

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

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Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

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BILL: SJR 1438

INTRODUCER: Senator Hays

SUBJECT: Sovereignty of the State

DATE: April 7, 2011

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	<b>Favorable</b>
2.	Naf	Roberts	GO	<b>Favorable</b>
3.			RC	
4.				
5.				
6.				

**I. Summary:**

The Senate joint resolution proposes an amendment to the Florida Constitution expressing the sovereignty of the state under the Tenth Amendment to the United States Constitution. More specifically, the joint resolution provides that all powers not otherwise enumerated and granted to the federal government by the U.S. Constitution are reserved to the state, and that Floridians are not required to comply with mandates from the federal government which are beyond the scope of its constitutionally delegated powers.

The joint resolution also provides that all compulsory federal legislation that directs states to comply under threat of losing federal funding should be repealed and are not recognized by the state.

This resolution proposes the creation of article I, section 28, of the Florida Constitution.

**II. Present Situation:**

**Tenth Amendment and State Sovereignty**

By the provisions of the United States Constitution, certain powers are entrusted solely to the federal government alone, while others are reserved to the states, and still others may be exercised concurrently by both the federal and state governments.<sup>1</sup> All attributes of government that have not been relinquished by the adoption of the United States Constitution and its

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<sup>1</sup> 48A FLA. JUR 2D, *State of Florida* s. 13 (2010).

amendments have been reserved to the states.<sup>2</sup> The Tenth Amendment to the United States Constitution provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” As noted by one Supreme Court Justice:

[t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.<sup>3</sup>

Therefore, courts have consistently interpreted the Tenth Amendment to mean that “[t]he States unquestionably do retain a significant measure of sovereign authority. . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.”<sup>4</sup> Under the federalist system of government in the United States, states may enact more rigorous restraints on government intrusion than the federal charter imposes.<sup>5</sup> However, a state may not adopt more restrictions on the fundamental rights of a citizen than the United States Constitution allows.<sup>6</sup>

The United States Supreme Court has recognized that the framers of the Constitution explicitly chose a constitution that affords to Congress the power to regulate individuals, not states.<sup>7</sup> Therefore, the Court has consistently held that the Tenth Amendment does not afford Congress the power to require states to enact particular laws or require that states regulate in a particular manner.<sup>8</sup> For example, in *New York v. United States*, the Court, in interpreting the Tenth Amendment, ruled that the Constitution does not confer upon Congress the power to compel states to provide for disposal of radioactive waste generated within their borders, though Congress has substantial power under the Constitution to encourage states to do so.<sup>9</sup>

### **State Sovereignty Movement**

A state sovereignty movement has emerged in the United States over the past couple of years. The premise of this movement is the belief that the balance of power has tilted too far in favor of the federal government. Proponents of this movement urge legislators and citizens to support resolutions or state constitutional amendments declaring the sovereignty of the state over all matters not delegated by the limited enumeration of powers in the United States Constitution to the federal government. The resolutions often mandate that the state government will hold the federal government accountable to the United States Constitution to protect state residents from federal abuse.

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<sup>2</sup> *Id.*

<sup>3</sup> *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833)).

<sup>4</sup> *Id.*

<sup>5</sup> 48A FLA. JUR 2D, *State of Florida* s. 13 (2010).

<sup>6</sup> *Id.* (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985)).

<sup>7</sup> *New York v. United States*, 505 U.S. at 156.

<sup>8</sup> *Id.*; see also *Baggs v. City of South Pasadena*, 947 F. Supp. 1580 (M.D. Fla. 1996).

<sup>9</sup> *New York v. United States*, 505 U.S. at 156.

An advocacy organization supporting state sovereignty reports that multiple states have introduced similar resolutions asserting state sovereignty.<sup>10</sup> Nine legislatures have adopted some variation of the resolution.<sup>11</sup> In late June 2009, the Tennessee governor became the first governor to sign such a resolution.<sup>12</sup>

In lieu of a resolution asserting state sovereignty, some state legislators have filed bills proposing binding legislation supporting state sovereignty. For example, a New Hampshire legislator filed a bill to create a “joint committee on the constitutionality of acts, orders, laws, statutes, regulations, and rules of the government of the United States of America in order to protect state sovereignty.”<sup>13</sup> Some state legislators have filed legislation for a constitutional amendment asserting state sovereignty.<sup>14</sup> To date, no state constitutional amendment has been adopted.

### **Constitutional Amendment Process**

Article XI of the Florida Constitution sets forth various methods for proposing amendments to the constitution, along with the methods for approval or rejection of proposals. One method by which constitutional amendments may be proposed is by joint resolution agreed to by three-fifths of the membership of each house of the Legislature.<sup>15</sup> Any such proposal must be submitted to the electors, either at the next general election held more than 90 days after the joint resolution is filed with the Secretary of State, or, if pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision, at an earlier special election held more than 90 days after such filing.<sup>16</sup> If the proposed amendment is approved by a vote of at least 60 percent of the electors voting on the measure, it becomes effective as an amendment to the Florida Constitution on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment.<sup>17</sup>

### **III. Effect of Proposed Changes:**

The Senate joint resolution proposes an amendment to the Florida Constitution expressing the sovereignty of the state under the Tenth Amendment to the United States Constitution.

The joint resolution recognizes Florida’s residual and inviolable sovereignty under the Tenth Amendment to the United States Constitution over all powers not otherwise enumerated and granted to the federal government. The joint resolution states that the people of this state refuse

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<sup>10</sup> Tenth Amendment Center, *10th Amendment Resolutions*, <http://www.tenthamendmentcenter.com/nullification/10th-amendment-resolutions/> (last visited April 1, 2011).

<sup>11</sup> Those states include: Arizona, Idaho, Kansas, Louisiana, Nebraska, North Dakota, Oklahoma, South Carolina, and South Dakota.

<sup>12</sup> Tennessee HJR 108 (2009).

<sup>13</sup> New Hampshire HB 1343 (2010). A Missouri legislator filed a bill creating a “Tenth Amendment Commission.” The commission refers cases to the Attorney General when the federal government enacts laws requiring the state or a state officer to enact or enforce a provision of federal law believed to be unconstitutional. See Missouri SB 587 (2010).

<sup>14</sup> *See, e.g.*, Oklahoma HJR 1063 (2010).

<sup>15</sup> FLA. CONST., art. XI, s. 1.

<sup>16</sup> FLA. CONST., art. XI, s. 5(a).

<sup>17</sup> FLA. CONST., art. XI, s. 5(e).

to comply with federal government mandates from any branch which are beyond the scope of those constitutionally delegated powers.

The joint resolution also provides that the people of this state refuse to recognize or comply with compulsory federal legislation that directs the state to comply or requires the state to pass certain legislation in order to retain federal funding. The joint resolution further demands the repeal of these mandates.

The specific statement to be placed on the ballot is provided. This language summarizes the provisions in the proposed constitutional amendment.

The joint resolution is silent regarding an effective date for the constitutional amendment. Therefore, in accordance with section 5, article XI, of the Florida Constitution, it would take effect on the first Tuesday after the first Monday in January following the election at which it was approved by at least 60 percent of the electorate voting on the measure.

#### **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:

##### **Preemption**

Depending upon the nature and scope of any federal mandates enacted after the effective date of the constitutional amendment, if it is adopted, the federal law could preempt the effect of this proposed constitutional amendment. The Supremacy Clause of the United States Constitution establishes federal law as the “supreme law of the land, and invalidates state laws that interfere with or are contrary to federal law.”<sup>18</sup> However, the Tenth Amendment to the U.S. Constitution provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Therefore, courts have consistently interpreted the Tenth Amendment to mean that “[t]he States unquestionably do retain a significant measure of sovereign authority. . . to the extent that the Constitution has not divested

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<sup>18</sup> *ABC Charters, Inc. v. Bronson*, 591 F.Supp.2d 1272 (S.D. Fla. 2008) (quoting *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 518 (M.D. Pa. 2007)); see also U.S. CONST., art. VI.

them of their original powers and transferred those powers to the Federal Government.”<sup>19</sup>

In conducting a preemption analysis in areas traditionally regulated by the states, there is a presumption against preemption.<sup>20</sup> There are three types of preemption:

- Express preemption;
- Field preemption; and
- Conflict preemption.

“Conflict preemption” occurs when “it is impossible to comply with both federal and state law, or when state law stands as an obstacle to the objectives of federal law.”<sup>21</sup>

“Field preemption” occurs when federal regulation in a legislative field is so pervasive that Congress left no room for the states to supplement it. “Express preemption” occurs when federal law explicitly expresses Congress’ intent to preempt a state law.<sup>22</sup>

The Florida constitutional amendment could be subject to a constitutional challenge if the state, in reliance upon the proposed amendment, refuses to comply with a mandate from the federal government. The constitutionality of the Florida constitutional amendment may turn on whether the court determines that the federal legislation adopted is beyond the scope of the federal government’s constitutionally guaranteed powers.

### **Joint Resolutions**

In order for the Legislature to submit the joint resolution to the voters for approval, the joint resolution must be agreed to by three-fifths of the membership of each house.<sup>23</sup> If SJR 1438 is agreed to by the Legislature, it will be submitted to the voters at the next general election held more than 90 days after the amendment is filed with the Department of State.<sup>24</sup> As such, SJR 1438 would be submitted to the voters at the 2012 General Election. In order for SJR 1438 to take effect, it must be approved by at least 60 percent of the voters voting on the measure.<sup>25</sup>

## **V. Fiscal Impact Statement:**

### **A. Tax/Fee Issues:**

None.

### **B. Private Sector Impact:**

None.

<sup>19</sup> *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833)).

<sup>20</sup> 48A FLA. JUR 2D *State of Florida* s. 13.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> FLA. CONST. art. XI, s. 1.

<sup>24</sup> FLA. CONST. art. XI, s. 5(a).

<sup>25</sup> FLA. CONST. art. XI, s. 5(e).

**C. Government Sector Impact:**

Each constitutional amendment is required to be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding the general election.<sup>26</sup> Costs for advertising vary depending upon the length of the amendment. According to the Department of State, the average cost per word of publishing a constitutional amendment is \$106.14.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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

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<sup>26</sup> FLA. CONST. art. XI, s. 5(d).