

JUSTICE DEFERRED

Albion Tourgée and the Fight for Civil Rights

By MARK ELLIOTT, Ph.D.

“I don’t care a rag for *‘the Union as it was.’*
I want and fight for the Union *‘better than
it was.’*”

Albion Winegar Tourgée
In a letter to schoolmates at the University of
Rochester, ca. 1863



This exhibition was made possible by The Gladys Kreible Delmas Foundation, The New York Council for the Humanities (an affiliate of The National Endowment for the Humanities) and with additional support from the Chautauqua Region Community Foundation. Any views, findings, conclusions or recommendations expressed in this publication do not necessarily represent those of the sponsors. Copyright © 2008 by Mark Elliott. Published by the Chautauqua County Historical Society, P. O. Box 7, Westfield NY 14787. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior permission of the Chautauqua County Historical Society.

Foreword

ALBION W. TOURGÉE (1838-1905) DESERVES A PLACE OF HONOR in the pantheon of American heroes, yet he is only now garnering the public recognition he should have won in his lifetime. Passionately dedicated to the ideals of equality and justice inscribed in the Declaration of Independence and the Constitution, he fought for half a century to implement them, as a Union soldier in the Civil War, as a politician and judge in Reconstruction-era North Carolina, as a novelist and journalist in subsequent decades, as the founder of the country's first national civil rights association with an interracial membership, and as a lawyer arguing against segregation on behalf of African Americans. Tourgée sought to fulfill the mission of the abolitionist movement, which had culminated in ending slavery and granting African American men citizenship and voting rights.

Unlike his abolitionist predecessors, however, who saw their ranks broaden and public opinion gradually shift in favor of their goals, Tourgée saw the abolitionist movement disband, the nation walk away from its responsibility to the emancipated slaves, the public tire of the “everlasting Negro question,” the courts gut the new constitutional amendments, and the Congress allow southern states to suppress the African American vote with impunity. In a political climate of hardening racist ideology, he stood almost alone among whites in championing the rights of African Americans and disputing theories of biological inferiority. Even more impressive, at a time when social contacts across racial lines had all but ceased, Tourgée maintained a vast correspondence with African Americans in all walks of life, frequently addressed Black audiences, and collaborated with such radical race leaders as Ida B. Wells in agitating against lynching, disfranchisement, and Jim Crow. Tourgée died forgotten by white Americans, having paid a heavy price for his commitment to his country's founding ideals, but now that the nation has finally caught up with his vision of racial equality, we can embrace his legacy with special pride.

That legacy might have died with him, had not Tourgée and his wife Emma carefully preserved his papers for posterity, an extraordinary collection which were ultimately donated to the Chautauqua County Historical Society. The Albion W. Tourgée Papers total 11,167 items filling 83 boxes and 60 reels of microfilm. They include letters to six U.S. Presidents and dozens of important political figures; fascinating exchanges with African Americans, white progressives, and racist spokesmen; decades of correspondence with Emma providing an astonishingly intimate view of their conjugal life, as well as of Emma's role in managing Tourgée's career and editing his writing; communications with publishers and editors; copies of Tourgée's articles, numbering in the hundreds and buried in newspapers that sometimes no longer survive in other repositories; and scrapbooks Tourgée kept of current political commentary and reviews of his own lectures and writings. Thanks to this precious archive, historians have been able to recover Tourgée's contributions from obscurity and thereby to illuminate the past from an alternative perspective.

The three historians who have done the most to restore Tourgée to public memory have all mined the Chautauqua County Historical Society's collections. Otto Olsen wrote the first comprehensive biography of him and in the process rewrote the history of Reconstruction; Richard Current's collective biography vindicated Tourgée and his fellow carpetbaggers from unmerited obloquy; and Mark Elliott won the Organization of American Historians' prestigious Avery O. Craven prize for the first biography to offer a fully rounded portrait of Tourgée's public and private life, along with an insightful reinterpretation of his arguments in the *Plessy v. Ferguson* case. No scholar is better suited than Elliott to sum up Tourgée's achievements in graceful, lively prose and thus prepare viewers to appreciate the Chautauqua County Historical Society's splendid exhibition, “Justice Deferred: Albion Tourgée and the Fight for Civil Rights.”

Carolyn L. Karcher Ph.D.
Professor Emerita, Temple University



Justice Robert H. Jackson boarding a flight from Paris to Germany in 1946 for the International War Crimes Trial

Introduction

On April 4, 1950, Supreme Court Justice Robert H. Jackson wrote a letter to friends in Jamestown, New York, after discovering an impressively-argued legal brief by one “Albion W. Tourgée” among the documents filed in the 1896 U.S. Supreme Court case of *Plessy v. Ferguson*. Jackson knew it had to be the same Albion Tourgée he recalled hearing about in his youth, a once-famous author who lived in nearby Mayville, just a few miles from his hometown. Tourgée’s career, after all, had been built upon his forceful advocacy of black civil rights and the racial egalitarian ideals of Reconstruction, and the brief he discovered was in keeping with those principles as it offered a sweeping challenge to the constitutionality of racial segregation on railroad cars on behalf of the plaintiff Homer Plessy. Besides, could there really be two men with the name *Albion Tourgée*? But Jackson was mystified as to how this upstate New Yorker came to be involved in a case arising out of New Orleans. Moreover, he wondered why Tourgée’s participation and his powerful arguments in the case were not as well-known to locals as Tourgée’s best-selling political novels.

“The Plessy case arose in Louisiana and how Tourgée got into it I have not learned,” Jackson

told his Jamestown friends. “In any event,” he continued:

I have gone to his old brief, filed here, and there is no argument made today that he would not make to the Court. His brief is a rather witty production of points. He says ‘Justice is pictured blind and her daughter, the Law, ought at least to be color-blind.’ Whether this was original with him, it has been gotten off a number of times since as original wit.

Tourgée’s forgotten arguments must have given Jackson pause for reflection upon the far-reaching historical consequences of the landmark *Plessy* case. His investigation into *Plessy* came not from idle curiosity. At that moment, two cases had come before the Supreme Court that once again challenged the constitutionality of racial segregation, *Sweatt v. Painter* and *McClaurin v. the Oklahoma Board of Regents*. Each offered the court with an opportunity to reverse the infamous precedent of *Plessy v. Ferguson* that had established the constitutionality of the “separate but equal” doctrine used by the state of Louisiana to justify legally required segregation. The legal

foundation of the Jim Crow south was built upon this decision. As Jackson wrote to his friends, he pondered whether or not he would vote to reverse *Plessy*, remarking that it still remained to be seen “whether [Tourgé’s] position will be adopted and what was a defeat for him in ’96 will be a post-mortem victory.”

Tourgé’s post-mortem victory would have to wait four more years. In 1950, Justice Jackson and a majority of his colleagues on the Supreme Court chose not to directly attack the precedent of *Plessy v. Ferguson*, but rather to rule in favor of the plaintiffs in the two above-mentioned cases on narrower grounds. Instead, it would be *Brown v. the Board of the Education of Topeka, Kansas* in 1954 that dealt the death blow to *Plessy*. In that landmark case, a unanimous court, that included a physically-ailing Justice Jackson and a brand-new Chief Justice Earl Warren, ruled that segregating schools by race is “inherently unequal,”



Tourgé at his office at Thorheim, his home in Mayville, Chautauqua County, New York, ca. 1890

declaring that “any language in *Plessy v. Ferguson* contrary to this finding is rejected.”

Though its legal standing is no more, the story of the *Plessy* case cannot be erased from history. Over a half-century since the momentous *Brown* decision, some of the questions over proper remedies for racial injustice and protections of equal citizenship with which Tourgé grappled in the 19th century remain unsettled. There is much to learn from re-visiting Tourgé’s early struggles for civil rights and it is still true, just as Justice Jackson remarked in 1950, that there are few arguments made today that Tourgé did not make himself back in 1896. Indeed, Tourgé’s brief in the *Plessy* case has been re-discovered by a new generation of legal and historical scholars, and its arguments have become the subject of rapidly-increasing attention in law reviews and scholarly journals over the past decade. His argument that the law should be “color-blind” law, for one, has drawn attention from scholars who recognize his use of this concept as one of the first influential articulations of a constitutional position on race-neutral citizenship. At the same time, Tourgé made pioneering arguments about the nature of white privilege, in particular his assertion that “whiteness” functions as a kind of “property” in America that inherently advantages some while disadvantaging others. That “whiteness” is property has more recently become a main contention of legal scholars who reject the possibility of “race-neutral” citizenship in a society with such deeply-entrenched institutional and cultural racism. In his elaboration on these points and others, Tourgé may still have more to contribute to our contemporary debates on the relation of race to citizenship.

We should then begin by asking, who was Albion Tourgé? Tourgé’s involvement in the landmark case of *Plessy v. Ferguson* capped a remarkable career marked by a crusading spirit, unflinching courage, personal sacrifice, and timeless eloquence in support of citizens’ rights. His career highlights include: two enlistments as a Union officer in the Civil War; an eight-year term as U.S. Superior Court Justice in North Carolina;



The Greek Revival home of the Tourgée family home in Kingsville, Ohio in a photograph, ca. 1908

co-authorship of the North Carolina legal codes; a main architect of North Carolina's 1868 State Constitution; national literary fame as an author of more than twenty books, including two best-sellers; editor of a national monthly magazine entitled *Our Continent*; popular columnist for the *Chicago Daily Inter-Ocean*; honorary professor of legal ethics at Buffalo Law School; founder of the first national civil rights organization (the National Citizens Rights Association) in 1891, and author of the nation's first anti-lynching law, passed in Ohio in 1896.

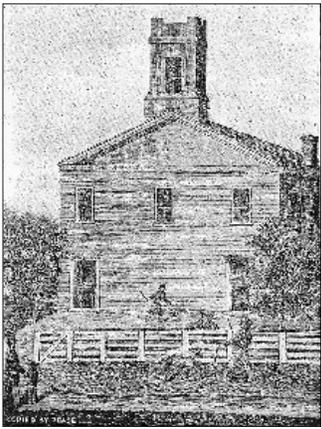
Yet, this list of achievements hardly begins to tell the story of Tourgée's life. His career spanned one of the most tumultuous periods of American history that saw the nation torn apart by Civil War, slavery abolished, the slave states reformed and reconstructed, and the United States Constitution revised in fundamental ways. Tourgée took an active part in all of these changes. Yet, he lived to witness a counterrevolution succeed in the south that attempted to undo all of that had been accomplished. In the final years of his life, Tourgée did everything in his power to halt the counterrevolution. The following pages provide some of the details of this dramatic tale, and a few answers to the query of Justice Jackson who wondered how Tourgée ended up before the

Supreme Court in 1896.

Early Life

Albion Winegar Tourgée was born in the small, rural town of Williamsfield in the extreme northeast corner of Ohio on May 2, 1838. At that time, Ohio was still frontier country and the northeast region surrounding Williamsfield, which was known as the Western Reserve, continued to be settled primarily by New Englanders who had migrated across upstate New York, and through Western Pennsylvania. Tourgée's parents, Valentine and Louisa (Winegar) Tourgee, came from Massachusetts in search of cheap land to farm, and arrived in Ohio just two years before Albion, their only child, was born. But they found conditions harsh; medicine scarce; and in 1843, an illness took Louisa's life. Valentine soon remarried and moved to the more established town of Kingsville, Ohio. His second marriage to a woman named Rowena Snow would produce Albion's only sibling, a half-sister named Rosette.

During Tourgée's youth, the demographic profile and culture of the Western Reserve mirrored that of Western New York. Both were "burned-over" districts where the religious enthusiasm of the 1830s evangelical revivals paved the road for a plethora of radical and utopian politi-



Tourgée attended Kingsville Academy, shown here in an early engraving, courtesy of the Kingsville Public Library, Kingsville, Ohio

cal movements in the antebellum years. Among the most controversial of these evangelical-influenced movements was abolitionism. Though he never embraced the “immediatism” of the most uncompromising abolitionists, Tourgée lamented the “crying sin” of slavery as a young man, and was impressed by the courage of hard-liners who endured public ridicule and often risked their lives in their unrelenting agitation for the abolition of slavery. Later in life, he would write glowingly of abolitionists like Frederick Douglass and William Lloyd Garrison as “men of conscience” who refused to allow their fellow citizens to shut their eyes to this great injustice. Tourgée credited the abolitionists with hastening a transformation in public values that brought down the slave empire—an event deemed impossible by many when their movement began.

An academic standout at the Kingsville Academy, Tourgée sought entrance to Harvard University, but had to settle for a more affordable alternative in the University of Rochester. As a Rochester student, he excelled in debate and earned a reputation for aggressive argumentation and a penchant for challenging authority both inside and outside the classroom. During the 1860 election, he helped organize and lead a student chapter of the “Wide Awakes” club in support of Abraham Lincoln’s candidacy for President, despite a ban on political clubs by the University. Continuing financial hardship prompted Tourgée to drop out of Rochester in the spring of 1861, though he planned to re-enter the University the following semester. But the firing on Fort Sumter in South Carolina changed his plans. Responding to Lincoln’s call for troops, Tourgée enlisted in the 27th New York infantry regiment in April. He would never return to the University of Rochester, but the school later conferred a Bachelor’s Degree on him in 1862 in recognition of his military service, and a Master’s Degree in 1865.

Military Career

Whenever he discussed his personal history, Tourgée would insist that his experience in the Civil

War “radicalized” him on civil rights issues.

There is little evidence, indeed, that he would have followed the same path in life had it not been for the trauma he suffered and the experiences he had when serving as a Union officer in the occupied south. Those memories never left him; he returned to them again and again in his literature for the remainder of his life.

His first term of service in the 27th New York infantry was brief, but not mercifully so. After a few weeks of inadequate training exercises, his regiment was rushed to Washington, DC in early July to defend the capitol. On July 21, he participated in the Battle of Bull Run; the first major conflict between Union and Confederate forces at the Manassas railroad junction in Northern Virginia where Confederates had been massing for a possible attack. After enduring several hours of intense fighting in the battle, Tourgée was grievously wounded during the Union retreat from the field. A speeding artillery vehicle struck him in the back, and by the morning, he was paralyzed in his lower extremities. Honorably discharged after doctors pronounced him permanently disabled, Tourgée returned to Kingsville for ten miserable months of rehabilitation. He busied himself during this time by reading law on the presumption that his paralysis would prevent him from a life of manual labor. Miraculously, he regained the ability to walk in the summer of 1862, and to the surprise of all, promptly reenlisted by joining the 105th Ohio infantry—a new regiment that he had helped to recruit.

Though his injuries continued to plague him, Tourgée served as a Lieutenant for another eighteen months during which he participated in several significant engagements with the enemy at Perryville, Stones River, Chattanooga, and Chickamauga before his ailing back eventually forced him to resign his commission. Stationed in Kentucky and Tennessee, he witnessed slavery—and met slaves—for the first time. These experiences brought about a new conviction that the war had been intended to serve a higher purpose. Tourgée, and many others in his regiment,



Lieutenant Tourgée at left, with Lieutenants Wallace and Morgaridge of the 105th Ohio Infantry, taken near Deerhead, Tennessee, 1863.



Tourgée with fellow North Carolina Code Commissioners William Rodman and Victor C. Barringer, 1868.

formed strong bonds with the fugitive slaves they encountered, men and women who entered their ranks offering information and assistance. When Lincoln implemented the Emancipation Proclamation in 1863, Tourgée wrote to his friends at the University of Rochester:

I don't care a rag for *'the Union as it was.'*
I want and fight for the Union *'better than it was.'* Before this is accomplished we must have... a thorough and complete revolution and renovation. This I expect and hope. For this I am willing to die—for this I expect to *die*.

The “revolution” that he envisioned meant redeeming the nation from the sin of slavery, and making good on the principles of equality stated in the Declaration of Independence.

On a furlough from the 105th in May of 1863, Tourgée married his longtime fiancée Emma Kilbourne, who had once been a classmate at Kingsville Academy. Once his crippling back ailments returned, Emma helped persuade him to resign from the military in December of 1863. Back in Ohio he gained entrance to the bar, but Tourgée found it difficult to pursue a career in the overcrowded field of law. The couple soon moved to Erie, Pennsylvania where he became

headmaster of the Erie Academy. But the drama of the great social upheaval he witnessed in the south remained with him. As the war dragged to its close in 1865, he hatched a plan to return to the south and take part in completing the “revolution” by aiding in the transition from a slave society to a free one.

Reconstruction

While the nation mourned the assassination of Abraham Lincoln and welcomed home the war's survivors in the summer of 1865, Tourgée organized a caravan of friends and extended family to start a new life in the south. Having been devastated economically by the war, the south as a whole presented an inviting field of opportunity for those with capital and skills to invest. After personally meeting with North Carolina State Governor William W. Holden, Tourgée arranged to purchase property in Greensboro from a prominent Quaker family and he devised plans to launch a nursery business in partnership with two Rochester classmates. He seems to have persuaded both his friends and family members that the South's welcoming climate and cheap land surpassed the West as a land of opportunity.

Once in Greensboro, the Tourgées demonstrated that they had interests other than pecuni-



Emma Kilbourne Tourgée and Albion Tourgée, 1865

ary gain in mind. Both Albion and Emma were actively involved with the local Quaker community, longtime antislavery agitators, in aiding the black community to found schools and acquire property. But, this work came under attack when North Carolina conservatives swept into power in 1866 and curtailed basic civic rights for the former slaves—a result of President Andrew Johnson’s lenient reconstruction policies that restored the planter class to power. Tourgée’s eloquent denunciations of the “black codes” at local political meetings catapulted him into a position of political leadership. Soon, he was editing a Republican newspaper, the *Union Register*, and picked to represent Guilford County at the national “Loyalist Convention” held in Philadelphia in 1866—a group of Southern Republicans calling upon Congress to take stronger measures to counteract the President’s reconstruction policies. Then, in 1868, he was elected to the North Carolina Constitutional Convention on the strength of the black electorate, temporarily enfranchised by the U.S. Congress.

Tourgée’s legal training and oratorical prowess made him a natural leader at the 1868 State Constitutional Convention, where he influenced the conferees to adopt broad reforms, including equal citizenship for all men, regardless of race; elimination of property requirements for jury duty and holding of public office; abolition of corporal punishment including whips and stocks, free public education for all; popular election of most political offices and judgeships; and an overhaul of the civil and criminal codes. Though he failed to secure two additional reforms—elimination of the poll tax and abolition of capital punishment—the new Constitution amounted to an egalitarian revolution in the state that would never be entirely reversed, even after the fall of Republican governments in the south. After the Constitution was ratified, Tourgée served on the three-person committee to re-write the Code of Civil Procedure for the state, eliminating the antiquated procedures that bogged down the justice system, and modernizing the law to make it more comprehensible and accessible to the common people.

Though he aspired to enter the United States Congress, the Republican Party prevailed upon Tourgée to run instead for Superior Court Justice, out of a desperate need for qualified Republican candidates with legal training. His proficiency in the law served him well during his six year term from 1868 to 1874; he distinguished himself in the courtroom and earned the respect and praise of many, including some prominent conservatives. This is not to say that his jurisprudence was uncontroversial, far from it. His courtroom was notorious for such unusual policies as a ban on the use of racial epithets by practicing lawyers on penalty of a heavy fine, and an insistence on racially-integrated juries in cases that involved racial violence. On several occasions, he put his own life in jeopardy by implementing harsh sentences to white men for crimes against blacks, and for taking steps to make certain justice was served in the courtroom regardless of public pressure to acquit.

A campaign of terror and vilification against Republican governments spread in 1868-70, often undertaken by that shadowy organization that called itself the Ku Klux Klan. Tourgée personally found himself the target of threats and assassination plots—it was rumored that he had been sentenced to death by the Klan. Not one to back down to extra-legal politics, he personally led an investigation in 1871 that brought indictments against sixty-three Klan members that ensnared several prominent citizens.

Due in part to the intimidation of black voters and ballot box fraud, Conservatives took back the State legislature in North Carolina in 1870, and initiated a slow rollback of Republican policies over the next decade. Most convicted Klansmen were pardoned, and the civil rights of black citizens were gradually eroded. At the reactionary North Carolina Constitutional Convention of 1875, Tourgée stood with the Republican minority that sought to prevent the complete undoing of their 1868 constitutional reforms. While most Republican reforms were left intact, Conservatives successfully inscribed public school segregation and a ban on interracial marriage into

the State Constitution. When Tourgée's Superior Court term expired in 1876, he was shut out of most political opportunities in the state, and reduced to the modest federal-patronage position of Pension Officer in Raleigh.



Adaline Patillo, shown with her younger sister Mary, was adopted and given an education by the Tourgées

The Tourgées lived an unconventional life in the South. They were shunned by Southern “polite society” because of their close association with blacks, the northern schoolteachers and missionaries who worked with blacks, and lower class whites. In 1869, they adopted Adaline Patillo, a destitute ex-slave, and raised her and her sister Mary in their home to the great horror of the conservative press. In 1873, they sent Adaline to Virginia’s famous Hampden Institute where she was a classmate of Booker T. Washington, and then to other boarding schools in the North. But, after the birth of a daughter in 1870, Emma’s enthusiasm for their work in North Carolina began to fade. She wished to raise Aimée, their only natural child, in a less hostile environment where they could freely attend church, and she feared the treatment her daughter might receive when she entered school. After several

extended stays in Erie, Emma decided to take Aimée to Erie permanently and separated from Albion in 1878. A year later, after a failed run for U.S. Congress in the fall of 1878, Albion and Emma reconciled when he agreed to leave North Carolina for good.

Before he left, Tourgée made one last contribution to the reconstruction of North Carolina. He appeared before the Supreme Court of North Carolina and made a brilliant argument on behalf of Tabitha A. Holton, who had applied for admission to the bar. Holton and her brother Samuel had prepared for the bar exam (probably under Tourgée’s tutelage), but the State had refused to give Tabitha the exam, arguing that women could not be admitted to the bar because they were not included in the term persons when the governing antebellum statute was originally framed. In a special hearing of the State Supreme Court, Tourgée argued that the revolution that had brought citizenship to former slaves ought to extend those rights to women as well:

The Court has already held that the term ‘person’ in this state includes colored males which was certainly as far from the intent of the Legislature at the time of [the statute’s] adoption as the construction now contended could *possibly* be... The same reason which induced the Court to extend the law to the colored men, applies with equal force to women. The circumstances surrounding the former have been changed by revolution. The circumstances which surround the latter are constantly changing by the progress of enlightened thought.

His argument prevailed and, after Tabitha Holton passed the bar exam on her first try, North Carolina became the first southern state, and only the sixth state in the Union, to admit women to the bar.

Literary Fame

In 1879, Tourgée decided to make his experiences during Reconstruction the basis for a novel. The

final withdrawal of Federal support for Republican governments in South Carolina and Louisiana overwhelmed him with an urge to tell the true story of Reconstruction. He had published an intriguing, moderately-successful novel entitled *Tionette* (1874) under the pseudonym “Henry Churton,” about the life of a young slave woman who escaped to freedom during the Civil War. A second novel, *Figs and Thistles*, that drew upon his own Civil War experiences, lay unfinished when he decided to undertake his Reconstruction novel. He put aside all else and poured fifteen years of struggle and frustration into a story that was both a scathing indictment of the Republican party for abandoning Reconstruction, and a rousing defense of the high principles of equal citizenship and Federal supremacy that the party still officially embraced. The result was a novel anonymously published in November of 1879 entitled *A Fool’s Errand by One of the Fools*.

Within six weeks of its release, *A Fool’s Errand* had become a sensational best-seller, enjoying dozens of rave reviews and attracting a great deal of speculation about the identity of its author. No one was more surprised than Tourgée, who had expected the romantic *Figs and Thistles* (which came out at nearly the same time) to be the commercial success, and the defiant *A Fool’s Errand* to be scorned. But, the novel seemed to stir the old antislavery fervor in the north—indeed many enthusiastically likened the novel to *Uncle Tom’s Cabin* for its effectively dramatized political message—it sparked a genuine political debate over the need for new approaches to solving racial strife in the south. Most gratifying was the warm reception for his vindication of the much-abused “carpetbaggers,” “scalawags” and “freedmen” depicted in the novel as courageous defenders of democracy and the rule of law standing alone against unreconstructed Confederates seeking to undo the results of the Civil War. The story concluded with an endorsement of Federal funding for public education in the South and continued Federal protection of black civil rights.

Once his authorship had been revealed, Tour-

gée took up residence in New York City where he enjoyed celebrity status and rubbed elbows with leading literary figures and Republican Party string-pullers. Embraced as an important voice for the Stalwart faction of the Republican Party, Tourgée took an active role in the presidential campaign of 1880, and wielded a direct influence on the Republican candidate James A. Garfield, an old friend, in his views on southern issues. *Bricks Without Straw* (1880), a sequel of sorts to *A Fool’s Errand*, came out during the election season, and even surpassed the original in sales during its first six months. This novel told the story of Reconstruction largely from the point of view of two former slaves, and it concluded with another rousing plea for Federal intervention in the south. After President Garfield was assassinated just a few months into his first term, Tourgée’s position of influence in the Republican Party quickly faded, and soon he gave up designs for a patronage position to focus instead on his literary career.

Mayville

On a trip through Western New York in 1881, Tourgée purchased a twenty-three room mansion situated on fifty picturesque acres overlooking Chautauqua Lake in the town of Mayville. Whimsically he dubbed the home “Thorheim,” or “fool’s home.” A perfect writer’s retreat, the home was located close to the thriving intellectual community at the Chautauqua Institution, where Tourgée would become a regular speaker, and within easy reach of many friends and family in Erie and the Western Reserve. The house still stands in 2008 on South Erie Street, identified with a historic site marker, though it has long since been converted into an apartment house.

Tourgée continued to write fiction while living in Mayville, eventually totaling twelve novels, three novellas, and three collections of short stories. His subject matter ranged from political histories, such as *Hot Plowshares* (1884) which dramatized the abolitionist movement and the causes of the Civil War, to political causes, such as *Pactolus Prime* (1890) and *Murvale Eastman* (1890) which addressed the “race problem”



Emma Tourgée with Amiée, the only child born to the Tourgées



In 1881, the Tourgées purchased this 23-room mansion in Mayville and renamed it “Thorheim,” or “fool’s home”

and the “labor problem” respectively, to lighter stories on topics of local color, such as *Button’s Inn* (1887) which captured bygone days at a popular local establishment. None of these recaptured the commercial success of his two Reconstruction novels, and Tourgée’s penchant for didacticism increasingly hurt his critical reputation as the rage for unsentimental realism in fiction took hold.

Tourgée’s most ambitious literary venture came with the launch of a lavish weekly magazine, *Our Continent*, in 1882. Published at a time when magazine editors carried enormous influence on middle class values and tastes, the magazine aimed to establish itself as a national arbiter of literary and cultural trends with Tourgée as editor-in-chief. Enthusiastic for the venture, Tourgée sunk his entire fortune into the magazine, and paid high commissions to attract leading illustrators and authors, including Oscar Wilde, Harriet Beecher Stowe, Rebecca Harding Davis, and Joel Chandler Harris. Unfortunately, the magazine was unsuccessful, and Tourgée bankrupted himself in vain efforts to save it. After the last issue of *Our Continent* in 1884, the Tourgées spent the next thirteen years fighting off creditors, while maintaining their lavish Mayville home on a shoe-string budget.

Beginning the Civil Rights Movement

When not writing works of fiction, Tourgée went on lecture tours and contributed a steady stream of lively and often controversial newspaper editorials on a variety of political and social issues. In 1888, the Chicago Daily *Inter-Ocean*, the city’s leading Republican newspaper, gave him a regular weekly column entitled “A Bystander’s Notes.” This column brought Tourgée back into the thick of politics, and he concentrated his attacks on the Republican Party for failing to take action against the new wave of white supremacy in the South. “A Bystander’s Notes” carried gruesome details on an alarming number of incidents involving racial violence and brutal lynching—a growing phenomenon—that failed to receive attention in mainstream northern press. His columns provoked extreme responses: an avalanche of hate mail from those who accused Tourgée of dredging up Civil War antipathies for political purposes, and scores of admirers, especially among African Americans who cheered his unwavering devotion to principle. “A Bystander’s Notes” was soon being republished across the nation in black-owned newspapers, bringing Tourgée renewed status and visibility.

When the State of Louisiana passed the “Separate Car” Act in 1890 requiring railroads to



Button’s Inn, an old stage coach tavern in Westfield NY, was the inspiration for Tourgée’s 1887 novel of the same name

maintain “equal but separate” facilities for blacks and whites, Tourgée denounced it in his column. This law was one of several bold new attempts by conservative governments in the South to deprive blacks of civil and political rights through legislation (as opposed to extra-legal violence or intimidation). Though segregation was already widely practiced in privately-owned businesses, and tolerated in public schools which were community-controlled, no States had passed laws that actually *required* racial segregation in any businesses or public services for fear that it violated the 14th Amendment. Tourgée certainly agreed. He called upon Louisiana blacks to challenge the constitutionality of the law, citing the 14th Amendment’s guarantee of “equal protection” of the laws and its clear language that “no state may make or enforce any law” that deprived American citizens of their “privileges or immunities.”

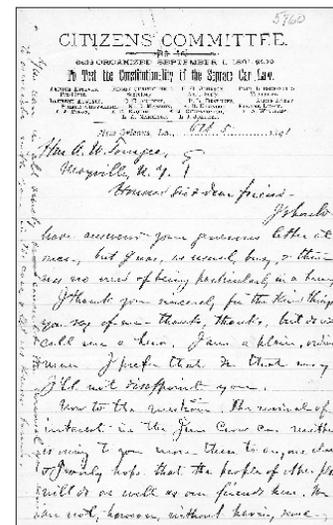
Within a year, a group of New Orleans activists led by Louis A. Martinet, the editor of an African American newspaper, the *New Orleans Crusader*, and an avid reader of “A Bystander’s Notes,” organized a “citizen’s league” to challenge the law. Once they had raised \$1,412.70, Martinet contacted Tourgée and offered him the entire fund to serve as “lead counsel in the case from beginning to end.” Though he remained heavily in debt, Tourgée agreed to take the case without remuneration. The fund was used instead to hire co-counselors with more experience in the procedures of Louisiana and in guiding a case to the Supreme Court. Through long-distance correspondence, Tourgée worked with his colleagues on every detail of their test case, from the choice of defendant and the staging of his arrest, to the fine points of argument to be made at the local, state, and federal levels.

From the beginning, Tourgée and Martinet saw the Louisiana test case as only one prong in a larger strategy to stop the assault on black civil rights. With their collective experience in journalism, they agreed to launch a national civil rights organization and publicize their activities as widely as possible. On October 17, 1891, Tourgée announced in “A Bystander’s Notes” the

founding of a new organization to protect the rights of all citizens, regardless of color, and to find out “whether justice is still color-blind or National citizenship worth a rag for the defense of right.” The National Citizens’ Rights Association (NCRA) enlisted 20,000 members by the end of 1891 (membership was free), and planning began for a journal to be called the *National Citizen*. Under the auspices of the NCRA, Tourgée would meet with political leaders, publish pamphlets and editorials, and lecture extensively over the following three years. In 1894, Harry Smith, African American editor of the *Cleveland Gazette*, enlisted the NCRA’s support in his campaign to draft an anti-lynching law in the State of Ohio. Tourgée drew up a law that would penalize any county that had an incidence of a mob lynching with a steep fiscal penalty in the theory that lynchings usually occurred with tacit approval of communities and law enforcement. When elected to the State House of Representatives in 1896, Smith introduced the Tourgée Bill which was later enacted into law, and upheld by the State Supreme Court. It was the first of its kind in the country.

Plessy v. Ferguson

It took five years from its inception for the Louisiana test case to make it to the Supreme Court. After one false start in which Tourgée actually won his case on technical grounds, the second test case began on June 7, 1892 when Homer Adolphe Plessy boarded a train at a New Orleans station and sat in the car reserved for “whites only”. An activist and local shoemaker, Plessy was approached by the Citizen’s Committee to serve as the plaintiff to satisfy Tourgée’s request that a man light-skinned enough to pass for white ought to serve in the role. Plessy was to all appearances a white man because seven of his eight grandparents were of white ancestry. Indeed, when his arrest took place, Plessy had to reveal his racial identity to the conductor himself in order for authorities to arrest him for unlawfully sitting in a “whites only” car. Tourgée hoped that Plessy’s ambiguous racial identity, and deceptive appearance, would raise a legal quagmire



“...thanks, thanks, but do not call me a hero. I am a plain, ordinary man.”

Louis A. Martinet in a letter to Tourgée dated October 5, 1891.

Martinet was one of the founders of the Citizens’ Committee to Test the Constitutionality of the Separate Car Act.

over how to define “race” in the first place—something that the Louisiana statute book had never attempted. How could a railroad company be held liable for making public racial assessments (failure to comply with the law brought a stiff fine to the railroads) when the state of Louisiana could provide no guidance or clear-cut definition of race based on appearance alone?

As Tourgée anticipated, the Louisiana criminal court’s ruling by Judge John H. Ferguson convicted Plessy of violating the Separate Car Act, and Tourgée’s appeal of Ferguson’s decision made its way to the Louisiana State Supreme Court as *Plessy v. Ferguson*. By December 1892, the Louisiana Supreme Court had upheld Ferguson’s ruling, and Tourgée’s appeal awaited hearing in the nation’s highest court. Three and one-half long years later, the United States Supreme Court heard oral arguments on April 13, 1896. Tourgée and his co-counsel Samuel F. Phillips, a powerful Washington lawyer and old ally from his North Carolina days, were present in the old Senate chamber of the U.S. Capitol Building to argue the case for the plaintiff.

The arguments made in the *Plessy* case have often been misunderstood because the wording of the Separate Car Act prevented any discussion of the inferior conditions that often existed on black-only cars. The law attempted to satisfy the requirements of the Fourteenth Amendment’s equal protection clause by providing that the “separate coaches” for whites and blacks must be kept substantially equal in quality—separate *but equal*. To argue that the “equality” requirement was often neglected would do nothing to challenge the constitutionality of the law. Tourgée’s burden was to demonstrate that its intent was to degrade and subordinate non-whites, as he put it to the Supreme Court:

The Statute itself is a skillful attempt to confuse and conceal its real purpose. It assumes impartiality. It fulminates apparently against white and black alike. Its real object is to keep negroes out of one car for the gratification of whites—not to keep whites out of another car

for the comfort and satisfaction of the colored passenger.

To persuade the Court of this fact—in particular those hostile justices not inclined to look beyond the letter of the law—would require some innovative argumentation.

Tourgée pursued too many lines of argument to summarize in a brief review. Among these, however, one of the most notable was his assertion that the State did not have the power to “know the race” of its citizens. All were equal before the law: “Justice was pictured blind and her daughter the law ought to at least be color-blind.” But Tourgée went further than simply to assert that race should not matter. He argued that “race” itself was a category that had no stable or essential meaning. He showed that its definitions changed from state to state, and nation to nation, and that Louisiana had failed to provide any definition of “race” at all. “Race is a question,” he told the court, “which the law of Louisiana has not decided and which science it totally unable to solve.” On which side of the color-line did a man like Homer Plessy belong? “Who are white and who are colored?” he asked bluntly. Anticipating the modern view that notions of “race” are mere social customs and not biological fact, he dismissed the idea that the State had any right “to label one citizen white and another colored” when these were arbitrary classifications.

Tourgée also used the racial indeterminacy of Homer Plessy to argue that “whiteness” functioned as property in the United States. What would happen, he conjectured, if a white man were misidentified as black by a railroad conductor? That man’s reputation might be damaged so completely that he ought to sue the railroad company. To be forced to submit to haphazard public assessments of one’s race, he concluded, risked damage to the value of one’s whiteness. Using this point as an opening, Tourgée then discoursed memorably about the social power of whiteness. He mused:

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. These propositions are rendered even more startling by the intensity of feeling which excludes the colored man from the friendship and companionship of the white man... under these conditions, is it possible to conclude that the *reputation of being white* is not property? Indeed, is it not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity?

A powerful philosophical insight, Tourgée's argument about whiteness also directed the Court's attention to the real social world in which racial segregation existed. The sole purpose of segregation, it was clear, was to stigmatize blacks and perpetuate the supremacy of a ruling caste that was based on "whiteness." Separate could never be equal in that world.

Of course, Tourgée's arguments did not prevail. The Supreme Court ruled 8 to 1 to uphold Judge Ferguson's decision, and determined that the Separate Car Act met the 14th Amendment's guarantees of equal protection and due process. Only Justice John Marshall Harlan from Kentucky dissented, and he echoed Tourgée in his famous declaration that "our constitution is color-blind and neither knows nor tolerates classes among citizens." But Harlan's dissent was cold comfort for Tourgée who predicted that it would cost the nation another Civil War to undo the results of the case.

Tourgée's Legacy

After the devastating *Plessy* decision, Tourgée ended his civil rights work. By the time the *Plessy* case had reached the Supreme Court, the NCRA had already become all-but-defunct. The reactionary spirit of the 1890s overwhelmed its efforts to slow its momentum through protest and political pressure, and a new strategy of

accommodation to segregation had arisen in the speeches of black leaders like Booker T. Washington that captured the attention of the press. Many believed that violence and lynching would subside once "troublemakers" like Tourgée and his sympathizers quit their agitation on the so-called "race problem." From this viewpoint, the doctrine of "separate but equal" promised a peaceful resolution to racial strife by which blacks and whites could co-exist with a minimum of antagonism. A great many hard-won rights, however, were sacrificed in the bargain.

Tourgée reluctantly silenced his pen on the struggle that had absorbed most of his career. After campaigning for William McKinley in 1896, he was rewarded with a foreign ambassadorship as United States Counsel to Bordeaux, France. In 1897, Albion left Thorheim for France, never to return to the United States. He spent the last eight years of his life reflecting upon the future of democracy around the world, and observing painfully as the promise of "accommodationism" failed to stem the tide of violence and lynching in America. He died on May 21, 1905. Emma brought his cremated remains back to the United States and had them interred at the Mayville cemetery where a stately monument to his memory now stands. Emma herself lived at Thorheim until her death in 1915, when she bequeathed a portion of her property for the construction of Mayville's first public library, which stands there today.

In July of 1905, a few months after his death, a new civil rights organization was founded that would carry on Tourgée's legacy. The Niagara Movement launched by W.E.B. Du Bois, William M. Trotter, Harry C. Smith and others represented a break with the "accommodationist" leaders, and took inspiration from the work of Tourgée and activists before him. In 1910, their organization would re-organize itself into the National Association for the Advancement of Colored People (NAACP) which, of course, brought the cases to the Supreme Court in the 1950s that led to the reversal of *Plessy v. Ferguson*. At their inaugural meeting in 1905, the Niagara



Tourgée in Bordeaux, ca. 1900

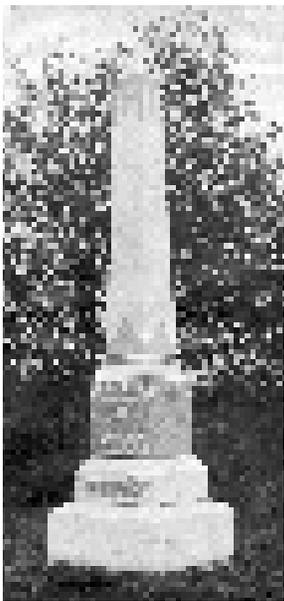


“Ignorance and neglect are the mainsprings of misrule.” – Albion W. Tourgée (1838-1905)

Movement adopted a resolution that each local chapter should hold a memorial service that Thanksgiving in honor of three “Friends of Freedom” whose uncompromising approach to justice they aspired to emulate: William Lloyd Garrison, Frederick Douglass, and Albion Tourgée.

Tourgée’s fame has never equaled that of Garrison or Douglass in the history books for many reasons. While both of those men no doubt had a larger impact on their times, they also enjoyed an immortalized success through the abolition of slavery—the single greatest object of their public crusade. Tourgée enjoyed no such lasting triumph.

The history of Reconstruction was buried under a mountain of myth and propaganda that vilified “carpetbaggers” like Tourgée and depicted the period as a shameful episode of sectional animosity rather than a high-minded egalitarian revolution on behalf of democracy. The *Plessy* case too has been shrouded in myth, and until recently, studied mostly as an example of racist jurisprudence. But, the rediscovery of Tourgée’s role in the case by legal scholars, and the growing recognition of his arguments’ relevance for our own political debates promise to give this deserving civil rights champion his due place in history at long last.



Albion Tourgée’s monument in Mayville Cemetery

Bibliography

- Current, Richard Nelson. *Those Terrible Carpetbaggers: A Reinterpretation*. Oxford: Oxford University Press, 1988.
- Curtis, Michael Kent. "Albion Tourgée: Remembering Plessy's Lawyer on the 100th Anniversary of Plessy v. Ferguson." *Constitutional Commentary* 13 (Summer 1996): 187-99.
- Dibble, Roy. *Albion W. Tourgée*. New York, Lemcke & Buechner, 1921.
- Elliott, Mark. *Color-Blind Justice: Albion W. Tourgée and the Quest for Racial Equality from the Civil War to Plessy v. Ferguson*. New York: Oxford University Press, 2006.
- _____. and John David Smith, eds., *Citizenship and the Race Problem: Selected Writings of Albion W. Tourgée*. Baton Rouge: Louisiana State University Press, forthcoming.
- _____. "Race, Color Blindness, and the Democratic Public: Albion W. Tourgée's Radical Principles in *Plessy v. Ferguson*." *Journal of Southern History* 67 (May 2001): 287-330.
- Golub, Mark. "*Plessy* as 'Passing': Judicial Responses to the Ambiguously Raced Bodies in *Plessy v. Ferguson*," *Law & Society Review* 39 (September 2005): 563-600.
- Gross, Theodore L. *Albion W. Tourgée*. New York: Twayne Publishers, 1963.
- Kaplan, Sidney. "Albion W. Tourgée: Attorney for the Segregated." *Journal of Negro History* 49 (April 1964): 128-33.
- Karcher, Carolyn L. "Ida B. Wells and Her Allies Against Lynching: A Transnational Perspective." *Comparative American Studies* 3 (2005): 131-51
- _____. "'Men are Burned at the Stake in Our Free Country': Albion W. Tourgée's Antilynching Journalism," *Resources for American Literary Study* 30 (2006): 178-215.
- _____. "The White 'Bystander' and the Black Journalist 'Abroad': Albion W. Tourgée and Ida B. Wells as Allies Against Lynching." *Prospects* 29 (2004): 85-119.
- Keller, Dean H. ed. "A Civil War Diary of Albion Tourgée." *Ohio History* 74 (Spring 1965):
- _____. "Tourgée's Ohio Days," *Ohioana* 5 (Winter 1962): 99-132, 146-48.
- Lofgren, Charles A. *The Plessy Case: A Legal-Historical Interpretation*. Oxford: Oxford University Press, 1987.
- Medley, Keith Weldon. *We as Freemen: Plessy v. Ferguson*. Gretna, LA: Pelican Publishing Co., 2003.
- Nye, Russell B. "Judge Tourgée and Reconstruction." *The Ohio State Archaeological and Historical Quarterly* 50 (1941): 101-14.
- Olsen, Otto H. *Carpetbagger's Crusade: The Life of Albion Winegar Tourgée*. Baltimore: The Johns Hopkins University Press, 1965.
- _____. "Albion W. Tourgée and Negro Militants of the 1890's: A Documentary Selection." *Science and Society* 28 (1964): 183-207.
- _____. ed. *The Thin Disguise: Plessy v. Ferguson, A Documentary Presentation*. New York: Humanities Press, 1967.