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 1558
INTRODUCER:	Senator Benacquisto
SUBJECT:	Repeal of Federal Law or Regulation
DATE:	April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White/Maclure	Maclure	JU	**Favorable**
2.			GO	
3.			RC	
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 permit repeal of any federal law or regulation by vote of two-thirds of the state legislatures. The concurrent resolution specifies that it is revoked and withdrawn, nullified, and superseded if it is used for the purpose of calling or conducting a convention to amend the U.S. Constitution for any other purpose.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 be 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. Only once, for the 21st Amendment, has Congress employed state conventions, rather than state legislatures, to ratify an amendment. See Russell L. Caplan, *Constitutional Brinksmanship: Amending the Constitution by National Convention* 126 (1988).

[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 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] The Florida Legislature passed memorials related to a convention for a balanced federal budget, including Senate Memorial 234[8] and House Memorial 2801[9] in 1976, and Senate Memorial 302[10] in 1988. Depending upon the manner of tallying applications, the total count was two short of the 34 state applications necessary under article V of the U.S. Constitution.[11]

In 2010, the Florida Legislature adopted Senate Concurrent Resolution 10 (SCR 10). The concurrent resolution called 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 2010 resolution specified that it superseded "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."[12] Furthermore, SCR 10 contained a self-executing revocation clause. The resolution specifies that if it is used for the purpose of, or in support of, calling or conducting a convention to amend the U.S. Constitution for any purpose other than requiring a balanced federal budget or limiting the ability of the Federal Government to require states to spend money, then it is revoked and withdrawn, nullified, and superseded.

Tenth Amendment and the Balance of Power between State and Federal Government

By the provisions of the U.S. Constitution, certain powers are entrusted solely to the federal government alone, while others are reserved to the states, and still others may be exercised concurrently by both the federal and state governments.[13] All attributes of government that have not been relinquished by the adoption of the U.S. Constitution and its amendments have been reserved to the states.[14] The Tenth Amendment to the U.S. Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As noted by one Supreme Court Justice:

> [t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and

[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).
[10] Senate Memorial 302 (Reg. Sess. 1988).
[11] For a list of state applications for a constitutional convention, including the applications of 32 states for a convention to discuss a balanced budget amendment, see, Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 765-89 (1993).
[12] Senate Concurrent Resolution 10 (Reg. Sess. 2010).
[13] 48A FLA. JUR 2D, *State of Florida* s. 13 (2010).
[14] *Id*.

> enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.[15]

Therefore, courts have consistently interpreted the Tenth Amendment to mean that "'[t]he States unquestionably do retai[n] a significant measure of sovereign authority. . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.'"[16] Under the federalist system of government in the United States, states may enact more rigorous restraints on government intrusion than the federal charter imposes.[17] However, a state may not adopt more restrictions on the fundamental rights of a citizen than the U.S. Constitution allows.[18]

The U.S. Supreme Court has recognized that the framers of the Constitution explicitly chose a constitution that affords to Congress the power to regulate individuals, not states.[19] Therefore, the Court has consistently held that the Tenth Amendment does not afford Congress the power to require states to enact particular laws or require that states regulate in a particular manner.[20] For example, in *New York v. United States*, the Court, in interpreting the Tenth Amendment, ruled that the Constitution does not confer upon Congress the power to compel states to provide for disposal of radioactive waste generated within their borders, though Congress has substantial power under the Constitution to encourage states to do so.[21]

Recent Tenth Amendment Legislation

A movement has emerged in the United States over the past couple of years in which state legislators have sponsored pieces of legislation invoking the Tenth Amendment for the purpose of declaring some power or powers as retained within the sovereignty of the state. The main premise of this state sovereignty movement is the belief that the balance of power has tilted too far in favor of the federal government. Proponents of this movement have urged legislators and citizens to support resolutions or state constitutional amendments that often mandate that the state government will hold the federal government accountable to the United States Constitution to protect state residents from federal abuse. For example, during the term of the 111th Congress, fourteen states passed declaratory Tenth Amendment resolutions declaring the sovereignty of the state over all matters not delegated by limited enumeration of powers in the United States Constitution to the federal government.[22]

Additionally, state legislators have introduced bills that attempt to declare specific instruments to be beyond the scope of federal regulation, most often citing the Commerce Clause as the power

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[15] *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833)).
[16] *Id*.
[17] 48A FLA. JUR 2D, *State of Florida* s. 13 (2010).
[18] *Id*. (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985)).
[19] *New York v. United States*, 505 U.S. at 156.
[20] *Id; see also Baggs v. City of South Pasadena*, 947 F. Supp. 1580 (M.D. Fla. 1996).
[21] *New York v. United States*, 505 U.S. at 156.
[22] Such a measure was introduced but not adopted in Florida (SJR 1240 (Reg. Sess. 2010)). During the 2011 Regular Session, a similar measure was filed, SJR 1438. Similarly, SM 358 is a memorial recognizing Florida's sovereignty under the Tenth Amendment to the United States Constitution over all powers not otherwise enumerated and granted to the federal government.

breached. For example, the Oklahoma Communications Freedom Act declared intrastate radio communications beyond the scope of the federal government's Commerce Clause authority.[23] In Montana, the Firearms Freedom Act was enacted,[24] and another bill asserted "state rights and challeng[ed] federal authority" with respect to federal regulations protecting gray wolves.[25] In Arizona, a bill declared incandescent light bulbs manufactured in Arizona and not exported to other states as purely intrastate goods not subject to federal regulation under the Commerce Clause.[26]

Federal Budget Deficit and National Debt

The contribution of federal budget deficits to a growing national debt is often cited by proponents of the state sovereignty movement.[27] A sharp rise in national debt has occurred due to "lower tax revenues and higher federal spending related to the recent severe recession and turmoil in financial markets," and an "imbalance between spending and revenues that predated those economic developments."[28] Currently, the debt held by the public is estimated to be $9.59 trillion.[29]

Federal budget deficits are estimated to total $7 trillion over the next decade if current laws remain unchanged; although "[i]f certain policies that are scheduled to expire under current law are extended instead, deficits may be much larger."[30] The 2011 federal budget deficit is projected to equal 9.8 percent of GDP.[31]

The Congressional Budget Office notes that, "[t]o prevent federal debt from becoming unsupportable, lawmakers will have to restrain the growth of spending substantially, raise revenues significantly above their historical share of GDP, or pursue some combination of those two approaches."[32] Otherwise, federal debt may continue to expand faster than the economy, and "the growth of people's income will slow, the share of federal spending devoted to paying interest on the debt will rise, and the risk of a fiscal crisis will increase."[33]

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[23] HB 2812, 52nd Leg., 2d Sess. (Okla. 2010).
[24] HB 246, 61st Leg. (Mont. 2009), *codified in* 70 MONT. CODE ANN. ss. 30-20-101 to 106 (2007 & Supp. 2010).
[25] SB 0183, 61st Leg. (Mont. 2009) (bill died in committee).
[26] HB 2337, 49th Leg., 2d Reg. Sess. (Ariz. 2010).
[27] Marianne Moran, *Give States A Tool to Check Federal Power*, Richmond Times Dispatch (column) (Sep. 19, 2010), available at http://www.repealamendment.org/press-coverage.html (last visited Apr. 4, 2011).
[28] Congressional Budget Office, *The Long-Term Budget Outlook*, 1 (June 2010, revised August 2010), *available at* http://www.cbo.gov/ftpdocs/115xx/doc11579/06-30-LTBO.pdf.
[29] TreasuryDirect, *The Debt to the Penny and Who Holds It*, http://www.treasurydirect.gov/NP/BPDLogin?application=np (last visited Mar. 29, 2011). 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. 29, 2011).
[30] Congressional Budget Office, *Spending and Revenue Options*, *Summary* (March 2011), http://www.cbo.gov/doc.cfm?index=12085 (last visited Mar. 29, 2011).
[31] *Id*.
[32] *Id*.
[33] *Id*.

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 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.[34]

Congress enacted the Unfunded Mandate Reform Act of 1995,[35] 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."[36] 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.[37]

Challenges to the Patient Protection and Affordable Care Act

Federal health care reform legislation titled the "Patient Protection and Affordable Care Act" is one of the focuses of the state sovereignty movement. Following the enactment of the legislation in 2010, the attorneys general, including the attorney general of Florida, or governors of 26 states, two private citizens, and the National Federation of Independent Business filed suit in the United States District Court for the Northern District of Florida challenging the constitutionality

[34] 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).
[35] Public Law 104-4 (Mar. 22, 1995).
[36] *Id*. at s. 2.
[37] 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 Senate Committee on Judiciary).

of the Act.[38] Plaintiffs alleged that the individual mandate set forth in the Act requiring everyone to purchase federally approved health insurance violates the Commerce Clause of the United States Constitution. In addition, plaintiffs alleged that the provisions in the Act expanding Medicaid violate the Spending Clause, as well as the Ninth and Tenth Amendments of the United States Constitution. On January 31, 2011, the court concluded that:

> Congress exceeded the bounds of its authority in passing the Act with the individual mandate. . . . Because the individual mandate is unconstitutional and not severable, the entire Act must be declared void.[39]

This ruling is consistent with the United States District Court for the Eastern District of Virginia's ruling that provisions of the Act exceed the constitutional boundaries of congressional power.[40] However, two federal district courts have upheld the constitutionality of the provisions of the Act.[41]

III. Effect of Proposed Changes:

In 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 permit repeal of any federal law or regulation by vote of two-thirds of the state legislatures. The concurrent resolution specifies the following language for the proposed constitutional amendment:

> Any provision of law or regulation of the United States may be repealed by the several states, and such repeal shall be effective when the legislatures of two-thirds of the several states approve resolutions for this purpose that particularly describe the same provision or provisions of law or regulation to be repealed.

Similar to other legislation citing to the Tenth Amendment, the call for a convention on a repeal amendment[42] purports to "halt federal encroachment and restore a proper balance between the powers of Congress and those of the several states." Unlike other Tenth Amendment legislation that has largely been declaratory, the repeal amendment seeks to create a future method by which states can override federal regulations. Should a Constitutional Convention be called, and the repeal amendment adopted and ratified, then two-thirds of the states could attempt to repeal any federal law or regulation.

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[38] *State of Florida v. United States Department of Health and Human Services*, Case No. 3:10-CV-91-RV/EMT (N.D. Fla. 2010).
[39] *State of Florida v. United States Department of Health and Human Services, Order Granting Summary Judgment,* Case No. 3:10-CV-91-RV/EMT, 76 (N.D. Fla. 2011).
[40] *Commonwealth of Virginia v. Kathleen Sebelius, Secretary of the Department of Health and Human Services, Memorandum Opinion (Cross Motions for Summary Judgment),* Case No. 3:10CV188-HEH (E.D. Va. 2011).
[41] *Thomas More Law Center v. Obama*, 720 F.Supp.2d 882 (E.D. Mich. 2010); *Liberty University, Inc. v. Geithner*, 2010 WL 4860299 (W.D. Va. 2010).
[42] The constitutional language proposed by the concurrent resolution matches language referred to as the "Repeal Amendment" and advocated by The Repeal Amendment, Inc. The organization's website is www.repealamendment.org (last visited April 10, 2011).

The concurrent resolution contains a self-executing revocation clause, specifying that it is revoked and withdrawn, nullified, and superseded if it is used for the purpose of calling or conducting a convention to amend the U.S. Constitution for a purpose other than consideration of the amendment proposed by the resolution. Nonetheless, the concurrent resolution also specifies that the State of Florida reserves the right to add future amendments to the application, as determined by the Florida Legislature.

In addition, the concurrent resolution affirms that selection procedures for delegates to a constitutional convention should be established by the legislatures of the several states.

Under the Senate rules, a concurrent resolution must be read twice by the title, passed by both houses of the Legislature, and signed by the presiding officers.[43]

Other Potential Implications:

Amending the U.S. Constitution to permit repeal of federal laws and regulations by the states could represent a fundamental change in the nature of federalism in the United States. If the repeal method provided for by the amendment is successful, it would undoubtedly affect decisions ranging from the nature and quantity of government revenue generation, regulations, services, and expenditures. The potential implications for government at all levels and for private citizens and businesses are difficult to quantify but likely to be significant.

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 permitting repeal of federal law or regulation by the states. See the "Present Situation" section of this bill analysis for a discussion of the convention as a method of proposing amendments to the Constitution.

[43] 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 Mike Haridopolos, President, 2010-2012.*

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 an amendment to the U.S. Constitution that actually results in repeal of federal laws and regulations, the private sector may be affected by policy 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 an amendment to the U.S. Constitution that actually results in repeal of federal laws and regulations, the government sector may be affected by policy changes stemming from the constitutional changes.

VI. Technical Deficiencies:

The concurrent resolution does not specify whether it supersedes previous resolutions applying to Congress for a constitutional convention for the purpose of proposing an amendment to the U.S. Constitution. It is difficult to assess what effect this legislation could have on Senate Concurrent Resolution 10, the resolution adopted by the Legislature in 2010 which called upon Congress to convene a constitutional convention for the purpose of proposing amendments to the Constitution to achieve and maintain a balanced federal budget. It contained a self-executing revocation clause. The resolution specified that if it is used for the purpose of, or in support of, calling or conducting a convention to amend the U.S. Constitution for any purpose other than requiring a balanced federal budget or limiting the ability of the Federal Government to require states to spend money, then it is revoked and withdrawn, nullified, and superseded.

Concurrent Resolution 1558 provides for the ability to add future amendments to this application, as determined by the Florida Legislature. It is not immediately clear how the ability to add future amendments reconciles with the provision in the resolution stating that it is revoked should it be used in support of conducting a convention for any purpose other than consideration of the amendment proposed by the resolution.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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