

Special Report

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A Tax on Services Does Not Belong in the Constitution

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Inquisitive and enlightened statesmen are deemed everywhere best qualified to make a judicious selection of the objects proper for revenue....

*Alexander Hamilton
The Federalist No. 36*

The Committee Substitute for SJR 938 is a proposal to amend the Florida Constitution. This measure would require the broad-based taxation of services and restrict legislative authority over the sales and use taxes, despite the historic character of taxation as a legislative function, despite substantial difficulties engendered by existing mandates and constitutional restrictions on the legislative taxing power, despite the prior failure of a statutory services tax, and despite pervasive interpretive issues raised by the proposal. These features of the proposal, which are developed in the ensuing paragraphs, should dissuade even the most ardent advocate of tax reform from supporting this measure.

The questions whether Florida needs tax reform, whether broad-based taxation of services is responsive to the need, and whether a reasonably workable system for applying the sales and use taxes in this manner is feasible, are not addressed this article. Whatever the merits of those issues, the Constitution is not the proper vehicle for advancing them.

I. Existing Framework and History

Article VII, section 1(a) of the Constitution provides:

No tax shall be levied except in pursuance of law.

"Law" as used in the Constitution means an act of the Legislature. Article III, Section 6, Fla. Const; *see also Advisory Opinion to Governor*, 22 So. 2d 398 (Fla. 1945). The language in Article VII, Section 1(a) first appeared as Article XII, Section 3 of the Constitution of 1885, but its genesis was in the Constitution of 1838, which provided in Article VIII, Section 1:

The General Assembly shall devise and adopt a system of Revenue having regard to an equal and uniform mode of taxation, to be general throughout the State.

Thus, in adopting the existing Constitution and each of its predecessors, the people of Florida established taxation as a uniquely *legislative* function. They did not contemplate taxation by referendum. They recognized, as did the Legislature in proposing the current Constitution in 1968, that selection of the objects of taxation is a complex subject best left to the deliberative judgments of their elected representatives.

Although the principle is especially true in the context of taxation, the idea that the Constitution is not a place for statutes more broadly reflects the nature of a constitution as a charter document. As the Florida Supreme Court has observed:

The constitution is the framework of the government containing the general principles upon which the government must function. (citation omitted) It is not designed to provide detailed instructions for the method of its implementation. This must of necessity be left up to the legislature.

Johns v. May, 402 So. 2d 1166 (Fla. 1981).

In recent years, the Florida Constitution has increasingly become a vehicle for adopting changes in Florida government programs that the Legislature has the authority to enact as laws, but is unwilling to enact. The initiative process has produced most of these measures. An interest group favors a program, restriction, or requirement, the legislature is considered unreceptive to it, and a public relations campaign is waged to induce a favorable popular vote. Examples include the Everglades Trust Fund and "Polluter Pays" amendments now embodied in Article X, Section 17 and Article II, Section (7)(b), the Limited Marine Net Fishing amendment that appears in Article X, Section 16, and the High Speed Ground Transportation amendment in Article 10, Section 19.

On January 17, 2002, the Florida Supreme Court held that a proposed constitutional amendment to prohibit the inhumane treatment of pregnant pigs satisfied the legal requirements for inclusion on the ballot. *Advisory Opinion to the Attorney General Re: Limiting Cruel and Inhumane Treatment of Pigs During Pregnancy*, 27 Fla. L. Weekly 571 (Fla. 2002). The Court emphasized that its role in reviewing an initiative proposal is limited to determining whether the measure satisfies the single subject and ballot summary requirements. In a concurring opinion, Justice Pariente recalled these observations of Justice McDonald when the Limited Marine Net Fishing initiative was before the Court:

The legal principles in the state constitution inherently command a higher status than any other legal rules in our society. By transcending time and changing political mores, the constitution is a document that provides stability in the law and society's consensus on general, fundamental values. Statutory law, on the other hand, provides a set of legal rules that are specific, easily amended, and adaptable to the political, economic, and social changes of our society.

The power to change both the constitution and statutory law is, theoretically, vested in the people.... Recognizing the sovereignty of the people, I still feel compelled to express my view that the permanency and supremacy of state constitutional jurisprudence is jeopardized by the recent proliferation of constitutional amendments.

*** [t]he legislative power of the state is vested in the Legislature, art III § 1, and on matters that are statutory in nature, a concerted effort should be made to have the Legislature address the subject. **** It is my hope that the next Revision Commission will have the opportunity to establish some criteria regarding the subject matter of initiatives that will preserve the constitution as a document of fundamental laws, while still preserving the popular power of the people.

quoting from *Advisory Opinion to the Attorney General - Limited Marine Net Fishing*, 620 So. 2d 997, 999-1000 (Fla. 1993) (McDonald, J., concurring).

As Justice McDonald recognized, the principal threat to the Constitution as a charter document has in the past not come from the Legislature, but from abuse of the initiative process. *See also* Daniel Gordon, *Protecting Against the State Constitutional Law Junkyard: Proposals to Limit Popular Constitutional Revision in Florida*, 20 Nova L. Rev. 413 (Fall 1995). The prospect that the Legislature might contribute to demoting the Constitution to the status of a statutory code has not been actively contemplated because the Legislature, for the most part, has not engendered such concerns.

Another historical observation illustrates the results of constitutionally handcuffing the Legislature in tax matters. The 1968 Constitution expressly permitted the Legislature to classify four types of property for ad valorem tax purposes: agricultural, non-commercial recreational, stock in trade, and livestock. Art. VII, Sec. 4, Fla. Const. In 1973, the Supreme Court interpreted this provision as a prohibition against other statutory classifications. *Interlachen Lakes Estates v. Snyder*, 304 So. 2d 433 (Fla. 1973). Given the structure of the provision, this interpretation is understandable, if not inevitable, but the important lesson is in the consequences.

The consequences are these: beginning with *Interlachen*, the courts have repeatedly stricken property tax legislation for violating Article VII, Section 4. In *Interlachen* the statute dealt with the valuation of unsold platted lots. In *ITT Development Corp .v. Seay*, 347 So. 2d 1024 (Fla. 1977), it was a measure that allowed an alternative means of determining value. In *Valencia Center v. Bystrom*, 543 So. 2d 214 (Fla. 1989), it was a provision relating to the use of actual rent rather than market rent in commercial property valuation. In *Fuchs v. Robbins*, 738 So. 2d 338 (Fla. 3rd DCA 1999), appeal pending, the court struck a

statute deferring taxation of improvements to real property until they are substantially completed. Other statutes have also been challenged based on Article VII, Section 4, with no authoritative resolution to date.

Another line of decisions establishes that the Constitution limits legislative power to decide the property tax treatment of property owned by governmental entities. *See, e.g., Archer v. Marshall*, 355 So. 2d 781 (Fla. 1978); *Sebring Airport Authority v. McIntyre*, 783 So. 2d 238 (Fla. 2001). As a result, issues continue to vex local governments, leaseholders, and courts more than three decades after adoption of the 1968 Constitution. The fee interest of a city or special district in property that is not used for a public purpose must be subjected to ad valorem taxation, *Orlando Aviation Authority v. Hausman*, 534 So. 2d 1183 (Fla. 5th DCA 1988); *Canaveral Port Authority v. Department of Revenue*, 690 So. 2d 1226 (Fla. 1996). However, a county's interest in property is immune from taxation, regardless of use, *Id.* And it is constitutionally impossible for the use of a parcel of property to serve a public purpose if a private interest might derive a profit from it. *Sebring Airport Authority v. McIntyre*.

The constitutional restrictions on legislative authority in the property tax arena have been a continuing source of frustration for the Legislature. Given its repeated efforts to address property tax issues over the decades, it is evident that as an institution the Legislature believes it should have the flexibility to solve problems and meet changing needs in the field. Instead, it is essentially powerless to do so. The policies it establishes are consistently repudiated because of constitutional constraints.

It is understandable that the Legislature might propose an amendment to remove a restriction or clarify an issue; it is more difficult to appreciate why it would propose new mandates and restrictions that limit its own flexibility. One might expect proposals of that kind from other sources who object to legislative policies, but not from the legislative branch itself. The Legislature is an institution, and for current members to suggest that it is necessary to add new constitutional mandates and restrictions on its power would seem to undermine the vitality of the institution.

The origin of the sales and use taxes is also historically relevant. These levies were not designed to apply to services, and they are currently showing strains in the tangible personal property context. They were developed during the Depression, when commerce was largely local and the service economy was far less significant than it is now.¹ Today, transactions routinely cross jurisdictional lines, and sellers access markets without subjecting themselves to the taxing power of market states.² States perceive this as a threat to their revenues, and most of them, including Florida, are presently collaborating in an effort (the Streamlined Sales Tax Project) to accommodate the *conventional* sales and use taxes to the modern economy.³

Although taxation of some services, in some circumstances, may be relatively straightforward, the application of sales and use taxes to service transactions involving more than one jurisdiction is substantially more complex than with tangible personal property. The sale of a tangible object is generally a discrete, momentary, event that can be observed physically or documented contractually at a specified location. The same is true of the "use" of an object as the term is defined in use tax statutes.

With services the transaction is more likely to occur over time, and the locus of a sale or "use" is much more abstract. There is no passage of "title" in any traditional sense, nor does one transfer "possession" of a service. The provider may expend labor in several jurisdictions to provide a single service, and the purchaser's activities related to the service may also occur in several jurisdictions that are different than those in which the provider expended his labor. Application of sales and use taxes to services thus requires development of unique sourcing rules, which sellers and purchasers must be capable of administering at reasonable cost. And the potential for multiple jurisdictions asserting the right to tax the same transaction is substantially greater with services than with tangible personal property.

None of this means it is impossible to devise a reasonable system for the general taxation of services. It means, rather, that the effort requires more than simply pronouncing that the tax system is out of sync with the economy and that services will henceforth be taxed. It means working through the unique issues that are raised and developing thoughtful solutions, with due regard for the burdens created. This includes not only the tax burdens, but also the administrative and compliance burdens. Proponents of CS for SJR 938 imply that this has already occurred, pointing to prior studies of Florida's tax system and arguing that the subject has been studied enough. This argument obscures the distinction between a high level examination of Florida's tax structure, on the one hand, and the design of a workable regime for the application of sales and use taxes to services, on the other. The former undertaking has occurred, the latter has not.

Florida's own 1987 experience with broad-based sales and use taxes on services hardly invites optimism over the State's ability to design such a workable regime. Chapters 87-6 and 87-101, Laws of Florida were two complex bills, and were followed by voluminous Department of Revenue rules and rulings issued to individual taxpayers. The regime was not only politically unpopular, it was extraordinarily complicated and difficult for business to administer. The problem provisions included elaborate allocation and apportionment mechanisms, pursuant to which a service was either taxed entirely in Florida, only partially in Florida, or not at all. After six months the tax was repealed. Chapter 87-548, Laws of Florida.

Florida's existing constitutional framework and its history are important. The character of taxation as a legislative function, the Legislature's experience in attempting to overcome constitutional restrictions involving other taxes, the limited context in which sales and use taxes were originally designed, and the failure of Florida's prior experiment with general taxation of services, all counsel against a constitutional amendment to require such taxation. Other reasons relate to the specific nature of this proposal.

II. SJR 938

As of this writing, Floridians have been provided with two iterations of the proposal. Originally, SJR 938 unequivocally mandated that sales of all "goods and services" must be "subject to the general state sales and use tax." The only specified exceptions were groceries, health services, prescription drugs, and basic residential telephone service. The original proposal would have allowed the Legislature to establish exemptions, but only in accordance with vague criteria.⁴ Other restrictions were the requirement of a

three-fifths vote of both chambers for exemptions enacted after July 1, 2004, and the requirement that such legislation embrace no subject matter other than a single exemption. The proposal featured a reduction in the state rate to a maximum of 4%, with a higher rate requiring a three-fifths vote of the Legislature. Revenue neutrality would be required in fiscal 2004-2005.

Despite a number of interpretive issues, it is reasonably clear that the original proposal would have been self-executing insofar as the imposition of "sales and use tax" on all "goods and services" is concerned. Without the necessity for any legislative implementation, the taxes would have been automatically imposed on July 1, 2004. Indeed, the Legislature could have done nothing to prevent their imposition, except to the extent that specific transactions were brought to its attention and could reasonably be considered to fit within one of the exemption criteria.

On January 25, 2002, the Senate Finance and Taxation Committee approved a rewrite that is now identified as Committee Substitute for SJR 938. The committee substitute would tax "all sales of goods and services, *as defined by general law*," with the same exclusions as in the original version other than basic residential telephone service. The revision also excludes, "unless otherwise provided by general law," sales of tangible personal property purchased for resale or imported, produced, or manufactured in this state for export, sales of real and intangible personal property, employee salaries and benefits, and communications services. The criteria for exemptions are eliminated, but the other restrictions on enactment of exemptions are retained. ⁵

Although it appears to afford the Legislature greater flexibility than the original proposal, the rewrite is riddled with interpretive issues. Consider, for example, the taxation of goods and services "as defined by general law," and the absence of any super-majority or single subject requirement for the "definitions." Would the proposal allow the Legislature to avoid taxing a service merely by omitting a statutory definition for it? If so, the restrictions on exemptions would seem completely illusory. On the other hand, if this is not the intent, then it is the flexibility suggested by the change in language that becomes illusory.

The Florida Supreme Court has held that the words "as defined by law" as used in Article VII of the Constitution do not confer unlimited discretion in the Legislature, *Department of Revenue v. Florida Boaters Assn., Inc.* 409 So. 2d 17 (Fla. 1981). One could argue that the committee substitute confers legislative discretion only at the margins, so that in cases where the object of a transaction might be characterized in more than one way (for example, as a service or as an intangible), the statutory "definition" would control. If interpreted this way, the rewrite, like its predecessor, would be an unequivocal constitutional mandate to tax services. On the other hand, one could also posit that in the absence of legislative definitions, the tax on services has nothing on which to operate, and cannot be self-executing. ⁶

A third interpretation is that the definitions in CS SB 1106 would control the reach of the constitutional tax on services. This "implementing bill," approved by the Senate Finance and Tax Committee at the same January 25 hearing at which CS for SJR 938 was approved, defines the word "service" by listing 42

activities and their Standard Industrial Classifications. Would these services, embodied in a statute, effectively become part of the Constitution by virtue of contemporaneous enactment? If so, one must assume that the Legislature would be without power to delete any of the listed activities, at least without complying with the restrictions applicable to exemptions. This leaves unresolved the status of any services that are not listed in CS SB 1106.

Other interpretive issues abound. The proposed amendment refers to the "general sales and use tax" as though it were already established in the Constitution. It is not, however, nor is there a constitutional requirement that the State impose such taxes. They are purely of statutory creation, but now they would in some sense become permanent parts of our organic law.⁷ Presumably this means the Legislature would lack authority to repeal Chapter 212, Florida Statutes in its entirety. However, Chapter 212 is 90 pages long. One must decide whether the "general sales and use tax" that will now be constitutionalized includes all of Chapter 212 or only some of it, and if only some of it, which portions. A constitution exists independently of statutes, indeed, it is the foundation for them. By ambiguously referring to the statutory "general sales and use tax," the proposed constitutional amendment would turn this relationship on its head, with the result that we would lose forever the ability to discern where the Constitution ends, and Chapter 212 begins.

In commanding that all services must be taxed unless exempted, the proposal does not articulate the intended reach of Florida's taxing power. Many transactions have only tenuous connections with Florida. The proposal is silent as to the nature and extent of the connection that would trigger a state constitutional requirement to tax a service.

The manner in which this proposal is being promoted also merits mention. The public is told that households and small businesses should experience savings. This appears to be based upon a comparison of taxes paid *as taxes* under the existing system and under the proposal. However, unless the tax expenses that businesses will recover through prices are also quantified and included in the analysis, it is impossible to say whether the average consumer or small business will ultimately enjoy a savings. The tax savings assertions become even more speculative after the one year of revenue neutrality. If, as many fear, this proposal is a prelude to higher rates within the next few years, even the "tax as tax" savings could quickly evaporate.

Popular wisdom is that a constitutional amendment to allow a personal income tax could not gain voter approval in Florida. The difference between such an amendment and CS for SJR 938 is that the prospect of increased out-of-pocket costs would be immediately obvious to voters in the context of an income tax amendment, whereas with CS for SJR 938 the impact can be obscured by one's choice of arithmetic.

A final observation concerns the role of CS SB 1106, released following criticism that the proposal does not provide sufficient information about how it will work. The Senate leadership deserves credit for making the effort to provide information, but it is also likely to confuse voters. As a potential statute that can be modified, the implementing bill can at most provide them with one example of how the new regime *might* work. So, for example, the omission of the 1987-era draconian apportionment provisions

suggests that in operation the scheme *might* not include such mechanisms. But then again, it might. The suggestion that CS SB 1106 fills the gaps in CS for SJR 938 invites voters to believe they are voting for the implementing bill. They are asked to approve a proposal that experienced tax practitioners do not understand, on the promise of a savings that is speculative at best, and on the premise that the implementing bill is somehow part of the package on which they are voting.

III. The Proposal is Not Prudent

Based upon the foregoing, the following are reasons for opposing CS for SJR 938:

Levying taxes is a legislative function. The Legislature has the authority to expand the sales and use tax base and reduce the rate without the necessity for amending the Constitution. Since 1949, the sales and use tax have been modified many times without a plebiscite. There is no evidence that the public is outraged by this, or that there is popular misgiving over the Legislature having been accorded the constitutional duty to pass laws imposing taxes;

A legislature should not propose constitutional amendments to restrict its own freedom of action. As the most representative branch, it is charged with establishing and changing public policy through laws in accordance with changing conditions. By suggesting that its actions should be restricted constitutionally, it implies that it lacks confidence in its own institutional ability to pass laws for the public good. Future legislatures do not have a voice in the current process, yet their powers would be undermined by current members. The Legislature should protect its power as an institution;

The Legislature has tax committees in both chambers, and staff personnel with tax expertise. In addition, interest groups can often provide subject matter specialists to help flesh out the consequences of proposed tax legislation. However imperfect the process, it compares favorably to a superficial and polemical debate in the media. This is an advantage in the current constitutional system of delegating decisions about the levy of taxes to the legislative branch;

The Legislature's experience with constitutional property tax restrictions on its authority has been unsatisfactory. In that arena it wears a constitutional straight jacket. With CS for SJR 938, it would be fitting itself for another one. We should learn from our history;

The Legislature's experience with the general taxation of services has also been unsatisfactory. It makes no sense to suggest a constitutional mandate for a system that was a notorious failure in Florida as a statutory program. If the Legislature wants to experiment again with taxing services, it should act prudently and retain the flexibility to correct or repeal such taxes. We should learn from our history;

The proposal is so vague and ambiguous that voters would be confused over its effect, and once adopted, the many interpretive issues would plague tax administrators and taxpayers for years. No one can anticipate the consequences of requirements and restrictions that are poorly defined;

✚ The true economic impact on consumers, households, businesses and tourists is highly speculative. The intended and unintended consequences of a proposed new tax system should be assessed by a highly rigorous and independent and consensus process. Florida TaxWatch has consistently opposed attempts to legislate by constitutional amendment. The reasons are simple, compelling, and echo the concerns of Justice McDonald, quoted previously. Most recently, for example, the point was made in this way:

The Florida Constitution is a body of precepts, the purpose of which is to set forth, control and guide key governmental functions and the basic structure of government to provide for the health, safety and welfare of Floridians. The purpose of a constitutional amendment is not to reverse the perceived "unwisdom" of elected representatives. The Constitution should not be cluttered, though it often is, with specific provision pronouncements designed to appeal to sentiments perceived to be popular with segments of the electorate. (Briefings, *State Constitution Is Not the Appropriate Destination for Proposed High Speed Rail*, Florida TaxWatch, October 2000).

IV. The Other Side

The principal argument in favor of a constitutional amendment is that the people should be allowed to vote on tax reform. Assuming that adjusting the base and rate of a single existing tax regime qualifies as "reform," the argument is not persuasive. First, the same observation could be advanced with equal force with respect to virtually any bill the Legislature enacts. To suggest that a popular vote is required for "tax reform," but not for the Legislature's other business, invites the question whether any principled criteria have been employed to make such choices.

Second, the people have already spoken. In the absence of constitutional *restrictions* on legislative action, they have prescribed the levy of taxes as a duty of the Legislature. There is no popular clamor for shifting the decisions about what should be taxed back into the laps of the voters. They have not asked for referenda on such matters, and those who are forthright would admit that they lack the information required. Rather, they would point out that this is a task uniquely suited to the legislative branch, and one of the primary reasons for having a legislative branch. To suggest that this amendment is ill-advised is not to deprive voters of a say; it is to honor what they have already said.

Third, as previously explained, the proposal is confusing, deals with an arcane subject, and the information available to voters is not likely to provide them with an understanding of the impact.

Fourth, the gravity of this issue is not in the idea of a popular vote, it is in the proposal to amend the Constitution. A referendum that does not bind this Legislature or future generations would be a different matter. It is the essentially irrevocable character of this proposal that creates the most serious concerns about it.

In response to the contention that the Constitution is no place for provisions that should be enacted as statutes, proponents point out that such provisions are already prevalent. At the Senate Finance and Tax

Committee meeting of January 25, 2002, a sponsor remarked that if the people are to vote on the protection of pregnant pigs, they should certainly be allowed to vote on tax reform. However, the fact that the Constitution has already been muddled with programmatic content is not responsive to the contention that this is unhealthy and should not be exacerbated by the political leadership. It may be too late to preserve the "purity" of the Constitution as a charter document, but every improvident amendment creates its own set of adverse issues and risks. The Legislature may be unable to control abuses of the initiative mechanism, but it can control its own actions.⁸

The restrictions and the revenue neutrality provision in CS for SJR 938 have been advanced as major distinctions between this proposal and the 1987 service tax legislation. But the central difficulty in 1987 was the imposition of a Depression-era tax, that had been designed for local transactions in tangible personal property, on broad array of services crossing state lines. The more significant difference between the 1987 enactment and this proposal is that the 1987 measure was purely statutory and the Legislature was able to repeal it when it proved unworkable. CS for SJR 938 would not allow that flexibility.

V. Conclusion

The subject of taxation is always volatile and legislative leaders cannot be blamed for perceiving that popular support would assist them in achieving their goal. However, the means they have chosen is a constitutional proposal that is not in the best interests of the State. The voters of Florida have determined that the Legislature is best qualified to make decisions concerning the objects of taxation, and to modify those decisions as conditions require. This structural feature of Florida government should not be repudiated for political expediency.

ENDNOTES

1. The first general sales tax was enacted in Mississippi in 1932. The Florida sales and use taxes were enacted in the Revenue Act of 1949, Chapter 26319, Laws of Florida.
2. See, *Quill Corporation v. North Dakota*, 112 S. Ct. 1904 (1992).
3. See Special Report *Florida Joins the Streamline Sales Tax Project: An Important First Step in Modernizing Florida's Tax System* (Florida TaxWatch, August 2001).
4. The criteria were "encouraging economic development and competitiveness; supporting educational, governmental, religious, or charitable initiatives or institutions; or securing tax fairness by reducing or eliminating regressive tax burdens."
5. In both versions a majority vote is sufficient to enact exemptions until July 1, 2004. Thus, the vote of a future lawmaker would be worth only 5/6 the vote of a present lawmaker on the identical issue.
6. The question whether the proposal would be self-executing would affect the percentage of the popular vote required to approve it. See, Article XI, Section 7, Florida Constitution, requiring a two-thirds vote to approve taxes imposed "by any amendment to this constitution."
7. The sales and use taxes are codified in the same chapter, but they are different taxes, imposed on different events. There is no "state sales and use tax," as the proposal suggests in paragraphs (a)(1) and (2); there is a state sales tax and a state use tax. As written, the provisions would literally require the imposition of both taxes with respect to the same transaction.
8. Although the protection of pregnant pigs is not a proper subject for inclusion in the Constitution, at least the pregnant pig amendment is reasonably clear and unambiguous, so that people can understand what their votes would achieve. This

is not true of CS for SJR 938.

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