Unfunded Mandates: A Continuing Source of Intergovernmental Discord

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KRISTIN CONROY RUBIN

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UNFUNDED MANDATES: A CONTINUING SOURCE OF INTERGOVERNMENTAL DISCORD

KRISTIN CONROY RUBIN

TENSION between the State and local governments reached a new high in 1988 when the Florida Legislature passed a mandate with an estimated annual cost to local governments of over fifty million dollars.¹ Mandates, which are state laws requiring the expenditure of local funds, infringe upon a local government's autonomy and create intergovernmental discord. Passage of the 1988 mandate made local government organizations even more determined to amend the Florida Constitution to prohibit the Legislature from passing such unfunded mandates.

This Comment examines the history of intergovernmental relations in Florida, the problems and tensions unfunded mandates create, and how other states have dealt with this issue. It then analyzes a petition for amendment of the constitution circulated by the Florida League of Cities, the subsequent proposals introduced into the Legislature, and the joint resolution which will appear on the ballot in November of 1990. This Comment should be of interest to anyone planning to vote in November. It should be of special interest to those concerned with state-local relations and the fiscal condition of the State.

I. BACKGROUND ON FLORIDA INTERGOVERNMENTAL RELATIONS

The sharing of power among levels of government is basic to federalism. Although many think of federalism in terms of national and state governments, federalism extends down to the relationship between state and local governments, which were created, at least in part, to protect individual rights against a centralized state government.² State government, however, also protects individual rights by providing a forum above local politics. The ability to circumvent local government by appealing directly to the State prevents narrowly defined minorities from gaining too much control at the local level.³ The different levels of government serve as checks against the accumu-

¹. Ch. 88-382, 1988 Fla. Laws 2087 (codified in scattered sections of chapters 112 and 121, Florida Statutes (1989)). This legislation expanded the category of people eligible to receive pension benefits by local governments.
³. Id.
tion of power by any governing body. Thus, under the federalist system, an inherent tension exists among the different levels of government.

A. Dillon Rule

Prior to 1968, the Dillon Rule defined intergovernmental relations in Florida.\(^4\) Under the Dillon Rule, local governments\(^5\) possessed only those powers expressly granted by the State, those powers implied by other powers expressly granted, and those powers essential to the accomplishment of local objectives.\(^6\) Florida's adherence to the Dillon Rule denied local governments unilateral authority to adopt their own ordinances for their own purposes. Without such power, local governments had little autonomy.

B. Home Rule

The 1968 revision of the Florida Constitution formally gave counties and municipalities what is known as "home rule,"\(^7\) which carries the opposite assumption of the Dillon Rule. Under home rule, local governments possess "all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors."\(^8\) The rule presumes local governments have authority to adopt ordinances and provide services unless specifically prohibited by the State. Despite this constitutional provision,\(^9\) home rule was not realized for some years. Municipalities eventually secured home rule in 1973 through the Municipal Home Rule Powers Act.\(^10\) For counties, home rule was finally realized through amendments to the Florida Statutes\(^11\) and judicial decisions interpreting those amendments.\(^12\) Nei-

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5. Although there are several different kinds of local governments, such as school districts, mosquito control districts and other special taxing districts, the term "local governments" in this Comment refers strictly to counties and municipalities, unless otherwise noted.

6. ADVISORY COUNCIL, supra note 4, at 1.

7. Fla. Const. art. VIII, § 1(g); see also ADVISORY COUNCIL, supra note 4, at 1.

8. Fla. Const. art. VIII, § 1(g).

9. Id.


12. See, e.g., Speer v. Olson, 367 So. 2d 207 (Fla. 1978) (holding statute granting county governing body full governing power authorizes issuance of general obligation bonds for acquisition of sewer and water systems).
ther counties nor municipalities, however, have received "fiscal home rule" in the area of taxation.

The State retains almost complete authority to determine local governments' revenue sources. Presently, revenue for local governments comes from three major sources: ad valorem taxes, state-shared revenue and service charges. Other revenue sources include federal intergovernmental revenues, municipal utility service taxes, franchise fees, license and permit fees, fines and forfeitures, and local option taxes such as the local option gas tax. Since the State determines the parameters of each tax, the State controls the revenue generating capacity of local governments.

II. THE MANDATE PROBLEM

The tension created by the federalist system and by the structure of fiscal relations between state and local governments lies at the root of Florida's mandate problem. Mandates infringe upon the autonomy of local governments, which resent the State's authority to enact laws requiring the expenditure of funds local governments may not have the power to raise. The State, on the other hand, must retain its authority over local governments in order to maintain the separation of power necessary for federalism. If the State could not mandate requirements on local governments, powerful local minorities could control majorities without any governmental check. State government could not assure citizens equal treatment regardless of where they might live in the State.

Although some mandates are beneficial and therefore uncontroversial, many mandates frustrate local governments. Perhaps the most frustrating scenario occurs when local government employees obtain

13. "No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law." Fla. Const. art. VII, § 1(a). The Florida Constitution gives counties, municipalities and school districts the right to levy ad valorem taxes. Id. § 9(a). The Legislature, however, may set a limit on property taxes. Id. § 9(b). The Legislature may also create exempt property by statute. Fla. Stat. ch. 196 (1989).

14. ADVISORY COUNCIL, supra note 4, at 122-23, 126-27.

15. Id. at 15-16.

16. When the Legislature enacts a revenue source for local governments, it generally limits the amount of the tax as well as its use. See, e.g., Fla. Stat. §§ 210.01-.22 (1989) (state provides municipalities revenue from cigarette taxes, but retains the power to collect and distribute the tax, as well as authority over the amount of the tax).

17. FLORIDA LEAGUE OF CITIES, STATE MANDATES ON LOCAL GOVERNMENT: A QUESTION OF RESPONSIBILITY!! at Introduction 1-1 (Jan. 1988) [hereinafter A QUESTION OF RESPONSIBILITY] (available from Florida League of Cities). For example, mandates relating to the organization and procedures of local governments are necessary and often beneficial. See id.
from the Legislature "more generous personnel benefits on a mandated basis than they could obtain through negotiation with locally elected officials." This occurs when a local government negotiates in good faith with employees and reaches an agreement on salaries and benefits. After the agreement is reached, however, the employees circumvent the local officials by appealing to the Legislature for a mandate of more generous salaries and benefits. A successful appeal foils the previous agreement between employees and the local government.

Thus, two issues arise from the mandate problem. First, how far may the State infringe on local authority to control local concerns? Second, and more importantly, is it good public policy for the State to require local governments to expend money without also providing the authority to generate additional revenue to compensate for the increased expenditure? Local governments assert that the second issue is one of responsibility. The State must not simply pass on expenditures to local governments without responsibly ensuring that local governments have the funds to carry out the requirements. How that responsibility should be imposed on the State is the topic of this Comment.

There are five ways the State may be forced to be more responsible in this area: monitoring programs, fiscal notes, sunrise programs, sunset programs and reimbursement policies. Monitoring programs identify bills containing mandates and monitor them as they pass through the legislative process. Fiscal notes assess the fiscal impact of bills containing mandates in order to raise legislators' awareness of costs to local governments. Sunrise programs make mandates harder to enact by requiring an extraordinary vote to pass a bill that includes a mandate. Sunset programs provide for the automatic expiration of mandates unless they are specifically reenacted by the Legislature. Finally, reimbursement policies require the State to either fund the estimated cost when the mandate is passed or to reimburse local governments for local revenue actually spent on mandates.

A. The Federal Government Examines the Mandate Problem

In 1988, the United States General Accounting Office (GAO) analyzed state legislation addressing the mandate problem in order to de-


termine whether the federal government should enact legislation to control the mandates it imposes on state and local governments.\textsuperscript{20} After closely examining the effectiveness of mandate legislation in selected states, the GAO concluded that cost estimate and reimbursement programs have limited impact\textsuperscript{21} and are successful only when there is a strong legislative concern.\textsuperscript{22} The GAO discovered that two key factors in successful reimbursement programs are a healthy fiscal climate and public input by either referendum or constitutional amendment.\textsuperscript{23}

According to the GAO, either the legislators themselves must be motivated to reduce mandates or significant external political pressure urging a reduction in unfunded mandates must exist. The GAO also found that in a healthy fiscal climate, the issue tends to be described more as a contest between federalist authority and local autonomy rather than in terms of fiscal impact. The GAO recommended that the federal government adopt only a fiscal notes program. The GAO did not recommend federal reimbursement legislation in light of the large federal deficit, the absence of electoral political pressure, and the perception that the federal government must mandate certain action to ensure uniformity among the states.\textsuperscript{24}

\textbf{B. Florida's Fiscal Climate}

The GAO Report brings Florida's fiscal condition into question. Florida ranks near the bottom of the fifty states in per capita spending on its education system.\textsuperscript{25} In addition, Florida's motorists are experiencing the need for new roads as well as repair to existing roads.\textsuperscript{26} The State's per capita spending for social services, ranging from health care to child abuse, ranks forty-seventh among the fifty states.\textsuperscript{27} The \textit{Tampa Tribune} captured the statistical trend in a statement by T.K. Wetherell,\textsuperscript{28} Chairman of the House Committee on Appropriations: "I think you’ll find Florida generally comes out to have one of the

\begin{flushleft}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{Id.} at 24-25, 43-44.
\textsuperscript{25} Florida ranks 48th of the 50 states in total education spending per capita, ahead of only Kentucky and Tennessee. 2 U.S. Advis. Comm'n on Intergovtl. Relations, Significant Features of Fiscal Federalism 123 (1988) [hereinafter Fiscal Federalism].
\textsuperscript{26} Florida ranks 44th in direct highway expenditure per capita. \textit{Id.} at 124.
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} Dem., Daytona Beach.
\end{flushleft}
lowest per capita expenditures in just about anything. . . . We're doing about as well as we can do with the tax structure we've got."^29

Florida's low tax base, unable to keep pace with the State's increasing population, receives much of the blame for the poor quality of governmental services. The large percentage of senior citizens retiring to Florida erodes the tax base because their health care costs are higher and their exemptions from taxes are greater.^30 As a result, budget increases are used to provide existing services to new residents rather than to pay for existing deficiencies.^31

Florida also does not have the tax sources possessed by the other four most populous states. While Florida relies on its six-cent sales tax, New York, California and Pennsylvania have state income taxes in addition to a sales tax,^32 and Texas has a higher percentage sales tax.\footnote{33} Attempts to raise taxes to increase the quality of service by the State of Florida have been quashed in the past. One way the State saves on costs while attempting to increase governmental services is to mandate that programs be conducted and paid for by local governments.

As mandates have cut into local budgets, the reduction in federal funds and an increase in population have added to the financial pressure experienced by local governments. Federal funding for the nation's local governments as a whole decreased by twenty billion dollars from 1978 to 1987.\footnote{34} Over that time span, Florida municipalities experienced an average state-wide decline in federal funds of 29.1\%, while counties experienced an average loss of 63.6\%.\footnote{35} Waning federal support has forced local governments, with service delivery problems of their own, to rely more heavily on state funding. Yet the State, unable to fund the programs it imposes on local governments, turns increasingly to unfunded mandates, which cut even further into local budgets. In sum, the State's rapidly increasing population and unhealthy fiscal condition serve to exacerbate the mandate problem.


\footnote{30} Interview with Samuel P. Bell, Dem., Ormond Beach, 1974-88, former Chairman, Fla. H.R., Comm. on Approp. (Sept. 1, 1989) (notes available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

\footnote{31} Tampa Tribune, Aug. 26, 1989, at 1, col. 1.

\footnote{32} Fiscal Federalism, \textit{supra} note 25, at 115. Only five states other than Florida (Nevada, South Dakota, Texas, Washington and Wyoming) do not have a state or local income tax. \textit{Id.}

\footnote{33} \textit{Id.}

\footnote{34} \textit{Advisory Council, supra} note 4, at 91.

\footnote{35} \textit{Id.} at 91-92.
C. Florida’s Existing Law

In 1978, the Florida Legislature enacted a statute addressing the issue of unfunded mandates. Section 11.076, Florida Statutes, sets forth requirements for the passage of “[a]ny general law, enacted by the Legislature after July 1, 1978, which requires a municipality or county to perform an activity or to provide a service or facility, which activity, service, or facility will require the expenditure of additional funds.” The statute requires the Legislature to provide an economic impact statement for the bill and a means to finance the required expenditure. The statute also requires the Legislature to provide a means of financing any changes in the manner property values are assessed or in the authority to levy local taxes. The State would therefore have to compensate local governments for reductions in the local tax base resulting from a state law. In this way, the 1978 Legislature attempted to prohibit both local expenditure requirements and any reduction in local taxing authority without compensatory state funding. The Legislature’s attempt, however, failed.

Although no subsequent Legislature has repealed the statute, the number of unfunded mandates has steadily increased since 1978. Legislatures have been able to ignore the statute because a Legislature cannot statutorily bind a future one. Any subsequent Legislature has the ability to repeal or change a previous statute by its own authority. In the event of a conflict between a legislative action and a previous statute, the later action will prevail. Therefore, in order to bind future Legislatures, the law must be placed in the Florida Constitution, and thus beyond legislative reach.

D. Other States

The theory that one Legislature cannot statutorily tie the hands of a subsequent one only partially explains why the mandate reduction efforts of states have failed. As of this writing, forty-two states have enacted statutes requiring their state legislators to prepare local cost

37. Id.
38. Id.
40. R. Bradley, supra note 2, at 12.
estimates for each proposed mandate. In general, however, neither scheme has curtailed the flow of unfunded mandates. In addition, constitutional amendments have not been completely successful in the seven states which have adopted them. A review of other states' laws helps elucidate different problems encountered in mandate legislation.

1. California

California was the first state to enact legislation addressing the mandate problem. The California Legislature included a reimbursement requirement in a bill limiting the tax rates of cities, counties and special districts and the revenue of school districts. In 1979 the California electorate approved the reimbursement requirement in a constitutional amendment. As a result, the California Legislature has the option of either funding a mandate at the time it is passed or funding it through reimbursement once the costs to local governments are known. Even though mandate reimbursement is constitutionally dictated, its effectiveness has been limited. Only a small number of mandates in California have been funded at the time of passage. In addition, the reimbursement process is long and complex, and the burden of proof rests on local governments to show that the mandate should be reimbursed.

The reimbursement process begins when a local government files a test claim alleging the existence of costs eligible for reimbursement. The claim is heard by the Commission on State Mandates (CSM),


43. California, Hawaii, Michigan, Missouri, New Hampshire, New Mexico, Tennessee. Id.


45. STATE OF CALIFORNIA COMM’N ON STATE MANDATES, LOCAL GOVERNMENT GUIDE TO THE MANDATE PROCESS 1 (Dec. 1987) [hereinafter GUIDE TO THE MANDATE PROCESS].

46. CAL. CONST. art. XIII B, § 6. “Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service . . . .” Id. (exceptions omitted).

47. According to the GAO, only 124 of California’s 4100 mandates were funded up front over a 10-year period. GAO REPORT, supra note 20, at 36.

48. For a chart illustrating the reimbursement process, see GUIDE TO THE MANDATE PROCESS, supra note 45, at 2.

49. GAO REPORT, supra note 20, at 36.
which holds several hearings to determine the merits of the test claim, the costs and types of localities eligible for reimbursement, and the statewide cost of reimbursement. The CSM may reject the claim or submit a request for reimbursement to the Legislature in the form of a "local government claims bill." If such a bill is approved by both the Legislature and the governor, the appropriation is forwarded to the State Controller, who then instructs eligible entities on how to claim the reimbursement. Localities generally do not receive reimbursement until approximately two years after the claim is filed.

While this process has resulted in funding for many mandates, it does not guarantee the funding of mandates that even the CSM and the Legislature admit should be reimbursed. This result makes the whole process unpredictable. Moreover, according to a staff attorney for the League of California Cities, court rulings have "essentially gutted the mandate provision." Apparently, the problems with the mandate legislation in California stem from the complexity and unpredictability of the reimbursement process, as well as from judicial interpretation of the constitutional and statutory provisions.

2. **Massachusetts**

In 1980, the Massachusetts General Court, the legislative body of Massachusetts, enacted a statutory mandate reimbursement requirement as part of a voter-initiated tax limitation statute. Under this requirement, the Division of Local Mandates (DLM) determines which mandates qualify for reimbursement. If the DLM decides that a mandate requires reimbursement, the Legislature must appropriate funds annually to cover the cost of the mandate. If the Legislature fails to fund a mandate, local governments have the option of petitioning the courts to permit non-compliance with the unfunded mandate.

The GAO Report concluded that the Massachusetts statute has had some success in reducing the number of mandates as well as in provid-
ing a small amount of funding. The deterrence of mandates may not have been healthy in some cases, however. The GAO noted, for example, that Massachusetts "delayed updating landfill regulations to avoid dealing with the mandate issue." Hence, while the reimbursement statute deterred some mandates, it also inhibited progressivity by deterring the Legislature from dealing with significant state problems.

3. Illinois

In 1979, the Illinois General Assembly enacted a statutory requirement for reimbursement of mandates. The statute divides mandates into the following categories: 1) local government organization and structure mandates; 2) due process mandates; 3) service mandates; 4) tax exemption mandates; and 5) personnel mandates. The statute exempts local government organization and structure mandates and due process mandates from any reimbursement requirement. For service mandates, the State must reimburse local governments for 50 to 100% of their increased costs. Ad valorem tax exemption mandates resulting in the loss of revenue to local governments are fully reimbursable, and although personnel mandates and public employee retirement benefits are supposed to be reimbursed, a lengthy list of exceptions to those mandates exists.

The Legislature has carved additional exceptions out of the limited number of reimbursable mandates. These exceptions include: mandates requested by local governments or organizations thereof; mandates which impose additional annual net costs of less than $1000 for each local government affected, or less than $50,000 in the aggregate for all local governments affected; and homestead exemptions contained in the Revenue Act of 1939. Furthermore, the Illinois General Assembly may override the reimbursement requirement by stating an intent to override in the bill, and attaining a three-fifths affirmative vote. Thus, the large number of exceptions and the Legislature's ability to circumvent the statute's requirements make the Illinois statute ineffective.

57. GAO REPORT, supra note 20, at 34.
58. Id. at 35.
60. Id. para. 2206(a).
61. Id. para. 2206(b).
62. Id. para. 2206(c).
63. Twenty exceptions to the personnel mandate reimbursement requirement are listed by statute number. Id. para. 2206(e).
64. Id. para. 2208(a)(1).
65. Id. para. 2208(a)(5).
66. Id. paras. 2208.1-.3, .5-.6.
III. Action on Mandates in Florida in 1989

Although local governments have been urging Florida’s state legislators not to enact unfunded mandates for over fifteen years, several factors recently highlighted the importance of the issue. First, local governments are beginning to realize the fiscal burden of the Local Government Comprehensive Planning and Land Regulation Act, which was enacted in 1984. Second, when a joint resolution restricting the passage of mandates was proposed during the 1988 Regular Session, the House and Senate passed different versions of the joint resolution. Before a single version was agreed upon, the session came to an end, thereby killing the proposal. Local government organizations perceived the Legislature as playing political games. For example, legislators could say they voted for the joint resolution, even though nothing had passed. Third, at the same time the Legislature was perceived as playing political games, it passed one of the most significant mandates ever, increasing pension benefit costs by approximately fifty million dollars per year, and imposing this cost on local governments.

The Florida League of Cities (FLC) reacted to the 1988 politicking by organizing a petition drive to place a voter-initiated constitutional amendment on the ballot in November of 1990. As written by the FLC, the ballot referendum would impose heavy restrictions on the passage of mandates. The FLC agreed to end the petition drive only if the Legislature passed an acceptable joint resolution to amend the state constitution. This ultimatum forced the Legislature either to en-

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70. Interview with Michael Sittig, supra note 18.
71. See ch. 88-382, 1988 Fla. Laws 2087 (codified in scattered sections of chapters 112 and 121, Florida Statutes (1989)).
72. The referendum proposed the following amendment:
   Section 17. Laws Requiring Expenditure by Counties or Municipalities
   The Legislature may not enact a general law if compliance with that law will require a county or municipality to spend local monies (which shall include all funds available from then existing revenue sources to counties or municipalities on the date the law is enacted), unless the Legislature provides adequate state monies to fund the cost of compliance with the law. This provision shall not apply to laws dealing with the judiciary.

act its own mandate legislation or to stand by as the voters enacted the FLC's super-restrictive amendment.

A. Proposed Legislation

During the 1989 Regular Session, two joint resolutions addressing the issue of unfunded mandates were considered. The resolutions proposed the addition of section 18 to article VII of the Florida Constitution, concerning finance and taxation.

1. The First Proposal

The first draft of House Joint Resolution 40,73 proposed by Representative Ron Saunders,74 created both sunrise and sunset programs to deal with mandates. Subsection (a) of proposed section 18 prohibited the Legislature from enacting mandates unless approved by three-fourths of the membership of each chamber.75 Yet the language determining which laws would be considered mandates was narrowly drawn. The proposal would have restricted only those laws having the effect of requiring, or authorizing an executive department or agency to require, local governments to "expend revenues and receipts raised from its own sources."76 The proposal did not apply to laws requiring local governments to make expenditures from state-shared revenue sources.

Subsection (b) provided for the expiration of all mandates within five years of the effective date of the amendment unless reenacted by three-fourths of the membership at a regular session prior to the end of that period.77 This sunset provision would have ensured a means for reviewing the necessity of each mandate and eliminating all unnecessary requirements. The only exceptions to the sunset review were growth management requirements and environmental standards.78

Finally, subsection (c) attempted to ensure that local governments would retain their authority to raise revenue as well as their allotment of state-shared revenue existing on February 1, 1990.79 This provision stated that the "legislature may not enact, amend or repeal any general law if the effect of doing so would be to abolish, limit, or reduce" the aggregate authority or aggregate revenue of a local

74. Dem., Key West.
75. Fla. HJR 40 (1989) at 1 (proposed Fla. Const. art. VII, § 18(a)).
76. Id. (emphasis added).
77. Id. at 2 (proposed Fla. Const. art. VII, § 18(b)).
78. Id.
79. Id. (proposed Fla. Const. art. VII, § 18(c)).
government. In an effort to gain some minimum degree of local autonomy, the proposal secured a set level of authority and revenue for local government so that the local government would not be under the complete authority of the State.

2. The Second Proposal

Representative Sandra Mortham, encouraged by the FLC, proposed House Joint Resolution 139, which included a stricter sunrise program than Representative Saunders' proposal, but did not provide for sunset review of mandates. Subsection (a) defined a mandate as any law requiring a local government to spend money out of state-shared revenue sources as well as revenues and receipts raised from its own sources. Therefore, Representative Mortham's proposal went beyond Representative Saunders' proposal by including laws requiring expenditures from state-shared revenue. The Mortham proposal prohibited the Legislature from creating a mandate unless two requirements were met. First, the law must pass by an affirmative vote of three-fourths of the membership of both houses. Second, the mandate must be "enacted in response to an overwhelming state interest." Subsection (b) eliminated the two requirements for criminal laws and laws adopted to require funding of existing pension benefits. The exception for criminal laws was based on the State's great interest in the uniformity of state criminal laws, which are created for the protection and safety of the public and should not be inhibited by special requirements. The exceptions for revisions of existing pension benefits were included in light of the state constitution's requirement of periodic pension benefit review.

80. Id.
81. Id.
83. Id. at 1 (proposed Fla. Const. art VII, § 18(a)).
84. Id.
86. It seems ironic that pension benefits are exempt from reimbursement requirements, when it was the 1988 $50,000,000 pension benefit mandate which caused the turmoil creating the legislation. The 1988 law, however, expanded the categories of people eligible to receive certain benefits, thereby creating new pensions, rather than revising existing pensions. Therefore, the 1988 mandate is not exempt from the requirements. Interview with Kurt Spitzer, Exec. Dir., Fla. Assoc. of Counties (Aug. 30 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.); ch. 88-382, 1988 Fla. Laws 2087 (codified in scattered sections of chapters 112 and 121, Florida Statutes (1989)).
87. Article X, section 14 of the Florida Constitution requires that pension plans be funded on a sound actuarial basis. Interview with Kurt Spitzer, supra note 86.
Proponents of the legislation wanted to create specific exceptions to the amendment so that the courts would not create their own exceptions, as the courts did in California. With specific exceptions included in the joint resolution, Florida courts would be more likely to accept the argument that the Legislature did not intend for other laws to be excepted. As shall be seen, the Legislature appreciated this tactic and made specific additions to the list of exceptions.

B. The Committee Process

The Speaker of the House referred both proposals to the Committee on Community Affairs, the Committee on Governmental Operations, the Committee on Finance and Taxation, and the Committee on Appropriations. The members of the Committee on Community Affairs combined the two proposed joint resolutions. Major revisions to the joint resolution occurred in the Committee on Governmental Operations and its Subcommittee on Local Government Efficiency and Mandates. The Committee on Finance and Taxation and the Committee on Appropriations then fine-tuned the language of the joint resolution and made a limited number of amendments.

The resolution passed the House of Representatives without floor amendments by a vote of 101 to 13. In the Senate, House Joint Resolutions 139 and 40 went through the Committee on Finance, Taxation and Claims, and the Committee on Appropriations without amendments. The Senate approved the resolution by a vote of 38 to 1.

C. The Enrolled Joint Resolution

The enrolled version of the joint resolution is much more complex than the proposed versions because it includes many more exceptions and special provisions. The final version contains five subsections to

88. Interview with Michael Sittig, supra note 18.
89. FLA. LEGIS., HISTORY OF LEGISLATION, 1989 REGULAR SESSION, HISTORY OF HOUSE BILLS at 259-60, HB 139; id., HISTORY OF SENATE BILLS at 36, SB 40.
the proposed section 18 of article VII, in addition to the language which will appear on the ballot in November 1990.95

1. Subsection (a)

Subsection (a) differs from the proposed version beginning with the first word. Instead of the original proposal’s language restricting legislative acts,96 the first paragraph of the enrolled version begins: “No county or municipality shall be bound by any general law requiring such county or municipality to spend funds . . . .”97 This language gives only counties and municipalities standing to challenge the law,98 protecting the courts against a flood of private litigation. In addition, the subsection allows local governments to refuse to comply with a law not passed pursuant to the section.99 Litigation would occur only if local governments were challenged for their noncompliance. Local governments may also choose to provide unfunded mandated programs that are locally popular.

Subsection (a) describes the type of legislation which is subject to the requirements of the proposal as “any general law requiring [a] county or municipality to spend funds or to take an action requiring the expenditure of funds.”100 Under the earlier revisions, enacting such legislation would have required a showing that the legislation responds to an overwhelming state interest and the approval of three-fourths of the membership of both houses.101 The two-prong test in-

95. The ballot language will read as follows:

LAWS AFFECTING LOCAL GOVERNMENTAL EXPENDITURES OR ABILITY TO RAISE REVENUE OR RECEIVE STATE TAX REVENUE

Excuses counties and municipalities from complying with general laws requiring them to spend funds unless: the law fulfills an important state interest; and it is enacted by two-thirds vote, or funding or funding sources are provided, or certain other conditions are met. Prohibits general laws that have certain negative fiscal consequences for counties and municipalities unless enacted by two-thirds vote. Exempts certain categories of laws from these requirements.


96. “The Legislature may not enact, amend or repeal a general law if the effect of doing so . . . .” Fla. HJR 139 (1989) at 1 (proposed Fla. Const. art. VII, § 18(a)).

97. Fla. fourth CS for HJRs 139 & 40 (1989) at 1 (proposed Fla. Const. art. VII, § 18(a)).


99. Fla. fourth CS for HJRs 139 & 40 (1989) at 1-2 (proposed Fla. Const. art. VII, § 18(a)).

100. Id. at 1.

cluded in the enrolled joint resolution, however, is more complex. Similar to the first prong of the Mortham proposal requirement, the enrolled version requires the “legislature [to determine] that such law fulfills an important state interest.”102 Instead of requiring passage by three-fourths of the membership of both houses, the second prong of the enrolled version is met if: 1) the Legislature appropriates funds estimated to be sufficient to fund the local governments’ expenditures; 2) the Legislature authorizes or has authorized a new funding source that can generate the estimated amount of money necessary to fund the local governments’ expenditures; 3) two-thirds of the membership approves an unfunded mandate; 4) the law applies to all persons similarly situated, including state and local government; or 5) the law is required for compliance with a federal requirement or for eligibility to a federal entitlement.103

The first option available to the Legislature is simply to appropriate money to pay for a mandate. If the Legislature wanted to increase the number of recipients of pension benefits, for example, at a cost of an additional fifty million dollars per year, it would appropriate fifty million dollars to counties and municipalities to cover the expenditure.

The second option enables the Legislature to authorize local governments to enact a local funding source. Giving the local government this authority would ease the tension caused by unfunded mandates. By the terms of the resolution the funding source must be one that was not available to the county or municipality prior to February 1, 1989.104 Although most local option taxes require voter approval before implementation,105 the joint resolution requires that the Legislature give the local governing body the authority to enact the funding source itself by a simple majority vote.106 Otherwise, the State could authorize a local tax to fund a mandate, and if the local voters rejected the tax, the local government would be left without a funding source. Under this option, if the Legislature, for example, wanted to increase the

102. Fla. fourth CS for HJR 139 & 40 (1989) at 1 (proposed Fla. Const. art. VII, § 18 (a)). Notably, this reduces the stringency of the state interest required and places the determination of the interest in the hands of the State. Compare Fla. HJR 139 (1989) (proposed Fla. Const. art. VII § 18(a)) ("... overwhelming state interest.") with Fla. fourth CS for HJR 139 & 40 (1989) (proposed Fla. Const. art. VII, § 18(a)) ("... important state interest.") Under the enrolled version’s language, an important state interest is whatever the Legislature decides it is. No objective criteria are provided.

103. Fla fourth CS for HJR 139 & 40 (1989) at 1-2 (proposed Fla. Const. art. VII, § 18(a)).

104. Id. at 1.

105. Most local option taxes, such as the local option gas tax, require voter referendum by statute. See ADVISORY COUNCIL, supra note 4, at 105.

106. Fla. fourth CS for HJR 139 & 40 (1989) at 1-2 (proposed Fla. Const. art. VII, § 18(a)).
number of pension recipients at a cost of an additional fifty million dollars, it could include in the bill a new service fee or tax estimated to generate the required annual fifty million dollars for local governments.

Both of the above options require the Legislature to analyze proposed legislation to estimate its fiscal impact on local governments. Moreover, the estimates made by the Legislature become the limit of State responsibility: the State is not required to increase the funding if the actual expenditure exceeds the estimate. Additionally, under the second option the State must estimate the amount of money a certain funding source will generate. If the funding source does not generate the anticipated amount, the State is not required to make up the difference. Thus, from the State’s perspective, the funding options are a limited responsibility.

The third option allows the Legislature to enact an unfunded mandate by an extraordinary vote of both houses. This sunrise option is intended to limit the number of unfunded mandates, as the extraordinary vote is more difficult for the Legislature to achieve. Because most laws pass by more than a two-thirds vote, local governments consider the sunrise provision to be rather ineffective. Requiring an extraordinary vote, however, voids those mandates receiving only a slim majority.

The fourth and fifth options, unlike the three discussed above, do not involve legislative actions but instead provide exceptions to the second prong. If a local mandate is included in a law that applies to all persons similarly situated, including state and local governments, then only the first prong must be met. That is, the Legislature need only determine that the mandate “fulfills an important state interest.” The Legislature included this provision so that a law which protects the health, safety and welfare of the public will be binding on local governments without funding or an extraordinary vote. Similarly, a mandate must meet only the first prong if the law is necessary to comply with a federal requirement or to be eligible for a federal entitlement which contemplates action by local governments.

108. Id. at 13.
109. Fla. fourth CS for HJRs 139 & 40 (1989) at 2 (proposed Fla. Const. art. VII, § 18(a)).
110. Interview with Michael Sittig, supra note 18.
111. For a discussion of the vote requirement, see infra notes 138-43 and accompanying text.
112. Fla. fourth CS for HJRs 139 & 40 (1989) at 1 (proposed Fla. Const. art. VII, § 18(a)).
114. Fla. fourth CS for HJRs 139 & 40 (1989) at 2 (proposed Fla. Const. art. VII, § 18(a)).
Thus, the State has the authority to comply with federal laws or federal entitlement programs without being restricted by the mandate requirement.\footnote{115} The Legislature may require local governments to participate in the federal program if the first prong, fulfilling an important state interest, is met.\footnote{116}

In sum, subsection (a) establishes a two-prong test for all mandates. First, the Legislature must determine that the law including the mandate meets an important state interest. Second, if the law is not one that applies to all persons similarly situated, or one that is necessary to comply with federal requirements, the Legislature must fund the expenditure, provide a local funding source for the expenditure, or override the funding requirement by a vote of two-thirds of the membership of both houses.

2. **Subsection (b)**

Subsection (b) prohibits the Legislature from abolishing, limiting, or reducing the aggregate authority of local governments to raise revenue, "'[e]xcept upon approval of each house of the legislature by two-thirds of the membership.'"\footnote{117} The Legislature thus confers stability by prohibiting the reduction of local revenue authority, but retains the discretion to determine, on a bill-by-bill basis, whether particular legislation is sufficiently important that an extraordinary majority could override the prohibition.

The final version also protects the Legislature by adding the term "anticipated" to the phrase: "the legislature may not enact, amend or repeal any general law if the anticipated effect of doing so would be to reduce the authority" of municipalities or counties to raise revenue.\footnote{118} A law which inadvertently reduces a local government's revenue raising authority would not be subject to challenge in the courts. Again, the Legislature limits its liability for funding legislation by imbuing the joint resolution with a State bias, making legislative intent the final arbiter of what procedural requirements must be met for passage of a mandate.

3. **Subsection (c)**

The main thrust of subsection (c) is to restrict the Legislature's ability to reduce the aggregate state-shared revenues received by local gov-

\footnote{116} Id.
\footnote{117} Fla. fourth CS for HJRs 139 & 40 (1989) at 2 (proposed FLA. CONST. art. VII, § 18(b)).
\footnote{118} Id. (emphasis added).
ernments as of February 1, 1989. The joint resolution again permits
the Legislature to override the prohibition by an extraordinary vote.\footnote{119}{"Except upon approval of each house of the legislature by two-thirds of the membership, the legislature may not enact, amend or repeal any general law if the anticipated effect of doing so would be . . . ." \textit{Id.} (proposed FLA. CONST. art. VII, § 18(c)).}

Significant changes to this subsection occurred in committee. First,
rather than prohibiting the reduction of the aggregate state-shared
revenues, the final version prohibits the reduction of the percentage of
a state tax shared with counties or municipalities as an aggregate.\footnote{120}{\textit{Id.}} Accordingly, if the State received less revenue in one year, it would
not be required to give the local governments a greater percentage to
equal the dollar amount from the previous year. The requirements
would not apply to enhancements, to state tax sources, during a fiscal
emergency, and where the Legislature provided additional state-shared
revenues to replace those lost.\footnote{121}{\textit{Id.}}

Enhancements to state tax sources are excepted from the prohibi-
tion as an incentive for the State to grant enhancements to local gov-
ernments. Under this exception, the State could enhance local budgets
with extra state money in years of fiscal health without fearing that
the enhancement would become a requirement for subsequent years.

The provisions of subsection (c) also do not apply during a fiscal
emergency “declared in a written joint proclamation issued by the
president of the senate and the speaker of the house of representa-
tives.”\footnote{122}{\textit{Id.}} During a fiscal emergency, many state and local programs
might have to be cut. During such an emergency the State should be
able to cut back the state-shared revenues equally. Exactly what con-
stitutes a fiscal emergency, however, is unclear. Since the term “fiscal
emergency” is relative, the Speaker and President would have broad
discretion in determining when the provision applies. It is also unclear
why the Speaker and President were given the ability to declare a fis-
cal emergency in this context, while only the Governor can declare a
fiscal emergency generally.\footnote{123}{\textit{Id.}}

The last exception to the provisions of the subsection applies when
the State provides additional state-shared revenues “which are antici-
pated to be sufficient to replace the anticipated aggregate loss of state-
shared revenues resulting from the reduction of the percentage of the
state tax shared with counties and municipalities.”\footnote{124}{Fla. fourth CS for HJR 139 & 40 (1989) at 2-3 (proposed FLA. CONST. art. VII, § 18(c)).} This exception

\footnotesize{\begin{itemize}
\item \textsuperscript{119} “Except upon approval of each house of the legislature by two-thirds of the membership, the legislature may not enact, amend or repeal any general law if the anticipated effect of doing so would be . . . .” \textit{Id.} (proposed FLA. CONST. art. VII, § 18(c)).
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} Interview with Thomas Tedcastle, \textit{supra} note 68.
\item \textsuperscript{124} Fla. fourth CS for HJR 139 & 40 (1989) at 2-3 (proposed FLA. CONST. art. VII, § 18(c)).
\end{itemize}}
enables the Legislature to re-order state-shared revenue taxing sources without an extraordinary vote. It gives the Legislature necessary flexibility and at the same time attempts to provide the same amount of money to the local governments. The exception states that the replacement revenue will be subject to the same requirements for repeal or modification as the state-shared tax it is replacing. Use of the term "anticipated" ensures that the Legislature estimates the amount of the replacement funds at the time of enactment, as well as the amount of the loss, so the Legislature is not responsible for any discrepancies.

4. Subsection (d)

Subsection (d) of the enrolled joint resolution includes eight exceptions to the mandate requirements. These involve: "[l]aws adopted to require funding of pension benefits existing on the effective date of this section, criminal laws, election laws, the general appropriations act, special appropriations acts, laws reauthorizing but not expanding then-existing statutory authority, laws having insignificant fiscal impact, and laws creating, modifying, or repealing noncriminal infractions."

The Legislature urged that election laws not be restricted since elections are a constitutionally-mandated function. When enacting laws involving such a basic right, legislators should not be inhibited by requirements of extraordinary votes or funding sources. Local governments argue that regardless of the purpose of the law being passed, they are in the same fiscal situation and should still be granted funding.

Appropriations acts, which must be enacted every session, are already very difficult to manage. The Legislature grinds to a halt at midnight of June 30th each year if the general appropriations act is not passed. Given this fact, it would be politically imprudent to require an extraordinary vote to pass an appropriations act. If the chairman of appropriations were required to solicit additional votes for the appropriations bill, the chairman, in exchange, would have to promise funding for even more projects. In light of the pork-barrel politics already taking place, and the toll such politics takes on appropriation acts, the Legislature likely sought to avoid such a result.

125. Id.
126. Id. at 3 (proposed Fla. Const. art. VII, § 18(d)).
128. Interview with Michael Sittig, supra note 18.
129. Interview with Mitchell Rubin, supra note 85.
The fourth category of exceptions, involving laws reauthorizing but not expanding existing statutory authority, serves to grandfather in existing laws and programs. The State’s rationale for adding this exception is that the reauthorization of an existing program through sunset review creates no new mandate.\textsuperscript{130} Because local governments have been funding the program, the continuation of the program should not unduly burden them. Expansion of an existing program, however, would be considered a mandate and thus not exempt from the proposed amendment.

The provision’s exception of laws having insignificant fiscal impact is probably the most controversial, because the term “insignificant” is relative. An expenditure the State considers “insignificant” may well be significant to local authorities. Nevertheless, the reason for including the exception is sound. Some fiscal impacts may be so minor as not to justify the time and energy required for quantification of the impact. The different ways the Legislature might determine the meaning of “insignificant” are discussed below.\textsuperscript{131}

The final exemption applies to laws creating, modifying or repealing noncriminal infractions.\textsuperscript{132} Modification of noncriminal laws, like modification of criminal laws, is intended to benefit the safety and welfare of the public and should not be inhibited.\textsuperscript{133} Moreover, by repealing or even creating a new traffic infraction, for example, the additional expenditures are likely to be minor in the context of existing traffic requirements and in view of the existing enforcement structure. Given the existing enforcement system, the creation or modification of a minor parking law would not require the hiring of additional law enforcement officers.

5. Subsection (e)

The final subsection of the amendment, added by the House Committee on Governmental Operations,\textsuperscript{134} allows the Legislature to “enact laws to assist in the implementation and enforcement of this section.”\textsuperscript{135} The Legislature may, but is not required to, clear up existing ambiguities as well as establish the means to carry out the amendment. While the Legislature would probably have the authority to

\textsuperscript{130} Id.
\textsuperscript{131} See infra text accompanying note 156.
\textsuperscript{132} Fla. fourth CS for HJRs 139 & 40 (1989) at 3 (proposed Fla. Const. art. VII, § 18(c)).
\textsuperscript{135} Fla. fourth CS for HJRs 139 & 40 (1989) at 3 (proposed Fla. Const. art. VII, § 18(e)).
enact implementing legislation without this provision, the Legislature wanted to be sure it had further control over implementation of the amendment if adopted.\textsuperscript{136} Possible issues which could be addressed in the implementing legislation are discussed below.\textsuperscript{137}

IV. \textsc{Effect of the Legislation}

Although the version of the joint resolution eventually passed is substantially weaker than the versions originally introduced, the Legislature is still concerned about the effect the law could have on the Legislature.

\textit{A. Two-thirds Vote}

One of the major concerns raised in committee debates involved the vote required to pass an unfunded mandate. Legislators found the three-fourths requirement originally proposed too burdensome.\textsuperscript{138} However, some question the wisdom of the eventual two-thirds compromise, noting that it would be easier to pass a joint resolution proposing a constitutional amendment than to pass an unfunded mandate.\textsuperscript{139} Local governments emphasize that the Legislature has the option to fund the mandates, so the overriding vote burden should be greater for deterrence purposes.\textsuperscript{140}

From the perspective of local government, the extraordinary vote requirement may still be too low to be effective. In Illinois, where the Legislature can override the State's reimbursement requirement by a three-fifths vote, over a seven-year period the Legislature voted to exempt itself from the requirement in nearly half of the mandates passed.\textsuperscript{141} Moreover, most of the mandates that failed to garner the three-fifths vote went unfunded.\textsuperscript{142} In one instance, when a mandate was challenged and an Illinois appellate court ruled that the local government was not bound by the unfunded mandate, the General Assembly "approved by a three-fifths vote an amendment to exempt this mandate from the reimbursement law, thereby requiring local govern-

\begin{itemize}
  \item \textsuperscript{136} Fla. H.R., Comm. on Govtl. Ops., tape recording of proceedings (Apr. 25, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).
  \item \textsuperscript{137} See \textit{infra} text accompanying notes 155-58.
  \item \textsuperscript{138} Fla. H.R. Comm. on Comm'y Affairs, Subcomm. on Intergovtl. Relations, tape recording of proceedings (Apr. 5, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).
  \item \textsuperscript{139} A joint resolution proposing a constitutional amendment requires three-fifths approval.
  \item \textsuperscript{140} Interview with Michael Sittig, \textit{supra} note 18.
  \item \textsuperscript{141} GAO \textit{REPORT}, \textit{supra} note 20, at 39.
  \item \textsuperscript{142} Id.
\end{itemize}
ments to implement it." Thus, for Illinois local governments, the three-fifths vote requirement has not effectively reduced the passage of mandates.

B. Progressivity

Legislators also expressed concern that the progressivity of the Legislature would be inhibited if the amendment were to pass. Any controversial issue with a fiscal impact on local governments will likely not pass, because the proponents will be unable to muster support of two-thirds of the membership, or the funding requirement will destroy its chance of gaining the support of even a majority. Controversial measures, such as those arising in the areas of human rights, human services, and the environment, will likely fail. Without continued progress, the State will wither. According to a former legislator, passage of the amendment would "unduly restrict the ability of the Legislature to carry out its constitutional duty."

Proponents of the legislation reply that imposed legislative restraint is a positive aspect of the joint resolution. Such restraint, for example, would give the Legislature an excuse for evading controversial issues such as abortion. Any changes to abortion laws having a fiscal impact on local governments would require the approval of two-thirds of both chambers, which would be very difficult to achieve. The question thus becomes whether the few times that the Legislature would be helped by an extraordinary vote requirement outweigh the possibility that the progressivity of the State would cease.

Overall, the extraordinary vote requirement seems to serve almost no purpose. Most mandates will receive more than a two-thirds vote and will be exempt from the funding requirement. The mandates which do not receive support of two-thirds of the membership are probably contained in the more controversial bills. Avoiding the controversy may relieve legislators of some problems, but only at the risk of inhibiting the progressivity of the State.

143. Id.
144. Representative Corrine Brown, Dem., Jacksonville, voted against the joint resolution in the meeting of the Committee on Governmental Operations after expressing concern about restrictions on the Legislature's constitutional duty to run the State. See Fla. H.R., Comm. on Govtl. Ops., tape recording of proceedings (Apr. 5, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).
145. Interview with Samuel P. Bell, supra note 30.
C. State-shared Revenues

Passage of the joint resolution might have a negative impact on existing state-shared revenues. The Massachusetts Legislature earmarked state-shared revenues already going to local governments to satisfy the funding requirements for local mandates. More specifically, "$11.7 million of the $14.4 million it has provided came from local aid monies that local governments would have received anyway." Although the Florida Legislature would be restricted from reducing the percentage of state tax shared with the local governments under the joint resolution, funds from the state-shared percentage could possibly be earmarked for mandate reimbursement. Although such meaningless funding would be contrary to the intent of the legislation, the joint resolution contains no prohibition against it.

A related issue arises in the area of discretionary funding now provided by the Legislature to local governments. If the amendment passes, the Legislature will be less likely to grant money for particular local projects since the funding of mandates will necessarily be a higher priority. This could have a positive or negative effect, depending on the perspective taken. The restructuring of priorities may be welcome to the extent that it eliminates "turkey" legislation. But local projects that have been funded and now rely on state funds would not benefit from the new priorities. From either perspective, the Legislature is less likely to distribute discretionary funding.

D. Effect on Other Local Governments

Another restructuring of priorities, which would be felt by other local governments such as school districts and other special districts, may occur. The State might choose to place mandates on school districts and special districts, rather than on counties or municipalities, so that the restrictions would not apply. For example, if the State were to require a program allowing students to register to vote at their high school, the State would probably place the cost on the school districts rather than on the counties, because by doing so the State could avoid the funding and voting requirements. Therefore, local governmental entities, other than counties and municipalities, would probably have to bear a significant share of the amendment's negative implications.

147. GAO REPORT, supra note 20, at 34.
148. Id. at 35.
E. Estimating Local Costs

Between 1979 and 1988, the Legislature did not identify the local fiscal impact of 283 of the 349 mandates passed. The local government representatives blame the lack of impact identification on misplaced legislative priorities. The Florida Advisory Council on Intergovernmental Relations (ACIR), however, concluded that “[l]ocal government fiscal information is difficult to obtain for many reasons.” The reasons listed by the ACIR include the diversity of local government itself, the difficulty inherent in estimating the cost of new programs, the rapid pace of legislation, and the amendatory process in the waning days of each session.

The joint resolution’s requirement of funding to subsidize the anticipated costs of mandates requires that the estimating process overcome the difficulties of the task. Improving the process would require extra staff and additional expenses. Staff could spend time analyzing costs to diverse local governments by studying, for example, a large urban county, a coastal city, and a rural county to understand the differing costs and more accurately determine the overall costs of the legislation. Such efforts might overcome the difficulties identified by the ACIR.

However, there exist some estimative difficulties which cannot be overcome by staff because the difficulties are a function of time and information. Estimating costs with any degree of accuracy takes time. Normally, if an amendment with a fiscal impact is proposed during floor debate, the bill must be referred to the Committee on Appropriations. If the Committee determines that the amendment has a fiscal impact on local governments, the Committee hears the amendment and determines whether to appropriate money. If the constitutional amendment were adopted, the Legislature would have to either provide a funding mechanism or approve the measure by a two-thirds vote. In either instance, time would be crucial. A late amendment with a fiscal impact on local governments might leave the bill stranded in the process when the session ends.

Local governments find the deterrence against late amendments desirable. Many late amendments prove to be expensive because they are not well thought out due to the lack of time. Local governments

151. Interview with Michael Sittig, supra note 18.
152. 1988 ADVISORY COUNCIL REPORT, supra note 39, at 6.
153. See id. at 6-7.
154. Interview with Michael Sittig, supra note 18.
would prefer the failure of a bill to an expensive and unrecognized mandate.

V. IMPLEMENTING LEGISLATION

If the electorate approves the amendment, the Legislature may choose to address some difficult issues or ambiguities in the amendment’s implementing legislation. Subsection (e) of the joint resolution grants the Legislature the authority to “enact laws to assist in the implementation and enforcement of” section 18.155 Noteworthy elements of the implementing statute may include the definitions of ambiguous terms, the designation of which legislative body will oversee the program, and what constitutes funding for the purposes of the section.

A. Definitions

As noted previously,156 an important matter left open in the joint resolution is the meaning of the term “insignificant.” If the Legislature decides to define the term, it may affix a numerical amount to the term, describe the term by some percentage, or indicate that the Legislature will decide on a bill-by-bill basis whether a mandate is insignificant. Because percentages fluctuate with the fiscal condition of the State, assigning a percentage to the term would probably be the most advantageous for purposes of certainty.

Affixing a numerical amount to the term would generate much debate between local governments and the State. The final amount would likely be unfair to the poorer local governments since wealthier local governments might concede a higher amount. Moreover, the set number would have to be subject to change by statute whenever the effects of inflation were greatly felt. The State and local governments would thus have to re-negotiate the amount periodically.

The percentage option may not be much fairer to smaller local governments, but it would probably not fluctuate from year to year. The stability of the percentage would depend upon what figure the definition is based. Since state-shared revenues are protected by the joint resolution, “insignificant” could be defined as a percentage of state-shared revenues. If the state-shared revenues increased, then the amount defining “insignificant” would increase and the threshold for unfunded mandates would rise. But if state-shared revenues decreased, fewer mandates would have insignificant costs, and therefore might be funded. This option thus has a balancing effect.

155. Fla. fourth CS for HJRs 139 & 40 (1989) at 3 (proposed Fla. Const. art. VII, § 18(e)).
156. See supra text accompanying note 131.
Determining significance on a bill-by-bill basis would leave the decision to the political forces each year. The problem with this more ambiguous approach is that the rationale for excluding mandates with insignificant costs would be defeated. Time and energy would be spent determining the local impact, comparing that figure to mandates excepted and mandates not excepted under the insignificant rule, and finally debating over just where to draw the line. The negotiations would be annual, rather than complete following passage of the implementing legislation. Assigning a percentage to define the term seems to be the most advantageous approach.

B. Oversight

The Legislature may want to assign oversight and fiscal impact determinations to a particular legislative body. One convenient possibility would be to expand the ACIR to serve those functions. Following each session, the ACIR presently gathers legislation containing mandates, classifies them in certain categories, and compiles statistical information about them. Moreover, the ACIR has an expanding information network with local governments. To carry out the requirements of the joint resolution, a new branch of the ACIR could prepare fiscal analyses for proposed legislation with the input of local governments themselves. Since the ACIR already conducts similar programs, the costs would be minimal.

The oversight body should also be responsible for the tabulation of mandates and funding to ensure that all mandates which should be funded are funded. If the Legislature implements a system in which credit funding is appropriate, the oversight body should also keep track of credits.

C. Funding

The Legislature must determine what constitutes funding when it decides to appropriate funds for mandates. First, the Legislature must decide whether to fund a mandate annually, or to grant a lump sum to local governments to continue the program on their own. Also, the Legislature may set out whether credits from prior funding established after February 1, 1989, will be considered funding.

Appropriations on a year-to-year basis would probably be more accurate than lump sum funding, especially after the first year of a program's operation. In addition, the Legislature may more easily

distribute small amounts than take a large amount out of its budget. However, looking at the long-range effects of a mandate in order to make a single appropriation could eliminate the need for funding. If a mandate, such as a recycling program, eventually saves money for local governments, the estimated cost for the mandate could be zero, thereby exempting the Legislature from funding responsibility. If the Legislature were to fund yearly, it would have to appropriate funds for the years before the program results in savings to the local governments. The time span over which the local cost impacts are estimated should be a consideration of the Legislature.

Also, if funding for one mandate exceeds the actual amount required by local governments, the Legislature may attempt to treat the excess money as a credit for future mandates. Although the joint resolution does not prohibit such credits, the limitation of the Legislature's liability for underfunded mandates may conversely prohibit the local government's liability for overfunded mandates. It is not clear, however, whether the Legislature would appropriate separate funds for individual mandates or appropriate a large amount to cover any mandates enacted during that year. If the Legislature chooses the latter course, it may over-appropriate. Excess funds from a general mandate appropriation may be considered a credit for future mandates. The Legislature, then, should address whether it will appropriate funds for individual mandates, and whether any excess funds will be treated as credits for future mandates.

D. Amendment Policy

In the implementing statute, the Legislature could enunciate its policy for handling late amendments with fiscal impacts. Once the fiscal impact of the amendment is known, the Legislature could either decide to provide funding or a funding source, or vote to override the funding. One way to deal with late amendments would be to make such amendments severable from the entire bill in cases where the bill was challenged for containing a mandate. If the Legislature decided not to fund the mandate in the amendment, the implementing legislation could require a two-thirds vote for only the amendment rather than for the entire bill. Both of these possibilities assume that an accurate fiscal impact could be made within the necessary time.

VI. Overall Effectiveness

The joint resolution has already succeeded in elevating the issue of unfunded mandates. If adopted by the electorate, the amendment will also provide legislators who are concerned with unfunded mandates a
point of debate on the floor. The goal of slowing the flow of unfunded mandates, however, will probably not result from the passage of this constitutional amendment. Not only do the number of exceptions create a large body of privileged legislation, but the ability to override the provisions by an extraordinary vote makes every restriction nearly meaningless without strong legislative concern.

As noted previously, the GAO found that the key to the success of any mandate program is legislative concern.\(^{158}\) The Legislature, as a whole, demonstrated its lack of concern both in the 1988 Regular Session by passing the large unfunded mandate for pension benefits, and in the 1989 Regular Session not only by passing unfunded mandates, but also by adding the many exceptions to the mandate legislation. Although some legislators are concerned about local mandates, a majority of legislators are more concerned about not restricting state government. Without a genuine legislative intention to fund mandates, the Legislature will continue to pass unfunded mandates even with the constitutional provision in place. The loopholes are too large and many to impose legislative responsibility.

VII. CONCLUSION

Due to mandates imposed by the State, local governments find themselves in fiscal binds without total control over their fiscal predicament. In an effort to alleviate this dilemma, local governments turned to the Legislature for greater revenue or revenue generating capacity. However, the Legislature, also in a fiscal crisis, avoided the local governments for as long as politically possible. When the local governments finally insisted on the passage of a joint resolution, the result was proposed section 18, a watered-down version of the two original proposals by Representatives Saunders and Mortham.

The problem, however, will not be solved even if the constitutional amendment is approved by the electorate. A better solution would be genuine legislative responsibility for funding local mandates and, possibly, a change in the tax structure of the State. The State could give local governments more taxing authority, while still retaining the power to review local taxes, thus maintaining federalist separation of powers. Or, perhaps the State could raise taxes itself and share more money with the local governments rather than passing the buck to local officials.

A tax commission has been established which will address issues such as this.\(^{159}\) Such an independent commission is in a better position

\(^{158}\) GAO REPORT, supra note 20, at 41.

\(^{159}\) See FLA. CONST. art. II, § 5; id. art. XI, §§ 2, 5, 6.
to determine, and is more free to state, the revenue needs and possible
tax sources of both the State and local governments, than is the Legis-
lature. Also, the commission may propose a system in which local
governments have greater taxing authority.

Mandates are, no doubt, a question of responsibility and this con-
stitutional amendment is a step in the right direction. The imposition
of responsibility, however, will probably not occur through this con-
stitutional amendment alone.