

Plessy v Ferguson And The Literary Imagination

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On 7 June 1892, Homer Plessy was arrested for violating Section 2 of Act 111 passed by the Louisiana Legislature in 1890. The law called for 'equal but separate accommodations for the white and colored races' on all passenger railways within the state. Plessy's arrest was part of a planned challenge to the law by New Orleans blacks, who formed a committee of protest. In September 1891 the committee had contacted the white lawyer Albion Winegar Tourgée.¹

A resident of upstate New York, Tourgée was perhaps the leading white spokesman for people of color. Following service in the Union army, he moved to North Carolina after the Civil War, where he served as a judge. People from the North who moved South after the Civil War were called carpetbaggers. Tourgée provided the period's most vivid account of the experiences of a carpetbagger in his popularly successful autobiographical novel called *A Fool's Errand By One of the Fools* (1879). Continuing his legal and literary career after he returned to New York, he worked to expose the Ku Klux Klan and campaigned for improved conditions for freedmen. Convinced that the only solution to the 'race problem' in the United States was education, both for whites to reduce racial prejudice and for freedmen to increase economic opportunity and to inform them as new citizens, Tourgée actively campaigned for federal money to wipe out illiteracy, which was especially high in the South. His proposal was, however, never adopted.²

When the New Orleans committee contacted Tourgée, it had raised \$1,412.70, but he agreed to work at a distance for no fee. For him the case was part of a larger project to achieve equal rights for all citizens of the United States. An important part of that project was to get the United States Supreme Court to declare segregation laws unconstitutional.

Part of Tourgée's strategy was to have someone of mixed blood violate the

law, since to do so would allow him to question the arbitrariness by which people were classified 'colored'. Homer Plessy agreed to be a test case. Plessy had been born free in 1862. His family was French-speaking. He had only one-eighth African blood and, according to his counsel, 'the mixture [was] not discernable' (Lofgren 1987: 41). Most likely he could have passed and ridden in the white car without trouble, but the committee wanted a legal challenge. Its challenge received some silent support from railroad companies, which did not like the added expense of providing separate cars. By pre-arrangement the railroad conductor and a private detective detained Plessy when he sat in the forbidden coach.

A month after his arrest Plessy came before the court of Justice John Howard Ferguson. A native of Massachusetts, Ferguson was a carpetbagger who stayed in the South, marrying the daughter of a prominent New Orleans attorney. Between Plessy's arrest and his trial, Ferguson had ruled on another test case in which Daniel F. Desdunes was arrested for traveling in the white car on an interstate train. Also someone who could pass as white, Desdunes was the twenty-one-year-old son of Rodolphe Desdunes, one of the leaders of the New Orleans committee. Ferguson ruled that the law was unconstitutional on interstate trains because of the federal government's power to regulate interstate commerce, and the committee celebrated. Plessy, however, was travelling on an intrastate train, and at his trial Ferguson upheld the law, arguing that a state had the power to regulate railroad companies operating solely within its borders. The constitutional challenge was underway and the decision was appealed to the state supreme court and eventually to the United States Supreme Court.

As Plessy's argument was that the Louisiana law violated his Thirteenth and Fourteenth Amendment rights we need to look at these two amendments, which were the first of three passed after the North's victory over the South in the Civil War. The Thirteenth Amendment reads:

AMENDMENT XIII [1865]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

The primary purpose of the Amendment was to make slavery illegal. Its

passage was relatively uncontroversial. But the amendment has a complicated history. Those who proposed it did not see it as the first of three amendments. Instead, they felt that it would be enough to give African Americans their rightful place in United States society. But people did not agree on what that place should be. Some felt that all that the amendment was supposed to do was to free slaves. Others felt that it also banned any racial discrimination that, in marking blacks with a 'badge of servitude', perpetuated the heritage of slavery³ Read this way, the amendment gave Congress power to enact legislation prohibiting most forms of discrimination.

But passage of laws in the South restricting the rights of blacks soon made it clear that, if this was the intention of the amendment, its language was not specific enough. Thus an 1866 Civil Rights Act was passed which provided more specific guarantees. The 1866 Civil Rights Act provided for African-American citizenship and certain rights with the following language:

All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States: and such citizens of every race and color [including former slaves], shall have the same right, in every State and territory of the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any statute, ordinance, regulation, or custom, to the contrary notwithstanding.⁴

Many of these guaranteed civil rights, such as making and enforcing contracts and holding and conveying property, are economic rights that had previously been denied to slaves. Guaranteeing these rights to all citizens was part of the campaign to have the entire country adopt the northern economic system.

As fundamental as these rights may seem to us today, sponsors of the 1866 Civil Rights Act worried that its opponents might challenge its constitutionality. Under the federal system of the United States, in which power was divided between the states and the federal government, such rights had traditionally been guaranteed by the states, who were responsible for pro-

protecting citizens within their jurisdiction. For Congress to guarantee them meant a fundamental change in the relationship between the federal government and the states. Thus, in order to ensure the constitutionality of its act, the 1866 Congress also proposed the Fourteenth Amendment that, according to Charles Wallace Collins, shifted 'the court of final appeal from the State to the Federal Supreme Court' (Collins 1912: 151).

Defenders of states' rights passionately resisted that shift. As Collins notes, 'so far as the records show not one single Democrat in a single State of the Union' voted for it. For most white southerners the amendment was a partisan and undemocratic 'attempt by one section of the country to force its political ideals upon another section' (Collins 1912: 144 and 142-3). Indeed, it was ratified by the states in 1868 only because southern states could not rejoin the Union without ratifying it. Careful attention to its language reveals why it was so controversial.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws....

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The wording of this amendment is much more complicated than that of the Thirteenth. The first sentence defines the conditions of United States citizenship. It was necessary because, although the Thirteenth Amendment made slavery illegal, it did not explicitly guarantee former slaves citizenship. Indeed, in the infamous Dred Scott case (1857) the Supreme Court had denied United States citizenship to all African Americans, not just slaves. How it did so is important for an understanding of the legal background of Plessy v. Ferguson.

As United States citizenship had not been defined in the Constitution, Chief Justice Roger B. Taney, writing for the majority in Dred Scott, offered an interpretation that linked it with the famous phrase 'We, the people of the United States.'

The words 'people of the United States,' and 'citizens,' [Taney wrote] are synonymous terms, and mean the same thing. They both describe the political body, who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty.

Taney's definition implied that there is only one class of citizens and citizens are those who constitute the sovereignty of the country. But Taney used this democratic-sounding definition to deny citizenship to African Americans. Allowing for only one class of citizens, he argued that the 'deep and enduring marks of inferiority and degradation' implanted on blacks excluded them from the community that originally constituted the sovereign people of the nation: 19 How 393 at 404 and 416 (1857).

Despite this definition, Taney did admit that African Americans were citizens in some states. The issue, he felt, was whether or not their state citizenship granted them United States citizenship. His answer was no. Since, according to him, members of the 'negro African race' were not part of the sovereign people who constituted the country, the only way for one of them to become a citizen of the United States would be through naturalization. But the Constitution had granted the power of naturalization to the national Congress, not to the individual states. Therefore, if an African American became a citizen in a state, he did not automatically become a United States citizen.

We must not confound the rights of citizenship, which a state may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States: 19 How 393 at 405, 406 and 405 (1857).⁵

The first sentence of the Fourteenth Amendment overturned Taney's ruling, making all people born in the United States citizens. Included, therefore, were almost all African Americans, whether former slaves or not.^(vi) In addition to guaranteeing citizenship, the amendment protects the rights of those who are citizens. Its second sentence makes it unconstitutional for any state to 'make or enforce' laws that 'shall abridge the privileges or immunities of citizens of the United States.' This provision gave the fed-

eral government important power over the states. Guaranteeing national citizenship rights, it implied that, if someone is a citizen in one state, he or she is automatically a citizen of the entire country, and no state can abridge the 'privileges or immunities' of that citizenship. Once again the language of the amendment was designed to overturn Dred Scott in which Taney declared that just because someone 'has all the rights and privileges of a citizen of a State,' he is not necessarily a 'citizen of the United States.'⁷

The second clause of the second sentence is its 'due process' clause. Most of its language simply repeats language from the 5th Amendment. We might ask why this repetition is necessary. It is, because of the addition of the words 'any State.' As in the first clause of this sentence, this clause limited the power of individual states to restrict various rights. Emphasizing the transfer of power from the states to the federal government, it declares unconstitutional a state's effort to 'deprive any person of life, liberty, or property, without due process of law.'

As similar as the second clause is to the first in giving the federal government control over states, an important change has occurred. The first clause protects 'citizens'; the second, 'any person.' 'Citizens' has a more restricted meaning than 'person.' All citizens of the United States are people, but not all people are citizens of the United States. The authors obviously wanted to make it clear that citizens of the United States have privileges and immunities other than the guaranteed protection of life, liberty, and property.

This distinction is important to keep in mind when we move to the third clause of the second sentence - the 'equal protection' clause. By guaranteeing 'any person within its jurisdiction the equal protection of the laws', this clause might seem to grant all people within a state equality under the law. But, 'equal protection of the laws' clearly does not mean that everyone is entitled to the 'privileges and immunities' of United States citizenship. For instance, foreigners living in the United States do not have the rights of United States citizenship.

Both proponents and opponents acknowledged that the Fourteenth Amendment shifted the balance of power in favor of the federal government over the states. Nonetheless, a number of issues of importance for the Plessy case remained unresolved. One was how expansively the amendment should be interpreted to protect the rights of African Americans. Was it simply intended to prohibit states from abridging the privileges and immunities of citizenship enumerated in the 1866 Civil Rights Bill, or

should the scope of its protection be interpreted more widely? There is evidence for both a restricted and an expanded interpretation.^(viii)

Even if an expanded interpretation is granted, another issue presents itself. As Alfred H. Kelley puts it, if the two amendments were designed to guarantee equality for African Americans, did the meaning of equality forbid separation by race if equal conditions were provided? (Kelley 1956: 1050)^(ix) Once again there is evidence on both sides (Lofgren 1987: 64-7). As we have seen, Democratic opponents of the 1866 Civil Rights Act and the Fourteenth Amendment warned that they would bring about total integration of the races. At the same time, Senator Lyman Trumbull, who sponsored the Civil Rights Act, argued that it would not threaten state anti-miscegenation laws because, even though such laws prevented integration, they treated blacks and whites the same. Both blacks and whites were forbidden from marrying someone from the other race and both were punished equally if they broke the laws.¹⁰

Prior to 1896 the Supreme Court established precedents that adopted a restricted interpretation of both the Thirteenth and Fourteenth Amendments, but before *Plessy* it had not explicitly ruled on the issue of separate but equal on intrastate public transportation. It is time, therefore, to turn the Supreme Court's answer to *Tourgée's* claim that the Louisiana equal but separate law violated Homer *Plessy's* Thirteenth and Fourteenth Amendment rights. Justice Brown delivered the Court's majority opinion May 18, 1896. It dismissed the Thirteenth Amendment claim almost without argument, citing an earlier ruling and pointing out that segregation is not slavery. The Fourteenth Amendment claim was, Brown admitted, was more complicated. To understand its complications we have to turn back to the 1875 Civil Rights Act passed by a lame-duck Congress, partially in honor of its main advocate Charles Sumner, who had recently died. The most comprehensive civil rights act passed after the Civil War, it forbade numerous acts of racial discrimination. But in 1883 the Supreme Court by an eight to one majority declared the act unconstitutional. The lone dissenter was Justice John Marshall Harlan, the only southerner on the Court and a former slave-owner.

Given the Fourteenth Amendment's various guarantees, this decision might seem bizarre, but the Court found justification in a close reading of the amendment. The Civil Rights Act forbade racially discriminatory acts by private parties. The Fourteenth Amendment's final three clauses limit state action, not the action of individuals. The Court's point was not to condone racial discrimination; it was simply to make clear the limits of feder-

al power under the Fourteenth Amendment. If an illegal act was committed by a private individual, it was up to an individual state to intervene. The federal government's role was to control state actions.

Of course, with whites back in control of southern states after Reconstruction, the chances of states actually punishing racial discrimination was slim. On the contrary, many began to pass Jim Crow legislation. The issue in *Plessy* is how far a state can go: is a state law mandating the assortment of races on intrastate travel a violation of Fourteenth-Amendment guarantees?

In his decision *Brown* first establishes that every state has certain police powers that can be used for the public good. In *Yick Wo v Hopkins* (1886) the Supreme Court had ruled that the use of those police powers was constitutional insofar as the law mandating them was reasonable. The question facing the Court in *Plessy*, therefore, was whether the Louisiana law was reasonable.

In determining the question of reasonableness, [it argued, a legislature] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order: 163 US 537 at 550 (1896).

According to this standard, the Louisiana law was deemed constitutional. Indeed, to stress its reasonableness *Brown* cites the antebellum Massachusetts case of *Roberts v. City of Boston* (1849). Speaking for the court, Lemuel Shaw, Herman Melville's famous father-in-law, declared that segregated schools did not violate the Massachusetts constitution's guarantee of equality before the law.

In allowing the legislature great latitude in defining reasonableness, the Supreme Court exercised restraint, refusing to interfere with the legislature's power to make laws. This restraint has puzzled some legal scholars because this Court is noted for its judicial activism, especially on Fourteenth-Amendment issues. Its activism was motivated by the *laissez-faire* desire to keep states from interfering with people's private lives. For instance, in *Lochner v New York* 198 US 45 (1905), it declared unconstitutional a New York state law limiting to fifty the hours that bakers could work. Such a law, it felt, was an unreasonable state intrusion into a worker's right to contract his labor and thus accumulate property.

The Court's laissez-faire beliefs are expressed in Plessy when it declares that Plessy's argument

assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals: 163 US 537 at 551 (1896).

What this statement does not explain is why, therefore, the Court allows the state to pass a law mandating how races can sit in railroad cars. Though not explicitly stated, the explanation is implied by the Court's assumption of a natural difference between the races. For instance, Brown argues,

The object of the [Fourteenth] amendment was undoubtedly to enforce equality of the two races before the law, but in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to both (emphasis added): 163 US 537 at 544 (1896).

Since it is perfectly reasonable to pass laws in conformity with nature, the Louisiana Jim Crow law is not a violation of the Fourteenth Amendment, whereas the New York law limiting work hours is because it interferes with natural laws of the market.

The effect of the Plessy ruling was to allow a system of legally mandated segregation to exist in the United States from 1896 until *Brown v. Board of Education* (1954). But what, we need to ask, does this case have to do with the literary imagination? I have a two-part answer to that question. First, I want to examine ways in which the literary imagination contributed to arguments made in the case. Second, I want to examine literary responses to the Court's decision.

The crucial figure in the first instance is Tourgée. A close reading of Tourgée's fiction reveals that he often used it to rehearse legal arguments that later made their way into court.¹¹ For instance, even before he took Plessy's case, he imagined the general strategy that he would take in *Pactolus Prime*, an 1890 novel about 'black' characters who could pass as

'white.' In addition to allowing him to rehearse that general strategy, the novel also allowed him to imagine specific arguments that he could draw upon later. In one of his most ingenious arguments before the Supreme Court, Tourgée pointed to Plessy's mixed blood to claim that the Louisiana law conferred upon the conductor 'the power to deprive one of the reputation of being a white man, or at least to impair that reputation.' In turn, reputation, he claimed, is a form of property because it can affect earning power. Thus, the law deprived Plessy, at least seven eighths of him, of the reputation of a white man and violated the Fourteenth Amendment's protection of property. This argument was first worked out in *Pactolus Prime* when Tourgée has his black protagonist advise a young mulatto training for the law to pass as white. Repeating his character's argument in his brief to the Supreme Court Tourgée asks,

How much would it be worth to a young man entering upon the practice of law, to be regarded as a white man rather than a colored one? Six-sevenths of the population are white. Nineteen-twentieths of the property of the country is owned by white people.¹²

If Tourgée used his fiction to rehearse legal arguments that he would make in support of blacks, those rehearsals in turn helped to determine the form of his novels. In a subtle way, that form suggests a Thirteenth Amendment argument. It does so by challenging both a literary and legal tradition that focusses on the concerns of only white Americans. Tourgée's most important statement defining the problems facing those treating blacks in fiction is 'The South as a Field for Fiction,' which appeared in December 1888.

The title alone indicates two ways in which Tourgée invited a reconsideration of what constitutes American literature. First, to emphasize the importance of the South was to alter the narrative by which a New England literary tradition expands into an American one. Second, for Tourgée the South did not mean the white South but the region in which the lives of blacks and whites most prominently intersect. Thus an important task for the writer of southern fiction was to go beyond existing representations of blacks.

About the Negro as a man, with hopes, fears and aspirations like other men [Tourgée writes], our literature is very nearly silent. Much has been written of the slave and something of the freedman, but thus far no one has been found able to weld the new life to the old. This indeed is the great difficulty to be overcome. As

soon as the American Negro seeks to rise above the level of the former time, he finds himself confronted with the past of his race and the woes of his kindred (Tourgéé 1888: 409).

In *Pactolus Prime*, which was begun as he was writing his essay and serialized from December 1888 to March 1889, Tourgéé, with mixed success, tries to find a formal solution to overcome the great difficulty that he identifies. That difficulty, it needs to be stressed, has legal implications. Tourgéé's essay and novel anticipate why the Plessy majority's rejection of Plessy's Thirteenth Amendment claim is flawed.

In hastily dismissing Plessy's claim that Jim Crow laws violate the Thirteenth Amendment, Justice Brown briefly cites the Civil Rights Cases. In his decision Justice Bradley had written:

When a man has emerged from slavery and by the aid of beneficent legislation has shaken off the inseparable concomitant of that state, there must be some stage in the progress of his elevation when he takes the ranks of a mere citizen, and ceases to be the special favorite of the law, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected: 109 US 3 at 26 (1883).

By attempting to find a fictional form to show how the freedman's life is still welded to his life as a slave, Tourgéé undercut Bradley's logic. The point is not that at some time the freedman should not take the 'ranks of the mere citizen,' it is simply that in such a short time after emancipation the effects of slavery were not yet over. Indeed, to refer to blacks in this period as the 'special favorite of the law,' is to betray a lack of understanding of their actual social conditions.

Prior to the Civil Rights Cases the courts had recognized those conditions and how they were affected by the heritage of slavery by ruling that the Thirteenth Amendment did not simply ban slavery and involuntary servitude, but also acts which branded freedmen with a 'badge of servitude.' For Tourgéé and Harlan Jim Crow laws did just that and thus violated the Thirteenth Amendment. If the majority implied that the Louisiana law was reasonable because natural social differences existed between blacks and whites, Tourgéé linked those differences to the history of slavery. As his fiction dramatized, it was not enough simply to abolish slavery, so long as the effects of slavery's history remained.

Tourgée's effort to dramatize the continued effects of that history helps distinguish his fiction from Mark Twain's. Twain's two most powerful portrayals of race, *Adventures of Huckleberry Finn* and *Pudd'nhead Wilson*, are written between the Civil Rights Cases and Plessy. Both are set in the era of slavery, and in both the foremost evil of slavery is, as in Harriet Beecher Stowe's *Uncle Tom's Cabin*, the reduction of human beings to pieces of property. Twain's portrayal of slavery allows him to tap into the widespread belief that all humans had a right to freedom. He can also elicit powerful emotional reactions by showing how such a system allowed family relations to be violated by the logic of the market. But his focus severely limits his ability to face the 'great difficulty' of welding the life of the freedman to that of the slave. After all, once the freedman is no longer a piece of property, the emotional force of Twain's plot disappears.

This limitation may help to explain Steven Mailloux's remarkable discovery that, despite the publication of part of *Huckleberry Finn* in the 1885 volume of *The Century Magazine* containing Cable's 'The Freedman's Case in Equity' and Henry Grady's response, entitled 'In Plain Black and White,' there is almost no contemporary commentary linking Twain's novel to debates over the 'Negro Question' (Mailloux 1989: 102).¹³ Indeed, insofar as Grady makes clear that no one in the New South wanted a return to slavery, it could be argued that Twain's portrayal of the inhumanity of slavery does not explicitly take sides in the post-Reconstruction debate. My point is not that Twain lacks concern for blacks after emancipation. Indeed, we can even read both novels as allegorical comments on the conditions of blacks in the post-Reconstruction period. Nonetheless, they do not explicitly link the condition of slaves with that of freedmen. The same could not be said of Tourgée's works.

The worst evil of slavery in *Pactolus Prime* is not the reduction of human beings to property. It is the production of a racism that continues to brand even freedmen with a badge of inferiority. According to Pactolus, 'Slavery was never half so great a curse as that brand of infamy which stamps the soul at its birth with ineradicable inferiority' (Tourgée 1890: 45). The end of slavery does not mean an end to this infamy.

There are other examples of Tourgée using works of fiction as a testing ground for arguments that he would make in courts of law. I will come back to a complicated one at the end. But first I want to turn to examples, not of the literary imagination shaping legal arguments, but of the Supreme Court's decision evoking a literary response.

I can start with Plessy's relation to the African-American literary tradition. Few doubt the importance of W. E. B. Du Bois' notion of double consciousness for a portion of that tradition. What has not been noted is the relation between Du Bois' definition and Plessy. The major reason why no relation has been acknowledged is that in his definition Du Bois makes no explicit reference to the case. Another reason is that most of us come to the definition in *The Souls of Black Folks*, which was published a bit of a distance from the decision in 1903. But we should not forget that the definition first appeared in an 1897 *Atlantic Monthly* essay; that is, immediately following the ruling. Whether he intended it or not, Du Bois offers one of the most persuasive refutations of an important part of the majority's logic.

Noting that color forced those of African descent to be considered African Americans, not simply Americans, Du Bois declares,

After the Egyptian and Indian, the Greek and Roman, the Teuton and Mongolian, the Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world,—a world which yields him no [true] self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder (DuBois 1897: 194; emphasis added; parenthetical phrase added in *Souls*).

In terms of Plessy Du Bois's most important recognition is not simply that the social and historical conditions of African Americans given them two souls, it is that they force them to measure their worth by the standard of whites who deem them inferior. This interiorization of inferiority explains the majority's blindness when it argues,

We consider the underlying fallacy of [Plessy's] argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If that be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it: 163 US 537 at 551 (1896).

The majority's logic is impeccable. Nothing in the act explicitly claims that 'coloreds' are inferior. For instance, if a white person sat in a colored car he would be subject to arrest just as if a black sat in a white car. Since blacks and whites are treated equally under the law, how can it be argued that the law discriminates against blacks? Du Bois' definition of double consciousness explains why.

If the majority's logic is impeccable, its history and sociology are seriously flawed. The majority claims that blacks 'choose' to impose a reading onto an essentially neutral law. What Du Bois lets us see is that blacks' reading of the law is not a matter of choice. Given the history of race relations in the country and the social position of blacks in Louisiana, when a predominantly white legislature passed an act mandating the separation of the races, blacks could not help but see it as a desire not to associate with what is perceived to be an inferior race. Indeed, as Justice Harlan notes, no one should be deceived by the 'thin disguise' of the law's guarantee of equality: 163 US 537 at 562 (1896).

Gary Jacobsohn has argued that 'American citizenship is a source of identity as well as rights' (Jacobsohn: 89). The Plessy majority institutionalizes double consciousness as African American identity, an identity that influences the form of at least one strain of the African American literary tradition. Indeed, a large part of the African American tradition combines in a complicated manner Du Bois's implied Fourteenth Amendment point and Tourgée's Thirteenth Amendment one. We can see that combination in the fiction of Charles W. Chesnutt, a trained lawyer who is also one of the most important figures in the African American literary tradition. Chesnutt has links with the Plessy argument both before and after the case is decided. Those before Plessy have to do with his relationship with Tourgée. In a 16 March, 1880, entry in his journal, Chesnutt reveals how the success of Tourgée's *A Fool's Errand* was an inspiration to him to pursue a career as an author (Brodhead 1993: 124-6). As he began to publish, he was in contact with Tourgée, who suggested that he would write a preface for a collection of Chesnutt's short stories. This suggestion occurred ten years before a collection actually appeared, one without Tourgée's preface.

In a letter to Tourgée 26 September, 1889, Chesnutt described his story 'The Sheriff's Children' as 'dealing with a tragic incident, not of slavery exactly, but showing the fruits of slavery.'^(xiv) To me this comment sent the message to Tourgée that Chesnutt had read 'The South as a Field for Fiction,' published the previous December, and was working on dramatizing its message, a message reinforce in much of his short fiction.

Chesnutt's relationship with Tourgée specifically linked up with the latter's involvement in the Plessy case in 1893, which is part of Chesnutt's 'silent period' when he devoted his energy to providing a secure financial foundation for his family by drawing on his legal, not literary skills. Convinced that the only way to get the Supreme Court to rule on Plessy's behalf was to have the public place pressure on the Court, Tourgée tried to establish a journal to get the public's ear. He asked Chesnutt both to contribute money and be an editor. Chesnutt was interested, although cautious about the financial side of the venture. He told Tourgée that he had 'always looked forward to the literary life, although not specially in the direction of journalism.'^(xv) We will never know if Chesnutt would have given up both his existing job and his later career as a writer of fiction to become an editor. The journal lacked financial support and never got off the ground. Nonetheless, Chesnutt continued to pay close attention to the outcome of the Plessy case.

Evidence of that attention occurs in allusions in his three novels, all of which were published after Plessy was decided. The most obvious is a scene in a Jim Crow car in *The Marrow of Tradition* (1901). Forced to ride in a colored car, the book's protagonist Dr. Miller watches as 'A Chinaman, of the ordinary laundry type, boarded the train, and took his seat in the white car without objection. At another point a colored nurse found a place with her mistress' (Chesnutt 1993: 59).

The detail of the nurse alludes to a provision in the 1890 Louisiana law that exempted nurses of children from separate car restrictions. Dr. Miller's response to this exemption is almost exactly the same as Tourgée's response in his brief to the court: 'White people ... do not object to the negro as a servant. As the traditional negro,—the servant,—he is welcomed; as an equal, he is repudiated' (Chesnutt 1993: 59). Indeed, since hardly any blacks had white nurses for their children, this provision betrays the true intent of the law.

The detail of the 'Chinaman' reveals how closely Chesnutt read the Plessy decision. In his dissent Justice Harlan claims,

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passen-

ger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom perhaps risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race: 163 US 537 at 561 (1896).

Both Harlan's and Chesnutt's points of view remind us that even one hundred years ago race in the United States was not simply a black and white issue. Indeed, both would prove to be wrong about the classification of Chinese in the South as white. In *Gong Lum v Rice* (1927) the Supreme Court upheld Mississippi's ruling that Chinese Americans were of the 'colored races' and could not attend white schools. Nonetheless, Harlan's and Chesnutt's evocation of the Chinese reveals how they tried to draw on any possible argument to demonstrate to the white majority the inconsistency of Jim Crow laws.

In an unpublished speech entitled 'The Courts and the Negro' Chesnutt declares:

The opinion in *Plessy v Ferguson* is, to my mind, as epoch-making as the *Dred Scott* decision. Unfortunately, it applies to a class of rights which do not make to the heart and conscience of the nation the same direct appeal as was made by slavery, and has not been nor is it likely to produce any such revulsion of feeling.¹⁶

Chesnutt's fiction, I am arguing, attempted the difficult job of producing such a feeling. But I am also making a more general claim: the Thirteenth Amendment argument made by Tourgée in *Plessy*, I am suggesting, is kept alive in literature even though it dies out in the law. Indeed, in *Brown v Board of Education* 347 US 483 (1954) the Thirteenth Amendment is not cited as part of Chief Justice Warren's decision declaring separate but equal inherently unequal. Warren relies instead solely on the Fourteenth Amendment. Yet in 1952 Ralph Ellison published *Invisible Man*, which is one of the most subtle and successful literary embodiments of the problems for African-American identity brought about by the failure of emancipation to break away from the effects of a tradition of slavery. An equally successful literary embodiment of the Thirteenth Amendment argument is Toni Morrison's *Beloved* (1987), whose action occurs both before and after emancipation. To state my point somewhat differently, if the Thirteenth

Amendment argument had been accepted by the Court in Plessy, the African-American, and thus the American, literary tradition would have a somewhat different shape.

Of course, the major reason that the American literary tradition would have a different shape is that the Plessy decision affected the shape of American society. Jim Crow laws were employed to shape American society along racial lines. One of the most ambitious efforts to reshape a society plagued by the heritage of slavery and segregation has been affirmative action. Ironically, however, affirmative action is legitimated by the same constitutional principle upheld in Plessy; that is, racial classifications are acceptable so long as they are a reasonable measure to promote the social good.¹⁷ The debate over affirmative action brings me to my final example of the literary imagination's relationship to the Plessy case.

The most famous statement in Justice Harlan's dissent is, 'Our Constitution is color-blind, and neither knows nor tolerates classes among citizens': 163 US 537 at 559 (1896). Harlan in turn borrows his metaphor from Tourgée's brief to the Court. After pointing out that

The exemption of nurses shows that the real evil [for authors of the law] lies not in the color of skin but in the relation the colored person sustains to the white. If he is dependent it may be endured; if he is not, his presence is insufferable,' [Tourgée proclaims], 'Justice is pictured as blind and her daughter, the Law, ought at least be color-blind (Olsen 1967: 90).

Because affirmative action is not colorblind, many of its opponents advocate a colorblind Constitution and claim to be the true inheritors of Harlan's and Tourgée's position.¹⁸ What they do not know, however, is that Tourgée first used the metaphor in his 1880 novel, *Bricks Without Straw*. In his novel he does not use colorblindness as a positive quality that keeps people from discriminating. Instead, he describes it as a defect that does not allow people to see the actual condition of freedmen. Describing how the freedman had been granted legal rights, the narrator complains, 'Right he had, in the abstract; in the concrete, none. Justice would not hear his voice. The law was still color-blinded by the past' (Tourgée 1880: 35).¹⁹ Appearing in a chapter entitled 'Nunc Pro Tunc,' a legal phrase meaning 'now for then' that describes acts with a retroactive effect allowed to be done after the time when they should be done, Tourgée's literary use of the metaphor indicates that he, like defenders of affirmative action, recognized how colorblindness could become a myopia keeping the law from acting

affirmatively to help improve the concrete conditions of those that society had historically disadvantaged.²⁰

Tourgée's use of the conflicted meanings of a metaphor so hotly debated today indicates the extent to which we are still in the wake of Plessy. On the one hand, history teaches us the injustice that can result from not maintaining a colorblind standard in the law. On the other, it teaches us that prematurely to evoke that standard in a society that is not yet colorblind is to continue to disadvantage historically disadvantaged groups. The literary imagination in the United States will continue both to respond and contribute to debates over that complicated situation.

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NOTES

1 My account of the case is especially indebted to Lofgren (1987). It also relies on Olsen (1965), Olsen (1967), Fiss (1993), and Medley (1994: 105-117). See also Thomas (1996).

2 Tourgée's proposal failed in part because of southern opposition and in part because of his unwillingness to compromise and support a different measure called the Blair Bill, which was opposed by the white supremacist Senator John Tyler Morgan. We can only speculate on what the effects on United States society would have been if Tourgée's plan had been adopted or if he had compromised his position and helped to pass the less-than-perfect Blair Bill.

3 See Hyman and Wiecek (1982). The point that legislation unfriendly to blacks constituted a 'badge of servitude' and thus was unconstitutional was made by Senator Trumbull in debates over the 1866 Freedmen's Bureau Bill and Civil Rights Act. See Fairman (1971: 1165 and 1173).

4 Once the Act declared: 'That there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery;....' But this language was deleted during debate in the House of Representatives.

5 In *Dred Scott* Taney contradicts his earlier ruling that 'every citizen of a State is also a citizen of the United States' (7 How. 283 at 492).

6 The phrase 'and subject to the jurisdiction thereof' caused some confusion. Were, for instance, children born in the United States of foreign parents subject to United States jurisdiction or the jurisdiction of the parents' country? For African Americans the issue was irrelevant because, even though denied national citizenship by *Dred Scott*, they were not subject to any foreign power. But for other immigrant groups the issue was extremely important, especially for those not of European or African descent since they were not allowed to become naturalized citizens. The Supreme Court did not rule on the issue until *United States v. Wong Kim Ark* (1898). Involving someone born in the United States of Chinese parents, *Wong Kim Ark* declared that the citizenship of parents was irrelevant.

7 19 How. 393 at 405 (1857). The first use of 'privileges and immunities' in the constitutional history of the country is in the Articles of Confederation. The second section of the fourth article of the Constitution states, 'The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.'

8 For restrictive interpretations see Fairman (1971), Belz (1978), Berger (1977). For expansive interpretations see Hyman and Wiecek (1982), Karst (1989), tenBroek (1965), Soifer (1987: 1916-59).

9 Kelley, writing in the wake of the Supreme Court's decision in *Brown v Board of Education* (1954), concentrates on the 14th Amendment.

10 Trumbull first makes his argument about anti-miscegenation laws during debates on the Freedmen's Bureau Bill of 1866, but he repeats it in debates on the Civil Rights Act. See Fairman (1971: 1164-5 and 1180).

11 The examples that I cite in this essay might suggest that using the literary imagination to rehearse legal arguments is an inherently liberating activity. But literature can also be used to imagine repressive legal arguments. On the inability to subordinate the literary imagination to the dictates of either critical or 'right' reason, see Thomas (1991: 510-539).

12 Quoted in Olsen (1967: 83).

13 Mailloux lists one minor exception.

14 Letter to Tourgée, September 26, 1889, item 4026, Tourgée Collection, Chautauqua County Historical Society, Westfield, New York.

15 Letter to Tourgée, November 21, 1893, item 7513, Tourgée Collection, Chautauqua County Historical Society, Westfield, New York.

16 'The Courts and the Negro,' p. 12 (Chesnutt Collection, Fisk University Library).

17 A crucial distinction between the application of the principle in *Plessy* and affirmative action is that in the latter racial classifications are subject to strict scrutiny and should not stigmatize any group.

18 In *University of California Regents v Bakke* (1978) Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, argues of the 1964 Civil Rights Act that proponents assumed that the 'Constitution itself required a colorblind standard on the part of the government' (438 U.S. 265 at 416 [1978]). If this argument had been accepted, the Court most likely would have struck down affirmative action. But it is a minority opinion.

19 Although Andrew Kull is unaware of this quotation, it confirms his observation that for his time Tourgée supported versions of affirmative action, which were not afraid of recognizing race as a legal category, a stand that Kull contrasts with his interpretation of Justice Harlan's position. Kull also cites Wendell Phillips' and Theodore Tilton's use of the color-blind metaphor (Kull 1992: 119-120). When Tourgée first begins his press campaign against Jim Crow laws, he praises the New Orleans challenge and adds, 'Thanks to the civic impulse of an "inferior" race we shall see whether justice is still color-blind or National citizenship worth a rag for the defense of right or not' (Tourgée 1891: 4).

20 In *Bakke* Justices Brennan, White, Marshall, and Blackmun argue that we should not 'let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetime as inferior both by the law and by their fellow citizens': 438 U.S. 265 at 327 (1978).