Constitution Revision Commission
Judicial Committee
Proposal Analysis

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

Proposal #: P 22

Relating to: DECLARATION OF RIGHTS, Right of privacy

Introducer(s): Commissioner Stemberger

Article/Section affected: Article I, Section 23 – Right of privacy.

Date: January 31, 2018

	REFERENCE	ACTION
1.	DR	**Favorable**
2.	JU	**Pre-meeting**

I. SUMMARY:

Article I, Section 23 of the Florida Constitution establishes the right of every person "to be let alone and free from governmental intrusion into the person's private life." The Florida Supreme Court has interpreted this express "right of privacy" to embrace more privacy interests, and extend more protection to the individual in those interests, such as abortion and parental rights, than the implicit "right of privacy" under the U.S. Constitution.

This proposal narrows the applicability of Article I, Section 23 to protect a person's privacy with respect to privacy of information and the disclosure of that information, from protection from intrusion into the person's private life.

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.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

"Privacy" in General

The concept of individual "privacy" has been described as a "physical and psychological zone within which an individual has the right to be free from intrusion or coercion, whether by the

government or the by the society at large."[1] This "right to be let alone" was first described more than a century ago by Thomas M. Cooley in the 1880 edition of his *Treatise on the Law of Torts.*[2] Samuel Warren and Louis Brandeis seized on this concept of a "right to be let alone" as the basis for one of the most influential law review articles in modern legal history, *The Right to Privacy*.[3] Warren and Brandeis advanced the concept of a "right to privacy" by re-conceptualizing existing common law decisions prohibiting the publication of an individual's personal information without the subject's consent. Such decisions had rested primarily on theories of invasion of a property interest or a breach of contract or trust.[4] They suggested that in such cases, the court had simply stretched property and contract rules to protect what was in fact an individual's privacy interests.[5] Thus, Warren and Brandeis argued a "right of privacy" was an existing principle of common law that should be explicitly recognized separate from other articulable interests:

> The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.[6]

From these auspicious beginnings, jurisprudence relating to the "right of privacy" has developed along two separate tracks. One track – constitutional privacy – relates to the effort to assert a right of privacy against governmental intrusion. The second track – the tort law of privacy- relates to efforts to assert a right of privacy against intrusion by other private citizens.[7]

The "right of privacy" implicated by this proposal concerns the constitutional right of privacy asserted by individuals against intrusions by the government.

Privacy Rights under the U.S. Constitution

There is no express right to privacy under the United States Constitution. However, several provisions of the Bill of Rights reflects the concerns of the framers with protecting certain aspects of individual affairs from intrusion by the government:

- **1st Amendment:** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....[8]

- **2nd Amendment:** A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.[9]

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[1] Gerald B. Cope, Jr., *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 Fla. St. U. L. Rev. 671, 677 (2014) available at http://ir.law.fsu.edu/lr/vol6/iss3/8 (last visited Jan. 8, 2018).
[2] *Id.*
[3] Samuel Warren and Louis Brandeis, *The Right to Privacy,* 4 Harv. L. Rev. 193 (1890).
[4] Gerald B. Cope, Jr., *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 Fla. St. U. L. Rev. 631, 648 (2014) available at http://ir.law.fsu.edu/lr/vol5/iss4/4 (last visited Jan. 8, 2018).
[5] *Id.*
[6] *Supra* note 3 at 213.
[7] *Supra* note 1 at 678.
[8] U.S. Constitution Amendment I
[9] U.S. Constitution Amendment II

- **3rd Amendment:** No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.[10]

- **4th Amendment:** The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[11]

In 1886, the U.S. Supreme Court noted for the first time that the U.S. Constitution, through the Fourth and Fifth Amendments, protects the "privacies of life."[12] However, it was not until 1965, in the seminal opinion of *Griswold v. Connecticut*,[13] that the United States Supreme Court recognized an implicit right of privacy in the Constitution. In the court's opinion, authored by Justice Douglas, the Court stated that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."[14] Over the next decade the Court would extend the "zone of privacy" to marriage, the possession of obscene materials in the privacy of one's home, and the use of contraceptives.[15]

The court limited this continuing expansion of the "zones of privacy" in *Roe v. Wade.*[16] Contrary to *Griswold*, the Court in *Roe* concluded that the right of privacy was founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action.[17] The Court explained that "only personal rights that can be deemed 'fundamental' or 'implicit' in the concept of ordered liberty are included in this guarantee of personal privacy."[18] The court listed five such areas of fundamental rights: marriage, procreation, contraception, family relationships, and child rearing and education. Generally, these protected autonomy rights may only be restricted if a state establishes a compelling interest for which the restriction is narrowly drawn. Thus the Supreme Court has established a number of privacy rights in the following areas:

A Parent's Rights over the care, control and custody of children:

- A teacher's right to teach and the right of parents to engage a teacher to instruct their children are within the liberty guaranteed under U.S. Const. amend. XIV.[19]
- Legislation may not unreasonably interfere with the liberty of parents and guardians to direct the upbringing and education of children under their control. Rights guaranteed by the U.S. Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state.[20]

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[10] U.S. Constitution Amendment III
[11] U.S. Constitution Amendment IV
[12] *Boyd v. United States,* 116 US 616, 630 (1886).
[13] 381 U.S. 479 (1965).
[14] *Id*. at 484-486.
[15] B. Harding, Mark J. Criser & Michael R. Ufferman, *Right to Be Let Alone - Has the Adoption of Article I, Section 23 in the Florida Constitution, Which Explicitly Provides for a State Right of Privacy, Resulted in Greater Privacy Protection for Florida Citizens*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 945, 948-49 (2000).
[16] 410 U.S. 113 (1973).
[17] 410 U.S. 113, 153 (1973).
[18] 410 U.S. 113, 152 (1973).
[19] *Meyer v. Nebraska*, 262 U.S. 390 (1923).
[20] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

- Rights guaranteed by the United States Constitution may not be abridged by legislation that has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. The duty to prepare the child for "additional obligations" must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship.[21]
- The family is not beyond regulation. But when the government intrudes on choices concerning family living arrangements, the U.S. Supreme Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.[22]
- The liberty protected by the Due Process Clause of the United States Constitution includes the right of parents to establish a home and bring up children and to control the education of their own.[23]

Rights to refuse unwanted medical treatment:

- No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. The right to one's person may be said to be a right of complete immunity: to be let alone. In a civil action for an injury to the person, the court, on application of the defendant, and in advance of the trial, may not order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injury sued for.[24]
- Prison may not require an inmate with a diagnosed mental illness to take psychotropic medication against their will without due process afforded by the Fourteenth Amendment of the United States Constitution.[25]
- The United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition, but Missouri's requirement that those wishes be proven by clear and convincing evidence when the person is in a persistent vegetative state is not a violation of the due process clause of the Fourteenth Amendment.[26]

Rights to abortion:

- Only personal rights that can be deemed "fundamental" or implicit in the concept of ordered liberty are included in this guarantee of personal privacy. The right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. This right of privacy, whether it be founded in the U.S. Const. amend. XIV concept of personal liberty and restrictions upon state action, as the court feels

[21] *Wisconsin v. Yoder*, 406 U.S. 205 (1971).
[22] *Moore v. City of East Cleveland*, 431 US. 494 (1977) (striking down municipal ordinance restricting extended family living arrangements).
[23] *Troxel v. Granville*, 530 U.S. 57 (2000)
[24] *Union Pacific Railroad Co. v. Botsford*, 141 US. 250 (1891).
[25] *Washington v. Harper,* 494 U.S. 210 (1990).
[26] *Cruzan v. Director, Missouri Dep't of Health*, 497 US. 261 (1990).

it is, or, in the U.S. Const. amend. IX reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[27]

- The Court reaffirms Roe v. Wade's essential holding, which has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another.[28]

Nevertheless, the Supreme Court has generally refused to expand the federal right of privacy beyond the areas articulated in *Roe* or to recognize a general right to privacy under the federal constitution touching on all aspects of private life. Rather, the U.S. Supreme Court has found that the "protection of a person's *general* right to privacy – his right to be let alone by other people – is, like the protection of his property and of his very life, left largely to the law of the individual states."[29] Thus, outside of the marriage-procreation-childrearing area, any protection of privacy against governmental intrusion must be done by the states.[30] The crucial position of the states was underlined by the 1977 report of the Federal Privacy Protection Study Commission, when it concluded:

> The States have been active in privacy protection, and in many cases innovative, but neither they nor the Federal governmental have taken full advantage of each other's experimentation.[31]

In response to the emerging limitations of the federal privacy right, several states between 1968 and 1980, began to adopt explicit privacy clauses to their own state constitutions.

Privacy Rights under the Florida Constitution

History

Given the limits of the privacy right under the federal constitution, states have taken advantage of opportunities to afford additional privacy protection under state constitutions. Florida is one of ten states that has expanded constitutional privacy protection beyond its federally defined boundaries (See **Appendix "A"**).[32]

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[27] *Roe v. Wade*, 410 U.S. 113 (1973).
[28] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
[29] *Katz v. United States*, 389 U.S. 347, 350-351 (1967).
[30] *Supra* note 1 at 681.
[31] Privacy Protection Study Commission, *Personal Privacy In An Information Society* 489 (1977).
[32] NATIONAL CONFERENCE OF STATE LEGISLATURES, *Privacy Protections in State Constitutions,* May 5, 2017, available at http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx (last visited Jan. 21, 2018)

The road to adoption of a general privacy amendment in Florida began with the 1977-1978 Constitution Revision Commission (CRC). Just prior to the opening of the 1977-1978 CRC, the Florida Supreme Court[33] issued its decision *Laird v. Florida*, 342 So. 2d 962, 965 (Fla. 1977). In *Laird*, the Court expressly rejected the argument that a general "right of privacy" existed under the Florida Constitution that protected privacy interests beyond the scope of those protected under the federal constitution.[34] The Court noted that it did not find a decision of the Alaska Supreme Court recognizing a general privacy right on similar facts to be persuasive as the Alaska Supreme Court based its decision on the express privacy provision of the Alaska Constitution[35] which had no analogue in Florida. [36] Later, when addressing the CRC at the opening session, Florida Supreme Court Chief Justice Ben Overton, who also served as a member of the CRC, strongly urged the CRC to address developing privacy issues:

> The subject of individual privacy and privacy law is in a developing stage. [A number of] states have adopted some form of privacy legislation, and many appellate courts in this nation now have substantial right of privacy issues before them for consideration. It is a new problem that should be addressed.

The commission, responding these emerging concerns, about the privacy of information and other transformative issues in society and law, eventually proposed the following amendment to the Florida Constitution:

> Section 23. Right of privacy. – Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein.

The last portion of the first sentence of the constitutional provision, "except as otherwise provided herein," was added to ensure there would be no adverse effect on law enforcement activities and the police power of the state. For example, it would not modify the search and seizure provision of Article I, Section 12.[37] The proposed privacy amendment was placed on the November 7, 1978 General Election ballot with a number of other CRC amendments, but was not adopted by Florida voters.

Two years later, another decision of the Florida Supreme Court decision would prompt the Florida Legislature to re-examine the privacy issue. In *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.,* 379 So. 2d 633 (Fla. 1980), the Court overturned a First District Court of Appeal decision recognizing a constitutionally protected right of "personhood," which included the right

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[33] Members of the Supreme Court in 1977 included James C. Adkins, Joseph A. Boyd, Jr., Ben F. Overton (CJ), Arthur J. England, Alan C. Sundberg, Joseph W. Hatchett, and Frederick B. Karl.

[34] *Laird v. Florida*, 342 So. 2d 962, 965 (Fla. 1977).

[35] An express right of privacy was added to the Alaska Constitution in 1972. *See* **Appendix "A".**

[36] *Laird v. Florida*, 342 So.2d 962, 965(Fla. 1977) (rejecting as persuasive a decision on the Supreme Court of Alaska finding a constitutional right of privacy with regard to personal possession and ingestion of marijuana in the home because the decision was based on a provision of the Alaska State Constitution which had no analogue in Florida).

[37] Justice Ben F. Overton & Katherine E. Giddings, *The Right of Privacy in Florida in the Age of Technology and the Twenty-First Century: A Need for Protection from Private and Commercial Intrusion*, 25 FLA. ST. U. L. REV. 25, 36 (1997) available at http://ir.law.fsu.edu/lr/vol25/iss1/3 (last visited Jan. 8, 2018).

of disclosural privacy as to personal information given by public job seekers to a recruiter.[38] The Court concluded that "under the federal constitution a person's right of disclosural privacy is not as broad as was found by the district court and that under [the Florida] constitution no broader right is granted."[39]

In 1980, largely as a result of that decision, the Legislature passed a joint resolution placing another privacy amendment on the ballot for consideration by the electorate.[40] Legislative staff analyses framed the issue under consideration as the lack of a "***general [emphasis added]*** state constitutional right of privacy."[41] Efforts to qualify the scope of the proposed privacy amendment to only "unwarranted" or "unreasonable" government intrusions were debated and soundly defeated in the Legislature.[42] The resulting proposed amendment was identical to the previous CRC privacy amendment with the addition of one sentence relating to public records and meetings:

> Every natural person has the right to be let alone and free from governmental intrusion into his 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.[43]

The single revision to the language of the CRC privacy amendment sentence addressed concerns that the amendment would could be construed to limit existing statutory Sunshine laws.[44] The privacy amendment was adopted by a margin of 60.6% to 39.4% of voters.[45] In 1998, as the result of a proposal submitted to electors by the 1997-1998 Constitution Revision Commission, the privacy provision was amended to make its language gender neutral, replacing the term "his private life" with "the person's private life."[46]

Nature of Florida Privacy Right

The adoption of the privacy amendment to the Florida Constitution subsequent to the U.S. Supreme Court decisions in *Griswold v. Connecticut* and *Roe v. Wade,* has led the Florida Supreme Court to conclude that the amendment encompasses, at a minimum, all privacy rights protected by

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[38] 379 So.2d 633, 635-636 (Fla. 1980)
[39] *Id.* at 634.
[40] B. Harding, Mark J. Criser & Michael R. Ufferman, *Right to Be Let Alone - Has the Adoption of Article I, Section 23 in the Florida Constitution, Which Explicitly Provides for a State Right of Privacy, Resulted in Greater Privacy Protection for Florida Citizens*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 945, 953 (2000).
[41] *See* Florida House of Representatives Committee on Governmental Operations, Staff Analysis of CS/HJR 387, Feb. 7, 1980; Senate Committee on Rules and Calendar, Senate Staff Analysis and Economic Impact Statement of SJR 935, May 6, 1980.
[42] *Supra* note 32.
[43] HJR 387 (1980)
[44] *Supra* note 29 at pg. 36; *See also* Senate Committee on Rules and Calendar, Senate Staff Analysis and Economic Impact Statement of SJR 935, May 6, 1980, pg. 2.
[45] Florida Department of State, Division of Elections, Election Results, Constitutional Amendment Right of Privacy, https://results.elections.myflorida.com/Index.asp?ElectionDate=11/4/1980&DATAMODE= (last visited Jan. 3, 2018).
[46] 1997-1998 Constitution Revision Commission, *Nine Proposed Revisions for the 1998 Ballot*, available at http://fall.fsulawrc.com/crc/ballot.html (last visited Jan. 19, 2018).

the U.S. Supreme Court under federal law as it existed in 1980.[47] As a result, post-1980 federal cases cannot erode the floor of privacy established in Florida by Article I, Section 23, even though the U.S. Supreme Court has in subsequent cases signaled a retreat from its previous vigorous protection of privacy rights.[48]

The Florida Supreme Court has explained the difference in the legal vitality and breadth of Article I, Section 23, in relation to the, by comparison, limited general privacy right under the U.S. Constitution:

> The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.
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> In other words, the amendment embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution.[49]

The amendment provides an explicit textual foundation for those privacy interests inherent in the concept of liberty, which may not otherwise be protected by specific constitutional provisions.[50]

The Florida Supreme Court has declared that the right of privacy under Article I, Section 23 is a fundamental right. Any law that implicates the fundamental right of privacy, regardless of the activity, is subject to the "compelling interest" test (strict scrutiny) and, therefore, presumptively unconstitutional.[51] The compelling interest test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.[52] However, the right of privacy is not absolute, and the before the right will attach, a reasonable expectation of privacy must exist.[53]

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[47] Michael J. Minerva, Jr., Grandparent Visitation: The Parental Privacy Right to Raise Their "Bundle of Joy", 18 FLA. ST. U. L. REV. 533, 541 (2017), available at http://ir.law.fsu.edu/lr/vol18/iss2/11 (last visited Jan. 8, 2018).

[48] *See e.g. Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

[49] *In re TW*, 551 So. 2d 1186 (Fla. 1989).

[50] *Rasmussen v. South Florida Blood Service,* 500 So. 2d 533 (Fla. 1987).

[51] *Gainesville Woman Care v. Florida*, 210 So. 3d 1243, 1245 (Fla. 2017).

[52] *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985).

[53] *Id.*

The express right of privacy articulated by Article I, Section 23 of the Florida Constitution has been interpreted by both Florida and federal courts to touch on a wide range subjects dealing with a person's exercise of their autonomy, government intrusion and disclosure of personal information. These include:

Disclosure of Information

- Florida Constitution did not prevent the Department of Business Regulation from subpoenaing a Florida citizen's bank records without notice. The right to privacy yielded to compelling governmental interests such as the state's interest in conducting effective investigations in the pari-mutuel industry.[54]
- A principal aim of Fla. Const. art. I, § 23, is to afford individuals some protection against the increasing collection, retention, and use of information relating to all facets of an individual's life.[55]
- Under Fla. Const. art. I, § 23, privacy interests of blood donors, blood service, and society in maintaining a strong volunteer blood donation system outweighed individual's interest in discovering donor information in attempting to discover from whom the individual contracted Acquired Immune Deficiency Syndrome (AIDS).[56]
- Nonpublic employees may have a privacy interest in certain information contained in their personnel files, which they may assert as intervenors in the litigation; moreover, in the appropriate case, the trial court should fully consider the employees' alleged privacy interest — in the context of determining the relevancy of any discovery request which implicates it — regardless of whether the subject employees have intervened or not.[57]
- Privacy provision in article I, section 23, of the Florida Constitution, providing that citizens of this state shall have the "right to be let alone from government intrusion," is inapplicable to civil dissolution proceeding. [58]
- Under appropriate circumstances, the constitutional right of privacy established in Florida by the adoption of Fla. Const. art. I, § 23 could form a constitutional basis for closure of civil proceedings to avoid substantial injury to innocent third parties or to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.[59]
- The Florida Board of Bar Examiners' decision to refuse to complete applicant's request for admission to the Florida Bar was affirmed because the information sought regarding applicant's history of mental health was the least intrusive means to achieve a compelling governmental interest.[60]
- No legitimate expectation of privacy in revealing smoker status to government employer.[61]
- Plaintiff, whose husband had drowned in a hotel pool, was not entitled to discovery of non-party identification information in surveys completed by hotel guests, as the names and contact information of the non-party guests who completed the surveys were

[54] *Id.*
[55] *Rasmussen v. South Florida Blood Service*, 500 So. 2d 533 (Fla. 1987).
[56] *Id.*
[57] *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936 (Fla. 2002).
[58] *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113 (Fla. 1988).
[59] *Id.*
[60] *Florida Bd. of Bar Examiners re: Applicant*, 443 So.2d 71 (Fla. 1983).
[61] *City of North Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995).

constitutionally protected, private details, the guests had not waived their right to privacy by providing the information to the hotel when they made reservations, and plaintiff had not shown any compelling interest in disclosure of the names and contact information.[62]

- Article I section 23 specifically does not apply to public records.[63]
- Fla. Const. art. I, § 23 did not protect third parties from public disclosure of their names and addresses on state's witness list as former clients of defendant charged with prostitution.[64]

Decisional Autonomy

- Natural parent's fundamental right to privacy in rearing one's own child, a right this Court found to exist under article I, section 23 of the Florida Constitution.[65]
- Arbitration provision in a commercial travel contract for an African safari was valid and enforceable in a wrongful death action involving a minor child who died on the safari because the child's mother had authority, under U.S. Const. amend. XIV and Fla. Const. art. I, § 23, to enter into the contract on behalf of her child.[66]
- Under Fla. Const. art. I, § 23, the state may not intrude upon parents' fundamental right to raise their children except in cases where a child is threatened with harm; a best interest test without an explicit requirement of harm cannot pass constitutional muster.[67]
- Putative father's privacy interests permits refusal of blood test under certain circumstances.[68]
- Public notice provisions of Fla. Stat. § 63.088 were unconstitutional under Fla. Const. art. I, § 23 because the provisions violated the mother's right to privacy, independence in choosing adoption as an alternative to giving birth and with the right not to disclose the intimate personal information that is required when the father is unknown.[69]
- Surrogate or proxy may exercise the constitutional right of privacy for an incompetent person who, while competent, expressed his or her wishes to discontinue artificial life-prolonging procedures.[70]
- In ordering a pregnant woman to submit to treatment deemed necessary by her obstetrician, the trial court applied the wrong test. The case relied upon by the trial court did not involve the privacy rights of a pregnant woman; the test to overcome a woman's right to refuse medical intervention in her pregnancy was whether the State's compelling state interest was sufficient to override the pregnant woman's constitutional right to the control of her person, including her right to refuse medical treatment.[71]
- Since a privacy section as adopted, Fla. Const. art. I, § 23, contains no textual standard of review, it is important for courts to identify an explicit standard to be applied in order to give proper force and effect to an amendment. The right of privacy is a fundamental right which demands the compelling state interest standard. The test shifts the burden of proof

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[62] *Mishko Josifov v. Iman Kamal-Hashmat*, 217 So. 3d 1085, (Fla. 3rd DCA 2017).
[63] *Fosberg. v. Miami Housing*, 455 So. 2d 373 (Fla. 1984).
[64] *Post-Newsweek Stations, Florida, Inc. v. Doe*, 612 So. 2d 549 (Fla. 1992).
[65] *Richardson v. Richardson*, 766 So. 2d 1036 (Fla. 2000).
[66] *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 2005 Fla. LEXIS 1454 (Fla. 2005).
[67] *Beagle v. Beagle*, 678 So. 2d 1271, (Fla. 1996).
[68] *Dept. of Health & Rehab Services v. Privette*, 617 So. 2d 305 (Fla. 1993).
[69] *G.P. v. State,* 842 So. 2d 1059, 2003 Fla. App. LEXIS 5743 (Fla. 4th DCA 2003).
[70] *Bush v. Schiavo*, 861 So. 2d 506, 2003 Fla. App. LEXIS 18702 (Fla. 2nd DCA 2003).
[71] *Burton v. State*, 49 So. 3d 263, 2010 Fla. App. LEXIS 11754 (Fla. 1st DCA 2010).

to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. [72]

- Since the curfew ordinances applicable to minors involved a right of privacy and were not "narrowly tailored," and the statistical data failed to establish the necessary nexus between the governmental interest and the classification created by the ordinances, they were unconstitutional under a strict scrutiny analysis.[73]
- Supreme court reversed a lower court's holding that the Parental Notice Act was constitutional; the Act's requirement that a minor must notify a parent of her decision to have an abortion was a significant intrusion on a minor's privacy right.[74]
- As the state presented no evidence that the Mandatory Delay Law, which imposed a 24-hour waiting period on women seeking abortions, served any compelling state interest, much less through least restrictive means, the trial court correctly found a substantial likelihood that it was facially unconstitutional for imposing a significant restriction on women's fundamental right of privacy, which was a sufficient basis for it to issue a temporary injunction barring application of the Law in its entirety.[75]
- Statute prohibiting sex with a minor violated the state constitution's privacy provisions as applied to a 15 year old minor with another 15 year old minor, because the purpose of the statute was to protect minors from the sexual acts of adults, and a minor could not be prosecuted under it.[76]
- Whatever privacy interest, under Fla. Const. art. I, § 23, a 15-year-old minor has in sexual intercourse is clearly outweighed by the State's interest in protecting 12-year-old children from harmful sexual conduct, under Fla. Stat. § 800.04, irrespective of whether the 12-year-old consented to the sexual activity.[77]
- Statue requiring parental consent before a minor could obtain an abortion violated the minors right to privacy under Article I Section 23 of the Florida Constitution because it could not survive strict scrutiny as the statute lacked procedural safeguards.[78]
- In Re Guardianship of Browning, 568 So. 2d 4; Public Health Trust v. Wons, 541 So.2d 96 (Fla. 1989) (refusal of blood transfusion that is necessary to sustain life).

Government Intrusion

- Under Fla. Const. art. I, § 23, an individual's privacy interest is implicated when the government gathers telephone numbers through the use of a pen register; however, upon a showing of a compelling government interest as well as a showing that the government used the least intrusive means, suppression of the evidence is not warranted.[79]
- While the statute and rule banning sexual conduct between a psychologist and a former client serve a compelling state interest, the perpetuity clause fails the least-intrusive means

[72] *In re TW*, 551 So. 2d 1186 (1989) (stronger than under U.S. Constitution because Florida uses strict scrutiny in abortion cases, federal courts use "undue burden test") *See also Gainesville Woman's Care v. Florida*, 210 So. 3d 1243 (Fla. 2017).
[73] *State v. J.P.,* 2004 Fla. LEXIS 2101 (Fla. Nov. 18, 2004), modified, 907 So. 2d 1101, 2004 Fla. LEXIS 2529 (Fla. 2004).
[74] *N. Fla. Women's Health & Counseling Servs. v. State*, 866 So. 2d 612, (Fla. 2003).
[75] *Gainesville Woman Care, LLC v. State,* 210 So. 3d 1243, 2017 Fla. LEXIS 340 (Fla. 2017).
[76] *BB v. State*, 659 So. 2d 256 (Fla. 1995).
[77] *J.A.S. v. State*, 705 So. 2d 1381 (Fla. 1998).
[78] *In re TW*, 551 So. 2d 1186 (Fla. 1989).
[79] *Shaktman v. State*, 553 So. 2d 148 (Fla. 1989)

test, is on its face over-broad, and, for this reason, violates Florida's Privacy Amendment, Fla. Const. art. I, § 23.[80]

- When an arresting officer plainly stated that he had no actual consent to open a suitcase found in defendant's automobile's trunk, defendant's general consent to look in the trunk did not constitute permission to pry open the locked piece of luggage found inside; therefore Fla. Const. art. I, § 23 was violated when the suitcase was pried open.[81]
- Evidence of randomly intercepted private conversations emanating from defendants' home over a cordless telephone could not be used by the State of Florida, as such conversations were protected by Fla. Const. art. I, § 12, which provided for a strong right of privacy and specifically included protection for private communications; under Fla. Const. art. I, § 23, an explicit right of privacy was created and together, Fla. Const. art. I, §§ 12 and 23 provided a very high degree of protection of private communications from governmental intrusion; a person's private conversations over a cordless telephone were presumptively protected from government interception.[82]
- No privacy right to use land regardless of environmental interests of state.[83]

B. EFFECT OF PROPOSED CHANGES:

This proposal narrows the applicability of Florida's broader "right of privacy" to protect only a person's information and the disclosure of such information from government intrusion. The term "information" is undefined by the proposal.

The narrowing of the state "right of privacy" may require that the court decisions related to personal autonomy and government intrusion be relitigated in response to the narrowing of the language of Article I, Section 23 and there could be a limitation of the precedential value of those decisions subject to the federal privacy rights articulated above. Decisions related to disclosure of information may avoid the courts having to reexamine their precedents.

If approved by the voters, the proposal will take effect on January 8, 2019.[84]

C. FISCAL IMPACT:

The fiscal impact is indeterminate.

[80] *Caddy v. Department of Health, Bd. of Psychology*, 764 So. 2d 625, (Fla. 1st DCA 2000).
[81] *State v. Wells*, 539 So. 2d 464, 1989 Fla. LEXIS 181 (Fla. 1989), aff'd, 495 U.S. 1, 110 S. Ct. 1632, 109 L. Ed. 2d 1, 1990 U.S. LEXIS 2035 (U.S. 1990).
[82] *Mozo v. State*, 632 So. 2d 623, (Fla. 4th DCA 1994).
[83] *Department of Community Affairs v. Moorman*, 664 So. 2d 930 (Fla. 1995)
[84] *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.)

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:

None.

APPENDIX "A"

STATE CONSTITUTIONS WITH EXPRESS PRIVACY PROVISIONS

ALASKA
ARTICLE I: DECLARATION OF RIGHTS
SECTION 22: RIGHT OF PRIVACY
Added by voter amendment in 1972.[85]

The right of the people to **privacy** is recognized and shall not be infringed. The legislature shall implement this section.

ARIZONA
ARTICLE 2: DECLARATION OF RIGHTS
SECTION 8: RIGHT TO PRIVACY
Established in Arizona Constitution of 1910.[86]

No person shall be disturbed in his **private affairs**, or his home invaded, without authority of law.

CALIFORNIA
ARTICLE I: DECLARATION OF RIGHTS
SECTION 1
Added by citizen initiative in 1972.[87]

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and **privacy**.

FLORIDA
ARTICLE I: DECLARATION OF RIGHTS
SECTION 23: RIGHT OF PRIVACY
Added by voter adoption of joint resolution in 1980.[88]

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.

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[85] Gordon Harrison, Alaska Legislative Affairs Agency, *Alaska's Constitution: A Citizen's Guide (5th ed.),* available at http://w3.legis.state.ak.us/docs/pdf/citizens_guide.pdf (last visited December 28, 2017).
[86] *Supra* note 1, at FN 14.
[87] J. Clark Kelso, *California's Constitutional Right to Privacy*, 19 PEPP. L. REV. 2, pg. 328 (1992), available at http://digitalcommons.pepperdine.edu/plr/vol19/iss2/1 (last visited December 28, 2017).
[88] B. Harding, Mark J. Criser & Michael R. Ufferman, *Right to Be Let Alone - Has the Adoption of Article I, Section 23 in the Florida Constitution, Which Explicitly Provides for a State Right of Privacy, Resulted in Greater Privacy Protection for Florida Citizens*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 945, pg. 945 (2000), available at http://scholarship.law.nd.edu/ndjlepp/vol14/iss2/8 (last visited December 28, 2017).

HAWAII
ARTICLE I: BILL OF RIGHTS
SECTION 6: RIGHT TO PRIVACY
Added by voter adoption of constitutional convention proposal in 1978.[89]

The right of the people to **privacy** is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

ILLINOIS
ARTICLE I: BILL OF RIGHTS
SECTION 6: SEARCHES, SEIZURES, PRIVACY AND INTERCEPTIONS
Adopted as part of revision of constitution in 1970.[90]

The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, **invasions of privacy** or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

LOUISIANA
ARTICLE I: DECLARATION OF RIGHTS
SECTION 5: RIGHT TO PRIVACY

Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or **invasions of privacy**. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

MONTANA
ARTICLE II: DECLARATION OF RIGHTS
SECTION 10: RIGHT OF PRIVACY
Adopted in 1972 by Constitutional Convention[91]

The right of **individual privacy** is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

[89] Hawaii Legislative Reference Bureau, *The Constitution of the State of Hawaii,* available at http://lrbhawaii.org/con/ (last visited December 28, 2017).
[90] Illinois General Assembly Legislative Research Unit, *1970 Illinois Constitution: Annotated for Legislators (4th ed.)*, available at http://www.ilga.gov/commission/lru/ILConstitution.pdf (last visited December 28, 2017).
[91] Larry Elison and Fritz Snyder, *The Montana State Constitution,* pg. xv

SOUTH CAROLINA
ARTICLE I: DECLARATION OF RIGHTS
SECTION 10: SEARCHES AND SEIZURES; INVASIONS OF PRIVACY

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable **invasions of privacy** shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

WASHINGTON
ARTICLE I: DECLARATION OF RIGHTS
SECTION 7: INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED

Established in Washington Constitution of 1889.[92]

No person shall be disturbed in his **private affairs**, or his home invaded, without authority of law.

[92] *Supra* note 1, at FN 14.