This essay repudiates the perceived differences between the discourse of law and literature that interfere with an understanding of literature, as well as law, as participating meaningfully in inquiries into justice and injustice. By analyzing the work of Charles Chesnutt, it demonstrates that not only can literature elucidate law’s missteps, but also that it can offer persuasive alternative renderings of a just society.

In *The Marrow of Tradition* (1901), Chesnutt dramatized the race antagonism that underlay the South’s system of racial segregation while simultaneously challenging the logic of the law that kept it intact. Chesnutt particularly questions the reasoning of *Plessy vs. Ferguson*, the 1896 United Supreme Court ruling that anchored Jim Crow laws in America’s legal system for more than half a century. Chesnutt’s story of a young African-American doctor whose professional efforts are thwarted and whose personal life is tragically disrupted by racial antagonisms offers an argument on behalf of integration as the necessary first step towards the achievement of racial equality. Chesnutt’s description of Jim Crow train travel, which reveals the fallacies in the Court’s acceptance of “separate but equal,” reveals that the Court’s objective view of segregation had a decidedly subjective cast that reflected particular racist cultural assumptions. Chesnutt’s work exemplifies the deployment of literary imagination in an effort to prompt cultural and legal change, and testifies to the persuasive power of literature to influence laws.

The (inter)discipline of law and literature calls upon us to reconsider existing divisions between argumentation and storytelling, legal scholarship and literary criticism, and judicial opinions and fiction. While law is purported to rest on solid “objective” and “logical” foundations, literature is presumed to deal with the imaginary, subjective and emotional. One deals with reality, and the other with fancy. One solves problems, and the other entertains (when it is popular literature) or educates (when it is, for lack of a better descriptive term, literary literature). One is rule bound, and the other is transcendent to the point of practical irrelevance. True?
The question is critical, because belief in such clear dichotomies would suggest that literature can have no bearing on law. As Judge Richard Posner emphasized in an early article, one certainly would not turn to literature to learn anything specific about law. But as Stanley Fish has noted in criticism of Posner, distinctions between law and literature, and between legal and literary language and interpretations, are historically determined, not naturally so. What we do (or do not do) with literature depends entirely on the cultural habits or disciplinary constraints that demarcate possibilities—that tell us how to read, interpret, evaluate, apply, make connections, draw conclusions and so on. If literature does not mean anything in legal discourse, it is because the rules of legal discourse do not grant it authority, not because literature is inherently unable to address legal issues in ways that lawyers might beneficially heed. Moreover, to distinguish between law and literature partly on the grounds that the “literary” is such because of its universality, as Posner does, is to condemn literature to meaning “nothing in particular.” On the contrary, it is literature’s ability to elucidate details and difficulties of historical moments that gives it unique power to illuminate specific, time-bound justices and injustices.

A task of law and literature, then, is to shed light on literature’s actual and potential contributions to jurisprudential thought. This paper attempts to contribute to that effort by describing one author’s literary challenge to the most authoritative judicial tribunal in the United States, the Supreme Court. The author is Charles Chesnutt, whose work demonstrates how false is the notion that literature cannot offer instruction on matters of law and cannot meaningfully and specifically engage in debate over legal principles. His 1901 novel The Marrow of Tradition, despite its being fiction (indeed, because of its being fiction), is “a particularly powerful kind of rational argument,” as Steven Winter says of narrative generally. Its subject is late nineteenth-century racism as expressed in law and in the everyday events of the post-Reconstruction South. Of particular historical and personal significance to Chesnutt were race riots in Wilmington, North Carolina in 1898 and the United States Supreme Court decision in Plessy v. Ferguson (1896).