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Why Strauder v. West Virginia Is the Most Important Single Source of Insight on the Tensions Contained Within the Equal Protection Clause of the Fourteenth Amendment

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WHY *STRAUDER v. WEST VIRGINIA* IS THE MOST IMPORTANT SINGLE SOURCE OF INSIGHT ON THE TENSIONS CONTAINED WITHIN THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

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I am delighted to participate in this issue of the *Saint Louis University Law Journal* on teaching the Fourteenth Amendment. This is a subject near and dear to my heart, having tried to introduce the complexities of the Fourteenth Amendment—in particular, the Equal Protection Clause—for what now is more than four decades. I have long thought that *Strauder v. West Virginia*[1] is the most illuminating single case ever decided by the Supreme Court regarding the doctrinal implications of the Equal Protection Clause for the ever-controversial topics of race and, in our own time, ethnicity. I have often told my own students, as we embark on our study of *Strauder*, that no future decision—which certainly includes *Brown*,[2] the most canonical of the equal protection decisions involving race—casts so much light on interpretive difficulties generated by the rather opaque language of the Equal Protection Clause. I have gone so far as to assert that in a very real way it is unnecessary to read any subsequent opinions, at least if one is seeking truly satisfying clarification of the questions left hanging after *Strauder*. The Supreme Court has not, in the ensuing 138 years, offered any genuine resolution of the fault lines that are exposed in Justice Strong's opinion.

I will devote the space allotted me to defending these apparently hyperbolic claims about a case that is not highlighted in most of the leading casebooks on constitutional law, if it appears at all.[3] As one might imagine, I regard this as a

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1. 100 U.S. 303 (1879).

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

3. Only one other casebook besides PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 391–98 (7th ed. 2018), treats *Strauder* as a major case. *See* MICHAEL STOKES PAULSEN, ET AL., THE CONSTITUTION OF THE UNITED STATES 1303 (3d ed. 2013). One might be tempted to ascribe this to the fact that Paulsen and his colleagues are identified as originalists. However, the equally prominent originalist, Randy Barnett, basically ignores *Strauder*, leaving the sole mention of the case to an excerpt by Michael Klarman criticizing Paulsen's co-author, Michael McConnell, for his originalist defense of *Brown v. Board of*

grievous omission, and one purpose of this Essay, frankly, is to shame my fellow academics who have relegated *Strauder* to the backwaters of the constitutional law canon and thus rendered their students ignorant of a truly seminal case. This particular Essay might well be read as the latest in a series of pieces on what is (and is not) within the canon of American constitutional law.[4] Jack Balkin and I have identified multiple canons: the cases (or other relevant materials) that provide the central grist for contemporary scholarly mills; the cases or materials that all lawyers should be expected to know as part of their "cultural heritage" as students and guardians of the American constitutional tradition; and, finally, the cases and materials that are most useful pedagogically.[5] Very few cases are part of all three. My claim for *Strauder* is primarily that it belongs in the third of these canons, though I think a good case can be made that it ought to be part of the articles that legal academics write for one another (and, possibly, for judicial readers) as well.

Education. Klarman wrote that McConnell's "defense of *Brown* does not enable him to justify court decisions such as *Strauder v. W. Va.*" *See* RANDY E. BARNETT & HOWARD E. KATZ, CONSTITUTIONAL LAW: CASES IN CONTEXT 965 (2d ed. 2013). What is probably the most widely used casebook, GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 521–22 (7th ed. 2013), devotes two pages to the case, as do WILLIAM D. ARAIZA, PHOEBE A. HADDON & DOROTHY E. ROBERTS, CONSTITUTIONAL LAW: CASES, HISTORY, AND DIALOGUES 865–67 (3d ed. 2006); JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, AND QUESTIONS 1316–17 (11th ed. 2011); and RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 712–13 (11th ed. 2015). NOAH FELDMAN & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW (19th ed. 2016) do not include *Strauder* in their table of contents, but they do address the case in the body of the casebook, as is true in DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 21, 68, 193, 332 (4th ed. 2009). There is only a glancing reference, often within the text of other, much later, cases, in ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 727, 751 (5th ed. 2017), which may reflect Chermerinsky's relative lack of interest in older cases and preference for the more recent handiwork of the Supreme Court, since, as a practical matter, it is these later cases that will be most likely relevant to the actual practice of litigating lawyers. I don't know if the same preference explains the lack of mention in MICHAEL KENT CURTIS ET AL., 2 CONSTITUTIONAL LAW IN CONTEXT (2010); DOUGLAS KMIEC ET AL., THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, AND PHILOSOPHY 1222 (3d ed. 2009); JONATHAN D. VARAT, WILLIAM COHEN & VIKRAM D. AMAR, CONSTITUTIONAL LAW: CASES AND MATERIALS (13th ed. 2009); and RUSSELL L. WEAVER ET AL., CONSTITUTIONAL LAW: CASES, MATERIALS, & PROBLEMS 529 (4th ed. 2017). In any event, one must assume that many, probably most, graduates of our finest law schools basically never hear of *Strauder*, and it is even less likely they discuss it.

4. Sanford Levinson, *Installing the* Insular Cases *into the Canon of Constitutional Law*, *in* FOREIGN IN A DOMESTIC SENSE 121, 121–39 (Christina Duffy Burnett & Burke Marshall eds., 2001) [hereinafter Levinson, *Installing the* Insular Cases]; J. M. Balkin & Sanford Levinson, *Legal Canons: An Introduction*, *in* LEGAL CANONS 3 (J. M. Balkin & Sanford Levinson eds., 2000) [hereinafter Balkin & Levinson, *Legal Canons*]; J. M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 968 (1998) [hereinafter Balkin & Levinson, *Canons of Constitutional Law*]; Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-KENT L. REV. 1087 (1993) [hereinafter Levinson, *Slavery in the Canon*].

5. *See* Balkin & Levinson, *Legal Canons*, *supra* note 4, at 12.

One thing that makes *Strauder* so teachable, for both professors and students alike, is its relative brevity; it is approximately 3,600 words in its entirety. Unlike the almost endless modern opinions that profess to turn on casuistic analysis of the Court's own murky, if not outright incoherent, precedents,[6] Justice Strong's opinion takes up only a few pages, even in its unedited version. The advantage is *not* that one can simply speed through the material on the way, say, to *Plessy v. Ferguson*.[7] Instead, my own inclination is to dwell on individual cases; there is no real point to assigning a case if one is not prepared to spend some significant amount of time on it. Otherwise, we should simply assign treatises on constitutional law. In fact, one of the things I like to do on occasion is to have students read aloud from key portions of opinions and stop frequently along the way to address exactly what is being argued.

In the best of all worlds, that near-Talmudic approach would allow the reading of the case in its entirety. Perhaps the most enriching teaching experience I have ever had was the opportunity, in a reading course at the Harvard Law School, to spend its twelve hours (over a six-meeting span) having students read aloud *McCulloch v. Maryland* in its 75-paragraph entirety and discuss its individual sentences and paragraphs. During the current spring semester of 2018, I am teaching, together with Professor Philip Bobbitt, a full-scale advanced constitutional law course at the University of Texas Law School that will concentrate entirely on a maximum of four cases, which will be read with similar intensity over the fourteen-week, forty-two-hour period. Not surprisingly, *McCulloch* and *Strauder* are two of those cases. I expect to spend at least six class hours on the latter and will no doubt be tempted to spend even more.

So why is *Strauder* so important for somebody trying to understand the legal doctrines implicated by the Equal Protection Clause? One reason is simply that, although decided only in 1879, it is the first case following the 1868 addition of the Fourteenth Amendment to the Constitution that fully addresses its meaning with regard to state laws conferring benefits or imposing burdens based on race. The earlier *Slaughter-House Cases* had certainly suggested that the treatment of African Americans who had been enslaved but had now become full citizens of the United States was the primary focus of the Amendment. That statement was important in the context of the case only insofar as it allowed the Court to dismiss the claims of (white) Louisiana butchers that they had been deprived of valuable property or liberty rights by virtue of the state legislature establishing a monopolistic abattoir at which all of the butchers were required to slaughter their

6. The most egregious example is probably the remarkably hostile exchanges between Chief Justice Roberts and Justice Breyer in their respective opinions in the 2007 *Parents Involved* set of cases, in which they claim to be ascertaining the one true meaning of *Brown*. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 759–60, 765, 771, 829–33 (2007).

7. 163 U.S. 537 (1896).

animals.[8] In *Strauder*, however, the issue of race was front and center. However, it is not this historical importance alone, or perhaps even at all, that justifies such close attention. Instead, its importance pedagogically lies in the set of arguments set forth by Justice Strong, writing for seven members of the Court.

First, the basic facts: Taylor Strauder himself was described by the Court only as "a colored man" who was indicted and convicted of murder in 1874.[9] He—or more accurately, of course, his lawyer—objected to the fact that West Virginia explicitly prohibited any non-whites from serving on the jury that would try him.[10] As Justice Strong put it, he claimed "reason to believe," by virtue of "his being a colored man and having been a slave . . . [that] he could not have the full and equal benefit of all laws and proceedings in the State of West Virginia for the security of his person as is enjoyed by white citizens."[11] He argued, therefore, that under federal law, he had a right to remove his trial to a federal court because he could not receive a fair trial in the state court.[12]

It is worth noting that West Virginia had in effect seceded from Virginia in 1863 in protest of Virginia's casting its lot with the pro-slavery Confederacy.[13] But it should be clear that to be anti-slavery (and, even more to the point, anti-Confederacy) was not necessarily to be racially progressive. One of the reasons that West Virginia did not identify with its mother state was its dramatic difference in topography, which made plantation agriculture simply irrelevant, though the 1860 census did reveal the presence of 18,371 slaves (plus 2,773 free blacks) out of a total population of approximately 375,000 persons.[14] Appomattox did nothing to change either topography or demography. The 1870 census indicated the presence of only 17,980 blacks; even by 1880, the total number of what the census now called "colored" was only 25,886.[15] In any event, it should occasion no surprise to learn that an 1873 West Virginia law provided that only "white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided."[16]

8. 83 U.S. 37, 80–81 (1872).

9. Strauder v. West Virginia, 100 U.S. 303, 304 (1879).

10. *Id.*

11. *Id.*

12. *Id.*

13. *See* Vesan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 293 (2002) (defending the legality of the creation of West Virginia).

14. *West Virginia Population by Race*, W. VA. DIVISION CULTURE & HIST., http://www.wvculture.org/history/teacherresources/censuspopulationrace.html [https://perma.cc/8J9U-3RPM]. As of 2016, the U.S. census estimated that 93.6% of West Virginia's population is "white alone." *West Virginia*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/WV [https://perma.cc/C9EC-9E4Z].

15. *West Virginia Population by Race*, *supra* note 14.

16. *Strauder*, 100 U.S. at 305. State officials were the exception to the law. *Id.*

At this point, I have always found it useful to stop and ask students to respond to these various classifications establishing eligibility for jury service. Which of them, in the twenty-first century, seem objectionable and which remain altogether tolerable (and, of course, why)? All students today, at least in class, find the racial and gender classifications unacceptable (though they are surprised to learn that it took until the 1970s to establish the right of women to serve on juries). But almost no one has similar reaction to the age and citizenship requirements.

To be sure, today the age of eligibility is eighteen. Yet students almost never suggest that the age classification is itself the kind of arbitrary line vulnerable to an "equal protection" challenge, even when, it might be added, many states, to prove their toughness on crime, are willing to label as "adults" younger teenagers who are charged with heinous offenses (and were, until the Supreme Court deemed it unconstitutional, willing to make minors eligible for capital punishment). So why is it that a sixteen-year-old charged as an adult must face a jury that, by law, can contain no one from his age cohort? At the very least, students learn that the very notion of "adulthood" is truly a socially- and legally-constructed concept that has no fixed meaning, even if genuine consequences follow from being classified as an adult or as a "minor."

Needless to say, almost all students are more than happy to argue that minors have neither the knowledge nor experience that we seek in jurors. This would surely be true, say, of six-year-olds, so why not assume the same of those ten years older? As someone whose actual career in the law consisted of a year working for the Children's Defense Fund, I press my adult students on the basis by which they offer basically demeaning stereotypes of those younger than themselves. To what extent are their conclusions based on empirical evidence as compared to "conventional wisdom" about the comparative capacities of a privileged group—in this case, "adults"—and a subordinated group of children? And is it relevant, for example, that outside of science fiction no law student faces the prospect of returning to their younger selves? One potential safeguard against demeaning stereotypes and ill-treatment of the elderly is that most students understand that in time they can expect to inhabit that role themselves. They might, therefore, be hesitant, simply out of "enlightened self-interest," to support laws that discriminate against the elderly. But there is no such self-interest attached to protecting the rights of children. Perhaps it is accurate to say, as a practical matter, that children in a very real way possess only such rights as adults might choose to give them, and that obviously does not, for starters, include the right to vote or serve on a jury. Indeed, in most states, thanks to federal law, an ability to vote or serve on a jury (or enlist in the armed forces) does not guarantee that one can buy alcoholic beverages.

One might similarly ask why it is that non-citizens should be denied the opportunity to serve on a jury, especially if the defendant is also an alien. If we believe that Mr. Strauder had a cognizable interest in at least the theoretical

possibility that his jury could include a fellow African American, then we should ask if the same might be true of forcing non-citizens, who may themselves increasingly be the target of opprobrium from nativists, to make their cases before a jury that under no circumstances will include anyone who shares their status. Every equal protection case necessarily is about both those distinctions that we object to and those that we often unthinkingly accept as "natural."

At the very least, it is important to learn early on in one's exploration of the notion of "equal protection" that the one thing that the concept *cannot* mean, as a practical matter, is that everyone must be treated exactly alike. It is usually at this point that I mention one of my favorite books, *Equalities*, by Yale political scientist Doug Rae and several of his colleagues.[17] The plural form of the word is absolutely crucial, for the book demonstrates quite clearly that there are at least 108 logically tenable theories of "equality"[18] and, therefore, of "equal protection." We are forced to pick among them without any genuine guidance from the text itself. The most obvious theory—treat everyone identically—is surely logical but politically nonsensical. There are *no* circumstances under which we put everyone's name in a hat, the newborn child and the elderly individual facing death alike, and simply pick a name at random when allocating benefits or burdens attached to public policies. What almost all laws do is to distinguish on the basis of what we hope are relevant attributes. Even if, as with the draft by the end of the 1960s, there are elements of selection by lottery, the pool from which those drafted were chosen was stratified most obviously by age and gender, not to mention ostensible medical disabilities.[19]

I usually emphasize to my students that they are occupying their seats at the University of Texas only because of a variety of "discriminatory" criteria, such as grade point average, LSAT scores, as well as state residence—Texans get a significant preference in admissions—and, perhaps, race or ethnicity. Students must learn that "discrimination" is a more neutral term than they might first believe. It is, for example, a good thing to be thought to have "discriminating tastes" in many contexts, just as it is very definitely not so good to engage in unwarranted or what the Supreme Court is wont to call "odious" or "invidious" discrimination. The central task is how to figure out the difference, and it is important to realize how little genuine help the Fourteenth Amendment provides as to how to answer that question. For better or, quite possibly, for worse, the words of the Amendment generate endless conversation—which often takes the form of acrimonious argument—rather than providing anything that could be

17. DOUGLAS RAE ET AL., EQUALITIES (1981).

18. *Id.* at 133.

19. Such as the bone spurs that kept Donald Trump out of the armed services in the 1960s. Steve Eder & Dave Phillips, *Donald Trump's Draft Deferments: Four for College, One for Bad Feet*, N.Y. TIMES (Aug. 1, 2016), https://www.nytimes.com/2016/08/02/us/politics/donald-trump-draft-record.html.

called a textual resolution. Contrast this, say, with the clauses setting out the terms of offices of representatives, senators, and presidents or establishing the date on which a new president is inaugurated.[20]

Turning to the specifics of the case before him, Justice Strong is very careful to delineate the exact issue presented to the Court:

> [The question] is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law solely because of their race or color, so that *by no possibility* can any colored man sit upon the jury.[21]

That is, this is a question exclusively about the *process* of jury selection; *Strauder* is not a case about a *substantive* theory of what ultimately constitutes a fair jury per se. But, obviously, one is not estopped from having such substantive theories and, perhaps, criticizing a polity for failing to adopt one's favorite such theory. Indeed, it is not remotely clear that Strauder's complaint, assuming it is legitimate at all, is truly assuaged by creating a situation where there was a theoretical possibility that an African American *might* have served on the jury even though, in fact, the jury ended up all-white. One suspects that this would be cold comfort. If one is concerned about the "security of his person," one might believe that a racially heterogeneous jury would be more protective of that security than the all-white one. However, that was not the Supreme Court's view then, nor is it now.

Students may well be interested in the fact that Great Britain until the nineteenth century provided that a jury trying a commercial case between a British and foreign merchant included both British and foreign nationals.[22] Foreign merchants might well have felt concerned about having their claims tried before all-British juries, and a trading country like Great Britain had an obvious interest in reassuring foreign merchants that they would not face the equivalent of kangaroo courts. Abstract assurances of "fair treatment" were understandably likely to be dismissed as what Publius in *The Federalist* termed "parchment barriers" that could easily be breached.[23] Far more impressive was to design the institution of the jury in such a way that would guarantee a mixture of jury members likely to produce confidence in whatever verdict might be reached. Some of the same concerns, even if not the same solutions, are

20. I distinguish very sharply between what I call the "Constitution of Conversation" and the "Constitution of Settlement" in SANFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 19 (2012).

21. *Strauder*, 100 U.S. at 305 (emphasis added).

22. *See* MARIANNE CONSTABLE, THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE 103 (Donald N. McCloskey & John S. Nelson eds., 1994).

23. THE FEDERALIST NO. 48 (James Madison).

discernable within the text of the 1787 Constitution itself. After all, one of the explanations for Article III's Diversity Clause was the fear that out-of-state plaintiffs would not receive justice from state courts.[24] The promise in the Preamble to "establish justice" was manifested procedurally in giving out-of-state plaintiffs the constitutional right to sue in federal courts as a means of limiting illegitimate prejudice in favor of locals. To be sure, juries would still be drawn from the locality, but at least the judge, as an appointee of the president confirmed by the Senate (and enjoying life tenure), might be less parochial than a state judge.

Students should certainly learn that a key aspect of the case, in effect left unmentioned by Strong (though not by Justice Field in his dissent), is the assumption that juries are in fact covered by the Fourteenth Amendment. As a matter of fact, the debate in the Congress that proposed the Fourteenth Amendment was suffused with the distinction between "civil" and "political" rights, and several legislators took great care to emphasize that only the former were covered.[25] The paradigm cases of political rights were voting and jury service. (It's also worth noting that an additional distinction was made with regard to "social" rights, including the right to attend desegregated schools). Vikram Amar has cogently argued that *Strauder* should have been decided as a Fifteenth Amendment case,[26] though this would have required, among other things, amalgamating jury service to the even more fundamental right to vote. Students fixated on "originalism" as a method of constitutional analysis should certainly be invited to address this problem. Yet the central reality is that Justice Strong did not for a moment register any doubt—or present any concrete evidence supporting his view that juries were, at least under some circumstances, the object of Fourteenth Amendment solicitude. One can also argue, of course, that the distinction between "civil" and "political" rights was far murkier, even in the nineteenth century, than some of its proponents thought it was. After all, a basic civil right was access to courts, including the rights to sue and to testify. The case is not, at least on the surface, about the abstract dignity interest per se that African-American West Virginians might have to serve on juries, but, instead, about the possibility that the particular criminal defendant, Taylor Strauder, was harmed by the exclusionary policy. Had the defendant been a

24. See, for example, Chief Justice Marshall's opinion in *Bank of the United States v. Deveaux*, 9 U.S. 61, 87 (1809) ("However, true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.").

25. *See, e.g.*, BREST ET AL., *supra* note 3, at 356–57.

26. Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 241 (1995).

white man charged with murdering a fellow white, there can be no practical doubt that he would not have been allowed to raise this issue,[27] which we might identify today as "third party standing" for African Americans suffering dignitary harm.[28] Strong assumes that it was Strauder himself who suffered the harm.

So, at this point, the case invites the obvious discussion as to whether it is enough that African Americans (or any other group) be theoretically "eligible" for jury service even if the final jury is exclusively white (or any other relevant category). Almost inevitably, some student will bring up the notion of "a jury of one's peers," with the implication that a defendant might be entitled to have at least someone on a jury who "looks like him" or otherwise shares some central attribute that defines one's identity. The quick response is that the term comes from Great Britain, which was explicitly divided by class.[29] The "peers" of those sitting in the House of Lords were other Lords, of commoners, other commoners.[30] But in the United States there were no such acknowledged divisions by class. We are *all* peers of one another at least insofar as we share a common citizenship. Thus, a chimney sweep is the peer of Bill Gates, at least from the perspective of the U.S. Constitution.

At least some students will understandably cavil at such a formal and legalistic understanding of "peerage" and adopt instead more sociological approaches. Students should understand that "thinking like a well-trained American constitutional lawyer," at least at present, requires rejection of such approaches in favor of a far more abstract theory of the commonality of all citizens. Moreover, they should understand that the Constitution continues to be interpreted as requiring only a "fair process" and not any given set of outcomes that might accord with a more substantive theory of fairness. It is telling from this perspective that it is actually a matter of debate whether an individual who is later conclusively proved to be innocent is nevertheless subject to being

27. But see *Peters v. Kiff*, 407 U.S. 493, 504 (1972), in which the Court upheld the right of a white civil rights activist to challenge jury discrimination against African Americans. This can be viewed as relying on third party standing or, in the spirit of *Strauder* itself, recognizing that not all whites are fungible and that whites who are part of the civil rights movement might be the victims of illegitimate treatment in an all-white jury within a culture hostile to civil rights.

28. *See, e.g.*, Powers v. Ohio, 499 U.S. 400 (1991). In *Powers*, the Court upheld a criminal defendant's standing to assert prospective jurors' rights not to be peremptorily challenged on grounds of race, in light of the "relation" between the defendant and jurors that "continues throughout the entire trial" and the significant practical barriers to the assertion by prospective jurors of their own rights. *Id.* at 413–14. To put it mildly, standing doctrine is notoriously complex, and some would characterize it as incoherent. *See, e.g.*, Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1061–63 (2015).

29. Bruce McKenna, *A Jury of One's Peers*, FEDERAL LAWYER, Aug. 2010, at 4, http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2010/The-Federal-Lawyer—August-2010/Columns/At-Sidebar.aspx?FT=.pdf [https://perma.cc/BA4K-5U39].

30. *Id.*

executed by the state if he received a completely "fair trial" and if the jury at the time could reasonably have believed in his guilt (and the proposition that death was warranted as the punishment).[31]

Strong moves toward explicit analysis of Section 1 of the Fourteenth Amendment itself. He begins by describing it as "one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that, through many generations, had been held in slavery, all the civil rights that the superior race enjoy."[32] One suspects that almost everyone will agree with this anodyne description, though this requires, almost by definition, a *purposive* reading of an almost completely abstract text that says no such thing explicitly. At what level of generality do we discern such purposes? After all, we have already demonstrated that Strong, although referring to "the civil rights" that whites enjoy, almost blithely ignores the quite well-established distinction between "civil" and "political" rights that would leave jury service firmly in the latter category.[33] But let's move beyond this point, however important it may be historically. We must still confront the implications of Strong's definition of *purpose*. The devil, of course, is always in the details. How, exactly, are we to achieve what he would presumably regard as a desirable outcome?

It is at this point that Strong writes what are undoubtedly the hardest-to-read and most discomforting sentences in the entire opinion. These new additions to the Constitution, he reminds us:

> [C]annot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that, in some States, laws making such discrimination then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and, as such, they needed the protection which a wise government extends to those who are unable to protect themselves. *They especially needed protection against unfriendly*

31. *See* Herrera v. Collins, 50 U.S. 390, 400 (1993) ("[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact [such as the high probability that they are innocent of the crime for which they were convicted and sentenced to death])." Justice Blackmun, in dissent, described the possibility that the State would execute someone likely to be innocent as nothing more than simple murder. *Id.* at 446.

32. Strauder v. West Virginia, 100 U.S. 303, 306 (1879).

33. *Id.*

> *action in the States where they were resident*. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that, under the law, are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation.[34]

Strong quotes a key passage from the *Slaughter-House Cases*, describing the "one pervaiding [sic] purpose" of the Reconstruction Amendments as providing "protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them."[35] So what do we make of this? At the least, one can suggest that Strong was fully aware that losing a war did not necessarily bring about a change of fundamental consciousness, of what are often called "the hearts and minds" of one's adversaries. A war fought to retain race-based slavery, even if lost, could not be expected to extirpate the racialist ideology on which the slave system was based. Contemporary Americans aware of the aftermath of the U.S. intervention in Iraq should be able to understand the notion that it is indeed difficult to discern when the presumptive mission is accomplished. Ostensible defeat of the Confederacy at Appomattox was followed by a Southern white "insurgency" most significantly instantiated in the Ku Klux Klan. Concrete realities of the Old Order continued into the purportedly reconstructed United States and well after. Most important is that former slaves, including, one might assume, Mr. Strauder, continued to live within a fundamentally racist society and had to bear the continuing consequences of the fact that they had been systematically deprived of education and other resources that might have enabled them to enjoy unproblematic access to a new status within society. That Strong might have written his opinion in a more sensitive way, at least according to our own sensibilities, does not gainsay that he was far from accepting any naive notion that the white ruling class could be trusted to be adequately sensitive to the constitutional interests (let alone ordinary political ones) of a despised minority. "Protection" is needed, and the question is what this means. Whatever discomfort one feels at Strong's specific language should be secondary to his candor and genuine insight about what is at stake.

We then move on to what I have always found the most important, and problematic, paragraph in the entire opinion:

> If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally to carry out the purposes of its framers. It ordains

34. *Id.* at 306–07 (emphasis added).

35. *Id.* at 307.

> that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. *What is this but declaring that the law in the States shall be the same for the black as for the white*; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—*the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race*.[36]

Especially if one chooses to focus on the first emphasized fragment, the reader may surely be tempted to read Strong as calling for what Justice Harlan subsequently labeled the "color-blind" Constitution in his *Plessy* dissent. One surely cannot discern this simply from reading the text of the Fourteenth Amendment, which says no such thing, but one might believe that the best way to assure that African Americans will be treated fairly is to prohibit any distinction based on race. Color-blindness is thus a "prophylactic rule," adopted self-consciously by those who endorse it on the basis of a particular instrumentalist analysis of how best to achieve the purpose of the Amendment. The law, as declared by the Supreme Court, shall be the same, i.e., identical, for the black citizen as for the white. What could be more simple (or simplistic)?

But then Strong goes on to emphasize something quite different, the notion that the Amendment requires only (but importantly) "an exception from unfriendly legislation" that is designed in effect to keep African Americans in their subordinate place. Again, one can easily agree that *unfriendly* legislation should be invalidated. But then the obvious question is what about *friendly* legislation that, to be sure, distinguishes between African Americans and whites but is done so for inclusionary and not subordinating purposes? This one paragraph enables us to posit the contrast between two significant visions of the Fourteenth Amendment that continue to be contested today, often in bitterly divided decisions of the Supreme Court. Anyone who is skeptical, for example, of Chief Justice Roberts's imprecation that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race"[37] will, almost by definition, be receptive to arguments in behalf of what is thought to be the

36. *Id.* at 307–08 (emphases added).

37. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

"friendly" legislation or policies endorsing "affirmative action." Concomitantly, any critic of affirmative action is likely to find Roberts's statement the equivalent of a self-evident truth.

What I often ask my students to do is to imagine themselves as law clerks to Justice Strong who are preternaturally aware of the implications that future generations might draw from the text of Strong's opinion. Would they advise him to rewrite this paragraph (or any other part of the opinion) in a way that would more clearly resolve the tension between these two views of "equal protection"? Is there, incidentally, reason to believe that *he* was aware of the potential problems posed by his language, or is this something that is revealed only by the passage of time? Is this a dilemma presented by all reliance on past precedents, i.e., that they are inevitably construed in a different context?

Strong further complicates matters in his next paragraph:

> That the West Virginia statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a[n unfriendly?] discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. *If, in those States where the colored people constitute a majority of the entire population, a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating fully with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor, if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment.* The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law as jurors because of their color, though they are citizens and may be in other respects fully qualified, is practically *a brand upon them affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.*[38]

How shall we read this? If the paragraph ended with the sentence referring simply to the exclusion of "white men," we might well offer this to support the "color-blind" reading. But, of course, it does not. Instead, we are invited to contemplate the concrete demography of particular polities. The first is one in which "the colored people constitute a majority of the entire population" and, presumably, possess control over the mechanisms of decision-making within the polity. If one adopts a certain kind of interest-group theory of politics—one that amply explains the subordination of blacks by politically powerful slaveowners—it is easy enough to imagine that a black majority might be tempted to engage in similar self-dealing, even if not outright revenge against their now displaced oppressors. Indeed, the majority of the Court adopted

38. *Strauder*, 100 U.S. at 308 (emphases added).

something close to this theory in *City of Richmond v. J.A. Croson Co.*, where Justice O'Connor paid great attention to the fact that the Richmond, Virginia, requirement of affirmative action in the assignment of public contracts had been adopted by a now-majority African-American city council.[39] But if the demographics are important in that case, what should we make of various preferential programs that are adopted by decision-making bodies that have scarcely been captured by former minorities? What if a decidedly "white" legislature decides that preferences for racial minorities are in fact desirable (or if a similarly "male" legislature passes legislation designed to favor women)?

The reference to "naturalized Celtic Irishmen" is also of great interest. It underscores the point that the Amendment is not limited in its reach to protecting African Americans against clearly invidious discrimination. Why might one be especially sensitive to the circumstances of "naturalized Celtic Irishmen," by definition fellow members of the civic community? It takes no great leap to assume that Justice Strong, born in Connecticut and educated in Massachusetts, was aware of immigrants from Ireland who were scarcely welcomed with open arms by existing Yankee hegemons in New England, even if their paths to citizenship were in fact tolerated. *The New York Times* has recently republished an 1854 advertisement for a housekeeper that included the warning "No Irish need apply."[40] It is easy enough to imagine a notion of citizenship that did not include eligibility to serve on the jury or even to vote. That is, after all, not only what was at issue in *Strauder* itself, but also the fate of the demographic majority of women who were left unprotected by Reconstruction with regard to the right to vote. So, is it important that Strong refers to "Irish*men*" and not to the more general class of the "naturalized Celtics"? But we can also wonder if these "Celtics" could object to the exclusion, say, of African Americans, let alone women. It's easy enough to see why they might object to the ineligibility of other "Celtics," but it is more difficult to ascertain their immediate interest in assuring that jury selection met the criteria of a more generalized theory of justice or adequately protected the dignitary interests of all persons who might wish to serve on juries.

Finally, the last emphasized sentences invite us to reflect on the way that the law is a profound teacher and agent in the formation of social consciousness. Some "discriminations" are totally innocent, but others, as Strong emphasizes, work to generate a culture of racial supremacy and concomitant subordination. Contrary to what William Graham Sumner asserted at the end of the nineteenth century, law does not merely reflect exogenous "mores,"[41] but, instead, as

39. 488 U.S. 469, 495, 499 (1989).

40. Mark Bulik, *1854: No Irish Need Apply*, N.Y. TIMES (Sept. 8, 2015), https://www.nytimes.com/2015/09/08/insider/1854-no-irish-need-apply.html?mcubz=2&_r=0.

41. WILLIAM GRAHAM SUMNER, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS 53 (1906).

Justice Strong suggests, serves as a "stimulant" to generating perceptions of "inferiority" and consequent "race prejudice" that is indeed an "impediment" to full membership and genuinely equal citizenship.[42] The awareness by white jurors that blacks were thought unworthy to serve on juries at all might have spillover consequences for their perception of Taylor Strauder and other African-American defendants who challenge the State's account of their conduct. Justice Strong indeed goes on to discuss, with citations to Blackstone,[43] the importance of juries and the potential consequences to a black defendant should the state suggest that no African American, albeit a citizen, has the capacity to participate in this essential role of citizenship. "How can it be maintained," asks Strong, speaking for the Court, "that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection" because of the general message it sends about the more general inequality of African Americans within the West Virginia polity?[44] Again, though, this suggests that Strauder could not have made similar claims with regard to the exclusion of other groups.

So, is *Strauder* a ringing assertion of a very broad notion of equality, a case in which we should take unequivocal pride (and all the more regret its non-canonical status)? Perhaps not, for Strong proceeds to state:

> We do not say that . . . a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it. . . . "[It] is necessary to keep the main purpose steadily in view. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other." We are not now called upon to affirm or deny that it had other purposes.[45]

So, the good news is that *Strauder* can easily be read as a very broad mandate both to guard against *unfriendly* discrimination against African Americans and, at the same time, to be more accepting of arguably *friendly* legislation designed to integrate and include them within the wider society and

42. *Strauder*, 100 U.S. at 308.

43. Though not to Alexis de Tocqueville, who had emphasized in *Democracy in America* the centrality of juries to the democratic enterprise. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 312 (Henry Reeve trans., Pa. State Univ. 2002) (1835).

44. *See Strauder*, 100 U.S. at 309.

45. *Id.* at 310 (quoting the Slaughter-House Cases, 83 U.S. 37, 81 (1872)).

polity. For many, though, the bad news is that many other classifications remain altogether available. For contemporary students, the most obvious example is gender. Indeed, one might use this as the occasion to tell students that Justice Scalia expressed doubts late in his career that the Fourteenth Amendment *is* correctly interpreted to prohibit gender discriminations.[46]

Strong concludes his opinion by easily upholding the power of Congress, under Section 5 of the Fourteenth Amendment, to allow removal of any case to a federal court whenever the state violates basic constitutional rights of a fair trial, as certainly occurred in the case.[47]

As noted earlier, Justice Field, joined by Justice Clifford, dissented, though the opinion was part of an attached case, *Ex parte Virginia*.[48] For our purposes, the most important passages are as follows:

> [T]he first section of the Fourteenth Amendment was adopted. Its first clause declared who are citizens of the United States and of the States. . . . It also recognized, if it did not create, a national citizenship, as contradistinguished from that of the States. But the privilege or the duty, whichever it may be called, of acting as a juror in the courts of the country is not an incident of citizenship. Women are citizens; so are the aged above sixty, and children in their minority; yet they are not allowed in Virginia to act as jurors. Though some of these are in all respects qualified for such service, no one will pretend that their exclusion by law from the jury list impairs their rights as citizens.
>
> . . . .
>
> The fourth clause in the first section of the amendment declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws." . . . All persons within the jurisdiction of the State, whether permanent residents or temporary sojourners, whether old or young, male or female, are to be equally protected. Yet no one will contend that equal protection to women, to children, to the aged, to aliens, can only be secured by allowing persons of the class to which they belong to act as jurors in cases affecting their interests. The equality of protection intended does not require that all persons shall be permitted to participate in the government of the State and the administration of its laws, to hold its offices, or be clothed with any public trusts. As already said, the universality of the protection assured repels any such conclusion.
>
> The equality of the protection secured extends only to civil rights, as distinguished from those which are political or arise from the form of the government and its mode of administration. . . . It secures to all persons their civil rights upon the same terms; but it leaves political rights, or such as arise

46. Emi Kolawole, *Scalia: Constitution Does Not Protect Women Against Discrimination*, WASH. POST (Jan. 4, 2011, 9:08 AM), http://voices.washingtonpost.com/44/2011/01/scalia-constitution-does-not-p.html [https://perma.cc/29XN-UD6C].

47. *Strauder*, 100 U.S. at 312. I have been unable to discover whether Taylor Strauder in fact received a new trial before a federal court and jury. As is so often the case, the actual human beings disappear behind the cloud of legal doctrine.

48. 100 U.S. 339 (1879).

> from the form of government and its administration, as they stood previous to its adoption. It has no more reference to them than it has to social rights and duties, which do not rest upon any positive law, though they are more potential in controlling the intercourse of individuals. In the consideration of questions growing out of these amendments, much confusion has arisen from a failure to distinguish between the civil and the political rights of citizens. Civil rights are absolute and personal. Political rights, on the other hand, are conditioned and dependent upon the discretion of the elective or appointing power, whether that be the people acting through the ballot or one of the departments of their government. The civil rights of the individual are never to be withheld, and may be always judicially enforced. The political rights which he may enjoy, such as holding office and discharging a public trust, are qualified because their possession depends on his fitness, to be adjudged by those whom society has clothed with the elective authority. The Thirteenth and Fourteenth Amendments were designed to secure the civil rights of all persons, of every race, color, and condition; but they left to the States to determine to whom the possession of political powers should be intrusted. This is manifest from the fact that when it was desired to confer political power upon the newly made citizens of the States, as was done by inhibiting the denial to them of the suffrage on account of race, color, or previous condition of servitude, a new amendment was required.[49]

Most of us, no doubt, would simply like to dismiss Field's arguments because they lead to what are clearly unacceptable results, unlike Justice Strong's own opinion. But on what ground, precisely, does Field's argument fail? Is he demonstrably wrong on the historical facts as to the likely meaning attached to the Fourteenth Amendment by those framing it, or by the initial audience discussing the "public meaning" of the Amendment? This obviously raises a central question linked to the whole enterprise of "originalism," which rests on highly contested readings of relevant historical records. But, of course, one might argue that the historical record is, in effect, irrelevant, that Justice Strong was altogether correct in failing to offer any rebuttal at all to Justice Field's arguments and instead almost blandly uniting the "political right" of jury service with the "civil rights" that were protected by the Fourteenth Amendment. Such questions, of course, will recur throughout the next fourteen decades, regarding the scope of coverage, whether concerning the specific group covered (women, the disabled, various sexual groups, etc.), or the specific rights that are thought to be instantiated within the Amendment (civil rights, the most basic political right of voting, "social rights" such as marriage or education, etc.).

A class that takes the time genuinely to ponder the complexities (or minefields) that can be found within *Strauder* will have a basically complete understanding of at least the broad issues presented by the Fourteenth Amendment and the notion of "equal protection of the laws." Justice Scalia was fond of saying that you can beat a theory (like originalism) only by positing a

49. *Id.* at 365, 367–68.

better theory.[50] So, in this instance, the question is whether there is another case or even single opinion that is so genuinely illuminating as *Strauder*. I have no difficulty at all in saying that neither *Brown* nor any of the increasing multitude of "affirmative action" cases come close to defeating my claims in behalf of *Strauder*. I should be clear: I do not believe it would be desirable for students to leave law school without knowing anything at all about *Brown v. Board of Education*. But, as Balkin and I argued some two decades ago, the reason to read and discuss *Brown* has almost nothing to do with providing genuine clarity as to the meaning of the Fourteenth Amendment—if it did that, we would not have suffered through the unseemly Roberts-Breyer shootout in *Parents Involved*—and everything to do with the fact that *Brown* is part of what we termed the "cultural canon" that lawyers are simply expected to be able to identify to avoid the embarrassment of revealing ignorance of the case. But the point is that *Brown* simply does not contain within it (especially if one includes Field's dissent) the analytical riches of *Strauder*. I rest my case.

CODA

It should be clear that this Essay is almost exclusively about tensions in Fourteenth Amendment *doctrine*. That is, it is written from an "internal perspective," in which one is tasked with trying to make the best interpretive sense of the elusive language of the Fourteenth Amendment itself. But such a perspective is only one way of approaching both legal materials and, more to the point, the concrete realities of a legal system. One can ask, for example, about the various external forces within the larger polity that might explain shifts in doctrine over time. Just think of the difference that deaths, resignations, and new appointments, influenced by election results, can make with regard to the outcome of cases. This is one reason, of course, that contemporary appointments to the Supreme Court have become so contentious. Almost literally no one in the entire country thought that Judges Merrick Garland and Neil Gorsuch were fungible, that it just didn't matter which of them acceded to the highest bench because, after all, both were extremely smart graduates of the Harvard Law School, experienced federal judges who should, therefore, come basically to the same conclusions about disputed matters of constitutional law. What explains Neil Gorsuch's being on the U.S. Supreme Court is first, that the Republican Majority Leader Mitch McConnell ruthlessly decided to deny Judge Garland even the courtesy of a hearing, let alone an actual vote, and then that Donald Trump won the election, coupled with the fact that the Senate Republicans were willing to eliminate the filibuster for Supreme Court nominees. This amply vindicated the seeming reality, according to polling data, that Evangelical

50. Mary Wood, *Scalia Defends Originalism as Best Methodology for Judging Law*, UNIV. VA. SCH. L. (Apr. 20, 2010), https://content.law.virginia.edu/news/2010_spr/scalia.htm [https://perma.cc/5C39-Y2TZ].

Protestants who might otherwise have been expected to be repulsed by the hedonistic and otherwise immoral Donald Trump, nonetheless happily voted for him because of their confidence that he would appoint a Supreme Court Justice compatible with their beliefs.

But there are, of course, yet other non-doctrinal questions that anyone interested in American constitutional development should certainly ask. Although I have argued that *Strauder* is almost uniquely illuminating with regard to the doctrinal intricacies of race and the Fourteenth Amendment, is there any other reason to believe that the case is actually "important"? For example, did it actually change the behavior of West Virginia and other states that were forthrightly informed that they could not be racially bigoted in deciding who could (and could not) serve on juries? Gerald Rosenberg has famously argued that the Supreme Court has generally been a "hollow hope" with regard to bringing about significant changes within the polity or wider social order.[51] One of his examples, indeed, was *Brown* and its relative insignificance in changing the actual composition of public schools outside the border states prior to the passage of the Civil Rights Act of 1964.[52] It takes little research to demonstrate that African Americans were not welcomed as members of jury pools and, even more to the point, the petit juries themselves, until almost a century following *Strauder*.[53] What *Strauder* said was "only" that states could not explicitly bar African Americans from the jury. But the opinion, intentionally or not, almost invited states to rely on other criteria that might well have a disparate impact on African Americans. And, of course, there is the hoary practice of "peremptory challenges," which allows the State (as well as defense attorneys) to exclude potential members of the jury without supplying any reason at all.

One of the most disgraceful decisions of the Warren Court, written by Justice White—and joined by liberal stalwart Justice Brennan—*Swain v. Alabama*,[54] which basically expressed indifference to the use of peremptory challenges and other mechanisms of jury selection that had the consequences, even if not the demonstrated "intent," to exclude African Americans from juries.[55] It took a further two decades before the Court began to rein in peremptory challenges in *Batson v. Kentucky*,[56] but it remains an unfortunate

51. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008).

52. *Id.* at 70–71.

53. *See* Smith v. Texas, 311 U.S. 128, 128–32 (1940); *see also* GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW, 253–272 (1910) (illustrating through a survey that southern counties allowed extremely few, if any, African Americans to serve on juries).

54. *See* 380 U.S. 202 (1965).

55. *See id.* at 222. Chief Justice Warren, Justice Goldberg, and Justice Douglas dissented. *Id.* at 226.

56. *See* 476 U.S. 79 (1986).

truth that judges have been astonishingly credulous in accepting prosecutors' explanations of the "non-racial" criteria being used to exclude potential black jurors.[57] And, of course, with regard to voting rights, the Supreme Court exhibited little interest over the decades in whether "literacy tests" were applied fairly instead of being used as a convenient pretext, with regard both to voting and jury service, for discrimination. No less a liberal denizen than Justice Douglas wrote the Court's opinion in 1957 upholding North Carolina's continued use of literacy tests for voting, in part because the plaintiffs offered only a facial challenge to such tests and the Court accepted the State's argument that they were applied to white and black citizens alike.[58]

One danger, perhaps, of my relative valorization of Justice Strong's opinion is that it might lead impressionable students to believe that it accurately mirrored the general legal culture of the time and, even more importantly, offers a guide to inferring the actual behavior of those within the wider political system. No political scientist would ever make such an error, but law professors and students may be especially attracted to such arguments. After all, devotees of the judiciary have a vested interest in believing that opinions that they admire because of their abstract reasoning or reflection of admirable moral or political views were also influential within the wider society. If one listens only to (certain) law professors, one might believe that *Brown* singlehandedly transformed the American South. Students are rarely taught about Harry Truman and the 1948 election or about the crucial role played in American consciousness by Branch Rickey's decision to bring Jackie Robinson to integrate what had hitherto been an exclusively white "major league" baseball industry. And so on.

Strauder therefore is simply a "data point" in a very complex saga of American constitutional history. It may be extraordinarily useful for some pedagogical purposes, as I have argued, but probably irrelevant for others (such as understanding the actual behavior of southern states). Perhaps the most fundamental question is whether *any* Supreme Court cases are of transcendent significance with regard to developments in the wider political order. But that topic, however important, is beyond the scope of this Essay.

57. *See* Shaila Dewan, *Study Finds Blacks Blocked from Southern Juries*, N.Y. TIMES (June 1, 2010), http://www.nytimes.com/2010/06/02/us/02jury.html?pagewanted=all; Adam Liptak, *Exclusion of Blacks from Juries Raises Renewed Scrutiny*, N.Y. TIMES (Aug. 16, 2015), https://www.nytimes.com/2015/08/17/us/politics/exclusion-of-blacks-from-juries-raises-renewed-scrutiny.html.

58. *See* Lassiter v. Northhampton Cty. Bd. of Elections, 360 U.S 45 (1959). It may be worth noting that the case was argued on May 18-19, 1959, and then decided June 8, 1959, in a unanimous opinion. *Id.* One might suggest, then, that the Court treated this as a toss-off case, if not outright frivolous then, at least not worth serious consideration.