
THE PAST AS PROLOGUE: ALBION TOURGÉE AND THE
NORTH CAROLINA CONSTITUTION

JUDGE ROBERT N. HUNTER, JR.
NORTH CAROLINA COURT OF APPEALS

On Friday, November 4, 2011, The University of North Carolina Center for the Study of the American South held a symposium entitled “A Radical Notion of Democracy: Law, Race, and Albion Tourgée, 1865-1905.”¹ The symposium focused on “recall[ing] the legacies of Reconstruction to offer insight into ongoing policy debates.”² The literature promoting the event described Albion Winegar Tourgée as “[a] former Union soldier [who] . . . settled in Greensboro in 1865 in hopes of helping to shape the new post-slavery South.”³ Moreover, as “[a] lawyer, judge, novelist, and activist, Tourgée worked for racial equality in the state for thirteen years. His North Carolina legacy lives on in the provisions of the state Constitution guaranteeing free public education, as well as other reforms.”⁴

The symposium was timely because Tourgée has recently experienced heightened national academic interest. Tourgée’s life has been the subject of three modern biographies: *Carpenter’s Crusade: The Life of Albion Winegar Tourgée* by Otto H. Olsen (1965); *Those Terrible Carpenters: A Reinterpretation* by Richard Nelson Current (1965); and most recently, *Color-Blind Justice: Albion Tourgée and the Quest for Racial*

¹ Major sponsors for the event included Elon University School of Law, The University of North Carolina School of Law, The North Carolina Institute for Constitutional Law, and The Office of Archives and History in the North Carolina Department of Cultural Resources.

² Press Release, Ctr. for the Study of the Am. S., A Radical Notion of Democracy: Law, Race, and Albion Tourgée, 1865-1905 (Oct. 10, 2011), *available at* http://www.uncsouth.org/content/news/news-item/a_radical_notion_of_democracy_law_race_and_albion_tourgée_1865-1905_albion_/.

³ *Id.*

⁴ *Id.*

Equality from the Civil War to Plessy v. Ferguson by Mark Elliott (2006). In addition to the UNC Symposium, The University of Rochester has also held a recent symposium on Tourgée's life and works.⁵ Even more, Mark Elliott and John David Smith's *Undaunted Radical: The Selected Writings and Speeches of Albion W. Tourgée* was published in 2010 by Louisiana State University Press.⁶

In addition to his personal narrative, Tourgée's fiction provides readers insight into the realms of law and literature. *A Fool's Errand: By One of the Fools* is based on Tourgée's experiences in Greensboro, North Carolina during Reconstruction.⁷ The story is a thinly veiled *roman à clef* in which Comfort Servosse, a man of French-Canadian descent, fights in the Union army before settling in the South after the war.⁸ It is there where he purchases a southern plantation called Warrington.⁹ In his new home, Servosse arouses the hostility of his neighbors by espousing social equality with newly freed blacks.¹⁰ Servosse becomes a judge and narrates cases involving Klan violence in litigation that comes before him at trial.¹¹ *A Fool's Errand* was later followed by a sequel, entitled *The Invisible Empire*, which illustrated the Ku Klux Klan activities going on during the time period. These novels were immensely popular at the time they were published,¹² and *A Fool's Errand* is often assigned to students in History or Law and Literature programs. Moreover, in 2009, Duke University Press republished Tourgée's *Bricks Without Straw*, describing the novel as being "unique among the white-authored literary works of its time in presenting Reconstruction through the eyes of emancipated slaves."¹³

⁵ Symposium, *Justice Deferred: Albion Tourgée and the Fight for Civil Rights*, Chautauqua Cnty. Historical Soc'y (Oct. 11, 2008), http://tourgee-justicedeferred.blogspot.com/2009/02/blank-3_09.html.

⁶ For a brief summary of Tourgée's life story, see Michael Kent Curtis, *Albion Tourgée: Remembering Plessy's Lawyer on the 100th Anniversary of Plessy v. Ferguson*, 13 CONST. COMMENT. 187 (1996).

⁷ Christopher Hill, *Summary: A Fool's Errand: By One of the Fools*, DOCUMENTING THE AMERICAN SOUTH, <http://docsouth.unc.edu/church/tourgée/summary.html> (last visited July 3, 2012).

⁸ ALBION TOURGÉE, *A FOOL'S ERRAND: BY ONE OF THE FOOLS* 1-37 (Fords, Howard, & Hulbert 1st ed. 1879).

⁹ *Id.* at 36.

¹⁰ *Id.* at 45-46.

¹¹ *Id.* at 162-72.

¹² EDMUND WILSON, *PATRIOTIC GORE* 536 (Farrar, Straus & Giroux 1st ed. 1962).

¹³ Product Description for *Bricks Without Straw*, DUKE UNIV. PRESS, <http://www.dukeupress.edu/Catalog/ViewProduct.php?productid=15019> (last visited July 3, 2012).

A study of Tourgée has relevance today in contemporary policy discussions. Tourgée's story is 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. Since Reconstruction, our nation has been engaged in a number of reconstruction or “nation building” projects abroad.¹⁴ Our trusteeship of the Philippines,¹⁵ the occupation of Japan,¹⁶ the Marshall Plan in Europe after World War II,¹⁷ our contemporary ventures in South America¹⁸ and the Middle East¹⁹ are a few of these reformist ventures. Like Reconstruction, these ventures are premised on visions of moral uplift and bringing appropriate contemporary technology to underdeveloped societies. In addition, a study of legal literature provides readers with insight into the emotional life of the litigants and lawyers, richly deepening one's understanding of the effect that the rules of law have on society at large.

¹⁴ “Nation building” in this context is sometimes referred to as “state building” or “state rebuilding” and broadly means the use of armed force following a war to bring about a permanent transition to democracy. *See generally* Verena Fritz & Alina Rocha Menocal, *Understanding State-Building from a Political Economy Perspective*, THE OVERSEAS DEVELOPMENT INSTITUTE, 13-15 (Sept. 2007), <http://www.odi.org.uk/resources/docs/1979.pdf>.

¹⁵ Annexation of the Philippines, Puerto Rico, and Guam by the United States was a result of the Treaty of Paris of 1898. SAMUEL E. MORISON ET AL., *A CONCISE HISTORY OF THE AMERICAN REPUBLIC 488-90* (Oxford Univ. Press 1st ed. 1977). The United States maintained some control over the Philippines until July 4, 1946 with the signing of the Treaty of General Relations between the Republic of the Philippines and the United States. *See* Treaty of General Relations Between the United States of America and the Republic of the Philippines, U.S.-Phil., July 4, 1946, 61 Stat. 1174.

¹⁶ Japan surrendered to the Allies on August 14, 1945 by accepting the Potsdam Declaration. MORISON ET AL., *supra* note 15, at 660. On August 15th, President Truman appointed General Douglas MacArthur as supreme commander to supervise the occupation of Japan, which lasted until the signing of the San Francisco Peace Treaty in 1951. *Id.* at 680.

¹⁷ The European Recovery Program, the “Marshall Plan,” was an American aid program to give monetary relief to European Countries after the end of World War II. *Id.* at 671-73. *See also* The Economic Cooperation Act of 1948, Pub. L. No. 472, 62 Stat. 137 (repealed 1952).

¹⁸ For example, The United States occupation of Haiti lasted from July 28, 1915 to August 14, 1934. *US Occupation of Haiti, 1915-1934*, NAVY DEP'T LIBRARY (July 18, 2005), http://www.history.navy.mil/library/online/haiti_main.htm.

¹⁹ For example, in Afghanistan, the International Security Assistance force was established by the UN Security Council to help assist in the creation of new state institutions and provided basic security for its people. S.C. Res. 1386 ¶ 1, U.N. DOC. S/RES 1386 (Dec. 20, 2001).

Like our contemporary ventures, the period from 1865 to 1875 brought about breath-taking societal transformations in North Carolina.²⁰ Chief among these transformations was the abolition of slavery and a commitment to social democracy.²¹ Inherent in the commitment to social democracy was the concept that all men are created equal.²² Inherent in the extension of legal rights was the concept of social equality between different ethnic groups.²³

A societal commitment to social democracy and individual freedom is required for the development of a successful, economically viable, and modern democratic society.²⁴ Because the contemporary efforts of the United States at nation building involve the extension of individual freedom to groups previously not empowered, the parallel of Reconstruction policies to ongoing public policy is palpable. Tourgée's contributions in North Carolina—helping to bring about the governmental infrastructure necessary to secure important constitutional rights—model a method for underdeveloped societies attempting to establish a legal structure that promote ideals of liberty, free markets, democracy, and equality.

Examining the constitutional structure of North Carolina in 1861 with its successor constitution of 1868 provides a comparison of the governmental structural changes that Tourgée and his colleagues ushered in. These changes shifted the Constitution from a document that restrained government power over its citizens to a document that required affirmative governmental power to enhance equality. The tension between governmental restraint and power, at the time of the adoption of the 1868 Constitution and continuing until modern time, shaped North Carolina's politics and its constitutional jurisprudence.

Over the past several years, I have taught the Law of Democracy to several classes at Elon University School of Law and Wake Forest Law

²⁰ See MILTON READY, *THE TAR HEEL STATE, A HISTORY OF NORTH CAROLINA* 256-57, 264 (Univ. of S.C. Press 2005).

²¹ See *id.* at 251.

²² See, e.g., U.S. CONST. amend. XIV, § 1. The 14th Amendment to the United States Constitution was adopted to specifically overrule the Supreme Court's *Dred Scott* decision, which held that people of African descent brought into the United States and held as slaves (or their descendants, whether or not they were slaves) were not protected by the Constitution and could never be United States citizens. *Dred Scott v. Sandford*, 60 U.S. 393, 425-27 (1856).

²³ See generally, Amartya Sen, *Individual Freedom as a Social Commitment*, N.Y. REVIEW OF BOOKS, June 14, 1990. See also Declaration of Independence, Prologue.

²⁴ See Sen, *supra* note 23.

School. Each year I ask my upper-level students if they have read or seen a copy of the Constitution of North Carolina. Most have not read or seen the state's Constitution and do not have an understanding of the historical context within which it was formed. This is particularly unfortunate because the Constitution is tested on the bar examination and because most graduates of North Carolina's law schools will begin practice in the state without a fundamental grounding in the state's organic legal document. This article will, in some small part, introduce the reader to the role that Tourgée played in North Carolina's legal history and provide some historical context for the legal reforms that he introduced to the state. Like any study of a constitution, a necessary prerequisite for interpretation of the document is the historical context in which it arose.

Heuristically, the interpreter of words must understand the intent of the writer and the writer's time to comprehend the importance of the studied text. The study of the American Revolution is significant to the interpretation of the Founder's Constitution. A study of Reconstruction is fundamental to an interpretation of the 1868 Constitution of North Carolina. Because the existing Constitution is merely an editorial revision of the 1868 Constitution, this study is central to those who practice law today.²⁵

When Tourgée arrived in North Carolina in 1865, a provisional Government appointed by President Andrew Johnson was in nominal control of the state.²⁶ The organic legal structure of the government was contained in the state's Constitution. Originally written in 1776, the Constitution was revised in 1835 to provide for a reallocation of power among the counties²⁷ and, in 1860, to secede from the Union.²⁸ Both of these earlier constitutions reflected the passions of the time in which they were adopted. Article I of the Constitution of North Caro-

²⁵ See An Act to Revise the North Carolina Constitution, ch. 1258 (1969).

²⁶ OTTO OLSEN, *CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGÉE* 38-39 (Johns Hopkins Press, 1965).

²⁷ See Journal of the Convention, Called by the Freemen of North-Carolina, to Amend the Constitution of the State, Which Assembled in the City of Raleigh, on the 4th of June, 1835, and Continued in Session Until the 11th Day of July Thereafter, Constitutional Convention of North Carolina, 1835, available at <http://docsouth.unc.edu/nc/conv1835/conv1835.html>.

²⁸ An Ordinance to Dissolve the Union between the State of North Carolina and the Other States United with Her Under the Compact Entitled the Constitution of the United States (May 20, 1861), available at <http://www.rootsweb.ancestry.com/~ncttp/secession.html>.

lina of 1776 contained twenty-five Declarations of Rights.²⁹ These declarations guaranteed the historical protections that English freedmen enjoyed against government authority and have their historical roots in the Magna Carta, the Glorious Revolution, and the American Revolution. For example, Article I of the North Carolina Constitution of 1835 contained familiar protections for “freemen,” including the freedom from self-incrimination, the freedom from excessive bail, a jury trial in open court, habeas corpus, the right to bear arms, the right to worship according to conscience, and the right to be free of retrospective laws.³⁰ Other rights included the right not to be deprived of life, liberty, or property but by the law of the land.³¹ The Constitution provided for freedmen over twenty-one years of age (who lived within the state for twelve months preceding the election and paid taxes) to vote for the legislature, which in turn elected the Governor, Treasurer, Secretary of State, and the judicial branch.³² Most of these rights were guaranteed to freedmen living in England at the time of the American Revolution but were denied to the “colonists,” and this denial served as a catalyst for the American Revolution.³³

These enumerated rights are now viewed collectively by constitutional scholars as “negative rights.”³⁴ A negative right prohibits governmental action, providing for legal neutrality or prohibition from laws that restrict individual freedom.³⁵ For example, originally Articles VIII and IX provided “that no freeman shall be put to answer any criminal charge, but by indictment, presentment or impeachment,”³⁶ and “no

²⁹ Declarations of Rights §§ 1-25 (preceding the Constitution of North Carolina ratified by open congress 1776), *available at* http://presspubs.uchicago.edu/founders/documents/bill_of_rightss10.html.

³⁰ *Id.*

³¹ N.C. CONST. art. I, §§ 6-10, 12-14, 19-24, 30, 32-35. All have their antecedents in the Constitution of 1776.

³² Interestingly, freed blacks that met the property tax qualifications voted in North Carolina until the 1835 constitution eliminated their voting for office. N.C. CONST. of 1835, art. I, § 3.3 (“No free negro, free mulatto, or free person of mixed blood descended from negro ancestors, to the fourth generation inclusive, (though one ancestor of each generation may have been a white person,) shall vote for members of the Senate or House of Commons.”).

³³ READY, *supra* note 20, at 89.

³⁴ ISAAH BERLIN, LIBERTY 1-54 (Oxford 2004).

³⁵ ISAAH BERLIN, TWO CONCEPTS OF LIBERTY (Oxford 1958) (“Liberty in the negative sense involves an answer to the question: ‘what is the area within which the subject—a person or group of persons—is or should be left to do or be what is able to do or be, without interference by other persons?’”).

³⁶ N.C. CONST. of 1776, Declaration of Rights VIII.

freeman shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men, in open court, as heretofore used.”³⁷ These rights are very specific in their effect.³⁸ Others were vague, such as original Article XIX that “all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences” or the original text of Article XXI that “a frequent recurrence to fundamental principles is absolutely necessary to preserve the blessing of liberty.”³⁹ Because these “negative” rights restrained the government or conferred no justiciable rights on individuals, there was no required governmental action to implement their provisions. The restraint of government action would benefit classes of society most able to take political and economic advantage without benefit of public assistance. In Antebellum America, these classes were men of property, regardless of location, that restricted the franchise and participation in public life to voters who could pass a literacy test, landowners, and taxpayers. Consequently, itinerant working men, freed blacks, land tenants, and immigrants who competed with slave labor for work were disenfranchised and left with scant free means of rising in society.

After the Civil War in 1866, under the terms of Presidential reconstruction, North Carolina drafted a new constitution to rejoin the Union under lenient terms in which the state would abolish slavery and revoke its secession resolution.⁴⁰ However, the document failed to be ratified by the electorate that consisted solely of voters qualified only under the antebellum constitution in the election of 1866.⁴¹ Even if it had passed, the document would likely have failed to achieve its goal of reunion because it failed to ensure that newly freed slaves had the franchise and “equal” rights as participants in the rebellion then enjoined. For example, under the proposed terms, only “whites” were to be counted in apportioning the seats in the legislature and voting rights for former slaves were not guaranteed in the document.⁴² The

³⁷ N.C. CONST. of 1776, Declaration of Rights IX.

³⁸ N.C. CONST. of 1776, Declaration of Rights VII-VIII.

³⁹ N.C. CONST. of 1776, Declaration of Rights XIX, XXI.

⁴⁰ N.C. CONST. of 1866; NORTH CAROLINA GOVERNMENT 1835-1974: A NARRATIVE AND STATISTICAL HISTORY 832 (John L. Cheney, Jr. ed., rev. prtng. 1981).

⁴¹ NORTH CAROLINA GOVERNMENT 1835-1974: A NARRATIVE AND STATISTICAL HISTORY, *supra* note 40, at 844.

⁴² N.C. CONST. of 1866, art. II, § 3; *Id.*

purpose of these acts was to keep the antebellum status quo in place after the war.⁴³

The Thirteenth Amendment abolished slavery and was ratified on December 18, 1865.⁴⁴ The Fourteenth Amendment, which conferred national and state citizenship on former slaves, was ratified on July 28, 1868.⁴⁵ However, the North Carolina Legislature, prior to Reconstruction, rejected ratification of the Fourteenth Amendment, as did the legislatures of all Southern states.⁴⁶ The rejection by North Carolina of the Fourteenth Amendment led to the refusal of Congress to seat federal legislators from the Southern states.⁴⁷ Moreover, Congress passed the first of three "Reconstruction Acts" on March 2, 1867.⁴⁸

The Reconstruction Acts of 1867 provided a much harsher framework for readmission to the Union by requiring ratification of the Fourteenth and Fifteenth Amendments.⁴⁹ These acts provided that the South was to be divided into military districts in which North and South Carolina were placed under the control of General Sickles and later General Canby.⁵⁰ The military, with the assistance of the provisional governments appointed by President Johnson, was to conduct a registration of voters and an election of delegates to draft a new constitution whose provisions must provide for universal manhood suffrage.⁵¹

⁴³ HUGH TALMAGE LEFLER & ALBERT RAY NEWSOME, *NORTH CAROLINA: THE HISTORY OF A SOUTHERN STATE* 453-457 (The Univ. of N.C. Press, 1963).

⁴⁴ *Id.* at 33 (North Carolina ratified the Thirteenth Amendment on December 4, 1865).

⁴⁵ *Id.* at 458.

⁴⁶ North Carolina initially rejected the Fourteenth Amendment on December 14, 1865 in the legislature elected before the enfranchisement of former slaves but subsequently ratified the amendment on July 4, 1868 in the Constitutional Convention of 1868. See *Journal of the Constitutional Convention of the State of North-Carolina, at Its Session 1868*, available at <http://docsouth.unc.edu/nc/conv1868/conv1868.html>.

⁴⁷ LEFLER & NEWSOME, *supra* note 43, at 486-87.

⁴⁸ See *id.* at 487.

⁴⁹ An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428 (1867) [hereinafter Reconstruction Act]; Act of Mar. 23, 1867, ch. 6, 15 Stat. 2; Act of July 19, 1867, ch. 30, 15 Stat. 14 (amended by Act of Mar. 11, 1868, ch. 25, 15 Stat. 41). Congress declared that North Carolina had complied with the acts and readmitted the State's representatives to Congress, subject to the State government's ratification of the Fourteenth Amendment and conditioned upon their continued compliance in refraining from withdrawing the right to vote from any citizen or class. Act of June 25, 1868, ch. 70, 15 Stat. 73, 73.

⁵⁰ LEFLER & NEWSOME, *supra* note 43, at 487.

⁵¹ Reconstruction Act §§ 1-5.

The Reconstruction Acts' provisions for universal manhood suffrage, excluding only those citizens who supported the rebellion, greatly expanded the electorate by including former slaves and freed blacks.⁵² The 1866 electorate failed to ratify the proposed 1866 Constitution by a vote of 21,770 to 19,880, a combined 41,650 votes in total.⁵³ In contrast to the electorate of 1866, the electorate of 1868 consisted of a total registration of 179,653.⁵⁴ The registered voters who participated in the call for the convention consisted of 106,721 whites and 72,932 blacks.⁵⁵ It was this expanded electorate of former Union supporters, newly enfranchised blacks, and previously disenfranchised whites who comprised the majorities that elected Tourgée from Guilford County and a majority of Republicans throughout the state to the constitutional convention.⁵⁶ To appeal to this electorate, Tourgée set forth a political platform in Guilford County that would not only guarantee the continuation of the franchise to the newly expanded electorate, but would also ensure a series of constitutional benefits not previously included in the Constitution.⁵⁷

The addition of these “positive” rights, requiring governmental expenditures to provide services to the public, which were not constitutionally mandated before 1868, fundamentally changed North Carolina’s constitutional structure. While the Constitution of 1776 reflected the electorate’s desire to restrain government power, the Constitution of 1868 reflected the electorate’s desire to ensure equality by placing in the Constitution social policies designed to promote not only equal protection of the laws, but also social equality. For example, the 1776 Constitution as amended in 1835 contained an admonition for the General Assembly to provide for schools and university

⁵² *Id.* § 5.

⁵³ NORTH CAROLINA GOVERNMENT 1585-1979: A NARRATIVE AND STATISTICAL HISTORY 844 (John L. Cheney, Jr. ed., rev. prtng. 1981).

⁵⁴ LEFLER & NEWSOME, *supra* note 43, at 489.

⁵⁵ *Id.*

⁵⁶ *See id.*

⁵⁷ *See* UNDAUNTED RADICAL: THE SELECTED WRITINGS AND SPEECHES OF ALBION W. TOURGÉE 25-27 (Mark Elliott & John David Smith eds., 2010). Among these benefits were: (1) Equal civil and political rights to the negroes. N.C. CONST. art. I, §§ 1, 33 (1868). (2) Abolition of all property qualifications to vote. *See* N.C. CONST. art. VI, § 1 (1868). (3) Election by the people to all offices. *Id.* § 4. (4) Penal reform – the abolition of the whipping-post, stocks and branding – and Provisions for public charities for the blind, and mentally handicapped. *See* N.C. CONST. art. XI, §§ 1-11 (1868). (5) Uniform and ad valorem taxation of property. *See* N.C. CONST. art. V, § 3 (1868). (6) Provisions for an effective and free public school system, N.C. CONST. art. IX, § 2 (1868), and a provision for a low cost university system. *Id.* § 6.

education “at low costs.”⁵⁸ The 1868 Constitution provided a positive duty to provide for public education free of tuition⁵⁹ and included a provision to promote education in the Declaration of Rights.⁶⁰ Article I, Section 27 provided that “[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”⁶¹

Within the social structure of 1868, these changes greatly expanded the citizenship and constitutional guarantees of both the 1776 Constitution and the 1868 Constitution. The popularity among the newly expanded electorate was evident in the vote to ratify the Constitution. The new Constitution was passed by a vote of 93,084 to 74,015.⁶²

The political linchpins of these guarantees depended upon an electorate who would support these rights and support the election of officials who believed in these guarantees, and would act to implement and enforce them. Initially, the judiciary was concerned with the melding of freed blacks into the structures of the 1860’s, including jury service, the ability to give testimony as a witness, and the right to vote.⁶³ In modern times, the jurisprudence has been extended to involve the judiciary in more complex social problems, education, penal institutions, provisions for the mentally ill, and electoral fairness.⁶⁴

Tourgée’s life in North Carolina reflects these concerns. Although Tourgée sought election to Congress in the fall election of 1868,⁶⁵ local Republicans nominated him for superior court judge for

⁵⁸ N.C. CONST. ¶ 41 (1776).

⁵⁹ N.C. CONST. art. IX, § 2 (1868).

⁶⁰ N.C. CONST. art. I, § 27 (1868).

⁶¹ *Id.*

⁶² LEFLER & NEWSOME, *supra* note 43, at 491.

⁶³ *See id.* at 479-80 (“The idea of social equality was repugnant to most whites and was advocated by very few negroes.”).

⁶⁴ *See generally* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY’S ROLE IN AMERICAN EDUCATION 116 (Joshua M. Dunn & Martin R. West eds., 2009) (describing the judiciary’s role in pre-kindergarten programs at the state level in North Carolina); JOHN Q. LAFOND & MARY L. DURHAM, BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES 121-22 (1992) (discussing the judiciary’s role in outpatient commitment in North Carolina); PENAL REFORM IN OVERCROWDED TIMES 90-93 (Michael Tonry ed. 2001) (discussing judicial adherence to revised sentencing guidelines in North Carolina); Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2505 (1997) (analyzing the Supreme Court’s decisions regarding electoral districts in North Carolina).

⁶⁵ OLSEN, *supra* note 26, at 117-18.

the Seventh Judicial District, which was composed of eight counties: Person, Randolph, Guilford, Rockingham, Caswell, Alamance, Orange, and Chatham.⁶⁶ Elected for a six-year term, his experience on the bench illustrated the necessity of a judicial official willing to enforce the Constitution as written in order to ensure that constitutional rights were available equally. Tourgée's personal experience illustrated both the requirement that elected officials take seriously the need to uphold the Constitution and the principle that an independent judiciary is needed to uphold the rule of law.

In addition to his work on the state Constitution, Tourgée personally advocated (despite opposition from the legal community) for a simplification of the common law legal procedure.⁶⁷ Specifically, he advocated replacing the pre-war practice with a civil code based upon the Field Code in New York.⁶⁸ This began by a merger of the courts of law and equity and Tourgée's appointment to a Civil and Criminal Code Commission, where he codified and rewrote both North Carolina's civil and criminal laws.⁶⁹ Tourgée was joined in this effort by two other prominent lawyers, William B. Rodman and Victor C. Barringer.⁷⁰ Tourgée's efforts on the Code Commission lasted until 1871, when the new legislature ended the Commission.⁷¹ By that time, the Commission had reformed civil practice in the state.⁷² The reforms were designed to make the civil legal code and the courts accessible to the common man.⁷³ To compare the importance of this reform in North Carolina with the nation, the federal courts did not reform their pleading codes until 1937⁷⁴ and North Carolina did not rewrite the civil procedures adopted by this Code Commission until 1967, when it adopted a form of the Federal Rules of Civil Procedure.⁷⁵

⁶⁶ *Id.*

⁶⁷ *Id.* at 131.

⁶⁸ *Id.*

⁶⁹ *Id.* at 130.

⁷⁰ *Id.*

⁷¹ *Id.* at 137-38.

⁷² *Id.* at 131, 138.

⁷³ *Id.* at 131.

⁷⁴ Until 1938, federal civil procedure was a combination of common law pleading practices and Field Code pleading. See 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 1002 (3d ed. 2002).

⁷⁵ Chapter 1A of the General Statutes was added by Session Laws 1967, c. 954, s. 1; 1971, c. 818 and was made applicable to all actions pending on January 1, 1970. See N.C. GEN. STAT. § 1A-1; N.C. Monroe Constr. Co. v. Guilford Cnty. Bd. of Educ., 180 S.E.2d 818, 820 (N.C. 1971).

Tourgée's experience on the bench confirmed his suspicions that recalcitrant former Confederates would return to the antebellum status quo in their treatment of blacks. Tourgée intervened with local clerks of court to ensure that blacks would be included in jury venires.⁷⁶ He intervened to ensure that black witnesses would be allowed to testify at trial.⁷⁷ He sought the indictments of large numbers of Ku Klux Klansmen who sought to intimidate black voters in the elections of 1870.⁷⁸ It was these experiences that gave him the material he needed for his works of fiction.

Tourgée's work on the legal structure of North Carolina ended as an elected delegate to the convention of 1875, in which he fought a largely successful rearguard action protecting the reforms he advocated for in 1868.⁷⁹ After his service on the bench ended in 1875, Tourgée published legal practice manuals for the practicing bar that explained the reasoning behind the new Code.⁸⁰ In addition, he published a digest of decisions as an aid to implementing the Code.⁸¹

It is a testament to his handiwork and his advocacy that all of the major legal and social reforms he championed remained in the Constitution. But while the specific constitutional provisions guaranteeing equality remained in the Constitution, eliminating the two linchpins of the political system that brought about those guarantees diluted their practical effect. In 1877, the electoral compromise that withdrew federal troops from the South began a "redemptive" process where former Confederate officials began to "redeem" the states from Republican and black rule through violence and electoral victory.⁸² The immediate effect of these reforms was to first eliminate elected

⁷⁶ OLSEN, *supra* note 26, at 144-69.

⁷⁷ *Id.*

⁷⁸ *Id.* at 165-66.

⁷⁹ *Id.* at 199.

⁸⁰ VICTOR C. BARRINGER, WILLIAM B. RODMAN, ALBION W. TOURGÉE, *THE CODE OF CIVIL PROCEDURE OF NORTH CAROLINA* (1868), available at <http://archive.org/details/codeofcivilproce1868nort>.

⁸¹ ALBION W. TOURGÉE, *THE CODE OF CIVIL PROCEDURE OF NORTH CAROLINA, WITH NOTES AND DECISIONS* (1879), available at <http://archive.org/details/codecivilproced11courgoog>.

⁸² Electoral Commission Act (1877). On January 29, 1877, President Grant signed the Electoral Commission Act to settle the disputed 1876 election. The Commission awarded Rutherford B. Hayes the electoral votes he needed and Congress subsequently certified Hayes as elected by one electoral vote. In return Hayes agreed to withdraw troops from the South.

state officials committed to individual liberty as a social commitment.⁸³ However, the Reconstruction reforms stayed in place and were largely untouched by the state redeemers from 1875 until 1900.⁸⁴ While state constitutional protections remained in place, federal guarantees contained in the Thirteenth, Fourteenth, and Fifteenth Amendments were eviscerated by court decisions that effectively eliminated federal force against state action.⁸⁵ This retreat is best illustrated by judicial and Congressional decisions of the time, motivated in part by the exhaustion the nation faced after the Civil War.

In the federal judiciary, the retreat of individual liberty began with the *Slaughter-House Cases* and continued in the failure to support black voting rights in federal elections.⁸⁶ In addition to the lack of judicial enforcement, Congress failed to exercise its oversight of congressional elections to intervene in election contests placed before it in Southern congressional elections marred by electoral fraud or violence.⁸⁷ The failure of judicial officials to promote social equality was capped by *Plessy v. Ferguson*, a case in which Tourgée was the plaintiff's attorney and in which he sought colorblind justice.⁸⁸

However, his personal commitment to these affirmative rights was tested in his work as one of the state's first elected superior court

⁸³ LEFLER & NEWSOME, *supra* note 43, at 468.

⁸⁴ *Id.* at 506-30.

⁸⁵ *Williams v. Mississippi*, 170 U.S. 213 (1898) (providing that blatant black disenfranchisement could survive constitutional challenge under the Fourteenth and Fifteenth Amendments); *United States v. Cruikshank*, 92 U.S. 542 (1875) (dismissing federal indictments arising from mob violence against black voters in the Colfax Massacre); and *United States v. Reese*, 92 U.S. 214 (1875) (striking down federal enforcement act which prevented black elimination from juries).

⁸⁶ *Slaughter-House Cases*, 83 U.S. 36 (1872) (consolidating *The Butchers' Benevolent Ass'n of New Orleans v. The Crescent City Live-Stock Landing and Slaughter-House Co.*; *Paul Esteben v. Louisiana*; *The Butchers' Benevolent Ass'n of New Orleans v. The Crescent City Live-Stock Landing and Slaughter-House Co.*) (These cases were the first United States Supreme Court interpretation of the relatively new Fourteenth Amendment to the Constitution. It is viewed as a pivotal case in early civil rights law, reading the Fourteenth Amendment as protecting the "privileges or immunities" conferred by virtue of the federal United States citizenship to all individuals of all states within it, but not those privileges or immunities incident to citizenship of a state.).

⁸⁷ For an example of this see the election contest filed by Alexander D. Dantzer in 1902 in the 7th District of South Carolina where a contestant objected to the disenfranchisement of thousands of black voters which rejected the contest on the grounds that judicial relief was available to the contestant and that Congress should not declare acts unconstitutional.

⁸⁸ *See Plessy v. Ferguson*, 163 U.S. 537 (1896).

judges between 1868 and 1874.⁸⁹ He personally intervened in courts to ensure that new black citizens were included in jury lists and able to give testimony as witnesses in court.⁹⁰ Furthermore, he took an active role in eliminating Klan violence during the Kirk-Holden rebellion in Alamance and Guilford counties by securing the indictments against Klan members in those counties.⁹¹ Despite Tourgée's personal and direct efforts, statewide change was difficult because it required personal commitment on the part of the judges to the principle of equal protection for all citizens.

After 1877, the political will to enforce both state and federal guarantees began to wane in the face of the lingering exhaustion from the Civil War and in the face of resurgent notions of white supremacy. Once the right to vote was denied to the black Republican population of the South, the ballot box was no longer an effective means for citizens to police their officials.⁹² Thus, a new political majority effectively ended party competition for sixty years until the reapportionment revolution brought about by *Reynolds v. Sims*.⁹³

While Tourgée's quest for racial equality failed to capture political support, the other reforms he championed flourished in North Carolina, providing the public with the tools to become a social democracy. This "mixed record" is reflected in Samuel Ashe's *Biographical History of North Carolina* where Tourgée's contribution to North Carolina is described as follows:

What wonder, then, that such a man, with different antecedents, different ideals, different ambitions, and looking at public questions from a diametrically opposite point of view, should soon become the worst hated of the foes of the white man?

His first public service in the State was as member of the Constitutional Convention of 1868. A man so ambitious, so able, so cultured, could not fail to use an opportunity like this to leave his impress upon the fundamental law of the State. He was largely influential in securing:

1. Equal civil and political rights to the negroes.
2. Abolition of all property qualifications.
3. Election by the people of all officers.

⁸⁹ OLSEN, *supra* note 26, at 144-169.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² LEFLER & NEWSOME, *supra* note 43, at 506-30.

⁹³ *Reynolds v. Sims*, 377 U.S. 533 (1964); *Id.*

4. Penal reform—the abolition of the whipping-post, stocks, and branding.
5. Uniform and ad-valorem taxation.
6. Provisions for an effective public school system.
7. Judicial reform, resulting in the Code of Civil Procedure.

His persistence, in season and out of season, in advocating the first of these objects has made the people forget, to a great degree, his real service to them in securing the last six. As a matter of fact, few men have lived in the State who have conferred upon it such lasting good as did A.W. Tourgée; and yet he was a partisan leader of a motley horde, not many of whom were blessed with any sense of common decency or common honesty.⁹⁴

While it would be sixty years before the United States Supreme Court and the Federal Congress began systematically dismantling the legal structures surrounding segregation and disenfranchisement, the state structure remained available for enforcement. Since the invigoration of the Fourteenth and Fifteenth Amendments, new judicial standards to enforce the protection of these states rights have arisen.⁹⁵ The development of federal law to enforce protections of the Civil War Amendments has a state parallel, where the North Carolina Supreme Court has developed new standards to expand judicial relief for violation of the constitutional rights established by Tourgée and his compatriots during Reconstruction.⁹⁶ Tourgée's enduring legacy is the structure of affirmative rights that he drafted in 1868.

During his lifetime, Tourgée remained a lightning rod for controversy on matters of racial equality. Tourgée, like most reformers, is a paradox of light and darkness. An uncompromising romantic for his cause, he shares much with his opponents, Southern romantics of another cause lost in their lifetimes. Like the paradox of the South, he was defined by the passions and problems of race in America. He is an archetypal figure that carried the passions of racial equality, and, for a brief period of time between 1868 and 1875, made an indelible mark on North Carolina jurisprudence. The energy which racial conflict ignites remains a constant in Southern politics and literature. Tourgée is a distinct voice, a Northern romantic.

⁹⁴ 4 SAMUEL A. ASHE, *BIOGRAPHICAL HISTORY OF NORTH CAROLINA* 433 (1905).

⁹⁵ See *Hoke Cnty. Bd. of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004) ("Leandro II"); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997) ("Leandro I").

⁹⁶ See generally *Corum v. Univ. of North Carolina*, 413 S.E.2d 276, 289-91 (N.C. 1992) (discussing the rationale for allowing direct causes of action against the State for violations of the civil rights protected in the North Carolina Constitution).

He dually documented his passion in both literature and in legal assertions. His contribution to both is legion. He fully embraced public life and contributed to the dialogue of public issues of his time. When he was not shaping public policy directly, he was writing about it. He remained true to his ideals—democracy and equality—despite the tide of public opinion in his lifetime and the resulting cost to his personal financial interests.

One cannot separate the Tourgée of literature from Tourgée the lawyer. In both roles, he sought through legal argument and emotional appeal to debunk the irrationality of laws and social prejudices based upon accidents of birth. In the detail of his novels, he evidences the irrationality of inequality in the daily life of a judge. Similarly, Tourgée's briefs, particularly in *Plessy*, show the irrationality of laws whose benefits and detriments are based solely upon ethnicity.

The tension between the guarantees limiting governmental power and requiring its exercise pose unique remedial problems for the judicial branch of government, which have recently been the subject of sporadic litigation across the country. These remedial problems pose core constitutional dilemmas involving the application of the separation of powers doctrine. In North Carolina, funding for education has been the subject of such remedial problems. In addition to educational funding issues, other states have had issues with prison funding and funding for essential state services such as the courts.⁹⁷

When the legislative branch and the executive branch fail to provide citizens with constitutionally required services, what remedial actions may citizens avail themselves of in the judicial branch? This tension is left unanswered both by the text of the Constitution and by Tourgée himself. Even so, Tourgée's legacy is one of moral obligation, calling future generations to have a commitment to individual liberty, democracy, and equality.

Tourgée's successes and failures are a cautionary tale for the modern reader. Reformers, like Tourgée, promote ideals of social democracy and reform in societies that do not appreciate their benefits. The premature introduction of these ideals can lead to backlash which stunts development of the more progressive society that the reformer desperately seeks. At the end of his life, Tourgée was bitter about the

⁹⁷ See Scott Mayerowitz & Nathalie Tadana, *Budget Nightmare: 10 Most Broke States*, ABC NEWS (July 7, 2009), <http://abcnews.go.com/Business/Economy/story?id=8016634&page=1&singlePage=true#.T-n4orXDCAg>.

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results of his errand because he could not foresee the catalyst that his advocacy promoted. Not surprisingly, it was his promotion of education and other social programs that ultimately led to the revolution in social equality that he sought to impose.

