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## ARTICLES

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### INTRODUCTION: “A RADICAL NOTION OF DEMOCRACY: LAW, RACE, AND ALBION TOURGÉE, 1865-1905”

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On a drizzly weekday in November 2011, a hundred people gathered in Raleigh for a day’s worth of discussion about an obscure historical figure with an odd name: Albion Winegar Tourgée. The occasion was the symposium “A Radical Notion of Democracy: Law, Race, and Albion Tourgée, 1865-1905.”

To those familiar with Greensboro, Albion Tourgée’s name, at least, was not so strange. A historical marker on Lee Street in downtown Greensboro points toward the site of his home.<sup>1</sup> A former Union soldier, Tourgée (1838-1905) became one of the great civil rights advocates of the nineteenth century.<sup>2</sup> He settled in Greensboro in 1865 in hopes of helping to shape the new post-slavery South.<sup>3</sup> As a member of the Constitutional Convention of 1868, he successfully campaigned for such important provisions as free public education, the election of municipal and county office-holders, the abolition of the whipping post, and the elimination of property qualifications for jury duty in North Carolina’s Reconstruction Constitution.<sup>4</sup> Working as a reformer, lawyer, judge, and novelist, Tourgée fought for racial equality openly

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<sup>1</sup> John David Smith, *Albion W. Tourgée in North Carolina Historiography and Historical Memory*, CAROLINA COMMENTS (Office of Archives and History, Raleigh, N.C.), Jan. 2012, at 29, 31.

<sup>2</sup> Michael Kent Curtis, *Albion Tourgée: Remembering Plessy’s Lawyer on the 100th Anniversary of Plessy v. Ferguson*, 13 CONST. COMMENT. 187 (1996).

<sup>3</sup> See *id.* at 189.

<sup>4</sup> See *id.* at 190.

enough to attract the attention of the Ku Klux Klan, which he vigorously opposed.<sup>5</sup> After he left North Carolina, he achieved national fame for representing Homer Plessy in the landmark case *Plessy v. Ferguson*.<sup>6</sup>

In the laconic language of the historical marker, erected in 1979, Tourgée was a “Union army officer . . . judge. Member of 1868 Convention.”<sup>7</sup> Volumes are said, and unsaid, in those carefully chosen words.<sup>8</sup> For much of the twentieth century, Tourgée’s dubious reputation as a “carpetbagger” persisted.<sup>9</sup> University of North Carolina historian Harry Watson remembers his introduction to Tourgée in grade school in mid-century Greensboro.<sup>10</sup> His teacher showed the class a cartoon by William Sydney Porter (“O. Henry”) that pictured Tourgée as “a disreputable-looking angel in full flight,” as historian George Fredrickson described it: “in one hand, he held a carpetbag, to symbolize his membership in the despised tribe of Yankees who had allegedly descended like vultures upon the south after the Civil War, and, in the other, a handkerchief to catch the tears falling from his one good eye.”<sup>11</sup> The “full flight” was a retreat, and the unambiguous message was good riddance. Albion Tourgée was no role model for modern girls and boys.

The scholars assembled in Raleigh offered a different picture. Reflecting a broad-scale historical reassessment of the legacy of Recon-

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<sup>5</sup> See *id.* at 191.

<sup>6</sup> See *Plessy v. Ferguson*, 163 U.S. 537 (1896). See Curtis, *supra* note 2, at 192-93.

<sup>7</sup> *Albion W. Tourgee 1838-1905*, N.C. HIGHWAY HIST. MARKER PROGRAM, [http://www.ncmarkers.com/marker\\_photo.aspx?sf=a&id=J-78](http://www.ncmarkers.com/marker_photo.aspx?sf=a&id=J-78) (last visited Feb. 6, 2013).

<sup>8</sup> See *id.* The history of the Tourgée marker itself is revealing, as John David Smith has discovered. In 1951 the advisory committee on historical markers for the North Carolina Historical Marker Program recommended a marker honoring Tourgée with a text that began, “ALBION W. TOURGÉE: Carpetbagger from Ohio.” *Id.* at 30. The term “carpetbagger” met objection from, among others, Greensboro attorney Martin F. Douglas. Douglas urged the N.C. Department of Archives and History not “to apply epithets to those whom you are commemorating.” *Id.* at 31. With the Department’s director, Christopher Crittenden, unpersuaded to remove the word, the project was tabled. *Id.* The successful effort to erect the 1979 marker was coupled with a petition for a marker on Elm Street to commemorate the Greensboro sit-ins of 1960. *Id.* Guilford College historian Alexander R. Stoesen submitted both petitions. *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Professor Harry Watson, director of the Center for the Study of the American South from 1998 to 2011, told this story in his opening remarks at the symposium.

<sup>11</sup> George M. Fredrickson, *Introduction* to ALBION TOURGÉE, A FOOL’S ERRAND: A NOVEL OF THE SOUTH DURING RECONSTRUCTION, at vii, vii (Harper Torchbooks 1966) (1879).

struction,<sup>12</sup> the symposium's participants came to praise Tourgée for his unwavering and principled advocacy for the civil rights of American citizens formerly held in bondage. Fundamentally, these scholars set out to introduce this North Carolina audience to a figure about whom they had largely never been taught, despite his palpable impact on North Carolina's governmental and political structures, and indeed on the larger American civil rights movement.

That Tourgée remains relatively obscure, even today, reflects his peculiarly difficult position within the revisionist histories of Reconstruction that appeared in the second half of the twentieth century. After a brief moment of rediscovery, with Otto H. Olsen's 1965 biography followed by new editions of his major Reconstruction novels, *A Fool's Errand* and *Bricks Without Straw*, Tourgée "underwent a second eclipse," as symposium participant Carolyn Karcher observes. She suggests two reasons for this turn, one rooted in politics and the other implicated in aesthetics. Politically, as a white man, Tourgée was out of place amidst the rise of separatism and the birth of the discipline of Black Studies, which devoted its energies to recovering long-forgotten black writers and activists. Aesthetically, the pervasive practice of the New Criticism, and its successor Deconstruction (each of which carried its own political undertones), tended to devalue historical fiction.<sup>13</sup>

To these possible reasons, Mark Elliott and John David Smith, also participants in the symposium, add that the single-minded focus on equality characteristic of reformers like Tourgée "seemed inadequate"

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<sup>12</sup> During the "second Reconstruction"—the civil rights revolution of the 1950s and -60s—historians began a close examination of the politics that underlay received historical understandings of Reconstruction. In histories written by white scholars in the early twentieth century, reflecting the ideology of the time, Reconstruction had been described as a dark time of Southern "misrule" during which corrupt "carpetbaggers" took advantage of ignorant and vengeful Negroes to wreak havoc that could be ended only through "redemption" by the white establishment. See, e.g., J.G. DE ROULHAC HAMILTON, *RECONSTRUCTION IN NORTH CAROLINA* (1914). The work that most clearly ushered in a new historical view, in which the positive legacies of Reconstruction were brought to light, is Eric Foner's magisterial *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* (1988) (ushering in a revisionist view, this work most clearly brings the positive legacies of Reconstruction to light).

<sup>13</sup> See generally OTTO H. OLSEN, *CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION WINGAR TOURGÉE* (1965); ALBION TOURGÉE, *A FOOL'S ERRAND: A NOVEL OF THE SOUTH DURING RECONSTRUCTION* (Harper Torchbook 1966) (1879); ALBION TOURGÉE, *BRICKS WITHOUT STRAW* (Otto H. Olsen ed., La. State Univ. Press 1969) (1880); see also FRANK LENTRICCHIA, *AFTER THE NEW CRITICISM* (1980) (regarding the politics of the New Criticism).

as “scholars began to focus on Reconstruction’s limitations, lamenting the failure of its architects to impose broader reforms on the South, including land redistribution, and decrying their inordinate faith in free markets to settle labor conflict . . . .”<sup>14</sup> Further, the “perceived complicity” of Radical Republicans and abolitionists “in the ‘civilizationist’ goal of moral uplift and assimilation,” combined with their whiteness, rendered activists like Tourgée “suspect even in their commitment to racial equality.”<sup>15</sup>

But toward the turn of the twenty-first century, as Karcher notes, Tourgée’s critical fortunes improved again. Tunneling more deeply into Reconstruction archives, scholars began to see that his “fictional” narratives of both the horrific violence of the white supremacy campaigns and the occasional triumphs of black Reconstruction actors served as powerful witness to the facts.<sup>16</sup> Meanwhile, as the New Historicism entered the academy, literary studies turned again to contextual, historical approaches (while historical and legal studies participated in a broad movement to acknowledge the fundamentally narrative quality of all critical discourse).<sup>17</sup> Moreover, Elliott and Smith note that the “uplift and civilization” rhetoric dismissed by earlier critics had come, by the mid-1990s, to be read in “subtle and subversive ways” to demonstrate that activists like Ida B. Wells, Charles Chesnut, W.E.B. Du Bois, and even Booker T. Washington were deploying such rhetoric effectively “to advance the cause of racial equality.”<sup>18</sup> And legal historians including Brook Thomas, another symposium participant, offered new

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<sup>14</sup> Mark Elliot & John David Smith, *Introduction to UNDAUNTED RADICAL: THE SELECTED WRITINGS AND SPEECHES OF ALBION W. TOURGÉE* 1, 19 (Mark Elliott & John David Smith, eds., 2010).

<sup>15</sup> *Id.* at 19.

<sup>16</sup> For example, “W.E.B. Du Bois’s historical classic, *Black Reconstruction in America*, which began the process of dismantling the racist mythologies about the era, not only vindicated much of Tourgée’s position, but drew inspiration directly from his writings.” MARK ELLIOTT, *COLOR-BLIND JUSTICE: ALBION TOURGÉE AND THE QUEST FOR RACIAL EQUALITY FROM THE CIVIL WAR TO PLESSY V. FERGUSON* 12 & 326-27 n.33 (2006). Latter-day critics have observed the striking parallels between Tourgée’s fiction and contemporaneous accounts of Reconstruction. See, e.g., Karcher, *supra* note 13.

<sup>17</sup> Karcher, *supra* note 13, at 51-52. On the decline of the New Criticism, see, for example, LENTRICCHIA, *supra* note 13. For an introduction to the New Historicism in literary criticism, see, for example, CATHERINE GALLAGHER & STEPHEN GREENBLATT, *PRACTICING NEW HISTORICISM* (2001). On the “narrative turn” in history, see, for example, *THE HISTORY AND THE NARRATIVE READER* (Geoffrey Roberts ed., 2001). On the “narrative turn” in law, see, for example, *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (Peter Brooks & Paul Gewitz eds., 1996).

<sup>18</sup> Elliot & Smith, *supra* note 14, at 19.

readings of *Plessy v. Ferguson* that began to reveal the complex political and cultural negotiations that surrounded the case.<sup>19</sup>

Thomas, Karcher, Elliot, and Smith have each contributed substantially to a renewed appreciation of Albion Tourgée and his efforts in the struggle for racial equality. Elliot's award-winning biography *Color-Blind Justice: Albion Tourgée and the Quest for Racial Equality* complements Olsen's earlier biography, which had focused more on Tourgée's North Carolina years, by emphasizing his place in the national movement for civil rights.<sup>20</sup> Karcher begins her 2009 edition of *Bricks Without Straw* with a richly contextual and analytical introduction that lends value to the experience of reading the novel.<sup>21</sup> Elliot and Smith's selected edition of Tourgée's writings and speeches, also framed with a helpful introduction, makes a wealth of primary material readily available for further study.<sup>22</sup> Their assertions that Tourgée "deserves to stand alongside Wells and Du Bois in the front ranks of racial reformers,"<sup>23</sup> and that "conditions are finally ripe for the lasting revival of an unjustly neglected American hero,"<sup>24</sup> animated the spirit of the symposium.

These four scholars—Elliot, Smith, Thomas, and Karcher—joined six other distinguished historians and legal scholars, including a North Carolina appellate court judge, to share their thoughts on the life and legacy of Albion Tourgée. As a result, the editors of the *Elon Law Review* have generously put together this volume of selected articles.<sup>25</sup>

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<sup>19</sup> Brook Thomas, *The Legal and Literary Complexities of U.S. Citizenship Around 1900*, 22 *LAW & LITERATURE* 307 (2010); *PLESSY V. FERGUSON: A BRIEF HISTORY WITH DOCUMENTS* (Brook Thomas ed., 1997). See also Rebecca J. Scott, *Public Rights, Social Equality and the Conceptual Roots of the Plessy Challenge*, 106 *MICH. L. REV.* 777 (2008); additional cases cited in Elliot & Smith, *supra* note 14, at 20 n.16.

<sup>20</sup> See ELLIOTT, *supra* note 16. The book won the 2007 Avery O. Craven Award from the Organization of American Historians.

<sup>21</sup> Karcher, *supra* note 13, at 52.

<sup>22</sup> Elliot & Smith, *supra* note 14, at 20.

<sup>23</sup> Karcher, *supra* note 13, at 52.

<sup>24</sup> *Id.*

<sup>25</sup> Professor Elliot's keynote address is not included in this collection. See Mark Elliot, Assoc. Professor of History at the Univ. of N.C. at Greensboro, Opening Keynote Address at Public Law and Humanities Symposium: A Radical Notion of Democracy: Law, Race, and Albion Tourgée, 1865-1905 (Nov. 4, 2011). Nor does the collection include the closing keynote address by Blair L. M. Kelley. See Blair L. M. Kelley, Assoc. Professor of History, N.C. State Univ., Closing Keynote Address at Public Law and Humanities Symposium: A Radical Notion of Democracy: Law, Race, and Albion Tourgée, 1865-1905 (Nov. 4, 2011). Also not represented in this volume is a special version of the

Shedding light on an important but unexplored chapter of Tourgée's biography, Frank Woods tells the story of Adaline Pattillo, an enslaved woman whom Tourgée adopted and raised in his Greensboro home. She was the slave and probably the daughter of a notorious Caswell County slave trader, A.A. Pattillo. Tourgée took in Adaline, her mother Louise, and her younger sister Mary, looking with special favor on Adaline. Through Woods' narrative, we gain an insight into the interest that Tourgée would take, later in his career, in Homer Plessy, a "black" man so light-skinned that his arrest for entering a "white" train car had to be staged. Tourgée took a deep interest in light-skinned blacks, like Adaline, because they literally embodied the hypocrisy of white southern men whose "nighttime integration" belied every daytime claim they made about the natural stratification of the races.

For Tourgée, Woods claims, Adaline became a Pygmalion-like "experiment"—"a modest start on a path of social and political engineering" that would compel white Americans to accept African Americans on equal terms. He sent her to the Hampton Normal and Industrial Institute in Virginia, where she studied alongside Booker T. Washington.<sup>26</sup> Though Tourgée's own financial exigencies kept her from graduating, she returned to Greensboro to live a productive life, "obtain[ing] much of what she sought . . . including middle-class respectability." What Woods neglects to mention in this insightful essay is that he is the great-grandson of Adaline Pattillo Woods.

Judge Robert N. Hunter Jr., of the North Carolina Court of Appeals, stresses the importance for North Carolina lawyers of understanding the Constitution of 1868 and, with it, Albion Tourgée's contributions. Because so much of its substance remains in the state's current constitution, Judge Hunter argues, understanding the Reconstruction history and context of the Constitution of 1868 is vitally important. Whereas "negative rights" secure an individual against such intrusions as being deprived of life, liberty, or property except through

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drama *Constitutional Tales*, produced by Ann McColl, in the House Chamber of the State Capitol. This performance, which concluded the symposium, highlighted Tourgée's role in the creation of the North Carolina Constitution of 1868. See Ann McColl, Legis. Dir. State Bd. of Educ., *Constitutional Tales*, in House Chamber presentation at Public Law and Humanities Symposium: A Radical Notion of Democracy: Law, Race, and Albion Tourgée, 1865-1905 (Nov. 4, 2011). Professor Smith's remarks were previously published in Smith, *supra* note 1.

<sup>26</sup> ELLIOTT, *supra* note 16, at 137.

due process, the Constitution of 1868, thanks largely to Tourgée's advocacy, introduced a number of "positive rights," including broad and nondiscriminatory voting rights (for men only, we should note), establishment of public charities for the blind and mentally handicapped, and the right to a free system of public schools. Positive rights cannot be realized without the political will to sustain the necessary material support; hence they become vulnerable during times of political upheaval.

As Judge Hunter makes clear, the story of Tourgée's work in North Carolina is largely that of securing and defending these positive rights against a tremendous backlash of white supremacy, expressed most forcefully in the violence of the Ku Klux Klan. Tourgée's story, Judge Hunter writes, serves as "a cautionary tale of the possibility and limits of exporting the ideals inherent in free markets, equality and democracy to societies where these ideals have not been realized." Here in North Carolina, debates over the equitable operation of public schools suggest that the challenges to constitutional jurisprudence brought on by these positive rights are still with us.

Carolyn Karcher brings the story into the 1890s, following Tourgée's career after his departure from North Carolina. This is a decade usually remembered in civil rights history as occupying the dark space of time between the passage of the Fifteenth Amendment and the rise of a new generation of activists with the establishment of the National Association for the Advancement of Colored People. But Tourgée's efforts during this period, as Karcher demonstrates, remained unflagging. Inspired by Afro-Creoles in New Orleans, who by 1891 were mobilizing to contest segregated railway cars, he set out to found a new interracial civil rights organization: the National Citizens' Rights Association.

The story of this effort sheds equal light on Tourgée and the times. With typical idealism, he insisted that the organization be interracial, which proved exceedingly difficult, at least in the North: efforts by this white man to organize among blacks outside the South failed utterly. That a ten-to-one majority of the organization's members were white Northerners offended Tourgée's pragmatist sensibilities as well, for he felt that an organization with so little African American support sent a message to the larger white population that African Americans were unwilling or unable to fight for their own rights. Karcher deftly traces the ways in which Tourgée's moves reflected his own narrow strategies (women not welcome, for example, since women could not

vote), ultimately spelling the failure of the National Citizens' Rights Organization. And yet, she also points out that Tourgée's weaknesses in such critical areas as organizing and fundraising skills were offset by strengths that put him well ahead of his time. The hope he placed in the simple act of galvanizing public opinion serves as a precursor to later strategies of mass mobilization: sit-ins, marches, and the like. His insistent habit of letter writing and lobbying finds a latter-day parallel in internet-based organizations such as MoveOn.org. In his own time, however, as Karcher concludes, his efforts to create a new national interracial civil rights organization came to their disappointing end just as *Plessy v. Ferguson* was about to be heard in the Supreme Court.

Complementing Karcher's discussion of Tourgée's activist strategies, Brook Thomas offers an insightful analysis of Tourgée's strategies as a novelist. Thomas reads Tourgée's fiction as an "imaginative space" for testing out arguments for the courtroom and beyond.

Thomas' argument proceeds along two lines. First, he explores ways in which Tourgée's fiction "rehearses various arguments that he would eventually use in his argument for Homer Plessy." Against the tide of legal opinions that had already narrowed the application of the Fourteenth Amendment, and realizing that the courts had only fleetingly embraced more than a literal interpretation of the Thirteenth Amendment, Tourgée insists on the crucial importance of the context of slavery against which those amendments were enacted. Thus, he argues both that the "whiteness" of the mixed-race Homer Plessy was a form of property that the federal government had a responsibility to protect from erosion under the Fourteenth Amendment, and that the discrimination at issue in the case was an example of the "badges and incidents of slavery" that the federal government was obligated to remove under the Thirteenth Amendment. In these ways Tourgée argued for a positive, affirmative right to national citizenship. But these arguments, which moved from his novels to his legal briefs, were not destined to persuade a Supreme Court that had already held that "Sovereignty, for the protection of the rights of life and personal liberty within the respective States, rests alone with the States."<sup>27</sup>

Second, Thomas explores the ways in which Tourgée's fiction points up the limits of the law. Whereas the majority opinion in *Plessy* had cited "the established usages, customs and traditions of the peo-

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<sup>27</sup> *United States v. Cruikshank*, 92 U.S. 542, 542 (1875).



ple"<sup>28</sup> as a basis for upholding the segregated railroad car law, Thomas notes that "[f]or Tourgée . . . it was precisely the 'established usages, customs and traditions' of the white population in the South that were the problem." Reconstruction had operated with insufficient tools. Tourgée's insistence that the primary fault for the failures of Reconstruction lay with the white Northern Republican establishment finds resonance in Gunnar Myrdal's observation in his *American Dilemma* (1944) that the "race problem" in the United States was fundamentally "a white man's problem."<sup>29</sup> Tourgée grasped what Myrdal would later emphasize—that "practically all the economic, social, and political power is held by whites," and thus that it is "the white majority group that naturally determines the Negro's 'place.'"<sup>30</sup> Thomas concludes by turning to the reformist economic arguments suggested in Tourgée's fiction, citing his support for unrealized Republican policy proposals that would have strengthened the economic positions of African Americans. As Thomas demonstrates, Tourgée was a "stark realist" who maintained that even the Supreme Court's most favorable rulings could not guarantee racial equality in the absence of sweeping social changes.

In a masterful analysis of the Supreme Court's civil rights jurisprudence from before the Civil War through *Plessy*, Michael Curtis puts Tourgée's claim that the Court had been "the consistent enemy of personal liberty and equal right" to the test. He concludes that the claim was exaggerated—but not by much. With few exceptions, Curtis finds the Court to have embraced interpretations of the Constitution that served to limit, rather than to secure, the civil rights of African Americans.

Carefully threading us through the prevailing arguments in the cases interpreting the Reconstruction Amendments, including the landmark opinions in the *Slaughter-House Cases*, *United States v. Cruikshank*, and the *Civil Rights Cases*, Curtis reveals a court systematically at work to "hollow[ ] out" the Reconstruction statutes, leaving their shells but denying the core protections of the "rights, privileges, and immunities" of all citizens under federal law. By laying out alternative choices the Court could have made, Curtis highlights the contingency of judicial reasoning. He leaves little doubt that the course of jurispru-

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<sup>28</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>29</sup> GUNNAR MYRDAL, *AN AMERICAN DILEMMA: VOL. I. THE NEGRO IN A WHITE NATION* lxxv (1964).

<sup>30</sup> *Id.*

dence under the Constitution after the Reconstruction Amendments was fundamentally no less biased against the rights of African Americans than it was prior to the Civil War.

Throughout the postwar period, Curtis notes, Tourgée remained keenly and painfully aware of the inequities being cemented into law by an unsympathetic Supreme Court: not even the heinous, Klan-instigated political murder of his white Republican friend, Senator John W. Stephens of Caswell County, found redress under federal law. The Court's position that individual rights were the province of the states alone rang false to Tourgée, who maintained that "the past has shown conclusively that the white man of the South is not a fair or just guardian of the interest of the colored man."<sup>31</sup> Yet even in the face of this discouraging precedent, Curtis points out, Tourgée soldiered on in *Plessy*. With as much conviction as ever, he argued that the Constitution, as amended during the halting process of "reconstructing" a broken nation, offered direct, affirmative protections ensuring equal civil rights for all American citizens. "Justice is pictured as blind," Tourgée wrote in his brief before the Court, "and her daughter the Law, ought to be at least color-blind."<sup>32</sup> Against a long history of legally sanctioned denials of personal liberty and equal right, Tourgée insisted that the Reconstruction Amendments had created "a *new citizenship*."<sup>33</sup>

Over the century since Tourgée's impassioned argument for "color-blindness" under the law, the term has come to be interpreted in ways that would astonish him. It has undergone an "ideological drift," to borrow Jack Balkin's useful term,<sup>34</sup> or rather a 180-degree shift. In his dissent in *Plessy*, Justice John Marshall Harlan embraced "color-blindness" as shorthand for the recognition of a positive right granted to African Americans by the Reconstruction Amendments "to exemption from unfriendly legislation against them distinctively as colored."<sup>35</sup> By the 1970s, though, "color-blindness" had come to stand for the rejection of any structural, race-conscious remedy to institutional and historical segregation. Perhaps it would not surprise

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<sup>31</sup> ALBION W. TOURGÉE, *Shall White Minorities Rule? (1889)*, in UNDAUNTED RADICAL, 112, 116 (Mark Elliot & John David Smith, eds., 2010).

<sup>32</sup> ALBION W. TOURGÉE, *Brief of Plaintiff in Error (1895)*, in UNDAUNTED RADICAL, 296, 310 (Mark Elliot & John David Smith, eds., 2010).

<sup>33</sup> *Id.* at 317.

<sup>34</sup> J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 870-72 (1993).

<sup>35</sup> *Plessy v. Ferguson*, 163 U.S. 537, 556, 559 (1896) (Harlan, J., dissenting).

Tourgée at all that the concept of a “color-blind” Constitution has “drifted” most dramatically across the field of education.

Attorney Thurgood Marshall invoked Harlan’s famous line frequently during the years in which he led the NAACP’s campaign to eliminate Jim Crow from public life.<sup>36</sup> But in the case that culminated those efforts, *Brown v. Board of Education*,<sup>37</sup> the hurdle to be overcome was, of course, the *majority* opinion in *Plessy*, which had turned not on whether a racial classification existed (finding no inherent fault with such a classification) but on whether the classification led to inequitable outcomes (finding, insensibly to our ears, that if “the enforced separation of the two races stamps the colored race with a badge of inferiority . . . it is . . . solely because the colored race chooses to put that construction on it”).<sup>38</sup> Therefore, the argument in *Brown*, though grounded in the concept of colorblindness, turned upon demonstrating that segregation per se created inequality: that it did psychological harm to black students.

Yet even though the concept of “colorblindness” does not appear in *Brown*, in the subsequent desegregation cases<sup>39</sup> the concept re-emerged, this time as a two-edged sword. In *Briggs v. Elliott*, on remand from *Brown*, a South Carolina district court held that the Constitution “does not require integration. It merely forbids discrimination.”<sup>40</sup> Ten years later, the same district court restated this logic, declaring that “[t]he Constitution is color-blind; it should no more be violated to attempt integration than to preserve segregation.”<sup>41</sup> In this new use of “colorblindness,” the state could compel neither segregation nor integration.<sup>42</sup> This strained reading of *Brown* ratified “freedom of choice” school attendance plans that were resulting in minimal actual integra-

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<sup>36</sup> See Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 988-89 (2007).

<sup>37</sup> 347 U.S. 483 (1954).

<sup>38</sup> *Plessy*, 163 U.S. at 551. See also Brook Thomas, *Stigmas, Badges, and Brands: Discriminating Marks in Legal History* in HISTORY, MEMORY, AND THE LAW 249-81, 265-64 (Austin Sarat & Thomas R. Kearns eds., 1999) [hereinafter *Stigmas*] (analyzing Supreme Court’s rhetorical strategies in distinguishing *Brown* from *Plessy*).

<sup>39</sup> It is worth remembering that for a decade after *Brown*, virtually no southern school systems were desegregated. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 223 (2010).

<sup>40</sup> 132 F. Supp. 776, 777 (E.D.S.C. 1955).

<sup>41</sup> *Randall v. Sumter Sch. Dist. No. 2*, 241 F. Supp. 787, 789 (E.D.S.C. 1965) (citation omitted).

<sup>42</sup> *Id.*

tion, leaving *de facto* segregation in place.<sup>43</sup> Such plans were eventually barred in favor of results-oriented integration plans in *Green v. County School Board of New Kent County*<sup>44</sup>—another opinion that makes no mention of “colorblindness”—but in the meantime the lower courts reached inconsistent results, and the new understanding of “colorblindness” continued to gain momentum.<sup>45</sup>

During this critical period, Tourgée’s reading of the Reconstruction Amendments as the source of affirmative rights, of a “new citizenship” founded in personally guaranteed equal rights, found a strong champion in Judge John Minor Wisdom, an Eisenhower appointee to the Fifth Circuit Court of Appeals. In the landmark case of *United States v. Jefferson County Board of Education*, Wisdom held that *Brown* imposed an “affirmative duty [on] states to furnish a fully integrated education to Negroes as a class . . . .”<sup>46</sup> Refuting the Fourth Circuit’s *Briggs* approach before the Supreme Court had had a chance to rule on the case, Judge Wisdom set forth an alternative understanding:

*Brown*’s broad meaning, its important meaning, is its revitalization of the national constitutional right the Thirteenth, Fourteenth, and Fifteenth Amendments created in favor of Negroes. This is the right of Negroes to national citizenship, their right as a class to share the privileges and immunities only white citizens had enjoyed as a class. *Brown* erased *Dred Scott*, used the Fourteenth Amendment to breathe life into the Thirteenth, and wrote the Declaration of Independence into the Constitution.

A primary responsibility of federal courts is to protect nationally created constitutional rights. A duty of the States is to give effect to such rights—here, by providing equal educational opportunities free of any compulsion that Negroes wear a badge of slavery.<sup>47</sup>

Judge Wisdom cited Justice Harlan’s dissent in an opinion that preceded *Plessy*, the *Civil Rights Cases*, as authority for these expansive propositions.<sup>48</sup> This was a bold move, revealing a line of thought tracing back to Tourgée. The *Civil Rights Cases* overturned the 1875 Civil Rights Act, which (much like the Civil Rights Act of 1964) forbade segregation in public transportation, theaters, and other public places.<sup>49</sup> Justice Harlan would have upheld the Act under the Thirteenth and

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<sup>43</sup> See *id.* at 790-91.

<sup>44</sup> 391 U.S. 430 (1968).

<sup>45</sup> See generally Haney López, *supra* note 36, at 1001-04.

<sup>46</sup> 372 F.2d 836, 846-47 (5th Cir. 1966).

<sup>47</sup> *Id.* at 872-73.

<sup>48</sup> *Id.* (citing *The Civil Rights Cases*, 109 U.S. 3 (1883)).

<sup>49</sup> See 109 U.S. at 26.

Fourteenth Amendments: he embraced the arguments made for the United States by Solicitor General Samuel Field Phillips, a close friend of Tourgée’s who would join Tourgée a decade later as counsel for Homer Plessy.<sup>50</sup>

Citing Justice Harlan’s dissent in the *Civil Rights Cases*, Judge Wisdom found that *Brown* had revitalized the proposition that the Reconstruction Amendments created a new national citizenship.<sup>51</sup> In one stroke, Judge Wisdom implied that *Brown* had overturned the *Civil Rights Cases* and that it buttressed the constitutionality of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.<sup>52</sup> Responding to the emerging notion of a “colorblind” Constitution that would forbid acknowledging race even for reasons of remedying past wrongs, Judge Wisdom wrote,

The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.<sup>53</sup>

Thirty years later, on the 100th anniversary of *Plessy*, Judge Wisdom made his indebtedness to Albion Tourgée explicit, commending his powerful advocacy on Plessy’s behalf. “Tourgée argued that Section I of the Fourteenth Amendment created a new national citizenship,” Judge Wisdom noted in remarks that reflected a rich appreciation for this “brilliant but erratic lawyer.”<sup>54</sup> In contrast to his claims in *Jefferson County*, Judge Wisdom here acknowledged that this interpretation of the Fourteenth Amendment was rejected in the *Civil Rights Cases*. Nonetheless, he stood his ground, restating key passages from his opinion:

I admire Harlan. But I do not go all the way with his strong words. I have said on several occasions in one form or another: The Thirteenth and Fourteenth Amendments are both color-blind and color-conscious. These amendments took cognizance of the Founding Fathers’ decision in

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<sup>50</sup> See Robert D. Miller, *Samuel Field Phillips: The Odyssey of a Southern Dissenter*, 58 N.C. HISTORICAL REVIEW 263 (1981). For more on Phillips’ friendship with Tourgée, see ELLIOTT, *supra* note 16, at 269.

<sup>51</sup> 372 F.2d at 872-73.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 876.

<sup>54</sup> John Minor Wisdom, *Plessy v. Ferguson – 100 Years Later*, 53 WASH. & LEE L. REV. 9, 10, 17 (1996).

1787 not to face up directly to the issue of slavery—in the interest of putting together a viable national government and creating what is, in effect, national citizenship. I see these amendments as reversing *Dred Scott*, bringing the Declaration of Independence into the Constitution, making freed men and their descendants free men and full American citizens.<sup>55</sup>

But in a rueful concession, he concluded, “[s]ome would call this affirmative action.”<sup>56</sup>

In the interval between the *Jefferson County* opinion and Judge Wisdom’s reflections in 1996, intense debates played out—in courtrooms, in living rooms, and sometimes in the streets—over the proper role of the law in adopting “color-conscious” policies to remedy lingering structural discrimination. A pivotal moment came in the *Swann* opinions, the seminal busing cases arising out of Charlotte.<sup>57</sup> The Supreme Court, consistent with Judge Wisdom in *Jefferson County*, held that a “color blind” approach to school assignment plans in a city with such deep historical segregation “would render illusory the promise of *Brown v. Board of Education*. Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy.”<sup>58</sup> But *Swann* sparked a fierce backlash among middle-class suburban families who defended their white neighborhoods as manifestations not of racism but of the marketplace at work: while willing to allow black families with the necessary means to live in their neighborhoods and attend their schools, parents were unwilling to send their own children to historically black schools in poorer neighborhoods.<sup>59</sup>

Issues of class, claims to the primacy of individual merit, theories about the role of government, and debates over the relevance of history have continued to complicate the work of addressing historical racism in the schools—from *Swann v. Charlotte-Mecklenburg Board of Ed-*

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<sup>55</sup> *Id.* at 19-20.

<sup>56</sup> *Id.* at 20.

<sup>57</sup> See *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

<sup>58</sup> *N.C. State Bd. of Educ.*, 402 U.S. at 45-46 (citation omitted); Tom Hanchett, *Salad-bowl Suburbs: A History of Charlotte’s East Side and South Boulevard Immigrant Corridors*, in CHARLOTTE, NC: THE GLOBAL EVOLUTION OF A NEW SOUTH CITY 247, 254 (William Graves & Heather A. Smith eds., hardcover ed. 2010) (stating that in 1970, Charlotte was the nation’s fifth most segregated city).

<sup>59</sup> See MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* 137-47 (Princeton Univ. Press 2006). Lassiter’s book offers a useful context for understanding *Swann v. Charlotte-Mecklenburg Board of Education* within the evolving politics of Charlotte and the nation.

ucation and *Milliken v. Bradley* and subsequent public school cases<sup>60</sup> through *Board of Regents v. Bakke* and the contentious issues of affirmative action in higher education.<sup>61</sup> Meanwhile, affirmative action in employment law has become increasingly challenged by the new colorblindness.<sup>62</sup> The term has evolved into a trope of pure anti-classification, used to delegitimize any legal system or organizing principle that considers race at all. The high-water mark of this conservative appropriation of Tourgée’s ideal of “colorblindness” came perhaps in 1995 when Justice Clarence Thomas “insisted . . . that ‘between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality’ the one was ‘just as noxious’ as the other.”<sup>63</sup>

To be sure, the premises supporting affirmative action, which have changed over time,<sup>64</sup> are less sturdy than those that undermined

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<sup>60</sup> See *Parents Involved in Cnty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 754, 786 (2007) (in the latest in the public school line of cases, the Court invalidated a student assignment plan that used race as a factor); see *Milliken v. Bradley*, 433 U.S. 267, 287 (1977) (invalidating multi-district desegregation plans); *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 1; Dana Ruso, *School Desegregation: From Topeka, Kansas to Wake County, North Carolina – Changing the Path, but Staying the Course*, 19 GEO. J. ON POVERTY L. & POL’Y 535 (2012).

<sup>61</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). The scholarly discourse on affirmative action in higher education is extensive. The most recent in the line of higher education cases is *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011) cert. granted, 132 S. Ct. 1536 (Feb. 21, 2012) (No. 11-345). For a sampling of critical views, see CARL COHEN & JAMES B. STERBA, *AFFIRMATIVE ACTION AND RACIAL PREFERENCE: A DEBATE* (2003).

<sup>62</sup> For a recent history of the rich scholarly discourse on the history of affirmative action in the workplace, see FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (2009).

<sup>63</sup> DANIEL T. RODGERS, *AGE OF FRACTURE* 134 (2009) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring)).

<sup>64</sup> Implemented in the wake of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, affirmative action was intended to level the playing field. In a speech at Howard University in 1965 that laid the groundwork for affirmative action, President Lyndon Johnson said, “You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair.” President Lyndon B. Johnson, Commencement Address at Howard University: “To Fulfill These Rights,” (June 4, 1965), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1965, at 635-40 (1966), available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>. In contrast, the current constitutional standard for affirmative action programs, which stems from a case involving a public university’s admissions practices, is premised on the university’s compelling interest in maintaining a diverse student body. *Grutter v. Bollinger*, 539 U.S. 306 (2003). See Erwin Chemerinsky, Drew Days III, et al., *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases*, CIV. RTS. PROJECT (July

the Jim Crow regime. Brook Thomas identifies the critical difference: *Brown* and related cases “confronted the dilemma of how to forbid a practice that the [Supreme] Court had already declared just,” he writes. That is, the Court grappled with an evolving historical context to remedy concrete practices of long standing. In contrast, *Bakke* and subsequent affirmative action cases are “future-oriented.” And “[s]ince the future, unlike the past, is incapable of generating empirical evidence,” writes Thomas, “no appeal to history can prove its truth.”<sup>65</sup>

In the post-Jim Crow era, the new understanding of colorblindness resonates positively among conservatives, for whom it represents a commitment to individual merit, an appropriate withholding of government intervention into affairs that should be left to the marketplace. Moreover, the ideal of colorblindness retains a certain attraction for liberals as well, in that it represents the aspirational ideal of racial equality. Such, indeed, was the thought expressed by the University of Michigan in defending its law school’s affirmative action plan in *Grutter v. Bollinger*: “We take the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable,” wrote Justice O’Connor in upholding the school’s admissions policy.<sup>66</sup> Situating the opinion on a progressive continuum, Justice O’Connor looked backward to *Bakke*, decided 25 years prior, and expressed the “expectation” that “25 years from now, the use of racial preferences will no longer be necessary” to advance the goal of true equality.<sup>67</sup>

In our time, then, colorblindness is a shape-shifting notion, sailing curiously adrift from its historical roots.<sup>68</sup> For this reason among others, some civil rights scholars and advocates are questioning its utility. In *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*,

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08, 2003), <http://civilrightsproject.ucla.edu/legal-developments/legal-memos/real-firming-diversity-a-legal-analysis-of-the-university-of-michigan-affirmative-action-cases>. The Court is poised to issue a new ruling on affirmative action in *Fisher v. Texas*, argued October 10, 2012.

<sup>65</sup> *Stigmas*, *supra* note 38, at 277.

<sup>66</sup> *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

<sup>67</sup> *Id.*

<sup>68</sup> But note that even Tourgée understood that the metaphor could work both ways. As Karcher notes in her contribution to this volume, he wrote in 1891 that he founded the National Citizens’ Rights Association to test “whether justice is still color-blind. . . .” Albion W. Tourgée, *A Bystander’s Notes*, *Chicago Daily Inter Ocean*, Oct. 17, 1891, at 4.



Michelle Alexander argues that the rhetorical convergence of left and right on the concept of colorblindness has resulted in a kind of blindness in fact: a widespread indifference to rampant discrimination in the criminal justice system.<sup>69</sup> While the courts continue to refine the constitutional parameters of affirmative action in schools and in the workplace, Alexander writes, criminal laws and procedures race-neutral on their face are enforced unevenly, with results that have proved catastrophic for African Americans.<sup>70</sup> Summing up copious research demonstrating both conscious and unconscious bias, she continues,

[i]t is not an overstatement to say the systematic mass incarceration of people of color in the United States would not have been possible in the post-civil rights era if the nation had not fallen under the spell of a callous colorblindness. The seemingly innocent phrase, “I don’t care if he’s black . . .” perfectly captures the perversion of Martin Luther King Jr.’s dream that we may, one day, be able to see beyond race to connect spiritually across racial lines . . . . It is precisely because we, as a nation, have not cared much about African Americans that we have allowed our criminal justice system to create a new judicial undercaste.<sup>71</sup>

Alexander proposes a new “commitment to color consciousness”—an honest conversation about the history of racism and its continued relevance—as the first step toward a solution.<sup>72</sup> In the same vein, legal scholar Cynthia Lee argues that “making race salient” in the criminal courtroom can temper the effect of stereotypes on the perceptions of jurors, leading to more just outcomes.<sup>73</sup>

In *Sister-Citizen: Shame, Stereotypes, and Black Women in America*, Melissa Harris-Perry asserts that African Americans are confronting a “recognition crisis.”<sup>74</sup> While “they do not want to be reduced to their racial identity alone,”<sup>75</sup> writes Harris-Perry, “[m]any African Americans bristle at the idea of color blindness because it suggests that race is irrelevant to identity. They want to be understood as black and thus tied to a history and culture associated with blackness.”<sup>76</sup>

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<sup>69</sup> ALEXANDER, *supra* note 39, at 228.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 230.

<sup>73</sup> Cynthia Lee, Charles Kennedy Poe Research Professor of Law, The George Washington University Law School, Panel: Civil and Criminal Trials of Race in the Twenty-First Century at University of North Carolina Law Review Symposium: Race Trials (Oct. 5, 2012).

<sup>74</sup> MELISSA HARRIS-PERRY, *SISTER-CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA* 40 (2011).

<sup>75</sup> *Id.* at 39.

<sup>76</sup> *Id.*

Striking this balance is a tricky proposition. As Daniel Rodgers writes in an important and aptly titled intellectual history of the late twentieth century, *Age of Fracture*, the language of race has shifted from a binary negotiation of a historical power dynamic to a multi-voiced conversation in which issues of dominance and subversion are constantly in flux.<sup>77</sup> Legacies of slavery, white supremacy, and structural discrimination remain, but “the claims of the past [have] become more attenuated,” writes Rodgers.<sup>78</sup> As these “more complex understandings of identity” have arisen, we have witnessed “the retreat of history.”<sup>79</sup>

In offering their interpretations of Tourgée’s “radical notion of democracy,” the authors of the following essays bring that history back into view. At the heart of each essay is an insistence on the continued vitality and relevance of Reconstruction to contemporary understandings of racial discrimination. As these distinguished scholars make resoundingly clear, no one worked harder to make real the promises of Reconstruction—and to keep its lessons squarely before us—than Albion Winegar Tourgée.

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<sup>77</sup> RODGERS, *supra* note 63.

<sup>78</sup> *Id.* at 143.

<sup>79</sup> *Id.*