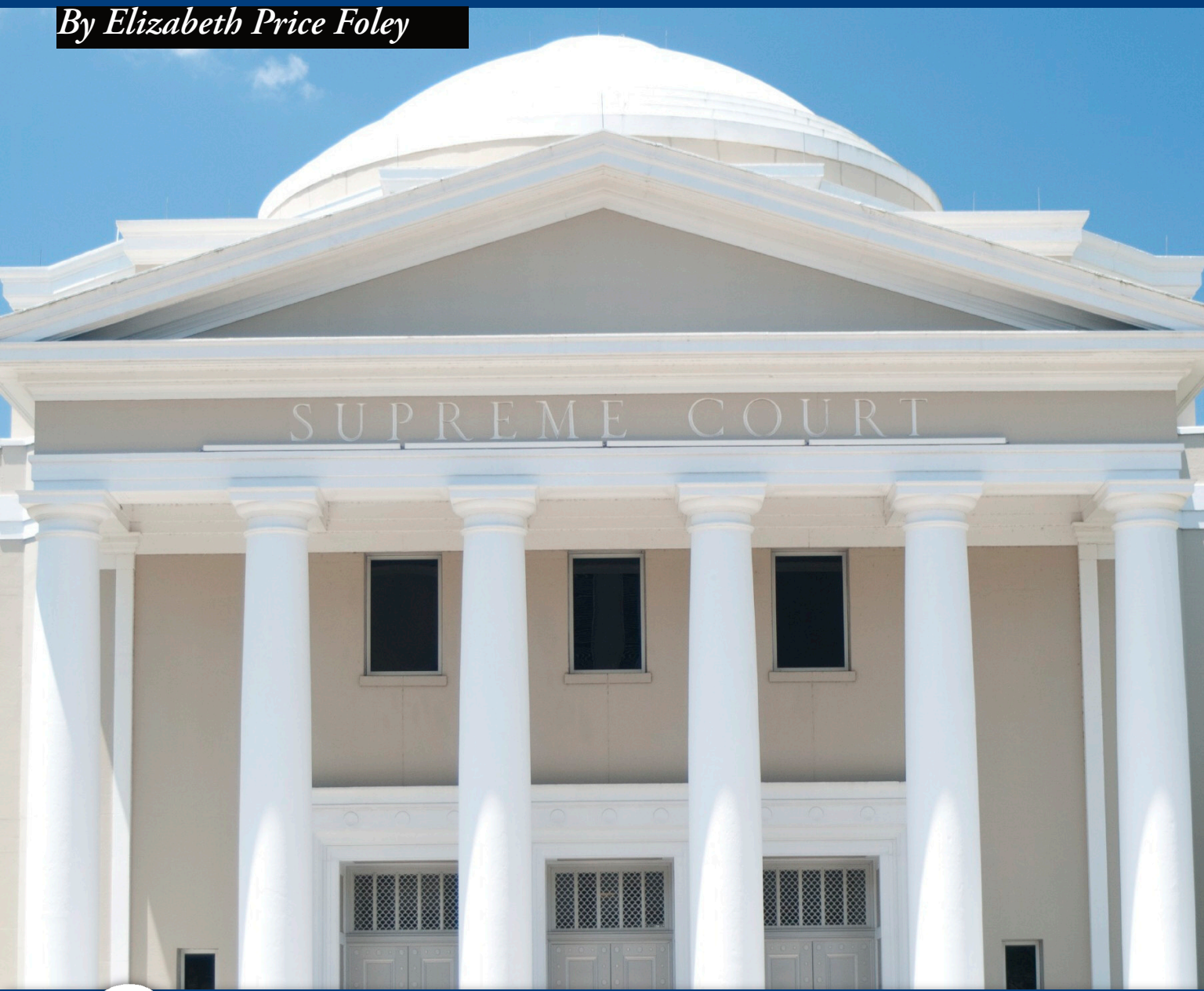
A Review of the Florida Supreme Court: 2000-2012

By Elizabeth Price Foley



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*Elizabeth Price Foley**

Introduction

On November 6, 2012, Floridians will vote on the retention of three justices of the Florida Supreme Court: Fred Lewis, Barbara Pariente and Peggy Quince.[1] Critics of these justices have urged voters to vote "no" on retention, asserting that these justices are engaging in judicial "activism" by disregarding the law and substituting their own subjective, ideological preferences.[2] Supporters of the justices assert that opposition to their retention is itself ideological, and is a blatant attempt to politicize the judiciary of Florida.[3]

In addition, the November 2012 ballot in Florida will contain a proposed constitutional amendment—Amendment 5—that would give the Florida Legislature a greater role in the judicial selection process. Specifically, Amendment 5 would grant the Florida Senate power to confirm gubernatorial appointments to the Florida Supreme Court.[4] It would also allow the Florida Legislature to repeal rules of practice and procedure promulgated by the Florida Supreme Court by a simple majority vote (rather than a two-thirds supermajority presently required) and grant the House of Representatives greater access to confidential files about sitting judges that are maintained by the Judicial Qualifications Commission.[5]

The debate about the merit retention election of three Florida Supreme Court justices and Amendment 5 both suggest some level of dissatisfaction with the way judges—and in particular, those on the Florida Supreme Court—are behaving. In both the retention election debate and Amendment 5, some complain that Florida Supreme Court justices are not sufficiently attuned to the desires of the people and their representatives in the political branches.

Leading members of the legal profession do not share that view. The Florida Bar is fighting to defend the status quo, supporting retention of the three sitting justices[6] and opposing the changes proposed in Amendment 5.[7] In short, the bar seeks to preserve the current process of both appointing judges and retaining them through periodic, up-or-down retention elections. The legal profession generally maintains that the present system has largely succeeded in the goal of de-politicizing the selection and retention of judges.[8]

The purpose of this Paper is to examine the history and purpose of Florida's current system of selecting state supreme court justices, as well as nine of the most high-profile decisions of the Florida Supreme Court since 2000.

The Paper will not draw its own conclusions about these questions because its purpose is to describe, not to criticize or persuade. Readers must draw their own conclusions regarding the outcomes of the cases examined, the persuasiveness of the legal reasoning therein, and the strengths and weaknesses of Florida's system for selecting and retaining its supreme court justices. Indeed, if retention elections are worth preserving, this is exactly the way the system is supposed to work: Voters are able to access objective and accurate information about the justices, and then cast their votes, employing their own subjective notion of "merit."

I. Florida's System of Selecting Supreme Court Justices

Under article V, section 1 of the Florida Constitution, the State's judicial power is vested in a supreme court, district courts of appeal, circuit courts and county courts. [9] The Florida Supreme Court consists of seven justices,[10] who must live within Florida, be appointed before age 70, and be a member of the Florida bar for the ten years preceding their appointment.[11]

Justices of the Florida Supreme Court are initially appointed by the Governor, who is constitutionally required to appoint "one of not fewer than three persons nor more than six persons nominated"[12] by a nonpartisan judicial nominating commission (JNC).[13] A separate JNC exists for the Florida Supreme Court.[14]

The justices appointed must then stand for nonpartisan "retention elections," in the next general election (provided the justice has served for at least one year), and then every six years thereafter.[15] The ballot

for retention elections is constitutionally proscribed to read as follows: "Shall Justice _____[name] of the _____ [Florida Supreme Court] be retained in office?"[16] If the justice fails to obtain majority support of the voters, a vacancy is created and the process for filling it starts over.[17]

The Florida Constitution does not provide any guidance to voters regarding what factors should or should not be considered in casting their "yes" or "no" retention vote. While retention elections are often referred to as "merit" retention elections, the truth is that the word "merit" appears nowhere in the Florida Constitution, and is itself an inherently subjective term. What constitutes merit to one person may not suffice for another. The constitutional role of voters is one of *retention*, and there is simply no approved rubric for guiding voters in casting their votes, other than a vague suggestion by some that voters cast their votes based on a judge's "merit." But on some level, this is what voters do in *all* elections, even overtly partisan ones, such as those for governor or the legislature. While judicial elections have been depoliticized somewhat to insulate judges from political pressures while on the bench, they are not entirely apolitical for the simple reason that they must face voters' judgment. In the end, voters get to decide what warrants retention or not, based on their own criteria.

In the context of the November 2012 election, if a majority of the voters decide not to retain any of the three Florida Supreme Court justices, Florida Governor Rick Scott will appoint replacements from candidates submitted to him from the Supreme Court JNC. This has led some to assert that the opposition to the three justices is designed to give Scott, a Republican governor, the opportunity to appoint up to three new supreme court justices.[18] Others have stated that, while the Governor will indeed make the final call regarding whom to appoint to the Supreme Court, he is constitutionally constrained to select from a list of nominees provided by the Supreme Court JNC. On this view, the process provides some guarantee that the nominees presented to the Governor are not ideological outliers, but instead are those who, by definition, are capable of obtaining majority support from a nine-member body comprised of individuals of diverse backgrounds and political leanings. And any new appointees will remain accountable to the people of Florida via future retention elections.

Florida's current process for selecting its supreme court justices is the byproduct of a 1976 amendment to the Florida Constitution. Prior to the 1976 amendment, justices of the Florida Supreme Court were elected in ordinary elections.[19] The primary impetus for the 1976 switch to retention elections was a widely publicized scandal involving three Florida Supreme Court justices. Specifically, in 1975, Justices Joseph Boyd, Hal Dekle, and David McCain were threatened with impeachment after they were each discovered to have engaged in improprieties while serving on the bench.

Justice Joseph Boyd was a Miami-area lawyer and Miami-Dade County commissioner who served 18 years on the Florida Supreme Court, serving as Chief Justice for two years. Boyd accepted a secret draft opinion from lawyers representing a utility company in case pending before the Florida Supreme Court.[20] He claimed that he never read the draft and narrowly avoided impeachment by agreeing to take and pass a mental examination.[21] Boyd was reprimanded in 1975 by his colleagues on the Florida Supreme Court but remained a justice for another twelve years.[22]

Justice Hal Dekle was another Miami-area lawyer and co-recipient of the secret utility company draft opinion. Unlike Boyd, however, Dekle was accused of using the draft in the opinion he penned in the case, and of trying to influence a lower court judge to rule in favor of a campaign contributor.[23] In the face of imminent impeachment proceedings by the Florida legislature, Dekle resigned.[24]

The third justice, Justice David McCain, was a young lawyer from Ft. Pierce when he won election to the Florida Supreme Court in 1970 at the age of 39. By 1975, a committee of the Florida House recommended McCain's impeachment—the first time in history that impeachment proceedings had resulted in a recommendation of impeachment for a Florida Supreme Court justice.[25] McCain was accused of pressuring lower court judges to rule in favor of certain friends and giving special treatment to campaign contributors appearing before him.[26] Before the full House could vote on impeachment (or the Senate

convict), McCain resigned. [27]

These scandals at Florida's highest court spurred Floridians to enact the 1976 constitutional amendment providing for retention elections. The putative goal of the merit retention election system is to depoliticize the court to some degree, freeing judges from the need to campaign for office, including soliciting campaign contributions.[28] Indeed, Florida's retention system is a type of "Missouri Plan," modeled on a similar system of gubernatorial judicial appointment followed by retention elections adopted in Missouri in 1940 and other states in the 1960s and 70s.[29] The goal of the retention election system is to better insulate judges from shifting political winds, providing greater freedom to decide cases on their legal merits.[30] Judges are thus not permitted to convey any party affiliation during their retention election,[31] they are somewhat limited in their ability to solicit campaign contributions,[32] and they may not announce their personal or political views, or opinions about potential cases, as judicial candidates.[33]

Retention elections lack many traditional characteristics of partisan elections. They are still elections, though, requiring judicial candidates to raise money and gain voter approval. They are somewhat depoliticized, but not entirely so. Judges can still raise large sums of money through committees—the committees of the three Florida Supreme Court justices facing retention elections in 2012 have raised over $1 million to defend the justices.[34] Indeed, the author of this paper has, as a member of the Florida Bar, received numerous email solicitations of campaign contributions on behalf of each of the three justices facing retention election.[35]

Moreover, recent research conducted for the Florida Bar revealed that 90 percent of those participating in a focus group did not understand what "judicial merit retention" referred to.[36] As a result, the Florida Bar Board of Governors has mounted a significant voter education program, "The Vote's In Your Court," which attempts to provide basic information about how judges are appointed and retained, how to access background information and opinions of judges, and what characteristics might make a "good" judge.[37] For example, in the Florida Bar's *Guide for Florida Voters: Questions and Answers about Florida Judges, Judicial Elections and Merit Retention*, a FAQ asks, "What makes someone a 'good' judge?" The answer provided is understandably vague:

> Judges must display impartiality and an understanding of the law. All judges may deal with cases that are either civil or criminal in nature. Knowledge in one particular area is not more important than the other. Judges should be selected based on their legal abilities, temperament and commitment to follow the law and decide cases impartially.[38]

Whether the Florida Bar's definition of a "good" judge is the same one used by a voter is debatable. Certainly, voters may cast their vote for any reason. While some of us may disagree with their reason or even think it is inappropriate, policing the motives for individuals' voting decisions is neither possible nor desirable in a democracy. The Florida Bar is to be lauded for attempting to educate Floridians about the nature of retention elections and the role of judges generally—since a well-informed citizenry is undeniably critical to the proper functioning of a republican form of government.

II. High-Profile Florida Supreme Court Decisions, 2000-present

This section will explore several of the decisions of the Florida Supreme Court since 2000. Specifically, it will examine nine cases that are most frequently cited in debates over the proper role of a judge. The author does not maintain that these cases are necessarily representative of the Florida Supreme Court's jurisprudence since 2000. That is possible, but such a study exceeds the purpose of this paper. Rather, the author hopes to help readers reach a better understanding of the cases most frequently used to support the case for non-retention.

The cases have been grouped into three general categories, for ease of comparison and discussion: (1) ballot initiative cases; (2) criminal cases; and (3)

miscellaneous cases.

A. Ballot Initiative Cases

1. *Florida Department of State v. Mangat* (2010)

In 2010, shortly after the enactment of the federal health care reform law, the Affordable Care Act (ACA), the Florida Legislature proposed a state constitutional amendment—Amendment 9—that was designed to be a statement of nullification of the "individual mandate" portion of the ACA. The individual mandate of the ACA required most Americans to purchase a private health insurance policy or face a penalty imposed by the federal government. Opposition to the ACA, and in particular to the individual mandate, was intense, based on concerns that the mandate exceeded Congress's limited and enumerated powers.

Many states, including Florida, subsequently attempted to express their displeasure at the federal health insurance mandate by passing state laws and constitutional provisions that purported to exempt state citizens from the mandate. Although as a matter of simple Supremacy Clause analysis[39] these state attempts were not legally effective, they represented an important statement of opposition to the individual mandate and the inherently broad concept of federal power it represented.

In passing proposed Amendment 9, the Florida Legislature provided a summary that was to appear on the ballot to assist voters in making their decision. The summary began, "HEALTH CARE SERVICES.—Proposing an amendment to the State Constitution to ensure access to health care services without waiting lists, protect the doctor-patient relationship, guard against mandates that don't work, prohibit laws or rules from compelling any person, employer, or health care provider to participate in any health care system . . . ."[40]

The question faced by the Florida Supreme Court in *Mangat* was whether this summary of Amendment 9 was misleading. Specifically, there was both a statutory and a constitutional issue: (1) whether the summary language was "clear and unambiguous" as required by a Florida statute;[41] and (2) whether the summary language complied with the accuracy requirement implicit in article XI, section 5 of the Florida Constitution, which deals with proposed state constitutional amendments.

The Florida Supreme Court was divided, but overall five justices agreed that the summary of Amendment 9 was misleading in violation of both the statute and the state constitution, and two justices dissented. As a result, Amendment 9 was stricken from the ballot and the voters of Florida never had the opportunity to vote on it.

The three justices facing retention elections in 2012 all agreed with the majority that the summary was misleading.[42] The majority concluded that:

> The first two statements [of the summary] . . . are classic examples of a ballot summary "flying under false colors" as the amendment does not address waiting lists or the "doctor-patient relationship" at all. These statements do not give fair notice of the purpose and effect of the amendment. Even if the amendment is approved by the voters, it will not create a constitutional right to access health care services without a waiting list and will not affect the doctor-patient relationship.[43]

The two dissenters in *Mangat* did not seem to disagree that the summary was, in fact, misleading in violation of both the statute and Florida Constitution. Instead, the dissenters' point of disagreement regarded the *remedy* that should follow. Specifically, the dissenters believed that pursuant to an unpublished order in a previous case, *ACLU v. Hood*,[44] the proper remedy was not to strike the proposed amendment off the ballot entirely, but instead to strike the misleading summary and substitute instead the full text of the proposed amendment.[45] The dissenters acknowledged "unpublished orders do not constitute binding precedent" but believed that the court had "looked to such unpublished orders for guidance in the past and . . . ha[s] not been reluctant to rely on such orders in justifying our decisions."[46] Further, the dissenters believed that the court "should act with

restraint" when deciding ballot initiative issues in order to prevent unnecessarily "bar[ring] the people from voting on a proposal submitted to them by their elected representatives."[47]

The majority did not think substitution of the summary for the full text was a proper remedy, concluding, "This Court does not have the authority to substitute the language that three-fifths of the members of the Legislature have voted to place on the ballot."[48] The majority characterized the unpublished order in the *ACLU v. Hood* decision as one that "contained no explanation, analysis, or authority for the Court's action."[49] It then "specifically recede[d] from *ACLU*" because it was "not consistent with a long line of cases involving constitutional amendments" in which the court found the summary fatally defective and struck the proposal from the ballot as a result.[50] Moreover, the majority noted that in a similar case, *Smith v. American Airlines, Inc.*,[51] the court had specifically "asked the Legislature to establish a procedure that would avoid this problem."[52] Moreover, the majority noted that if the Legislature had wanted the entire text of Amendment 9 to be placed on the ballot summary, it could have done so.[53]

While it is true that substitution of the full text of Amendment 9 for the summary provided by the Florida Legislature would have remedied the misleading nature of the summary (by deleting it entirely), it is also true that substituting the full text for the summary would have been contrary to the law enacted by the legislature. The legislature chose to provide a summary, not just the full text, and the summary was most likely misleading. Under such circumstances, while it might be pragmatically understandable to justify substituting the full text for the summary, would this be a proper role for the judiciary? This would seem to be a relevant question.

On the other hand, there was a precedent on point, *ACLU v. Hood*, in which the Florida Supreme Court did indeed allow such a substitution of full text to replace a misleading amendment summary. The *Hood* decision was not, however, binding precedent, as it was an unpublished opinion. So the court in *Mangat* was indeed free, as a matter of law, to disregard *Hood* as an aberration. The disagreement among the Florida Supreme Court justices in *Mangat* was not about whether the ballot summary was misleading, but about what would be the *better remedy* for a court to supply. In the end, the justices faced a choice about a remedy (full text substitution) allowed by one unpublished prior order, or another remedy (striking the ballot initiative) that had been used in several prior published opinions. Justices might reasonably disagree about how much to "weigh" available remedies.

2. *Roberts v. Doyle* (2010)

Roberts v. Doyle involved another ballot initiative—Amendment 3—that was proposed by the Florida Legislature and slated to appear on the November 2010 ballot.[54] Amendment 3 concerned the homestead tax exemption, a complicated area of the law that exempts a portion of some property taxes for properties that are considered "homestead." As was the case with Amendment 9 in *Mangat*, the basis for the challenge to Amendment 3 was the misleading nature of its ballot summary, in violation of both the Florida statute that requires "clear and unambiguous" language, and the accuracy requirement implicit in article XI, section 5 of the Florida Constitution.[55]

The five justice majority in *Doyle*—which included Justices Lewis, Pariente, and Quince—agreed with the trial court that Amendment 3 was misleading in various respects:

> Because of the omissions in the ballot title and summary, a voter would not be clearly informed who qualifies for the proposed [homestead] exemption; that a person's spouse could exempt him or her from qualifying for the additional homestead exemption; that the measure would be effective beginning January 1, 2011, for homes purchased on or after January 1, 2010; and that the additional exemption is available only for a single property.[56]

The court acknowledged that a ballot summary "need not explain every detail or ramification of the proposed amendment," yet it reaffirmed its touchstone that the summary must "give the voter fair notice of the decision he or she must make" and cannot

therefore "'fly under false colors' or 'hide the ball' as to the amendment's true effect."[57]

Given the incredible complexity of any proposed amendment relating to homestead exemptions, it is difficult to say, in any objective way, that the majority's conclusion that Amendment 3 was "misleading" was wrong as a matter of fact or law. And interestingly for comparison to the *Mangat* court's debate about appropriate remedy (full text substitution versus striking the initiative from the ballot), the *Doyle* court unambiguously declared, "[a] proposed amendment must be removed from the ballot when the title and summary do not accurately describe the scope of the text of the amendment, because it has failed in its purpose."[58] As a result, the *Doyle* court, like the *Mangat* court, struck the proposed amendment from the ballot.

Two dissenters in *Doyle* did not think the ballot summary was misleading *enough* to remove the proposed amendment from the ballot, concluding, "[a]lthough the title and summary do not explain every detail within the proposed amendment, [we] do not consider the differences sufficiently material to keep the people of Florida from voting on the proposed amendment. There is no 'hiding the ball' or 'flying under false colors.'"[59]

As with *Mangat*, the *Doyle* decision shows a basic disagreement among Florida Supreme Court justices about what constitutes a sufficiently material or substantial enough omission to render a proposed amendment summary misleading. There also appears to be a fundamental disagreement about whether to err on the side of keeping or striking the amendment in situation that is not entirely clear-cut. The dissenters in both *Mangat* and *Doyle* seem to believe that the court should err in favor of retaining proposed amendments on the ballot as much as possible, whereas the majority in these decisions seems to favor striking them once a determination has been made that they are misleading in some respect.

B. Criminal Cases

1. *State v. McMahon* (2012)

State v. McMahon addressed the ability of the State of Florida to appeal the sentencing decision of a trial judge who had not provided a special hearing to determine if the accused was a habitual offender.[60] A five-justice majority—including Justices Lewis, Pariente and Quince—ruled that the state could not, in fact, appeal such a sentence.

In *McMahon*, the criminal defendant was charged with possession of cocaine, possession of drug paraphernalia, and grand theft.[61] McMahon was a repeat felon and, pursuant to Florida's habitual felony offender statute, the sentencing court is required to impose felony offender status (which carries a longer term of imprisonment) on any qualifying defendant unless the court specifically finds that doing so "is not necessary for the protection of the pubic" and provides reasons for that finding.[62]

In McMahon's case, during the sentencing hearing, the trial judge engaged in a colloquy with the prosecutor and defense counsel, in which defense counsel suggested that McMahon was interested in reaching a plea agreement with the State. In response, the trial judge stated, "If Mr. McMahon wants to enter his plea here today, I would exercise my discretion and sentence him as a regular offender, not as a habitual offender."[63] The prosecutor objected, demanding a separate hearing on McMahon's felony offender status.[64] The trial judge noted the prosecutor's objection, and then proceeded to sentence McMahon to a sentence of 18 months' imprisonment, which was the minimum sentence allowed under the applicable sentencing guidelines.[65]

Under Florida law, prosecutors can appeal criminal cases only in narrowly defined situations, the only one of which applicable to McMahon's case is a provision that allows an appeal of "[t]he sentence, on the ground that *it is illegal.*"[66] The question faced by the Florida Supreme Court in *McMahon*, therefore, was whether the sentence McMahon received was "illegal"?

The state argued that McMahon's sentence was "illegal" because the trial judge did not hold a separate felony offender hearing and make the finding mandated by the felony offender statute that sentencing McMahon as a felony offender was not "necessary for the protection of the public" and provide reasons for such finding. Defense counsel argued that McMahon's sentence was *not* "illegal" because it was within the acceptable range of sentencing allowed the trial judge under Florida's

sentencing guidelines. The majority in *McMahon* agreed with defense counsel, concluding that:

> The sentence imposed in this case was within the range determined by the sentencing scoresheet. An illegal sentence has generally been defined as "one that imposes a punishment or penalty that no judge under the entire body of sentencing statutes and laws could impose under any set of factual circumstances. Because the sentence imposed in this case was within the range established by the sentencing scoresheet and because the trial court was not mandated to impose an HFO [habitual felony offender] sentence even if a hearing had been held and McMahon was proven to qualify, the sentence in this case is not "illegal"[67]

The two dissenters in *McMahon* argued that under Florida's habitual offender statute, the trial judge was legally required to hold a habitual offender hearing and, if the defendant was found to be a habitual offender, the trial judge was required to impose an habitual offender sanction unless she found specifically that doing so "is not necessary for the protection of the public" and explain why. The dissenters maintained that the trial judge's failure to even *hold* the required habitual offender hearing thus rendered the 18 month sentence "illegal," even if it was "within the range" of the sentencing guidelines.[68]

The dissenters took the *McMahon* majority to task for interpreting the word "illegal" as a "term of art" and thereby undercutting the entire purpose of the habitual offender statute.[69] Specifically, they pointed out that the definition of "illegal" used by the majority had been borrowed from cases involving postconviction habeas proceedings and were not appropriate in cases, such as McMahon's, involving a direct appeal of the sentence.[70]

The *McMahon* decision evinces a disagreement among Florida Supreme Court justices about how broadly or narrowly to interpret a statute that allows prosecutors to appeal sentences that are "illegal." On the one hand, criminal statutes are generally construed narrowly in fairness to criminal defendants,[71] which would suggest that the majority's narrow definition of "illegal" might be correct. On the other hand, the ordinary meaning of the word "illegal" is "contrary to, or forbidden by, law."[72] Which value should trump: narrow construction or plain meaning? This was the choice faced by the justices in *McMahon*, and while they clearly made different choices, it is difficult to characterize either as unsupportable by existing law.

2. *Scott v. State* (2011)

Another recent controversial decision by the Florida Supreme Court in the realm of criminal law is the 2011 decision in *Scott v. State* involving the propriety of imposing the death penalty.[73] As with *McMahon* in 2012, the court was split, with five justices joining the majority opinion, and two justices dissenting. Justices Lewis, Pariente, and Quince joined the majority opinion.

Kevin Jerome Scott was convicted of first-degree murder, attempted armed robbery, and aggravated battery after he and two acquaintances planned and executed the robbery of a coin laundry. During the course of the robbery, Scott shot and killed the laundry's owner.[74] The jury recommended the imposition of the death penalty by a vote of nine to three.[75] Following a hearing regarding mitigating and aggravating factors, the trial judge followed the jury's recommendation and sentenced Scott to death.[76]

The majority of the Florida Supreme Court determined that the death penalty was "disproportionate" under the facts of the case and remanded the case back to the trial court for the imposition of a life sentence without the possibility of parole.[77] In making this determination regarding proportionality, the Florida Supreme Court weighed the aggravating and mitigating factors as found by the trial judge. Specifically, the trial court had found two aggravating factors present, weighing in favor of the death penalty: (1) a prior violent felony; and (2) the commission of murder during an attempted armed robbery.[78] Weighed against these two aggravators were nine mitigating factors recognized by the trial court, including things such as evidence of Scott's faith, his love of family, an absentee father, good

relationships with his family, and Scott's witnessing of domestic abuse as a small child—all of which were given "slight" or "little" weight by the trial judge.[79]

The Florida Supreme Court majority found that the trial judge gave too much weight to Scott's prior violent felony aggravator because the prior violent felony was the *contemporaneous* aggravated assault that Scott had committed on a laundry patron while robbing the store.[80] Specifically, the court majority was concerned that "the battery occurred at the same time as the murder and apparently involved a limited threat of violence and no permanent injury."[81] As such, the majority concluded "the circumstances of this case stand in stark contrast to other robbery-murder cases in which this Court has upheld the sentence of death as proportionate where the prior violent felony aggravator was predicated upon crimes that *did not occur* contemporaneously with the murder."[82]

The two dissenters agreed that the first-degree murder conviction should be affirmed, but disagreed that the death penalty was disproportionate. In affirming the proportionality of the death penalty, the dissenters did not directly address the contemporaneous-versus-prior in time felony distinction that was so important to the majority, instead focusing on the fact that the court had upheld death sentences in a number of robbery cases involving prior violent felonies, as well as in cases where, like Scott, the defendant did not have an apparent prior design to shoot anyone.[83]

The disagreement in *Scott*, once again, seems to be a disagreement about how much to defer to trial court determinations about the propriety of the death penalty, which itself involves a disagreement about how much "weight" to assign to various facts. The justices in *Scott* simply disagreed about how much weight to give to a well-established aggravating factor—prior violent felonies—when the prior violent felony occurred during the course of the *same criminal enterprise* that also resulted in murder. According to the majority, when the prior violent felony is committed during the *same* criminal enterprise, this suggests that the defendant is not as dangerous or black-hearted as a defendant with a prior violent felony that occurred well before the commission of the murder. Presumably, in the eyes of the *Scott* majority, a criminal defendant who commits a prior violent felony and then *later* commits a murder is someone who should receive closer consideration for the ultimate penalty—the death penalty—because of the defendant's pattern of violent behavior. Conversely, the opposite is true as well for the majority: a "prior violent felony" committed at the same time as the murder (for which the death penalty is sought), while still an aggravating factor, should be assigned less "weight" than a prior violent felony committed at a different time.

3. *State v. Cable* (2010)

Kathy Jo Cable was arrested in her hotel room and charged with trafficking in methamphetamine and possession of drug paraphernalia. The officer who arrested Cable had a warrant for her arrest, knocked on her hotel room door, but did not announce, prior to entering the room, that he had a warrant for her arrest. The question in *State v. Cable* was whether the officer's failure to announce that he had a warrant for Cable's arrest required suppression of the evidence obtained upon entering the room. Specifically, the question was whether the officer's failure to both knock *and* announce mandated exclusion of evidence.[84]

In *Hudson v. Michigan*, the U.S. Supreme Court ruled in 2006 that violations of the so-called "knock and announce" rule required by the Fourth Amendment to the U.S. Constitution did *not* require the suppression of evidence if the officer had a valid warrant.[85] The *Hudson* Court explained:

> The knock-and-announce rule gives individuals the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry. And . . . destroyed by a sudden entrance. It gives residents the opportunity to prepare themselves for the entry of the police. The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed. In other words, it assures the opportunity to collect oneself before answering the door. . . .What the knock-and-announce rule has never protected,

> however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. [86]

The Florida Supreme Court in *Cable* acknowledged *Hudson* and its holding that the Fourth Amendment knock-and-announce rule did not require exclusion of evidence in the event of a valid warrant. [87] Nonetheless, the majority in *Cable* also noted that *Hudson*, as an interpretation of the U.S. Fourth Amendment, was not controlling precedent on the issue of the proper interpretation of Florida's knock-and-announce *statute*.

As a matter of law, it has long been accepted that states are allowed, under their state law, to provide higher protection for individual rights than those provided by the U.S. Constitution.[88] In Florida, the knock-and-announce rule has been codified, providing:

> If a peace officer fails to gain admittance after she or he has announced her or his authority and purpose in order to make an arrest either by warrant or when authorized to make an arrest for a felony without a warrant, the officer may use all necessary and reasonable force to enter any building or property where the person to be arrested is or is reasonably believed to be.[89]

In 1964, in *Benefield v. State*, the Florida Supreme Court held that a violation of Florida knock-and-announce statute required automatic exclusion of evidence, except in very narrow circumstances.[90]

In *Cable*, the Florida Supreme Court did not have to follow *Hudson*. It could, if it wanted to, overrule *Benefield* in light of the Fourth Amendment values articulated in *Hudson* (that did not require exclusion of evidence), or it could reaffirm *Benefield* and conclude that Florida's own knock-and-announce statute required the exclusion of evidence any time an officer did not both knock and announce prior to entering the premises with a warrant. The four-justice majority in *Cable*[91]—including Justices Lewis, Pariente, and Quince—opted for the latter, reasoning:

> [W]e are concerned that the important values represented by the knock-and-announce statute, which is based on common law origins, would be undermined if the exclusionary rule did not apply to its violation . . . .The fact that *Benefield* has been the law since 1964 and the fact that the statute has not been amended by the Legislature to prohibit the remedy of exclusion are further considerations of not receding from *Benefield*. As we have observed, "[l]ong-term legislative inaction after a court construes a statute amounts to legislative acceptance or approval of that judicial construction."[92]

The two dissenting justices in *Cable* believed that, because neither the U.S. Fourth Amendment (per *Hudson*) nor the Florida constitutional equivalent[93] required exclusion of evidence when the knock-and-announce rule is violated, that Florida's knock-and-announce *statute* should not be construed to give greater protections to individuals. Accordingly, the dissenters believed the court should overrule *Benefield* and reinterpret the knock-and-announce statute to be harmonious with both the U.S. and Florida constitutions.[94]

The dissenters' point is essentially based on pragmatism—i.e., because the U.S. Fourth Amendment and its Florida constitutional equivalent do not require exclusion of evidence when the knock-and-announce rule grounded in those amendments is violated, any statutory codification of the knock-and-announce rule should not be interpreted in a way that differs fundamentally from the constitutional antecedent. Such an approach would bring about uniformity across constitutional and statutory manifestations of the knock-and-announce rule, reducing litigation and uncertainty.

Nonetheless, the dissenters' argument, while compelling, was not required by U.S. constitutional, Florida constitutional, or Florida case law. Indeed, as the majority pointed out, the ultimate legal question presented was whether the Florida Supreme Court, in light of *Hudson*, was willing to reconsider its 1964 interpretation of the Florida statute in *Benefield*. It was not required to do so, and it chose not to. The dissenters did not disagree with this basic legal framework, but they simply thought that the court *should* (though it was not required to) recede from *Benefield.* Indeed,

the dissenters acknowledged that, since *Benefield* was merely an interpretation of a Florida statute enacted by the legislature, the legislature is free to revise the knock-and-announce statute to eliminate the exclusionary rule as a remedy altogether.[95]

4. *Bulgin v. State* (2005)

Bulgin v. State involved the criminal prosecution of several defendants arrested for selling controlled substances.[96] All defendants agreed to cooperate with law enforcement by conducting controlled drug buys. They signed agreements that recited that, in return for their assistance, they would be immediately released and formal charges would not be filed against them until their covert assistance had ended.[97] The agreements did not contain any discussion of the defendants' right to a speedy trial.[98]

After cooperating with authorities for a while, the defendants were each rearrested and formal charges filed. Defendants' then challenged their detention as violative of Florida's speedy trial rule, which requires that an individual charged with a felony must be brought to trial within 175 days of his arrest, except under four specific exceptions.[99] The Florida Supreme Court's precedent interpreting the speedy trial rule had previously made it clear that the 175-day clock begins ticking upon the defendant's *initial* arrest.[100] The only legal issue in *Bulgin*, therefore, was whether one of the four exceptions applied to the defendants.

Specifically, the prosecution argued that it was not limited by the 175-day rule because defendants' fell into the exception which provides, "the failure to hold trial [within 175 days of initial arrest] is *attributable to the accused*, a codefendant in the same trial, or their counsel . . . ."[101] The prosecution asserted, in other words, that the defendants were "at fault" in the delay to trial, because they had voluntarily agreed to forego the filing of formal charges until their cooperation with law enforcement ended.

The five-justice majority in *Bulgin*—including Justices Lewis, Pariente, and Quince—disagreed with this argument, concluding that the defendants' actions did not "prevent the State from bringing the case to trial within the speedy trial time."[102] The majority instead saw the delay as attributable to the State, which had decided to put the defendants' cases on a different prosecutorial track by seeking their cooperation with other controlled drug buys.[103] The majority explained:

> [I]t is not unreasonable to expect that if the State makes this decision after an arrest, it cannot ignore the speedy trial rule; and it has the responsibility to take the rule into account, including the obvious option of including a waiver of speedy trial in the cooperation agreement, something the court noted the State was aware of and obviously knew how to do since it was undisputed that it had done so in other cooperation agreements. . . . [T]he State can cite no instance in which a court has held that ere silence constitutes a waiver of the right to speedy trial.[104]

Justice Quince joined the majority but she also concurred separately—along with Justice Cantero—to express her frustration that the speedy trial rule did not create an exception for such cooperation agreements. She noted that under such circumstances, the defendants were not coerced into a later prosecution and "not only had the benefit of being free to roam the streets, but were also free of any criminal charges during the period of time they were rendering assistance."[105] As such, Justice Quince thought that "implicit in the defendants' agreements with the State was an acknowledgment that the State could proceed with the defendants' individual criminal cases when their assistance to the State was over. Yet the defendants, after getting the benefit of their bargains, filed motions for discharge under the speedy trial rule."[106] Quince then concluded that the speedy trial rule should be amended to allow for an extension of the speedy trial rule under such circumstances.[107] She also urged state prosecutors to include explicit waivers of the speedy trial rule within the text of future cooperation agreements.[108]

Justice Wells was the sole dissenter in *Bulgin*. He dissented because he believed that Florida's speedy trial rule had been interpreted so rigidly—in favor of criminal defendants—that it effectively undermined

the statute of limitations for many crimes, substantially shortening the available time period for a prosecution to occur.[109] Justice Wells pointed out that the "decision to arrest is different from the decision to charge."[110] Because Florida's 175 day speedy trial rule is triggered by initial arrest, Justice Wells observed that prosecutors are forced to "proceed to trial within the speedy trial period even though they may need more time to gather sufficient evidence, prepare the case, secure the apprehension of other suspects, or negotiate a plea arrangement with the defendant. The only other option is to forego arrest, which in some cases could produce even more dire consequences."[111]

As *Bulgin* and *Cable* both show, there appears to be considerable frustration on the part of some justices of the Florida Supreme Court with the Florida Legislature. In these cases, justices in the majority instruct the legislature that, if it is unhappy with the court's interpretation of statutes, it should change them, because the court does not feel comfortable overruling its own precedent or contorting statutory exceptions to reach pragmatically desirable goals. Here, the Florida Supreme Court evinced an awareness of the limited role of the judiciary in interpreting such statutes.

5. *Nixon v. State* (2003)

In August 1984, Joe Elton Nixon approached Jeanne Bicker at Governor's Square Mall in Tallahassee, Florida and asked if she had jumper cables to help jump-start his car. Bickner agreed to offer Nixon a ride home in her MG sports car. En route, Nixon overpowered Bickner, put her in the trunk of the MG, and drove to secluded wooded area. Once there, Nixon tied Bickner between two trees with the jumper cables and set her on fire, killing her.[112]

Nixon told his brother and girlfriend that he had killed Bickner, and pawned two rings he took from Bickner.[113] Upon questioning by police, Nixon described killing Bickner in graphic detail.[114] Nixon was indicted on capital murder and other charges and assigned a public defender. After investigating the case and the overwhelming evidence of guilt, Nixon's lawyer told Nixon that he believed the best trial strategy would be to focus on the penalty provision in an effort to convince the jury to spare Nixon's life.[115] The lawyer attempted to explain this strategy to Nixon on several occasions, but Nixon was unresponsive during these discussions, neither expressly consenting nor objecting to counsel's proposed strategy.[116]

During both opening and closing arguments at the guilt phase of Nixon's trial, Nixon's lawyer conceded to the jury that Nixon had, in fact, murdered Ms. Bickner. [117] The jury returned a guilty verdict and the trial moved to the sentencing phase. At the sentencing phase, Nixon's lawyer presented multiple lay and expert witnesses that described many factors mitigating against the imposition of the death penalty, including his troubled childhood, history of emotional problems, low IQ, and possible brain damage.[118] After three hours of deliberation, the jury recommended that Nixon receive the death penalty.[119]

After losing direct appeals, Nixon began seeking postconviction habeas relief. In 2003, a five justice majority of the Florida Supreme Court—including Justices Lewis, Pariente, and Quince—determined that Nixon was entitled to a new trial on grounds that he had received ineffective assistance of counsel at his trial, in violation of the Sixth Amendment of the U.S. Constitution.[120] The Florida Supreme Court had earlier concluded that the comments by Nixon's lawyer, during the guilt phase, conceding Nixon's guilt were tantamount to a guilty plea.[121] As such, the court believed that there must be substantial evidence that Nixon did more than merely silently acquiesce to his counsel's strategy of conceding guilt.[122] Because the record did not reflect anything more than Nixon's silent acquiescence, the counsel's continued insistence on pursuing such a strategy constituted ineffective assistance of counsel.[123]

Justice Lewis concurred in the result (new trial) only, writing separately to state that while he believed the court's analysis was defective, he believed he was bound by the law of the case: "If I were writing on a clean slate, I would affirm the decision of the trial court here [to deny a new trial], but unfortunately, *Nixon II* [the court's earlier decision] directs a different result and I am therefore compelled to concur in the result based solely upon the law of the case."[124]

The sole dissenter in *Nixon* was Justice Wells, who agreed with the trial judge's findings denying a new

trial.

The U.S. Supreme Court granted *certiorari* to review the Florida Supreme Court's ruling in *Nixon* and reversed in a unanimous 8-0 decision.[125] The Court concluded that the Florida Supreme Court had applied the wrong standard for determining whether Nixon's attorney had rendered ineffective assistance of counsel.[126] Specifically, the U.S. Supreme Court disagreed that the strategy of Nixon's lawyer to concede guilt was the functional equivalent of a guilty plea, because, unlike a guilty plea, the state prosecutors were still obligated to prove each element of the murder charge beyond a reasonable doubt and the defendant was still able to confront and cross-examine witnesses against him.[127] As such, the Florida Supreme Court should have simply asked whether counsel's strategy of conceding guilt was reasonable under all the circumstances, and it concluded that it was.[128]

Following the U.S. Supreme Courts reversal, the Florida Supreme Court considered two additional postconviction appeals. In both instances, the court unanimously rejected Nixon's claims.[129]

Nixon is a controversial decision due to the basic, qualitative differences between a guilty plea and a strategy to concede guilt. Because the court persisted in characterizing the latter as synonymous with the former, it relied upon an incorrect line of U.S. Supreme Court precedents that required a *per se* finding of ineffective assistance of counsel rather than an employing a more traditional reasonableness analysis. Justice Lewis recognized this error, but felt obligated to follow the Florida Supreme Court's own precedent in the law of the case. Justices Pariente and Quince and their other colleagues in the majority, by contrast, did not see any error with their reasoning until the U.S. Supreme Court's unanimous reversal.

C. Miscellaneous Cases

1. *Whiley v. Scott* (2011)

Whiley v. Scott involved a constitutional challenge to two executive orders of Governor Rick Scott, establishing a new Office of Fiscal Accountability and Regulatory Reform (OFARR) within the Governor's office.[130] As the name suggests, the OFARR was charged with ensuring and monitoring the propriety, efficiency and fiscal impact of agency rulemaking and rules. A citizen/taxpayer who was receiving food stamps challenged the constitutionality of the executive orders establishing the OFARR, asserting that they violated the Florida Constitution's separation of powers provision.[131]

At issue were two separate executive orders issued by Governor Scott. The first, Executive Order 11-01, directed "all agencies under the direction of the Governor to immediately suspend all rulemaking" and prohibited any further rulemaking activities "except at the direction of the [OFARR]."[132] The second, Executive Order 11-72, expressly stated that it superseded Executive Order 11-01,[133] and rather than suspending all rulemaking (as the earlier order had declared), it directed "all agencies under the direct supervision of the Governor, prior to developing new rules or amending or repealing existing rules, to submit [them to the OFARR]" and prohibited the publication of any rules "without OFARR's approval."[134]

A five-justice majority—including Justices Lewis, Pariente and Quince—agreed to adjudicate the case under the court's discretionary review, and determined that the executive orders were unconstitutional. Specifically, the majority found that the executive orders unconstitutionally infringed upon the legislative power, which includes the power of rulemaking.[135] In reaching this conclusion, the majority concluded that only the legislature could decide whom to engage in rulemaking, and that the Florida legislature had delegated that task to various administrative agencies—not the Governor—in the Administrative Procedures Act (APA).[136]

The Governor argued in *Whiley* that the executive orders were valid exercises of executive power under various provisions of the Florida Constitution that grant to the Governor "supreme executive power," supervisory power over various state departments, the power to faithfully execute the laws, and the power to remove agency heads who serve at the Governor's pleasure.[137] The majority rejected each of these arguments, reasoning that supreme executive power did not include power to intrude into the lawmaking and rulemaking function of the legislature, and hat the power to remove agency heads did not include the power to control them.[138]

The two dissenters in *Whiley* did not believe the majority should have granted discretionary review to hear the case because the case presented only hypothetical future scenarios under which compliance with the executive orders *might* be contrary to the Administrative Procedures Act or some other legislative edict.[139] Moreover, the dissenters believed that the majority erred in considering Executive Order 11-01, which the dissenters believed had no legal force because it was superseded by Executive Order 11-72.[140]

On the specific constitutional issues presented by the case, the dissenters believed that, pursuant to various gubernatorial powers of the constitution—including the supreme executive power, faithful execution power, and supervisory power over agency heads—the Governor had ample authority to "ensure that [existing and proposed] rules are in accord with the codified goals and requirements of the APA."[141] The dissenters asserted that the plaintiff "has not demonstrated in this record a single instance of the Governor's executive order causing any violations of the requirements proscribed by the APA. Moreover, if hypothetically speaking an agency violated an APA requirement due to Governor Scott's actions under the executive order, such a violation should be challenged under the remedies provided by the APA, not in an extraordinary writ proceeding in this Court."[142]

There is a vast difference of opinion between the majority and dissenters in *Whiley* about the scope of gubernatorial power under the Florida Constitution. In the majority's view, the Governor was not acting as chief executive and ensuring that Florida's administrative agencies were following the APA in the most efficient manner. Instead, the Governor was overreaching, trying to pre-approve rulemaking, which the majority saw as belonging independently to Florida's administrative agencies, via delegation of the Florida legislature. The dissenters, by contrast, read Florida's gubernatorial power provisions more broadly, envisioning a Governor who is the constitutional head of administrative agencies in various important ways, including a duty to see that the laws enacted by the legislature are faithfully executed. As such, the dissenters viewed the executive orders—in particular, Executive Order 11-72—as consistent with the Governor's constitutional duties as well as the APA. In the absence of concrete evidence that the executive orders actually contradicted or frustrated the APA, the dissenters were willing to err on the side of denying the requested extraordinary writ—which is not lightly granted—to stop the Governor from implementing the OFARR review scheme.

2. *Bush v. Holmes* (2006)

In 1999, the Florida Legislature enacted the Opportunity Scholarship Program (OSP) that provided vouchers for students to escape failing public schools by either transferring to passing public schools or attending a participating private school.[143] If the student chose the private school option, the money that would have otherwise gone to the public school would, for the most part, be transferred to the private school to pay for the school's tuition.[144]

In *Bush v. Holmes*, plaintiffs challenged the constitutionality of the OSP, asserting that it violated two provisions of the Florida Constitution: (1) the "no aid" provision of article I, section 3;[145] and (2) the "uniformity" provision of article IX, section 1.[146] The lower courts initially addressed the article IX uniformity question, finding no violation of this provision. The Florida Supreme Court denied review and the case was remanded back to the trial court for consideration of the other constitutional questions.[147]

On remand, the lower courts concluded that the OSP violated the "no aid" provision of article I, and the case once again went to the Florida Supreme Court.[148]

Rather than just addressing the issue decided below—the "no aid" provision—the Florida Supreme Court in *Holmes* decided to address the uniformity provision, despite its earlier denial of review on that question. In fairness to the majority, one of the concurring judges below had expressed the opinion that OSP was also violative of the uniformity requirement—not just the no aid requirement—so, in theory, this aspect of the judgment below was in play for consideration by the Florida Supreme Court.[149] It was a bit unusual, however, for the majority in *Holmes* to begin and end its constitutional analysis with a question that was not the focus of the courts' rulings below.

Nevertheless, a five-justice majority in *Holmes*—

including Justices Lewis, Pariente, and Quince—concluded that the OSP violated the uniformity requirement of article IX, section 1(a) of the Florida Constitution, which declares:

The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.[150]

The *Holmes* court acknowledged that statutes were to be given a presumption of constitutionality,[151] but concluded that the presumption was overcome based on the application of canons of construction that demonstrated the OSP's inconsistency with article IX, section 1. Specifically, the *Holmes* court asserted that the second and third sentences of that provision should be read *in pari material*—i.e., as a coherent whole.[152] When read this way, the majority believed that the "adequate provision" mandate of the second sentence was qualified, or limited, by the third sentence, which mandated a "uniform . . . system of free public schools . . . ."[153] The majority concluded that OSP violated this uniformity provision "by devoting the state's resources to the education of children within our state through means other than a system of free public schools."[154]

In addition, the *Holmes* majority believed the maxim, *expression unius est exclusion alterius* (the expression of one thing implies the exclusion of another) supported its conclusion, as mandating a system of free public schools under article IX implied the exclusion of other types of public support of education, such as OSP's private school vouchers.[155] As such, a "uniform . . . system of free public schools" was the *exclusive means* of satisfying the mandate of adequate provision of education required in the second sentence of the section.

The two dissenting justices in *Holmes* believed that the majority failed to resolve "every doubt in favor" of the OSP statute's constitutionality, as required by the court's oft-pronounced presumption of constitutionality for statutes.[156] Moreover, the dissenters did not believe article IX, section one was ambiguous, thus rendering canons of construction such as *in pari material* and *expression unius* inappropriate.[157]

The dissenters argued that there is no language of exclusion in article IX, section 1. While the second sentence establishes an obligation to provide adequate education for all children, the third sentence *merely* says that adequate provision "shall be made by law *for* a uniform . . . system of free public schools . . . ." The mandate "for" a uniform public school system is not the same as a mandate of adequate provision "by" or "through" a uniform public school system.[158] They concluded that mandating adequate provision "for" a uniform system of public schools is thus a mandate that stands on its own, requiring the Florida legislature to provide for uniform public schools, but not *excluding or prohibiting* the legislature from fulfilling its adequate education mandate through *other* means, such as vouchers to attend private schools.

The *Holmes* decision illustrates the variety of approaches to interpreting legal texts, and the variety of sources that can potentially be relied upon to aid in such interpretation. It is difficult to say with confidence that one approach versus another is clearly "wrong," particularly when the justices disagree on a fundamental question—namely, whether a given text is "ambiguous" (and thus requiring resort to canons of construction and extrinsic sources to aid in interpretation) or not. The *Holmes* majority did not, however, appear to analyze the constitutional questions beginning with a presumption of constitutionality, despite noting it as the accepted starting point. Moreover, the majority concluded, "[o]ther educational programs, such as the program for exceptional students . . . are structurally different from the OSP, which provides a systematic private school alternative to the public school system mandated by our constitution."[159] The dissenters took the majority to task on this distinction, concluding:

> It is nonsensical to hold that article IX allows the Legislature to fund education outside the public school system when the public school system fails to uphold its constitutional duty in regard to

> disable students but prohibits it when that school system fails to uphold the duty in regard to disadvantaged students. . . . [T]his is more of a policy distinction than a legal one, and absent an express or necessarily implied mandate to the contrary, our constitutional form of government leaves such political distinctions to the legislative branch.[160]

In fairness to the majority, it noted that its prior decision upholding vouchers for disabled children addressed a different provision of the Florida Constitution—the equal protection provision of article I, section 2—and not the uniformity provision of article IX, section 1. Nonetheless, the *Holmes*' majority's dicta suggested that, should the disability voucher program be challenged under the uniformity provision, the majority would uphold it. The dissenters in *Holmes* challenged the majority's basis for this suggestion. Resolution of the question, however, must await a future decision of the court.

III. A Brief Look at Proposed Amendment V

As stated earlier, one of the manifestations of public dissatisfaction with the current way of selecting and retaining judges—including Florida Supreme Court justices—is proposed Amendment 5, which will appear on the November 2012 ballot. One of the most significant provisions of Amendment 5 would require Florida Senate confirmation of all gubernatorial appointments to the state supreme court.

Senate confirmation of judicial appointees exists at the federal level for federal judges appointed by the U.S. President.[161] And while the confirmation of federal judges—particularly U.S. Supreme Court Justices—has been perceived as overtly politicized in recent decades, the founding generation considered Senate confirmation to be a necessary check against excessive executive (presidential) power. In Florida, the check against excessive executive (gubernatorial) power comes in the form of Judicial Nominating Commissions (JNCs). Of the nine members of the Florida Supreme Court JNC, five are appointed by the Governor directly, and the remaining four are appointed from a list of three nominees provided by the Florida Bar Board of Governors, from which the Governor must select.[162] While the Governor is free to reject all three of the initial nominees provided by the Florida Bar, the Florida Bar is permitted to submit a new list of three nominees, and the Governor must ultimately fill the post(s) from a nominee provided by the Florida Bar.[163] Thus, while the Governor has ultimate authority to appoint JNC members, his discretion is significantly curtailed by the significant role for the Florida Bar that has been carved out via statute. This is not to say that JNCs are not themselves somewhat political in nature, but merely that JNCs seem to provide a check on executive power.

Interjection of the Florida Senate into the appointment of Florida Supreme Court justices has been criticized as unnecessarily politicizing the process.[164] And indeed, it does add a layer of complexity, by requiring additional approval of a portion of another political branch, which always holds the potential for slowing the process or raising concerns that might otherwise go unexpressed. This is not necessarily a bad thing, however, depending on one's perspective, and perhaps on who sits in the Governor's office. If one dislikes the sitting Governor, one might take solace in the possibility of curbing his appointment power by requiring Senate confirmation. By contrast, if one supports the sitting Governor, or believes that the JNC process already constrains the Governor, this extra layer of political involvement might see m unnecessary.

Amendment 5 would also allow a simple majority vote (rather than the current two-thirds supermajority) of the Florida Legislature to repeal rules of practice and procedure that have been adopted by the Florida Supreme Court. Much like Senate confirmation, this appears to be an attempt to grant more power to the Florida Legislature by making it easier for the legislature to alter these procedural rules. This, in turn, would put more power in the hands of elected representatives, and less power in the hands of Florida Supreme Court justices. It has also been viewed as measure that could result in greater politicization of the court.

Conclusion

As the debates over Florida's method of selection and its supreme court's decisions have shown, there is considerable disagreement about whether the state's high court is being politicized, or alternatively, whether it should be more accountable to the people of Florida and their elected officials.

Ascertaining precisely whether a given judge crosses the line—from following text and precedent to going on a subjective detour—can be exceedingly difficult to pinpoint in any given case because the law is not always clear. In complex and controversial cases, for example, there might be reasonable arguments and positions, rooted in traditional legal principles, on both sides. Choosing between those reasonable positions is just that—a choice—not an unprincipled decision. In the analysis of the preceding nine most controversial cases, there does not appear to be a pattern of unprincipled decision-making by any of the justices of the Florida Supreme Court. There are disagreements, true. But disagreements do not suggest that those with whom you disagree are unprincipled.

There are, however, discernible voting patterns on the Florida Supreme Court and they seem to be based on the general ideological leanings of the justices. But the same is true with all courts, not just Florida's Supreme Court. Judges, after all, are human, not computers, and their rulings will inevitably reflect their general judicial philosophy, including their belief about the best way to interpret a legal text, set of precedents, or assign weight to various facts. Floridians should become as informed as possible about the Florida Supreme Court's decisions and ask themselves whether those decisions reflect unprincipled decision-making. But the most important question being debated in Florida right now is a more basic one, and it goes to the very purpose of retention elections for judges: Is disagreement with a judge's ideological leanings and the way those leanings manifest themselves in particular cases a *proper* basis for citizen's to vote? To put it another way, should voters be able to express basic *disagreement* with the outcomes of judicial decisions by voting out of office those judges who wrote or joined the opinions?

Unfortunately, no legal text or document provides the "right" answer to this question. Because retention elections are *elections*—though admittedly different from overtly partisan elections—voters have the responsibility to judge for themselves whether a given judge's record warrants retention. For some voters, their decision will hinge upon the judge's demeanor, the strength of her analysis, lifetime achievements, or some combination thereof. For others, merit may include an assessment of whether the judge is too ideological in particular cases, too rigid or unpredictable in her analysis, or is seemingly biased in favor of (or against) certain groups or interests. In this way, some subjective determination of the raw "rightness" or "wrongness" of a judge's decisions will enter into some voters' retention determination.

There are ways to reduce this subjectivism—e.g., voter education—but it will never be entirely eliminated. Since Floridians have chosen a system of selecting judges that includes an element of voter accountability, the final determination about any particular judge's "merit" is ultimately up to each Floridian.

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Endnotes

1 Fifteen lower appellate judges in Florida are also up for retention votes in November 2012, but this report focuses only on the Florida Supreme Court.

2 *See, e.g.*, Press Release, RPOF Board Votes to Oppose Retention of Liberal Supreme Court Justices, Sept. 21, 2012, *available at* http://rpof.org/blog/press-releases/rpof-board-votes-to-oppose-retention-of-liberal-supreme-court-justices/("This week, the RPOF [Republican Party of Florida] executive board voted unanimously to oppose the retention of Supreme Court

Justices R. Fred Lewis, Barbara Pariente, and Peggy Quince. [The] collective evidence of judicial activism amassed by these three individuals is extensive . . . . ").

3 *See, e.g.*, Harry Lee Anstead et al., *Six Former Florida Justices Speak Up Against GOP Attempts to Politicize Judiciary*, Miami Herald, Sept. 30, 2012, *available at* http://www.miamiherald.com/2012/09/30/3024932/six-former-florida-justices-speak.html.

4 H.J.R. 7111, 2011 Legislature (Fl. 2011), *available at* http://www.myfloridahouse.gov/sections/bills/billsdetail.aspx?BillId=46714&SessionIndex=-1&SessionId=66&BillText=&BillNumber=7111&BillSponsorIndex=0&BillListIndex=0&BillStatuteText=&BillTypeIndex=0&BillReferredIndex=0&HouseChamber=H&BillSearchIndex=0.

5 *Id.*

6 For example, a poll of Florida Bar members revealed that at all three Florida Supreme Court Justices up for merit retention election in 2012 enjoy overwhelming support. Specifically, Florida bar members supported the retention of Justice Pariente by 89 percent; Justice Quince by 90 percent; and Justice Lewis by 92 percent. Press Release, The Florida Bar, Florida Bar Poll Shows Overwhelming Support for Supreme Court Justices, Appellate Judges in Merit Retention Elections (Sept. 7, 2012), *available at* *http://www.floridabar.org/TFB/TFBPublic.nsf/WNewsReleases/327A4AEB6DB7B8BE85257A7200455FB0?OpenDocument*. *See also 23 Former Bar Presidents Back Justices' Retention,* Tampa Bay Times, Sept. 5, 2012, *available at* http://www.tampabay.com/blogs/the-buzz-florida-politics/content/23-former-bar-presidents-back-justices-retention.

7 *Florida Bar to Oppose Amendment 5*, News-Press.Com (Ft. Meyers, FL), Oct. 9, 2012, *available at* http://www.news-press.com/article/20121009/NEWS0107/121009025/Florida-bar-oppose-Amendment-5?odyssey=tab|topnews|text|Home .

8 *See, e.g.*, Anstead et al, *supra* note 3; *see also Former Republican Judge and 2 U.S. Attorneys to FL GOP: It's a "Mistake" to Politicize Supreme Court Justice Fight*, Miami Herald (Naked Politics Blog), Oct. 9, 2012, *available at* *http://miamiherald.typepad.com/nakedpolitics/2012/10/former-republican-judge-and-2-us-attorneys-to-fl-gop-its-a-mistake-to-politicize-supreme-court-justi.html*.

9 Fla. Const. art. V, § 1.

10 *Id.* § 3.

11 *Id.* § 8.

12 *Id.* § 11.

13 *Id.* § 11.

14 *Id.* § 11(d).

15 *Id.* §§ 10–11.

16 *Id.* § 10.

17 *Id.*

18 Lizette Alvarez, *G.O.P. Aims to Remake Florida Supreme Court*, N.Y. Times, Oct. 2, 2012, *available at* http://www.nytimes.com/2012/10/03/us/republican-party-aims-to-remake-florida-supreme-court.html?pagewanted=all ("Democrats say the campaign is really about giving Gov. Rick Scott, a Republican, the chance to appoint three new justices.").

19 Fla. Const. of 1885, art. V, § 2 ("The Supreme Court shall consist of three Justices, who shall be elected by the qualified electors of the State at the time and places of voting for members of the Legislature, and shall hold their office for the term of six years . . . .").

20 *Justice McCain Resigns Effective Aug. 31*, Sarasota Herald-Tribune, Apr. 29, 1975, at 4-C ("The House committee delayed for up to a week a decision whether to recommend removal of a fifth court member, Justice Joseph A. Boyd, who is accused of accepting a secret memorandum from a utilities lawyer in a utility tax case.").

21 Jan Pudlow, *Justice Boyd Remembered Across Florida*, Fla Bar News, Nov. 15, 2007, *available at* http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/Articles/A99735DCC7F2A6C18525738B00534046.

22 *In re* Boyd, 308 So.2d 13 (Fla. 1975).

23 *Dekle Resigning Under Pressure*, News Herald (Panama City, FL), Mar. 10, 1975, at A1.

24 *Id.*

25 *Impeach Justice McCain*, The Ledger Opinion (Lakeland, FL), Apr. 27, 1975, at 2B.

26 *Id.*

27 Jim Cullinane, *Crabtree: McCain Impeachment Was Sure*, Sarasota Herald Tribune, Apr. 29, 1975, at 4-C.

28 *See* Scott G. Hawkins, To Retain or Not to Retain—That is the Question, Fla Bar J., Apr. 2012, *available at* http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/8c9f13012b96736985256aa900624829/987aad5ff8c91f9b852579d1006526ac!OpenDocument.

29 G. Alan Tarr, *Do Retention Elections Work?*, 74 Mo. L. Rev. 605, 605, 609 (2009).

30 *Id.* at 610.

31 Fla. Stat. § 105.071(2).

32 Fla. Code of Judicial Conduct, Canon 7(C)(1) ("A candidate . . . shall not personally solicit campaign funds . . . but may establish committees of responsible persons to secure and manage the expenditure of funds . . . ."); *id.* at 7(C)(2) ("A candidate for merit retention in office may conduct only limited campaign activities . , [which] shall . . . include the conduct authorized by subsection (C)(1)).

33 *Id.* at 7(A)(3)(e)(iii) (candidates for judicial office "shall not

. . . while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing.").

34 *G.O.P. Aims to Remake Florida Supreme Court*, *supra* note 18.

35 For example, one email solicitation from a former Florida Bar president who ironically declares, "We must send a message that politics has no place on the bench: donate $50, $100, or $150 today to add your voice to our campaign. . . Contribute what you can right now to help keep politics out of the courts." (received Sept. 6, 2012; on file with author).

36 Scott G. Hawkins, *Perspective on Judicial Merit Retention in Florida*, 64 Fla. L. Rev. 1421, 1422, 1428 (2012).

37 *See id.* at 1428; *see also* Florida Bar, Guide for Florida Voters: Questions and Answers About Florida Judges, Judicial Elections and Merit Retention (2012), *available at* http://www.floridabar.org/thevotesinyourcourt.

38 *Id.*

39 U.S. Const. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

40 Florida Dep't of State v. Mangat, 43 So.3d 642, 646 (Fla. 2010) (per curiam).

41 Fla. Stat. § 101.161(1).

42 Two of the three justices facing retention election in 2012—Justices Pariente and Lewis—concurred separately, agreeing with the result (that the summary was misleading), but wrote separate opinions to express their disagreement with the majority's suggestion that providing the full text of a proposed amendment would per se comply with the statutory and constitutional requirements. *Mangat*, 43 So.3d at 652 (Pariente, J., concurring). Justice Quince joined the majority opinion. *Id.* at 652.

43 *Id.* at 648.

44 No. SC04-1671, 888 So.2d 621, 2004 Fla. Lexis 1514 (Fla. Sept. 2, 2004).

45 *Mangat*, 43 So.3d at 653 (Canady, C.J., dissenting).

46 *Id.* (Canady, C.J., dissenting).

47 *Id.* at 654 (Canady, C.J., dissenting).

48 *Id.* at 650.

49 *Id.* at 651.

50 *Id.*

51 606 So.2d 618 (Fla. 1992).

52 *Mangat*, 43 So.3d at 651 (citing *American Airlines*, 606 So.2d at 622) ("In order to prevent this problem from recurring in the future, we urge the legislature to consider amendment the statute to empower this Court to fix fatal problems with ballot summaries . . . .").

53 *Id.* at 651.

54 43 So.3d 654 (Fla. 2010).

55 *Id.* at 657–58.

56 *Id.* at 660.

57 *Id.* at 659.

58 *Id.* at 659.

59 *Id.* at 661 (Polston, J., dissenting).

60 94 So.3d 468 (Fla. 2012).

61 *Id.* at 470.

62 *Id.* at 479 (Canady, C.J., dissenting) (citing Fla. Stat. § 775.084(3)(a)(6)).

63 *Id.* at 476.

64 *Id.* at 475–76.

65 *Id.* at 477.

66 *Id.* at 472 (emphasis added)(citing Fla. Stat. § 924.07).

67 *Id.* at 477.

68 *Id.* at 479 (Canady, C.J., dissenting).

69 *Id.* (Canady, C.J., dissenting).

70 *Id.* at 479–81 (Canady, C.J., dissenting).

71 *Id.* at 472 (Statutes such as section 924.07 'which afford the government the right to appeal in criminal cases should be construed narrowly.'").

72 *Id.* at 479 (Canady, C.J., dissenting).

73 66 So.3d 923 (Fla. 2011).

74 *Id.* at 925–26.

75 *Id.* at 928.

76 *Id.*

77 *Id.* at 925.

78 *Id.* at 935.

79 *Id.*

80 *Id.* at 936.

81 *Id.*

82 *Id.* (emphasis in original).

83 *Id.* at 939–40 (Polston, J., concurring in part and dissenting in part).

84 State v. Cable, 51 So.3d 434 (Fla. 2010).

85 Hudson v. Michigan, 547 U.S. 586 (2006).

86 *Id.* at 594.

87 *Cable*, 51 So.3d at 439–41.

88 *Id.* at 441.

89 Fla. Stat. § 901.19(1).

90 160 So.2d 706, 710-11 (Fla. 1964).

91 The decision in *Cable* was 4-2, as Justice Canady recused himself from the decision.

92 *Cable*, 51 So.3d at 443.

93 Fla. Const. art. I, § 12. The Florida constitutional provision protecting against unreasonable searches and seizures uses the same language as the U.S. Fourth Amendment and indeed explicitly declares "This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." *Id*. The *Cable* majority observed that because *Hudson*'s interpretation of the U.S. Fourth Amendment was not binding on the court's interpretation of Florida's knock-and-announce statute as interpreted in *Benefield*, the Florida constitutional language did not make any difference in its analysis. *Cable*, 51 So.3d at 442–43.

94 *Id.* at 444 (Polston, J., dissenting).

95 *Id.* (Polston, J., dissenting).

96 912 So.2d 307 (Fla. 2005).

97 *Id.* at 308.

98 *Id.*

99 *Id.* at 310. *See also* Fla. R. Crim. P. 3.191.

100 *Id.* at 310.

101 *Id.* (citing Fla. R. Crim. P. 3.191(j)).

102 *Id.* at 311.

103 *Id.*

104 *Id.*

105 *Id.* at 313 (Quince, J., concurring).

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.* at 314 (Wells, J., dissenting).

110 *Id.* at 315–16 (Wells, J., dissenting).

111 *Id.* at 316.

112 Florida v. Nixon, 543 U.S. 175, 179-80 (2004).

113 *Id.* at 180.

114 *Id* at 179.

115 *Id.* at 181.

116 *Id.*

117 *Id.* at 182–83.

118 *Id.* at 184.

119 *Id.*

120 Nixon v. State, 857 So.2d 172 (Fla. 2003).

121 *Id.* at 176.

122 *Id.*

123 *Id.*

124 *Id.* at 183 (Lewis, J., concurring in result only).

125 Florida v. Nixon, 543 U.S. 175 (2004). Chief Justice Rehnquist took no part in the *Nixon* decision.

126 *Id.* at 189.

127 *Id.* at 188–89.

128 *Id.* at 190–92.

129 *See* Nixon v. State, 932 So.2d 1009 (Fla. 2006); Nixon v. State, 2 So.3d 137 (Fla. 2009).

130 79 So.3d 702 (Fla. 2011).

131 *Id.* at 706.

132 *Id.* at 709.

133 *Id.* at 719 (Polston, J., dissenting).

134 *Id.* at 709–10.

135 *Id.* at 713.

136 *Id.*

137 *Id.* at 713–15.

138 *Id.*

139 *Id.* at 718 (Polston, J., dissenting).

140 *Id.* (Polston, J., dissenting).

141 *Id.* at 724 (Polston, J., dissenting).

142 *Id.* at 725 (Polston, J., dissenting).

143 Bush v. Holmes, 919 So.2d 392, 400 (Fla. 2006).

144 *Id.* at 397.

145 Fla. Const. art. I, § 3 ("No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.").

146 Fla. Const. art. IX, § 1 ("The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.").

147 *Holmes*, 919 So.2d at 399. *See also* Holmes v. Bush, 790 So.2d 1104 (Fla. 2001).

148 *Holmes*, 919 So.2d at 399.

149 *Id.*

150 *Id.* at 403.

151 *Id.* at 405.

152 *Id.* at 406–07.

153 *Id.* at 407.

154 *Id.*

155 *Id.*

156 *Id.* at 413 (Bell, J., dissenting).

157 *Id.* (Bell, J., dissenting).

158 *Id.* at 416 (Bell, J., dissenting).

159 *Id.* at 412.

160 *Id.* at 422–23 n. 23 (Bell, J., dissenting).

161 U.S. Const. art. II, § 2 (declaring that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other officers of the United States . . . .").

162 Fla. Stat. § 43.291 (2011).

163 *Id.*

164 *Reject Legislative Meddling with Courts*, Tampa Bay Times, Oct. 10, 2012, *available at* http://www.tampabay.com/opinion/editorials/reject-legislative-meddling-with-courts/1255572.

includes the power of rulemaking.[136] In reaching this conclusion, the majority concluded that only the legislature could decide whom to engage in rulemaking, and that the Florida legislature had delegated that task to various administrative agencies—not the Governor—in the Administrative Procedures Act (APA).[137]

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