The Constitution Revision Commission

COMMITTEE MEETING EXPANDED AGENDA

DECLARATION OF RIGHTS
Commissioner Carlton, Chair
Commissioner Stemberger, Vice Chair

MEETING DATE: Wednesday, November 29, 2017
TIME: 1:00—5:00 p.m.
PLACE: 110 Senate Office Building, Tallahassee, Florida

MEMBERS: Commissioner Carlton, Chair; Commissioner Stemberger, Vice Chair; Commissioners Donalds, Gainey, Johnson, Joyner, and Lester

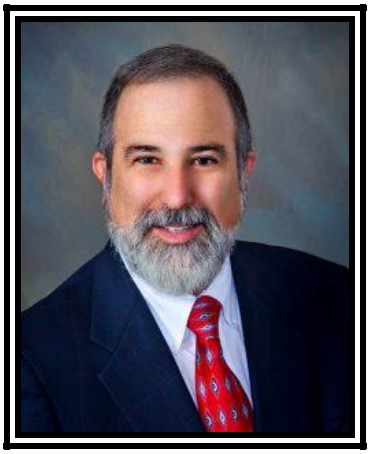
TAB	PROPOSAL NO. and INTRODUCER	PROPOSAL DESCRIPTION and COMMITTEE ACTIONS	COMMITTEE ACTION
1	Presentation on Article I, Section 2 of the Florida Constitution: Alien Land Law by Michael J. Gelfand, Esq.		Presented
2	Presentation on Article I, Section 3 of the Florida Constitution: No-Aid Provision by Nathan A. Adams, IV, Ph.D., Esq.		Discussed
3	**P 3** Martinez	DECLARATION OF RIGHTS, Basic rights; Section 2 of Article I of the State Constitution to remove a provision authorizing laws that regulate or prohibit the ownership, inheritance, disposition, and possession of real property by aliens ineligible for citizenship and to provide that a person may not be deprived of any right because of any disability. DR 11/29/2017 Fav/CS	Fav/CS Yeas 6 Nays 0
4	**P 30** Martinez	DECLARATION OF RIGHTS, Basic rights; Section 2 of Article I of the State Constitution to provide that a person may not be deprived of any right because of any disability. DR 11/29/2017 Temporarily Postponed ED	Temporarily Postponed
5	**P 15** Gamez	DECLARATION OF RIGHTS, Basic rights; Section 2 of Article I of the State Constitution to remove a provision authorizing laws that regulate or prohibit the ownership, inheritance, disposition, and possession of real property by aliens ineligible for citizenship and to provide that a person may not be deprived of any right because of a cognitive disability. DR 11/29/2017 Temporarily Postponed ED	Temporarily Postponed

TAB	PROPOSAL NO. and INTRODUCER	PROPOSAL DESCRIPTION and COMMITTEE ACTIONS	COMMITTEE ACTION
6	**P 4** Martinez	DECLARATION OF RIGHTS, Religious freedom; Section 3 of Article I of the State Constitution to remove the prohibition against using public revenues in aid of any church, sect, or religious denomination or any sectarian institution. DR 11/29/2017 Favorable ED	Favorable Yeas 5 Nays 1
7	Other Related Meeting Documents		

NOTE: Public comment will be taken on all noticed agenda items.

CONSTITUTION REVISION COMMISSION
2017 - 2018

PRESENTER BIOGRAPHY



MICHAEL J. GELFAND, ESQ.

Senior Partner, Gelfand & Arpe, P.A
Former Chair, Real Property, Probate, and Trust Law Section of the Florida Bar
B.A., Northwestern University
J.D., University of Florida

Michael J. Gelfand is a Florida Bar Board Certified Real Estate Attorney and the Senior Partner of Gelfand & Arpe, P.A. which emphasizes a community association law practice. He is also co-owner of ARC Mediation, Palm Beach County's largest mediation and arbitration firm.

Mr. Gelfand served as the immediate past Chair of The Florida Bar's Real Property, Probate and Trust Law Section (RPPTLs), the Florida Bar's largest substantive law section with over 10,000 members. He has also served as the RPPTL Real Property Division Director, and chaired the RPPTL Legislative Review Committee. In addition to being "AV" rated by Martindale Hubble, Mr. Gelfand is a fellow of the American College of Real Estate Lawyers, and a member of the College of Community Association Lawyers.

A recipient of the Palm Beach County Pro Bono Child Advocate of the Year Award, Mr. Gelfand believes in personal community involvement and encourages others to become involved as well. His volunteer efforts within the public schools include serving on the Palm Beach County School District's Construction Oversight and Review Committee, and for the District's Law Magnet Program. He has also served as chair and as a director of the Youth Orchestra of Palm Beach County, Florida.


THE FLORIDA BAR
Real Property, Probate & Trust Law Section
1950

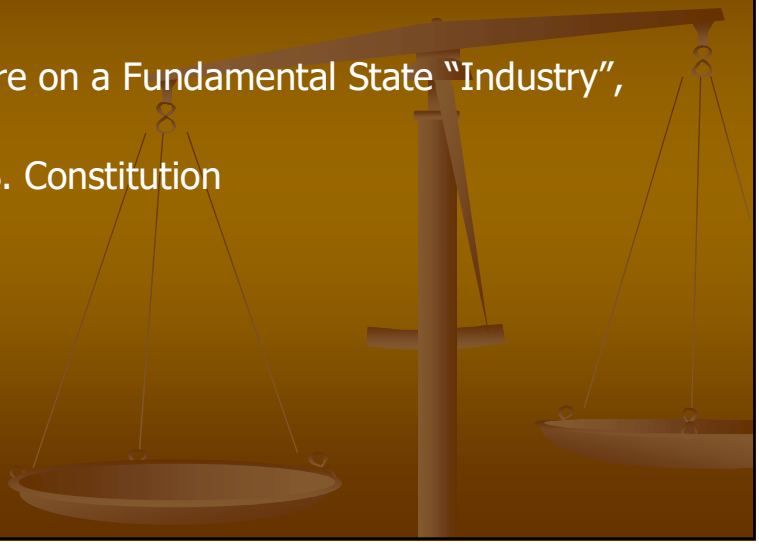

PROPOSAL 3
ALIEN OWNERSHIP OF REAL PROPERTY
MICHAEL J. GELFAND, ESQ.

BACKGROUND

- 1926 Constitution
- No Apparent Current Law
- Not Relied Upon In Court Decisions

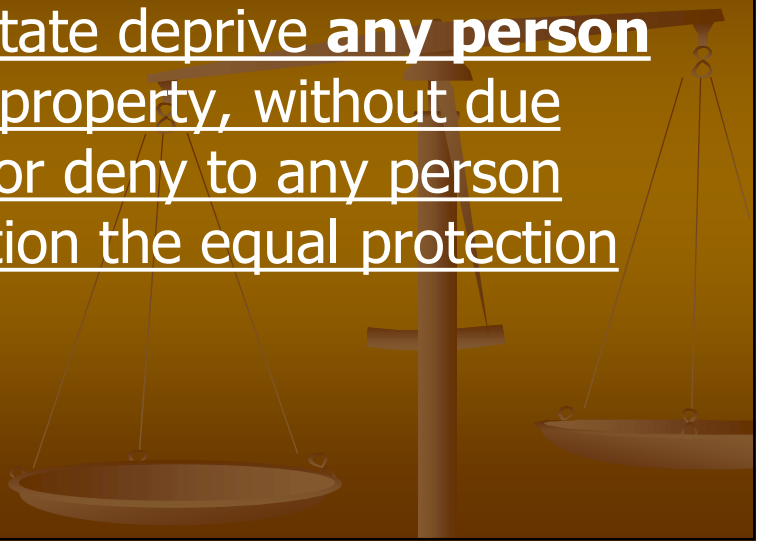
ARGUMENTS

- PRO
  - Avoid Negative Pressure on a Fundamental State "Industry", Real Estate
  - Avoid Conflict with U.S. Constitution
  - Avoid Zenophbia
- CON: ?



U.S. EQUAL PROTECTION CLAUSE

… nor shall any State deprive **any person** of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



FUTURE LAWS

- Strict Scrutiny
- Rational Basis

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

11/29/17
Meeting Date

P3
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** ALIEN REAL PROPERTY / DISABILITY

***Name** GELFAND, MICHAEL J.

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Phone 561-655-6224

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Email

***Speaking**: ☐ For ☐ Against ☒ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? REAL PROPERTY PROBATE & TRUST LAW SECTION OF THE FLORIDA BAR

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION
2017 - 2018

PRESENTER BIOGRAPHY

BENJAMIN J. GIBSON, ESQ.

Founder, Benjamin J. Gibson, P.A.
B.A., University of Florida
J.D., Florida State University

Benjamin J. Gibson is the founding attorney of Benjamin J. Gibson, P.A., in Tallahassee, FL. He focuses his law practice on federal and state election law, government law and government consulting. He previously served as Deputy General Counsel and Assistant General Counsel in the Executive Office of the Governor.

Mr. Gibson is very involved in the statewide legal community and serves on The Florida Bar Young Lawyers Division Board of Governors and was recently appointed to The Florida Bar's Special Committee on Mental Health and Wellness for Florida Lawyers. He previously was appointed by Chief Justice Labarga to Florida's first-ever Commission on Access to Civil Justice.

Mr. Gibson was named to the FSU Alumni Association's "FSU Thirty Under 30" list in 2013 and honored as a *Florida Trend* Legal Elite Top Government Attorney in 2012, 2013, 2016 and 2017. This July, he was appointed by Governor Scott to the State Board of Education, which oversees Florida's K-12 education system and state colleges. He graduated from Florida State Law in 2008 and served as president of the Student Bar Association named "Best in the Nation" by the American Bar Association.

Article I, Section 3

Article I
Declaration of Rights

Section 3. **Religious Freedom.–** There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. **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.**

- "Blaine Amendments" are present in at least 37 state constitutions, including Florida (1885) and include "no-aid" provisions.
- Predominantly enacted between 1875-1900 and inspired by advocacy of U.S. Rep. James G. Blaine federal constitutional proposal.
- Scholars point to anti-Catholic motives behind enactment of Blaine Amendments.

School Choice

- Courts throughout the country have struck down school choice programs citing state Blaine Amendment provisions.
- Argument is that these "no-aid" provisions prohibit providing public funds to individuals through a school choice program when those individuals can use those funds at religious schools. These funds are said to aid sectarian institutions.
- Some state courts have upheld school choice programs under Blaine Amendments.

- U.S. Supreme Court has not directly addressed constitutionality of state Blaine Amendments.
- Lower federal and state courts are split on whether school choice programs can exclude religious schools from otherwise generally available scholarship programs.

Amendment 6 (1998): Public Education of Children

Section 1. Public Education.

(a) 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.

School Choice Programs

- Governor Bush signed into law school choice programs that were designed to provide educational opportunities to low-income families in failing school districts:
  - Opportunity Scholarship Program
  - Florida Tax Credit Scholarship Program

SCOTUS Cases

- *Mitchell v. Helms*, 530 U.S. 793 (2000)
- *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)
- *Locke v. Davey*, 540 U.S. 712 (2004)

Bush v. Holmes

886 So. 2d 340 (Fla. 1st DCA 2004)

- En banc First DCA opinion.
- Held that "no-aid" provision in Florida Constitution (Article I, Section 3) prohibited indirect benefit to sectarian schools resulting from receipt of funds by such institutions through voucher program (OSP).

Bush v. Holmes

919 So. 2d 392 (Fla. 2006)

- Florida Supreme Court
- Article IX, Section 1 imposes a maximum duty on the state to provide for public education that is uniform and of high quality.
- Opportunity Scholarship Program, which used public school funds to fund private school options, violated "uniform" language of s. 1.

Taxation and Budget Reform Commission

- Commission proposed amendments to Article I, section 3 and Article IX section 1.
- Supreme Court in *Ford v. Browning*, 992 So. 2d 132, 135 (Fla. 2008) held that Commission exceeded constitutional authority in proposing amendments on these subjects.
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Council for Secular Humanism Inc. v. McNeil

44 So. 3d 112 (Fla. 1st DCA 2010)

- Challenge to DOC contracts with faith-based entities to provide substance abuse transitional housing for inmates.
- No-aid provision in Article I, section 3 is not limited to school context.
- To violate no-aid provision, government funded program must advance religion in addition to providing social services.
- Florida's no-aid provision, can bar state financial aid to religious institutions without violating either the Establishment Clause or Free Exercise Clause.

Amendment 8 (2012): Religious Freedom

- Joint Resolution included four (4) pages of Whereas clauses explaining historical background and intent of amendment.
- Removed Blaine Amendment from Article I, Section 3.
- Inserted language that Religious Freedom clause of Florida Constitution was not to be interpreted as more restrictive than the Establishment Clause of the First Amendment to the U.S. Constitution.
- **Origin: Proposed Legislature (H.J.R. 1471 (2011)).**
- Defeated – 44.53% / 55.47%
- Votes in favor: 3,441,330
- Votes against: 4,286,572

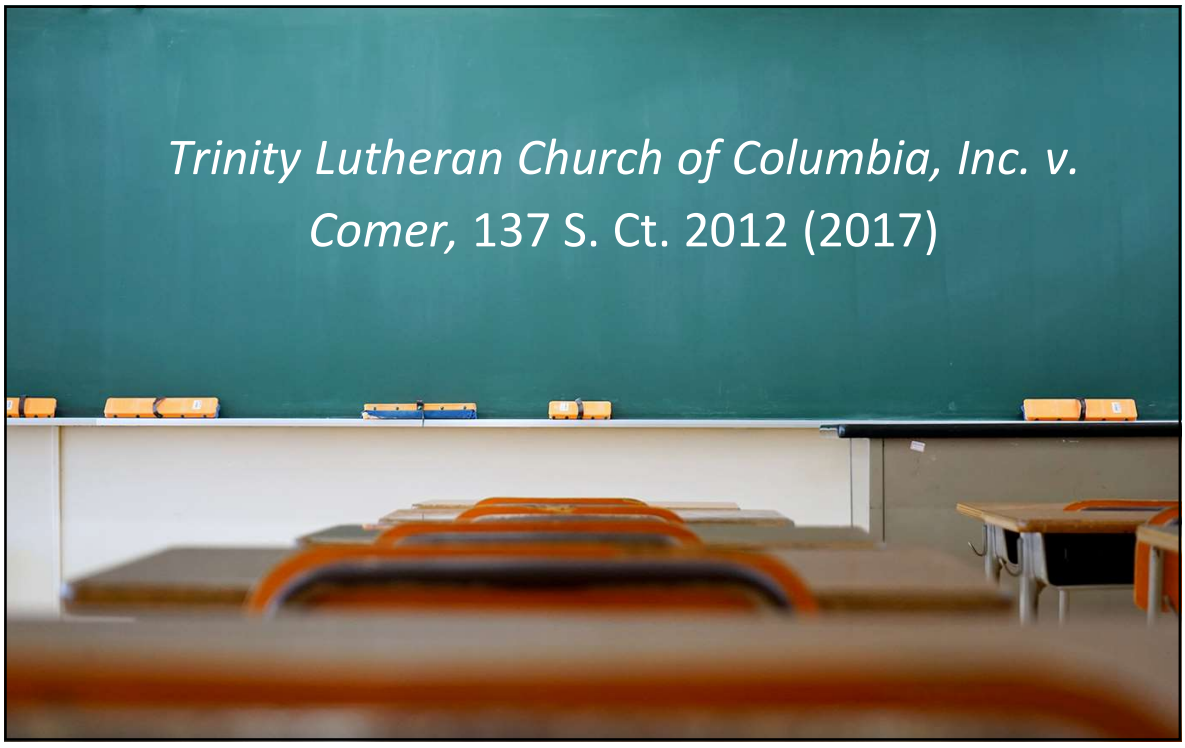
Amendment 8 (2012)

ARTICLE I

DECLARATION OF RIGHTS

SECTION 3. Religious freedom.—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace, or safety. Except to the extent required by the First Amendment to the United States Constitution, neither the government nor any agent of the government may deny to any individual or entity the benefits of any program, funding, or other support on the basis of religious identity or belief. ~~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.~~


McCall v. Scott,
199 So. 3d 359,
(Fla. 1st DCA 2016)


Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017)

Article I, Section 3

Religious Freedom and Florida Education

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

11/29/17
Meeting Date

Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** No Aid Provision

***Name** Ben Gibson, Esq.

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***Speaking**: ☐ For ☐ Against ☑ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☐ No

If yes, who?

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Are you an elected official or judge? ☐ Yes ☐ No

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***Required**

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 3

Relating to: DECLARATION OF RIGHTS, Basic rights

Introducer(s): Commissioners Martinez and Keiser

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

Date: November 27, 2017

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

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 "any disability," rather than only physical 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 the 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 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. [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 64.
[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 Nov. 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 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

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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).

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.[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.)

666242

CRC ACTION

Commissioner .
Comm: FAV .
12/01/2017 .
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The Committee on Declaration of Rights (Stemberger) recommended the following:

CRC Amendment (with title amendment)

Delete line 24
and insert:
because of race, religion, national origin, or physical

========== T I T L E A M E N D M E N T ==========
And the title is amended as follows:
Delete lines 6 - 7

666242

and insert:

citizenship.

By Commissioner Martinez

martinezr-00004-17 20173__

A proposal to amend

Section 2 of Article I of the State Constitution to remove a provision authorizing laws that regulate or prohibit the ownership, inheritance, disposition, and possession of real property by aliens ineligible for citizenship and to provide that a person may not be deprived of any right because of any disability.

Be It Proposed by the Constitution Revision Commission of Florida:

Section 2 of Article I of the State Constitution is amended to read:

ARTICLE I

DECLARATION OF RIGHTS

SECTION 2. 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.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

666242

CRC ACTION

Commissioner .
Comm: FAV .
12/01/2017 .
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666242

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CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

11/29/17
Meeting Date

Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Art I § 2

***Name** Mary Adkins

Address PO Box 511
Street

Phone 352 316 3693

Email ~~adkins~~ adkins m@ufl.edu

Melrose FL 32666
City *State* *Zip*

***Speaking**: ☐ For ☐ Against ☒ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

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 30

Relating to: DECLARATION OF RIGHTS, Basic rights

Introducer(s): Commissioner Martinez

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, expressly forbids discrimination by the government on the basis of race, religion, national origin, or physical disability. This proposal expands the prohibited bases of discrimination to include "any disability," rather than only physical 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.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The Equal Protection Clause of the U.S. Constitution and the Basic Rights Provision of the Florida Constitution entitle everyone to stand before the law on equal terms with others. In addition to this principle of equal treatment, the Florida Constitution also expressly prohibits discrimination by the government on the basis of an individual's race, religion, natural origin, or physical disability. Specifically, Article I, Section 2 of the Florida Constitution 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.**

Florida is one of only three states with an express constitutional prohibition regarding discrimination on the basis of a disability.[1] 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.[2]

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.[3] Some developments began in 1971 in federal and state courts, others in proposed legislative amendments, and still others in administrative regulations.[4]

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.[5] The companion House Joint Resolution,[6] 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."[7] However, the Senate Health & Rehabilitative Services Committee amended the proposal to remove mental disabilities from the Senate Joint Resolution.[8] 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.[9] Electors voted overwhelming to adopt the amendment during the 1974 General Election, garnering 76.43% of votes for approval.

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[1] 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).
[2] *Scavella v. School Bd. of Dade County*, 363 So. 2d 1095, 1097 (Fla. 1978).
[3] The Florida Bar Committee on the Mentally Disabled, MENTAL DISABILITY LAW: EDUCATION RIGHTS OF THE HANDICAPPED, 1 (1979)
[4] *Id.*
[5] SJR 917 (1974).
[6] HJR 3621 (1974).
[7] Fla. S. Comm. on HRS, SJR 917 (1974) Staff Evaluation 1 (April 22, 1974).
[8] Senate Bill Action Report 211 (July 17, 1974).
[9] *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.[10]

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

In *City of Cleburne v. Cleburne Living Center*,[15] 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.[16] 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.[17]

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[10] Ann C. McGinley and Ellen Catsman Freiden, *Protecting Basic Rights of Florida Citizens*, THE FLORIDA BAR JOURNAL, October 1998.

[11] 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).

[12] *Amerisure Ins. Co. v. State Farm Mut. Auto. Ins. Co*., 897 So. 2d 1287, 1291 n.2 (Fla. 2005).

[13] 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).

[14] 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).

[15] 473 U.S. 432 (1985).

[16] 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).

[17] 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.[18] Eventually, in *Board of Trustees of the University of Alabama v. Garrett,*[19]a case involving physical disabilities,[20] the U.S. Supreme Court extended to all groups of persons with disabilities the finding from *Cleburne*:[21]

> 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].[22]

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.[23] Accordingly, courts need only decide whether laws deprive claimants of any right, not just the right to be treated equally before the law.[24] 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"[25] 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.[26] 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.[27]

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

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[18] *See e.g., Heller v. Doe*, 509 U.S. 312 (1993).
[19] 531 U.S. 356 (2001).
[20] 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).
[21] 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).
[22] 531 U.S. 356, 367-368 (2001).
[23] 363 So. 2d 1095, 1097-1098 (1978).
[24] *Id.*
[25] *Supra* note 10.
[26] There does not appear to be any case interpreting the meaning of this term under Article I, Section 2 of the Florida Constitution.
[27] *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.[28] 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[29] than the average person.[30] Cognitive impairment is not caused by any one disease or condition, nor is it limited to a specific age group.[31] 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.[32]

"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.[33] The term covers the same population of individuals who were diagnosed previously with mental retardation.[34]

"Developmental Disabilities" is an umbrella term that includes intellectual disabilities but also includes other disabilities that are apparent during childhood.[35] 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.[36]

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.[37] Related federal laws with definitions of

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

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

[30] 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).

[31] 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).

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

[33] 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).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Supra* note 10.

"disabilities" could include, without limitation, the Americans with Disabilities Act,[38] the 1973 Rehabilitation Act,[39] the Social Security Disability Insurance Program,[40] the Fair Housing Act,[41] or the Individuals with Disabilities Education Act.[42]

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.[43]

C. FISCAL IMPACT:

The fiscal impact on state and local government is indeterminate.

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[38] 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.

[39] The definition of "disability" under the ADA applies to claims under the 1973 Rehabilitation Act. 29 U.S.C. § 705(20)(B).

[40] 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).

[41] 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).

[42] 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).

[43] *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.

By Commissioner Martinez

martinezr-00060-17 201730__

A proposal to amend
Section 2 of Article I of the State Constitution to provide that a person may not be deprived of any right because of any disability.

Be It Proposed by the Constitution Revision Commission of Florida:

Section 2 of Article I of the State Constitution is amended to read:

ARTICLE I
DECLARATION OF RIGHTS

SECTION 2. 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 <u>any</u> ~~physical~~ disability.

CODING: Words ~~stricken~~ are deletions; words <u>underlined</u> are additions.

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.)

By Commissioner Gamez

gameza-00034-17 201715__

A proposal to amend

Section 2 of Article I of the State Constitution to remove a provision authorizing laws that regulate or prohibit the ownership, inheritance, disposition, and possession of real property by aliens ineligible for citizenship and to provide that a person may not be deprived of any right because of a cognitive disability.

Be It Proposed by the Constitution Revision Commission of Florida:

Section 2 of Article I of the State Constitution is amended to read:

ARTICLE I

DECLARATION OF RIGHTS

SECTION 2. 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 a physical or cognitive disability.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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 4

Relating to: DECLARATION OF RIGHTS, Religious freedom

Introducer(s): Commissioners Martinez and Gamez

Article/Section affected: Article I, Section 3 – Religious freedom.

Date: November 28, 2017

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

I. SUMMARY:

The Proposal amends Article I, Section 3 of the Florida Constitution, relating to religious freedom, to repeal the prohibition on the use of public revenue in aid of a church, sect, religious denomination, or sectarian institution. The prohibition is commonly known as the "No Aid Provision" or "Blaine Amendment."

If approved 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 similar proposal was submitted to voters in the 2012 General Election. The proposal received 44.5% of the vote and was not adopted.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Religion and Government

The relationship between Religion and Government in Florida is governed by both the U.S. Constitution and the Florida Constitution. Specifically, the First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Similarly, Article I, Section 3 of the Florida Constitution provides:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. 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.

These provisions comprise the elements of the religious freedoms that are a central tenet of the American system of government. The Establishment Clause "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion."[1] The Free Exercise Clause directs that no law may discriminate against some or all religious beliefs, or regulate or prohibit conduct undertaken for religious reasons.[2] Florida courts have generally interpreted Florida's Free Exercise Clause as coequal to the federal clause.[3]

However, while the U.S. Constitution and Florida Constitution both contain a prohibition respecting the establishment of religion, the Florida Constitution imposes an additional restriction on the state not explicitly present under the U.S. Constitution. Commonly referred to as a "Blaine Amendment" or "No-Aid Provision," the last sentence of Article I, Section 3 of the Florida Constitution prohibits the direct or indirect use of public revenue in aid of a church, sect, religious denomination or sectarian institution.

"Blaine Amendments" or "No-Aid Provisions"

Florida is one of thirty-seven states to adopt a "No-Aid provision" within the state constitution.[4] The first iteration of Florida's constitutional "no aid provision" was adopted during the Constitutional Convention of 1885. Enacted as Article I, Section 6 of the 1885 Florida Constitution, the "no aid provision" originally provided that:

> No preference shall be given by law to any church, sect or mode of worship, and no money 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.

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[1] *Zelman v. Simmons-Harris*, 536 US 639, 648-649 (Fla. 2002).
[2] *Church of the Lukimi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).
[3] *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1030 (Fla. 2004).
[4] Richard D. Komer and Olivia Grady, *School Choice and State Constitutions: A Guide to Designing School Choice Programs*, THE INSTITUTE FOR JUSTICE AND THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL (2d. ed.), available at http://ij.org/wp-content/uploads/2016/09/50-state-SC-report-2016-web.pdf.

This provision was re-adopted in the 1968 revision of the Florida Constitution as Article I, Section 3 and specifically delineated that the "no aid" prohibition also applied to local governments.

Legal scholars and historians disagree regarding the impetus and intended effect of these "no-aid provisions" which were adopted by many states, including Florida. Some historians trace the origin of "no-aid" provisions to 1875 during the administration of President Ulysses S. Grant, who recommended an amendment to the U.S. Constitution denying all direct or indirect public support to "sectarian" institutions, commonly understood to mean "Catholic" institutions.[5] Then-Speaker of the U.S. House of Representatives James G. Blaine proposed an amendment to effectuate Grant's wishes. The measure passed overwhelmingly in the House (180-7), but failed to satisfy the supermajority needed in the Senate by four votes. When the amendment failed at the federal level, supporters turned their attention to the states. Provisions were voluntarily adopted in several existing states and were required as part of gaining statehood in others.

However, a number of states had adopted no-aid provisions prior to the proposal of such an amendment by Representative Blaine.[6] Some have argued those states were likely motivated by a Madisonian concern about liberty of conscience and a pragmatic desire to ensure the financial success of newly formed school systems rather than anti-catholic sentiment.[7] Others have argued that the purpose of the contemporaneous adoption of the "separate but equal doctrine" and the no-aid provision by the framers of the 1885 Florida Constitution was to prevent freedmen from receiving an equal education.[8]

There exists no record from the constitutional convention that incorporated the no-aid provision into the 1885 Florida Constitution regarding the intent of the framers.[9] The Florida First District Court of Appeal, in acknowledging the dispute over the origins of the Florida "Blaine Amendment" or "no aid provision," found no evidence of religious bigotry specific to Florida, pointing out that:

> Significantly, nothing in the proceedings of the CRC or the Florida Legislature indicates any bigoted purpose in retaining the no-aid provision in the 1968 general Revision of the Florida Constitution.[10]

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[5] America's public schools, or "common schools" were essentially Protestant. Due to this Protestant influence, Catholics established a parallel school system and sought public funding. *See* Nathan A. Adams, *Florida's Blaine Amendment: Goldilocks and the Separate but Equal Doctrine*, 24 St. Thomas L. Rev. 1, 3 (2011).

[6] In 1792, New Hampshire became the first state in the newly formed Union to prohibit the use of state and local school funds by religious institutions; Connecticut followed suit in 1818. Michigan placed a no-funding provision in its constitution in 1835, which served as the prototype for several other states in the region, including Wisconsin in 1848, Ohio and Indiana in 1851, Oregon in 1857, and Kansas in 1858. *See Exposing the Myth of Anti-Catholic Bias,* AMERICAN CIVIL LIBERTIES UNION (July 2011), available at https://www.aclu.org/files/assets/aclu-exposingthemythofanticatholicbias.pdf.

[7] *Id.*

[8] The schools that freedman attended after the Civil War were chiefly sponsored by religious abolitionist societies, such as the American Missionary Association and National Freedman's Relief Organization, and by the Catholic Church. *See* Nathan A. Adams, *Florida's Blaine Amendment: Goldilocks and the Separate but Equal Doctrine*, 24 St. Thomas L. Rev. 1, 13 (2011).

[9] *Bush v. Holmes*, 886 So. 2d 340, 348 (Fla. 1st DCA 2004).

[10] *Bush v. Holmes*, 866 So.2d 340 FN 9 (Fla. 1st DCA 2004).

Nevertheless, the court held, "even if the no-aid provisions were "born of bigotry," such a history does not render the final sentence of Article I, Section 3 superfluous."[11]

Litigation under Florida "Blaine Amendment" or "No-Aid Provision"

Prior to 2004, there was not a substantial body of case law interpreting the no-aid provision in Article I, Section 3. The earliest cases which interpreted the no-aid provision did not involve the use of state revenue, but rather the grant of tax exemptions and the use of public facilities by religious institutions.[12] In upholding the benefit obtained by religious groups in such cases, the Florida Supreme Court took the position that an incidental benefit to a religious group resulting from an appropriate use of public property, or from state action to promote the general welfare of society, is not violative" of the no-aid provision.[13] The court generally focused on the neutrality of such laws.

However, in a series of cases beginning in 2004 which did involve the use of state revenue, the Florida First District Court of Appeal more clearly defined the contours of Article I, Section 3. The court held that Article I, Section 3 of the Florida Constitution is not "substantively synonymous" with the Establishment Clause of the First Amendment to the United States Constitution.[14] The court explained:[15]

> While the first sentence of Article I, section 3 is consistent with the Federal Establishment Clause by "generally prohibiting laws respecting the establishment of religion," the no-aid provision of Article I, section 3 imposes "further restrictions on the state's involvement with religious institutions than [imposed by] the Establishment Clause.

The court articulated a four-part test to assess compliance with Article I, Section 3. The test combines the elements of the *Lemon*[16] test utilized under the Federal Establishment Clause with the additional restriction on the use of state revenue in Florida's Constitution: [17]

- The statute must have a secular legislative purpose (religion-neutral program);
- Its principal or primary effect must be one that neither advances nor inhibits religion;
- The statute must not foster "an excessive government entanglement with religion; and
- The statute must not authorize the use of public monies, directly or indirectly, in aid of a sectarian institution.

This standard as applied in the areas of education and government contracting, has resulted in the invalidation of the Florida Opportunity Scholarship Program and application of the no-aid

[11] *Id.*
[12] *See e.g.*, *Koerner v. Borck*, 100 So. 2d 398 (Fla. 1958); *Southside Estates Baptist Church v. Board of Trustees*, 115 So. 2d 697 (1959).
[13] *See Southside Estates Baptist Church v. Board of Trustees*, 115 So. 2d 697, 700 (Fla. 1959); *Johnson v. Presbyterian Homes of Synod of Fla., Inc.*, 239 So. 2d 256, 261 (Fla. 1970).
[14] *Council for Secular Humanism v. McNeil*, 44 So. 3d 112, 119 (Fla. 1st DCA 2010).
[15] *Id.*
[16] *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).
[17] *Bush v. Holmes*, 886 So. 2d 340, 358 (Fla. 1st DCA 2004).

prohibition to service contracts with faith based service providers. Under the Federal Establishment Clause, similar programs and laws have been held to be constitutional.

Education

Beginning in 1999, the Legislature passed several laws to expand educational opportunities. Among the education reforms adopted by the Legislature were two "school choice" programs: The Opportunity Scholarship Program (OSP) and the Florida Tax Credit Scholarship Program (FTCSP). The OSP was designed to provide parents of students in "failing schools" the opportunity to send their children to a satisfactorily performing public school or to an eligible private school, including sectarian private schools, through the use of a scholarship.[18] Of the private schools participating in the OSP, 71.7 percent were sectarian, and 55.3 percent of the OSP students utilizing scholarships were attending those sectarian schools.[19]

The FTCSP was designed to further expand school choice opportunities beyond those available under the OSP. Scholarships offered under the FTCSP are not limited to "failing" schools. Rather students receiving certain government assistance or students whose families have an annual income below 185% of the federal poverty level are eligible to receive scholarships. [20] During the 2016-2017 school year, scholarships in the amount of $536 million were awarded to a total of 98,936 students enrolled in 1,733 participating Florida private schools.[21]

In *Bush v. Holmes*, 886 So. 2d 340 (Fla. 1st DCA 2004), the First District Court of Appeal invalidated the scholarship element of the OSP on the grounds that it violated Article I, Section 3 because it used state revenues to aid sectarian schools.[22] The court distinguished *Zelman v. Simmons-Harris*, 536 U.S. 669, in which the U.S. Supreme Court upheld a similar Ohio school choice program under the Federal Establishment Clause:[23]

> If article I, section 3 of the Florida Constitution was coterminous with the First Amendment to the United States Constitution, our inquiry in this case would be decidedly different, and a reversal would be mandated

[18] A voucher utilized by an opportunity scholar is a warrant made payable to the parents of the student attending a private school. Upon receiving notification of the number of students utilizing vouchers, the DOE transfers funds from the respective districts' appropriated budgets to an account for the OSP. Then, the Chief Financial Officer sends the warrants to the respective private schools, and parents must endorse them for the schools to receive OSP funds. *See Legal Issues and Policy Considerations Raised by the Challenge to the Opportunity Scholarship Program: Interim Project Report 2006-139,*, The Florida Senate Committee on Judiciary (February 2006), available at http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-139ju.pdf.

[19] *Id.*

[20] The law provides for state tax credits for contributions to nonprofit scholarship funding organizations, (SFOs). The SFOs then award scholarships to eligible children of low-income families. Scholarships may be used to pay tuition and fees at an eligible private school or to pay for transportation to a Florida public school that is outside of the student's district or to a lab school. An eligible private school may be religiously affiliated. SFOs pay the scholarship funds directly to the participating private schools. *McCall v. Scott*, 199 So. 3d 359 (Fla. 1st DCA 2016).

[21] *Facts & Figures*, FLORIDA DEPARTMENT OF EDUCATION, available at http://www.fldoe.org/core/fileparse.php/15230/urlt/FTC_Sept_2017_1.pdf. (last visited Nov. 28, 2017).

[22] The court held that because an OSP voucher is used to pay the cost of tuition, any disbursement made under the OSP and paid to a sectarian or religious school is made in aid of a "sectarian institution," the school itself, even if it can be shown that no voucher funds benefit or support a church or religious denomination. *Bush v. Holmes* 886 So. 2d 340, 366 (Fla. 1st DCA 2014).

[23] *Bush v. Holmes*, 886 So. 2d 340 (Fla 1st DCA 2014).

> under *Zelman.* If we were resolving this case purely on Establishment Clause principles, the fact that the OSP program on its face has a religiously neutral purpose — to aid children in failing public schools — and the fact that the OSP gives parents or guardians the freedom of choice in selecting an alternative to a failing public school, would be dispositive factors, without regard to whether a disbursement was made directly to a parent or guardian rather than the school….However, article I, section 3 of Florida's Constitution is plainly not identical to the First Amendment [Citations omitted].

On appeal of the decision in *Bush v. Holmes,* the Supreme Court found the OSP scholarships violated Article IX, Section 1 (a) of the Florida Constitution which requires a "uniform, efficient, safe, secure, and high quality system of free public schools." By diverting public dollars into separate private systems parallel to and in competition with free public schools the OSP violated this provision.[24] Thus, the Court found "it unnecessary to address whether the OSP is a violation of the "no aid" provision in article I, section 3 of the Constitution, as held by the First District."[25]

The FTCSP has also been subject to constitutional challenge based upon the no-aid provision. The most recent constitutional challenge to the FTCSP was dismissed because the court determined the plaintiff's lacked standing.[26] No courts have yet reached the merits of the constitutional arguments against the FTCSP.

Social Services

In *Council for Secular Humanism v. McNeil,* 44 So. 3d 112 (Fla. 1st DCA 2010), the court concluded that Article I, Section 3, does not create a per se bar to state or local government contracts with religious entities for the provision of goods and services.[27] The case involved the constitutionality of a statute which authorized the Department of Corrections to consider faith-based services groups when selecting providers to administer substance abuse treatment programs. The court found that such contracts could violate Article I, Section 3, if in addition to providing social services, the government-funded program also advances religion.[28] The court explained that:

> In determining whether such programs violate the no-aid provision, the inquiry necessarily will be case-by-case and will consider such matters as whether the government-funded program is used to promote the religion of the provider, is significantly sectarian in nature, involves religious indoctrination, requires participation in religious ritual, or encourages the preference of one religion over another.[29]

[24] *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006).
[25] *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).
[26] *McCall v. Scott*, 199 So. 3d 359 (Fla. 1st DCA 2016).
[27] *Council for Secular Humanism v. McNeil*, 44 So. 3d 112, 121 (Fla. 1st DCA 2010).
[28] *Id.* at 120.
[29] *Id.*

B. EFFECT OF PROPOSED CHANGES:

The proposal repeals the "No Aid Provision" or "Blaine Amendment" in Article I, Section 3 of the Florida Constitution. The repeal removes the prohibition on the direct or indirect use of public revenue in aid of a church, sect, religious denomination, or sectarian institution.

The repeal does not affect the limitation on government spending power in aid of religious activities under the Establishment Clause of the U.S. Constitution.

If approved by the voters, the proposal will take effect on January 8, 2019.[30]

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:

Recently, in *Trinity Lutheran Church v. Comer,* 137 S. Ct. 2012 (2017), the U.S. Supreme Court held that the denial of a grant to a church affiliated daycare center for playground equipment pursuant to the Missouri's Blaine Amendment violated the Free Exercise Clause of the U.S. Constitution.[31]

The Trinity Lutheran Church Child Learning Center applied for a grant under a Missouri state program which offered reimbursement grants to qualifying nonprofit organizations that install playground surfaces made from recycled tires. The department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. Pursuant to that policy, the department denied the Center's application. In a letter rejecting that

[30] *See* Article XI, Sec. 5(e) of the Florida Constitution ("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.)
[31] *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2015 (2017).

application, the department explained that under Article I, Section 7 of the Missouri Constitution, the State's Blaine Amendment, the department could not provide financial assistance directly to a church.

The court held that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion.[32] The court found that the express discrimination against religious exercise at issue in the case was not the denial of a grant, but rather the refusal to allow the Church-solely because it is a church-to compete with secular organizations for a grant.[33] The Court held Missouri's preference for "skating as far as possible from religious establishment concerns," in the face of the clear infringement on free exercise, is not a compelling interest that would justify the department's policy.[34]

[32] *Id*. at 2015.
[33] *Id*. at 2021-2022.
[34] *Id*. at 2024-2025.

By Commissioner Martinez

martinezr-00002-17 20174__

A proposal to amend
Section 3 of Article I of the State Constitution to remove the prohibition against using public revenues in aid of any church, sect, or religious denomination or any sectarian institution.

Be It Proposed by the Constitution Revision Commission of Florida:

Section 3 of Article I of the State Constitution is amended to read:

ARTICLE I
DECLARATION OF RIGHTS

SECTION 3. Religious freedom.—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. ~~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.~~

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

October 31, 2017 Delivered via Email

Constitution Revision Commission 2017-18
The Capitol
400 S. Monroe Street
Tallahassee, FL 32399

Dear Commissioners,

The undersigned clergy and faith leaders write to express our concerns and opposition to Proposal Four, which would repeal an essential religious liberty protection from the Florida Constitution's religion freedom clauses found in Art. I §3.

Firmly believing that our faith and houses of worships flourish when they are truly independent from government, we subscribe to the astute observation in Virginia Statute of Religious Freedom drafted by Thomas Jefferson that "… to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical … ."

Proposal 4 would repeal the last sentence of Art. I §3 known as the "No Aid" provision, which was adopted in 1885. Providing stronger religious liberty rights than the First Amendment, this provision embodies Thomas Jefferson's wise admonition by guaranteeing that Florida taxpayers are not compelled by the State to support religious institutions or beliefs with which they disagree or represent a faith tradition other than their own.

In addition to compelling taxpayers to support houses of worship and other religious institutions that advance beliefs with which the taxpayer may not adhere to or agree, the proposal would create an unacceptable risk of Floridians directly or indirectly funding religious indoctrination, proselytizing, or discrimination in publicly-funded social and other services.

Furthermore, repeal of the No Aid provision is wholly unnecessary for faith-based groups to provide publicly-funded social services. Indeed, Florida Courts have found that the State may enter into contracts with religiously-affiliated organizations. For decades, organizations such as Catholic Charities, Jewish Federations, and Lutheran Services Florida, which abide by stringent constitutional and legal safeguards, have contracted with the State to provide critical social services to Floridians without issues of taxpayer-funded proselytizing or discrimination.

Some proponents of Proposal 4 may mistakenly assert that it is necessary because anti-Catholic prejudice motivated adoption of the No Aid provision. However, the text and history of the provision belie such an assertion. Indeed, a 2004 First District Court of Appeals decision, which the Florida Supreme Court subsequently affirmed, found that "… nothing in the history or text of the Florida no-aid provision suggests animus towards religion … ."

Any claim of anti-religious motivation also is dispelled by the fact that the No Aid provision was re-ratified in 1968. Thus, the same District Court of Appeals decision also stated "…. nothing in the proceedings of the CRC or the Florida Legislature indicates any bigoted purpose in retaining the no-aid provision in the 1968 general Revision of the Florida Constitution." In addition, when

the 1978 and 1998 Constitution Revision Commissions each considered removing the provision no action was taken. Surely the latter half of the 20th Century was not a period of anti-Catholic prejudice in Florida and such prejudice therefore played absolutely no role in the 1968 re-ratification or the 1978 and 1998 considerations of the No Aid provision.

For 130 years, the No Aid provision has protected religious freedom in Florida. Its repeal would serve no purpose and harm the religious liberty and conscience of all Floridians. We therefore urge you to oppose Proposal 4.

Sincerely,

Reverend John F. Gundlach III
Mount Dora, Florida
Retired minister/chaplain

Rev. Richard L. Huggins
HR Presbyterian Church USA
Pastor Emeritus of the McLeod Memorial
Presbyterian Church in Bartow, FL

Rev. Dr. Raymond Johnson
State Coordinator
Cooperative Baptist Fellowship of Florida

Rabbi Dan Levin
Temple Beth El of Boca Raton

Ronnie McBrayer, DMin
Pastor
A Simple Faith
Santa Rosa Beach, Florida

Rev. Candace C. McKibben
Pastor
Tallahassee Fellowship

Robert J. McKinnon
Florida Statewide Coordinator
Faith in Public Life

Rev. Dr. Russell Meyer
Executive Director
Florida Council of Churches

Rev. Rubén Ortiz
Latino Field Coordinator
Cooperative Baptist Fellowship

Rachel Shapard
Associate Coordinator
Cooperative Baptist Fellowship of Florida

Rabbi Ari Shapiro - Florida Department of Corrections (Arcadia) and
Temple Sinai (Sarasota)

Rabbi Merrill Shapiro
St. Augustine Jewish Historical Society

Rev. Paul T. Werner
Pastor, St. Andrew UCC, Sarasota

November 17, 2017 DELIVERED VIA EMAIL

Florida Constitution Revision Commission
The Capitol
400 S. Monroe Street
Tallahassee, FL 32399

Re: Vote No on Proposals Amending Art. 1, Section 3

Dear Chair Carlton and Declaration of Rights Committee Commissioners, and Chair Johnson and Education Committee Commissioners:

On behalf of more than 100,000 supporters state-wide, the American Civil Liberties Union (ACLU) of Florida submits this testimony urging the Constitution Revision Commission to reject various proposals to delete or alter the "No Aid" provision of the Florida Constitution. (e.g., Proposals 4, 59).

ACLU Florida

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Miami, FL
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Kirk Bailey
Political Director

Kara Gross
Legislative Counsel

Preserve Religious Freedom – Article I, Section 3

We urge the Commission to preserve Florida's "No Aid" provision as is, which currently provides: "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasure directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."

Proposal 4, which would delete the No Aid provision, and Proposal 59, which would amend the No Aid proposal, would open the door to taxpayers being compelled by the State to advance religious beliefs that they may not agree with or that represent a faith tradition other than their own. Moreover, deleting or amending the No Aid provision would create an unacceptable risk of Floridians directly or indirectly funding religious indoctrination, proselytizing, or discrimination in publicly-funded services.

Trinity Lutheran Does Not Invalidate the No Aid Provision

We note that some members of the Constitution Revision Commission have raised questions about the impact of the United States Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) ("*Trinity Lutheran*") on Florida's 130-year old No Aid provision. We write to clarify that *Trinity Lutheran* does not require a change to the Florida Constitution, because the No Aid provision, as interpreted by Florida courts, is not affected by *Trinity Lutheran*.

The relevant facts in *Trinity Lutheran* are as follows: Missouri's Department of Natural Resources had a Scrap Tire Grant Program that offered reimbursement grants to qualifying organizations that install playground surfaces made from recycled tires. The state had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or

other religious entity. Trinity Lutheran operated a preschool/daycare center that applied for the grant funding. Pursuant to the state's express policy of not funding churches or other religious institutions, it denied Trinity Lutheran's application, and the church brought suit.

In *Trinity Lutheran*, the Supreme Court held that the state policy violated the federal Free Exercise Clause of the First Amendment by denying a church operated preschool -- solely because of its religious status -- a grant to purchase a rubber surface for its playground. The Court's narrow decision held that denial of an otherwise generally available public grant to a religious institution solely based on its *religious status* violated the Trinity Lutheran Church's First Amendment free exercise rights. 137 S. Ct. at 2024-25.

ACLU Florida

The Supreme Court's *Trinity Lutheran* opinion was a narrow decision holding that a religious institution cannot be denied a generally available public benefit (grant funding) for non-religious use (resurfacing a playground) solely because of its religious institution status, and is limited to grant funding that does not advance religion.

In reaching its conclusion, the Supreme Court reiterated its prior holding in *Locke v. Davey*, 540 U.S. 712 (2004), in which the Court upheld the State of Washington's application of its constitutional No Aid provision to bar scholarships to be used for the pursuit of a devotional theological degree. *Id.* at 2023. The Court explained that, in *Locke*, the plaintiff-student "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*. Here there is no question that *Trinity Lutheran* was denied a grant simply because of what it is—a church." *Id.* Thus, the policy that was rejected in *Trinity Lutheran* was the denial of public funds to a religious organization solely because it was a religious organization, while the constitutionally permitted policy in *Locke* was the denial of public funds that would be used for religious purposes. *Id.* In other words, *Trinity Lutheran* does not disturb the constitutional bar on the use of public funds to advance religion.

Trinity Lutheran is further limited in its application to religiously-affiliated institutions by Footnote 3 of the opinion, that stated: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." *Id.* at 2024 n. 3.[1] Thus, *Trinity Lutheran*, by its express

[1] Four of the six justices that joined the majority opinion joined footnote 3. *Id.* at 2016. The two remaining justices favored a broader ruling. *Id.* at 2026. However, as the narrower holding, footnote 3 is the controlling opinion. *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds …'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169, n. 15 (1976)).

terms, is limited to cases involving "express discrimination based on religious identity with respect to playground resurfacing." *Id.* Even viewed slightly more broadly, the opinion is limited to cases involving "general program[s] designed to secure or to improve the health and safety of children." *Id.* at 2027 (Breyer, J. concurring in judgment).

Moreover, the Missouri state constitution's No Aid provision at issue in *Trinity Lutheran* is similar to Florida's No Aid provision. Both bar spending public money "directly or indirectly, in aid of any church." It is significant to note that the Supreme Court's decision in *Trinity Lutheran* did not result in any repeal or amendment to Missouri's No Aid provision; instead, the Court simply limited the provision's application in the narrow, unique circumstances addressed by that case, and the provision remains on the books and in effect in Missouri. As such, there is no mandate or justification for repealing Florida's No Aid provision in light of *Trinity Lutheran*. Moreover, *Trinity Lutheran* does nothing to change the fact that the government shall not compel taxpayer funding of religious institutions for religious uses.

ACLU Florida

For all the above reasons, the ruling in *Trinity Lutheran* is consistent with Florida courts' interpretation of the No-Aid provision.

No Aid Provision Does Not Bar the State from Contracting with Religiously-Affiliated Entities to Provide Social Services

Florida's No Aid provision does not prevent the State from contracting with religiously-affiliated organizations to provide social services. This is exemplified by the fact that there exists longstanding and successful partnerships between Florida and the faith-based community through religiously-affiliated organizations such as Catholic Charities, Lutheran Social Services and Jewish Federations. These organizations enter into contracts with the state and agree to provide services on a non-discriminatory basis and not to proselytize or force religious activity on the beneficiaries they serve. Consequently, for decades in Florida, and throughout the country, religiously-affiliated organizations have freely contracted with the state to provide housing, food, refugee services, and other secular services for those in need.

Moreover, Florida courts have consistently interpreted the No Aid provision as a prohibition on the use of state funds to advance religion, not as a *per se* ban on the state giving funds to any religiously-affiliated institution. For example, in *Council for Secular Humanism, Inc. v. McNeil*, the First District Court of Appeal determined that the Florida Department of Corrections did not violate the No Aid provision when it used state funds to support a faith-based substance abuse transitional housing program. 44 So. 3d 112, 120-21 (Fla. 1st DCA 2010) (holding that the No Aid provision is not a "per se bar" on government contracts with rel-igious organizations and that funds paid to a

religious organization for secular purposes would not violate the No Aid provision). The Department's policy was to "consider faith-based service groups on an equal basis with other private org-anizations," which the court determined "was merely an expression of a nondis-crimination policy that would prevent the state from excluding groups based on religion." *Id.* at 118. "Given the text of the no-aid provision, we conclude that the overriding purpose of the provision is to prohibit the use of state funds to *promote religious or sectarian activities*. Thus, to violate the no-aid provision, in addition to providing social services, the government-funded program must also *advance religion*." *Id.* at 119-20 (emphasis added). The court concluded that "the no-aid provision does not constitute a per se bar to state or local government contracting with religious entities for the provision of goods and services." *Id.* at 121.

ACLU Florida

More recently, the Eleventh Circuit explained that, under the No Aid provision, state funds advance religion "when a government-sponsored program is 'used to promote the religion of the provider, is significantly sectarian in nature, involves religious indoctrination, requires participation in religious ritual, or encourages the preference of one religion over another.'" *Atheists of Florida, Inc. v. City of Lakeland, Fla.*, 713 F.3d 577, 596 (11th Cir. 2013) (quoting *McNeil,* 44 So. 3d at 120).

Additionally, in *Bush v. Holmes*, the district court of appeal determined that the state's Opportunity Scholarship Program (OSP), which provided public funds for students who attended a failing public school to choose a higher performing public school or a participating private school, violated the No Aid provision. 886 So. 2d 340, 366 (Fla. 1st DCA 2004).[2] The court based its decision on the fact that "the vast majority of the schools receiving state funds from OSP vouchers at the time of the hearing below are operated by religious or church groups with an intent to teach to their attending students the religious and sectarian values of the group operating the school." *Id.* at 354. The court noted that nothing in the No Aid provision bars the state from aiding or funding not-for-profit, religiously-affiliated organizations. *Id.* at 362.

As is clear from the above, Florida courts have interpreted and applied the Florida Constitution's No Aid provision as prohibiting the state from using its funds to *advance religion*, but there is no prohibition on the use of state funds for the delivery of non-religious social services by religiously-affiliated entities.

In sum, because the No Aid provision is not affected by *Trinity Lutheran*, there is no reason to repeal the provision nor any mandate to amend it. The provision has been maintained in the Florida Constitution in nearly identical

[2] When the case was appealed to Florida Supreme Court, the court determined that the OSP was unconstitutional based on another provision of the Florida Constitution, and did not address the No Aid provision. *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006). Thus, the First District Court of Appeal's ruling on the No Aid provision remains the current law. *McNeil,* 44 So. 3d at 117.

form since the 1885 Florida Constitution, and it does not preclude contracting with religiously-affiliated entities for secular social service purposes.

Thank you for your consideration of the above and we look forward to working with you as this process moves forward. Please do not hesitate to contact us at kbailey@aclufl.org (786) 363-2713 or kgross@aclufl.org (786) 363-4436, if you have any questions or would like any additional information.

Sincerely,

Kirk Bailey
Political Director

ACLU Florida

Kara Gross
Legislative Counsel

ADL
Anti-Defamation League®

Florida

FLORIDA REGION

TRACEY GROSSMAN
REGIONAL CHAIR

STEVEN L. DANIELS
DEVELOPMENT CHAIR

MICHAEL FREELING
LEADERSHIP CHAIR

REGIONAL STAFF

SHERI ZVI
REGIONAL DIRECTOR

EMMY BARRACO
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KIESHA A.L. EDGE
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BY E-MAIL

November 21, 2017

Commissioner Lisa Carlton
Chair
Declaration of Rights Committee
Florida Constitution Revision Commission
The Capitol
400 S. Monroe Street
Tallahassee, FL 32399

Re: Proposal 4

Dear Commissioner Carlton,

On behalf of the Anti-Defamation League ("ADL"), we write to express our serious concerns about and opposition to Proposal 4, which would repeal the "No Aid" provision from the Florida Constitution.

ADL is one of the nation's leading human relations and civil rights organizations advocating for religious liberty in America. For over a century, we have stood for faith, fairness and freedom. To that end, we work to oppose government interference, regulation, and entanglement with religion and strive to advance individual religious liberty.

From our 104 years of day-to-day experience serving our constituents, we can testify that the more government and religion become entangled, the more threatening the environment becomes for each. In the familiar words of Justice Black: "A union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

THE NO AID PROVISION PROTECTS RELIGIOUS FREEDOM

In addition to its establishment and free exercise clauses, which track the language of the religion clauses to the First Amendment, Art. I §3 contains the "No Aid" provision, which states:

> *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.*

ADL firmly believes that this provision embodies the religious liberty principles on which our nation was founded, including the freedoms protected by the

Virginia Statute of Religious Freedom. This Statute, adopted by the Virginia General Assembly in 1786, was the blue print for the religion clauses to the First Amendment.

Drafted by Thomas Jefferson in 1777, the Statute poignantly states that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[1] Jefferson believed that religious liberty is harmed even when the state asks citizens to support their own faith, because the individual should be absolutely free to contribute to "the particular minister, whose morals he would make his pattern."[2] According to Jefferson, religion itself neither requires nor benefits from the support of the state: "truth is great and will prevail if left to herself."[3] Therefore, the Virginia Statute directed "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever."[4]

Providing stronger religious liberty rights than the First Amendment, the No Aid provision, adopted in 1885, embodies Thomas Jefferson's wise admonitions by guaranteeing that Florida taxpayers are not compelled by the State to support religious institutions or beliefs with which they are unaffiliated, disagree or find offensive.

PROPOSAL 4 WILL OPEN THE DOOR TO STATE-FUNDED RELIGIOUS DISCRIMINATION & INDOCTRINATION

Proposal 4 could allow houses of worship and other pervasively sectarian institutions, which integrate faith into social and other services, to obtain public funding for provision of such services. Thus, repealing the No Aid provision would create an unacceptable risk of Floridians directly or indirectly funding religious discrimination or indoctrination in publicly-funded social and other services. Such a circumstance is highly problematic for two reasons.

First, it would allow state-funded social service providers to discriminate on the basis of religion for taxpayer-funded jobs. Federal and Florida anti-discrimination laws provide religious institutions with the right to hire co-religionists as part of forwarding their religious missions. These federal and state anti-discrimination laws were written before religious institutions were eligible for public dollars.[5] Proposal 4 in conjunction with these statutory rights would allow Florida's religious institutions to hire on the basis of religion for any taxpayer-funded job in publicly-funded social service or other programs.[6]

Although ADL supports the right of a church, synagogue, mosque or other religious organization to use its own private funds to hire only co-religionists for positions that forward its religious mission, religious discrimination in hiring for government-funded programs is a wholly different

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[1] *See* Thomas Jefferson, The Virginia Statute for Religious Freedom (Jan. 16, 1786), reprinted in FOUNDING THE REPUBLIC: A DOCUMENTARY HISTORY 94, 95 (John J. Patrick ed., 1995).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] From 1965 through 2002, presidential executive order prohibited religious corporations, associations, educational institutions, or societies contracting or subcontracting with the Federal government from discriminating on the basis of religion in hiring and firing. *See* Executive Orders 11246 & 13279.
[6] *See Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987) (Finding that Title VII's religious-discrimination exemption "... cover[s] all activities of religious employers.")

circumstance. No one should be barred from a tax-payer funded job based on their faith. Furthermore, it is unconstitutional. This discrimination constitutes government support for particular religious missions in violation of the Establishment Clause to the First Amendment. In addition, such discrimination runs afoul of the "no-religious-tests clause" of the United States Constitution.[7]

Second, allowing pervasively sectarian institutions to obtain public funding for provision of social and other services would create a high risk of religious institutions subjecting social-service beneficiaries – the state's most vulnerable citizens, the homeless, hungry and addicted – to unwanted proselytizing and religious activity while delivering taxpayer-funded social services. Such publicly-funded religious indoctrination would violate the Establishment Clause's prohibition on religious coercion.

State-subsidized discrimination or religious indoctrination is patently unfair and contrary to the American principles of equality, meritocracy and religious freedom. Furthermore, it undoubtedly would be subject to successful constitutional challenge.[8]

THE U.S. SUPREME COURT'S RECENT *TRINITY LUTHERAN* DECISION DOES NOT INVALIDATE THE NO AID PROVISION

The U.S. Supreme Court's recent decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer* does not invalidate the No Aid provision. Rather, it creates a narrow exception to the provision limited to secular aid for the health and safety of children.

At issue in *Trinity Lutheran* was a Missouri program that provides grants to private and public schools and other non-profits to purchase rubber playground surfaces made from recycled tires.[9] Based on Missouri's No-Aid Clause, the program prohibited houses of worship and other religious entities from participating in the program.[10]

In an unprecedented ruling, the Court held that the Free Exercise Clause required a state to provide a direct grant to a house of worship.[11] Specifically, it found that "denying a generally

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[7] *See* US Const., Art. VI, cl. 3 ("no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

[8] *See Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406 (8th Cir. 2007) (state funding of religious residential prisoner program); *Teen Ranch, Inc. v. Udow*, 479 F.3d 403 (6th Cir. 2007)(government placement of minors into religious residential services program for delinquent, neglected, abused, and emotionally troubled youth); *ACLU Found. of La. v. Blanco*, 2007 U.S. Dist. LEXIS 74590 (E.D. La. 2007) (state allocation of funds from various sources for purposes including state government administration, public education, local government services, and health and human services to two houses of worship without restrictions); *Freedom from Religion Found., Inc. v. Mont. Office of Rural Health*, 2004 U.S. Dist. LEXIS 29139 (D. Mt. 2004) (government funding for the purpose of promoting and endorsing the use and application of Judeo-Christian principles in the provision of otherwise secular health care); *ACLA v. Foster*, 2002 U.S. Dist. LEXIS 13778 (E.D. La. 2002) (state funding of abstinence program providers in "which 'religion is so pervasive that a substantial portion of [their] functions are subsumed in the religious mission....'")(citations omitted); *Freedom from Religion Found. v. McCallum*, 179 F. Supp. 2d 950 (W.D. Wis. 2002) (government funding of long-term residential drug and alcohol treatment program that indoctrinates its participants in religion, primarily through its counselors).

[9] *See* 137 S. Ct. 2012, 2017 (U.S. June 26, 2017).

[10] *Id.* at 2017.

[11] *Id.* at 2024.

available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.' " [12] In reaching this conclusion, the Court distinguished its decision in *Locke v. Davey*, 540 U.S. 712 (2004), which upheld a denial of public funding for "'degrees in devotional theology'" based on the State of Washington's No-Aid Clause, stating that the petitioner in the case "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do* – use the funds to prepare for the ministry."[13] The Court further found that Missouri failed to justify the program's exclusion of religious institutions based on "religious establishment concerns."[14]

Critically, the six justices who joined the *Trinity Lutheran* majority evenly split on footnote 3, which states:

> *This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.* [15]

This even split on footnote 3, read in conjunction with Justice Breyer's concurrence -- which appears to be limited to "general programs designed to secure or to improve the health and safety of children,"[16] -- and Justice Sotomayor's dissent joined by Justice Ginsberg, strongly suggests that there is not a majority on the Court today that would extend *Trinity Lutheran* to state prohibitions on programs that provide other forms of secular aid to religious institutions or more clearly fund religious activities. Consequently, any assertion that the decision significantly abrogates the No Aid provision and requires its repeal is erroneous.

THE NO AID PROVISION IN NO WAY PROHIBITS GOVERNMENT CONTRACTS WITH RELIGIOUSLY AFFILIATED ORGANIZATIONS

There are longstanding and successful partnerships between Florida and the faith-based community through religiously affiliated organizations such as Catholic Charities, Lutheran Services Florida and Jewish Federations, which have helped to combat poverty and provided housing, education, and health care services for those in need. Critically, Florida Courts have repeatedly found that the No Aid provision in no ways prohibits such partnerships:

> *[N]othing in the Florida no-aid provision would create a constitutional bar to state aid to a non-profit institution that was not itself sectarian, even if the institution is affiliated with a religious order or religious organization.* (Emphasis added).[17]

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[12] *Id.* at 2019 (citations omitted).
[13] *Id* at 2023.
[14] *Id* a 2024.
[15] *Id* at 2024.
[16] *Id* at 2027.
[17] *See Bush v. Holmes*, 886 So.2d. 340, 362 (Fla. 1st DCA 2004), *aff'd in part*, 919 So. 2d 392, 413 (Fla. 2006) ("[w]e affirm the First District's decision finding section 1002.38 unconstitutional in *Holmes II*, but neither approve nor disapprove the First District's determination that the OSP violates the 'no aid' provision in article I, section 3 of the Florida Constitution, an issue we decline to reach"); *Council for Secular Humanism, Inc. v. McNeil*, 44 So. 3d 112,118 (Fla. 1st DCA 2010) (quoting *Bush v. Holmes*, 886 So. 2d at 362).

Furthermore, Federal and state laws generally prohibit religiously affiliated organizations from hiring and firing on the basis of religion.[18] Additionally, the separate accounting and corporate structure of religiously affiliated institutions ensures that state funds are not directed to the religious activities of their affiliated religious institutions.

Consequently, for decades religiously affiliated organizations have used public funds to help the neediest and most vulnerable Floridians largely unburdened by concerns over state-funded discrimination or entanglement between government and religion.

THE NO AID PROVISION IS NOT BASED ON RELIGIOUS ANIMUS

Any assertion that the No Aid provision is based on anti-Catholic animus is refuted by its text and history. As a starting point, the text of provision in no way targets a particular faith. Rather, it neutrally applies to all religions. Furthermore, a First District Court of Appeals decision found that "... nothing in the history or text of the Florida no-aid provision suggests animus towards religion ... ."[19]

Claims of anti-religious motivation are further refuted by the fact that the No Aid provision was re-ratified in 1968. The same District Court of Appeals decision also stated "…. nothing in the proceedings of the CRC or the Florida Legislature indicates any bigoted purpose in retaining the no-aid provision in the 1968 general Revision of the Florida Constitution."[20] Moreover, when the 1978 and 1998 Constitution Revision Commissions each considered removing the No Aid provision no action was taken. Surely the latter half of the 20th Century was not a period of anti-Catholic prejudice in Florida and such prejudice therefore played absolutely no role in the 1968 re-ratification or the 1978 and 1998 considerations of the No Aid provision.

The findings of the First District Court of Appeals were further confirmed by a detailed and well-documented 2011 ACLU report, which concluded:

> *Accusations of anti-Catholicism clearly are meant to portray the proposed repeal of the no-aid provision as the only moral public policy choice and to lend credibility to the suggestion that "to oppose the failing-school vouchers . . . is to support prejudice." But no matter how often these manufactured claims of bias are repeated, voucher and repeal proponents cannot back them up with evidence. Anyone who has taken the time to read the text of Article I, Section 3 will understand that it is worded in a neutral way that is fair to all religions, and that it places no special burdens on the Catholic Church. There is also no evidence that any of the constitutional drafters harbored anti-Catholic feelings, or that there was a powerful anti-Catholic political lobby working behind the scenes to insert this language into the state constitution. Indeed, every prominent historian of Florida agrees that Florida was free of antiCatholicism both in 1885 when the no-aid provision was first passed, and in 1968, when it was ratified.* (Emphasis added).[21]

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[18] *See* 42 U.S.C. 2000e-2(e) (Section 703(e) of Title VII of the 1964 Civil Rights Act); F.S.A. 760.10(9) (Title XLIV, Chapter 760, Florida Civil Rights Act).

[19] See *Bush v. Holmes*, 886 So.2d. at 364.

[20] *Id.* at 351.

[21] *See* "Exposing the Myth of Anti-Catholic Bias The Fabrication of History to Repeal the Florida Constitution's No-Aid Provision," ACLU Program on Freedom of Religion and Belief and the ACLU of Florida, July 2011 –

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For 130 years, the No Aid provision has protected religious freedom in Florida. Its repeal would serve no purpose and harm the religious liberty and conscience of all Floridians. We therefore urge you to oppose Proposal 4.

Sincerely,

David L. Barkey
Religious Freedom Counsel & Southeast Counsel

cc: Commissioner John Stemberger
Commissioner Erika Donalds
Commissioner Emery Gainey
Commissioner Marva Johnson
Commissioner Arthenia Joyner
Commissioner Dr. Gary Lester

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https://www.aclu.org/files/assets/aclu-exposingthemythofanticatholicbias.pdf (web-page last visited on November 10, 2017).

FREEDOM FROM RELIGION *foundation*

P.O. BOX 750 · MADISON, WI 53701 · (608) 256-8900 · WWW.FFRF.ORG

Written Testimony on the Florida Constitution's No Aid Clause

submitted to the
Declaration of Rights Committee
of the
Florida Constitution Revision Commission

"No Aid Clauses should be preserved and enforced"

By Andrew L. Seidel
Constitutional Attorney, Director of Strategic Response
Freedom From Religion Foundation

November 27, 2017

"Every new & successful example . . . of a perfect separation between ecclesiastical and civil matters, is of importance. And I have no doubt that every new example, will succeed, as every past one has done, in showing that religion and government will both exist in greater purity, the less they are mixed together."

– James Madison[1]

Small-minded and dishonest bigot. Jew. Militant secularist and homosexual. Piece of____ Marxist. Racist pig. Anti-Catholic, Anti-American, Anti-Constitutional and Anti-Christian. A cancer on humanity that should be removed. The anti-Christ. Communist. Hideous, deplorable, and anti-god. Mentally ill, anti-Catholic bigot.

These are all names I've been called for fighting to uphold the First Amendment. This is a small, *tame* sample. I work as a constitutional attorney at the Freedom From Religion Foundation, which defends the constitutional separation between state and church and educates the public about nontheism. For those defending what Thomas Jefferson called "the wall of separation between church and state," facing this hate is nothing new. Nor is one of the foundational principles of state-church separation, the principle that underpins the No Aid Clauses, also called Blaine Amendments, that this Committee is examining.

That principle—the no-funding principle[2]—has a long, clear history that shows it was designed to foster religious freedom. The principle is simple: the taxing power of the government should not be used to support religion. As states faced the challenges of a growing pluralistic society, including the challenge of providing a public education to all, they strengthened, invigorated, and implemented this concept with legislation and constitutional amendments, including the so-called Blaine Amendments, from 1776 through the 1950s.

My testimony will explain that the true purpose behind these clauses is to protect religious freedom and that history makes this clear. Abandoning these clauses will erode religious liberty. I will also address the Supreme Court's recent *Trinity Lutheran* decision, which should not impact the Florida No Aid provision.

Throughout, I will disprove the common and alarmingly popular argument that these crucial clauses are anti-Catholic.[3] The catalog of opprobrium I listed at the outset was not to garner your sympathy, but to make a critical and often ignored point in any Blaine Amendment discussion: **advocating for the separation of state and church, including No Aid Clauses, is not anti-religious bigotry**. Bigotry regards any member of a particular group with hatred and intolerance. Seeking to ensure our government stays secular, as required by the Constitution, is neither hateful nor intolerant, even when doing so denies religion a financial benefit to which it feels entitled.[4]

The purpose of No Aid Clauses is to protect religious freedom.

The purpose of No Aid Clauses is to ensure religious freedom. James Madison, the Father of the Bill of Rights and the Father of the Constitution, explained it well: "Religion then of every man must be left to the conviction and conscience of every man," not the taxing power of the state.[5]

The principle in every No Aid Clause, including Florida's, is that the government should not tax citizens to benefit a religion. Religious education, propagation, and worship should be the result of free and voluntary support given by the faithful. The coercive taxing power of the government should not be wielded to oblige Muslims to bankroll temples and yeshivas, or to compel Jews to subsidize Christian churches and Catholic schools, or to force Christians to fund mosques and madrassas. If this still seems unobjectionable, imagine your tax dollars funding a school for Satanism or a Ku Klux Klan (which self-identifies as Christian) school.

Religious duty, including financial support, is a personal duty over which our secular governments can have no jurisdiction. "It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him," as James Madison put it in his paean against a three penny tax to support Christian preachers and churches.[6]

This principle is vital to ensure true religious freedom. Daniel Carroll, a Catholic representative to the Constitutional Convention from Maryland, put it best during the congressional debates on the First Amendment when he said that "the rights of conscience are, in their nature, of peculiar delicacy, will little bear the gentlest touch of the governmental hand."[7] No citizen can have religious freedom when the government can force them to donate to a sect that promises them eternal torture if they happen to exercise that freedom. Compelled support of a religion or god that is not your own is anathema to American principles.

Ben Franklin went so far as to say that religions that need state support are probably "bad," a quip that might get him labeled a bigot today were it more widely known: "When a Religion is good, I conceive that it will support itself; and, when it cannot support itself, and God does not take care to support, so that its Professors are oblig'd to call for the help of the Civil Power, it is a sign, I apprehend, of its being a bad one."[8]

The principle underlying No Aid Clauses dates to America's founding and was uniformly accepted after years of experience.

The early history of state-church separation in our federal government is clear to the Supreme Court: "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[9]

The history of the states is more varied, each adopting disestablishment principles at different times and to varying degrees. But as Justice Sotomayor recently pointed out, "Despite this rich diversity of experience, the story relevant here is one of consistency. The use of public funds to support core religious institutions can safely be described as a hallmark of the States' early experiences with religious establishment. Every state establishment saw laws passed to raise public funds and direct them toward houses of worship and ministers. And as the States all disestablished, one by one, they all undid those laws."[10]

New Jersey, Pennsylvania, Maryland, North Carolina, and Virginia all began this process in the year of American independence, 1776. Other states took longer to realize the severe problems with sponsoring or financially supporting religion, disestablishing up through the 1830s.[11]

In his Virginia bill for establishing religious freedom, Thomas Jefferson explained that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty . . . ."[12] Madison shepherded this bill through the Virginia legislature and, when president, applied the same principle to veto a bill that would have given a D.C. Episcopal church government funds to educate and care for orphans.[13]

This history is crucial to the issue before this Committee. These states experienced religious establishments and made a careful decision after lengthy debates to stop taxing citizens to

support religion because doing so violated the civil rights of those citizens. This was a hard-learned lesson over decades of living in a pluralistic America, which has only become more diverse.

This history seems distant today, but was the result of centuries—millennia—of oppression by religion blended with government. We should not spurn such lessons. Thanks to the separation of state and church, we have not had that oppressive experience. As a result, Americans have a certain amount of complacency and no real understanding that these provisions protect religious freedom. That has led bodies like this Committee to consider whether or not they are still valuable. They are, and I hope we don't find out the hard way.

The early implementation of the no-funding principle shows that, in an effort to create inclusive schools for all citizens, various states banned funds for "sectarian" schools of *all* denominations, not only Catholic schools.

Another hallowed American constitutional principle, equality, also needed constitutional amendments and supporting statutes to mature and realize its full potential. Like the no-funding principle, without that evolution it was mainly aspirational. Also like the no-funding principle, creating a universal public school system brought the issue to the fore. Indeed the idea that government should not tax citizens to support religion is intimately tied to the idea of nonsectarian schools for all citizens.

The no-funding principle was so integral to the American founding, it necessarily influenced the later debate over common schools and parochial schools. As the leading expert in this history, Prof. Steven Green explained that the "impulse toward nonsectarian public education was based on noble, republican ideals. The fact that nativist groups hijacked the no-funding principle for their bigoted aims does not invalidate the concept or mean that all advocates of the no-funding principle supported nativist goals."[14]

Separating religion from public schools was even a concern for some founders. Thomas Jefferson's plan for public elementary schools excluded religion: "Instead therefore of putting the Bible and Testament into the hands of the children, at an age when their judgments are not sufficiently matured for religious enquiries, their memories may here be stored with the most useful facts from Grecian, Roman, European and American history."[15]

New York City first attempted to create these nonsectarian or "common" schools in 1805. The nonsectarian schools, run by the Free School Society, would not be considered sufficiently nonsectarian by today's more evolved standards. But the more important aspect of this period is that those nonsectarian schools were favored, on religious liberty grounds, over "sectarian" schools—***including sectarian schools that were Protestant***.

After a sectarian school run by the Bethel Baptist Church (a Protestant sect) applied for public funds in the early 1820s, the various legislative bodies controlling funds for New York City schools decided that such a grant would violate "a fundamental principle . . . to allow the funds of the State, raised by a tax on the citizens, designed for civil purposes, to be subject to the control of any religious organization."[16]

This is significant because sectarian Protestant schools were found to violate the no-funding principle before Catholic schools and Catholic immigration surged in NYC.

Moreover, six years later, the Roman Catholic Orphan Asylum was *granted* funding, on the understanding that it would be used to support orphans, while at the same time the Methodist Charity School was denied funding because it was sectarian—even though it was Protestant. The Methodists were denied because "to raise a fund by taxation, for the support of a particular sect, or every sect of Christians . . . would unhesitatingly be declared an infringement of the Constitution, and a violation of our chartered rights."[17]

This history gives lie to the idea that refusing to fund religion and religious schools is anti-Catholic. Catholic schools were denied funds decades later, but by then (about 1841) the no-funding principle was firmly established. Importantly, both the no-funding principle and the idea of universal public education predate significant Catholic immigration and subsequent demands for taxpayer funds.

New York is not an outlier; other states followed a similar pattern.

The history of No Aid Clauses in the Midwest—Ohio, Wisconsin, Indiana, and Michigan—shows that they were motivated by religious freedom and a desire to educate all citizens, not by anti-Catholic bigotry. Each of these states adopted No Aid Clauses in their constitutions decades before Blaine's federal amendment[18] was even proposed and when there were no "significant conflicts over parochial schools."[19]

Catholic schools were not established in Wisconsin when the provision was adopted and critics have failed to document any anti-Catholic bigotry in Wisconsin's establishment of common schools.[20]

Prof. Green summed it up like this: "there is little evidence that anti-Catholicism or disdain for Catholic schooling played a significant role in the development of the no-funding principle or in the enactment of many no-funding provisions prior to the Civil War."[21]

The same is true of Florida. As Florida courts have recognized, like other state No-aid Clauses, "nothing in the history or text of the Florida no-aid provision suggests animus towards religion."[22] Nor was there any contemporaneous suggestion, including from any of the many Catholic Churches in Florida, that the provision was anti-Catholic, either when it was initially adopted in 1885 or when revised in minor ways in 1968, 1977, or 1997.[23] Put simply, "there is no evidence of religious bigotry relating to Florida's no-aid provision . . . nothing in the proceedings . . . indicates any bigoted purpose in retaining the no-aid provision."[24]

More importantly, the Florida No Aid Clause has never been used to discriminate against Catholics—it has been used to maintain a secular government and thereby protect the religious freedom of Florida citizens. If it truly were meant to discriminate, passed to discriminate, and designed to discriminate, it is a curious failure in the long, sad history of discrimination. Like the Florida Constitution, the history of the federal and state constitutions show a concern for religious freedom in state-church clauses, not a desire to discriminate.

The history is clear: the no-funding principle and the No Aid Clauses which embody it are meant to foster religious freedom. To abandon them is to curtail religious freedom.

The No Aid Clauses of the 1870s were partially a response to the Catholic Church pushing for public funds for its parochial schools.

Many American Catholics during the 1870s actually *wanted* the funding prohibitions that the No Aid Clauses provided.[25] However, the Catholic Church in America did attempt to grab a chunk of public funds for its school systems. It even sought its own constitutional amendments to do so.[26] Indeed, when Colorado was debating its no-aid clause, the Church's "anti-Catholic" allegations seem to have been "motivated by financial considerations," as even some state appellate judges recently pointed out.[27]

This push for public funds for parochial schools, which was sometimes successful even in places with No Aid Clauses (again belying the anti-Catholic claims),[28] helped bring the issue of religion in public schools to the fore and showed the need for a permanent solution. Prof. Green explained it like this: "As information about the syphoning of monies from school funds became public, many Protestants began calling for legislation prohibiting sectarian control over public schools and the diversion of public funds to religious institutions. State legislatures responded quickly. By 1876 fourteen states had joined New York in passing measures prohibiting the division of public school funds, often in the form of constitutional amendments. By 1890, the number of states with constitutional prohibitions against the transfer of public funds would rise to twenty nine."[29]

Protestants had the unwarranted and unconstitutional privilege of using the public schools and taxpayer funds to promote their religion. Catholics understandably wanted the same privilege. Catholic challenges to this Protestant privilege inspired the No Aid Clauses. Rather than expand unwarranted privileges that trampled citizens' rights not to fund religion, we the people removed those baseless entitlements from all.

An educated public is necessary to a healthy democratic republic, as more than one founder observed.[30] The government can, of course, provide a generic baseline benefit, an education free of religious divisiveness, to all citizens. This educational core—math, science, English, history, art, etc.—can and should be augmented by parents, who can farm that out to churches or religious schools if they so choose.

This much is clear: There is no discrimination in providing the same baseline benefit to all citizens. But what if the government allows—even though it shouldn't—one religion an edge, an unwarranted privilege? Can the government, when challenged, remove that benefit or must the government extend the benefit to all?

This is the central question: was invoking the no-funding principle—a principle central to America's founding and to religious freedom—a legitimate response to these requests? Yes, because barring an unwarranted privilege to all via No Aid Clauses promoted equality, not favoritism. Denying an unconscionable entitlement is equality, not discrimination. A pair of self-evident examples may help illustrate this point.

In the 1960s, Maurice Bessinger refused to let a minister's wife enter his South Carolina barbeque joint because she was black. He believed he had "a constitutional right to refuse to serve members of the Negro race in his business establishments [and] that to do so would violate his sacred religious beliefs."[31] Accustomed to this dubious privilege, Bessinger fought the

subsequent lawsuit all the way to the Supreme Court. He argued "that the [Civil Rights] Act was invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion."[32] No court countenanced the religiously motivated discrimination, however well-entrenched.

Bob Jones, the televangelist and founder of an eponymous religious school, infamously declared that segregation was scriptural in his 1960 Easter sermon: "If you are against segregation and against racial separation, then you are against God . . . ."[33] Bob Jones University enjoyed tax exemption, a privilege. But the IRS revoked the tax exemption because the school discriminated on the basis of race. BJU sued the government, arguing that its religious beliefs required the discrimination and that the government could not remove its privilege because of its religion. The Supreme Court held that the "governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[34]

These two examples tell us two things. *First*, correcting religiously motivated discrimination is not anti-religious. Parity is not oppression. The erosion of unwarranted privilege is not persecution. This was simply a waypoint on the steady march toward realizing true equality, a founding principle that required periodic reinvigoration by new laws and amendments. *Second*, there is no religious right to violate that important founding ideal. Similarly, laws and amendments strengthening the no-funding principle, even if they remove a religious privilege, are not anti-religious. Nor is their a religious right to violate the no-funding principle, especially given that it protects religious freedom.

Often we cannot see how the rights of minorities are violated until there is a clash, until equality is demanded. The conflict sparks societal friction which in turn produces light.[35] As Catholics began seeking what they viewed as equal funding for parochial schools, many Protestants began to realize for the first time that funding religious education is a serious violation of civil rights. It was not until the majority walked in minority shoes that it began to understand the problem. The Catholic challenge bred empathy, not antipathy.

The No Aid Clauses exclude all religions alike, as they were intended to.

The principal counterargument to the solution in the last point is that, while there may be nothing wrong with removing funding from all religions, that is not what the No Aid Clauses did. Instead, the argument goes, No Aid Clauses funded Protestant schools but excluded Catholic schools. The implication is that No Aid Clauses are discriminatory in practice and that all religious schools should be funded to remedy this discrimination.

But this counter-argument points to an abuse of constitutional principles to support its point. It argues that two wrongs make a right. It's like opening a restaurant in the 1960s and pointing to Bessinger, the stubborn racist, to show that you must be allowed a religious right to violate the Civil Rights Act too. Or pointing to Bob Jones University to claim your religious school can discriminate against non-whites and not pay taxes. It may be true that Protestants used public schools to promote their religion, but that does not make it right, legal, or constitutional.

Put another way, this argument assumes that promoting Protestantism in public school was permissible, rather than violating the rights of students. And this too is belied by history.

In a rather famous 1890 case—it was cited by Justice Brennan in his *Schempp* opinion[36]—the Wisconsin Supreme Court ruled that the Wisconsin No Aid Clause[37] prohibited bible readings in the public schools:

> The only object, purpose, or use for taxation by law in this state must be exclusively secular. There is no such source and cause of strife, quarrel, fights, malignant opposition, persecution, and war, and all evil in the state, as religion. Let it once enter into our civil affairs, our government would soon be destroyed. Let it once enter into our common schools, they would be destroyed.[38]

The case was brought by Catholic families.

Catholic families successfully kept public schools secular using this supposedly anti-Catholic/pro-Protestant provision. And of course, this is the correct decision. The public schools should not be promoting religion, "no one's religion can be taught in our common schools."[39] But the fact that the Protestant majority was abusing its majoritarian status does not mean that these No Aid Clauses are all tainted with an anti-Catholic bias. The solution today is still what it was in 1890, to keep all religion out of the public schools, keep them secular, and to use taxpayer funds for our secular government, not for religious schools and churches.

Even now, some use the machinery of the government to impose their religion on others. The nonprofit I represent, the Freedom From Religion Foundation, exists because people disregard clear constitutional rules *all the time*. We get about 5,000 state church complaints every year from all over the country. In the past five years, we've received more than 1,250 complaints from Florida, addressing more than 400 different violations. I have a job because in our democratic republic, individuals occupying government offices and employed by the government often use their public power to promote their personal religion.

We deal with hundreds of issues that courts have ruled unconstitutional. Creationism is still taught in public schools, regularly. I've dealt with seven separate instances of public school teachers preaching creationism in 2017 alone. In the last three school years, we've dealt with more than 350 instances of school district staff imposing prayer on their students. We even had to sue a school district in Georgia for refusing to stop its teachers from organizing daily prayer with their first and second grade classes.[40]

These are long-standing prohibitions over which there is no dispute. The courts have been clear. And yet, the law is disregarded. But if legislatures were to take up this clear problem and pass an amendment against teaching creationism or against teachers imposing prayer on other people's children, those amendments would not be anti-Christian. If Catholics sought to have their prayers included in the illegal classroom prayers and that prompted such an amendment, it would not be an anti-Catholic amendment, though it would surely be smeared as such.

Protestants had been using the machinery of the state to propagate their religion. When Catholics sought to do the same, the Protestant error became clear and a constitutional solution at the federal level was sought.

The federal Blaine Amendment was motivated partly by politics, but also substantially by President Grant's call for stronger state-church separation.

Not all the motivations for No Aid Clauses were high-minded. Sister Marie Carolyn Klinkhamer, who was writing in *The Catholic Historical Review* as a associate professor at the Catholic University of America, concluded that the federal Blaine amendment was "suggested for purely political reasons," and though it failed, it "inflamed the anti-Catholic, anti-foreign, anti-Negro passions of many persons in the United States."[41] Blaine, who would eventually propose the amendment, thought it might propel him to a presidential nomination. It didn't. In other words, it was not motivated by animosity or bigotry, but bigots adopted the cause.

While some anti-Catholic groups may have agreed with the no-funding principle a century after its inception, that does not detract from the value of the idea. To argue against the principle, or even a constitutional provision implementing the principle, on that basis is like arguing that laws protecting free speech and free assembly are anti-semitic because the principles underlying those laws protect the rights of National Socialists along with everyone else.[42] To try and paint the entire concept, the idea, the principle as anti-Catholic is to oppose every principle, even those enshrined in the Constitution, because a few bigots also fight for those principles.

This is an attempt to use a logical fallacy to paint state-church separation as an instrument of oppression rather than as armor for our rights of conscience. This logical fallacy even has a name, the "genetic fallacy," which attacks not the merits of an idea, but its origins. Here, the true origin of the idea is the American founding, but by alleging origins that are anti-Catholic, opponents can taint a principle that was sacred to our country long before Blaine was a glint in his Roman Catholic mother's eye. That undeniable fact cannot be avoided, so instead it is stigmatized.

Sister Klinkhamer also explains that the impetus for the federal Blaine Amendment was President Ulysses Grant's speech to a joint Session of Congress one week before the amendment was introduced, which in turn was based on his earlier remarks to the Army of the Tennessee in Iowa on September 29, 1875.[43]

Grant's speech was a clarion call to strengthen America's secular foundations. It was not an attack on Catholicism, but an appeal to continue the work of the Founding Fathers:

> The centennial year of our national existence, I believe, is a good time to begin the work of **strengthening the foundations of the structure commenced by our patriotic forefathers** one hundred years ago at Lexington. **Let us all labor to add all needful guarantees for the security of free thought, free speech, a free press, pure morals, unfettered religious sentiments, and of equal rights and privileges to all men, irrespective of nationality, color or religion. Encourage free schools and resolve that not one dollar, appropriated for their support shall be appropriated to the support of any sectarian schools**. Resolve that neither the state nor nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child growing up in the land the opportunity of a good common school education, **unmixed with sectarian, pagan or atheistical dogmas. Leave the matter of religion to the family altar, the Church, and the private school, supported entirely by private contributions. Keep the Church and State forever separate.**[44]

Free thought. Free speech. Free press. Advance religious freedom by leaving religion to the family, not the government. Let private schools be funded with private contributions. Keep state and church forever separate. These are core constitutional principles, not anti-Catholic sentiments. Grant focused on religious freedom and equality—no dogma, be it religious, atheist, or pagan, should be favored.

Grant's speech was well received. A New York Times editorial of the amendment said that it "expresses a conviction profoundly cherished by a very large part of the American people."[45] The sole criticism of the speech came from the Catholic Church and even it admitted that "if the President's speech could be accepted at face value, Catholics would have few complaints with its content."[46]

The Catholic Church's criticism was married to a substantial financial stake, the unwarranted privilege it had been seeking. The Church asked either for public funds for its schools or "to free Catholics from the tax burden of supporting public schools."[47] The Church was asking for what it considered to be its fair share of taxpayer funds when it maligned the proposal that would prevent it from receiving that money as "a veiled attack on Catholicism."[48]

Abandoning No Aid Clauses and the no-funding principle will inhibit religious freedom.

The purpose of the no-funding principle, No Aid Clauses, and state-church separation is to promote religious freedom. There can be no freedom of religion without a government that is free from religion. Doing away with these provisions and taxing citizens to support religion, even indirectly, will inhibit religious freedom. That the Committee is even considering it is alarming.

Justice Robert Jackson was a titan of the Supreme Court. He took a leave of absence from the court to prosecute Nazi war crimes as U.S. Chief of Counsel at Nuremberg. He checked himself out of the hospital on the day *Brown v. Board of Education* was handed down to be present in the courtroom and emphasize the Court's unanimity in that historic case. In the *Korematsu* case, he wrote one of the Court's most famous dissents, condemning America's WWII internment camps for citizens of Japanese ancestry. In a less famous, though equally powerful dissent, he explained how our Constitution protects religious freedom:

> [T]he effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. **That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom . . .. This freedom was first in the Bill of Rights because it was first in the forefathers' minds**; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy **or the public purse**.[49]

State-church separation gives churches some significant benefits, like exclusion from taxation. Attached to these benefits are burdens, most importantly that taxpayers will not fund your religion.

Removing important protections such as No Aid Clauses changes that. The push to eviscerate No Aid Clauses is meant to augment the benefit churches receive under the separation of state and church and to minimize the burdens. Put simply, this push is about giving churches special treatment. Churches want to have their cake—which they think American taxpayers must buy—and eat it too.

If this movement is successful, it will impact religious freedom in two ways. First and most obviously, it will force citizens to bankroll creeds antithetical to their own. Second, and perhaps less obvious because it seems unlikely, is that this will lead to great oversight, control, and entanglement of the government in religion.

Vouchers and school choice provide a perfect example of this second issue. Regulations on private religious schools are foreordained because unregulated funds flowing to unaccountable organizations guarantees abuse. We've seen this play out in the country's longest-lived voucher program. In Milwaukee, over a 10-year period, more than $139 million in taxpayer funds went to voucher schools that failed to meet standards.[50] That's almost $140 million of our money, wasted on religious schools that failed our students.

Unregulated as they currently are, abuse in religious schools that receive taxpayer funds is rife. Examples include:

- Setting up shop in office and industrial buildings that lack a safe place for students to play outside.[51]
- Serving students ramen noodles with hot sauce and a cup of water for lunch before the school was removed from the National School Lunch Program.[52]
- Failing to provide textbooks to students.[53]
- Adopting a "science" curriculum that claims to refute "the man-made idea of evolution."[54]
- Teaching a fundamentalist curriculum, including revisionist U.S. history. One text notoriously said, "The majority of slave holders treated their slaves well."[55]

The solution to these problems is inevitable: accountability through government oversight. Ultimately, publicly funded schools will be regulated. Maybe not now, perhaps not for years, but accepting public money ***will*** open private schools to public oversight and governmental entanglement. The question is not if, but when.

It is shortsighted for religious freedom advocates to believe otherwise and invite such regulation by insisting on a right to dip into the public purse.

Trinity Lutheran's impact on Florida's No Aid clause and vouchers is minimal.

Earlier this year, the Supreme Court decided *Trinity Lutheran v. Comer*, holding that the state could not bar a school, even a religious school, from a state program that resurfaced playgrounds.[56] The First Amendment's Free Exercise Clause prevented a state from denying a

generally available benefit solely because of an applicant's religion, when the benefit does not further that religion.

The *Trinity Lutheran* decision did not analyze or address any federal Establishment Clause concerns,[57] nor did it declare Missouri's No Aid provision unconstitutional. The Court did not analyze whether extending such a grant violated the no-funding principle in those provisions, instead relying on concessions by two parties who, by the time of oral argument, agreed that the church should be eligible for the grants.[58] This is a glaring defect in the case, as Justice Sotomayor explained: "Constitutional questions are decided by this Court, not the parties' concessions. The Establishment Clause does not allow Missouri to grant the Church's funding request because the Church uses the Learning Center, including its playground, in conjunction with its religious mission."[59]

In other words, *Trinity Lutheran* did not explore the famous "play in the joints" between the Free Exercise Clause and the Establishment Clause of the First Amendment because the Court failed to examine one of the two clauses restricting that latitude. Instead, it focused solely on the Free Exercise Clause.

That limited analysis severely confines the opinion, especially when paired with its explicit limiting language: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."[60]

Perhaps most importantly, *Trinity Lutheran* does not apply to voucher programs. As others have pointed out, "*Trinity Lutheran* can have no applicability to voucher programs, in which the government typically provides to parents funds that they can use to pay tuition for their children to attend the private school of their choice – and in which the overwhelming majority of the private-school options available to parents typically are schools operated by churches and other religious institutions that have as a central purpose the inculcation of religious belief. A state constitutional provision that prohibits the use of public funds for such a purpose disqualifies no one from receiving a public benefit on the basis of his or her status."[61]

Moreover, the opinion was circumscribed to an activity that was not advancing religion in the manner that religious education does. This goes to the distinction between "use" and "status" on which Chief Justice Roberts based his rationale.[62] Florida's No Aid Clause can reasonably be interpreted within this framework, and indeed, it already has been.

Conclusion

Atheists and agnostics now make up 7% of the total U.S. population, which is more than Mormons, Jews, Hindus, Muslims, Jehovah's Witnesses and Buddhists ***combined***.[63] About 12% of millennials are atheist or agnostic.[64] Overall, 23% Americans identify as nonreligious.[65] That 8-point increase since 2007[66] and 15-point jump since 1990 makes the "nones" the fastest growing identification in America.[67] Nationally, about 35% of millennials—born after 1981—are nonreligious.[68]

New studies suggest that the number of atheists is significantly higher.[69] Recognizing that atheists are heavily stigmatized in this country and might be disinclined to use the label when

talking to a researcher, a recent study used a subtler and less direct technique to get at participants' religious beliefs. It concluded that about 26% of Americans do not believe in God.

In the minds of some school choice activists, the rise of nonreligion and the erosion of traditional Protestantism in this country is due to public schools. These same activists "see the weakening of support for public education as a desirable side effect or even a goal of their work. Indeed, the national groups most active in supporting religious initiatives in public schools see our system of public education as a bad thing. These are the same groups that sponsor efforts to undermine, defund, and perhaps ultimately destroy the system altogether."[70]

Sometimes, they are open about this goal. Kyle Olson helped create and chaired National School Choice Week through its 2011 birth, and as its executive director he wrote, "I would like to think that, yes, Jesus would destroy the public education temple and save the children from despair and a hopeless future."[71] School choice is theoretically about privatizing education, but for many it's about ending public education.

And that is what will happen if We the People abandon the no-funding principle and No Aid Clauses. Not only will citizens be taxed to support religions in violation of their rights of conscience, and not only will this call down extensive state regulation of religious operations, it will also destroy our public schools.

ENDNOTES

[1] Letter to Edward Livingston, July 10, 1822.

[2] Steven Green, *'Blaming Blaine': Understanding the Blaine Amendment and the 'No-Funding' Principle*, 2 FIRST AMENDMENT L. REV. 107 (2004).

[3] *See also* Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & POL. 65 (2002).

[4] "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." *Engel v. Vitale*, 370 U.S. 421, 435 (1962).

[5] James Madison, *Memorial and Remonstrance Against Religious Assessments*, Para. 1 (1785).

[6] *Id*.

[7] 15 Aug. 1789, 1 Annals of Congress 729–31, The Debates and Proceedings in the Congress of the United States. "History of Congress." 42 vols. (Washington, D.C., Gales & Seaton, 1834–56), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_religions53.html.

[8] Benjamin Franklin, Letter to Richard Price (Oct. 9, 1780).

[9] *Walz v. Tax Comm'n of City of N.Y.,* 397 U.S. 664, 668 (1970).

[10] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2033 (2017) (Sotomayor, J., dissenting).

[11] For a decently comprehensive summary of this history, with citations, see *id.* at 2032-36.

[12] "82. A Bill for Establishing Religious Freedom, 18 June 1779," *Founders Online,* National Archives, last modified June 29, 2017, http://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082. [Original source: *The Papers of Thomas Jefferson*, vol. 2, *1777–18 June 1779*, 545–53 (Julian P. Boyd. ed., Princeton University Press, 1950).

[13] *See*, Annals of Congress, House of Representatives, 11th Congress, 3rd Session (1811) at 982–85, *available at* https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=022/llac022.db&recNum=488; James Madison, *Veto*

Message, Feb. 21, 1811, The American Presidency Project (Gerhard Peters and John T. Woolley), http://www.presidency.ucsb.edu/ws/?pid=65921.

[14] Green, *supra* note 2, at 113.

[15] *Thomas Jefferson, Notes on the State of Virginia, Queries 14 AND 19*, The Founders' Constitution Vol. 1, Ch. 18, Document 16 (Univ. of Chicago Press), http://press-pubs.uchicago.edu/founders/documents/v1ch18s16.html.

[16] Green, *supra* note 2, at 121.

[17] *Id.* at 122-24.

[18] Michigan (1835); Wisconsin (1848); Indiana (1851); Minnesota (1857).

[19] Green, *supra* note 2, at 127.

[20] Lloyd Jorgenson, *The Founding of Public Education in Wisconsin*, 68-93 (1956).

[21] Green, *supra* note 2, at 128.

[22] *Bush v. Holmes*, 886 So. 2d 340, 364 (Fla. Dist. Ct. App. 2004), *aff'd in part*, 919 So. 2d 392 (Fla. 2006).

[23] JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF FLORIDA, WHICH CONVENED AT THE CAPITOL, AT TALLAHASSEE, ON TUESDAY, JUNE 9, 1885 (Tallahassee, Fla., N. M. Bowen 1885); Nathan A. Adams, Pedigree of an Unusual Blaine Amendment: Article I, Section 3 Interpreted and Implemented in Florida Education, 30 NOVA L. REV 1, 43 (2005).

[24] *Bush v. Holmes*, 886 So. 2d at 351n.9.

[25] Speaking of the federal Blaine Amendment that came out of the Senate Judiciary Committee, Senator Theodore Fitz Randolph (N.J.) noted that "Most Protestants urge taxation for the support of public schools, in which they would have limited religious instruction. Catholics would have no general taxation for the purpose; or if any be had, then an equitable distribution of the moneys raised. The Catholic preference is for an education dependent upon the will of the parent, or the zeal of rival religious organizations." Congressional Record, 44th Congress, 1st Session, Vol. 4, 5455 (1876), *available at* https://books.google.com/books?id=PrppAAAAcAAJ&pg=PA5455&lpg=PA5455.

[26] "in spite of strenuous efforts in Ohio, Massachusetts, and other places, Roman Catholics have not been able to secure an amendment to a state constitution that would permit grants from public funds to parochial schools," wrote Anson Stokes in his classic, *Church and State in the United States*. Anson Stokes, II *Church and State in the United States*, 71 (Harper & Brothers 1950, New York).

[27] *Douglas Cnty.*, 356 P.3d at 867, ¶ 191–92 (Bernard, J., dissenting).

[28] In 1871 the Catholic diocese of New York City received more than $700,000—about $193,000,000 today—in taxpayer money for parochial education. Even though such grants were banned under the state's No Aid Clause. Steven Green, "The Blaine Amendment Reconsidered," 36 *The Am. Journal of Legal History* 38, 43 (1992). Determining relative historical value of a sum can offer a range of estimates depending on the method of measurement. MeasuringWorth.com is a valuable resource that provides valuations by different methods across the spectrum. In this case, it determined that "In 2016, the relative value of $700,000.00 from 1871 ranges from $12,900,000.00 to $1,700,000,000.00." I used the labor cost method assuming production worker compensation as opposed to an unskilled wage.

[29] Steven Green, "The Blaine Amendment Reconsidered," 36 *The Am. Journal of Legal History* 38, 43.

[30] Jefferson found it particularly important, "A system of general instruction, which shall reach every description of our citizens from the richest to the poorest, as it was the earliest, so will it be the latest of all the public concerns in which I shall permit myself to take an interest." Thomas Jefferson, Letter to Joseph C. Cabell, Jan. 14, 1818, in 10 *The Writing of Thomas Jefferson* 102 (ed. Paul L. Ford) (G.P. Putnam's Sons, 1899), *available at* https://books.google.com/books?id=InAsAAAAIAAJ&pg=PA98#v=onepage&q&f=false.

[31] *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968) (the issue on appeal was whether the CRA applied to the restaurants, not this conclusion.).

[32] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 403 n.5 (1968) *citing lower court opinion* 377 F.2d 433, 437–438.

[33] Bob Jones Sr., *Is Segregation Scriptural?* (Greenville, SC: Bob Jones University, 1960). Originally a sermon given as a radio address on WMUU, on April 17, 1960 and later published in pamphlet form.

[34] *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

[35] It may have for Blaine too, "This adjustment, it seems to me, would be comprehensive and conclusive, and would be fair alike to Protestant and Catholic, to Jew and Gentile, leaving the religious faith and the conscience of every man free and unmolested." Green, *The Blaine Amendment Reconsidered*, 36 AM. J. OF LEGAL HISTORY 50 (citing J. Boyd, *Life and Public Services of Hon. James G. Blaine*, 353 (1893)).

[36] *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 292, 275 n.51 (1963) (J. Brennan, concurring).

[37] The court analyzed various parts of the clause, and specifically held that the fourth clause, that no money shall "be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries," what is often dubbed the Blaine Amendment, was also violated by the bible reading: "The thing that is prohibited is the drawing of any money from the state treasury for the benefit of any religious school. If the stated reading of the Bible in the school as a text–book is not only, in a limited sense, worship, but also instruction, as it manifestly is, then there is no escape from the conclusion that it is religious instruction; and hence the money so drawn from the state treasury was for the benefit of a religious school, within the meaning of this clause of the constitution." *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8 of City of Edgerton,* 76 Wis. 177, 44 N.W. 967, 980 (1890) (Cassoday, J., concurring).

[38] *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8 of City of Edgerton*, 76 Wis. 177, 44 N.W. 967, 981 (1890) (Orton, J., concurring). Interestingly, the language in the Wisconsin Supreme Court decision upholding the rights of Catholics and others to a secular public education sounds like Blaine himself, "The bitterest of all strifes is the strife between religious sects, and if that strife be permitted to cross the threshold of our public schools, free education in this country is at an end." He went on to say, "We must have absolute religious toleration." *See* James Gillespie Blaine letter to A.T. Wikoff, October 29, 1875 in *James Gillespie Blaine family papers*, Library of Congress, http://hdl.loc.gov/loc.mss/eadmss.ms003039 quoted and cited by Sister Marie Carolyn Klinkhamer, "The Blaine Amendment of 1875: Private Motives for Political Action," 42 *Catholic Historical Review* 22 (1955).

[39] *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8 of City of Edgerton*, 76 Wis. 177, 44 N.W. 967, 981 (1890) (Orton, J., concurring).

[40] *See* https://ffrf.org/news/news-releases/item/24220-ffrf-court-victory-ga-school-stops-school-prayer.

[41] Sister Marie Carolyn Klinkhamer, "The Blaine Amendment of 1875: Private Motives for Political Action," 42 *Catholic Historical Review* 49 (1956).

[42] *See, e.g., Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977) which paired the ACLU with Nazis to fight for those two rights.

[43] Sister Marie Carolyn Klinkhamer, "The Blaine Amendment of 1875: Private Motives for Political Action," 42 *Catholic Historical Review* 15–16 (1956).

[44] Anson Stokes, II *Church and State in the United States*, 68.

[45] *New York Times*, June 16, 1876, pp. 2, 4.

[46] Steven Green, "The Blaine Amendment Reconsidered," 36 *The Am. Journal of Legal History* 48.

[47] *Id*.

[48] *Id*.

[49] *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 26–27, (1947) (Jackson, J., dissenting).

[50] Molly Beck, "State paid $139 million to schools terminated from voucher program since 2004," *Wisconsin State Journal*, Oct. 12, 2014.

[51] Barbara Miner, "Do Children Deserve Playgrounds? 'Maybe,' Says Milwaukee's Common Council," *Milwaukee Journal Sentinel*, Aug. 2, 2012, *available at* http://archive.jsonline.com/blogs/purple-wisconsin/164835586.html.

[52] Tony Evers, Letter to Taron Monroe, June 28, 2011, *Freedom From Religion Foundation*, *available at* https://ffrf.org/uploads/legal/LifeSkillsDPIjune28.pdf.

[53] Erin Richards, "Former Employees Cast Doubt on Voucher School's Operations," *Milwaukee Journal Sentinel*, Dec. 15, 2014, *available at* http://archive.jsonline.com/news/education/former-employees-cast-doubt-on-voucher-schools-operations-b99407859z1-285881491.html.

[54]Rachel Tabachnick, "Vouchers/Tax Credits Funding Creationism, Revisionist History, Hostility Toward Other Religions," *K-12 News Network*, May 25, 2011, *available at* http://k12newsnetwork.com/blog/2011/05/25/voucherstax-credits-funding-creationism-revisionist-history-hostility-toward-other-religions/.

[55] *Id*.

[56] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017).

[57] *Id.* ("The parties agree that the Establishment Clause of that Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program.")

[58] *See, e.g.,* Amy Howe, "Missouri reverses course on aid to religious organizations (UPDATED)," *SCOTUSblog*, Apr. 14, 2017, 10:54 AM, *available at* http://www.scotusblog.com/2017/04/missouri-reverses-course-aid-religious-organizations/.

[59] *Trinity Lutheran*, 137 S. Ct. at 2028 (Sotomayor, J., dissenting).

[60] *Id.* at 2024 n.3.

[61] Alice O'Brien, "Symposium: Playground resurfacing case provides soft landing for state 'no aid' provisions," *SCOTUSblog*, Jun. 28, 2017, *available at* http://www.scotusblog.com/2017/06/symposium-playground-resurfacing-case-provides-soft-landing-state-no-aid-provisions/.

[62] *Trinity Lutheran*, 137 S.Ct. at 2019–21.

[63] *America's Changing Religious Landscape*, PEW RESEARCH CENTER, May 12, 2015, *available at* www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

[64] *Id.*

[65] *Id.*

[66] *Nones on the Rise: One-in-Five Adults Have No Religious Affiliation*, THE PEW FORUM ON RELIGION & PUBLIC LIFE (October 9, 2012), *available at* http://www.pewforum.org/Unaffiliated/nones-on-the-rise.aspx.

[67] Barry Kosmin, *National Religious Identification Survey* 1989–1990.

[68] *America's Changing Religious Landscape*, PEW RESEARCH CENTER, May 12, 2015, *available at* www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

[69] Will M, Gervais and Maxine B Najle, "How Many Atheists Are There?," March 3, 2017, available at https://osf.io/preprints/psyarxiv/edzda.

[70] Katherine Stewart, *The Good News Club: The Christian Right's Stealth Assault on America's Children*, 5 (Public Affairs, 2012).

[71] Kyle Olson, "Jesus Isn't in Michigan," *Townhall.com*, March 18, 2011, *available at* https://townhall.com/columnists/kyleolson/2011/03/18/jesus-isnt-in-michigan-n1034051. He went on to say, "And he would smash a temple that has been perverted to meet the needs of the administrators, teachers, school board members, unions, bureaucrats and contractors. But, Jesus isn't in Michigan – or Indiana – so it's incumbent upon leaders to do something about it. And in Indiana, they're trying." *See also* Katherine Stewart, *The Good News Club: The Christian Right's Stealth Assault on America's Children* at 254.

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

Nov 29, 2017
Meeting Date

P-4
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Religious Freedom

***Name** Pamela Burch Fort

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Tallahassee FL 32301
City *State* *Zip*

Phone 850-425-1344

Email TcgLobby@aol.com

***Speaking:** ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☑ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? ACLU of Florida

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

4.

Meeting Date

Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** No-Aid clause, P. 4

***Name** Jiri Hulcr

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Street

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City State Zip

Phone

Email hulcr@ufl.edu

***Speaking**: ☐ For ☒ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who?

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

29 Nov 17
Meeting Date

4
Proposal Number (if applicable)

***Topic** P.4 NO-AID CLAUSE PROPOSITION

Amendment Barcode (if applicable)

***Name** JOSEPH RICHARDSON

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Street

Phone 407-340-0799

WINTER GARDEN FL 34787
City *State* *Zip*

Email

***Speaking:** ☐ For ☑ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who?

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

11/28/17
Meeting Date

~~PC~~ P4
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** "No-Aid" Provision

***Name** Rich Templin

Address 135 S. Monroe
Street

Phone 850-224-6926

Tallahassee FL 32301
City *State* *Zip*

Email

***Speaking**: ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☒ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? Florida AFL-CIO

Are you a registered lobbyist? ☐ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☐ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

11/29/17
Meeting Date

Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Art I §3

***Name** Mary Adkins

Address PO Box 511 Phone 352 316 3693
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Melrose FL 32666 Email adkinsm@law.ufl.edu
City *State* *Zip*

***Speaking**: ☐ For ☒ Against ☒ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who? Kind of; as an LWVF member as historian

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

November 29, 2017
Meeting Date

P 4
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Religious freedom proposal

***Name** Marco Paredes

Address 200 W Park Ave
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Tallahassee FL 32301
City *State* *Zip*

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Email mparedes@flaccb.org

***Speaking:** ☑ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? Florida Conference of Catholic Bishops

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

PREAMBLE

We, the people of the State of Florida, being grateful to Almighty God for our constitutional liberty, in order to secure its benefits, perfect our government, insure domestic tranquility, maintain public order, and guarantee equal civil and political rights to all, do ordain and establish this constitution.

ARTICLE I

DECLARATION OF RIGHTS

Sec.

SECTION 1. Political power.—All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

SECTION 2. 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.

History.—Am. S.J.R. 917, 1974; adopted 1974; Am. proposed by Constitution Revision Commission, Revision No. 9, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

SECTION 3. Religious freedom.—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. 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.

SECTION 4. Freedom of speech and press.—Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

History.—Am. proposed by Constitution Revision Commission, Revision No. 13, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

SECTION 5. Right to assemble.—The people shall have the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances.

SECTION 6. Right to work.—The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

SECTION 7. Military power.—The military power shall be subordinate to the civil.

SECTION 8. Right to bear arms.—

(a) The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.

(b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, "purchase" means the transfer of money or other valuable consideration to the retailer, and "handgun" means a firearm capable of being carried and used by one hand, such as a pistol or revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.

(c) The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.

(d) This restriction shall not apply to a trade in of another handgun.

History.—Am. C.S. for S.J.R. 43, 1989; adopted 1990.

SECTION 9. Due process.—No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

History.—Am. proposed by Constitution Revision Commission, Revision No. 13, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

SECTION 10. Prohibited laws.—No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.

SECTION 11. Imprisonment for debt.—No person shall be imprisoned for debt, except in cases of fraud.

SECTION 12. Searches and seizures.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

History.—Am. H.J.R. 31-H, 1982; adopted 1982.

SECTION 13. Habeas corpus.—The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.

SECTION 14. Pretrial release and detention.—Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

History.—Am. H.J.R. 43-H, 1982; adopted 1982.

SECTION 15. Prosecution for crime; offenses committed by children.—

(a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

(b) When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. Any child so charged shall, upon demand made as provided by law before a trial in a juvenile proceeding, be tried in an appropriate court as an adult. A child found delinquent shall be disciplined as provided by law.

SECTION 16. Rights of accused and of victims.

(a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

(b) Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

History.—Am. S.J.R. 135, 1987; adopted 1988; Am. proposed by Constitution Revision Commission, Revision No. 13, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

SECTION 17. Excessive punishments.—Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be

lawfully executed by any valid method. This section shall apply retroactively.

History.—Am. H.J.R. 3505, 1998; adopted 1998; Am. H.J.R. 951, 2001; adopted 2002.

SECTION 18. Administrative penalties.—No administrative agency, except the Department of Military Affairs in an appropriately convened court-martial action as provided by law, shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law.

History.—Am. proposed by Constitution Revision Commission, Revision No. 13, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

SECTION 19. Costs.—No person charged with crime shall be compelled to pay costs before a judgment of conviction has become final.

SECTION 20. Treason.—Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort, and no person shall be convicted of treason except on the testimony of two witnesses to the same overt act or on confession in open court.

SECTION 21. Access to courts.—The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

SECTION 22. Trial by jury.—The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

SECTION 23. Right of privacy.—Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

History.—Added, C.S. for H.J.R. 387, 1980; adopted 1980; Am. proposed by Constitution Revision Commission, Revision No. 13, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

SECTION 24. Access to public records and meetings.—

(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

(b) All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

(c) This section shall be self-executing. The legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch. Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.

(d) All laws that are in effect on July 1, 1993 that limit public access to records or meetings shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed. Rules of court that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed.

History.—Added, C.S. for C.S. for H.J.R.'s 1727, 863, 2035, 1992; adopted 1992; Am. S.J.R. 1284, 2002; adopted 2002.

[1]SECTION 25. Taxpayers' Bill of Rights.—By general law the legislature shall prescribe and adopt a Taxpayers' Bill of Rights that, in clear and concise language, sets forth taxpayers' rights and responsibilities and government's responsibilities to deal fairly with taxpayers under the laws of this state. This section shall be effective July 1, 1993.

History.—Proposed by Taxation and Budget Reform Commission, Revision No. 2, 1992, filed with the Secretary of State May 7, 1992; adopted 1992.

[1]**Note.**—This section, originally designated section 24 by Revision No. 2 of the Taxation and Budget Reform Commission, 1992, was redesignated section 25 by the editors in order to avoid confusion with section 24 as contained in H.J.R.'s 1727, 863, 2035, 1992.

SECTION 26. Claimant's right to fair compensation.—

(a) Article I, Section 26 is created to read "Claimant's right to fair compensation." In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first $250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of $250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.

(b) This Amendment shall take effect on the day following approval by the voters.

History.—Proposed by Initiative Petition filed with the Secretary of State September 8, 2003; adopted 2004.

SECTION 27. Marriage defined.—Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.

History.—Proposed by Initiative Petition filed with the Secretary of State February 9, 2005; adopted 2008.

ARTICLE II

GENERAL PROVISIONS

Sec.

SECTION 1. State boundaries.—

(a) The state boundaries are: Begin at the mouth of the Perdido River, which for the purposes of this description is defined as the point where latitude 30°16′53″ north and longitude 87°31′06″ west intersect; thence to the point where latitude 30°17′02″ north and longitude 87°31′06″ west intersect; thence to the point where latitude 30°18′00″ north and longitude 87°27′08″ west intersect; thence to the point where the center line of the Intracoastal Canal (as the same existed on June 12, 1953) and longitude 87°27′00″ west intersect; the same being in the middle of the Perdido River; thence up the middle of the Perdido River to the point where it intersects the south boundary of the State of Alabama, being also the point of intersection of the middle of the Perdido River with latitude 31°00′00″ north; thence east, along the south boundary line of the State of Alabama, the same being latitude 31°00′00″ north to the middle of the Chattahoochee River; thence down the middle of said river to its confluence with the Flint River; thence in a straight line to the head of the St. Marys River; thence down the middle of said river to the Atlantic Ocean; thence due east to the edge of the Gulf Stream or a distance of three geographic miles whichever is the greater distance; thence in a southerly direction along the edge of the Gulf Stream or along a line three geographic miles from the Atlantic coastline and three leagues distant from the Gulf of Mexico coastline, whichever is greater, to and through the Straits of Florida and westerly, including the Florida reefs, to a point due south of and three leagues from the southernmost point of the Marquesas Keys; thence westerly along a straight line to a point due south of and three leagues from Loggerhead Key, the westernmost of the Dry Tortugas Islands; thence westerly, northerly and easterly along the arc of a curve three leagues distant from Loggerhead Key to a point due north of Loggerhead Key; thence northeast along a straight line to a point three leagues from the coastline of Florida; thence northerly and westerly three leagues distant from the coastline to a point west of the mouth of the Perdido River three leagues from the coastline as measured on a line bearing south 0°01′00″ west from the point of beginning; thence northerly along said line to the point of beginning. The State of Florida shall also include any additional territory within the United States adjacent to the Peninsula of Florida lying south of the St. Marys River, east of the Perdido River, and south of the States of Alabama and Georgia.

(b) The coastal boundaries may be extended by statute to the limits permitted by the laws of the United States or international law.

SECTION 2. Seat of government.—The seat of government shall be the City of Tallahassee, in Leon County, where the offices of the governor, lieutenant governor, cabinet members and the supreme court shall be maintained and the sessions of the legislature shall be held; provided that, in time of invasion or grave emergency, the governor by proclamation may for the period of the emergency transfer the seat of government to another place.

SECTION 3. Branches of government.—The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

SECTION 4. State seal and flag.—The design of the great seal and flag of the state shall be prescribed by law.

SECTION 5. Public officers.—

(a) No person holding any office of emolument under any foreign government, or civil office of emolument under the United States or any other state, shall hold any office of honor or of emolument under the government of this state. No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers.

(b) Each state and county officer, before entering upon the duties of the office, shall give bond as required by law, and shall swear or affirm:

"I do solemnly swear (or affirm) that I will support, protect, and defend the Constitution and Government of the United States and of the State of Florida; that I am duly qualified to hold office under the Constitution of the state; and that I will well and faithfully perform the duties of (title of office) on which I am now about to enter. So help me God.",

and thereafter shall devote personal attention to the duties of the office, and continue in office until a successor qualifies.