

## LAST WORDS ON RECENT DEVELOPMENTS

### *BROWNING v. FLORIDA HOMETOWN DEMOCRACY, INC.*: A CASE STUDY IN JUDICIAL OPINION WRITING

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#### I. INTRODUCTION

Attorneys who fail to achieve appellate success in a particular case tend to rationalize the result or search for reasons why the judges (at least the court's majority) decided the case so horribly wrong. Lawyers, including appellate practitioners, are skilled in the art of post-hoc reductionism. Laudably, the *Stetson Law Review* has provided this remedial, if not therapeutic, forum as an outlet for this type of Monday-morning expressionism. With both a sense of pride and ignominy, the Author has agreed to the *Review's* overture to ventilate a bit about a recent high-profile case my office handled on behalf of Florida's former Secretary of State, Kurt Browning: *Browning v. Florida Hometown Democracy, Inc., PAC*.<sup>1</sup>

But the topics explored in this Article are not the typical ones, such as how the Court majority got it wrong, how the dissent got it right, or how the case might alter the law's trajectory. Instead, this Article queries whether a published judicial decision was necessary in this case and whether the three written opinions ultimately were a productive use of limited judi-

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1. 29 So. 3d 1053 (Fla. 2010).

cial resources. The query is not whether the result is correct but whether the published judicial work was warranted, given that no law was established. This may appear to be an odd inquiry, so let us start at the beginning.

## II. FACTS AND PROCEDURAL HISTORY

Voting and elections in Florida, like many other states,<sup>2</sup> have had their fair share of high and low points. Concerns about ensuring the integrity of elections and about whether voters have sufficient information to make informed decisions when they cast their votes undergird much of Florida's electoral history.<sup>3</sup> One need only contrast two of the most disputed presidential elections in the country's history—the famed Hayes–Tilden election in 1876 and the Bush–Gore election in 2000—to see that Florida has played an instrumental role in defining the contours of election law and policy.<sup>4</sup>

Florida was prominent in the 1876 presidential election between the eventual victor, Ohio Governor Rutherford B. Hayes, and New York Governor Samuel Tilden, the latter winning the popular vote but losing in the Electoral College by one vote: 185 to 184.<sup>5</sup> A fifteen-member commission, specifically created to resolve the controversy,<sup>6</sup> ultimately decided the election by awarding twenty disputed electoral votes to Republican Hayes.<sup>7</sup>

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2. See generally Electiononline.org, *Election Reform: What's Changed, What Hasn't and Why 2000-2006*, [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election\\_reform/electionline\\_022006.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election_reform/electionline_022006.pdf) (accessed Mar. 20, 2012) (providing a general overview of election reform after the contested presidential election of 2000 and detailing voting problems and procedures for each state).

3. See Fla. Stat. § 97.012 (2011) (laying out the Secretary of State's responsibilities as the "chief election officer of the state"). Florida Statutes Title IX (Chapters 97–107) provides the general law governing elections in the state and mandates voting procedures, violation investigations, and voter education. *Id.* at §§ 97.011–97.105.

4. See generally Roy Morris, Jr., *Fraud of the Century: Rutherford B. Hayes, Samuel Tilden, and the Stolen Election of 1876* (Simon & Schuster 2003) (comparing the disputed election of 1876 between Rutherford B. Hayes and Samuel Tilden with the recent political turmoil surrounding the 2000 election between George W. Bush and Al Gore).

5. *Id.* at 201.

6. Morris, *supra* n. 4, at 213.

7. Lloyd Robinson, *The Stolen Election: Hayes versus Tilden—1876*, at 127 (Forge 1996). The candidates disputed nineteen electoral votes from southern states: three from Florida, eight from Louisiana, and seven from South Carolina. *Id.* In addition, Tilden disputed a single electoral vote from Oregon because the elector was found to be a postmaster, which Tilden contended was a violation of the United States Constitution. *Id.*

The commission's vote of eight to seven in Hayes' favor was itself a political thriller.<sup>8</sup>

The dispute's bitterly contested resolution left an unpleasant legacy; one chronicler described the election as "the most corrupt presidential election in American history."<sup>9</sup> Unfair practices and fraud by political parties infected much of the process. For example, white southern Democrats suppressed the African American vote with violence and intimidation as African Americans began to exercise their right to vote under the Fifteenth Amendment.<sup>10</sup> Although Florida, Louisiana, and South Carolina reported returns favorable to Democrat Tilden,<sup>11</sup> fraud and violent threats against African American voters tarnished elections in each of these states.<sup>12</sup> Further, Republicans had political control in these states and threw their electoral support to Hayes.<sup>13</sup> Some have argued that Louisiana and South Carolina, which had majority African American populations, would likely have voted for Republican Hayes anyway,<sup>14</sup> thereby making the commission's assignment of the electoral votes to Hayes a seemingly fair result.<sup>15</sup>

As Floridians went to the polls on November 7, 2000, it was likely that very few were aware of the Hayes–Tilden controversy or Florida's role in the dispute.<sup>16</sup> Within hours after the polls closed in Florida, however, the State's legacy in Election 2000 was just beginning to form. It would take two trips to the Supreme Court of the United States, both involving the review of

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at 127–128.

8. Michael F. Holt, *By One Vote: The Disputed Presidential Election of 1876*, at 233 (U. Press of Kan. 2008); William H. Rehnquist, *Centennial Crisis: The Disputed Election of 1876*, at 175–176 (1st ed., Knopf 2004). The 1876 election spawned much academic interest both before and after 2000. See generally e.g. Holt, *supra* n. 8 (offering a 2008 account of the 1876 election); Rehnquist, *supra* n. 8 (writing in 2004 about the 1876 election); Robinson, *supra* n. 7 (publishing the first edition of his book in 1968 about "the stolen election" of 1876).

9. Morris, *supra* n. 4, at 5.

10. Holt, *supra* n. 8, at 2, 164.

11. Morris, *supra* n. 4, at 174–176.

12. Holt, *supra* n. 8, at 164.

13. *Id.* at 165.

14. See *id.* at 2 (arguing that the 440,000-increase in Republican votes between 1868 and 1872 "undoubtedly came from newly enfranchised freedmen").

15. Morris, *supra* n. 4, at 5.

16. *Id.* at 1. The Hayes–Tilden election took place 124 years to the day before the disputed 2000 election. *Id.*

Florida Supreme Court decisions,<sup>17</sup> before the election's finality was eventually punctuated in *Bush v. Gore*.<sup>18</sup> Much has been written about hanging chads and other election-related peculiarities that surfaced during the thirty-six days of litigation centered in Florida.<sup>19</sup> Though the election process in 2000 was fraught with allegations that each side tried to steal the election,<sup>20</sup> it had little in common with the downright fraud and occasional violence that defined the 1876 presidential election in the contested southern states.<sup>21</sup> Nonetheless, due to the 1876 and 2000 presidential elections, Florida has spawned an enduring stereotype as a state where elections raise eyebrows from time to time.<sup>22</sup>

Worries about fraud in the election process motivated the Florida legislature in its 2007 general session to enact a law that allowed persons who had signed petitions for proposed amendments to the Florida Constitution to revoke their signatures.<sup>23</sup> Reports of fraud in the signature-gathering process during the 2004 election cycle spawned the legislation. The legislative history of the Senate's version of the proposed statute states:

During the 2004 election cycle, numerous stories appeared in newspapers concerning fraud in the petition process to place constitutional amendments on the ballot. Two petition gatherers were arrested in Santa Rosa County

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17. *Bush v. Gore*, 531 U.S. 1046 (2000); *Bush v. Palm Beach Co. Canvassing Bd.*, 531 U.S. 70 (2000).

18. 531 U.S. 98 (2000).

19. See e.g. Hugh M. Lee, *An Analysis of State and Federal Remedies for Election Fraud, Learning from Florida's Presidential Election Debacle*, 63 U. Pitt. L. Rev. 159, 160, 164–167 (2001) (discussing the many challenges parties made to the Florida statute in place at the time that aimed to prevent election fraud); Jon Mills, *Reforms in Florida after the 2000 Presidential Election*, 13 U. Fla. J.L. & Pub. Policy 69, 70–72 (2001) (identifying factors that led to the election debacle in Florida in 2000).

20. See Lee, *supra* n. 19, at 159–160 (giving a brief overview of the allegations made in various lawsuits arising out of the 2000 elections).

21. See generally Holt, *supra* n. 8 (discussing the politics and racial tension surrounding the 1876 election); Morris, *supra* n. 4 (arguing that there were “no real winners” in the 1876 election because it was plagued with fraud and oppression); Robinson, *supra* n. 7 (giving a historical account of the corruption on both sides of the 1876 election and referring to it as “the last battle of the Civil War”).

22. See Morris, *supra* n. 4, at 1 (paraphrasing Karl Marx, stating that “[h]istory . . . repeats itself, first as tragedy, then as farce”).

23. 2007 Fla. Laws. ch. 30, § 25.

for over 40 counts each of uttering a forged document. Several other elections supervisors found petitions signed with the names of dead voters.

The Florida Department of Law Enforcement (FDLE) issued a press release in October of 2004 indicating that it had received numerous complaints relating to voting irregularities and had initiated several investigations. Specifically, the FDLE created regional elections task forces to address the issue of voter fraud in a statewide manner. While the FDLE did not reveal details of the investigations, it noted that the investigations focused on the following conduct:

In some cases, persons who believed they were signing petitions later found out that their signatures or possible forged signatures were used to complete a fraudulent voter registration. In other instances, it appears that workers hired to obtain legitimate voter registrations filled in the information on the registration forms that should have been completed by the registrants. On several occasions, workers appear to have signed multiple voter registrations themselves using information obtained during the registration drive. In many of the situations complained about, the workers were being paid on the basis of each registration form submitted.<sup>24</sup>

Two bills, differing only in the length of the signature-revocation period, were introduced, and the House version became law.<sup>25</sup>

The new law amended Florida Statutes Section 100.371<sup>26</sup> to give electors the right to revoke their petition signatures.<sup>27</sup> The new process allowed electors to revoke their signatures by signing an approved petition-revocation form and submitting it to their

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24. Fla. Sen. Jud. Comm., Prof. Staff Analysis & Econ. Impact State., *Initiative Petitions CS/SB 900* (Apr. 18, 2007) (footnotes omitted).

25. 2007 Fla. Laws. at ch. 30, § 25; Fla. H. 537, 2007 Legis. § 100.371 (May 7, 2007). A Senate floor amendment added the revocation provisions on April 27, 2007. Fla. Sen. J. 17, 2007 Legis. § 24, 100.371(6) (Apr. 27, 2007).

26. Fla. Stat. § 100.371 (2007).

27. 2007 Fla. Laws at ch. 30, § 25.

respective supervisors of elections within 150 days after signing the initiative petitions.<sup>28</sup>

Revocation sponsors produce the revocation forms, which are made available at the supervisors' of elections office.<sup>29</sup> The revocation forms are legally required to follow the "same relevant requirements and timeframes as the corresponding [initiative] processes . . . ."<sup>30</sup> To ensure transparency and parity in the revocation process, the legislature required that the revocation sponsors follow the same rules as those who were proposing the amendment,<sup>31</sup> to do otherwise would be to treat the revocation sponsors differently and more favorably than the amendment sponsors. Thus, revocation sponsors were required to register with the Department of State,<sup>32</sup> propose and obtain certification of signature-revocation forms, pay a fee of ten cents to verify each revocation signature, and file verified revocation signatures with the supervisors of elections by February 1 of the year the sponsor sought to place the amendment on the ballot.<sup>33</sup>

A target of a possible signature-revocation effort was a proposed amendment entitled "Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans"<sup>34</sup> whose proponents were Florida Hometown Democracy, Inc., PAC (FHD) and Lesley G. Blackner.<sup>35</sup> Florida's Secretary of State had already approved their initiative-petition form,<sup>36</sup> and the Florida Supreme Court had reviewed and approved

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28. Fla. Stat. § 100.371(6)(a).

29. *Id.* at § 100.371(6)(b)–(c).

30. *Id.* at § 100.371(6)(b); *see also id.* at § 100.371(2) (describing the requirements that a sponsor of an initiative amendment must meet during the initiative process).

31. *See id.* at § 100.371 (6)(b) (providing that sponsors of the revocation process must follow the same requirements as sponsors of the initiative process).

32. Fla. Admin. Code Ann. R. 1S-2.0095(1), [https://www.flrules.org/Gateway/View\\_notice.asp?id=4697533](https://www.flrules.org/Gateway/View_notice.asp?id=4697533); *select* View Notice (2007). A sponsoring group must register as a political committee, and the Division of Elections must approve the group's revocation form. *Id.*

33. Fla. Stat. § 100.371(6)(b), (d).

34. Fla. Const. Amend. Pet., *Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans* (June 21, 2005) (amendment to Fla. Const. art. II, § 7) (available at <http://election.dos.state.fl.us/initiatives/fulltext/pdf/37681-2.pdf>).

35. Fla. Dep't St. Div. Elections, *Initiative Information: Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, <http://election.dos.state.fl.us/initiatives/initdetail.asp?account=37681&seqnum=2> (accessed Mar. 20, 2012).

36. *Id.*

the proposed amendment language.<sup>37</sup> The proposed “Hometown Democracy” amendment (as it came to be known) could not be placed on the 2008 ballot, however, because its sponsors failed to file sufficient verified signatures<sup>38</sup> by February 1, 2008, the constitutionally imposed deadline.<sup>39</sup>

To counter the sponsors’ efforts to get the Hometown Democracy amendment on the ballot, an organization named Save Our Constitution, Inc. registered as a non-profit corporation with the Department of State in July 2007<sup>40</sup> and sponsored a revocation effort against the proposed amendment.<sup>41</sup> After its revocation form was approved, the organization sought out those voters who might have desired to revoke their signatures in support of putting the amendment on the ballot.<sup>42</sup>

In August 2007, FHD filed a complaint seeking a declaratory judgment and injunction against the new revocation laws, claiming that the laws violated Article XI, Section 3 of the Florida Constitution and the due process and equal protection provisions

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37. *Advisory Op. to the Att’y Gen. re Referenda Required for Adoption & Amend. of Loc. Gov’t Comprehensive Land Use Plans*, 938 So. 2d 501, 501 (Fla. 2006). The Florida Supreme Court in a separate case held that the proposed financial-impact statement, which the Financial Impact Estimating Conference prepared, was misleading. *Advisory Op. to the Att’y Gen. re Referenda Required for Adoption & Amend. of Loc. Gov’t Comprehensive Land Use Plans*, 963 So. 2d 210, 214–215 (Fla. 2007). The attorney general redrafted the statement and later submitted it, and the Court again deemed it misleading. *Advisory Op. to the Att’y Gen. re Referenda Required for Adoption & Amend. of Loc. Gov’t Comprehensive Land Use Plans*, 992 So. 2d 190, 193 (Fla. 2008). The Court eventually deemed a revised financial-impact statement acceptable, but the proposed amendment failed by a vote of 1,682,177 to 3,424,204 on November 2, 2010. See Fla. Dep’t St. Div. Elections, *supra* n. 35 (indicating that the amendment made the ballot on June 22, 2009 and providing the total number of votes for and against the amendment).

38. Initial Br. of Appellants, *Browning v. Fla. Hometown Democracy, Inc.* PAC 2008 WL 3491037 at \*6 (Fla. July 28, 2008). A total of 611,009 signatures were required for the petition’s placement on the ballot in 2008. Fla. Dep’t St. Div. Elections, *Congressional District Requirements*, <http://election.dos.state.fl.us/constitutional-amendments/2004cong-dist-require.shtml> (accessed Mar. 20, 2012).

39. Fla. Const. art. XI, § 5(b).

40. Fla. Sec’y St., *Electronic Articles of Incorporation for Save Our Constitution, Inc.* 1, <http://www.sunbiz.org>; *hover over* Document Searches: Corporation/Trademark/LLC/LP, *select* Inquire by Entity Name, *search* Save Our Constitution, Inc., *select* SAVE OUR CONSTITUTION, INC., *scroll down and select* 7/24/2007 -- Domestic Non-Profit (July 24, 2007).

41. Compl., *Fla. Hometown Democracy, Inc. PAC v. Browning*, 2007 WL 5040670 at para. 35 (Fla. 2d Cir. Aug. 22, 2007).

42. *Id.*

of the federal and state constitutions.<sup>43</sup> Article XI, Section 3, entitled “Initiative,” states:

The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith. It may be invoked by filing with the custodian of state records a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.<sup>44</sup>

After the parties briefed and argued the matter, the trial court ruled in November 2007 that the law did not violate the initiative provision in Florida’s Constitution, nor did it violate the equal protection or due process clauses of the federal or state constitutions.<sup>45</sup> As to the initiative provision, the court stated:

The [revocation laws] do not place any additional requirement or burden on the elector who intends to sign a petition, or to vote on the initiative once it is placed on the ballot. The [revocation laws] do in fact grant the elector more power over his signature and decision to support the placement of an initiative on the ballot. [They] do not change or add to the requirements set forth in Article XI, Section 3 of the Florida Constitution. Furthermore, the [revocation laws] do not in any way strengthen the power of the Legislature vis-a-vis the people . . . .<sup>46</sup>

As to the equal protection claim, the court held that “the state has a legitimate interest in ensuring that the petition process evi-

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43. *Id.* at paras. 1, 39, 44, 48–49.

44. Fla. Const. art. XI, § 3.

45. *Fla. Hometown Democracy, Inc., PAC v. Browning*, 2007 WL 5032502 at \*\*1–2 (Fla. 2d Cir. Nov. 27, 2007), *rev’d*, 980 So. 2d 547 (Fla. 1st Dist. App. 2008).

46. *Id.* at \*\*5–6.



dences the will of the people,” such that a signature revocation law is rationally related to that state interest.<sup>47</sup> Finally, the trial court found no due process violation because “no vested right to be on the ballot ha[d] ripened” for purposes of a due process claim.<sup>48</sup>

In April 2008, the First District reversed on appeal, holding that the revocation laws impede the citizen initiative process in Article XI, Section 3 and are unnecessary to ensure ballot integrity.<sup>49</sup> The appellate court reasoned that revocation laws were unnecessary because they “do not serve to confirm compliance with constitutionally[ ]specified requirements for submission of proposed amendments through the initiative process,” and they “burden the initiative process with requirements that are not prescribed by the constitution.”<sup>50</sup>

Because the First District’s decision struck down a state statute as unconstitutional, the State had a right of direct appeal under the Florida Supreme Court’s mandatory jurisdiction,<sup>51</sup> which the State pursued.<sup>52</sup> The Court initially denied FHD’s efforts to expedite the appeal.<sup>53</sup> The parties briefed the case in the fall of 2008 and argued it on January 8, 2009,<sup>54</sup> to a panel of just five justices because two justices had left the Court the prior year.<sup>55</sup> Five months later, FHD moved to expedite the Court’s resolution of the case,<sup>56</sup> which the Court granted<sup>57</sup> and followed

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47. *Id.* at \*7.

48. *Id.* at \*\*8–9.

49. *Fla. Hometown Democracy, Inc. PAC v. Browning*, 980 So. 2d 547, 548 (Fla. 1st Dist. App. 2008).

50. *Id.* at 550.

51. Fla. Const. art. V, § 3(b)(1).

52. Fla. Sup. Ct. Case Dkt., *Browning v. Fla. Hometown Democracy, Inc. PAC*, [http://jweb.flcourts.org/pls/docket/ds\\_docket?p\\_caseyear=2008&p\\_casenummer=884](http://jweb.flcourts.org/pls/docket/ds_docket?p_caseyear=2008&p_casenummer=884) (Fla. May 28, 2010) (No. SC08-884).

53. *Id.*

54. *Id.*; Clerk Fla. Sup. Ct., *Cases for Oral Argument, Thursday, January 8, 2009–9:00 A.M.*, at 2, [http://www.floridasupremecourt.org/clerk/oral\\_argument\\_cal/2009/OAJan2009.pdf](http://www.floridasupremecourt.org/clerk/oral_argument_cal/2009/OAJan2009.pdf) (accessed Mar. 20, 2012).

55. See Mary Agnes Thursby, Jo Dowling & Off. Pub. Info., *Succession of Justices of Supreme Court of Florida* 6, [http://www.floridasupremecourt.org/pub\\_info/documents/appointed.pdf](http://www.floridasupremecourt.org/pub_info/documents/appointed.pdf) (updated Aug. 11, 2009) (providing that Justices Cantero and Bell resigned on September 6, 2008 and October 1, 2008, respectively). Justice Jorge Labarga had just been appointed to the Court on January 1, 2009, and, though not appearing at oral argument, participated in the case. After oral argument, the Court’s most recently appointed member, Justice James E. C. Perry, was sworn in on March 11, 2009 but did not participate in the case. See *id.* (providing the appointment dates for Justices Labarga and Perry).

56. Fla. Sup. Ct. Case Dkt., *supra* n. 52.

shortly thereafter on June 17, 2009 with the following order (set out in full):

This case is before the Court pursuant to article V, section 3(b)(1) of the Florida Constitution. Due to the impending, exceptional time issues associated with the potential verification and certification of the initiative proposal, we issue this order at this time. We affirm the decision of the First District Court of Appeal below *with our full opinion to follow at a later date*. See *Fla. Hometown Democracy, Inc. v. Browning*, 980 So.2d 547, 548[-5]50 (Fla. 1st DCA 2008). Accordingly, the signature-revocation provisions provided in section 100.371, Florida Statutes, and Florida Administrative Code Rules 1 S 2.0091 and 1 S 2.0095 violate the Florida Constitution and are void, unenforceable, and without effect. See art. XI, §§ 3, 5, Fla. Const.

There shall be no motion for rehearing from this order. Any motion for rehearing may follow the issuance of the Court's written opinion. The automatic stay is hereby vacated.<sup>58</sup>

As the order's highlighted language indicates, the Court summarily affirmed the First District but did not contemporaneously issue a written decision explaining its reasoning.<sup>59</sup> At that point in time, all that was known was that the Court, by a four-to-two vote, had affirmed the First District, indicating that a written opinion would be forthcoming at some unspecified time.<sup>60</sup> Neither party was allowed to seek rehearing; instead, both were required to await the Court's written opinion.<sup>61</sup>

And wait they did. Eight months later, on February 18, 2010, the Court issued its thirty-four-page written decision: a two-opinion, three-justice plurality with two dissenters and one justice concurring in the result only.<sup>62</sup> Three justices formed a coalition

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57. *Id.*

58. *Browning v. Fla. Hometown Democracy, Inc. PAC*, 13 So. 3d 57 (Fla. 2009) (order) (emphasis added).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Browning*, 29 So. 3d at 1054.

that generated two separately authored opinions, both holding essentially the same thing—one spanning seventeen printed pages in the official reporter, the other spanning only two.<sup>63</sup> A fourth justice, the swing vote, joined in neither opinion; instead, he concurred in the result only, thereby affirming the invalidity of the challenged statute,<sup>64</sup> but leaving the court with no precedential decision upon which future litigants could rely.<sup>65</sup> The thirteen-page dissenting opinion of one justice, joined by another, rounded out the Court's viewpoints, which are now memorialized in the Southern Reporter Third.<sup>66</sup>

### III. JUDICIAL OPINION WRITING

The most important responsibility of an appellate court is to determine whether errors of sufficient magnitude occurred in the lower court or tribunal to warrant disturbing the judgment or ruling on appeal. The second most important responsibility, in my opinion, is to provide explanations for the decisions in the form of written opinions.<sup>67</sup>

Scholars have created such an extensive body of literature over the past twenty or so years on the judicial opinion-writing process that an annotated bibliography on the subject matter now exists.<sup>68</sup> Topics span the gamut from the theoretical underpinnings and principles of judicial opinions<sup>69</sup> to their style

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63. *Id.* at 1057–1074.

64. *Id.* at 1073.

65. See Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 Nova L. Rev. 1151, 1175 (1994) (explaining that an opinion that concurs in the result only may provide the fourth vote constitutionally required to establish a *decision*, but it does not create a *majority opinion* that would extend beyond the facts of the present case to provide precedential guidance in future controversies).

66. *Browning*, 29 So. 3d at 1074–1086.

67. Charles R. Wilson, *How Opinions Are Developed in the United States Court of Appeals for the Eleventh Circuit*, 32 Stetson L. Rev. 247, 247 (2003).

68. Ruth C. Vance, *Judicial Opinion Writing: An Annotated Bibliography*, 17 J. Leg. Writing \_\_\_\_ (forthcoming) (Valparaiso Univ. Sch. L. Leg. Studies Research Paper Series, No. 11-14, 2011) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1911948](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911948)); see also Michael P. Allen, *The Roberts Court and How to Say What the Law Is*, 40 Stetson L. Rev. 671, 676 (2011) (discussing the role constitutional interpretation techniques play in crafting United States Supreme Court opinions).

69. See generally Ruggero J. Aldisert, *Opinion Writing* (2d ed., AuthorHouse 2009) (providing a comprehensive exploration of both theoretical and practical concepts in judicial opinion writing).

and structure.<sup>70</sup> Handbooks and sometimes voluminous manuals have appeared.<sup>71</sup> Detailed analyses of the voting patterns and judicial opinions of the Supreme Court are now very common.<sup>72</sup> The topic of judicial opinion writing is becoming an increasingly common course at some law schools.<sup>73</sup>

This “Last Word” Article only discusses two components of the judicial-opinion-writing genre: (1) how judges decide cases, particularly on appellate courts where judges must form majorities through a collegial process, and (2) whether publication of written opinions is justified (the “published” versus “unpublished” debate being one aspect of this latter discussion).<sup>74</sup>

The Florida Supreme Court’s decision to publish written opinions in *Browning*, as well as the practice of using concurring and concurring-in-result-only opinions, raises a number of issues that appear in the judicial-opinion-writing literature. One of the most fundamental questions of judicial opinion writing is whether to write an opinion at all. Dispositions of appeals take many forms, ranging from the minimalist “per curiam affirmed” to full written opinions with majorities, pluralities, concurrences, dissents, and other types of individualistic writings.<sup>75</sup> Thus, the first question

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70. *Id.*

71. See generally e.g. Joyce J. George, *Judicial Opinion Writing Handbook* (5th ed., William S. Hein & Co. 2007) (offering an expansive overview of judicial opinion writing at the trial and appellate court levels).

72. As an example, the Supreme Court of the United States blog (SCOTUSblog) features a statistical summary of many aspects of the Court’s operations, including the voting relationships among the justices, voting patterns, and the pace of grants and decisions. S. Ct. of the U.S., SCOTUSblog, *Statistics*, <http://www.scotusblog.com/statistics> (accessed Mar. 20, 2012).

73. Thirty-four schools offered a course in judicial opinion writing in 2011, up from twenty-four in 2008. Ass’n L. Writing Dirs. & Leg. Writing Inst., *Report of the Annual Legal Writing Survey 2011*, at 25, [http://www.alwd.org/surveys/survey\\_results/2011\\_LWI\\_ALWD\\_Survey.pdf](http://www.alwd.org/surveys/survey_results/2011_LWI_ALWD_Survey.pdf) (2011). The Author of this Article, for example, teaches a seminar on the topic at the Florida State University College of Law. Beyond learning about the judicial-opinion-writing process, students in the seminar must prepare a written opinion in a case with publically available briefs and oral argument, and students must prepare and present a “jurist synopsis” on a judge of their choosing.

74. This debate primarily centers on the proliferation of opinions that, because of their sheer volume and potential for contradiction, bring “confusion to the law rather than clarity.” Wilson, *supra* n. 67, at 257. As Judge Aldisert notes in the first two sentences in his judicial-opinion-writing text, “[w]e have a problem with judicial opinions. Too many opinions are being published that contribute nothing new to the body of law.” Aldisert, *supra* n. 69, at 1; see also Wilson, *supra* n. 67, at 257 (expressing his belief “that the most important consideration in deciding whether to publish an opinion is whether it adds to the law of this Circuit”).

75. An opinion “dubitante” is one form. As two well-known Florida Supreme Court

is: Why did the Court choose to publish its many pages of written opinions when not a single sentence of any opinion commanded a majority vote or became precedential law?

A majority of justices apparently decided to affirm the First District's invalidation of the statute. The Court's summary order was sufficient to accomplish this result.<sup>76</sup> Though it is not a recommended practice, the majority could have summarily affirmed the First District and adopted the First District's holding and reasoning as its own.<sup>77</sup> This procedure, which is used from time to time,<sup>78</sup> has the virtue of efficiency (and clarity, assuming the lower court's opinion is lucidly written and the reviewing court fully adopts it).<sup>79</sup> The summary affirmance does not eliminate the possibility that dissenting justices may want to write separately and append their opinions to the summary order, perhaps at a

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experts have stated:

The rarest category of separate opinions are those issued "dubitante," a notation expressing serious doubt about the case. Only one such opinion has been issued in the Court's history, although it is recent. With this sparse usage, it still is not entirely clear in Florida whether a dubitante opinion should be regarded as a type of concurrence or dissent or something else, or indeed, whether a dubitante opinion can constitute the fourth vote necessary to fulfill the constitutional requirement that four justices must concur in a decision.

Kogan & Waters, *supra* n. 65, at 1176 (footnotes omitted).

76. See *Elliott v. Elliott*, 648 So. 2d 137, 138 (Fla. 4th Dist. App. 1994) (clarifying, begrudgingly, that appellate courts often forgo a written opinion when the law involved is so well settled that additional writing would be an inefficient use of the courts' time).

77. See *Dep't Leg. Affairs v. Dist. Ct. App., 5th Dist.*, 434 So. 2d 310, 311–312 (Fla. 1983) (explaining that summary affirmance without a written opinion serves only to approve the result of the lower court and establishes no precedent to guide future decisions); see also William C. Smith, *Big Objections to Brief Decisions: Critics Contend One-Word Appellate Rulings Give Short Shrift to Justice*, ABA J. 1, 34–36 (Aug. 1999) (discussing criticism of appellate rulings that decline to include discussion of the court's rationale, including the belief that summary dispositions negatively affect the "appearance of legitimacy of the appellate process") (citation omitted).

78. See e.g. *R.J. Reynolds Tobacco Co. v. Kenyon*, 856 So. 2d 998 (Fla. 2d Dist. App. 2003) (issuing a "per curiam affirmed" without explanation); *Whipple v. State*, 431 So. 2d 1011, 1012–1015 (Fla. 2d Dist. App. 1983) (issuing a one-word affirmance, but continuing to explain that a written opinion in this case would have merely "repeat[ed] well[-]established principles and further burden[ed] attorneys with their research"); *State v. Breen*, 709 So. 2d 546 (Fla. 4th Dist. App. 1998) (issuing a "per curiam affirmed" without explanation).

79. See *Elliott*, 648 So. 2d at 138 (explaining that the volume of appeals precludes the inclusion of a written opinion for every affirmance, and that courts do not provide opinions when the points of law are well settled); see also Steven Brannock & Sarah Weinzierl, *Confronting a PCA: Finding a Path around a Brick Wall*, 32 Stetson L. Rev. 367, 369 (2003) (weighing the merits of eschewing written opinions to "prevent the proliferation of unnecessary case law on settled propositions . . .").

later date. But it is not unheard of for dissenting judges to merely “dissent” without a written opinion, which can be as unsatisfying as a summary affirmance.<sup>80</sup>

A downside to this “opinion-adoption” process is that West Publishing and its users could have difficulty figuring out what the keynotes should be for the Florida Supreme Court’s decision. An example is *Irvine v. Duval County Planning Commission*,<sup>81</sup> which involved the Court agreeing with the dissenting opinion in a decision from the First District.<sup>82</sup> In a one-paragraph opinion, the Court summarily reversed the lower court, stating that “we agree with Judge Zehmer (dissenting)” and remanding the case for “further proceedings consistent with this opinion.”<sup>83</sup> On remand, the First District, in yet another short (two-paragraph) summary opinion, adopted the Supreme Court’s “opinion and judgment” and stated that the “dissenting opinion of Judge Zehmer, reported at 466 So.2d 362, is adopted as this court’s opinion and judgment.”<sup>84</sup>

The oddity is that the perfunctory one-paragraph adoption of Judge Zehmer’s dissent has *twelve* keynotes linked to it<sup>85</sup>—none of which relate to the text of the opinion.<sup>86</sup> Instead, West Publishing apparently parsed Judge Zehmer’s earlier dissent into twelve separate keynotes, appending them to the First District’s subsequent decision on remand.<sup>87</sup> Each keynote has a parenthetical (“Per dissenting opinion of Zehmer, J., at 466 So. 2d 357”) to attract the reader’s attention to the keynote’s source.<sup>88</sup>

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80. See Howard J. Bashman, *The Appellate Judge Has an Opinion, but He’s Not Sharing It*, N.J. L.J. para. 2 (Feb. 19, 2008) (available in LEXIS, News Library) (noting that “dissents without explanation are extremely rare [ ] . . . which is fortunate because it is useful to the advancement of the law when a judge who disagrees with the majority’s reasoning or outcome explains his or her views”).

81. 495 So. 2d 167 (Fla. 1986).

82. *Id.* at 167; *Irvine v. Duval Co. Plan. Comm’n*, 466 So. 2d 357, 362–369 (Fla. 1st Dist. App. 1985).

83. *Irvine*, 495 So. 2d at 167.

84. *Irvine v. Duval Co. Plan. Comm’n*, 504 So. 2d 1265, 1267 (Fla. 1st Dist. App. 1986).

85. *Id.* at 1265–1266.

86. See *id.* (indicating that the keynotes are “[p]er dissenting opinion of Zehmer, J., at 466 So. 2d 357”).

87. See *id.* at 1265–1267 (showing that the First District adopted the dissenting opinion at 466 So. 2d 357 and that the substance of the keynotes comes from this dissenting opinion).

88. *Id.* at 1265–1266. An unresolved question is whether the First District’s adoption of Judge Zehmer’s dissent establishes broader precedent than that of the Supreme Court, which merely “agreed” with the dissent without specifically adopting it. The short answer

A preferable practice may be for the reviewing court to append the lower court's opinion to its decision, specifically stating which legal points are adopted in whole or in part, thereby providing a clearer roadmap for Westlaw to create keynotes. The Eleventh Circuit has successfully written this type of decision from time to time,<sup>89</sup> though once it adopted a district court opinion as its own that it later reversed en banc.<sup>90</sup> Needless to say, adopting lower court opinions is a less-than-ideal method to establish law in a clear and straightforward way, which may explain why it is rarely used.<sup>91</sup>

Given its brevity, the First District's opinion in *Browning* presented the possibility that the Florida Supreme Court might decide the case in a similarly brief manner. That was not to be. Though it cannot be determined, it is likely that the lengthy per curiam opinion was prepared and circulated first, followed by the shorter concurrence. Why only three justices joined each opinion is unclear and unknown. The concurring opinion was authored by a justice who writes concurrences with regularity,<sup>92</sup> which may partially explain why it was written. Yet, the concurrence does not add materially to the per curiam opinion; instead, the end product appears to be two plurality opinions, each saying practically the same thing, both joined by only three justices.

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is that the First District's opinion on remand is binding on trial courts statewide and that none of the other four appellate courts are likely to deviate from it, given the Supreme Court's agreement with the dissent. See *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) (noting that district court decisions "bind all Florida trial courts" unless the Florida Supreme Court overrules them).

89. Research has found a few dozen over the past forty years, though two are very recent. See e.g. *Trailer Bridge, Inc. v. Ill. Nat'l Ins. Co.*, 657 F.3d 1135, 1138 (11th Cir. 2011) (stating "we conclude that the district court did not err in granting summary judgment . . . for the reasons set forth in the district court's thorough and well-reasoned order, which we adopt as our own"); *Valle v. Singer*, 655 F.3d 1223, 1225 (11th Cir. 2011) (holding that "[w]e adopt that part of the district court's opinion as our own. For the convenience of the reader, we reproduce that part of the opinion, as well as some introductory parts of it, as an appendix to this one."); see also *Aetna Cas. & Sur. Co. v. A. Nat'l Bank of W. Palm Beach*, 430 F.2d 574, 575 (5th Cir. 1970) (stating "[w]e adopt the opinion of the district court, reprinted here as Appendix A").

90. *Chabad-Lubavitch of Ga. v. Miller*, 976 F.2d 1386 (11th Cir. 1992), *vacated*, 988 F.2d 1563 (11th Cir. 1993), *rev'd*, 5 F.3d 1383 (11th Cir. 1993).

91. Search in Westlaw, ALLCASES library, using the search "adopt /s "district court" /s opinion /s own" (Mar. 20, 2012) (yielding only 185 cases).

92. Justice Pariente wrote the concurring opinion. *Browning*, 29 So. 3d at 1073. A number of Florida Supreme Court cases have concurring opinions written by Justice Pariente. E.g. *C.E.L. v. State*, 24 So. 3d 1181, 1189 (Fla. 2009); *Victorino v. State*, 23 So. 3d 87, 108 (Fla. 2009); *Aguirre-Jarquin v. State*, 9 So. 3d 593, 610 (Fla. 2009).

The mystery is further shrouded because the fourth justice concurred in the result only but stated no reasons for doing so.<sup>93</sup> Scholars have criticized the practice of concurring only in the result of a case without further explanation, particularly when doing so creates uncertainty in the law.<sup>94</sup> This topic is discussed in a recent article by a prominent appellate attorney, Mr. Howard Bashman, who wrestles with the pros and cons of “result-only” concurrences:

On the one hand, you cannot help but wonder what aspects of the majority opinion precluded a given judge from joining in the majority’s explanation of its reasoning. On the other hand, you can infer that while those differences of opinion were important enough to preclude the third judge from joining in his or her colleagues’ opinion, those differences were not important enough to cause that third judge to explain publicly what the differences were. And, of course, the third judge’s decision not to write separately presumably caused the court’s ruling to issue more quickly to the public and the parties than if the third judge had written separately.<sup>95</sup>

Mr. Bashman’s viewpoint is that even a short written explanation of why the concurring judge chose to join only in the result would be helpful:

It would be preferable, in my view, if a judge who is tempted to concur in the result without opinion would instead undertake to express in just a few paragraphs why he or she disagrees with the majority’s reasoning, so that the

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93. See *Browning*, 29 So. 3d at 1073 (indicating that Justice Lewis “concur[s] in result only”).

94. For a general criticism of the confusion fractured opinions spawn, see Abner J. Mikva, *Law Reviews, Judicial Opinions, and Their Relationship to Writing*, 30 *Stetson L. Rev.* 521, 522–523 (2000) (criticizing split decisions that fail to provide guidance to those persons the decisions affect).

95. Bashman, *supra* n. 80, at para. 4. The concurrence in result only in *Browning* presumably did not cause the Court’s decision to be rendered more quickly, given that it was released eight months after the court initially rendered its judgment. 29 So. 3d at 1073. For another example of confusion arising from a concurrence in judgment or result only, see *Floridians for a Level Playing Field v. Floridians against Expanded Gambling*, 967 So. 2d 832, 834 (Fla. 2007) (holding that the vote of a district judge “concurring in the judgment” is akin to [a] “concurring in result only” vote, resulting in no-majority vote on the certification of a question of great public importance).



public and the parties can appreciate the basis for that judge's disagreement.

Providing this sort of simple explanation would not necessitate untoward delay, and it would remove the mystery and concern that arise when a judge in disagreement with the majority's approach keeps those views to himself or herself.<sup>96</sup>

Notably, Mr. Bashman points out the problematic situation in which concurring in the results only causes no law to be established. He gives the following example:

Also quite rare, thankfully, are instances in which one judge on a three-judge appellate panel writes an opinion and the other two judges simply note that they "concur in the result" without joining in their colleague's opinion or offering any separate opinions of their own. In this scenario, *the one opinion that exists would be of absolutely no precedential value because it did not reflect a majority view.*<sup>97</sup>

Likewise, the net result of the two three-justice plurality opinions in *Browning* is that neither establishes any precedential points of law. The Florida Constitution states that "[t]he concurrence of four justices shall be necessary to a decision."<sup>98</sup> It takes a majority vote, however, to make law with precedential force, as the authors of the definitive publication on Florida Supreme Court operations and procedure note:

A "concurring in result only" opinion indicates agreement only with the decision (that is, the result reached) and a refusal to join in the majority's opinion. A separate opinion that "concurs in result only" can constitute the fourth vote necessary to establish a "decision" under the Florida Constitution, but the effect in such a case is that there is no "opinion" of the Court and thus no precedent beyond the specific facts of the controversy at hand.<sup>99</sup>

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96. Bashman, *supra* n. 80, at para. 9.

97. *Id.* at para. 6 (emphasis added).

98. Fla. Const. art. V, § 3(a).

99. Kogan & Waters, *supra* n. 65, at 1175; see also *Greene v. Massey*, 384 So. 2d 24, 27

Consequently, the entire judicial effort spent on the thirty-four pages of opinions is apparently almost for naught. None of the opinions can be cited as binding law. Instead, the opinions only tell us that three justices agreed with the lower court, as reflected in two separate opinions; two justices disagreed; and one justice decided to join none of his brethren, but he agreed that the statute was unconstitutional in some way. While the opinions may be of interest to Florida Supreme Court practitioners or those who practice in this specialized area of the law, and it may provide windows of understanding into the views of the individual justices on the legal principles at issue, it is questionable whether the judicial effort in producing the many pages of opinions was worth their published value.

A key purpose of opinion writing is to “tell the participants in the lawsuit why the court acted the way it did.”<sup>100</sup> The parties, though clearly knowing who won and lost, do not know with certainty which legal principles prevailed and will be applicable in future cases.<sup>101</sup> In this regard, an additional institutional function of opinion writing is to “at all times consider the effect the opinion will have on [the court] as an institution charged with responsibilities for setting precedent and for defining law.”<sup>102</sup> Thus, a court’s written opinion must be written with consideration of its consequences in future cases, its consistency with legal precedents and principles, and its coherence to those who are governed by it and turn to it for guidance.<sup>103</sup>

Notably, Westlaw has adorned *Browning* with twenty-five keynotes for various points of law, each with the caveat (or warning label) that the point is supported only by a “[p]ler curiam with three justice concurring and one justice concurring in result only.”<sup>104</sup> In other words, none of the twenty-five keynotes establishes law. This result is unfortunate for the victors in the litigation because they won the battle by having the statute

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(Fla. 1980) (explaining that “[a]n opinion joined in by a majority of the members of the Court constitutes the law of the case. A concurring opinion does not constitute the law of the case nor the basis of the ultimate decision unless concurred in by a majority of the Court.”).

100. Aldisert, *supra* n. 69, at 27.

101. Bashman, *supra* n. 80, at para. 8.

102. Aldisert, *supra* n. 69, at 28.

103. *Id.* at 29.

104. *Browning*, 29 So. 3d at 1054–1057.

declared unconstitutional, but they did not convince a majority of a central rationale for doing so. This uncertainty leaves open the potential for future litigation to depart from the pluralities' opinions and follow another path. In short, the consequences, consistency, and coherence of the written opinions in *Browning* leave room for improvement from the perspective of "making law" or, indeed, failing to make law.<sup>105</sup> Courts frequently fail to achieve a majority vote in closely divided cases,<sup>106</sup> so it cannot be considered a judicial sin to fail to achieve a precedential opinion. But it is at least a disfavored practice in modern American court systems to publish extensive plurality opinions that, in the end, do not lend themselves to citation in future developments in the law.<sup>107</sup>

The fractured nature of the Court's opinions in this case renders the net result similar to cases in which a court is evenly divided, i.e., no precedent is achieved, and the lower court's ruling stands. The practice of publishing opinions in evenly divided cases has not gone unnoticed by Mr. Bashman, who opines:

It strikes me as futile for an evenly divided court to write opinions for or against the affirmance of a lower court ruling. None of the opinions has any precedential value. And by investing time and effort in publicly recording their views, the appellate judges risk locking themselves in to a particular outcome on the question presented, thereby losing the flexibility to change their minds if the question resurfaces in the context of a different case.<sup>108</sup>

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105. See Lon L. Fuller, *The Morality of Law* 38–39 (rev. ed., Yale U. 1969) (discussing at least eight ways to fail to maintain coherent legal rules and systems, one of which is failing to make rules or laws).

106. See Joseph M. Cacace, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the Marks Doctrine after Rapanos v. United States*, 41 Suffolk U. L. Rev. 97, 97 (2007) (stating that if there is disagreement in the rationale, the Court will announce a plurality decision).

107. See John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 Duke L.J. 59, 62 (noting several reasons why plurality decisions are disfavored, including: (1) their professional and public acceptance may be compromised, (2) they have less precedential weight within the Court itself, and (3) they fail to give definitive guidance).

108. Howard J. Bashman, *Decide or Get Out of the Way; A Vote against Opinions from Evenly Divided Appellate Courts*, 31 Pa. L. Wkly. 5, 5 (Apr. 7, 2008).

He also criticizes the practice by rhetorically asking “[w]hy an otherwise overworked appellate court would nevertheless choose to engage in the pointless exercise of writing opinions for or against affirmance when the court is evenly divided is a mystery whose answer may never be definitively known.”<sup>109</sup> He would prefer that a court “merely announce that the ruling under review is affirmed by an evenly divided court without issuing opinions or revealing how the appellate judges voted.”<sup>110</sup> While it does not appear that the Court in *Browning* was ever in the position of being equally divided in its vote, its 3-1-2 vote pattern effectively made its decision like that of an equally divided court because a majority agreed with the result of the First District’s ruling. It is thereby a candidate for Mr. Bashman’s suggested “no opinions” rule.

#### IV. CONCLUDING THOUGHTS

It is worth raising the question of why—given the lack of a majority—the Court did not simply affirm without a written opinion and leave it at that. The dilemma is that the two choices—releasing thirty-four pages of work product that do not result in a single precedential point of law or simply affirming without a written opinion—are both subject to criticism. While the former shows that the Court expended serious time and thought on the legal issues, the Court was nonetheless unable to achieve a majority consensus on legal principles, resulting in no citable precedent. The latter—though also lacking precedential effect—could subject the Court to the criticism that it did not devote sufficient attention to the case, leaving the world to wonder whether the Court was simply too busy to explain itself. The Court could have simply adopted the First District’s decision as its own, but that practice is fraught with potential confusion. No preferable path is clearly marked. In conclusion, it bears noting that the Florida Supreme Court’s collective opinions in *Browning* had not spawned a single judicial citation to the justices’ efforts through the date this Article’s submission.<sup>111</sup> Only a few publica-

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109. *Id.*

110. *Id.*

111. Three have cited it since, two simply being embedded quotes from other cases. *Bates v. Smuggler’s Enters., Inc.*, 2010 WL 3293347, at \*4 (M.D. Fla. 2010) (quoting *Gray*

tions in Westlaw's broad range of databases have seen fit to mention it, generally doing so in a summary manner as a recent development.<sup>112</sup> Perhaps this commentary will be the first, and only, to delve more deeply into this case's structure and precedential significance as a study in judicial opinion writing.

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*v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960)); *Fla. Gaming Ctrs., Inc. v. Fla. Dep't of Bus. & Prof'l Reg.*, 71 So. 3d 226, 229 (Fla. 1st Dist. App. 2011) (citing Justice Polston's dissent and quoting from, but omitting citation to *Fla. H.R. v. Crist*, 999 So. 2d 601, 611 (Fla. 2008), which in turn quoted from *State ex rel. Green v. Pearson*, 14 So. 2d 565, 567 (Fla. 1943)). The third involves citation for a non-novel principle. *De La Mora v. Andonie*, 51 So. 3d 517, 522 (Fla. 3rd Dist. App. 2010), *rev. granted*, 65 So. 3d 515 (Fla. 2011).

112. See e.g. Patrick O. Gudridge, *Complexity and Contradiction in Florida Constitutional Law*, 64 U. Miami L. Rev. 879, 936–938 (2010) (discussing the case over a three-page span); Stacey L. Rowan, Student Author, *Election & Voting Rights: Ballot Initiatives*, 40 Stetson L. Rev. 531, 533–535 (2011) (discussing the facts and procedural history and providing the analysis and significance of the case).