

### Art. III, § 40

Sec. 40. SPECIAL SESSIONS; SUBJECTS OF LEGISLATION; DURATION. When the Legislature shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session, or presented to them by the Governor; and no such session shall be of longer duration than thirty days.

#### History

The 1836 Constitution gave the governor power to call special sessions upon “extraordinary occasions” and, in the event of disagreement as to the time of adjournment, to adjourn both houses.

The 1845 and 1861 Constitutions provided that the governor could “by proclamation on extraordinary occasions convene the Legislature at the Seat of Government, or at a different place, if that should be in the actual possession of a public enemy.” He retained the power to adjourn both houses, but “not beyond the day of the next regular meeting of the Legislature.”

The comparable section of the 1866 Constitution remained unchanged except for adding another reason for convening the legislature outside Austin: “if that [city] shall be dangerous by reason of disease. . . .”

The Constitution of 1869 resembled its predecessors, except that it gave the governor “power,” by proclamation on extraordinary occasions, to convene a special session. In addition, this constitution deleted the provision authorizing the governor to adjourn both houses.

The summarized *Debates* of the Convention of 1875 yield no insight into the history of the present section, which has never been amended.

#### Explanation

Only the governor may convene the legislature in special session, the supreme court disapproving the senate’s doing so on its own to consider gubernatorial appointments in the only case found that decided the issue. (*Walker v. Baker*, 145 Tex. 121, 196 S.W.2d 324 (1946); see also the *Explanation* of Sec. 5 of this article.) The governor may of course submit any subject he wishes, and his proclamation doing so need not “state the details of legislation in order to give the Legislature jurisdiction to consider it at a special session. . . .” (Ex parte *Fulton*, 86 Tex. Crim. 149, 150, 215 S.W. 331, 334 (1919).) As a practical matter, the governor often submits draft legislation on the subjects he wants considered, usually through a member who will sponsor it.

The governor controls the agenda of a special session as to “legislation,” this section prohibiting the legislature from legislating on subjects not submitted. A few early cases interpreted “legislation” broadly, invalidating a special session resolution creating a committee to investigate a subject not submitted (e.g., Ex parte *Wolters*, 64 Tex. Crim. 238, 144 S.W. 531 (1912)), but for many years now the legislature has considered and adopted resolutions at special sessions on a variety of subjects not in the governor’s proclamations convening the sessions, and this practice has not been challenged. (See, e.g., Tex. Att’y Gen. Op. Nos. M-309 (1968) (study committee created by simple resolution); M-1167 (1972) (joint resolution petitioning amendment to United States Constitution); cf. *Ferguson v. Maddox*, 114 Tex. 85, 263 S.W. 888 (1924), discussed in the *Explanation* of Sec. 5.)

The governor’s real control of a special session’s agenda derives from his veto power (see Secs. 14 and 15 of Art. IV), with which he can disapprove bills passed on subjects not submitted, and not from this section. This is because the legislature’s compliance or noncompliance with Section 40 is shielded from judicial review, and thus enforcement, by the enrolled bill doctrine. Simply stated, this doctrine forbids

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the courts from going behind an enrolled bill (*i.e.*, a bill that has passed both houses, has been approved by the governor, and that appears regular on its face) to see whether the legislature complied with the various procedural rules (like Sec. 40) imposed on the legislative process by the constitution. The enrolled bill doctrine is discussed in the *Explanation* of Section 12, and suffice it here to note that Texas courts have applied the doctrine generally since the last century and have applied it specifically to shield noncompliance with Section 40. (See *City of Houston v. Allred*, 123 Tex. 334, 71 S.W.2d 251 (1934); *Maldonado v. State*, 473 S.W.2d 26 (Tex. Crim. App. (1971).) The courts' application of the enrolled bill doctrine to Section 40 should not imply that the legislature regularly legislates on subjects not submitted to the governor. As noted, the veto is always a threat, but more important is the legislature's responsibility to obey the constitution, which it enforces in this instance by parliamentary rule, noncompliance with Section 40 being subject to point of order objection.

The increasing number of special sessions of the Texas Legislature (as the *Author's Comment* to Sec. 5 notes, the 11 legislatures meeting between 1951-1971 held 17) is of course symptomatic of society's increasing complexity and state government's increasing involvement in it.

#### Comparative Analysis

In all states the governor has power to call special sessions. In North Carolina he does so "by and with the advice of the Council of State," consisting of certain elected executive officers. The legislatures of at least 22 states now have the power to call themselves into special sessions. A dozen or so states authorize the governor to call the senate into session alone. In Alaska the governor may convene either house.

Approximately 21 states limit the special session to the subject matter specified by the governor. With one exception these are states in which only the governor may convene a special session. The exception, Arizona, permits the governor to convene the legislature to consider a specified subject, but two-thirds of the members of each house can force a special session with no limitation on subject matter.

The President of the United States may "convene both houses [of congress], or either of them," but he has no power to limit the subject matter considered. Under the *Model State Constitution* a special session may be called by the governor or by the presiding officer of each house upon the written request of a majority of its members.

Thirty-five states have no limit on the length of a special session. The *Model State Constitution* has no limit either.

During 1970-71 special sessions were numerous, with 14 states holding them in 1970 and 20 in 1971. Florida and West Virginia each had two, and Missouri three, in 1970. Florida and Montana each had two in 1971. (Council of State Governments, *The Book of the States, 1971-72* (Lexington, 1972), p. 52.)

Approximately 23 states authorize the governor to adjourn the legislature in case of disagreement. About six states require a certificate of disagreement, but only Oklahoma calls for a certificate from the house first moving adjournment. In Colorado it is the house last moving adjournment that must certify; in Alaska and Rhode Island, either house; and in Arkansas, both houses. In most of the 23 states the governor is limited only by the prohibition against adjourning beyond the beginning date of the next regular session, but in a few states there are specific limitations such as not exceeding four months. The President of the United States, in the case of disagreement, may adjourn congress "to such time as he shall think proper." There is no comparable provision in the *Model State Constitution*.

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### Author's Comment

If the legislature is allowed to prescribe its own meeting times, as recommended in the *Author's Comment* on Section 5, the issue of legislative power to convene itself in special session should quickly become moot because the legislature may so order its business to prevent "emergencies" from occurring. Provision probably should be made for true emergencies occurring between statutorily prescribed sessions (although judging from congressional experience continuous sessions may eventually become a reality for state legislatures, too) and, as noted, Section 4.08 of the *Model State Constitution* permits either the governor or both houses of the legislature by majority vote to convene special sessions.

The questions of whether special sessions should be of constitutionally prescribed (limited) duration and who should control their agenda are also answered in terms of the basic issue: how to treat legislative sessions in the constitution? If the legislature is to be allowed to prescribe the frequency and duration of its regular sessions by law, surely it should be entrusted with responsibility to convene itself by simple majority vote in special session, consider what is necessary, and meet as long as necessary to deal with the emergency. If, on the other hand, a new constitutional convention opts for regular sessions of limited duration, it should nevertheless consider permitting the legislature as well as the governor to convene special sessions, perhaps upon two-thirds or three-fourths vote of each house and perhaps only to consider subjects submitted with the vote to convene.

The automatic postveto session, by which the legislature reconvenes to consider legislation vetoed by the governor after adjournment, is discussed in the *Author's Comment* on Article IV, Section 8.

Section 40 of this article of course belongs with the other sections dealing with legislative sessions (Secs. 5 and 24 of this article, Sec. 8 of Art. IV), and all should be consolidated if retained.

Sec. 41. ELECTIONS BY SENATE AND HOUSE OF REPRESENTATIVES. In all elections by the Senate and House of Representatives, jointly or separately, the vote shall be given viva voce, except in the election of their officers.

### History

The Constitution of the Republic provided that "All elections by joint vote of both Houses of Congress shall be viva voce, shall be entered on the journals, and a majority of the votes shall be necessary to a choice." The Constitution of 1845 provided for a viva voce (voice) vote in both joint and separate elections by the senate and house, except in the election of their officers, but eliminated the journal record requirement. The present wording has remained unchanged since 1845.

### Explanation

Before adoption of the Seventeenth Amendment to the United States Constitution in 1913, U.S. Senators were elected by state legislatures, and this section was aimed at ensuring a public vote for these elections. Today of course senators are popularly elected, and the only officers presently elected by the legislature, other than its own officers, are the governor, lieutenant governor, and other executive officers named in Article IV, Section 1, in case of a tie popular vote or contested election, and the governor and lieutenant governor if either dies or becomes totally incapacitated before qualifying. (See Art. IV, Sec. 3; Election Code art. 8.46.)

"Viva voce" means literally living voice, but the distinction the section makes is between secret ballot, which is permitted only to elect legislative officers, and public

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voting. The secret ballot exception for election of officers is to prevent a vindictive winner from punishing members who voted against him.

Strictly speaking the officers of the legislature are the lieutenant governor, who presides over the senate and is popularly elected; the president pro tempore of the senate, who is elected by the senators and presides when the lieutenant governor is absent; and the speaker of the house, who is elected by the representatives. (The elected speaker is authorized to appoint a speaker pro tempore by the house rules. Tex. H. Rule 1, Sec. 11 (1973).) The parliamentarian, chief clerk, and sergeant at arms of each house, and the senate secretary, are often referred to as officers, but they are actually employees of their respective houses, although the senate rules designate them officers (Tex. S. Rule 7 (1973)).

Section 41 does not prevent the use of a voting machine. The house has used one for years, but the senate still votes viva voce.

#### Comparative Analysis

Approximately two-thirds of the states specify that legislative elections shall be by ballot, and about one-third of these require secret ballot. A dozen or so states specifically authorize the use of voting machines.

The United States Constitution has nothing comparable and the *Model State Constitution* simply instructs the legislature to provide for "the administration of elections" by law.

#### Author's Comment

This section should be retained not only to ensure a public vote to break ties in gubernatorial (and other) elections (if Art. IV, Sec. 3, is preserved), but also to permit a secret ballot in legislative officer elections. In fact, consideration should be given to *requiring* secret election of officers by this section. Recent experience in house speaker elections point up the desirability of this kind of requirement, and although a secret ballot will not prevent abuse of power, it will encourage uncoerced voting by discouraging reprisal.

Sec. 43. REVISION OF LAWS. The first session of the Legislature under this Constitution shall provide for revising, digesting and publishing the laws, civil and criminal; and a like revision, digest and publication may be made every ten years thereafter; provided, that in the adoption of and giving effect to any such digest or revision, the Legislature shall not be limited by sections 35 and 36 of this Article.

#### History

Sections commanding periodic statutory revision have appeared in all earlier constitutions, with that of the Republic being the most specific:

So soon as convenience will permit, there shall be a penal code formed on principles of reformation, and not of vindictive justice; and the civil and criminal laws shall be revised, digested, and arranged under different heads; and all laws relating to land titles shall be translated, revised, and promulgated.

The exception of law revision bills from the subject/title and amendment/revival rules of Sections 35 and 36 originated in the present constitution.

#### Explanation

Until 1963 statutory revision in Texas was haphazard. Although a new Penal Code and Code of Criminal Procedure were enacted in 1856, the statutes at large

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were neither digested nor revised by the state until 1879. Thereafter similar bulk revisions were completed in 1895, 1911, and most recently in 1925.

A “bulk” revision as distinguished from “topical” revision deals with all or nearly all the state’s statutes, rearranging them into logical order and into a uniform format and culling out inoperative, inconsistent, and confusing provisions. The resulting revision is then reenacted by the legislature and becomes the law, superseding all of its source statutes. (See *American Indemnity Co. v. City of Austin*, 112 Tex. 239, 246 S.W. 1019 (1922)). A digest or compilation, on the other hand, merely rearranges the statutes into logical order to facilitate their consultation; a compilation is not reenacted and is not the law, although commercial compilations are usually accurate copies of the statutes and are customarily relied on by the bench and bar. (See Pool, “Bulk Revision of Texas Statutes,” 39 *Texas L. Rev.* 469 (1961).)

The legislature in 1963 created a permanent statutory revision program, to be carried on by the Texas Legislative Council, that will recodify all Texas statutes of a general and permanent nature into 26 topical codes and then keep them up to date on a continuing basis. (See Tex. Rev. Civ. Stat. Ann. art. 5429b–1.) Under this program a Business & Commerce Code and Water Code have already been enacted, and codifications of statutes dealing with alcoholic beverages, parks and wildlife, and natural resources are in progress. (An Education Code has also been enacted, but it was prepared by a gubernatorial committee, not the Legislative Council. See Freeman, “The Texas Legislative Council’s Statutory Revision Program,” 29 *Texas Bar Journal* 1021 (1966).)

Throughout the state’s history various substantive revisions or reforms of the statutes dealing with a particular topic have been undertaken. Unlike bulk revision or recodification, statutory reform seeks to improve the substance and operation of statutory law, often by repealing many existing statutes and drastically altering the remainder. The first example of statutory reform in Texas was the Penal Code and Code of Criminal Procedure of 1856; the most recent example is the Penal Code enacted by the 63rd Legislature. (For a history of statute law reform, see Comment, “Substantive Law Revision in Texas,” 37 *Texas L. Rev.* 740 (1959).)

Why the 1875 Convention thought it necessary to except law revision bills from the requirements of Sections 35 and 36 is difficult to guess. (See the *Explanation* of those sections.) Perhaps they feared a bill containing a major law revision would be considered to contain many subjects, one for each topic of the statutes included in the revision, and thus violate the unity-of-subject requirement of Section 35. But why they thought law revision bills needed exemption from the amendment or revival by reference prohibition of Section 36 defies speculation.

In the leading case on the effect of a law revision act, the Texas Supreme Court followed the decisional law of the great majority of American jurisdictions by holding that a bulk revision (the Revised Statutes of 1911) was the statute law of the state, that it repealed any statutes omitted, and that it completely replaced the 1895 revision and all statutes enacted since then. To the objection that the title of one of the revision’s source statutes was defective under Section 35 of this article, the court held that the title of the revision “cured” any title defect in the source statutes, quoting this section in passing, and a few pages later giving the real reason for its decision:

To say that the citizen, in order to know the law by which his rights are to be determined, must go through the many volumes of session laws enacted by nearly 40 different Legislatures, and examine the original acts, including the [titles] and repealing acts and clauses, is not to be seriously considered. . . . (*American Indemnity Co. v. City of Austin*, 112 Tex. 239, 251, 246 S.W. 1019, 1025 (1922)). See generally C. Dallas Sands,

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*Sutherland Statutory Construction*, 4th ed. (Chicago: Callaghan & Co., 1972), vol. 1A, ch. 28.)

#### Comparative Analysis

Four states, including Texas, provide for the revision of their statutes every ten years, while one state, Alabama, requires a revision every 12 years and is the only other state found that excepts revisions from the subject/title requirement. Arkansas provides for the revision, digest, and publication of laws at such times and in such manner as the legislature directs. Michigan authorizes the legislature to provide for the compilation of laws, arranged without alteration under appropriate headings, while South Carolina provides for a commissioner to index and arrange statutes when passed, codify the general statutes, and then report to the legislature at the end of every period not exceeding 10 years.

Both the United States Constitution and the *Model State Constitution* are silent on this subject.

#### Author's Comment

This section's single mandate was carried out in 1879, and of course the legislature has power to revise the statutes without constitutional authorization.

Does the section's third clause, containing the exception, merit retention? Only one other state, Alabama, has it, and the exception for law revision bills in its constitution is only from the subject/title requirement, making the Texas exception from the amendment or revival by reference prohibition unique and, as already noted, meaningless. It is safe to assume today that Texas courts, like their counterparts in the great majority of jurisdictions whose constitutions do not contain either exception, would uphold the title of a law revision act in the absence of this section if it specified the single subject of law revision. (See, *e.g.*, *Ex parte Jimenez*, 159 Tex. 183, 317 S.W.2d 189 (1958); *Sutherland*, sec. 28.06.)

Sec. 44. COMPENSATION OF PUBLIC OFFICERS, SERVANTS, AGENTS AND CONTRACTORS; EXTRA COMPENSATION; UNAUTHORIZED CLAIMS; UNAUTHORIZED EMPLOYMENT. The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this Constitution, but shall not grant extra compensation to any officer, agent, servant, or public contractors, after such public service shall have been performed or contract entered into, for the performance of the same; nor grant, by appropriation or otherwise, any amount of money out of the Treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law; nor employ any one in the name of the State, unless authorized by pre-existing law.

#### History

This section dates from the Constitution of 1845. The original section had a proviso preserving claims against the Republic. This was dropped from the section in the Constitution of 1869. The only substantive change made by the 1875 Convention was to add the final restriction on employment. This was a floor amendment adopted by voice vote. (See *Journal*, p. 268.) The action took place on October 1, 1875, a day which Professor McKay characterized as "without debates." (*Debates*, p. 134.) Thus it is unknown whether the addition was aimed at some evil that had arisen under the Reconstruction Constitution, whether the delegate who offered the amendment was closing an imagined loophole, or whether there was some other reason. Whatever the reason, it must have been noncontroversial.

### Art. III, § 44

#### Explanation

On its face this section governs compensation and payments by the state whereas Section 53 of this article governs compensation and payments by political subdivisions. The two sections differ in two respects that, under some circumstances, would lead one to believe that there were different meanings intended. One difference is the prohibition against employing anyone without pre-existing authority. As noted previously, this was added to Section 44 on the floor of the 1875 Convention; it was not added to Section 53. The other difference is the requirement in Section 44 of authorization by "pre-existing law" and in Section 53 only of "authority of law."

In his comprehensive article on fiscal and constitutional limitations in contracting with the state of Texas, Stephen D. Susman notes the second difference but concludes that it was not purposeful because Section 44 dates from the 1845 Constitution whereas Section 53 was added in 1875. (The article is part of a symposium on contracting with the state of Texas. Mr. Susman's article is titled "Fiscal and Constitutional Limitations," 44 *Texas L. Rev.* 106 (1965). His analysis of Section 44 is so comprehensive that only a summary explanation will be offered here. His discussion concerning the differences between Sections 44 and 53 appears on pages 129-30.)

Not only is no difference between the sections recognized by the courts, they sometimes rely on both sections in the same case or use Section 53 cases for precedent in a Section 44 case or vice versa. Notwithstanding this somewhat sloppy practice of indiscriminate citing of sections, the two are discussed separately in this annotation.

The first half of the section is straightforward and clear, so much so that there has been almost no litigation concerning it. (For a recent case where the State unsuccessfully invoked Sec. 44, see *The University of Texas System v. Robert E. McKee, Inc.*, 521 S.W.2d 944 (Tex. Civ. App.—Eastland, 1975, writ *ref'd n.r.e.*.) The section prohibits paying an extra amount for services performed or supplies contracted for. This is a prohibition that creates no problem except in the case of a desire to increase the pensions of employees after they have retired. (See *Author's Comment* following this *Explanation*.) There also appears to have been no problem of employing someone in the absence of a pre-existing law.

The principal difficulty arises from the prohibition against payment in the absence of pre-existing law. Under ordinary circumstances this is not too different from the normal rules for doing business with the government. In the world of private business one can normally rely upon a promise by a representative of a business because the common law recognizes an agent's apparent authority to commit his principal. In the case of government business, there can be no reliance on apparent authority. But this is not so bad as it seems, for the authority of government agents is a matter of law and the law is available to the public. If a law authorizes the Widget Department to purchase widgets only after advertising for bids and only to the lowest responsible bidder, a widget manufacturer can hardly complain if his negotiated contract is repudiated. Likewise, if an appropriations bill authorizes the purchase of ten widgets and appropriates \$10,000 for them, a businessman can satisfy himself that a government purchasing agent has no power to buy ten widgets for \$15,000.

In theory and to a considerable degree in practice, Section 44 is defensible. People doing business with the government may have to rely on more legal advice than when dealing with private parties, but this is only an added cost of doing business with the government, a cost normally passed on to the government. Yet there can be inequities. Consider the emergency situation. *State v. Ragland Clinic-*

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*Hospital* involved a medical bill for services for treating a man who had been shot accidentally by an agent of the Liquor Control Board. The agent took the man to the hospital and promised that the state would pay the bill. The promise was no good. “[No] one has authority to make a contract binding on the State except where he is authorized so to do by the Constitution or a pre-existing statute.” (138 Tex. 393, 395, 159 S.W.2d 105, 106 (1942).) Obviously an emergency room physician can hardly be expected to refuse treatment until the hospital’s counsel is reached for an opinion. Indeed, the physician could hardly refuse treatment if his counsel told him the promise was no good. Of course, the state can put a statute on the books covering emergencies, but can the legislature anticipate all emergencies? In any event, the real issue is whether the constitution should forbid subsequent payment of a just bill. (See *Author’s Comment* following this *Explanation*.)

Another situation, discussed by Mr. Susman, is that of the misleading pre-existing law. He cites a situation where a statute gave contracting authority to an agency but the attorney general ruled that the contractor could not be paid because a later statute dealing with another matter repealed the pre-existing authority by implication. (*Susman*, pp. 137-38.)

Section 44 states that no money may be paid out for any claim unless there was pre-existing authority. This destroys the ancient common law rules of *quantum meruit*, restitution, and unjust enrichment. Ordinary people may be able to get out of contracts for good legal reasons, but they usually have to pay a fair price for anything that they have received and cannot return, or return it if that is appropriate, or give up an unjust windfall. Under Section 44 the state keeps its ill-gotten gains and pays nothing.

The most significant consequence of a Section 44 problem was the adoption of Section 23-a of Article III.

#### Comparative Analysis

See *Comparative Analysis* of Section 53.

#### Author’s Comment

It is worth noting at some place—this is as good as any—that the economists tell us that there is no such thing as a free lunch. All these restrictions against paying out public moneys mean that someone does not receive money that he deserves. In many of the cases the government ends up with a “free lunch” but some citizen or corporation—poor or rich—ends up having paid for the “lunch.”

Except for the reason discussed below, the difficulties under Section 44 evaporate if the section ends at the semicolon. The government would then stand on the same footing as the public—subject to ordinary contract law.

Retention of the first half of Section 44 could create a problem if the state or any of its political subdivisions decided to do something about inequities in a pension system. Many employers, both government and private, recognize the erosion of pensions of retired employees and from time to time make cost-of-living adjustments. In the case of a government the adjustment can be defended as an expenditure for a public purpose. It is not easy to defend the adjustment in the case of a Section 44 prohibition against extra compensation.

In sum, one must conclude that Section 44 may prevent corrupt feeding at the public trough but equally may prevent expenditures that are wholly justifiable.

Sec. 45. CHANGE OF VENUE IN CIVIL AND CRIMINAL CASES. The power to change the venue in civil and criminal cases shall be vested in the courts, to be



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exercised in such manner as shall be provided by law; and the Legislature shall pass laws for that purpose.

#### History

The court's power to change venue was first mentioned in the Constitution of 1845; it was lumped together with a provision for penitentiaries in a section that read: "The Legislature shall provide for a change of venue in civil and criminal cases; and for the erection of a Penitentiary at as early a day as practicable." (Art. VII, Sec. 14.) The venue-changing provision probably was considered necessary because of the belief that courts had no common-law power to change venue. (See *Rogers v. Watrous*, 8 Tex. 62 (1852).)

The section was retained with no change through the 1861 and 1866 Constitutions (Art. VII, Sec. 14), and in 1869 the only change was deletion of the portion relating to erection of a penitentiary (Art. XII, Sec. 10). The more verbose language now in effect was drafted by the 1875 Convention. It provides a classic illustration of why a simple, straightforward command is all that is necessary: the courts have held that the 38 words of the present longer version mean exactly the same thing as the 14 words of the 1845 version. (*Buchanan v. Crow*, 241 S.W. 563 (Tex. Civ. App.—Austin 1922, *no writ*).)

#### Explanation

This section undertakes three tasks: (1) to give courts power to change venue, (2) to authorize the legislature to regulate the method by which that power is exercised, and (3) to direct the legislature to do so. The Texas courts to some extent have thwarted the first of those objectives by holding that courts have no power to change venue unless a statute authorizes them to do so. (*Humphrey v. Rawlins*, 88 S.W.2d 776 (Tex. Civ. App.—Dallas 1935, *no writ*).) Thus, the section has been interpreted as if it read "the courts shall have such power to change venue as the legislature may provide."

On the other hand, the authority of the legislature to restrict the courts' venue-changing power has been limited by federal court decisions. The Supreme Court has held that a state court must grant a change of venue in a criminal case if such a change is necessary to ensure the defendant a fair trial. (*Irvin v. Dowd*, 366 U.S. 717 (1961).) The lower federal courts have been even more specific, holding that a Texas court must order a change of venue in a criminal case, if necessary for a fair trial, even if a state statute forbids it. (*Mason v. Pamplin*, 232 F. Supp. 539 (W.D. Tex. 1964).) Thus, in some cases, the courts must exercise venue-changing power in criminal cases irrespective of statute. Section 45 therefore is not fully effective in authorizing the legislature to regulate changes in venue.

The third objective of the section—the directive to the legislature to pass laws regulating changes of venue—has fared better. In civil cases, the legislature has delegated this power to the Texas Supreme Court, which has promulgated rules governing changes of venue. (See Rules of Civil Procedure, rules 255, 257-61.) In criminal cases, the legislature itself has prescribed the rules governing the manner in which courts exercise their venue-changing power. (Code of Criminal Procedure arts. 31.01-31.07.)

Another section of the constitution prohibits the legislature from passing local or special laws changing venue in civil or criminal cases. (See the Annotation of Art. III, Sec. 56.)

#### Comparative Analysis

Most state constitutions simply do not mention the subject of venue. Neither

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the federal constitution nor the *Model State Constitution* mentions it.

About 15 state constitutions do mention the subject, and about ten of those give the courts power to change venue, subject to regulation by the legislature. About five states describe constitutionally some of the circumstances under which a change of venue should be granted. (See, *e.g.*, Maryland Constitution Art. IV, Sec. 8.)

About half of the state constitutions prohibit the legislature from changing venue by local or special law.

#### Author's Comment

There is little reason to retain this section. As pointed out in the preceding *Explanation*, it has not succeeded in giving courts venue-changing power irrespective of statute, but neither does it prevent courts from exercising that power in the absence of statute. The subject of venue is thoroughly covered by statute and rule, so deletion of this section would not change existing practice.

If the section is retained, the more concise language of the 1845 version should be used.

Sec. 47. LOTTERIES AND GIFT ENTERPRISES. The Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this State, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principle, established or existing in other States.

#### History

Article VII, Section 17, of the Constitution of 1845 contained this provision:

No lottery shall be authorized by this State; and the buying or selling of lottery tickets within this State is prohibited.

An identical prohibition is found in the Constitutions of 1861, 1866, and 1869.

In 1874 and 1875 the Texas Supreme Court decided the cases of *State v. Randle* (41 Tex. 292 (1874)) and *Randle v. State* (42 Tex. 580 (1875)). In those cases the Galveston Gift Enterprise Association attempted to avoid prosecution under the Penal Code article prohibiting lotteries on the grounds that conduct constituting the establishment of a lottery was not defined by the Code; that the legislature had licensed their operation by authorizing an occupation tax on gift enterprises; that religious and charitable organizations freely conduct lotteries; and that everyone who received a ticket received something of value. The court affirmed the conviction, citing cases in other states and treatises for a definition of lottery as "a scheme for the distribution of prizes by chance." The court also chastised religious and charitable organizations for employing unlawful means to achieve worthy ends, condemned novel subterfuges and evasions of conventional lottery rules in an attempt to avoid prosecution, and held that the legislature had no power to legalize lotteries by imposing a tax on "gift enterprises."

The activities giving rise to this case are probably the source of the resolution offered by Mr. DeMorse that became the present Section 47. (*Journal*, p. 139.) Other resolutions offered restatements of the prior constitutional language. (*Journal*, pp. 51-52, 65, 390.) An amendment was offered to add the words "and shall pass laws prohibiting gambling of every character in all places," but this amendment failed. (*Journal*, p. 269.) Curiously, an amendment was adopted on third reading striking everything after the word "State," but the engrossed constitution failed to make this deletion. (See *Journal*, p. 504. This may be a

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mistake in the *Journal*.) A slight rewording of DeMorse's resolution was adopted as Section 47. No amendment to the section has been submitted to the voters since the constitution was ratified.

#### Explanation

One plausible reading of this section is that the legislature is directed (1) to prohibit the establishment of lotteries and gift enterprises in Texas and (2) to prohibit the sale in Texas of tickets for lotteries, gift enterprises, or other evasions involving the lottery principle existing in other states.

However, the courts have given a broader interpretation to these directions. In *Castilleja v. Camero* (414 S.W.2d 424, 430 (Tex. 1967)), Justice Pope tabulates the section as follows:

The Legislature shall pass laws prohibiting the [1] establishment of lotteries and gift enterprises in this State, [2] as well as the sale of tickets in lotteries, gift enterprises or [3] other evasions involving the lottery principle, established or existing in other States.

Even though the section is apparently not self-executing the courts have cited it as stating public policy, and in *City of Wink v. Griffith Amusement Co.* (129 Tex. 40, 100 S.W.2d 695 (1936)), said that even though only lotteries are covered by the Penal Code, effect must be given to the language of this section so that "gift enterprises" and "other evasions" are also prohibited. The court denied Griffith an injunction against enforcement of a local ordinance aimed at stopping "bank night" at a local theatre on the ground that a party guilty of violating this public policy does not have "clean hands." (Actually, the ordinance was void because it conflicted with a state penal statute.)

In *Barry v. State* (39 Tex. Crim. 240, 45 S.W. 571 (1898)), the court reasoned that a tax on the carnival games of pitching rings or throwing balls cannot authorize a lottery. Likewise, the attorney general has ruled that the legislature may not exempt churches, veterans' organizations, or other nonprofit charitable organizations from prosecution under the lottery provisions of the Penal Code. (Tex. Att'y Gen. Op. No. M-964 (1971).)

The courts have decided that not all distributions of prizes by chance are prohibited, however. In *Brice v. State* (156 Tex. Crim. 372, 242 S.W.2d 433 (1951)), the court held that payment of a consideration, directly or indirectly by the participant, is an element of the lottery offense; therefore, a free drawing for prizes by a retail store where no purchase was necessary to win and no favoritism was shown customers of the store was not a lottery.

The public policy against lotteries is not so strong that it prevents Texas courts from enforcing the rights of the co-owner of a winning ticket in the Mexican National Lottery (*Castilleja v. Camero, supra*). In this case the ticket was purchased in Mexico and redeemed in Mexico, where lotteries are legal.

#### Comparative Analysis

Almost 30 states contain constitutional prohibitions against lotteries. Most of the more recent constitutions omit any reference to lotteries. Several states constitutionally exempt religious and other charitable organizations from their lottery prohibitions. In 1971 Virginia voters adopted a new constitution omitting a lottery prohibition and at the same election specifically repealed the lottery prohibition in the old constitution. The *Model State Constitution* does not mention lotteries.

## Art. III, § 48a

### Author's Comment

Lotteries and gambling generally are carefully defined and penalized by the new Penal Code that took effect January 1, 1974. (See Penal Code ch. 47 (1974).)

Lotteries were lawful under common law, but during the 19th century there was a nationwide movement against them resulting in widespread adoption of anti-lottery provisions in penal codes and state constitutions. Recently, New Hampshire, New York, Massachusetts, New Jersey, and Michigan have established state lotteries as a source of revenue.

With the enactment of the new Penal Code, Texas has adopted tougher anti-lottery laws than it has ever had before. The inclusion of an anti-lottery provision in the constitution adds nothing to the penal law. Moreover, if the people of Texas desire to change the policy regarding lotteries, by exempting churches and veterans' organizations for example, or by establishing a state-operated lottery, these changes should be possible without the necessity of amending the fundamental document of the state government.

#### Sec. 48a. FUND FOR RETIREMENT, DISABILITY AND DEATH BENEFITS FOR EMPLOYEES OF PUBLIC SCHOOLS, COLLEGES AND UNIVERSITIES.

In addition to the powers given the Legislature under Section 48, Article III, it shall have the right to levy taxes to establish a fund to provide retirement, disability and death benefits for persons employed in the public schools, colleges and universities supported wholly or partly by the state; provided that the amount contributed by the state to such fund each year shall be equal to the aggregate amount required by law to be paid into the fund by such employees, and shall not exceed at any time six per centum (6%) of the compensation paid each such person by the state and/or school districts; and provided that no person shall be eligible for retirement who has not rendered ten (10) years of creditable service in such employment, and in no case shall any person retire before either attaining the age of fifty-five (55) or completing thirty (30) years of creditable service, but shall be entitled to refund of moneys paid into the fund.

Moneys coming into such fund shall be managed and invested as provided in Section 48b of Section III of the Constitution of Texas; provided a sufficient sum shall be kept on hand to meet payments as they become due each year under such retirement plan, as may be provided by law; and provided that the recipients of such retirement fund shall not be eligible for any other state pension retirement funds or direct aid from the State of Texas, unless such other state pension or retirement fund, contributed by the state, is released to the State of Texas as a condition to receiving such other pension aid; providing, however, that this Section shall not amend, alter, or repeal Section 63 of Article 16 of the Constitution of Texas as adopted November, 1954, or any enabling legislation passed pursuant thereto. (Repealed April 22, 1975. See Sec. 67 of Art. XVI.)

### History

This section was added to the constitution by amendment in November 1936. Although denominated and worded as an amendment of Section 48, repealed in 1969, Section 48a actually had nothing to do with Section 48. That section was one of many which the Convention of 1875 included in a misguided effort to keep the state government from spending much money. Section 48 told the legislature that it had no right to raise money except for the "economical administration of the government," and added a laundry list of proper purposes for spending money. Except as political orators may have found the admonition effective in campaigning, the section served no function as a limitation on power. At least no court is reported to have invalidated any tax on the ground that Section 48 prohibited it.

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Indeed, the supreme court once said that any tax that served a public purpose met the requirements of Section 48. (See *Friedman v. American Surety Co.*, 137 Tex. 149, 158, 151 S.W.2d 570, 577 (1941).) Section 48 was included in the bundle of superfluous sections repealed by the omnibus “clean-up” amendment adopted in 1969.

Section 48a is really an amendment of Section 51 of this article. In 1917 the State Teachers’ Association began a campaign to obtain a statewide pension system. Their first effort was rejected in 1919 by the Education Committee of the Texas House of Representatives on the ground that the proposal would be unconstitutional under Section 51. That section prohibits grants to individuals, and the assumption must have been that state contributions to a retirement fund would be grants to individuals. In any event, the Teachers’ Association campaigned for a constitutional amendment and succeeded with the adoption of Section 48a. (See Swanson and Miskell, *Public Employee Retirement in Texas* (Austin: Institute of Public Affairs, The University of Texas, 1955), pp. 1-2) The section was amended twice—in 1956 and in 1968.

The original Section 48a provided that the state had to contribute an amount equal to the contribution of the employee but that the legislature could not allow the employee to contribute either more than 5 percent of his salary or more than \$180.00 a year. The first amendment to the section increased the maximum percentage to six and the maximum amount to \$504.00. The second amendment eliminated the annual maximum so that total salary was subject to a 6 percent maximum contribution to be matched by the state.

The original section also provided that no pension could be paid to a person unless he had 20 years of creditable service but that any person not entitled to a pension would receive a refund of his contributions. The first amendment changed the eligibility rules to require 30 years of service or attainment of age 55. Coverage also was broadened to add disability and death benefits to retirement pensions. The second amendment added the requirement for a minimum of ten years of service in any event.

Finally, the original section required that the retirement fund be invested in government bonds. The first amendment loosened up this restriction by permitting investment “in such other securities as are now or hereafter may be permitted by law as investments for the Permanent University Fund or for the Permanent School Fund. . . .” This was superseded by Section 48b adopted in 1965. The second amendment conformed Section 48a to Section 48b.

Section 48a and all other sections dealing with pensions were repealed on April 22, 1975, when the voters adopted an amendment to replace these several sections. The new pension provision is Section 67 of Article XVI. For reasons discussed in the *Explanation* of Section 67, it is appropriate to retain the annotations of the repealed sections.

#### Explanation

Section 48a appears to have served two constitutional purposes: (1) to obtain the power to provide pensions and (2) to create a pension right that could not be taken away by statute. As noted above, a statutory retirement program was once turned down because of the prohibition of Section 51, and one must assume that the original Section 48a was proposed by the 44th Legislature because of this prohibition. The problem is that the 45th Legislature, which passed the Teacher Retirement System bill, also passed the State Firemen’s Relief and Retirement Fund bill, for which there was no preceding specific constitutional authorization. The 45th Legislature evidently did not view Section 51 as an obstacle to the firemen’s fund.

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Part of the confusion may have grown out of the case of *Byrd v. City of Dallas* (118 Tex. 28, 6 S.W.2d 738 (1928)). That case upheld a city pension plan authorized by a statute passed in 1919, the same year that the teachers' proposal was turned down on constitutional grounds. The Dallas plan was attacked both as violating the extra compensation prohibition (Secs. 44 and 53 of this article) and the "grants" provisions (Secs. 51 and 52 of this article). The court's answer was that a pension plan instituted for present employees and payable when they retire is a part of current compensation. It also was argued that it would be invalid to award full pensions to policemen and firemen who retired after the minimum of 20 years but whose service included many years before there was a plan. The court noted that the relationship between contributions to the fund and pensions might be unequal but stated that this was a matter of legislative wisdom and not power. It may be that the 1935 and 1937 legislatures felt secure with the *Byrd* case in backing pensions for local governments but unsure about state pension plans.

Even if the *Byrd* case had been accepted as supporting any retirement plan, employees still would have an interest in a constitutional provision concerning pensions. Over the years the courts have built up a confusing body of law that, in many states, allows the government to renege on what would appear to many to be vested contractual rights. Some people may believe that Section 48a gave teachers vested rights. This is undoubtedly true as to money in the retirement fund. It was not so clear that the legislature had any obligation to keep adding to the fund or to preserve the law that required employees to contribute to the fund. Section 48a was a grant of power with certain limitations on the power; it was not a limitation on the discontinuance of the use of the power. (See *Author's Comment* below and the Annotation of the new Sec. 67 of Art. XVI.)

Subsection (a) of Section 62 of Article XVI, added in 1946, tracked Section 48a in authorizing a retirement system for state employees. In 1949 the legislature passed a bill authorizing transfer of credited service from one system to the other. The supreme court struck this down. (*Farrar v. Board of Trustees*, 150 Tex. 572, 243 S.W.2d 688 (1951).) The court italicized the words "persons employed" in the first sentence of Section 48a and the words comprising what is now the second proviso of the second sentence. The court relied on the words "persons employed" to rule that the legislature had no power to permit transfer of credited service between the two similar plans. (Sec. 63 of Art. XVI "overruled" the *Farrar* case.)

The only other case of any significance construing this section is *Woods v. Reilly* (147 Tex. 586, 218 S.W.2d 437 (1949)). The case involved the common option whereby a pensioner can accept a smaller pension for the rest of his life in return for a continuation of the pension to another person, normally the pensioner's spouse. The supreme court was faced with the literal wording of the section as it then existed: ". . . a Retirement Fund for persons employed in public schools, [etc.] . . ." The court found a way around this by distinguishing between the right to receive a pension and the method by which payment is made. This result is sensible enough, for if the reduced amount is actuarially correct the total cost of all such options is neither more nor less than full payments without options. Conceptually, the opinion leaves much to be desired; indeed, one justice specifically repudiated the distinction.

The *Woods* case also explained the meaning of the obscurely worded second proviso of the second sentence. The court said that it meant that a teacher could not get a second state pension or receive direct state aid unless he gave up the state's contribution toward his teacher's retirement. As noted above, Section 63 of Article XVI allowed transfer of credited service from the state employees' system to the teachers' system, thus effectively nullifying the restriction of the proviso

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insofar as two pensions were concerned. Presumably the section continued to be operative insofar as "direct aid" was concerned. Thus, if a retired teacher's pension was so small that he had to apply for state aid, his pension would have to be cut in half. This would make his need all the greater, and presumably the amount of state aid would be increased. This is known as "robbing Peter to pay Paul."

Early in 1975, before the new Section 67 was adopted, the decision was made to increase the pensions of retired teachers and state employees. On the face of it, this proposal would seem to fly in the face of Section 44 prohibiting extra compensation after work is performed, in the face of the *Byrd* case discussed earlier, and possibly in the face of the "grants" prohibition of Section 51 of this article. In an opinion dated January 17, 1975, the attorney general neatly finessed this problem by ignoring it and concentrating on the specific words of Section 48a (and the comparable wording of Section 62 of Article XVI). The attorney general noted that Section 48a prohibited the state from contributing more than 6 percent of the compensation paid to teachers. He ruled that the state could appropriate additional funds to the retirement system to the extent that previously contributed amounts did not add up to 6 percent of compensation paid to teachers. (Tex. Att'y Gen. Op. No. H-497 (1975).)

In an opinion issued the same day, the attorney general, discussing a different question concerning teachers, revealed one of the ways in which there might be room to add to the state's contribution. In the context of the issue involved, the attorney general said that "it is our opinion that in computing the maximum allowable state contribution, the total salaries of all participating employees may be used. Since some covered employees earn in excess of \$25,000 per year, it is possible that the state is not currently contributing to the maximum amount allowable under the Constitution." (See Tex. Att'y Gen. Op. No. H-498 (1975). The opinion notes that for contribution purposes the statute, as opposed to the constitution, limits the state's 6 percent contribution to compensation up to a maximum of \$25,000 a year.) What is not clear from these opinions is how far back one may go in totting up 6 percent of total compensation for all teachers. As the preceding *History* points out, the state's contribution from 1937 to 1956 was limited to 5 percent of a salary of \$3,600 and from 1956 to 1968 to 6 percent of a salary of \$8,400. If the 1968 wording relied upon in the two opinions is effective retroactively to 1937, there might be great leeway in appropriating money to increase pensions of retired teachers. All in all, the attorney general's opinion is a masterful bit of ingenuity in getting around Sections 44 and 51 and, for that matter, Section 6 of Article XVI, prohibiting the appropriation of money for private purposes. Except in the "robbing Peter to pay Paul" situation discussed above, an increase in the pension of a retired person would normally be considered an appropriation for a private purpose, a gift, and extra compensation after work was performed. But Section 48a as of 1948 as interpreted by the attorney general can be read to "repeal" Sections 44 and 51 and, of course, Section 6 of Article XVI specifically authorizes appropriations for "individual purposes" if "authorized by this Constitution."

As a practical matter, the questions raised above are both academic and de minimis. A statute that became effective on February 13, 1975 (Tex. Laws 1975, ch. 6) provided for an increase in pensions of retired teachers but the increase was to end unless what is now Section 67 of Article XVI was adopted by the voters. This happy event occurred on April 22, 1975; thus, the increased payments under Section 48a were only for the months of February, March, and April. Payments after that are under Section 67. (See the *Explanation* of that section for a discussion of the constitutional basis for increases in the pensions of those retired.)

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Since the pensions of retired teachers were miserably low, it would have been unlikely that any Scrooge would have attempted to halt the payment of this miniscule amount. In any event, no attempt was made; had it been made the attorney general's ingenious reasoning would surely have prevailed.

**Comparative Analysis**

See the *Comparative Analysis* of Section 67 of Article XVI.

**Author's Comment**

See the *Author's Comment* on Section 67 of Article XVI.

Sec. 48b. TEACHER RETIREMENT SYSTEM OF TEXAS. There is hereby created as an agency of the State of Texas the Teacher Retirement System of Texas, the rights of membership in which, the retirement privileges and benefits thereunder, and the management and operations of which shall be governed by the provisions herein contained and by present or hereafter enacted Acts of the Legislature not inconsistent herewith. The general administration and responsibility for the proper operation of said system are hereby vested in a State Board of Trustees, to be known as the State Board of Trustees of the Teacher Retirement System of Texas, which Board shall be constituted and shall serve as may now or hereafter be provided by the Legislature. Said Board shall exercise such powers as are herein provided together with such other powers and duties not inconsistent herewith as may be prescribed by the Legislature. All moneys from whatever source coming into the Fund to provide retirement, disability, and death benefits for persons employed in the public schools, colleges, and universities supported wholly or partly by the state and all other securities, moneys, and assets of the Teacher Retirement System of Texas shall be administered by said Board and said Board shall be the trustees thereof. The Treasurer of the State of Texas shall be custodian of said moneys and securities. Said Board is hereby authorized and empowered to acquire, hold, manage, purchase, sell, assign, trade, transfer, and dispose of any securities, evidences of debt, and other investments in which said securities, moneys, and assets have been or may hereafter be invested by said Board. Said Board is hereby authorized and empowered to invest and reinvest any of said moneys, securities, and assets, as well as the proceeds of any of such investments, in bonds, notes, or other evidences of indebtedness issued, or assumed or guaranteed in whole or in part, by the United States or any agency of the United States, or by the State of Texas, or by any county, city, school district, municipal corporation, or other political subdivision of the State of Texas, both general and special obligations; or in home office facilities to be used in administering the Teacher Retirement System including land, equipment, and office building; or in such corporation bonds, notes, other evidences of indebtedness, and corporation stocks, including common and preferred stocks, of any corporation created or existing under the laws of the United States or of any of the states of the United States, as said Board may deem to be proper investments; provided that in making each and all of such investments said Board shall exercise the judgment and care under the circumstances then prevailing which men of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income therefrom as well as probable safety of their capital; and further provided, that a sufficient sum shall be kept on hand to meet payments as they become due each year under such retirement plan, as may now or hereafter be provided by law. Unless investments authorized herein are hereafter further restricted by an Act of the Legislature, no more than one per cent (1%) of the book value of the total assets of the Teacher Retirement System shall be invested in the stock of any one (1) corporation, nor shall more than five per cent (5%) of the voting stock of any one (1) corporation be owned; and provided further, that stocks eligible for purchase shall be restricted to stocks of



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companies incorporated within the United States which have paid cash dividends for ten (10) consecutive years or longer immediately prior to the date of purchase and which, except for bank stocks and insurance stocks, are listed upon an exchange registered with the Securities and Exchange Commission or its successors; and provided further, that so long as less than \$500,000,000 of said Fund is invested in the government and municipal securities enumerated above, not more than thirty-three and one-third per cent (33 1/3%) of the Fund shall be invested at any given time in common stocks. This Amendment shall be self-enacting and shall become effective immediately upon its adoption without any enabling legislation. This Section shall not alter, amend or repeal the first paragraph of Section 48a of Article III of the Constitution of Texas as amended November 6, 1956, or any legislation passed pursuant thereto. This Section shall not alter, amend or repeal the second paragraph of Section 48a of Article III of the Constitution of Texas as amended November 6, 1956, or any legislation passed pursuant thereto, except insofar as the provisions of the second paragraph of Section 48a and any legislation passed pursuant thereto, may limit or restrict the provisions hereof and only to the extent of such limitation or restriction. (Repealed April 22, 1975. See Sec. 67 of Art. XVI.)

#### History

This section was added in 1965. In essence it was an amendment of Section 48a as the section then read. (The 1968 amendment of Section 48a served in part to make it consistent with the new Section 48b.) It was repealed on April 22, 1975. (See *History* of Sec. 67 of Art. XVI.)

#### Explanation

This section served one major purpose and two minor purposes. One minor purpose was to add to the permanence of the retirement plan by giving it a title—Teacher Retirement System of Texas—and stating that it would be run by a Board of Trustees. A second minor purpose was to protect the moneys in the fund by providing that everything that came into the fund was to be administered by the Board of Trustees. (If the purpose was the major one of protecting the retirement program, Sec. 48b did not do this. See the *Explanation* of Sec. 48a.)

The major purpose of the section was to increase the investment discretion of the Trustees. (See the *History* of Sec. 48a for earlier restrictions on investments.) The limits on this discretion were spelled out in great detail. Except for the retirement system's own office headquarters, all holdings had to be in United States or Texas state or local government debt, debt guaranteed by any of these governments, or in corporate debt or stocks. (This may or may not have permitted investment in oil production payments and lease-backs, both of which have been participated in by conservative private pension funds.) Within this initial limitation, the trustees were held to the common law prudent investment rule for fiduciaries. (Any court would hold them to this rule whether Sec. 48b said so or not.) But the section restricted prudent investment in corporate stocks by defining what is "prudent" in terms of which corporations were eligible, what percentage of stock of any one corporation could be owned, and what percentage of total assets could be in common stocks.

This last restriction was a weird one. It provided that until \$500 million was in government securities, no more than one-third of all assets could be in common stocks. This meant that, unless the legislature prohibited it or a court said it was not prudent, \$1.22 billion of the \$1.72 billion in the retirement fund as of August 31, 1971 could be in common stocks so long as the remainder was in government securities. The retirement system did not take advantage of this weird provision. As of August 31, 1971, it held only \$16 million in Texas obligations and \$301 million

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in United States obligations. It held \$380 million in corporate stock, or 22 percent. Well over 50 percent was in corporate obligations. The reason for putting only 1 percent of its assets in Texas obligations is obvious: they are tax-exempt; a tax-exempt agency like the retirement system has no incentive for holding obligations that carry a lower yield because of a tax advantage that cannot be used.

Finally, all of this limited discretion could be restricted further by the legislature. Apparently the legislature could have restricted the trustees to investment in government bonds, the restriction of the original Section 48a. There does not appear to have been any official interpretations of this section.

#### Comparative Analysis

No state appears to have a comparable constitutional provision. Undoubtedly many states have statutes that are comparable. (For pensions in general see *Comparative Analysis* of Sec. 67 of Art. XVI.)

#### Author's Comment

This section was a totally unnecessary piece of legislation that had no business in a constitution. In fact Section 48b could have ended up being positively harmful. The section was unnecessary because the legislature can do everything this section did. Without the section, of course, the legislature could have passed a statute authorizing the teachers' retirement system to invest its money in speculative cats and dogs. This seems unlikely. If it is not unlikely, the entire governmental system would be in such danger that much more than constitutional provisions like Section 48b would be required to save the state.

One of the problems growing out of this sort of detail is the probability that whatever the section permits can be done safely. "If it's constitutional, it's good." This is a mistaken, but common, notion that flows from the obvious proposition that if something is unconstitutional, it is bad. The Board of Trustees could have made a number of poor investment decisions but if the detailed rules had been followed, it would have been difficult to remove them for incompetence.

Moreover, this business of detailed rules is in itself inadvisable. Section 48b required that any stock invested in must have paid cash dividends for the preceding ten years or longer. This is an acceptable rule of thumb to be considered with all other factors but not to be adhered to rigidly. For example, a purchase of Penn Central Stock in early June 1971 would have met the requirements of Section 48b, but the railroad was on the verge of bankruptcy.

People frequently argue about whether or not a particular constitutional provision is statutory. There is one sentence in Section 48b that settles the issue: "This Amendment shall be self-enacting and shall become effective immediately upon its adoption without any enabling legislation."

Sec. 48-d. RURAL FIRE PREVENTION DISTRICTS. The Legislature shall have the power to provide for the establishment and creation of rural fire prevention districts and to authorize a tax on the ad valorem property situated in said districts not to exceed Three (3¢) Cents on the One Hundred (\$100.00) Dollars valuation for the support thereof; provided that no tax shall be levied in support of said districts until approved by vote of the people residing therein.

#### History

This section was added in 1949. Two years later an amendment was proposed

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that would have increased the permissible property tax from 3¢ to 50¢. The amendment was defeated. No statute was enacted under the grant of power until 1957. (Tex. Rev. Civ. Stat. Ann. art. 2351a-6.) As of the end of 1972, there were six fire districts in existence.

#### Explanation

There is no constitutional necessity for this section. The legislature could authorize the creation of rural fire prevention districts as it has authorized the creation of mosquito control districts. (See Tex. Rev. Civ. Stat. Ann. art. 4477-2.) The real purpose of Section 48-d is to add 3¢ to the maximum property tax rate that may be imposed in a county. (See the *Introductory Comment* to Article VIII.)

Only recently does there appear to have been an official interpretation of this section. In 1975, the attorney general was requested to rule on the constitutionality of two subsections of the implementing statute cited in the preceding *History*. One subsection authorizes cooperative contracts with other government units; the other authorizes a fire district to maintain an ambulance service. The resulting opinion is one of many recent examples of generous interpretation of a constitutional provision that could easily be read as a restriction on legislative power. As noted, Section 48-d exists only as a device to create additional taxing power. Although the attorney general made no reference to this constitutional quirk, he read Section 48-d as if the words "fire prevention" were not there. By reliance on various general rules—e.g., there is a strong presumption of constitutionality, a legislature has all power not expressly or impliedly denied it—the attorney general, in effect, said that the legislature could let rural fire prevention districts do more than just deal with fires. It was as if the attorney general tied "fire prevention" to the power to levy a tax and excluded the words so far as the operating powers of the district were concerned. (Tex. Att'y Gen. Op. No. H-562 (1975).)

#### Comparative Analysis

No other state appears to have a comparable provision. Many states have fire districts, of course, but they are authorized by statute.

#### Author's Comment

Texas has many provisions designed to limit voting on financial issues to taxpaying voters. It is ironical that Section 48-d is not so limited. Perhaps the drafter of the amendment assumed that all of the residents of a rural fire district would be property taxpayers.

It is to be hoped that any constitutional revision will provide for a rational and realistic tax structure. In that event there will be no need for a Section 48-d. Under ordinary circumstances a legislature can provide for whatever fire fighting is necessary. No constitutional authorization is required.

Sec. 49. STATE DEBTS. No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or pay existing debt; and the debt created to supply deficiencies in the revenue, shall never exceed in the aggregate at any one time two hundred thousand dollars.

#### History

The 1845 Constitution had a section much like Section 49 except that the maximum permissible amount of debt was only \$100,000 and any borrowing