Constitution Revision Commission
Declaration Of Rights Committee
Proposal Analysis

(This document is based on the provisions contained in the proposal as of the latest date listed below.)

Proposal #: P 15

Relating to: DECLARATION OF RIGHTS, Basic rights

Introducer(s): Commissioner Gamez

Article/Section affected: Article I, Section 2 – Basic rights.

Date: November 27, 2017

	REFERENCE	ACTION
1.	DR	**Pre-meeting**
2.	ED	

I. SUMMARY:

Article I, Section 2 of the Florida Constitution, Florida's "Equal Protection" Provision, establishes the equality of all persons under Florida law and delineates the basic inalienable rights guaranteed to all natural persons. It also expressly forbids discrimination by the government on the basis of race, religion, national origin, or physical disability.

Among the inalienable rights guaranteed under Article I, Section 2, are the right to acquire, possess, and protect property; however, the Florida Constitution carves out an exception which authorizes the Legislature to regulate or restrict property rights of "aliens ineligible for citizenship." This provision is commonly referred to as an "Alien Land Law." Alien Land Laws were adopted by several states in the late 19th and early 20th centuries to bar certain nationalities of immigrants from acquiring land.

This proposal repeals the Florida Alien Land Law. It also expands the prohibited bases of government discrimination to include "cognitive disabilities."

If passed by the Constitution Revision Commission, the proposal will be placed on the ballot at the November 6, 2018, General Election. Sixty percent voter approval is required for adoption. If approved by the voters, the proposal will take effect on January 8, 2019.

A proposal to repeal the Alien Land Law was previously submitted to voters in the 2008 General Election. The proposal received 47.9% of the vote for approval and was not adopted.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Article I, Section 2 of the Florida Constitution, Florida's "Equal Protection" Provision, establishes the equality of all persons under Florida law and delineates the basic inalienable rights guaranteed to all natural persons. It also expressly forbids discrimination by the government based on certain suspect classifications. Specifically, Article I, Section 2 of the Florida Constitution[1] provides:

> Basic rights.—All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

Alien Land Law

Property Rights under the Florida Constitution

Property rights are among the basic substantive rights expressly protected by the Basic Rights Provision. These property rights are "woven into the fabric of Florida History,"[2] and, occasionally, provide citizens greater protection with regard to property than the Due Process Clause of the 14th Amendment to the U.S. Constitution.[3]

Despite a more specific and broad guarantee of property rights under the Florida Constitution, the document carves out an exception that authorizes the Legislature to regulate or restrict such rights of "aliens ineligible for citizenship."[4] This provision is commonly known as an Alien Land Law. Florida, like many other states, adopted an Alien Land Law at a time when attitudes about immigration and the immigration policy of the United States were undergoing substantial change.

History of Florida Alien Land Law

Florida's Alien Land Law can be best understood within the context of the historical development of alien property rights in the United States of America. The law of real property in the United States is derived from English feudal law, which was designed to secure allegiance to the crown through military service.[5] Such a system did not lend itself to alien land ownership, thus aliens were not permitted to own land.[6] Subsequent laws eased this restriction, permitting aliens to obtain

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[1] FLA. CONST. ART I, S. 2 (1968).

[2] *Shriners Hospital for Crippled Children v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990).

[3] *See e.g. Shriners Hospital for Crippled Children v. Zrillic,* 563 So. 2d 64 (Fla. 1990) (holding Mortmain statute unconstitutional).

[4] The Florida Constitution does not define the term "aliens ineligible for citizenship." The term "alien" is commonly defined as relating, belonging, or owing allegiance to another country or government. *See Alien*. (n.d.). Retrieved November 27, 2017, from https://www.merriam-webster.com/dictionary/alien. Further, eligibility for U.S. Citizenship is governed by the Immigration and Nationality Act of 1952 (INA) (8 U.S.C. § 1101 – 1537). Thus, a literal interpretation of the clause relates to foreign persons ineligible for citizenship under the INA.

[5] Mark Shapiro, *The Dormant Commerce Clause: A Limit on Alien Land Laws*, 20 BROOK. J. INT'L L. 217, 220 (1993).

[6] *Id.*

real property by purchase, but not by inheritance.[7] By 1870, this English land system was abolished and aliens were granted full property rights.

Initially, the early English colonies in America adopted the English common law with regard to real property and also excluded aliens from land ownership.[8] However, beginning with the independence of the colonies through the late 19th century, there was a uniform tendency toward abolition or dilution of the common law exclusion of aliens from land ownership though legislation and judicial interpretation.[9] This trend is reflected in Florida's early constitutions which provided property rights to "foreigners" that were coextensive with property rights of citizens. The Florida Constitution of 1868 provided: [10]

> Section 17. Foreigners who are or who may hereafter become bona fide residents of the State, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property as native-born citizens.

The Florida Constitution of 1885 similarly provided:[11]

> Section 18. Foreigners shall have the same rights as to the ownership, inheritance and disposition of property in this State as citizens of the State.

This guarantee of alien property rights was displaced not only in Florida, but in many other states, in response to growing anti-Japanese sentiment in the early 1900s.The antipathy was largely fueled by perceived unfair agricultural competition from an increasing influx of Japanese agricultural workers.[12] Other sources of angst included the "alleged disloyalty, clannishness, inability to assimilate, racial inferiority, and racial undesirability of the Japanese, whether citizens or aliens."[13]

In 1913, California, a state with one of the largest Asian immigrant populations, passed the first Alien Land Law aimed at the Japanese; it would become a model statute for other states.[14] The law prohibited persons "ineligible for citizenship" from owning or leasing farmland. At that time, the right to become a naturalized U.S. Citizen extended only to free white persons and persons of African nativity or descent.[15] Thus, the term "ineligible for citizenship" acted as a restriction based upon a racial classification without expressly singling out the Japanese.

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[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] FLA. CONST, Declaration of Rights, s. 17 (1868).
[11] FLA. CONST, Declaration of Rights, s. 18 (1885).
[12] ASIAN AMERICAN FEDERATION OF FLORIDA, *Florida Alien Land Law*, http://www.asianamericanfederation.org/ISSUES/Alien%20Land%20Law/florida_alien_land_law.html (last visited Nov. 17, 2017)
[13] *Oyama v. California*, 332 U.S. 633, 671 (1948)(Murphy, J., concurring)(identifying and refuting the arguments in support of California's Alien Land Law).
[14] Arizona, Washington, Florida, Louisiana, Oregon, Idaho, Montana, Kansas, Wyoming, Utah, New Mexico, and Arkansas were among the states to pass Alien Land Laws in the wake of California.
[15] The Immigration Act of 1924 (Pub.L. 68–139, H.R. 7995, 68th Cong., May 26, 1924) defined the term "ineligible to citizenship,' when used in reference to any individual, as an individual who is debarred from becoming a citizen of the United

The Florida Legislature proposed a similar constitutional amendment by joint resolution in 1925,[16] which, according to its sponsors, was also aimed specifically at Japanese subjects.[17] Florida State Senator Calkins explained "that the provisions of the measure followed closely those of the California plan."[18] He further acknowledged that although there seemed no immediate necessity for the regulation, "it was well to provide for it, now, in anticipation of future contingencies."[19] Such future contingencies may have been the belief that Asian farmers, driven from their property by restrictions in western states, would head east.[20] Editorials in Florida newspapers urged voters to reject the amendment as unnecessary, arguing that there was "no menace of foreign ownership in Florida."[21]

Nevertheless, the electors subsequently approved the proposed amendment to the Florida Constitution of 1885 in 1926, which thereafter provided:

> Section 18. Equal rights for aliens and citizens.-Foreigners who are eligible to become citizens of the United States under provisions of the laws and treaties of the United States shall have the same rights as to the ownership, inheritance and disposition of property in the state as citizens of the state, but the Legislature shall have power to limit, regulate and prohibit the ownership, inheritance, disposition, possession and enjoyment of real estate in the State of Florida by foreigners who are not eligible to become citizens of the United States under provisions of the laws and treaties of the United States.

The Alien Land Law was readopted during the 1968 revision of the Florida Constitution, and now appears as a portion of Article I, Section 2 of the Florida Constitution.[22] It has remained unaltered through subsequent constitution revision commissions in 1977-1978 and 1997-1998.[23] In 2007, staff of the Florida Senate Judiciary Committee conducted a review of Florida statutes adopted since 1847, and found that no statutes had been enacted by the Florida Legislature to restrict alien

States under section 2169 of the Revised Statutes. Section 2169, Revised Statutes, provided that the provisions of the Naturalization Act "shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent." Thus every other race was "ineligible to citizenship" under the Immigration Act of 1924. The Immigration Act of 1924 also included a provision excluding from entry any alien who by virtue of race or nationality was ineligible for citizenship. As a result, groups not previously prevented from immigrating – the Japanese in particular – would no longer be admitted to the United States.

[16] House Joint Resolution No. 750 (1925)

[17] *Florida to Vote on Alien Land Law*, THE NEW YORK TIMES, October 30, 1926, at 3.

[18] *Joint Committee Drafts New Appropriation Measure*, ST. PETERSBURG TIMES, June 4, 1925, Section 2.

[19] *Id.*

[20] *Supra* note 12.

[21] *See e.g., Reject the Three*, TAMPA SUNDAY TRIBUNE, October 24, 1926; *Defeat All*, THE MIAMI HERALD, October 30, 1926, at Editorial Page.

[22] HJR 1-2X (1968).

[23] The Chair of the 1997-1998 Revision Commission later explained that the Alien Land Law did not come up during the revision commissions and posited that if the commission had been aware of the provision, it probably would have been removed. *See* Randall Pendleton, *Old law bars Asian property ownership* The Florida Times-Union, (Feb. 12, 2001), http://jacksonville.com/tu-online/stories/021201/met_5375163.html#.WhBZGuSWzcs.

land ownership, possession, or inheritance pursuant to the Alien Land Law.[24] Rather, the only Florida statutes relating to alien property rights provide:

- Aliens have the same rights of inheritance as citizens;[25]
- Alien business organizations[26] that own real property, or a mortgage on real property, must maintain a registered agent in the state;[27] and
- For the taxation of an alien's real property upon his or her death.[28]

Naturalization under the Immigration and Nationality Act of 1952 (INA)

The Immigration and Nationality Act of 1952 (INA)[29] governs the naturalization[30] of aliens.[31] The naturalization process was made entirely race- and nationality-neutral under the INA. Persons currently ineligible for naturalization are ineligible based on individual considerations. Generally, an alien is eligible for naturalization if he or she:[32]

- Is at least 18 years old;
- Has been a legal permanent resident ("green card holder") of the United States for at least five years;
- Has lived for at least 3 months in the state or USCIS district of their application for naturalization;
- Demonstrates continuous residence in the United States for at least the 5 years immediately preceding the date of the application for naturalization;
- Demonstrates physical presence in the United States for at least 30 months out of the 5 years immediately preceding the date of the application for naturalization;
- Is able to read, write, and speak basic English;
- Has a basic understanding of U.S. history and government (civics);
- Has a good moral character; and
- Demonstrates an attachment to the principles and ideals of the U.S. Constitution.

Due to the requirement that an applicant for naturalization be a legal permanent resident, eligibility for naturalization also relates back to initial green card eligibility. In general, to meet the requirements for permanent residence, an alien must be eligible for one of the immigrant categories established under the INA,[33] have an approved immigrant petition, have an immigrant visa

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[24] Fla. S. Comm. On Judiciary, SJR 166 (2007) Staff Analysis 3 (Mar. 7, 2007), *available at* http://archive.flsenate.gov/data/session/2007/Senate/bills/analysis/pdf/2007s0166.ms.pdf.

[25] s. 732.1101, F.S.

[26] An alien business organization means any corporation, association, partnership, trust, joint stock company, or other entity organized under any laws other than the laws of the United States, of any United States territory or possession, or of any state of the United States; or any corporation, association, partnership, trust, joint stock company, or other entity or device 10 percent or more of which is owned or controlled, directly or indirectly, by an entity described in subparagraph 1. or by a foreign natural person. s. 607.0505(11)(a), F.S.

[27] s. 607.0505, F.S.

[28] s. 198.04, F.S.

[29] 8 U.S.C. § 1101 – 1537.

[30] Naturalization is the process by which U.S. citizenship is granted to a foreign citizen or national after he or she fulfills the requirements established by Congress.

[31] The term "alien" under the INA means any person not a citizen or national of the United States. 8 U.S.C. § 1101

[32] U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Naturalization Information*, www.uscis.gov/citizenship/educators/naturalization-information (last visited Nov. 18, 2017).

[33] An alien must qualify through familial ties, through employment, as a "special immigrant", through Refugee or Asylee Status, as a Human Trafficking and Crime Victim, as a Victim of Abuse, as a continuous resident of the United States beginning earlier

immediately available, and be admissible into the United States.[34] An alien is considered inadmissible to the United States if he or she:[35]

- Has a communicable disease designated by the Secretary of Health and Human Services as being of public health significance;
- Fails to present documentation of having received vaccination against vaccine-preventable diseases;
- Has a physical or mental disorder with associated harmful behavior or harmful behavior that is likely to reoccur;
- Is a drug abuser or addict;
- Has committed a crime involving moral turpitude or a violation of any controlled substance law;
- Has been convicted of two or more crimes of any kind, other than purely political offense, the aggregate sentences for which were five years or more;
- Is reasonably believed to be involved in drug trafficking, including individuals who aid, abet, conspire, or collude with others in illicit drug trafficking;
- Seeks entry to engage in prostitution, or has engaged in prostitution within the past ten years, including persons that profited from prostitution;
- Seeks entry to engage in any unlawful commercialized vice;
- Has ever asserted diplomatic immunity to escape criminal prosecution in the United States;
- Has engaged in severe violations of religious freedom as an official of a foreign government;
- Has committed or conspired to commit human trafficking, including individuals who aid, abet, or collude with a human trafficker;
- Has engaged in money laundering or seeks to enter the United States to engage in an offense relating to laundering of financial instruments;
- Is reasonably believed to be seeking entry to engage in sabotage, espionage, or attempts to overthrow the U.S. government by force;
- Is reasonably believed to have participated in any terrorist activities or is associated with terrorist organizations, governments, or individuals;
- Is reasonably believed to be a threat to foreign policy or has membership in any totalitarian party;
- Has participated in Nazi persecutions or genocide;
- Is likely to become a public charge;
- Lacks a labor certification;
- Has engaged in fraud or misrepresentation during the admissions process;
- Has been removed from the United States or has been unlawfully present in the United States;
- Is a practicing polygamist;
- Is a former citizen who renounced citizenship to avoid taxation;
- Has abused a student visa; or

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than January 1, 1972, or through a number of other special programs. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Green Card Eligibility Categories*, https://www.uscis.gov/greencard/eligibility-categories (last visited Nov. 18, 2017).

[34] U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Green Card Eligibility*, https://my.uscis.gov/exploremyoptions/green_card_eligibility (last visited Nov. 18, 2017).

[35] 8 U.S.C. § 1182 (Certain grounds of inadmissibility may be waived).

- Is an international child abductor or relative of such abductor.

Status of Florida Alien Land Law

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits states from denying "to any person within its jurisdiction the equal protection of the laws." This places substantial limitations on a state's ability to treat similarly circumstanced persons differently based upon "suspect classifications," among which are race, national origin, and alienage, unless such laws are necessary to promote a 'compelling' interest of government.

A provision of a state constitution can provide greater Equal Protection rights than those provided by the U.S. Constitution, but a state constitution cannot narrow such rights.[36] Accordingly, the controlling precedent of the U.S. Supreme Court relating to the equal protection rights of aliens under the Fourteenth Amendment is instructive in any discussion of the Florida Alien Land Law.

For most of U.S. history, states have been free to reserve resources for their own citizens or to share them with noncitizens at their discretion.[37] In a series of cases throughout the late 19th and early 20th century, the U.S. Supreme Court would recognize a permissible state interest in distinguishing between citizens and aliens in the enjoyment of such resources and in areas relating to public employment.[38] The recognition of a permissible state interest in the allocation of resources became known as the "special public interest doctrine." [39]

By 1886, however, the U.S. Supreme Court began to invalidate special public interest ordinances. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the U.S. Supreme Court struck down the administration of a facially-neutral ordinance which, as applied, discriminated against Chinese laundry mat owners.[40] In this seminal case, the Court established that the term 'person' in the equal protection clause encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside.[41] Nevertheless, *Yick Wo* did not completely rid the states of special public interest ordinances and the Supreme Court continued to uphold some laws barring noncitizens from jobs or natural resources, including Alien Land Laws.[42]

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[36] *Traylor v. Florida*, 596 So.2d 957, 963 (Fla. 1992)(providing that "in any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling.")

[37] *Hauenstein v. Lynham*, 100 U.S. 483, 484 (1880)(stating that the "the law of nations recognizes the liberty of every government to give foreigners only such rights, touching immovable property within its territory, as it may see fit to concede...in our country, this authority is primarily in the States where the property is situated.")

[38] *See e.g., Patsone v. Pennsylvania,* 232 U.S. 138 (1914)(holding that a Pennsylvania law prohibiting an unnaturalized foreign born resident from killing wild game did not violate due process and equal protection provisions of the Fourteenth Amendment); *Porterfield v. Webb*, 263 U.S. 225 (1923)(holding that California law denying Japanese the right to acquire or lease agricultural land did not violate the equal protection clause).

[39] Kevin R. Johnson, Raquel Aldana, Bill Ong Hing, Leticia M. Saucedo, and Enid Trucios-Haynes, UNDERSTANDING IMMIGRATION LAW 155 (2nd ed. 2015).

[40] An ordinance in San Francisco was used to deny commercial licenses almost exclusively to Children laundry mat owners, some of whom had operated their business for more than twenty years.

[41] *Yick Wo v. Hopkins*, 118 U.S. 356, 356 (1886).

[42] *See Cockrill v. California,* 268 U.S. 258 (1925); *Frick v. Webb*, 263 U.S. 326 (1923); *Webb v. O'Brien*, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197 (1923).

By the end of World War II, the U.S. Supreme Court reversed course and strongly signaled in the dicta of two decisions relating to the California Alien Land Law that discriminatory Alien Land Laws directed at the Japanese were vulnerable to attack on equal protection grounds.[43] *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), in particular cast doubt on the continuing validity of the special public interest doctrine in all contexts. Although, the specific question of Alien Land Laws did not come before the U.S. Supreme Court again, over the next decade, several State Supreme Courts declared Alien Land Laws unconstitutional in violation of the Fourteenth Amendment.[44] Other states repealed such laws.[45]

Shortly after the re-adoption of the Florida Alien Law in the 1968 revision of the state constitution, the U.S. Supreme Court largely rejected[46] the continuing validity of the special public interest doctrine. In *Graham v. Richardson*, 403 U.S. 365 (1971), a case relating to the provision of welfare benefits, the Court held that classifications based on alienage, like those based on nationality or race, are considered inherently suspect and subject to strict scrutiny.[47] In the wake of *Graham, t*he Supreme Court has invalidated a number of state laws disadvantaging aliens.[48] The Court has also found the protections of the Equal Protection Clause applicable to illegal aliens.[49]

In subsequent years, the U.S. Supreme Court has also found that "special public interest" laws may be unconstitutional because they impose burdens not permitted or contemplated by Congress in its regulations of the admission and conditions of admission of aliens.[50] In addition, to the extent such laws violate treaty obligations, they may be void under the Supremacy Clause.[51]

No federal or state court has examined whether the Florida Alien Land Law is permissible under the U.S. Constitution or Florida Constitution.[52]

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[43] *See Oyama v.* California, 332 U.S. 633 (1948)(holding that California Alien Land Law, as applied, deprived complainant of equal protection of the laws, however four concurring justices concluded that Alien Land Laws were unconstitutional as a whole); *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948)(holding that California statute barring issuance of commercial fishing licenses to persons "ineligible to citizenship" violated equal protection clause).

[44] *See e.g. Namba v. McCourt*, 204 P.2d 569, 583 (Or. 1949)(concluding that Oregon Alien Land Law was "violative of the principles of law which protect from classifications based upon color, race, and creed); *Sei Fujii v. California*, 242 P.2d 617, (Cal. 1952)(holding that the California Alien Land Law violates the Fourteenth Amendment); *Montana v. Oakland*, 287 P.2d 39, 42 (holding that the Montana Alien Land Law was unconstitutional on equal protection grounds).

[45] Utah, Washington, Wyoming, and New Mexico repealed their Alien Land Laws in 1947, 1966, 2001, and 2006, respectively.

[46] The U.S. Supreme Court has recognized an exception to the close analysis of state alienage classification for classifications involving political functions or self-governance. *See e.g. Foley v. Connelie*, 435 U.S. 291 (1978); *Ambach v. Norwick*, 441 U.S. 68 (1979).

[47] *Graham v Richardson*, 403 U.S. 365, 372 (1971) (stating that aliens as a class are a prime example of a "discrete and insular" minority for whom such heightened judicial solicitude is appropriate.)

[48] *See e.g., In re Griffiths*, 413 U.S. 717 (1953)(voiding a state law limiting bar membership to citizens); *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (voiding a state law barring certain resident aliens from state financial assistance for higher education on equal protection grounds).

[49] *Plyer v. Doe*, 457 U.S. 202 (1982)(holding that a Texas statute which denied education funding and public school enrollment to illegal aliens violated equal protection clause).

[50] *See e.g. Hines v. Davidowitz*, 312 U.S. 52 (1941); *Toll v. Moreno*, 441 U.S. 458 (1979).

[51] *Asakura v. City of Seattle*, 265 U.S. 332 (1924).

[52] The Florida Alien Land Law has been quoted in approximately 20 cases decided by the Florida Supreme Court and the Florida District Courts of Appeal, but has never been the actual subject of one of those cases. There does not appear to be a case where the outcome was controlled by this Alien Land Law.

Efforts to Repeal the Florida Alien Land Law

In 2007, the Florida Legislature passed Senate Joint Resolution No. 166, proposing an amendment to the Florida Constitution to remove the Alien Land Law provision. The proposed amendment, known to voters as "Amendment 1" in the 2008 General Election, received only 47.9% of votes for approval, and was not adopted. Proponents of "Amendment 1" pointed to a mix of confusion regarding the ballot summary and attitudes about illegal immigration for the defeat.[53]

Subsequent legislative efforts to pass a resolution proposing the removal of the Alien Land Law have been unsuccessful.[54]

Disabilities

The Basic Rights Provision also expressly forbids discrimination by the government based on certain suspect classifications. Florida is one of only three states that designates disability as a constitutionally suspect classification.[55] The Florida Supreme Court has found that this explicit prohibition is a more stringent constitutional requirement than the right to be treated equally before the law.[56]

Development of Constitutional Protection for Persons with Disabilities

State constitutional protection for persons with disabilities is woven from developments during the 1970s in three parallel areas: educational rights, residential rights, and civil rights.[57] Some developments began in 1971 in federal and state courts, others in proposed legislative amendments, and still others in administrative regulations.[58]

It was within this social context that the Florida Legislature proposed a disability amendment to the Florida Constitution. In 1974, the Florida Senate introduced a Joint Resolution proposing to amend Article I, Section 2 of the Florida Constitution (the Basic Rights provision) to add "mental or physical handicap" as an additional ground of prohibited discrimination.[59] The companion House Joint Resolution,[60] proposed the following amendment to the Basic Rights provision delineating even broader and more specific rights for disabled persons than the Senate version:

> No person shall be subjected to discriminatory treatment which results in the deprivation of any right, benefit, or opportunity on account of a physical or mental handicap; this guarantee shall include, among other areas: housing, access to services and facilities available to the public, education, employment, and any governmental action.

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[53] Senator Geller, the resolution sponsor, later explained that "a lot of people thought [the amendment] had to do with illegal aliens, and it had nothing to do with illegal aliens." *See* Damien Cave, *In Florida, an Initiative Intended to End Bias is Killed,* THE NEW YORK TIMES (Nov. 5, 2008), www.nytimes.com/2008/11/06/us/06florida.html.

[54] *See* HJR 1553 (2011).

[55] Louisiana constitutionally prohibits discrimination based upon "physical condition." *See* LA. CONST. art. I, § 3 (1974). Rhode Island constitutionally prohibits discrimination on the basis of a "handicap." *See* R. I. CONST. art. I, § 2 (1986).

[56] *Scavella v. School Bd. of Dade County,* 363 So. 2d 1095, 1097 (Fla. 1978).

[57] The Florida Bar Committee on the Mentally Disabled, MENTAL DISABILITY LAW: EDUCATION RIGHTS OF THE HANDICAPPED, 1 (1979)

[58] *Id.*

[59] SJR 917 (1974).

[60] HJR 3621 (1974).

Senate staff explained that the Senate amendment "[spoke] to the rights that have been denied to physically and mentally handicapped because of the stigma attached to being handicapped."[61] However, the Senate Health & Rehabilitative Services Committee amended the proposal to remove mental disabilities from the Senate Joint Resolution.[62] The Senate Joint Resolution, encompassing only "physical handicaps" as a basis of prohibited discrimination, unanimously passed both the Florida Senate and House of Representatives on May 31, 1974.[63] Electors voted overwhelming to adopt the amendment during the 1974 General Election, garnering 76.43% of votes for approval.

In 1998, as the result of a proposal submitted to electors by the 1997-1998 Florida Constitution Revision Commission, the Basic Rights provision was again amended to revise the term "physical handicap" to "physical disability." The purpose of the amendment was to replace the term "handicap" which had come to be regarded as derogatory, and to offer a body of federal law that Florida courts could use when defining a "disability" under Article I, Section 2. [64]

Disability Discrimination

The standard of review that a court applies in evaluating a claim of discrimination mandates the level of protection guaranteed. Under both the U.S. Constitution and the Florida Constitution, the lowest level of judicial review, the rational basis test,[65] will apply to evaluate a claim of discrimination unless a suspect class, quasi-suspect class, or fundamental right is implicated by the challenged law.[66] In applying the rational basis test, courts begin with a strong presumption that the law or policy under review is valid and the challenging party bears the burden of demonstrating the law or policy does not have a rational basis. Classifications based upon race, national origin, and alienage, are considered "suspect classifications" which trigger a review of claimed discrimination under the highest standard, strict scrutiny.[67] In applying strict scrutiny, it is presumed that the law or policy is unconstitutional and the government bears the burden of proof to overcome the presumption.[68] The constitutional treatment of disabilities varies, however, under the U.S. Constitution and the Florida Constitution.

In *City of Cleburne v. Cleburne Living Center*,[69] the U.S. Supreme Court held that intellectual disabilities were not a "quasi-suspect class" for purposes of the Federal Equal Protection Clause, and that claims of discrimination based upon such classifications were subject to only rational basis review.[70] With regard to intellectual disabilities, the Court explained that:

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[61] Fla. S. Comm. on HRS, SJR 917 (1974) Staff Evaluation 1 (April 22, 1974).
[62] Senate Bill Action Report 211 (July 17, 1974).
[63] *Id.*
[64] Ann C. McGinley and Ellen Catsman Freiden, *Protecting Basic Rights of Florida Citizens*, THE FLORIDA BAR JOURNAL, October 1998.
[65] To satisfy the rational basis test, a statute must bear a rational and reasonable relationship to a legitimate state objective, and it cannot be arbitrary or capriciously imposed. *Dep't of Corr. v. Fla. Nurses Ass'n*, 508 So. 2d 317, 319 (Fla. 1987).
[66] *Amerisure Ins. Co. v. State Farm Mut. Auto. Ins. Co*., 897 So. 2d 1287, 1291 n.2 (Fla. 2005).
[67] Laws subject to strict scrutiny will be sustained only if they are suitably tailored to serve a compelling state interest. *Jackson v. Florida*, 191 So. 3d 423, 427 (Fla. 2016).
[68] The Florida Supreme Court explained that, "this test, which is almost always fatal in its application, imposes a heavy burden of justification upon the state.." *In re Estate of Greenberg*, 390 So. 2d 40, 43 (Fla. 1980).
[69] 473 U.S. 432 (1985).
[70] Despite purporting to apply rational basis scrutiny, the Court actually applied a heightened form of rational basis scrutiny, often referred to as "rational basis with teeth." *See* Michael E. Waterstone, *Disability Constitutional Law*, 63 Emory L. J. 527, 540 (2001).

> If the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.[71]

The Supreme Court would continue to affirm this position in later cases involving intellectual disabilities and the mentally ill.[72] Eventually, in *Board of Trustees of the University of Alabama v. Garrett*,[73]a case involving physical disabilities,[74] the U.S. Supreme Court extended to all groups of persons with disabilities the finding from *Cleburne*:[75]

> The result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the *disabled*, so long as their actions toward such individuals are rational [Emphasis added].[76]

In contrast, under the Equal Protection Provision of the Florida Constitution, "physical disabilities" are a specifically enumerated suspect classification requiring strict scrutiny. The Florida Supreme Court has also described the express prohibition against discrimination as a more stringent constitutional requirement than the standard of review in equal protection cases involving suspect classifications.[77] Accordingly, courts need only decide whether laws deprive claimants of any right, not just the right to be treated equally before the law.[78] Thus, this clause in the Florida Constitution is "an unambiguous vehicle for providing greater protection to individuals who are members of any newly enumerated group"[79] than may be found under the U.S. Constitution.

Defining "Disability"

"Disability" or "physical disability" is not defined by the Florida Constitution, nor does it appear that any case has interpreted the meaning of this term under Article I, Section 2.[80] For purposes of construing an undefined constitutional provision, the Florida Supreme Court will first begin with

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[71] 473 U.S. 432, 445-446 (1985).
[72] *See e.g., Heller v. Doe*, 509 U.S. 312 (1993).
[73] 531 U.S. 356 (2001).
[74] The suit was brought by two state employees seeking money damages under the ADA, a nurse with breast cancer who lost her director position after undergoing cancer treatment and a security officer with asthma and sleep apnea denied workplace accommodations. 531 U.S. 356, 362 (2001).
[75] Steven K. Hoge, *Cleburne and the Pursuit of Equal Protection for Individuals with Mental Disorders,* THE JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW 43(4), p. 416-422, available at http://jaapl.org/content/43/4/416 (last visited Nov. 26, 2017).
[76] 531 U.S. 356, 367-368 (2001).
[77] 363 So. 2d 1095, 1097-1098 (1978).
[78] *Id.*
[79] *Supra* note 10.
[80] There does not appear to be any case interpreting the meaning of this term under Article I, Section 2 of the Florida Constitution.

an examination of the provision's explicit language. If that language is clear and unambiguous, and addresses the matter at issue, it is enforced as written. If, however, the provision's language is ambiguous or does not address the exact issue, a court must endeavor to construe the constitutional provision in a manner consistent with the intent of the framers and the voters.[81]

Concept-based Definition

In its ordinary usage, the term "disability" is understood as a physical, mental, cognitive, or developmental condition that impairs, interferes with, or limits a person's ability to engage in certain tasks or actions or participate in typical daily activities and interactions.[82] However, in practice, there is not a single definition of the term "disability." Health professionals, advocates, and other individuals use the term in different contexts, with different meanings.

For example, the concept of cognitive disabilities is extremely broad. In general, a person with a cognitive disability has a disability that adversely affects the brain resulting in greater difficulty performing one or more types of mental tasks[83] than the average person.[84] Cognitive impairment is not caused by any one disease or condition, nor is it limited to a specific age group.[85] There are at least two ways to classify cognitive disabilities: by functional disability or by clinical disability. Clinical diagnoses of cognitive disabilities include autism, Down Syndrome, traumatic brain injury (TBI), and even dementia. Other cognitive conditions include attention deficit disorder (ADD), dyslexia (difficulty reading), dyscalculia (difficulty with math), and learning disabilities in general.[86]

"Intellectual disabilities" refer to certain cognitive disabilities that develop at an early age. The American Association on Intellectual and Developmental Disabilities (AAIDD) defines "intellectual disability" as a disability characterized by significant limitations both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behavior, which covers a range of everyday social and practical skills, with an onset before the age of 18.[87] The term covers the same population of individuals who were diagnosed previously with mental retardation.[88]

"Developmental Disabilities" is an umbrella term that includes intellectual disabilities but also includes other disabilities that are apparent during childhood.[89] Developmental disabilities are severe chronic disabilities that can be cognitive or physical or both. These disabilities typically manifest before the age of 22 and are likely to be lifelong. Some developmental disabilities are largely related to physical disabilities, such as cerebral palsy or epilepsy. Other conditions involve

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[81] *West Florida Regional Medical Center v. See*, 79 So. 3d 1, 9 (Fla. 2012).

[82] "Disability." Merriam-Webster.com. Accessed November 22, 2017. https://www.merriam-webster.com/dictionary/disability.

[83] Tasks such as reasoning, planning, problem-solving, abstract thinking, comprehension of complex ideas, and learning.

[84] Finn Orfano, *Defining cognitive disability*, BRIGHT HUB EDUCATION, http://www.brighthubeducation.com/special-ed-learning-disorders/70555-defining-cognitive-disabilities/ (last visited November 24, 2017).

[85] CENTERS FOR DISEASE CONTROL AND PREVENTION, *Cognitive Impairment: The Impact on Health in Florida*, https://www.cdc.gov/aging/pdf/cognitive_impairment/cogImp_fl_final.pdf (last visited Nov. 24, 2017).

[86] WebAIM, *Cognitive*, https://webaim.org/articles/cognitive/ (last visited Nov. 24, 2017).

[87] AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, *Frequently Asked Questions on Intellectual Disability*, https://aaidd.org/intellectual-disability/definition/faqs-on-intellectual-disability#.Whh9K7pFzct (last visited Nov. 24, 2017).

[88] *Id.*

[89] *Id.*

the co-occurrence of a physical and intellectual disability, for example Down Syndrome or Fetal Alcohol Syndrome.[90]

Intent-based Definition
The 1997-1998 Constitution Revision Commission cited the intent to offer a body of federal law for purposes of defining the term "disability" as one reason for replacing the term "physical handicap" with "physical disability" in 1998.[91] Related federal laws with definitions of "disabilities" could include, without limitation, the Americans with Disabilities Act,[92] the 1973 Rehabilitation Act,[93] the Social Security Disability Insurance Program,[94] the Fair Housing Act,[95] or the Individuals with Disabilities Education Act.[96]

B. EFFECT OF PROPOSED CHANGES:

The proposal repeals the Florida Alien Land Law. The repeal abrogates the authorization of the Legislature to regulate or prohibit the ownership, inheritance, disposition, and possession of real property by aliens ineligible for citizenship.

The proposal also expands the prohibited bases of government discrimination to include a "cognitive disability," rather than only physical disabilities. Thus, classifications based upon cognitive disabilities may be subject to a higher level of judicial scrutiny under the Florida Constitution than is currently required by the Equal Protection Clause of the U.S. Constitution.

The term "cognitive disability" is undefined.

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[90] *Id.*
[91] *Supra* note 64.
[92] Under the ADA, a "disability" is defined as a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such impairment; or being regarded as having such an impairment. 42 U.S.C. § 12102.
[93] The definition of "disability" under the ADA applies to claims under the 1973 Rehabilitation Act. 29 U.S.C. § 705(20)(B).
[94] For individuals applying for disability benefits under Title II of the Social Security Act (Disability), and for adults applying under Title XVI (SSI), the definition of disability is the same. The law defines disability as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment (s) which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. Under Title XVI (SSI), a child under the age of 18 will be considered disabled if he or she has a medically determinable physical or mental impairment or combination of impairments that causes marked and severe functional limitations, and that can be expected to cause death or that has lasted or can be expected to last for a continuous period of not less than 12 months. A "medically determinable impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities that can be shown by medically acceptable clinical and laboratory diagnostic techniques. *See Disability Evaluation under Social Security*, Social Security Administration, https://www.ssa.gov/disability/professionals/bluebook/general-info.htm (last visited Nov. 24, 2017).
[95] Under the FHA, a "handicap" means, with respect to a person, a physical or mental impairment which substantially limits one or more of such person's major life activities; a record of having such impairment; or being regarded as having such impairment. 42 U.S.C. § 3602 (h).
[96] Under IDEA, a "child with a disability" means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities. For children aged 3 -9, the definition may also include children experiencing developmental delays in physical development, cognitive development, communication development, social or emotional development, or adaptive development. 20 U.S.C. § 1401(3).

If approved by the voters, the proposal will take effect on January 8, 2019.[97]

C. FISCAL IMPACT:

The fiscal impact on state and local government is indeterminate.

III. Additional Information:

A. Statement of Changes:
(Summarizing differences between the current version and the prior version of the proposal.)

None.

B. Amendments:

None.

C. Technical Deficiencies:

None.

D. Related Issues:

The adoption of the proposed amendment may subject Florida laws relating to mental, cognitive, or developmental disabilities to a heightened level of judicial scrutiny. Areas of the law which may be impacted include, but are not limited to guardianship, involuntary mental health treatment (Baker Act), etc.

[97] *See* FLA. CONST. ART XI, S. 5(E) (1968) ("Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.)