The Constitution Revision Commission

COMMITTEE MEETING EXPANDED AGENDA

JUDICIAL
Commissioner Schifino, Chair
Commissioner Gamez, Vice Chair

MEETING DATE: Tuesday, December 12, 2017
TIME: 1:00—5:00 p.m.
PLACE: 301 Senate Office Building, Tallahassee, Florida

MEMBERS: Commissioner Schifino, Chair; Commissioner Gamez, Vice Chair; Commissioners Bondi, Cerio, Coxe, Joyner, Lee, Martinez, and Timmann

TAB	PROPOSAL NO. and INTRODUCER	PROPOSAL DESCRIPTION and COMMITTEE ACTIONS	COMMITTEE ACTION
1	**P 23** Thurlow-Lippisch	GENERAL PROVISIONS, Natural resources and scenic beauty; Section 7 of Article II of the State Constitution to establish that every person has a right to a clean and healthful environment. JU 12/12/2017 Amendment Adopted - Temporarily Postponed GP	Amendment Adopted - Temporarily Postponed
2	Presentation on Judicial Selection		Presented
3	**P 20** Rouson	MISCELLANEOUS, Repeal of criminal statutes; Section 9 of Article X of the State Constitution to provide that the repeal of a criminal statute shall not affect the prosecution of any crime committed before such repeal. GP 11/28/2017 Favorable GP 11/30/2017 JU 12/12/2017 Favorable	Favorable Yeas 6 Nays 0

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 23

Relating to: GENERAL PROVISIONS, Natural resources and scenic beauty

Introducer(s): Commissioner Thurlow-Lippisch

Article/Section affected:

Date: December 11, 2017

	REFERENCE	ACTION
1.	JU	**Pre-meeting**
2.	GP	

I. SUMMARY:

The proposal states that "natural resources of the state are the legacy of present and future generations." The proposal creates rights to a "clean and healthful environment" and substantive rights to clean air, water, pollution control and conservation. The proposal creates a cause of action and gives standing to anyone to enforce these rights "subject to reasonable limitations as provided by law."

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The Florida Constitution currently has a provision that declares state policy on conservation and protection of the environment and mandates that there be "adequate provision in law" for pollution control and conservation of natural resources.[1] Under state law the Department of Legal Affairs (DLA), any political subdivision or municipality of the state, or a citizen of the state may maintain an action for injunctive relief against any governmental agency or authority charged by law with the duty of enforcing laws, rules, and regulations for the protection of the air, water, and other natural resources of the state to compel such governmental authority to enforce such laws, rules, and regulations.[2] They may also maintain an action for injunctive relief against any person, natural or corporate, or governmental agency or authority to enjoin such persons,

[1] Fla. Const. Art II § 7.
[2] Fla. Stat. § 403.412(2)(a)1.

agencies, or authorities from violating any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state.[3]

However, as a condition precedent to the institution of an action against a governmental agency or authority, the complaining party shall first file with the governmental agencies or authorities charged by law with the duty of regulating or prohibiting the act or conduct complained of a verified complaint setting forth the facts upon which the complaint is based and the manner in which the complaining party is affected.[4] Upon receipt of a complaint, the governmental agency or authority shall forthwith transmit, by registered or certified mail, a copy of such complaint to those parties charged with violating the laws, rules, and regulations for the protection of the air, water, and other natural resources of the state.[5] The agency receiving such complaint shall have 30 days after the receipt thereof within which to take appropriate action.[6] If such action is not taken within the time prescribed, the complaining party may institute the judicial proceedings for injunctive relief.[7] However, failure to comply with the statutory process shall not bar an action for a temporary restraining order to prevent immediate and irreparable harm from the conduct or activity complained of.[8]

The court, in the interest of justice, may add as party defendant any governmental agency or authority charged with the duty of enforcing the applicable laws, rules, and regulations for the protection of the air, water, and other natural resources of the state.[9] The DLA may intervene to represent any interest of the state in any suit filed.[10]

Venue of any causes brought under this law shall lie in the county or counties wherein the cause of action is alleged to have occurred.[11]

No action may be maintained if the person (natural or corporate) or governmental agency or authority charged with pollution, impairment, or destruction of the air, water, or other natural resources of the state is acting or conducting operations pursuant to currently valid permit or certificate covering such operations, issued by the appropriate governmental authorities or agencies, and is complying with the requirements of said permits or certificates.[12]

In such action, other than an action involving a state National Pollutant Discharge Elimination System (NPDES) permit authorized under s. 403.0885, F.S., the prevailing party or parties shall be entitled to costs and attorney's fees.[13] Any award of attorney's fees in an action involving such a state NPDES permit shall be discretionary with the

[3] Fla. Stat. § 403.412(2)(a)2.
[4] Fla. Stat. § 403.412(2)(c).
[5] Id.
[6] Id.
[7] Id.
[8] Id.
[9] Fla. Stat. § 403.412(2)(d).
[10] Fla. Stat. § 403.412(2)(b).
[11] Fla. Stat. § 403.412(8).
[12] Fla. Stat. § 403.412(2)(e).
[13] Fla. Stat. § 403.412(2)(f).

court.[14] If the court has reasonable ground to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment which might be rendered against him or her in an action brought under this section, the court may order the plaintiff to post a good and sufficient surety bond or cash.[15]

The court may grant injunctive relief and impose conditions on the defendant which are consistent with and in accordance with law and any rules or regulations adopted by any state or local governmental agency which is charged to protect the air, water, and other natural resources of the state from pollution, impairment, or destruction.[16] The doctrines of res judicata and collateral estoppel shall apply.[17] The court shall make such orders as necessary to avoid multiplicity of actions.[18]

In any administrative, licensing, or other proceedings authorized by law for the protection of the air, water, or other natural resources of the state from pollution, impairment, or destruction, DLA, a political subdivision or municipality of the state, or a citizen of the state shall have standing to intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state.[19]

A citizen whose substantial interests will be determined or affected by a proposed agency action from initiating a formal administrative proceeding under s. 120.569 or s. 120.57, F.S.[20] A citizen's substantial interests will be considered to be determined or affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by chapter 403, F.S.[21] No demonstration of special injury different in kind from the general public at large is required.[22] A sufficient demonstration of a substantial interest may be made by a petitioner who establishes that the proposed activity, conduct, or product to be licensed or permitted affects the petitioner's use or enjoyment of air, water, or natural resources protected by chapter 403, F.S.[23]

Any Florida corporation not for profit which has at least 25 current members residing within the county where the activity is proposed, and which was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality, may initiate a hearing pursuant to s. 120.569 or s. 120.57, F.S., provided that the Florida corporation not for profit was formed at least 1 year prior to the date of

[14] Id.
[15] Id.
[16] Fla. Stat. § 403.412(3).
[17] Fla. Stat. § 403.412(4).
[18] Id.
[19] Fla. Stat. § 403.412(5). The term "intervene" means to join an ongoing s. 120.569 or s. 120.57 proceeding; this section does not authorize a citizen to institute, initiate, petition for, or request a proceeding under s. 120.569 or s. 120.57, F.S.
[20] Fla. Stat. § 403.412(5).
[21] Id.
[22] Id.
[23] Id.

the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action.[24]

In a matter pertaining to a federally delegated or approved program, a citizen of the state may initiate an administrative proceeding under this subsection if the citizen meets the standing requirements for judicial review of a case or controversy pursuant to Article III of the United States Constitution.[25]

B. EFFECT OF PROPOSED CHANGES:

The proposal provides that the natural resources of the state are the legacy of present and future generations. The proposal gives every person a right to a clean and healthful environment, including clean air and water; control of pollution; and the conservation and restoration of the natural, scenic, historic, and aesthetic values of the environment as provided by law. The proposal allows any person to enforce this right against any party, public or private, subject to reasonable limitations, as provided by law.

The proposal appears to expand the parties that may have legal standing to initiate or intervene in civil or administrative legal actions.[26] It may create a new legal cause of action that previously did not exist.[27] It also could have the effect of allowing a legal action against "an entity that is impacting the environment in accordance with law."[28]

The proposal provides that enforcement is subject to "reasonable limitations as provided by law." The phrase by law means by act of the legislature.[29] The exact extent or nature of such enforcement is unknown, but may include administrative, civil, or criminal legal actions.[30].

C. FISCAL IMPACT:

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.

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[24] Fla. Stat. § 403.412(6).
[25] Fla. Stat. § 403.412(7).
[26] Department of Environmental Protection Analysis on file with the CRC.
[27] Analysis by Kai Su on file with the CRC.
[28] Department of Environmental Protection Analysis on file with the CRC.
[29] *See, Holzendorf v. Bell* 606 So.2d 645, 648 (Fla. 1st DCA 1992). Under the Constitution, the phrase "as provided by law" means as passed "by an act of the legislature."
[30] Department of Environmental Protection Analysis on file with the CRC.

C. Technical Deficiencies:

None.

D. Related Issues:

None.

367752

CRC ACTION

Commissioner .
Comm: FAV .
12/13/2017 .
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The Committee on Judicial (Gamez) recommended the following:

CRC Amendment

Delete lines 30 - 31
and insert:
the natural environment as provided by law. A resident of this state, not including a corporation, may enforce this

By Commissioner Thurlow-Lippisch

thurlowlj-00038-17 201723__

A proposal to amend
Section 7 of Article II of the State Constitution to establish that every person has a right to a clean and healthful environment.

Be It Proposed by the Constitution Revision Commission of Florida:

Section 7 of Article II of the State Constitution is amended to read:

ARTICLE II
GENERAL PROVISIONS

SECTION 7. Natural resources and scenic beauty.—

(a) It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.

(b) Those in the Everglades Agricultural Area who cause water pollution within the Everglades Protection Area or the Everglades Agricultural Area shall be primarily responsible for paying the costs of the abatement of that pollution. For the purposes of this subsection, the terms "Everglades Protection Area" and "Everglades Agricultural Area" shall have the meanings as defined in statutes in effect on January 1, 1996.

(c) The natural resources of the state are the legacy of present and future generations. Every person has a right to a clean and healthful environment, including clean air and water; control of pollution; and the conservation and restoration of the natural, scenic, historic, and aesthetic values of the environment as provided by law. Any person may enforce this right against any party, public or private, subject to

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reasonable limitations, as provided by law.

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Effects of proposed "Right to a Clean and Healthful Environment" (PUB 700540)

I. IS THE PROVISION SELF-EXECUTING?

The first question is whether the right to a clean environment provided by our provision is self-executing, or whether it requires legislative action to be effective. Self-executing means the provision is "complete in itself" and does not require further legislative action. *County of Hawaii v. Ala Loop Homeowners*, 235 P.3d 1103, 1124 (Haw. 2010).

1. Courts review language of the provision.

Courts (at least in Hawaii) review the plain language of the provision to determine whether adoption of legislation is required; any reference to exercising a right "as provided by law" indicated implementing legislation to enforce the provision. *Id.* Our proposal uses this exact language in subsection (c) ("…subject to reasonable limitations, as provided by law."), so it will most likely be self-executing. http://www.flcrc.gov/Proposals/Public/700540.

2. However, this language is not dispositive.

Even though this language suggests self-execution, it does not mean legislation is *required* before the right can be enforced. *Id.* at 1125. It simply preserves the legislature's ability to reasonably limit exercise of the right, but "the right exists and can be exercised even in the absence of such limitations." *Id.* So it seems that even with this plain language in our proposal, legislation would not necessarily be *required* for the right to be enforced.

I believe Professor Long and I discussed how a non-self-executing provision would be preferable to business and development people who are concerned about this amendment being too restrictive; a possible response to this criticism is that our amendment would provide long-term protection of their interests by ensuring Florida's environmental prosperity and vibrant tourism industry for generations to come.

II. WHAT DOES ENFORCEMENT OF THE PROVISION LOOK LIKE?

The two most apparent effects of this amendment are (1) making it easier for parties to bring environmental claims to court because they now have a legal cause of action that previously did not exist and (2) making it easier for plaintiffs to challenge parties who violate their right to a clean environment by providing constitutional support for this right.

1. Looser standing for plaintiffs bring environmental claims.

It is accurate that this provision would loosen standing requirements, as Professor Henderson mentioned in one of his emails. *See Sierra Club v. Dept. of Transp.*, 167 P.3d 292, 313 (Haw. 2007), as corrected (Oct. 10, 2007) (recognizing that public interest concerns warrant lowering standing barriers in environmental cases). I believe this would be an example of a non-self-executing provision because it appears that the provision was used in conjunction with the Hawai'i Environmental Policy Act (HEPA).

Parties bringing environmental actions will have a better chance of their claims surviving in court if this environmental provision is added to Florida's Constitution. *See Pennsylvania Envtl. Def. Found. v. Cmmw.*, 161 A.3d 911, 916 (Pa. 2017) (holding that laws unreasonably impairing the right to clean air and water and environmental preservation are unconstitutional). For example, in this Pennsylvania case, the state Supreme Court ruled for an environmental organization in its suit against the Commonwealth, finding budget-related decisions that led to additional oil-and-gas lease sales was unconstitutional.

2. Greater support for enforcing existing environmental regulations.

Based on the cases from the six other states with environmental provisions, another effect of this proposed amendment would be greater support for enforcing existing environmental regulations by giving parties a legal cause of action. Riley v. Rhode Island Dept. of Envtl. Mgt.,

941 A.2d 198, 201 (R.I. 2008) (finding the General Assembly and Department of Environmental Management restriction of commercial licenses to regulate the state's fisheries was constitutional; the restriction did not implicate the public's fundamental right of fishery found in the state Constitution). In this case, the Department of Environmental Management successfully defended its constitutional duty to regulate the fisheries by relying on the state's environmental provision; the court said the Department's power to regulate is "broad and plenary." *Id.* at 206. The provision was not used in conjunction with any other legislation (in other words, it was self-executing).

Public Proposal

Florida Constitution Revision Commission

Title: Right to a Clean and Healthful Environment

Article II Section 7(c) is created to read:

(c) The natural resources of the State are the legacy of present and future generations. Every person has a right to a clean and healthful environment, including clean air and water, control of pollution, and the conservation and restoration of the natural, scenic, historic, and esthetic values of the environment as provided by law. Any person may enforce this right against any party, public or private, subject to reasonable limitations as provided by law.

Discussion.

Florida's Constitution contains broad policy statements, financial authorization, and a unique government structure to support agencies, programs, and actions geared toward environmental protection. This includes a policy to "conservation and protect natural resources and scenic beauty," financial commitments for land and water conservation and environmental restoration, and creation of an independent wildlife agency. These constitutional provisions have been proposed by the Legislature, Constitution Revision Commission, Budget and Tax Reform Commission, and citizen initiatives. Time and again Florida voters have ratified amendments to the Constitution by significant majorities which signifies that Floridians consider protection of the environmental as a fundamental value.

Even though Florida's Constitution gives policy-makers multiple tools to protect natural resources, there is evidence that these resources are under continued stress as evidenced by impaired waters, algae blooms, wildlife mortality, loss of habitat, and billions of dollars of need for restoration of degraded systems such as the Florida Keys, Everglades, Indian River Lagoon, and springs. As recently as 2014, Florida citizens utilized the initiative process of the Constitution to overwhelmingly ratify the largest environmental funding measure in our nation's history, but the Legislature diverted those funds to management and administration rather than land and water conservation. What is missing from the Florida Constitution is the right to a clean environment.

Florida's Constitutional Framework for Environmental Protection. Florida's Constitution contains a number of provisions which set forth policies, authorize funding, and jurisdiction for a range of programs and agencies to protect the environment.

The 1968 Florida Constitutional Revision contained a policy statement in the General Provisions article which addressed "natural resources and scenic beauty," which for the times was fairly new. It provided:

> Section 7. Natural Resources and Scenic Beauty. It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise.

This provision was expanded by initiative in 1994 and further by the 1998 Constitution Revision Commission. Art. 2 Sec. 7(a) Fla. Const. now provides as follows:

> It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.

Art. 2 Sec. 7(b) Fla. Const. was added by Initiative in 1994 and is generally referred to as the "polluter pays" clause and is specific to the Everglades. The courts determined the clause was not self-executing and the Legislature has taken no steps to implement this provision.

Other constitutional provisions provide governmental structure, finance, and policy to implement the broad policy of Article 2. Article 4 Sec. 9 establishes the Fish and Wildlife Conservation Commission as an independent agency " with "the regulatory and executive powers of the state with respect to wild animal life… fresh water aquatic life, and … marine life."

Article 7 provides authorization for specific funding for conservation programs. Section 9 authorizes ad valorem taxes for "water management purposes" which is the constitutional basis for the five water management districts. Section 11(e) provides authorization for state bonds for conservation, outdoor recreation, water resource development, restoration of natural systems, and historic preservation.

Article X is a hodgepodge that contains several amendments which strengthen environmental protection. Section 11 entitled "sovereignty lands" was proposed by Legislature to codify the "public trust doctrine" in Florida for beaches and lands under navigable waters to be held "in trust for all the people." Section 16 contains the gill net restrictions placed in the Constitution by initiative in 1994. The amendment also contains a broad policy statement that "the marine resources of the State of Florida belong to all of the people of the state and should be conserved and managed for the benefit of the state, its people, and future generations."

Right to a Clean Environment. A constitutional right to a clean environment has been adopted by many nations and several states within the United States as a fundamental human right. The United Nations Conference on the Human Environment was convened in Stockholm, Sweden in 1972, and has been referred to since as the Stockholm Declaration. There were 26 principles established including a formal declaration of a fundamental right to a quality environment:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

Recent surveys indicate that 172 nations have adopted as part of their constitution a "right to a clean environment." In 1976, Portugal became the first nation to adopt a provision as part of their constitution. Article 66 provides in part: "Everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it."

Since the Stockholm Declaration six states have amended their state constitution to include some form of environment right. Some of these states include the provision within their declaration of rights section while others have a separate article relating to environmental protection. Those provisions are set forth as follows:

Hawaii: Article 11 Section 9

ENVIRONMENTAL RIGHTS. Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

Illinois Article 11 Section 2

RIGHTS OF INDIVIDUALS
Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.

Montana Article 2 Section 3

Inalienable rights. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

Massachusetts Article 97

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

Pennsylvania Article 1 Section 27

§ 27. Natural resources and the public estate.
The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Rhode Island Article 1 Section 17

Section 17. Fishery rights — Shore privileges — Preservation of natural resources.
The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.

Florida has no such "right to a clean environment" within its Constitution. The 1998 Constitution Revision Commission held public hearings around the state where many citizens came forth an urged the commission to include such a right in the state constitution. Two proposals were introduced and reviewed by the CRC. Each is a little different in its placement and form.

1998 CRC proposal 36 Amendment to Article 2 Section 7

(c) The natural resources of the state are the heritage of present and future generations. The right of each person to clean and healthful air and water and to the protection of the other natural resources of the state shall not be infringed by any person.

1998 CRC proposal 36 Amendment to Article 1 Section 26

SECTION 26. Environmental Bill of Rights.--Every person has a right to live in an environment that is free from the toxic pollution of manufactured chemicals; to protect and preserve pristine natural communities as God made them; to ensure the existence of the scarce and fragile plants and animal species that live in the state; to outdoor recreation; and to sustained economic success within our natural resources capacity.

Ultimately, the CRC combined the two proposals but significantly revised it to become the broadened policy statement now in Art. 2 Sec 7(a).

A review of case law from the six states which have adopted some form of "clean and healthful environment" show the proposal to be a mainstream constitution provision. The Legislature and appropriate agencies still set the standards for environmental protection. What the constitutional provision does is authorize a private right of action when environmental degradation either violates the adopted standard or causes special injury. This is not unlike the private right of action available under the Clean Water Act and Clean Air Act.

Respectfully submitted: Clay Henderson, Lance Long, Traci Deen

By Commissioner Thurlow-Lippisch

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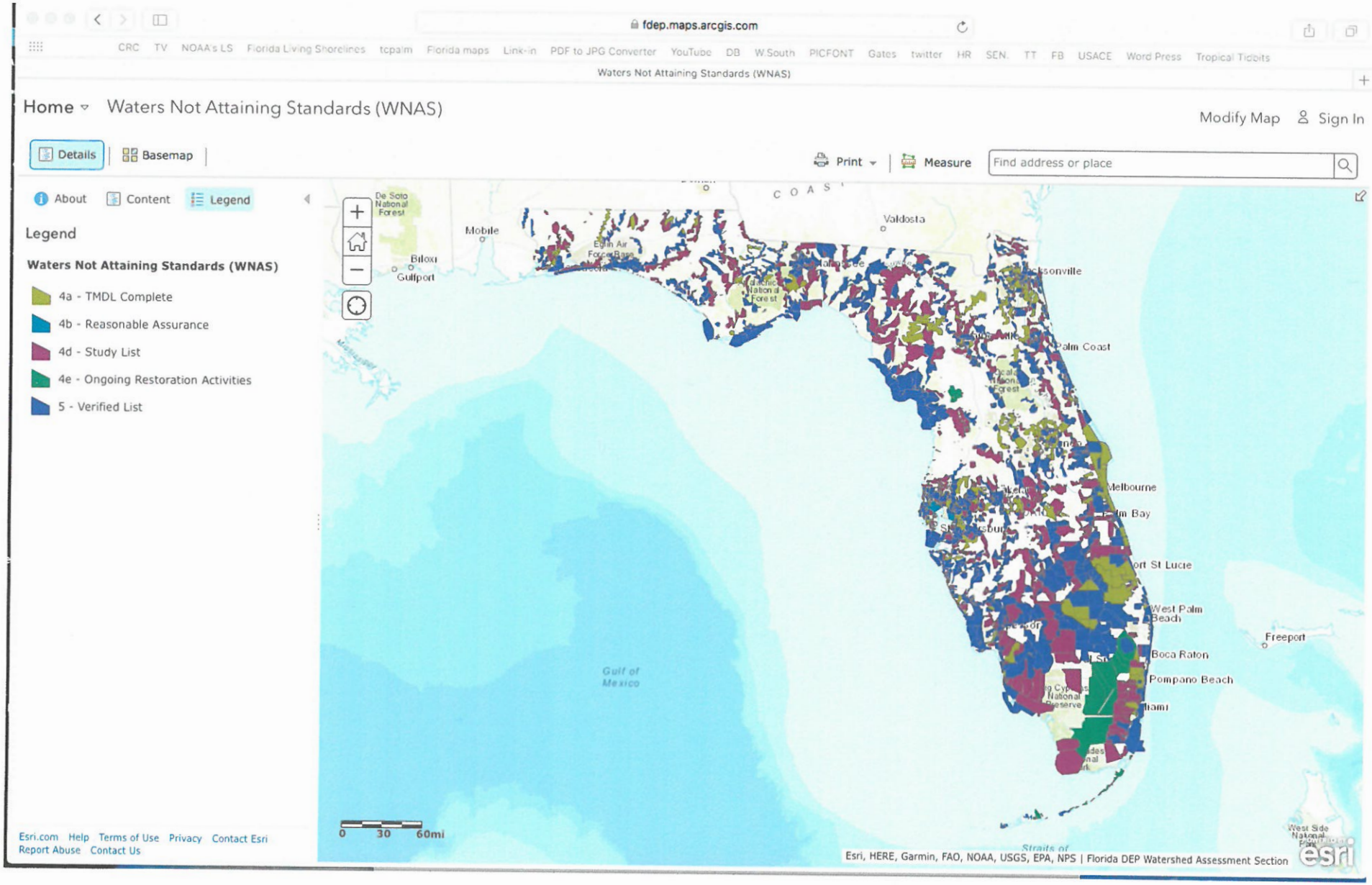
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IRL Bottle-nosed Dolphins up to 70% sickly. Here lobomyosis due to lowered immunity from poor water quality. Cases through out entire IRL but most extreme observations in southern IRL, Photo credits: Elizabeth Howell,FAU Harbor Branch & Nic Mader, Dolphin Ecology Project. Above, 2007/Mother and calf, below, 2015

Fig. 1

Fig. 2

Select Year: 2017 Go

The 2017 Florida Statutes

Title XXIX
PUBLIC HEALTH

Chapter 403
ENVIRONMENTAL CONTROL

View Entire Chapter

403.412 Environmental Protection Act.—

(1) This section shall be known and may be cited as the "Environmental Protection Act of 1971."

(2)(a) The Department of Legal Affairs, any political subdivision or municipality of the state, or a citizen of the state may maintain an action for injunctive relief against:

1. Any governmental agency or authority charged by law with the duty of enforcing laws, rules, and regulations for the protection of the air, water, and other natural resources of the state to compel such governmental authority to enforce such laws, rules, and regulations;

2. Any person, natural or corporate, or governmental agency or authority to enjoin such persons, agencies, or authorities from violating any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state.

(b) In any suit under paragraph (a), the Department of Legal Affairs may intervene to represent the interests of the state.

(c) As a condition precedent to the institution of an action pursuant to paragraph (a), the complaining party shall first file with the governmental agencies or authorities charged by law with the duty of regulating or prohibiting the act or conduct complained of a verified complaint setting forth the facts upon which the complaint is based and the manner in which the complaining party is affected. Upon receipt of a complaint, the governmental agency or authority shall forthwith transmit, by registered or certified mail, a copy of such complaint to those parties charged with violating the laws, rules, and regulations for the protection of the air, water, and other natural resources of the state. The agency receiving such complaint shall have 30 days after the receipt thereof within which to take appropriate action. If such action is not taken within the time prescribed, the complaining party may institute the judicial proceedings authorized in paragraph (a). However, failure to comply with this subsection shall not bar an action for a temporary restraining order to prevent immediate and irreparable harm from the conduct or activity complained of.

(d) In any action instituted pursuant to paragraph (a), the court, in the interest of justice, may add as party defendant any governmental agency or authority charged with the duty of enforcing the applicable laws, rules, and regulations for the protection of the air, water, and other natural resources of the state.

(e) No action pursuant to this section may be maintained if the person (natural or corporate) or governmental agency or authority charged with pollution, impairment, or destruction of the air, water, or other natural resources of the state is acting or conducting operations pursuant to currently valid permit or certificate covering such operations, issued by the appropriate governmental authorities or agencies, and is complying with the requirements of said permits or certificates.

(f) In any action instituted pursuant to this section, other than an action involving a state NPDES permit

authorized under s. 403.0885, the prevailing party or parties shall be entitled to costs and attorney's fees. Any award of attorney's fees in an action involving such a state NPDES permit shall be discretionary with the court. If the court has reasonable ground to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment which might be rendered against him or her in an action brought under this section, the court may order the plaintiff to post a good and sufficient surety bond or cash.

(3) The court may grant injunctive relief and impose conditions on the defendant which are consistent with and in accordance with law and any rules or regulations adopted by any state or local governmental agency which is charged to protect the air, water, and other natural resources of the state from pollution, impairment, or destruction.

(4) The doctrines of res judicata and collateral estoppel shall apply. The court shall make such orders as necessary to avoid multiplicity of actions.

(5) In any administrative, licensing, or other proceedings authorized by law for the protection of the air, water, or other natural resources of the state from pollution, impairment, or destruction, the Department of Legal Affairs, a political subdivision or municipality of the state, or a citizen of the state shall have standing to intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state. As used in this section and as it relates to citizens, the term "intervene" means to join an ongoing s. 120.569 or s. 120.57 proceeding; this section does not authorize a citizen to institute, initiate, petition for, or request a proceeding under s. 120.569 or s. 120.57. Nothing herein limits or prohibits a citizen whose substantial interests will be determined or affected by a proposed agency action from initiating a formal administrative proceeding under s. 120.569 or s. 120.57. A citizen's substantial interests will be considered to be determined or affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by this chapter. No demonstration of special injury different in kind from the general public at large is required. A sufficient demonstration of a substantial interest may be made by a petitioner who establishes that the proposed activity, conduct, or product to be licensed or permitted affects the petitioner's use or enjoyment of air, water, or natural resources protected by this chapter.

(6) Any Florida corporation not for profit which has at least 25 current members residing within the county where the activity is proposed, and which was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality, may initiate a hearing pursuant to s. 120.569 or s. 120.57, provided that the Florida corporation not for profit was formed at least 1 year prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action.

(7) In a matter pertaining to a federally delegated or approved program, a citizen of the state may initiate an administrative proceeding under this subsection if the citizen meets the standing requirements for judicial review of a case or controversy pursuant to Article III of the United States Constitution.

(8) Venue of any causes brought under this law shall lie in the county or counties wherein the cause of action is alleged to have occurred.

History.—ss. 1, 2, 3, 4, 5, 6, ch. 71-343; s. 24, ch. 88-393; s. 10, ch. 97-103; s. 9, ch. 2002-261.

Richard Grosso, Esq.
954-801-5662
grosso.richard@yahoo.com

December 11, 2017

Commissioner, Jacqui Thurlow-Lippisch
CRC 2017-2018

Re: CRC Proposal 23

Dear Commissioner Thurlow-Lippisch,

I have reviewed Proposal 23 that would amend article II, Section 7 of the Florida Constitution, which would read as follows:

> *SECTION 7. Natural resources and scenic beauty.— (c) The natural resources of the state are the legacy of present and future generations. Every person has a right to a clean and healthful environment, including clean air and water; control of pollution; and the conservation and restoration of the natural, scenic, historic, and aesthetic values of the environment as provided by law. Any person may enforce this right against any party, public or private, subject to reasonable limitations, as provided by law.*

I have practiced environmental and land use law in Florida for over 30 years and taught Florida Constitutional Law for six years. I briefly explain my interpretation of the proposal below.

Initially, I would point out that Florida's Constitution is interpreted by Florida courts based on its language, history, ballot summary and supporting information, not judicial interpretations of similar language in other states. How other state courts have interpreted their constitutions will not control the interpretation of a Florida constitutional amendment.

Moving to the actual language of your proposal, the proposed policy statements seem hard to oppose. I cannot imagine that any interest would think it wrong for Florida's Constitution to espouse this language as the official policy of the state of Florida. The language would support enhanced environmental laws and ordinances by the Legislature or local governments. The claim, however, that it would "wipe the slate [of existing laws] clean" and make it difficult to enact new laws, rules and ordinances, is hard to glean from the either its language or intent. It is difficult to find support in any of the language for the claims that the proposal would create chaos and uncertainty and render state agencies unable to reasonably administer their respective laws and rules.

The qualifying phrase "as provided by law" appears to leave the specifics of what those policy statements would mean in terms of legally – binding and enforceable permit or government approval standards to the Legislature. The law has been clear for decades that the Legislature's interpretation (via the adoption of statutes) of constitutional language will be given deference by

the Courts and laws enacted by the Legislature are presumed to be constitutional unless the challenger carried the heavy burden of demonstrating clear unconstitutionality. Where the constitution is susceptible of more than one reasonable interpretation, the one chosen by the Legislature must prevail in a court challenge. *Carroll v. State,* 361 So.2d 144, 146 (Fla. 1978). Nothing about that would be changed by this proposal. It surely does not hand over the writing of environmental standards to the courts.

In 1997, the Florida Supreme Court of Florida ruled, in *Advisory Opinion to the Governor-1996 Amendment 5 (Everglades),* 706 So.2d 278 (Fla.1997), that Article II, Section 7(b) of the Florida Constitution was not self-executing and thus that the courts could not use it to overturn the Legislature's adopted funding mechanism for pollution abatement in the Everglades Agricultural Area. The constitutional language at issue there stated that "[t]hose in the Everglades Agricultural Area who cause water pollution within the Everglades Protection Area *shall be primarily responsible for paying the costs* of the abatement of that pollution…." (emphasis added). The Court explained the enforcement of ambiguous constitutional language:

> "whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment."

The court ruled that the constitutional language "is not self-executing and cannot be implemented without the aid of legislative enactment because it fails to lay down a sufficient rule for accomplishing its purpose." Where, the Court wrote, constitutional language leaves "too many policy determinations … unanswered", including "the means by which the purposes may be accomplished", constitutional language cannot be enforced on its own unless sufficient details are provide by legislative acts. In that case, the language raised "a number of questions such as what constitutes 'water pollution'; how will one be adjudged a polluter; [and] how will the cost of pollution abatement be assessed…", and was thus not self-executing.

A 1998 Florida Supreme Court decision, in *St. Johns Medical Plans, Inc. v. Gutman*, 721 So. 2d 717 (Fla. 1998) found the "public trust" provision in article II, § 8 (c) of the Florida Constitution to not be self-executing. It explained that in order to be enforceable without the need for implementing legislation, constitutional language has to establish a "sufficient rule" that needs no aid of legislation to be enjoyed or enforced. In other words, where definitions and procedures are not set forth in the constitution, implementing legislation is required to give it "teeth".

Finally, it seems clear that many of the opponents are especially concerned about the language that would recognize the right of "any person" to "enforce this right against any party, public or private". This right is, however, "subject to reasonable limitations, as provided by law." First, the argument against this right is an argument that violations of environmental standards should go unenforced where the violator is lucky enough that no one with a "special injury" and the money to fund litigation stepped forward to bring a challenge. Florida's generally strict current limitation on standing to challenge environmental decisions is a major hindrance to enforcement. Challengers must typically show special injury to themselves that exceeds that of the general

public. *Agrico Chemical Company vs. Dept. of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). Organizations must prove that a "substantial number" of their members would experience such an injury. *Fla. Home Builders Ass'n v. Dep't of Labor & Emp. Sec.*, 412 So.2d 351 (Fla. 1982). Those current standards are themselves vague and rife with uncertainty. Every Florida citizen should have the right to enforce environmental standards without the excessive cost and uncertainty posed by Florida's current limiting standing law.

The claimed spectre of excessive, frivolous litigation that would supposedly be spawned by this proposal is wholly unwarranted, and completely precluded by the explicit language that enforcement would be "subject to reasonable limitations, as provided by law." One opponent raised the prospect of duplicative, simultaneous legal challenges to government approvals. It is hard to see how that would ever be allowed by any court of law. It is however easy to expect that the Legislature would simply maintain reasonable limitations against frivolous, premature, or duplicative litigation, with defined, reasonable, deadlines for initiating legal challenges.

The cost, difficulty and uphill climb (for example, courts regularly defer to agency decisions) involved in bringing suit to defend environmental policies is a major limitation on enforcement, even where a citizen is fortunate enough to be able to secure the services of one of the relative handful of courtroom lawyers who work on the side of "third parties" in Florida. This propose amendment would, at most, reduce some of the currently overly strict limits on who can bring such challenges, where they are valid and timely. Anyone claiming that it will open up a floodgate of unwarranted litigation to enforce environmental standards may possess inadequate experience counselling or representing people seeking to oppose government approvals.

In closing, the Supreme Court decisions above and otherwise about non self-executing constitutional provisions is a result in large part of Florida's strict "separation of powers" constitutional limitation on the judicial branch intruding into the Legislature's powers. In the case of this current proposal, given the judicial approaches discussed above, the lack of definitions and details in the language is far more of a challenge for those seeking new, stronger environmental protections than for those who would oppose them. It surely does not give the courts the ability to write the state's environmental laws. The qualifying phrase "as provided by law" could not be clearer. This proposal leaves much discretion to the Legislature.

I hope that this brief analysis is helpful to the discussion about the merits of your proposal.

Sincerely,

/s/ Richard Grosso /s/

Richard Grosso

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

12.12.17
Meeting Date

23
Proposal Number (if applicable)

367752
Amendment Barcode (if applicable)

***Topic** Gamez Amendment to Proposal #23

***Name** William Large

Address ~~1810 Miccosukee~~ 210 S. Monroe Street
Street

Tallahassee, FL 32301
City *State* *Zip*

Phone 850-509-0756

Email william@fljustice.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 Justice Reform Institute

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)

12-12-17
Meeting Date

23
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Clean Air + Water Amendment - Prop 23

***Name** Everett Wilkinson

Address 9208 Sandy ~~Road~~ Run Rd
Street

Phone

Jupiter FL 33478
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)

Dec 12 2017
Meeting Date

23
Proposal Number (if applicable)

367752
Amendment Barcode (if applicable)

***Topic** Amendment to Proposition 23

***Name** DAVID CHILDS

Address 119 S. Monroe St Suite 300
Street

TALLAHASSEE FL 32301
City *State* *Zip*

Phone 850 222 7500

Email DAVIDC@HGSLAW.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? FLORIDA CHAMBER OF COMMERCE

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)

12/12/17
Meeting Date

23
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Proposal 23 Amendment

***Name** Greg Munson

Address 201 S. Monroe St
Street

Tallahassee FL 32308
City *State* *Zip*

Phone 850-521-1980

Email gmunson@gunster.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? Associated Industries 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**

Judicial Selection & IAC Geography

William E. Raftery, PhD

Sr. KIS Analyst

National Center for State Courts

Overview

- Acronyms To Be Used
- What is NCSC?
- Judicial Selection: Current Status
- Judicial Selection: Pros/Cons
- Judicial Selection: Trends
- IAC and Geography

Acronyms To Be Used

- NCSC: National Center for State Courts
- States use vastly different names for courts
- COLR: Court of Last Resort
  - Florida Supreme Court
- IAC: Intermediate Appellate Court
  - Florida District Courts of Appeal
- GJ: General Jurisdiction Trial Court
  - Florida Circuit Courts

What is NCSC?

- Created in 1971
- Chief Justice Warren E. Burger
- Clearinghouse for research information and comparative data to support improvement in judicial administration in state courts

Judicial Selection: Current Status

- 21 different mechanisms for COLRs
- Similar patchwork for IACs and GJ courts
- Five most common
  - Partisan
  - Nonpartisan
  - Commission Without Confirmation
  - Commission With Confirmation
  - Legislative Appointment

Judicial Selection: Current Status

- Different selection system for COLR/IAC vs. GJ or even COLR vs. IAC vs. GJ
- Different selection systems depending on county/circuit/district in question

Judicial Selection: Current Status

- Partisan
  - Partisan/Partisan
  - Partisan to Nonpartisan
  - Partisan Once
- Nonpartisan
  - Montana exception

Judicial Selection: Current Status

- Commission Without Confirmation
  - Retention Elections
- Commission With Confirmation
  - No elections (retention or otherwise)
  - Utah Exception
- Legislative Appointment

Judicial Selection: Pros/Cons

- Partisan
  - Pro: Gives voters some data and direct voice; partisan races prompt voters to vote
  - Con: Judges are different; don't overly or overtly politicize the courts; need to raise funds and adhere to party

Judicial Selection: Pros/Cons

- Nonpartisan
  - Pro: Gives voters direct voice; insulates from direct overt partisanship; more in keeping with desire for judges to focus on fairness and impartiality
  - Con: Nonpartisan races really aren't; voters tend not to vote in them (drop-off)

Judicial Selection: Pros/Cons

- Commission Without Confirmation
  - Pro: Focus on best/brightest ("merit" selection); retention elections deescalate politicization; presumption of continued service; partisan balance provisions
  - Con: Commission-bias; retention elections not adequate check; role of bar

Judicial Selection: Pros/Cons

- Commission With Confirmation
  - Pro: No need for elections at all; role for elected legislature; partisan balance provisions
  - Con: Role for legislature; no default confirmation; reconfirmation and legislative pressure

Judicial Selection: Pros/Cons

- Legislative Appointment
  - Pro: No need for elections at all; role for elected legislature
  - Con: Role for legislature but not governor; no default confirmation; reconfirmation and legislative pressure

Judicial Selection: Trends

- Partisan
  - Move to nonpartisan (WV)
  - End straight ticket voting (TX)
- Nonpartisan
  - Move to partisan (NC)
  - “Endorsed by” language

Judicial Selection: Trends

- Commission-based
  - Eliminate (KS Court of Appeals; TN appellate)
  - Add confirmation
  - Add legislative appointments to commission
  - Give governor more control
  - Diminish bar selection
  - Give more names or send all qualified names
  - Supermajority retention

Judicial Selection: Trends

- Legislative Appointment
  - Create Commissions
  - Readopt from colonial period
- Related Issues
  - Recusal/disqualification
  - Repeal Public Financing (NC, WI)
  - Adopt Public Financing (WV)

IAC and Geography

- History of IACs
  - Local? GJ court judges en banc or GJ court judges “elevated” (NJ, NY)
  - Localized? (Court of Appeals for St. Louis)
  - State? Deputy Chamber/Error Correcting?
  - One court in multiple places, or multiple courts?
  - “Deflector” courts
- 41 states have IACs

IAC and Geography

- Florida + 19 states rely on geography for their IACs
- 13 states: GJ Geographic Areas > Number of IAC judges
- 6 states: realistically cannot use or opt not to

IAC and Geography

- Use of Appellate Districts/Subdistricts/Sub-subdistricts
- “Geographic diversity” provision for nominating commissions themselves

Judicial Selection & IAC Geography

William E. Raftery, PhD

Sr. KIS Analyst

National Center for State Courts

To: Judicial Committee, Constitution Revision Commission
From: William E. Raftery, PhD
Date: December 7, 2017
RE: Use of Geographic Considerations in Selection of State Intermediate Appellate Court Judges

41 states have intermediate appellate courts (IACs), however of these only Florida + 19 states make use of geography (circuits, districts, etc.) with respect to selection and residency of IAC judges.

Of these 19 other than Florida

- 13 states have more general jurisdiction trial court circuits/districts than they have IAC judges and therefore can't impose a one-judge-per-circuit/district rule.

State	Number of GJ Trial Court Geographic Areas	Number of IAC judges
Arkansas	23 Circuits	12
Indiana	26 Districts	15
Kentucky	57 Districts	14
Michigan	57 Circuits	27
Missouri	45 Circuits	32
Mississippi	22 Circuits	10
Nebraska	12 Districts	6
Ohio	88 Counties	69
Oklahoma	26 Districts	10
Tennessee	31 Districts	12 (per IAC)
Texas	507 Districts	80
Washington	39 Districts (= County)	22
Wisconsin	69 Circuits	16

- Arizona has no circuit/district system, instead each of the 15 counties has its own Superior Court. There are fewer counties (15) than IAC judges (22) making a one-IAC-judge-per-county-rule theoretically possible, however 94% of the attorneys in the state practice in the two largest counties (Maricopa and Pima) making it unclear that such a rule could realistically be imposed.

- California has no circuits/districts for its sole trial court (Superior), instead dividing its trial courts by county (58). Per the state's constitution, the state is divided into Appellate Districts (the legislature has created 6). While its IAC has a total of 99 judges and therefore theoretically could impose a one-IAC-judge-per-county rule, there does not appear to have been any attempt to do so.

- Illinois's constitution requires that the First Appellate Judicial District (IAC) and the Cook Circuit (trial) be the same, namely Cook County. The remaining 23 Circuits are divided among the other Four Appellate Judicial Districts and the constitution limits the Appellate Judicial Districts to 4 + Cook/First. With only 30 IAC judges to cover the 4 AJDs, it would be difficult to impose a one-IAC-judge-per-circuit rule and there does not appear to have been any attempt to do so.

AJD	Number of IAC judges	Number of Circuits in AJD
2	9	7
3	7	6
4	7	5
5	7	5

- Louisiana has 43 Districts at the trial court level and 53 IAC judges. The state makes use of not only 5 Appellate Circuits, but 15 Appellate Districts (3 per Appellate Circuit), plus many Appellate Districts are further subdivided into Election Districts. Much of this division and sub-division was in response to Voting Rights Act lawsuits.

- Maryland has 8 Circuits but 7 Appellate Judicial Districts (AJD) for its IAC. The AJD lines do not always follow the Circuit lines. For example, Prince George's County is cut out of the 7th Circuit to form the single-county 4th AJD. The remaining parts of the 7th Circuit plus Anne Arundel (taken out of the 5th Circuit) form the 3rd AJD. Moreover, Maryland's IAC uses a unique election process: 7 judges are appointed/retained by AJD, the remaining 8 statewide.

- New York's IAC is made up of judges elected to the state's general jurisdiction court who are then elevated by the governor to serve for 5 years in one of the state's 4 Appellate Divisions. The constitution requires only that their Presiding Judge reside in the geographic area of the IAC (called a "department", see Art. VI, Sec. 4(c)). Only a simple majority of judges must reside in the department in which they are serving (NY Jud. § 71) and there is no requirement that each of the states 13 judicial districts is entitled to at least one of the state's 90 IAC judges.

Constitutional Provisions Regarding Nominating Commissions for Courts of Last Resort

State	Nominating Commission Composition?	Bar	Governor	Other	Role of Chief Justice	Number of Names
Alaska	Yes (nominating commission = Judicial Council)	Three attorneys by state bar board of governors	Three non-attorneys with House/Senate confirmation	n/a	Chief Justice chairs	"two or more"
Arizona	Yes	Five attorney members chosen by governor from list send by state bar board of governors and confirmed by Senate	Ten non-attorneys confirmed by Senate	n/a	Chief Justice chairs	"not less than three"[1]
Colorado	Yes	None	Two non-attorneys per congressional district	One attorney per congressional district chosen by Governor + Chief Justice + Attorney General	Chief Justice chairs	"three"
Connecticut	No	No mention	No mention	No mention	No mention	No mention
Florida	No	No mention	No mention	No mention	No mention	"not fewer than three persons nor more than six persons"
Hawaii	Yes	Two attorneys by state bar as a whole	Two, of which only one may be an attorney	Two by Speaker of House, two by President of Senate	Chief Justice names member	"not less than four, and not more than six"

[1] The state legislature passed a law requiring "at least five" which was struck down by state supreme court as unconstitutional. *See Dobson v. State ex rel., Com'n on Appellate Court Appointments*, 233 Ariz. 119 (2013).

Constitutional Provisions Regarding Nominating Commissions for Courts of Last Resort

State	Nominating Commission Composition?	Bar	Governor	Other	Role of Chief Justice	Number of Names
Indiana	Yes	Three attorneys by state bar as a whole	Three non-attorneys	n/a	Chief Justice chairs	"three"
Iowa	Yes, but legislature may change at will	Three attorneys by state bar as a whole	Three non-attorneys confirmed by Senate	n/a	Chief Justice may not serve, next most senior Justice chairs	"three"
Kansas	Yes	One attorney per congressional district chosen by bar members in that district	One non-attorney per congressional district	n/a	None. Chair is attorney chosen by state bar members statewide	"three"
Missouri	Yes	One attorney per Court of Appeals District chosen by bar members in that district	One non-attorney per Court of Appeals District chosen by bar members in that district	n/a	Possible. Supreme Court names a justice to commission, who could be Chief Justice.	"three"
Nebraska	Yes	Four attorneys chosen by attorneys from Supreme Court District (associate justices) or statewide (chief justice)	Four non-attorneys chosen from Supreme Court District (associate justices) or statewide (chief justice)	n/a	None. Governor selects Supreme Court Justice to serve as non-voting chair.	"at least two"
New York	Yes	None	Names four members	One per legislative leader (speaker of the assembly, the temporary president of the senate, the minority leader of the senate, and the minority leader of the assembly).	Names four members	No mention

State	Nominating Commission Composition?	Bar	Governor	Other	Role of Chief Justice	Number of Names
Oklahoma	Yes	One attorney per congressional district chosen by bar members in that district[2]	One non-attorney per congressional district	Three: one chosen House Speaker, one by Senate President Pro Tempore, and one by other members of the commission	None. Commission names chair.	"three (3)"
Rhode Island	No	No mention	No mention	No mention	No mention	No mention
South Carolina	No	No mention	No mention	No mention	No mention	No mention
South Dakota	No	No mention	No mention	No mention	No mention	"two or more"
Utah	No	No mention	No mention	No mention	No mention	"at least three"
Vermont	No	No mention	No mention	No mention	No mention	No mention
Wyoming	Yes	Three attorneys by state bar as a whole	Three non-attorneys	No mention	Chief Justice chair, or Chief Justice names associate justice as chair	"three"

[2]As those 6 congressional districts existed at the time of adoption of the constitutional amendment. Oklahoma lost 1 congressional district in 2003.

BRIEFS

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Happy Birthday! Now get out.

Interest in increasing or repealing mandatory judicial retirement ages is growing in the legislatures – but not among voters

Mandatory judicial retirement ages have existed in the states since the nation was founded. In 1789 Alexander Hamilton noted in Federalist No. 79 that New York had a mandatory judicial retirement age of 60 and argued against the practice for both the federal and state judiciaries. Some 225 years later, many state legislatures show continued interest in raising the mandatory retirement age or abolishing it altogether. Voters, on the other hand, remain wary.

There are in practice three forms of mandatory retirement for state judges. The first is the most direct: On the day a judge reaches the applicable age, his or her birthday party doubles as a retirement party. Some states allow for service until the end of the applicable month or year, and on rare occasions the person may serve out the term in which the specified age is reached. The second version links the retirement age to retirement benefits. A judge is not automatically removed from office on a particular birthday, but if he or she refuses to retire on that day some or perhaps all retirement benefits may be forfeited. The third version is perhaps more accurately described as an electoral disqualifier: A judge who has reached a particular age may continue to serve but may not be elected or appointed to any additional terms.

Thirty-two states plus the District of Columbia currently impose some sort of retirement age on appellate or general jurisdiction court judges. Interestingly, most states do not impose a mandatory judicial retirement on limited-jurisdiction court judges; for that group, the states mostly are silent on the subject or allow local appointing bodies to set mandatory retirement ages. But of those 32 states with mandatory retirement ages, 70 is the most common retirement age. Some set retirement at 72, 74, 75, or, in the case of Vermont, 90.

Most states codify retirement ages in state constitutions, and both the legislature and the public must vote in order to make changes, though in some instances, the legislature has latitude to set the age. In the past two decades, the legislatures in the 32 states with mandatory retirement ages have debated and in many instances passed efforts to raise or eliminate them. For the most part, the focus has been on efforts to raise, rather than eliminate, retirement ages, with most moving from 70 to 72 or 75.

Advocates of raising mandatory retirement ages argue that increased life expectancy and vitality, along with the oversight of disciplinary bodies that can remove a judge who has aged into — as Alexander Hamilton put it — "inability," make later retirements feasible. Some proponents argue that mandatory retirement ages are wholly unfair, especially because the other two branches do not have similar requirements.

Those who oppose changing mandatory retirement ages generally say the loss of retiring judges does not harm the judiciary and in fact creates vacancies and opportunities ▸

for newer, younger judges. In some instances, legislators do not want to extend existing terms for a particular judge or judges and therefore vote against any change. Case in point: In New Jersey, a plan to raise the mandatory retirement age for judges met resistance until the Supreme Court was exempted. Some have voted for retirement age increases that apply only to those judges who are elected or appointed after some future date.

CHANGES IN STATUTES

Recent changes to mandatory judicial retirement ages mostly have been in those states with statute-based policies. Indiana, where a legislatively set retirement age for trial judges was repealed in 2011, nearly repealed the mandatory retirement age for appellate judges in 2014. Virginia's legislature, after debating and voting on the subject for nine years in a row, approved a limited retirement-age increase in 2015: The retirement age for Virginia appellate judges increased from 70 to 73; the increase will apply only to those trial judges elected or appointed after July 1, 2015.

Legislatively passed constitutional amendments to raise or repeal these ages have appeared on ballots 11 times in nine states since 1995, but with little success — particularly in the last decade. Efforts to raise retirement ages failed in Arizona (2012), Louisiana (1995 and 2014), Hawaii (2006 and 2014), New York, (2013), and Ohio (2011). Also a failure: a 2012 effort in Hawaii to permit judges who were forced out by mandatory retirement to be called back into service by the chief justice for up to three months.

The 2012 Arizona proposition is of particular note: The increase to the mandatory judicial retirement age was bundled with a series of other changes to the state's judiciary article, including a plan to give the governor more power over the state's merit selection system. Opponents of Proposition 115 focused mainly on those provisions without expressing particular concern over raising the mandatory retirement age from 70 to 75. Several bills in other states have coupled increases to judicial retirement ages with increasing gubernatorial power over judicial selection.

Generally, voters have rejected retirement-age changes. Aside from Vermont (2002), only three ballot measures have succeeded; all were in off-year elections and did not increase or repeal the ages but simply allowed judges to serve out their terms or to the end of the calendar year after reaching retirement age. Those were in Louisiana (2003), Pennsylvania (2001), and Texas (2007).

WHAT'S NEXT?

Oregon voters will decide in 2016 on an outright repeal of that state's retirement age. Pennsylvania's legislature approved an increase (to the end of the term in which a judge reaches age 75, up from the end of the term in which a judge reaches 70) in its 2013-14 session, and the state's 2015-16 House has given second-round approval. Movement toward constitutional changes occurred this year in Alabama (approved in House), Maryland (approved in Senate), and Wyoming (approved by House), and Indiana (approved by Senate) and North Carolina (approved by House) took steps to change statutes with mandatory retirement ages. Where such measures will land is unclear, but the issue of when a judge should retire seems likely to stay on the legislative and popular agenda for years to come.

— WILLIAM E. RAFTERY *is the author of* Gavel to Gavel, *a newsletter of the National Center for State Courts that tracks legislative activity that affects the courts.*

RESULTS OF ELECTIONS TO INCREASE OR REPEAL MANDATORY JUDICIAL RETIREMENT AGES

STATE	YEAR	PROVISION	RESULT
Louisiana	1995	Increase age from 70 to 75	Failed 38-62%
Pennsylvania	2001	Serve remainder of year reach 70	Approved 68-32%
Vermont[1]	2002	Repeal mandatory retirement age, let legislature set at least 70	Approved 64-36%
Louisiana	2003	Serve remainder of term reach 70	Approved 53-47%
Hawaii[2]	2006	Repeal mandatory retirement age	Failed 35-58% *(7% not voting)*
Texas	2007	Serve remainder of term reach 75, but only if already served 4 years of 6 year term	Approved 75-25%
Ohio	2011	Increase age from 70 to 75	Failed 38-62%
Arizona	2012	Increase age from 70 to 75, give governor more power over judicial selection	Failed 27-73%
New York	2013	Increase age from 70 to 80 (court of last resort only); allow judges of lower trial court to be given 2-year extensions from 70 to 80 (currently up to 76)	Failed 40-60%
Louisiana	2014	Repeal mandatory retirement age	Failed 42-58%
Hawaii[2]	2014	Increase age from 70 to 80	Failed 22-73% *(5% not voting)*
Oregon	2016	Repeal mandatory retirement age	On 2016 ballot
Pennsylvania	2016(?)	Increase age from 70 to 75	Approved by 2013-14 legislature. *Must be approved by 2015-16 legislature before appearing on ballot.*

[1] Vermont legislature enacted law setting age at end of calendar year judge reaches 90.

[2] Hawaii requires a constitutional amendment be approved by a majority of all voters casting ballots. Non-votes are therefore tabulated and reported.

Methods of Judicial Selection: Courts of Last Resort

Partisan

1) Partisan/Partisan: Alabama, Louisiana, North Carolina, Texas
2) Nonpartisan-Partisan/Nonpartisan-Partisan: Michigan, Ohio
3) Partisan/Retention: Illinois (60%), Pennsylvania

Nonpartisan

4) Nonpartisan/Nonpartisan: Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Nevada, North Dakota, Oregon, Washington, West Virginia, Wisconsin
5) Nonpartisan/Nonpartisan OR Retention: Montana (opposed- NP, unopposed – RET)

Commission Based (no confirmation)

6) Commission-Governor/Retention: Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, South Dakota, Wyoming

Commission Based (confirmation)

7) Commission-Governor & House + Senate confirm/ Commission-Governor & House + Senate reconfirm: Connecticut
8) Commission-Governor & Senate confirm/Judicial Nominating Commission reconfirm: Hawaii
9) Commission-Governor & Senate confirm/Commission-Governor & Senate reconfirm: New York
10) Commission-Governor-House & Senate/Life: Rhode Island
11) Commission-Governor & Senate confirm/Retention: Utah
12) Commission-Governor & Senate confirm/Legislature Can Reject: Vermont

Legislative Appointment

13) Legislature/Legislature: South Carolina (with commission), Virginia

Other

14) California: Governor & Commission on Judicial Appointments confirms/Retention
15) Delaware & Maine: Governor & Senate confirms/Governor renominates & Senate reconfirms
16) Maryland: Governor & Senate confirms/Retention
17) Massachusetts: Governor & Governor's Council confirms/serve until age 70
18) New Hampshire: Governor & Executive Council confirms/serve until age 70
19) New Jersey: Governor & Senate confirms (7 years)/ Governor renominates & Senate reconfirms (serve until age 70)
20) New Mexico: Commission recommends, Governor appoints, separately political parties nominate & partisan election held/retention election (57%)
21) Tennessee: Governor & House + Senate confirm/Retention

States That Have Different Selection Methods: Courts of Last Resort Vs. General Jurisdiction Courts

1) Arizona: Nonpartisan/Nonpartisan for GJ Courts (counties below 250,000)
2) California: Nonpartisan/Nonpartisan for GJ Courts
3) Florida: Nonpartisan/Nonpartisan for GJ Courts
4) Indiana: Partisan/Partisan for GJ Courts
5) Kansas: Nonpartisan/Nonpartisan for GJ Courts (select Districts)
6) Maryland: Nonpartisan/Nonpartisan for GJ Courts
7) Michigan: Nonpartisan/Nonpartisan for GJ Courts
8) Kansas: Partisan/Partisan for GJ Courts (select Circuits)
9) New York: Partisan/Partisan for GJ Courts
10) Oklahoma: Nonpartisan/Nonpartisan for GJ Courts
11) Pennsylvania: Partisan/Partisan for GJ Courts
12) South Dakota: Nonpartisan/Nonpartisan for GJ Courts

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

_____ _____

Meeting Date *Proposal Number (if applicable)*

***Topic** _____ _____

Amendment Barcode (if applicable)

***Name** William E. Raftery

Address _____ Phone _____

Street

_____ Email _____

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? National Center for State Courts

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
Judicial Committee
Proposal Analysis

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

Proposal #: P 20

Relating to: MISCELLANEOUS, Repeal of criminal statutes

Introducer(s): Commissioner Rouson

Article/Section affected:

Date: December 11, 2017

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

I. SUMMARY:

The Proposal amends section 9 of Article X to provide that the repeal of a criminal statute shall not affect the prosecution of any crime committed before such repeal.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The Savings Clause was added to the Florida Constitution in 1885 in response to a high profile criminal case in which a defendant charged with assault could not be prosecuted because the legislature repealed the assault statute and failed to "save" prosecutions for offenses committed before the repeal.[1] The Savings Clause prevents the legislature from making changes to substantive criminal laws, including sentencing laws, retroactive.

Currently, the Florida Constitution provides that the "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." Termed the "Ex Post facto" clause, the purpose of the clause is to require the statute in effect at the time of the crime to govern the sentence an offender receives for the commission of that crime.[2] In cases where a statute was found to be unconstitutional, the courts have allowed the amended statute to serve as the governing law in individual cases.[3] The federal government is barred from passing ex post facto laws[4] and in general,

[1] Information provided by Families Against Mandatory Minimums (FAMM) (on file with CRC staff). See Higginbotham v. State, 19 Fla. 557 (1882).
[2] Horton v. Crosby, 848 So.2d 504 (Fla. 3rd DCA 2003).
[3] Horsley v. State, 160 So.3d (Fla. 2015).
[4] US Const. Art I, s. 9, Cl. 3.

individual states are barred from passing ex post facto laws as well.[5] However, the US Supreme Court has held that in some limited circumstances, states may pass ex post facto laws if they have a narrow application, and the "statute's intent was to create a civil and nonpunitive regime."[6] One example of this is the requirement that convicted child sex offenders must register with the state.[7]

Most states and the federal government have Savings Clause statutes that limit retroactivity of changes to criminal and civil statutes.[8] Some states have statutory provisions allowing for retroactivity when it is made explicit in new law.[9] Florida is one of only 3 states (aside from New Mexico and Oklahoma) that have a constitutional savings clause.[10] But the constitutions of New Mexico and Oklahoma prohibit retroactivity of repeals of criminal statutes.[11] Florida is the only state in which the constitution explicitly forbids retroactivity of amendments to criminal statutes.[12]

B. EFFECT OF PROPOSED CHANGES:

While the ex post facto clauses of the federal and state constitutions prevent new punishments "to a crime already consummated, to the detriment or material disadvantage of the wrongdoer,"[13] there is no constitutional limitation on retroactive application of criminal legislation which mollifies criminal sanctions.[14]

The removal of "or amendment" and "or punishment" from the clause would only prevent the repeal of a criminal statute from affecting the prosecution of a crime. However, the removal of the punishment provision could allow courts to consider altering punishment in light of a statute being repealed or amended. For example, in 2014, the legislature amended drug sentencing laws.[15] A defendant who committed certain drug offenses on June 30, 2014 would serve five times longer in prison as a defendant who committed that same offense one day later. A repeal of the Savings Clause will allow to the legislature to retroactively apply lesser sentencing to prisoners currently in prison.

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[5] US Const. Art I s. 10, Cl. 1
[6] *Smith v. Doe*, 538 U.S. 84 (2003).
[7] Id.
[8] Information provided by proposal sponsor (on file with CRC staff).
[9] Id.
[10] Id.
[11] Id.
[12] Id.
[13] *Lindsey v. Washington*, 301 U.S. 397, 401 (1937). The classic definition of an *ex post facto* law appears in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (emphasis in the original): 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to *convict the offender*.
[14] *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=5103&context=penn_law_review (last visited 11/22/17).
[15] See ch. 2014-176, L.O.F.

C. FISCAL IMPACT:

If the proposal is adopted by the voters, the legislature may apply new sentencing guidelines to prisoners currently incarcerated allowing an earlier release and possibly reduce expenses to the state..

III. Additional Information:

A. Statement of Changes:

None.

B. Amendments:

None.

C. Technical Deficiencies:

None.

D. Related Issues:

None.

By Commissioner Rouson

rousond-00023-17 201720__

A proposal to amend
Section 9 of Article X of the State Constitution to provide that the repeal of a criminal statute shall not affect the prosecution of any crime committed before such repeal.

Be It Proposed by the Constitution Revision Commission of Florida:

Section 9 of Article X of the State Constitution is amended to read:

ARTICLE X
MISCELLANEOUS

SECTION 9. Repeal of criminal statutes.—Repeal ~~or amendment~~ of a criminal statute shall not affect prosecution ~~or punishment~~ for any crime ~~previously~~ committed before such repeal.

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