

Florida Supreme Court Historical Society

SPRING/SUMMER 2016

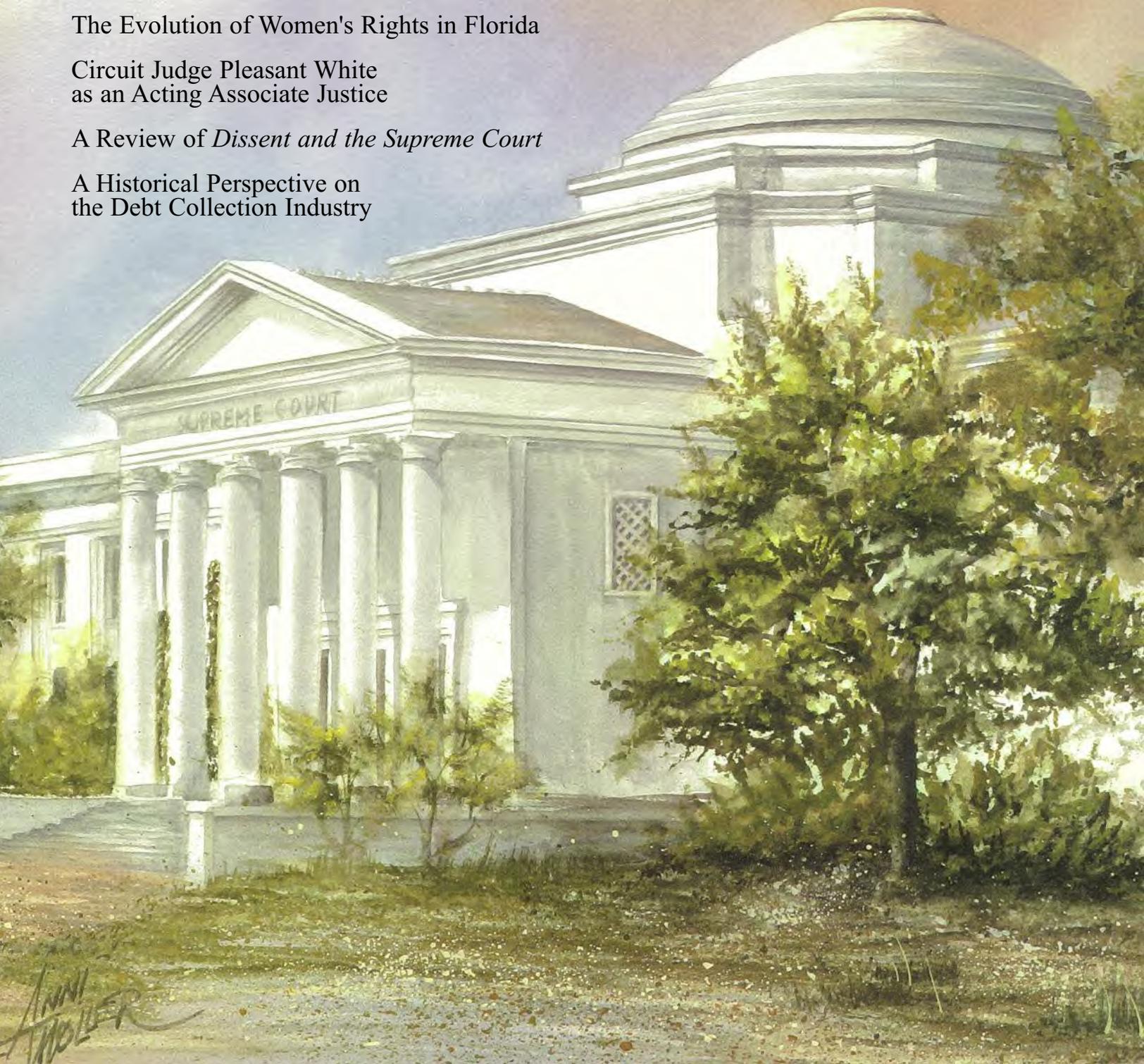
Honoring the Late Former
Chief Justice Leander J. Shaw, Jr.

The Evolution of Women's Rights in Florida

Circuit Judge Pleasant White
as an Acting Associate Justice

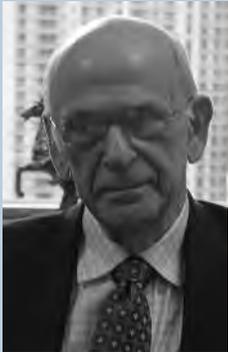
A Review of *Dissent and the Supreme Court*

A Historical Perspective on
the Debt Collection Industry



ANNI
MOLLER

FROM THE EDITORS



We hope you enjoy this fifth annual edition of the Society's magazine, which includes a memorial to the late former Justice Shaw and an update from Chief Justice Labarga on the Florida Commission on Access to Civil Justice. The feature articles are an interesting mix: the evolution of women's rights under Florida law, the history of a circuit judge sitting as an acting justice on the Florida Supreme Court, and a historical perspective on the debt collection industry — from debtors' prisons to the CFPB. This edition's book review is of *Dissent and the Supreme Court*, and there is also an update on Volume III of the History of the Florida Supreme Court.

Stanley M. Rosenblatt

Daniel R. Hoffman

TABLE OF CONTENTS

- 5 From the President**
By Kelly O'Keefe
- 7 Under the Dome**
By Chief Justice Jorge Labarga
- 8 The Evolution of Women's Rights in Florida:**
From Injustice to Supreme Court Justice
By Sylvia H. Walbolt and Christine Davis Graves
- 14 In Memory of Former Chief Justice Leander J. Shaw**
September 6, 1930 - December 14, 2015
- 17 Farewell to a Good Friend of the Historical Society**
by Stanley Rosenblatt
- 18 Judge Pleasant W. White:**
Acting Associate Justice of the Florida Supreme Court
By Judge Robert W. Lee, Broward County Court Judge
- 20 Dissent and the Supreme Court**
A Review of Melvin Urofsky's *Dissent and the Supreme Court*
By Susan Rosenblatt
- 24 From Debtors' Prisons to the CFPB:**
A Historical Perspective of the Debt Collection Industry
By Shaun Ertischek
- 29 An update on Volume III of the**
History of the Florida Supreme Court
By Neil Skeene

Florida Supreme Court Historical Society

Spring/Summer 2016

Editors

Stanley M. Rosenblatt, Esq.
Daniel R. Hoffman, Esq.

Editorial Assistance

Jonathan Claussen, Esq.
Kelly O'Keefe, Esq.
Mark A. Miller
Susan Rosenblatt, Esq.
Stephanie L. Varela, Esq.

Designer

Lili Picou

Published annually by the Florida
Supreme Court Historical Society

The Florida Supreme Court Historical Society works to save and maintain for future generations the records of the people and events that have shaped the evolution of Florida's court system from the early 1800s, through the 20th Century, and beyond. The Society is committed to making sure people understand the importance of a strong, independent judiciary in our governmental balance of power. The Society's two-fold mission is to (1) educate the public about the critically important work of the courts in protecting personal rights and freedoms, as well as in resolving the myriad of disputes that arise within the state, and (2) preserve the rich history of Florida's judicial system.

This publication has been sponsored by the members of the Florida Supreme Court Historical Society.

Florida Supreme Court Historical Society
1947 Greenwood Drive, Tallahassee FL 32302

CONTRIBUTORS



Shaun Ertischek is General Counsel for an accounts receivable management company located in Naples, Florida. He also serves as a Trustee for the Florida Supreme Court Historical Society.



Christine Graves is a shareholder of Carlton Fields, and formerly clerked with the Florida Supreme Court for Justice Charles T. Wells.



Judge Robert W. Lee of the Broward County Court, has authored more than a dozen articles in legal publications. He has had more than 500 of his legal decisions published and has presided over more than 335 jury trials. He is currently sitting as an Acting Circuit Judge and Chair of the Civil Division of the Broward County Court.



Susan Rosenblatt is an appellate attorney practicing in Miami with her husband Stanley and is writing a book about the two tobacco class actions they handled. She is Treasurer of the FSCHS and a trustee of FAMRI, a nonprofit created through tobacco litigation, seeking cures for diseases associated with cigarette smoke.



Sylvia Walbolt is a shareholder of Carlton Fields, and a former President of the Florida Supreme Court Historical Society.

WHAT'S NEW

As part of the Historical Society's ongoing mission to preserve and honor the history of the Florida Supreme Court, many projects that have been commissioned, hosted or sponsored by the Society have now been commemorated on our website. These projects are made possible by the members' support.

Check out what's new at FLCourtHistory.org:

- The African-American Experience and the Florida Supreme Court
- Evolution of Justice, Historical Panels
- Links to our YouTube Channel that include many interesting videos both new and old, from interviews of current and past Justices, to highlights of recent Annual Dinner events
- Biographies and portraits of the early Justices, 1846-1917
- Photos from the Presentation of the Supreme Court Justices' Portraits to the Court
- Downloadable issues of the Historical Review magazine from 2010 to 2016
- Downloadable issues of the Historia Juris newsletter from 2012 to 2015
- Video highlights from the 2014 & 2015 Annual Dinners
- Photo galleries from the 2014 & 2015 Annual Dinners



TAKE A FEW MINUTES TO VISIT THE WEBSITE AND SEE WHAT IS NEW AND HISTORIC AT FLCOURTHISTORY.ORG

Florida Supreme Court Historical Society

2015-2016 Officers & Trustees

EXECUTIVE COMMITTEE OFFICERS

President: Kelly A. O'Keefe, *Tallahassee*
First Vice President: George 'Buddy' Schulz, *Jacksonville*
Second Vice President: Edward G. Guedes, *Coral Gables*
Secretary: Jonathan F. Claussen, *Boca Raton*
Treasurer: Susan Rosenblatt, *Miami*
Past President: Sylvia H. Walbolt, *Tampa*

EX OFFICIO TRUSTEE MEMBERS

*Bruce Blackwell, *Maitland*
*James E. Cobb, *Jacksonville*
*Henry M. Coxe III, *Jacksonville*
*Talbot 'Sandy' D'Alemberte, *Tallahassee*
*John A. DeVault III, *Jacksonville*
*Herman J. Russomanno, *Coral Gables*
*Christian D. Searcy, *West Palm Beach*
Billy Blaine, Librarian, Florida Supreme Court

TRUSTEES

Mary E. Adkins, *Gainesville*
Mary Barzee Flores, *Coral Gables*
Mitchell W. Berger, *Ft. Lauderdale*
Carol A. Berkowitz, *Tallahassee*
Alan B. Bookman, *Pensacola*
Robert A. Butterworth Jr, *Fort Lauderdale*
Timothy P. Chinari, *Nashville*
Marguerite H. Davis, *Tallahassee*
Sean T. Desmond, *Tallahassee*
Charles W. Ehrhardt, *Tallahassee*
Shaun Ertischek, *Naples*
Joseph P. Farina, *Miami*
Amy S. Farrior, *Tampa*
Jerry Gewirtz, *Tampa*
Leonard H. Gilbert, *Tampa*
Thomas D. Hall, *Tallahassee*
John F. Harkness, *Tallahassee*
Scott G. Hawkins, *West Palm Beach*
Gregory Hearing, *Tampa*
John Wayne Hogan, *Jacksonville*
†Julio C. Jaramillo, *Miami*
Jeffrey D. Kottkamp, *Tallahassee*
Joseph A. Lang, *Tampa*
John S. Mills, *Tallahassee*
Harvey E. Oyer III, *West Palm Beach*
Daryl Parks, *Tallahassee*

EXECUTIVE COMMITTEE MEMBERS AT LARGE

*Howard C. Coker, *Jacksonville*
*Alan G. Greer, *Miami*
Justice Stephen H. Grimes, *Tallahassee*
Justice Major B. Harding, *Tallahassee*
*Benjamin H. Hill, *Tampa*
*Rutledge R. Liles, *Jacksonville*
*Miles A. McGrane, *Coral Gables*
*Edith G. Osman, *Miami*

CHAIRS OF STANDING COMMITTEES

Acquisitions:	Tom Hall
Budget & Finance:	Susan Rosenblatt
Executive:	Kelly O'Keefe
Long Range Planning:	Sylvia Walbolt
Membership:	Sean Desmond
Nominating:	John DeVault
Oral History:	Mary Adkins
Publications:	Stan Rosenblatt
Special Gifts & Projects:	Renee Thompson

Eugene K. Pettis, *Ft. Lauderdale*
David C. Prather, *West Palm Beach*
Gary Lee Printy, *Tallahassee*
Mary R. Robinson, *Ft. Lauderdale*
Michael L. Rosen, *Miami*
Stanley M. Rosenblatt, *Miami*
Scott R. Rost, *Orlando*
Neal A. Roth, *Miami*
Scott J. Silverman, *Miami*
Neal R. Sonnett, *Miami*
Renee E. Thompson, *Ocala*
Daryl E. Trawick, *Miami*
Stephanie L. Varela, *Miami*
Barbara C. Wingo, *Gainesville*
*Gwynne A. Young, *Tampa*
Stephen N. Zack, *Miami*

HONORARY LIFE TRUSTEES

Irene Kogan, *Coconut Grove*
Walter W. Manley II, *Tallahassee*
Ruth McDonald, *Tallahassee*

EXECUTIVE DIRECTOR

Mark A. Miller, *Tallahassee*

* *Past Society Presidents*

† *Deceased*

FROM THE PRESIDENT

Dear Members and Friends:

The Society has moved in leaps and bounds over the past few years in furtherance of its mission to preserve and honor the rich history of the Florida Supreme Court.

This year the Society is focused on two primary goals. The first is increasing awareness of the Society and its mission, and the second is building active and enthusiastic core committees equipped with the tools each needs to achieve its specific goals. The Trustees serving on each committee are the Society's greatest asset. We have among us, and will continue to recruit, extraordinary Trustees with valuable experience such as Mary Adkins, who developed Oral Histories for the Middle District of Florida. Mary's experience will be of great help as the Society develops a new template for the Florida Supreme Court's Oral Histories. Mary, who authored a soon to be published book on the 1966-68 revision of the Florida State Constitution, is also sharing invaluable information about the publication process with the Publications Committee. The Committee is coordinating publication and release of the Society's much anticipated third book in early 2017.



The Society's book, by Neil Skene, has received rave reviews from our Trustees who volunteered to read it on the Society's behalf. The book not only recounts key cases from 1973 to 1986, but also grabs the reader's attention by focusing on the story of the people in the life of the Court, including lawyers who moved key cases to the Court and the Justices who brought resolution to the issues those cases presented.

The Society's publications remain one of its core tools for increasing awareness of the Society and our mission. In addition to our book we are very excited about this year's magazine, which is now in your hands thanks to the work of Daniel Hoffman, Susan Rosenblatt and Stanley Rosenblatt. They have donated countless hours and resources to the Society's magazine and to preserving the Court's history.

This magazine includes tributes to several pillars of our legal community whom we recently lost. Justice Shaw's legacy will live on in what he did for others and in the many people he helped through his work both on and off the bench. Sheldon Schlesinger, a long-time Trustee of the Society, will be remembered for his dedication to achieving justice for his clients. The Society is not only preserving the stories of individuals like these that shaped the Court and Florida's judicial system, but is sharing them more widely with the use of our website and other social media. The Society's website (flcourthistory.org) is evolving as we continue adding historic content and updates on the Society's activities, and it is receiving positive feedback from many, including members of the judiciary. The website links to the Society's very own YouTube channel, where you can view the Society produced "History of Merit Selection and Retention in Florida's Supreme Court," the unveiling of the newest Justices' Portraits and several past Annual Dinner speakers.

The Society is also working to spark the interest of young lawyers with a social media presence. Trustee Stephanie Varela, former Law Clerk to Chief Justice Labarga, is developing a Twitter account, which should act as a doorway for new generations to learn about the Society and its mission. Thanks to the Membership Committee and its Chair Sean Desmond, we are also gearing up to disseminate historical articles and Society information on the Young Lawyers Division's social media platforms.

We are not stopping there — the Society is reaching out to law students as well. The Society is offering FSU's law student organizations the opportunity to receive a \$2500 grant for assisting the Society with its Archiving Project. The law student organization receiving the grant will work with the Society and the Supreme Court archivist to place former Justices' papers in archival quality folders so they are accessible to future generations. This project has future generations of lawyers learning first-hand about the importance of preserving the Court's history and we hope it will result in future Society members and Trustees!

Continued on page 6

The law student organization receiving the grant will be announced at the Annual Dinner, which promises to be an outstanding event. Our featured speaker this year is David Boies, Chairman of Boies, Schiller & Flexner LLP, and one of the most renowned lawyers of our time. Chief Justice Labarga will also provide an update on the state of the judiciary and the work of the Florida Commission on Access to Justice, which the Chief focuses on in his column here.

The Society has been working very closely with the Justices on several projects. When the Society's Justices' Bio Project is complete, each Justice's biography will appear on the Supreme Court website, the Society's website, and with each portrait in the Supreme Court building. The Acquisitions Committee, chaired by Tom Hall, is assessing procedures for preserving the Justices' papers and the Special Projects Committee, headed by Renee Thompson, has started planning retirement dinners to take place in each of the Justices' hometowns. We are working with the Court's Docent Program to develop much needed new materials for the presentations made to the thousands of school children visiting the Court each year.

To assure the continued success of all these great existing and future projects, our Long Range Planning Committee, chaired by Sylvia Walbolt, is conducting a retreat in March. Sylvia was an outstanding President and we thank her for her past service as well as her continuing dedication to the Society. Look for the Long Range Plan at our June meeting. In the meantime, please enjoy the magazine, attend the Annual Dinner, and let me know if you would like to contribute to a committee!



Kelly O'Keefe
President
KOkeefe@bergersingerman.com

INCOMING PRESIDENT KELLY O'KEEFE PRESENTING OUTGOING PRESIDENT SYLVIA WALBOLT WITH HER PRESIDENT'S GIFT, JUNE 25, 2015



**Signed Group Portrait of the Florida Supreme Court Justices
Presented to Sylvia Walbolt**

UNDER THE DOME

BY CHIEF JUSTICE JORGE LABARGA



The Florida Commission on Access to Civil Justice marked the first anniversary of its creation recently and, just a month before reaching that milestone, it issued an interim report to the Florida Supreme Court.

That's the history I'll be discussing in this column. Very recent history, certainly, but just as certainly, a project and a development of great

importance that warrants close attention and thoughtful analysis, especially from those of us who have dedicated much of our lives to the legal profession and the rule of law.

The challenge facing the Commission and all of us as well: Too many people in our state are isolated without legal help for life-changing problems — and not just poor people. This problem stretches well into the middle class.

The Commission's final report is not due to the Court until June 30, 2016. The interim report, however, was released in October and it identified concrete steps that we might take to bridge the civil justice gap.

Before I go any further, I want to acknowledge the many people who have dedicated themselves and their careers to the challenge of helping people get meaningful access to civil justice. Lawyers working on the front lines to help impoverished people seeking justice are true heroes. As Florida chief justice, as a lawyer, as a citizen, and as a human being, I am deeply grateful to them for all they do and have done in the interest of justice, simple justice. In addition, Florida's lawyers donate hundreds of thousands of pro bono hours—nearly two million last year—and millions of dollars to legal service organizations. Judges and court staff do what they can, ethically, to help people who call and come into our courthouses.

But, as I said when I signed the administrative order creating the Access Commission, and as I have said many times since: The gap in access to civil justice is a societal problem. It needs a societal solution.

That's why this initiative has such a broad foundation. The Florida Supreme Court, backed by The Florida Bar and The Florida Bar

Foundation, created the Commission in November 2014. Leaders from the other two branches of government, the legal profession, and the business sector agreed to be a part of it. In fact, the interest in this issue was such that 16 prominent leaders were named ad hoc members in addition to the 27 commission members.

The report highlights two essential questions before it outlines its recommendations. The first question: What is the Florida access to civil justice gap? The second question: Who are the underserved Floridians?

We don't yet know everything we'd like to know—but the measurements and the statistics we can gather indicate the depth and the breadth of this challenge.

One of the most interesting gauges comes from surveys conducted by Florida's trial court clerks. According to the Florida Court Clerks and Comptrollers, nearly two-thirds of the people asking them for help with forms designed for pro se litigants are involved in a family law case. Ten percent of the questions they get deal with landlord-tenant cases and another 9 percent domestic violence injunctions.

National studies indicate that one in four poor people has a civil legal problem every year. That means that, because Florida has about 3.24 million people living in poverty, more than 800,000 people are likely to find themselves faced with a civil legal issue. At the same time, we know that only an estimated 20 percent of Florida's indigent residents get legal counsel in civil cases. And an estimated 80 percent of Florida's divorce cases include at least one pro se litigant.

There are more statistics but even the few I have cited can quickly seem overwhelming. The Access Commission, however, has not been deterred by the size of the challenge. Its recommendations show it has made a strong start to tackling the access to civil service gap.

The recommendations to the Supreme Court:

- develop a gateway portal to serve as an online connector to existing resources, such as hotlines, law libraries, legal aid organizations, and court self-help centers;
- approve creation of a website, which would collect information about all the resources.
- let law professors and retired judges serve as “emeritus attorneys” in some cases, advising people on a pro bono basis.
- develop a rule that would designate for legal aid programs funds left over after class-action settlements are distributed to the plaintiffs covered by the lawsuit.
- endorse the resolution by the Conference of Chief Justices/Conference of State Court Administrators reaffirming the commitment to meaningful access to civil justice.

If you have not had a chance to read the report at <http://www.flaccessjustice.org>, I strongly recommend it. It is filled with information and ideas.

The Commission will next meet on February 12, 2016. I welcome your attention and, if possible, your attendance. Much more remains to be done before all have meaningful access to justice. But the work has begun and must not stop. ■

THE EVOLUTION OF WOMEN'S RIGHTS IN FLORIDA

FROM INJUSTICE TO SUPREME COURT JUSTICE

BY SYLVIA H. WALBOLT AND CHRISTINE DAVIS GRAVES

The first Justices of the Florida Supreme Court, all white males, were elected by the Legislature and began serving in 1846. See <http://www.floridasupremecourt.org/about/history/schistory.shtml>. From the outset, and for decades thereafter, the Court grappled with a wide variety of issues relating to the rights and obligations of women under Florida law. Reviewing those decisions is a trip through time and highlights the dramatic change of the Court's view of the proper role of women in our society.

1. Women's Property Rights, Often in Slaves

Many of the early decisions of the Florida Supreme Court establishing the law of Florida with respect to property rights arose out of disputes over slaves and the legal documents conveying them. See <http://flcourthistory.org/From-Chatte-to-Justice>.

In the Court's decision — during its first term — in *Horn v. Gartman*, 1 Fla. 63, 101, 1846 WL 1001 (Jan. Term 1846), for example, a deed conveyed a slave named Will, as well as seven cows and calves, to the plaintiff, but reserved a life interest in this “property.” *Id.* at *1-2. In ruling on these “property rights,” the Court relied on prior decisions that it concluded were “abundant” and had been “ably decided,” declaring that “[n]othing is better settled than that, an interest in remainder, after an interest for life expires, may be limited in a deed for slaves.” *Id.* at *3-4 (citation omitted).

The casual way in which the Court addresses these “property” rights issues — grouping negro slaves with cows and household furniture — is chilling to read today. But, also startling is the realization of how sharply limited the property rights of women — albeit white women — were with respect to property given to them or purchased by them. Many of these early Supreme Court decisions dealt with efforts by husbands and sons to control the disposition of a woman's slaves, even where the slaves were plainly intended to be the woman's property for her individual benefit alone.

Consider the Court's 1848 decision addressing the will of William Gore in *Watts v. Clardy*, 2 Fla. 369, 1848 WL 1268 (Jan. Term 1848). After saying “I lend unto my beloved wife Mary, during her natural life, . . . as many of the negroes as [the



Charles H. DuPont with his wife, Mary Ann Hobson Dupont, pictured during the decade prior to his election as a justice of the Florida Supreme Court in 1853. Justice DuPont, a wealthy planter active in secessionist politics, wrote a pair of dissenting opinions in strong favor of a married woman's property rights.

Executors] shall deem proper for her comfortable support,” Gore’s will provided that all of them thereafter shall be “equally divided between my lawful heirs, share and share about.” *Id.* at *1-2.

The will then stated that Gore’s executors “shall divide all the remainder and residue of my negroes, stock of all kinds, household furniture, plantation tools, ready money, debts that are due me, and all other any personal property not already divided, betwixt my said sons and daughters having an equal share. . . .” *Id.* at *4. The property is “only lent” to his daughters “during their natural lives, and then to return in manner above mentioned.” *Id.* at *3-4.

Prior to his death, however, Gore had by deed “loaned” to one of his daughters, Anner Clardy, as follows:

during her natural life, and after her death, . . . to the heirs of her body which shall survive her, to be equally divided amongst them, the following negroes, with their future increase, viz: Charlotte, Silvey and Tenor; the said Anner Clardy to have and to hold and enjoy during her natural life, the said negroes Charlotte, Silvey and Tenor, and their future increase, and after her decease, to be then equally divided between her surviving heirs, as their exclusive property.

Id. at *2.

The question for the Court, then, was whether the will and deed (or either of them) conveyed to this daughter such an absolute interest and estate in the slaves that it vested the same interest and estate in her husband as absolute owner. *Id.* at *4. Finding such an interest had vested in the husband, the Court concluded that the daughter’s children did not have a vested interest in the estate residue. *Id.* at *4-5.

In the April 1855 term, two issues involving a woman’s rights in her slaves came before the Court. In *Sanderson v. Jones*, 6 Fla. 430, 1855 WL 1400, at *10-12 (Apr. Term 1855), the Court upheld a husband’s right to convey an interest in certain slaves who were part of his wife’s marriage settlement.

Then, over dissent, the Court held in *Maiben v. Bobe*, 6 Fla. 381, 1855 WL 1399, at *4 (Apr. Term 1855), that “the feme, Mrs. Shomo, [had the “power”] to “dispose of the property” – the “property” being “several negroes” who had been deeded to her by her brother “with the provision that they were ‘not to be subject to the control, or debts, or contracts of her husband’” and were to be “solely invested as the property of his sister.”” *Id.* at *4-5.

Although recognizing that “[m]arried women are entitled to the peculiar regard of Courts of Equity, . . . when they present a case of fairness and of equity, free from unfair dealing and impropriety,” the Court found Mrs. Shomo had not complained at the time of the sale of the first negro, or thereafter, of the alleged coercion by her husband to make the sale. Hence, the purchaser of the negroes was a bona fide purchaser, without notice. *Id.* at *12.

In a lengthy, dissenting opinion addressing prior authorities, Justice Dupont wrote in strong support of a married woman’s rights to property deeded to her, stating: “where by the terms of the deed or settlement, *the intention to exclude the marital rights of the husband*, is clearly expressed or can be reasonably implied . . . , a trust for the wife will be declared.” *Id.* at *22 (emphasis in original). In explaining his willingness to depart from the English common law’s “strong aversion to the wife’s enjoyment of her separate estate,” Justice Dupont declared that

the delicate relation which as men we bear to the very interesting class of society, who are more particularly interested in the question, ought to afford a sufficient motive. It would be monstrous indeed, that when upon every other subject that affects the interests of men, the law is continually changing to meet the progress of advancing civilization, upon this the most interesting of all subjects, and in reference too to a class of society who have kept even pace with the utmost progress of the age, it should be decreed to be as fixed and unalterable as is “the law of the Medes and Persians.”

Id. at *14-15.

The entire dissent is a good read but especially this observation:

These very settlements are intended to protect her weakness against her husband’s power, and her maintenance against his dissipation. It is a protection which the court allows her to assume, and her friends to give, and it ought not to be rendered illusory.

Id. at *21.

Rights (or lack of rights) of married women in slaves continued to be addressed by the Florida Supreme Court. See *Crowell v. Skipper*, 6 Fla. 580 (Jan. Term 1856) (rejecting claim that slave could not be levied upon for husband's debt because of deed of marriage settlement for wife); *May v. May*, 7 Fla. 207 (Jan. Term 1857) (holding deed of trust to daughter of certain slaves conveyed interest, share and share alike, to issue of both marriages of daughter); *McHardy v. McHardy*, 7 Fla. 301 (Feb. Term 1857) (rejecting son's claim to the "increase of the labor" of slaves belonging to his mother); *Broome v. Alston*, 8 Fla. 307 (1859) (holding widow's deed of slaves void because she had two distinct titles to the slaves and the particular interest she conveyed belonged to the estate); *Smith v. Hines*, 10 Fla. 258 (1863) (reviewing evidence in detail and holding husband's purported conveyance of slaves was a contrivance to avoid wife's dower rights).

A particularly interesting decision was rendered in *Tyson v. Mattair*, 8 Fla. 107, 1858 WL 1642 (1858). The deed of gift was to the grantor's married daughter and the "heirs of her body," and it described the "property" as "a negro man named Primus, aged about twenty-three years; a negro woman named Clarissa, aged about 17 years, and a negro man named William, aged about 12 years." *Id.* at *1-2. The daughter later asserted a claim to Primus, who had been levied on to pay her husband's debts.

The Court held, over dissent, that the deed to a married woman and the heirs of her body to have and to hold the property to their "own proper use and behoof forever" did not constitute a separate estate in her under the rules of equity, and thus was insufficient to deprive the husband of his marital rights in the negroes. *Id.* at *4, 7-9. Accordingly, the wife's claim to "the right of property in the slave Primus" was rejected "so as to leave the property subject to her husband's debts." *Id.* at *9.

The dissenting justice – again Justice Dupont – found the relevant authorities to be in conflict and thus relied on "the application of elementary principles, the only unerring guide to correct conclusions." He went on to say:

It is well settled, that no particular form of words is necessary in order to vest property in a married woman to her separate use; but the intentions to give her such an interest, in opposition to the legal rights of her husband, must be clear and unequivocal. On the other hand, whenever it appears, either from the nature of the transaction, as in the instance of a settlement in the contemplation of marriage, where the husband is a party, or from the whole context of the instrument, limiting to the wife the property, that she was intended to have it to her sole use, that intention will be carried into effect by a court of equity.

Id. at *12.

In Justice Dupont's view, the clear intention was to secure in the grantor's daughter "a separate *estate* in the slave levied

upon," such that he was not subject to the husband's debts. *Id.* at *10. Referring to "the disability of coverture" – i.e., the legal status of marriage – he reasoned:

If we refer to the *nature of the transaction*, it will be found that this was a gift to a woman, who was at the time under *the disability of coverture*. If it were not the intention of the donor to give her a separate estate in the property, and to bar the marital rights of the husband, why was the deed made to her? We certainly cannot impute the donor an ignorance of the fact, that, at common law, personal property given to the wife insures absolutely to the husband. There must have been some object contemplated in making the wife the donee in the deed. I do not insist that this circumstance taken alone, is sufficient to fix an intention to create a separate estate, but I enumerate it as only one of the indicia of such an intention.

Id. at *13 (emphasis in original). Disability indeed!

In 1885, Florida adopted a Constitution that provided for the right of married women to acquire and hold property and further regulating the extent to which their separate property could be subject to their debts and the debts of their husbands. The Supreme Court construed this provision in *Halle v. Einstein*, 34 Fla. 589, 16 So. 554, 559 (1894), declaring it to mean that a "married women's separate real or personal property may be charged in equity and sold, or the uses, rents, and profits thereof sequestered for the price of any property purchased by her."

The history of married women's property rights in Florida is described by the Supreme Court in *Blood v. Hunt*, 97 Fla. 551, 121 So. 886 (1929), and included a discussion of the civil law of Spain that was in force when provinces in Florida became part of the United States, as well as the development of Florida law thereafter.

Many years later, the Court again reviewed the development of this law from 1776 to date. It held a debt of a married woman that was valid under the laws of the state where it was incurred nonetheless was invalid in Florida as "a personal liability of the married woman not a free dealer. . . ." *Kellogg-Citizens Nat. Bank of Green Bay, Wis.*, 145 Fla. 68, 199 So. 50 (1940).

Suffice it to say, the rights and obligations of married women in commerce today are far greater than the days the husband had control over the wife's property. That change in the law was rightly made by the Court. As it explained in abrogating the rule that contracts could not be enforced against women, saying that was an improvident "hangover from the old common law" based on the theory husband and wife became one person, such that the "legal existence and personality of the wife [was] suspended during coverture," a theory having "no more place in present day equity practice than the old 'Pleas Roll' of the early day." *Merchant's Hostess Serv. of Fla. v. Cain*, 151 Fla. 253, 9 So. 2d 373, 375 (1942).



An all-male jury in the 1950's. Calhoun County, Florida.

2. Women's Rights Regarding Jury Service

The rights of women to serve on juries, and the corresponding right of a female defendant to have women on the jury determining the case against her, has similarly evolved since the days a woman's place was deemed to always be the home. Rejecting a challenge by a woman convicted of perjury by an all male jury, the Florida Supreme Court held in 1939 that there was no violation of the United States Constitution by limiting juries to males. *Hall v. State*, 136 Fla. 644, 187 So. 392 (1939). The Court concluded that the Fourteenth and Fifteenth Amendments were not implicated because they were intended "to give the nearly emancipated colored race complete equality of civil and political rights" within the states, whereas "[w]omen had not been enslaved" and instead had already been recognized "as the equal of man intellectually, morally, and socially." 187 So. at 400. The Court deemed the Nineteenth Amendment limited to a prohibition of "any denial or abridgement of the right to vote based on sex."

Id. at 401.

The Court went on to discuss United States Supreme Court decisions upholding the right of states to deny various rights to women, including the right to practice law, and described those rights as being "as essential to the privileges and immunities of citizens and equal protection of the laws as the opportunity to serve as jurors, which service entails a burden of responsibility, and frequently of real hardship, which many male citizens would escape from if they could." *Id.* The failure to permit the imposition of jury duty on women did not deprive the defendant of her constitutional rights.

Saying that the legislature has the right to "prescribe the qualifications of jurors, and to improve this burden upon men

alone if it sees fit to do so," the Court dismissed any notion of prejudice to a woman defendant from a jury entirely of men, making this remarkable observation:

It is not contended that juries composed of men would be less fair to women defendants than would juries composed of women. Indeed, experience would lead to a contrary conclusion. The spirit of chivalry, and of deep respect for the rights of the opposite sex, have not yet departed from the heads and hearts of men of this country.

Id. at 401.

In 1960, the Florida Supreme Court concluded that a Florida statute imposing upon women a burden of voluntary registration as a requirement for being called for jury service — a burden not imposed upon men — did not deprive the female defendant of an impartial jury in violation of the Florida Constitution and the Fourteenth Amendment to the federal Constitution. *Hoyte v. State*, 119 So. 2d 691 (Fla. 1955). There was no evidence that women were being systematically excluded from juries and their exclusion from compulsory service was not unconstitutional.

Saying the statute allowed women "as those best qualified to judge, the right to decide without compulsion whether such service could be rendered without risk of impairment in their more vital role," the Court went on to say:

Whatever changes may have taken place in the political or economic status of women in our society, nothing has yet altered the fact of their primary responsibility, as a class, for the daily welfare of the family unit upon which our civilization depends. The statute, in effect, simply recognizes that the traditional exclusion was based not



Justice Ellis, writing in dissent in 1924: “Politically sex makes no difference and cannot be the basis of classification in determining eligibility to office.”

upon inherent disability or incapacity but upon the premise that such demands might place an unwarranted strain upon the social and domestic structure, or result in unwilling participation by those whose conflicting duties, while not amounting to actual hardship, might yet be expected, as a general rule, to affect the quality of their service as jurors.

Id. at 694.

As late as 1972, issues of women’s rights to serve on juries in Florida were being resolved by the Florida Supreme Court. Dade County had a “quota system” fixing a limited percentage of African-American registered voters as potential jurors and further limiting the number of qualified women to the same number of qualified men. *State v. Silva*, 259 So. 2d 153, 156 (Fla. 1972).

Citing United States Supreme Court precedent prohibiting proportional racial limitations on the selection of jurors, the Court “reluctantly” followed that mandate and held that Dade County’s manner of selecting jury panels was unconstitutional. Citing other Supreme Court precedent, however, the Court then upheld Florida’s statute allowing the selecting officers to limit jury lists to persons they “know, and have reason to believe are law-abiding citizens of approved integrity, who are of good character, sound judgment and intelligence. . . .” *Id.* at 164. The inevitable effect of that grant of discretion goes without saying.

Justice Dekle dissented with respect to the Court’s decision on the issue of proportionality, saying “[a]n improved more equally balanced jury venire is a strange basis for its disqualification. We lose our perspective in our eager effort for equality.” *Id.*

3. Women’s Civic and Employment Rights

Over dissent, the Court held in 1924 that a statutory provision establishing that a county welfare board should consist of five men and four women was not unconstitutional. *State v. Daniel*, 87 Fla. 270, 99 So. 804 (1924). In the Court’s words, this disparity “merely recognizes the inherent differences between men and women immutably fixed by nature and also recognizes political equalities imposed by law upon men and women, and qualifies both men and women electors for appointment under the act.” *Id.* at 808.

In a powerful dissent, Justice Ellis found the limitation on the number of women who could serve on this Board was unconstitutional. The following quotes, though lengthy, are too good to leave out:

In view of the Nineteenth Amendment to the federal Constitution there exists no principle in government upon which women, as a class, may be excluded from service as governmental officers. To limit, therefore, her membership upon any board, commission, court, or Legislature to a minority is to assert the power of reducing her opportunity for service to a negligible quantity. Eligibility to office does not rest upon considerations of sex, nor does woman’s qualifications for public service rest upon any assumed spiritual endowments, or beauty of soul, nor peculiar faculty for discerning the distinctions, with clearer perception between right and wrong than her male compatriot. As a qualified member of the electorate she is, so far as constitutional, logical, legal, physical, moral, and intellectual inhibitions are concerned, free and qualified to become an official of the government in any of its branches; and being so qualified her activities cannot be limited to that sphere of influence to which she may be assigned by her generous but mistaken fellow citizens of the male persuasion. . .

Qualifications, in addition to those of citizenship and age, may be prescribed by the Legislature for holding public office, but there must be some relation between the qualifications prescribed and the duties to be performed. It is difficult to understand by what process of reasoning, or principle of political science, it may be said that a woman is qualified to hold office as a member of a commission only when the female members thereof number three, or less, but when the board or commission has among its membership four women no other woman is qualified for membership, although there may be five vacancies upon the board to fill. The theory under which a man qualified in

every respect to hold office is said to be qualified only when there are four or less members of his sex on the board, and not qualified if there are more, is equally incomprehensible.

Id. at 811.

He ended eloquently as follows:

Since the Nineteenth Amendment, sovereignty, in so far as that word signifies supreme political power as evidenced by the might of the ballot—the power that determines and administers the government of a state in the final analysis—is vested in woman as completely as in the other sex. Politically sex makes no difference and cannot be the basis of classification in determining eligibility to office. To discriminate between the sexes as the Legislature attempted by this act to do renders it as objectionable to the principles of free government as ordained by our Constitutions and established, we hope, of all time in this country, as any attempted discrimination between races.

Id. at 812.

In a pointed dissent by Justice Browne, joined in by Justice Ellis, they declared that the Legislature could no more make sex a qualification for appointment to the board than it could make race a qualification. *Id.* at 815-16. Furthermore, the requirement of a bond as a condition of membership on the board “bars a woman under coverture, not a free dealer, from serving on the board, as she cannot execute a bond,” a bar the dissenting justices regarded “as an unjust and unwarranted discrimination against women under coverture.” *Id.* at 816.

In *Pittman v. Barber*, 113 Fla. 865, 152 So. 682 (1934), a unanimous supreme court held, during the throes of the Great Depression, that the school district could not refuse reappointment of women as teachers based on the fact they were married or on the fact that the woman had “an independent, adequate income and that others needed the position worse than she did.” Writing through Justice Terrell, the Court declared:

The effect of such a policy is unreasonable and unheard of in any other business or profession. Prevailing policy is to admit women to all professions and businesses on equal terms with men, but this is the first instance brought to our attention in which an attempt was made to bar them on the ground of marriage. In other words, capable women are invited to qualify themselves to teach, but if they choose to marry or through industry or good fortune they attain some degree of financial independence, they are penalized and shut out of the profession they have spent years of time and thousands of dollars to equip themselves for, and this likely at the period of their greatest usefulness and at a time when it would be difficult to qualify and adapt themselves to another profession.

Id. at 684.

4. Other legal disabilities of married women

As late as 1967, the Court held, over a strong dissent by Justice Ervin, that a married woman beaten during marriage could not sue her former husband for damages, even after the marriage was dissolved. *Bencomo v. Bencomo*, 200 So. 2d 171 (Fla. 1967). As late as 1952, the Court held that a married woman could not recover for loss of consortium. *Ripley v. Ewell*, 61 So. 2d 420 (Fla. 1952). It was not until 1971 that wives gained the right to recover for loss of consortium, *Gates v. Foley*, 247 So. 2d 40 (Fla. 1971), and 1973 when they could recover damages for injury to a child, *Yordon v. Savage*, 279 So. 2d 844 (Fla. 1973). It was not until 1985, that the Florida Supreme Court got its first female justice – Justice Barkett.

Conclusion

2016 – Women’s rights have dramatically evolved from manifest injustice in many areas of the law to making law as Florida Supreme Court Justices. ■

*For the footnotes to this article, please refer to the Society website:
<http://www.flcourthistory.org>.*

Photographs provided by the State Archives of Florida, Florida Memory.

IN MEMORY OF FORMER CHIEF JUSTICE LEANDER J. SHAW

SEPTEMBER 6, 1930 - DECEMBER 14, 2015



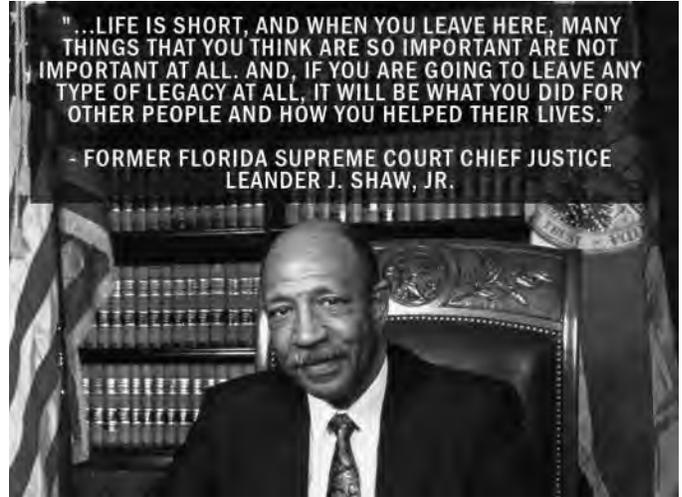
The Florida Supreme Court Historical Society notes with sadness the passing of former Florida Supreme Court Justice Leander J. Shaw Jr. In a statement released by the Supreme Court, Chief Justice Labarga said that “Justice Shaw served Florida with dedication and distinction, first as a lawyer and then as a member of Florida’s highest court for two decades.”



Justice Shaw was born in rural Salem, Virginia to Leander J. Shaw, a retired dean of the Florida A&M University Graduate School in Tallahassee, and Margaret Shaw, a retired high school teacher. He attended public schools in Virginia and received his bachelor's degree in 1952 from West Virginia State College. After serving in the Korean War as an Artillery Officer, he entered law school and earned his law degree in 1957 from Howard University in Washington, D.C. In a 2002 interview, Justice Shaw explained his decision to attend law school: "I thought when I got out of the service, this country was being changed by lawyers, especially in civil rights." At Howard, he met Joseph Hatchett, who later became the first black Florida Supreme Court Justice and Shaw's long-time friend. Hatchett recalls that "not only did we face discrimination, but we pledged our lives to fight it, and that's why we went to law school at that particular law school."

Justice Shaw came to Tallahassee in 1957 as an assistant professor of law at historically black Florida A&M University. When Shaw, together with Hatchett, took the Florida Bar exam in the old DuPont Plaza Hotel in Miami in 1960, he was barred from staying at the segregated hotel or from eating lunch with the white examinees. Upon his admission to the Bar that year, Shaw became one of only about 25 black attorneys practicing in the state. "When we started practicing law, courthouses were completely segregated," said Hatchett, Shaw's lifelong friend. "All public facilities were completely segregated. We're the last of the early lawyers who lived through prejudice and discrimination on a widespread basis." Shaw began in private practice in Jacksonville, and as one of just a handful of African-American lawyers in the city, devoted much of his time to pro bono activities, including civil rights cases, working to integrate schools, and representing minorities arrested for demonstrating against discrimination. Shaw was passionate about securing rights for people who didn't have the power to stand up for themselves. "When you are privileged or blessed, there's a debt that goes along with that ... because life is short and, when you leave here, many things that you think are so important are not important at all," Shaw told the Florida Bar News in a 2002 interview. "If you are going to leave any type of legacy at all, it will be what you did for other people and how you helped their lives."

Shaw then served as an Assistant Public Defender in the newly created Jacksonville Public Defender's Office handling an influx of post-Gideon cases. In 1969, he was hired by then State Attorney Ed Austin to join the State Attorney's staff, where he rose to serve as head of the Capital Crimes Division, a first for an African-American lawyer in the South. Senior U.S. District Judge Henry Lee Adams, himself a native of Jacksonville, recalls it being "remarkable" for a black lawyer to hold that job at that time. Shaw prosecuted to conviction 41 of 42 murder



cases. In 1972, Shaw returned to private practice with the law firm of Harrison, Finegold and Shaw, the first interracial law firm in northern Florida.

In 1974, Governor Reubin Askew appointed Shaw to the Florida Industrial Relations Commission, where he served until October 1979 when Governor Bob Graham appointed him to the First District Court of Appeal. He served there until January 1983 when Governor Graham appointed him to the Supreme Court. Justice Shaw was the first African-American Chief Justice in Florida and in all of the South, holding that position from 1990 to 1992.

Justice Shaw survived a merit retention challenge in 1990, which was motivated by his opinion in a case striking down a parental abortion notification law as violative of privacy rights granted in Florida’s Constitution. Justice Shaw later observed that “I see in this victory the determination of a people not to let the law — under which we all must live and raise our children — be shackled to the politics of some special-interest group. . . I hope judges and justices will continue to render decisions according to their conscience and their best understanding of the law, not on their reading of the latest opinion polls.”

Justice Shaw served on Florida’s high court for 20 years, until

mandatory retirement in early 2003. “Leander Shaw was one of a handful of judges,” Chief Justice Labarga said, “who helped restore the public’s faith in the Supreme Court and who transformed it into one of the most respected Courts in the nation. This was no small feat after the scandals of the 1970’s.” Shaw had a remarkable temperament, according to former Chief Justice Major Harding, whose service on the high court overlapped with Shaw’s for all of Harding’s eleven years. “Whether you agreed with him or not on a case or any issue, he was always the same,” Harding said. “He never allowed any difference of opinion to interfere with the significant friendship that we all were privileged to share.”

At his 2003 retirement ceremony, Justice Shaw described his position as “an extremely demanding job and at times stressful,” but added that “I can’t think of a job more professionally satisfying or rewarding.”

A lying in state was held in the rotunda of the Supreme Court Building on Monday, December 21 with a Florida Highway Patrol honor guard present. Family, friends and colleagues paid their respects as the honor guard carried his coffin in from rain-soaked Duval Street, with former Chief Justice Major Harding leading the way. Justice Shaw’s remains will be entombed in Arlington National Cemetery, Arlington, VA. ■

CEREMONIAL SESSION

THE SUPREME COURT OF FLORIDA WILL FORMALLY CONVENE IN CEREMONIAL SESSION IN ITS COURTROOM TO HONOR THE MEMORY OF JUSTICE SHAW.

SPEAKERS WILL INCLUDE CURRENT AND FORMER JUSTICES, COLLEAGUES, AND OTHERS.

THE EVENT IS OPEN TO THE GENERAL PUBLIC
AND WILL BE WEBCAST FROM WFSU.ORG/GAVEL2GAVEL/
WEDNESDAY, MARCH 2, 2016, 2:00 P.M. TO 3:30 P.M., EST

FAREWELL TO A GOOD FRIEND OF THE
FLORIDA SUPREME COURT HISTORICAL SOCIETY:
SHELDON SCHLESINGER
BY STANLEY ROSENBLATT



Sheldon was my friend and colleague and a long-time fellow trustee of the Historical Society. He unexpectedly passed away on December 2, 2015, and we will greatly miss his humor, his vision and his special insights. On that very day he had been in his office continuing his lifelong fascination and love for the law. His beloved wife Barbara (Bobbe) predeceased him in January, 2015.

Sheldon was much more than a great trial lawyer. He was a giant personality possessed of a unique presence and the capacity to understand and relate to people of every background. He was a hard worker always in command of the facts no matter how complex they may have been. Juries related to him because they could sense how deeply he cared about his clients and achieving justice for them. He was a towering figure who will be remembered by so many, including adversaries who respected his abilities and integrity. Sheldon was a member of the Inner Circle of Advocates.

Sheldon and Bobbe were loyal supporters of many civic and charitable organizations, including the Broward Center for the Performing Arts and the American Cancer Society. He was a member of the Board of Governors of NOVA Southeastern Law Center and chairman of the Board of Trustees of Broward Community College for 13 years. He strongly believed that education should be available to everyone and he unselfishly wanted future generations to be given every opportunity to succeed.

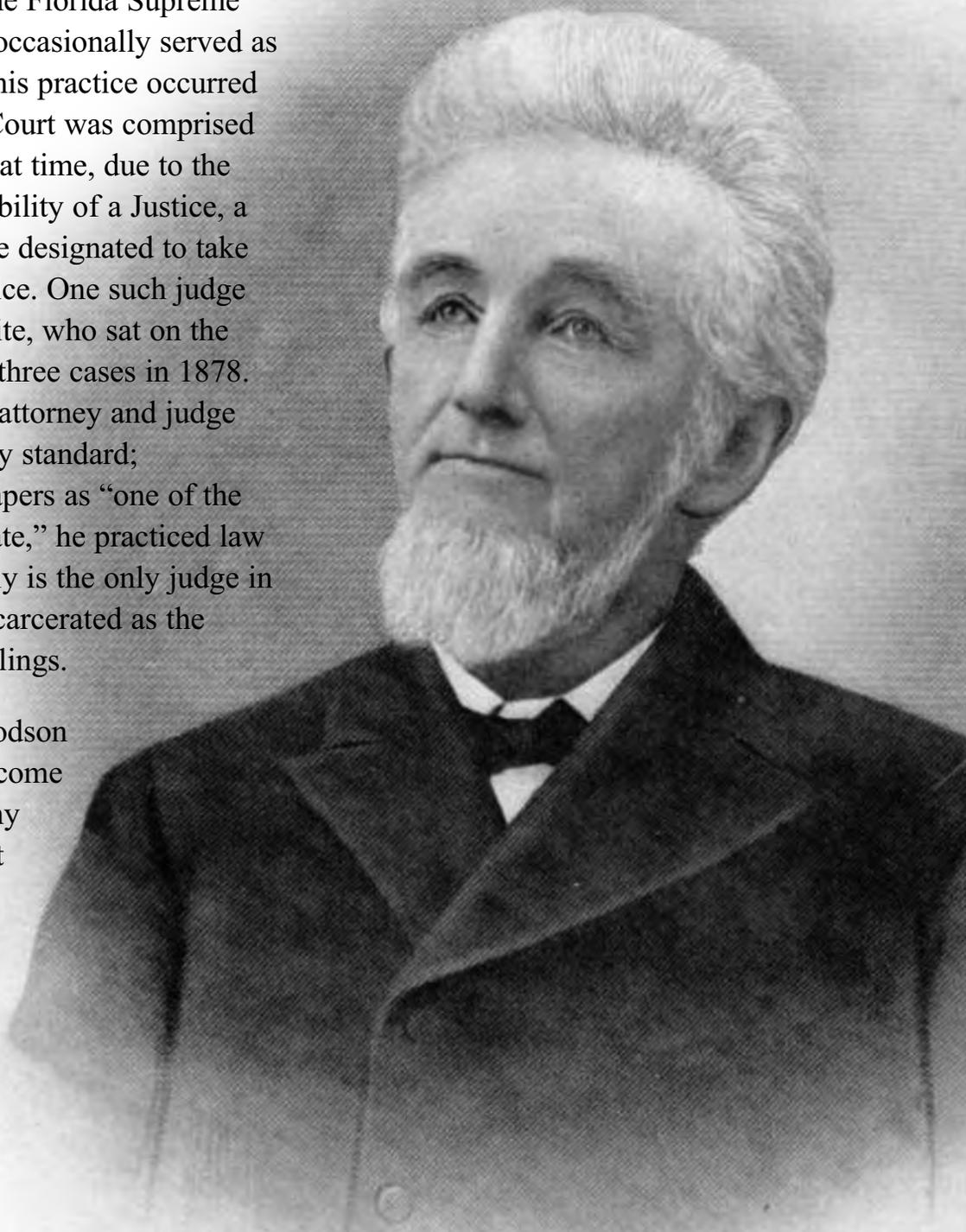
He is survived by his sons: Scott and Gregg – both esteemed lawyers who practiced with their father, recognizing the value of being exposed to a superb and caring mentor. Sheldon's six grandchildren lit up his life. ■

JUDGE PLEASANT W. WHITE: ACTING ASSOCIATE JUSTICE OF THE FLORIDA SUPREME COURT

BY JUDGE ROBERT W. LEE, BROWARD COUNTY COURT JUDGE

Early on in the history of the Florida Supreme Court, circuit court judges occasionally served as acting associate Justices. This practice occurred most frequently when the Court was comprised of only three Justices. At that time, due to the disqualification or unavailability of a Justice, a circuit court judge would be designated to take the place of the absent Justice. One such judge was Pleasant Woodson White, who sat on the Florida Supreme Court for three cases in 1878. Judge White's career as an attorney and judge was truly remarkable by any standard; recognized by local newspapers as "one of the unique characters of our state," he practiced law until the age of 90 and likely is the only judge in Florida history who was incarcerated as the result of one of his court rulings.

Born in 1819, Pleasant Woodson White would eventually become an active participant in many important events of the first century of Florida state history. Upon statehood in 1845, White attended the inauguration of Florida's



first governor, William D. Moseley. He thereafter completed Emory College in 1848, relocating to Quincy, Florida to practice law. Seven years into his career, when he was 36 years old, Pleasant Woodson White had his first two cases as a lawyer come before the Florida Supreme Court, *Croom v. Noll*, in which he represented the appellant, and *Kilcrease v. White*, in which he represented himself as appellee.

Upon the outbreak of the Civil War, White served the Confederate cause as the Chief Commissary Officer of the State of Florida, primarily focusing on the supply of Florida beef to meet the demands of the Confederate armies.

After the war, he was appointed judge of the Second Judicial Circuit, serving from 1869-1877. At that time, due in large part to the state's sparse population, there were only seven judicial circuits in Florida, each with a single judge who served an eight-year term. The Second Judicial Circuit was comprised of the counties of Gadsden, Liberty, Calhoun, Franklin, Leon, Wakulla, and Jefferson, all located in the middle-west portion of the Florida Panhandle. The first mention of White as a judge in a reported case was 1869 in *Swepton v. Call*, a case dealing with the issue of venue and the court's jurisdiction.

In addition to adjudicating cases between parties, Florida judges at this time continued to play a role in certifying election results, as they had done in Florida for decades. In the general election of 1870, the judiciary was involved in a very contentious, heavily disputed statewide election. At this time during the era of Reconstruction, the Republicans controlled the statewide canvassing board. The Democrats, however, believed that the canvassing board intended to control the results of the election, and they sought an injunction in circuit court to prevent the canvassing board from tallying the returns and declaring winners. The case unceremoniously came before Judge White as presiding judge in the Second Judicial Circuit. He was persuaded by the Democrats' argument and accordingly issued the requested injunction. Not to be outmaneuvered, the Republicans approached a federal judge in Jacksonville, claiming that Judge White's suspension of the canvassing board count contravened federal election laws issued in the aftermath of the Civil War. Rather than merely overturn Judge White's order, however, the federal court surprisingly issued a warrant for the arrest of Judge White. The federal judge dispatched a U.S. Marshall to escort Judge White to Jacksonville. With Judge White absent and in custody, the canvassing board resumed its count. At the same time, to avoid further delays, the Republicans appealed Judge White's decision to the Florida Supreme Court. Before the tribunal could reach a decision, however, the State Legislature intervened and abolished the state canvassing board. The action had its desired effect; the Supreme Court ruled that no action could be taken concerning a board that no longer existed. Soon thereafter, the federal prosecution of Judge White was dropped due to deficiencies in the indictment. Judge White, undeterred by these troublesome

events, remained on the bench. Thereafter, he remained serving as a circuit judge five years later in one of the several railroad cases coming before the Florida Supreme Court during the last quarter of the nineteenth century.

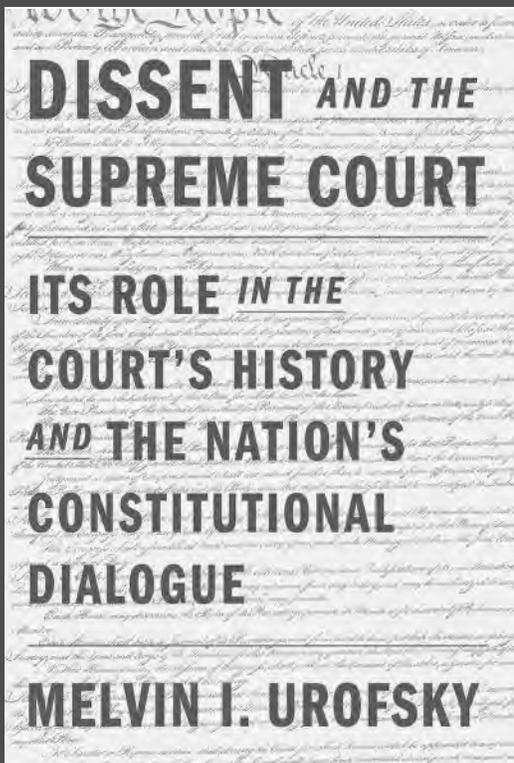
Judge White's judicial service in the capacity of an Acting Associate Justice of the Florida Supreme Court arose in 1878, when he was called on to preside in *Trustees of the Internal Improvement Fund v. St. Johns Railway Company* due to the disqualification of Justice James Westcott, one of the three justices sitting on the Florida Supreme Court at that time. The same year, he sat in two additional railroad cases, *State v. Jacksonville, Pensacola & Mobile Railroad Company* and *State v. Florida Central R.R. Company*, this time sitting along with Circuit Judge Emmet Maxwell because of the disqualification of both Chief Justice Edwin Randall and Justice Robert Van Valkenburgh, both of whom had prior business dealings with the railroads. At least two more of his trial level cases came before the Supreme Court before his service as a Circuit Judge ended.

In 1879, Pleasant White left the bench but thereafter engaged in a very active law practice, additionally serving as the Florida Commissioner of Lands and Immigration. In the early 1880's, Judge White relocated to Dade County where he bought large tracts of land and, with his sons, turned to farming citrus. He, however, continued to practice law, serving as counsel for the Florida Coast Line Canal & Transport Company, which had a substantial presence in Dade County. He appeared before the Florida Supreme Court representing parties in both civil and criminal matters on at least seven occasions, including one in which he was almost 80 years old.

In 1913, he assisted in the inauguration ceremony of Governor Park Trammell. A year later, Florida's "grand old man" was noted as being the "oldest practicing attorney" in Florida, one who was "still standing erect and contemplating a past full of useful work." Most summers, Judge White would return to the panhandle to spend time with his daughters and even ventured to Cuba to visit his son who had relocated there. Judge White died in 1919, just over age 100.

The Quincy home of the Florida judge who spent time in federal custody now sits on the United States National Register of Historic Places. His papers are housed as the Pleasant Woodson White Collection at the Florida Historical Society in Brevard County. ■

*For the footnotes to this article, please refer to the Society website:
<http://flcourthistory.org/Historical-Review>*



A REVIEW BY
SUSAN ROSENBLATT

Dissent and the Supreme Court captivates the reader with significant Supreme Court decisions over the past two centuries, analyzed through a series of landmark dissenting opinions. The well-thought-out and reasoned dissent, according to the author, Professor Melvin I. Urofsky, is the mechanism for a much needed “constitutional dialogue” among the Justices, with other branches of government, as well as with the public. Justice William O. Douglas described the dissent “as an essential safeguard in democracy,” and Justice Antonin Scalia noted “dissents augment rather than diminish the prestige of the Court.” (4-5).

The author describes how a well-reasoned dissent often will “refine and clarify” the majority opinion, citing Justices Ruth Bader Ginsburg and Antonin Scalia (17-18). Justice William Brennan commented that “it is a common experience that dissents change votes, even enough votes to become the majority.” (16) Indeed, Justice Ginsburg explained that “about four times a term, an opinion starting out as a dissent is so well reasoned that it persuades enough justices to join” and becomes a majority opinion (407). Several Justices were interviewed in a 2009 C-SPAN program, and Justice Stephen Breyer noted that “your dissent, will at the least, make me write a better opinion”; Justice Samuel Alito agreed that a dissent “ultimately improves the quality of the majority opinion.” (18-19). But as the author discusses, when the Supreme Court first heard cases, there were separate or seriatim opinions, following the English tradition. That way justices could openly disagree without explicitly dissenting.

John Marshall was appointed Chief Justice in 1801 and endorsed unified, unanimous opinions, which became the norm, and remains the standard in much of Europe. There are no dissents in Austria, France or Italy (333). Chief Justice Marshall (1801-1835) believed that the Supreme Court should “speak through one voice,” and avoided dissents by “modifying his own opinions” (45-46). During Marshall’s thirty-four years on the bench, the Court spoke in a unified fashion and Marshall dissented only seven times. Following his death in 1835, Chief Justice Roger Brook Taney was appointed and once again, “separate opinions had gained legitimacy.” (56)

Professor Urofsky discusses how a handful of monumental Supreme Court dissents have changed the course of history by ultimately directing the path of the Supreme Court and the country. These include the dissents of Chief Justice Salmon P. Chase and Justice Stephen Johnson Field in the *Slaughterhouse Cases* (1868), first raising the Fourteenth Amendment protections and the “jurisprudence out of the Due Process Clause.” (103) In subsequent decisions of the Supreme Court, Justice William O. Douglas cited Justice Field’s dissent as a barrier against the states infringing on individual liberties, as did Justice John Marshall Harlan II “endorsing Field’s expansive view of what rights belonged to the ‘citizens of any free government.’” (104) More recently, Justices Samuel Alito and Antonia Scalia relied on Field’s interpretation of the Privileges or Immunities Clause (Id).

Justice John Marshall Harlan (1877-1911), the grandfather of Justice John Marshall Harlan II, was known as the “Great Dissenter, because his dissents helped shape the constitutional development of the country.” (105) He was the lone dissenter in the *Civil Rights Cases* (1883), and his dissent has been referred to as the “noblest opinion in the history of our country.” (111) Justice Harlan’s dissent was cited and relied on over eighty years later in a series of civil rights cases, for the principle that private property and businesses that serve the public must provide equal treatment and cannot discriminate against Blacks. Justice Thurgood Marshall invoked Harlan’s dissent in the first affirmative action case, on the issue of equality under the Fourteenth Amendment (116). Justice Harlan’s compelling dissent in *Plessy v. Ferguson* (1896) is much cited, including in the landmark decision of *Brown v. Board of Education* (1954), overruling *Plessy*, for Harlan’s pronouncement that “Our Constitution is color-blind.” (119) This was a rather astounding statement in 1896 from a Southerner and former slave owner (136).

Justice Louis Dembitz Brandeis’ dissent, joined by Justice Oliver Wendell Holmes, Jr., in *Schaefer v. United States* (1920), remains highly relevant today: “The constitutional right of free speech has been declared to be the same in peace and in war . . . and an intolerant majority, swayed by passion or by fear, may be prone in the future . . . to stamp as disloyal opinions with which it disagrees. . . . The fierce sentiments of war should not color the judgment of what had been said.” (174) Brandeis’s *Gilbert* (1920) dissent followed, where the majority upheld the

conviction of a pacifist who spoke out against the war and draft. Justice Brandeis invoked the Fourteenth Amendment’s Due Process Clause for the right of parents to teach their children the doctrine of pacifism (177). The *Gilbert* dissent is also an important milestone in the development of case law utilizing the Fourteenth Amendment to protect other rights.

Some have said that Brandeis’s greatest dissent, which was actually a concurrence, was in the case involving *Charlotte Anita Whitney*, a niece of Justice Stephen Field, whose conviction in California for membership in the Communist Labor Party was affirmed in the Supreme Court. (180-81). Brandeis identified the scope of the First Amendment protection for speech and the “*Whitney* concurrence has shaped American constitutional law.” (181-83) Following a discussion of the many important dissents of Justice Brandeis, Professor Urofsky stresses “how often the dissent would become the accepted jurisprudence of the Court.” (187) Nor did Brandeis feel forever bound by precedent. In one dissent (*Burnet v. Coronado Oil and Gas Co.*) Justice Brandeis listed over one hundred cases where the Supreme Court overruled itself, suggesting a more pragmatic and flexible approach to the *stare decisis* doctrine. (192)

The author devotes a full chapter to Justice Brandeis’s dissent in *Olmstead v. United States* (1928) (194-208). The *Olmstead* dissent, according to Urofsky, “runs a close second” to that in *Whitney* (184). Roy Olmstead, a police lieutenant in Seattle, quit the force and became a prominent bootlegger, running the ‘Olmstead Ring’ between British Columbia and Seattle (194-95). Olmstead was arrested based on a series of warrantless wire taps on the organization’s phones. The Ninth Circuit affirmed convictions of Olmstead and seventeen of his partners. The issue before the Supreme Court was whether the use of wiretap evidence obtained without a search warrant violates the Fourth Amendment to the Constitution. (196)

Brandeis’ dissent in *Olmstead* “had a profound and lasting impact on Fourth Amendment jurisprudence” (199). His compelling dissent warned that “[i]f the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.” (200) Justice Brandeis rejected the proposition that to achieve justice, “the end justifies the means,” declaring that “[a]gainst that pernicious doctrine this Court should resolutely set its face.” (*Id.*) Significantly, Brandeis also invoked the right to privacy/the right to be left alone: [E]very unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.” (201) Though Brandeis lived to see Congress prohibit warrantless wiretapping evidence in federal courts in 1934 (202), it would take until 1967 for the Supreme Court to adopt Brandeis’s *Olmstead* dissent in *Berger v. New York* (202).

During the 1920’s and the tenure of Chief Justice William Howard Taft, there were fewer dissents because Justice Taft declared that dissents “are a form of egotism. They don’t do any

good and only weaken the prestige of the Court.” (214) Taft considered the dissents of Brandeis and Holmes “frustrating and maddening,” because the Court needed to “display a united front to the public.” (*Id.*) But the ‘unified front’ drastically changed with President Franklin D. Roosevelt’s appointment of eight new justices who “embraced legal realism and liberal legalism,” with a profound “collapse of consensus” (221). Urofsky has included for the reader interesting statistics, in chart form, for each of the Roosevelt appointees, including each Justice’s years on the court, the number of cases heard, written opinions, dissents and concurring opinions (223). Justice William O. Douglas’ 468 dissents dramatically exceeded the other Justices, followed by 310 dissents of Justice Hugo Black, though Douglas and Black served longer than other Roosevelt appointees. The Roosevelt appointees, often referred to as the “scorpions,” are remembered for their personal antagonism and bitter infighting (222-224). Urofsky notes that this period echoes today, with scathing comments contained in a significant number of the dissents of current Supreme Court Justices. (406-07).

There were some very important dissents written by the Roosevelt appointees, including the dissent of Justice Hugo Black in *Betts v. Brady* (1942), Justice Robert H. Jackson in *Korematsu v. United States* (1944), Justice Wiley Rutledge in *In re Yamashita* (1946) and Justice William O. Douglas in *Dennis v. United States* (1951) (228-29).

Justice Rutledge’s dissent in *In re Yamashita*, was from the Supreme Court’s nearly instantaneous per curiam affirmance of a military commission’s verdict. The issue was the power of a military tribunal consisting of General MacArthur and five military judges to try and punish by execution General Tomoyuki Yamashita for the civilian crimes of Japanese soldiers under his command in the Philippines. Rutledge believed that “Yamashita should have been tried in civilian court and accorded full due process of law.” (256)

Dr. Wolf was convicted of conspiring to perform abortions based on evidence seized during a warrantless search, in *Wolf v. Colorado* (1949), and the dissents of Justices Douglas, Murphy and Rutledge advocated an exclusionary rule for violation of the Fourth Amendment. “A dozen years later the Warren court explicitly overruled *Wolf* in *Mapp v. Ohio*.” (287) The exclusionary rule applied and evidence seized without a warrant was inadmissible, as the *Wolf* dissents had earlier urged.

The “train wreck of the *Dennis* case,” (1951), involved the conviction of a group of twelve leaders of the American Communist Party under the 1940 Smith Act, making it a crime to teach or advocate the overthrow of the government (293-95). Much respected Chief Circuit Judge Learned Hand of the Second Circuit affirmed the conviction applying a balancing test and the clear and present danger test (299). Justice Hugo Black’s two-page dissent of the affirmance in the Supreme Court, described the indictment as a “virulent form of prior censorship of speech and press.”(302) Black hoped that “in calmer times, when

present pressures, passions, and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.” (303) Justice Douglas’ dissent did not deny that Communism posed a threat but asserted nevertheless that “the witch hunt launched against the U.S. Communist Party leaders constituted an even greater threat to American values.” (*Id.*)

Another landmark dissent from a Roosevelt appointee was in *Betts v. Brady* (1942), involving the right to counsel in a criminal proceeding. Justice Hugo Black’s dissent expressed his belief that the Fourteenth Amendment made the Sixth Amendment applicable to the states. The dissent ultimately became the governing law two decades later in *Gideon v. Wainwright* (1963), overruling *Betts* and holding that the Fourteenth Amendment incorporates the Sixth Amendment guarantees and applies to the states (315).

A significant dissent from the Warren Court (1953-1969), was that of Justice John Marshall Harlan II in *Poe v. Ullman* (1961), involving the validity of an 1879 statute prohibiting a physician from providing contraception advice to a married couple. Harlan asserted that the Connecticut statute making it a criminal offense for a married couple to use birth control, was an “intolerable invasion of privacy in the conduct of the most intimate concerns of an individual’s personal life.” (348)

Four years later, the Supreme Court decided *Griswold v. Connecticut* (1965), and Chief Justice Earl Warren assigned the opinion to Justice Douglas who had also dissented in *Poe*. This time the Supreme Court, following Douglas’ dissent in *Poe*, found a right of privacy derived from the Bill of Rights. (349) Justice Harlan, in his concurring opinion, relied on his dissent in *Poe* that a right of privacy existed within due process. (350)

In May, 1969, President Richard Nixon appointed Warren Earl Burger as Chief Justice, succeeding Justice Earl Warren (355). The Burger years (1969-1986), included several key cases with important dissents, including on abortion, *Roe v. Wade* (1973), affirmative action, *Regents of the University of California v. Bakke* (1976), and the constitutionality of sodomy laws, *Bowers v. Hardwick* (1986). *Roe v. Wade* relied on the Brandeis’ dissent in *Olmstead*, which was also cited by Justice Harold Andrew Blackmun in his dissent in *Hardwick*. Later, in *Lawrence v. Texas* (2003), Justice Anthony McLeod Kennedy stated that “the dissenters in *Hardwick* had gotten it right.” (387)

Professor Urofsky consulted his colleagues in the field of constitutional history to predict which of the current Justices dissents will have “staying power.” (416) History will reveal whether these recent dissents selected will trigger constitutional dialogue and influence future decisions of the Supreme Court and the path of our country. But even if Urofsky’s predictions prove wrong, *Dissent and the Supreme Court* is very entertaining reading for those of us who appreciate the rich history of Supreme Court constitutional law. ■

MEMBERSHIP

YOUR MEMBERSHIP IN THE FLORIDA SUPREME COURT HISTORICAL SOCIETY

We would like to personally request a small commitment from you to support the vital programs that preserve and honor our State's long and proud history of Florida's Supreme Court.

Your tax-deductible membership into the **Florida Supreme Court Historical Society (FSCHS)** will show your commitment to commemorating and preserving the milestones of Florida's judiciary. Please support the efforts of the Historical Society on this year's Florida Bar Fee Statement or complete the membership form below.

Your membership into the **Florida Supreme Court Historical Society** funds these projects and more...

- ◆ Funding of the Oral History Projects & the Supreme Court Docents Program
- ◆ Commissioning of the official portraits of five of the Justices
- ◆ Funding the research and publishing of the *History of the Florida Supreme Court*, Vol. I, II & III
- ◆ Sponsoring the 'Passing of the Gavel Ceremony' for the incoming Chief Justices
- ◆ Assistance to the Court in finding unique ways to publicly commemorate historical milestones
- ◆ Lifetime Achievement Awards at the Annual Dinner
- ◆ Publishing of the *Historia Juris Newsletter* & *The Florida Supreme Court Historical Society Review*
- ◆ Ongoing efforts to acquire significant artifacts from the history of Florida's Court



The simple truth is, funding for these types of projects is drying up from traditional sources. That is why it is essential now, more than ever, for you and along with our Florida Bar colleagues to fill this important funding need. If not us, then who will?

Please join the Historical Society online at FLCourtHistory.org or complete and return the form below. Either way your commitment at any level would be greatly valued.

FSCHS 2016 MEMBERSHIP ACCEPTANCE

Annual Membership Check one, please

- Student \$25.00
- Young Lawyers Members/Paralegals \$50.00
- Individual \$100.00

Special Recognition Levels

- Contributor \$500.00
- Patron \$1,000.00
- Benefactor
- A Life Membership \$5,000.00 over a five year period

NAME _____ ORGANIZATION _____

ADDRESS _____ CITY _____ ST _____ ZIP _____

EMAIL _____ PHONE _____ / _____ FAX _____ / _____

Three convenient ways to return your Membership Acceptance Form

- Online: FLCourtHistory.org All Major Credit Cards & PayPal accepted online
- By Check: Please make payable to: FSCHS 1947 Greenwood Drive, Tallahassee, FL 32303
- By Credit Card: MasterCard Visa AmEx Discover

Card # _____ Expiry _____ CVCode _____

Your credit card information will be utilized for a one-time PayPal transaction marked "SUP CT HIST" or "FL SUPR CT HIST SOC" on your statement. I authorize the use of my card for the Society to conduct this PayPal transaction.

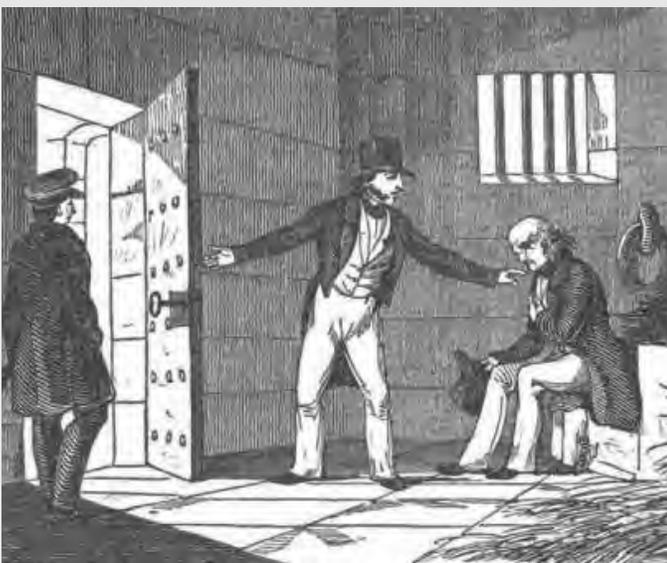
Authorizing Signature _____

Return your Membership by: FAX: 850:201.2947 EMAIL: Admin@FLCourtHistory.org
US Mail: FSCHS 1947 Greenwood Drive, Tallahassee, FL 32303

Dues and contributions to the FSCHS, Inc., are tax-deductible for charitable purposes to the extent allowed by law, and 100 percent of each dues contribution is received by this organization. The Society's IRS tax identification number, for your records, is 59-2287922. Florida non-profit registration number: SC-09634

FROM DEBTORS' PRISONS TO THE CFPB: A HISTORICAL PERSPECTIVE ON THE DEBT COLLECTION INDUSTRY

BY SHAUN ERTISCHEK



A sketch of Richard Mentor Johnson, the ninth vice president of the US, freeing a man from debtors' prison. Johnson was a 19th-century advocate of ending debtors' prisons.

INTRODUCTION AND HISTORICAL PERSPECTIVE

Can I go to jail for not paying my debt? That is a question posed by some consumers even in modern times. Like many good legal questions, the answer is: “It depends.”

Historically, individuals were often imprisoned for failing to pay their debts. This practice permeated Europe throughout the Middle Ages and was established in America during colonial times. Debtors' prisons were prevalent in this country until the middle of the 19th century. Oftentimes, obligors were forced to “work off” their debt or have someone else pay it in order to be released. None were exempt, as even Robert Morris — a Founding Father, signer of the Declaration of Independence, and financier of the American Revolution — was imprisoned in 1789 for debts resulting from land speculation. James Wilson, another Founding Father and signatory to the Declaration of Independence, was imprisoned while serving as one of the original Justices on the U.S. Supreme Court.

States controlled this practice and had the right to abolish imprisonment for debt if they so desired. Debtors' prisons generally ceased on a federal level in 1839 after the enactment of Sections 990-992 of the Revised Statutes of the United States, the precursor to 28 United States Code Section 2007, which currently reads, in part, that “[a] person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished.”

Article 1, Section 8, Clause 4 of the U.S. Constitution also authorized Congress to enact “uniform Laws on the subject of Bankruptcies throughout the United States.” As such, various bankruptcy laws were passed and subsequently repealed until the modern bankruptcy code was initially created through the adoption of the Bankruptcy Reform Act of 1978. Bankruptcy filings allow qualifying petitioners to discharge certain debts in an effort to obtain a fresh start. During the 19th century, these laws helped to get and keep debtors out of prison. Additionally, individual states began to prohibit imprisonment for owing debt.

On February 25, 1868, the State of Florida adopted the third version of its Constitution, which contained a Declaration of Rights. Section 15 thereof read: “No person shall be imprisoned for debt, except in case[s] of fraud.” This provision survives today in Article 1, Section 11 of the current Florida Constitution adopted in 1968.



Portrait of James Wilson, a signatory of the US Declaration of Independence, member of the Continental Congress, and an original Justice appointed to the Supreme Court of the United States. Wilson was imprisoned for his debts while serving on the high court.

THE MODERN DEBTORS' PRISON

Although individuals can no longer be imprisoned simply for incurring and owing debt, they can be jailed for failing to obey a court order related to such debt as well as the non-payment of certain types of debt.

A report issued by the Brennan Center for Justice examined states with the highest prison populations and identified four causes that lead to the arrest of people for failing to pay certain debt or appear at debt related hearings. First, certain states make criminal justice debt a condition of probation, parole, or other correctional supervision with failure to pay resulting in arrest and reimprisonment. Second, certain states consider imprisonment as a penalty for the willful failure to pay criminal justice debt. Third, defendants in certain states can voluntarily spend time in jail as a way of paying down court imposed debt. Lastly, certain states arrest people for failing to pay criminal justice debt or appear at debt-related hearings (pending an ability to pay hearing).

Several court cases have ruled on and clarified such situations. In 1970, the U.S. Supreme Court ruled in *Williams v. Illinois* that extending a maximum prison term because a person is too poor to pay fines or court costs violates the right to equal protection under the Fourteenth Amendment. The Court opined that the Equal Protection Clause required the statutory ceiling placed on imprisonment for any substantive offense to be the same for all defendants irrespective of their economic status. In 1971, the High Court found it unconstitutional in *Tate v. Short* to impose a fine as a sentence and then automatically convert it

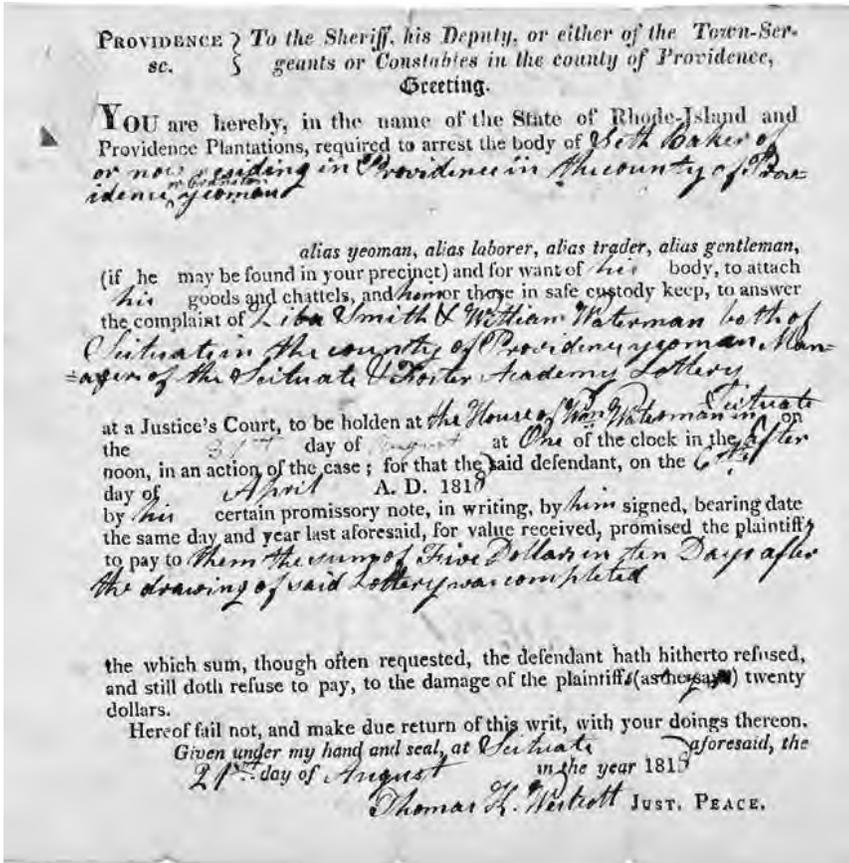
into “a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.” Then, in 1983, the Court held in *Bearden v. Georgia* that the Fourteenth Amendment bars courts from revoking probation for a failure to pay a fine without first inquiring into a person's ability to pay and considering whether there are adequate alternatives to imprisonment.

Following *Bearden*, the Supreme Court of Florida held that “before a person on probation can be imprisoned for failing to make restitution, there must be a determination that that person has, or has had, the ability to pay but has willfully refused to do so.”

The Florida Supreme Court later struck down Florida Statute § 948.06(5), in *Del Valle v. State*, which governed who had the burden to prove “willfulness” relative to non-payment of restitution or court fines prior to imprisonment. The Statute required “the probationer or offender to prove by clear and convincing evidence that he or she does not have the present resources available to pay restitution or the cost of supervision despite sufficient bona fide efforts legally to acquire the resources to do so.” However, the Court held that “before a probationer can be imprisoned for failure to pay a monetary obligation such as restitution, the trial court must inquire into a probationer's ability to pay and make an explicit finding of willfulness based on the greater weight of the evidence.” Further, relative to probation revocation proceedings, it was determined that the State must present sufficient evidence of the probationer's willful failure to pay a monetary obligation, which includes evidence on ability to pay, to support the court's finding. After evidence of willfulness is introduced by the State, then the burden can be shifted to the probationer to assert and prove his or her inability to pay. Nevertheless, the probationer need not prove inability to pay by clear and convincing evidence, which would be a higher burden than that required of the State.

Similarly, although an individual cannot be arrested for failing to pay a civil debt anymore, they can still potentially be imprisoned for failing to comply with a court order related to the debt such that the court finds the person in contempt. As a tool for enforcing a money judgment, several states permit the issuance of information subpoenas. Such a subpoena is intended to obtain information about the judgment debtor's income and assets in order to satisfy the judgment. However, when a consumer does not respond to the subpoena, many states will issue an arrest warrant for contempt of court.

The Florida Rules of Civil Procedure include a standard financial disclosure form called a Fact Information Sheet and a judgment creditor can ask the court to order the debtor to complete and return the form. Specifically, Rule 1.560(b) states: “In addition to any other discovery available to a judgment creditor under this rule, the court, at the request of the judgment creditor, shall order the judgment debtor or debtors to



An 1818 arrest warrant for nonpayment of debts related to lotto ticket purchases.

complete form 1.977, including all required attachments, within 45 days of the order or such other reasonable time as determined by the court. Failure to obey the order may be considered contempt of court.”

Today, most financial institutions and creditors realize the draconian nature of such penalty and will not permit their collection counsel to take any post-judgment remedy or action that could potentially trigger a court to issue an arrest warrant for a consumer.

INDUSTRY REGULATION

In 1977, Congress enacted the Fair Debt Collection Practices Act (“FDCPA”) to “eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.”

The FDCPA prohibits “false, deceptive, or misleading representations” in connection with the collection of any debt. It limits how and when a debt collector may communicate with a consumer, forbids the use of “unfair and unconscionable means to collect a debt,” and proscribes conduct deemed to be

harassing. By way of example, such prohibited conduct includes, but is not limited to, communicating with consumers at any inconvenient place or time, allowing a telephone to ring repeatedly or engaging in conversation with the intent to “annoy” or “abuse,” engaging in misrepresentations as to the nature or amount of the debt, threatening legal action with regard to the debt that is not actually permitted or contemplated, using abusive or profane language in the course of collecting a debt, and disclosing the existence of the debt to third parties. The FDCPA affirmatively requires certain conduct as well, including that the debt collector identify itself and provide certain disclosures, such the right to dispute the debt and request validation of the debt.

Numerous states also have their own debt collection laws including those that mimic the requirements of the FDCPA. Several states have restrictions that are more burdensome and require additional consumer disclosures. Florida is one such state, having enacted the Florida Consumer Collection Practices Act, which also covers original creditors in addition to debt collectors.

Enforcement of the FDCPA and state law in this area has been under the auspices of the Federal Trade Commission (“FTC”) and the attorney general in each state. Additionally, consumer attorneys regularly bring litigation against debt collectors under these statutes to obtain an award of statutory damages for technical violations, action damages (if any), and an award of attorneys’ fees. Due to the fee-shifting provision that awards attorneys’ fees to successful litigants, an entire cottage industry of debtors’ attorneys has arisen to bring such actions. The award (or settlement) of fees oftentimes dwarfs any remuneration actually received by the consumer.

There are also media stories of scam artists that pose as legitimate debt collectors in an effort to fraudulently elicit payments from consumers. Such negative press fuels further regulatory scrutiny of the industry and hampers legitimate debt collection efforts.

Other statutes, such as the Fair Credit Reporting Act (“FCRA”) and the Telephone Consumer Protection Act (“TCPA”), also govern various aspects of the debt collection space. In fact, there is much concern today over the TCPA, which was originally drafted in 1991 to limit unwanted telemarketing calls, as it eschews the use of modern technology (not yet in existence at the time it was enacted) to contact consumers. For example, the TCPA broadly prohibits the use of an “automatic telephone

dialing system” to call wireless numbers without “prior express consent.” According to the National Center for Health Statistics, about 41% of U.S. households had only wireless phones by the second half of 2013. Such prohibition can prevent creditors from contacting consumers and other companies from contacting their customers. Judges throughout the country are currently faced with rendering decisions on TCPA cases that are now heavily impacted by even broader new rules recently promulgated by the Federal Communications Commission (“FCC”) in response to several petitions seeking clarification. A petition for review of the FCC’s Declaratory Ruling and Order that created these new rules is currently pending before the United States Court of Appeals for the District of Columbia.

DODD-FRANK AND THE CFPB

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), Pub. L. 111-203, 124 Stat. 1376-2223, was signed into law and became effective on July 21, 2010 in an effort to reform financial regulation. Title X of the Dodd-Frank Act created a new federal agency called the Consumer Financial Protection Bureau (“CFPB”). The CFPB regulates consumer financial products through (1) writing rules, supervising companies, and enforcing federal consumer financial protection laws, (2) restricting unfair, deceptive, or abusive acts or practices, (3) taking consumer complaints, (4) promoting financial education, (5) researching consumer behavior, (6) monitoring financial markets for new risks to consumers, and (7) enforcing laws that outlaw discrimination and other unfair treatment in consumer finance. The CFPB has oversight over the consumer debt collection industry and regulates it through divisions that handle rulemaking, supervision, and enforcement.

The CFPB has proven to be a powerful agency in just its first few years of existence by taking action against numerous banks, lenders, mortgage servicers, debt buyers, and debt collectors. It has conducted examinations, promulgated rules, issued fines, entered into consent orders, and created a consumer complaint database. The CFPB has grown to 1,443 employees at the end of fiscal year 2014 (ending September 30th) during which the bureau issued almost \$4 billion in penalties, redress and relief to consumers and imposed against defendants in enforcement actions.

In its efforts to regulate consumer finance markets and protect consumers, the CFPB is on the forefront of enforcing federal debt collection laws. That includes the FDCPA, but goes beyond that to include other consumer financial laws, as well as “preventing unfair, deceptive, or abusive acts or practices” (collectively, UDAAPs) in violation of the Dodd-Frank Act.

This is a very broad category of behavior related to the collection of consumer debt. As such, the CFPB seemingly has unprecedented power that can be exercised indiscriminately.



The CFPB was formed in 2011.

The CFPB has entered into Consent Orders with Encore Capital Group and Portfolio Recovery Associates, the country’s largest debt buyers, requiring that they refund millions of dollars and overhaul their debt collection and litigation practices. The agency has even filed suit against a large Georgia collection law firm alleging impermissible and unlawful litigation tactics. These actions result in resolutions that often create new standards to which the entire industry must adhere.

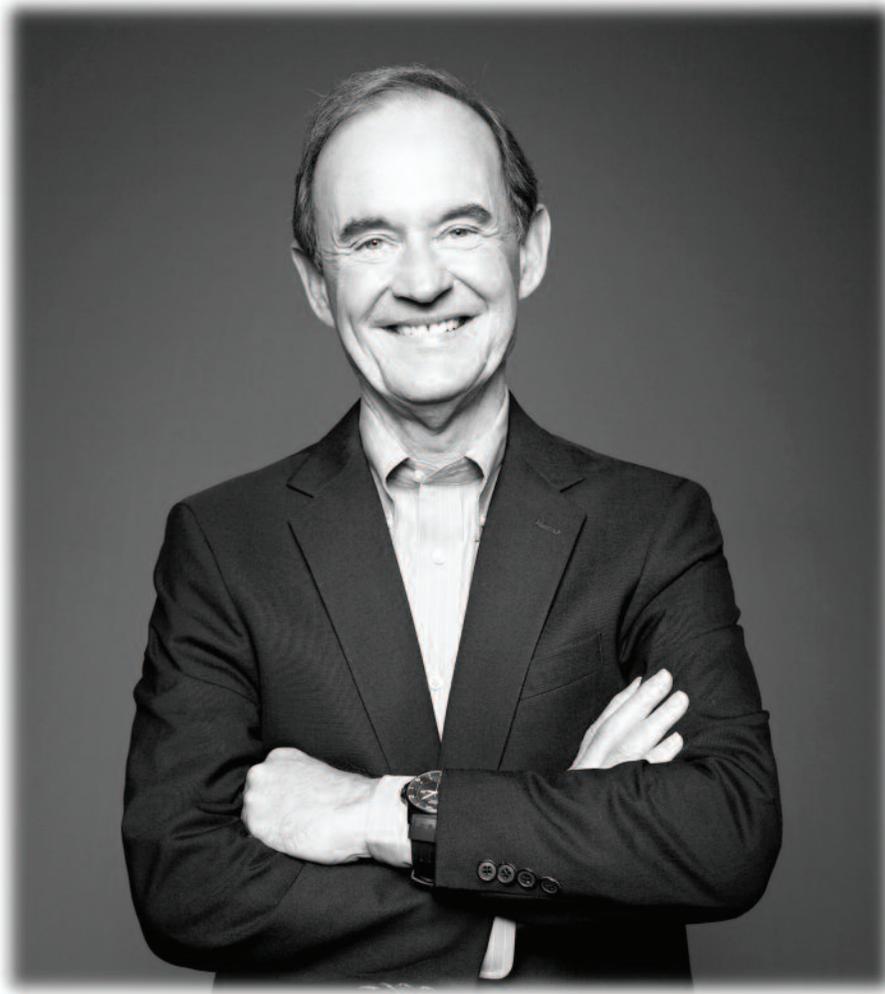
Furthermore, the CFPB intends to promulgate rules governing the debt collection field. The FDCPA was drafted very broadly and the CFPB will be the first agency with authority to issue rules under this statute. The industry is uncertain if such rules will further increase compliance burdens or clarify many of the ambiguities in the FDCPA that are often exploited by litigious consumers as well as the cottage industry of debtors’ counsel. The activities of the CFPB have been controversial and partisan as several pieces of legislation have been sponsored to curtail the agency’s powers. For example, H.R. 957, creating a separate Inspector General for the CFPB and H.R. 1266, replacing the director with a five-member commission were both introduced in the 114th Congress. Additionally, S. 1804 was introduced in an effort to repeal the Consumer Financial Protection Act of 2010, which established the CFPB.

There is also pending litigation alleging that the establishment of the CFPB itself is unconstitutional because, among other things, the independent agency is headed by a single person rather than multiple members and such a bureau director was an unlawful recess appointment.

CONCLUSION

The debt collection industry is certainly a complex one that has evolved throughout history. Consumer rights and protections have grown exponentially as debtors’ prisons have become a vestige of the past, while regulators currently define an evolving paradigm that continues to set a higher standard for creditors to collect debt and pursue remedies under the law. ■

For the footnotes to this article, please refer to the Society website: <http://flcourthisory.org/Historical-Review>



Boies, Schiller & Flexner LLP

congratulates its Chairman

DAVID BOIES

the keynote speaker at the

Florida Supreme Court Historical Society Annual Dinner

And we salute the Society for its mission
to preserve, protect, and honor the long and proud history
of the Florida Supreme Court

BOIES, SCHILLER & FLEXNER LLP

UPCOMING PUBLICATIONS

VOLUME III OF THE SUPREME COURT HISTORY IS NOW IN THE HANDS OF THE PUBLISHER, UNIVERSITY PRESS OF FLORIDA.

The Historical Society is pleased to announce that the complete manuscript of Volume III of History of the Florida Supreme Court has been turned over to the publisher and will be entering the next phase of publication. The projected release date is in early 2017. Author Neil Skene has poured years of work and masses of fascinating information into Volume III, which will cover history from the 1970's to 1987, one of the most transformative periods of the Court's history. Early feedback on the thoroughly researched and engagingly written manuscript is very positive, and this volume is sure to be a gratifying read for anyone interested in the Florida Supreme Court's captivating history. Though the manuscript is completed, there are more steps to follow.

One of those steps is to collect photographs as illustrations for the book. Any society member who has photographs from that era is urged to contact the author at neil@skenelaw.com and let him know.

Here is an update directly from the author himself:

After completing years of research and countless numbers of interviews, the final manuscript of Volume III was submitted to the University Press of Florida (UPF) for publication and has now passed the "peer review" evaluation by published authors. Peer reviewer Martin Dyckman, the longtime journalist, called it "superb." Peer reviewer Jon Mills, the

former House speaker and Dean Emeritus of the University of Florida Law School, commented, "Mr. Skene's research is thorough, includes personal interviews and evaluations of historic documents. The result is not only a valuable research tool, but a book that is enjoyable reading."

Very positive comments have come from others who have read the manuscript at my request or the Society's, including Sandy D'Alemberte, Judge Marguerite "Ditti" Davis (who was law clerk to B.K. Roberts, Fred Karl and James Alderman), retired Justice Steve Grimes, and former Clerk of the House and legislative historian John Phelps (who said it reminded him of Blackstone's Commentaries). All of them offered many very constructive suggestions in addition to generous time in interviews, for which I'm very grateful.

UPF executive director Meredith Babb (who doubles as the acquisitions editor for this book) will seek a final approval from the UPF advisory board at its quarterly meeting in mid-February. Then UPF and the Society will enter into a final contract for publication, including a timeline and pricing.

A long production process follows: copy-editing, selection of photos, page and cover design, page proofs, and finally indexing. Then the book goes to a printer. In the meantime the FSCHS Publication Committee members will be preparing a comprehensive marketing plan for this Volume, with a kickoff at the Florida Bar's Annual Convention.

I'm very grateful to the many members of the Society who have supported this effort and provided insights and knowledge. ■

MAKING MODERN FLORIDA: HOW THE SPIRIT OF REFORM SHAPED A NEW CONSTITUTION

University Press of Florida will publish FSCHS Trustee Mary Adkins's book on the making of Florida's 1968 Constitution. The book, *Making Modern Florida: How the Spirit of Reform Shaped a New State Constitution*, will be available this summer.

Publisher's description: Mid-twentieth-century Florida was a state in flux. Changes exemplified by rapidly burgeoning cities and suburbs, the growth of the Kennedy Space Center during the space race, and the impending construction of Walt Disney World overwhelmed the outdated 1885 Constitution. A small group of rural legislators known as the "Pork Chop Gang" controlled the state and thwarted several attempts to modernize the Constitution. Through court-imposed redistribution of legislators and the hard work of state leaders, however, the

executive branch was reorganized and the Constitution was modernized.

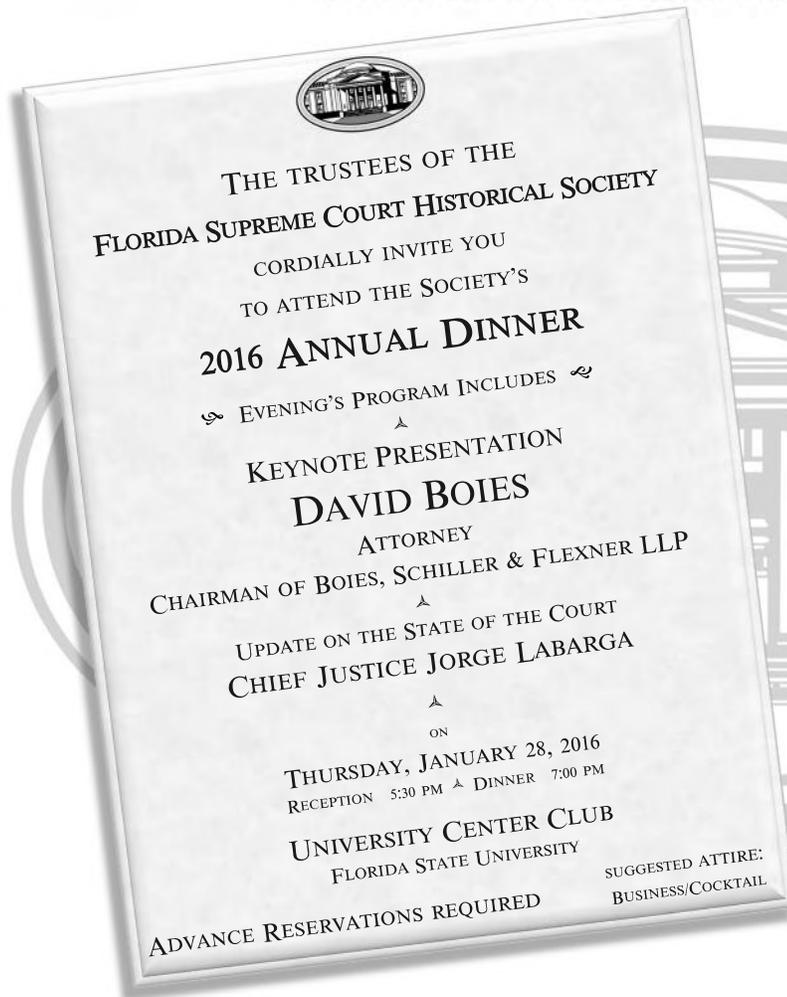
In *Making Modern Florida*, Mary Adkins goes behind the scenes to examine the history and impact of the 1966-68 revision of the Florida state Constitution. With storytelling flair, Adkins uses interviews and detailed analysis of speeches and transcripts to vividly capture the moves, gambits, and backroom moments necessary to create and introduce a new state Constitution. This carefully researched account brings to light the constitutional debates and political processes in the growth to maturity of the nation's third largest state. ■

Mary E. Adkins is director of legal writing and appellate advocacy and master legal skills professor at the University of Florida's Fredric G. Levin College of Law.

A volume in the series Florida Government and Politics, edited by David R. Colburn and Susan A. MacManus.

2016 ANNUAL DINNER OF THE HISTORICAL SOCIETY

ATTORNEY DAVID BOIES TO PRESENT KEYNOTE ADDRESS



Join us for Florida's premier judicial event, **The Annual Dinner** hosted by the **Florida Supreme Court Historical Society**. The Dinner is always well attended by the current and future leaders of the state's legal profession, as well as the leadership from all three branches of Florida's Government. The evening has the well-earned reputation in the state's legal community as the "must attend event" of the year.

The evening's keynote address will be delivered by **David Boies**, the highly distinguished American trial lawyer who has litigated some of the highest profile cases in recent history.

Mr. Boies has served as the Chairman of Boies, Schiller & Flexner LLP for the last 19 years. *Time Magazine* listed him as one of their 100 Most Influential People; he was also listed as runner-up for Person of the Year in 2010. He was honored as the Global International Litigator of the Year by *Who's Who Legal* an unprecedented seven times. He has been named Litigator of the Year by numerous publications including *The American Lawyer* and *The National Law Journal*. The New York Bar Association recognized him as Antitrust Lawyer of the Year, a specialization for which he is best known.



David Boies, referred to by the *New York Times* as "the lawyer everyone wants," has been presented with an extraordinary list of awards and honors. Mr. Boies is known for being involved in many of the nation's most prominent cases; he has represented clients on both sides of key issues that have shaped our society for the last half century.

Mr. Boies is also a noted philanthropist. He has endowed nine chairs at universities including his alma maters, NYU and Yale. He frequently represents pro bono clients and speaks at events for causes including dyslexia, a cause especially close to his heart as he has worked to overcome it.

We hope you will join us when Mr. Boies shares with us his insight into some of the country's landmark high-profile cases with his brilliance, creativity, and passion for justice.

Chief Justice Jorge Labarga will provide an update on his highly praised initiative to improve access to civil justice for all of Florida's citizens, as well as his perspective on the state of the Florida judicial system.

RESERVATION REQUESTS FOR THE FCSHS 2016 ANNUAL DINNER



Name _____ Organization _____

Address _____ City _____ ST _____ Zip _____

Email* _____ Phone _____ / _____ FAX _____ / _____

Please print or type your guest's names below that will be seated at your table. (10 people max per table)

- 1) _____ 2) _____ 3) _____
- 4) _____ 5) _____ 6) _____
- 7) _____ 8) _____ 9) _____

Reserve _____ seats for the Annual Dinner at \$95 per person on or before January 15, 2016

Reserve _____ seats for the Annual Dinner at \$115 per person after January 15, 2016

I'm not able to attend the Annual Dinner, here is my tax-deductible gift to the Historical Society of \$ _____

Gift contributions of \$100 or more include a one year individual membership in the Historical Society.

Total \$ _____ Credit Card Payment: MasterCard Visa AMEX Discover

Card # _____ Expiry _____ CVCode _____

Authorizing Signature _____ *All reservation confirmations will be sent by email.

Plenty of convenient ways to make your Reservations for the 2016 Annual Dinner

Online: www.FLCourtHistory.org

Visa, MasterCard, AMEX & Discover accepted

By Credit Card:

Return your Reservation Request Form by:

FAX: 850:201.2947

EMAIL: RSVP@FLCourtHistory.org

US Mail: Mailing address below

Checks: Made payable & mail to:

FCSHS Annual Dinner

1947 Greenwood Drive

Tallahassee, FL 32303

THANK YOU

Thank you to our Early Sponsors of the 2016 Annual Dinner

A special thank you to all of our Annual Dinner Sponsors for their generous contributions that make this event possible. It is their commitment to the Historical Society's mission that makes it possible for us to educate the public about the critically important work of the courts in protecting personal rights and freedoms, and to preserve the history of Florida's judicial system.

Double Platinum Sponsor

Stanley & Susan
Rosenblatt

Platinum Sponsors



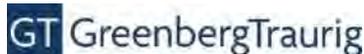
Holland & Knight

CARLTON FIELDS
JORDEN BURT

JACQUELYN & BRUCE
ROGOW

SEARCY
DENNEY
SCAROLA
BARNHART
& SHIPLEY PA
Attorneys at Law

Gold Sponsors



BILL SCHIFINO WITH
BURR FORMAN
results matter



STEARNS WEAVER MILLER
WESSLER ALHADEFF & SITTERSON, P.A.

Silver Sponsors

AUSLEY & McMULLEN
ATTORNEYS AND COUNSELORS AT LAW

Edwards & Ragatz, P.A.
Personal Injury and Commercial Trials

David J. Sales, P.A.
APPEALS | TRIAL COUNSEL | TRIAL SUPPORT



THE MILLS FIRM

WEISS SEROTA HELFMAN
COLE & BIERMAN
AT THE CROSSROADS OF BUSINESS, GOVERNMENT & THE LAW

Bronze Sponsors

ARNSTEIN & LEHR, LLP
BUCHANAN INGERSOLL & ROONEY PC
COLSON HICKS & EIDSON
DEAN MEAD
EMMANUEL, SHEPPARD & CONDON, P.A.
HILL, WARD, HENDERSON
HOGAN LOVELLS, US LLP
JONES FOSTER JOHNSTON & STUBBS, P.A.

KING, BLACKWELL, ZEHNDER, WERMUTH
LILES, GAVIN, PA
MESSER CAPARELLO, P.A.
PARKS & CRUMP
PRINTY & PRINTY, PA
RICHMAN GREER
RUSSOMANNO & BORRELLO, PA
TIMOTHY CHINARIS
THOMPSON, SIZEMORE, GONZALEZ & HEARING
TRENAM LAW

Special Gifts

JUSTICE KENNETH BELL
BRUCE BLACKWELL
JUSTICE GERALD & IRENE KOGAN
KYNES, MARKMAN & FELMAN, P.A.
GEORGE "BUDDY" SCHULZ, JR.
TRAK AMERICA

Florida Supreme Court Historical Society
1947 Greenwood Drive
Tallahassee, FL 32303-4825

NonProfit Org.
US Postage
PAID
Tallahassee, FL
Permit 904

A MOMENT IN TIME



Chief Justice Leander Shaw with U.S. Circuit Judge Joseph Hatchett, at a Florida Supreme Court ceremony honoring Judge Hatchett, May 2, 1990.