race-based cases brought under the Equal Protection Clause will prove difficult to win in the future. In light of this reality, advocates for racial justice should look for new remedies. This Article proposes that the Commerce Clause could be a very viable option. Subsection A, below, will briefly explain the workings of the Commerce Clause. Then, Subsection B will discuss why the Commerce Clause could be an attractive option.

A. The Commerce Clause

In 1995, the Supreme Court's decision in *United States v. Lopez* ushered in a new era of Commerce Clause jurisprudence.[61] In *Lopez*, the Court acknowledged that Congress may regulate four broad categories using the Commerce power: the channels of interstate commerce, instrumentalities of interstate commerce, persons and things in interstate commerce, and "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."[62]

In order to determine whether the final category should be applied in any given case, the Court considers four factors. First, the activity at issue should be economic.[63] The Court has defined "economic" as "the consumption, production, or distribution" of goods or services.[64] Second, the Court will attempt to locate a reference to interstate commerce—or a "jurisdictional hook"—in the statute.[65] Third, the Court examines the record for any findings made by Congress attempting to explain the link between the regulated activity and interstate commerce.[66] Finally, the Court will evaluate the link between the regulated activity and interstate commerce to ensure that the link is not too attenuated.[67]

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61 United States v. Lopez, 514 U.S. 549 (1995).

62 *Id.* at 558–59 (citations omitted).

63 *See id.* at 559–60.

64 Gonzalez v. Raich, 545 U.S. 1, 25 (2005).

65 *Lopez*, 514 U.S. at 561–62.

66 *See id.* at 562–63.

67 *See id.* at 567.

B. Why the Commerce Clause is an Attractive Option for Racial Justice

The Commerce Clause could be an effective tool for racial justice for at least three reasons, which will be explained below. First, the doctrine itself is nominally race neutral. Second, past practice indicates that the Commerce Clause can be successfully used to further racial justice—it has simply been underutilized. Finally, the issue of "interest convergence" will be explored. Each of these will be examined in turn.

1. The Racial Neutrality of the Commerce Clause

From the "three-fifths" clause[68] to *Dred Scott v. Sandford*,[69] the early days of American Constitutional jurisprudence—and indeed, the Constitution itself—made clear that the races in America were not regarded equally in the eyes of the law. The Reconstruction Amendments attempted to correct this Original American Sin by freeing the slaves, granting formerly enslaved men the right to vote, and extending American citizenship to the newly freed slaves.[70] In *Plessy v. Ferguson*, the Court interpreted the newly minted Equal Protection Clause in a narrow manner, leading to the implementation of "Jim Crow" segregation laws across much of the southern United States.[71] The doctrine of "separate but equal" would persist until it was declared unconstitutional in *Brown v. Board of Education*.[72]

The point of the foregoing paragraph is to illustrate that the "narrative," so to speak, of Equal Protection jurisprudence, is a narrative of the struggle of African Americans and other racial minorities to seek legal redress. In other words, the entire history of the Equal Protection Clause is racialized. From Homer Plessy to Linda Brown to the plaintiffs in numerous other cases, the story of Equal Protection is the story of race in America. To be certain, the Equal Protection Clause extends to all persons in the country and is not limited to racial claims. However, any plaintiff of color bringing a suit under the Equal Protection Clause must recognize the history that is being invoked when the Equal Protection Clause is employed.

In stark contrast, the narrative of the Commerce Clause is quite different. The Commerce Clause has undergone at least four eras of change.[73] Early in the nation's history, the Court adopted an expansive view of the

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68 *See* U.S. CONST. art. I, § 2, cl. 3.

69 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

70 *See* U.S. CONST. amend. XII, amend. XIV, amend XV.

71 163 U.S. 537 (1896).

72 347 U.S. 483 (1954).

73 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 247–48 (4th ed. 2011).

clause.[74] During the Industrial Revolution, the Court changed course and took a narrower position.[75] In its third era, the Court again adopted an expansive view.[76] The Court's current Commerce Clause jurisprudence has narrowed the doctrine a bit. In both *Lopez* and *National Federation of Independent Businesses v. Sebelius*, for example, the Court held that Congress had exceeded its power under the Commerce Clause. [77]

If the jurisprudence regarding both the Commerce Clause and the Equal Protection Clause has evolved, one might wonder why either has an advantage. The advantage lies in the fact that although the changes in Commerce Clause jurisprudence have been largely tied to major shifts in the American economy, Equal Protection jurisprudence has fluctuated based on not only the individual justices on the Court, but also the commitment of the nation at a particular time to racial advancement.

For example, it has been argued that although the Warren Court was able to make great strides in moving the country towards racial equality, its successors have not taken the same approach.[78] One could argue that this is due to the hostility of the successor justices as individuals.[79] One could also argue that the Warren Court was merely reacting to the majority of Americans who wanted to change the racial status quo.[80] Further still, one could argue that as

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74 *See id.* at 251.

75 *See id.* at 252.

76 *See id.* at 261.

77 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608 (2012); United States v. Lopez, 514 U.S. 549, 551 (1995).

78 *See* Lord Woolf, *The International Impact of the Warran Court*, *in* THE WARREN COURT: A RETROSPECTIVE 366, 368 (Bernard Schwartz, ed., 1996) ("Hence, as the successor court to the Warren Court was, in the view of some observers, going into reverse, English law was firmly embracing the pure Warren approach to gender and race equality."). *See generally* Rogers M. Smith, *Black and White after* Brown*: Constructions of Race in Modern Supreme Court Decisions*, 5 U. PA. J. CONST. L. 709, 715 (2003) ("But in the last two decades, other judges have explicitly criticized the aspects of Warren's opinion [in *Brown v. Board of Education*] that most clearly express this conception, none more frequently or influentially than Marshall's successor, Justice Clarence Thomas.").

79 *See* Spann, *supra* note 19, at 2011 ("Hence, regardless of the particular political preferences that individual justices may have, the Supreme Court as an institution will be receptive to legal arguments advancing political positions that have the support of durable rather than transitory majorities. The ultimate effect of this selective sensitivity is to render the Court a force for preservation of the political status quo. Proponents of political change will be less successful before the Court than will their opponents.").

80 Jack M. Balkin, *What* Brown *Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1541 (2004) ("The Court did relatively little to enforce *Brown* until the legislative deadlock over civil rights was broken with the passage of the Civil Rights Act of 1964 and President Lyndon B. Johnson's landslide election in the same year. Thus, the Court generally worked with national majorities rather than against them. It did not take the lead so much as work in tandem with political forces that had been growing in strength and influence for some time. It was countermajoritarian primarily with respect to those states that resisted a growing national

de jure segregation ended, it freed up the Court to declare—merely 25 years after the passage of the Civil Rights Act of 1964—that programs intended to target the racist practices of the past were unconstitutional.[81] Put simply, once de jure segregation ended, the impetus—of the Court, its justices, and indeed many Americans—to seek racial justice faded.

Unlike the Equal Protection Clause, the history of the Commerce Clause is not steeped in racial drama. Indeed, the most noted Commerce Clause cases—*Gibbons v. Ogden*,[82] *Carter v. Carter Coal Co.*,[83] *United States v. E.C. Knight*,[84] *NLRB v. Jones Laughlin*,[85] *United States v. Lopez*,[86] *United States v. Morrison*[87]—have no racial component at all. The question must be asked—Why does this matter?

As the Court becomes hostile to race based claims, invoking a portion of the Constitution that explicitly requires the Court to consider race could result in an unfavorable outcome. Put another way, why place race front and center when the reaction of the majority of the Court to such a claim would range from ambivalence to outright hostility? To be certain, under any claim, a justice could, if she wanted, view the facts through a particular lens that favors a particular outcome.[88] The argument proffered in this writing is not that such engineering would never happen, but rather that such engineering would be more difficult under the Commerce Clause than the Equal Protection Clause where race is involved.

2. *Heart of Atlanta* and *Katzenbach v. McClung*—What Is Past Is Prologue?

In 1964, due to pressure placed by the burgeoning Civil Rights Movement, Congress passed the Civil Rights Act of 1964 ("the Act").[89] The Act prohibited establishments designated as public accommodations from

trend, and it became most insistent precisely at the moment when civil rights became a national legislative policy. Throughout, the Supreme Court supported national values at the expense of regional values.").

81 *See* Richmond v. J.A. Croson, Co., 448 U.S. 469, 528 (1989) (Marshall, J., dissenting) (noting the irony of the Court's decision in light of the fact that the plaintiffs had lived in Richmond, Virginia, formerly the capital of the Confederate States of America).

82 22 U.S. 1 (1824).

83 298 U.S. 238 (1936).

84 156 U.S. 1 (1895).

85 301 U.S. 1 (1937).

86 514 U.S. 549 (1995).

87 529 U.S. 598 (2000).

88 On this note, see, e.g., BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921). This writing is considered one of the leading publications on legal realism.

89 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C.A. § 2000(a) (West 2014)).

engaging in racial discrimination in the provision of goods or services.[90] The Act was challenged before the Supreme Court in two cases.

In *Heart of Atlanta Motel v. United States*, the plaintiff hotel alleged that the Act exceeded Congress's Commerce authority.[91] The Court rejected their claims.[92] The plaintiff asserted that Congress lacked the authority to use the Commerce Power to address the social ill of racism.[93] The Court roundly rejected this claim in the following words:

> That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.[94]

In a companion case, *Katzenbach v. McClung*,[95] the Court reached a similar conclusion. The plaintiff's restaurant refused to serve African Americans, although the Act required it to do so, and much of its food travelled in interstate commerce.[96] The Court rejected the claim, stating that Congress had "broad and sweeping" Commerce powers and that so long as a *de minimis* amount of the goods at the establishment had crossed state lines, the Commerce Clause had not been violated.[97]

Thus, in not one, but two prior cases invoking both race and commerce, the Court has indicated that it is commerce that will carry the day. In both cases, race played no part in the Court's rationale. Moreover, the Court's statement in *Heart of Atlanta* that Congress can use the Commerce Clause to solve racial issues is one that should be used by racial justice advocates. *Heart of Atlanta* and *McClung* demonstrate that the Commerce Clause can be effectively used to work for racial justice.

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90 *See id.*

91 379 U.S. 241, 243 (1964).

92 *See id.*

93 *See id.* at 257.

94 *See id.* at 257–58.

95 379 U.S. 294 (1964). This case is sometimes colloquially referred to as "Ollie's Barbeque" after the name of the plaintiff's restaurant.

96 *See id.* at 295.

97 *Id.* at 305.

Of course, it is possible that a different nine justices under different circumstances would decide *Heart of Atlanta* or *McClung* differently. In fairness, that difference in outcome could stem from racial animosity, but could also stem from a hostility to, say, the expansion of Congress's authority over interstate activities.[98] However, it would be far more difficult to invalidate the law under the Commerce Clause without engaging in a completely tortured analysis. As previously stated, the Commerce Clause allows for the regulation of persons and things in interstate commerce. While it is possible that the Court could revise this statement, it is highly unlikely. Without the ability to regulate persons and things in interstate commerce, the Commerce Clause would lose significant functionality. As such, this seems a more solid place to build a foundation than the quicksand of the Equal Protection Clause. Thus, as long as racial advocates are hoping to regulate persons or things in interstate commerce, there seems to be hope for laws that address racial issues through an economic means.

3. Interest Convergence—Next Steps

The theory of interest convergence was first proposed by Professor Derrick A. Bell. Writing in 1980 about the aftermath of the *Brown v. Board of Education* decision, Professor Bell wrote:

> Translated from judicial activity in racial cases both before and after *Brown*, this principle of "interest convergence" provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.
>
> It follows that the availability of fourteenth amendment protection in racial cases may not actually be determined by the character of harm suffered by blacks or the quantum of liability proved against whites. Racial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites. Racial justice—or its appearance—may, from time to time, be

[98] See United States v. Lopez, 514 U.S. 549, 589 (Thomas, J., concurring) (disfavoring any approach to the Commerce Clause that gives Congress power over "matters that substantially affect interstate commerce").

> counted among the interests deemed important by the courts and by society's policymakers.[99]

Interest convergence theory suggests that the Commerce Clause would be a natural fit for advancing racial justice. Take, for example, the issue of race-conscious admissions programs in colleges and universities. When such an issue is framed in racial terms, there will always be a "winner" and a "loser." Whites may feel cheated, while people of color may feel that race neutral programs fail to consider the race-based challenges many students of color face. Thus, the parties are naturally antagonistic. This is the stalemate produced by Equal Protection jurisprudence.

However, if the issue is framed in economic terms, there is more of a chance of finding common ground. For instance, if the issue is framed as "African American college graduates save the nation x amount of dollars each year," interest convergence theory states that more whites, though they may be nominally disadvantaged by such a policy, would be more open to it because of the benefit to the city, state, or nation. Of course, there is no guarantee that whites would respond in this manner. This writing simply asserts that such an outcome is more likely under a commerce based approach.

The question then becomes—how much does racism cost? In the absence of the de jure segregation that existed in the 1960s when *Heart of Atlanta* and *McClung* were decided, it seems that some quantifiable measure would be helpful. At this point, it appears that there are no studies in the social sciences that attempt to place a dollar figure on how racism impacts daily life. However, there is one solid number that exists that can be used to create a syllogism that should demonstrate the workability of commerce-based approaches to racial justice.

At present, the Nielsen Company estimates that African Americans have one trillion dollars in buying power.[100] The number is expected to reach $1.3 trillion by 2017.[101] In addition,

> African-Americans make an average of 156 shopping trips per year, compared with 146 for the total market. Favoring smaller retail outlets, blacks shop more frequently at drug stores, convenience stores, and dollar stores. Beauty supply stores are also popular within the black community, as they typically carry an abundance of ethnic hair and beauty aids . . . that cater

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[99] Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523–24 (1980).

[100] *See African American Consumers Are More Relevant Than Ever*, NIELSEN (Sept. 19, 2013), http://www.nielsen.com/us/en/insights/news/2013/african-american-consumers-are-more-relevant-than-ever.html.

[101] *See id.*

> specifically to the unique needs of African-American hair textures.[102]

Using this information, consider the issue of "shopping while black." Many African Americans allege that due to an irrational fear that African Americans are more likely to steal items, they are followed around stores.[103] Assuming that African Americans are avoiding certain establishments due to this profiling behavior, their purchases are not made, and their money is diverted elsewhere. Because the goods at issue have travelled interstate, such as those in *Katzenbach v. McClung*, the Court should easily be able to regulate such behavior. (As a bonus, it should be noted that the Fourteenth Amendment cannot be used to regulate such behavior because the provision does not extend to the actions of privately owned businesses.)[104]

This may not be the only, or the best, example of the plausibility of commerce jurisprudence to right racialized wrongs. Moreover, it must be noted that many manifestations of racism—such as police brutality—lack a patently obvious economic component. In addition, to the extent that someone could put a price on certain racial microagressions, such as shopping while black, some may feel it distasteful to do so. These are all worthy criticisms. However, the objective of the current writing is simply to outline what could perhaps be a new—if imperfect—way to approach racial justice issues in the federal courts.

IV. CONCLUSION

In the heady days following May 17, 1954, advocates for racial equality surely and justly felt that they won a hard fought victory. However, in the decades that followed, they surely must have been chagrined by the "one step forward, two steps back" approach to racial justice adopted by the Supreme Court. The Court's stubborn unwillingness to recognize the persistence of racism is not something that can be overcome by simply

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102 *See id.*

103 *See, e.g.*, Michelle Singletary, *Shopping While Black*, WASH. POST (Oct. 31, 2013), http://www.washingtonpost.com/business/economy/shopping-while-black/2013/10/31/5c7129d4-41a4-11e3-a751-f032898f2dbc_story.html; Teresa Wiltz, *"Shopping While Black" Is Still an Issue—at Barneys and Elsewhere*, THE GUARDIAN (Oct. 28, 2013), http://www.theguardian.com/commentisfree/2013/oct/28/barneys-racial-profiling-shopping-while-black.

104 Section 1981, passed under the Thirteenth Amendment authority, may seem to be a possibility. However, that law has a mens rea requirement that need not be imported into Commerce Clause analysis. *See, e.g.*, Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1, 28–29 (2003) ("To state a claim in the making or enforcing of a contract under § 1981, a preponderance of the evidence must prove that: (1) the plaintiff is a member of a racial minority; (2) defendants intentionally discriminated against plaintiff on the basis of race; and (3) the discrimination was directed toward one or more of the activities protected by the statute." (citations omitted)).

appointing more sympathetic justices. Rather, a change in tactics would be helpful.

This brief essay is not intended to be a treatise, but the start of a conversation. There are many things that were not discussed in order to keep this writing compact. Other things—such as the economic impact of racism—were not discussed because the data do not exist. Despite these gaps, this is a worthy project. When battling a foe as pernicious and clever as racism, one must be careful not to become too complacent or reliant on one approach. This writing hopes to shed light on a new approach to racial issues.