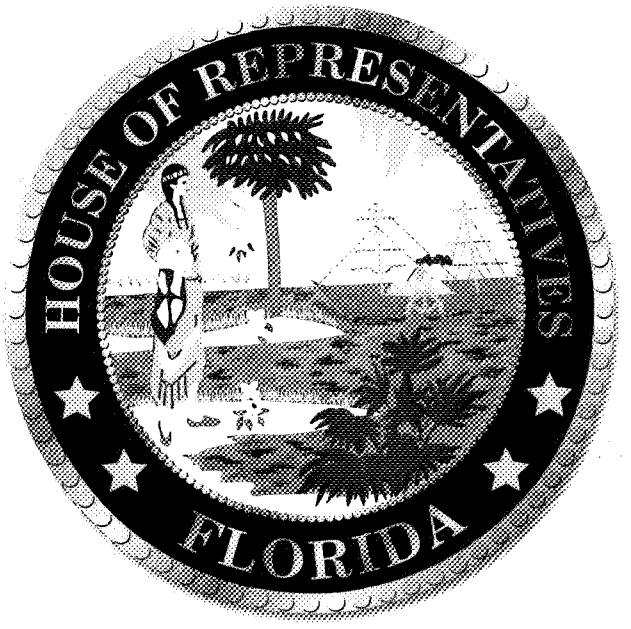

RULES & CALENDAR COUNCIL

COMMITTEE MEETING
Monday, April 19, 2010
6:15 P.M. – 9:15 P.M.
404 HOB

MEETING PACKET

Larry Cretul
Speaker

Bill Galvano
Chair

Council Meeting Notice

HOUSE OF REPRESENTATIVES

Rules & Calendar Council

Start Date and Time: Monday, April 19, 2010 06:15 pm or 15 minutes upon adjournment of Session

End Date and Time: Monday, April 19, 2010 09:15 pm

Location: 404 HOB

Duration: 3.00 hrs

Consideration of the following bill(s):

SCR 10 Balanced Federal Budget [SPSC] by Atwater
HJR 15 Department of Elder Affairs by Pafford
CS/HJR 37 Health Care Services by Health Care Regulation Policy Committee, Plakon, Workman, Ray
HM 1535 American Clean Energy and Security Act by Adams
HR 1613 Taiwan by Lopez-Cantera
HB 7227 Legislature by Select Policy Council on Strategic & Economic Planning, Carroll
HJR 7231 Standards for Establishing Legislative and Congressional District Boundaries by Select Policy Council on Strategic & Economic Planning, Hukill

Set Special Order Calendar(s)

NOTICE FINALIZED on 04/16/2010 16:41 by Williams.Tanesha

SCR 10

By Senators Atwater, Gaetz, Jones, and Bennett

25-01084B-10 201010__

Senate Concurrent Resolution

A concurrent resolution urging Congress to call a convention for the purpose of proposing amendments to the Constitution of the United States to provide for a balanced federal budget and limit the ability of Congress to dictate to states requirements for the expenditure of federal funds.

WHEREAS, fiscal discipline and economic integrity have been core principles of American governance, and

WHEREAS, the American people have historically demanded the same prudent, responsible, and intellectually honest financial behavior from their elected representatives as ultimately compels individual behavior, and

WHEREAS, it is the firm conviction of the Legislature of the State of Florida that it is wrong to fund the prosperity of the present generation by robbing future Americans of their own, and

WHEREAS, mortgaging the birthright of our children and grandchildren is a dangerous departure from traditional American values which threatens to permanently undermine the strength of our nation, and

WHEREAS, the national debt has nearly doubled over the past 8 years and Florida's share of that debt is $727 billion, more than all Floridians make in wages and salaries in 2 years, and

WHEREAS, for the nation to pay off the entire federal debt by 2015, Congress would have to triple the federal income taxes of every American and devote the increase exclusively to debt payments, and

WHEREAS, our debt is increasingly owed to the governments of foreign nations, not to the citizens of the United States; therefore, our wealth is transferred to others and will not be available to supply the means for America's future growth and prosperity, and

WHEREAS, this generation will bequeath to its children one of the world's most indebted industrial democracies, and

WHEREAS, high federal deficits cause increasingly high payments for debt interest in the future, make future borrowing more costly, reduce investment activity, and thus reduce the size of the future economy, and

WHEREAS, the people of Florida recognized the wisdom of fiscal discipline and enshrined in its State Constitution the requirement for a balanced budget to place a prudent limit on the tendencies of government, and

WHEREAS, the Florida Legislature has made fiscally responsible decisions, maintaining a balanced budget and saving the citizens of this State from crippling deficits, massive debt burdens, and bankruptcy, and

WHEREAS, we the Legislature of the State of Florida call for the Constitution of the United States to be amended to require the Federal Government to operate with fiscal responsibility, common sense, and the revenues granted to it by the people, and

WHEREAS, the Federal Government has for too long relied on revenue increases and borrowing against our future rather than on prudent spending decisions within the limits of current revenues, and

WHEREAS, lasting resolution of this nation's budget deficit

can be achieved only by addressing the spending habits of our Federal Government, not by increasing the tax burden under which our citizens already labor, and

WHEREAS, Article V of the Constitution of the United States makes provision for amending the Constitution on the application of the legislatures of two-thirds of the several states, calling a convention for proposing amendments that shall be valid to all intents and purposes if ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by Congress, NOW, THEREFORE,

Be It Resolved by the Senate of the State of Florida, the House of Representatives Concurring:

That the Legislature of the State of Florida, with all due respect and great reluctance, does hereby make application to the Congress of the United States pursuant to Article V of the Constitution of the United States to call an Article V amendments convention for the sole purpose of proposing amendments to the Constitution of the United States:

(1) To achieve and maintain a balanced budget by:

(a) Requiring that such balanced budget account for all obligations of the Federal Government;

(b) Allowing flexibility in federal balanced budget requirements by providing exceptions related to exigencies such as national emergencies or threats to the nation's security;

(c) Imposing spending limits on the Federal Government;

(d) Setting extraordinary vote requirements for new or

increased federal taxes and other revenues; and

(e) Prohibiting federal mandates on states to impose taxes or fees.

(2) To control the ability of the Congress and the various federal executive agencies to require states to expend funds by:

(a) Limiting the ability of Congress and the various federal executive agencies to pass legislation requiring states to spend money or to take actions requiring the expenditure of money unless federal funds are provided in ongoing amounts sufficient to offset the full costs of such requirements; and

(b) Limiting the ability of Congress to dictate to states requirements for the expenditure of federal funds other than such requirements as may be necessary to measure outcomes to be achieved through the expenditure of the federal funds, leaving to the several states the ability to decide how to best accomplish those outcomes.

BE IT FURTHER RESOLVED that this concurrent resolution supersedes all previous memorials applying to the Congress of the United States to call a convention for the purpose of proposing an amendment to the Constitution of the United States, including Senate Memorial 234 and House Memorial 2801, both passed in 1976, and superseded, revoked, and withdrawn in 1988 by Senate Memorial 302, and that such previous memorials are hereby revoked and withdrawn, nullified, and superseded to the same effect as if they had never been passed.

BE IT FURTHER RESOLVED that this concurrent resolution is revoked and withdrawn, nullified, and superseded to the same effect as if it had never been passed, and retroactive to the date of passage, if it is used for the purpose of calling a

convention or used in support of conducting a convention to amend the Constitution of the United States for any purpose other than requiring a balanced federal budget or limiting the ability of the Federal Government to require states to spend money.

BE IT FURTHER RESOLVED that a copy of this concurrent resolution be dispatched to the President of the United States Senate, to the Speaker of the United States House of Representatives, to each member of the Florida delegation to the United States Congress, and to the presiding officers of each house of the several state legislatures.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: SCR 10 Balanced Federal Budget [SPSC]
SPONSOR(S): Atwater and others
TIED BILLS: **IDEN./SIM. BILLS:** HCR 8001

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Rules & Calendar Council		Rubottom	Birtman
2)				
3)				
4)				
5)				

SUMMARY ANALYSIS

SCR 10 makes application under Article V of the United States Constitution, for Congress to call a convention for the purpose of proposing amendments to the Constitution to achieve and maintain a balanced federal budget and to control the ability of the Congress and the various federal executive agencies to require states to expend funds. The Resolution supersedes all previous memorials applying to Congress to call a convention. The Resolution provides for its own retroactive nullification "if it is used to amend the Constitution for any purpose other than the two stated in the Resolution."

The "Senate Bill Analysis and Fiscal Impact Statement" for SCR 10, revised March 10, 2010, is incorporated by reference into this Staff Analysis.

Article V provides that, upon application of the legislatures of two-thirds of the several states, Congress shall call a convention for proposing amendments. The convention mode is the only mode of proposing amendments other than the proposals deemed necessary by two-thirds of both houses of Congress. Amendments proposed by either mode must be submitted to the states for ratification by the legislatures, or state conventions, at the choice of Congress. An amendment must be ratified by three-fourths of the states to be binding on the nation.

Although there is limited legislative history behind the convention language in Article V, it appears clear that Congress was empowered to propose amendments and select state conventions as the mode of ratification, in order to allow the people of the United States to overcome excesses by state governments, and the state legislatures were empowered to initiate conventions as might be needed to propose amendments without the approval of Congress, to overcome excesses by the Congress. Congressional spending and Congressional mandates addressed in the Resolution appear well suited to the convention mode of proposing amendments.

No convention for proposing amendments has been called under the 1787 Constitution. The political and legal questions that must be answered before a convention assembles, as well as those certain to arise during the convention's proceedings and in any review of its work are numerous. The effect of an application, such as SCR 10, limited in scope, is also uncertain.

In the early 1980's Congress passed significant budget reforms when it became likely a convention might be called. Present proponents of a convention argue that reigniting the push for a convention might motivate Congress to propose a balanced budget amendment to diffuse the effort. In 1995, the newly elected Republican controlled Congress came within one vote in the Senate of submitting a balanced budget amendment to the states for ratification. Opponents of a convention argue that the risks of an unlimited convention are too great to hazard that approach.

The possibilities and questions that may surround the calling of a convention are many.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

The "Florida Senate Bill Analysis and Fiscal Impact Statement" for SCR 10, revised March 10, 2010, is hereby incorporated by reference[1] and adopted excepting any conclusions inconsistent with the discussion below. That document is herein cited as "Senate Analysis."

The effect of the Resolution would be nil unless counted with applications of a number of states sufficient to require the convening of a constitutional convention. The effect, in that event, can neither be fully predicted nor analyzed.

Present situation:

Demands for a Balanced Budget Amendment

The Senate Analysis briefly explains the present situation regarding the history of states' requests for amendments and applications for conventions. However, it is extremely difficult to properly categorize such state communications in that some simply request the passage of an amendment by Congress, some request a convention for limited subject matter purposes and some request conventions open as to subject matter. Moreover, those applying for a convention for limited purposes including or exclusively relating to a balanced federal budget do not describe the purposes consistently. Thus, the Senate Analysis claim of at least 400 convention applications to Congress constitutes a maximal characterization of the evidence. Minimizing the same evidence, it is sufficient to say that no one has successfully petitioned the Congress or the judiciary for a determination that a sufficient number of applications have at any time been submitted to require a convention. Counting states' applications is further discussed in the Constitutional Issues discussion below (Part III, A.).

The Senate Analysis thoroughly describes the past efforts of Florida to encourage adoption of a balanced budget amendment via memorials to Congress including applications for a convention. Those efforts date back to 1976, the bicentennial of American Independence.

Federal Debt and Spending

The Senate Analysis thoroughly examines the present status and trends regarding the spending and debt of the federal government as of March 10, 2010. Since that time, Congress has enacted the largest social welfare program in the history of the Republic. The 2010 federal health care legislation purports to expand access to health care to all residents of the United States through massive

[1] http://www.flsenate.gov/data/session/2010/Senate/bills/analysis/pdf/2010s0010.ju.pdf

spending, tax subsidies, and direct and indirect compulsion of both individuals and employers. The program purports to be funded by multi-billion dollar tax increases, including "Medicare" taxes not dedicated to Medicare expenditures, putative cuts in Medicare expenditures, and billions of dollars in individual and business penalties. These penalties include between $240 and $360 million that would be assessed against the State of Florida, as an employer, if it continues to employ OPS (part-time and temporary) workers without offering health insurance to those employees. While Congressional leadership claimed the program to be in fiscal balance over its first 10 years, its benefits and subsidies begin long after the tax increases take effect. Too, there is no way to discover how individuals and businesses might adjust their behavior (or even decrease their economic productivity) in order to maximize enjoyment of subsidies and minimize the taxes and penalties incurred. Therefore, one must conclude that, at least by the second decade, the plan may very well add many billions of dollars to federal deficits and trillions of dollars to federal indebtedness. Thus, the federal long term fiscal outlook described in the Senate Analysis has worsened significantly in recent weeks.

Federal Mandates

The 2010 federal health care legislation has sparked a new round of lawsuits by states and local governments questioning the limits of federal interference with individual liberty and with state and local government authority and discretion. While those cases raise important issues, a less open question is the capacity of Congress to use its spending power to coerce state action and increased state expenditures. Medicaid alone is the fastest growing part of state government budgets and state expenditures for that program alone have grown unrelentingly for decades, generally faster than state tax revenues and faster than any other area of state spending. The Senate Analysis more thoroughly discusses the general issue of federal mandates and their detrimental impact on states.

B. SECTION DIRECTORY:

The first "resolved" clause provides the application for calling a convention and contains limited purposes for the application, set forth in two provisions outlined below:

(1) Specifies the Legislature's intention with respect to achieving and maintaining a balanced federal budget. The provision sets out a suggested framework:
- (a) requiring a balanced budget account for all federal obligations
- (b) providing for national emergencies
- (c) imposing spending limitations
- (d) setting extraordinary vote requirements for tax increases
- (e) prohibiting federal mandates on states or local governments to raise taxes or fees

(2) Specifies the Legislature's intention with respect to controlling the ability of Congress and federal agencies to require expenditures by states:
- (a) limiting mandates compliance with which are not fully funded by federal dollars
- (b) limiting mandates on the expenditure of federal funds

The second "resolved' clause provides for repeal, rescission, nullification and superseding of all previous Florida applications for a balanced federal budget and for a constitutional convention.

The final "resolved" clause provides for self-revocation, retroactive to date of passage, in the event the application is counted in calling a convention for purposes not expressly permitted by the Resolution.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

If the intentions of the resolution were ever realized, revenues received from federal sources would likely decline significantly

2. Expenditures:

If the intentions of the Resolution were ever realized, expenditures mandated by federal law and agencies would likely decrease significantly, and state expenditures presently funded by revenues received from federal sources would need to be replaced in part by state revenues. Total expenditures would likely decline.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Effects similar to those described for state government would likely be incurred.

2. Expenditures:

Effects similar to those described for state government would likely be incurred.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The impact on the private sector from reductions in federal spending and borrowing combined with possible increases in state and federal taxes are incalculable, but substantial, should the intentions of the Resolution ever be realized.

D. FISCAL COMMENTS:

No immediate fiscal impact is foreseen or likely as a result of adoption of the Resolution.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

Constitutional Conventions

Organizational Challenges and Concerns

The nature of the legislatures' applications poses the first challenge to organizing a convention. The attributes of a proper application are subject to scrutiny by Congress. All that Article V requires is an "application" of "the Legislatures." Clearly if 400 putative applications have been submitted, some discretion lies in Congress to ignore those it deems insufficient. The only language that would certainly be sufficient would be an unconditional application for Congress to "call a Convention for proposing Amendments." Whether applications may be conditional is a subject of great disagreement among scholars and politicians.

Limited Applications

The most significant legal question raised by the Resolution is whether it constitutes a valid exercise of the Florida Legislature's prerogative under Article V to apply for Congress to call a convention. Some prominent scholars have argued that an application for a convention of limited purview should have no effect. This is based on a textual interpretation that there is only one kind of convention contemplated in Article V: "a Convention for proposing Amendments, which...shall be valid to all Intents and Purposes." The power to limit an application revolves in part on the power of Congress to limit the call in Article V.

Under Article II, the President may "convene both Houses" of Congress, with no provision there for limiting the purview. Based on parliamentary law that goes back to the Glorious Revolution in Great Britain, it is clear that, once convened, a parliamentary body may not be limited, unless by express

constitutional provision, in the purview of its considerations. From this perspective, an application for a convention of limited purview asks for what cannot be done.[2]

Others hold a more open view of the question, opining that "the state mode for getting amendments proposed was not to be contingent upon any significant cooperation or discretion in Congress,"[3] meaning, at least in part, that Congress has no authority to excessively scrutinize convention applications. The author just quoted, however, also opined that Congress would be bound to cooperate with limited applications by limiting its call in accordance therewith, and that the appropriateness of a convention actually increased with the narrowness of the state applications.[4]

Disputing this "narrow is better" approach, another author has provided a more thorough historical analysis of the question. This scholar asserts that the 1787 Constitutional Convention clearly rejected giving authority to states to directly propose amendments, opting instead for two different national bodies to propose amendments: Congress and a convention. In rejecting conventions restricted to specific propositions pre-agreed by the legislatures, this writer argues:

> If the aim had been to give the state legislatures the power to propose as well as to ratify amendments, it would have been unnecessary to provide for conventions. The drafters could simply have provided that when two-thirds of the state legislatures agree on the wording of an amendment, some central authority must automatically submit that amendment for ratification by the required three-fourths of the states. Of course, a convention whose sole authority would be to vote "yes" or "no" on a proposal dictated in advance by state legislatures could, by delaying the amendment process, serve an important function by allowing time for reflection and debate and by providing an additional hurdle for any proposed amendment. Assembling a tightly controlled convention for this limited purpose, however, would have made little sense to the drafters in 1787. The difficulty of choosing and assembly delegates from all the states was extraordinary; commencement of national meeting was sometimes delayed for weeks by the late arrival of many of the delegates. Delegates to such convention would likely be frustrated by the delay and anxious to get on with the sole official act permitted them: voting on an amendment whose wording had been determined beforehand. The framers understood that "conventions are serious things" and it is doubtful that they meant to suggest such a meeting by the phrase "a Convention for proposing Amendments."[5]

Thus, the idea that a convention can be called to consider a single specific proposal should be rejected.

This same author argues further that Congress should not assume a major role in setting the convention's purview. "That role should be left to the convention itself in order to avoid undue congressional influence over the convention mode of amendment."[6] This author suggests that Congress may count applications that express a purpose for a convention, but not if the application evinces the assumption that "the applying state legislatures or Congress can limit the convention's agenda."[7]

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[2] Black, "Amending the Constitution: A Letter to a Congressman," 82 Yale L.J. 189 (1972); Ackerman, "Unconstitutional Convention," New Republic, Mar. 3, 1979.

[3] Van Alstyne, "Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague," 1978 Duke L. J. 1295, 1303 (1978).

[4] Van Alstyne, 1978 Duke L.J. at 1306.

[5] Dellinger, "The Recurring Question of the 'Limited' Constitutional Convention," 88 Yale L.J. 1623, 1632-33 (1979)(citations omitted).

[6] Dellinger, 88 Yale L.J. at 1634 (citations omitted). Dellinger considers and rejects Van Alstyne's analysis. 88 Yale L.J. at 1631-32.

[7] Dellinger, 88 Yale L.J. at 1636. Dellinger would count applications that express purposes without expressing limiting intentions. He points out that Black would not count any application expressing a purpose. 88 Yale L.J. at 1636. Van Alstyne acknowledges that Ackerman agrees with Black. 178 Duke L.J. at 1296.

Therefore, SCR 10 would not be counted by three of the four scholars cited above. If it would be counted by Congress in calling a convention, the capacity of the states and Congress to limit the purview of the convention remains disputed.

Limitations in the Call of Congress

Most analysts agree that once a convention convenes, it may undertake to adopt any proposal that it may allow under its own rules. Section 299 of Mason's Manual of Legislative Procedure affirms that there are few occasions when an objection to consideration is appropriate in a legislative body, but even when it is, the objection ought to be sustained by the majority. Thus, the majority of a parliamentary body is the sole judge of the subject matters it may deliberate. Further, the notion that the convention may be limited in subject matter by the will of those who applied for the convention, against the will of the actual delegates thereto, has scant support among anyone who has ever participated in a political convention or engaged in similar efforts to restrain the purview of any parliamentary body.

In Florida, by way of comparison, express provision is made for "special sessions" of the legislature to be called, during which "only" business "within the purview of the proclamation" OR introduced "by consent of two-thirds of the membership of each house." No such limitation applies to general sessions of the Florida Legislature or to any general session of any Legislature seated in North America. As stated above, the President can call Congress into session, but has no power to limit its purview once assembled. The same has been true of Parliament since the time of Charles II. Even where such limitations do apply to special sessions, the power of the parliamentary body to expand the purview of its session by some extraordinary vote appears to be generally preserved. Furthermore, there is no authority external to a parliamentary body that may regulate its internal conduct, whether that power may be executive or judicial.[8] The power of judicial review may be utilized to nullify an unauthorized enactment of a legislative body but no power exists to block the legislative acts creating such enactment.

(The principle arguments concerning a possible "runaway convention" relate to the *political* consequences of unanticipated results. Even if it were presumed that Congress had some unenumerated power to limit the purview of a convention, once the convention acted outside that limitation, the question would then arise as to the effect of such action. This and many of the questions raised in this discussion may be characterized as "political questions" and would likely be carefully avoided by the judiciary, leaving only political bodies to resolve them.)

Process and Substance Concerns

SCR 10 explicitly provides that its intent is limited to calling a convention for purposes relating to federal budgeting and mandates. Once a convention is organized though, it appears highly unlikely that it could be dissolved by a challenge from a state that intended only a convention of limited scope. Moreover, even if sufficient power to appoint, recall and replace delegates existed, it may not be possible to affect the result of a convention by a number of states withdrawing from the convention by state action. The Convention would be a national legislative body not subject to state powers. Thus the ability of the Florida Legislature to impact the purview a convention would be minimal.

Congress may have power to impose some limitations on the purview or procedural discretion of a convention, particularly if Congress remained determined not to submit proposals to the states for ratification if adopted outside the limitations. However, two powers, the federal judiciary, and successor Congresses, might successfully overcome such limitations by requiring submission, in the case of the judiciary, or revisiting the limitations, in the case of a successor Congress, making later ratification possible. Omitting any limited ratification period from one or more of its proposals might preserve a convention's proposals making them available for submission and ratification at any future time.

[8] See generally, Tenney v. Brandhove, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951).

In addition to subject matter limitations, Congress might attempt to pre-determine procedural rules governing the convention. The 1787 Convention began when a quorum of seven states assembled. (Rhode Island never did participate.) It chose its own presiding officer and adopted its own rules of procedure. Following the pattern of the successive Continental Congresses and the Congress meeting under the Articles of Confederation, voting was by state, with each having a single vote[9]. Congress might attempt to set a particular quorum requirement, impose procedural rules or limitations, set deadlines, appoint a presiding officer, and impose voting rules similar to the electoral college, the Senate (two votes per state), the House (votes apportioned based on population) or the 1787 Convention. Yet, the convention itself would have clear authority to govern itself and get around many such restrictions. As with subject matter limitations, the judiciary or successor congresses, could also nullify such Congressional limitations on process and voting. Even a minimum quorum requirement may be questioned, as the Electoral College has no quorum requirement: a President may be elected by the majority vote of electors appointed, with no minimum quorum required. Yet, without a quorum requirement, a "rump" convention would be a real possibility.

The most difficult procedural question presenting itself would be how delegates are selected. This question could create an impasse in Congress when formulating a call, and in the states, it could create great conflicts. May Congress appoint its own members as delegates? They have been elected by the people. They are apportioned by population. They meet all requirements for a representative body.

Or, might Congress require the popular election of delegates, apportioned in a manner determined by Congress? Might Congress rig the rules to ease the election of many of its own members as delegates? Who would pay for the elections and who would regulate the election procedures? Could Congress grant the power to appoint delegates? Would partisan interests control all these decisions? Would delegate elections be by partisan ballots?

Could states refuse to comply with Congress's limitations or requirements and send a delegation more pleasing to their legislatures or executives? Would partisan interests in the states affect each state's decisions respecting delegates? Would the convention itself, once convened, have final say over which delegates are admitted to represent each state? Would it look like a joint convention of the National Republican and Democratic parties, split evenly, never to agree on anything?

Finally, could terms or term limits be imposed on the delegates by the convention itself, by the states or by Congress?

The last procedural question that could arise would be final dissolution of the convention. Ordinarily, a parliamentary body is the only power that may dissolve itself unless some constitutional calendar deadline or external power is provided to dissolve it. Once convened, might the convention adjourn from time to time without limitation, available at any time in the future to assemble again to propose additional amendments deemed necessary? If the assembly of the convention proves as difficult as imagined, would it not be prudent to keep the convention going to avoid repeating the battles inherent in convening?

Logrolling is seldom considered in convention literature, but would clearly be available to the convention. It is a common practice in Congress, expressly restricted in Florida's Constitution by single subject requirements imposed on both general laws and initiative petitions. Although Congress has not proposed multiple amendments in recent history, it is notable that the first ten amendments to the United States Constitution, encompassing the Bill of Rights, were approved in one single Resolution adopted by the First Congress convened under the 1787 Constitution. Thus logrolling by the convention would be clearly legal.

Logrolling allows the cobbling together of the vote required for passage in a parliamentary body through inclusion of multiple propositions important to a minority of delegates, though not necessarily having

[9] A picture of page 1 of the convention vote sheet is available at: http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/voting_record.jpg

majority support standing alone. In order to make its work easier the convention might include any number of diverse proposals supported by any delegates into a single report of the convention. Such proposals might even be mutually contradictory. Both pro-life and pro-abortion amendments could be included. Both pro-gay-marriage and anti-gay-marriage amendments could be included. Both pro-gerrymandering and anti-gerrymandering amendments could be included. Both pro- and anti-amendments relating to partisan politics might be included, leading to constitutional enshrinement or abolishment of political parties. And both pro- and anti- "states rights" amendments might be included. Delegates could rely on the three-fourths ratification requirement as the real check and balance on each proposal, letting the American people make the final decisions on many controversial issues.

Given that no convention has assembled in 220 years, and the likelihood that one might not ever assemble again, the temptation to logroll and to submit everything with any articulate proponent into the mix of ratification might be irresistible for delegates. This is particularly so with respect to serious amendment proposals likely never to attain two-thirds approval of the Congress. Regardless of the passage requirement used by the Convention, whether majority, supermajority, by state, fractional or other voting method, logrolling could vastly expand the number of distinct propositions approved.

Ratification Concerns

Ratification is the final step in adoption of an amendment to the United States Constitution. Ratification may be by the legislatures, or by conventions in the states, as Congress may choose. All more recent amendments proposed by Congress have contained ratification deadlines within the amendment itself. Such deadlines, typically seven years from submission, are prudential limitations intended to assure a broad contemporaneous national consensus for change. Many amendments, however, were proposed without a deadline for ratification. Thus, the most recently ratified amendment, certified as ratified in 1992, more than 200 years after its submission in 1789.[10] To have the maximum chance at ratification, proposals by the convention might omit any deadline, leaving each pending until finally ratified. On the other hand, if Congress chose state conventions as the mode of ratification, if no deadline were placed on ratification, activists might be encouraged to immigrate from state to state in order to effect ratification of a less popular amendment one state at a time, thereby effecting super-majority adoption by concerted minority activism.

Without considering the possibilities arising from unlimited ratification periods, most convention proponents take comfort in the three-fourths ratification requirement in Article V. Proponents perceive the three-fourths requirement as adequate protection of the Union from precipitous and ill-considered amendments. Yet, although not discussed in the literature surrounding convention proposals, the question clearly arises whether a Convention might propose amendments that might have the effect of forming a new union upon ratification of less than three-fourths of the states. Or, it might propose amendments that would have some *local* effect upon ratification of less than three-fourths of the states. For example, an amendment might state that it is binding upon each state that ratifies it, or, following the example of 1787, state that the ratification of some number of states would establish the amendment, including an entirely new constitution, as binding between the states so ratifying.

The 1787 Convention that drafted the Constitution of the United States was convened under the authority of the Articles of Confederation which required that amendments thereto had to be ratified by all 13 states in the Union. The Articles themselves asserted a "perpetual" Union of those States. The Constitution, however, became effective upon the ratification of the conventions of only nine States pursuant to *its* own terms, set in Article VII, in direct conflict with the terms of the Articles of Confederation. In the process of ratification, the perpetuity of the Union was seriously contemplated, with proponents concluding that all 13 states would eventually ratify the Constitution, but its effectiveness could not await unanimity.[11]

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[10] The Twenty-seventh Amendment, approved by Congress in the same Resolution proposing the Bill of Rights, provides:

> No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

[11] In Federalist No. 43, James Madison reflected on the nine state ratification requirement:

> In general, it may be observed that although no political relation can subsist between the assenting and dissenting States, yet the moral relations will remain uncancelled. The claims of justice, both on one side and on the other, will be in force,

Some might argue that it would be absurd for the Constitution to have differing terms in differing states, yet that is exactly the present effect. All fifty states have state judicial systems that may interpret federal constitutional questions in slightly diverse ways. State courts are bound by the precedent of their own state's highest court. Moreover, the federal judicial system is divided in to fourteen appellate circuits, each having a distinct territorial jurisdiction within the nation. On questions not decided by the U.S. Supreme Court, all United States District Courts and the courts of the 50 states are bound by the often conflicting precedents of their respective Circuit Court of Appeals. Thus, on many fine points of interpretation, America has in effect 13 slightly different constitutions containing a total of 50 variations.

In matters of concern significant enough to generate constitutional amendments in numerous states, but not having popularity among all states, it would not be so absurd for differences from state to state to be affirmed by express constitutional provisions. A number of current national movements are looking for ways to assure that state policy choices will be respected by the federal judiciary. Federal constitutional provisions binding only in consenting states would be better suited to such purpose than state constitutional provisions. For that reason provisions not binding in every state might be attractive to convention delegates challenged with issues that divide the states. Even without a radical imitation of the 1787 ratification by less than the "required" number, a patchwork effect could result from an amendment that, by its own terms, was only binding on states that ratify. Similarly, an amendment might extend supremacy within each state to state constitutional provisions within particular subject areas such as individual liberties, establishing a type of super Tenth Amendment approach binding on Congress. Such amendment would be attractive to every state during ratification.

Too, the Constitution has a very different effect (exclusive legislative authority vested in Congress) on federally owned lands, Indian lands and in federal territories and possessions than it has in the states (where the legislative powers of Congress are specifically enumerated). Consequently, while slightly different from the experience of the first 250 years of American Union, it is not unimaginable to have a constitution that has different provisions applicable in different places.

B. RULE-MAKING AUTHORITY:

No rule-making is authorized by the Resolution.

C. DRAFTING ISSUES OR OTHER COMMENTS:

If Congress does respect the limited purposed of application, and such limitations are applied and respected, SCR 10 appears clear that it may be used to support calling a convention only to consider balanced budget proposals even if federal mandates are excluded in the call. In such case, a balanced budget amendment that might allow Congress to shift all deficits to the states in the form of mandates might be a likely result.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

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and must be fulfilled; the rights of humanity must in all cases be duly and mutually respected; whilst considerations of a common interest, and, above all, the remembrance of the endearing scenes which are past, and the anticipation of a speedy triumph over the obstacles to reunion, will, it is hoped, not urge in vain MODERATION on one side, and PRUDENCE on the other.

The Federalist, p. 238 (1987)(Chadwick, Ed.) Thus, the proponents of the 1787 Constitution were convinced that "a more perfect union" was not only necessary, but that necessity might require at least a temporary disunion of nine states from the others until reunion might be accomplished. See also, Harry V. Jaffa, A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War, pp. 193-197 (Rowman & Littlefield, 2004 paperback ed.)(discussing the implications of Madison's commentary in the context of 19th century secession arguments).

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.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SCR 10
INTRODUCER:	Senator Atwater and others
SUBJECT:	Balanced Federal Budget
DATE:	March 8, 2010 REVISED: 03/10/10

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	**Favorable**
2.				
3.				
4.				
5.				
6.				

I. Summary:

Through this concurrent resolution, the Legislature calls upon Congress to convene a constitutional convention under article V of the U.S. Constitution for the purpose of proposing amendments to the Constitution to achieve and maintain a balanced federal budget and to control the ability of the federal government to require states to expend funds. The concurrent resolution specifies that it is revoked and withdrawn, nullified, and superseded if it used for the purpose of calling or conducting a convention to amend the U.S. Constitution for any other purpose.

II. Present Situation:

Conventions as Method of Proposing Amendments to U.S. Constitution

The Constitution of the United States prescribes two methods for proposing amendments to the document. Under the first method, Congress – upon the agreement of two-thirds of both houses – may propose an amendment itself. Under the second, Congress – upon application from legislatures in two-thirds of the states – "shall call a Convention for proposing Amendments."[1]

[1] U.S. CONST. art. V. By comparison, the Florida Constitution provides the following methods for proposing amendments to the document: by joint resolution agreed to by three-fifths of the membership of each house of the Legislature (FLA. CONST. art. XI, s. 1); by constitutional revision commission (FLA. CONST. art. XI, s. 2); by citizen initiative (FLA. CONST. art. XI, s. 3); by a constitutional convention to consider revision to the entire document called by the people of the state (FLA. CONST. art. XI, s. 4); and by a taxation and budget reform commission (FLA. CONST. art. XI, s. 6). Regardless of the method by which an amendment to the Florida Constitution is proposed, the amendment must be approved by at least 60 percent of the electors voting on the measure (FLA. CONST. art. XI, s. 5(e)).

Under either method, Congress is authorized to specify whether the amendment must be ratified by the legislatures of three-fourths of the states or by conventions in three-fourths of the states.[2]

Legal scholarship notes that the convention method for proposing amendments to the U.S. Constitution emerged as a compromise among "Founding Fathers" who disagreed on the respective roles of Congress and the states in proposing amendments to the document. Although some participants in the Philadelphia Convention of 1787 argued that Congress' concurrence should not be required to amend the Constitution, others argued that Congress should have the power to propose amendments, and the states' role should restricted to ratification.[3] The language ultimately agreed upon, and which became article V of the U.S. Constitution, states:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Despite the fact that over time states have made at least 400 convention applications to Congress on a variety of topics,[4] the constitutional convention method of proposing amendments has never been fully employed and, as authors have noted, occupies some unknown legal territory. Some of the legal questions surrounding the method relate to whether Congress has discretion to call a convention once 34 states make application; whether the scope of a convention may be limited to certain subject matters and by whom; and how applications from the states are to be tallied – "separately by subject matter or cumulatively, regardless of their subject matter."[5]

Over time, some states have rescinded applications, in part amid concerns that the scope of a constitutional convention could extend to subjects beyond the subject proposed in a given state's application. For example, in 2003 the Arizona Legislature adopted a concurrent resolution that "repeals, rescinds, cancels, renders null and void and supersedes any and all existing applications to the Congress ... for a constitutional convention ... for any purpose, whether limited or general."[6] Article V of the U.S. Constitution is silent on the legal effect of a state's decision to rescind a previously submitted application.

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[2] U.S. CONST. art. V.

[3] James Kenneth Rogers, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL'Y 1005, 1006-07 (2007).

[4] *Id.* at 1005. The author cites this figure as of 1993.

[5] *Id.*

[6] Senate Concurrent Resolution 1022, State of Arizona, Senate, Forty-sixth Legislature (First Reg. Sess. 2003) (copy on file with the Florida Senate Committee on Judiciary). The concurrent resolution notes that "certain persons or states have called for a constitutional convention on issues that may be directly in opposition to the will of the people of this state." *Id.*

Calls for a Constitutional Convention on a Balanced Federal Budget

One of the country's most significant movements toward activation of the constitutional convention method of proposing an amendment to the U.S. Constitution occurred starting in the mid-1970s, when eventually 32 states adopted measures, of varying forms, urging Congress to convene a constitutional convention to address federal budget deficits.[7] Depending upon the manner of tallying applications, that count was two short of the 34 state applications necessary under article V of the U.S. Constitution.

Florida's 1976 Convention Application

Florida participated in that movement, when in 1976 the Legislature adopted Senate Memorial 234. Through that memorial, the Legislature made "application to the Congress of the United States ... to call a convention for the sole purpose of proposing an amendment to the Constitution of the United States to require a balanced federal budget and to make certain exceptions with respect thereto."[8]

That same year, the Legislature adopted House Memorial 2801, through which the Legislature also made application to Congress for a convention to consider an amendment to the U.S. Constitution requiring a balanced federal budget. Unlike Senate Memorial 234, House Memorial 2801 prescribed the precise language of the proposed constitutional amendment. Among other provisions, the proposed amendment stated:

> [T]he Congress shall make no appropriation for any fiscal year if the resulting total of appropriations for such fiscal year would exceed the total revenues of the United States for such fiscal year. ... There shall be no increase in the national debt, and the existing debt, as it exists on the date which this amendment is ratified, shall be repaid during the one hundred-year period following the date of such ratification.

The proposed constitutional language also authorized Congress to suspend the requirement for a balanced budget in times of national emergency, as identified by a concurrent resolution of three-fourths of the membership of the U.S. Senate and the U.S. House of Representatives.

House Memorial 2801 further specified that "the purview of any convention called by the Congress pursuant to this resolution [shall] be strictly limited to the consideration" of a balanced-budget amendment. In addition, the Legislature resolved that the 1976 application for a constitutional convention "constitutes a continuing application ... until such time as two-thirds of the Legislatures of the several states have made similar application, and the convention herein applied for is convened."[9]

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[7] E. Donald Elliott, *Constitutional Conventions and the Deficit*, 1985 DUKE L.J. 1077, 1078 (1985).
[8] Senate Memorial 234 (Reg. Sess. 1976).
[9] House Memorial 2801 (Reg. Sess. 1976).

Florida's 1988 Request to Congress

In 1988, the Legislature adopted a measure urging congressional action related to the federal budget deficit. Adopted by both chambers, Senate Memorial 302, rather than making application for a constitutional convention, urged Congress to use its own power to propose an amendment to the U.S. Constitution requiring the federal budget to be in balance except under specified emergencies.

The memorial specified that it superseded "all previous memorials applying to the Congress of the United States to call a convention to propose an amendment to the Constitution of the United States to require a balanced federal budget," including the two memorials passed in 1976. The 1988 memorial further specified that the previous memorials were "revoked and withdrawn."[10]

State Balanced-Budget Requirements

Although it noted that there is not agreement on what is meant by a "balanced budget," the National Conference of State Legislatures reported in 2004 that 49 states "have at least a limited statutory or constitutional requirement of a balanced budget."[11] Florida's requirement is prescribed in article VII, section 1 of the Florida Constitution. The constitution requires that "[p]rovision shall be made by law for raising sufficient revenue to defray the expenses of the state for each fiscal period."[12] Among other elements, the implementing statute, s. 216.221, F.S., provides that all appropriations shall be maximum appropriations, based on the collection of sufficient revenue. In addition, "[i]t is the duty of the Governor, as chief budget officer, to ensure that revenues collected will be sufficient to meet the appropriations and that no deficit occurs in any state fund."[13]

Section 215.98, F.S., provides that the "Legislature shall not authorize the issuance of additional state tax-supported debt if such authorization would cause the designated benchmark debt ratio of debt service to revenues available to pay debt service to exceed 7 percent unless" it finds that the additional debt is necessary to address a critical state emergency.[14]

Federal Budget Deficit and National Debt

The Congressional Budget Office (CBO) estimates that the federal budget deficit will be approximately $1.3 trillion for fiscal year 2010, assuming current law and policies remain unchanged.[15] According to the CBO, at "9.2 percent of gross domestic product (GDP), that deficit would be slightly smaller than the shortfall of 9.9 percent of GDP ($1.4 trillion) posted in 2009."[16] The CBO explained that:

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[10] Senate Memorial 302 (Reg. Sess. 1988).
[11] Nat'l Conference of State Legislatures, *State Balanced Budget Requirements: Provisions and Practice* (updated 2004), http://www.ncsl.org/IssuesResearch/BudgetTax/StateBalancedBudgetRequirementsProvisionsand/tabid/12651/Default.aspx (last visited Mar. 7, 2010).
[12] FLA. CONST. art VII, s. 1(d).
[13] Section 216.221(1), F.S.
[14] Section 215.98(1), F.S.
[15] Congressional Budget Office, Congress of the United States, *The Budget and Economic Outlook: Fiscal Years 2010 to 2020, Summary* (Jan. 2010), http://www.cbo.gov/ftpdocs/108xx/doc10871/01-26-Outlook.pdf.
[16] *Id.*

> The large 2009 and 2010 deficits reflect a combination of factors: an imbalance between revenues and spending that predates the recession and turmoil in financial markets, sharply lower revenues and elevated spending associated with those economic conditions, and the costs of various federal policies implemented in response to those conditions.[17]

The office projects average deficits of approximately $600 billion per year over the 2011-2020 period.[18]

In turn, the deficits will cause federal debt held by the public to increase significantly. Currently, the debt held by the public is estimated to be $8.1 trillion.[19] The CBO projects that the figure will increase to $15 trillion by the end of 2020.[20]

Following is historical data for the past 10 years on surpluses, deficits, and debt held by the public as a percentage of gross domestic product:[21]

Surpluses, Deficits, and Debt Held by the Public: 2000-2009		
Year	Surplus or Deficit Total (in Billions of Dollars)	Debt Held by the Public (in Billions of Dollars)
2000	$236.2	$3,409.8
2001	$128.2	$3,319.6
2002	($157.8)	$3,540.4
2003	($377.6)	$3,913.4
2004	($412.7)	$4,295.5
2005	($318.3)	$4,592.2
2006	($248.2)	$4,829.0
2007	($160.7)	$5,035.1
2008	($458.6)	$5,803.1
2009	($1,413.6)	$7,544.0

Source: Congressional Budget Office; Office of Management and Budget

State Legislative Concerns over Federal Mandates

In recent years, state legislatures have given increasing attention to the effect of mandates imposed by the federal government on states and localities. According to the National Conference of State Legislatures (NCSL), the growth of mandates and other costs imposed by

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[17] *Id.*
[18] *Id.*
[19] TreasuryDirect, *The Debt to the Penny and Who Holds It*, http://www.treasurydirect.gov/NP/BPDLogin?application=np (last visited Mar. 5, 2010). TreasuryDirect is a financial services website through which a person may purchase and redeem securities directly from the U.S. Department of the Treasury in paperless electronic form. TreasuryDirect is a service of the U.S. Department of the Treasury Bureau of the Public Debt. See TreasuryDirect, *About TreasuryDirect*, http://www.treasurydirect.gov/about.htm (last visited Mar. 5, 2010).
[20] Congressional Budget Office, *supra* note 15.
[21] Congressional Budget Office, *supra* note 15, at Appendix F, Table F-1.

the federal government is one of the most serious fiscal issues facing state and local governments. The NCSL notes that:

> The manner in which the federal government imposes costly unfunded mandates on state and local governments is multi-faceted, including:
>
> - direct federal orders without sufficient funding to pay for their implementation[;]
> - burdensome conditions on grant assistance;
> - cross sanctions and redirection penalties that imperil grant funding in order to regulate and preempt the states actions in both related and unrelated programmatic areas;
> - amendments to the tax code that impose direct compliance costs on states or restrict state revenues;
> - overly prescriptive regulatory procedures that move beyond the scope of congressional intent;
> - incomplete and vague definitions which cause ambiguity; and
> - perceived or actual intrusion on state sovereignty.[22]

Congress enacted the Unfunded Mandate Reform Act of 1995,[23] which is designed, in part, "to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding, in a manner that may displace other essential State, local, and tribal government priorities."[24] Among other provisions, the act requires the use of new information in the legislative process and of new procedures designed to reduce the creation of unfunded mandates. Further, the act contemplates certain executive branch procedures on the development of regulations that might lead to new mandates.[25]

III. Effect of Proposed Changes:

Through this concurrent resolution, the Legislature makes application to and calls upon Congress to convene a constitutional convention under article V of the U.S. Constitution for the sole purpose of proposing amendments to the Constitution to:

- Achieve and maintain a balanced federal budget; and
- Control the ability of Congress and federal executive agencies to require states to expend funds.

The concurrent resolution does not contain specific constitutional language; however, it proposes achieving and maintaining a balanced federal budget by:

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[22] Nat'l Conference of State Legislatures, State-Federal Relations and Standing Committees, *2009-2010 Policies for the Jurisdiction of the Budgets and Revenue Committee: Federal Mandate Relief*, http://www.ncsl.org/default.aspx?TabID=773&tabs=855,20,632#855 (last visited Mar. 8, 2010).

[23] Public Law 104-4 (Mar. 22, 1995).

[24] *Id.* at s. 2.

[25] Sandra S. Osbourn, Government Division, Congressional Research Service, *Unfunded Mandate Reform Act: A Brief Summary* (95-246 GOV) (Mar. 17, 1995) (on file with the Committee on Judiciary).

- Requiring the balanced budget to account for all obligations of the federal government;
- Providing exceptions to the requirement for a balanced budget in cases of national emergencies or threats to national security;
- Imposing spending limits on the federal government;
- Establishing extraordinary vote requirements for new or increased federal taxes and other revenues; and
- Prohibiting federal mandates on states to impose taxes or fees.

With respect to controlling the ability of the federal government to require states to expend funds, the concurrent resolution proposes:

- Limiting the ability of Congress and federal executive agencies to pass legislation requiring states to spend money or take actions that require expenditure of money unless sufficient federal funds are provided on an ongoing basis to offset the full costs; and
- Limiting Congress' ability to dictate to the states requirements for the expenditure of federal funds, other than requirements that may be necessary to measure the outcomes underlying the expenditure of federal monies.

The concurrent resolution specifies that it supersedes all previous memorials applying to Congress for a constitutional convention for the purpose of proposing an amendment to the U.S. Constitution, including memorials adopted in 1976 and 1988. The concurrent resolution provides that the previous memorials are "revoked and withdrawn, nullified, and superseded to the same effect as if they had never been passed."

In addition, the concurrent resolution specifies that it is similarly revoked and withdrawn, nullified, and superseded if it used for the purpose of calling or conducting a convention to amend the U.S. Constitution for a purpose other than requiring a balanced federal budget or limiting the ability of the federal government to require states to spend money.

Under the Senate rules, a concurrent resolution must be read twice, passed by both houses of the Legislature, and signed by the presiding officers.[26]

Other Potential Implications:

Unlike Florida, which has a constitutional requirement for raising sufficient revenue to defray the expenses of the state in each fiscal year, the U.S. Constitution does not contain a requirement for a balanced federal budget. Amending the U.S. Constitution to require a balanced federal budget would represent a fundamental change in federal fiscal policy and practice and would undoubtedly affect decisions ranging from the nature and quantity of government expenditures to the sources and level of revenue generation. The potential implications for government at all levels and for private citizens and businesses are difficult to quantify but likely to be significant.

[26] The Florida Senate, *Manual for Drafting Legislation*, 129 (6th ed. 2009); *see also* Rule 4.13, *Rules and Manual of the Senate of the State of Florida, Senator Jeff Atwater, President, 2008-2010.*

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 concurrent resolution makes an application to Congress under article V of the U.S. Constitution for a convention to propose amendments to the Constitution requiring a balanced federal budget and limiting the ability of the federal government to require states to expend funds. See the "Present Situation" section of this bill analysis for a discussion of the convention as a method of proposing amendments to the Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The concurrent resolution itself does not directly affect the private sector fiscally. However, to the extent applications from the states to Congress for a constitutional convention ultimately result in amendments to the U.S. Constitution requiring a balanced federal budget and limiting federal mandates for states to spend money, the private sector may be affected by budgetary and economic changes stemming from the constitutional changes.

C. Government Sector Impact:

The concurrent resolution itself does not directly affect state government or local governments fiscally. However, to the extent applications from the states to Congress for a constitutional convention ultimately result in amendments to the U.S. Constitution requiring a balanced federal budget and limiting federal mandates for states to spend money, the government sector may be affected by budgetary and economic changes stemming from the constitutional changes.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Senate Bill 2742 has also been filed during the 2010 Regular Session. Although it is not linked to this concurrent resolution, it provides for a nonbinding statewide advisory referendum on the question of whether the U.S. Constitution should be amended to require a balanced federal budget.

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.

HJR 15

House Joint Resolution

A joint resolution proposing an amendment to Section 12 of Article IV of the State Constitution to redesignate the Department of Elderly Affairs as the Department of Elder Affairs.

Be It Resolved by the Legislature of the State of Florida:

That the following amendment to Section 12 of Article IV of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE IV

EXECUTIVE

SECTION 12. Department of Elder ~~Elderly~~ Affairs.--The legislature may create a Department of Elder ~~Elderly~~ Affairs and prescribe its duties. The provisions governing the administration of the department must comply with Section 6 of Article IV of the State Constitution.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE IV, SECTION 12

DEPARTMENT OF ELDER AFFAIRS.--Proposing an amendment to the State Constitution to redesignate the Department of Elderly Affairs as the Department of Elder Affairs.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 15 Department of Elder Affairs
SPONSOR(S): Pafford and others
TIED BILLS: **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Elder & Family Services Policy Committee	10 Y, 0 N	Guy	Shaw
2)	Rules & Calendar Council		Kirksey	Birtman
3)				
4)				
5)				

SUMMARY ANALYSIS

House Joint Resolution 15 proposes an amendment to Section 12 of Article IV of the Florida Constitution to redesignate the Department of Elderly Affairs as the Department of Elder Affairs.

This joint resolution to redesignate the Florida Department of Elder Affairs must be approved by a 3/5 vote of the membership of each house of the Legislature. If enacted by such a vote, the proposal will be presented to the electors of Florida during the state's next general election (November 2, 2010). Final approval requires a favorable vote from 60 percent or more of the electors of the state.

Since the Department presently refers to itself as the "Department of Elder Affairs," there will be no fiscal impact on state government related to changing the Department's printed materials or signs.

This joint resolution appears to have a fiscal impact on state government in that the Department of State, Division of Elections, estimates a non-recurring cost of approximately $7,669 for FY 2010-11. The cost is a result of placing the joint resolution on the ballot and publishing two required notices.

The joint resolution does not contain a specific effective date. Therefore, if adopted by the voters at the 2010 General Election, the resolution would take effect January 4, 2011.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Persons age 60 and older compose 23 percent of Florida's total population while one out of every 11 Floridians is age 75 or older.[1] Seniors make up more of the state's population than the populations of 17 other states and the District of Columbia combined.[2]

The Department of Elderly Affairs (the "Department") was authorized in 1991 via an amendment to Article IV, Section 12 of the Florida Constitution, codified in section 20.41, Florida Statutes, and organized pursuant to Chapter 430, F.S., the "Department of Elderly Affairs Act." The Department began operation in January 1992.

The Department of Elderly Affairs is designated as the state unit on aging[3] as defined in the Older Americans Act (the "OAA") of 1965.[4] The Department's role is to administer the state's OAA allotment and grants, and to advocate, coordinate, and plan all services to elders provided by the state of Florida.[5] The OAA requires the Department to fund a service delivery system through designated area agencies on aging (AAAs) in each of the state's 11 planning and service areas.[6] In addition, ch. 430, F.S., requires that the Department fund service delivery "lead agencies" that coordinate and deliver care at the consumer level in the counties comprising each planning and service area.

Proposed Changes

House Joint Resolution 15 proposes an amendment to Section 12 of Article IV of the Florida Constitution to redesignate the Department of Elderly Affairs as the Department of Elder Affairs.

B. SECTION DIRECTORY:

Not applicable.

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[1] Florida Department of Elder Affairs, http://elderaffairs.state.fl.us/english/aboutus.php (last visited January 26, 2010).

[2] *Id.*

[3] Section 20.41(5), Florida Statutes.

[4] Section 305(a)(1)(C), Older Americans Act.

[5] Section 430.04(1), Florida Statutes.

[6] Section 20.41(6), Florida Statutes.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   Non-recurring FY 2010-2011

   Department of State, Division of Elections
   Publication Costs Approximately $7,669 (General Revenue)[7]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Department presently refers to itself as the "Department of Elder Affairs" in all of its printed materials and contracts. Should the joint resolution pass the Legislature and be approved by the voters of Florida, the Department would not need to change any of its materials to adapt to the name change.[8]

This joint resolution appears to have a fiscal impact on state government in that 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.[9] Costs for advertising vary depending upon the length of the amendment. According to the Department of State, Division of Elections, the average cost of publishing a constitutional amendment is $94.68 per word. The word count for HJR 15 is 81 words x $94.68 = $7,669.08.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

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[7] Florida Department of State, Fiscal Note (November 18, 2009).

[8] Florida Department of Elder Affairs, 2010 Legislative Bill Analysis, House Joint Resolution 15.

[9] Fla. Const., art. XI, s. 5(d).

2. Other:

Article XI, Section 1 of the Florida Constitution authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by three-fifths of the elected membership of each house. If agreed to by the Legislature, the amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office or at a special election held for that purpose. The resolution would be submitted to the voters at the 2010 General Election and must be approved by at least 60 percent of the voters voting on the measure. If approved, the amendment becomes effective on the first Tuesday after the first Monday in January following the election (January 4, 2011).[10]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

[10] Fla. Const., art. XI, s. 5(e).

House Joint Resolution

A joint resolution proposing the creation of Section 28 of Article I of the State Constitution, relating to health care services.

Be It Resolved by the Legislature of the State of Florida:

That the following creation of Section 28 of Article I of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE I

DECLARATION OF RIGHTS

SECTION 28. Health care services.—

(a) To preserve the freedom of all residents of the state to provide for their own health care:

(1) A law or rule may not compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system.

(2) A person or employer may pay directly for lawful health care services and may not be required to pay penalties or fines for paying directly for lawful health care services. A health care provider may accept direct payment for lawful health care services and may not be required to pay penalties or fines for accepting direct payment from a person or employer for lawful health care services.

(b) Subject to reasonable and necessary rules that do not

substantially limit a person's options, the purchase or sale of health insurance in private health care systems shall not be prohibited by law or rule.

(c) This section does not:

(1) Affect which health care services a health care provider is required to perform or provide.

(2) Affect which health care services are permitted by law.

(3) Prohibit care provided pursuant to general law relating to workers' compensation.

(4) Affect laws or rules in effect as of March 1, 2010.

(5) Affect the terms or conditions of any health care system to the extent that those terms and conditions do not have the effect of punishing a person or employer for paying directly for lawful health care services or a health care provider for accepting direct payment from a person or employer for lawful health care services.

(d) For purposes of this section:

(1) "Compel" includes the imposition of penalties or fines.

(2) "Direct payment" or "pay directly" means payment for lawful health care services without a public or private third party, not including an employer, paying for any portion of the service.

(3) "Health care system" means any public or private entity whose function or purpose is the management of, processing of, enrollment of individuals for, or payment, in full or in part, for health care services, health care data, or

health care information for its participants.

(4) "Lawful health care services" means any health-related service or treatment, to the extent that the service or treatment is permitted or not prohibited by law or regulation, which may be provided by persons or businesses otherwise permitted to offer such services.

(5) "Penalties or fines" means any civil or criminal penalty or fine, tax, salary or wage withholding or surcharge, or any named fee with a similar effect established by law or rule by an agency established, created, or controlled by the government which is used to punish or discourage the exercise of rights protected under this section.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE I, SECTION 28

HEALTH CARE SERVICES.—Proposing an amendment to the State Constitution to prohibit laws or rules from compelling any person, employer, or health care provider to participate in any health care system; permit a person or employer to purchase lawful health care services directly from a health care provider; permit a health care provider to accept direct payment from a person or employer for lawful health care services; exempt persons, employers, and health care providers from penalties and fines for paying or accepting direct payment for lawful health care services; and permit the purchase or sale of health insurance in private health care systems. Specifies that the amendment does not affect which health care services a

health care provider is required to perform or provide; affect which health care services are permitted by law; prohibit care provided pursuant to general law relating to workers' compensation; affect laws or rules in effect as of March 1, 2010; or affect the terms or conditions of any health care system to the extent that those terms and conditions do not have the effect of punishing a person or employer for paying directly for lawful health care services or a health care provider for accepting direct payment from a person or employer for lawful health care services.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HJR 37 Health Care Services
SPONSOR(S): Health Care Regulation Policy Committee; Plakon and others
TIED BILLS: **IDEN./SIM. BILLS:** SJR 72

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Health Care Regulation Policy Committee	10 Y, 3 N, As CS	Guy	Calamas
2)	Rules & Calendar Council		Hassell	Birtman
3)				
4)				
5)				

SUMMARY ANALYSIS

CS/HJR 37 proposes the creation of Section 28 of Article I of the Florida Constitution relating to Health Care Services. Specifically the constitutional amendment:

- prohibits persons and employers from compelled participation in a heath care system;
- allows direct payment of health care services and prohibits penalizing persons, employers and health care providers from utilizing a direct payment system;
- allows the purchase or sale of health insurance in the private market, subject to certain conditions; and
- exempts laws enacted prior to March 1, 2010, from requirements of the amendment.

The joint resolution provides definitions for certain terms and includes a ballot summary.

This joint resolution appears to have a negative, non-recurring fiscal impact on state government. The Department of State, Division of Elections, estimates a cost of approximately $65,045 for FY 10-11. The cost is a result of placing the joint resolution on the ballot and publishing two required notices.

The joint resolution does not contain a specific effective date. Therefore, if adopted by the voters at the 2010 General Election, the resolution would take effect January 4, 2011.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Federal Health Care Reform[1]

On March 21, 2010, Congress passed national health care reform. The new health care law (PL 111-148) and the reconciliation bill (HR 4872) passed shortly thereafter will bring sweeping changes to the U.S. health care system. Among other things, it:

• **Extends health insurance coverage** to about 32 million people who currently lack it, leading to coverage of about 94 percent of Americans. The cost of coverage expansions will total $940 billion from fiscal 2010 to fiscal 2019. But taking into account the changes to mandatory spending and tax law, the overhaul will reduce the deficit by a net $138 billion over the same period.

• **Creates state-based exchanges**, or marketplaces, where individuals without employer-provided insurance can buy health care coverage. Federal subsidies will be available to help cover the cost for individuals who earn between 133 percent and 400 percent of the federal poverty level (or $24,352 to $73,240 for a family of three in 2010).

• **Expands Medicaid eligibility** to all individuals with incomes of up to 133 percent of the federal poverty level. Specifies that in all states, the federal government will cover the entire cost of coverage to newly eligible people from 2014 through 2016. **In 2017, federal matching funds for all states will cover 95 percent of the costs for the newly eligible people.** The rate would be 94 percent in 2018, 93 percent in 2019 and 90 percent in 2020 and afterward.

• **Provides a one-time, $250 rebate for Medicare beneficiaries** who fall into a prescription drug coverage gap known as the "doughnut hole" in 2010 and seeks to eliminate the gap entirely within 10 years. Starting in 2011, the overhaul creates a discount of 50 percent on brand-name drugs for beneficiaries who fall into the gap. The discount will increase to 75 percent by 2020, with the government paying the rest of the cost of the drugs.

• **Imposes new regulations on health insurance companies**. Beginning six months after enactment, health insurers may rescind group or individual coverage only with clear and convincing evidence of fraud or intentional misrepresentation by an enrollee. Insurance plans also are required to allow parents to continue coverage for dependent children who would otherwise not have health insurance until a child reaches his or her 26th birthday. Insurers are barred from setting lifetime limits on the dollar value

[1] For a more detailed summary of the health insurance provisions in the federal health care reform initiatives, see the National Conference of State Legislatures website: http://www.ncsl.org/default.aspx?tabid=17639

of health care. And they also may not set any annual limits on the dollar value of health care provided, effective six months after enactment.
• **Requires individuals to obtain health insurance** or pay either $325 or 2 percent of income, whichever is higher, in 2015. Fines will increase in subsequent years.
• **Penalizes employers with more than 50 workers** who have employees who obtain subsidies to purchase coverage through the exchanges. Companies that offer health care benefits face a penalty of either $3,000 for each employee (full-time or part-time) who receives a subsidy or $750 per full-time employee, whichever would be less.
• **Imposes an excise tax on high-cost health care plans** — the so-called Cadillac plans — beginning in 2018. The tax will apply to plans costing $10,200 for individual coverage and $27,500 for family coverage.
• **Increases the Medicare payroll tax** for individuals making more than $200,000 and couples making more than $250,000 and imposes an additional 3.8 percent surtax on investment income.
• **Creates a 2.9 percent tax on the sale of any taxable medical device**, excluding less invasive and risky products classified as Class I by the Food and Drug Administration. The tax also will not apply to eyeglasses, contact lenses and hearing aids.
• **Imposes new fees on health insurers.** Beginning in 2014, an annual flat fee of $8 billion will be levied on the industry. It rises to $11.3 billion in 2015 and 2016, $13.9 billion in 2017, and $14.3 billion in 2018. In 2019, these fees will be adjusted by the same rate as the growth in health insurance premiums.
• **Levies annual industrywide fees on brand-name drugs** totaling $2.5 billion in 2011, $3 billion from 2012 through 2016, $3.5 billion in 2017, $4.2 billion in 2018, and $2.8 billion in 2019 and later years.

Much of the federal health care reform debate has centered on the cost of reform measures. The Congressional Budget Office (CBO) released an estimate of the direct spending and revenue effects of the combined reconciliation and Senate bills on March 20, 2010.[2] Together with the education provisions, CBO estimates that federal reform will "produce a net reduction in federal deficits of $143 billion over the 2010-2019 period."[3] Of that total, CBO attributes $19 billion in savings to education provisions.[4] CBO estimates the cost of coverage requirements in the two bills to be $938 billion over the 2010-1019 period.[5] Discretionary spending provisions include:[6]

Agency	Action	Cost
Internal Revenue Service	Implement eligibility determination, documentation and verification processes	$5 - $10 billion over 10 years
Dept of Health & Human Services and Ofc of Personnel Management	Implement changes in Medicare, Medicaid and CHIP	$5 - $10 billion over 10 years

Approximately 32 million nonelderly people would become insured under the bills and CBO estimates that 6 percent of the total population of nonelderly legal residents would remain uninsured.[7]

Prior to enactment of these bills, there was no existing requirement in federal law that individuals maintain health insurance coverage; nor did federal law require employers to provide health insurance to employees.

Florida Health Insurance

Florida law does not require state residents to have health insurance coverage. However, Florida law does require drivers to carry Personal Injury Protection (PIP), which includes certain health care coverage, as a condition of receiving a state driver's license.[8] Florida law also requires most

[2] Cost estimate for the amendment in the nature of a substitute for H.R. 4872, incorporating a proposed manager's amendment, Congressional Budget Office, see http://www.cbo.gov/doc.cfm?index=11379&type=1 (last visited March 24, 2010).
[3] *Id.*, at 2.
[4] *Id.*
[5] *Id.*, at 22.
[6] *Id.*, at 11.
[7] *Id.*, at 9.
[8] s. 627.736, F.S.

employers to carry workers' compensation insurance which includes certain health care provisions for injured workers.[9]

Approximately 20 percent of Floridians are uninsured,[10] or 3,665,668 persons out of a total 18,328,340.[11]

Massachusetts Health Insurance Mandate

In 2006, to address rising costs, the State of Massachusetts passed a health care reform initiative which requires every Massachusetts citizen to have minimum health insurance coverage, whether from the private market or public assistance.[12] The law requires:

- Employers with ten or more employees to offer health insurance to their employees;
- Monetary penalties to be assessed on individuals and employers for non-compliance;
- An individual to report coverage compliance on his state income tax return; and
- Subsidies for individuals and families who do not meet a certain income threshold.

The legislation directed the state to set up a health insurance exchange, the "Commonwealth Connector" from which individuals may purchase insurance. The Commonwealth Connector also regulates the private health insurance market in the state.

Studies suggest that the Massachusetts health insurance mandate has not achieved projected state cost savings. State funding for the Commonwealth Connector and public assistance has increased government spending on health insurance programs by 42 percent.[13] Cost to the individual has also risen as insurance premiums increased 40 percent from 2003 to 2008.[14] In 2008, two years after passage of reform, Massachusetts health insurance premiums for family coverage exceeded the national average by $1,500.[15] When surveyed two years after implementation, Massachusetts residents still supported the mandate, but 51 percent believed their health care costs had risen as result.[16]

Although the uninsured rate in Massachusetts is 4.1 percent while the national average is 15.1%,[17] the cost of for uninsured care appears to be significant. The state's safety-net hospitals indicate that a large percentage of patients seeking care are uninsured; however reform measures reduced the level of payments to hospitals for charity care.[18] Recently, the Massachusetts State Treasurer Tim Cahill said that state health care reform "has nearly bankrupted the state" and is still operational only with the help of federal funding.[19] [20]

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[9] Workers' compensation insurance provisions are found in Chapter 440, F.S.

[10] Joanna Turner, et al., *A Preliminary Evaluation of Health Insurance Coverage in the 2008 American Community Survey*, U.S. Bureau of the Census, see www.census.gov/hhes/www/hlthins/2008ACS_healthins.pdf (September 22, 2009). Florida Health Insurance Study, *Health Insurance Coverage among Men and Women in Florida*, see http://fcmu.phhp.ufl.edu/publications/issue-briefs/pdf/fs04-03-2006-FlMenWomenHealthInsCoverage.pdf (March 2006).

[11] U.S. Census Bureau, "Florida QuickFacts," see http://quickfacts.census.gov/qfd/states/12000.html (last visited March 24, 2010).

[12] Chapter 58 of the Acts of 2006, An Act Relating to Affordable, Quality, Accountable Health Care (April 12, 2006).

[13] Kevin Sack, "Massachusetts Faces Costs of Big Health Plan," New York Times, see http://www.nytimes.com/2009/03/16/health/policy/16mass.html March 15, 2009.

[14] Cathy Schoen, *Paying the Price: How Health Insurance Premiums are Eating Up Middle-class Incomes*, The Commonwealth Fund, see http://www.commonwealthfund.org/Content/Publications/Data-Briefs/2009/Aug/Paying-the-Price-How-Health-Insurance-Premiums-Are-Eating-Up-Middle-Class-Incomes.aspx (August 2009).

[15] *Id.*

[16] Robert J. Blendon, et al., *Massachusetts Health Reform: A Public Perspective from Debate Through Implementation*, Health Affairs, 27:6, at 559, 562 (2008).

[17] Turner, *supra* note 11.

[18] See "Some Massachusetts Safety New Hospitals face Budget Problems because of Health Insurance Law," Kaiser Daily Health Report (March 19, 2008).

[19] Michael Levenson, "cahill bashes state – and national – health care reform law," The Boston Globe, see http://www.boston.com/news/local/breaking_news/2010/03/cahill_bashes_s.html (March 16, 2010).

[20] For detailed discussion of the Massachusetts Health Insurance Mandate, see Michael Tanner, *Massachusetts Miracle or Massachusetts Miserable: What the Failure of the 'Massachusetts Model' Tells Us about Health Care Reform*, Briefing Paper No. 112, Cato Institute, see http://www.cato.org/pub_display.php?pub_id=10268 (June 9, 2009). See Aaron Yelowitz and Michael F. Cannon, *The Massachusetts Health Plan: Much Pain, Little Gain*, Policy Analysis No. 657, Cato Institute, see http://www.cato.org/pub_display.php?pub_id=11115 (January 20, 2010).

Congressional Authority and Constitutionality

Constitutional scholars and health care policy experts are debating the constitutionality of many of the federal health care reform provisions. The debate centers on four constitutional issues.

Commerce Clause (U.S. Const. Art. I, Sec. 8, Clause 3)

Congress has the power to regulate interstate commerce, including local matters and things that "substantially affect" interstate commerce. Proponents of reform assert that although health care delivery is local, the sale and purchase of medical supplies and health insurance occurs across state lines, thus regulation of health care is within Commerce Clause authority. Arguing in support of an individual mandate, proponents point to insurance market de-stabilization caused by the large uninsured population as reason enough to authorize Congressional action under the Commerce Clause.[21] Opponents suggest that the decision not to purchase health care coverage is not a commercial activity and cite to *United States v. Lopez* which held that Congress is prohibited from "...unfettered use of the Commerce Clause authority to police individual behavior that does not constitute interstate commerce."[22]

Tax and Spend for the General Welfare (U.S. Const. Art. I, Sec. 8, Clause 1)

The Tax and Spend Clause of the U.S. Constitution provides Congress with taxation authority and also authorizes Congress to spend funds with the limitation that spending must be in pursuit of the general welfare of the population. To be held constitutional, Congressional action pursuant to this Clause must be reasonable.[23] With respect to the penalty or fine on individuals who do not have health insurance, proponents suggest that Congress' power to tax and spend for the general welfare authorizes the crafting of tax policy which in effect encourages and discourages behavior.[24] Opponents cite U.S. Supreme Court case law that prohibits "a tax to regulate conduct that is otherwise indisputably beyond [Congress'] regulatory power."[25]

The Tenth Amendment and the Anti-Commandeering Doctrine (U.S. Const. Amend. 10)

The Tenth Amendment reserves to the states all power that is not expressly reserved for the federal government in the U.S. Constitution. Opponents of federal reform assert that the individual mandate violates federalism principles because the U.S. Constitution does not authorize the federal government to regulate health care. They argue, "...state governments – unlike the federal government – have greater, plenary authority and police powers under their state constitutions to mandate the purchase of health insurance."[26] Further, opponents argue that the state health insurance exchange mandate may violate the anti-commandeering doctrine which prohibits the federal government from requiring state officials to carry out onerous federal regulations.[27] Proponents for reform suggest that Tenth Amendment jurisprudence only places wide and weak boundaries around Congressional regulatory authority to act under the Commerce Clause.[28]

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[21] Jack Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, N. Eng. J. Med. 362:6, at 482 (February 11, 2010).
[22] Peter Urbanowicz and Dennis G. Smith, *Constitutional Implications of an 'Individual Mandate' in Health Care Reform*, The Federalist Society for Law and Public Policy, at 4 (July 10, 2009).
[23] *Helvering v. Davis*, 301 U.S. 619 (1937).
[24] Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, Legal Solutions in Health Reform project, O'Neill Institute, at 7.
[25] David B. Rivkin and Lee A. Casey, "Illegal Health Reform" Washington Post, August 22, 2009, at A15. Rivkin and Lee cite to *Bailey v. Drexel Furniture*, 259 U.S. 20 (1922), a Commerce Clause case which held that Congress has the authority to tax as a means of controlling conduct.
[26] *Id.*
[27] Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, The Annals of the American Academy of Policy and Social Science, 574, at 158 (March 2001).
[28] Hall, *supra* note 25, at 8-9.

Supremacy Clause (U.S. Const. Art. 6, Clause 2)

Supremacy Clause jurisprudence firmly establishes that the U.S. Constitution and federal law possess ultimate authority when in conflict with state law. The Supreme Court held "...the Supremacy Clause gives the Federal Government 'a decided advantage in the delicate balance' the Constitution strikes between state and federal power."[29] Proponents cite to the Supremacy Clause as a self-evident justification for passage of federal health reform. Opponents assert that the Supremacy Clause only protects congressional actions that are based on express authority in the Constitution and "where [the action] does not impermissibly tread upon state sovereignty."[30]

State Reaction to Federal Health Care Reform

State constitutional amendments addressing the state-federal relationship and federal health care reform are currently under consideration before 22 state legislatures, not including Florida.[31] Arizona passed the Freedom of Choice in Health Care Act last year and it will appear on the ballot for voter approval November 2010. Similar measures have failed in Georgia, Indiana, Mississippi and New Hampshire.[32]

Nine states are currently considering statutory amendments to prohibit mandated health insurance coverage.[33] In March 2010, Virginia and Idaho enacted such a statutory change. In addition to asserting the right of citizens to choose health care services without the threat of penalty from the federal government, the Idaho law directs the state's Attorney General to sue the federal government if it enacts laws that compel the purchase health insurance.[34] Utah passed state law changes; enactment is pending gubernatorial approval.[35] Changes to state law failed in New Hampshire.[36]

In Florida, Attorney General Bill McCollum has asserted the constitutionality argument to Congress. On January 19, 2010, Attorney General McCollum sent a letter to U.S. House and Senate leadership in which he said that he would pursue legal action if the individual mandate becomes law. Attorney General McCollum then sent a letter to the president of the National Association of Attorneys General on March 16, 2010, asking other attorneys general to participate in litigation challenging the individual mandate. Attorney General McCollum argued that Congress lacks Commerce Clause authority to compel individuals to purchase health insurance: "A citizen's choice not to buy health insurance cannot rationally be construed as economic activity, or even 'activity,' to subject that inactivity to regulation under the Commerce Clause."[37]

On March 23, 2010, Attorney General McCollum, along with twelve other state Attorneys General, filed a lawsuit in the U.S. District Court, Northern District of Florida, challenging the constitutionality of H.R. 3590. The complaint contends that H.R. 3590:[38]

- Exceeds Congress' legislative powers under Article I;
- Constitutes an unlawful capitation or direct tax under Article I; and
- Violates state sovereignty under the Tenth Amendment.

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[29] *New York v. United States*, 505 US. 144, 160 (1992).
[30] Clint Bolick, *The Health Care Freedom Act: Questions and Answers*, Goldwater Institute, at 3 (February 2, 2010).
[31] National Conference of State Legislatures, *State Legislation Opposing Certain Health Reforms, 2009-2010*, see http://www.ncsl.org/IssuesResearch/Health/StateLegislationOpposingCertainHealthReforms/tabid/18906/Default.aspx?TabId=18906#AZ08 (last visited March 23, 2010).
[32] *Id.*
[33] *Id.*
[34] Chapter Law 46, Idaho Health Freedom Act, effective date June 1, 2010.
[35] *Id.*
[36] National Conference of State Legislatures, *supra* note 32.
[37] Florida Attorney General Bill McCollum, Letter to Congressional Leaders, dated January 19, 2010.
[38] Complaint, McCollum v. Sebelius, No. 3:10-cv-91 (N.D. Fla., filed March 23, 2010).

The Attorneys General request the court to declare H.R. 3590 unconstitutional and enjoin the Secretary of the U.S. Department of Health and Human Services, the Secretary of the U.S. Treasury and the Secretary of the U.S. Department of Labor from enforcing it. No action has yet occurred on the case.

Effect of Proposed Changes

CS/HJR 37 proposes the creation of Section 28 of Article I of the Florida Constitution relating to health care services. The resolution prohibits any person, employer or health care provider from being compelled to participate in any health care system. With respect to an individual or employer mandate, this provision would allow any person or employer to opt-out of mandated insurance coverage and would allow for flexibility in any health care provider's participation in a particular health care system.

The resolution authorizes any person or employer to pay directly for health care services and provides that persons or employers shall not incur a penalty or fine for direct payment. The resolution authorizes a health care provider to accept direct payment and provides that such health care provider will not incur a penalty or fine for accepting direct payment. This provision would allow a person or employer to purchase health care services without participation in a health care system or plan.

The resolution prohibits any law or rule which prohibits private health insurance sales or purchases. The bill subjects this prohibition to reasonable and necessary rules that do not substantially limit purchase or sale options. This provision would allow the purchase or sale of private insurance to individuals regardless of a mandate requiring individuals to have health insurance coverage.

The resolution directs that its provisions do not affect:

- Required performance of services by a health care provider or hospital;
- Health care services permitted by law;
- Worker's compensation care as provided by general law;
- Laws or rules in effect as of March 1, 2010; and
- Any health care system terms and conditions that do not provide punitive measures against persons, employers or health care providers for direct payment.

The resolution provides definitions or usage for the following terms:

- "Compel" includes the imposition of penalties or fines.
- "Direct payment" or "pay directly" means payment for health care services without the use of a public or third party, excluding any employers.
- "Health care system" means any public or private entity whose function or purpose is the management of, processing of, enrollment of individuals for, or payment, in full or in part, for health care services, health care data, or health care information for its participants.
- "Lawful health care services" means any health care service offered by legally authorized persons or businesses, provided that such services are permitted or not prohibited by law or regulation.
- "Penalties or fines" mean any civil or criminal penalty or fine, tax, salary or wage withholding or surcharge, or any named fee with a similar effect established by law or rule by an agency established, created, or controlled by the government which is used to punish or discourage the exercise of rights protected under this section.

The resolution provides for a ballot summary which describes the provisions of the constitutional amendment in plain language.

The joint resolution does not contain a specific effective date. Therefore, if adopted by the voters at the 2010 General Election, the resolution would take effect January 4, 2011.

B. SECTION DIRECTORY:

Not applicable.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   Non-recurring FY 2010-2011

   The Department of State, Division of Elections estimates the bill will cost approximately $65,045.16 in non-recurring General Revenue for publication costs. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

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.[39] Costs for advertising vary depending upon the length of the amendment. According to the Department of State, Division of Elections, the average cost of publishing a constitutional amendment is $94.68 per word. The word count for CS/HJR 37 is 687 words X $94.68 = $65,045.16.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

   Article XI, Section 1 of the Florida Constitution authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by three-fifths of the elected membership of each house. If agreed to by the Legislature, the amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office or at a special election held for that purpose. The resolution would be submitted to the voters at the 2010 General Election and must be approved by at least 60 percent of the voters voting on the measure.

B. RULE-MAKING AUTHORITY:

[39] Fla. Const., art. XI, s. 5(d).

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The joint resolution may be construed to limit the ability of a future Legislature to modify existing laws.

The joint resolution may be construed to prohibit negotiated provisions in insurance contracts, network agreements, or other provider agreements that contractually limit co-payments, coinsurance, deductibles, or similar patient charges (balanced billing).

It is unclear how the courts will apply or construe provisions of the joint resolution if approved. It may affect other programs in a manner that is unforeseen at this time.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 22, 2010, the House Health Care Regulation Policy Committee adopted one strike-all amendment to House Joint Resolution 37.

The strike-all amendment moves the provision from Article X, Miscellaneous, of the Florida Constitution to Article I, Bill of Rights. The amendment also changes the exemption for laws already in effect prior to the approval of the constitutional amendment to March 1, 2010.

The joint resolution was reported favorably as a Committee Substitute. This analysis reflects the committee substitute.

Amendment No. 02

COUNCIL/COMMITTEE ACTION

ADOPTED __ (Y/N)

ADOPTED AS AMENDED __ (Y/N)

ADOPTED W/O OBJECTION __ (Y/N)

FAILED TO ADOPT __ (Y/N)

WITHDRAWN __ (Y/N)

OTHER _____

Council/Committee hearing bill: Rules & Calendar Council

Representative(s) Plakon offered the following:

Amendment

Remove everything after the resolving clause and insert:

That the following creation of Section 28 of Article I of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE I

DECLARATION OF RIGHTS

SECTION 28. Health care services.—

(a) To preserve the freedom of all residents of the state to provide for their own health care:

(1) A law or rule may not compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system.

(2) A person or an employer may pay directly for lawful health care services and may not be required to pay penalties or fines for paying directly for lawful health care services. A health care provider may accept direct payment for lawful health care services and may not be required to pay penalties or fines for accepting direct payment from a person or an employer for lawful health care services.

(b) Subject to reasonable and necessary rules that do not substantially limit a person's options, the purchase or sale of health insurance in private health care systems may not be prohibited by law or rule.

(c) This section does not:

(1) Affect which health care services a health care provider is required to perform or provide.

(2) Affect which health care services are permitted by law.

(3) Prohibit care provided pursuant to general law relating to workers' compensation.

(4) Affect laws or rules in effect as of March 1, 2010.

(5) Affect the terms or conditions of any health care system to the extent that those terms and conditions do not have the effect of punishing a person or an employer for paying directly for lawful health care services or a health care provider for accepting direct payment from a person or an employer for lawful health care services, except that this section may not be construed to prohibit any negotiated provision in any insurance contract, network agreement, or other

provider agreement contractually limiting copayments, coinsurance, deductibles, or other patient charges.

(6) Affect any general law passed by a two-thirds vote of the membership of each house of the legislature after the effective date of this section, if the law states with specificity the public necessity that justifies an exception from this section.

(d) As used in this section, the term:

(1) "Compel" includes the imposition of penalties or fines.

(2) "Direct payment" or "pay directly" means payment for lawful health care services without a public or private third party, not including an employer, paying for any portion of the service.

(3) "Health care system" means any public or private entity whose function or purpose is the management of, processing of, enrollment of individuals for, or payment, in full or in part, for health care services, health care data, or health care information for its participants.

(4) "Lawful health care services" means any health-related service or treatment, to the extent that the service or treatment is permitted or not prohibited by law or regulation, which may be provided by persons or businesses otherwise permitted to offer such services.

(5) "Penalties or fines" means any civil or criminal penalty or fine, tax, salary or wage withholding or surcharge, or named fee with a similar effect established by law or rule by an agency established, created, or controlled by the government

which is used to punish or discourage the exercise of rights protected under this section. For purposes of this section only, the term "rule by an agency" may not be construed to mean any negotiated provision in any insurance contract, network agreement, or other provider agreement contractually limiting copayments, coinsurance, deductibles, or other patient charges.

BE IT FURTHER RESOLVED that the following title and statement be placed on the ballot:

HEALTH CARE FREEDOM
CONSTITUTIONAL AMENDMENT
ARTICLE I, SECTION 28

HEALTH CARE SERVICES.—Proposing an amendment to the State Constitution to ensure access to health care services without waiting lists, protect the doctor-patient relationship, guard against mandates that don't work, prohibit laws or rules from compelling any person, employer, or health care provider to participate in any health care system; permit a person or an employer to purchase lawful health care services directly from a health care provider; permit a health care provider to accept direct payment from a person or an employer for lawful health care services; exempt persons, employers, and health care providers from penalties and fines for paying directly or accepting direct payment for lawful health care services; and permit the purchase or sale of health insurance in private health care systems. Specifies that the amendment does not affect which health care services a health care provider is required to perform or provide; affect which health care services are permitted by law; prohibit care provided pursuant

to general law relating to workers' compensation; affect laws or rules in effect as of March 1, 2010; affect the terms or conditions of any health care system to the extent that those terms and conditions do not have the effect of punishing a person or employer for paying directly for lawful health care services or a health care provider for accepting direct payment from a person or employer for lawful health care services; or affect any general law passed by two-thirds vote of the membership of each house of the Legislature, passed after the effective date of the amendment, provided such law states with specificity the public necessity justifying the exceptions from the provisions of the amendment. The amendment expressly provides that it may not be construed to prohibit negotiated provisions in insurance contracts, network agreements, or other provider agreements contractually limiting copayments, coinsurance, deductibles, or other patient charges.

House Memorial

A memorial to the Congress of the United States, urging Congress to reject the American Clean Energy and Security Act and other similar energy proposals.

WHEREAS, the American Clean Energy and Security Act of 2009 (H.R. 2454), also known as the Waxman-Markey bill, is pending in Congress, and

WHEREAS, there is currently a global economic recession, with unemployment rates in the United States hovering at 10 percent, and some estimates place the cost of implementing H.R. 2454 as high as $1,500 or more per household per year, and

WHEREAS, if those estimates prove correct, H.R. 2454 would represent the single largest tax increase in the history of the United States, and

WHEREAS, if fully implemented, the regulatory schemes created under H.R. 2454 are estimated to reduce global temperatures by approximately nine-hundredths of one degree Fahrenheit, and

WHEREAS, meaningful global emissions reductions cannot happen without the aggressive participation of India, China, and other developing nations, and

WHEREAS, China and India have indicated that they will not participate in mandatory emissions control, and

WHEREAS, the passage of H.R. 2454 will result in job losses for the citizens of the United States, and

WHEREAS, carbon-producing industries will be more likely to move to countries where the costs to operate will be lower and

may ultimately have a negative effect on the environment as many of those nations do not employ the environmental constraints and requirements currently administered in the United States, and

WHEREAS, H.R. 2454 establishes a cap-and-trade scheme in which 85 percent of the carbon rations are to be given away to preferred businesses, ensuring higher revenues for the recipients and a rise in energy prices for consumers, and

WHEREAS, the costs to consumers in the United States imposed by H.R. 2454 were ignored when an amendment to suspend the program if gas prices reached a disastrous $5 per gallon was defeated, and

WHEREAS, the costs to jobs in the United States imposed by H.R. 2454 were ignored when an amendment to suspend the program if unemployment reached 15 percent was also defeated, and

WHEREAS, the United States Congress has, for several years, debated and declined to grant the United States Environmental Protection Agency the authority to regulate greenhouse gases, and

WHEREAS, the United States Environmental Protection Agency has taken steps to unilaterally circumvent the legislative process to regulate greenhouse gases, citing the Clean Air Act, a document not meant to address the global environment, though it admits such authority under the Act is "absurd" and would stretch the doctrines of "administrative necessity," and

WHEREAS, the United States Environmental Protection Agency estimates such unilateral regulation would cost businesses in the United States as much as $55 billion in these tough economic times, not to mention the suffocating costs to businesses and

local and state governments associated with additional permitting, regulation, and enforcement, and

WHEREAS, the energy resources of the United States provide well-paying jobs and affordable energy for the citizens of the United States and should be bolstered, rather than undermined by transferring jobs and wealth to nations that regard this nation as an enemy, and

WHEREAS, the United States must create a diverse energy portfolio that is not only sustainable, but also efficient and reliable, and

WHEREAS, the United States should be focusing on improving technologies that will make coal, the nation's most abundant energy source, cleaner, and

WHEREAS, nuclear energy is clean, reliable, and safe, using current technology, provides long-term cost savings, and should play a constructive role in any legitimate comprehensive energy plan, and

WHEREAS, the United States can protect the environment and use the nation's energy sources, including oil, natural gas, coal, and nuclear power, to create jobs in the United States and increase national security by utilizing those resources and the ingenuity and productivity of its citizens, NOW, THEREFORE,

Be It Resolved by the Legislature of the State of Florida:

That the Congress of the United States is urged to reject the American Clean Energy and Security Act (H.R. 2454), also known as the Waxman-Markey bill, and any other energy proposals

or overreaching actions by federal agencies that will artificially raise energy prices for consumers and place an undue burden on the economy and the people of the United States for little or no environmental benefit.

BE IT FURTHER RESOLVED that copies of this memorial be dispatched to the President of the United States, to the President of the United States Senate, to the Speaker of the United States House of Representatives, and to each member of the Florida delegation to the United States Congress.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HM 1535 American Clean Energy and Security Act
SPONSOR(S): Adams
TIED BILLS: None **IDEN./SIM. BILLS:** None

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	General Government Policy Council	12 Y, 3 N	Blalock	Hamby
2)	Rules & Calendar Council		Kirksey	Birtman
3)				
4)				
5)				

SUMMARY ANALYSIS

The American Clean Energy and Security Act of 2009 (ACES) is an energy bill in the 111th United States Congress (H.R.2454). The bill was approved by the House of Representatives on June 26, 2009 by a vote of 219-212, and was placed on calendar in the Senate under general orders on July 6, 2009. No further action has been taken on the bill in the U.S. Senate.

H.R. 2454:

- Requires a 17-percent emissions reduction from 2005 levels by 2020.
- Includes a cap-and-trade plan for greenhouse gases to address climate change.
- Requires electric utilities to meet 20% of their electricity demand through renewable energy sources and energy efficiency by 2020.
- Subsidizes new clean energy technologies and energy efficiency, including renewable energy ($90 billion in new subsidies by 2025), carbon capture and sequestration ($60 billion), electric and other advanced technology vehicles ($20 billion), and basic scientific research and development ($20 billion).
- Includes a renewable electricity standard (almost identical to a renewable portfolio standard, but narrowly tailored to electrical energy) requiring each electricity provider who supplies over 4 million MWh to produce 20 percent of its electricity from renewable sources (such as wind, solar, and geothermal) by 2020. There is a provision whereby 5% of this standard can be met through energy efficiency savings, as well as an additional 3% with certification of the Governor of the state in which the provider operates.
- Provides for modernization of the electrical grid
- Provides for expanded production of electric vehicles
- Mandates significant increases in energy efficiency in buildings, home appliances, and electricity generation.

This memorial urges the Congress of the United States to reject the American Clean Energy and Security Act (H.R. 2454), also known as the Waxman-Markey bill, and any other energy proposals or overreaching actions by federal agencies that will artificially raise energy prices for consumers and place an undue burden on the economy and the people of the United States for little or no environmental benefit. The memorial further directs that copies of this memorial be dispatched to the President of the United States, to the President of the United States Senate, to the Speaker of the United States House of Representatives, and to each member of the Florida delegation to the United States Congress.

This memorial does not have a fiscal impact on state or local governments.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

PRESENT SITUATION

The American Clean Energy and Security Act of 2009 (ACES) is an energy bill in the 111th United States Congress (H.R.2454[1]) that would establish a variant of a cap-and-trade plan for greenhouse gases to address climate change. The bill was approved by the House of Representatives on June 26, 2009, by a vote of 219-212, and was placed on calendar in the Senate under general orders on July 6, 2009. No further action has been taken on the bill in the U.S. Senate. The following is a summary of H.R. 2454 as passed by the U.S. House of Representatives. The summary is organized by subject area and details the various provisions found in the bill.

Clean Energy

- Combined efficiency and renewable electricity standard: 20% renewables by 2020. Eligible resources are wind, solar, geothermal, biomass or landfill gas, qualified (incremental) hydropower, marine and hydrokinetic renewable energy. Hydro, nuclear, and CCS generation are not included in base sales. Up to 25% of compliance obligation can be met through efficiency and states may petition to increase this to 40% (Sec. 101, pg. 28-29[2]).
- Clean transportation
    - *Electric vehicles*: Requires utilities to plan for the integration of electric vehicles. Creates a program to fund broad demonstration of electric vehicle integration into the grid. Provides financial assistance for electric drive vehicle and battery manufacturing (Sec. 121-123, pg. 108).
    - *Large-scale vehicle electrification program use of funds.* Funds may be used to assist fleet owners in the purchase of electric vehicles and provide electric vehicle supporting infrastructure such as smart grid (Sec. 122, pg. 115).
- State Energy and Environment Development (SEED) Funds are created for each state to manage and account for federal funds given to states to support state clean energy, energy efficiency, and climate change programs (Sec. 131, pg. 137). Revenue for SEEDS is derived from the disposition of allowances under Title III, the cap and trade program.
- Transmission and distribution

[1] H. R. 2454, 111TH Cong. (2009).
[2] H. R. 2454, 111TH Cong. (2009).

- *Smart grid*: Incorporates smart grid considerations into the federal labeling programs. Requires states or load-serving entities to establish peak demand reduction goals. Expands rebate and public information programs to include smart grid equipment (Sec. 141, pg. 154).
- *Transmission planning*: Calls for a regional transmission planning process to be coordinated by FERC. However, the ACES does not give FERC siting authority, as called for in other similar proposals (Sec. 151, pg. 172). In the Western Interconnection FERC may call for the construction or modification of construction facilities if the facility is multi-state, if there is no conflict concerning the need for the facility, and if the appropriate siting authority does not carry out its obligations within 1 year after the date of application (Sec. 216B, pg. 180).

- Technical corrections to energy laws: Makes a variety of amendments to 2007 EISA and 2005 EPACT (Sec. 161, pg. 200 and Sec. 162, pg. 235).
- Energy and efficiency centers: Establishes and funds regional research centers to develop renewable, transmission, water security, and efficiency technologies (Sec. 171-175, pg. 235-265).
- Nuclear and advanced technologies: Establishes energy technology deployment goals to be met through loan-guarantees and a clean energy investment fund. Applies broadly to technologies that can reduce energy sector emissions or improve energy security (Sec. 181, pg. 265).

Energy Efficiency

- Building efficiency: Requires government to update national model building codes for residential and commercial buildings every three years in line with specific efficiency targets (Sec. 201-205, pg. 320).
  - Incentives in the form of allowances from Title III are provided to states and local governments for implementing and complying with building codes.
  - Establishes Retrofits for Energy and Environmental Performance (REEP) program to facilitate energy efficient retrofits for residential and non-residential buildings.
  - Provides for rebates to owners of manufactured homes constructed prior to 1976 to use toward the purchase of an Energy Star qualified manufactured home. Establishes a building efficiency labeling program for residential and commercial markets.
  - Requires labeling program to be used in Department of Energy and Environmental Protection Agency buildings.
  - Establishes a grant program for retail power providers that partner with tree planting organizations to develop targeted tree planting programs for residences and small office buildings.
  - Under HUD, establishes Residential Energy Efficiency Block Grant Program of $2.5 billion (Sec. 123, pg. 630).
- Lighting and appliance efficiency: Provides a series of new appliance and lighting efficiency standards and makes changes to standards-setting process. Establishes a WaterSense program in EPA to identify and promote water efficient products, buildings, and landscapes. Also creates new water-efficiency purchase requirements, rebates, and labeling programs (Sec. 211-219, pg. 421).
- Transportation efficiency
  - *Vehicle performance standards*: Creates new performance standards for heavy-duty vehicles and other mobile emissions sources. See "interaction with EPA authority" section for more details.
  - *State planning*: States must create transportation emissions reduction goals incorporating strategies such as new public transit, land use and zoning policies, etc. (Sec. 841, pg. 510).
  - *Smartway transport efficiency program*: Measures and designates energy-efficient, low-greenhouse gas "SmartWay" technologies and strategies. Provides incentives for the adoption of SmartWay technologies (Sec. 822, pg. 519).
- Industrial efficiency programs: Requires DOE to establish industrial plant energy efficiency certification standards. Provides awards for electric and thermal energy efficiency. Provides

rebates for efficient industrial motors. Establishes a revolving loan fund program for clean energy technology products, including wind turbines, solar panels, and fuel cells (Sec. 241, pg. 524).

Global Warming Pollution Reduction Targets And Timetables

- Emissions cap. The ACES sets both a non-binding economy-wide GHG emission reduction goal (Sec. 702, pg. 682) as well as a mandatory cap on covered greenhouse gases (Sec. 703, pg. 682).
- The economy-wide emission reduction goals are:
  - 2012: 3% below 2005 emission levels (~12% above 1990 emission levels)
  - 2020: 20% below 2005 (~7% below 1990)
  - 2030: 42% below 2005 (~33% below 1990)
  - 2050: 83% below 2005 (~80% below 1990)
- The emission reduction cap targets are:
  - 2012: 3% below 2005 emission levels (~12% above 1990 emission levels)
  - 2020: 17% below 2005 (~4% below 1990)
  - 2030: 42% below 2005 (~33% below 1990)
  - 2050: 83% below 2005 (~80% below 1990)

The cap brings in covered sources in three phases from 2012 through 2016 (see Point of Regulation).

- A consumption cap on all HFCs. This cap is established by extending Title VI of the CAA to apply to HFCs and represents the maximum annual allowable amount of consumption. Reduction amounts are relative to average U.S. HFC consumption levels between 2004 and 2006 (Sec. 619, pg. 963).
  - 2012: 10% below
  - 2020: 33% below
  - 2030: 75% below
  - 2032 and onward: 85% below
- Scientific and programmatic review. The ACES requires the National Academies of Science (NAS) to conduct a review of climate science, technology options, and U.S. progress toward meeting the economy-wide emission reduction goals set by the proposal. The President is authorized to exercise all statutory authority to act on recommendations made by the NAS and recommend to Congress additional actions that may be necessary to meet U.S. and global GHG reduction commitments (Sec. 705, 706, pg. 684).

Point Of Regulation, Emissions Reporting And Coverage

- Covered gases: 5 Kyoto gases (not HFCs, see above) with EPA authorized to add additional GHGs in the future (Sec. 711, pg. 699).
- Mandatory reporting: Required by 2011 for all prior years through 2007. Quarterly reporting is required beginning in 2011. All covered entities plus other types of entities are required to report (Sec. 713, pg. 711).
- Point of regulation: A hybrid approach is used with sources phased in over a 5-year time frame (see definitions Sec. 700, pg. 844 and Sec. 722, pg. 734).
  - *Covered in 2012*: The ACES assumes the cap covers 66.2% of total U.S. emissions during this phase.
    - All electric power generators (downstream).
    - Natural gas liquid-, petroleum-, and coal-based liquid fuel producers/importers (upstream) whose products when combusted emit over 25,000 tonnes annually.
    - Producers and importers of fluorinated gases (upstream) except HFCs.
    - Geologic storage sites.
  - *Added to coverage in 2014*: The ACES assumes the cap covers 75.7% of total U.S. emissions during this phase.
    - Industrial sources (downstream) that annually emit 25,000 tonnes or more, not including emissions from petroleum and renewable biomass combustion; plus all

sources (regardless of size) in select energy-intensive sectors (e.g., glass, ceramics).
    - *Added to coverage in 2016*: The ACES assumes the cap covers 84.5% of total U.S. emissions during this phase.
        - Natural gas Local Distribution Companies (LDCs) (midstream) that deliver more than 460,000,000 cubic feet of gas annually to non-covered entities. Emissions that result from sales are regulated with measures to prevent double counting.

Carbon Market Assurance And Oversight

- FERC: The Federal Energy Regulatory Commission is given regulatory authority over allowance and offset markets and allowance derivative markets (Sec. 341, pg. 1027). The President is also delegated authority to instruct agencies to pieces of market regulation based on existing authority as long as regulations are consistent with this section. The ACES makes it a federal crime to commit fraud or manipulate any carbon market. In addition, the regulations facilitate and maintain market oversight and transparency and require market monitoring to prevent fraud, manipulation, and excessive speculation. FERC is required to set position limits and margin requirements for all participants in regulated allowance markets.
- Additional market assurance measures: Expands authority of the Commodities Futures Trading Commission (CFTC) to regulate energy derivatives and carbon market derivatives (Sec. 351, pg. 1046). Requires these derivatives to be settled and cleared on designated exchanges (Sec. 354, pg. 1060).
- Cease and desist powers: FERC and CFTC are also given cease and desist powers for offenses that have taken place or may take place in their respective jurisdictions (Sec. 359, pg. 1077).

Allowance Value Distribution

- Auction procedure: Quarterly auctions will be held to sell allowances designated for auction beginning in March 2011. Auctions will be open to all individuals. A reserve price is established for all regular auctions initially set at $10/tonne increasing at 5% above inflation in each subsequent year. All entities in possession of allowances may request that the Administrator sell their allowances on consignment (Sec. 791, pg. 943).
- Distribution of value: The ACES distributes allowance value in a number of ways to support various federal and state programs (both existing and established under the Act) and benefit energy consumers as well as giving some value to regulated entities for free. The amount of value directed to various purposes changes over time (Part H, Sec. 781-790, pg. 862-942).
- Carryover: If allowances are allocated to energy-intensive, trade-exposed industries, and the deployment of carbon capture and sequestration technology or supplemental agriculture and renewable energy are not all distributed in a vintage year, the Administrator shall use the undistributed allowances to increase, for the same vintage year, the allocation of allowances to be auctioned for deficit reduction, consumer refunds, and low-income consumers. In the following vintage year, the allocations to these programs is decreased by the same amount as it was increased the previous year, and those allowances are allocated for the purpose for which the undistributed allowances were originally allocated (Sec. 781, pg. 882).
- Future release: The Administrator shall make future year allowances available by auctioning specific amounts of allowances with vintage years 12 to 17 years after the year of auction (Sec. 781, pg. 880).

Cost Containment (Other Than Offsets)

- Trading. Unlimited trading of allowances is permitted by any party (not restricted to owners and operators of covered entities). All allowances will be tracked in an allowance tracking system (Sec. 724, pg. 752).
- Banking and borrowing:
    - *Banking of allowances and offsets is not limited* (Sec. 725, pg. 754).

- *Borrowing without interest*: Allowances can be used for compliance for emissions in the calendar year preceding the vintage year (e.g., for compliance in 2015 a covered entity could use an allowance from 2016). There is no limit on this type of borrowing (Sec. 725, pg. 755).
- *Borrowing with interest*: Up to 15% of an entity's compliance obligation can be met through submission of allowances with a vintage year 1-5 years later than that calendar year. For each borrowed allowance, the borrower needs to submit additional allowances to meet an 8% annual interest fee (Sec. 725, pg. 756).

- Strategic reserve: Quarterly auctions will be held to auction strategic reserve allowances. Only covered entities will be eligible to purchase allowances from the auction (Sec. 726, pg. 757). The following percentage of allowances will be held annually by the Administrator for the auction:
  - *2012-2019*: 1% of allowances for that year
  - *2020-2029*: 2% of allowances for that year
  - *2030-2050*: 3% of allowances for that year
  - The reserve will also contain allowances not sold in previous auctions.
  - *Minimum reserve price*:
    - 2012 minimum price will be $28.
    - 2013 and 2014 price will be the price set for 2012, plus 5% above the rate of inflation
    - 2015 onward: minimum price will be 60% above a rolling 36-month average of the daily closing price for that year's allowance vintage.
  - *Quantity of allowances sold at auction*:
    - 2012-2016: not more than 5% of allowances established for that year can be sold
    - 2017-2050: not more than 10% of allowances established for that year can be sold
  - *Purchase limits*: Not more than 20% of a covered entity's compliance obligation may be purchased from the strategic reserve annually. Administrator shall establish a separate purchase limit for new entrants, starting at a minimum of 20%.
  - *Auction proceeds*: Proceeds from auction will be placed in a strategic reserve fund. The fund will be used to purchase international offset credits from reduced deforestation. The Administrator will retire those credits and establish emissions allowances equal to 80% of the number of offset credits retired. These allowances will be placed back into the strategic reserve to fill it to its original size (Sec. 726, pg. 763).
  - *Additional forest offset sales*: Under certain circumstances (very high offset use and a full exhaustion of strategic reserve allowances at any given auction), entities may sell at auction additional forest offsets above and beyond allowances sold at strategic reserve auctions. These offsets are not subject to the purchase limits in place for strategic reserve allowances or use limits in place for international offsets (Sec. 726, pg. 765).
- International emission allowances: The Administrator may by rule allow allowances from other trading programs that are at least as stringent as the U.S. program. Entities may initially use an unlimited number of international allowances for compliance, though the Administrator has the authority to restrict their use (Sec. 728, pg. 774).

Offsets

- Program administration. EPA is Administrator of the international offset program and all project types other than domestic forestry and agriculture offset projects; the Secretary of Agriculture will oversee the domestic agriculture and forestry sector (Sec. 501, pg. 1386).

  - Advisement.
    - Establishes an independent "Offsets Integrity Advisory Board" to provide guidance to EPA on project types, areas of scientific uncertainty, and acceptable qualification and quantification methodologies (for all project types other than domestic forestry and agriculture projects). The Board will also conduct a scientific review of offset program and deforestation reduction programs by 2017, and every 5 years thereafter (Sec. 731, pg. 776).

- Also establishes a separate "USDA Greenhouse Gas Emission Reduction and Sequestration Advisory Committee" not later than 30 days after the date of enactment. Will consist of 9 members qualified by education or training and appointed by the Secretary to make recommendations on domestic agriculture and forestry offset projects (Sec. 531, pg. 1412).

- Limits on offset use
  - *System-level offset limit*: No more than 2 billion tons of offsets annually may be used for compliance (Sec. 722, pg. 740). The President may make a recommendation to Congress regarding whether the 2 billion ton limit should be increased or decreased (Sec. 722, pg. 743).
  - *Entity-level offset limits*: Covered entities may satisfy a percentage of their compliance obligation with offsets each year. This number is divided pro rata among covered entities. This percentage limit varies year to year and is determined by the Administrator by dividing the number 2 billion by the sum of 2 billion plus the number of emission allowances in the previous year's allowance budget and multiplying that number by 100 (for example, the 2013 limit will be 30% of an entity's compliance obligation and the 2050 limit will be 66%) (Sec. 722, pg. 741).
  - *Domestic/International offset limits*: Of the total offsets allowed, not more than half can come from domestic offsets and not more than half can come from international offsets. However, if the Administrator determines that less than 0.9 billion tons of domestic offsets are available, the Administrator can increase the use of international offsets, and decrease by a corresponding amount the domestic offset limit up to a maximum of 1.5 billion international tons and a minimum of 0.5 billion domestic tons (Sec. 722, pg. 744).
- Early offset supply. One offset credit shall be issued for each ton of CO2e registered under a government-established or Administrator-approved program established before Jan. 1, 2009, as long as the project: 1) was started after Jan. 1, 2001, 2) has developed methodologies through a public consultation or peer-review process, 3) has publicly published standards that ensure emission reductions are real, additional, verifiable, and enforceable, 4) requires that all credits issued are registered in a publicly accessible registry with individual serial numbers for each ton, and 5) there is no conflict of interest between the offset project representative and the registry.
  - Retired and expired credits are not eligible.
  - Credits will only be issued for emission reductions that occur after Jan. 1, 2009, and only for 3 years after the date of enactment of the act.
  - Projects that were not established by state or tribal law, or were established after Jan. 1, 2009 but otherwise meet all other criteria can apply to the Administrator for consideration for early offset credit (Sec. 740, pg. 800).

Domestic Agriculture And Forestry Offsets

- Administration. The Secretary of Agriculture will oversee the domestic agriculture and forestry offset programs. The Secretary has 1 year from the date of enactment to establish the program governing domestic offsets (Sec. 502, pg. 1390). The Secretary shall review the program and based on updated information and the recommendations of the Advisory Board shall update and revise the offset program (Sec. 509, pg. 1410).
- General offset provisions
  - *Offset quality.* Offsets must represent additional, verifiable emission reductions, avoidance, or sequestration. Sequestration projects can only be issued for GHG reductions that result in a permanent net reduction in atmospheric GHGs (Sec. 502, pg. 1391).
  - *Offset project types.* Requires the Secretary to, within 1 year of date of enactment, consider a broad range of potential emission reduction and sequestration projects. Includes list of projects to be considered as long as they meet offset provisions in the bill. Provides a petition process for adding project types to the list (Sec. 503, pg. 1392).
  - *Offset baselines.* The Secretary shall set baselines to reflect a conservative estimate of performance or activity for the relevant type of practice (excluding previous changes in performance or activities due to the availability of offset credits) such that the baseline

provides an adequate margin of safety to ensure the environmental integrity of offset credits calculated in reference to such baseline (Sec. 504, pg. 1396).
    - *Additionality*. Offset projects are considered additional only to the extent that they result from activities that: 1) are not required by existing government regulation, as determined by the Secretary, 2) were not commenced prior to January 1, 2009 (with exceptions for certain types of sequestration projects that started after 2001), 3) exceed the applicable activity baseline established under paragraph 2 (Sec. 1396).
    - *Crediting periods*. Offsets crediting periods are specified: 5 years for agricultural sequestration, 20 years for forestry and 10 years for other practice types. Crediting period renewals are unlimited, but can be limited for some project types by the Secretary (Sec. 504, pg.1404).
- Term offset credits. Offset projects with 5-year crediting periods approved as an offset project type under the list promulgated by the Secretary (largely agriculture sequestration projects) can be issued temporary credits that expire 1 year after this crediting period ends and must be replaced by a permanent offset credit, an emissions allowance, or another term offset credit. Reversals are only required to be accounted for during the activity crediting period (Sec. 504, pg.1403 and Sec. 722, pg.743).
- Environmental integrity. The Secretary shall apply conservative assumptions or methods to ensure the environmental integrity of the cap (Sec. 504, pg. 1405).
- Offset reversals. The bill requires that reversals of stored carbon be addressed through an offset credit and/or allowance reserve established to fully account for any reversals (with the exception of reversals of projects issued term offset credits, where reversals are only required to be accounted for during the project's crediting period) (Sec. 504, pg. 1399).
- Verification and auditing. Requires the Secretary to establish a process and requirements for periodic accreditation of third-party verifiers to ensure that those verifiers are professionally qualified and have no conflicts of interest. Requires annual, random audits of offset projects, credits, and practices of third-party verifiers (Sec. 506, pg. 1407 and Sec. 511, pg. 1412).
- Environmental considerations. Requires the Secretary to consider native species, biodiversity, and sustainable forestry practices for offset projects in the forestry sector (Sec. 510, pg. 1411).

International Offsets

- Administration. The Administrator, in consultation with the Secretary of State and Administrator of USAID, may issue international offset credits based on projects that avoid, reduce or sequester emissions in developing countries. Regulations must be promulgated within 2 years from date of enactment (Sec. 743, pg. 805).
    - *Regulation*. International offset credits may be issued only if: 1) the U.S. is a party to a bilateral or multilateral agreement that includes the country in which the project has occurred, 2) such a country is a developing country8, 3) the agreement ensures all requirements of legislation apply and provides for appropriate disposition of offsets (Sec. 743, pg. 805).
    - *Additional credit requirement*. Beginning in 2018, a covered entity must surrender 1.25 offset credits in lieu of 1 allowance for any international offset credits (Sec. 722, pg. 743).
- Project sources. Offset credits may be issued for projects identified by the Administrator under Sec. 733, through an approved international body, sectoral crediting mechanisms, or international reduced deforestation as outlined in legislation (Sec. 743, pg. 805).
    - *Sector-based credits*: Approves the issuance of offset credits based on sectoral crediting mechanisms targeted at sectors in countries that 1) have comparatively high emissions or greater levels of economic development, or 2) would be subject to a compliance obligation under section 722 if it were located in the U.S. Also outlines factors that should be taken into consideration including GDP, GHG emissions, international competitiveness, risk of leakage, etc. (Sec. 743, pg. 806).
    - *Recognition of other programs*: The Administrator can issue credits in exchange for credits issued by an international body established by the UNFCCC, a protocol to such convention or a treaty that succeeds such a convention, as long as those credits were generated through a program that creates equal or greater assurance of the

environmental integrity of the U.S. program. After Jan. 1, 2016, credits cannot be issued if the activity occurs in a country and sector covered under a sectoral crediting agreement (Sec. 743, pg. 810).

- *Offsets from reduced deforestation*: International offset credits are allowed only if the activity occurs in a country identified by the Administrator pursuant to their ability to participate in such a program according to specific criteria as established by this Act. Offset credits can be issued relative to a national, sub-national, or activity basis (in certain instances) (Sec. 743, pg. 811).

Other Offset Related Provisions

- Agriculture incentives program. A portion of allowances are set aside to [provide incentives for] additional activities in the agriculture sector to reduce GHG emissions or sequester carbon. These must be: 1) GHG emission reduction or avoidance projects that do not meet the criteria for offsets credits as established by the bill; 2) support actions to adapt to climate change, or 3) activities that prevent conversion of land in ways that would increase GHG emissions (these can include projects and activities that complement or supplement conservation programs) (Sec. 788, pg. 938).
- Exchange for early action offset credits. Credits issued by an Administrator-approved offset program under the early offset provisions (Sec. 740) may be exchanged for allowances. The exchange value will be determined by the average monetary value of the credits during the period of Jan. 1, 2006 - Jan. 1, 2009. Only credits that have not been retired and were issued between Jan.1, 2001 and Jan. 1, 2009 are eligible to receive allowances (Sec. 795, pg. 952).

Interaction With EPA Authority Under The Clean Air Act

- Extension of CAA Title VI (stratospheric ozone protection) to include HFCs (Sec. 619, pg. 963).
  - Sets a cap on consumption of HFCs with most allowances auctioned and the rest sold to producers, importers, and consumers of HFCs (see targets and timetables section above). This cap is separate from the broader cap and trade program. No trading is permitted between programs (Sec. 619, pg. 963).
  - Imposes other requirements restricting commerce of HFCs (Sec. 619, pg. 963).
- Prohibits EPA from:
  - Classifying GHGs as criteria pollutants on the basis of their climate impacts (Sec. 831, pg. 962).
  - Designating any GHG as a hazardous air pollutant on the basis of its climate impacts (Sec. 833, pg. 963).
  - Setting New Source Review standards for GHGs on the basis of their climate impacts (Sec. 834, pg. 963).
  - Considering the climate impacts of GHG emissions when issuing operating permits under Title V of the CAA (Sec. 835, pg. 963).
- Requires EPA to:
  - Regulate black carbon or decide that any regulations set under the CAA are adequate (Sec. 851, pg. 206).
  - Set performance standards for GHGs from uncapped stationary emission sources that emit greater than 10,000 tonnes. Sources of methane from enteric fermentation are exempt from standards (Sec. 811, pg. 191).
  - Set emission standards for certain mobile sources based on costs and available technology (Sec. 821, pg. 505). Covered sources include heavy-duty vehicles not covered under existing CAA authority, aircraft, and other non-road vehicles (which may include marine vessels and other non-road vehicles and engines).
  - Set standards for CCS geologic storage sites and coal-fired power plants (see coal provisions).

Interaction With State Programs

- Temporarily prohibits States from running their own cap and trade programs. This prohibition expires after 2017. The prohibition does not apply to state LCFSs9, vehicle fleet standards such as CA cars, or most other areas of state authority (Sec. 861, pg. 1018).
    - Those who hold CA or RGGI allowances can be compensated with allowances from the federal program. Compensation is based on the cost of holding allowances, not the amount of allowances held (see allowance distribution).
    - States are permitted to require federal allowances for compliance with state air regulations that reduce GHGs.
- State cooperation on energy programs established or changed through the clean energy and energy efficiency titles of the ACES are required or encouraged. States also receive federal funds for clean energy, energy efficiency, and climate change programs (see Clean Energy and Energy Efficiency).

International Issues

- Forestry
    - *Supplemental emissions reductions from reduced deforestation*: Achieve supplemental emissions reductions of at least 720 million tons in 2020 (cumulative amount of 6 billion tons by 2025) through forestry projects in developing nations. Also builds capacity for international forest credits and preservation of existing forest carbon stocks at risk of international leakage (Sec. 751, pg. 826).
    - *Allowances for reduced deforestation*: In order to achieve the reductions called for in Sec. 751, the ACES allocates 5% from 2012-2025, 3% from 2026-2030, and 2% from 2031-2050 (Sec. 781, pg. 862).
- Adaptation: Establishes an international climate change adaptation program under State, USAID, Treasury, and EPA. The program would be administered by USAID, although 40-60% of funding should be distributed to international funds that meet specific eligibility criteria (Sec. 493, pg. 1370). This program will receive 1% of allowances between 2012 and 2021, 2% of allowances between 2022 and 2026, and 4% of allowances between 2027 and 2050 (Sec. 782, pg. 863).
- Clean technology transfer: Establishes a framework for an international technology transfer fund run by State, in consultation with DOE, EPA, USAID, and Treasury. Developing countries that have entered into an international climate agreement to which the U.S. is party and have undertaken nationally appropriate mitigation activities are eligible to receive support. Funded activities must contribute to substantial reductions, sequestration or avoidance of emissions. The Secretary of State will disburse funding through bilateral aid or through multilateral funds pursuant to the Convention (Sec. 441, pg. 1212). This program will receive 1% of allowances between 2012 and 2021, 2% of allowances between 2022 and 2026, and 4% of allowances between 2027 and 2050 (Sec. 782, pg. 864).
- Competitiveness/leakage:
    - *Rebates*: Follows Inslee-Doyle Output Based Rebating (OBR) model of providing rebates to carbon-intense manufacturers to offset their cost of compliance. Sectors are presumed eligible if they meet a 5% energy or GHG intensity threshold and 15% trade intensity, or just a 20% energy or GHG intensity threshold. Each sector is rebated at 100% of sector average direct and indirect emissions cost. Rebates are phased out beginning in 2025, unless Presidential review determines that other countries have not yet taken substantial action and leakage concerns persist (Sec. 761, pg.1081).
    - *International negotiations*: Recognizes that competitiveness concerns can be most effectively dealt with through internationally negotiated agreements. Also sets negotiating objectives including equitable emission reductions among all countries, the recognition of leakage as a concern, and the acceptance/adoption of mechanisms to address such leakage (Sec. 762, pg. 1089).
    - *International reserve allowance program*: If negotiating objectives have not been met by January 2018, the President will establish an international reserve allowance program to adjust the prices of energy-intensive imports at the border. Eligible industries will include

those sectors that are eligible for rebates (see above) as well as manufactured goods that are primarily composed of the products of those sectors. Border adjustments will take into account free allocations provided through output-based rebates (Sec. 767, pg. 1116).

Provisions For Coal

- Legal and regulatory issues around carbon capture and storage (CCS)
  - Requires interagency report that identifies legal and regulatory barriers to commercial CCS deployment. The report must provide recommendations to the President and Congress for new legislation and regulations that would address these barriers (Sec. 111, pg. 56). A task force study to design a legal framework for geologic storage sites is also established (Sec. 113, pg. 60).
  - CO2 geologic storage site regulations: Amends the CAA and the Safe Drinking Water Act (SDWA) to establish standards (Sec. 813, pg. 57). Standards must include rules on financial responsibility of injected CO2, monitoring, record keeping, public participation, and certification rules, among other things. Rules must minimize redundancy between CAA and SDWA authority. Certified and uncertified geologic storage sites are covered entities under the cap and trade program (see Point of Regulation above).
- R&D and early deployment of CCS
  - *Carbon Storage Research Corporation*: Established to oversee and direct R&D of CCS technologies by issuing grants and financial assistance. This program is identical to Rep. Rick Boucher's (D-VA) proposal (Sec. 114, pg. 63).
  - *Funding*: Secured through assessments on utility sales of electricity from fossil fuels with annual nationwide limit of $1 billion per year for no more than 10 years (Sec. 114., pg. 76).
  - *Financial assistance eligibility*: Commercial-scale projects undertaken by private, public, academic, and non-profit organizations are eligible, with an emphasis on supporting a diversity of technologies and fuels (Sec. 114, pg. 70).
  - Other provisions deal with governance, government oversight, sharing of information, and intellectual property.
- Incentives and standards for commercial deployment of CCS
  - *Incentives*: Provides fixed payments to facilities for tonnes of CO2 captured and sequestered (Sec. 786, pg. 87). Amount per tonne is set on a sliding scale based on percent captured and the amount of commercial CCS already deployed. Initial amounts are as high as $90/tonne for the highest capture rates. After 6 Gigawatts of CCS are deployed, bonus allowances are awarded through a reverse auction process. To be eligible, facilities must be fired by coal- or petroleum coke at least 50% of the time, achieve the emissions limitations set forth in Sec. 812, be an electric generating unit with 200 MW or greater nameplate capacity, or be an industrial source that will emit more than 50,000 tonnes of CO2 per year absent any emissions capture.
  - *Performance standards*: Amends the CAA to require new coal-fired power plants to meet emission performance standards (Sec. 812, pg.104). The Administrator must review standards and may tighten them depending on the performance of commercially available technology. Details include:
    - Standards apply to all plants initially permitted after Jan. 1, 2009 where 30% or more of their fuel is coal and/or petroleum coke. Standards vary based on the year in which the plant is permitted along with other factors.
    - Plants initially permitted from 2009 through 2019 must emit no more than 50% fewer GHGs on an annual basis than they would otherwise by 2025 and potentially earlier, depending on the amount of commercial CCS technology deployed.
    - Plants initially permitted from 2020 onward must emit no more than 65% fewer GHGs on an annual basis than they would otherwise.
    - The Administrator may strengthen the standards but may not relax them.

Domestic Adaptation

- State Programs. Establishes allocation of allowances to states starting in 2012 through 2050 to build resilience to climate change impacts.
    - A State must sell allowances within one year of receipt, and deposit proceeds into its State Energy and Environment Development (SEED) Fund. Requires promulgation of regulations related to submission of State climate adaptation plans not more than 2 years after date of enactment and submission of said plans every 5 years (Sec. 453, pg. 1230).
    - Requires State-level Natural Resource Adaptation Plans detailing each state's current and projected efforts to address the potential impacts of climate change and ocean acidification on natural resources and costal areas (Sec. 479, pg. 1335).
- Federal programs.
    - Establishes a National Climate Change Adaptation Panel that will include the heads of 10 federal agencies (Sec. 475, pg. 1320). Requires the development of climate change adaptation plans by each federal agency on the Climate Change Adaptation Panel (Sec. 478, pg. 1330).
    - Establishes a National Climate Service within NOAA to develop climate information and forecasts at national and regional scales. This service will also distribute information regarding climate impacts to State, local, and tribal governments (Sec. 452, pg. 1258).
    - Public health and climate change. Requires establishment of national strategic action plan to assist health professionals in preparing for and responding to the impacts of public health and climate change in the U.S. and other nations, particularly developing nations. Calls for development of a Science Advisory Board. Establishes climate change health protection and promotion fund of an unspecified amount (Sec. 461, pg. 1302).
    - Establishes a National Climate Change Adaptation Strategy that will develop reports and provide advice to key federal agencies (Sec. 476, pg. 1321).
    - Establishes a National Climate Change Adaptation Fund in the U.S. Dept. of Treasury with unspecified allowance allocation to assist regions and states in taking mitigation and adaptation actions. Allocation to States: 84.4% of funds will be made available to state wildlife agencies and 15.6% shall be made available to state coastal agencies. Allocation to federal agencies: 27.6% to Secretary of Interior, plus 8.1% for cooperative grant program, 4.9% for Indian Tribes. Land and Water Conservation Fund: 19.5%. Forest Service: 8.1%. Department of Commerce: 11.5%. EPA: 12.2% (Sec. 480, pg. 1345).

Assistance During The Transition To A Low Carbon Economy

- Additional consumer assistance
    - *Electric and natural gas LDC rate payer assistance*: Emission allowances distributed to an electricity or natural gas local distribution company shall be used exclusively for the benefit of its retail rate payers and may not be used to support electricity sales or deliveries to entities or persons other than its ratepayers (Sec. 783, pg. 886 and Sec. 784, pg. 922).
    - *Heating oil consumer assistance*: Emission allowances are distributed to states that shall use them exclusively for the benefit of consumers of oilheat fuel, propane, or kerosene for residential or commercial purposes by using the proceeds for cost-effective energy efficiency programs, rebates, or other direct financial assistance programs (Sec. 785, pg. 932).
    - *Climate change consumer fund*: The Secretary of the Treasury shall provide tax refunds on a per capita basis to each household in the United States that shall collectively equal the amount deposited into the Climate Change Consumer Refund Account (Sec. 789, pg. 941).
    - *Energy refund program for low income Americans*: Amends the Social Security Act by adding that eligible low-income households are provided cash payments to reimburse the households for the estimated loss in their purchasing power resulting from the American Clean Energy and Security Act of 2009 (Sec. 431, pg. 1194).

- Green job and worker transition
  - Establishes a competitive grant program within the Department of Education for the development of programs of study in the fields of clean energy, renewable energy, energy efficiency, climate change mitigation, and climate change adaptation.
  - Establishes an Energy Efficiency and Worker Training Fund that will provide climate change worker adjustment assistance for adversely affected sectors (Sec. 421, pg. 1127).

EFFECT OF PROPOSED MEMORIAL

This memorial urges the Congress of the United States to reject the American Clean Energy and Security Act (H.R. 2454), also known as the Waxman-Markey bill, and any other energy proposals or overreaching actions by federal agencies that will artificially raise energy prices for consumers and place an undue burden on the economy and the people of the United States for little or no environmental benefit. The memorial further directs that copies of this memorial be dispatched to the President of the United States, to the President of the United States Senate, to the Speaker of the United States House of Representatives, and to each member of the Florida delegation to the United States Congress.

B. SECTION DIRECTORY:

None.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have

to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

None.

House Resolution

A resolution supporting Taiwan's meaningful participation in organizations and conventions of the United Nations and other international entities.

WHEREAS, April 10, 2010, will mark the 31st anniversary of the enactment of the Taiwan Relations Act, and

WHEREAS, the Taiwan Relations Act continues to be instrumental in maintaining peace, security, and stability in the Taiwan Strait since its enactment in 1979, and

WHEREAS, Florida maintains a vested interest in relations between the United States and Taiwan as a sister state of the Province of Taiwan, and

WHEREAS, Taiwan is an active member in the international community with a long-standing commitment to international health and humanitarian aid, and

WHEREAS, Taiwan is a key air transport hub that connects Northeast Asia and Southeast Asia, serves more than 1.3 million flights, and carries over 35 million passengers every year, and

WHEREAS, as an island state in the Pacific Ocean, Taiwan faces the serious problem of rising sea levels and the ravages of extreme weather such as cyclones and has unique contributions to make in the discussion on climate change, NOW, THEREFORE,

Be It Resolved by the House of Representatives of the State of Florida:

That the House of Representatives supports Taiwan's meaningful participation in organizations and conventions of the United Nations and other international entities, such as the World Health Organization, the International Civil Aviation Organization, and the United Nations Framework Convention on Climate Change.

BE IT FURTHER RESOLVED that a copy of this resolution be presented to the Taipei Economic and Cultural Office in Miami as a tangible token of the sentiments expressed herein.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HR 1613 Taiwan
SPONSOR(S): Lopez-Cantera
TIED BILLS: **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	General Government Policy Council	15 Y, 0 N	Marra	Hamby
2)	Rules & Calendar Council		Kirksey	Birtman
3)				
4)				
5)				

SUMMARY ANALYSIS

The resolution expresses support for Taiwan's meaningful participation in organizations and conventions of the United Nations and other international entities, including the World Health Organization, the International Civil Aviation Organization, and the United Nations Framework Convention on Climate Change.

The resolution also provides that a copy of the resolution will be presented to the Taipei Economic and Cultural Office in Miami.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Taiwan

Taiwan is a nation of 23 million people with a combined area of approximately 13,900 square miles, slightly smaller than Delaware and Maryland combined. It is comprised of the main island of Taiwan, the archipelagoes of Penghu, Kinmen and Matsu, and a number of other islands.[1] It is GDP of $717.7 billion ranks 20th in the world.[2]

Taiwan is governed by the Taipei-based Republic of China (ROC), but the Beijing-based People's Republic of China (PRC) claims sovereignty over Taiwan as a part of China.[3] Taiwan has never been actively ruled by the Chinese Communist Party (CCP) or as part of the PRC.[4] However, the PRC maintains an estimated 1,500 ballistic missiles on the Chinese mainland aimed at Taiwan.[5] Earlier this year, U.S. plans to aid Taiwan in building its military defense prompted China to suspend military exchanges with the U.S.[6]

There is significant legal uncertainty as to Taiwan's status in the international community.[7] Taiwan has adopted a new foreign policy of "flexible diplomacy" that stresses raising Taiwan's international profile and integrating its economy with the region instead of competing with the PRC for diplomatic allies.[8]

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[1] CIA World Factbook, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/tw.html
[2] *Id.*
[3] KERRY DUMBAUGH, TAIWAN'S POLITICAL STATUS: HISTORICAL BACKGROUND AND ONGOING IMPLICATIONS, CONGRESSIONAL RESEARCH SERVICE REPORT RL30341 at 1, Jun. 4, 2009, *available at* http://fpc.state.gov/documents/organization/110831.pdf.
[4] SHIRLEY KAN, CHINA/TAIWAN: EVOLUTION OF THE 'ONE CHINA' POLICY, CONGRESSIONAL RESEARCH REPORT RS22388 at 4, Aug. 17, 2009.
[5] *China Increases Missiles Pointed at Taiwan to 1,500*, REUTERS, Feb. 15, 2009, *available at* http://www.taipeitimes.com/News/front/archives/2009/02/15/2003436194.
[6] *China Hits Back at U.S. over Taiwan Weapons Sale*, BBC NEWS, Jan. 30, 2010, *available at* http://news.bbc.co.uk/2/hi/8488765.stm; Cara Anna, *China Says Military Ties with US Still Suspended*, ASSOCIATED PRESS, Apr. 13, 2010, *available at* http://www.google.com/hostednews/ap/article/ALeqM5h4kq-860fCB0J11y73pGafA7SMTwD9F23J580.
[7] *See* Taiwan and the International Community, *infra* at p. 3.
[8] Republic of China Yearbook 2009, available at http://www.gio.gov.tw/taiwan-website/5-gp/yearbook/ch06.html.

Governance

The ROC government is divided into central, provincial and municipal, as well as county and city, levels. The central government consists of the Office of the President and five branches (called "Yuan")—the Executive Yuan, the Legislative Yuan, the Judicial Yuan, the Examination Yuan and the Control Yuan.[9]

The Constitution of the Republic of China[10] was adopted on December 25, 1946, based on three principles:

- The Principle of Nationalism asserts the ROC's sovereign status and insists on its equal rights in international affairs, as well as equality among all ethnic groups within the country.
- The Principle of Democracy assures each citizen the right to exercise political and civil liberties, is the foundation of the organization and structure of the government.
- The Principle of Social Well-being states that the powers granted to the government must be used to serve the people through building a prosperous economy and a just society.

The Constitution guarantees various rights to all citizens, including equality before the law; the right to work, seek a livelihood and own property; and the powers of election, recall, initiative and referendum. The Constitution also ensures the freedoms of speech, choice of residence, movement, assembly, confidential communication, religion and association.

History

During World War II, Taiwan was a Japanese colony. The ROC controlled continental China, but was in the midst of a civil war against the Chinese Communist Party. The ROC seized Taiwan on behalf of the Allies. Relying on the Cairo Declaration, the ROC government declared Taiwan a province of the ROC in 1945.[11]

Four years later, on the verge of defeat by communist forces, the ROC government fled the continent and relocated to the island of Taiwan. About 1.3 million people, primarily soldiers, civil servants and teachers, came to Taiwan from the Chinese mainland.[12]

Since then, the ROC government has exercised jurisdiction over Taiwan and a number of other islands, while the PRC has exercised jurisdiction over the Chinese mainland. The two societies have developed in radically different directions: Taiwan has joined the ranks of democracies while the mainland has remained under authoritarian rule.[13]

On March 14, 2005, Beijing enacted an anti-secession law calling for use of "non-peaceful means" to achieve unification should Taiwan's people attempt to secede from the PRC.[14]

Upon President Ma Ying-jeou's election in 2008, Taiwan has engaged in "flexible diplomacy." As part of this policy, a truce has been reached between the ROC and PRC to end competition for diplomatic allies at the other side's expense. Furthermore, efforts are being made to raise Taiwan's international profile.[15]

After being suspended for nearly a decade, meetings between ROC's Straits Exchange Foundation (SEF) and PRC's Association for Relations Across the Taiwan Strait (ARATS) resumed in 2008. To date, the SEF-ARATS talks have resulted in the signing of several agreements concerning cross-strait

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[9] *Id.*
[10] *Available at* http://www.servat.unibe.ch/icl/tw00000_.html.
[11] CIA World Factbook, *supra* n. 1.
[12] Republic of China Yearbook 2009, *supra* n. 12.
[13] *Id.*
[14] *Available at* http://www.china.org.cn/english/2005lh/122724.htm.
[15] Republic of China Yearbook 2009, *supra* n. 12.

tourism, direct shipping, air transportation, postal services, food safety, financial cooperation, and joint crime-fighting and mutual judicial assistance.[16]

Taiwan and the International Community

Taiwan Relations Act

The ROC and United States were allies during World War II, and maintained diplomatic ties until 1979, when the United States established diplomatic ties with the PRC. The Taiwan Relations Act[17] (TRA) of 1979 has governed the U.S. relationship with the "governing authorities on Taiwan," in the absence of diplomatic recognition.

The TRA stipulates that it is the U.S. expectation that the future of Taiwan "will be determined" by peaceful means. It also establishes it is U.S. policy:

- to consider any non-peaceful means to determine Taiwan's future "a threat" to the peace and security of the Western Pacific and of "grave concern" to the United States;
- "to provide Taiwan with arms of a defensive character;" and
- "to maintain the capacity of the United States to resist any resort to force or other forms of coercion" jeopardizing the security, or social or economic system of Taiwan's people.

The TRA provides a congressional role in determining security assistance "necessary to enable Taiwan to maintain a sufficient self-defense capability."

China has been firmly opposed to the unilateral enactment of the Taiwan Relations Act by the United States in 1979, regarding it as openly violating China's sovereignty.[18]

Florida Sister State Agreement

In 1992, Florida and Taiwan entered into a sister state agreement. The agreement gave Florida rent-free office space in the Taipei World Trade Center for two years.[19]

Taipei Economic Cultural Office in Miami

The Taipei Economic and Cultural Office in Miami (TECO-Miami) is one of 12 offices under the Washington D.C.-based Taipei Economic and Cultural Representative Office (TECRO), Taiwan's de facto embassy in the United States in the absence of diplomatic ties. TECRO was established in 1979 to represent Taiwan's interests in the US. Taipei-Washington relations.[20]

Participation in International Community

From the beginning, both the ROC and PRC claimed to be the rightful government of *all* of China, including Taiwan. A consensus reached in 1992 between the ROC and PRC holds that there is only one China, and the definition of that China is to be determined separately by Taipei and Beijing.[21] The "one China" question has been left somewhat ambiguous and subject to different interpretations among

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[16] *Id.*

[17] 22 U.S.C. 48 §§ 3301-16.

[18] Press Release, Embassy of the People's Republic of China, China opposes US congress' resolution on Taiwan, (Jul. 17, 2004), *available at* http://www.china-embassy.org/eng/xw/t143465.htm.

[19] Mike Billington, *State Plans Trade Office For Taiwan Florida Aims To Tap Pacific Rim Markets,* SUN SENTINEL, Jan. 16 1992, http://articles.sun-sentinel.com/1992-01-16/business/9201030488_1_taiwanese-trade-free-trade-agreement-trade-office; *See also* Taiwan.Gov, *President Chen Makes a Stopover in Miami,* http://www.taiwan.gov.tw/print.asp?xItem=11164&ctNode=1933&mp=1001 (last visited, Apr. 16, 2010).

[20] About Us. The Taipei Economic and Cultural Office in Miami. *Available at* http://www.taiwanembassy.org/US/MIA.

[21] KAN, *supra,* n. 4 at 44.

Washington, Beijing, and Taipei.[22] As a result, there is legal uncertainty in the international community as to whether Taiwan is an independent state.

The ROC, a founding member of the United Nations (UN), was forced to withdraw as China's representative in 1971. The UN General Assembly voted to replace it with the PRC as representative of the State of China for the *State's* membership of the UN.[23] Until recently, the ROC had repeatedly attempted to gain admittance to the UN for Taiwan.[24] In 2009, the ROC changed course, instead seeking "meaningful participation" in UN activities and membership in two UN agencies: as an observer (like Palestine) at the International Civil Aviation Organisation and as a member of the United Nations Framework Convention on Climate Change.[25]

In May 2009, Taiwan became an observer at the World Health Assembly of the U.N.'s World Health Organization (W.H.O.) under the name "Chinese Taipei," marking its first official participation in U.N. activity since 1971. Mainland China had blocked the W.H.O. from providing direct assistance to Taiwan during 2003's SARS outbreak, but dropped objections to Taiwan's participation shortly before it gained observer status.[26]

Taiwan also holds membership in 27 intergovernmental organizations and their subsidiary bodies, including the Asian Development Bank; the World Trade Organization (WTO), which Taiwan joined under the name "Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu"; and the Asia-Pacific Economic Cooperation (APEC) forum, in which it participates as "Chinese Taipei". The ROC also has observer status or associate membership in 21 other intergovernmental organizations and their subsidiary bodies.[27]

Proposed Changes

The resolution expresses support for Taiwan's meaningful participation in organizations and conventions of the United Nations and other international entities, including the World Health Organization, the International Civil Aviation Organization, and the United Nations Framework Convention on Climate Change.

The resolution also provides that a copy of the resolution will be presented to the Taipei Economic and Cultural Office in Miami.

In Support of the resolution, the resolution provides the following "whereas clauses":

- Whereas, April 10, 2010, will mark the 31st anniversary of the enactment of the Taiwan Relations Act, and
- Whereas, the Taiwan Relations Act continues to be instrumental in maintaining peace, security, and stability in the Taiwan Strait since its enactment in 1979, and
- Whereas, Florida maintains a vested interest in relations between the United States and Taiwan as a sister state of the Province of Taiwan, and
- Whereas, Taiwan is an active member in the international community with a long-standing commitment to international health and humanitarian aid, and

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[22] *Id.* at 4.
[23] UNITED NATIONS GENERAL ASSEMBLY, RESOLUTION 2758, Oct. 25 1971. *See also* Phil Chan, *The Legal Status of Taiwan and the Legality of the Use of Force in a Cross-Taiwan Strait Conflict*, 8 CHINESE J. INT'L L. 455, 468 (2009).
[24] *See, e.g., UN Rejects Taiwan Membership Bid*, BBC NEWS, Jul. 24, 2007, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/6913020.stm.
[25] *Not Even Asking: At the United Nations a Pragmatic Taiwan Changes Tack,* THE ECONOMIST, Sep. 24, 2009, *available at* http://www.economist.com/displayStory.cfm?story_ID=14506556&source=login_payBarrier
[26] K. Bradsher, *Taiwan Takes Step Forward at U.N. Health Agency,* THE NEW YORK TIMES, Apr. 30, 2009, *available at* http://www.nytimes.com/2009/04/30/world/asia/30taiwan.html.
[27] Republic of China Yearbook 2009, *supra* n. 12.

- Whereas, Taiwan is a key air transport hub that connects Northeast Asia and Southeast Asia, serves more than 1.3 million flights, and carries over 35 million passengers every year, and
- Whereas, as an island state in the Pacific Ocean, Taiwan faces the serious problem of rising sea levels and the ravages of extreme weather such as cyclones and has unique contributions to make in the discussion on climate change.

B. SECTION DIRECTORY:
Not applicable.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this resolution does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to the Legislature; fixing the date for convening the regular session of the Legislature in the year 2012; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. In accordance with subsection (b) of Section 3 of Article III of the State Constitution and in lieu of the date fixed therein, the 2012 Regular Session of the Legislature shall convene on January 17, 2012.

Section 2. This act shall take effect July 1, 2010.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7227 PCB SPCSEP 10-02 Legislature
SPONSOR(S): Select Policy Council on Strategic & Economic Planning; Carroll
TIED BILLS: **IDEN./SIM. BILLS:** SB 2284

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.:	Select Policy Council on Strategic & Economic Planning	16 Y, 0 N	Kelly	Bahl
1)	Rules & Calendar Council		Hassell	Birtman
2)				
3)				
4)				
5)				

SUMMARY ANALYSIS

This bill provides that the 2012 Regular Session of the Legislature will convene on January 17, 2012.

The next regular apportionment would occur in 2012. Traditionally, the Legislature fixes an early start date for the regular session in apportionment years—years in which the Legislature redistricts Florida's state legislative and congressional district boundary lines.

- Chapter 2001-128, Laws of Florida, provided that the 2002 Regular Session convene on January 22, 2002.
- Chapter 91-90, Laws of Florida, provided that the 1992 Regular Session convene on January 14, 1992.

The Legislature advances the commencement of session in apportionment years in order that the redistricting plans can be timely submitted for review by the Florida Supreme Court and the United States Department of Justice, in sufficient time for qualifying for state and federal offices.

This proposal will help reduce the possibility of voter confusion in the 2012 election cycle

The bill does not have a fiscal impact.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

The Florida Constitution requires the Legislature, by joint resolution at its regular session in the second year after the Census is conducted, to apportion the State into senatorial districts and representative districts. The next regular apportionment would occur in 2012.[1] The Legislature also redraws its congressional districts in the same session that it apportions its state legislative districts.

Within 15 days after the Legislature adopts the state legislative districts, the Attorney General must petition the Supreme Court to review the apportionment plan. Subsection (c) of Section 16 of Article III of the State Constitution provides: "The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment." If the Court invalidates the apportionment plan, the Governor must reconvene the Legislature in an extraordinary apportionment session, not to exceed 15 days. Within 15 days after the adjournment of the extraordinary apportionment session, the Attorney General must petition the Supreme Court to review the apportionment plan adopted by the Legislature.[2]

The entirety of this review could take 30-60 days. Note, congressional redistricting plans are not subject to constitutionally mandated, automatic review by the Florida Supreme Court.

Section 5 of the federal Voting Rights Act (VRA) of 1965 requires states that comprise or include "covered jurisdictions" to obtain federal preclearance of any new enactment of or amendment to a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." This includes redistricting plans. Five Florida counties are covered by preclearance requirements of Section 5 of the Voting Rights Act: Those "covered jurisdictions" are Collier, Hardee, Hendry, Hillsborough, and Monroe counties.[3]

Florida must submit its state legislative and congressional plans for federal preclearance, through either a judicial or administrative process. States can seek a declaratory judgment from the U.S. District Court for the District of Columbia. However, generally, states will alternatively first submit a voting change to United States Department of Justice.[4] The Department of Justice has 60 calendar days in which to request more information, interpose an objection to the submitted change, or allow the

[1] Article III, Section 16, Florida Constitution.
[2] Article III, Section 16, Florida Constitution.
[3] 42 U.S.C. Section 1973c.
[4] 28 C.F.R. Section 51.52.

submitted change to take effect.[5] If the Department of Justice requests additional information, it can add an additional 60 days to the period of review, from the date of the receipt of additional information.[6]

The entirety of federal preclearance could take 60 days at minimum. If either the Florida Supreme Court or the Department of Justice were to render a district or plan invalid, combined with legal challenges, the complete review of Florida's redistricting plans could be a four month process or longer.

Subsection (b) of Section 3 of Article III of the State Constitution provides: "A regular session of the legislature shall convene on the first Tuesday after the first Monday in March of each odd-numbered year, and on the first Tuesday after the first Monday in March, or such other date as may be fixed by law, of each even-numbered year." Because 2012 is an even-numbered year, the date the Legislature convenes may be changed by law.

If the 2012 Session were to convene the "first Tuesday after the first Monday in March—March 6, 2012—state legislative and congressional redistricting plans may not be completed by the Legislature until May. In 2012, qualifying for state and federal offices will occur during the week of June 18-22.[7] There is little likelihood that the redrawn maps would complete the mandated review processes before qualifying.

Therefore, this bill provides that the 2012 Regular Session of the Legislature will convene Tuesday, January 17, 2012. The 60-day session then will conclude Friday, March 16, 2012.

Traditionally, the Legislature fixes an early start date for the regular session in apportionment (redistricting) years.

- Chapter 2001-128, Laws of Florida, provided that the 2002 Regular Session convene on January 22, 2002.

- Chapter 91-90, Laws of Florida, provided that the 1992 Regular Session convene on January 14, 1992.

The earlier start date for the 2012 Regular Session will add two months to the period in which Florida's new districts can be reviewed and approved, prior to qualifying for state and federal offices. This is likely to help the completion of redistricting in 2012 in a timely manner, thereby reducing the possibility of candidate and voter confusion in the 2012 election cycle.

. SECTION DIRECTORY:

Section 1. "In accordance with subsection (b) of Section 3 of Article III of the State Constitution and in lieu of the date fixed therein, the 2012 Regular Session of the Legislature shall convene on January 17, 2012."

Section 2. "This act shall take effect July 1, 2010."

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

[5] 28 C.F.R. section 51.9; *see also* 28 C.F.R. section 51.37.
[6] 28 C.F.R. section 51.37.
[7] Section 99.061(1) and (9), Florida Statutes.

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:
The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:
None.

B. RULE-MAKING AUTHORITY:
Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:
None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

House Joint Resolution

A joint resolution proposing the creation of Section 20 of Article III of the State Constitution to provide standards for establishing legislative and congressional district boundaries.

Be It Resolved by the Legislature of the State of Florida:

That the following creation of Section 20 of Article III of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE III

LEGISLATURE

SECTION 20. Standards for establishing legislative and congressional district boundaries.—In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in this constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of interest may be respected and promoted, both without subordination to any other provision of this article. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in this constitution and is consistent with federal law.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE III, SECTION 20

STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE AND CONGRESSIONAL REDISTRICTING.—In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of interest may be respected and promoted, both without subordination to any other provision of Article III of the State Constitution. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution and is consistent with federal law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 7231 PCB SPCSEP 10-01 Method and Standards for Legislative and Congressional Redistricting and Reapportionment
SPONSOR(S): Select Policy Council on Strategic & Economic Planning; Hukill
TIED BILLS: **IDEN./SIM. BILLS:** SJR 2288

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.:	Select Policy Council on Strategic & Economic Planning	11 Y, 5 N	Kelly	Bahl
1)	Rules & Calendar Council		Hassell	Birtman
2)				
3)				
4)				
5)				

SUMMARY ANALYSIS

The Florida Constitution requires the Legislature, by joint resolution at its regular session in the second year after the United States Census, to apportion state legislative districts. The United States Constitution requires the reapportionment of the United States House of Representatives every ten years, which includes the distribution of the House's 435 seats between the states and the equalization of population between districts within each state.

Two citizen initiatives, related to redistricting, have secured placement on the 2010 General Election ballot. Amendments 5 and 6, promoted by FairDistrictsFlorida.org, would add standards for state legislative and congressional redistricting to the Florida Constitution. The amendments do not contain definitions for the proposed new standards, which may have the effect of restricting the range of redistricting choices available under the federal Voting Rights Act.

The proposed joint resolution would create a new Section 20 to Article III of the Florida Constitution. The new section would add new state constitutional standards for establishing legislative and congressional district boundaries. The proposed standards in the joint resolution would complement the proposed standards in Amendment 5 and 6 and provide for a balancing of the various constitutional redistricting standards.

Specifically, the proposed joint resolution would require that the state apply federal requirements in its balancing and implementing of the redistricting standards in the state constitution. Both the equal opportunity of racial and language minorities to participate in the political process and communities of interest are established as standards that are on equal footing as any other standard in the state constitution. Therefore minority access districts can be considered, and communities of interest can be respected and promoted, as matters of legislative discretion. Finally, the proposed joint resolution asserts that districts and plans are valid if the standards in the state constitution were balanced and implemented rationally and consistent with federal law.

The proposed joint resolution would require approval by 60% of the voting electorate in Florida's 2010 General Election.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

The law governing the reapportionment and redistricting[1] of congressional and state legislative districts implicates the United States Constitution, the Florida Constitution, and federal statutes.

Florida Constitution

The Florida Constitution requires the Legislature, by joint resolution at its regular session in the second year after the Census is conducted, to apportion the State into senatorial districts and representative districts. According to Article III, Section 16(a), Florida Constitution, senatorial districts must be:

1. Between 30 and 40 in numbers;

2. Consecutively numbered; and

3. Of contiguous, overlapping, or identical territory.

Representative districts must be:

1. Between 80 and 120 in number;

2. Consecutively numbered; and

3. Of contiguous, overlapping, or identical territory.

The joint resolution is not subject to gubernatorial approval. If the Legislature fails to make the apportionment, the Governor must reconvene the Legislature in a special apportionment session not to exceed 30 days. If the Legislature fails to adopt an apportionment plan at its regular or special apportionment session, the Attorney General must petition the Florida Supreme Court to make the apportionment.[2]

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[1] The concepts of reapportionment and redistricting are distinct. Reapportionment refers to the process of proportionally reassigning a given number of seats in a legislative body, i.e. 435 seats in the U.S. House of Representatives, to established districts, i.e. amongst the states, based on an established formula. Redistricting refers to the process of changing the boundaries of any given legislative district.

[2] Article III, Section 16(b), Florida Constitution.

Within 15 days after the Legislature adopts the joint resolution, the Attorney General must petition the Supreme Court to review the apportionment plan.[3] Judicial review is limited to:

1. Whether the plan satisfies the "one person, one vote" mandate of equal protection; and

2. Whether the districts are of contiguous, overlapping or identical territory.[4]

If the Court invalidates the apportionment plan, the Governor must reconvene the Legislature in an extraordinary apportionment session, not to exceed 15 days.[5] Within 15 days after the adjournment of the extraordinary apportionment session, the Attorney General must petition the Supreme Court to review the apportionment plan adopted by the Legislature or, if no plan was adopted, report the fact to the Court.[6] If the Court invalidates the apportionment plan adopted by the Legislature at the extraordinary apportionment session, or if the Legislature fails to adopt a plan, the Court must draft the redistricting plan.[7]

The Florida Constitution is silent with respect to congressional redistricting. Article 1 Section 4 of the United States Constitution grants to each state legislature the exclusive authority to apportion seats designated to that state by providing the legislative bodies with the authority to determine the times place and manner of holding elections for senators and representatives. Consistent therewith, Florida has adopted its congressional apportionment plans by legislation subject to gubernatorial approval.[8] Congressional apportionment plans are not subject to automatic review by the Florida Supreme Court.

U.S. Constitution

The United States Constitution requires the reapportionment of the House of Representatives every ten years to distribute each of the House of Representatives' 435 seats between the states and to equalize population between districts within each state.

Article I, Section 4 of the United States Constitution provides that "[t]he Time, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." *See also* U.S. Const. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."). The U.S. Supreme Court has recognized that this language delegates to state legislatures the exclusive authority to create congressional districts. *See e.g., Growe v. Emison,* 507 U.S. 25, 34 (1993); *League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 416 (2006) ("[T]he Constitution vests redistricting responsibilities foremost in the legislatures of the States and in Congress . . . .").

In addition to state specific requirements to redistrict, states are obligated to redistrict based on the principle commonly referred to as "one-person, one-vote."[9] In *Reynolds*, the United States Supreme Court held that the Fourteenth Amendment required that seats in state legislature be reapportioned on a population basis. The Supreme Court concluded:

> ..."the basic principle of representative government remains, and must remain, unchanged – the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies...The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races. We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[10]

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[3] Article III, Section 16(c), Florida Constitution.
[4] *In re Constitutionality of House Joint Resolution 25E,* 863 So. 2d 1176, 1178 (Fla. 2003).
[5] Article III, Section 16(d), Florida Constitution.
[6] Article III, Section 16(e), Florida Constitution.
[7] Article III, Section 16(f), Florida Constitution.
[8] *See generally* Section 8.0001, et seq., Florida Statutes (2007).
[9] *Baker v. Carr*, 369 U.S. 186 (1962).
[10] *Reynolds v. Sims,* 377 U.S. 533, 568 (1964).

The Court went on to conclude that decennial reapportionment was a rational approach to readjust legislative representation to take into consideration population shifts and growth.[11]

In addition to requiring states to redistrict, the principle of one-person, one-vote, has come to generally stand for the proposition that each person's vote should count as much as anyone else's vote.

The requirement that each district be equal in population applies differently to congressional districts than to state legislative districts. The populations of congressional districts must achieve absolute mathematical equality, with no *de minimis* exception.[12] Limited population variances are permitted if they are "unavoidable despite a good faith effort" or if a valid "justification is shown."[13]

In practice, congressional districting has strictly adhered to the requirement of exact mathematical equality. In *Kirkpatrick v. Preisler* the Court rejected several justifications for violating this principle, including "a desire to avoid fragmenting either political subdivisions or areas with distinct economic and social interests, considerations of practical politics, and even an asserted preference for geographically compact districts."[14]

For state legislative districts, the courts have permitted a greater population deviation amongst districts. The populations of state legislative districts must be "substantially equal."[15] Substantial equality of population has come to generally mean that a legislative plan will not be held to violate the Equal Protection Clause if the difference between the smallest and largest district is less than ten percent.[16] Nevertheless, any significant deviation (even within the 10 percent overall deviation margin) must be "based on legitimate considerations incident to the effectuation of a rational state policy,"[17] including "the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts, or the recognition of natural or historical boundary lines."[18]

However, states should not interpret this 10 percent standard to be a safe haven.[19] Additionally, nothing in the U.S. Constitution or case law prevents States from imposing stricter standards for population equality.[20]

Compared to other states, Florida's population range ranked 13th of 49 (2.79%) for its State House districts, ranked 3rd of 50 (0.03%) for it State Senate districts, and achieved statistical perfection (0.00%) for its Congressional districts.[21]

The Voting Rights Act

Congress passed the Voting Rights Act (VRA) in 1965. The VRA protects the right to vote as guaranteed by the 15th Amendment to the United States Constitution. In addition, the VRA enforces the protections of the 14th Amendment to the United States Constitution by providing "minority voters an opportunity to participate in the electoral process and elect candidates of their choice, generally free of discrimination."[22]

The relevant components of the Act are contained in Section 2 and Section 5. Section 2 applies to all jurisdictions, while Section 5 applies only to covered jurisdictions (states, counties, or other jurisdictions within a state).[23] The two sections, and any analysis related to each, are considered independently of

[11] *Reynolds v. Sims,* 377 U.S. 584 (1964).
[12] *Kirkpatrick v. Preisler,* 394 U.S. 526, 531 (1969).
[13] *Kirkpatrick v. Preisler,* 394 U.S. 526, 531 (1969).
[14] *Kirkpatrick v. Preisler,* 394 U.S. 526, 531 (1969).
[15] *Reynolds v. Sims,* 377 U.S. 533, 568 (1964).
[16] *Chapman v. Meier,* 420 U.S. 1 (1975); *Connor v. Finch,* 431 U.S. 407, 418 (1977).
[17] *Reynolds,* 377 U.S. at 579.
[18] *Swann v. Adams,* 385 U.S. 440, 444 (1967).
[19] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 36.
[20] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 39.
[21] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Pages 47-48.
[22] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 51.
[23] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 51.

each other, and therefore a matter considered under by one section may be treated differently by the other section.

The phraseology for types of minority districts can be confusing and often times unintentionally misspoken. It is important to understand that each phrase can have significantly different implications for the courts, depending on the nature of a legal complaint.

A "majority-minority district" is a district in which the majority of the voting-age population (VAP) of the district is African American, Hispanic, Asian or Native-American. A "minority access district" is a district in which the dominant minority community is less than a majority of the VAP, but is still large enough to elect a candidate of its choice through either crossover votes from majority voters or a coalition with another minority community.

"Minority access" though is more jargon than meaningful in a legal context. There are two types of districts that fall under the definition. A "crossover district" is a minority-access district in which the dominant minority community is less than a majority of the VAP, but is still large enough that a crossover of majority voters is adequate enough to provide that minority community with the opportunity to elect a candidate of its choice. A "coalitional district" is a minority-access district in which two or more minority groups, which individually comprise less than a majority of the VAP, can form a coalition to elect their preferred candidate of choice. A distinction is sometimes made between the two in case law. For example, the legislative discretion asserted in *Bartlett v. Strickland*—as discussed later in this document—is meant for crossover districts, not for coalitional districts.

Lastly, the courts have recognized that an "influence district" is a district in which a minority community is not sufficiently large enough to form a coalition or meaningfully solicit crossover votes and thereby elect a candidate of its choice, but is able to effect election outcomes and therefore elect a candidate who would be mindful of the minority community's needs.

Section 2 of the Voting Rights Act

The most common challenge to congressional and state legislative districts arises under Section 2 of the Voting Rights Act. Section 2 provides: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State...in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[24] The purpose of Section 2 is to ensure that minority voters have an equal opportunity along with other members of the electorate to influence the political process and elect representatives of their choice.[25]

In general, Section 2 challenges have been brought against districting schemes that either disperse members of minority communities into districts where they constitute an ineffective minority—known as "cracking"[26]—or which concentrate minority voters into districts where they constitute excessive majorities—known as "packing"—thus diminishing minority influence in neighboring districts. In prior decades, it was also common that Section 2 challenges would be brought against multimember districts, in which "the voting strength of a minority group can be lessened by placing it in a larger multimember or at-large district where the majority can elect a number of its preferred candidates and the minority group cannot elect any of its preferred candidates."[27]

The Supreme Court set forth the criteria of a vote-dilution claim in *Thornburg v. Gingles*.[28] A plaintiff must show:

1. A minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district;

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[24] 42 U.S.C. Section 1973(a) (2006).
[25] 42 U.S.C. Section 1973(b); *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993).
[26] Also frequently referred to as "fracturing."
[27] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 54.
[28] 478 U.S. 30 (1986).

2. The minority group must be politically cohesive; and

3. White voters must vote sufficiently as a bloc to enable them usually to defeat the candidate preferred by the minority group.

The three "*Gingles* factors" are necessary, but not sufficient, to show a violation of Section 2.[29] To determine whether minority voters have been denied an equal opportunity to influence the political process and elect representatives of their choice, a court must examine the totality of the circumstances.[30]

This analysis requires consideration of the so-called "Senate factors," which assess historical patterns of discrimination and the success, or lack thereof, of minorities in participating in campaigns and being elected to office. [31] Generally, these "Senate factors" were born in an attempt to distance Section 2 claims from standards that would otherwise require plaintiffs to prove "intent," which Congress viewed as an additional and largely excessive burden of proof, because "It diverts the judicial injury from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives."[32]

States are obligated to balance the existence and creation of districts that provide electoral opportunities for minorities with the reasonable availability of such opportunities and other traditional redistricting principles. For example, in *Johnson v. De Grandy*, the Court decided that while states are not obligated to maximize the number of minority districts, states are also not given safe harbor if they achieve proportionality between the minority population(s) of the state and the number of minority districts.[33] Rather, the Court considers the totality of the circumstances. In "examining the totality of the circumstances, the Court found that, since Hispanics and Blacks could elect representatives of their choice in proportion to their share of the voting age population and since there was no other evidence of either minority group having less opportunity than other members of the electorate to participate in the political process, there was no violation of Section 2."[34]

In *League of United Latin American Citizens (LULAC) v. Perry*, the Court elaborated on the first *Gingles* precondition. "Although for a racial gerrymandering claim the focus should be on compactness in the district's shape, for the first *Gingles* prong in a Section 2 claim the focus should be on the compactness of the minority group."[35]

In *Shaw v. Reno*, the Court found that "state legislation that expressly distinguishes among citizens on account of race - whether it contains an explicit distinction or is "unexplainable on grounds other than race,"...must be narrowly tailored to further a compelling governmental interest. Redistricting legislation that is alleged to be so bizarre on its face that it is unexplainable on grounds other than race demands the same close scrutiny, regardless of the motivations underlying its adoption."[36]

Later, in *Shaw v. Hunt*, the Court found that the State of North Carolina made race the predominant consideration for redistricting, such that other race-neutral districting principles were subordinated, but the state failed to meet the strict scrutiny[37] test. The Court found that the district in question, "as drawn, is not a remedy narrowly tailored to the State's professed interest in avoiding liability under Section(s) 2 of the Act," and "could not remedy any potential Section(s) 2 violation, since the minority group must be shown to be "geographically compact" to establish Section(s) 2 liability."[38] Likewise, in *Bush v. Vera*,

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[29] *Johnson v. De Grandy*, 512 U.S. 997, 1011-1012 (1994).
[30] 42 U.S.C. Section 1973(b); *Thornburg vs. Gingles*, 478 U.S. 46 (1986).
[31] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 57.
[32] Senate Report Number 417, 97th Congress, Session 2 (1982).
[33] *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994).
[34] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 61-62.
[35] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 62.
[36] *Shaw v. Reno*, 509 U.S. 630 (1993).
[37] "Strict scrutiny" is the most rigorous standard used in judicial review by courts that are reviewing federal law. Strict scrutiny is part of a hierarchy of standards courts employ to weigh an asserted government interest against a constitutional right or principle that conflicts with the manner in which the interest is being pursued.
[38] *Shaw v. Hunt,* 517 U.S. 899 (1996).

the Supreme Court supported the strict scrutiny approach, ruling against a Texas redistricting plan included highly irregularly shaped districts that were significantly more sensitive to racial data, and lacked any semblance to pre-existing race-neutral districts.[39]

Lastly, In *Bartlett v. Strickland*, the Supreme Court provided a "bright line" distinction between majority-minority districts and other minority "crossover" or "influence districts. The Court "concluded that §2 does not require state officials to draw election district lines to allow a racial minority that would make up less than 50 percent of the voting-age population in the redrawn district to join with crossover voters to elect the minority's candidate of choice."[40] However, the Court made clear that States had the flexibility to implement crossover districts as a method of compliance with the Voting Rights Act, where no other prohibition exists. In the opinion of the Court, Justice Kennedy stated as follows:

> "Much like §5, §2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts...When we address the mandate of §2, however, we must note it is not concerned with maximizing minority voting strength...and, as a statutory matter, §2 does not mandate creating or preserving crossover districts. Our holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns...States that wish to draw crossover districts are free to do so where no other prohibition exists. Majority-minority districts are only required if all three *Gingles* factors are met and if §2 applies based on a totality of the circumstances. In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority voters." [41]

Section 5 of the Voting Rights Act

Section 5 of the Voting Rights Act of 1965, as amended, is an independent mandate separate and distinct from the requirements of Section 2. "The intent of Section 5 was to prevent states that had a history of racially discriminatory electoral practices from developing new and innovative means to continue to effectively disenfranchise Black voters."[42]

Section 5 requires states that comprise or include "covered jurisdictions" to obtain federal preclearance of any new enactment of or amendment to a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."[43] This includes districting plans.

Five Florida counties—Collier, Hardee, Hendry, Hillsborough, and Monroe—have been designated as covered jurisdictions.[44]

Preclearance may be secured either by initiating a declaratory judgment action in the District Court for the District of Columbia or, as is the case in almost all instances, submitting the new enactment or amendment to the United States Attorney General (United States Department of Justice).[45] Preclearance must be granted if the qualification, prerequisite, standard, practice, or procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[46]

The purpose of Section 5 is to "insure that no voting procedure changes would be made that would lead to a retrogression[47] in the position of racial minorities with respect to their effective exercise of the electoral franchise."[48] Whether a districting plan is retrogressive in effect requires an examination of

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[39] *Bush v. Vera*, 517 U.S. 952 (1996),
[40] *Bartlett v. Strickland,* No. 07-689 (U.S. Mar. 9, 2009).
[41] *Bartlett v. Strickland,* No. 07-689 (U.S. Mar. 9, 2009).
[42] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 78.
[43] 42 U.S.C. Section 1973c.
[44] Some states were covered in their entirety. In other states only certain counties were covered.
[45] 42 U.S.C. Section 1973c.
[46] 42 U.S.C. Section 1973c
[47] A decrease in the absolute number of representatives which a minority group has a fair chance to elect.
[48] *Beer v. United States*, 425 U.S. 130, 141 (1976).

"the entire statewide plan as a whole."[49] "And it is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new districting plan."[50]

The Department of Justice requires that submissions for preclearance include numerous quantitative and qualitative pieces of data to satisfy the Section 5 review. "The Department of Justice, through the U.S. Attorney General, has 60 days in which to interpose an objection to a preclearance submission. The Department of Justice can request additional information within the period of review and following receipt of the additional information, the Department of Justice has an additional 60 days to review the additional information. A change, either approved or not objected to, can be implemented by the submitting jurisdiction. Without preclearance, proposed changes are not legally enforceable and cannot be implemented."[51]

Majority-Minority and Minority Access Districts in Florida

Based on the 2002 data and subsequent state legislative and congressional maps:

- The Florida House of Representatives includes 24 majority-minority districts[52] and 10 minority access districts.[53]
- The Florida Senate includes 5 majority-minority districts[54] and 7 minority access districts.[55]
- Florida's Congressional districts include 4 majority-minority districts[56] and 2 minority access districts.[57]

Legal challenges to the Florida's 1992 state legislative and congressional redistricting plans resulted in a significant increase in elected representation for both African-Americans and Hispanics. Table 1 illustrates those increases. Prior to 1992, the Florida Congressional Delegation included only one minority member, Congresswoman Ileana Ros-Lehtinen. Since those legal challenges, the Florida Legislature created maps that balance the establishment and maintenance of majority-minority districts and minority access districts, with other legally mandated redistricting standards, and other traditional redistricting principles.

[49] *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003).
[50] *Georgia v. Ashcroft*, 539 U.S. 484 (2003).
[51] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 96.
[52] House Districts 8, 14-15, 39, 55, 59, 84, 93-94, 102-104, 107-117 and 119.
[53] House Districts 23, 27, 49, 58, 92, 101, 105-106, 118 and 120
[54] Senate Districts 29, 33, 36, 38 and 40.
[55] Senate Districts 1, 6, 18-19, 34-35 and 39.
[56] Congressional Districts 17-18, 21 and 25.
[57] Congressional Districts 3 and 23.

Table 1. Number of Elected African-American and Hispanic Members in the Florida Legislature and Florida Congressional Delegation

	Congress African-American	*Congress Hispanic*	*Senate African-American*	*Senate Hispanic*	*House African-American*	*House Hispanic*
Before 1982	*0*	*0*	*0*	*0*	*5*	*0*
1982 to 1992	*0*	*0-1*	*2*	*0-3*	*10-12*	*3-7*
1992 to 2002	*3*	*2*	*5*	*3*	*14-16*	*9-11*
2002 to Present	*3*	*3*	*7*	*3*	*17-20*	*11-15*

Prior to the legal challenges in the 1990s, the Florida Legislature established districts that generally included minority populations of less than 30 percent of the total population of the districts. For example, Table 2 illustrates that the 1982 plan for the Florida House of Representatives included 27 districts in which African-Americans comprised 20 percent of more of the total population. In the majority of those districts, 15 of 27, African-Americans represented 20 to 29 percent of the total population. None of the 15 districts elected an African-American to the Florida House of Representatives.

Table 2. 1982 House Plan
Only Districts with Greater Than 20% African-American Population[58]

Total African-American Population	House District Number	Total Districts	African-American Representatives Elected
20% - 29%	2, 12, 15, 22, 23, 25, 29, 42, 78, 81, 92, 94, 103, 118, 119	15	0
30% - 39%	8, 9	2	1
40% - 49%	55, 83, 91	3	2
50% - 59%	17, 40, 63, 108	4	4
60% - 69%	16, 106,	2	2
70% - 79%	107	1	1
TOTAL			10

Subsequent to the legal challenges in the 1990s, the Florida Legislature established districts that were compliant with provisions of federal law, and did not fracture or dilute minority voting strength. As Table 1 and Table 3 illustrate, the resulting districting plan, which allowed minority communities an equal opportunity to participate and elect its candidates of choice, doubled the number of African-American representatives in the Florida House of Representatives.

[58] It is preferred to use voting age population, rather than total population, for this analysis, but the 1982 voting age population data is not available. Therefore total population is used for the sake of comparison.

Table 3. 2002 House Plan
Only Districts with Greater Than 20% African-American Population[59]

Total African-American Population	House District Number	Total Districts	African-American Representatives Elected
20% - 29%	10, 27, 36, 86	4	1
30% - 39%	3, 23, 92, 105	4	3
40% - 49%	118	1	1
50% - 59%	8, 14, 15, 55, 59, 84, 93, 94, 104, 108	10	10
60% - 69%	39, 109	2	2
70% - 79%	103	1	1
TOTAL			18

Equal Protection – Racial Gerrymandering

Racial gerrymandering is "the deliberate and arbitrary distortion of district boundaries...for (racial) purposes."[60] Racial gerrymandering claims are justiciable under equal protection.[61] In the wake of *Shaw v. Reno*, the Court rendered several opinions that attempted to harmonize the balance between "competing constitutional guarantees that: 1) no state shall purposefully discriminate against any individual on the basis of race; and 2) members of a minority group shall be free from discrimination in the electoral process."[62]

To make a *prima facie* showing of impermissible racial gerrymandering, the burden rests with the plaintiff to "show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[63] Thus, the "plaintiff must prove that the legislature subordinated traditional race-neutral districting principles...to racial considerations."[64] Traditional districting principles include "compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests,"[65] and even incumbency protection.[66] If the plaintiff meets this burden, "the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest,"[67] i.e. "narrowly tailored" to achieve that singular compelling state interest.

While compliance with federal antidiscrimination laws—specifically, the Voting Rights Act—is a "very strong interest," it is not in all cases a compelling interest sufficient to overcome strict scrutiny.[68] With respect to Section 2, traditional districting principles may be subordinated to race, and strict scrutiny will be satisfied, where (i) the state has a "strong basis in evidence" for concluding that a majority-minority district is "reasonably necessary" to comply with Section 2; (ii) the race-based districting "substantially addresses" the Section 2 violation; and (iii) the district does "not subordinate traditional districting

[59] It is preferred to use voting age population, rather than total population, for this analysis, but the 1982 voting age population data is not available. Therefore total population is used for the sake of comparison
[60] *Shaw v. Reno*, 509 U.S. 630, 640 (1993)
[61] *Shaw v. Reno*, 509 U.S. 630, 642 (1993)
[62] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 72.
[63] *Miller v. Johnson*, 515 U.S. 900, 916 (1995).
[64] *Miller v. Johnson*, 515 U.S. 900, 916 (1995).
[65] *Miller v. Johnson*, 515 U.S. 900, 916 (1995).
[66] *Bush v. Vera*, 517 U.S. 952, 964 (1996).
[67] *Miller v. Johnson*, 515 U.S. 920 (1995).
[68] *Shaw v. Reno*, 509 U.S. at 653-654 (1993).

principles to race substantially more than is 'reasonably necessary' to avoid" the Section 2 violation.[69] The Court has held that compliance with Section 5 is not a compelling interest where race-based districting is not "reasonably necessary" under a "correct reading" of the Voting Rights Act.[70]

The Use of Statistical Evidence

Political vote histories are essential tools to ensure that new districts comply with the Voting Rights Act.[71] For example, the use of racial and political data is critical for a court's consideration of the compelling interests that may be involved in a racial gerrymander. In *Bush v. Vera*, the Court stated:

> "The use of sophisticated technology and detailed information in the drawing of majority minority districts is no more objectionable than it is in the drawing of majority majority districts. But ... the direct evidence of racial considerations, coupled with the fact that the computer program used was significantly more sophisticated with respect to race than with respect to other demographic data, provides substantial evidence that it was race that led to the neglect of traditional districting criteria..."

As noted previously, when the U.S. Department of Justice conducts a Section 5 preclearance review it requires that a submitting authority provide political data supporting a plan.[72] Registration and performance data must be used under Section 2 of the Voting Rights Act to determine whether geographically compact minority groups are politically cohesive, and also to determine whether the majority population votes as a block to defeat the minority's candidate of choice. That data is equally essential to prove the validity of any electoral changes under Section 5 of the Voting Rights Act.[73]

If Florida were to attempt to craft districts in areas of significant minority population without such data (or in any of the five Section 5 counties), the districts would be legally suspect and would probably invite litigation.

Traditional Redistricting Principles

There are seven general policies or goals that have been most frequently recognized by the courts as "traditional districting principles." If a state uses these principles as the primary basis for creating a district, with race factoring in simply as a consideration, then the redistricting plan will not be subject to strict scrutiny. If race is a predominant factor, particularly for a district that is oddly shaped, then the state will be subject to strict scrutiny and therefore must show that the district was narrowly tailored to serve a compelling state interest.[74]

Since 1993, the seven most common judicially recognized "traditional districting principles" are:[75]

- Compactness;
- Contiguity;
- Preservation of counties and other political subdivisions;
- Preservation of communities of interest;
- Preservation of cores of prior districts;
- Protection of incumbents; and
- Compliance with Section 2 of the Voting Rights Act

The meaning of "compactness" can vary significantly, depending on the type of redistricting-related analysis in which the court is involved.[76] Primarily, courts have used compactness to assess whether

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[69] *Bush v. Vera,* 517 U.S. 977-979 (1996).
[70] *Miller v. Johnson*, 515 U.S. 921 (1995).
[71] *Georgia v. Ashcroft*, 539 U.S. 461, 487-88 (2003); *Thornburg v. Gingles*, 478 U.S. 30, 36-37, 48-49 (1986).
[72] 28 U.S.C. § 51.27(q) & 51.28(a)(1).
[73] *Georgia v. Ashcroft*, 539 U.S. 461, 487-88 (2003); *Thornburg v. Gingles*, 478 U.S. 30, 36-37, 48-49 (1986).
[74] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Pages 105-114.
[75] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Pages 105-106.
[76] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Pages 109-112.

some form of racial or political gerrymandering exists. That said, it is important to remember that gerrymandering could conversely be the necessary component of a district or plan that attempts to eliminate the dilution of the minority vote. Therefore, compactness is not by itself a dispositive factor.

"There are three generally accepted statistical measures of compactness, as noted in *Karcher*: the total perimeter test, the Reock test, and the Schwartzberg test."[77] However, courts have also found that "compactness does not refer to geometric shapes but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency. Further it speaks to relationships that are facilitated by shared interests and by membership in a political community including a county or a city."[78] In a Voting Rights context, compactness "refers to the compactness of the minority population, not to the compactness of the contest district"[79] as a whole.

Overall, compactness is a functional factor in reviewing plans and districts. Albeit, compactness is not regarded as a trumping provision against the carrying out of other rationally formed districting decisions. [80] Additionally, interpretations of compactness require considerations of more than just geography. For example, the "interpretation of the *Gingles* compactness requirement has been termed 'cultural compactness' by some, because it suggests more than geographical compactness."[81] In a vote dilution context, "While no precise rule has emerged governing § 2 compactness, the inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries."[82]

Moreover, it should be noted that in the context of geography, states use a number of geographical units to define the contours of their districting maps. The most common form of geography utilized is Census Blocks, followed by Voter Tabulation Districts. Several states also utilize designations such as Counties, Towns, Political Subdivisions, Precincts, and Wards. For the current districts maps, Florida used Counties, Census Tracts, Block Groups and Census Blocks, more geographical criteria than any other state.[83]

Along the lines of other race-neutral traditional redistricting principles, in *Wise v. Lipscomb*, the Court noted "that preserving the cores of prior districts" was a legitimate goal in redistricting.[84] In *Georgia v. Ashcroft*, the United States Supreme Court recognized that the positions of legislative power, influence, and leadership achieved by representatives elected from majority-minority districts are one valid measure of the minority population's opportunity to participate in the political process. [85] The Court noted that, "Indeed, in a representative democracy, the very purpose of voting is to delegate to chosen representatives the power to make and pass laws. The ability to exert more control over that process is at the core of exercising political power. A lawmaker with more legislative influence has more potential to set the agenda..."[86]

Equal Protection – Partisan Gerrymandering

"Partisan (or political) gerrymandering is the drawing of electoral district lines in a manner that intentionally discriminates against a political party. Courts recognize that politics is an inherent part of any redistricting plan. The question is how much partisan gerrymandering is too much, so that it denies a citizen the equal protection of the laws in violation of the 14th Amendment."[87]

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[77] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 109.
[78] *DeWitt v. Wilson*, 856 Federal Supplement 1409, 1414 (E.D. California 1994).
[79] *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 26 (2006).
[80] *Karcher v. Daggett*, 462 U.S. 725, 756 (1983).
[81] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 111.
[82] *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 27 (2006).
[83] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 49.
[84] *Wise v. Lipscomb*, 437 U.S. 535 (1978).
[85] *Georgia v. Ashcroft*, 539 U.S. 461 (2003).
[86] *Georgia v. Ashcroft*, 539 U.S. 461 (2003).
[87] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 115.

In *Davis v. Bandemer*, the Court held that an allegation of partisan gerrymandering presents a justiciable equal protection claim.[88] It declined to articulate a standard, but a plurality concluded that a violation "occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[89]

Eighteen years later, no congressional or state legislative redistricting plan had been invalidated on partisan gerrymandering grounds. Thus, in *Vieth vs. Jubelirer*, four Justices explained that "no judicially discernable and manageable standards for adjudicating political gerrymandering claims have emerged" and concluded as a result that such claims "are nonjusticiable and...*Bandemer* was wrongly decided."[90]

Furthermore, the *Vieth* Court rejected a standard that is "based on discerning 'fairness' from a totality of the circumstances...as unmanageable in that the plurality could conceive of "fair" districting plans that would include all of the alleged flaws inherent in the" very plan that the Court was rejecting in *Vieth*.[91]

More recently, in *League of United Latin American Citizens v. Perry*, the Court declined to "revisit the justiciability holding" but found that the plaintiffs failed to provide a "workable test for judging partisan gerrymanders." However, the case did not foreclose the possibility that such a test might be discovered.[92] Furthermore, *Davis v. Bandemer* does still offer helpful guidance of the Court's opinion on the subject, noting that:

> "The mere fact that an apportionment scheme makes it more difficult for a particular group in a particular district to elect representatives of its choice does not render that scheme unconstitutional. A group's electoral power is not unconstitutionally diminished by the fact that an apportionment scheme makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause. As with individual districts, where unconstitutional vote dilution is alleged in the form of statewide political gerrymandering, as here, the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination. Without specific supporting evidence, a court cannot presume in such a case that those who are elected will disregard the disproportionally underrepresented group. Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[93]

FairDistrictsFlorida.org

Two citizen initiatives, related to redistricting, have already secured placement on the 2010 General Election ballot. Amendments 5 and 6, often referred to as the FairDistrictsFlorida.org amendments, seek to add standards for state legislative and congressional redistricting to the Florida Constitution. Most of the standards contained within Amendments 5 and 6 are not currently referenced in the Florida Constitution, although there is some overlap with the current requirements in Article III, Section 16 for legislative apportionment. Amendments 5 and 6 would create sections 20 and 21 in Article III of the Florida Constitution.

"The FairDistrictsFlorida.org is the official sponsor of this proposed constitutional amendment. FairDistrictsFlorida.org is a registered political committee 'working to reform the way the state draws Legislative and Congressional district lines by establishing constitutionally mandated fairness standards.'"[94] "The sponsor proposes that the amendment will establish fairness standards for use in creating legislative district boundaries; protecting minority voting rights; prohibiting district lines that

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[88] *Davis v. Bandemer*, 478 U.S. 109 (1986).
[89] *Davis v. Bandemer*, 478 U.S. 132 (1986).
[90] *Vieth vs. Jubelirer*, 541 U.S. 267, 281 (2004)
[91] *Vieth vs. Jubelirer*, 541 U.S. 267, 291 (2004)
[92] *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 414 (2006).
[93] *Davis v. Bandemer*, 478 U.S. 109, 132 (1986).
[94] *Complete Financial Information Sheet.* Financial Impact Estimating Conference. Standards for Legislature to Follow in Congressional Redistricting, #07-15, and Standards for Legislature to Follow in Legislative Redistricting, #07-16.

favor or disfavor any incumbent or political party; requiring that districts are compact; and requiring that existing political and geographical boundaries be used."

While Amendment 5 relates to state legislative redistricting, and Amendment 6 relates to congressional redistricting, the standards contained within both are substantively identical. In subsection (1) of the amendments, there is a prohibition against any apportionment plan or individual district from being drawn with the intent to favor or disfavor a political party or incumbent. The amendments prohibit any district from being drawn with the intent or result of denying racial and language minorities the equal opportunity to participate in the political process or diminishing their ability to elect candidates of their choice.

According to Amendments 5 and 6, districts shall consist of contiguous territory. This requirement is similar to the current language in Article III, Section 16(a) of the Florida Constitution. However, Amendments 5 and 6 do not make any reference to the additional language in Article III, Section 16(a), regarding districts overlapping or being identical in territory (*often referred to as "multi-member districts"*).

In subsection (2), Amendments 5 and 6 further require that districts shall be compact, districts shall be as nearly equal in population as practicable, and districts shall utilize existing political and geographic boundaries where feasible. However, compliance with these standards is not required if they are in conflict with the standards in subsection (1) or federal law.

In subsection (3), Amendments 5 and 6 clarify that the standards within each subsection are not to be read as though they were establishing any priority of one standard over another within each subsection.

The ballot summary for Amendment 5 [and Amendment 6] states:

> "Legislative [Congressional] districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries."

On January 29, 2009, the Florida Supreme Court approved the ballot summaries for the 2010 General Election ballot.[95] The Court wrote, "We conclude that the proposed amendments comply with the single-subject requirement of article XI, section 3 of the Florida Constitution, and that the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008)."

In that ruling the Court noted, "The proposed amendments do not alter the functions of the judiciary. They merely change the standard for review to be applied when either the attorney general seeks a 'declaratory judgment" with regard to the validity of a legislative apportionment, or a redistricting plan is challenged."

Furthermore, the Court concluded:

- "There is no basis that the judiciary will reject any redistricting plan that the Legislature adopts for failure to comply with the guidelines. We must assume that the Legislature will comply with the law at the time an apportionment plan is adopted."

- "It can logically be presumed that if the Legislature fails to comply with the Constitution and follow the applicable standards, the entity responsible for redrawing the boundaries must also comply with these standards."

[95] *Advisory Opinion to Attorney General re Standards for Establish Legislative District Boundaries*, 2 So. 3d 175, 191 (Fla. 2009).

- "Rather, under the proposals, the judiciary maintains the same role as it has always possessed—to only review apportionment plans for compliance with state and federal constitutional requirements and to adjudicate challenges to redistricting plans. The proposed amendments do not shift in any way the authority of the Legislature to draw legislative and congressional districts to the judicial branch."

The financial impact statement on the ballot will read, "The fiscal impact cannot be determined precisely. State government and state courts may incur additional costs if litigation increases beyond the number or complexity of cases which would have occurred in the amendment's absence."[96]

The FairDistrictsFlorida.org amendments do increase the number of state constitutional requirements for the Court to consider, and the amendments increase the number of standards by which an apportionment plan can be challenged. According to the Financial Impact Estimating Conference, "the proposed amendment(s) may result in increased costs based on the following":

- "The State may incur additional legal costs to litigate the redistricting plans developed under the proposed constitutional standards. Since the amendment(s) increases the number of factors that could be litigated, the districting initiative may expand the scope and complexity of litigation to determine the validity of each new apportionment plan." Such legal costs are indeterminate.

- "The Department of Legal Affairs concurs that there may be increased litigation costs, and that they may experience increased costs if they are asked to litigate these actions."

- "The Office of the State Courts Administrator believes there will be an impact at the trial court and appellate level. They assume that litigation will increase. The amount of increased litigation is unknown and the estimated impact on the trial court, the judicial workload, and the appellate workload is indeterminate."

- "The amendment does not substantially alter the current responsibilities or costs of the Department of State, the supervisors of elections, or local governments."

- "Any additional cost to the Legislature to develop the plans is indeterminate."

On November 6, 2009, Congresspersons Corrine Brown (FL-3) and Mario Diaz-Balart (FL-25) sent correspondence to the House Select Policy Council on Strategic & Economic Planning, asking questions about the impact of the initiative petitions proposed by FairDistrictsFlorida.Org. In this correspondence, the congresspersons raised several significant legal issues, stating:

> "These questions seek an explanation for the Amendments, which in our initial review appear internally contradictory and to violate several constitutional and statutory provisions, especially the protections of the 14th and 15th Amendments to the United States Constitution and the Voting Rights Act, as amended. We are particularly concerned that passage of these amendments would result – however unintentionally – in a significant dilution of the voting rights of the African-Americans and Hispanics as well as significant loss in a number of representatives elected from those communities."[97]

The letter asked 18 questions including whether the several standards in the petitions can be reconciled and applied practically and legally in the Redistricting process. The 18 questions can be generally summarized into four separate areas of analysis:

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[96] *Financial Impact Statement.* Financial Impact Estimating Conference. Standards for Legislature to Follow in Congressional Redistricting, #07-15, and Standards for Legislature to Follow in Legislative Redistricting, #07-16.

[97] *Letter from Congresswoman Corrine Brown and Congressman Mario Diaz-Balart to Chairman Dean Cannon.* November 6, 2009.

- Impact of the U.S. Supreme Court case of *Bartlett v. Strickland*, and how the terms of these initiatives may affect the ability and discretion of the Legislature to create minority access or "crossover" districts;[98]

- Questions raised regarding the relationship between incumbency protection and minority voting rights;[99]

- Use of political data which is necessary to comply with federal law, and how the use of this data itself may give rise to litigation;[100] and

- The legality or constitutionality of the petitions.[101]

Overall, the congresspersons asserted that FairDistrictsFlorida.org's proposed standards lack definition, lacked a clear method for reconciling inconsistencies, and could dilute minority access seats.

Effects of the Proposed Joint Resolution

The proposed joint resolution would create a new Section 20 to Article III of the Florida Constitution. The new section would add state constitutional standards for establishing legislative and congressional district boundaries. The ballot summary is identical to the actual proposed joint resolution, and reads as follows:

> "In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in this constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of interest may be respected and promoted, both without subordination to any other provision of this article. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in this constitution and is consistent with federal law."

District Boundary Lines: The proposed joint resolution would add new state constitutional standards for state legislative redistricting. Furthermore, the proposed joint resolution would create state constitutional standards for congressional districting. The proposed joint resolution does not apply the already existing state standards for state legislative redistricting to the process of congressional redistricting.

State and Federal Redistricting Requirements: The state shall apply federal requirements for state legislative and congressional redistricting, and balance the standards for state legislative and congressional redistricting contained in the Florida Constitution. In effect, this balancing requirement acknowledges an already existing body of case law, and requires the state to incorporate those standards in how it is that the state reads the state and congressional redistricting standards in the Florida Constitution.

Racial and Language Minorities: In state legislative and congressional redistricting, the state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, without being subordinated to any other provision in Article III of the Florida Constitution. This portion of the proposed joint resolution establishes the discretion of the state, in state law, to create and maintain districts that enable the ability of racial and language minorities to participate in the political process and elect candidates of their choice, without other standards in Article III of the Florida Constitution being read as restrictions upon or prerequisites to the exercise of such discretion.

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[98] *Id.*.
[99] *Id.*
[100] *Id.*
[101] *Id.*

Currently, only federal law addresses the ability of racial and language minorities to participate in the political process and elect candidates of their choice. In effect, the proposed joint resolution maintains the discretion of the state to establish and maintain minority districts, and ensures that other redistricting standards in Article III do not limit or prohibit the state's discretion to establish and maintain minority districts.

Communities of Interest: In state legislative and congressional redistricting, the state may respect and promote communities of interest, without being subordinated to any other provision in Article III of the Florida Constitution. This portion of the proposed joint resolution establishes the discretion of the state, in state law, to create and maintain districts that respect and promote communities of interest, without other standards in Article III of the Florida Constitution being read as restrictions upon or prerequisites to the exercise of such discretion.

Currently, only case law addresses communities of interest. In effect, the proposed joint resolution maintains the discretion of the state to respect and promote communities of interest, and ensures that other redistricting standards in Article III do not limit or prohibit the state's discretion to create districts that respect and promote communities of interest.

Communities of interest in Florida's current state legislative and congressional district maps include, but are not limited to: cultural communities, agricultural communities, economic development communities, coastal communities, environmental communities, Caribbean-American communities, urban communities, rural communities, historically underserved communities, minority communities, ethnic communities, retirement communities, etc.

Validity of Districts and Plans: State legislative and congressional districting plans and individual districts are considered to be valid, provided that the balancing and implementation of state legislative and congressional redistricting standards is both rationally related to the standards for state legislative and congressional redistricting contained in the Florida Constitution, and is consistent with federal law for state legislative and congressional redistricting.

Racial and Language Minorities

Concerns have been expressed that the FairDistrictsFlorida.org initiatives do not articulate their relationship to the federal Voting Rights Act, and therefore could result in a regression of minority representation.[102] Additionally, while federal law regarding redistricting has become relatively settled in the past decade, there is a lack of precedent to guide both the Courts and the Legislature in complying with the arrangement of standards in FairDistrictsFlorida.org's initiatives. Depending on how it is that the FairDistrictsFlorida.org initiatives are interpreted, the results could range from a reduction in minority access seats to equal protection concerns.

For example, *Bartlett v. Strickland*, was decided March 9, 2009, after the FairDistrictsFlorida.org initiative petitions were crafted, and after the Florida Supreme Court completed its review of the petitions' ballot summary in January, 2009. In *Bartlett v. Strickland*, the State of North Carolina had a provision in its Constitution prohibiting dividing counties when drawing the State's legislative districts, which was known as the "Whole-County Provision." The "Whole-County Provision" in the North Carolina Constitution is somewhat analogous to the provisions in FairDistrictsFlorida.org's initiatives requiring compact districts, and use of existing political and geographical boundaries.

The U.S. Supreme Court held in favor of the "Whole-County Provision," and ruled against the creation of a minority "crossover" district that had violated the provision. According to the Court, Section 2 of the VRA allows States to choose their own methods of compliance with the VRA, and compliance may include the creation of crossover districts, where no other prohibition exists in the State's law. The only districts that could violate such a prohibition in State law would be majority-minority districts.

[102] Brown, Congresswoman Corrine and Congressman Mario Diaz-Balart. *Select Policy Council on Strategic & Economic Planning Part 2 of 2.* http://www.myfloridahouse.gov/Sections/PodCasts/PodCasts.aspx. January 11, 2010.

Subsection (2) of the FairDistrictsFlorida.org initiatives does preempt the requirements (compactness, contiguity, equal population, political and geographical boundary lines) in that subsection if they are in conflict with federal law or the requirements (incumbency, political parties, and equal participation for minorities) in Subsection (1). However, if federal law is interpreted to be discretionary in this matter, and the state law is interpreted to reflect federal law, the other standards in the initiatives could never be in conflict with a purely discretionary matter. Therefore, if FairDistrictsFlorida.org's provisions were interpreted to be a recapitulation of the federal Voting Rights Act, and if the Voting Rights Act does not compel the creation of minority access seats, where the minority group is less than 50 percent of the voting age population, the FairDistrictsFlorida.org's initiatives may create prohibitions to the Legislature's discretion in maintaining and creating minority access seats.

Conversely, if FairDistrictsFlorida.org's initiatives were interpreted to exceed the VRA, and allow for the creation of irregularly shaped districts under Section 1 only for racial factors, the such districts may run afoul of the Equal Protection Clause of the United States Constitution.

Additionally, one other possible view of the initiatives is that they would create a Section 5 standard with statewide application. If the initiatives create a permanent Section 5 standard which would apply to every individual district drawn in all 67 Florida counties, regardless of evidence of prior or present discrimination, there would be significant legal concerns. Federal case law holds that race-based provisions of law must be of last resort, remedial in nature, and narrowly tailored. Therefore, as written, the initiatives invite equal protection challenges and furthermore a volume of litigation which no state has experienced.

In public statements that addressed the relationship between the initiatives and the VRA, FairDistrictsFlorida.org provided three perspectives on the language.

1. "While minority voting rights are presently guaranteed by federal statute, the new standards will enshrine them in the Florida Constitution and they will be difficult to repeal. These standards will not change current law but they will ensure that the law is permanent in Florida."[103]

2. "Compactness and utilization of local boundaries only come into play to the extent that they can without conflicting with the protection of minority voters."[104] "If it is a race district, if it is a racial or language minority district it is going to be a very different calculus than it is going to be if it is a -- if it is a non minority district."[105] "So first you have to have the minority districts drawn. Once you have those districts drawn you go ahead and you make the other districts to the extent that you can, compact and utilizing existing boundaries."[106]

3. "The language says that districts cannot be drawn or plans cannot be drawn to diminish the ability of minority voters to elect representatives of their choice. That is not presently part of the Voting Rights Act, except to the extent that it might be somewhat similar to what is in Section V."[107]

The proposed joint resolution addresses these concerns in two different ways. First, the state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, without being subordinated to any other provision in Article III of the Florida Constitution. Reflecting back on *Bartlett v. Strickland*, this proposed joint resolution prohibits other standards in Article III from being read as a prohibition against the creation of crossover districts.

Second, the proposed joint resolution requires that districts and plans be drawn in a manner that balanced and implements the standards in the Florida Constitution in a rational manner and in a

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[103] Mills, Jon. *How will the FairDistrictsFlorida.org Amendments Work?* March, 2009.
[104] Freidin, Ellen. *Select Policy Council on Strategic & Economic Planning & Senate Reapportionment.* Meeting Transcript. February 11, 2010.
[105] *Id.*
[106] *Id.*
[107] *Id.*

manner that is consistent with federal law. In effect, the Legislature is required the rationally balance the plain reading of Florida Constitution with the U.S. Constitution and the federal Voting Rights Act.

As it pertains to the ability of racial and language minorities to participate in the political process and elect candidates of their choice, because the standards contained in this amendment are not subordinate to any other provision of Article III, they would be of at least equal dignity with the standards contained in Subsection (1) of the FairDistrictsFlorida.org amendments, and would be superior to the standards contained in Subsection (2) of the FairDistrictsFlorida.org amendments.

Communities of Interest

Communities of interest are a well-recognized traditional redistricting principle in case law. Florida's current district maps include a number of districts that encompass communities with common priorities and interest, including agricultural communities of interest, coastal communities of interest, economic communities of interest, etc.

However, without explicit instruction, a compactness standard would not necessarily be interpreted to incorporate such communities. For instance, low income communities and historically underserved communities are frequently isolated in urban centers, and thereby not always immediately connected to communities with similar interest. Yet such communities may be well served if aligned together, in the same district, as this would increase the likelihood that the elected representatives of the district were mindful of the economic and historical needs of the district.[108] Furthermore, maintaining communities of interest can help maintain the core of existing districts, and thereby reduce voter confusion.[109]

The FairDistrictsFlorida.org initiatives are silent in regards to "traditional redistricting principles." Because they have no mention in the language of the initiatives, aesthetic issues such as compactness and maintaining political boundaries would likely supersede the interest of maintaining communities of interest. Therefore, under the plain reading of the language of the initiatives, legislative discretion to respect communities of interest may be eliminated, or at least constrained. For example, Florida's 25th Congressional District contains one of the most significant environmental communities of interest in the world, yet otherwise the boundaries of the district would be difficult to maintain under a purely mathematical or geometrical application of a compactness standard.

The proposed joint resolution addresses these concerns in a similar manner to those regarding minority districts. First, communities of interest are expressed in the language as a standard that may be respected and promoted. Second, communities of interest may not be subordinated to any other provision in Article III of the Florida Constitution, giving communities of interest an equal footing with other state redistricting standards.

As it pertains to communities of interest, because the standards contained in this amendment are not subordinate to any other provision of Article III, they would be of at least equal dignity with the standards contained in Subsection (1) of the FairDistrictsFlorida.org amendments, and would be superior to the standards contained in Subsection (2) of the FairDistrictsFlorida.org amendments.

Balancing

The Florida Supreme Court presumes the constitutionality of legislative action. "[E]very reasonable doubt must be indulged in favor of the act. If it can be rationally interpreted to harmonize with the Constitution, it is the duty of the Court to adopt that construction and sustain the act."[110] Also, in the specific context of determining compliance with redistricting standards in the state constitution, the court has held that the legislature's enactment is presumed constitutional. Specifically:

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[108] Brown, Congresswoman Corrine and Congressman Mario Diaz-Balart. *Select Policy Council on Strategic & Economic Planning Part 2 of 2.* http://www.myfloridahouse.gov/Sections/PodCasts/PodCasts.aspx. January 11, 2010.
[109] *Id.*
[110] *In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session*, 263 So. 2d 797, 805-06 (Fla. 1972).

> "Also in contention in various comments and at oral argument is the presumptive validity of the joint resolution of apportionment and the amount of deference this Court gives to the joint resolution of apportionment. The opponents generally argue that the Legislature's joint resolution of apportionment is not presumptively valid like a statute because the joint resolution is not subject to gubernatorial veto. Our 1972 opinion addressed this issue. *See In re Apportionment Law*, 263 So. 2d at 805-6. To clarify this issue, consistent with the discussion in the 1972 case, we hold that the joint resolution of apportionment identified in article III, section 16, Florida Constitution, upon passage is presumptively valid."[111]

However, without providing much instruction, the intent provisions in the FairDistrictsFlorida.org initiatives—regarding incumbency, political parties, and equal participation for minorities—could be read to create standards for challenging or reviewing redistricting plans or districts. Proponents of FairDistrictsFlorida.org suggested that the intent standards were meant to make discoverable and scrutinize the use of political data in redistricting.[112] Furthermore, the intent standards are divined by the public and private statements of the legislators themselves. [113]

Conversely, Ellen Freidin provided some insight that would suggest FairDistrictsFlorida.org's initiatives were not intending to excessively increase public review and judicial scrutiny if districts and plans were established through reasonable processes that accounted for all the applicable standards. According to Ellen Freidin, "The answer is that in order to draw these maps you must have not only data, but you must have census information. You must have voting data, you must have census information, you must have geographical information and you have also got to have a balancing by a legislative body of all of the criteria." [114] "Well, I think that the very principal of districting and the way it has always been done in the past is to do it after public comment and with collegial collaboration among the members."[115]

The proposed joint resolution incorporates these statements and the historical position of the Florida Supreme Court in two statements. First, "In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in this constitution." In effect, this balancing requirement acknowledges an already existing body of case law, and requires the state to incorporate those standards in how it is that the state reads the state and congressional redistricting standards in the Florida Constitution.

Second, "Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in this constitution and is consistent with federal law. State legislative and congressional districting plans and individual districts are considered to be valid, provided that the balancing and implementation of state legislative and congressional redistricting standards is both rationally related to the standards for state legislative and congressional redistricting contained in the Florida Constitution, and is consistent with federal law for state legislative and congressional redistricting.

Requirements for Joint Resolutions by the Florida Legislature

- According to Article XI, Section 1, of the Florida Constitution, "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."

- According to Article XI, Section 5(a), of the Florida Constitution, "A proposed amendment to or revision of this constitution, or any part of it, shall be submitted to the electors at the next general election held more than ninety days after the joint resolution or report of revision commission,

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[111] *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 825 (Fla. 2002)
[112] Mills, Jon. *How will the FairDistrictsFlorida.org Amendments Work?* March, 2009.
[113] Freidin, Ellen. *Select Policy Council on Strategic & Economic Planning & Senate Reapportionment.* Meeting Transcript. February 11, 2010.
[114] *Id.*
[115] *Id.*

constitutional convention or taxation and budget reform commission proposing it is filed with the custodian of state records..."

- According to Article XI, Section 5(d), of the Florida Constitution, "Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment or revision, with notice of the date of election at which it will be submitted to the electors, shall be published in one newspaper of general circulation in each county in which a newspaper is published."

- According to Article XI, Section 5(e), of the Florida Constitution, "Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.

- According to Section 101.161(1), Florida Statutes, "Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language." The substance of the amendment shall be embodied in the ballot summary of the measure. Ballot language for amendments proposed by joint resolution is not restricted by the 75 word standard that applies to other forms of constitutional amendments. In addition, joint resolutions are not required to provide a separate financial impact statement. "The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of."

- According to Section 101.161(2), Florida Statutes, the Department of State is responsible for furnishing each proposed constitutional amendment with a place on the ballot and corresponding number. "The Department of State shall furnish the designating number, the ballot title, and the substance of each amendment to the supervisor of elections of each county in which such amendment is to be voted on."

B. SECTION DIRECTORY:

Not Applicable.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   Non-recurring FY 2010-2011

   The Department of State, Division of Elections would estimates the cost of this proposed amendment to the state constitution, to be considered on the November 2, 2010 General Election ballot, to be approximately $9,089.28 in non-recurring General Revenue for publication costs.

   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. Costs for advertising vary depending upon the length of the amendment. According to the Department of State, Division of Elections, the average cost of publishing a constitutional amendment is $94.68 per word. The word count for the proposed joint resolution is 96 words X $94.68 = $9,089.28.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   Supervisors of Election would be required to include the ballot summary proposed amendment on printed ballots.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The joint resolution does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

   Article XI, Section 1 of the Florida Constitution authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by three-fifths of the elected membership of each house. If agreed to by the Legislature, the amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office or at a special election held for that purpose. The resolution would be submitted to the voters at the 2010 General Election and must be approved by at least 60 percent of the voters voting on the measure.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES