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The History of the Florida Supreme Court

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THE HISTORY OF THE FLORIDA SUPREME COURT, VOLUME 0

BY PROFESSOR M.C. MIROW

The Florida Supreme Court Historical Society's multi-volume *History of the Florida Supreme Court* is a wonderful addition to the literature of our state's legal history and a much-needed professional study of its premier judicial institution. The series aptly begins in *Volume 1* with Florida as a territory of the United States and the territorial courts that existed from 1821 until statehood in 1845. Similarly, another path-breaking work of Florida's judicial history, Kermit Hall and Eric Rise's *From Local Courts to National Tribunals*, begins with the territorial courts of this period.

Nonetheless, Florida has a much longer legal history than the starting points of these works might lead us to believe. Indeed, when considering Florida's participation in European law and legal systems, the approximately 200 year span from 1821 to the present date has to be read against the more than 300 years of Florida under either Spain or Britain from 1513 to 1821. In theory, for us to understand the continuities and changes that occurred in Florida's judiciary throughout its history, the *History of the Florida Supreme Court* should be supplemented with an additional volume, *Volume 0*, on colonial courts. Here I consider some of the obstacles to this work and imagine what such a volume about Florida's colonial courts might look like.

As a legal historian, I think *Volume 0* would be an invaluable contribution to the field of Florida's colonial legal history. The academic contribution would be immense. Such work would also have practical import. Glenn Boggs' studies of land grants in Florida have demonstrated that Florida's colonial legal history is not exclusively of academic interest.

Before exploring Florida's high courts in the Spanish and British periods, it is worth thinking about some of the reasons why a *Volume 0* has not already been written, as well as about what contributions have already been made in its direction. Several years ago, Robert M. Jarvis, professor of law at Nova Southeastern University, approached me about contributing to a volume of essays on various Florida courts that lie outside the purview of ordinary common-law justice. Having written an important study of the Florida courts and judiciary in the British period (1763-1783), he asked me to write about Spanish courts for the book, and I gladly accepted. Other chapters in this forthcoming work edited by Professor Jarvis will look at territorial courts, Confederate courts, military courts, religious courts, Miami's "Black Court," and the courts of indigenous communities. For general readers, historians, and lawyers, this book, and especially its first two chapters, will fill some of the void we currently have in our knowledge of Florida's colonial legal history. It will be an important contribution to our understanding of courts and justice in Florida. Nonetheless, the chapters on colonial courts are



The promulgation of the Constitution of 1812, oil painting by Salvador Viniegra (Museo de las Cortes de Cádiz).

written as initial studies that highlight the limited nature of available sources and secondary scholarly studies in the field. They are first attempts to unearth the basic contours of these important, established, and relatively unknown precursors of the Florida Supreme Court.

So, as lawyers and judges in Florida, we should be somewhat surprised that so little has been done, that the law reviews of our state have not explored Florida's courts and colonial law, and that professional historians of Florida have not sought to examine these institutions and guiding norms of family, commerce, and society. Why have so few scholars explored Florida's colonial courts and its colonial legal history?

Let me offer a few thoughts on this dearth of interest, research, and scholarship. The reasons can be grouped around three general categories. First, there is a general lack of appreciation for Florida's colonial history. Second, the development of law and legal institutions has not been an emphasis of today's historians, who are more interested in economic and social history. Third, locating, reading, and interpreting legal records erect additional hurdles to preparing an in-depth study of Florida's colonial courts. I'll take these one at a time.

The first hurdle has to do with the nature of the material artifacts of Florida's colonial history. Florida natives and transplants alike know that if you leave a sheet of paper on the ground in Florida for a day or two, the sun, rain, humidity, and insects quickly make it disappear. Most of Florida's colonial settlements and structures have gone the way of a sheet of paper exposed to the elements. There are few landmark structures standing to testify to Florida's complex and international colonial past. Their wooden construction has long succumbed to the violent and unrelenting forces of nature in Florida. The rarity of more lasting building materials meant that many cut blocks and bricks were put to other uses after storms or fires. Apart from a few extant spectacular sites, Florida's material colonial history is left to the imagination. We are not blessed with the buildings similar to those of colonial Massachusetts or colonial Williamsburg to pique the popular interests of Floridians. Without popular engagement in

our state's history, professional and scholarly activities are too often viewed as being less relevant and less worthy of public support.

Furthermore, Florida, now the nation's third most populous state, has only recently arrived on the national stage as a massive and important player. Because Florida is a state of national and international transplants, there has been little opportunity to develop the deep, local appreciation for the past that exists in so many other parts of the United States. And, as a historian and legal historian, I think it is fair to say that until quite recently, there has been a scholarly bias against southern history and southern legal history. An additional problem is that the unique array of international connections and colonial links of our region means that Florida history actually challenges the simplistic, middle-school story of the United States unfolding from a popular British democratic revolt against royal absolutism based on the rights of an "Englishman." How many of us know or remember that when St. Augustine was transferred from Spain to the United States in 1821, the city was under a constitutional monarchy limited by a written constitution? This was far too late to fit into a story focused on 1776 and far too "constitutional" for a story of free men casting off the yoke of an absolutist king. Thus, Florida's history has always been too different, too international, too temporally out of step, and perhaps even too diverse for it to fit comfortably with the general notions many of us were taught about the colonial period of U.S. history.

Please don't think I am saying that no one is writing about Florida history, or even Florida's legal history. There are and have been excellent historians of Florida, and there is a growing pool of people interested in and writing about the history of law in Florida. I do think that we are underappreciated on the national scene and that the importance of Florida in the United States has been neglected by scholars. While I will have to explore this topic another day, I can give one example. The Index of *The Cambridge History of Law in America, Volume I, Early America (1580-1815)*, a standard reference work for U.S. legal historians, contains no entry for the terms "East Florida," "West Florida," or "Florida." This same work, however, has entries for Delaware, Georgia, Louisiana, Maryland, Massachusetts, Middle colonies, New England colonies, New France, New Hampshire, New Haven colony, New Holland, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Virginia.

There is also the hurdle of finding scholars to do this work. Modern historians tend to be more interested in economic and social history than in *legal* history. Different areas, approaches, and predilections move in and out of fashion as historians train the next generation of scholars to carry on their craft. Despite the importance of law in changes in society, politics, and economics over time, few historians dedicate themselves exclusively to legal history. Individuals with legal training in the United States almost always opt for the professional and

intellectual rewards of legal practice, rather than using their law degrees as the basis for further study of the history of our profession. This is not new. In 1888, perhaps the greatest of English legal historians, Frederic William Maitland, lamented exactly this problem in his famous inaugural lecture as Downing Professor of the Law of England at Cambridge University. The title of his talk was *Why the History of English Law is not Written*. Nearly one hundred thirty years later, the same hurdles exist. Plus ça change.

Assuming there are people with the proper historical and legal training ready to jump fully into the task, the records themselves are a third hurdle to writing a history of Florida's colonial courts. The records of Florida's colonial courts present additional challenges for the legal historian. These obstacles are related to locating the records and to interpreting their language and hand. Let's begin with locating records. Here, there is some good news. For what is called Florida's second Spanish period (1783-1821), records for East Florida with its capital at St. Augustine are available, complete, reasonably well-organized, and relatively legible. I have done some preliminary studies of these documents summarized in an article *Law in East Florida 1783-1821* found in the Further Reading section below. Documents for the entirety of the first Spanish period (1513-1763) and for West Florida in the second Spanish period (1784-1821) have either been lost or are scattered amongst various archives in the Americas and Spain, and they are in various conditions and states of legibility. Just finding all these legal documents for Florida represents a Herculean task.

Colonial Florida has not attracted the attention of historians of Spanish colonial law, and so these historians are apt not to focus on legal papers found in Spanish-language archives. Historians of North American law have not focused on the available legal records for Spanish Florida probably because they are in Spanish, and many U.S. colonial historians are not trained in Spanish or Spanish paleography to decipher properly these rich materials.

Similarly, until recently, it had been assumed that the legal records from Florida's British courts from 1763 to 1783 were entirely lost or destroyed. Nonetheless, I am pleased to report that in the summer of 2015, I found documents from Florida's British courts in the National Archives (Kew) in England. They are not well-organized and many have been rendered illegible from water damage, mold, and insects. I am currently trying to make sense of these documents, and I believe that they are a great, unknown treasure of Florida's legal past.

Locating the records aside, a student of Florida's colonial courts must be trained in both Spanish and English and in the paleography of the period. The documents from the British courts contain pages in Spanish, and the documents from the second Spanish period contain some documents in English. Scholars need both languages to study the activities of these



Constitution Monument in La Plaza de la Constitucion, St. Augustine. Erected 1813; photographed in 1937 by Frances Benjamin Johnston. (Library of Congress)

courts. They also need to become acquainted with the handwriting of the periods.

Finally, these documents will say little to someone who does not have a good understanding of the underlying law in its colonial context. Spanish colonial law, commonly called *derecho indiano*, is necessary to make sense of the Spanish records, and a good understanding of eighteenth-century English common law is necessary to make sense of the British records.

Despite these obstacles, some studies indicate what lies beneath the surface of these records and reveal what they say about Florida's early judiciary. I have worked mostly on the papers from the second Spanish period from 1783 to 1821. These documents reveal a sophisticated legal world in St. Augustine and East Florida. It seems that unlike elsewhere in the Spanish empire, St. Augustine's city council did not have individuals who served as local judges. The governor of the province served as the judge, but this does not mean that the cases he heard were few or small. There are records of significant civil cases dealing with, of course, debt collection and contract enforcement. There are cases dealing with testaments, and many criminal cases. Enslaved human beings appear in the records of cases as plaintiffs, defendants, and as objects and assets in dispute. Litigants relied on Spanish colonial law and supporting documents. Legal advice was scarce and sought only in the bigger, more important cases. Some parties even sought legal advice from lawyers in Havana

when no one legally trained could be found in St. Augustine. The governor, however, often had access to a local, trained, legal adviser, an asesor, who would provide him substantial guidance. We know much less about what happened during the first Spanish period, but for the time being, we can imagine that Spanish justice was administered similarly during the first 250 years. I should mention that nothing in my research so far indicates that the Spanish system of justice was awash in corruption, partiality, avarice, and slapdash procedures. Spaniards were ferocious record-keepers and, if nothing else, compulsive proceduralists.

Thanks to two important books published in the 1940s about British East Florida and British West Florida and the forthcoming work of Professor Jarvis, we have a good general knowledge of the British judiciary and the names of the courts in which they served. It may be surprising to Florida's present bench and bar that during the British period from 1763 to 1783, Florida had a Court of Common Pleas; a Court of General Sessions of the Peace, Oyer et Terminer, Assize and General Gaol Delivery; a Court of Chancery; a Court of the Vice-Admiralty, and a Court of the Ordinary. Grand juries were empaneled in criminal matters, and petit juries decided criminal and civil cases under judicial supervision. There was a small corps of trained lawyers representing clients in these courts. During the British years, Florida had some members of the judiciary who were relatively independent from the other branches of government and, as in the case of East Florida's Chief Justice, William Drayton, ran into great personal and constitutional difficulties because of their assertions of judicial independence. The governor of West Florida sparred with his Chief Justice, and both East and West Florida had Chief Justices who were suspended at one time or another.

These flitting descriptions of centuries of law, judges, and justice in Florida only reveal the great work ahead for historians of Florida's colonial judiciary and legal world. With all the hurdles mentioned, it is not surprising that, in truth, paraphrasing Maitland, the history of Florida's colonial courts is not written. Volume 0 of the *History of the Florida Supreme Court*, a meaningful and comprehensive history of the courts of Florida during the first 300 years, is a distant dream for those of us working slowly on small pieces of Florida's colonial legal history. Nonetheless, sources exist, and they are available and legible. Considering the indisputable future growth of our state and its greater political, economic, and social power within the United States and world, it is likely that generations of legal historians to come will turn their attention to these important documents. Nonetheless, we may have to wait a long time before the *History of the Florida Supreme Court, Volume 0*, sees the light of day. ■

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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*.

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Professor Mirow's most recent book is *Latin American Constitutions: The Constitution of Cádiz and its Legacy in Spanish America* (Cambridge University Press, 2015)