
THE LEGITIMACY OF LAW IN LITERATURE:
THE CASE OF ALBION W. TOURGÉE

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I.

Alluding to Albion W. Tourgée's literary career, Yale Law Professor Owen Fiss refers to Tourgée's brief to the Court in *Plessy v. Ferguson* as the product of a "legal Don Quixote."¹ Fiss's characterization is understandable. After all, Tourgée's most famous novel is called *A Fool's Errand* (1879), which is a semi-autobiographic account of Tourgée's failed efforts to bring about racial justice as a carpetbagger in North Carolina. Just as Cervantes's hero goes mad and begins his futile quest by reading works of romance, so, at the start of Tourgée's novel, the Fool becomes distracted from the practicalities of everyday life by reading newspaper accounts of the Civil War. Enlisting in the army, he fights to help save the Union. Maintaining his patriotism after the war, he heads south on a failed quest to reconstruct the nation. But there is a crucial difference between Tourgée's Fool and Don Quixote. The Don reads romances; the Fool reads newspapers. If the Don's romances cause him to confuse reality and fiction, the Fool's newspapers make him all too aware of the real state of the world. Indeed, his creator does not confuse fiction and reality. On the contrary, he tries to use his fiction to alter reality.

In this essay, I want to focus on two ways in which Tourgée uses fiction to do so. Both ways complicate standard accounts of how the disciplines of law and literature relate to one another. Most "lawterature" scholars claim to examine either law in literature or law as literature. Frequently, those interested in the representations of the law in literature claim that a work of literature reflects the legal system at a

¹ Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888—1910*, in 8 THE OLIVER WENDELL HOLMES DEVISE History of the Supreme Court of the United States 354 (Macmillan Publ'g Co. 1993).

particular time. But if literature simply reflects the law, we may as well go directly to the law. Tourgée does not use literature simply to reflect the law; he uses it to try to change the law. One way he does so is to use the imaginative space provided by literature to rehearse various legal arguments, that, when the opportunity arises, he can use in court. In the first half of this essay, I will provide some examples of how he rehearses various arguments that he would eventually use in his brief for Homer Plessy before the Supreme Court. In the second half of the essay, I will show how his fiction complicates efforts to read law as literature.

In one sense, the claim that we can read law as literature makes perfect sense. Both law and literature are heavily dependent on language. Indeed, the longstanding relation between the study of rhetoric and the law reminds us that we can—and should—read legal documents rhetorically. But the fact that law employs rhetoric should not lead us to mistake law for literature. Law and literature have different social functions. For instance, we go to the law to settle disputes. A legal system must make decisions. Literature need not. If that gives literature more freedom, it also means that literary language lacks the authority of legal language. After all, no work of literature has the force of the state behind it condemning someone to die or to go to prison. If it is important to remember this limitation of literature, there is also a way in which literature can point to the limits of the law.

The German legal thinker Carl Schmitt makes a distinction between legality and legitimacy.² Proponents of the modern *Rechtsstaat* claim to found the state on rule by law.³ But, Schmitt argues, it is impossible to find within the law itself an adequate foundation for the state.⁴ The law may have formal coherence, but a state needs more than legality to make people believe in its authority.⁵ A state must be legitimated by a sense of tradition and constantly reaffirmed and recreated symbols and myths, especially foundational myths.⁶

Woodrow Wilson, though not using Schmitt's terms of legality and legitimacy, makes a similar point in reviewing the work of John W. Burgess, a constitutional scholar and political scientist, whose life overlaps

² CARL SCHMITT, LEGALITY AND LEGITIMACY (Jeffrey Seitzer ed. & trans., 2004).

³ *Id.* at 18.

⁴ *Id.* at 20-23.

⁵ *Id.*

⁶ *Id.*

with Tourgée's.⁷ Wilson, praising Burgess's brilliant formal mind, admits that Burgess is an excellent constitutional scholar.⁸ But, Wilson claims, he fails as a political scientist.⁹ This is because political science deals with aspects of political life "lying entirely outside the thought of the lawyer," such as the way, "states come into existence, take historic shape, create governments and institutions and at pleasure change or discard what forms or laws they must in order to achieve development."¹⁰ In contrast, constitutional law "has a much narrower scope," dealing "only with such part of political life as is operative within the forms of law."¹¹ Burgess's limitation is registered in his style. Concerned with what Schmitt calls legality, not legitimacy, he "does not write in the language of literature, but in the language of science."¹² To be sure, Wilson admits, great political scientists do not "pretend to be making literature."¹³ Nonetheless, he goes on, "they have no choice; if they do not write literature, they do not write truth. For political science cannot be truthfully constructed except by the literary method."¹⁴ In the second half of my essay, I will show how in his literature Tourgée suggests that legality alone was not enough truly to reconstruct the nation. Instead, a reconstructed nation had to be legitimized through a new founding moment that would re-write the cultural assumptions of the South.

II.

My first example of Tourgée rehearsing a legal argument in literature comes from a neglected work called *With Gauge and Swallow, Attorneys* (1890). One chapter is called "A Conflict Between Church and State."¹⁵ It is about a former Confederate soldier who lost his arm during the Civil War. Despite his lost limb, he works diligently to make his northern Virginia farm an economic success. That success is due, not only to his hard labor, but also to the efficient management of the

⁷ See Woodrow Wilson, *A System of Political Science and Constitutional Law*, 67 ATLANTIC MONTHLY 694, 695 (reviewing JOHN W. BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* (1891)).

⁸ *Id.* at 695.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 699.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ ALBION W. TOURGÉE, *WITH GAUGE AND SWALLOW, ATTORNEYS* 163-78 (1890) [hereinafter *WITH GAUGE AND SWALLOW*].

farm by his housekeeper, a former slave. After a while, the two start to produce children as well as crops. Scandalized, neighbors send a minister to let the former soldier know that he has to put a halt to his immoral ways. For the minister, this means giving the former slave some money to convince her to leave the house and the state. But the soldier, who has come truly to love his housekeeper, misunderstands and thinks that the minister wants him to make the mother of his children an honest woman by marrying her. Virginia, however, has an anti-miscegenation law. Nonetheless, the two go to Washington, D.C., and get married. When they return, they are promptly arrested for violating the Virginia statute.

This story makes a variety of legal points. One is about the hypocrisy of anti-miscegenation laws. As Tourgée frequently argued, interracial love is bound to happen. Laws banning interracial marriage, therefore, turn love into an illegal act. The story makes two other points that, even though it was written before Tourgée knew about the possibility of the *Plessy* case, would be important for his brief to the Court. The first is that racially discriminatory laws, such as anti-miscegenation laws, are linked to the heritage of slavery. The second has to do with the relation between individual states and the national state. Although the chapter is called “A Conflict Between Church and State,” it is also about a conflict between state and national jurisdiction. Why is it, after all, that a marriage recognized in the national capital is not recognized by all of the states in the Union? For Tourgée, one of the most important results of the North’s victory in the Civil War and the three new amendments to the Constitution was to establish the priority of national citizenship over state citizenship. Yet leading up to the *Plessy* case, the Supreme Court repeatedly reasserted the importance of state citizenship. Both of these points raised in “A Conflict Between Church and State” had already been made in different form in Tourgée’s 1880 novel *Bricks Without Straw*.

Bricks Without Straw followed Tourgée’s success with *A Fool’s Errand*. It too is about Reconstruction in North Carolina, but rather than focusing on the carpetbagger’s crusade, it gives much more attention to the lives of freedmen as they attempt to become full-fledged citizens.¹⁶ The most important African American character in the book is Nimbus. Under slavery, Nimbus had a family, but was legally not al-

¹⁶ See ALBION W. TOURGÉE, *BRICKS WITHOUT STRAW* (1880) [hereinafter *BRICKS WITHOUT STRAW*].

lowed to marry. An early chapter in the novel describes a new law allowing former slaves to formalize their marriages. This chapter is called “*Nunc Pro Tunc*,”¹⁷ a legal phrase meaning “now for then,” that is, the effort to make up in the present for an injustice done in the past. But even though the new law is well intentioned, it creates problems for freedmen. For instance, in order to make their marriages legal, they have to pay a fee. Since some do not have any money, they cannot avail themselves of the law, opening up the charge that, even when they have the chance, African Americans do not want to have legal marriages. Commenting on such contradictions, the narrator writes “[r]ight he had, in the abstract; in the concrete, none. Justice could not hear his voice. The law was still color-blinded by the past.”¹⁸

Of interest for the *Plessy* case is the metaphor of color-blindness. In his dissent, Justice John Marshall Harlan argued that the Jim Crow law in question was unconstitutional because the Constitution is “color-blind.”¹⁹ He gets this famous metaphor from Tourgée’s brief to the Court.²⁰ In that instance, both Tourgée and Justice Harlan use “color-blindness” as a positive quality. It is a refusal to discriminate on the basis of color. But in his 1880 novel Tourgée uses “color-blindness” differently. In this case, “color-blindness” is a defect, a myopia that cannot see the actual conditions of people of color. Tourgée was obviously aware of both uses of the metaphor. What unites the two is the heritage of slavery. On the one hand, as we have seen, discrimination on the basis of color results from prejudices formed during the era of slavery. On the other, the past of slavery continued to affect the social and economic conditions of freedmen limiting the opportunities they had in life. Both notions lead to legal arguments Tourgée would use in his brief to the Court in the *Plessy* case.

There are many arguments for why we should be color-blind. For Tourgée, one has to do with the fact that African Americans were marked as different by the heritage of slavery more than by the actual color of their skin. Thus, he urged the New Orleans group to challenge the Jim Crow law by having someone who could pass as “white”

¹⁷ *Id.* at 34.

¹⁸ *Id.* at 35.

¹⁹ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

²⁰ “Justice is pictured blind and her daughter, the Law, ought at least to be color-blind.” Brief of Plaintiff in Error (1895), in ALBION W. TOURGÉE, UNDAUNTED RADICAL 310 (Mark Elliott & John David Smith eds., 2010) [hereinafter UNDAUNTED RADICAL].

sit in a white car. Homer Plessy, with 7/8th “European blood” and only 1/8th “African blood,” volunteered. But, long before the *Plessy* case, Tourgée created fictional characters who could pass as white. At times he went further. For instance, the housekeeper in “A Conflict Between Church and State” is an albino.²¹ In *Pactolus Prime* (1890), the title character is a former slave who, as the child of his owner, could pass as white, until shot by the owner’s white son, his half-brother.²² He turns pitch black when a conjure woman gives him a silver treatment to save his life. The *Plessy* Court argued that “in the nature of things,” the Fourteenth Amendment “could not have been intended to abolish distinctions based upon color.”²³ In contrast, Tourgée points out that distinctions based upon color have been socially and historically constructed.

In his *Plessy* brief, he exploits that fact to make a Fourteenth Amendment argument. The reputation of being white, he argues, creates earning power. He asks:

How much would it be *worth* to a young man entering upon the practice of law to be regarded as a *white* man rather than a colored one? Six-sevenths of the population are white. Nineteen-twentieths of the property of the country is owned by white people. Ninety-nine hundredths of the business opportunities are in the control of white people.²⁴

Earning power could, in turn, be considered a form of property. Under the Fourteenth Amendment, no state can pass a law depriving a person of life, liberty, or property without due process of law.²⁵ At the time, Louisiana had no law defining what made a person colored or white. Nonetheless, its Jim Crow law allowed a railroad conductor to determine whether someone was white or colored. When the conductor declared Plessy colored, Tourgée argues, he denied 7/8ths of him his reputation as a white man, and thus violated the Fourteenth Amendment.

Tourgée came up with the seed of this ingenious argument in *Pactolus Prime* when he imagines a discussion between Pactolus and Benny, the son of Pactolus’s former wife fathered by his white stepbrother. Benny is studying to be a lawyer and wants to do “something for the

²¹ WITH GAUGE AND SWALLOW, *supra* note 15, at 168.

²² ALBION W. TOURGÉE, *PACTOLUS PRIME* (1890) [hereinafter *PACTOLUS PRIME*].

²³ *Plessy*, 163 U.S. at 544.

²⁴ UNDAUNTED RADICAL, *supra* note 20, at 300.

²⁵ U.S. CONST. amend. XIV § 1 (“No state shall . . . deprive any person of life, liberty, or property, without due process of law.”).

race.”²⁶ Pactolus, however, counsels him to pass as white for the advantage and prosperity of his children. “Remember, Benny, whatever happens you are to be a lawyer, and a *white* lawyer too.”²⁷ Why, after all, should someone who appears white have to suffer the financial consequences and stigma of being called colored?

This Fourteenth Amendment argument about whiteness as a form of property works for people who can pass as white. But most freedmen could not do so. For them a Thirteenth Amendment argument about the myopia of color-blindness is more appropriate. Soon after the Thirteenth Amendment was passed, Justice Swayne on circuit in *United States v. Rhodes* noted that the institution of slavery had affected free blacks as well. “Many of the badges of the bondsman’s degradations were fastened upon them. Their condition, like his, was helpless and hopeless.”²⁸ Thus, it was established that the Thirteenth Amendment forbade, not only the institution of slavery, but also its badges and incidents. In the 1866 Senate debates over the Freedman’s Bureau and Civil Rights Act, for instance, Senator Trumbull labeled legislation unfriendly to freedmen a “badge of servitude.”²⁹ Nine years later, a new Civil Rights Bill was passed, making it a federal crime to discriminate on the basis of color in public transportation, public entertainment, and public amusement.³⁰ When the constitutionality of this act was challenged in the Civil Rights Cases of 1883, the Solicitor General the United States, William F. Phillips of North Carolina, argued the government’s case. Phillips was a friend of Tourgée’s from his carpetbagger days. Tourgée dedicated *With Gauge and Swallow* to him and recruited him to help with the *Plessy* case. Phillips gave both a Fourteenth and a Thirteenth Amendment justification for the Civil Rights Act of 1875.

The Court rejected both and declared the 1875 Act unconstitutional.³¹ It denied the government’s Fourteenth Amendment argument, claiming that the amendment forbade actions by states, not by

²⁶ PACTOLUS PRIME, *supra* note 22, at 140.

²⁷ *Id.* at 143.

²⁸ *United States v. Rhodes*, 27 F. Cas. 785, 793 (D. Ky. 1866) (No. 16,151).

²⁹ Charles Fairman, *Reconstruction and Reunion 1864-88*, in 6 THE OLIVER WENDELL HOLMES DEVISE History of the Supreme Court of the United States 1165, 1174 (The Macmillan Co. 1971).

³⁰ Civil Rights Act of 1875, 18 Stat. 335, *invalidated by* Civil Rights Cases, 109 U.S. 3 (1883).

³¹ Civil Rights Cases, 109 U.S. 3 (1883).

private individuals.³² We will come back to this claim about state action. For now, it is important to remember that the Thirteenth Amendment is not restricted to state action. It bans the perpetuation of slavery and involuntary servitude by individuals as well as by states. Nonetheless, the Court rejected the government's claim that acts of racial discrimination were a product of the institution of slavery.³³ According to Justice Bradley:

When a man has emerged from slavery, and by aid of beneficent legislation has shaken off the inseparable concomitants of that state, there has to be some stage in the progress of his elevation when he takes the ranks of a mere citizen, and ceases to be the special favorite of the law, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected.³⁴

If Bradley is logically correct, it was not at all clear that this stage had been reached less than a generation after the end of slavery. Clearly, Tourgée felt that it had not. In a manifesto for how to write fiction about the South a few years after the Civil Rights Cases, he argues:

Much has been written about the slave and something of the freedman, but thus far no one has been able to weld the new life to the old. This is indeed the great difficulty to overcome. As soon as the American Negro seeks to rise above the level of the former time, he finds himself confronted with the past of his race and the woes of his kindred.³⁵

Translated into legal terms, Tourgée's description of the novelist's task is a Thirteenth Amendment argument. By showing how the freedman's efforts to take the "ranks of a mere citizen" are blocked by attitudes and actions arising out of the past of slavery, Tourgée frequently uses his fiction to show how badges and incidents of slavery persist.

He does so with special effect through his portrayal of Nimbus in *Bricks Without Straw*.³⁶ Investing the wages he has earned as a soldier in the Union army, Nimbus buys land to farm tobacco. With hard work and expertise, he reaps a tidy profit, allowing him to employ other freedmen looking to sell their labor. But his economic success and the independence it gives to him and his workers are intolerable for many local whites. In one of the most dramatic scenes of the book, he and his family are attacked by the KKK, and he is forced to leave the state

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 25.

³⁵ UNDAUNTED RADICAL, *supra* note 20, at 208.

³⁶ BRICKS WITHOUT STRAW, *supra* note 16.

to survive. Nimbus's story allows Tourgée to make not only a Thirteenth Amendment argument, but also one about the issue of state versus national jurisdiction raised by "A Conflict Between Church and State" and, as we have seen, by the *Civil Rights Cases*.

For Tourgée, the Fourteenth Amendment incorporated into the Constitution a great victory of the Civil War, which was to make national citizenship supreme and state citizenship secondary. Yet in a series of cases, starting with the *Slaughter-House Cases* in 1873, the Court eroded the power and significance of national citizenship.³⁷ *The Civil Rights Cases* contributed to that erosion by pointing out that the Fourteenth Amendment's privileges and immunities, due process, and equal protection clauses prohibit state action, not the actions of private individuals.³⁸ Thus, the Court claimed that the state, not the national government, has jurisdiction over the actions of individuals, unless they are instituting a form of slavery or involuntary servitude.³⁹ Tourgée, however, agreed with Phillips's argument picked up by Justice Harlan's *Civil Rights Cases* dissent.⁴⁰ Both Phillips and Justice Harlan pointed to the importance of the citizenship clause. That clause, they argued, is not about prohibiting state action. On the contrary, in defining national citizenship, it is affirmative in scope. If United States citizenship means anything in the wake of the Civil War, they claimed, it implies the right to be free from racial discrimination.

African Americans had earned national citizenship by their military service in the Civil War. Tourgée's praise of colored soldiers caused a Southern paper to allege that, according to him, "the nigger alone crushed the rebellion."⁴¹ Justice Harlan in his *Plessy* dissent makes a similar point when he commends "citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union."⁴² Indeed, Tourgée's fiction has numerous colored characters who served in the Union Army, such as Bob Martin in *A Fool's Errand*, who participated in the attack on Fort Wagner, and Pacto-

³⁷ *Slaughter-House Cases*, 83 U.S. 36 (1873).

³⁸ *Civil Rights Cases*, 109 U.S. 3 (1883).

³⁹ *Id.*

⁴⁰ CHARLES A. LOFGREN, *THE PLESSY CASE* 164-65 (1987).

⁴¹ UNDAUNTED RADICAL, *supra* note 20, at 6.

⁴² *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

lus Prime.⁴³ Similarly, in *Bricks Without Straw*, Nimbus has won his right to national citizenship through his military service to save the Union.⁴⁴

Despite his bravery, however, Nimbus is no match for the overwhelming power of the KKK. Forced by the Klan to leave his home, he goes from state to state. Later in the book we learn that in his wanderings he participated in the Colfax Massacre. This event occurred Easter Sunday, April 13, 1873.⁴⁵ In Colfax, Grant Parrish, Louisiana, white supremacists resented the local Reconstruction government controlled by a mixture of whites and coloreds.⁴⁶ They organized a paramilitary group to attack colored officials and take control.⁴⁷ Outmatched in arms, the colored community tried to defend itself, but was overwhelmed.⁴⁸ As a historical marker by the Colfax Courthouse still on display puts it, “On this site occurred the Colfax Riot in which three white men and 150 negroes were slain. This event marked the end of carpetbag misrule in the South.”⁴⁹ In Tourgée’s novel Nimbus survives, but his spirit is broken. The event is significant for the *Plessy* case because it led to an important Supreme Court case.

Two of the whites involved were arrested and convicted under the 1870 Enforcement Act passed by Congress to counter the actions of the KKK and other white supremacist groups.⁵⁰ They were accused of a conspiracy to “injure, oppress, threaten, or intimidate” African Americans trying to exercise their rights.⁵¹ But in *United States v. Cruikshank*, the Supreme Court overruled their convictions by maintaining a strict distinction between national and state citizenship.⁵² According to the Court, “[s]overeignty, for the protection of the rights of life and personal liberty within the respective States, rests alone with the States.”⁵³ In making the white supremacists’ actions a federal crime, Congress had overstepped its authority. In his fiction, however, Tourgée rebuts the Court’s argument. In *A Fool’s Errand*, he argues that, if the KKK

⁴³ See ALBION W. TOURGÉE, *A FOOL’S ERRAND* (1966) [hereinafter *A FOOL’S ERRAND*]; PACTOLUS PRIME, *supra* note 22.

⁴⁴ *BRICKS WITHOUT STRAW*, *supra* note 16.

⁴⁵ CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* 9 (2008).

⁴⁶ *Id.* at 63-89.

⁴⁷ *Id.* at 87-89.

⁴⁸ *Id.* at 90-109.

⁴⁹ Fairman, *supra* note 29, at 1377.

⁵⁰ *United States v. Cruikshank*, 92 U.S. 542 (1875).

⁵¹ *Id.* at 544.

⁵² *Id.* at 549-56.

⁵³ *Id.* at 542.

had simply attacked the “poor colored man,” its actions would have been “cowardly.”⁵⁴ But the Klan and other white supremacist groups took on, not only the freedman, but also “the Nation, which had given the victim citizenship and power.”⁵⁵ Because these groups attacked the authority of the nation, the nation was justified in passing legislation allowing a national response. This argument proved very important for the *Plessy* case since, in his brief, Tourgée makes clear that for *Plessy* to prevail *Cruikshank* must be overruled. “Our opinion is that the opinion in *Cruikshank’s Case* cannot stand.”⁵⁶

III.

If Tourgée’s fiction gives him an imaginative space to rehearse various legal arguments, it also allows him to make a point that would not necessarily hold up in Court about the legitimacy, not the strict legality, of governments allowed to rule after the Civil War. In its *Plessy* decision, the Court claims that as far as the “[F]ourteenth [A]mendment is concerned, the case reduces itself to the question whether the statute in Louisiana is a reasonable regulation.”⁵⁷ In answering that question, “there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and . . . the preservation of the public peace and good order.”⁵⁸ For Tourgée, however, it was precisely the “established usages, customs and traditions” of the white population in the South that were the problem. Only by creating more legitimate usages, customs and traditions could a “good order” to society truly be established. In short, for Tourgée, the nation had failed adequately to reconstruct itself.

A Fool’s Errand has a variety of metaphors indicating what was needed for a proper reconstruction of the nation. For instance, pruning vines, a worker worries that “it seems a clar [sic] waste” to cut back too severely.⁵⁹ The Fool responds:

[C]ut it down. It seems a pity, as you say, to destroy that beautiful growth; but, when vines have run wild for a time, the only way to bring them back to sober, profitable bearing, is to cut them back without scruple. . . . It’s

⁵⁴ A FOOL’S ERRAND, *supra* note 43, at 254.

⁵⁵ *Id.*

⁵⁶ UNDAUNTED RADICAL, *supra* note 20, at 317.

⁵⁷ *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896).

⁵⁸ *Id.*

⁵⁹ A FOOL’S ERRAND, *supra* note 43, at 106.

wasting the past, but saving the future. And it's my notion that the same thing is true of peoples and nations, Andy. For instance, when a part of a country rebels, and runs wild for a time, it ought to have the rank wood, the wild growth, cut away without mercy. They ought to be held down, and pruned and shaped, until they are content to bear 'the peaceful fruits of righteousness,' instead of clambering about, 'cumbering the ground' with a useless growth.⁶⁰

Earlier the narrator uses a less explicit metaphor. Describing how the Fool parceled out some of his land to sell to freedmen so that they could be self-sufficient farmers, the narrator notes, "[h]e purchased some Confederate buildings which were sold by the government, tore them down, and, out of the materials, constructed a number of neat and substantial little houses on lots which he sold."⁶¹ Reconstruction for Tourgée did not mean simply repairing existing structures. It meant dismantling old institutions and building new structures. Most important, for Tourgée, was the need to dismantle the states that had rebelled against the Union. Not to do so would allow "those who had inaugurated and carried on war against the Nation" to regain power.⁶²

For Tourgée, the Civil War occurred, not only because of a dispute over slavery, but also because of the "fallacy" in our federal system of applying "the word 'State,' in its original or international sense, to one of the subordinate commonwealths of our nation."⁶³ A "*State of the Union*"⁶⁴ for him was precisely that, an entity depending on the nation for its existence. Reconstruction failed, he argued, because, except for the right of a state to secede, "the doctrine of 'State Rights' is altogether unimpaired and untouched by what has occurred."⁶⁵

Historians traditionally distinguish between two programs for Reconstruction: Presidential and Congressional. Presidential programs grew out of President Lincoln's insistence that the Union had never been split asunder because, lacking the right to secede, no "state" had left the nation. Indeed, both Presidents Lincoln and Johnson believed in the "perdurance" of individual "states," the doctrine that "once a State always a State."⁶⁶ For them, rebellion had been the act of combi-

⁶⁰ *Id.*

⁶¹ *Id.* at 51.

⁶² *Id.* at 305.

⁶³ *Id.* at 233.

⁶⁴ *Id.* at 232.

⁶⁵ *Id.* at 357.

⁶⁶ JOHN W. BURGESS, RECONSTRUCTION AND THE CONSTITUTION 1866-1876, at 4-5 (1902).

nations of disloyal persons, not “states.”⁶⁷ Since “states” themselves had never left the Union, once legitimate civil government was restored to them and they acknowledged terms established by the executive branch, reconstruction of the Union would be accomplished. In contrast, some Radical Republicans in Congress denied the indestructibility of individual “states.” Thaddeus Stevens, for instance, argued that rebellious states were conquered provinces.⁶⁸ If this was a realistic assessment of what happened, legally it led to the contradiction of a country conquering its own territory. Thus, Charles Sumner advocated the more logically consistent doctrine of “state suicide.”⁶⁹ When the southern states voted to secede, Sumner argued, they lost their status as “states.”⁷⁰ The territory over which they previously had jurisdiction was not lost to the United States, but it did come under control of Congress, as did other U.S. territory that was not a “state.”

Both the doctrine of “conquered territory” and “state suicide” justified the creation of military zones in the South until Congress agreed to readmit former “states” to the Union, and it is commonly assumed that this was the path taken during Congressional Reconstruction.⁷¹ Tourgèe, however, makes clear that, in fact, Congress took a significantly different path. For him, what has come to be known as Radical Reconstruction was not radical enough.

In the chapter “Out of Due Season,” the Fool reviews four proposals for Reconstruction.⁷²

The *first* was, that the State machinery of the *ante bellum* days in the lately denationalized sections should be set in motion, and the re-organized communities restored to their former positions without change, except as to individuals; just as you renew a wheel in a worn-out clock, and, starting the pendulum, set it again to its work.⁷³

This was the President’s plan. The second, also avoiding necessary changes, was “to allow the vagrant States to come back into the national fold,” but not to count freedmen in figuring population for both the House of Representatives and Electoral College unless they were

⁶⁷ *Id.*

⁶⁸ *Id.* at 58.

⁶⁹ *Id.* at 59-61.

⁷⁰ *Id.* at 60.

⁷¹ See WILLIAM ARCHIBALD DUNNING, *ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION AND RELATED TOPICS* 106-09 (1904).

⁷² A FOOL’S ERRAND, *supra* note 43, at 120-24.

⁷³ *Id.* at 120 (emphasis added).

enfranchised.⁷⁴ Holding out hope for the first plan, the South rejected this one.⁷⁵ The third plan, which the Fool favored, pointed to the doctrine of state sovereignty as the “root of the evil” and acknowledged the nation’s obligation to prepare freedmen for the responsibilities of liberty.⁷⁶

So it proposed that the States which had been in the infected region should be quietly left to molder in the grave of rebellion, – the bed they had themselves prepared; that the region they once embraced should be divided up into Territories without regard to former statal lines, and so remain for a score of years under national control, but without power to mold or fashion the national legislation – until time should naturally and thoroughly have healed the breaches of the past . . . It recognized as an undeniable fact the idea that men who had gazed into each other’s faces over gleaming gun-barrels, by the fateful blaze of battle, were not so fit to adjust the questions arising out of the conflict as those yet unborn. It was based on the fact, too, that the slave was not made fit for unrestrained political power by the simple fact of freedom. Slavery might be ended as a legal status by proclamation, but as a living fact it could not. The hands could be unshackled by a constitutional amendment, but heart and brain must have an opportunity to expand, before freedom could be capable of automatic liberty.⁷⁷

The fourth plan was a compromise of the first three. No one, the Fool complains, thought it was the best plan. But, because of the need to win an election, it prevailed. “From this womb of party necessity and political insincerity came forth this abortion, or, rather, this monster, doomed to parricide in the hour of its birth.”⁷⁸

The compromise that was adopted did temporarily divide the South into military districts, but it replaced Sumner’s doctrine of “state suicide” with that of “forfeited rights.”⁷⁹ The boundaries and jurisdictions of the formerly rebellious states remained in place, but were temporarily in suspended animation. Northern Republicans assumed they could rule these states by enfranchising freedmen. But they completely misunderstood the situation in the South. Northern Republicans thought that, with the elimination of slavery, North and South would be the same. That was, the Fool concludes, “a strange mis-

⁷⁴ *Id.* at 121.

⁷⁵ *Id.* The second plan refers to an unratified amendment proposed in January of 1866.

⁷⁶ *Id.*

⁷⁷ *Id.* at 121-22.

⁷⁸ *Id.* at 122.

⁷⁹ DUNNING, *supra* note 71, at 109.

take.”⁸⁰ North and South were, in fact, “two divergent civilizations.”⁸¹ “The ideas of generations,” the Fool warns, “do not perish in an hour. Divergent civilizations can not be made instantly identical by uprooting a single institution.”⁸²

As this account makes clear, Tourgée’s primary target in *A Fool’s Errand* is Northern Republicans, not Southerners. It is the “Wise Men” of the North who continually undercut the Fool’s errand.⁸³ For Tourgée, Reconstruction’s only chance of success was for the Wise Men to support a coalition of carpetbaggers, scalawags, and freedmen. Instead, they abandoned all three to the overwhelming power of the entrenched southern establishment. As a result, the responsibility for Reconstruction’s failure “will rest now and for all time with the Republican party of the North, –a party the most cowardly, vacillating, and inconsistent in its management of these questions, that has ever been known in any government.”⁸⁴

A major mistake of the Wise Men of the North was to assume that legal change would be enough to make Reconstruction a success. For instance, as much as Tourgée worked to enfranchise African Americans, he chastised Charles Sumner for “exulting too quickly when he declared that by giving the ballot to the freedmen we had ‘chained him to the chariot-wheel of American progress.’”⁸⁵ Given the continued power of the southern oligarchy, it was naive to believe that “enfranchisement was all that was required to cure all the ills which hitherto had afflicted, or in the future might assail,” newly emancipated slaves.⁸⁶ On the contrary, “[t]he freedman is,” the Fool writes to his former Northern mentor, “just as impotent now of all power of self-protection as he was before the ballot was given him.”⁸⁷ Legal reform was needed, but it had to support and to complement educational and economic change.

Tourgée’s most comprehensive case for educational reform comes in *An Appeal to Caesar*, a book of non-fiction he wrote hoping to influ-

⁸⁰ A FOOL’S ERRAND, *supra* note 43, at 140.

⁸¹ *Id.* at 168.

⁸² *Id.* at 140.

⁸³ *See id.*

⁸⁴ *Id.* at 171.

⁸⁵ ALBION W. TOURGÉE, AN APPEAL TO CAESAR 72 (1884) [hereinafter AN APPEAL TO CAESAR].

⁸⁶ A FOOL’S ERRAND, *supra* note 43, at 250.

⁸⁷ *Id.* at 170.

ence the 1884 election.⁸⁸ But education is a major topic in his fictional works as well. The heroine of *Bricks Without Straw* is a Mollie Ainslie, who comes to North Carolina from New England to teach the freedmen.⁸⁹ She helps prepare African American Eliab Hill to become a teacher himself. In *Pactolus Prime*, Pactolus debates a Senator about educational policy.⁹⁰ Toward the end of *A Fool's Errand*, the Fool proclaims, “[m]ake the spelling-book the scepter of national policy.”⁹¹

In all cases, Tourgée linked educational reform to political reform, since for him a democracy is at risk if its citizens are uneducated. But, as he knew, to make education a national campaign would risk having advocates of a state's rights raise a constitutional issue. “But how,” one of his characters asks, “shall these citizens of the States be educated by the Government without infringement of the rights of the States?”⁹² Tourgée gives a ready answer in the form of a rhetorical question posed by Pactolus Prime. “Does not the whole theory of National aid to education rest in the idea that the ignorant voter is a source of actual peril—less likely to know what he ought to do and quite powerless to do even what he may perceive ought to be done?”⁹³ The “Nation,” Pactolus insists, has “the right, in order to provide for the ‘general welfare of the United States,’ to declare that every man who holds a ballot shall be enabled to read it.”⁹⁴

Education was especially needed in the South, whose failure to have a comprehensive public school system for whites as well as coloreds influenced how it conducted politics. If the North's township system was a “nursery of democratic freedom,” allowing all to participate, the South, although “a republic in name,” remained “an oligarchy in fact.”⁹⁵ As a result, the franchise operated differently in the two regions. Southern politics were controlled by a few influential families. “Every family there,” the Fool explains, “has its clientage, its followers, who rally to its lead as quickly, and with almost as unreasoning faith, as the old Scottish clansmen, summoned by the burning cross.”⁹⁶ It would take educated voters—white and colored—to dismantle the old

⁸⁸ See AN APPEAL TO CAESAR, *supra* note 85.

⁸⁹ BRICKS WITHOUT STRAW, *supra* note 16.

⁹⁰ PACTOLUS PRIME, *supra* note 22.

⁹¹ A FOOL'S ERRAND, *supra* note 43, at 387.

⁹² *Id.* at 388.

⁹³ PACTOLUS PRIME, *supra* note 22, at 119-20.

⁹⁴ *Id.*

⁹⁵ A FOOL'S ERRAND, *supra* note 43, at 168.

⁹⁶ *Id.* at 141.

system of influence. But it would also take economic reform to free the poor of both races from their dependence on the old planter class.

Because of attention to his literary and legal careers, Tourgée's economic vision has often been ignored. Yet in all the works of fiction I have mentioned, economics play a major role. In *A Fool's Errand*, the metaphor for successful Reconstruction comes from a description of the Fool's plan to provide freedmen with land of their own to become economically self-sufficient.⁹⁷ In *Bricks Without Straw*, Nimbus's economic success as a tobacco farmer leads to the Klan's attack upon him and his family.⁹⁸ In "A Conflict Between Church and State," the prosperity of a farm resulting from the hard work of a former slave and a former Confederate soldier is a model of what interracial cooperation in the South could produce.⁹⁹ In *Pactolus Prime*, Pactolus gives Benny advice on how to become an economically successful lawyer, and Pactolus himself amasses a fortune in Washington, D.C. real estate, although he has to do so under an assumed name that makes him appear white.¹⁰⁰

As these examples make clear, Tourgée would have substantially agreed with W.E.B. Du Bois, when he argued that "[t]he whole development of Reconstruction was primarily an economic development."¹⁰¹ Tourgée did not, however, share the Marxist views that Du Bois adopted later in his life. Instead, Tourgée's economics were heavily dependent on the Republican Party's original free labor ideology. If, after the Civil War, a majority of Republicans allowed that ideology to be co-opted by their support for big business and corporate monopolies, Tourgée stayed true to the Republican ideal of economic self-sufficiency created through commerce and trade, not simply Jeffersonian agrarianism. Indeed, one reason it is important to study Tourgée is to get a sense of what history might have looked like if the nation had stuck to its belief in racial justice and accomplished the revolution Reconstruction was supposed to bring about. Another reason is to get a sense of an alternative direction that the Republican Party could have taken economically. In fact, the two are intricately related. For Tourgée, the rights of freedmen could be advanced only if all citizens—white and colored—were freed economically from the domina-

⁹⁷ *Id.*

⁹⁸ BRICKS WITHOUT STRAW, *supra* note 16.

⁹⁹ WITH GAUGE AND SWALLOW, *supra* note 15.

¹⁰⁰ PACTOLUS PRIME, *supra* note 22.

¹⁰¹ W. E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION IN AMERICA 721 (1935).

tion of the planter class in the South and big business in the North. The best way to achieve that goal, he felt, was through the American System originally advocated by the Whig, Henry Clay.

The chief architect of Clay's American System was Henry Charles Carey, an economic advisor to President Lincoln and perhaps the most famous American economist of his generation. The American System promised to overcome sectional differences by harmonizing the interests of manufacturing, commerce, and agriculture through an activist government that stimulated the economy through a program of internal improvements and tariff protection.¹⁰² To work, Carey argued, the system had to be self-contained. Set in motion by home-grown capital, production using native materials would generate profits that, re-invested, would lead to further production. Convinced that either reliance on foreign capital or use of profits to "manure" production in other countries would ruin the system, Carey strongly opposed the "English System" of *laissez-faire* economics and free trade.¹⁰³ Indeed, he claimed that major assumptions of classical English political economy, especially the theories of Malthus, did not apply to America. Not an island with limited resources, America could, with the proper economic policies, have production outpace population growth. Carey was also convinced that, if Clay had won the 1844 election, manufacturing would have flourished in the South, leading to the gradual abandonment of slavery, the easing of sectional tensions, and avoidance of civil war. Fearful that the country would become dependent on English capitalists investing in bonds needed to pay off the massive debt incurred during the war, he advocated continuance of Lincoln's "greenback" policy.¹⁰⁴ Carey outlined his program in a series of letters to the Speaker of the House of Representatives, Schuyler Colfax. Those letters were published in 1865 under the title, *The Way to Outdo England Without Fighting Her*.¹⁰⁵ Colfax would become Grant's first Vice President, which is why the Louisiana town is named after him. In 1867 Carey wrote another series of letters to Massachusetts Senator Henry Wilson, who would become Grant's second Vice President.

¹⁰² See HENRY C. CAREY, *THE HARMONY OF INTERESTS, AGRICULTURAL, MANUFACTURING AND COMMERCIAL* (Myron Finch ed., 2d ed. 1852).

¹⁰³ See *id.* at 123-30.

¹⁰⁴ See HENRY C. CAREY, *THE WAY TO OUTDO ENGLAND WITHOUT FIGHTING HER: LETTERS TO THE HONORABLE SCHUYLER COLFAX, SPEAKER OF THE HOUSE OF REPRESENTATIVES, ON THE PAPER, THE IRON, THE FARMER'S, THE RAILROAD, AND THE CURRENCY QUESTIONS* 50, 58 (1865).

¹⁰⁵ *Id.*

Strongly disagreeing with Wilson's *laissez-faire*, free trade politics, Carey collected these letters as *Reconstruction, Industrial, Financial, and Political*.¹⁰⁶

Tourgée's support of the American System is apparent from the titles of two essays he published in 1896, the same year as the *Plessy* decision. One is called "The Reversal of Malthus"¹⁰⁷; the other "Best Currency,"¹⁰⁸ which was an intervention, compatible with Carey's thought, into the hotly contested currency issue of the 1896 election. But a plan first hatched at the same time as proposals for Radical Reconstruction best shows how Tourgée hoped the American System could have helped the nation truly reconstruct itself. Appalled at the large sums of taxpayer dollars being granted to railroad companies, Lorenzo Sherwood, a former anti-slavery Whig from Texas, formed the National Anti-Monopoly Cheap-Freight League.¹⁰⁹ Hoping to stimulate internal trade and industry, Sherwood drafted legislation designed to guarantee cheap freight rates on railroads. Rather than continue handing out lucrative governmental subsidies to private companies, Sherwood proposed having the government build the lines itself. Once built, they would be available, at the same rate, for any company to use. Modeled on earlier projects building canals, the League's plan allowed for competition between private companies but gave no one company control of a particular line, nor did it allow for the expensive land grants and construction subsidies doled out to railroad after railroad. Providing a vision for developing the country economically at the same time that plans were underway to give freedmen equal civil and political rights, Sherwood's proposal was considered by its backers essential for the success of Reconstruction.¹¹⁰

It had a notable group of supporters. One was George H. Williams of Oregon, who later, as President Grant's Attorney General, worked with Samuel Phillips to prosecute members of the KKK under the Enforcement Act. Another was James Speed of Kentucky, Presidents Lincoln's and Andrew Johnson's Attorney General, before resigning over President Johnson's Reconstruction politics. Others included former Northern Generals Burnside and Sickles, one a rail-

¹⁰⁶ H.C. CAREY, *RECONSTRUCTION: INDUSTRIAL, FINANCIAL, AND POLITICAL* (1867).

¹⁰⁷ Albion W. Tourgée, *The Reversal of Malthus*, 2 AM. J. OF SOC. 13 (1896).

¹⁰⁸ Albion W. Tourgée, *The Best Currency*, 163 N. AM. REV. 416 (1896) [hereinafter *The Best Currency*].

¹⁰⁹ LORENZO SHERWOOD, *THE DEVELOPMENT OF OUR INDUSTRIAL RESOURCES* 23 (1867).

¹¹⁰ *Id.* at 1.

road man, the other commander of the second military district of North and South Carolina created by Radical legislation; Governors Holden, Peirpont, and Brownlow of North Carolina, Virginia, and Tennessee; Senator Nye of Nevada, who briefly employed Mark Twain as his secretary and is mocked in Twain's *Sketches Old and New*; Senator Harlan of Iowa, who as President Johnson's Secretary of the Interior fired Walt Whitman, who worked as a clerk in his department; Senator Fowler of Tennessee, who broke party ranks and voted for acquittal at President Johnson impeachment trial; and Senator Henderson of Missouri, a co-author of the Thirteenth Amendment, who likewise voted to acquit President Johnson. Sherwood's plan also had the backing of Carey—and Tourgée.¹¹¹

Like many of the Cheap Freight League's supporters, Tourgée met Sherwood at the 1866 Southern Loyalist Convention in Philadelphia. A member of the League's National Council, Tourgée wrote, "[t]here is nothing which can ever secure a genuine, hearty, and valuable reconstruction but a full, thorough, and efficient system of national development."¹¹² Waxing eloquent in the League's praise, he went on, "[h]ourly it has grown more and more stupendous in its proportions and more and more beautiful in its harmony."¹¹³ "Steam Reconstruction," he called the plan.¹¹⁴

We will, of course, never know if Tourgée's hopes would have been realized. Unmentioned in almost all accounts of Reconstruction, Sherwood's legislation did not pass. Certainly, history—and the Republican Party—went in a different direction. Becoming the party of big business, especially through its support of railroad giants, Republicans became heavily implicated in the graft and corruption of the age. Then the bubble of railroad investment burst with the Panic of 1873. Convinced that speculation leading to the Panic of 1873 could be controlled by backing up the nation's currency with something "real," the Republican Congress stopped issuing greenbacks and passed the Coinage Act, which moved the country toward the gold standard.¹¹⁵ One

¹¹¹ *Id.* at vii.

¹¹² *Id.* at 19 (quoting UNION REGISTER (Tourgée's newspaper)).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ On the *laissez-faire*, free trade effects of the move toward a gold standard, see MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES, 1867-1960, 49 (1963); JOSEPH SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 405-6 (1954); RICHARD H. TIMBERLAKE, MONETARY POLICY IN THE UNITED STATES: AN INTELLECTUAL AND INSTITUTIONAL HISTORY (1993).

result was, as Carey predicted, the destruction of any possibility for a self-contained, productive national economy. Without the government's ability to create money to stimulate the economy, development became increasingly dependent on foreign investment, especially from the same English capitalists who had helped finance the Confederacy. From 1873 until the outbreak of World War I, the United States became the world's largest debtor nation, with the majority of foreign money going to railroads.¹¹⁶ There were dealers for American railroad securities in Amsterdam, Frankfurt, Paris, and London, which set aside a special section of its stock market for American lines.¹¹⁷ In the midst of this market-driven turmoil, Reconstruction was derailed as it was linked to the corruption of the day and seen as a drain on the economy. Indeed, as Tourgée reminds us in *A Fool's Errand*, the term "carpetbagger" itself took on its first derogatory connotations when applied to fraudulent wildcat bankers carrying suspect paper currency.¹¹⁸

Tourgée, however, continued to see a necessary link between successful Reconstruction and economic reform. We see how in two novels written a year after the Panic of 1873: *John Eax* and *Mamelon*. These two neglected works are dedicated:

To

THE NEW SOUTH

That Is to Be.

When the Fire of Self-Sacrifice Shall Have Burned Away

The Dross of the Past and Left Only Its

GOLD¹¹⁹

¹¹⁶ See DOROTHY ADLER, *BRITISH INVESTMENT IN AMERICAN RAILWAYS* (1970); Mira Wilkins, *Foreign Investment in the U.S. Economy before 1914*, 516 *ANNALS OF THE AM. ACAD. POL. & SOC. SCI.* 9-21 (1991).

¹¹⁷ See Wilkins, *supra* note 116, at 9-21.

¹¹⁸ *A FOOL'S ERRAND*, *supra* note 43, at 165-66. Tourgée spelled out his position on currency in the 1896 election. He opposed the free coinage of silver as a move back toward bullionism but also worried about the scarcity of existing gold currency. Denouncing reliance on private bankers to pay the government's debt, he, sounding like Carey, recommended more governmental control through federal notes and a federal banking system. See generally ALBION W. TOURGÉE, *THE WAR OF THE STANDARDS: COIN AND CREDIT VERSUS COIN WITHOUT CREDIT* (1896); *The Best Currency*, *supra* note 108.

¹¹⁹ ALBION W. TOURGÉE, *JOHN EAX AND MAMELON OR THE SOUTH WITHOUT THE SHADOW* (1882) [hereinafter *JOHN EAX AND MAMELON*]. Both stories were composed in 1874.

Tourgée's New South is, of course, significantly different from the New South advocated by Henry Grady and other white racists. Nonetheless, there are some important similarities. Even though Tourgée felt that North and South were different civilizations, he fervently believed that they could be united to give birth to a new nation after the Civil War. As he writes in his Preface to these two stories, "[i]f the North and South are contrasted, it is but to show the fusing potency of love or the solvent power of manly friendship."¹²⁰ Thus, even though he believes that "the North and the South were two families in one house—two peoples under one government,"¹²¹ *A Fool's Errand* and *Bricks Without Straw* include that staple of the Reconstruction novel: a marriage of northern and southern couples. In *John Eax and Mamelon*, however, he tries a unique strategy. As their subtitle indicates, in them he tries to imagine a New South as a "South without the Shadow."¹²² Thus, in these two works, unlike Tourgée's other Reconstruction works, race plays a very minor role. To be sure, in his Preface, Tourgée acknowledges that "the shadow was over all—the shadow of Slavery and its children, Ignorance and War and Poverty."¹²³ But he also notes that "there were rifts in the shadow."¹²⁴ By focusing on those rifts, Tourgée tries to imagine a new myth of national origins, one based on an economy freed of slave labor.

Most of the action of *John Eax* takes place prior to the Civil War. It is about the De Jeunette family that dominated its region in the South and whose rule was more powerful than any written code of law. The De Jeunettes have complete disdain for labor, none having "condescended, so far as was known, to learn or practice any trade or profession."¹²⁵ Charles, however, decides to become a lawyer. Even worse, although everyone expects him to marry his beautiful cousin Louise, he falls in love with Alice Bain, the niece of the overseer. When he announces his intentions, he is disowned and his mother and father die of shame. With all influential people in the county against him, he ends up in debtor's prison. Escaping, he goes north where he marries Alice, who turns out to be the unknown heir of John Eax, a rich British manufacturer from Birmingham. The newlyweds inherit a fortune on the condition that Charles take the name of their benefactor. Re-

¹²⁰ *Id.* at ix.

¹²¹ *Id.* at vi.

¹²² *Id.* at ix.

¹²³ *Id.* at vi.

¹²⁴ *Id.* at vii.

¹²⁵ *Id.* at 29.

jecting life in Europe, they return to live in one of the new midwestern states and develop a thriving estate, where they give birth to a daughter, named Louise in honor of Charles's cousin, who, Alice reveals, had secretly arranged for Charles's/John's escape from prison. Alice dies young, and when the Civil War breaks out, John raises a regiment and helps defeat the South, ending the war occupying the region of his childhood. He arranges to meet Louise, who is now the local matriarch. She resists meeting a Yankee conqueror, but must consent. John reveals his identity and his knowledge of her role in helping him escape prison. When John insists on paying his debt to her, she refuses, lamenting that he has "become a Yankee in fact."¹²⁶ Alluding to the currency debate of the time, Tourgée has John jokingly suggest, "[p]erhaps you want specie."¹²⁷ Finally, no longer insisting on repaying his debt, he asks her to marry him instead, which, still in love, she agrees to do.

This story, the narrator tells us, shows that "[t]he old South was dying around us. The new South was springing into life about us—the spirit of the North and the manhood of the South its matchless elements."¹²⁸ And yet, by having his northerner turn out to be from the South, Tourgée gives us a twist on the standard North/South marriage plot. The North and South may be different civilizations, but for Tourgée that difference is, like race, culturally and historically constructed. Thus, we have the homonym linking the De Juenettes and John Eax. Indeed, although the white South prided itself in its Anglo-Saxon heritage, the De Jeunettes turn out to be descended from French Huguenots meaning that their Anglo-Saxon pedigree is as adopted as the second John Eax's. Likewise, despite their aristocratic pretensions, the De Jeunette's are in fact descended from a family of shoemakers, just as the original John Eax's fortune came from making shovels. That Tourgée intends his story to suggest a myth of origins is made clear when we learn that the English John Eax died in 1783, which gave birth to the United States. In Tourgée's national myth, labor of the sort Eax promoted built the nation and will help create a New South, as shovels will not only help till the soil, but also mine the ore that John discovers on the De Jeunette land. Americans, including those in the new South, become the heir of the work ethic of that English city "where hammers have forged miracles of progress, and

¹²⁶ *Id.* at 137.

¹²⁷ *Id.* at 140.

¹²⁸ *Id.* at 144.

built a metropolis that queens it in the world of mechanic art as easily as Athens once ruled the domain of the beautiful.”¹²⁹

But more than a myth about productive, free labor is at stake. To comfort Charles while he is in prison, Alice gives him her family bible. Inscribed on the first blank page is: “*To my beloved daughter Nell, John Eax.*”¹³⁰ Nell turns out to be Alice’s grandmother, who came to America shortly before the Revolution. Convinced that the name John Eax is familiar, Charles searches his legal notebook and finds a newspaper notice he had placed in it asking for information about Eax’s heirs. Charles’s use of a bible and legal notebook to discover the source for his personal and his region’s rejuvenation expresses Tourgée’s hope that a reborn nation will not suffer the moral conflict between church and state plaguing the existing one.

Appropriately, the new world Tourgée imagines will be liberated from an archaic system of laws perpetuated in the old South. For instance, Charles’s time in prison allows Tourgée to condemn North Carolina’s penal code that not only placed debtors in prison but forced all prisoners, even ones not yet declared guilty, to suffer unnecessarily. If the system was not quite as bad as the inquisition, under it, “[p]unishment . . . was inseparably associated with suffering—physical pain. The gallows, the lash, and the branding-iron were its implements and it was considered eminently proper that they should be supplemented by disease and exposure.”¹³¹ Tourgée had successfully reformed that inhumane system in the North Carolina’s 1868 Constitutional Convention.

Of course, the old South’s most inhumane law was the law of slavery. But by seeking rifts in the shadow it cast, Tourgée is free to imagine a new economic order. For instance, as much as novels supporting Reconstruction differ from those condemning it, they have one element in common: all portray plantation overseers or their heirs as villains. In *The Leopard’s Spots* Thomas Dixon turns Simon Legree from *Uncle Tom’s Cabin* into a post-bellum monopoly capitalist who treats his workers worse than slaves.¹³² In *Red Rock* Thomas Nelson Page depicts a former overseer as a hypocritical scalawag who leads freedmen into misrule allowing him illegitimately to take possession of once produc-

¹²⁹ *Id.* at 108.

¹³⁰ *Id.*

¹³¹ *Id.* at 11-12.

¹³² THOMAS DIXON, JR., *THE LEOPARD’S SPOTS* (1902).

tive plantations.¹³³ Challenging Dixon and Page on almost every point, African American novelist Charles W. Chesnutt, nonetheless, in both *The Marrow of Tradition* and *The Colonel's Dream* makes the sons of former overseers his crudest racists, who act as parasites on the economy while enriching themselves through the convict lease system.¹³⁴

Trying to exploit a rift in the shadow, Tourgée, in contrast, recognizes that overseers can be aligned with productive forces against planter domination. It is through marriage to the overseer's niece that Charles De Juenette is transformed into the Yankee John Eax who can then fulfill the needs of the standard reconciliation plot by marrying a landed Southern lady. The root meaning of "economy" means the management of a household, and Tourgée recognizes that there is something to admire about the way a good overseer can manage an estate, just as he admires the way the former slave of the confederate soldier manages the farm in "The Conflict Between Church and State."¹³⁵

If Tourgée's first novella is about a Northern soldier, his second is about a Southern soldier. *Mamelon* is also about a new economy for a new South, dramatizing the effects of the Panic of 1873.¹³⁶ It tells of Paul Dewar, a Southerner, whose wife inherits a plantation called Mamelon, named after a pre-historic mound, the relic of an unknown race once inhabiting the land. After fighting for the South in the Civil War, Paul tries to transform from a leisurely gentleman to a productive man of enterprise. Turning first to plowing the land to plant tobacco, he earns the disdain of his wife, who, a product of the Southern planter class, feels that such labor is unsuited for a gentleman. When tobacco farming fails, Paul joins forces with Captain Dickson from Massachusetts to turn the persimmon and hickory trees growing on the property into hardwood handles for tools that will help build the nation. Mortgaging his wife's plantation to build a factory, Paul and his partner soon have a thriving business.¹³⁷

But the Panic of 1873 hits, destroying their market for goods and leaving them heavily in debt. Going north to seek financial support,

¹³³ THOMAS NELSON PAGE, *RED ROCK* (1900).

¹³⁴ CHARLES WADDELL CHESNUTT, *THE COLONEL'S DREAM* (1905); CHARLES WADDELL CHESNUTT, *THE MARROW OF TRADITION* (1901).

¹³⁵ WITH GAUGE AND SWALLOW, *supra* note 15, at 163-78.

¹³⁶ JOHN EAX AND MAMELON, *supra* note 119.

¹³⁷ Tourgée had a similar business, which failed because of the Panic of 1873. OTTO OLSEN, *CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION W. TOURGÉE* 176-78 (1965).

Paul returns empty handed. With the mortgage on Mamelon about to be called, he appears to shoot himself so his wife can collect his life insurance. But the bullet goes astray, and Paul is in fact struck with a case of apoplexy. He is brought back to health by Professor Ware, who has come with him from the North. The professor finds the stray bullet, lodged in a piece of rock that is part of a collection that Paul had found at the ancient mound. The force of the bullet exposes the core of the rock, which turns out to be corundum. "It is," the professor tells us, "but a step from corundum to sapphire and the ruby . . . I should not be surprised, if this very specimen were properly cut and worked, to find a perfect crystal ruby, without a flaw in its heart."¹³⁸ Soon Captain Dickson returns "with his engines and machinery . . . grinding the faulty crystals to powder to be used in polishing other jewels and hard substances—glass and the like. Every day the hopes of the great 'New York Corundum Company' have been growing brighter."¹³⁹ It is even possible that they will soon be taking out "rubies, sapphires, and . . . other jewels there."¹⁴⁰

A romance, told on Valentine's Day, this tale imagines a prosperous New South shaped by Carey's design for the American System. Like *John Eax*, *Mamelon* indicts the leisure class of planters that was so important in the ideology of the Old South. Paul's effort to make Mamelon productive dramatizes Carey's view that land has value as the result of the labor—past and present—expended on it. For both Carey and Tourgée the leisure class has no place in a productive national economy. But Tourgée indicts northern bankers as well as southern planters. Loyal to rebuild the South, Paul finds no financing in the North, even though, as Tourgée angrily noted in 1868, northern bankers and their Wall Street and foreign friends maintained the South during the days of rebellion by buying its bonds.¹⁴¹ Furthermore, if Southerners supported the doctrine of free trade so they could send their products to Europe rather than to the North, the mineral wealth found on the land in *Mamelon* has a practical use and achieves its full value, not by shipping it to Europe, but through the scientific knowledge and enterprising spirit of Northerners helping a Southerner move beyond sectional prejudice. Most important, the mounds where that wealth is discovered establish that America has a

¹³⁸ JOHN EAX AND MAMELON, *supra* note 119, at 297.

¹³⁹ *Id.* at 298.

¹⁴⁰ *Id.*

¹⁴¹ OLSEN, *supra* note 137, at 111.

unique identity and potential even before European settlement. Anticipating José Martí, Tourgée is an exceptionalist, tracing the value of the American soil to its ancient inhabitants. In this myth of origins, all who inhabit the land and cooperatively use it productively are Americans: Northerners and Southerners; blacks, whites, and natives.

By trying to imagine a world without the shadow of slavery in these two short works, Tourgée could, of course, be accused of neglecting the role of race in the nation's history. But his effort to create a myth of national origins that transcends race is not a denial of its importance. On the contrary, Tourgée's acknowledgement that national reconciliation is much easier to imagine "without the shadow" is his way of reminding the reader the extent to which the "race question" blocks the birth of a new nation. That the country proved more likely to embrace the mythology dramatized in D. W. Griffith's film *The Birth of a Nation*, based on the novels of Thomas Dixon, might give support to Fiss's characterization of Tourgée as a "legal Don Quixote."¹⁴² But to me, it shows the extent to which Tourgée was a stark realist aware of how much had to be done to help ensure racial justice.

¹⁴² Fiss, *supra* note 1, at 354.

