

# 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: CS/SJR 1918

INTRODUCER: Judiciary Committee and Judiciary Committee

SUBJECT: Revision of the State Constitution

DATE: April 21, 2006

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Maclure	JU	<b>Fav/CS</b>
2.	_____	_____	RC	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

---

## I. Summary:

This joint resolution corrects multiple spelling errors, punctuation errors, and grammatical errors; repeals obsolete language; and makes other technical changes to the State Constitution. The following provisions are among the obsolete language repealed:

- Section 4(b)(5) and (6), Art. VI, State Const., which imposes term limits on the offices of U.S. Representative and U.S. Senator from Florida;
- Section 1, Art. X, State Const., which addresses the ratification of amendments to the U.S. Constitution; and
- Section 5, Art. X, State Const., which pertains to the property rights of married men and women and authorizes the establishment of dower and curtesy by law;

Additionally, the joint resolution repeals the following provisions and provides for their codification as statutes:

- Section 26, Art. I, State Const., which pertains to a claimant's right to compensation in medical liability claims;
- Section 21, Art. X, State Const., which pertains to the confinement of pregnant pigs;
- Section 25, Art. X, State Const., which pertains to a patient's right to know about adverse medical incidents; and
- Section 26, Art. X, State Const., which pertains to a prohibition on having a medical license after repeated medical malpractice.

The joint resolution provides that until January 2, 2015, the Legislature may not modify, repeal, or act inconsistent with a constitutional provision codified as a statute, except upon the approval of three-fourths of the membership of both houses of the Legislature.

This resolution amends numerous sections of the Florida Constitution.

## 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;<sup>1</sup> authorization of the use of slot machines;<sup>2</sup> an increase in the minimum wage;<sup>3</sup> creation of a right to information related to adverse medical incidents;<sup>4</sup> and a prohibition on the practice of medicine by doctors who have engaged in repeated medical malpractice.<sup>5</sup> Other recent citizen initiative amendments include a requirement that pens for pregnant pigs be large enough to allow a pig to turn around freely<sup>6</sup> and a requirement that the state build a high-speed railway.<sup>7</sup> 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.<sup>8</sup> An approach that failed to pass the Legislature was a limit on the subject matter of citizen initiatives.<sup>9</sup> The interim project *Options for Streamlining the State Constitution*<sup>10</sup> 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.<sup>11</sup>
- The federal Constitution focuses on “shaping the general process of government” and leaves policy determinations to elected officials.<sup>12</sup>

---

<sup>1</sup> Section 26, Art. I, State Const.

<sup>2</sup> Section 23, Art. X, State Const.

<sup>3</sup> Section 24, Art. X, State Const.

<sup>4</sup> Section 25, Art. X, State Const.

<sup>5</sup> Section 26, Art. X, State Const.

<sup>6</sup> Section 21, Art. X, State Const., adopted 2002.

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

<sup>8</sup> House Joint Resolution 1723, 2005 Leg. Sess.

<sup>9</sup> Senate Joint Resolution 4, 2005 Leg. Sess.

<sup>10</sup> 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](http://www.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-141ju.pdf).

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

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

- Provisions that protect citizen rights by limiting government power are constitutional in nature.<sup>13</sup>
- “A constitution states or ought to state not rules for the passing hour, but principles for an expanding future.”<sup>14</sup> 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.”<sup>15</sup>
- Legislative matter is no different in type or quality from ordinary laws.<sup>16</sup>
- Legislative matter is often statute-like in detail or may contain unnecessary procedural detail.<sup>17</sup>
- Legislative matter includes social, political, and economic policy determinations.<sup>18</sup>
- “[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.”<sup>19</sup>
- A provision may be fundamental due to broad public support.<sup>20</sup>
- 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.<sup>21</sup> 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.<sup>22</sup>

## 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

<sup>13</sup> 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).

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

<sup>15</sup> Little, *supra* note 12, at 410.

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

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

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

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

<sup>20</sup> KAUPER, CITIZENS RESEARCH COUNCIL OF MICHIGAN, *THE STATE CONSTITUTION: ITS NATURE AND PURPOSE* 14 (1961); Grad, *supra* note 10, at 950.

<sup>21</sup> 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”).

<sup>22</sup> 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.

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.<sup>23</sup> In 1999, the Florida Supreme Court stated that:

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].<sup>24</sup>

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).<sup>25</sup> 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

---

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

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

<sup>25</sup> 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).

Constitution; and it transcends any limitations sought to be imposed by the people of a state.<sup>26</sup>

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. Lastly, common law limitations on a married woman’s property rights appear to have been eliminated by statute under ch. 708, 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 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 joint resolution corrects multiple spelling errors, punctuation errors, and grammatical errors; repeals obsolete language; and makes other technical changes to the State Constitution. The joint resolution also provides for the repeal of constitutional provisions and their codification as statutes.

---

<sup>26</sup> *Leser v. Garnett*, 258 U.S. 130, 137 (1922).

## Obsolete Provisions

The obsolete language deleted by the 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.<sup>27</sup> 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 joint resolution. The obsolete language, excluding effective dates and implementation dates, is identified and described below:

- Section 19(f)(2), Art. III, State Const., requires trust funds to terminate within 4 years of their creation or four years from the effective date of the paragraph. The first sentence of paragraph (2), which provided for the termination of preexisting trust funds, was not relevant past November 4, 1996.
- 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.
- Section 10(b)(3)a., Art. V, State Const., pertains to the timing of a vote to change the method of selecting trial court judges to merit selection. The first sentence of subparagraph provides that the first vote was to have taken place in 2000. That sentence is no longer relevant.
- Section 12(a)(1), Art. V, State Const., describes the authority of the Judicial Qualifications Commission to investigate and recommend discipline for judicial misconduct. That authority to investigate pertains to misconduct occurring after November 1, 1966. References to November 1, 1966, are no longer relevant.
- Section 20(c)(7), Art. V, State Const., provides for the length of terms and start dates for initial members of judicial nominating commissions. The provisions describing the initial terms of members of judicial nominating commissions pertained to events that occurred in the 1970's. As such most of the language in subsection (7) is no longer relevant. Additionally, s. 43.291, F.S., also describes the terms of members of a judicial nominating commission.

---

<sup>27</sup> 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.<sup>28</sup>
- 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 6(c), Art. VIII, State Const., pertains to certain officeholders in office in 1968. That section is no longer relevant.
- Section 1, Art. X, State Const., pertains to Legislative ratification of amendments to the U.S. Constitution. That provision has been held to be unconstitutional. As such, the provision is without meaning and therefore obsolete.
- Section 5, Art. X, State Const., provides for equal property rights for married men and women, except that it permits the establishment of dower and curtesy by law. The language of section 5 providing constitutional protections of married women's property rights is antiquated. The language is also somewhat redundant with s. 2, Art. I, State Const. That provision subjects distinctions between men and women to strict scrutiny. Additionally, dower and curtesy have been abolished by statute and replaced by elective share laws.

---

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

- Section 19, Art. X, State Const., requiring the construction of a high-speed railway was repealed by the voters during the 2004 General Election. The provision, however, continues to be printed in full in the official version of the State Constitution. The provision, as printed in the official version of the State Constitution, is followed by a notation of its repeal. This joint resolution strikes through section 19 to remove it from the official version of the State Constitution and to renumber subsequent sections.
- Section 20(d), Art. X, State Const., required the Legislature to implement the workplace smoking amendment shortly after its approval by the voters. The Legislature implemented the section previously. As such, the language in section 20(d) requiring legislative implementation by a certain date is no longer necessary.
- 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 4, Art. XII, State Const., provided for the State Commissioner of Education in office in January 1969 to become the Commissioner of Education. This provision is no longer relevant.
- Section 5(a), Art. XII, State Const., provided for County Commissioners of Education in office in January 1969 to become a Superintendent of Schools. That provision is no longer relevant.
- 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.<sup>29</sup>
- 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. 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.

---

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



## **Preservation of Constitutional Provisions as a Statutes**

This joint resolution repeals the following provisions and provides for their codification as statutes:

- Section 26, Art. I, State Const., which pertains to a claimant's right to compensation in medical liability claims;
- Section 21, Art. X, State Const., which pertains to the confinement of pregnant pigs;
- Section 25, Art. X, State Const., which pertains to a patient's right to know about adverse medical incidents; and
- Section 26, Art. X, State Const., which pertains to a prohibition on having a medical license after repeated medical malpractice.

The joint resolution authorizes the Division of Statutory Revision (Division) to make non-substantive changes to the provisions above to reflect their status as statutes. The Division has this authority already under s. 11.242, F.S., for laws passed by the Legislature. The joint resolution also provides for an 8-year period during which the Legislature may not modify, repeal, or act inconsistent with a constitutional provision codified as a statute, except upon the approval of three-fourths of the membership of both houses of the Legislature.

### **Effective Date**

If this 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:**

#### **Section 26, Article I, State Constitution**

This joint resolution repeals s. 26, Art. I, State Const., which, in effect, limits contingency fees in medical malpractice actions. The joint resolution also provides for the codification of that provision as a statute.

The Supreme Court has limited contingency fees that may be charged by attorneys under Rule 4-1.5, Rules of Professional Conduct. The Supreme Court cites s. 15, Art. V, State

Const., as its source of authority for the rule imposing those fee limitations.<sup>30</sup> Section 15, Art. V, State Const., states that “[t]he supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.” If the Supreme Court has exclusive authority over contingency fees, then the Legislature may not regulate those fees by statute.<sup>31</sup> As such, statutory limits on contingency fees adopted by the Legislature would be unconstitutional. The codification of s. 26, Art. I, State Const., however, is not performed by the Legislature, but by the State Constitution. That distinction may make the statute, which might otherwise be unconstitutional, constitutional. In effect, the codification of s. 26, Art. I, State Const., may implicitly authorize the Legislature to regulate contingency fees in medical malpractice actions, when it might be without authority otherwise.

### **Legislative Proposal of Constitutional Amendments**

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:**

The ballot statement for the joint resolution must be revised to reflect changes made by the committee substitute.

#### **VII. Related Issues:**

None.

<sup>30</sup> See, e.g., *In re Amendments to the Rules Regulating the Florida Bar*, 916 So. 2d 655, 655 (Fla. 2006).

<sup>31</sup> Committee staff has not located a judicial opinion expressly finding that the Supreme Court has exclusive authority to regulate contingency fees.

---

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.

---