

Defenders of Racial Justice:

The Law and Literature Partnership of Albion W. Tourgée and Samuel F. Phillips

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Perhaps the most important transformation of the US Constitution was the addition of three amendments that became the legal basis for reconstructing the Union after the Civil War. The Thirteenth Amendment eliminated slavery. The Fourteenth Amendment defined a more inclusive national citizenship and kept states from abridging the privileges and immunities of that citizenship, from taking away anyone's life, liberty and property without due process of law and from denying any person equal protection of the law. The Fifteenth Amendment banned using race to deny a citizen suffrage. Together the three transformed the relationship between states and the Union. The first ten amendments, commonly known as the "Bill of Rights," limited the power of the national government. In sharp contrast, the three Reconstruction amendments gave the national government new powers to enforce their provisions.

As necessary as these amendments were, they involved compromises. The Thirteenth Amendment allowed involuntary servitude as a punishment for a crime, causing some southern states to create petty crimes and then lease the labor of convicted freedmen to private individuals as a new form of slavery. By not spelling out the privileges and immunities of US citizenship, the Fourteenth Amendment allowed the Supreme Court to define them narrowly, making state citizenship the repository of most rights and leaving it up to states to decide if they wanted to forbid individuals from denying someone equal protection of the laws.¹ The Fifteenth Amendment prohibited states from denying suffrage on the basis of race, but otherwise it left states in control of suffrage, opening the possibility for

1. Fourteenth Amendment jurisprudence is extremely complicated. Because the due process and equal protection clauses use the word "person," it has been interpreted to protect corporations, which are considered legal persons. For years corporations benefitted more from the amendment than people of color. Also, the Bill of Rights originally protected individuals from only the federal government, not states.

imposing literacy and property requirements. The compromised language of the amendments was partially responsible for the demise of the egalitarian promise of the first years of Reconstruction, allowing white supremacists to “redeem,” that is, to reestablish control over former Confederate states after the end of military rule. Redemption was followed by the era of Jim Crow legitimated by *Plessy v. Ferguson* (1896), the US Supreme Court case that ruled that states did not violate the equal protection clause if they required segregated facilities, so long as those facilities were equal.

The history of law and literature in this transformative period from slavery to emancipation to *Plessy* can be traced by charting important personal connections. Herman Melville’s relation to his father-in-law Lemuel Shaw, the Chief Justice of Massachusetts’ Supreme Court, prompted some of the most important works of literature documenting legal complications in the age of slavery. Harriet Beecher Stowe’s connection with anti-slavery lawyers offers a different perspective on the same issues. Henry Thoreau’s friendship with fellow Concord resident Judge E. A. Hoar was instrumental in Thoreau’s condemnation of the 1850 fugitive slave law (Farbman, “Judicial Solidarity”). Hoar in turn was a member of Boston’s “Saturday Club” that brought together major literary figures, like Ralph Waldo Emerson, Henry Wadsworth Longfellow, Oliver Wendell Holmes, Sr., and James Russell Lowell with lawyers like himself and Charles Sumner. Those relations extended into the postbellum period as Hoar became Ulysses S. Grant’s first Attorney General. Likewise, Sumner developed a close friendship with Frederick Douglass that influenced one another’s views on slavery and Reconstruction.

But Sumner died in 1874, and when Douglass was contacted about the legal challenge that led to *Plessy* he disapproved and “saw no good in the undertaking” (*Albion W. Tourgée Papers* 6377). The best way to explore the confluence of law and literature from ratification of the Reconstruction amendments to *Plessy* is to focus on the career of a lesser known figure: Albion W. Tourgée. Tourgée was a legally-trained writer like those Robert Ferguson highlighted in his groundbreaking study of law and literature in the Early Republic (*Law and Letters*). A best-selling author of Reconstruction fiction, Tourgée was also Homer Plessy’s lead attorney. Elsewhere I have looked at Tourgée’s connections with other

Almost certainly the framers of the Fourteenth Amendment intended it to apply most of the Bill of Rights to states as well. But the Supreme Court originally denied that application. About a hundred years ago, the Court began selectively to incorporate some of the Bill of Rights under the Fourteenth Amendment, most recently the Second Amendment.

legally trained authors: Thomas Dixon, Jr., an avowed racist who wrote *The Clansman*, and African American Charles W. Chesnutt (*Literature of Reconstruction; "Legal Argument"*).² In this essay I explore Tourgée's friendship with Samuel F. Phillips, a fellow lawyer, though not a fellow writer.

Lesser known than even Tourgée, Phillips was the nation's second Solicitor General, who argued some of the most important cases involving the Reconstruction amendments before the Supreme Court. Later in life, while in private practice, Phillips joined Tourgée in defending Plessy. Telling the story of Phillips' collaboration with Tourgée requires delving into details about the US federal system unfamiliar even to many trained in the law. But without attention to those details it is impossible to appreciate how complicated advocacy for racial justice was at this critical moment of US history. Phillips' and Tourgée's partnership poignantly documents that complexity.

An Unlikely Pair

Phillips' and Tourgée's backgrounds did not portend close cooperation. Tourgée was born in 1838 in Ohio with French Huguenot ancestry (Elliott; Olsen). When the Civil War began he was studying at the University of Rochester. Dropping his studies, he fought for the Union army, suffering wounds that affected his health for the rest of his life. Contact with African American soldiers helped radicalize him. Receiving a law degree, he moved to North Carolina to help reconstruct the South. When he arrived, Phillips was one of the leading lawyers in the state. The son of a British mathematician, Phillips was born in New York in 1824.³ When he was two, his father became a professor at the University of North Carolina. Samuel and his older brother graduated with honors from UNC. The older brother became a mathematician, eventually replacing his father at UNC. Their sister was a poet whose son-in-law became a professor of mathematics at Harvard. Samuel, however, studied law and turned to politics as a Whig. Although Whigs opposed states'-rights Democrats, many, like Phillips, supported slavery. As the crisis over slavery intensified, anti-slavery Whigs created the Republican Party, turning the Whigs into a dying party.

2. Two other legally-trained authors are Owen Wister and Thomas Nelson Page, both staunch critics of Reconstruction.

3. On Phillips, see Miller, Robert D. "Samuel Field Phillips: the Odyssey of a Southern Dissenter." *The North Carolina Historical Review*, vol. 58, 1981, pp. 263-80; and Russell, Phillips. *The Woman Who Rang the Bell: The Story of Cornelia Phillips Spencer*. U of North Carolina P, 1949.

In 1866 Tourgée and Phillips had widely different views about Reconstruction. Phillips most likely owned two slaves, but, like many Whigs, he opposed North Carolina's secession, even though during the Civil War he was a loyal Confederate, serving as state auditor. When the Confederacy's defeat became clear, he advocated peace talks to offer renewed loyalty to the Union in exchange for North Carolina's exemption from military occupation and a guarantee of gradual, rather than immediate, emancipation of slaves. Instead, under President Andrew Johnson, North Carolina escaped military rule only by recognizing the Thirteenth Amendment. Johnson, however, did not support granting freedmen citizenship or crucial civil rights, and in 1866 Phillips played a leading role proposing a state constitution that would have kept freed slaves in a subservient condition through "Black Codes." Reactionaries considered any new constitution unacceptable and helped to defeat the proposal. Warning that a more radical constitution would follow, Phillips was appointed the recorder for the North Carolina Supreme Court while resuming private practice. In 1868 his prophecy proved accurate. In the 1866 national elections, Northerners and Westerners rebuked southern reactionaries by giving Republicans overwhelming control of Congress. As a condition of readmission to Congress and the end of military government, Congress required southern states to ratify the pending Fourteenth Amendment and allow African American males to vote on new constitutions. In 1868 Tourgée played a major role in drafting a constitution that dismantled the state's oligarchical rule by giving increased power to poor whites and freedmen (Farbman, "Reconstructing"). Ratification of the new constitution coincided with Republican control of state government and integration of the university. Only 41,630 people had voted on the constitution proposed in 1866. In 1868, with the expanded franchise, 179,653 voted.

Phillips attended the 1868 constitutional convention without playing an important role. Friends assumed that he would follow a path similar to that of his beloved sister who, like many former southern Whigs, became a Democrat and opposed Radical Reconstruction. Prohibited from attending UNC because she was a woman, Cornelia, nonetheless, envisioned the institution as a training ground of privileged white men. In 1870 when white supremacists regained control of the state and stopped integration of the campus, she rang the university's bell to signal its redemption. Samuel, however, shocked his former allies and his sister by joining the Republican Party. Well aware of Phillips' personal integrity, his friends did not understand his political transformation. But he recognized that to maintain his commitment to justice, he had to reconsider what justice meant for freedmen. The reactionary response to the proposed 1866 Consti-

tution and the Klan's violent opposition to African Americans trying to make a new life for themselves made him see that, if, as he fervently hoped, North Carolina was to be free of military rule, it was obligated to be fair to freedmen. Phillips was also influenced by Tourgée. In 1868 Tourgée had become a local judge. Phillips was impressed by Tourgée's fairness as a judge when he ruled against not only the Klan, but also African Americans who committed violence. He especially praised Tourgée's codification of North Carolina's civil procedures as "a modern scientific system for administering justice" (Olsen 132f). A social outcast after becoming a Republican, Phillips received notice in Washington, DC. At the time, the nation's first Solicitor General was Benjamin Bristow, another southern Republican. When Bristow resigned on November 12, 1872. President Ulysses S. Grant replaced him with Phillips.

The position of Solicitor General was created by the 1870 Judiciary Act as the only officer of the US required to be "learned in the law." In 1789 Congress had created the cabinet position of Attorney General who was supposed to give his opinion on questions of law faced by the president or other cabinet members. But, unlike other cabinet members, he had no department. The 1870 act made him head of the Department of Justice with the Solicitor General responsible for supervising litigation on behalf of the US in the Supreme Court, lower federal courts, and state courts. The standard story is that the Justice Department was created to fight the Klan. Indeed, one of its major assignments was to prosecute Klansmen arrested in the fall 1871 crackdown in South Carolina. The Attorney General at that time was Amos Akerman, another southern Republican who was an outspoken critic of the Klan. Ironically, however, creation of the Justice Department was initially recommended by one of Johnson's attorney generals, who would go on to defend members of the Klan (Waxman, "Twins at Birth"). In another irony, Grant fired Akerman in the middle of the trials and replaced him with George Williams from Oregon, who was an advocate of sectional reconciliation. When Bristol resigned as Solicitor General in 1872, Grant turned to Phillips in part to placate southern Republicans. As Solicitor General, Phillips argued some of the most important civil rights cases before the Supreme Court.

In the twelve years Phillips was in office, Tourgée experienced successes and setbacks. In North Carolina, white supremacists, aided by the Klan, successfully redeemed the state, undermining many reforms Tourgée had implemented. Yet his reputation grew nationally. When a spot opened on the Supreme Court in 1877, Tourgée urged President Rutherford Hayes to appoint Phillips. Hayes, however, chose John Marshall Harlan, another southern Republican and the former law partner of Phillips's predecessor Bristow.⁴ Harlan would be the lone dissenter

in *Plessy*. By 1878, encouraged by his wife and young daughter, Tourgée abandoned North Carolina, first heading west before settling in New York where he turned political defeat into literary success with two acclaimed novels based on his experience in North Carolina depicting the need to renew momentum for Reconstruction. These novels helped elect his friend James Garfield president in 1880. Although Garfield's assassination was a setback, Tourgée continued to write fiction and founded his own journal with financial backing from ex-president Grant. But in 1884 the journal went bankrupt and Democrat Grover Cleveland, intent on undoing much Reconstruction legislation, won the presidency. Despite facing financial hardship, Tourgée continued to write fiction and began a weekly newspaper column reprinted in almost all African American papers. In 1890, in the midst of lobbying Congress for federal aid to education to reduce illiteracy and to impose federal control over federal elections, he was contacted about a newly passed piece of Louisiana legislation called the "Separate Car Act," the statute that was challenged in the *Plessy* case.

Cleveland's presidential victory also spelled the end of Phillips' term as Solicitor General. Returning to private practice, he remained in Washington. Tourgée, who had been engaged to handle the *Plessy* case, added Phillips to his legal team. In turn, the team's legal strategy drew on arguments Tourgée imagined in fictional works linked to Phillips. Even before those works, however, Phillips had appeared in another work of fiction, but as a villain rather than as a hero.

Phillips in Fiction

In 1885 Maria Amparo Ruiz de Burton published *The Squatter and the Don*, widely praised as the first novel written by a Mexican-American woman. Set in the days of Reconstruction, it portrays the failure of the US legal system to honor the title to a California hacienda held by a fictional Mexican-American Don despite guarantees in the Treaty of Guadeloupe Hidalgo after the Mexican-American War. The novel also depicts the South as the victim of northern vindictiveness after the Civil War and links the Don's fate to the Texas and Pacific Railroad's planned transcontinental line that would connect the South with southern California and bring prosperity to both regions. Drawing on history, Ruiz de Burton has that plan blocked by railroad tycoon Collis Huntington, who wants his Union Pacific to maintain a monopoly on transcontinental traffic. The plots about rail-

4. On Harlan's and Bristow's relationship, see Webb, Ross A. Benjamin Helm Bristow: Border State Politician. UP of Kentucky, 1969.

roads and land title converge when friends of the Mexican-American Don travel to Washington, D.C., to lobby Attorney-General Williams on the Don's behalf. Williams assures the friends that the case against the Don before the Supreme Court should be dropped. He blames the failure to do so on his predecessor Akerman, who vigorously prosecuted the Klan and was allegedly fired for unfavorable rulings on railroads. Heading out of town, the Attorney General delegates the task to Solicitor General Phillips, whose predecessor Bristow resigned to take a lucrative position with the Texas and Pacific Railroad. Unlike Williams, Phillips was a staunch defender of African American rights. But Ruiz de Burton, who had a low regard for African Americans, turns Phillips into a villain who insists that the case against the Don does not warrant dismissal (Thomas, *Literature* 208-42).

Phillips fares better in Tourgée's fiction. Tourgée's *With Gauge and Swallow, Attorneys*, (1889) is dedicated to him, and *Pactolus Prime* (1890) models a character on him. *With Gauge and Swallow* consists of scattered episodes about a Wall Street law firm (Thomas, "Tourgée's Legal Romance"). Chapters include cases of mistaken identity, disputed marriages, unclear titles to western mines, and bizarre wills, interspersed with three having to do with race. This episodic form simulates the experience of a lawyer who "rarely knows, or cares to know, the whole history of any life. He sees specific episodes and catches fleeting glimpses of many as their orbits intersect the plane of his duty" (Tourgée, *Gauge and Swallow* 5). The form also anticipates television series about law firms that have a common cast of characters with each episode introducing new characters and new legal complications.

The book's dedication to Phillips sets the tone. Tourgée praises Phillips as "A lawyer worthy of the highest honors of a profession he has abundantly adorned, whose heart has never grown cold to the romance its practice reveals, whose faith in divine justice has not been dimmed by the fallibility of earthly tribunals, and whose sympathy for humanity has but strengthened with observation of its infirmities" (4). Those words articulate Tourgée's respect for the legal profession. They also anticipate the book's commitment to racial justice combined with an understanding of the inevitable shortcomings of human beings. Phillips might have been a Confederate, but he was not evil. On the contrary, his willingness to transform his views on racial justice increased his stature. Indeed, insofar as Tourgée hoped his fiction would alter people's views, a lawyer in the firm who is based on Phillips becomes a model for Tourgée's implied reader (Iser, *The Act of Reading*).

This lawyer, Mr. Burrill, is, like Phillips' father, an English immigrant. In the chapter "A Shattered Idol" Burrill takes a case after the Civil War involving African Americans' claim to property in the South. The case tests Burrill's love affair with the common law, which he worshipped as the "essence of right" (*Gauge* 116). Initially Burrill had little sympathy for African Americans or concern about the fate of the republic, but he was interested in the legal aspects of slavery. He assumed that though the common law did not contain a remedy for slavery, it did not support it. For him, the law's relation to slavery was the same as its relation to extralegal activity that "they call 'business' on the exchanges—stocks and produce and petroleum. . . . The law doesn't encourage or protect it, . . . but the law doesn't stop it" (111). Upon researching his case, however, his idol shatters. He discovers that the common law "not only tolerated, but regulated, enforced, and strengthened" slavery (116).

Burrill's case forces readers to confront issues left unresolved because of three incommensurate legal regimes: the antebellum Union, the Confederacy, and the postbellum Union. In 1857, the year *Dred Scott v. Sandford* denied freedom to a slave taken by his owner into free territory, Tourgée's fictional slave owner tried to take care of his colored kin by side-stepping existing law and selling his children and their mother to someone who took them to New York and freedom. When he died, he left his estate to his colored children and their mother. But they could not take physical possession without being re-enslaved. During the Civil War, white relatives bought the estate when the Confederate government auctioned it for back taxes. After surrender the coloreds sued for ownership, but the white heirs claimed that the sale of the slaves lacked consideration and was thus an invalid contract, rendering the will void because slaves could not own property.⁵ The African Americans maintained the validity of the will and contended that an auction by the Confederacy should not be recognized. In *Texas v. White* (1869), however, the Supreme Court ruled that southern states had never legally seceded. Thus, although states' actions supporting rebellion were invalid, those "sanctioning and protecting marriage and its domestic relations, governing the course of descents, regulating and conveying the transfer of property, real and personal" were valid (*Texas v. White* 733). The intent of the Court is

5. Editorial Note: "Consideration" is a doctrine applying in Anglo-American Common Law to contracts. Something of value (the "consideration") must be exchanged between the contracting parties at the time of making of the contract. Otherwise the contract might prove unenforceable for "lack of consideration."

clear. It wanted to affirm the validity of these legal transactions to make sure, for instance, that marriages under Confederate rule were recognized. But what about transfers of property involving slaves? And wasn't paying taxes and selling the property to put money in Confederate coffers aiding the rebellion?

Burrill is convinced that the case will go to the Supreme Court. "The Dartmouth College case, the Chesapeake Canal case, the Dred Scott decision, the Legal Tender cases, and the Slaughter House cases, all put together, did not present as many nor as difficult constitutional questions as *my case*" (*Gauge* 115). But the case is delayed. During the delay Burrill is asked to adjudicate a suit in equity that demonstrates Tourgée's respect for honorable southern lawyers who disagreed with him politically. During the war another Southerner wanted to free his children but was legally forbidden from doing so. Before dying, he created a secret trust giving Esquire Bagster his children and financial support with the purpose of freeing them when possible. Bagster loyally invested the money in Confederate bonds, now worthless. Though still committed to the Confederates' lost cause, Bagster feels he has betrayed his trust as a lawyer and brings suit against himself for recovery of the loss, which requires him to sell his home. Deciding in Bagster's "favor," Burrill is so impressed with his honor that, called back to New York, he leaves the Southerner in charge of his case with \$5,000 to cover costs. Bagster rightly calculates that his clients might lose and settles for more than they hoped for. But Burrill did not want a settlement. He wanted a legal decision in a lower court that could be appealed to the Supreme Court, thus forcing it to rule on the case's complicated constitutional issues. How would the Court adjudicate between the antebellum Constitution recognizing slavery when the original owner sold his kin but left them his property; the Confederate legal order when the estate was sold; and the postbellum Constitution when former slaves sued to recover property they never legally owned?

The fictional Burrill may have been dismayed, but Tourgée was not. His imagined case forces readers to confront the fact that, despite emancipation, the antebellum and Confederate legal regimes still had an effect, especially on transfers of property, just as in Germany, after the fall of the wall, there were competing claims to real estate in the former DDR stemming to the Weimar, Nazi, and Communist eras. Although the 1869 *Texas v. White* case most prominently draws attention to that contradiction, Tourgée, two decades before *Plessy*, was involved in another Supreme Court case that most likely influenced his fictional imagination. In 1877 he represented Archibald Kearzey in a suit brought by Leonidas Edwards in what became known as the "homestead" case.⁶ *Edwards v. Kearzey* involved Article 10 of the 1868 North Carolina Constitution that forbade the sale of moderately val-

ued “homesteads” to pay off debts. Tourgée’s client lost when the Court ruled that outlawing such sales violated Art 1 Sec 10 of the US Constitution forbidding a state from passing a law impairing the obligations of contracts. Significantly, Justice John Marshall Harlan, who would become the lone dissenter in *Plessy*, was also the lone dissenter in this case. Newly appointed to the bench, he did not write a dissenting opinion. Nonetheless, prior to the decision Phillips wrote Tourgée telling him that he had discussed the case with Harlan, who had praised Tourgée’s brief (AWTP 2213).

In Tourgée’s imagination his case before the Supreme Court could easily have contributed to Burrill’s fictional case. In 1864 Congress considered a bill that would have confiscated land from southern plantation owners and provided for 80 acres for soldiers while coloreds and whites loyal to the Union would have received 40 acres. George Julian, its sponsor, noted: “Of what avail would be an act of Congress totally abolishing slavery, or an amendment to the Constitution forever prohibiting it if the old agricultural basis of aristocratic power shall remain?” (Roark, “George W. Julian”). The bill passed the House, but the Senate never voted after the Attorney General, backed by Lincoln, stopped confiscation. Realistically, there was no hope of getting the people of North Carolina to support a similar law in 1868. Nonetheless, although Tourgée would not have supported exempting rich plantation owners, he backed Article 10 because he felt that working-class whites who found themselves in debt after the Civil War should not lose a homestead. Nor should those of moderate income, like his fictional Bagster. Furthermore, there were already cases—and sure to be more—in which freedmen had acquired property and then found themselves in debt because of bad harvests—such as happened in 1867. Tourgée felt that it was imperative that they maintain their homesteads.

Edwards v. Kearzey is relevant to Burrill’s case for another reason. As Burrill’s case reminds us, many contracts in the antebellum South involved selling slaves. Indeed, in *Edwards v. Kearzey* the Court cites the authority of Chief Justice Roger Taney in a case involving the impairment of contracts. But, as Tourgée well knew, in *Dred Scott* Taney had ruled that that a slave owner’s constitutional right to property overruled Congress’s ban on slavery in various US territories. In his brief on behalf of his client, Tourgée argued that the right of citizens of moderate means to maintain a homestead outweighed the importance of honoring contracts.

6. I am indebted to Steven Luxenberg for help in tracking down Tourgée’s role in this case.

While *Gauge and Swallow* was still being serialized, Tourgée began serializing *Pactolus Prime*. Its action takes place in Washington, D.C., on Christmas after the Republican victory in 1888. The title character is born a slave, the half-brother of his owner's son. Accompanying his relative to college, Pac educates himself. With the outbreak of war, he escapes and, passing as white and using the name P.P. Smith, joins the Union Army and heroically leads a charge up Missionary Ridge. After the war, Pac, under his pseudonym of Smith, buys a plantation, participates in Reconstruction, and marries Mazy, another ex-slave passing as white. They welcome their newborn, blue-eyed daughter Eva; earlier Mazy had given birth to Pac's half-brother's son, the white-looking baby Benny. Lusting after his former concubine, the half-brother ambushes Pac, leaving him for dead. Rescued by a conjure woman, Pac is treated by Dr. Darling whose injection of silver turns him pitch black. Unable to pass for white, Pac steals his daughter and relocates to the nation's capital where he raises Eva telling her he is fulfilling a promise to her father, his lost master. Pac works as a bootblack while secretly amassing a real estate fortune as P.P. Smith with the lawyer Willard Phelps acting as his agent.

In the meantime, Benny and his mother turn up with no knowledge of their connection to one another. Pac hires Benny as a partner to keep an eye on him, and Phelps hires Mazy, passing as white, to serve Eva. While shining shoes, Pac and Benny engage in political debates with customers at the Best House. Pac counsels Benny to pass as white as the only way to succeed in the world, but Benny refuses and reads law with Phelps hoping to serve African Americans. Pac feels that Eva also must think of herself as white, which means that she will never know her real father. Through Phelps, Pac concocts a plan to give Eva his fortune, pretending it is from the white P.P. Smith. Eva initially refuses, but when Pac dies suddenly she learns the truth. She shares this knowledge with a white journalist, ending his courtship of her. Honoring her beloved father's wishes, Eva continues to pass as white, but joins a convent as Sister Pactola, dedicating herself and her inherited fortune to serving African Americans.

The lawyer Phelps is modeled on Phillips, who had returned to private practice in Washington. Phelps helps Pac amass his fortune, prepares Benny for a legal career, and, after Pac dies, gives Eva his memoir revealing their true relationship. Phelps also maintains a strict code of lawyer/client confidentiality. One of his most important acts comes after Pac dies and Dr. Holbrook writes his death certificate. Talking to Phelps, Holbrook speculates about parallels between medical treatments of the physical body and legal treatments of the body politic. Perhaps, Holbrook ponders, "physical analogies . . . hold good in the moral and social world" (Tourgée, *Pactolus Prime* 332). But because of the American system of racial caste,

Phelps knows that in Pac's case the analogy does not hold. Dr. Darling, who treated Pac's wound during Reconstruction, thinks his injection of silver turned the white P.P. Smith black. Years later, Dr. Holbrook identifies Pac from a case study Darling published and tells Phelps that his patient is white. When the lawyer looks skeptical, Holbrook proclaims that, as a scientist, he deals with "facts . . . found in flesh and blood," not with a lawyer's "guesses at results from motive and circumstance" (245). Phelps agrees that, despite traces of colored blood, "medically, scientifically," Pac is white, but knowing "not to put entire reliance upon flesh-marks, and experts," the lawyer produces evidence proving that socially Pac is considered colored (244).

Phelps' response is a poignant exposure of the fallacies of the period's scientific racism that used flesh marks to proclaim the inferiority of people of color. In the scientific literature Pac is white, but that makes no difference in society because Pac, once a slave, is considered colored and inferior. As Phelps asks Holbrook: "Don't you see, Doctor, the man's whole life has been a struggle against the curse of color? First in his own person, and then for his child, he has labored to throw off the fetters of caste which civilization and Christianity has fastened on his race—the curse which makes the Negro a hopeless inferior!" (261). Ironically, however, for Pac's daughter to escape the fetters of caste the public has to think that he had been Eva's servant. Thus, the official death certificate must state that he is "colored."

As this tragic plot reveals, Tourgée had no simple solution for how to remedy the situation. Lamenting the ongoing effects of slavery, Dr. Holbrook asks Phelps what remedy there is for "the soul, the body politic." "There is but one," the lawyer replies, only to be interrupted by a phone call, leaving readers to ponder for themselves what to do (264). Nonetheless, Tourgée, the lawyer, knew that there were legal implications to be drawn from his work of fiction. The very month that the action of *Pactolus Prime* takes place, Tourgée published an essay urging writers of fiction to portray how the freedman's attempt to rise is blocked by "a sense of color" that "will not permit him to forget" the past of slavery (Tourgée, "The South").

For Tourgée such plots revealed how often practices within US society violated a basic principle of the Thirteenth Amendment. In 1866 Bristow, prior to his tenure as the first Solicitor General, and serving as a US Attorney in Kentucky, brought a case decided by Supreme Court Justice Swayne, serving as a Circuit Justice.⁷ In *United States v. Rhodes* Swayne, who later decided the homestead case, ruled that the Thirteenth Amendment forbade not only the institution of

slavery, but also perpetuation of its “badges and incidents.” The plot of *Pactolus Prime* dramatizes that legal argument. So long as Pac is considered his daughter’s servant, helping a young white woman live a comfortable life, he is praised. Reporting his death, a newspaper calls him a hero for giving “a lifetime of labor and self-sacrifice to restore his old master’s daughter to ease and luxury” (*Pactolus* 347). But if the truth were known, the public would have been scandalized. Indeed, Pac makes his fortune only by assuming a white identity.

In *Plessy* both Tourgée and Harlan, Bristow’s former law partner, would attempt to rely on the Thirteenth Amendment by arguing that Louisiana’s 1890 Separate Car Law stamped African Americans with a badge of inferiority by placing them in a subservient position. But before turning to Tourgée’s and Phillips’ arguments in *Plessy* and their links to literature, we briefly need to trace some of the major steps leading to the case’s legal challenge.

Legal Background to *Plessy*

The Black Codes that many southern states passed soon after emancipation prompted Congress to pass the 1866 Civil Rights Act that gave African Americans citizenship and basic rights such as to own property, enter into contracts, and give evidence. In *United States v. Rhodes*, Bristow appealed to the 1866 Act to claim federal jurisdiction to prosecute whites accused of robbing a colored family. The whites argued that the Civil Rights Act was unconstitutional and that robbery came under state, not national jurisdiction. But Bristow won the case by focusing on one provision of the 1866 Act that he successfully argued violated the Thirteenth Amendment. As evidence, he pointed out that Kentucky’s Constitution did not allow African Americans or Native Americans to testify in cases that involved whites. Nonetheless, because there was doubt as to whether the Thirteenth Amendment provided enough authority to uphold all provisions of the 1866 Act, Congress proposed the Fourteenth Amendment, which was ratified in 1868. After the Fifteenth Amendment was ratified in 1870, Congress passed acts designed to enforce the Fourteenth and Fifteenth Amendments. The Solicitor

7. Editorial Note: Early in US history, Supreme Court Justices would, in addition to their appellate court responsibilities, travel to local federal courts (currently called District Courts) to act as trial court judges on federal cases filed there.

General was responsible for arguing cases involving the new amendments and these Enforcement Acts. Although dominated by justices appointed by Lincoln and Grant, the full Supreme Court in this era, more often than not, undermined efforts to promote racial justice.

Before Bristow resigned as Solicitor General, he lost a case similar to the one he had won in 1866 as a US Attorney. In *Blyew & Kennard v. US* (1871) the Supreme Court, unlike Justice Swayne in *Rhodes*, refused to grant federal jurisdiction when two white men brutally murdered four African Americans who had opened their cabin to them. The Court acknowledged the gruesome murders and that two African Americans were the only witnesses to the crime.⁸ It also noted that, prior to the murders, one of the defendants was heard predicting that another war “about niggers” was about to occur, and that “when it did come, he intended to go on killing niggers, and he was not sure that he would not begin his work of killing them before the war should actually commence” (*Blyew & Kennard v. US* 585). Nonetheless, with only two dissenters, the Court refused federal jurisdiction. The decision rested on a technicality from an 1826 decision about those affected in a criminal case. The Court might also have been influenced because Kentucky passed a new law allowing African American testimony. Thus, as egregious as the *Blyew & Kennard* opinion was, it did not invalidate Justice Swayne’s *Rhodes* ruling that the Thirteenth Amendment prohibited badges and incidents of slavery.

As Solicitor General, Phillips had as little success protecting civil rights before the Supreme Court as Bristow before him had. Two cases in 1876 were major setbacks. In *US v. Reese* a Kentucky election official refused to count the ballot of an African American in a municipal election. He was convicted under one of the acts passed to enforce the Fifteenth Amendment. The Court ruled that the parts of the act under which he was convicted were too broadly construed to be justified by the Fifteenth Amendment and thus reversed his conviction. *US v. Cruikshank* was even more devastating. Some white supremacists were convicted under another section of that enforcement act for participating in the notorious Colfax Massacre on Easter Sunday 1873 in Louisiana, resulting in the murder of 150 African Americans and their white allies. Once again the Court reversed their conviction, this time by refusing to accept Phillips’ argument that

8. For details on the murders, see Webb 58f.

the Fourteenth Amendment incorporated the Bill of Rights and applied them to states as well as to the federal government. As a result of this decision, except in a very few cases, states remained in charge of prosecuting offenses against white supremacists, like the KKK, something few states in the South would do.

To be sure, there were occasional victories. In *Strauder v. West Virginia* (1880) the Supreme Court ruled that a law banning African Americans from juries violated the Fourteenth Amendment's equal protection clause. Another victory came in *Ex parte Yarbrough* (1884) when the Court upheld the conviction of a white supremacist's who violently intimidated an African American voter. The white supremacist argued that the section of the 1871 Enforcement Act (known as the KKK Act) authorizing his arrest was unconstitutional. But a unanimous Court rejected his claim. The *Yarbrough* case differed from *US v. Reese* because Yarbrough intimidated someone voting in a federal, not a state or municipal, election. According to the original Constitution, Congress can control elections for congressmen. Tourgée would rely upon this decision in his unsuccessful effort in 1890 to have Congress pass a federal elections bill.

Nonetheless, the decision highlighted how much power the Court reserved for states. In honoring what Tourgée called "the old fetish of State-sovereignty," the Court delivered Phillips two more major defeats in 1883 (Tourgée, "Brief of Plaintiff"). *US v. Harris* declared section two of the KKK Act unconstitutional. That section outlawed conspiracies to deprive people of the equal protection of the laws. Following the devastating logic of *Cruikshank*, the Court ruled that the section did not apply to private individuals only to the actions of states. That repeated refrain resulted in another regrettable 1883 decision, *The Civil Rights Cases*. In 1875 Congress had passed a new Civil Rights Act (CRA) making it a federal crime to use race to deny someone public accommodations, transportation, or entertainment. The law had proven almost impossible to enforce, and its constitutionality was challenged. In *The Civil Rights Cases* Phillips claimed that the CRA was authorized by both the Thirteenth and Fourteenth Amendments. The Thirteenth Amendment's ban on slavery clearly applied to individuals and not just to states, and Phillips argued that racial discrimination marked African Americans with a badge of servitude. The Court, however, disagreed by asserting that racial discrimination was not inevitably linked to slavery. Knowing that the Court had already ruled that the Fourteenth Amendment applied only to the action of states, not to those of private individuals, Phillips pointed out that hotels, railroads, theaters and the like had to be licensed by the state. As a result, their acts of discrimination did constitute state action. He also appealed to the amendment's citizenship clause that

was not limited to state action. US citizenship, he argued, entailed the right to be free of racial discrimination. In his lone dissent, Harlan, the only Southerner on the Court, agreed with his fellow Southerner Phillips' arguments. The Court, however, rejected all of them.

Plessy v. Ferguson

The Civil Rights Cases paved the way for *Plessy*. By mandating equal but separate cars on railroads, Louisiana's 1890 Separate Car Law was clearly state action. Early on a federal court ruled that a state did not have the authority to require separate cars for interstate travel. But the constitutionality of the law for travel exclusively within a state still had to be challenged. After Tourgée was contacted about testing the Louisiana law, he agreed to work without pay for a committee from New Orleans orchestrating the challenge.⁹ Their strategy relied on arguments rehearsed in Tourgée's novels.¹⁰

In 1892 Homer Plessy agreed to be arrested for violating the Separate Car Law. As the case worked its way to the Supreme Court, Tourgée was in his upstate New York home. The committee hired Louisiana attorney James Walker to help locally, and Tourgée secured the aid of Phillips, living in Washington, for when the case reached the Supreme Court. Plessy's legal team submitted different briefs arguing that the Separate Car Law violated the Thirteenth and Fourteenth Amendments. In 1896, in a seven to one decision, with one justice not participating and Harlan again dissenting, the Court denied both challenges.¹¹

Writing for the majority, Justice Henry Billings Brown rejected the Thirteenth Amendment argument by echoing the Court's reasoning in *The Civil Rights Cases* that distinguished segregation from slavery. Pointing out that the law also banned whites from sitting in colored cars, Brown claimed that the "underlying fallacy" of Plessy's argument was "the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority" (*Plessy v. Ferguson* 551). How could that be the case if both races were affected? With state

9. On Tourgée's work with the committee, see Karcher, Carolyn. *A Refugee from His Race: Albion W.*

Tourgée and His Fight against White Supremacy. U of North Carolina P, 2016.

10. On Tourgée's use of his fiction to rehearse legal arguments, see Thomas, Brook. "The Legitimacy of Law and Literature: The Case of Albion E. Tourgée." *Elon Law Review*, vol. 5, 2013, pp. 171-97; and "Albion W. Tourgée on Race, Class, and Caste." *ELH* (forthcoming).

11. Two superb accounts of *Plessy* are Luxenberg, Steven. *Separate: The Story of Plessy v. Ferguson, and America's Journey from Slavery to Segregation*. Norton, 2019; and Lofgren, Charles A. *The "Plessy" Case: A Legal-Historical Interpretation*. New York, Oxford UP, 1987.

action no longer a question, the appeal to the Fourteenth Amendment was more complicated. Acknowledging that the amendment guaranteed equal protection of the laws, Brown, without citing any language in the amendment, asserted that “in the nature of things it could not have been intended to abolish distinctions based upon color” (544). He also noted that states had the authority to use their police powers to promote the public good. The question facing the Court, therefore, was whether the Separate Car Law was a “reasonable” use of police powers. “In determining the question of reasonableness,” he proclaimed, the 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” (550). According to that standard, he upheld the Jim Crow law.

Harlan disagreed. Recalling that the Thirteenth Amendment outlaws “burdens or disabilities that constitute badges of slavery or servitude,” he argued that “The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude” (555, 562). He bolstered his Thirteenth Amendment argument by alluding to a point Tourgée made in his brief. As Harlan noted, Louisiana specifically exempted children’s nannies from the Separate Car Law. If separating whites and coloreds was necessary for the public good, Tourgée asked “why exempt nurses?” Relying on his argument in *Pactolus Prime*, Tourgée answered his own question. Whites, he noted, had no objection to sitting with a “colored person” so long as she was “in a menial or inferior capacity—as a servant or dependent.” They object only to “a citizen” who claims “equal right and privilege on a public highway” (“Brief” 322). For Harlan and Tourgée the exception for nurses was ample evidence that the Separate Car Law perpetuated the badges and incidents of slavery.

Harlan also appealed to the Fourteenth Amendment’s equal protection clause that the Court had earlier cited to ban segregated juries. How could the contact between whites and coloreds on railroads be more harmful to the public good than their contact on juries? Far from promoting the public good, laws of segregation would plant the seeds of “race hate” (560). Harlan’s most famous argument again borrowed from Tourgée’s brief. “Justice,” Tourgée wrote, “is pictured blind and her daughter the Law, ought to be color-blind” (“Brief” 310). For Harlan, the citizenship clause of the Fourteenth Amendment created a “color-blind” Constitution that recognized no “dominant class of citizens” (559).

Harlan's dissent was courageous. Nonetheless, it is as notable for what it leaves out as for what it includes. Today the Separate Car Law is portrayed as separating whites from coloreds. Little in Harlan's dissent would question that assumption. Yet the law actually separated whites from "coloreds." "Coloreds" included a variety of groups. For instance, most members of the committee that organized the challenge descended from free people of color, often French-speaking, who did not consider themselves "Negroes." Indeed, many people of color had white "blood." In most states that racial mixture resulted primarily from sexual abuse by masters under slavery, but Louisiana's Creole population included numerous legal interracial marriages. To undermine the premises of a law predicated on a white/colored binary, Tourgée and the committee turned to Plessy, who had one-eighth African and seven-eighths white ancestry, and could pass as white. Their challenge was bolstered by a number of factors. In 1890 Louisiana had no law banning interracial marriage. The committee had successfully blocked a proposal that would have banned marriages that produced most of its members. The lack of an anti-miscegenation law allowed Tourgée to point out that the Separate Car Law interfered with "natural domestic rights of the most sacred character" by forcing the separation of wives and "husbands or parents and children on railroads ("Brief" 301). Even more compellingly, in 1890 Louisiana had no legal definition of race. Furthermore, racial definitions in other states varied, making someone white in one state colored in another.

Harlan ignored all of these challenges to the arbitrariness of the color-line. Instead, he assumed that one existed, while arguing that the Constitution should be blind to it. Tourgée, however, knew that, although color-blindness was a symbol for impartiality, it could also be a myopic failure to see the conditions of people of color. In one of his best-selling novels, he wrote: "Right [the freedman] had, in the abstract; in the concrete, none. Justice would not hear his voice. The law was still color-blinded by the past" (Tourgée, *Bricks* 106). Indeed, the Court betrayed its color-blindness by calling white-looking Plessy colored.

The best way to understand Harlan's omissions is to look more closely at how indebted Tourgée's strategy in *Plessy* was to his literary imagination. For instance, the strategy of choosing Plessy grew directly out of *Pactolus Prime*. Not only does the novel have four characters who could pass as white, it also includes the scene when the lawyer based on Phillips convinces a doctor that someone scientifically considered white was socially considered colored. The fluidity of the color line in *Pactolus Prime* dramatizes Tourgée's most ingenious argument. While Benny is studying law with Phelps, Pac advises him to pass as white to make more money, prompting Tourgée, in *Plessy* to claim that the rep-

utation of being white was property in the form of earning power. “How much,” he asked, “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 man?” (“Brief” 300). Yet, without providing a scientific or legal definition, the Separate Car Law turned a railroad conductor into an “autocrat of caste” by allowing him arbitrarily to deny Plessy the reputation of whiteness, thus violating the Fourteenth Amendment by depriving him of property without due process of law (“Brief” 326).

Although Justice Harlan did not touch this argument, Justice Brown did, only to reject Tourgée’s point as irrelevant because he ruled that Plessy was colored. But by what standard? Louisiana had no legal definition of what made someone colored. The inadequacy of Brown’s response is magnified by his solution to the inconsistent definitions of race from state to state. States, he ruled, had the authority to determine who was colored in their jurisdictions.

By 1954 *Plessy*’s racial binary was so engrained in the public’s mind that in *Brown v. Board of Education* the NAACP did not attack its arbitrariness. Indeed, whereas Plessy’s lawyers raised multiple constitutional issues, the NAACP appealed only to one: the equal protection clause. Another difference between the cases is anticipated by *Pactolus Prime*. Justice Brown faulted Tourgée for arguing that “legislation” can overcome “social prejudices” (551). Brown had in mind the antebellum case of *Roberts v. Boston* (1849) that he cited as precedent. This case ruled that segregated schools did not violate Massachusetts’s guarantee of equality before the law; Justice Lemuel Shaw, Herman Melville’s father-in-law, proclaimed: “Prejudice, if it exists, is not created by law and cannot be changed by law” (*Roberts v. Boston* 209). Paradoxically, however, *Pactolus Prime* echoes Shaw. “Prejudice, whether right or wrong,” Pac admits, “can rarely be legislated out of existence, and the schools of the South would be valueless to the colored people if they were opened by compulsion to them” (*Pactolus* 118).

For a public taught that *Brown* reversed *Plessy*, it is almost inconceivable that Tourgée would have his African American protagonist utter those words. But *Plessy* was about railroads not schools. When the law that became the Civil Rights Act of 1875 was first proposed it banned segregated public schools. Despite his commitment to freedmen’s rights, Tourgée criticized the school provision as unrealistic for the South. Before Reconstruction very few public schools existed in the South. Basic education was considered unnecessary for poor whites to do their menial jobs, and it was illegal to teach slaves to read and write. Rich children went to private academies or received tutoring. Although southern states needed

railroads for their economies, Tourgée feared that they would shut down schools before integrating them. Criticizing Charles Sumner, who proposed the original act, he wrote: “I have no use for those who prescribe for a disease without knowing [its] nature” (Tourgée, “Letter”).

Before the bill was passed, the school provision was dropped. Otherwise, Phillips’s argument in *The Civil Rights Cases* would have been different. Phillips argued for the constitutionality of the 1875 Act in part because of Anglo-American law’s longstanding recognition of a right to freedom of locomotion. In his dissent, Harlan drew on the eighteenth-century’s *Blackstone’s Commentaries* to call freedom of locomotion on public highways “so far fundamental as to be deemed the essence of civil freedom.” “Personal liberty consists,’ says Blackstone, ‘in the power of locomotion, of changing situation, or removing one’s person to whatever places one’s own inclinations may direct, without restraint, unless by the due course of law’” (*Civil Rights Cases* 39).

Blackstone had no comparable comments about public schools, which rarely existed in eighteenth-century Britain. Indeed, Phillips’s brief in the *Plessy* case explicitly distinguished between schools and railroads by appealing to both freedom of locomotion and the US federal system. Although travel on a train might be solely within a state, railways connect federal offices to one another. Restriction of travel on public roads was, therefore, an illegitimate use of a state’s police powers. In contrast, education was the responsibility of states. In addition, Phillips maintained, parents had an interest in schooling. “The institution of *Marriage*, including the *Family* and the rearing of the young has,” he remarked, “always been amenable to the laws of police. That branch of police which looks to the interest of future generations and of the republic to come, punishes bigamy, and refuses certain privileges to children born out of wedlock; and entrusts the discipline and education of minors to the parents.” Because the government in its role as “*in loco parentis*” has an interest in “educating the young,” “no constitutional objection upon mere general grounds can be made to provisions by law which respect, so far as may be, a prevailing parental sentiment of the community upon this interesting and delicate subject.” “*Separate cars*, and “*separate schools*” . . . come under different orders of consideration” (“Brief for Homer A. Plessy”).

How much Tourgée agreed with Phillips is not clear. The complexities of the *Plessy* challenge created tensions in their friendship. Phillips was responsible for details in Washington, but he almost informed Tourgée too late to make oral argument. Phillips also knew that Tourgée was “annoyed” with parts of his brief.

The letter articulating Tourgée's precise objections is lost, but in an existing one Phillips admitted that in stressing technical points he worked on a "lower train of thought" than Tourgée (AWTP 9071). For instance, a chapter in *With Gauge and Swallow* condemns a state's right to ban interracial marriages, but Phillips's brief recognized that the Court had already upheld antimiscegenation laws.

Despite such differences Phillips's and Tourgée's views are a poignant reminder of how much the role of public education changed from *Plessy* to *Brown*. They also provide insight into what happened to public schools after *Brown*. To contemporary ears, Phillips's argument might seem to legitimate states' recent appeals to the general welfare to ban the teaching of some books, critical race theory, and LGBT issues. Nonetheless, Phillips' argument undermined the Court's appeal to the legality of segregated schools to justify the Separate Car Law. Also, his argument about education's contribution to the general welfare could be turned around. The *Brown* Court used it to ban segregation in public schools. Noting that public schools played a more important role in US society in 1954, the year *Brown* was decided, than at the time of *Plessy*, Chief Justice Earl Warren proclaimed: "Today, education is perhaps the most important function of state and local government. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professions and training, and in helping him to adjust normally to the environment" (*Brown v. Board* 493). Segregated schools could not provide that training in citizenship equally.

For a unanimous Court in *Brown* public education's role in training citizens trumped parental rights over their choice of schools. In the seventy years since *Brown*, however, the pendulum has swung back. Tourgée's fear that southern whites would shut schools down before integrating them proved true. After *Brown*, a number of districts in the South closed public schools with many white children opting for private schools. Today the tactics are more subtle but also ones that Tourgée would recognize. When Justice Warren described the role public schools played in preparing children for citizenship, his home state of California had one of the premiere public educational systems in the world, with much of its funding coming from property taxes. Today, while trying to serve a growing multicultural population, it suffers from perpetual underfunding, the result of a 1978 measure that limited property taxes, not only on individual homesteads, but also on businesses that include some of the wealthiest in the world. Schools across the nation suffer from similar problems, and the Republican Party is push-

ing for vouchers that would allow parents to send their children to private schools at taxpayer expense. Children in private schools, however, do not get the same education in citizenship as those attending racially and economically diverse public schools. Nor does home schooling expose children to the public sphere.

Tourgée's response to taxpayers' refusal properly to fund a public educational system providing a common civic education for a diverse population is not hard to imagine. Not only did he unsuccessfully lobby for federal aid for education to reduce illiteracy, he ended his brief to the Supreme Court in the 1877 homestead case with: "The safety and health of the Commonwealth are above a private right. The sacredness of private property must yield to the imperious demands of public necessity" (*Edwards v. Kearzey* 595).

Tourgée's and Phillips's defeat in *Plessy* brought their law and literature partnership to an end. Tourgée took a consular position in France and refrained thereafter from public participation in questions of racial justice. When he died in 1905 he was honored by the Niagara Movement, a precursor to the NAACP, along with Frederick Douglass and William Lloyd Garrison. Shortly before Phillips died in 1902, he told a historian critical of his alliance with Tourgée: "I have no regrets, for any substantial part of the part I took in Reconstruction" (Miller 263). The lesson the two have for today is expressed in the work of literature Tourgée dedicated to the lawyer Phillips. Like a lawyer in Tourgée's fictional law firm, neither forgot "what the law ought to be, in trying to find out what it was" (*Gauge* 112).

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