

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Judiciary Committee

BILL: SPB 7086

INTRODUCER: For consideration by Judiciary Committee

SUBJECT: Revision of the State Constitution

DATE: February 7, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Maclure		Pre-meeting
2.				
3.				
4.				
5.				
6.				

I. Summary:

This proposed joint resolution corrects multiple spelling errors and punctuation errors, repeals obsolete language, and makes other technical changes to the State Constitution. Additionally, the proposed joint resolution repeals language providing for term limits on federal officeholders which has been found to be unconstitutional. Lastly, the proposed joint resolution provides for the repeal of the pregnant pig amendment and its preservation as a statute.

This resolution amends numerous sections of the Florida Constitution. This resolution also provides for the codification of section 21, Article X, State Constitution as a statute.

II. Present Situation:

During the 2005 Regular Session, many legislators were concerned about the recent proliferation of amendments to the State Constitution proposed by citizen initiative. Some citizen initiative amendments adopted during the last general election include: limits on attorneys' fees in medical malpractice actions;¹ authorization of the use of slot machines;² an increase in the minimum wage;³ creation of a right to information related to adverse medical incidents;⁴ and a prohibition on the practice of medicine by doctors who have engaged in repeated medical malpractice.⁵ Other recent citizen initiative amendments include a requirement that pens for pregnant pigs be large enough to allow a pig to turn around freely⁶ and a requirement that the state build a high-

¹ Section 26, Art. I, State Const.

² Section 23, Art. X, State Const.

³ Section 24, Art. X, State Const.

⁴ Section 25, Art. X, State Const.

⁵ Section 26, Art. X, State Const.

⁶ Section 21, Art. X, State Const., adopted 2002.

speed railway.⁷ One approach approved by the Legislature last session to limit initiatives was to propose a constitutional amendment requiring that all future amendments, regardless of method of proposal, pass by a 60-percent margin.⁸ An approach that failed to pass the Legislature was a limit on the subject matter of citizen initiatives.⁹ The interim project *Options for Streamlining the State Constitution*¹⁰ was another response to the proliferation of state constitutional amendments.

Appropriate Content of a State Constitution

The interim project report stated that most constitutional scholars believe that a state constitution should be limited to fundamental provision and avoid legislative matter. Additionally, the report found that a state constitution should not contain obsolete provisions, unconstitutional provisions, or errors. Opinions can differ as to what constitutes a fundamental provision or legislative matter. However, the report identified the following principals to help distinguish whether a provision is a fundamental provision or legislative matter:

- The federal Constitution contains examples of fundamental provisions.¹¹
- The federal Constitution focuses on “shaping the general process of government” and leaves policy determinations to elected officials.¹²
- Provisions that protect citizen rights by limiting government power are constitutional in nature.¹³
- “A constitution states or ought to state not rules for the passing hour, but principles for an expanding future.”¹⁴ In other words, constitutional provisions should be timeless.
- Legislative matter “accomplish[es] a purpose that is within the power of [a legislature] to accomplish by law.”¹⁵
- Legislative matter is no different in type or quality from ordinary laws.¹⁶
- Legislative matter is often statute-like in detail or may contain unnecessary procedural detail.¹⁷
- Legislative matter includes social, political, and economic policy determinations.¹⁸
- “[T]he purpose of a statute is to govern the conduct of the citizen, but the purpose of a constitution is to govern the conduct and authority of [a] state.”¹⁹
- A provision may be fundamental due to broad public support.²⁰

⁷ Section 19, Art. X, State Const., adopted 2000; repealed 2004, effective 2005.

⁸ House Joint Resolution 1723, 2005 Leg. Sess.

⁹ Senate Joint Resolution 4, 2005 Leg. Sess.

¹⁰ The Florida Senate, Committee on Judiciary, *Options for Streamlining the State Constitution*, Interim Project Report 2006-141 (January 2006) at http://www.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-141ju.pdf.

¹¹ Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 943-943 (1968).

¹² Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 866 (1996).

¹³ See *Smathers v. Smith*, 338 So. 2d 825, 827 (Fla. 1976); Joseph W. Little, *Does Direct Democracy Threaten Constitutional Governance in Florida?*, 24 STETSON L. REV. 393, 409-410 (1995).

¹⁴ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, Lecture II (1921).

¹⁵ Little, *supra* note 12, at 410.

¹⁶ Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 RUTGERS L.J. 787, 810 (1997).

¹⁷ See *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819); see Grad, *supra* note 18, at 942-943.

¹⁸ See Major Harding, *Florida's Constitutional Amendment Process* (on file with the Senate Committee on Judiciary).

¹⁹ Jerry Payne, National Conference of State Legislators, *Editor's Corner: The Uses of a Constitution*, THE LEGISLATIVE LAWYER, Dec. 2004 at 9.

²⁰ KAUPER, CITIZENS RESEARCH COUNCIL OF MICHIGAN, *THE STATE CONSTITUTION: ITS NATURE AND PURPOSE* 14 (1961);

- A provision may be fundamental due to criteria other than the criteria described above.

The report also implied that the following criteria may help distinguish fundamental provisions from legislative matter:

- A provision may be fundamental because it is needed to circumvent or prevent an adverse judicial determination.²¹ In other words, the provision would be unconstitutional as a statute.
- Legislative matter may create inflexibility that prevents a legislature from addressing other pressing needs.²²

Specific Constitutional Provisions

Potential Legislative Matter

The interim project report noted that the net ban, the pregnant pig amendment, the smoking ban, and the high-speed rail amendment have been repeatedly criticized for lacking constitutional content. The report, however, did not address whether other provisions were fundamental or legislative matter.

Provision Containing an Error

The report also identified an error in s. 6(e), Art. XI, State Const., related to the Taxation and Budget Reform Commission (TBRC). An amendment proposed by the 1998 Constitution Revision Commission appears to provide that the next TBRC must deliver its proposed constitutional amendments 180 days before the 2009 general election. General elections, however, are only held in even-numbered years.

Obsolete Provisions

The State Constitution contains several types of obsolete language. The most common type of obsolete language is long-since-past effective dates and implementation dates. Other language is obsolete because it is unconstitutional or because it lacks continuing relevance.

At least two provisions of the State Constitution appear to be obsolete because they are unconstitutional under the U.S. Constitution. Section 4(b)(5) and (6), Art. VI, State Const., imposes term limits on federal officeholders. In 1995, the U.S. Supreme Court determined that term limits on federal officeholders are unconstitutional under the Qualifications Clause of the U.S. Constitution.²³ In 1999, the Florida Supreme Court stated that:

Grad, *supra* note 10, at 950.

²¹ See John F. Cooper, *The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?*, 28 N.M. L. REV. 227, 255-256 (1998); P.K. Jameson & Marsha Hosack, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives*, 23 FLA. ST. U. L. REV. 417, 421 (1995) (stating that lengthy and detailed state constitutions result from "public dissatisfaction with strict judicial interpretations of constitutional provisions").

²² See, e.g., Ryan Maloney, *Smoking Laws, High-Speed Trains, and Fishing Nets A State Constitution Does Not Make: Florida's Desperate Need for a Statutory Citizens Initiative*, 14 U. FLA. J.L. & PUB POL'Y 93, 99 (2002). The high-speed rail amendment has been identified as an inflexible provision because it could not be changed or delayed in response to current budgetary concerns.

²³ *U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779 (1995).

there is no question but that . . . section 4(b)(5) and 6 of article VI[, State Const.], placing limits on the terms of the U.S. Representatives and U.S. Senators, are unenforceable as violative of the United States [Constitution].²⁴

Section 1, Art. X, State Const., is also unconstitutional and, thus, obsolete. Section 1, Art. X, State Const., states:

Amendments to United States Constitution.—The legislature shall not take action on any proposed amendment to the constitution of the United States unless a majority of the members thereof have been elected after the proposed amendment has been submitted for ratification.

In *Trombetta v. State*, 353 F. Supp. 575 (M.D. Fla. 1973), s. 1, Art. X, State Const., was “declared to be unconstitutional and void.” *Trombetta*, though a federal trial court decision based its holding on *Leser v. Garnett*, 258 U.S. 130 (1922).²⁵ In *Lesser*, an issue was whether a provision similar to s. 1, Art. X, State Const., from the Tennessee Constitution prevented the ratification of the 19th Amendment to the U.S. Constitution. On that issue, the U.S. Supreme Court stated:

[T]he function of a state Legislature in ratifying a proposed amendment to the federal Constitution . . . is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state.²⁶

Section 5, Art. X., State Const., may be obsolete because it may not have continuing relevance. That section states states:

Coverture and Property.—There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal; except that dower or curtesy may be established and regulated by law.

The provision may no longer be relevant because it is hard to imagine a court ruling that women lack property rights. Additionally, s. 5, Art. X, State Const., may be somewhat redundant to s. 2, Art. I, State Const. That section states that “[a]ll natural persons, female and male alike, are equal before the law and have inalienable rights . . . to acquire, possess and protect property” Further, the Legislature abolished dower and curtesy in s. 732.111, F.S.

Other Issues

The *Supplement to Interim Project Report 2006-141: Options for Streamlining the State Constitution* contained marked-up copy of the State Constitution by the Division of Statutory Revision. This document shows that the State Constitution contains multiple spelling errors and

²⁴ *Ray v. Mortham*, 742 So. 2d 1276, 1280 (Fla. 1999).

²⁵ See *Leser v. Garnett*, 114 A. 840 (Md. 1921) for a full description of the facts in *Leser v. Garnett*, 258 U.S. 130 (1922).

²⁶ *Leser v. Garnett*, 258 U.S. 130, 137 (1922).

punctuation errors, obsolete provisions, an unconstitutional provision, and inconsistent use of capitalization and drafting styles.

Constitutional Provisions as Statutes

The Legislature has the authority to propose the repeal of constitutional provisions or propose to make constitutional provisions into statutory law. Previously, constitutional provisions were made into statutes by operation of s. 10, Art. XII, and s. 20(g), Art. V, State Const. For example, s. 10, Art. XII, State Const., states:

All provisions of Articles I through IV, VII and IX through XX of the Constitution of 1885, as amended, not embraced herein which are not inconsistent with this revision shall become statutes subject to modification or repeal as are other statutes.

III. Effect of Proposed Changes:

This proposed joint resolution corrects multiple spelling errors and punctuation errors, repeals obsolete language, and makes other technical changes to the State Constitution. Additionally, the proposed joint resolution repeals language providing for term limits on federal officeholders that has been found to be unconstitutional. The changes above do not change the effect of any provisions of the State Constitution. Lastly, the proposed joint resolution provides for the repeal of the pregnant pig amendment and its preservation as a statute.

Obsolete Provisions

The obsolete language deleted by the proposed joint resolution includes long-since-past effective dates and implementation dates and some transitional provisions. The Legislature has a duty to implement the State Constitution regardless of the existence of effective dates or implementation dates.²⁷ As such, the deletion of long-since-past effective dates will not affect the application of the constitution.

Some transitional provisions that may have been necessary for a limited period of time are also deleted by the proposed joint resolution. The obsolete language, excluding effective dates and implementation dates, is identified and described below:

- Section 19(g), Art. III, State Const., pertains to the budget stabilization fund. The first two sentences of subsection (g), which provide for the initial funding of the fund, were not relevant past the 1998-1999 fiscal year. The 1998-1999 fiscal year was the year in which the fund had to be fully funded. According to staff of the Senate Ways and Means Committee, the minimum funding requirements of the budget stabilization fund have been satisfied.

²⁷ See *Dade County Classroom Teachers' Ass'n, Inc. v. Legislature*, 269 So. 2d 684 (Fla. 1972). In *Dade County*, the Florida Supreme Court held that the Legislature has a duty to implement collective bargaining rights that are guaranteed by s. 6 Art. I, State Const., for public employees. Section 6, Art. I, State Const., does not contain an effective date or implementation date.

- Section 20(d)(6), Art. V, State Const., provided for the certification of the need for new judges and creation of new judgeships in 1972. This provision had no continuing significance past 1972.
- Section 20(d)(10), Art. V, State Const., states that the offices of county solicitor and prosecuting attorney are abolished and provides that the individuals filling those positions become assistant state attorneys. The transition described in subsection (d)(10), should have occurred on the effective date of Art. V, State Const., which was January 1, 1973.
- Section 20(e)(1), Art. V, State Const., provides that certain officeholders in office on January 1, 1973, shall remain in their offices for the remainder of their terms. The terms to the offices to which subsection (e)(1) applied have long since expired.
- Section 20(g), Art. V, State Const., provides that certain provisions of the Judiciary Article of the Constitution of 1885 are preserved as statutes. The provisions to which subsection 20(g) could have applied were repealed by ch. 73-303, L.O.F.
- Section 20(h), Art. V, State Const., provides that county court and municipal court judges did not have to be compensated by state salaries until January 3, 1977. Subsection (h) had no continuing significance past January 3, 1977.
- Section 4(b)(5) and (6), Art. VI, State Const., provide for term limits on certain federal officeholders. These provisions have been found to be unconstitutional under the U.S. Constitution.²⁸
- Section(1)(e), Art. VII, State Const., limits the growth of state revenues. One sentence of subsection (e) describes the limit on revenues for the 1995-1996 fiscal year. That sentence had no continuing significance after the 1995-1996 fiscal year.
- Section 3, Art. XII, State Const., provides that officeholders in office when the Constitution of 1968 became effective continue in their offices, unless their offices were abolished. Officers whose offices were abolished would be compensated by law. This section was only relevant immediately after the Constitution of 1968 was adopted.
- Section 10, Art. XII, State Const., provided for the preservation of certain unspecified provisions of the Constitution of 1885 as statutes. All of the provisions to which s. 10, Art. XII, State Const., applied have been codified.²⁹
- Section 16, Art. XII, State Const., provides that the executive branch of government must be organized into no more than 25 departments by July 1, 1969. Section 16 had no continuing significance past July 1, 1969.
- Section 25, Art. XII, State Const., provides for the gradual implementation of state funding for circuit and county courts, etc, as required by s. 14, Art. V, State Const.

²⁸ *U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779 (1995); *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999).

²⁹ See *Dade County v. American Hospital of Miami, Inc.*, 502 So. 2d 1230 (Fla. 1987).

Further, the section provides for full implementation by July 1, 2004. Section 14, Art. V, State Const., has been fully implemented, and the implementation date has expired. As such, s. 25, Art. XII, State Const., has no continuing significance.

Preservation of Section 21, Article X, State Constitution as a Statute

The proposed joint resolution repeals the pregnant pig amendment in s. 21, Art. X, State Const. Under the constitutional provision, animal cruelty includes the confinement of a pregnant pig in an area that is too small to allow the pig to turn around freely. The proposed joint resolution also creates a mechanism to preserve the s. 21, Art. X, State Const., as a statute subject to modification or repeal by the Legislature. Under the mechanism, the Division of Statutory Revision (Division) is directed to codify s. 21, Art X, State Const., in the *Florida Statutes*. The Division is also authorized to make non-substantive changes to the provision to reflect its status as a statute.

Effective Date

If this proposed joint resolution is approved by the voters, it will take effect on January 2, 2007

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This joint resolution proposes to make changes to numerous provisions of the State Constitution. Under s. 1, Art. XI, State Const.:

Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature. The full text of the joint resolution and the vote of each member voting shall be entered on the journal of each house.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
