

“Florida History: The Evolution of Florida’s Courts
In the Context of Other Historical Events”

by,

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This truly is an honor to speak to you this afternoon. I want to thank Judge Browning for inviting me to speak on this special occasion. You are commemorating your 50th Anniversary and it gives me pause to think that I will be commemorating my own personal 50th Anniversary next week on the 17th. Before I go any further, for the purpose of truth in advertising, I must say that I stand before you not a lawyer—but a Florida historian who specializes in Florida, the South, and legal history. Indeed, I am but a pinch hitter for two fine lawyers and as well as fine historians--Walter Manley and Canter Brown, both of whom have just released their second volume on the history of the Florida Supreme Court. Many of you have perhaps already seen this book as well as their previously published volume. If so, I am sure that you will agree with me that both volumes serve as wonderful judicial histories of our state.

My colleague Dr. Brown was originally supposed to be here today but unfortunately a medical lapse prevented him from being here, and I am here in the breach. He kindly shared with me an address he delivered before an assembly of Appeals court judges last fall. What follows is a condensed version of those remarks with a few Denhamisms thrown in. My remarks are aimed at honoring the fiftieth anniversary of the district courts of appeals by explaining the often confusing and sometimes convoluted path to their creation. My goal is to make this historical journey a relevant one. Here’s my promise: we’ll find heroes and villains (at least, sort of); regional warfare; farsighted vision and short-term interest; backstabbing; problems galore; and more politics than you can shake a stick at.

To begin with, let's understand that the creation of the district courts of appeal came all tied up in fundamental changes that, in the mid-1950s, were working social, cultural, political, and all manner of other revolutions in the Sunshine State. Population growth fueled those changes. A formerly poor and sparsely populated frontier outpost was being wrenched into a modern, urban-oriented state with an increasingly dispersed and diverse set of residents. The repercussions, legal and otherwise, were immense.

Let me emphasize how dramatic these ongoing changes were proving to be. Roughly 100 years earlier, that is to say when Florida became the twenty-seventh state in 1845, its total population had consisted of about 70,000 persons, split almost evenly between black and white and living primarily in the cotton plantation counties that centered on Tallahassee. Fifteen years later, as the Civil War loomed on the horizon, the population had doubled but remained less than 150,000. At the time, the City of New Orleans alone held about 30,000 more residents than did Florida. Little wonder that Horace Greeley referred to the state as "The smallest tadpole in the sinking cesspool of secession!"

By the twentieth century's dawn, development—especially in the St. Johns River valley—had pushed the population past the half million mark. Still, as late as 1920 Florida contained fewer than one million persons. The largest city by then was Jacksonville. It held a mere 58,000 inhabitants, having surpassed Key West for bragging rights a few years earlier.

Beyond a sense of how many people lived in Florida in 1920, the answer to a second question has to be considered. Where did Floridians live? As had been true virtually since Florida became an American possession in 1821, the majority resided during 1920 within 100 miles of the Georgia state line. This region aligned closely with the state's old slave and plantation belt. Outside this territory, only Tampa claimed rights as a serious urban center. As the number two city, it boasted less than 40,000 residents.

In 1920, however, things were about to change. World War One had brought countless servicemen to the state for training and recuperation. Wartime publicity meanwhile fanned interest in the exotic and romantic peninsula in the hearts of millions. Florida's role as a capital of the motion picture industry particularly fed the fervor. No portion of the state held greater allure to fans of the silver screen than the semi-tropical expanses of the lower Atlantic coast. Imagine winter-locked Northerners and Midwesterners huddled in Nickelodeons entranced at the prospects of white sand beaches, tropical breezes, swaying palm trees, and bathing beauties.

When the peace came, veterans, movie goers, and hundreds of thousands of others who wanted a new start in a tropical paradise began flocking to Florida. The Dixie Highway from Chicago, not yet completed, offered the most popular overland route. Down its length through the peninsula to Miami flocked "tin can tourists" in their Model T Fords and similar contraptions. Some hauled everything that they owned behind their "car" in a slapped-together trailer made of wood, tin, bailing wire, and what have you. Motor hotels (or motels) appeared to service the traffic, but many chose instead to spend nights in newly conceived and less-expensive trailer camps or trailer parks.

You may be asking yourself what all this has to do with creating courts of appeals in the 1950s. Don't despair, at least not yet. We'll tie things shortly. For now, just remember that an economic boom first sounded about 1919 and 1920 in Miami and soon echoed through central and south Florida. In the state's old Panhandle heartland, on the other hand, the tremors reverberated only lightly, if at all. The action centered in the fast-developing peninsula, previously remote, underdeveloped, and sparsely populated.

No event comparable to the Boom of the early 1920s had occurred previously in Florida's history. Twenty-five thousand brokers hawked real estate in Miami alone. Values everywhere seemed to soar, then soar again and again. Fortunes could be, and were, made overnight. By 1925, 2.5 million

tourists spent their dollars in the state, while an added half million residents strained resources, argued, transacted business, sinned, carried on, and, in the case of a few, tried to save souls. Most strove to have a good time. Those who failed, many at least, took their grievances to court.

Then came the Bust of 1926 and the years that followed through the 1930s. As corrupt and overextended banks failed, the economy collapsed. Massive hurricanes meanwhile struck south Florida in 1926 and 1928. Then, the Mediterranean fruit fly nearly destroyed the citrus industry. That was all before the Great Depression commenced in October 1929. Thanks to the cupidity of certain land-rich corporations that refused to pay taxes, municipalities, school districts, and special tax districts essentially bankrupted in waves. In fact, Key West earned the honor of becoming the first municipality in the nation to bankrupt officially pursuant to new laws enacted under President Franklin D. Roosevelt's New Deal. By then, it must have seemed that everyone was suing everybody.

Let's take a step back at this point, away from the economic and human carnage of the 1930s. Instead, let's take a minute to look at how Florida's court system and, especially its appellate court system, was handling the state's first century of evolution. Doing so eventually will help us to make sense of the 1950s.

Certain principals should guide our understanding. First, Florida rarely has lent much credence to the idea of preparing for the future. This would require legislators to impose taxes, a not very pleasant endeavor, and it also would require intrusive government that might discourage development and growth. Accordingly, the state always has played catch-up when it came to the provision of needed services, including law enforcement, prosecutorial, and judicial services. Second, and linked closely to the first principle, political leaders on the state level found—this will surprise no one—that successful careers depended upon appealing to popular passions. We'll see in a moment why one of those passions involved protecting wealthy people from taxation.

Right from the start, the state evidenced these principles in the structure it adopted for appellate review. The first state constitution essentially prohibited the establishment of an independent appellate judiciary until 1850 at the earliest. Instead, it authorized circuit judges, elected by the legislature, to sit together as an appellate bench. The first independent appellate court finally appeared in 1851. It took the form of a supreme court with a chief justice and two associate justices.

As the years passed the number of justices occasionally rose and fell and the manner of their selection changed. Mostly, they were appointed by the governor or else elected. The adoption of the Constitution of 1885, for example, provided for popular election of three justices beginning in 1888. Each served a term of six years. Population growth by the twentieth century's dawn compelled some adjustment in the number. Specifically, in 1902 voters approved an amendment authorizing the legislature to set the number of justices up to six beginning in 1905. A six-man court resulted. For a couple of years before this scheme took effect, three "commissioners of the court," selected by the supreme court, aided the panel in dealing with a mounting case load. Those positions became obsolete with the court expansion.

The Constitution of 1885 deserves more than passing mention as part of our historical tour, because it remained in effect, although often amended, when the courts of appeal were created in the 1950s. In reaction to what the majority of delegates perceived as excesses of strong government under the Republican-drafted Constitution of 1868, the charter called for a weak state government, with limited executive power that was dispersed among a governor and members of an elected cabinet. The real authority lay in the legislature. It met only every two years and its powers too were limited, but it nonetheless could pass laws, appropriate funds, and propose constitutional amendments. So, beginning in 1887 when the new constitution took effect, it often mattered more who controlled the legislature than who presided as governor.

This brings us to another legacy of the constitutional convention of 1885. That body proposed a separate referendum as to whether the legislature could impose a poll tax as a qualification for registering to vote. The voters said yes, and, as of 1889, Florida pioneered use of the poll tax as an effective device to eliminate—or nearly eliminate—voting by African Americans. The effect, though, ranged far more broadly. The law ousted most poor men, black and white, from the polls. The electorate constricted dramatically, with more-affluent white males suddenly dominating voting in most elections. During the mid-1920s, this relatively affluent electorate responded to the legislature's tempting invitation by approving constitutional amendments barring taxes on incomes and estates, thus ensuring Florida's inability to anticipate growth or cater to the needs created by growth. When funds were needed in an emergency, sin offered the most tempting field for taxation. Thus, during the Great Depression's depths in 1931, the legislature placed its imprimatur upon gambling so that it could tax pari-mutuel wagering pools at horse tracks. Miami's Hialeah started the ball rolling. We've never looked back.

Thus Florida entered the twentieth century already handicapped by a state constitution that did not anticipate expansion of government as the state grew and did not favor the use of state authority, especially when it conflicted with the pro-business, pro-growth attitudes of the more well-to-do. Meanwhile, as growth did occur, a mostly unobserved time bomb began to tick. This is a subject to which we'll return. For now, let's just say that the problem concerned who or, more precisely, what part of the state controlled the power of state government. Perhaps I should have said what part of the state controlled the legislature. As you may have guessed, in time the bomb also would encompass the question "What part of the state will control the appellate judiciary?"

In the early years of the twentieth century, though, control of appellate courts did not yet constitute so charged an issue. But then came the Boom of the early twenties, and, seemingly,

everything changed overnight. By 1921, 342 new cases appeared on the docket. If the Boom produced a river of litigation, the Bust produced a flood. The 1926 record of 469 new appeals swelled in the next year to 624. 1929 saw 797 new cases added, with 700 then pending. The *Florida State Bar Association Law Journal* joked that the shortest time between filing an appeal and getting a decision required “five years and three months, not counting the second petition for a rehearing.” Appeals sometimes took two full years to be heard.

This was the point at which the idea of a court of appeals first took concrete form. The legislature considered a constitutional amendment in 1929 authorizing a seventh justice. Most doubted voter approval, however, given the sour mood of voters toward the court in the midst of depression. Then Taylor County representative Claude Pepper proposed an alternative. The legislature, he argued, could create an intermediate court of appeals by statute. Nearby Georgia offered a model of sorts, having operated a court of appeals since 1907. Pepper’s audacious proposal seemed viable at first. Then, fierce resistance from friends of the supreme court and legislators with ties to the supreme court bar swamped it.

So, the solons compromised in a manner that had become typical. As usual they turned away from a permanent solution that addressed the implications of growth. Specifically, they authorized by statute the designation of three less-expensive court commissioners to evaluate records and render decisions in cases assigned to them. The commissioners helped, but the legislature proposed a constitutional amendment for a seventh justice for voter approval in November 1932.

In these circumstances a problem appeared in public view that would haunt the court for a generation or more. Fact was that the jurists lived effectively isolated from the state growing around them. Tallahassee remained anywhere from 200 to 450 or more miles from where Florida’s growth pulsed most strongly. They traveled rarely within the state, even to campaign for re-election. They

simply were growing out of touch. Voters proved quick to call that fact to their attention. They rejected the court addition by a ratio of two to one. Meanwhile, the legislature repealed the court commissioner law.

The appeals nonetheless kept coming. Matters came to a head in 1939 and 1940. Justice Elwyn Thomas enlisted bar support for another amendment for a seventh justice. Significantly, the proposal specified that the chief justice would serve as the court's administrative officer and vested in him authority for the dispatch of business and the procuring of consistent opinions. The court's problems had become so widely known that the legislature, left with no apparently viable alternative, agreed to the measure. So, too, did the voters.

Consider, though, that the electorate suddenly had changed. In 1937 Polk County's Senator Spessard Holland and Dade County senator Ernest Graham, father of future governor Bob Graham, had convinced the legislature, against all odds, to attack rampant corruption in electoral politics by abolishing the poll tax. A whites-only Democrat primary would bar most black voters from a role in electoral decision making until after 1944, but greater numbers of poorer whites now demanded a voice at the political table.

After World War II two geopolitical storms were about to engulf the state and its judiciary. Both centered upon population. Of foremost importance, whatever influence World War One had worked on growth and development in Florida, World War Two rewrote the book. Millions of servicemen and women had seen first hand the delights of life in the Sunshine State. New movies—now often in color and all with sound—brought Florida's magic into cities, towns, and villages throughout the world. The GI Bill made starting over, whether with an education or a new home, much easier. Innovations in air conditioning and mosquito control didn't hurt, either.

By 1945, 2.25 million people called the state home. And the population surge never has abated. A veritable tsunami of people washed into the state in the decade the followed World War Two's end. They concentrated in an arc beginning in Orange County and stretching eastward to Volusia and Brevard Counties and southward along the Atlantic coast to Dade. Miami jumped to honors as largest city by 1950, with a quarter million inhabitants. By mid-decade that figure had tripled. Formerly tiny communities emerged as thriving cities, among them Fort Lauderdale, Miami Beach, Orlando, West Palm Beach, St. Petersburg, and Daytona Beach.

As the peninsula groaned beneath the weight of this human onslaught, that ticking time bomb we mentioned earlier exploded. Although required to do so every ten years by the Constitution of 1885, the legislature, after 1920 and to the extent that it found politically possible, refused to reapportion itself. This meant that the rural counties of the state, especially those in the old Panhandle heartland of north Florida, fought a battle over generations to maintain control of the legislature in the face of urban and peninsular growth of unprecedented proportions. The *Tampa Tribune's* James A. Clendinen labeled their legislative leaders as "the Pork Chop Gang" in the 1950s, and the name stuck. The "porkchoppers" managed to sustain their stranglehold on legislative power until the federal courts intervened in 1967. Already by the early 1950s, Florida could claim the most mal-apportioned legislature in the country.

The porkchoppers did face a serious challenge to their rule. Statewide elections, such as that for governor, increasingly would produce executive officials more responsive to peninsular and urban needs. The 1952 election of Fort Pierce's Dan McCarty as governor illustrated the point. That fact, as is easily understood, made it evermore crucial for the legislature to keep a careful watch on the supreme court and to ensure control over the judiciary to the extent possible.

The crisis was reached in the early 1950s, as post-World War Two growth, reflected in the supreme court's caseload, made its impact felt profoundly. Where the court in the mid-1940s had

managed to get by with the disposition of only 125 cases, the justices found themselves dealing by 1950 with 927 appeals. By 1953, 1,172 matters came before the panel. The figure reached 1,251 the next year. Mid-decade found 600 appeals pending from previous calendars and an additional 1,225 arriving for consideration.

As it had in the 1920s, the supreme court reacted to issues of growth as they related to litigation and the volume of appeals with few innovative suggestions. The panel's members did endorse a Florida Bar request to the 1951 legislature to expand supreme court membership from seven to ten, and thus legislature approved a suitable constitutional amendment. Once more, the justices found themselves unaware of politically disastrous swings in public opinion regarding the court and its operations. They discovered the hard truth in November 1952. The electorate, as Florida Bar president Horner C. Fisher put it, "emphatically rejected" the amendment.

In the wake of the 1952 political disaster neither the supreme court nor the legislature stepped up to address appellate issues in a substantive manner. Instead, the Florida Bar—filled with dynamic reform leadership from Fisher, Robert J. Plois, William A. McRae, and others, all of whom were spurred on by young veterans—joined with newly elected governor Dan McCarty, himself a youthful veteran, to compel change. As Fisher explained, "The bar had had enough of half-baked, high-pressured, ill-considered, piecemeal projects for the amendment of the Judiciary Article." McCarty, with special encouragement from Justice Elwyn Thomas a fellow Fort Pierce man, opted instead to use his clout as a first-year governor to secure creation in 1953 of a Judicial Council of Florida to bring about what were termed "needed changes."

Unfortunately, debate soon bogged down in political reality. The council's common sense recommendations were ignored and blocked by the Florida Senate, dominated by the porkchoppers who declined to eliminate the jobs, customs, and support of friendly local judicial authorities. Matters likely

would have turned out differently had fate not intervened. Governor McCarty unexpectedly passed away in 1953. This left the state in the hands of State Senator Charley E. Johns of Starke, who served as senate president. Thus, just at the moment Florida's political environment had turned to favor a reforming south Florida governor, one of the Pork Chop Gang's principal leaders assumed the reins of executive power. This situation did not alter until after November 1954, when Leon County state senator LeRoy Collins, one of McCarty's close friends and allies, bested Johns in statewide voting.

Collins, closely advised by Justice Thomas, thereafter provided the political muscle needed to move a Judicial Council agenda ahead in 1955. As a result of the recent events, on the other hand, the agenda had changed. General thoughts of an intermediate court of appeals or several intermediate courts of appeals expanded to include specific constitutional limitations on supreme court powers and the vesting of those powers in not fewer than three courts of appeals with final appellate jurisdiction in most cases. Justice E. Harris Drew of West Palm Beach joined with Justice Thomas, the governor, and numerous others in the effort to trim the supreme tribunal's authority. The court's core majority, however, proved less enthusiastic.

These events transpired within a highly charged political environment that carried implications for the future of the court system that appeared dire to Collins, Thomas, and others. The United States Supreme Court the previous year had issued its ruling in *Brown v. Board of Education* and was primed to announce its follow-up implementation decision. Already voices such as those of Justices John E. Mathews and Glenn Terrell had called for resistance to court-ordered desegregation despite Collins's attempt to cool the heated atmosphere. Elections conducted in 1956 and thereafter, Collins understood, likely would result in wins for those who opposed moderation. This would apply to future gubernatorial elections and to supreme court elections. In the circumstances, the governor successfully pushed for

authority to appoint the initial appeals judges. Thereafter, elections were required but his appointees already would be established on the bench.

In 1955, in any event, Collins and his allies mostly prevailed. Under the ultimate proposal, the courts of appeals would obtain final appellate jurisdiction in all matters excepting judgments imposing the death penalty, construction of state and federal statutes or treaties, constitutional questions, bond validations, matters certified by the district courts to be of great public interest, and cases where district courts stood in conflict on the same point of law. The chief justice would administer and coordinate the work of all the state courts, but the amendment also mandated compulsory retirement for all justices and judges at age seventy.

Mandatory retirement clearly appealed to the voters as did the new courts. They ratified the constitutional amendment in November 1956 by a vote of 373,000 for and 96,000 against. Collins acted within six months to exercise his appointive powers. For the first district court, headquartered in Tallahassee, he designated Donald K. Carroll, Wallace E. Sturgis, and John T. Wigginton. William P. Allen, Robert J. Pleus, and A. O. Kanner mounted the second district bench at Lakeland. In Miami at the third district court, Mallory Horton, Charles A. Carroll, and Tillman Pearson assumed judicial responsibilities. Many of the appointees had served as state bar president.

The courts of appeals thus were gifts by legal and governmental visionaries to Florida's future, individuals who acted against the prevailing power structure epitomized by the Pork Chop Gang. They brought appellate justice closer to the new Florida, while permitting anticipation and recognition of growth and change with a system that offered precedent for the addition of new courts as well as of new judges. Appointed initially by a governor who well appreciated the state then building in the mid-1950s, the courts tended to sympathize, more so at least than had the supreme court previously, with the needs of the new Florida. In turn, they challenged the supreme court and its members to reconsider accepted

understandings and perspectives. The supreme tribunal stayed in Tallahassee, but Florida's appellate judicial system now grounded its service in every region of the state.

There's obviously much more to the story of the supreme court and of Florida's appellate system, but the telling must be left to another time. You can read about it, though. The second volume of the supreme court's history by Manley and Brown offers up a rich and often unexpected judicial history.

I will close, if you will permit me, with words expressed in 1945 by Justice Roy Chapman when implications about the law, the judiciary, and the future weighed heavily on that underappreciated jurist. Although he addressed the bar generally, Chapman's insights apply with equal weight to the judiciary. "The march of time suggests to our profession that we are now living in a world quite different from the one of only a few years ago," he began. Chapman continued: "The traditions of our profession have been efficient service to both society and our Nation. If our leadership is to be retained, we necessarily must turn our backs on many idols of the past. The law, based on reason and justice, easily converts its disciples into conservatives. It is possible that the encroachment on the business of the profession is indirectly traceable to the lack of vision or the proper perspective of the practitioners. If errors or mistakes have been committed, then it is our duty and obligation to correct them [so that] we can continue in the rendition of efficient and faithful service to society and the Nation. We can do nothing less."