
Constitution Proposal Analysis

PROPOSAL: 0003

SPONSOR: Commissioner Martinez

SUBJECT: Art. I, s. 2 Removing Provision that Allows Real Property Regulations on Aliens Ineligible for Citizenship

REFERENCES:

Prepared by: Chris Altenbernd

I. SUMMARY

It is proposed by Commissioner Martinez that a clause in Article 1, Section 2 of the Florida Constitution be eliminated. That clause, inserted into the Constitution in 1926, allows state regulation of property owned by aliens. It implies that alien-owned property can be more highly regulated than property owned by citizens.

The regulation of property owned by aliens clause does not appear to be addressed by any case law in Florida. There is no evidence that the Florida legislature has relied upon the clause to create differing levels of regulation.

There are valid reasons to remove this clause from the Florida Constitution, but if left in the Constitution, given that the property rights of aliens are also protected by the Equal Protection Clause of the U.S. Constitution, the inclusion of this language in the Florida Constitution may have very limited consequences.

II. CURRENT SITUATION

A. The Constitutional Provision and Its Predecessors.

Article 1, Section 2, of the Florida Constitution currently 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.

(Emphasis added.) The proposed amendment addressed in this White Paper would remove the following language:

except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law.

Interestingly, the Florida Constitution of 1868 provided in Article 1, 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.

Thus, the Constitution adopted shortly after the end of the Civil War contained a provision that is nearly the opposite of the current provision.

The Florida Constitution of 1885 in Article I, Section 18, initially provided:

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

In 1926, this provision was amended to add language similar to the language that it is now proposed to be removed. The provision after 1926 stated:

Foreigners who are eligible to become citizens of the United States under the 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 property in the State of Florida by foreigners who are not eligible to become citizens of United States under the provisions of the laws and treaties of the United States.

This provision was added at a time when attitudes about immigration and the immigration policy of the United States were undergoing substantial change. The Constitution adopted in 1968 incorporated the provisions of Article 1, Section 18, to create the language quoted above.

B. The Role Played by Article 1, Section 2, of the Florida Constitution, Including the Role of the Language That Would Be Removed by the Proposed Amendment.

Article 1, Section 2, is essentially the “Equal Protection” clause of the Florida Constitution. The language of this clause is more extensive than the language in the U.S. Constitution. The Florida Constitution recognizes a right to “pursue happiness” and a right to be “rewarded for industry.”

The language concerning rights to property is more specific than the language in the Due Process clause of the 14th Amendment to the U.S. Constitution. Thus, occasionally, this Florida Constitutional provision may provide protections that the U.S. Constitution does not. See e.g. *Shriners Hosps. for Crippled Children v. Zrillic*, 563 So. 2d 64 (Fla. 1990) (holding Mortmain statute unconstitutional).

The language that would be removed by this proposal has been quoted in about 20 cases decided by the Florida Supreme Court and the district courts of appeal. It has not, however, ever been the actual subject of one of those cases. There does not appear to be a case where the outcome of the case has been controlled by this language. Thus, it is fair to suggest that this language has played no significant role in the development of Florida law by the courts. If the legislature has ever relied upon this provision to create a law regulating property owned by aliens, we have located no example of such a law.

C. The Significance of the Equal Protection Clause of the United States Constitution.

Although a provision of the state constitution can provide greater equal protection rights than those provided by the U.S. Constitution, a state constitution cannot narrow the rights guaranteed by the U.S. Constitution. *Traylor v. State*, 596 So. 2d 957 (Fla., 1992), citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). Thus, it is important to consider the controlling case law from the U.S. Supreme Court relating to the equal protection rights of aliens.

The Equal Protection Clause of the 14th Amendment to the U. S. Constitution prohibits states from denying the equal protection of the laws to any “person” by the clause’s express text. Thus, that constitutional provision is not limited to citizens of the United States.

Shortly after Florida adopted the current constitution in 1968, the U.S. Supreme Court issued a series of opinions applying the Equal Protection Clause to aliens. In *Graham v. Richardson*, 403 U.S. 365 (1971), the Supreme Court applied strict scrutiny to strike down a state law that restricted state welfare benefits to citizens. In *Application of Griffiths* 413 U.S. 717 (1973), the Court again applied strict scrutiny to prevent a state from limiting bar membership to citizens. The Court has applied a rational basis test to permit governments to require police officers and schoolteachers to be citizens. *Foley v. Connelie*, 435 U.S. 291 (1978); *Ambach v. Norwick*, 441 U.S. 68 (1979). Although the level of judicial scrutiny may vary depending upon the precise nature of the law, it is safe to say that any Florida law discriminating against non-citizens could be examined under the Equal Protection Clause of the U.S. Constitution.

III. EFFECT OF PROPOSED CHANGES

Given that the provision in question has played no significant role in Florida judicial decisions or in the work of the Florida Legislature, it is likely that little would change in terms of the law if this provision were removed from the Florida Constitution and United States Supreme Court precedent on this issue continued to be followed.

Article 1, Section 2, in providing equal protection rights to all natural persons, does not prevent the Florida Legislature from all regulation of property rights. Indeed, the laws of Florida contain many statutes validly regulating property rights under the police powers of the state. Thus, even if this language were removed from the Florida Constitution, it would be lawful for the Legislature to enact a statute regulating the property of aliens if that statute satisfied the appropriate level of scrutiny under the U.S. Constitution. In light of the Equal Protection Clause in the U.S. Constitution, it does not appear that this provision in Article 1 Section 2 provides the Florida Legislature with any greater or lesser power than it would have in its absence.

IV. FISCAL IMPACT

A. Tax/Fee Issues

The removal of this provision would not appear to have a fiscal impact on state revenue.

B. Private Sector Impact

It is unlikely that the removal of this provision would have any significant adverse impact upon the private business sector. Given the substantial investment in Florida real estate by aliens, if anything, the removal of this language might encourage additional investment.

C. Government Sector Impact

It is unlikely that the removal of this provision would have any impact upon the government sector. To the extent that the inclusion of this language in the Florida Constitution might cause a citizen or alien to be confused about the role of the Equal Protection Clause in the U.S. Constitution and Florida's adherence to the U.S. Constitution, its removal might facilitate better government. Similarly, though it apparently has not been relied upon in the past, if a real property ownership statute or regulation was adopted which improperly discriminated based upon citizen/alien status such that the statute or regulation would not pass U.S. Constitutional scrutiny, then there would likely be impacts defending State's position.