WHY STRAUDER V. WEST VIRGINIA IS THE MOST IMPORTAN T SINGLE SOURCE OF INSIGHT ON THE TENSIONS CONTAINED WITHIN THE EQUAL PRO TECTION CLA USE 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, [illegible] always, I

er, which is reflected especially in Code," Jack Balkin, and

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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.wv

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

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,

> 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.

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.[89] 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

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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 discrimination.[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 and 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,

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 w (6)11.4 ( )]TJ9(t)6.3 (o)N l e e fo 5.3osg0T -0.007a cble i.6 (1t)0.6 ()0.8 (

truth that judges have been astonishingly credulous in accepting prosecutors' explanations of their "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 at face value the 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