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PROTECTING BASIC RIGHTS OF CITIZENS

by Ellen Catsman Freidin and Ann C. McGinley

Ballot Title: Basic Rights

Ballot Summary: Defines “natural persons,” who are equal before the law and who have inalienable rights, as “female and male alike;” provides that no person shall be deprived of any rights because of national origin; changes “physical handicap” to “physical disability” as a reason that people are protected from being deprived of any right.

Revision 9 suggests three important changes to the basic rights provision of the Florida Constitution. First, it would add “female and male alike” to define “natural persons who are equal before the law.” This change expressly recognizes equality of the sexes. Second, it would prohibit the government from depriving a person of any right because of the person’s national origin. Finally, the revision prohibits the government from depriving a person of any right because of “physical disability,” replacing the currently existing protection for “physical handicap.”

The Declaration of Rights Committee recommended these changes and the CRC overwhelmingly agreed after studying and debating each separately on its own merits. The vote on “female and male alike” was 31-5.1 The vote on “national origin” was 28-0; on “physical disability,” the vote was 29-1.3 The final vote on the entire Revision 9 was 28-7.4

Basic Rights: History and Interpretation

The basic rights provision begins with an affirmative grant of equality to all natural persons as well as an illustrative enumeration of inalienable rights. The term “natural” was interposed to clarify that this provision does not apply to corporations, but only to private persons.5

The last sentence of the basic rights provision currently states, “No person shall be deprived of any right because of race, religion or physical handicap.” The Florida Supreme Court has held unequivocally that this section protects individual rights from governmental intrusions, not from intrusions of private parties.6

Like the federal equal protection clause that requires strict scrutiny of governmental classifications based on race or national origin,7 this sentence in the Florida Constitution imposes a duty on the government to demonstrate that a classification based on race, religion, or physical handicap is narrowly tailored to further a compelling state interest.8 An amendment of this sentence, therefore, is an unambiguous vehicle for providing greater protection to individuals who are members of any newly enumerated group.

The CRC suggested amending this section to add “national origin.” As will be seen below, however, the CRC chose a different vehicle to recognize that Florida’s women and men are equal under the Florida Constitution.

Declaration of Rights Committee: Process and Substance

The CRC conducted 12 public hearings around the state, and the Declaration of Rights Committee met 11 times for approximately 32 hours. Both took testimony on a wide variety of proposals—from legalizing marijuana for medical purposes to permitting conjugal visits in Florida prisons. All together, the committee considered 29 proposals, reporting out 12 proposals favorably. Only three of these proposals, which are now combined in Revision 9, were approved by the whole CRC.9

“Female and Male Alike”

As the Florida Supreme Court currently interprets the basic rights provision of Article I, §2, classifications based on race, religion, and physical handicap are subject to strict scrutiny10 whereas classifications based on sex appear to be subject to a lesser intermediate level scrutiny.11 To with-
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stand a constitutional challenge, a gender-based classification must be substantially related to the achievement of important governmental objectives. Because the Florida Supreme Court has already interpreted the last sentence of Article I, §2 to require strict scrutiny of enumerated classifications made on the basis of race, religion, and physical handicap, adding "sex" to this section would almost certainly have raised the level of scrutiny applied to sex-based classifications to strict scrutiny. This change would put sex-based classifications on a par with race-based classifications.

The original proposal before the CRC was to add "sex" to the list of enumerated protected characteristics, but the CRC accepted an amendment to this proposal that defined "natural persons" as "female and male alike." This change was adopted as a solution to concerns expressed by some commissioners that adding "sex" to the last sentence of the basic rights provision could lead a Florida court to legalize same sex marriage. Their concern was engendered by a decision from the Supreme Court of Hawaii requiring the application of strict scrutiny to the marriage statute which limited marriage to a heterosexual union. When the lower court applied strict scrutiny, it held that the Hawaii marriage statute was unconstitutional because it discriminated on the basis of sex.

Because the intent was simply to secure equality for women in the Florida Constitution, the CRC accepted the amendment.

In debating the proposal, Commissioner Gerald Kogan, the chief justice of the Florida Supreme Court, expressed these views:

We have heard from the women, but this is not solely a women's issue. This is a statement that this Constitution Revision Commission can make. And the statement is that once and for all. And by saying that men and women are equal under the law, then we have made that statement that the time has finally come for it. And I recommend to all of you to vote in favor of this proposal.

Questions have arisen concerning the effect and interpretation of the "female and male alike" language in the basic rights provision.

Questions Raised

Questions have arisen concerning the effect and interpretation of the "female and male alike" language in the basic rights provision. Because no other state constitution contains similar language, Florida cannot rely for interpretation solely on other state decisions. Thus, the commissioners' intent in adopting this language and the overall purpose of the basic rights provision are particularly important in its interpretation.

Strict Scrutiny?

The first question is whether "female and male alike" requires courts to apply strict scrutiny to sex-based classifications. This language has two possible interpretations: It could simply clarify that "all natural persons" includes males and females, or it could raise sex to a protected class subject to strict scrutiny.

Commissioners voiced both interpretations in debate. In fact, one commissioner refused to support the amendment because it either did nothing or did too much. Other commissioners assumed that adding "female and male alike" would subject gender-based classifications to strict scrutiny. This reading is more consistent with the intent of the CRC.

Although the change would not necessarily enhance existing statutory protections of Florida's women, proponents emphasized that the time had come for the Florida Constitution to recognize that women are equal to men. As Commissioner Ellen Freidin stated:

If women had always been allowed to vote, had always been allowed to make decisions for themselves, had always been allowed to own property, that would be unnecessary. But under the circumstances where women have not had equal opportunities to employment, women have not been able to have equal pay, women initially were considered property of their husbands or their families, we have got a long history of oppression of women. And it's time that there be an explicit recognition that women are equal to men.

It is inexcusable that our Constitution in 1998 does not mention women. It is inexcusable that other classes of people are mentioned in our Constitution with specific protection and that women, more than 50 percent of our population, are not mentioned.

This interpretation is consistent with the general purpose of the basic rights provision and its history. In a statement before the commission, Professor Patrick O. Gudridge of the University of Miami School of Law emphasized that the addition of "female and male alike" would grant women greater protection than they currently have under the Florida Constitution:

Is "women and men alike" redundant language given the existing constitutional declaration that "[a]ll natural persons are equal before the law"? In answering this question, it is important to note that in 1968 there was relatively little constitutional case law considering the question of whether constitutional equality obligations limited legislative or administrative differences in treatment of men and women. Strictly speaking, therefore, it is not easy to read the 1968 language, in its original context, as dealing directly with "women and men alike." Article I, section 2, as it now stands, marks discrimination on the basis of religion, race and physical handicap as constitutionally suspect. No reference whatsoever to "women and men alike" may therefore carry (for some readers) a negative implication—that differences in treatment of this sort are not constitutionally controversial.

Same-Sex Marriage?

Because of the unique history of this provision, its proponents' clear statements of intent, and the experi-
ence in the vast majority of other jurisdictions upholding traditional marriage statutes, the claim that this provision will create some new entitlement to same-sex marriage is unfounded.

Florida law requires courts interpreting a constitutional provision to consider the people’s will in adopting the provision. In so doing, the courts will consider historical precedent, present facts, and common sense. Florida courts will also consider explanatory statements or materials available to the public at the time of the adoption of the constitutional provision. Here, the main proponents of equality for women, in debate and in written submissions for the record of the CRC, have made clear and unambiguous statements of intent. For example, Commissioner Freidin stated:

As a sponsor of that proposal, I state unequivocally that in offering this proposal I do not intend and have never intended for it to form the basis for a right to same-sex marriage in this state. Furthermore, I am satisfied that adoption of this proposal by the voters would not confer such a right.

An examination of the expressed intentions of the proponents of this proposal makes clear that the commissioners’ intent in offering the “female and male alike” language is limited to granting additional constitutional protection to women in Florida. This expressed intent is consistent with the overall purpose of the basic rights provision which is to grant rights to persons identified in the provision.

Furthermore, because no other state constitution or law includes the language “female and male alike” to define “natural persons,” the proposed language has never been interpreted to confer a right to same-sex marriage.

Most importantly, although over 20 states or territories have equal rights amendments, only the Hawaii court has held that an equal rights provision, which bears no resemblance to the proposed provision here, permits same-sex marriage. The Hawaii decision is an aberration. Courts in seven states with equal rights amendments and/or statutes prohibiting discrimination “because of sex” have consistently held that these provisions did not limit a state’s freedom to forbid same-sex marriage. One of the most recent cases addressing the constitutionality of a marriage statute is Baker v. Vermont, slip op. (Vt. Super., December 19, 1997) (also available at http://www.fitzhugh.com/samesex.htm). In Baker, the superior court upheld the Vermont marriage statute, concluding that the marriage statute does not violate a fundamental right and does not discriminate on the basis of gender.

The court stated:

“Same-sex unions simply fall outside the definition of marriage, which is premised on uniting one member of each sex. As a result an individual’s gender is irrelevant to the application of the marriage statute.”

Vermont’s laws do not treat similarly situated males and females in a different manner; the statutes apply even-handedly to both sexes. No benefit is conferred nor burden imposed upon one sex and not the other. Requiring a member of each sex to create a marriage does not favor one sex over the other, and does not constitute invidious discrimination based on gender.

There is no reason to believe that under these circumstances the proposed language would create any new right to same sex marriage in Florida.

National Origin

Revision 9 also adds “national origin” as a protected characteristic in the last sentence of Art. I, §2. If this proposal passes, the Florida Constitution will explicitly require that strict scrutiny be applied to governmental classifications based on a person’s national origin. “National origin” includes not only the place of birth, but also a person’s ancestry and ethnicity. Commissioner Planas, the sponsor of the proposal, explained that this provision is particularly necessary in Florida because of the state’s large number of immigrants and the continued existence in Florida of discrimination...
based on national origin. This proposal was adopted unanimously by the commission, and received virtually no opposition.

This new constitutional provision is intended to make clear to the Florida courts, to persons contemplating emigrating to Florida that Florida law will protect the interests of all persons and will not permit any deprivation of rights because of a person’s national origin, ancestry, or ethnicity. This provision is not, however, intended to protect illegal immigrants from federal immigration laws.

Physical Disability
Revision 9 also changes "physical handicap" to "physical disability." The intent of this provision is twofold. First, it updates the term "handicap," which is regarded by many as derogatory, replacing it with the currently acceptable term: "disability." Second, by changing the term to "disability," this proposal, although not requiring Florida courts to follow federal law, offers a body of federal law that Florida courts can access when defining "disability."

Conclusion
Revision 9 provides Florida voters the opportunity to make modest but meaningful changes to one of the most valued sections of our state's fundamental document. The Constitution Revision Commission did not arrive at these recommendations lightly; rather, they came about only after rigorous and lengthy debate. The overwhelming bipartisan support of the commission and the early favorable polling results indicate that Revision 9 represents what Floridians want their constitution to express.

1 See CRC, March 17, 1998, p. 213.
3 Id.
8 See, e.g., Abshire v. State, 642 So. 2d 542 (Fla. 1994).
9 Other proposals which were rejected included: protections on the basis of sexual orientation and age, several proposals dealing with abortion rights, civil forfeitures, computer privacy, equal opportunity, religious practices, and parental rights.
10 See Abshire v. State, 642 So. 2d 542 (Fla. 1994).
11 Although there is no case law under Art. I, §2 describing the scrutiny applied to gender classifications, Art. I, §2 follows the federal interpretation of the Equal Protection Clause. See Sasso v. Ram Property Mgt, 431 So. 2d 204 (1st D.C.A. Fla. 1983). Florida courts would, therefore, presumably use intermediate scrutiny to evaluate sex-based classifications under the Florida Constitution.

We use the terms "sex" and "gender" interchangeably because the courts use the terms interchangeably.
15 See Baehr v. Lewin, 852 P2d 44 (Haw. 1993) (holding that equal rights provision prohibiting discrimination "because of sex" in Hawaiian constitution required the court to apply the strict scrutiny test to marital statute prohibiting same-sex marriage); Baehr v. Miike, 1996 WL 694255 (Haw. Ct. Ct. 1996) (finding, upon remand, that the state had not met its burden of proving that the marital statute was the least restrictive means of furthering a compelling governmental interest.)
18 Florida's women are protected from discrimination by the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution, the federal civil rights acts, and various state statutes including: Fla. Stat. §§287.02, 287.042, 287.057 (procurement opportunities to "disadvantaged business enterprises" (DBEs), permitting them to participate in government-funded construction projects.
19 There are also at least 17 Florida statutes dealing with bidding procedures and special contracts to be granted to businesses owned by women, minorities, and members of other disadvantaged groups. (MBE/WBE). Typical of these statutes are: Fla. Stat. §§255.101-102 (1997) (public construction); Fla. Stats. §§287.02, 287.042, 287.057 (procurement of goods and services). Fla. Admin. Code tit. 14, ch. 14, §78.002(10)(a) grants opportunities to "disadvantaged business enterprises" (DBEs), permitting them to participate in government-funded construction projects.
22 This statement was originally made by Professor Gudridge at public hearings in Ft. Lauderdale and St. Petersburg, Florida, and was subsequently published in the Journal at the direction of Dexter Douglass, chair of the Constitution Revi...

In *Minor v. Hopperatt*, 88 U.S. 162 (1875), the Court held that although women were "citizens," the Fourteenth Amendment did not grant women the right to vote because they had no right to vote before the passage of the Fourteenth Amendment, which did not specifically deal with women's suffrage; nor did the Fifteenth Amendment which prohibited denial of right to vote to citizens on account of race or previous condition of servitude.

33 In *In re Advisory Opinion to the Governor*, 343 So. 2d 17, 21–23 (Fla. 1977).
34 Commissioner Freidin's Statement of Intent with Regards to Proposal 11, CRC, March 17, 1998, p. 213. Similarly, the following Statement of Intent was included in the *Journal* on January 15, 1998.


36 Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq. and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Fla. Stat. §§760.10, 760.23, 760.60, 112.66, 175.333, 185.341, 240.364, 420.516, and 641.406 already prohibit discrimination based on national origin. Fla. Stat. §760.02(5) specifically defines "national origin" to include ancestry for purposes of the Florida Civil Rights Act. Moreover, the Florida Supreme Court has held it unconstitutional under Art. I, §2 to exclude jurors solely on the basis of their ethnicity. See *State v. Alen*, 616 So. 2d 452, 454 (Fla. 1993).

41 See id.

The CRC's poll released July 28, 1998, conducted by Public Opinion Strategies and Frederick Schneider Research, indicated an 81 percent favorable vote on Revision A. A Mason Dixon poll, released July 25, 1998, indicated that 78 percent would vote "yes" on the revision.

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