



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**.

Florida is one of only three states with an express constitutional prohibition regarding discrimination on the basis of a disability.<sup>1</sup> 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.<sup>2</sup>

### **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.<sup>3</sup> Some developments began in 1971 in federal and state courts, others in proposed legislative amendments, and still others in administrative regulations.<sup>4</sup>

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.<sup>5</sup> The companion House Joint Resolution,<sup>6</sup> 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.

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.”<sup>7</sup> However, the Senate Health & Rehabilitative Services Committee amended the proposal to remove mental disabilities from the Senate Joint Resolution.<sup>8</sup> 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.<sup>9</sup> Electors voted overwhelming to adopt the amendment during the 1974 General Election, garnering 76.43% of votes for approval.

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<sup>1</sup> 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).

<sup>2</sup> *Scavella v. School Bd. of Dade County*, 363 So. 2d 1095, 1097 (Fla. 1978).

<sup>3</sup> The Florida Bar Committee on the Mentally Disabled, MENTAL DISABILITY LAW: EDUCATION RIGHTS OF THE HANDICAPPED, 1 (1979)

<sup>4</sup> *Id.*

<sup>5</sup> SJR 917 (1974).

<sup>6</sup> HJR 3621 (1974).

<sup>7</sup> Fla. S. Comm. on HRS, SJR 917 (1974) Staff Evaluation 1 (April 22, 1974).

<sup>8</sup> Senate Bill Action Report 211 (July 17, 1974).

<sup>9</sup> *Id.*

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 has 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.<sup>10</sup>

### **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,<sup>11</sup> will apply to evaluate a claim of discrimination unless a suspect class, quasi-suspect class, or fundamental right is implicated by the challenged law.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> The constitutional treatment of disabilities varies, however, under the U.S. Constitution and the Florida Constitution.

In *City of Cleburne v. Cleburne Living Center*,<sup>15</sup> 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.<sup>16</sup> With regard to intellectual disabilities, the Court explained that:

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.<sup>17</sup>

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<sup>10</sup> Ann C. McGinley and Ellen Catsman Freiden, *Protecting Basic Rights of Florida Citizens*, THE FLORIDA BAR JOURNAL, October 1998.

<sup>11</sup> 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).

<sup>12</sup> *Amerisure Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 897 So. 2d 1287, 1291 n.2 (Fla. 2005).

<sup>13</sup> 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).

<sup>14</sup> 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).

<sup>15</sup> 473 U.S. 432 (1985).

<sup>16</sup> 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).

<sup>17</sup> 473 U.S. 432, 445-446 (1985).

The Supreme Court would continue to affirm this position in later cases involving intellectual disabilities and the mentally ill.<sup>18</sup> Eventually, in *Board of Trustees of the University of Alabama v. Garrett*,<sup>19</sup> a case involving physical disabilities,<sup>20</sup> the U.S. Supreme Court extended to all groups of persons with disabilities the finding from *Cleburne*:<sup>21</sup>

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].<sup>22</sup>

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.<sup>23</sup> Accordingly, courts need only decide whether laws deprive claimants of any right, not just the right to be treated equally before the law.<sup>24</sup> 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”<sup>25</sup> 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.<sup>26</sup> For purposes of construing an undefined constitutional provision, the Florida Supreme Court will first begin with 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.<sup>27</sup>

### 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

<sup>18</sup> See e.g., *Heller v. Doe*, 509 U.S. 312 (1993).

<sup>19</sup> 531 U.S. 356 (2001).

<sup>20</sup> 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).

<sup>21</sup> 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).

<sup>22</sup> 531 U.S. 356, 367-368 (2001).

<sup>23</sup> 363 So. 2d 1095, 1097-1098 (1978).

<sup>24</sup> *Id.*

<sup>25</sup> *Supra* note 10.

<sup>26</sup> There does not appear to be any case interpreting the meaning of this term under Article I, Section 2 of the Florida Constitution.

<sup>27</sup> *West Florida Regional Medical Center v. See*, 79 So. 3d 1, 9 (Fla. 2012).

certain tasks or actions or participate in typical daily activities and interactions.<sup>28</sup> 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<sup>29</sup> than the average person.<sup>30</sup> Cognitive impairment is not caused by any one disease or condition, nor is it limited to a specific age group.<sup>31</sup> 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.<sup>32</sup>

“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.<sup>33</sup> The term covers the same population of individuals who were diagnosed previously with mental retardation.<sup>34</sup>

“Developmental Disabilities” is an umbrella term that includes intellectual disabilities but also includes other disabilities that are apparent during childhood.<sup>35</sup> 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 the co-occurrence of a physical and intellectual disability, for example Down Syndrome or Fetal Alcohol Syndrome.<sup>36</sup>

### 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.<sup>37</sup> Related federal laws with definitions of

<sup>28</sup> "Disability." Merriam-Webster.com. Accessed November 22, 2017. <https://www.merriam-webster.com/dictionary/disability>.

<sup>29</sup> Tasks such as reasoning, planning, problem-solving, abstract thinking, comprehension of complex ideas, and learning.

<sup>30</sup> 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).

<sup>31</sup> 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](https://www.cdc.gov/aging/pdf/cognitive_impairment/cogImp_fl_final.pdf) (last visited Nov. 24, 2017).

<sup>32</sup> WebAIM, *Cognitive*, <https://webaim.org/articles/cognitive/> (last visited Nov. 24, 2017).

<sup>33</sup> 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).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Supra* note 10.

“disabilities” could include, without limitation, the Americans with Disabilities Act,<sup>38</sup> the 1973 Rehabilitation Act,<sup>39</sup> the Social Security Disability Insurance Program,<sup>40</sup> the Fair Housing Act,<sup>41</sup> or the Individuals with Disabilities Education Act.<sup>42</sup>

## **B. EFFECT OF PROPOSED CHANGES:**

This proposal amends Article I, Section 2 of the Florida Constitution (the Basic Rights Provision) to expand the prohibited bases of discrimination to include “any disability,” rather than only physical disabilities. Thus, classifications based upon 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 “disability” is undefined, but may encompass a wide spectrum of physical, mental, cognitive, and developmental conditions that impair, interfere with, or limit a person’s ability to engage in certain tasks or actions. It may also encompass “disabilities” as defined under various federal laws.

If approved by the voters, the proposal will take effect on January 8, 2019.<sup>43</sup>

## **C. FISCAL IMPACT:**

The fiscal impact on state and local government is indeterminate.

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<sup>38</sup> 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.

<sup>39</sup> The definition of “disability” under the ADA applies to claims under the 1973 Rehabilitation Act. 29 U.S.C. § 705(20)(B).

<sup>40</sup> 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).

<sup>41</sup> 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).

<sup>42</sup> 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).

<sup>43</sup> *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.”)

**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.